

## **Nonprofits with USAID Funding May Be Vulnerable to Federal Lawsuits**

This spring the Charity & Security Network learned of several lawsuits filed in U.S. courts against nonprofit organizations (NPOs) that receive USAID funding. Using a law meant to combat fraud against the federal government by providing incentives for private citizens to act as whistleblowers (the False Claims Act), the Zionist Advocacy Center (TZAC) has alleged that three groups violated the anti-terrorist certification<sup>1</sup> in their grant agreements with USAID by providing "material support" to groups on the terrorist lists. In two of these cases, the U.S. Department of Justice (DOJ) joined the lawsuits, which were settled without trial. The third, against the Carter Center, was dismissed at the request of DOJ. TZAC says it has filed two additional cases against international NGOs. They are currently under seal.

This memo provides background on the False Claims Act, USAID anti-terrorism certification and the definition of material support. It suggests red flags NPOs should watch for and potential steps NPOs can take to protect themselves.

### **What is the False Claims Act and how is it being used against NPOs?**

The False Claims Act (FCA) allows private citizens to file suits on behalf of the U.S. government in cases of fraud. TZAC's lawsuits claim that each of the NPOs sued provided "material support" to listed groups in Palestine, making its certification to USAID a false claim.

USAID grant agreements require grantees to sign a certification that the NPO "to the best of its knowledge, did not provide, within the previous ten years, and will take all reasonable steps to ensure that it does not and will not knowingly provide, material support or resources" to any person or group "that commits, attempts to commit, advocates, facilitates, or participates in terrorist acts, or has committed, attempted to commit, facilitated, or participated in terrorist acts." USAID's position is that this applies to *all* the organization's activities, not just those it funds. (Note: The State Department's certification is different and is not an issue in these lawsuits. We are not aware of any cases involving State Department grants.)

Complaints filed under the FCA are automatically sealed for 60 days while the government investigates the claims and decides whether or not they merit further action. The court can extend the sealing period for months or even years. In the meantime, neither the party being sued nor the public know about the case. The FCA allows for triple damages against parties found to have violated the law and the private citizens bringing suit are eligible to receive up to 30% of that amount. It is not necessary to prove intent to file a false claim or defraud the government in order to be successful with an FCA complaint. Instead, the act sets a lower standard -- that the defendant had knowledge of the facts establishing fraud or a false claim.

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<sup>1</sup> A copy of USAID's June 2018 anti-terrorism certification is annexed to this memo. Grantees should check their grant agreements for specific language applicable to them.

The FCA is largely used address fraud in healthcare and defense contracting. In 2017, DOJ won \$3.7 billion in FCA settlements and judgments.<sup>2</sup> It provides a civil cause of action, although DOJ occasionally charges FCA violators with underlying crimes, mostly seen in egregious medical fraud cases.

### **What are the cases we know about?**

The three known cases filed by TZAC are as follows:

- *American University in Beirut (AUB)*: In a March 2017 settlement,<sup>3</sup> AUB agreed to pay the U.S. \$700,000 after TZAC alleged that its journalist training program included representatives of al Nour Radio and al Manar TV, both of which are on the Office of Foreign Asset Control's Specially Designated Nationals (SDN) list. In addition, the suit accused AUB of including Jihad al-Binaa, also on the SDN list, in a database connecting students with NPOs. As part of the settlement, AUB agreed to change its internal policies and procedures, including staff training, on compliance with U.S. law and to conduct periodic external audits on compliance.
- *Norwegian People's Aid (NPA)*: This case was settled on March 28, 2018.<sup>4</sup> TZAC's complaint alleged two material support violations: a democracy training in Palestine that included people affiliated with Hamas and the Popular Front for the Liberation of Palestine (PFLP), both on the U.S. State Department's list of Foreign Terrorist Organizations, and a program with the Iranian government to clear land mines from oil fields. NPA said it believed the certification only applied to U.S.-funded activities, but USAID said it applies to all NPA projects, regardless of funding source. NPA agreed to pay \$2.025 million in order to close the case and avoid the expense of a trial. It also agreed to make changes in its internal procedures to ensure future compliance.
- *The Carter Center*: On May 31, 2018 the U.S. District Court for the District of Columbia granted DOJ's motion to dismiss<sup>5</sup> TZAC's complaint,<sup>6</sup> which alleged the Carter Center provided Hamas and the PFLP with material support when it hosted a 2015 meeting that included both groups and served water, fruit and cookies. TZAC issued a statement saying that while it disagrees with the outcome "there is not much to do about it" and that it will "continue investigating the Carter Center."<sup>7</sup> TZAC claimed such meetings constitute

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<sup>2</sup> DOJ Office of Public Affairs Dec. 21, 2017 <https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017>

<sup>3</sup> US Attorney's Office for the Southern Districts of New York Press Release <https://www.justice.gov/usao-sdny/pr/acting-manhattan-us-attorney-announces-settlement-american-university-beirut-resolving>

<sup>4</sup> A summary of the case with links to key documents is available here: <https://www.charityandsecurity.org/News/NPA-US-Settle-Case>

<sup>5</sup> In its Motion to Dismiss DOJ said there was no allegation that the meeting was funded by USAID or that the Carter Center failed to fulfill its grant obligations to USAID. It had not concealed its activities. It also noted that while TZAC had a "difference of opinion with the Carter Center about how to resolve conflict in the Middle East" its complaint "does not allege facts addressed to the elements it or the United States must prove to establish violations of the FCA." In dismissing the case, the court did not rule on whether the Carter Center had provided material support.

<sup>6</sup> A summary of the case with links to key documents is available here: [https://www.charityandsecurity.org/news/Court\\_Dismisses\\_Suit\\_Against\\_Carter\\_Center](https://www.charityandsecurity.org/news/Court_Dismisses_Suit_Against_Carter_Center) and here [https://www.charityandsecurity.org/news/carter\\_center\\_sued](https://www.charityandsecurity.org/news/carter_center_sued)

<sup>7</sup> TZAC facebook page <https://www.facebook.com/ZionistAdvocacyCenter/>

material support because the Carter Center provided the facilities for the meetings to take place and that if Hamas and the PFLP resolve their differences, “it will free up more resources to engage in terrorism against Israelis.”

**What is “material support” anyway?**

There is no clear answer to this question under U.S. law. The definition used in the USAID certification is similar to, but not the same as, the criminal prohibition in the Antiterrorism and Effective Death Penalty Act (AEDPA). See the chart below to compare (text in bold is where definitions differ). The concept of *material support* has also been incorporated into many executive orders issued under sanctions laws, expanding the prohibition from the criminal to civil law.<sup>8</sup>

<b>U.S. Definitions of “Material Support”</b>	
USAID’s terrorism-financing certification	Criminal Prohibition in 18 U.S.C. 2339A (AEDPA)
<p>“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, transportation, <b>and other physical assets</b>, except medicine or religious materials.”</p>	<p>as “<b>any property, tangible or intangible, or service, including</b> 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 <b>(one or more individuals who may be or include oneself)</b>, and transportation, except medicine or religious materials.”</p>

The prohibitions on providing training, expert advice or assistance and personnel are particularly relevant in the context of the False Claims Act cases we have seen so far, in that the primary activities complained of involve peacebuilding-related activities.<sup>9</sup> Since the Supreme Court’s Humanitarian Law Project<sup>10</sup> decision in 2010, the criminal prohibition has been applied to peacebuilding activities that involve these three terms. To clarify what is covered, in 2004 Congress passed the Intelligence Reform and Terrorism Prevention Act (IRTPA)<sup>11</sup> with the following definitions:

- *Training*: “instruction or teaching designed to impart a specific skill, as opposed to general knowledge.”<sup>12</sup>
- *Expert advice or assistance*: “advice or assistance derived from scientific, technical, or other specialized knowledge.”<sup>13</sup>
- *Personnel*: when a “person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with one or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to

<sup>8</sup> See EO 13224

<sup>9</sup> The exception is the land mine removal program conducted by NPA.

<sup>10</sup> *Holder v Humanitarian Law Project* 130 S.Ct. 2705 (2010)

<sup>11</sup> Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, 118 Stat. 3638, [frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_cong\\_public\\_laws&docid=f:publ458.108.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_public_laws&docid=f:publ458.108.pdf)

<sup>12</sup> 18 U.S.C. §2339A(b)(2)

<sup>13</sup> 18 U.S.C. §2339A(b)(3)

organize, manage, supervise or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction or control."<sup>14</sup>

In addition, the definition of material support in the Immigration and Nationality Act (INA)<sup>15</sup> is sometimes used outside the immigration context.<sup>16</sup> It bars support for FTOs, as well as prohibiting support (1) for the commission of a terrorist activity; (2) to individuals who have committed or plan to commit terrorist activity, and (3) to terrorist organizations as defined in subsequent sections of the INA. The third category is highly discretionary and the information on all groups or persons considered to be terrorists by the INA is not publicly available.

### **What red flags may indicate a False Claims Act case has been filed against an NPO?**

These cases suggest several indicators or red flags that your organization should be on the lookout for:

- Your nonprofit organization does humanitarian aid, development, peacebuilding or other work in Palestine or other areas where designated terrorist groups are active;
- Your organization receives funding from USAID;
- Your organization has been contacted within the last two years by USAID, including the grant administrator or Inspector General, or another government agency, seeking additional information (beyond usual reporting) about work performed either under or outside your government grant or contract;
- Your organization is mentioned in far-right and/or Islamophobic blogs, website postings or "news" articles.

### **What steps can my organization take to protect itself or respond if we are sued?**

If you are concerned that there may be an investigation in a sealed case against your organization, or if you are served with a complaint under the False Claims Act the following are steps to consider taking:

- Review your activities, policies and procedures for compliance with the USAID certification, including determining whether any groups or persons on any U.S. terrorist list are involved in your activities and if so, whether the nature of that involvement violates the material support prohibition. (Although many transactions or communications may be material support, not all contact or communications with listed entities is prohibited. See more below)
- Consult legal counsel with specialized knowledge of the U.S. material support law. Pro bono assistance may be available. Contact the Charity & Security Network if you would like a referral.

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<sup>14</sup> 18 U.S.C. §2339B(h)

<sup>15</sup> Sec, 202(a)(3)(B)(iv)(VI)

<sup>16</sup> See HR 1677 115<sup>th</sup> Congress Caesar Syria Civilian Protection Act

- Do not assume TZAC's interpretation of what violates the material support provision is correct. This group takes a very expansive view of the prohibition and courts may not agree with it.
- Have a rapid response plan in place to address allegations that may be made against you, in litigation or the media. Some useful resources are here:  
<https://www.charityandsecurity.org/know-your-rights/steps-you-can-take-to-protect-yourself>

**For more information contact us at**

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## ANNEX

### P. 4-6 of USAID Certifications, Assurances, Representations and Other Statements of the Recipient

#### A Mandatory Reference for ADS Chapter 303

Partial Revision Date: 06/07/2018

Responsible Office: M/OAA/P

File Name: 303mav\_060718

#### Part I – Certifications and Assurances

#### **4. Certification Regarding Terrorist Financing, Implementing Executive Order 13224**

By signing and submitting this application, the prospective recipient provides the certification set out below:

1. The Recipient, to the best of its current knowledge, did not provide, within the previous ten years, and will take all reasonable steps to ensure that it does not and will not knowingly provide, material support or resources to any individual or entity that commits, attempts to commit, advocates, facilitates, or participates in terrorist acts, or has committed, attempted to commit, facilitated, or participated in terrorist acts, as that term is defined in paragraph 3. The Certification in the preceding sentence will not be deemed applicable to material support or resources provided by the Recipient pursuant to an authorization contained in one or more applicable licenses issued by the U.S. Treasury's Office of Foreign Assets Control (OFAC).

2. The following steps may enable the Recipient to comply with its obligations under paragraph 1:

**a.** Before providing any material support or resources to an individual or entity, the Recipient will verify that the individual or entity does not (i) appear on the master list of **Specially Designated Nationals and Blocked Persons**, which is maintained by OFAC, or (ii) is not included in any supplementary information concerning prohibited individuals or entities that may be provided by USAID to the Recipient.

b. Before providing any material support or resources to an individual or entity, the Recipient also will verify that the individual or entity has not been designated by the United Nations Security (UNSC) sanctions committee established under UNSC Resolution 1267 (1999) (the “1267 Committee”) [individuals and entities linked to the Taliban, Usama bin Laden, or the Al-Qaida Organization]. To determine whether there has been a published designation of an individual or entity by the 1267 Committee, the Recipient should refer to the consolidated list available online at the Committee’s Web site:

<http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm>.

c. Before providing any material support or resources to an individual or entity, the Recipient will consider all information about that individual or entity of which it is aware and all public information that is reasonably available to it or of which it should be aware.

d. The Recipient also will implement reasonable monitoring and oversight procedures to safeguard against assistance being diverted to support terrorist activity.

3. For purposes of this Certification -

a. “Material support and resources” means 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, transportation, and other physical assets, except medicine or religious materials.”

(i) “Training” means instruction or teaching designed to impart a specific skill, as opposed to general knowledge.

(ii) “Expert advice or assistance” means advice or assistance derived from scientific, technical, or other specialized knowledge.

b. “Terrorist act” means -

(i) an act prohibited pursuant to one of the 12 United Nations Conventions and Protocols related to terrorism (see UN terrorism conventions Internet site:

<http://untreaty.un.org/English/Terrorism.asp>); or

(ii) an act of premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents; or

(iii) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

c. "Entity" means a partnership, association, corporation, or other organization, group or subgroup.

d. References in this Certification to the provision of material support and resources must not be deemed to include the furnishing of USAID funds or USAID-financed commodities to the ultimate beneficiaries of USAID assistance, such as recipients of food, medical care, micro-enterprise loans, shelter, etc., unless the Recipient has reason to believe that one or more of these beneficiaries commits, attempts to commit, advocates, facilitates, or participates in terrorist acts, or has committed, attempted to commit, facilitated or participated in terrorist acts.

e. The Recipient's obligations under paragraph 1 are not applicable to the procurement of goods and/or services by the Recipient that are acquired in the ordinary course of business through contract or purchase, e.g., utilities, rents, office supplies, gasoline, etc., unless the Recipient has reason to believe that a vendor or supplier of such goods and services commits, attempts to commit, advocates, facilitates, or participates in terrorist acts, or has committed, attempted to commit, facilitated or participated in terrorist acts.

This Certification is an express term and condition of any agreement issued as a result of this application, and any violation of it will be grounds for unilateral termination of the agreement by USAID prior to the end of its term.