

PREVENTING PEACE

How "Material Support" Laws
Undermine Peacebuilding



Alliance for
Peacebuilding



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Overview

Counterterrorism laws have not kept pace with evolving security challenges or new programmatic approaches to end conflict, reduce violence, and build sustainable peace. The United States places broad legal restrictions on the provision of “[material support](#)” to foreign terrorist organizations (FTOs). Unfortunately, the restrictions imposed by U.S. laws limit the effectiveness of programs designed to prevent people from engaging in violent conflict and extremism, as material support includes a wide range of peacebuilding activities and interactions—from sharing tea at a meeting to disarmament, demobilization, and reintegration (DDR) programs that assist former members of FTOs transition to civilian life.

Peacebuilding activities are critical to addressing conflict drivers and preventing violence and extremism, as recognized by Congress in the [Global Fragility Act](#) (GFA), the [Women, Peace, and Security \(WPS\) Act](#), and the [Elie Wiesel Genocide and Atrocities Prevention Act](#) (EWGAPA). However, the last modification of the material support prohibition occurred in 2004 and did not anticipate the Congressional focus on violence, conflict, and extremism prevention as enshrined in the GFA, WPS Act, and EWGAPA. The existing bar frustrates the realization of these laws’ intent and undermines efforts that support nonviolence, facilitate DDR, curb violent extremism, and foster inclusive peace processes. Furthermore, the prohibition prevents the U.S. government and its non-governmental organization (NGO) partners from operating in the contexts in which implementation of the GFA, WPS Act, and EWGAPA are most essential.

This report provides an overview of the legal challenges posed by outdated counterterrorism laws to peacebuilding organizations; context-specific examples of the ways in which the material support prohibition inhibits the delivery of critical aid to end prolonged violence; and opportunities for Congress to address the anachronistic legal regime that undermines evolving counterterrorism approaches and the growing prevention-focused canon of law.



Background on the Law

In U.S. law, providing material support for terrorism is a crime prohibited by the [Antiterrorism and Effective Death Penalty Act](#) (AEDPA).ⁱ Although intended to deter terrorism and provide justice for its victims, the broadly defined criminal prohibition on material support of terrorism has proved contrary to that purpose, as it bars most forms of communication or engagement with listed FTOs identified by the Secretary of State, even as part of peace or DDR processes. As a result of litigation challenging the definition of material support for being overly broad, Congress [defined the terms](#) “training,” “expert advice and assistance,” and “personnel” in 2004, but did not explicitly assert whether or not those definitions applied to peacebuilding programs.

In June 2010, the U.S. Supreme Court upheld the law in an as-applied challenge in the case [Holder v. Humanitarian Law Project](#),ⁱⁱ but left open the door for other as-applied challenges. The plaintiffs had sought to help the Kurdistan Workers’ Party in Turkey and the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka learn means of peaceful conflict resolution. The Court said Congress has broad discretion to determine the definition of material support, but had failed to do so.

Compounding matters, most terrorism-related [Executive Orders](#) (EOs) issued under sanctions authority under the International Emergency Economic Powers Act (IEEPA) include a “material support” prohibition.ⁱⁱⁱ Due to the fact that EOs do not define the term, the AEDPA definition is generally applied. As a result, the problems associated with the definition in the criminal context are then imported into the sanctions context.

While these laws were not designed to limit programs working to end conflict, reduce violence, and build sustainable peace, they have that effect. Although current law gives the Secretary of State, with concurrence of the Attorney General, [authority to create exceptions](#) for providing “personnel,” “training,” or “expert advice or assistance” if that support may not be used to carry out terrorist activity, the State Department has never exercised this power in relation to



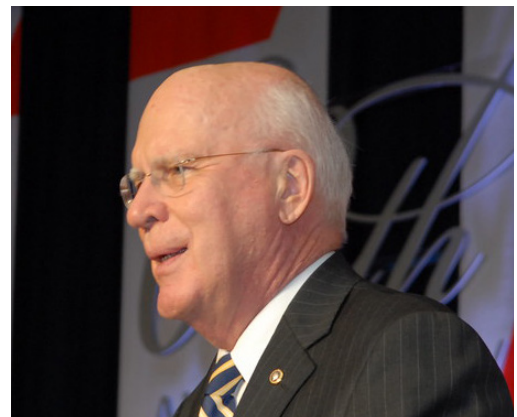
peacebuilding programs, resulting in lost opportunities to reduce violence, armed conflict, and extremism.^{iv}

Negative Impacts on Peacebuilding Activities

While the problematic impacts of the definition of material support have been recognized for some time, no action has been taken since the *Holder v. Humanitarian Law Project* decision in 2010 to update the statute or provide guidance that would establish reasonable standards for peacebuilders. In 2011, Senator Patrick Leahy [criticized the law](#), highlighting its impact on the 2011 famine in Somalia. He stated:

The current law is so broad as to be unworkable... it also limits the actions of individuals and NGOs engaged in unofficial diplomacy and peacebuilding. These actors often engage in informal negotiations that serve United States interests and have no intent to support terrorist movements.

Leahy urged the Department of Justice to facilitate a multi-stakeholder dialogue and then release “a set of guidelines that remove the uncertainty with the scope of the material support law....” He further urged that the U.S. government “must not impede the efforts of individuals and organizations that have no intent to provide material support for terrorism, and whose activities serve the goals of the United States.”



Sen. Patrick Leahy (D-VT), 2010.
(Photo: George Tolbert)

Unfortunately, no such guidance emerged despite ongoing requests from NGOs. Instead, there continues to be little to no direction on how far the prohibition reaches. While a declassified memo from the Department of Justice notes that “the government’s position on this issue is clear: the material support statutes do not prohibit legitimate, independent efforts to counter violent extremism,” it does not provide the specificity needed by organizations working on the



ground to ensure their programs are not subject to criminal liability.^v This lack of specificity has been used by private parties with political agendas to file meritless lawsuits against organizations like the Carter Center, alleging that peacebuilding activities constituted “material support.”^{vi}

Many organizations that implement U.S. government projects in these spaces find the work too risky to undertake given the lack of U.S. government protection against criminal liability and specificity surrounding the prohibition. This limits the number of actors available to engage, thus reducing capacity to respond to these critical issues and undermining peacebuilding and violence prevention efforts.

Exacerbating the problem, U.S. government-supported efforts to counter violent extremism [cannot assist](#) individuals who have left an FTO under their own accord without an official DDR or similar demobilization process. These processes can take years to put into place, resulting in reduced incentives for individuals to end their affiliation with extremist organizations. U.S. government-supported projects and NGOs could provide immediate and flexible demobilization and reintegration assistance to communities, creating a valuable off-ramp to incentivize individuals to leave these groups. Such efforts would support the successful implementation of the GFA, WPS Act, and EWGAPA, but remain illegal in light of the material support prohibition.

The OFAC Licensing Process Fails to Provide Legal Protection Against Criminal Prosecution

The Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury administers and enforces economic and trade sanctions against targeted foreign countries, terrorists, international narcotics traffickers, and proliferators of weapons of mass destruction. It maintains a list of sanctioned individuals and organizations. OFAC can also provide licenses to NGOs and other entities that permit otherwise prohibited transactions with sanctioned individuals and organizations. However, numerous experiences in places like Colombia and Iraq demonstrate the extreme difficulty organizations face in procuring licenses from OFAC for peacebuilding activities.^{vii}



Nonetheless, a larger problem persists. OFAC, an agency within the Department of Treasury, has no authority to limit the Department of Justice’s prosecutorial discretion when it comes to enforcement of the criminal prohibition on providing material support. As a result, peacebuilders risk criminal prosecution if they provide training or technical assistance to a peace process or help a former fighter re-enter society, even if they have a license from OFAC. Risk-averse NGOs often opt to forego the delivery of assistance in light of the potential legal consequences. This criminal liability inhibits the U.S. from being able to out-compete terrorists in conflict-affected and fragile contexts, which runs counter to the prevention aims of the GFA, WPS Act, and EWGAPA.

The Vetting Process is Increasingly Draconian and Expensive

Federal laws and regulations require the U.S. government to guard against the risk that taxpayer funds inadvertently benefit terrorists. Currently, the Department of State’s Risk Analysis and Management (RAM) office vets individuals from nonprofit programs that receive State Department funds.^{viii} The cost of vetting is an arbitrary \$400 per person or entity. The fee can come out of program funds, thus reducing the money that NGOs can utilize to implement critically needed peacebuilding aid. RAM’s slow and expensive process undermines the delivery of time-sensitive assistance and causes donor bureaus to avoid programming that could even tangentially invoke the material support prohibition.

Examples of Adverse Impacts of the Material Support Prohibition

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



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

- 2. In Colombia**, the Revolutionary Armed Forces of Colombia (FARC) remain on the FTO list, although it demobilized pursuant to the [2016 peace agreement](#), which ended 52 years of conflict. However, [some members of FARC](#) rejected the agreement, rearmed, and formed “FARC dissident” groups. The material support prohibition effectively bars U.S. peacebuilding organizations from lending their considerable expertise to the peace process and working with the dissident groups to bring them into the DDR and transition processes, and will continue to be a barrier as more and more [FARC members join the government](#).



Signing ceremony for a ceasefire and end to hostilities between the Government of Colombia and the FARC in Havana, Cuba, 2016. (Photo: Delegación de la Unión Europea en Cuba)

- 3. In Nigeria**, when a number of the 276 Chibok girls kidnapped by Boko Haram in 2014 were rescued, the U.S. government [failed to support them](#) because there was [no official DDR process](#) in place. Individuals [kidnapped](#) by ISIS and other FTOs have faced a similar lack of support. Even after USAID began working with the Nigerian military in 2016 to support a national DDR program called Operation Safe Corridor, the material support prohibition remained a [major roadblock](#), delaying direct support by requiring extensive vetting and interagency coordination. While Nigeria-based NGOs, such as the [Allamin Foundation for Peace and Development](#), could provide women and girl returnees of Boko Haram with psychosocial support, religious mentorship, skills training, and community sensitization, the material support prohibition hampered efforts for U.S.-based and funded organizations to multiply the positive and destigmatizing effects of such holistic programming.
- 4. In Sri Lanka**, an U.S.-funded [project to foster dialogue](#) among professionals, such as doctors and lawyers, was discontinued after the U.S. asked the program director Visaka Dharmadasa



if she could certify that none of the participants were sympathetic to the LTTE. Remarkably, the U.S. also asked her to certify that none of the tea houses she visited had ties to the LTTE. The justification for the requests was compliance with U.S. laws that prohibit dealing with the LTTE, an FTO. The NGO discontinued the program because they “[cannot clap from one hand](#).” This was the first time in 20 years the organization had to close a project halfway through implementation, even though the dialogue sought to stop violence and promote dialogue. Ms. Dharmadasa was [nominated](#) for a Nobel Peace Prize in 2005, and awarded InterAction’s Humanitarian Award in 2006, neither of which afforded her the benefit of the doubt in these interactions with the U.S. government in light of the material support prohibition.

The Case of Afghanistan: Designation Withheld to Facilitate Peace Talks

Since September 11, 2001, successive administrations [declined to designate the Afghan Taliban as an FTO](#), in recognition that the ultimate conclusion of U.S. intervention in Afghanistan would require a diplomatic solution—that is, direct negotiations with and engagement of the Taliban. While the Taliban is a [Specially Designated Global Terrorist \(SDGT\)](#) entity, which allows the U.S. to impose various sanctions and travel restrictions, by withholding an FTO designation, the State Department provided the space for direct negotiations. A critical piece of U.S. leverage to encourage the Taliban to participate in the intra-Afghan peace process included promises to lift sanctions against individual Taliban members. In addition, the lack of an FTO designation allows U.S. peacebuilding [organizations](#) and partners to operate in Taliban-



A worker with the Community-Based Disaster Risk Reduction project collects data from women in Badakhshan province, Afghanistan.
(Photo: Luke Bostian, Aga Khan Foundation)



controlled areas and educate and [train](#) women, youth, and minorities to participate in the peace process, collect surveys, provide platforms for Afghans to share their perspectives on the future of the country, and undertake top-down and bottom-up peacebuilding initiatives.

The Case of Yemen: Designation Reversed to Facilitate Peace Talks and Avoid Humanitarian Disaster

The FTO and SDGT [designation of Ansar Allah](#), commonly referred to as the Houthis, by the Trump administration on its final day in office is among the most illustrative of case studies on the impact of the material support statutes on humanitarian programs and peace processes. The designations came despite stern warnings from a wide range of [civil society actors](#) and [United Nations officials](#) that such a move would imperil millions of Yemenis suffering from years of civil war and the effects of the global COVID-19 pandemic.



A conflict resolution committee in Yemen debates a tribal decree to resolve conflict. (Photo: UN Peacebuilding Fund)

Unlike most groups designated as FTOs and SDGTs by the U.S. government, the Houthis control a broad swath of territory in Yemen, and thus operate as the de facto government for [roughly 80 percent](#) of Yemen's population. In this context, the designations meant that any U.S.-based or funded humanitarian or peacebuilding organizations operating in Yemen had to effectively cease operations in order to avoid the risk of criminal prosecution and civil liability under the material support prohibitions embedded in AEDPA and IEEPA, respectively.

In an effort to carve out exemptions for peacebuilding and humanitarian assistance, OFAC issued [four licenses](#), followed by a broad [fifth license](#) to allow the delivery of this aid in Houthi-controlled territory for one month. However, these steps were insufficient to reassure NGOs



that their work in Yemen would not subject them to criminal prosecution under the material support prohibition in AEDPA, as prosecutorial discretion lies within the Department of Justice, not the Treasury Department. The Treasury Department simply lacks the jurisdiction to protect NGOs from criminal liability under AEDPA, even if OFAC licenses permit certain activities otherwise prohibited. As a result, peacebuilding and humanitarian assistance in Yemen ground to a halt in early 2021. The Biden administration’s decision to [reverse the designations](#) was a tacit recognition of the problematic nature of the material support bar.

The Biden administration’s actions also recognized that the FTO and SDGT designations undermined U.S. diplomatic efforts and [imperiled multilateral and civil society-led peace processes](#) in Yemen. The designations served to reinforce perceptions of U.S. bias by demonizing the Houthis for their bad behavior while providing direct arms sales to the Saudi-led coalition responsible for the significant civilian casualty rate. [UN Special Envoy to Yemen Martin Griffiths](#) warned against the designations, believing they would have “a chilling effect on his efforts to bring the parties together.” Furthermore, the designations [threatened](#) the ability of third-party actors and organizations to support the peace process through direct engagement with a key party to the conflict, as well as civilians living in Houthi-controlled territory. While revoking the designations largely resolved the problems they created in Yemen, it did not address the underlying problems with the material support statutes. Current and future designations will continue to threaten the work of civil society until the legal roots of this problem are addressed.

How Holistic Programming Builds Peace

For over 20 years, U.S. counterterrorism laws have taken a punitive approach to individuals and organizations that may have incidental contact with FTOs in order to carry out their work, such as paying road tolls or utility bills, and with civilians living in FTO-controlled territory in the name of national security. However, these laws inadvertently harmed vulnerable populations and created the conditions for increased radicalization, violence, and human suffering—all of which subvert U.S. national security interests. Congress recognized the exorbitant costs in blood and treasure of U.S. militarized interventions and took an innovative approach to U.S. foreign policy towards preventing and reducing conflict and extremism through the GFA and



other key prevention-oriented legislation. Yet, the material support prohibition continues to undermine the realization of these laws' intent and the implementation of holistic programming that inhibits and reduces violence and violent extremism.



Former child soldiers welcome World Bank Managing Director Sri Mulyani Indrawati to the Mutubo Demobilization Center
(Photo: Simone D. McCourtie / World Bank)

Holistic programming funded by international institutions and partners demonstrates the effectiveness of peacebuilding interventions that address drivers of conflict and extremism, reduce stigmatization, promote dialogue, justice, and accountability, and encourage social cohesion. For instance, the United Nations Operation in Somalia supports a [country-wide strategy](#) to assist Al-

Shabaab combatants disengage and reintegrate into their communities through programs that support security, ideological rehabilitation, food, religious mentoring, and economic empowerment, which takes extremists off the battlefield. In Nigeria, the [Neem Foundation](#) works to understand the forces driving radicalization and provides former Boko Haram members with psychosocial support, education, vocational training, and other key services to facilitate deradicalization and reintegration. These holistic programs address both the causes and effects of extremism, reduce the number of combatants, and prevent individuals from joining terrorist organizations. Yet, the U.S. material support bar removes a valuable tool in the fight against extremism and undermines the aims of more recent prevention-oriented laws.

Conclusion: The Legislative Fix

Without a change in this outdated legal regime, efforts by NGOs and other U.S. implementing partners to prevent violent extremism and support peace processes will continue to be hampered. The mutually beneficial objectives of protecting national security and supporting peacebuilding are seriously weakened under current law. In recent years, Congress took critical steps towards



the creation of policies and programs that promote violence and conflict prevention through the Global Fragility Act (GFA), Women, Peace, and Security (WPS) Act, and the Elie Wiesel Genocide and Atrocities Prevention Act (EWGAPA). Now, a broader legislative fix to provide mechanisms that limit the impact of counterterrorism laws on these programs is essential. Congress and the administration can provide badly needed legal protection for NGOs that operate programs designed to prevent and end conflict, reduce violence, and build sustainable peace and ensure that there is adequate tailoring of means to fit the compelling ends.

To do so, Congress should support a legislative fix that protects peacebuilding and humanitarian organizations for any activities licensed by the Treasury Department in addition to the current exception authority of the Secretary of State and Attorney General in 18 U.S.C. § 2339B(j). Congress should further provide exceptions to these groups for transactions ordinarily incidental and necessary to provide aid, as well as training, expert advice, and assistance to build peace, reduce conflict, prevent extremism, facilitate inclusive peace processes, and implement DDR programs.

As the U.S. observes the 20th anniversary of 9/11, it is the time for Congress to revisit and revise U.S. counterterrorism laws to ensure they facilitate rather than impede the prevention-focused approaches to global violence and armed conflict enshrined in the GFA, WPS Act, and EWGAPA.



Endnotes

- i. 18 U.S.C. §§ 2339A - 2339B.
- ii. 561 U.S. 1 (2010).
- iii. See, e.g., EO 13886 (Sept. 10, 2019), updating EO 13224 (Sept. 25, 2011) and EO 13536 (April 12, 2010). Issued using authority from the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701 et seq.
- iv. See, 18 U.S.C. § 2339B(j).
- v. U.S. Department of Justice, [Online Activities to Counter Violent Extremism](#).
- vi. The case against the Carter Center was dismissed at the request of the Department of Justice. Charity & Security Network, [Suit Alleging Carter Center Provided Material Support Dismissed](#), June 12, 2018.
- vii. Kurtzer, Jacob, [Denial, Delay, Diversion: Tackling Access Challenges in an Evolving Humanitarian Landscape](#), Center for Strategic and International Studies, Sept. 18, 2019.
- viii. RAM is a small team located within the Bureau of Administration's Office of Logistics Management (A/LM) Critical Environment Contracting Analytics Staff with limited access to the resources.



About the Alliance for Peacebuilding (AfP)

Alliance for Peacebuilding (AfP) is a 501(c)3 not-for-profit, nonpartisan network of over 140+ organizations working in 181 countries to end conflict, reduce violence, and build sustainable peace. We build coalitions in critical areas of strategy and policy, develop an adaptive and rigorous evaluative culture, and build powerful partnerships and coalitions to elevate the entire peacebuilding field and ensure our members are part of the most important conversations impacting global conflict and building sustainable peace. Learn more on AfP's website at www.allianceforpeacebuilding.org.

About the Charity & Security Network (C&SN)

The Charity & Security Network is a resource and advocacy center working to promote and protect the ability of nonprofit organizations to carry out peacebuilding, humanitarian, and human rights missions and to advance national security frameworks that support rather than impede this work. Learn more on C&SN's website at www.charityandsecurity.org.