

## **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 civil society organizations and the people who participate in them and benefit from their activities are protected in their right to associate with one another, to assemble and carry out activities and to express ideas, opinions and share information. In this way civil society organizations represent the combined exercise of the fundamental human rights of freedom of association, assembly and expression.

2. Within civil society humanitarian organizations that operate on the principles of humanity, neutrality and independence enjoy special protections under international humanitarian law, including the right to offer their services to civilians in armed conflict. Civilians in turn are entitled to receive such services when provided on the basis of need alone.

3. International human rights law, international humanitarian law, as embodied in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Geneva Conventions and Additional Protocol II protect these rights. States, including the United States (U.S.), can only limit (derogate from) these rights for specific purposes and then only to the extent necessary and in a specific, proportionate and temporary manner.

4. This submission addresses the failure of the U.S. to implement 2011 UPR recommendations 92.58 and 92.65. It accepted both, agreeing to make all domestic counterterrorism legislation and action fully consistent with human rights standards, and to review laws to bring them in line with its international obligations.

### **Summary of Recommendations:**

5. We recommend that the U.S. engage civil society in a realignment of its national security and counterterrorism laws in order to remove legal restrictions on speech and association aimed at reducing armed conflict, lower barriers to humanitarian access to civilians in armed conflict and improve its redress process for terrorist lists.

## **I. BACKGROUND AND FRAMEWORK**

### **A. Relevant 2011 Uniform Periodical Review Recommendations to the U.S.**

6. The U.S. agreed to the following recommendations:

- *Recommendation 92.58: "Make fully consistent all domestic anti-terrorism legislation and action with human rights standards."*
- *Recommendation 92.65: "Review its laws at the Federal & State levels with a view to bring them in line with its international obligations."*

## **B. International Human Rights and Humanitarian Law Framework Applicable to Civil Society Organizations**

### *International Human Rights Law*

7. The U.S. adopted the *Universal Declaration of Human Rights (UDHR)* in 1948. It protects “all rights and freedoms without discrimination of any kind...” (Article 2), “freedom of opinion and expression...” (Article 19) and the “right to freedom of peaceful assembly and association” (Article 20).

8. The U.S. ratified the *International Covenant for Civil and Political Rights (ICCPR)* in 1992. It is binding pursuant to the Supremacy Clause of the U.S. Constitution. Provisions most relevant to the rights of civil society organizations include:

- The right to “effective remedies” (Article 2)
- “freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds” (Article 19.2)
- “right of peaceful assembly” (Article 21)
- the right to freedom of association with others (Article 22)
- “the right to equal protection of the law without any discrimination...” (Article 26)
- criteria limiting derogation from these protections to circumstances when the existence of the State is threatened and then only to “the extent strictly required by the exigencies of the situation provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination...” (Article 4.1)

9. The ICCPR is clear that the right of assembly can only be limited “in the interest of national security, public safety, or to protect the freedom of others (Article 21). Association may be only be restricted when “necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.” (Article 22.2)

### *International Humanitarian Law (IHL)*

10. The Geneva Conventions Common Article Three and Additional Protocols I and II Article 18 reflect international humanitarian law obligations of the U.S. (While the U.S. is not a party to Additional Protocol II, it has committed to following it and President Obama has recommended that it be ratified by Congress.) Both provisions allow humanitarian organizations to offer their services to civilians in need, provided that they are impartial in the conflict and provide aid on the basis of need alone.

11. Additional Protocol I Article 70(d) requires third states that are not a party to a conflict to “allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel” subject to state consent. Overall IHL requires that restrictions be based on valid, compelling security considerations. Consent for humanitarian access cannot be withheld arbitrarily.<sup>1</sup>

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<sup>1</sup> Sandoz, et. al. Commentary on the Additional Protocols

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### *United Nations Security Council and General Assembly Resolutions*

12. Security Council resolutions relevant to the rights of civil society organizations in the U.S. are:

- SCR 1456 (2003): States must respect human rights & humanitarian law
- SCR 1624 (2005): States must respect expression even when balancing incitement.
- SCR 1674 (2006): Elements for Humanitarian Intervention calls for the peaceful facilitation of humanitarian assistance to civilians under imminent danger.
- SCR 1904 (2009): Appoints Ombudsperson for Delisting Organizations
- UN General Assembly Resolution 60/288 The United Nations Global Counter-Terrorism Strategy, which reaffirms the importance of protecting human rights while countering terrorism.

### **C. U.S. Constitutional, Legislative and Policy Framework**

#### *The Bill of Rights*

13. 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. The Fourth Amendment protects against unreasonable search and seizures. The Fifth Amendment guarantees due process before one can be deprived of liberty or property. These rights apply to individuals and entities, including civil society organizations.

#### *The Prohibition on Material Support of Terrorism*

14. The Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, amended by the USA PATRIOT Act in 2001,<sup>2</sup> makes it a crime 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.<sup>3</sup> The statute requires only that a person have knowledge that the organization is a FTO or engages in terrorism.<sup>4</sup> Penalties include up to 15 years in prison or more if death results, and fines (up to \$500,000 for organizations and \$250,000 for individuals).<sup>5</sup> The law includes a broad extraterritorial jurisdiction provision that applies to persons found in the U.S. “even if conduct required for the offense occurs outside the United States.”<sup>6</sup>

15. The material support statute has a narrow humanitarian exemption, allowing only medicine and religious materials to be provided to FTOs.<sup>7</sup> It does not include medical services or incidental transactions necessary for humanitarian aid groups to access civilian populations.

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<sup>2</sup> Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. Material Support for Terrorism, Patriot Debates, <http://www.abanet.org/natsecurity/patriotdebates/act-section-805>

<sup>3</sup> See material support provision at “Providing Material Support to Terrorists,” 18 U.S.C. § 2339A and B

<sup>4</sup> 18 U.S.C. §6603(b)

<sup>5</sup> 18 U.S.C. § 2339B.

<sup>6</sup> 18 U.S.C. 2339B(d)

<sup>7</sup> 18 U.S.C. §2339A(b)(1)

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AEDPA allows the Secretary of State and Attorney General to approve exceptions for “training,” “personnel,” and “expert advice or assistance,” where the support may not be used to carry out terrorist activity.<sup>8</sup>

16. In the June 2010 case *Holder v. Humanitarian Law Project*<sup>9</sup> (HLP) the Supreme Court upheld the power of Congress to apply the material support prohibition to speech and communications aimed at conflict resolution training. HLP had sought to train the Kurdistan Workers Party (PKK) and Liberation Tigers of Tamil Elaam (LTTE), both designated FTOs, how to use UN procedures and international law to resolve disputes peacefully. The court said HLP can speak and write about the PKK and LTTE so long as it did not do so in coordination with them or under their direction or control. The Court did not define “coordinated speech.”

### *Sanctions under IEEPA and Treasury Department Policies and Procedures*

17. The International Emergency Economic Powers Act (IEEPA) authorizes the President to declare a national emergency when an extraordinary threat to the U.S. arises and to name specific countries, organizations, or persons as constituting such a threat.<sup>10</sup> Once named, the law prohibits U.S. persons and entities, including civil society organizations, from engaging in financial and other transactions with the listed person or organization.

18. On Sept. 23, 2001 President G.W. Bush used IEEPA authority to issue Executive Order (EO) 13324<sup>11</sup> which directed the Department of Treasury to designate Specially Designated Global Terrorists (SDGTs) and take action to freeze all their assets subject to U.S. jurisdiction if it finds a group has provided material support to or is “otherwise associated with” a listed group. It essentially incorporates the definition of material support used in AEDPA into this civil sanctions regime.<sup>12</sup>

19. In 2001 the USA Patriot expanded IEEPA sanctions to permit blocking the assets of a non-state entity “during the pendency of an investigation” into whether it should be listed as a SDGT. There is no time limit on such blocking.<sup>13</sup>

20. IEEPA bars the President from blocking “donations of food, clothing and medicine, intended to be used to relieve human suffering,” unless he or she determines that such donations would “seriously impair his ability to deal with any national emergency.”<sup>14</sup> Since 2001 this exception has been invoked routinely in Executive Orders naming SDGTs using standardized language and without explanation or specific findings.

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<sup>8</sup> 18 U.S.C. §2339B(j)

<sup>9</sup> *Holder et. al. v. Humanitarian Law Project et. al.*, 130 S.Ct. 270, 177 L. Ed. 2d 355 (2010).

<sup>10</sup> 50 U.S.C. §1701-06

International Emergency Economic Powers Act, 50 U.S.C. §1701 (1977).

<sup>11</sup> George Walker Bush, “Executive Order 13224- Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism,” Federal Register 66, no. 186, (September 25, 2001).

<sup>12</sup> The definition of material support is in the AEDPA at 18 U.S.C. §2339A(b)

<sup>13</sup> 50 U.S.C. §1702(a)(1)B

<sup>14</sup> 50 U.S.C. §1702(b)(2)

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21. IEEPA is administered by Treasury's Office of Foreign Assets Control (OFAC), which can issue licenses that allow otherwise prohibited activities. General Licenses authorize a particular type of transaction for anyone, without requiring application to OFAC. To receive a Specific License an organization must submit an application. There is no deadline for OFAC to make a decision on the application.

22. OFAC has broad discretion in considering license applications and no specific criteria for civil society applications.<sup>15</sup> It has discretionary power to amend or cancel it at any time. If the application is denied, the applicant may request an explanation or it ask for the application to be re-opened.<sup>16</sup> Court review is limited to whether OFAC acted arbitrarily and capriciously.

23. OFAC licensing determinations are "guided by U.S. foreign policy and national security concerns."<sup>17</sup> There are no standards for humanitarian or other civil society programs.

### *Limited Redress Procedures for U.S. Persons and Organizations Designated as Terrorists or Supporters of Terrorism*

24. To designate an organization or person as an SDGT, OFAC only needs to have a "reasonable suspicion" that it is providing "financial, material, or technological support for, or other services to" a designated terrorist organization or is "otherwise associat[ing]" with one. Once Treasury places a group or person on the list, it issues an order blocking all U.S. assets.<sup>18</sup>

25. Treasury regulations allow designated persons and entities to seek administrative reconsideration and to petition for the release of frozen property.<sup>19</sup> There is no deadline for OFAC action on these requests, no independent reviewer, no criteria for decisionmaking and no right to an in-person hearing or appearance. Federal court review is limited to whether OFAC's decision is capricious or arbitrary, based only on the record that OFAC provides to the court.

26. Two U.S. federal courts have found that OFAC's redress procedures violate civil society organizations' due process rights. In both *Al-Haramain Islamic Foundation et.al. v. Treasury*<sup>20</sup> and *KindHearts for Charitable Humanitarian Development v. Geithner, et al.*<sup>21</sup> the courts said that failed to provide adequate notice of the reasons for adding the charities to the terrorist list or a meaningful opportunity to respond. The courts also ruled that freezing assets for an extended period is a seizure that requires a court order.

## **II. U.S. FAILURE TO FULFILL INTERNATIONAL OBLIGATIONS AND MAINTAIN HUMAN RIGHTS STANDARDS APPLICABLE TO CIVIL SOCIETY ORGANIZATIONS AND THEIR BENEFICIARIES PER REC 92.58:**

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<sup>15</sup> 31 C.F.R. 501.801(b)(5) and 31 C.F.R. 501.597.502

<sup>16</sup> 31 C.F.R. 501.801(b)(4).

<sup>17</sup> OFAC Frequently Asked Questions and Answers

<sup>18</sup> "Presidential Authorities," 50 U.S.C. §1702(a)(1)(B)

<sup>19</sup> "Reporting, Procedures and Penalties, Regulations," 31 C.F.R. 501.807

<sup>20</sup> *Al-Haramain Islamic Foundation, Inc. v. U.S. Dept. Treasury*, 686 F.3d 965 (9<sup>th</sup> Cir. 2011)

<sup>21</sup> *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, 710 F. Supp. 2d 637 (N.D. Ohio 2010).

**A. Infringement on freedom of association, assembly and expression**

27. Contrary to ICCPR Articles 19 and 21 and the UDHR protections for freedom of expression and association, U.S. material support law criminalizes association and expression by peacebuilding organizations that wish to engage FTOs in communications and assemblies aimed at reducing armed conflict. It also creates barriers for humanitarian organizations that need to negotiate with listed terrorist groups controlling access to civilian populations.

28. The material support prohibition, as upheld by the Supreme Court ruling in *Holder v. Humanitarian Law Project* described above, has erected a significant barrier to the ability of peacebuilding organizations to engage armed actors in peace processes. The vagueness of the law and the lack of definition of what constitutes prohibited “coordination” of speech with an FTO exacerbate the problem. This has created a significant chilling impact on peacebuilding speech. As one expert has noted, “Although it is clear that training a DTO on how to negotiate for peace is unlawful, it remains unclear whether the mere coordination or facilitation of peace processes would run afoul of the ATA. In fact, apart from the conduct at issue in HLP, it is difficult to state with any precision what other forms of engagement might violate the statute.”<sup>22</sup>

29. Expert George Lopez of Notre Dame described how the post-HLP environment for peacebuilders puts international peace organizations that collaborate with Catholic groups “in a very odd situation.” He said, “We're allowed to work with the Colombian bishops, but we're not allowed to work with them in the same room when they are working with (groups on the terrorist list)... is there guilt by association?”<sup>23</sup>

30. The Carter Center counsels regional organizations about peaceful conflict resolution. It wanted to create a student “parliament” among the universities located in Gaza. Students would be trained to adjudicate disputes through peaceful dialogue rather than violence. Although this activity is intended to help reduce terrorism, if any of the students participating are known or likely to be members of Hamas (a FTO), the Carter Center could be prosecuted for material support of terrorism and subject to OFAC listing and asset freezes. As a result the program was not implemented.<sup>24</sup>

31. The Alliance for Peacebuilding wanted to work with a former U.S. ambassador to Sri Lanka to create dialogue between the Sri Lankan government and the LTTE. It did not proceed because the material support law prohibits the communications needed to bring the latter group into the discussion.<sup>25</sup>

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22 Spring 2011 The Yale Journal of International Law Online Material Support of Peace? The On-the-Ground Consequences of U.S. and International Material Support of Terrorism Laws and the Need for Greater Legal Precision Noah Bialostozky† <http://www.yjil.org/docs/pub/o-36-bialostozky-material-support-of-peace.pdf>

23 Adeshina Emmanuel, “Supreme Court Ruling Could Obstruct Peace Work,” Catholic News Service July 2010 <http://www.americancatholic.org/news/report.aspx?id=2867>

24 Charity & Security Network, Impacts of the Material Support Prohibition on Peacebuilding, 2011

25 <http://globalpublicsquare.blogs.cnn.com/2013/06/27/time-to-let-peace-builders-do-their-job/> Amb. Thomas Pickering and Amb. Nancy Soderburg, CNN World June 27, 2013

32. The fundamental inconsistency between protection of freedoms of expression, association and assembly and the material support prohibition was described by Elisabeth Decrey-Warner, president of the Swiss organization Geneva Call, who said, "How can you start peace talks or negotiations if you don't have the right to speak to both parties?"<sup>26</sup> Geneva Call works with armed non-state actors (ANSAs), providing training and technical advice on how to incorporate IHL, codes of conduct and norms such as the land mine ban into their policies. Ms. Decrey-Warner will not risk traveling to the U.S. out concern that she could be arrested under the material support law's extraterritorial jurisdiction provision. Apparently fearing prosecution, Geneva Call's pro bono U.S. legal representative withdrew from its contract and a U.S. university declined to work with it in a legal clinic.<sup>27</sup>

33. Despite these kinds of problems, the U.S. has failed to change the law or create a process that would allow peacebuilding projects with FTOs to go forward. In May 2011 a bipartisan group of 18 organizations and 27 foreign policy and peacebuilding experts sent then Secretary of State Hillary Clinton a letter asking that she use existing legal powers to exempt conflict resolution programs from the material support ban. The groups, including the Charity & Security Network met with State Department officials to discuss the issue several times, but no action was taken.<sup>28</sup>

34. Faith leaders renewed the request in a November 2012 letter to Clinton.<sup>29</sup> On June 20, 2013 a group of former ambassadors, foreign policy experts and peacebuilders, including former President Jimmy Carter, sent a similar petition to Secretary of State John F. Kerry.<sup>30</sup> No action has been taken.

35. To date Congress has failed to enact the Humanitarian Assistance Facilitation Act (HR 3526)<sup>31</sup> which would permit civil society to engage "in any speech or communication with a foreign person that is subject to sanctions under this Act to prevent or alleviate the suffering of a civilian population, including speech or communication to reduce or eliminate the frequency and severity of violent conflict and reducing its impact on the civilian population."

## **B. Failure to Incorporate International humanitarian law (IHL) into U.S. counterterrorism law**

36. Civil society organizations must be able to respond to humanitarian crises in a timely and effective manner in order to prevent unnecessary suffering. However in many conflict areas in the world non-state armed groups that are on the U.S. terrorist list are active or control

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<sup>26</sup> Marcus Berry (July 14, 2010). "Supreme Court ruling threatens Swiss NGO efforts". Retrieved September 26, 2010

<sup>27</sup> June, 2011 Implications of the US Government's 'material support laws' for international peacebuilding Andy Carl, Conciliation Resources [http://www.c-r.org/sites/c-r.org/files/ImplicationsofUSlaws\\_201106.pdf](http://www.c-r.org/sites/c-r.org/files/ImplicationsofUSlaws_201106.pdf)  
Presentation in Sweden organised by the Life and Peace Institute and the Folke Bernadotte Academy.

<sup>28</sup> [http://www.charityandsecurity.org/solution/Sec\\_State\\_Exemption\\_Peacebuilding](http://www.charityandsecurity.org/solution/Sec_State_Exemption_Peacebuilding)

<sup>29</sup> <http://www.charityandsecurity.org/system/files/2012%20sign%20on%20Clinton.pdf>

<sup>30</sup> [http://www.charityandsecurity.org/system/files/Peacebuilding%20Petition%202013\\_0.pdf](http://www.charityandsecurity.org/system/files/Peacebuilding%20Petition%202013_0.pdf)

<sup>31</sup> <https://beta.congress.gov/113/bills/hr3526/BILLS-113hr3526ih.pdf>

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territory. In these circumstances the material support statute and economic sanctions programs effectively impair or block access to civilians in need of humanitarian relief because incidental, minimal transactions necessary to access civilians are prohibited in the same manner as deliberate distribution of lethal assistance to terrorist groups.

37. The narrow exemption for the material support prohibition is insufficient to make the law consistent with the requirements of IHL. Basic necessities such as food, water, medical treatment and shelter are tangible property within the material support prohibition. As a practical matter these necessities cannot be provided to anyone, including civilians, if any part of the delivery system provides support to a FTO.

38. This is contrary to Common Article Three of the Geneva Conventions and Article 18 of Additional Protocol II, which permit relief societies to offer their services with the intent of alleviating the needs of civilians suffering in armed conflict. While IHL allows temporary restrictions on access to civilians, governments may only restrict logistics, such as timetables, itineraries, and arrangements of convoys. U.S. law goes beyond this, imposing a general ban.<sup>32</sup>

39. The humanitarian exemption in IEEPA has been routinely invoked in Executive Orders since 9/11, without explanation of the reasons or circumstances justifying such cancellation. This is also inconsistent with the IHL principle that restrictions on humanitarian access be limited to temporary, immediate and imperative security concerns.<sup>33</sup>

### *The OFAC Licensing Process is an Inadequate Means of Meeting International Humanitarian Law Standards*

40. The OFAC licensing process has proved to be an ineffective means of allowing humanitarian organizations access to civilians. Aid groups estimate it takes an average of seven months for a license application to be processed, although some Charity & Security Network members have reported significantly longer delays.

41. Although there are many examples of problems humanitarian groups have using the OFAC process the most glaring example is the 2011 famine in Somalia. In this case OFAC did not respond to humanitarian license requests even though the U.S. Agency for International Development's (USAID) Famine Early Warning Systems Network (FEWSNET) predicted the famine almost a year before the UN declared it in July 2011.

42. At the time south Somalia was controlled by al-Shabaab, which was designated as a SDGT and FTO in February 2008. In early 2011 OFAC refused a request from charities to issue a General License to provide aid in al-Shabaab controlled areas, and only partially relaxed restrictions in August of that year, after many deaths had already occurred. USAID stopped processing new humanitarian response grants to UN agencies and NGOs, resulting in the

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<sup>32</sup> Guinane, Holland and Lucas, *Safeguarding Humanitarianism in Armed Conflict* July 2012 Chapter 5

<sup>33</sup> Ibid



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suspension of U.S. funded humanitarian programs.<sup>34</sup> The U.S. drastically cut back its aid to Somalia, reducing it by 88 percent from \$237 million in 2008 to \$20 million in 2011.

43. A May 2013 study<sup>35</sup> commissioned by the UN Food and Agriculture Organization (FAO) and FEWSNET found that between October 2010 and April 2012 nearly five percent of the region's population and 10 percent of its children died because of severe food shortages. It noted "that limited access to most of the affected population, resulting from widespread insecurity and *operating restrictions imposed by several relief agencies*, was a major constraint." [p. 5] (emphasis added)

44. In July 2013 the UN Office for the Coordination of Humanitarian Affairs and the Norwegian Refugee Council released a study that found the drop in humanitarian aid in Somalia was caused by fear of violating U.S. anti-terrorism law and that had a significant impact on the quantity of live-saving goods and services humanitarian organizations were able to deliver.<sup>36</sup>

45. Prof. Ken Menkhaus of Davidson College in North Carolina, an expert on Somalia, attributes the bottlenecks in the licensing process in part to political considerations. He notes that, during the Somali famine, some within the U.S. government prioritized isolating al-Shabaab over assisting civilians in areas under their control. He said "a growing and convoluted number of U.S. counter-terrorism measures have greatly restricted the work of international humanitarian organizations working overseas."<sup>37</sup>

46. The Charity & Security Network hears about licensing problems from its members regularly. For example in September 2010 a U.S. charity operating in Gaza sought a license to obtain permission from the Ministry of Education to provide meals for children in non-UN schools, permission from the Ministry of Health to facilitate visiting medical doctors, and contact with the Ministry of Social Affairs to obtain demographic information and poverty statistics. This was necessary because the ministries are controlled by Hamas, a FTO. A month later OFAC asked the charity for clarification, which was provided. No action was taken until February 2013, more than two years after filing its request, when OFAC notified the charity that it was "unable to provide you with a licensing determination at this time due to: Lack of foreign policy guidance from the U.S. Department of State."<sup>38</sup> No further information was forthcoming. Without the license, the charity was limited in the scope of the work it could conduct.

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<sup>34</sup> Testimony of Jeremy Konyndyk before the U.S. Senate then- Director of Policy and Advocacy for s MercyCorps," Responding to Drought and Famine in the Horn of Africa Before the subcomm. on Arica of the Senate Comm. on Foreign Relations", Aug 2011.

<sup>35</sup> Mortality among populations of southern and central Somalia affected by severe food insecurity and famine during 2010-2012  
[http://reliefweb.int/sites/reliefweb.int/files/resources/Somalia\\_Mortality\\_Estimates\\_Final\\_Report\\_1May\\_2013.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/Somalia_Mortality_Estimates_Final_Report_1May_2013.pdf) May 2, 2013

<sup>36</sup> Kate Mackintosh & Patrick Duplat, "The Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action", *commissioned by OCHA & Norwegian Refugee Council*, pg. 103 (July 2013).

<sup>37</sup> Ken Menkhaus. "No Access: Critical Bottlenecks in the 2011 Somalia Famine." Global Food Security 1 No. 1. Dec. 2012. <http://www.sciencedirect.com/science/article/pii/S2211912412000053>

<sup>38</sup> A redacted copy of the OFAC denial letter is available online here:  
<http://www.charityandsecurity.org/system/files/OFAC%20License%20Denial%20REDACTED.pdf>

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47. The fact that OFAC would not act without foreign policy guidance from the State Department shows that it weighs political considerations over humanitarian ones in its licensing decisions, contrary to the humanitarian principle that such decisions should be based on need alone.

#### *Discriminatory Licensing Decisions*

48. In contrast to its actions during the Somalia famine, OFAC issued General License 11<sup>39</sup> in 2011, which authorizes civil society organizations to “engage in transactions with the government of Syria” that are necessary to support humanitarian projects, democracy building, education, non-commercial development and cultural preservation. This includes the paying of “taxes, fees, and import duties to, and purchase or receipt of permits, licenses, or public utility services from the government of Syria.”<sup>40</sup>

49. When civil society groups asked U.S. officials why a General License was provided for Syria but not for al-Shabaab controlled areas of Somalia the response was that the types of sanctions programs were different, with Syria being a state-based comprehensive program while in Somalia the sanctions were against a non-state group. This distinction has no relevance to humanitarian need and should not determine humanitarian outcomes.

### **III. THE U.S. FAILED TO CONDUCT A MEANINGFUL REVIEW OF LAWS IN ORDER TO COMPLY WITH INTERNATIONAL OBLIGATIONS APPLICABLE TO CIVIL SOCIETY ORGANIZATIONS PER REC. 92.65**

50. The U.S. responded to the 2011 UPR recommendation 92.65 by stating, “We regularly engage in such reviews of our laws in light of our human rights obligations...”

51. Unfortunately, the U.S. has failed to follow through on this recommendation when it comes to national security laws that limit the ability of U.S. civil society organizations. Instead the current administration repeatedly notes that it has not prosecuted or shut down charities since early 2009, implying that responsible organizations should not fear the consequences of violating the law. This is an insufficient response, as it leaves civil society organizations that rely on such assurances vulnerable to prosecutions by a future administration and/or for arbitrary, political or discriminatory reasons. In addition it contributes to the chilling impact on protected rights and undermines the rule of law.

52. The following examples illustrate the failure of the U.S. to review key national security restrictions on civil society organizations, despite requests from members of Congress and from civil society.

#### *Failure to Review restrictions imposed by economic sanctions and the material support prohibition*

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<sup>39</sup> Updated in General License 11A in 2013

<sup>40</sup> [http://www.strtrade.com/media/publication/6319\\_2011-September-28-syria\\_gl11.pdf](http://www.strtrade.com/media/publication/6319_2011-September-28-syria_gl11.pdf), updated June 12, 2013 to General License 11A at <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/syriagl11a.pdf>

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53. On Aug. 2, 2011, after OFAC's limited response to the Somalia famine, the Chair of the Senate Judiciary Committee, Sen. Patrick Leahy (VT) sent a letter to then Secretary of State Hillary Clinton and Attorney General Eric Holder expressing "deep concern that the current interpretation of the law governing material support for terrorism is prohibiting organizations from delivering essential humanitarian relief in the Horn of Africa." The letter also expressed concern that peacebuilding groups "are unduly constricted" in their efforts. The letter urged Holder and Clinton to facilitate a dialog between the administration and affected organizations to produce "a set of guidelines that remove the uncertainty with the scope of the material support law, and the establishment of a process by which actors may seek exemptions."<sup>41</sup>

54. There was no response to this letter and no review that involved civil society took place. A delegation from the Charity & Security Network met with a Department of Justice official to request action, but was told no guidelines would be forthcoming because the Department wished to maintain flexibility to prosecute. It noted that no charities had been prosecuted.

### *Failure to review or address problems with the OFAC licensing system*

55. The licensing process has continued to be a problem that infringes on the rights of civil society organizations and violates fundamental principles of international humanitarian law. Recognizing the issue, in January 2014 the Omnibus spending bill passed by Congress included the following:

"The reportedly slow response of the Department of the Treasury's Office of Foreign Assets Control (OFAC) to urgent requests in 2011 for a General License from humanitarian non-governmental organizations seeking to provide aid to famine victims in south central Somalia is an ongoing concern. *Not later than 45 days after enactment of this Act, OFAC shall submit to the Committees on Appropriations recommendations for reducing response times for such applications.*" (emphasis added)<sup>42</sup>

56. The Charity & Security Network wrote to Treasury offering to discuss what changes might be made, citing proposals for licensing reform sent them in 2013. There was no response to this offer. To date neither OFAC nor the Treasury Department leadership has sent Congress the required recommendations. The report was due in March.

### *The Treasury Department Failed to Review the Process for Terrorist Delisting Requests*

57. In July 2012 the Charity & Security Network and two other organizations sent the Treasury Department a letter asking for a review of the redress process for SDGT listing that would include input from civil society.<sup>43</sup> Treasury responded that it did not believe a review was necessary.

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<sup>41</sup> [www.leahy.senate.gov/imo/media/doc/080311LeahyToHolderClinton-SomaliaAidRelief.pdf](http://www.leahy.senate.gov/imo/media/doc/080311LeahyToHolderClinton-SomaliaAidRelief.pdf)

<sup>42</sup> [appropriations.house.gov/uploadedfiles/hrpt-113-hr-fy2015-fservices.pdf](http://appropriations.house.gov/uploadedfiles/hrpt-113-hr-fy2015-fservices.pdf)

<sup>43</sup> Signers were the Charity & Security Network, KARAMAH, and the Constitution Project Available online at <http://www.charityandsecurity.org/system/files/Geithner-letter-7-16-2012.pdf>

58. In July 2013 Rep. Steve Cohen (TN) wrote to Treasury Secretary Jacob Lew asking him to review the Department's terrorist listing process and bring it more in line with due process standards. Treasury responded in February 2014 that it has a "robust listing and delisting process," and therefore declined to conduct a review.<sup>44</sup>

#### **IV. U.S. NATIONAL SECURITY RESTRICTIONS ON CIVIL SOCIETY EXCEED LIMITS ALLOWED BY HUMAN RIGHTS OBLIGATIONS**

59. The broad, categorical prohibitions on humanitarian, peacebuilding and other civil society organizations found in U.S. counterterrorism law do not meet human rights or humanitarian standards that permit derogation of rights only in specific and limited circumstances. Instead, both the letter and application of U.S. law described above do the reverse, imposing general prohibitions with limited and ineffective remedies for civil society.

60. UN Special Rapporteurs have spelled out the specifics of acceptable limits on human rights and humanitarian assistance. In 2006 Martin Shenin, the Special Rapporteur on the promotion and protection of human rights while countering terrorism, submitted a report to the General Assembly that noted, "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."<sup>45</sup> Schiennen noted that limits on protected rights must be exceptional and temporary measures. Even then "[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. Furthermore, a State party to ICCPR must fully respect its other international obligations whenever it derogates from the Covenant.... 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 protection of the rights in question."<sup>46</sup>

61. In his 2013 report to the General Assembly the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, notes that on limitations on association and assembly must "not only pursue a legitimate interest but also be "necessary in a democratic society."<sup>47</sup> Kiai explains further 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..."<sup>48</sup> (emphasis added)

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<sup>44</sup> [http://www.charityandsecurity.org/news/Rep\\_Cohen\\_Call\\_For\\_Treasury\\_Review\\_Terrorist\\_Listing](http://www.charityandsecurity.org/news/Rep_Cohen_Call_For_Treasury_Review_Terrorist_Listing)

<sup>45</sup> Report to the UN General Assembly by Special Rapporteur on the promotion and protection of human rights while countering terrorism, Martin Scheinin, 16 August 2006 See A/61/267 para. 20.

<sup>46</sup> Ibid, Paragraph 12 and 13

<sup>47</sup> UN General Assembly, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai April 2013 A/HRC/23/39 para 23

<sup>48</sup> Kiai report, Paragraph 23

## **V. RECOMMENDATIONS**

62. We urge the U.S. to work with civil society to better incorporate international human rights and humanitarian law into U.S. national security law and enforcement policy.

63. The signatories specifically recommend that the U.S.:

1.) Take steps necessary to remove legal restrictions on speech and association, including that aimed at reducing armed conflict and accessing civilians in need of assistance, and ensure that any limitations on these rights meet the ICCPR article 4 criteria of being temporary, proportional and specific.

2.) Ensure that laws and rules protect the ability of humanitarian relief organizations to offer and provide services to civilians in areas of armed conflict, including the ability to negotiate access with armed non-state actors named as terrorists and to engage in minimal, incidental and necessary transactions for such access. Any limitations on these rights meet must the IHL criteria of being temporary, proportional and specific.

3.) Conduct a review of its program for licensing civil society organization activities and the redress process for U.S. terrorist listing.