

FATF Mutual Evaluation of the United States
Impact on Nonprofit Organizations and Alignment with FATF Principles
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To:

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I. Introduction

A. Purpose and Methodology

The purpose of this paper is to acclimate the Financial Action Task Force U.S. evaluation team to U.S. counterterrorism laws and regulations that impact the work of U.S.-based nonprofit organizations (“NPOs”), both operating charities and grantmakers. We hope these comments will provide context for the evaluators as they examine whether U.S. policies align with the FATF criteria, including effectiveness.

The paper provides background information and context on the implementation of the following U.S. counterterrorism laws and policies as applied to NPOs: the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”); Executive Order 13224; the International Emergency Economic Powers Act (“IEEPA”); the Treasury Department Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities and Risk Matrix for the Charitable Sector; the United States Agency for International Development’s application of counterterrorism laws, as well as anti-terrorist rules and regulations administered by the Treasury Department’s Office of Foreign Assets Control (“OFAC”), the Department of Commerce and the State Department.

Subsections of this paper identify how well the laws and regulations discussed align with FATF Recommendation 8 criteria, including whether the U.S. laws discussed are: risk-based; proportional to risk in what and how they regulate; proportional in the strictness of the sanctions; minimally disruptive of legitimate NPO activity; flexible; and consistent with international humanitarian law. The conclusion suggests that U.S. counterterrorism laws, as applied to nonprofit organizations (“NPOs”) fall short of these standards due to over-regulation. This in turn impedes the laws’ effectiveness in achieving FATF’s desired outcomes.

B. Summary of Key Findings

1. A Risk-Based Approach to NPOs is Lacking

Both AEDPA and IEEPA are one- size- fits-all laws. They do not account for assessment of risk based on the type and character of transactions, applying equally to weapons and basic necessities such as food and water. In particular, the statutes do not clearly distinguish between a foreign terrorist organization (“FTO”) and civilians living under its de facto control. A risk-based approach would consider the practical necessity for NPOs to engage in minimal transaction with FTOs controlling or active in territory in order to reach civilian populations.

This strict approach in U.S. law is not commensurate with the risks involved, especially when compared to the risks it creates. The strict ban reduces or eliminates the positive impact the work and presence of U.S. NPOs could have and can fuel conflict by creating a humanitarian vacuum, where truly humanitarian organizations cannot come into communities and terrorist groups fill the void, using aid as a wedge for propaganda and recruitment.

2. Definition of Prohibited “Material Support” is Overly Broad

Under the material support statutes and sanctions regime, all transactions with designated individuals or entities are prohibited, regardless of the size, purpose or nature of the transaction or the risk that the transaction will further a terrorist agenda. This blanket ban fails to distinguish between minimal and incidental transactions necessary to access civilians in need of humanitarian assistance and transactions that provide funding or weapons for terrorist activities.

3. Chilling Impact: The Law Disrupts, Rather Than Protects Legitimate NPOs

The severity of the penalties for violating the prohibition on material support, coupled with the broad definition, applicable even when delivering life-saving aid in full compliance with international humanitarian law or seeking to reduce armed conflict, create a chilling impact on legitimate NPOs that is based on reasonable fears of disproportionate enforcement.

The anti-terrorist financing regime under IEEPA is a major disruption for legitimate NPO activities, due to 1) the broad scope of prohibited transactions under Executive Order 13224, 2) the excessive burden and delays caused by using the OFAC licensing system in the NPO/humanitarian context, 3) the routine cancellation of the law’s humanitarian exemption, and 4) the chilling impact created by severe sanctions and lack of meaningful opportunities for appeal.

Although resolutions of the United Nations Security Council have provided important sanction carve-outs for humanitarian relief, U.S. NPOs cannot take advantage of them without violating the material support prohibition. In order to get clearance to conduct humanitarian, peacebuilding and other legitimate types of NPO programs, NPOs must obtain licenses from the Department of Treasury, a process that is slow, ineffective and fraught with problems.

NPOs that focus on peacebuilding projects aimed at reducing armed conflict and its impact on civilian populations have been unable to directly engage FTOs in peace processes or provide training in skills needed to seek political resolution of grievances. This is because the Supreme Court upheld the constitutionality of including speech with FTOs aimed at reducing violent conflict in the prohibition against material support.

4. Laws and Regulations Restricting NPOs Lack Proportionality

U.S. counterterrorism law as applied to NPOs is neither proportional nor flexible, and disrupts the legitimate activities of NPOs seeking to offer much-needed support to civilians and local charities helping civilians in areas that are nonetheless subject to FTO influence. All transactions with designated individuals or entities are prohibited, regardless of the size, purpose or nature of the transaction or the risk that the transaction will further a terrorist agenda. This blanket ban fails to distinguish between minimal and incidental transactions necessary to access civilians in need of humanitarian assistance and transactions that provide funding or weapons for terrorist activities.

Despite the severity of penalties for sanctions violations there are limited opportunities for redress.

5. Inconsistent with International Humanitarian Law (IHL) and International Human Rights Law (IHRL)

The material support prohibition is not consistent with the IHL framework because it imposes a blanket ban where IHL only allows limitations on access to civilians in specific, temporary situations when based on concrete security concerns.

IHL and IHRL standards are consistent with FATF's principles of a risk-based approach and proportionality. But the anti-terrorist financing regime does not incorporate these concepts. IHL and IHRL limit derogation of rights of association, assembly, expression and humanitarian action to specific and limited circumstances in which state security is threatened. U.S. law does the opposite, imposing general prohibitions with limited and ineffective remedies for NPOs.

6. NPO Access to Financial Services is a Growing Problem

In the past few years civil society organizations that need to conduct international financial transactions for their operations have experienced increasing difficulty getting access to financial services. Individual organizations' efforts to address the problem have not been successful. The problem has become a systemic one. By taking no action to reverse the bank derisking trend, the U.S. government is increasing the risk that NPOs will be forced to use unregulated, nontransparent channels in order to operate their programs. It also disrupts rather than protects legitimate NPO operations.

7. Outreach to NPOs Needs Improvement

Other than constructive engagement between NPOs and the Department of Treasury on matters relating to FATF, dialog and engagement on these issues with the Executive Branch and Congress has been limited and unsuccessful. For example, the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities were developed with little to no input from the U.S. charitable sector, and are criticized as promoting a "one-size-fits-all"

approach. It is to be hoped that going forward that the positive experience of engagement on FATF issues will open the door to constructive dialog on issues relating to U.S. law.

II. Prohibition on Material Support of Terrorism

A. Antiterrorism and Effective Death Penalty Act of 1996

1. Background on AEPA

The Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, amended by the USA PATRIOT Act in 2001,¹ makes it a crime for any person or organization to knowingly provide, or to attempt or conspire to provide, material support or resources to a Foreign Terrorist Organization (FTO) regardless of the character or intent of the support provided.² The statute defines “material support” broadly as:

Any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation, *except medicine or religious materials* (emphasis added).³

To be found criminally liable for providing material support to FTOs under AEDPA and prosecuted under the act, there is no requirement that an individual organization intend to support terrorism. Instead the law has a knowledge standard⁴, requiring only that an individual know a group is a FTO, or that the group in question has engaged or engages in terrorist activity or terrorism (as defined by the statute). The law is enforced by the U.S. Department of Justice.

The law stipulates that “[n]othing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States.”⁵ Nevertheless, the Supreme Court has upheld the constitutionality of extending the prohibition against providing “material support” to include speech with FTOs, even where the speech in question is aimed at reducing violent conflict.⁶

The statute allows the Attorney General to initiate civil action in federal district court to seek an injunction to block any person from engaging in any act that constitutes a violation of the

¹ *Material Support for Terrorism*, ABANET.ORG, <http://www.abanet.org/natsecurity/patriotdebates/act-section-805> (last visited July 1, 2015).

² Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. *See* material support provision at 18 U.S.C. § 2339A(b)(1) (2012).

³ Congress has since amended the law to clarify the definitions of “material support” for training, expert advice or assistance, and personnel. *See* 18 U.S.C. § 2339A-B (2012).

⁴ The limited protection offered by the knowledge requirement was undermined in *United States v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011). In that case, the jury instructions did not require a finding that the defendant foundation knew that local charities it was supporting were controlled by Hamas, or even that they should have known.

⁵ 18 U.S.C. § 2339B(i) (2012).

⁶ *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

prohibition on material support of terrorism.⁷ The statute also has an extraterritorial jurisdiction provision, so “after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States” and that conduct is legal in the place it occurs.⁸

The penalties for violations are severe: up to 20 years in prison or more, if death results, and fines of up to \$500,000 for organizations and \$250,000 for individuals.⁹

2. Impact on NPO Sector

The AEDPA material support prohibition and criminal sanctions can impact a diverse array of U.S. NPOs. While the prohibition only applies to support for the FTO, as a practical necessity it is often necessary for NPOs to engage in some form of transaction with FTOs controlling or active in a territory in order to reach civilian populations. This can result in indirect support to the FTO where incidental transactions, such as road tolls, occur to facilitate civilian access. Because the definition of “material support” is so broad, it encompasses nearly all types of support—whether monetary or direct aid—that grantmakers or charities provide to civilian groups overseas, including: humanitarian aid, peacebuilding operations, grant funds from U.S.-based foundations, support from human rights and civil liberties groups, academic exchanges, and much more. This definition includes even the most basic necessities such as food, water and shelter, which are considered tangible property within the meaning of the statute.

Furthermore, the statute has a very narrow humanitarian exception; only medicine and religious materials are excluded. This exception does not include medical services or other basic necessities to support life.¹⁰ The Secretary of State, with concurrence of the Attorney General, may also approve exceptions for non-tangible forms of support in the form of “training,” “personnel,” and “expert advice or assistance,” where the Secretary determines that it may not be used to carry out terrorist activity.¹¹

The statute does not clearly distinguish between an FTO and civilians living under the de facto control of terrorist groups. As discussed further in the next section comparing the law to Recommendation 8 principles, this is a sweeping prohibition that is neither proportional nor flexible, and disrupts the legitimate activities of NPOs seeking to offer much-needed support to true civilians and local charities helping civilians in areas that are nonetheless subject to FTO influence. Because of the extraordinarily broad array of behavior criminalized by the statute and the ambiguous threshold for prosecution, the potential for inconsistent and arbitrary enforcement is significant. NPOs that operate globally are typically experts at maintaining legitimate relationships in conflict-ridden areas, and observe the strictest of protocols to ensure that their support reaches those in need and does not benefit FTOs directly. The AEDPA should provide a pathway for U.S. NPOs to offer support to civilian non-combatants without fearing criminal consequences.

⁷ 18 USC § 2339B(c) (2012).

⁸ 18 USC § 2339B(d) (2012).

⁹ 18 U.S.C. § 2339B (2012).

¹⁰ 18 U.S.C. § 2339A(b)(1) (2012).

¹¹ 18 U.S.C. § 2339B(j) (2012).

For actors that do provide material support to FTOs, even inadvertently, there is no requirement that one must intend to support terrorism to be prosecuted and held criminally responsible. Instead, the law has a knowledge standard, requiring only that the party know a group is a FTO, or that the group in question has engaged or engages in terrorist activity or terrorism (as defined by the statute). As a result, *any activity*, including legitimate activity of NPOs, may incur civil or criminal liability under the statute.

Because of the material support prohibition, NPOs that focus on peacebuilding projects aimed at reducing armed conflict and its impact on civilian populations have been unable to directly engage FTOs in peace processes or provide training in skills needed to seek political resolution of grievances. On two occasions NPOs have petitioned the Secretary of State to use existing legal powers to exempt such speech, but to date no such exemption has been created.¹² This has greatly reduced the potential for turning FTOs and their members away from violence.

3. Comparison of AEDPA with FATF Criteria

a. *Risk-based*

The AEDPA is a one size fits all law. Its prohibition applies equally to weapons and basic necessities such as food and water, training in bomb building and training in peace processes. It does not distinguish between FTOs and civilians living under their control. As a result, delivery of grant dollars, food, water, blankets, shelter, clothing, or other materials necessary to save lives of victims of armed conflict or natural disasters can be blocked because an FTO may receive an indirect benefit or, as a practical matter, be involved in logistical arrangements.

With purely humanitarian—and not military—assistance, the risk of anything more than nominal gain to an FTO is very low.¹³ Yet, the statute does not account for assessment of risk based on the type and character of the activity. In particular, the statute does not make critical distinctions between impartial and partial assistance efforts,¹⁴ nor do the measures distinguish between terrorist front groups and legitimate NPOs.

Proponents of a broad definition of material support argue that it is necessary to avoid indirectly aiding terrorist groups. This is often referred to as the “fungibility argument.” It assumes a worst-case scenario as the default reality and imposes the legal restriction accordingly. Carried to

¹² *Letter to Secretary of State Hillary Clinton, May 12, 2011*, CHARITY & SECURITY NETWORK, <http://www.charityandsecurity.org/system/files/Ltr%20to%20Clinton%20w%20cover.pdf> (last visited July 1, 2015); *Petition to Secretary of State John Kerry, June 20, 2013*, CHARITY & SECURITY NETWORK, http://www.charityandsecurity.org/system/files/Peacebuilding%20Petition%202013_0.pdf (last visited July 1, 2015).

¹³ The definition of “humanitarian” in international humanitarian law requires that groups providing assistance be neutral in the conflict, impartial in aid delivery and independent of parties to the conflict. *See Safeguarding Humanitarianism in Armed Conflict*, CHARITY & SECURITY NETWORK, <http://www.charityandsecurity.org/system/files/Safeguarding%20Humanitarianism%20Final.pdf> (last visited July 1, 2015).

¹⁴ “Partial” assistance efforts are those that take sides in a conflict and are not based on humanitarian need, but leverage assistance for propaganda and recruitment purposes.

its logical extreme, the fungibility line of argument would preclude *ever* providing aid to people in regions where terrorist groups operate.

However, that argument is applied without risk assessment or taking context into account. It ignores humanitarian principles and defies common sense. Furthermore, Congress has never investigated the factual basis for its sweeping claims about fungibility, or offered any evidence to support this theory that provides the basis for the broad nature of the law. Absent such evidence, the AEDPA material support prohibition is overly broad and chills much-needed support to civilians from U.S. NPOs.

b. *Proportional restrictions/regulations*

The AEDPA is disproportionate to actual risk because it prohibits NPOs from engaging in a wide range of activities that involve listed terrorist organizations, regardless of the purpose or intent behind such engagement. In this respect the law has become increasingly restrictive over time. The original material support statute, passed in 1994, exempted “humanitarian assistance to persons not directly involved” in terrorism, which reflects the security/humanity balance struck by international humanitarian law. After the Oklahoma City bombing in 1995, Congress amended the law to limit the exemption to medicine and religious materials. In a statement that rejected proportionate or targeted approaches, congressional “findings of fact” supporting the change said that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”¹⁵

c. *Proportional sanctions*

The penalties for violations include up to 20 years in prison or more, if death results, and fines of up to \$500,000 for organizations and \$250,000 for individuals.¹⁶ The severity of these penalties, applicable even when delivering life-saving aid in full compliance with international humanitarian law or seeking to reduce armed conflict, creates significant barriers and delays to delivering aid to vulnerable civilians in these areas.

d. *Protects/Not Disrupts*

The Somalia famine, starting in 2010, is a tragic example of how legitimate humanitarian efforts are disrupted by the material support prohibition.¹⁷ When al-Shabaab, an al-Qaeda-linked terrorist group in Somalia, restricted access to famine-affected areas and threatened the safety of international humanitarian aid, NPOs were faced a difficult choice; they could pay a “tax” to al-Shabaab to access restricted areas and provide life-saving relief, or risk prosecution for providing “material support” in violation of AEDPA. A 2013 report commissioned by USAID and the UN

¹⁵ Antiterrorism and Effective Death Penalty Act of 1996 “Antiterrorism Act”), Pub. L. No. 104-132 § 301(a)(7), 110 Stat. 1214, 1247, 18 U.S.C. § 2339B.

¹⁶ 18 U.S.C. § 2339B (2012).

¹⁷ Senait Gebregziabher, *Antiterror Measures Can Block Humanitarian Aid*, N.Y. TIMES: ROOM FOR DEBATE (Nov. 19, 2013, 8:01 PM), <http://www.nytimes.com/roomfordebate/2013/11/19/sanctions-successes-and-failures/antiterror-measures-can-block-humanitarian-aid>.

found that legal restrictions contributed to the unusually high death rate in the famine, where 260,000 people died, over half of them children.¹⁸

There are many other salient examples of how U.S. counterterrorism laws can disrupt much-needed support efforts. After the devastating tsunami in 2008, Sri Lankans often could not get necessary aid from U.S. NPOs.¹⁹ In the midst of the Gaza conflict, NPOs like MercyCorps could not feed Palestinians. KARAMAH, a U.S. Muslim charity, could not provide backpacks to children who were displaced by the Pakistan flood for fear of criminal prosecution. IN speaking with our members, we learned that they were prohibited, for example, from sending counselors to help women and children who were victims of the Pakistan earthquake. Not only were populations in need short-changed, but the NPO lost a goodwill opportunity to do further work there. These tragedies have been well-documented in news coverage²⁰ and in reports.²¹

The effects on peacebuilding activities are also widespread. U.S. organizations report limits on their activities in Colombia, the Philippines, Somalia, Afghanistan, Nepal, Turkey, the Palestinian Territories, South Africa and more.²²

e. *Flexibility*

There is no process for the U.S. government to warn a NPO operating in a high-risk environment that its activities may be subject to abuse by terrorists. There is also no process for NPOs to correct or address problems in their operations once they become aware of operative risk to better avoid terrorist interventions. Either the government brings criminal charges, sanctions the charity, or no action is taken. This lack of an adequate warning mechanism for NPOs facing actual risk could lead to ongoing operational problems that could have been corrected, as well as an appearance of inconsistent and arbitrary enforcement.

f. *Consistent with International Humanitarian Law*

The IHL framework of access and assistance contemplates delivery of humanitarian assistance to civilians. The material support prohibition is not consistent with this framework, as it imposes a

¹⁸ Francesco Checchi & W. Courtland Robinson, *Mortality Among Populations of Southern and Central Somalia Affected by Severe Food Insecurity and Famine During 2010-2012*, RELIEFWEB.INT, http://reliefweb.int/sites/reliefweb.int/files/resources/Somalia_Mortality_Estimates_Final_Report_1May2013.pdf (last visited July 1, 2015).

¹⁹ Ahilan T. Arulanantham, *A Hungry Child Knows No Politics: A Proposal for Reform of the Laws Governing Humanitarian Relief and 'Material Support' of Terrorism*, ACSLAW.ORG, http://www.acslaw.org/sites/default/files/Arulanantham_Issue_Brief.pdf (last visited July 1, 2015).

²⁰ See, Stephanie Strom, *Small Charities Abroad Feel Pinch of U.S. War on Terror*, N.Y. TIMES, Aug. 5, 2003 at A8.

²¹ See, KAY GUINANE ET. AL, *COLLATERAL DAMAGE* (2008). See also, ACLU, *Blocking Faith Freezing Charity: Chilling Muslim Charitable Giving in the 'War on Terrorism Financing*, ACLU.ORG, <https://www.aclu.org/files/pdfs/humanrights/blockingfaith.pdf> (last visited July 1, 2015).

²² See *Examples: Impacts of the Material Support Prohibition on Peacebuilding*, CHARITY & SECURITY NETWORK (June 13, 2011); http://www.charityandsecurity.org/background/Examples_Impacts_Material_Support_Prohibition_on_Peacebuilding (last visited July 1, 2015); LOUISE BOON-KUO ET AL., *Building Peace in Permanent War*, TNI.ORG, http://www.tni.org/sites/www.tni.org/files/download/building_peace_in_permanent_war_feb_2015_-_for_circ.pdf (last visited July 1, 2015).

blanket ban where IHL only allows limitations on access to civilians in specific, temporary situations based on concrete security concerns.²³ In addition, the role of states that are not a direct party to the conflict is addressed in Additional Protocol I of the Geneva Convention, applicable to international armed conflict. It requires third states, that are not a party to the armed conflict, to “allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel” subject to state consent.²⁴ Additional Protocol II, which covers non-state armed conflict, does not contain a similar statement, but state practice suggests that such a third-party obligation exists. For instance, a U.N. Security Council Resolution adopted in 2000 on protection of civilians in armed conflicts called upon “all parties concerned, including neighboring states, to cooperate fully” in providing access for humanitarian personnel.²⁵

Nevertheless, the AEDPA material support prohibition ignores the distinction between assistance to civilians living under control of a FTO and the FTO itself, in contravention of the IHL goal of facilitating, rather than hindering, humanitarian support. There are also no standards or regulations under the AEDPA that are sufficient to permit the limited engagement necessary to gain access and deliver assistance to civilians in need.

Resolutions of the United Nations Security Council have provided important exceptions to sanctions for humanitarian relief, but U.S. NPOs cannot take advantage of them without violating the AEDPA material support prohibition.²⁶ In short, AEDPA does not give U.S. NPOs adequate maneuverability to provide support to civilians in need living in proximity to FTOs.

B. Executive Order 13224

AEDPA’s prohibition on material support was incorporated into sanctions law (described in the next section) in Executive Order 13224, issued in response to the September 11, 2001 terrorist attacks. It blocks the property of listed groups and authorizes designation and asset freezing of those “persons determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General; (i) to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed in the Annex to this order or determined to be subject to this order;”²⁷ It does not define “material support.”

In speaking with our members, we have learned that they overwhelmingly see these rules as disproportional, disrupting legitimate nonprofit work, inconsistent with humanitarian principles and standards and with the rights of freedom of association, assembly and expression.

III. Anti-Terrorist Financing

²³ See *supra* Chapter IV.

²⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 70(2), June 8, 1977, 1125 U.N.T.S. 3.

²⁵ S.C. Res. 1296 (Apr. 19, 2000).

²⁶ See S. C. Res. 1261 (Aug. 25, 1999); S.C. Res 1556 (July 30, 2004); S.C. Res. 1844 (Nov. 20, 2008); S.C. Res. 1916 (Mar. 19, 2010).

²⁷ Exec. Ord. No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

A. International Emergency Economic Powers Act

1. Background

The International Emergency Economic Powers Act (IEEPA) grants the President authority to declare a state of emergency relating to “any unusual and extraordinary threat, which has its source in whole or in part outside the United States, to the national security, foreign policy or economy of the United States.”²⁸ The statute authorizes the President, acting by Executive Order, to name specific countries, organizations, or persons as constituting such a threat. U.S. persons, including NPOs, are then prohibited from engaging in transactions with the designated state, person or organization. The IEEPA sanctions regime originally targeted foreign nations but has been expanded over time by Executive Order to include individuals and non-state entities.²⁹ This can include NPOs.

Once a national emergency is declared and Executive Order issued with respect to specific threats, the Treasury Department, in consultation with the Attorney General and the Secretary of State, can designate additional foreign and domestic individuals and organizations as terrorist or terrorist-affiliated. Treasury must base such designation on a “reasonable suspicion” that the individual or entity has is or has supported a terrorist organization. This decision can be based on classified information, open source news reporting, and hearsay.

IEEPA sanctions include asset freezes and travel bans. Although the designated entity retains legal title to frozen funds and property, it cannot access it. There is no time limit on how long assets may remain frozen. IEEPA also allows the government to investigate, “block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit” any transactions relating to property held by the designated foreign country or national.³⁰

IEEPA has a humanitarian exemption that 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.”³¹ Since 9/11, this power to cancel the humanitarian exemption has been invoked routinely in Executive Orders designating terrorist organizations and individuals, essentially repealing the exemption.

Like AEDPA, IEEPA has no intent requirement. Acting in good faith or making best efforts to avoid diversion of resources to listed groups are not factors in the enforcement of IEEPA.

²⁸ 50 U.S.C. §§ 1701-06 (2012).

²⁹ See Exec. Ord. No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995) (targeting persons and organizations that disrupt the Middle East peace process); Exec. Ord. No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001) (designating “Specially Designated Global Terrorists”).

³⁰ 50 U.S.C. § 1702(a)(1)(B) (2012).

³¹ 50 U.S.C. § 1702(b)(2) (2102).

Executive Order 13224³² significantly expanded the scope of designation authority beyond just those who “have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S.” by incorporating the following additional criteria:

- persons or entities owned or controlled by, or to act for or on behalf of a designated person or organization;
- those who assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or designated persons listed; or
- those otherwise associated with those persons listed.³³

Sanctions violations can result in designation, if they meet the criteria in the statute or Executive Order. Violations can also result in civil fines of \$250,000 or twice the amount of the illegal transaction or criminal prosecution for willful violations of fines up to \$1 million or imprisonment for up to 20 years.³⁴

Despite these stringent sanctions, once an entity or individual has been designated (or subject to sanctions pending investigation into designation), there are limited opportunities for redress. In 2003 Treasury issued regulations that allow those designated to submit written requests for reconsideration and to petition for release of frozen property.³⁵ There is no formal hearing. Although the designee may request an in-person meeting, Treasury is not required to grant the request. A statement of the reasons for designation has not always been provided to the listed person or entity. Although it is the practice of the current Administration to do so in certain cases, it is not required. There is no deadline for Treasury to render its written decision.

Designated entities can ask a federal district court to review the designation, but the court only reviews the administrative record. This can include classified information, but Treasury is only required to provide a designated entity the *unclassified* portion of the administrative record. NPOs are not entitled to cross-examine witnesses or to present witnesses of their own. Nor can NPOs present evidence on appeal to a federal court. The standard for judicial review is whether Treasury’s action was arbitrary or capricious, despite the lack of due process protections normally afforded by the Administrative Procedure Act.³⁶ In short, once a charity is designated, getting off the list is nearly impossible. Two federal courts have found Treasury’s process for listing and freezing assets to be unconstitutional as applied to two U.S. charities.³⁷ In each case,

³² Exec. Ord. No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001). Treasury regulations further define what it means to be “otherwise associated with” a terrorist organization:(a) To own or control; or (b) To attempt, or to conspire with one or more persons, to act for or on behalf of or to provide financial, material, or technological support, or financial or other services.

³³ Definitions at 31 C.F.R. § 594.316 (2014).

³⁴ 50 U.S.C. § 1705 (2012).

³⁵ 31 C.F.R. § 501.807 (2014).

³⁶ Because designation is carried out under the President’s Constitutional authority to conduct foreign policy, it is exempt from the Administrative Procedures Act.

³⁷ See *Al Haramain Islamic Found. v. U.S. Dep’t of Treasury*, 660 F.3d 1019 (9th Cir. 2011); *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, 676 F. Supp. 2d 649 (N.D. Ohio 2009).

the court found that the charity was not given sufficient notice of the accusations against it or an adequate opportunity to defend itself.

Treasury regulations do permit otherwise-prohibited transactions with designated entities in narrow circumstances through the issuance of two types of licenses: General Licenses, which authorize categories of otherwise prohibited transactions by the general public under specific terms and conditions;³⁸ and Specific Licenses, which authorize, on a case-by-case basis, a successful applicant to engage in transactions otherwise prohibited and not authorized by a general license.³⁹ The process is administered by OFAC within Treasury.

Procedures for the issuance of Specific Licenses give Treasury tight control and broad discretion over any transactions authorized. Specific Licenses are not transferable, and may be revoked or modified at the discretion of the Secretary of the Treasury. OFAC can require reports periodically, either before or after transactions are completed, and the applicant charity must submit the names of all parties "concerned with or interested in" the proposed transaction and "any further information as is deemed necessary."⁴⁰ There are no set standards to guide OFAC decisions on granting licenses, and no deadlines for it to make a decision.

If the application is denied, the applicant or "other party in interest" may request an explanation by letter or in person, or it may subsequently ask for the application to be re-opened. It can also file a new application.⁴¹ However, there is no independent review process of Treasury's decision and no appeal to the courts.⁴²

2. Impact on NPOs

a. *Charity Designations and Indefinite Asset Freezes*

Between 2001 and 2009, Treasury shut down nine U.S. charities, freezing an estimated \$8 million in funds donated for humanitarian purposes.⁴³ None of these funds have been transferred or released for charitable purposes. Many of the U.S. charities that have been designated requested licenses for the release of the funds to other charities and, in one case, to the UN, so they could be spent for humanitarian purposes. For example, in 2002, the Benevolence International Foundation asked that its funds be transferred to a children's hospital in Tajikistan and the Charity Women's Hospital in Daghestan, with safeguards to ensure safe delivery of the funds.⁴⁴ In 2006, KindHearts for Charitable Humanitarian Development asked that its funds be

³⁸ 31 C.F.R. § 501.801(a) (2014).

³⁹ 31 C.F.R. § 501.801(b) (2014).

⁴⁰ 31 C.F.R. § 501.801(b)(3) (2014).

⁴¹ 31 C.F.R. § 501.801(b)(4) (2014).

⁴² The license application process is exempt from the Administrative Procedure Act because it involves foreign affairs and OFAC's decision to grant or deny the license constitutes final agency action.

⁴³ Treasury says there is approximately \$3 million in currently frozen funds, but this does not include the \$5 million of the Holy Land Foundation's assets, which are have been forfeited to the government as a result of a criminal conviction for material support, now under appeal in the Fifth Circuit Court of Appeals.

⁴⁴ John Roth et al., *National Commission on Terrorist Attacks Upon the United States, Monograph on Terrorist Financing: Staff Report to the Commission*, at 101, NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf (last visited July 1, 2015).

transferred to the UN, USAID (a U.S. government agency), or an NPO, with priority given to refugees of the 2005 Pakistani earthquake, since most of the funds had been earmarked for that purpose.⁴⁵

Although the licensing process could be applied to transfer frozen funds of designated charities for charitable purposes, Treasury has refused all requests from designated charities requesting such transfers, often after prolonged delays between the time the application is submitted and the decision. In a letter to KindHearts, Treasury said that “blocked funds are not licensed for release except under limited and compelling circumstances consistent with the national security, economic and foreign policy of the United States. Therefore, your [KindHearts] request to fund relief efforts in Pakistan from blocked funds is denied.”⁴⁶ Treasury thus took the position that humanitarian relief is not a compelling need or consistent with national security.

Treasury has also said it is holding the funds in case victims of terrorism sue for civil damages, but only one such suit has been filed.⁴⁷ This is a misapplication of the Terrorism Risk Insurance Act (TRIA), which does not authorize funds to be held where no lawsuits have been filed or judgments rendered. Only one designated U.S. charity, the Holy Land Foundation, has a judgment against it. There is no evidence in the *Congressional Record* that Congress intended blocked funds to be held based only on the potential for litigation.⁴⁸ In addition, in 2003 the U.S. Court of Appeals for the Second Circuit ruled in *Smith v. Federal Reserve Bank of New York*⁴⁹ that “The language of section 201 cannot reasonably be read to mandate that terrorist assets be blocked in perpetuity... it confers no entitlement on victims who have not yet obtained judgments.”

b. Chilling Impact on Legitimate NPOs

U.S. NPOs have taken careful note of the impact designation has had on their work, particularly the indefinite asset freezes and minimal opportunity to challenge designations. In order to protect their assets, programs and beneficiaries from the consequences of being effectively shut down, NPOs often decline to provide services in areas where terrorist groups are active or control territory. This occurs despite the fact that the vast majority of NPOs operate according to due diligence and risk management protocols that are effective at preventing diversion of assets to terrorism, fraud or other illicit purposes. The draconian nature of the sanctions, coupled with the broad scope of prohibited transactions under the statute and Executive Orders, creates a

⁴⁵ Letter from Barbara C. Hammerle, Acting Director, Office of Foreign Assets Control, to Jihad Smaili, Esq., Counsel to KindHearts for Charitable Humanitarian Development Inc. (Mar. 23, 2006) (on file with author).

⁴⁶ *Id.* In May 2012 Treasury agreed to a settlement that included distribution of funds to a list of approved charities.

⁴⁷ Islamic American Relief Agency’s (IARA-USA) request for its funds to be released for humanitarian and disaster aid, including assistance for victims of Hurricane Katrina and the 2005 Pakistan earthquake. After two years, Treasury responded in a June 29, 2006, letter that said, “OFAC’s current policy to deny requests to release blocked funds is consistent with the congressional intent underlying section 201(a) of the Terrorism Risk Insurance Act of 2002, Public Law 107-297. Therefore, your request to fund relief efforts in Zaire, Niger or in the wake of Hurricane Katrina from blocked assets is denied.” Letter from Office of Foreign Assets Control to IARA-USA (June 29, 2006) (on file with Charity & Security Network).

⁴⁸ Sahar Aziz, *Review of Legislative History Shows Treasury’s Position on Frozen Funds Without Basis*, CHARITY & SECURITY NETWORK (June 15, 2011), http://www.charityandsecurity.org/analysis/leg_history_frozen_funds.

⁴⁹ *Smith v. Fed. Reserve Bank of N.Y.*, 346 F.3d 264 (2d Cir. 2003).

chilling impact on legitimate NPOs that is based on reasonable fears of disproportionate enforcement by Treasury. Our members tell us that this chilling impact has negatively affected their ability to reach those in need, due to fear of potential interactions with prohibited parties.

The record of redress attempts by designated U.S. NPOs exacerbates this chilling impact. The lack of transparency and due process afforded these organizations leaves open questions about the need for the drastic consequences imposed. Responsible NPOs cannot ignore the potential for similar consequences if something goes wrong, no matter how small or unintended. Regardless of the ultimate merits of any of the designations of U.S. organizations, the lack of effective process for appeal has been noted by prudent NPOs and chilled their humanitarian, development, grantmaking and human rights operations. “Even the hint of an investigation would be devastating for a nonprofit group,” one of our members told us.

The case of Kindhearts for Charitable Humanitarian Development illustrates the basis of the chilling impact. On Feb. 19, 2006, Treasury blocked Kindheart’s assets and seized its records and property “pending investigation” into whether it had supported Hamas. In April that year Kindheart’s attorney sought release of the assets. What followed was a procedural nightmare in which Kindhearts had to sue to get access to its own records and Treasury lost a 1,300+ page Kindhearts filing as part of its reconsideration request.⁵⁰ The process led the judge in the Northern District of Ohio to declare that “KindHearts is not only blindfolded, but also has its hands tied behind its back.”

c. Onerous Licensing Process Slows, Inhibits Legitimate NPO Activities

The licensing process is fraught with problems. NPOs complain that there are no guidelines for OFAC decision-making for their programs, they cannot get contact information for the person handling their application, long delays are common and the process is opaque and has no deadlines. A major roadblock in the process is Treasury’s reliance on the State Department for clearance on applications based on foreign policy considerations. Although the State Dept. has no official role in the licensing process, it has become a gatekeeper and apparent cause of delays in the process.

The designation of al Shabaab under IEEPA sanctions powers contributed to the restrictive legal environment that had foreseeable and tragic results in the Somalia famine, as described above. In 2009, the operating environment for humanitarian relief was extremely dangerous and difficult, due to al Shabaab demands for “security” fees from NPOs and the UN World Food Programme, which needed access to civilians in areas under their control. *The New York Times* reported that “United Nations officials say they have no choice but to work with local Shabab commanders to distribute critically needed aid.”⁵¹ Strict interpretation of the material support prohibition and sanctions made such engagement illegal for NPOs. Despite warnings of famine, there was an impasse between the U.S. and UN over conditions for NPOs to deliver aid and avoid diversion to al-Shabaab and the humanitarian crisis worsened.

⁵⁰ See *Kindhearts Case Timeline*, CHARITY & SECURITY NETWORK (July 9, 2010), http://www.charityandsecurity.org/litigation/KindHearts_Timeline.

⁵¹ Jeffrey Gettleman, *U.S. Delays Somalia Aid, Fearing It Is Feeding Terrorists*, N.Y. TIMES, Oct. 2, 2009, at A13.

By the summer of 2011, NPOs called on Treasury to issue a General License for humanitarian relief operations in Somalia⁵² but were told such a move was off the table. It was not until Aug. 2, 2011, after the death toll was already high, that the Department of State announced that U.S. NPOs providing famine relief in al-Shabaab-controlled areas would not be prosecuted for material support violation *if they act in good faith*.⁵³ But on August 4, 2011, Treasury limited the scope of the new policy to U.S. government and UN agencies and their grantees.⁵⁴

Although the case of the Somalia famine represents a worst-case scenario for dysfunction of OFAC's licensing system in the context of NPO programs, it is not the only one. In one example, a small NPO wishing to provide humanitarian assistance in Gaza waited two years for a determination on its license application, only to have the application closed with the explanation that "we are unable to provide you with a licensing determination at this time due to a lack for foreign policy guidance from the U.S. Department of State."⁵⁵

These problems are not new or unusual. InterAction's 2011 *Foreign Assistance Briefing Book*⁵⁶ cited licensing problems as an example of regulations that hinder government and NPO partnerships. Feedback from our members shows the impact of these policies first-hand. A failure to grant OFAC licenses and renewals has led charities to suspend vital programming. In real-life terms, for one NPO, this meant more than 2,600 beneficiaries who are no longer receiving monthly medical, nutritional and educational support. In addition, the loss of trust with the NPOs implementing partner has continued, four years later, and creates impediments to effective negotiation around program design and funding processes. Other NPOs tell us that in high-risk locations, these policies have impacted partner willingness to participate in programs and the charity's ability to operate in an independent humanitarian space.

3. Comparison of IEEPA with Recommendation 1 and 8 Criteria

a. *Risk-Based Approach*

Under the IEEPA sanctions regime all transactions with designated individuals or entities are prohibited, regardless of the size, purpose or nature of the transaction or the risk that the transaction will further a terrorist agenda. Like the material support prohibition, this blanket ban fails to distinguish between minimal and incidental transactions necessary to access civilians in need of humanitarian assistance and transactions that provide funding or weapons for terrorist activities.

⁵² George Rupp, *7 Ways the U.S. Can Fight Drought in Africa*, INTERNATIONAL RESCUE COMMITTEE (July 29, 2011), <http://www.rescue.org/blog/7-ways-us-can-fight-drought-africa>.

⁵³ *State Department Announces New Policy to Allow Famine Aid in Somalia, Treasury Releases Limited Guidance*, CHARITY & SECURITY NETWORK (Aug. 4, 2011), http://www.charityandsecurity.org/news/State_Announces_New_Policy_Allow_Famine_Aid_Somalia.

⁵⁴ *Office of Foreign Assets Control: Frequently Asked Question Regarding Private Relief Efforts in Somalia*, CHARITY & SECURITY NETWORK (Aug. 4, 2011), http://www.charityandsecurity.org/system/files/somalia_fa_q.pdf.

⁵⁵ *See A License to Aid? How Politics Delays Aid to Civilians in Conflict Zones*, CHARITY & SECURITY NETWORK (July 24, 2013) http://www.charityandsecurity.org/analysis/License_To_Aid.

⁵⁶ *Foreign Assistance Briefing Book*, INTERACTION, http://www.interaction.org/sites/default/files/2011%20InterAction%20Foreign%20Assistance%20Briefing%20Book_Complete_0.pdf (last visited July 1, 2015).

For humanitarian and development programs, the realities on the ground often require some form of interaction with the controlling powers, whether they are governments or non-state armed groups, in order to access civilians in need of assistance. Such interaction can involve payment of incidental, minimal and customary fees, tolls and taxes that are universally applicable.⁵⁷ However, without a license it is violation of IEEPA and relevant Executive Orders for NPOs to engage in such transactions. The difficulties in getting such licenses are discussed above. The broad definition of prohibited transactions, especially after issuance of EO 13224, exacerbates this problem.

This strict approach is not commensurate with the risks involved, especially when compared to the risks it creates. Minimal and incidental transactions by NPOs seeking to deliver services to civilians are too small to be a meaningful source of income for listed groups. In fact, studies of terrorist financing sources demonstrate that they rely on non-charity related sources of revenue, such as crime, kidnapping and financial fraud.⁵⁸

On the other hand, the strict ban carries larger risks. By making it difficult or impossible for U.S. NPOs to operate in areas where terrorist groups are present or control territory, the IEEPA sanctions regime reduces or eliminates the positive impact the work and presence of U.S. NPOs could have. In some cases this policy makes the situation worse by creating a humanitarian vacuum, where truly humanitarian organizations cannot come into communities. In these situations terrorist groups fill the void, using aid as a wedge for propaganda and recruitment.

The risk of diversion of aid resources in fragile states and territories controlled by listed groups is real and taken very seriously by the NPO sector.⁵⁹ Physical attacks on aid workers have increased dramatically over the last decade. NPOs conduct risk assessments before going into these complex environments and are skilled at navigating the dangers and leveraging the support of local communities as protection.⁶⁰ A reasonable approach to risk in sanctions programs would include a distinction between *de minimus* payments for standard transactions and diversion of funds from the NPO.

Instead, the IEEPA statutory scheme presumes that all NPO transactions support terror. There is no public record of fact finding to support this assumption. There is no public national risk assessment that reflects government engagement with the NPO sector on what risks are, what the relative level of these risks is and how they can be mitigated.

The routine cancellation of the humanitarian exemption in IEEPA reflects a lack of a risk-based approach on a general policy level. The cancellations all use the same standardized language that does not adequately distinguish between individuals and groups targeted by sanctions and civilians living under their *de facto* control.⁶¹ None of this language makes reference to facts or

⁵⁷ Such payments do not include bribes for humanitarian access, which the sector has rejected.

⁵⁸ Biersteker, T.J. & Eckert, S. E.(eds.) (2008) *Countering the financing of terrorism*. London; New York: Routledge, Freeman, M. (ed.) (2012) *Financing Terrorism: Case studies*. Burlington, VT: Ashgate.

⁵⁹ COUNCIL ON FOUNDATIONS, *PRINCIPLES OF INTERNATIONAL CHARITY* (2005).

⁶⁰ This can produce creative approaches. One NPO reported that it labelled a food consignment “women’s biscuits” in order to prevent theft. It worked.

⁶¹ For example, Exec. Ord. No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001) says:

circumstances specific to the context in which the designated groups operate that explain the need for such cancellation or limit its scope or duration. A risk-based approach would do so.

Finally, despite the fact that peacebuilding is an expressive activity and that FATF's typology report did not find any instances of expressive organizations being abused by terrorist groups, the IEEPA prohibitions apply to them.

b. Proportional Restrictions/Regulations

The definitions of prohibited transactions are so broad that customary transactions NPOs engage in during the course of delivering services to civilian populations are included. The scale of prohibited conduct is not proportionate to the risk of abuse.

c. Proportional Sanctions

IEEPA allows the President to choose among a variety of sanctions that fall short of asset freezes and designation. These include investigations, regulations, and control over transactions.⁶² However, since 9/11 the most severe sanctions have been applied to charities (designation and asset freezes). Over the past 14 years, NPOs have sought procedures that would provide them with opportunities to cure problems so that their beneficiaries do not suffer as a result of any finding that due diligence is lacking or that the NPO is otherwise being abused. However, these suggestions have been rejected by the Treasury Dept.

There is no differentiation between NPOs that operate in good faith and with a level of due diligence commensurate with risk and consistent with "industry" standards and fraudulent/sham NPOs that deliberately abuse the NPO structure to divert resources to terrorist groups.

This approach contrasts starkly with enforcement against for-profit entities such as Chiquita Brands International. Chiquita paid \$1.7 million to two designated terrorist groups in Colombia, between 1997 and 2004. In 2003, it received a notice of violation from the Dept. of Justice. In 2007 the investigation ended without criminal charges or designation and assets freezes. The company paid a \$25 million fine, and it continues to operate.

d. Disrupts Rather Than Protects Legitimate NPOs

"I hereby determine that the making of donations of the type specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) by United States persons to persons determined to be subject to this order would seriously impair my ability to deal with the national emergency declared in this order, and would endanger Armed Forces of the United States that are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances, and hereby prohibit such donations as provided by section 1 of this order."

Exec. Ord. No. 13,536, 75 Fed. Reg. 19,869 (April 12, 2010) says:

"I hereby determine that, to the extent section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) may apply, the making of donations of the type of articles specified in such section by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to subsection (a) of this section would seriously impair my ability to deal with the national emergency declared in this order, and I hereby prohibit such donations as provided by subsection (a) of this section."

⁶² 50 U.S.C. § 1702(a)(1)(B) (2012).

The sanctions regime under IEEPA is a major disruption for legitimate NPO activities, due to 1) the broad scope of prohibited transactions under EO13224, 2) the excessive burden and delays caused by using the OFAC licensing system in the NPO/humanitarian context, 3) the routine cancellation of the law's humanitarian exemption, and 4) the chilling impact created by severe sanctions and lack of meaningful opportunities for appeal.

For example, EO 13224 prohibits a wide range of transactions with listed groups and persons, including humanitarian action and peacebuilding, by explicitly prohibiting “the making or receiving of any contribution of funds, goods, or services to or for the benefit of those persons listed...” It includes those “otherwise associated” with them. When applied in the context of NPO programs that deliver services to communities in refugee camps, conflict zones and other complex environments, strict compliance with this vague standard can be impossible.

While Treasury's licensing regulations are intended to provide an adequate means of permitting humanitarian and other legitimate NPO activities that would otherwise be prohibited, a close look at the system demonstrates that it is ill-suited to protecting such operations. First, by requiring a license for a broadly defined scope of transactions, the system has established a presumption that NPO activity is all high-risk and cannot be undertaken without a specific grant of government approval. It treats humanitarian and other NPO programs as threats to national security and by involving the State Dept., imposes politicized foreign policy criteria on what would otherwise be independent civil society activities.

The routine cancellation of the humanitarian exemption in IEEPA has expanded the need for NPOs to file license applications. OFAC officials state that they do not have adequate resources to process applications in a timely manner. Although NPOs could decide not to seek licenses and interpret the vague provisions of the law in a manner consistent with an enabling environment for civil society, the chilling impact of severe sanctions coupled with lack of due process if designated is widespread. It operates as a serious impairment to delivering much needed services to legitimate program beneficiaries. As one of our members told us, “Working in an environment where there are no clear cut, block-and-white rules is confusing and unsettling.”

Expressive activities, including peacebuilding, have also been disrupted by the sanctions regime, primarily by EO 13224's importing the material support prohibition from AEDPA. To the extent efforts to bring listed groups into peace processes and/or equip them with the knowledge and skills necessary to make the transition from armed to political action come within the definition of material support under AEDPA, they also become prohibited transactions under IEEPA.

This has had a significant impact on peacebuilding. In the first study analyzing counterterrorism laws and the impact of terrorist listing on peacebuilding, published in early 2015, researchers found that “there is a growing consensus that laws prohibiting support of listed entities have contributed to a ‘shrinking space’ for those seeking to establish conditions conducive to peace.”⁶³ The authors also suggest that terrorist listing has had a negative influence on how conflict transformation is carried out by prohibiting “many forms of contact viewed as essential to

⁶³ Louise Boon-Kuo et al., *Building Peace in Permanent War*, TNI.ORG, http://www.tni.org/sites/www.tni.org/files/download/building_peace_in_permanent_war_feb_2015_-_for_circ.pdf (last visited July 1, 2015).

peacebuilding.” This confirms what peacebuilding organizations and human rights defenders have been saying since the *Humanitarian Law Project* decision in 2010. Long established and legitimate forms of conflict resolution and transformation, such as the behind the scenes contacts that resulted in the Good Friday agreement in Northern Ireland, have become illegal. Attempts to work around these restrictions inevitably distort the way programs are carried out and reduce their effectiveness.

One of our members said that although statements by federal officials that charitable activity is not a “prosecutorial priority does not mean that it will not prove expedient or politically advantageous to prosecute in the future.” NPOs living in the wake of the wake of the Humanitarian Law Project case know that charities can, and have, been prosecuted. This is resulted “in an extremely low risk tolerance,” the member said.

e. Flexibility

As with the material support prohibition, anti-terrorist financing restrictions under sanctions law are not structured or applied with sufficient flexibility to protect the legitimate activities of NPOs. While the licensing process and range of enforcement options provided in the law could be used to establish a regulatory regime with sufficient flexibility to allow NPOs reasonable space in which to operate, that approach has not been taken. Fear that a bad actor might exploit a loophole is used to justify this unduly rigid framework.

f. International Humanitarian and Human Rights Law

The IEEPA sanctions and anti-terrorist financing regime does not meet the human rights or humanitarian standards that limit derogation of rights of association, assembly, expression and humanitarian action to specific and limited circumstances in which state security is threatened. The IEEPA-based system does the opposite, imposing general prohibitions with limited and ineffective remedies for NPOs.

There are very clear standards that should be applied, drawn from the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Geneva Conventions and associated Protocols. UN Special Rapporteurs have described them in reports to the General Assembly. A 2006 report says, “The onus is on the Government to prove that a threat to one of the grounds for limitation exists and that the measures are taken to deal with the threat.”⁶⁴ Even then limits on protected rights must be exceptional and temporary measures.

These standards are consistent with principles of a risk based approach and proportionality adopted by FATF for implementation of 8. The report notes that, “[T]he principles of proportionality and of necessity must be respected concerning the duration and geographical and material scope of the state of emergency as well as all the measures of derogation resorted to because of the state of emergency. . . . Before resorting to derogations, States must make a careful analysis of the situation, examine if and which derogating measures are necessary, and choose from among the different options the one that will be the least restrictive for the

⁶⁴ Rep. of the Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism, Martin Scheinin, U.N. Doc. A/63/267 (2006) para. 2.

protection of the rights in question.”⁶⁵ A 2013 report notes that “In order to meet the proportionality and necessity test, restrictive measures must be the *least intrusive means* to achieve the desired objective and be limited to the associations falling within the clearly identified aspects characterizing terrorism only. They must not target all civil society associations...”⁶⁶ (emphasis added).

There are numerous ways in which anti-terrorist financing regulations and restrictions are inconsistent with these principles, as described in the impact sections above. For example, the blanket prohibition that only allows NPO operations after seeking and obtaining special permission through a license runs counter to and ignores the balance struck by the IHL and IHRL framework regulating humanitarian access and basic rights of association, assembly and expression.

B. Bank Derisking and NPO Access to Financial Services

1. Background

In order to operate, NPOs require the services of financial institutions. The Bank Secrecy Act, as amended by the USA PATRIOT Act, governs the anti-terrorist financing obligations and standards that financial institutions must follow.⁶⁷ This legal framework treats financial institutions as the first line of defense against anti-terrorist financing, placing them in a quasi-regulatory role.

Federal bank regulators use the Bank Examiner’s Manual⁶⁸ to set out the framework for very intense review of bank practices. Bank examiners look into whether financial institutions have appropriate controls and mechanisms in place to identify illicit money flows. Bank compliance methods include close monitoring of transactions, due diligence on their customers, terrorist list-checking and many other methods. The bank examiner’s manual recognizes that not all banks experience the same risks, and that not all customers are as “risky” as others. For NPOs specifically, the examiner manual states that NPOs working in certain contexts (conflict affected areas) are more at risk of abuse, as are those providing tangible services, such as humanitarian aid.

The manual requires federal examiners to ask banks very detailed and extensive questions about their nonprofit customers. The result is that banks must dedicate resources for a regulatory style investigation that asks for the NPOs’ Customer Identification Program information, Purpose and objectives, Geographic locations, Organizational structure, Donor and volunteer base, Funding and disbursement criteria, Basic beneficiary information, Recordkeeping requirements,

⁶⁵ *Id.* paras. 12-13.

⁶⁶ Rep. of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai, U.N. Doc. A/HRC/23/39 para. 23.

⁶⁷ *BSA and Related Regulations*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, <http://www.occ.gov/topics/compliance-bsa/bsa/bsa-regulations/index-bsa-regulations.html> (last visited July 1, 2015).

⁶⁸ *Manual Print/Search*, FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL BANK SECRECY ACT/ANTI-MONEY LAUNDERING INFOBASE, http://www.ffiec.gov/bsa_aml_infobase/pages_manual/manual_print.htm (last visited July 1, 2015).

Affiliations with other NPOs, government groups and Internal audits and controls. In addition to this, bank examiners ask banks about “high risk” due diligence measures, including evaluating the principals and obtaining and reviewing financial statements and audits.

2. Impact on NPOs

In the past few years civil society organizations that need to conduct international financial transactions for their operations have experienced increasing difficulty getting access to financial services. Financial institutions may refuse to make transfers between organizations, or delay them, often for months at a time. In other cases NPOs have had accounts closed or been turned away as customers. These problems have the most impact on grantmakers, NPOs and other civil society organizations engaged in important programs in global hot spots where their work is needed most. As one of our members told us, “All American citizens should have the right to donate to nonprofit organizations working in war zones throughout the world and the funds that they donate should be allowed to be transferred by U.S. banks to foreign banks to be used to provide humanitarian assistance to widows, orphans, the disabled, the displaced, refugees and the people affected by the wars...”

These problems are not limited to any one country or banking institution. Conversations with financial experts, civil society groups and remittance businesses indicate that banks are increasingly risk averse because they fear legal sanctions and do not want to take on what are often onerous regulatory obligations for accounts that, from their perspective, are not very large or profitable.

Efforts by individual organizations to address the problem have not been successful. The problem has become a systemic one. The result is that funds are sometimes driven outside the regulated financial sector, and groups that remain inside it have increased administrative costs and serious delays in program implementation. The trend of bank “derisking” has contributed to the growing financial exclusion of the charitable sector as well as remittances that are crucial financial life lines for low income communities in many countries.

3. Comparison to Recommendation 8 Criteria

By taking no action to reverse the bank derisking trend, the U.S. government is increasing the risk that NPOs will be forced to use unregulated, nontransparent channels in order to operate their programs. It also disrupts, rather than protects, legitimate NPO operations.

IV. Treasury Anti-Terrorist Financing Guidelines

In response to post-9/11 concerns that charities were vulnerable to terrorist influences or scams, the Treasury Department released its *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* (“Guidelines”) in 2002.⁶⁹ These were intended to assist

⁶⁹ U.S. Department of the Treasury *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities*, U.S. DEPARTMENT OF THE TREASURY, http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/guidelines_charities.pdf (last visited July 1, 2015).

nonprofits and grantmakers in complying with Executive Order 13244 and IEEPA, offering best practices for operating internationally and guidance on compliance with antiterrorist laws and regulations.

Unfortunately, the Guidelines were developed with little to no input from the U.S. charitable sector. While technically not binding, many charitable organizations consider the Guidelines mandatory because they are one of the few places organizations can turn to understand the government's interpretation of antiterrorism rules that apply to nonprofits. In addition, they are described as actions that organizations "should" take, implying a more mandatory nature and leading some practitioners to believe failure to comply could lead to unwanted investigation. Nevertheless, Treasury makes that clear in the introduction to the Guidelines that complete adherence to them offers no legal protection from sanctions.⁷⁰

Following the release of the Guidelines, the Council on Foundations convened a working group, "The Council on Foundations Treasury Guidelines Working Group of Charitable Sector Organizations and Advisors" (Working Group), comprising more than 40 U.S. charitable organizations, advocacy groups and advisors, representing collectively thousands of individual organizations engaged in international charity. The purpose of the Working Group was to determine how to respond as a sector to the Guidelines through meaningful input to Treasury.

The Council on Foundations, along with many other NPOs and coalitions,⁷¹ expressed concerns that the Guidelines proposed a "one-size-fits-all" approach and would "greatly increase the cost of making all international grants, without helping U.S. charities identify and take appropriate precautions with respect to the very small number that are at risk for diversion."⁷² Grantmakers and charities critique the Guidelines for 1) their failure to take into account IRS rules that require grantmakers to exercise responsible oversight of their international grants, 2) the extensive experience of U.S. charities in making grants and conducting operations overseas, and 3) being unworkable for NPOs in their "one size fits all" approach.

However, the Working Group embraced Treasury's stated willingness to engage in a productive dialogue to resolve some of the NPO sector's concerns about the Guidelines in a mutually agreeable solution, but the 2004 revisions to the Guidelines did not address these concerns. In response, the Working Group developed Principles of International Charity that set forth eight principles for organizations engaged in international charity to follow that "may provide additional confidence that resources and services are provided for exclusively charitable purposes."⁷³ The Working Group also directly called upon Treasury to withdraw its Guidelines and allow the sector to follow these voluntary, self-regulatory Principles that would address

⁷⁰ Press Release, U.S. Dep't Treas., U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. Based Charities, <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Pages/protecting-charities-intro.aspx> (last visited July 1, 2015).

⁷¹ *Analysis: 2006 Treasury Dept. Voluntary Anti-Terrorist Financing Guidelines*, CHARITY & SECURITY NETWORK (May 21, 2009), http://www.charityandsecurity.org/analysis/2006_Treasury_Guidelines.

⁷² Letter from Dorothy S. Ridings, Pres. & Chief Exc. Officer, Council on Foundations, to David Aufhauser, General Counsel, U.S. Department of the Treasury (June 20, 2003), http://www.cof.org/sites/default/files/documents/files/Treasury_Comments_06.03.pdf.

⁷³ COUNCIL ON FOUNDATIONS, PRINCIPLES OF INTERNATIONAL CHARITY (2005).

Treasury's concerns while providing NPOs with a more workable approach to navigating counterterrorism rules.

In 2007, Treasury issued a Risk Matrix for the Charitable Sector ("Matrix") that is intended to "assist the charitable sector in adopting an effective, risk-based approach" by laying out "common risk factors associated with disbursing funds and resources to grantees," especially those that do work overseas.⁷⁴ There was no opportunity for NPOs to comment on the Matrix. It is not well-received by the Working Group or the sector writ large because, like the Guidelines, it is viewed as overly prescriptive and inflexible. The Matrix identifies low, medium, and high risk factors and does little to help charities prevent the diversion of charitable funds. It also detracts from more effective and proven methods of due diligence that grantmakers apply routinely and is based on broad assumptions about the exploitation of charitable funds by terrorist organizations.

Unfortunately, Treasury was unwilling to engage with NPOs about either the Principles as an alternative to the Guidelines, or the Matrix, and with this impasse, the Working Group disbanded.

V. USAID Counterterrorism Efforts

A. USAID's No Contact Policy

The "material support" prohibition, both in AEDPA and Executive Order 13224, has been interpreted strictly by the United States Agency for International Development (USAID), which issued Gaza and West Bank Mission Order 18 on June 21, 2007.⁷⁵ The context was that Hamas, designated as a FTO by the Department of State, had won the 2006 election and taken power in Gaza. NPOs receiving USAID grants and contracts were told that contact with either private Palestinians or public officials was only allowed if "they are not affiliated with a designated terrorist organization (DTO)." The notice goes on to define "contact" as "any meeting, telephone conversation, or other communication, whether oral or written." As a practical matter, this bars groups operating USAID-funded programs from making any logistical arrangements with government officials or using government facilities, such as public schools or clinics, to access civilians in need.

The result is that since Hamas controls the education ministry in Gaza, NPOs have had problems serving children in public schools. The general counsel for one large NPO explained the effects of the "no-contact policy" in Gaza. "We were not allowed...to coordinate with the public health organization or the public school systems in order to implement programs, which is (sic) where they need to be..."⁷⁶ Although the organization could apply for a license to carry out the program, the application process for the license typically requires six to nine months for

⁷⁴ *Risk Matrix for the Charitable Sector*, U.S. DEPARTMENT OF THE TREASURY, http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/charity_risk_matrix.pdf (last visited July 1, 2015).

⁷⁵ Roy Plunkett, "Contact Policy for the Palestinian Authority," USAID, April 26, 2006 <http://www.usaid.gov/sites/default/files/documents/1883/2006-WBG-17.pdf>.

⁷⁶ Interview with Ellen Willmott, Deputy General Counsel, Save the Children, at Charity & Security Network in Washington, D.C., May 17, 2010.

approval. During that time, children devastated by the violence that is a regular part of their daily lives go without these critical services.

B. USAID's Partner Vetting System: Using NPOs for Intelligence Gathering

USAID's Partner Vetting System (PVS) is a prime example of misdirected national security programs that fundamentally violate the neutrality of NPOs. PVS, now operational in the West Bank and Gaza, requires foreign assistance grant applicants to submit detailed personal information on leaders and staff of local partner charities to be shared with U.S. intelligence agencies. Rather than creating a safe distance from government, PVS puts NPOs in the position of gathering intelligence for the U.S. government. USAID has proposed expanding PVS worldwide.⁷⁷ NPO experts say this type of activity will discourage local charitable groups from working with U.S. NPOs and strain aid delivery mechanisms, noting that NPOs cannot function effectively if they cannot form partnerships with other NPOs.⁷⁸

In addition to intruding into neutral NPO space with PVS, USAID has been unresponsive to complaints that the program creates unnecessary and potentially dangerous barriers for humanitarian groups. This failure to acknowledge the harsh realities NPOs face while working in conflict zones or failed states demonstrates a disturbing lack of understanding on the part of USAID.

VI. NPO Regulation: The Internal Revenue Service

A. Background

For nearly 45 years, international grantmaking by U.S. NPOs, particularly private foundations, has been governed by the Tax Reform Act of 1969, specifically, section 4945 of the Internal Revenue Code and the regulations issued by the Treasury Department that provide greater clarity and specificity with regard to the statutory requirements for such grantmaking. In evaluating the oversight structure imposed by Congress in 1969 and the related Treasury regulations, it is important to recall the political context: the Cold War between the U.S. and the Soviet Union was intense, the U.S. was heavily engaged in military action in Vietnam and in proxy wars and insurrections around the world. The hijacking of commercial airliners by terrorist groups, including in the Middle East, further exacerbated international tensions. It was against that backdrop that the Treasury Department decided to facilitate international philanthropic grantmaking by U.S. private foundations.

In summary, the rules set forth by the Treasury reflect a nuanced awareness of the shared goal of NPOs and the government to minimize the misuse of philanthropic funds in any fashion. The rules set forth in Treas. Reg. §53.4945-5 specifically support good faith due diligence by

⁷⁷ *Status Report: Partner Vetting System (PVS) Pilot Program*, USAID, <http://www.charityandsecurity.org/system/files/PVS%20PUBLIC%20Mtg%20STATUS%20REPORT%2009082011%20FINAL.pdf> (last visited July 1, 2015).

⁷⁸ Brian Majewski, Partner, Global Emergency Group, Panel Discussion, *The Dilemma for U.S. NGOs: Counterterrorism Laws vs. the Humanitarian Imperative*, at Charity & Security Network, Washington D.C., June 1, 2009).

grantmakers and the maintenance of records and reports to establish appropriate use of grant funds. The regulations provide a clear philosophical statement with regard to international grantmaking in Treas. Reg. §53.4945-5(b)(1) which states “A private foundation is not an insurer of the activity of the organization to which it makes a grant,” and provides that a grantmaker will be protected if it “exerts all reasonable efforts and establishes adequate procedures” to see that funds are spent appropriately and that records are kept. Enforcement of the statutory and regulatory standards in the Internal Revenue Code is the responsibility of the Internal Revenue Service, which administers the rules under published procedures that provide for notice and conference rights eventually leading, if necessary, to litigation in open court subject to the rules of evidence and procedure – in summary, due process.

For public charities, which operate charitable, educational, religious or scientific programs, the Internal Revenue Code also provides for transparency and accountability. In exchange for tax-exempt status and the ability to receive tax-deductible contributions, public charities comply with a host of good governance, financial accountability and reporting requirements that ensure they operate for charitable purposes only. This includes filing an annual information return (IRS Form 990) that includes detailed information about international activities and expenditures. In addition, these organizations must operate pursuant to governing documents that include articles of incorporation (registered at the state level) and by-laws. IRS regulations require that such documents include a provision requiring that, upon dissolution, all assets of the charity be transferred to another public charity.⁷⁹ If a NPO is designated as a terrorist organization or supporter of one, it automatically loses its tax-exempt status.⁸⁰ The Internal Revenue Code includes a process for intermediate sanctions as well as revocation of tax-exempt status in the event of violations.

B. Impact on NPOs

The structure of the counterterrorism rules and guidelines discussed earlier have not been reconciled by the Treasury Department, and in particular, neither the IRS nor the public, including NPOs, have been given guidance on how to both sets of requirements should be addressed. In fact, as noted previously, many aspects of the counterterrorism legal regime runs counter to the due diligence and due process based standards in the tax law. As a result of the lack of guidance from Treasury, IRS enforcement actions have been without a clear legal basis and consequently at risk of inconsistent and arbitrary action.

To date all frozen assets of charities remain frozen. Other than the licensing process, which Treasury has declined to use for protecting charitable assets for charitable purposes, there is no process for release of the funds for charitable purposes according to the IRS rules.

C. Comparison with FATF Criteria

The regulations under the Internal Revenue Code comprise a robust system of supervision and monitoring of the NPO sector in the U.S. These rules are structured to ensure that all NPO assets

⁷⁹ 26 CFR 1.501(c)(3)-1(b)(4).

⁸⁰ IRC § 501(p).

are used solely to achieve the organization's mission. As such, they fulfill a dual function of protecting these assets for abuse by terrorist organizations. If NPOs are in compliance with these requirements, the risk of abuse by terrorists is low and the additional restrictions described above are often unnecessary and counterproductive.

VII. Conclusion

A. Over-Regulation Impedes Effectiveness

In comparing U.S. counterterrorism laws as they are applied to NPOs with FATF's criteria for assessing compliance with its recommendations, one central conclusion emerges: the combination of overly broad prohibitions, insufficient exemptions and severe sanctions fails to support the legitimate activities of NPOs and is not risk-based, proportionate or in line with international standards protecting humanitarian action and civil society rights.

The system could be greatly improved through:

- Improvements to structural elements that would provide greater clarity, transparency and accountability for standards and enforcement, that would allow for consistent enforcement;
- Greater consideration for contextual factors, including the high level of existing regulation under the Internal Revenue Code and strong self-regulatory bodies within the NPO sector; and
- A more targeted approach to risk management and mitigation within the subset of NPOs facing risk of abuse by terrorist organizations.

We hope that the FATF evaluation team will take a close look at the issues raised in this memorandum. In particular, we ask that this input be used to assess the adequacy of the U.S. risk-based approach, the proportionality and dissuasive impact of sanctions and protection of legitimate NPOs.

1. The Risk-Based Approach

Service organizations working in high risk areas should not be treated in a one-size-fits-all manner. Yet, current rules do not vary according to specific circumstances or levels of risk. The criteria in human rights and humanitarian law provide a solid basis for establishing functional, risk based approaches.

The U.S. has not engaged the NPO sector about the nature or extent of risk of terrorist abuse or provided such information to self-regulatory bodies. There is no published assessment for NPOs to respond to regarding risk. A domestic review of risk for NPOs could lead to more targeted restrictions and a workable system for exemptions. Past attempts by the NPO sector to engage on issues regarding domestic laws and policies⁸¹ have not yielded satisfactory results. (See R 1 and 8, Immediate Outcome 1.3 and 1.5.)

⁸¹ This is in contrast to the more recent and positive experience with engagement on FATF related matters.

2. Proportionate and Dissuasive Sanctions

The threat of criminal prosecution or asset freezes that effectively close a NPO permanently has created a serious chilling impact on legitimate NPO operations. Because intermediate sanctions are not employed and there is no process for using frozen charitable funds for charitable purposes, the sanctions regime dissuades such legitimate activity as well as illegitimate activity. A better balance is needed.

FATF's emphasis on proportionality is clear in R 5, which calls sanctions regimes to consider whether violations are intentional or willful, R 6, which calls for publicly known procedures for de-listing and release of frozen assets, R 8 and R 35, which both recommend proportionate and dissuasive sanctions. The lack of proportionality explained in this memo is inconsistent with Immediate Outcomes 9 and 10.

3. Protecting Legitimate NPOs

R 8 and its Interpretive Note are clear: country laws and policies should protect the activities of legitimate NPOs. This is not only to be consistent with country obligations under international human rights and humanitarian law, but also to allow the benefits of NPO activities to contribute to human security globally.

Immediate Outcome 10 has clear criteria on this issue. It states that countries should take a targeted approach, conduct outreach and exercise oversight of the sector "without disrupting legitimate NPO activities." As the information and analysis in this memorandum demonstrates, improvements are needed in this area.

This first mutual evaluation of the U.S. under FATF's new methodology provides an important opportunity to address key issues of overregulation and effectiveness. As all parties work to make the transition to a risk based approach, the NPO sector stands ready to engage with both FATF and the U.S. government to make this transition successful.