

Anti-Terrorism Legislation: Impediments to Conflict Transformation

Véronique Dudouet

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What is this Policy Brief about?

This brief reviews the ambivalent impact of anti-terrorist legislation, in particular the so-called 'blacklisting' regimes, on the targeted entities as well as on third parties interacting with them for peaceful and constructive ends. It argues that when applied unwisely, terrorist lists might interfere with efforts to find a political solution to asymmetric intra-state conflicts. It thus offers a range of reform options to improve their capacity to foster armed groups' shifts from violent to non-violent strategies.

Why is the topic relevant?

International measures to combat terrorism introduced in the wake of September 11th 2001 have had serious consequences for armed conflicts around the globe. They need to be assessed and evaluated in order to improve their effectiveness and balance the short-term imperatives of reducing security threats with the long-term benefits of achieving peace and justice in protracted conflicts.

For whom is it important?

International and national policy-makers in charge of implementing counter-terrorism programmes (e.g. United Nations Counter-Terrorism Executive Directorate and Implementation Task Force, EU Sanctions Committee, national governments); diplomats, UN/EU envoys and NGOs involved in mediation and negotiation support; individuals and groups who are exposed to these legislations and policies.

Conclusions

- ≡ Engaging with non-state armed groups is an essential component of any conflict transformation strategy and a key ingredient to a peace agreement's implementation. However, the past decade has been marked by an increasingly hard security approach to conflicts, favouring military and judicial engagement at the expense of soft power dialogue and diplomacy.
- ≡ Although fostering war-to-peace transitions through the de-radicalisation of non-state armed actors is the most effective strategy to counter radical extremism, the political nature and inconsistent application of terrorist proscription tends to blur the distinction between legal and unlawful political activism, encourage state repression of unarmed dissidents, and fuel radicalism.
- ≡ Anti-terrorist policies also shrink the space for international peace facilitation in intra-state conflicts by criminalising third-party mediation and negotiation support, and impeding confidence-building with listed actors and 'insider mediators'.
- ≡ Policy-makers should improve analysis and evaluation of the political effects of anti-terrorist policies; design more discerning and transparent terrorist listing regimes; improve their 'positive conditionality' by relaxing criteria and mechanisms for de-listing to reward or encourage constructive behavioural shifts; carve out protected spaces for mediators and trainers to engage with conflict actors; and foster a culture of soft power engagement in dialogue and mediation.

About the editors

Berghof Conflict Research (BCR) identifies root causes of protracted violent conflict and carries out research into actor-inclusive approaches for peaceful conflict transformation. These crucial research findings are adapted to make practical proposals for political action by key conflict stakeholders, state- and non-state actors and civil society organizations.

Berghof Peace Support (BPS) was founded in 2004 and, as a practice-based organisation, seeks to implement innovative concepts and approaches to respond in effective and sustainable ways to the global challenges presented by violent political conflict.

About the author

Dr Véronique Dudouet is a Senior Researcher and coordinates the Resistance and Liberation Movements in Transition research programme area at Berghof Conflict Research.

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V.i.S.d.P. – Prof. Dr. Hans J. Giessmann

Berghof Conflict Research

Altensteinstr. 48a

14195 Berlin

info@berghof-conflictresearch.org

Berghof Foundation for Peace Support, gGmbH

Altensteinstr. 48a

14195 Berlin

home@berghof-peacesupport.org

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1. Introduction

As we recently commemorated the 10th anniversary of the infamous September 11th 2001 terrorist attacks in the United States and the subsequent launch of the ‘global war on terror’ by the Bush administration and its allies, it is an opportune time to reflect on the consequences of this new geopolitical environment on intra-state conflicts around the globe.

The vast majority of contemporary armed conflicts are typically asymmetrical in nature, with internationally legitimised state actors opposing non-state armed groups (NSAGs) – often labelled or legally proscribed as ‘terrorist organisations’. Although there is obviously no template model for conflict transformation in such contexts, it can be asserted that engaging with non-state armed groups is an essential component of any peace process support strategy and a key ingredient to a peace agreement’s implementation. In particular, armed resistance and liberation movements representing large social or ethnic constituencies with legitimate collective grievances and who possess the capacity to either impede or facilitate constructive social change must be involved in conflict settlements.

One of the most immediate responses to the New York and Washington attacks was the establishment of so-called terrorist lists by the US government and the UN Security Council (and subsequently UN member states and the EU), aimed at isolating and weakening NSAGs and inducing them to cease their activities or adopt more constructive – i.e. non-violent – behaviour. Armed actors have indeed been forced to adapt their courses of action to this new legal and political environment, albeit not necessarily in the intended direction. A number of concerns have been raised regarding the lack of effectiveness of proscription regimes and their possible counter-productive impact on the targeted entities themselves, as well as individuals or organisations interacting with them – including for peaceful and constructive ends.

This paper reviews the direct and indirect impact of anti-terrorist legislation (blacklists) on peace processes between states and non-state entities through their effects on the parties (so-called terrorists), the governments concerned and third-party involvement in mediation, facilitation or capacity-building. The findings are based on Berghof’s research and practical engagement in past and ongoing conflicts, multilateral discussions with practitioners and policy-makers in Washington (Dudouet 2010) and Brussels (Haspelslagh and Dudouet 2011), and other relevant sources.

2. Blacklisting regimes: purpose and mechanisms

Although the concept of terrorism and its policy use can be traced back to at least the beginning of the 20th century, the designation and proscription of alleged terrorist organisations through blacklisting regimes became particularly prominent after September 2001, representing one of the main dimensions of the ‘war on terror(ism)’. In late 2001, a number of anti-terrorist legislations were passed by the UN and its member states, such as the [United Nations Security Council Resolution \(UNSCR\) 1373](#),¹ the [US Patriot Act](#), the [UK Anti-Terrorism, Crime and Security Bill](#) and the [EU Council Common Position 931](#) on Combating Terrorism. Based on the principle of ‘targeted’ or ‘smart’ sanctions, blacklists are designed to “disrupt the activities of terrorist groups by criminalising their members,

¹ A preceding UNSC Resolution (1267) in 1998 had established a first blacklisting regime, but it targets exclusively individuals linked to Al-Qaida and the Taliban. This report is mostly concerned with the blacklists established by UN member states and the EU on the basis of UNSCR 1373, although most of the arguments raised here could be extended to the sanctions related to UNSCR 1267 as well.

cutting off their access to funds and undermining their support” (Sullivan and Hayes 2010), through various measures such as assets freeze and travel bans.

For instance, the European Union established an autonomous list in application of UNSCR 1373 requiring its member states to prevent “the public” from offering “any form of support, active or passive” to “persons, groups and entities involved in terrorist acts” (EU Common Position 931). The list is compiled and regularly updated by the EU Council, based on proposals from member states and recommendations from the EU sanctions committee. It includes actors operating both within and outside the EU, and currently comprises 22 individuals and 25 groups and entities. Although the legal effects of EU listing only entail the freezing of designated entities’ assets within the EU,² its political impact is much larger. For instance, visas and contacts can be opposed through political decisions superseding legal procedures, and more generally blacklists are also designed as symbolic and diplomatic instruments to isolate ‘terrorists’ and their sponsors on the international scene.

International blacklisting regimes established by the UN and EU furthermore create an ‘echo chamber’ for member states, by legitimising the introduction of wider criminal regimes embedded in national legislation that imposes travel bans, criminalises group membership or prohibits the provision of ‘material support’ to listed groups.

The most prominent national lists:

USA: [‘Foreign Terrorist Organisation’](#) (FTO) designation and [‘Terrorist Exclusion List’](#) (TEL)

Australia: [‘Listing of Terrorist Organisations’](#)

UK: [‘List of Proscribed Terrorist Groups’](#)

Canada: [‘Currently Listed Entities’](#)

Russia: [‘Terrorist Watch List’](#)

India: [‘Banned Organisations’](#)

The alleged aim of blacklisting regimes is usually not explicitly stated in the legislation enacting them, and has been variously interpreted by scholars. Sullivan and Hayes (2010) describe the ‘pre-emptive security’ logic which underscores targeted sanctions, aimed at preventing harm by anticipating – and thus deterring – crime. In addition to combating criminality, blacklists are also designed to isolate, stigmatise and delegitimise organisations that are seen as a threat to national security by communicating “societies’ moral disapproval on the most profound scale” (Muller 2008: 129). Moreover, the purpose of targeted sanctions can also be associated with the ‘carrots and sticks’ logic of economic incentive, which seeks to simultaneously disrupt the target groups’ activities while inducing them to modify their behaviour towards moderation or ‘de-radicalisation’ (Goerzig 2009).

The causality between listing policies and behavioural change by the listed entities, however, is very difficult to prove. The looming threat of international sanctions is more likely to play a moderating role on public or legal actors such as repressive governments or army leaders, who are usually more sensitive to the restrictions and moral stigma brought by diplomatic isolation. By contrast, the behaviour of non-state actors such as underground guerrilla organisations is less likely to be affected by international sanctions, as they already perceive themselves as stigmatised and isolated; in fact, some organisations might consider proscription by their ‘enemies’ as a badge of honour. A clear indication of the failure of sanction regimes to eradicate ‘terrorism’ is the fact that virtually all the groups that have

² These economic sanctions are only applied to designated groups operating outside the EU, as it is deemed impossible to limit the free movement of capital for EU-internal individuals and groups. Sanctions against these entities (i.e. Basque ETA or Northern Irish Real IRA) are delegated to national legislations in the respective EU member states, whose police and judiciary authorities also have an obligation to cooperate in criminal matters concerning both internal and external proscribed actors.

been proscribed in the past decade are still active – with the (debatable) exceptions of Tamil, Iranian and Basque armed actors. More importantly, it will be demonstrated below that far from fostering moderation and shifts to non-violent strategies, proscription can fuel radicalism and create direct impediments for humanitarian or political negotiations.

3. Effects of blacklists on peace processes

Since the establishment of anti-terrorist lists by the UN, EU and national governments, a number of critiques have been raised concerning their legality, legitimacy and effectiveness. In particular, the human rights community criticises proscription policies on the grounds of their unconstitutionality, as their imposition may violate fundamental rights such as the rights to association and free speech, right to a fair trial, right to be heard, right to be informed, right to judicial review or right to property (Sullivan and Hayes 2010). The ‘war on terror’ has indeed encouraged the adoption of exceptional legislation and regulations lacking democratic legitimacy (e.g. insufficient oversight by the UN General Assembly or European Parliament on the UN and EU blacklists) and lacking judicial safeguards: as was argued at a workshop on “10 years after 9/11” in June 2011 in Berlin, “a serial killer has more rights than someone on a blacklist” – unlike suspected ‘terrorists’, common criminals have access to procedural rights.

Although the human rights dimension of counter-terrorism measures such as blacklisting regimes has been well documented, there is a serious lack of research on their efficiency with regards to the resolution of political armed conflicts around the globe. This section attempts to elucidate a surprising paradox: while terrorist lists are supposed to encourage armed movements to adopt peaceful strategies, the proscription of such actors in Sri Lanka, Turkey, Colombia, the Philippines, Palestine and Nepal took place precisely while they were demonstrating their readiness to engage in dialogue and consider non-violent political strategies – ineluctably leading to their re-radicalisation.

3.1. An ideological instrument delegitimising the ‘right to resist’ and encouraging hard security approaches to political conflicts

One of the most acknowledged limits of the concept of ‘terrorism’ lies in its lack of internationally-accepted legal definition. As early as 1988, scholars had identified more than one hundred different definitions (Schmid et al 1988). In fact, UNSCR 1373 instructs member states to launch economic sanctions against those “who commit or attempt to commit terrorist acts or participate in or facilitate the commission of terrorist acts”, without specifying the identity of the targeted persons or entities, or the criteria according to which they should be listed.

This outsourcing of the definition of terrorism to individual UN member states allows them to interpret it according to their diplomatic agendas or domestic interests, e.g. to appease international allies or criminalise political opponents contesting the status quo.³ For instance, it has been argued that several of the groups appearing on the US FTO list were added as political concessions to respective countries such as Spain, China or Russia in exchange for their support (or at least neutrality) in the US war in Iraq (Mariner 2003).

As a result, human rights lawyers have denounced blacklisting as an ideological and politically-biased tool that is blurring the distinctions between acts of violence against civilians and legitimate struggles

³ For a comparison of the definitions of terrorism in UN, US, EU, Canadian and Australian legislations, see Ma’an Development Center (2011).

for democracy or self-determination⁴ (Muller 2008). For example, the definition of terrorism by EU Council members as “a crime perpetrated with the goal of gaining political advantages which could be achieved by legal means” (cited in Haspeslagh and Dudouet 2011) obscures the fact that many armed groups operate in fragile or authoritarian states where the rule of law is dysfunctional or politicised.

The political nature of terrorist proscription is also evidenced by the wide discrepancies in the size and contents of the main national blacklists⁵ – ranging from transnational groups clearly using terror tactics such as Al Qaida to unarmed opposition movements such as the PMOI in Iran.

The People’s Mojahedin Organisation of Iran (PMOI) was engaged in violent revolutionary activities against the Iranian state during the 1980s and 1990s. Although it abandoned its military activities after 2000, it was blacklisted by the Clinton administration as a ‘good will gesture’ towards Iran when the US government was seeking to court the newly-elected moderate President Khatami, and later by the EU under direct pressure from Tehran, as a precondition for negotiations over EU access to Iranian nuclear facilities. After the introduction of procedural reforms in 2006 requiring the EU Council to specify how blacklisted entities had been involved in terrorist acts, the EU listing of the PMOI was finally annulled in late 2008. The US listing, for its part, has still not been revoked (Sullivan and Hayes 2010: 80-81).

The instrumentalisation of blacklists for diplomatic or ideological purposes has a direct impact on state engagement with non-state armed groups, by encouraging ‘hard security’ counter-insurgency approaches to political conflict, while disincentivising the search for negotiated solutions. Although US counterterrorism experts and military officials acknowledge that military means alone cannot deter a shadowy force of non-state fighters and that the struggle against terrorist insurgency should be 80% non-military (Cortright et al 2011: 5-6), the rhetoric and logic of the war on terror has emphasised a militarised battle of arms, either through direct US engagement in international warfare (e.g. Afghanistan), or through combined blacklisting and military assistance in local conflicts.

The US-led war on terror has had a direct impact on several peace processes, including in the Philippines, where the Communist Party of the Philippines/National Democratic Front (CPP/NDF) and its New People’s Army were added to the US FTO list in 2002 during a phase of peace negotiations with the government. This ill-timed decision struck a severe blow to the confidence-building process. The CPP withdrew from the peace talks and demanded that the Philippine government work toward its removal from the list as a precondition for renewed dialogue. Meanwhile, the government felt encouraged to re-activate a counter-insurgency campaign against the insurgency, with US military assistance (interview with NDF negotiator, 2010).

The impact of anti-terrorist legislations in Europe and North America on the course of armed conflicts around the globe is all the more important as they often provide a source of inspiration for local governments to adopt similar legal measures in order to legitimise their conflicts with proscribed actors as part of a globalised fight against terrorism. Such tendencies can be observed for instance in Colombia, Turkey, Sri Lanka, Ethiopia and Uganda, where national counter-terrorism laws are largely inspired by US or EU legislations.

3.2. A blunt tool: closure of legal and non-violent avenues for expressing political grievances

Although described as ‘smart’ sanctions against targeted individuals, blacklists have in fact an opposite effect on the environment in which they operate, by turning unarmed activists and their communities into ‘terrorists’. This is especially the case when the listed movements do not have formal members but

⁴ The right to self-determination is recognised for example in the 1966 [UN International Covenant on Economic, Social and Cultural Rights](#) (Part 1, Article 1(1)).

⁵ For a visual comparison of these lists, see http://en.wikipedia.org/wiki/List_of_designated_terrorist_organizations

mostly sympathisers – such as Al Shabaab in Somalia (currently on the US FTO list); but also when unarmed political or social entities with assumed links to armed groups are added to the lists, contributing to blurring the boundaries between legal and proscribed activities.

In the **Basque country** (Spain), the pro-independence political party Batasuna (alongside numerous Basque social and cultural organisations) has been proscribed by the Spanish state since 2003, for being part of the ‘terrorist network’ of the armed separatist group Euzkadi Ta Askatasuna (ETA), which is listed by the EU and USA as a terrorist entity. Several party members, including the spokesperson and former chief negotiator Arnaldo Otegi, were arrested in October 2009, as the party was actively preparing for a new political initiative to resolve the ongoing conflict; militants were keen to interpret this course of events as a sign that the Spanish government was eager to “stop all steps forward in favour of a democratic solution of the Basque conflict” (Batasuna public statement, 14 October 2009). In September 2011, Otegi and his colleagues were sentenced to 10 years in prison, although their party has categorically rejected the use of violence in the past few months, opting instead for an unequivocal peaceful political strategy which prompted ETA to declare a permanent ceasefire in January 2011 and an end to its armed campaigns in October 2011.

In **Turkey**, the Kurdish organisation Partiya Karkerên Kurdistan (PKK) was added to the EU list in May 2002, while guns had been silenced for several years and the movement had announced a few days earlier its decision to dissolve itself and reorganise its work “using entirely peaceful and democratic methods”. This ill-timed decision provided an impetus for the Turkish government to increase military repression and to request from the EU the closure of 450 Kurdish and foreign social, cultural and human rights organisations for alleged ties to a terrorist entity. These policies led Kurdish activists to consider that “any person or organisation doing anything positive for Kurdish people are to be branded terrorists” (KNK 2002), and eventually fuelled the PKK’s eventual return to violence as all avenues for dialogue were closed (Muller 2008: 128). This trend was further emphasised in December 2009 when the Turkish Constitutional Court banned the Party of the Democratic Society (DTP), which advocates the recognition of the Kurds as a nation and a peaceful solution to the Kurdish question; dozens of its elected representatives were put in jail. The banning of DTP sent a very bad signal to the Kurdish community concerning the limitations of finding a political solution through democratic means.

As illustrated by these two examples, the banning and criminalisation of unarmed political or social movements associated with blacklisted organisations has severe consequences for the peaceful resolution of conflicts. Firstly, these policies tend to disadvantage pragmatists who are stronger on the political terrain, while strengthening military hardliners, by demonstrating the futility of negotiations or nonviolent political approaches. Secondly, these policies have a ‘blanket effect’ by criminalising not only terrorist acts (as a tactic of warfare) but also the ideology and grievances represented by such movements. Consequently, they can generate a sense of injustice and vilification among whole communities, which proscribed organisations can instrumentalise as a propaganda tool to enhance their perceived ‘victimhood’ and raise their status vis a vis their domestic constituency or other groups. Rather than “addressing the conditions conducive to the spread of terrorism” (first agenda item of the 2006 [UN Global Counter-Terrorism Strategy](#)), blunt sanctions are thus likely to create more adherents to violent strategies as dissident groups feel disenfranchised and unfairly punished. Finally, one can argue that the proscription by the EU or USA of political movements with a democratic mandate stand in sharp normative conflict with these governments’ democracy promotion efforts.

In the **Palestinian Territories**, both political and military divisions of the militant movement Hamas figure on the EU terrorist list. The European sanctions (e.g. freezing of aid, political boycott and withdrawal from common projects) launched against the Hamas government after the party demonstrated its socio-political legitimacy by winning the 2006 general elections has fostered anger among all its supporters, as well as across the Middle East, due to the perceived unfairness and double standards of Western policies. This international isolation has also halted the party’s chain of conciliatory steps to engage and move towards mainstream non-violent politics in its quest for international recognition, and led instead to a re-radicalization of its discourse and tactics. The moderate forces within the leadership were weakened while radical elements apparently took the lead when Hamas-affiliated forces took over the Gaza Strip in June 2007 (Hovdenak 2009, Goerzig 2010).

This example clearly indicates that the hard security agenda underscored by counter-terrorism has taken precedence over 'human security' imperatives and 'soft power' instruments such as democratic promotion and peacebuilding support.

3.3. A rigid mechanism: negation of the 'pull factor'

In order to be effective as a pressure and inducement strategy, proscription regimes should not only punish proscribed terrorist activities, but also offer incentives for the targeted individuals or groups to modify their behaviour in line with the desired outcome. Although intended to serve as a temporary precautionary instrument, blacklists have evolved into a quasi-permanent punitive measure (Sullivan and Hayes 2010). This lack of flexibility can be attributed to a range of bureaucratic and political obstacles which prevent the delisting of individuals or organisations, even when there is widespread consensus that their listing is no longer productive or relevant. A first impediment lies in the lack of clarity on de-proscription criteria and legal mechanisms. For instance, the Terrorist Exclusion List in the US contains no procedure for review or delisting.

Moreover, most proscription procedures fail to provide information substantiating the listing decision, rendering blacklisted individuals and groups unable to exercise their right of defence and appeal, and the courts unable to carry out their review of the lawfulness of the decision. There has been some progress made in recent years, especially at the EU level: since 2007, the EU Council is obliged to review and update its list every six months to determine whether the grounds for proscription are still valid, and blacklisted entities can also submit a request to the Council asking for their designation to be reconsidered. However, in practice, there have been so far only two cases of EU delisting as a result of appeal procedures, both in 2009 after seven years of proactive litigation, namely, the PMOI (see above) and Jose Maria Sison, alleged leader of the CPP in the Philippines, who lives as a refugee in the Netherlands. At the UN level, individuals can be delisted from the UNSCR 1267 blacklisting regime on request of the designating state. However, there have been very few such cases, with the rare exception of five Taliban who were struck off the list in July 2010, some of them because they were deceased, and others in order to ease negotiations with Afghan insurgents. This example shows the existing potential for using delisting mechanisms constructively to encourage peacemaking processes.

Even when legal mechanisms for delisting are introduced, however, political impediments inhibit their use. Indeed, decision-makers do not foresee any electoral or diplomatic benefit for delisting designated entities, whereas enlarging the lists tends to boost their terror-fighting credentials at home and vis a vis their strategic allies. Under such conditions, the proactive consensus required for removing designated groups from national or EU blacklists is very unlikely to arise.

In Nepal, the Maoists were placed on the US Terrorism Exclusion List and Specialist Designated Nationals Lists in 2003, in the wake of failed bilateral peace negotiations with the King's government. Although the movement signed a peace accord in 2006, renounced violence and entered the realm of conventional politics in 2008 (it is currently leading the government and represents the largest party in the constituent assembly), its terrorist designation has still not been revoked by the US administration.

One of the most illustrious examples of the longevity of terrorist sanctions comes from South Africa: until 2008, former President and Nobel Peace Prize recipient Nelson Mandela needed a special waiver to enter the US territory, due to his former terrorist designation by the defunct South African apartheid regime prior to 1990.

Given their complexity and lack of flexibility, (de)listing mechanisms cannot be used reactively in response to behavioural shifts, which makes it very difficult to calibrate them to the dynamics of conflict escalation and de-escalation. Gross (2011: 39) shows how "labelling a group as terrorist entity and cutting off the possibility for engagement can become a self-fulfilling prophecy, neutralising incentives for an armed group to undergo the difficult transformation to become a legitimate and nonviolent political party."

4. Impact of anti-terrorism legislation on third-party peace facilitation

Since the establishment of blacklists, a number of critiques have been raised with regards to their impact on third parties who interact with ‘terrorists’ or operate in their broader environment, such as charities and diaspora organisations (Guinane et al 2008), local and international NGOs (Cortright et al 2011) or humanitarian actors (Thorne 2007, Florquin and Decrey Warner 2008, Pantuliano et al 2011). This section focuses on a specific type of third-party actors, namely, intermediaries supporting political negotiations in intra-state asymmetric conflicts between armed groups and national governments.

4.1. Difficulties to meet and engage for mediation or negotiation support

Third-party mediation and facilitation imply direct engagement with all sides to a conflict, including proscribed organisations, in order to facilitate their transition from violent to non-violent political activities through peace negotiations. One-sided engagement through capacity-building (e.g. negotiation training) is also an important component of peace processes, as it helps to make parties more informed about peaceful strategies, dialogue options and skills, and enhances their ability to devise fair and equitable peace agreements, as well as their readiness to abide by their commitments. This sub-section looks at the practical impediments caused by anti-terrorist policies on peacemaking support by governments and civil society actors in intra-state conflicts.

≡ Impediments to governmental action

In past decades, European and North American governments have promoted peace processes around the globe through various forms of engagement with conflict stakeholders and their constituencies: by pressuring governments to negotiate with their armed challengers (e.g. the apartheid regime in South Africa), enhancing the legitimacy of non-state armed groups as negotiation partners (e.g. public recognition by the French and Spanish government of the FMLN guerrilla in El Salvador during the 1980s), and engaging with supporters of armed struggle to encourage constructive dialogue (e.g. US government talks with IRA allies in the Irish diaspora in the 1990s).

Since 2001, the trend towards hard security approaches described above has seriously affected the political will of US and EU diplomats to promote peaceful conflict management with listed actors, and has provided a pretext for inaction. For instance, although the Norwegian government has been at the forefront of peace facilitation efforts in intra-state conflicts, its diplomats became seriously restricted when some of its dialogue counterparts in the Philippines, Colombia, Sri Lanka and Palestine were added to the EU blacklist. It thus decided to withdraw all support for the EU terrorist list regime in 2006, on the grounds that “a continued alignment with the EU list could cause difficulties for Norway in its role as neutral facilitator in certain peace processes” (cited in Sullivan and Hayes 2010: 90).

Proscription also makes it harder for diplomats to talk to those who have the ability to implement (or disrupt) a peace deal.

In Israel/Palestine, the ongoing negotiation process is deeply flawed because the main armed group has been isolated and excluded from the talks. While most European countries had diplomatic contacts with Hamas prior to its terrorist designation, a EU diplomatic delegation to the Middle East in 2009 tasked to negotiate a ceasefire between Israel and the Gaza strip was not able to meet with the Hamas government, and instead was confined to holding talks with the Fatah-controlled Palestinian Authority in Ramallah (Sullivan and Hayes 2010: 90-1). As a result, it lost the opportunity to play a constructive facilitation role between Israelis and Palestinians, as well as between Palestinian factions, and its self-censorship and restraint from proactive political engagement has led instead to its progressive marginalisation as a regional facilitator.

In Afghanistan, the government expelled two EU and UN diplomats who had been holding talks with the Taliban in 2007, on the grounds of their terrorist blacklisting. The proscription of the Taliban leadership thus reduces the possibilities to engage with those who hold effective control over the movement.

≡ Impediments to non-governmental action

Given the constraints (pre-dating 2001) encountered by diplomats in their public engagement with armed actors judged to be 'beyond the pale', non-state actors such as European or North American NGOs have often been called to step in as informal mediators in intra-state disputes with implicit support from their governments, when these were unwilling or unable to engage directly. Well-known examples include the peace-brokering role of the Italian Community Sant'Egidio in Mozambique or the Finnish NGO Crisis Management Initiative in Aceh (Indonesia).

However, such 'private diplomacy' initiatives have become seriously affected by current anti-terrorist legislation in a number of ways. Firstly, many national blacklists include a ban on making funds directly or indirectly available to designated entities. These restrictions prohibit citizens or NGOs receiving funds from the government establishing the list from paying for flights, accommodation, food etc. for members of proscribed movements in order to invite them to negotiation training workshops, exploratory 'talks about talks' or peace negotiations in a neutral setting.

Regardless of financial transactions, some blacklists also prohibit third-party contact with proscribed actors which could be interpreted as providing 'material support' – with such support being defined quite extensively. In particular, the US FTO list makes it illegal for anyone residing in the US or subjected to US jurisdiction to offer listed organisations any service that can be construed as having tangible or intangible monetary value, including training, expert advice or assistance aimed at turning armed groups away from violence and advising them to join a negotiation process. The widely-commented [US Supreme Court ruling](#) in the 'Holder v. Humanitarian Law Project' case in June 2010⁶ provided an overly broad interpretation of the 'material support' clause, by confirming that all forms of services (such as consulting or advising) to listed entities are punishable no matter whether support was directed towards the criminal or other activities of the designated group. This decision was justified by the Court's assessment that peacemaking assistance could be used as a cover while terrorist groups re-arm themselves and could contribute to furthering the groups' legitimacy and increase their ability to gain support.

In the UK as well, arranging meetings where a real or professed member of a proscribed organisation will speak is punishable by up to 10 years' imprisonment (Thorne 2006), unless the meeting is considered 'genuinely benign' (Chatham House and Conciliation Resources 2011). In Canada, the law specifies the intent of interaction with proscribed entities: 'service' to these actors is only illegal if it helps to further their terrorist activities. For its part, the EU blacklisting regime does not preclude contact and travel and thus appears to be less restrictive with regards to peacemaking activities with members of proscribed entities which do not involve financial transactions.

However, the problem with these legislations is not so much the actual danger of prosecution before a criminal court, which is quite minimal, but rather the 'chilling effect' caused by the ambiguities relative to what is or is not permitted. Proscription regimes indeed leave mediators and negotiation trainers largely confused and frustrated, and discourage them from direct interactions with armed groups that might result in adverse media coverage or a damaged reputation if they were to be seen as terrorist-friendly. Most forms of direct engagement are thus impeded politically, if not legally. Moreover, new

⁶ The Humanitarian Law Project fought for more than a decade in US courts for the right to advise members of the Kurdish movement PKK on placing human rights claims before the UN, and to assist them in making peaceful overtures to the Turkish government (Cole 2011).

funding policies such as donor restrictions and exclusion clauses linked to terrorist blacklists also create serious financial impediments for conflict resolution projects.

During the peace process in Sri Lanka, a multi-party dialogue process called the 'One Text Initiative' was initiated by the international NGO Peace Appeal Foundation, with participation from Sinhalese, Tamil and Muslim politicians. The US Agency for International Development (USAID) withdrew its financial support for the project after a LTTE 'proxy representative' joined the process. "The withdrawal of funding created a crisis environment that was extremely detrimental during a sensitive period" (Peacebuilding Exemption Letter 2011).

Some of the activities of Berghof Conflict Research and Berghof Peace Support have also been affected by funding regulations relative to terrorist proscription regimes. From 2006 to 2009, we facilitated a collaborative project bringing together senior members of armed resistance/liberation movements (RLMs) and former negotiators who had been involved in successful conflict resolution processes. Such constructive 'peer advice' and sharing of experience had to be discontinued once new funding restrictions were introduced by our US and Canadian donors, as some participants were members of organisations proscribed by these countries.

As illustrated above, anti-terrorist policies tend to shrink the space for international peace facilitation in intra-state conflicts. Third-party actors supporting dialogue and conflict transformation face the challenge of balancing the need for proactive and multi-partial engagement with all conflict stakeholders with considerations for legal, political and financial restrictions imposed by blacklisting measures. Even actors who used to be characterised by their ability to talk to everyone, such as civil society organisations, are now forced to err on the side of caution and self-censor their own engagement in conflict zones. Their capacity to act has become seriously devalued as a result.

4.2. Mediators' loss of credibility and impartiality

A second challenge encountered by international peace-brokers relates to the impact of anti-terrorist policies on confidence-building with proscribed actors. Armed movements often claim that a certain parity of status is a necessary precondition for 'talks in good faith' (Dudouet 2008). At the very least, peace processes are highly conditioned on the building of trust between the conflicting parties, and with third-party facilitators.

However, in a number of recent cases, Western diplomats or non-governmental actors have been engaged in conflict resolution activities simultaneously with the listing of one negotiation party as a terrorist organisation by their own government. Such blatantly contradictory policies have led the proscribed party to blame the mediator(s) for not being able to guarantee their parity of status, while enticing hardliner factions on the other side to denigrate third-party engagement with the blacklisted organisation as support to illegal 'terrorists'. As a result, mediators lost their claim to even-handedness or impartiality, contributing to further deepening inter-party mistrust. Two illustrations from the EU context are offered below.

In Sri Lanka, the EU was involved in supporting the 2002-8 peace process through the participation of Denmark, Finland and Sweden in a ceasefire monitoring mission. However, the EU listing of the LTTE in May 2006 led the movement to object to the engagement of EU citizens in the mission, arguing that they were not sufficiently impartial to be able to adjudicate critical matters on the ground. As a result, EU members withdrew from the mission, drastically depleting its strength, which partly caused the peace process to collapse (Sullivan and Hayes 2010: 91; Nadarajah and Vimalarajah 2008).

In Colombia, the French and Spanish states were part of a Group of Friends helping to facilitate a peace process between the government and the guerrilla ELN in 2002 when the EU added the latter to its terrorist list, which led its negotiators to question the seriousness of these countries' commitment to peace. They also feared travelling to Mexico, where negotiations were due to take place, for fear of arrests in the wake of their terrorist designation. A few months later, the talks were discontinued and the group of friends was dissolved (interview with ex-ELN negotiator, 2009).

4.3. Challenges related to engagement with insider mediators

Finally, blacklists also create impediments for ‘insider mediators’, namely, local civil society actors trusted by all sides who are facilitating dialogue among different factions within or between the conflict parties. Local governments engaged in counter-insurgency operations against armed groups proscribed in the US or EU have taken advantage of the terror lists to enforce emergency legislations and exceptional measures which undermine the rule of law and human rights regimes, and in particular have led to increased security threats against grassroots actors or NGOs involved in peacemaking, humanitarian or development activities (Cortright et al 2011). This is especially detrimental for local community-based organisations which lack the foreign backing or protection that their international counterparts enjoy, making them particularly vulnerable to attack. For instance, numerous insider mediators have been arrested and jailed for engaging in illegal activities by meeting with proscribed terrorist organisations (for a Nepali example, see Mason 2009).

Moreover, the ‘material support’ provision which accompanies the US FTO list also prevents US-based or -funded NGOs from supporting local conflict resolution efforts, fearing that their counterparts might be associated with designated terrorist entities.

In Afghanistan, the US NGO 3D Security Initiative is participating in a series of meetings with Afghan counterparts to foster a ‘public peace process’ that would be more inclusive of civil society actors and concerns. Given the impossibility to predict and prevent the presence of Afghans associated with the Taliban in these meetings, the US facilitator was forced to withdraw her participation in order to avoid violating the ‘material support’ prohibition, resulting in a loss of expertise and a damaged reputation for the US (Peacebuilding Exemption Letter 2011).

5. Recommendations for national and international policy-makers

Given the demonstrated counter-effectiveness of existing anti-terrorist legislation in terms of encouraging the de-radicalisation of non-state armed groups and their adoption of peaceful strategies through dialogue and negotiation, serious reforms are required. The following recommendations share a common purpose of relaxing the legal and political restrictions placed on international and local peacemaking efforts.

5.1. Improving analysis and evaluation

Inter-governmental and governmental entities in charge of establishing terrorist lists should commission independent reviews on the effects of proscription on the target groups, their surrounding community, civil society and third parties who interact with them. Such analysis would greatly help to evaluate the effectiveness and utility of existing blacklisting regimes with respect to the promotion of successful and sustainable peace processes and political settlements, leading to improved governance, human security and development.

5.2. Designing more discriminate and transparent terrorist listing regimes

The UN and its member states should improve the transparency of designation processes and their effects by clarifying the legal basis and procedures for proscription and de-proscription. Given the lack of unified definition of ‘terrorism’, and the huge disparity of non-state actors employing various forms of violent strategies to pursue their goals (from liberation movements who are lawfully engaged in armed struggle against oppressive states and/or seeking to assert their right to self-determination, to

transnational criminal networks or radical religious organisations), sanction regimes should provide precise criteria for the types of activities warranting proscription.

In particular, unarmed activists, civil society organisations and political parties operating within the larger social or ethno-political constituency of armed groups should not be proscribed as long as they commit to democracy and eschew violence: “it is far healthier to let their ideas be defeated openly in elections than to clamp down and force them underground” (Financial Times 2011).

According to the 2006 [Ottawa Principles on Anti-terrorism and Human Rights](#), “security lists should only include the names of persons or groups that present a real, substantial and established danger to the national security of the state or the international or regional collectivity creating the list”. Furthermore, “states should avoid using the term ‘terrorist’ or ‘terrorism’ as a criterion for listing because of the definitional problems associated with the terms, but if they do, these terms must be precisely and narrowly defined by law ... so that they do not capture legitimate political activity, expression, association or insurgency”.

At the European level, the [EU Lisbon Treaty](#) (Article 83) offers an opportunity for such clarification, as it gives the European Parliament and the EU Council the competence to streamline the definition of terrorism by setting ‘minimal rules’ (Wählisch 2010).

5.3. Relaxing the criteria and mechanisms for de-listing

Listing and de-listing instruments should be more adaptable to constantly evolving conflict contexts, actors and behavioural patterns, by punishing violence but encouraging or rewarding moves towards peace talks and peaceful transition. It is well established among experts on sanction regimes that negative conditionality can only be effective if coupled with positive conditionality; in other words, proscription can be used as a stick only if it is accompanied by a credible carrot. Here are some possible suggestions to enhance the effectiveness of blacklists as a moderating impulse:

- Listing procedures should be made time-limited, rather than simply reviewed periodically; according to the Ottawa Principles, states should “provide a mechanism by which individuals and groups may periodically seek delisting and call new evidence in support of their case. There should be automatic delisting after a reasonable period of time, subject to renewal through the same process used in the initial listing”;
- One could introduce different graduations of sanctions or temporary suspensions from the lists conditioned by progressive behavioural change, or establish special legal categories for ‘NSAGs engaged in peace processes’, as a form of incentive and/or reward for their constructive political engagement (Santos 2008);
- Parties should be better informed about the ‘roadmap’ to legitimacy (Gross 2011) by articulating clear benchmarks for relaxing sanctions, such as compliance with the [Mitchell principles](#) (Chatham House and Conciliation Resources 2010);
- The threat of sanctions might in some cases be more effective than actual listing in incentivising armed groups to join the negotiation table, and should thus be used more frequently as a diplomatic instrument (Goerzig 2009).

5.4. Carving out ‘protected spaces’ for mediators to engage with conflict actors

Anti-terrorism policies should recognise the specificities of peacemaking work, and clearer distinctions should be drawn between such activities and commercial transactions with (or financial support to) proscribed entities. Possible strategies might include creating specific legal and political exemption protocols for mediators engaged in peace processes or humanitarian work, in order to allow constructive contact and dialogue with proscribed groups in the interest of finding peaceful solutions.

The US Office of Foreign Assets Control (OFAC) is entitled to deliver a waiver to state agencies, embassies or NGOs allowing them to interact with designated armed groups. Several US-based conflict resolution NGOs recently addressed US Secretary of State Hilary Clinton requesting a more systematic ‘peacebuilding exemption’ from the material support law, on the grounds that peace promotion services have no economic value and cannot be subject to diversion for terrorist activities (Peacebuilding Exemption Letter 2011). Parallel measures should be introduced in Europe, for instance through ‘immunity certificates’ that mediators or trainers could apply for (Chatham House and Conciliation Resources 2010: 10).

5.5. Fostering a culture of ‘soft power’ engagement in dialogue and mediation

Finally, diplomats and conflict resolution professionals should be better informed about the actual possibilities for action within the existing legislation, in order to reduce the current propensity for self-censorship resulting from the confusion as to what forms of engagement with non-state armed groups are allowed or proscribed.

On the one hand, ‘talking to terrorists’ always entails a degree of political risk – both institutional and personal, which often discourages policy-makers and diplomats from engaging proactively with all conflict parties to promote peaceful transitions. On the other hand, empirical evidence from the past decades shows that political conflicts can only be resolved effectively through political (vs. military) means, and that moderation (i.e. a shift from violent to peaceful politics) is more likely to result from ‘soft power’ engagement than to precede it. Therefore, the EU, US and other governments should ‘de-securitise’ their policy responses to contemporary political conflicts and develop a culture of dialogue as a first option and sanctions as a last resort.

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