

**Submission to the United Nations Universal Periodic Review
Of the United States of America**

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Submitted by: U.S. Civil Society Organizations and Experts

Executive Summary

1. Charitable, development, grantmaking, faith-based and peacebuilding organizations based in the United States (U.S.) support and protect vulnerable people around the world, promote human rights and contribute to sustaining democratic societies. These activities are protected by international obligations of the U.S. government, such as the Universal Declaration of Human Rights and the International Covenant for Civil and Political Rights. They are also protected by the U.S. Constitution's Bill of Rights and endorsed by the U.S. Department of State's 2006 *Guiding Principles on Non-Governmental Organizations*. But U.S. security laws and policies create unnecessary and unreasonable barriers to the legitimate activities of civil society organizations.

2. Key term defined: The term “civil society organizations” means charities, development, educational, scientific, religious, peacebuilding, advocacy and other not-for-profit organizations.

Priority Recommendations:

3. We recommend that the U.S. re-assess its national security and counterterrorism laws as applied to civil society organizations, providing clear standards, fair redress procedures, and protection for humanitarian aid, charitable funds and free speech.

Signatories: The organizations and experts endorsing this submission are international NGOs, grantmakers, charities, and legal and technical experts who advise them.

Organizations: ACLU of Southern California, American Jewish World Service, Appleton Foundation, Bill of Rights Defense Committee, Civicus, Defending Dissent Foundation, Friends of Charity Association, Grantmakers Without Borders, Grassroots International, The International Center for Not-for-Profit Law, Islamic Relief USA, Malcolm X Center for Self Determination, Muslim Legal Fund of America, NETWORK: the National Catholic Social Justice Lobby, OMB Watch, Psychologists for Social Responsibility (PsySR), The Sikh Coalition

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I. BACKGROUND AND FRAMEWORK

A. Scope of International Obligations

Universal Declaration of Human Rights (UDHR)

4. The UDHR was adopted by the United States in 1948. In addition to the provisions applicable to individuals the UDHR also recognizes the rights of civil society organizations to operate and serve as vehicles for expression of fundamental human rights. In this way the UDHR empowers civil society to fulfill its mission in international relief, development and other charitable, educational and human rights activities. Primary among the rights of civil society inherent in the Declaration are guarantees of:

- Non-discrimination in delivery of services and benefits, including factors such as ethnicity, religion, opinion, national origin, or the political or international status of the nation to which a person belongs (Article 2)
- Freedom of expression and communication (Article 19),
- Freedom of peaceful assembly and association (Article 20) and
- Participation in the democratic process (Article 21).

International Covenant for Civil and Political Rights (ICCPR)

5. The ICCPR was adopted by the United States in 1966. Its Preamble states:

“Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.”

6. This reinforces the principles of the UDHR and also links civil and political rights as necessary to the achievement of other human rights. The ICCPR provisions applicable to U.S. treatment of civil society include limits on restrictions that can be placed on the freedom to practice and express one’s religion or beliefs (Article 18. 3) and protection of the right to freedom of association with others (Article 22.1).

Security Council Resolution 1556

7. This binding resolution exempts humanitarian aid from certain sanctions against Darfur, saying they “shall not apply to: supplies of non-lethal military equipment intended solely for humanitarian, human rights monitoring or protective use, and related technical training and assistance...”

B. U.S. Legislative and Policy Framework

1. The Bill of Rights

8. The First Amendment to the U.S. Constitution protects the right of the people to assemble, speak and petition the government for redress of grievances. It also protects freedom of religion. The Fourth Amendment protects against unreasonable searches and seizures and the Fifth Amendment guarantees due process before one can be deprived of liberty or property. These rights apply not only to individuals, but also to their civil society organizations.

2. The USA Patriot Act

- **Lack of due process, including being shut down “pending investigation”**

9. In 2001 the USA Patriot Act extended application of the International Emergency Economic Powers Act (IEEPA) to target “Specially Designated Global Terrorists” (SDGTs), making it illegal for anyone to knowingly engage in transactions of any kind with them.¹ This prohibition includes benevolent activities such as humanitarian aid programs.

10. IEEPA is administered by the Department of Treasury’s Office of Foreign Assets Control (OFAC). To designate an organization as an SDGT, OFAC only needs to have a “reasonable suspicion” that it is providing “financial, material, or technological support for, or financial or other services to” a designated terrorist organization or “otherwise associat[ing]” with one.²

11. Once a group is listed Treasury’s enforcement office needs only to provide the entity with notice of the unclassified administrative record and an opportunity to provide responsive evidence in writing. Classified evidence does not have to be shared, meaning that determinations may be made on hearsay and coerced testimony, and civil society organizations are not entitled to cross examine witnesses or present witnesses of their own. In short, once designated, getting off the list is nearly impossible. Civil society organizations also cannot present evidence in an appeal to the federal courts.

12. Before an attorney can represent a designated organization, he or she must get a license from Treasury.³ Representing a designated organization without a Treasury license is considered “material support” to a designated organization and is illegal. In addition, if an organization wishes to pay its legal fees with assets frozen and seized by OFAC (typically the only funding available), it must ask for a separate Treasury license.⁴ These have frequently been denied.

- **Government seizure and indefinite holding of charitable funds**

¹ Section 1702(a)(1)(C)

²Executive Order 13224. (Sept. 23, 2001) “Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism.” Available at <http://www.whitehouse.gov/news/releases/2001/09/20010924-1.html>.

³ 31 C.F.R. 595.204.

⁴ 31 C.F.R. 595.506; *Global Relief Found.*, 207 F. Supp. 2d at 786.

13. Consequences of designation include the seizing and freezing of all tangible and financial assets and significant civil and criminal penalties. In addition, OFAC may seize an organization's assets "pending an investigation" without criminal charges or designation to the SDGT list.⁵ OFAC is not required to give notice to the organization that its assets will be frozen, nor provide it with a statement of reasons for the designation or investigation.⁶ There are no provisions in the law for these funds to ever be released.

- **Material support definition, with limited humanitarian exemption**

14. IEEPA bars the President from blocking "donations of food, clothing and medicine, intended to be used to relieve human suffering, unless the President determines that such donations would seriously impair his ability to deal with any national emergency." This provision was invoked in September 2001 by former President George W. Bush in Executive Order (EO) 13224, which placed humanitarian aid on the list of prohibited transactions with designated terrorist organizations.⁷

15. Humanitarian aid is also barred under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which authorizes the Secretary of State to designate "foreign terrorist organizations" (FTO) and makes it a crime for any person or organization to knowingly provide, attempt, or conspire to provide "material support or resources" to a designated entity, regardless of the character or intent of the support provided.⁸

16. The only exceptions to the definition of "material support or resources" are for medical and religious materials. The Secretary of State and Attorney General may approve exceptions for aid in the form of "training," "personnel," and "expert advice or assistance" where the Secretary determines that the aid may not be used to carry out terrorist activity (exceptions are not permitted for humanitarian aid such as food, water, etc.).⁹ This power has not been exercised.

- **Excessive surveillance powers**

17. In February 2010, three problematic surveillance related provisions of the Patriot Act were reauthorized for one year. They include:

- Section 206, a.k.a. the "roving wiretap" provision: Allows the FBI to wiretap a phone without having to provide the target's name or even phone number.
- Section 218, a.k.a. the "lone wolf" provision: Authorizes the government to get secret surveillance orders against individuals who are not associated with any international terrorist group or foreign nation.

⁵ IEEPA Section 1702(b)

⁶ Executive Order 13224, Sec. 10 (Sept. 23, 2001).

⁷ <http://www.ustreas.gov/offices/enforcement/ofac/programs/terror/terror.pdf>

⁸ 18 USC 2339A

⁹ 18 USC 2339B(j)

- Section 215, a.k.a. the “library/business records” provision: Lowers the bar on the standard of proof needed to get a court order to access private information.¹⁰

3. Executive Branch Policy and Action

- Executive Order 13224

18. On Sept. 23, 2001, President Bush invoked his authority under IEEPA to issue Executive Order (EO) 13224.¹¹ The order declared a national emergency based on the 9/11 attacks and directed Treasury, in consultation with the Attorney General and Secretary of State, to designate SDGTs and take action to freeze all assets subject to U.S. jurisdiction. Designation may be of a terrorist organization, or as a supporter of one if Treasury finds a group has provided material support to or is “otherwise associated with” an SDGT.

- Department of State Guiding Principles on Non-Governmental Organizations

19. The State Department’s 2006 *Guiding Principles on Non-Governmental Organizations*¹² recognized “the right to freedom of expression, peaceful assembly and association enshrined in the UN Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the UN Declaration on Human Rights Defenders.” Among other provisions, the Principles provide that:

- “NGOs should be permitted to carry out their peaceful work in a hospitable environment free from fear of harassment, reprisal, intimidation and discrimination.”
- “Acknowledging governments’ authority to regulate entities within their territory to promote the public welfare, such laws and administrative measures should protect – not impede – the peaceful operation of NGOs and be enforced in an apolitical, fair, transparent and consistent manner.”
- “Criminal and civil legal actions brought by governments against NGOs, like those brought against all individuals and organizations, should be based on tenets of due process and equality before the law.”

- Department of Treasury’s Anti-Terrorist Financing Guidelines

20. Treasury’s *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. Based Charities* interfere with U.S. civil society organizations operations by imposing inappropriate procedures that place charities in the role of government investigators. This can put the lives of international aid workers at risk. The U.S. civil society sector has universally criticized these Guidelines and called for their withdrawal.¹³

¹⁰ “Obama extends Patriot Act provisions,” *LA Times* (Feb. 28, 2010) at <http://www.latimes.com/news/nationworld/nation/la-na-patriot28-2010feb28,0,176068.story>

¹¹ <http://www.treasury.gov/offices/enforcement/ofac/programs/terror/terror.pdf>

¹² <http://www.state.gov/g/drl/rls/77771.htm>

¹³ http://www.cof.org/files/Documents/International_Programs/TreasuryLetter.pdf

4. Key Judicial Rulings

21. Two federal courts have ruled that Treasury's procedures in shutting down charities violate the U.S. Constitution. To date Treasury has not taken steps to change its procedures in a way that remedies the problem going forward. These cases are:

- *KindHearts for Charitable Humanitarian Development v. Geithner, et.al.*¹⁴
On Aug. 18, 2009 the court found that Treasury's seizure of KindHearts assets without notice or means of appeal “pending investigation” violates the Fourth and Fifth Amendments. KindHearts has never been designated as a supporter of terrorism, although in February 2006 Treasury seized its assets, including about \$1 million. The Court said Treasury “violated KindHearts’ fundamental right to be told on what basis and for what reasons the government deprived it of all access to all its assets and shut down its operations.”¹⁵
- *Al-Haramain Islamic Foundation et. al. v. Treasury*¹⁶
On Nov. 7, 2008 the court ruled that Treasury’s action in shutting down Al-Haramain Oregon (AHIF) in 2004 violated the organization’s due process rights because Treasury failed to provide notice for eight months between the time it froze AHIF's assets “pending investigation,” and the designation of the organization as a SDGT in September 2004. The judge also ruled that the freezing order against AHIF was a seizure under the Fourth Amendment and that the term "material support" of terrorism in EO 13224 is unconstitutionally vague.¹⁷

II. PROMOTION AND PROTECTION OF HUMAN RIGHTS ON THE GROUND: HUMAN RIGHTS AND COUNTERTERRORISM

A. There are no clear or reasonable standards for placing civil society organizations on terrorist watch lists, and there is no adequate redress process.

22. Under the legal regime described above, Treasury’s OFAC functions as prosecutor, judge, jury and executioner. Combined with a lack of transparency, this wide discretion opens the door to mistake and abuse.

23. The U.S. government does not have clear standards that establish what constitutes illegal activity for civil society organizations. It operates on a vague and unproven theory that civil society organizations are frequently subjected to “exploitation and abuse” by terrorist

¹⁴ Federal District Court for the Northern District of Ohio, Western Division, Case No. 3:08CV2400

¹⁵ Summary, procedural timeline and links to opinions and briefs at http://www.charityandsecurity.org/Litigation/KindHearts_v_Treasury

¹⁶ United States District Court, District of Oregon, Case No. 07-1155-K1

¹⁷ Summary, links to briefs and opinion at http://www.charityandsecurity.org/litigation/Al_Haramain_v_Treasury_Summary

organizations.¹⁸ These terms have never been defined, and OFAC has no process that allows civil society organizations that may be infiltrated by a member of a terrorist organization to correct a problem.

24. U.S. sanction powers do not require freezing assets, and include alternative approaches that allow for correction of improper transactions or procedures in otherwise law-abiding organizations. However, OFAC has applied only the harshest sanctions to charities, effectively shutting down nine U.S. organizations and listing 39 others as SDGTs.¹⁹ The law has not been evenly enforced. OFAC has shut down U.S. charities as supporters of terrorism, effectively closing all programs. In contrast, the for-profit corporation Chiquita Brands International only had to pay fines for very similar alleged violations, and its operations have not been interrupted or shut down.²⁰

25. Treasury has placed a heavy emphasis on checking names against terrorist watch lists as a means of determining whether or not transactions with an employee, grantee, or other contact violate counterterrorism laws. Organizations are asked to check “key employees, members of the governing board, or other senior management” and “assure itself that grantees do not appear on OFAC’s master list of Specially Designated Nationals (the SDN List).”²¹

26. Despite its widespread use, list-checking provides no legal protection to civil society organizations. For example, the directors of the Holy Land Foundation (HLF) were prosecuted by the U.S. government for providing charitable support to non-listed organizations.²² According to AlterNet,²³ the same groups HLF assisted had also received aid from the International Red Cross and USAID. During the criminal trial of HLF and its leaders, Robert McBrien from Treasury’s OFAC testified that it can be illegal to deal with groups that have not been designated as supporters of terrorism and placed on government watchlists. He said that keeping up with front groups “is a task beyond the wise use of resources.” (The groups HLF was convicted of working with have still never been placed on the U.S. government's list of organizations supporting terrorism.) Treasury's position makes it impossible for U.S. charities operating abroad to protect themselves by checking local charity partners against the list of designated supporters of terrorism.

27. In a potential step in the right direction, the U.S. supported passage of the UN Security Council’s Resolution 1904 in late 2009. It requires that before an individual or entity is listed the

¹⁸In fact, less than 2 percent of the SDN listed are charities.

<http://www.ustreas.gov/offices/enforcement/ofac/sdn/sdnlist.txt>

¹⁹<http://www.treasury.gov/offices/enforcement/ofac/sdn/>

²⁰Sources: “Chiquita agrees to fine for paying terrorists,” *USA Today* (March 14, 2007). http://www.usatoday.com/money/industries/food/2007-03-14-chiquita-terrorists_N.htm "In Terrorism-Law Case, Chiquita Points to U.S.," *Washington Post* (Aug. 2, 2007). <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/01/AR2007080102601.html?hpid=topnews>. “Ex-Chiquita Execs Won't Face Bribe Charges,” *Washington Post* (Aug. 12, 2007). 4. “Chiquita fined for Colombia payments,” *Los Angeles Times* (Sept. 18, 2007).

²¹<http://www.ustreas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf>

²²“Prosecutors Say Charity Aided Terrorists Indirectly,” *The New York Times* (Sept. 18, 2007), at <http://www.nytimes.com/2007/09/18/us/nationalspecial3/18holyland.html>.

²³<http://www.alternet.org/module/printversion/108740>

designating state must meet much higher evidentiary standards and prepare full case summaries defending the listing. It also created an Ombudsman to review de-listing requests, requires periodic review of the list to remove deceased persons and others who should no longer be on it and provides for expedited consideration of humanitarian exemptions. Praised by the U.S.'s top counterterrorism official,²⁴ these standards provide greater due process than current U.S. law.

B. Once a U.S. civil society organization is placed on a terrorist watch list, it is shut down and funds are frozen, records and assets seized.

28. Although current regulations grant Treasury authority to allow transfer of frozen funds,²⁵ our research indicates that no blocked funds have been released for charitable purposes, despite several requests. In fact, Treasury has repeatedly said that allowing transfers for humanitarian and disaster aid is not in the national interest.

29. Current counterterrorism financing policy allows the funds of designated charitable organizations to sit in frozen accounts indefinitely. The intent of the original donor is disregarded, and funds are unable to achieve any charitable purpose. Examples of requests to release funds include:

- In 2002, Treasury denied a license to Benevolence International Foundation for the release of most of its funds to a children's hospital in Tajikistan and the Charity Women's Hospital in Dagestan, even though the application included safeguards.²⁶
- Beginning in 2005 the Islamic American Relief Agency (IARA-USA) made repeated unsuccessful requests for release of funds for humanitarian and disaster aid, including assistance for victims of Hurricane Katrina. These requests included offers to change their governance structure, financial accounting, and even personnel, in order to assure Treasury that no funds would be diverted to terrorism.²⁷
- In 2006, KindHearts asked that its funds be released and spent by the UN, USAID, or any other humanitarian program, asking only that "special consideration be given to the refugees in the earthquake ravaged areas of Pakistan since the overwhelming majority of frozen funds were earmarked for projects therein." The application was denied.²⁸

30. Freezing the donated funds indefinitely rather than releasing the money for charitable purposes serves no function other than to deny urgently needed aid to vulnerable people in need of food, water, shelter and health care. This is inconsistent with the UDHR, which envisions "the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want..."

²⁴ <http://www.state.gov/s/ct/rls/rm/2010/137865.htm>

²⁵ See 31 C.F.R. 501 and 597.

²⁶ 9/11 Commission, Terrorist Financing Monograph, Ch. 6, Illinois Charities, p. 14.

²⁷ http://www.ombwatch.org/files/npadv/PDF/collateraldamage_chapter7.pdf

²⁸ Letter from Office of Foreign Assets Control to KindHearts attorney Jihad Smaili, March 23, 2006.

C. The definition of prohibited material support of terrorism is so broad that it criminalizes life-saving humanitarian aid and peacebuilding efforts.

31. Even when delivered in accordance with the Geneva Conventions and International Red Cross and Red Crescent Society Code of Conduct for aid in disaster situations, U.S. material support laws bar urgently needed aid from getting to people. This is due to the limited humanitarian exemption (medicine and religious materials only). Compliance effectively blocks aid to non-combatants based on their presence in a territory controlled by a listed terrorist group.

32. The draconian reach of material support laws is illustrated by a case currently before the U.S. Supreme Court. It involves the free speech and association rights of groups that wish to engage in human rights training and conflict resolution work with listed groups. The Humanitarian Law Project (HLP) is challenging the constitutionality of the limits material support laws place on these activities.²⁹

33. The U.S. has supported an expanded humanitarian exemption in the context of Security Council Resolution 1556³⁰ which forbids UN members from the sale or supply of materials to all militia members in Darfur. Paragraph 9 exempts humanitarian supplies and related “technical training and assistance.” This resolution was passed by the Security Council, of which the U.S. is a member, and shows that the humanitarian exception is well recognized within international law. The U.S. should support this principle in its own law.

D. Intimidation and harassment of donors

34. A 2009 report from the American Civil Liberties Union (ACLU)³¹ highlights the chilling effect U.S. counterterrorism policy has on donors to civil society organizations and its negative impact on overseas humanitarian relief efforts. Donors said they had been subjected to government investigation and intimidation for donating to a charity that is legal now but may be shut down at some future time because it is providing services in conflict areas of the world.

35. According to the report, “the ACLU documented a pervasive fear among Muslim charitable donors that they may be arrested, retroactively prosecuted for donations made in good faith to legal Muslim charities, targeted for law enforcement interviews for exercising their religious obligation to pay zakat, subpoenaed to testify in a criminal case, subjected to surveillance, deported or denied citizenship or a green card, or otherwise implicated because of charitable donations made in fulfillment of their religious obligation to give zakat.”

E. National security programs have been used for surveillance of U.S. advocacy and religious groups, especially those that openly dissent from government policies.

36. “National security” has been commonly used as an excuse for government spying on U.S. civil society organizations, encroaching on civil liberties and privacy, without adequate judicial oversight, impacting civil society’s right to free speech and association.

²⁹ Holder v. Humanitarian Law Project, United State Supreme Court Nos. 08-1498 and 09-89

³⁰ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/446/02/PDF/N0444602.pdf?OpenElement>

³¹ “Blocking Faith, Freezing Charity: Chilling Muslim Charitable Giving in the “War on Terrorism Financing,” American Civil Liberties Union (June 2009). Available at <http://www.aclu.org/pdfs/humanrights/blockingfaith.pdf>

37. For example, on March 31, 2010 a federal judge ruled the phone conversations of an Islamic charity, Al-Haramain, and two of its American lawyers were illegally wiretapped without a search warrant. In July 2009, Washington State peace activists alleged that an army intelligence analyst infiltrated their group and collected private information that was later shared with several law enforcement agencies.³² In March 2008, DHS gathered intelligence at a Muslim conference in Georgia³³ even though it “did not have any evidence the conference or the speakers promoted radical extremism or terrorist activity.” In 2008, the ACLU of Maryland disclosed documents revealing that state police engaged in covert surveillance of local peace and anti-death penalty groups for over a year during 2006.³⁴

III. RECOMMENDATIONS

38. In May 2009, after a three year investigation of the worldwide impact of counterterrorism laws in 40 countries, including 16 hearings, the prestigious International Commission of Jurists (ICJ) released the report *Assessing the Damage, Urging Action*.³⁵ It found that many governments, including the U.S., have “confronted the threat of terrorism with ill-conceived measures that have undermined cherished values and resulted in serious human rights violations.”

39. The ICJ report calls on governments to re-assess their strategies and not let temporary measures become permanent. This is exactly what the U.S. government must do to bring its national security and counterterrorism laws applied to civil society organizations into alignment with its human rights obligations.

40. We recommend that the U.S. immediately begin such a re-assessment and develop rules for civil society organizations that incorporate the following principles:

1. When acting in good faith and adhering to widely accepted due diligence standards, civil society organizations should be allowed to provide aid and services to those in need.
2. Civil society organizations should only be listed as terrorist organizations if they intentionally provide funds or material support to a listed terrorist group and do not meet the requirements of an adequate humanitarian exemption.
3. The U.S. should establish procedures that allow civil society organizations acting in good faith to address problems without being shut down.

³² http://www.charityandsecurity.org/news/Fusion_Center_Analyst_Caught_Spying_Protestors

³³ “Intelligence Improperly Collected on U.S. Citizens,” *New York Times* (Dec. 16, 2009) at <http://www.nytimes.com/2009/12/17/us/17disclose.html>

³⁴ “Activists Mislabeled as Terrorists Balk at Rules for Seeing Files,” *Washington Post* (Oct. 18, 2008) at <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/17/AR2008101702898.html>

³⁵ http://icj.org/news.php3?id_article=4453&lang=en

4. When accusations are made against a civil society organization there should be adequate redress procedures, including notice of the allegations against it, opportunity to respond and independent review of an adverse decision.
5. Create a process for ensuring frozen funds are spent only for charitable purposes.
6. Donors are critical to the ability of civil society organizations to carry out their work. These donors require protection from ex post facto criminalization of legal donations and investigation, harassment or invasions of privacy for legal donations.