



Alliance for
Peacebuilding



Fixing the Material Support Problem 2020

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Definition of the problem

Severe restrictions imposed by U.S. laws are limiting the effectiveness of programs designed to prevent people from engaging in violent conduct such as violent extremism. These counter-terrorism laws have not kept pace with evolving challenges and new programmatic approaches to end conflict, reduce violence and build sustainable peace.

In U.S. law, providing material support for terrorism is a crime prohibited by the Antiterrorism and Effective Death Penalty Act (AEDPA) title 18 of the United States Code, sections 2339A and 2339B. Specifically, the broadly defined criminal prohibition on material support of terrorism bars most forms of communication or engagement with listed Foreign Terrorist Organizations named by the Secretary of State, even as part of peace processes or demobilization, demilitarization and rehabilitation programs (DDR).¹

In June 2010, the U.S. Supreme Court upheld the law in an as-applied challenge in the case *Holder v. Humanitarian Law Project*,² but also 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.

In addition, most terrorism-related Executive Orders (EOs) issued under sanctions authority include a "material support" prohibition.³ Because the EOs do not define the term, the AEDPA definition is generally used, so that the problems associated with it are then imported into the sanctions context.

While these laws were not designed to limit programs designed to end conflict, reduce violence and build sustainable peace, they are having 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,⁴ the State Department has not exercised this power in relation of peacebuilding programs, resulting in lost opportunities to reduce violence.

¹ World Bank Social Development Department, Conflict, Crime and Violence "[Disarmament, Demobilization and Reintegration](#)" No 119 February 2009

² 561 U.S. 1 (2010)

³ For example, see EO 13886 (Sept. 10, 2019), updating EO 13224 (Sept. 25, 2011) and EO 13536 (April 12, 2010)

⁴ See 18 USC 2339B(j)

U.S. Senator Patrick Leahy seriously criticized these laws during the Somalia famine in 2011. He stated "I have long urged reform of our laws governing so-called material support for terrorism. The current law is so broad as to be unworkable... it also limits the actions of individuals and non-governmental organizations engaged in unofficial diplomacy and peace building. These actors often engage in informal negotiations that serve United States interests, and have no intent to support terrorist movements," Leahy urged DOJ to "facilitate a dialogue between relevant executive branch agencies and affected organizations and individuals. The result of this dialogue should be the release of a set of guidelines that remove the uncertainty with the scope of the material support law, and the establishment a process by which actors may seek exemptions." He concluded by saying, "we 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."⁵

Unfortunately, no such guidance has been forthcoming, despite ongoing requests from nonprofit organizations (NPOs). Instead there continues to be little to no guidance on how far the prohibition reaches. While a declassified memo from the Department Justice notes that "The Government's position on this is issue 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.⁶ While this note was declassified, it has not been widely published. This lack of specificity has been used by private parties with political agendas to file lawsuits against organizations like the Carter Center, alleging that peacebuilding activities constituted "material support." (The case against the Carter Center was dismissed at the request of the Department of Justice.)⁷

Problems with the administration of current law show the need to clarify and update it.

1) The OFAC Licensing Process is Unworkable

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. There are numerous examples from experiences in places like Colombia and Iraq that show that it is extremely difficult to get licenses from Treasury's Office of Foreign Assets Control for such activities.⁸

2) The Vetting Process is Increasingly Draconian and Expensive

Federal law and regulations require the U.S. Government to guard against the risk that taxpayer funds might inadvertently benefit terrorists. The Department of State and

⁵ <https://www.leahy.senate.gov/imo/media/doc/080311LeahyToHolderClinton-SomaliaAidRelief.pdf>

⁶ Department of Justice "Online Activities to Counter Violent Extremism" Undated. Available online at <https://charityandsecurity.org/system/files/DOJ%20Online%20Engagement%20Final%20Document.pdf>

⁷ Charity & Security Network, "[Suit Alleging Carter Center Provided Material Support Dismissed](#)" June 12, 2018

⁸ Center for Strategic and International Studies, Task Force on Humanitarian Access, "[Denial, Delay, Diversion: Tackling Access Challenges in an Evolving Humanitarian Landscape](#)" Sept. 18, 2019 See p. 22

USAID each began vetting programs to check names and other personally identifiable information of individuals in organizations applying for grants against information about suspected terrorists and their supporters.

Currently, the Department of State's counterterrorism vetting function, called Risk Analysis and Management (RAM), is a small team located within the Bureau of Administration's Office of Logistics Management (A/LM) Critical Environment Contracting Analytics Staff. RAM conducts vetting for Department of State bureaus, offices, and missions. Reports state that the cost of vetting is \$400 per person, which comes out of program funds. The slow and costly process has caused about 90 percent of programs to be effectively shutdown as RAM conducts vetting in pilot countries. Additionally, the cost is exorbitant for already underfunded peacebuilding programs.

Without a change in this outdated legal environment, efforts by NPOs and other 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 seriously weakened under current law. The 116th Congress has taken a critical step toward violence reduction with passage of the Global Fragility Act. We believe it is possible to craft legislative solutions that provide mechanisms that limit the risk of these programs. Congress can provide badly needed legal protection for NPOs that operate programs designed to end conflict, reduce violence and build sustainable peace and ensure that there is adequate tailoring of means to fit the compelling ends.

Goals for Congress

1. Provide legislative protection for speech and communications intended to advocate for peace, prevent civilian suffering, or reduce or eliminate violent conflict, by amending Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the International Emergency Economic Powers Act (IEEPA).
2. Establish safeguards for DDR programs that assist child soldiers, ex-combatants and their dependents and the communities where they live with putting down arms and reintegrating into society.
3. Provide a legal engagement process for designated organizations that participate in peace processes, that would enable peacebuilding organizations that are neutral in a conflict to support peace processes through training, technical advice and assistance.

Proposed Legislative Text

1) Amend AEDPA

“(j) Exception.--No person may be prosecuted under this section in connection with the term ‘personnel’, ‘training’, or ‘expert advice or assistance’ if the provision of that material support or resources to a foreign terrorist organization was:

(1) approved by the Secretary of State with the concurrence of the Attorney General. The Secretary of State may not approve the provision of any material support that may be used to carry out terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act).”.

(2) speech or communications if such speech or communication with a Foreign Terrorist Organization is in furtherance of the following:

- (A) programs to alleviate or prevent the suffering of civilian populations;**
- (B) reduce or eliminate the frequency and severity of violent conflict and its impact on civilian populations;**
- (C) atrocity prevention;**
- (D) peace processes;**
- (E) demobilization, disarmament or rehabilitation programs; and**
- (F) removal of land mines.**

Amend IEEPA with identical language that would protect against sanctions enforcement.

Example of holistic programming

Engaging Young Women Who Were Wives and Ex Combatants of the JAS Insurgency in MMC and Jere Local Government Area Communities of Borno State: carried out by Allamin Foundation for Peace and Development in Nigeria.

This program provides support to women and girl returnees and works with community leaders to reduce stigma and reintegrate them into society. Through its work, Allamin has developed a holistic community-based reintegration module, combining it with realignment of social norms in communities where Boko Haram has heavily recruited. They have also initiated two women’s groups, seeking accountability and justice for victims of enforced disappearance and survivors of mass atrocities. One is led by victims and the other by relatives of Boko Haram members. Following extensive interviews with women and girl returnees in the internally displaced persons (IDP) camps of Borno State, Allamin is now working to transform the ideologies of women and girls who have returned from Boko Haram through emotional support, religious mentorship, skills training, and community sensitization. Through the local radio and religious leaders, Allamin works to counter the prevailing stigma against these girls, calling upon communities to “take back their daughters.”

Source: International Civil Society Network Invisible Women: Gendered Dimensions of Return, Rehabilitation and Reintegration from Violent Extremism Jan. 11, 2019. Online at <http://www.icanpeacework.org/2019/01/11/invisible-women/> Pp. 77-81

Examples of negative impact of current law

1. In Nepal, the Maoists signed a peace agreement with the government and joined the government. But support could only be provided to the individuals within the government who were not affiliated with the Maoists, who were on the FTO list. U.S. government projects providing support to the government could only meet with non-Maoist government officials, making it logistically difficult and awkward to disinvite members of the government entities which the program was supposed to support. Projects intended to support the transition to the new government could not meet with all members of the government nor provide support across the government. Maoist members of the government could not come to trainings. It also set up a lop-sided capacity within the government because only one portion of it could receive capacity building, and the rest of the individuals were on their own, inhibiting overall government capacity building.
2. A similar situation to Nepal is brewing in Colombia. Currently the FARC in Colombia remains on the Foreign Terrorist Organization (FTO) list, although it is demobilizing pursuant to a peace agreement. This effectively bars U.S. peacebuilding organizations from lending their considerable expertise to the peace process and will continue to be a barrier once the FARC is elected into the government in 2020.
3. When the Chibok girls were rescued in Nigeria, the U.S. government did not support them because there was no official DDR process for them. This is a similar situation for individuals kidnapped by ISIS.
4. The U.S. government-supported countering violent extremism efforts cannot support individuals who have left a designated terrorist organization under their own accord without an official DDR or similar official demobilization process. These processes can take years to put into place, reducing the incentives for individuals to leave these groups. U.S. government-supported projects and NPs could provide reintegration assistance into communities, creating a valuable off-ramp to incentivize individuals to leave these groups.
5. Many organizations that implement U.S. government projects in these spaces are finding the work too risky to participate in given the lack of U.S. government protections behind U.S. government supported projects. This limits the number of actors available to engage, reducing capacity to respond to these critical issues.
6. A de-mining program in Colombia could not proceed because the mines are in areas controlled by the FARC. The organization did not proceed because it would have had to work with the FARC to identify the location of mines, raising the question of whether this would constitute a prohibited “service” under the material support prohibition.
7. An organization working in Africa was asked to assist a deserter from the Lords Resistance Army but was unsure whether providing transportation and a safe house for the escape would violate the material support prohibition, since the ex-fighter’s legal status was unclear.

8. In Sri Lanka a project to foster dialogue among professionals such as doctors and lawyers, funded by the U.S., was discontinued after the U.S. asked the program director if she was sure that none of the participants was sympathetic to the LTTE. She was also asked to ensure that they had not had tea on the wayside when traveling long distance from LTTE sympathetic areas. The justification for the requests was compliance with U.S. laws that prohibit dealing with the LTTE. The NGO discontinued the program because “we cannot clap from one hand.” This was the first time in 20 years the organization had to close a project down halfway through, even though the dialogue was focused on stopping killings