

Proscribing peace: **the impact of terrorist listing on** **peacebuilding organisations**

Briefing paper

Dr Teresa Dumasy and Sophie Haspeslagh, January 2016

“Our principle is that it is important to have the opportunity to talk to everybody. So, once you start classifying certain groups as ‘terrorists’ it complicates this and makes engaging certain groups in peace negotiations more difficult.”

Director of a conflict resolution NGO

Introduction

The work of non-governmental organisations in the prevention of violent conflict and in support of efforts to build peace is more relevant than ever. The number of armed conflicts – 40 in 2014 – is the highest recorded figure since 1999. The multiplicity of armed groups engaged in intra-state conflict has increased, as have the range of groups and the internationalisation of conflict through them. These factors call for the resources and influence of a broad range of actors, beyond national governments, the United Nations and other multilateral organisations, to find ways to address underlying drivers of conflict and further any opportunities for peace.

For international NGOs (INGOs) and local civil society actors and communities, engaging with armed groups for peaceful ends carries immediate risks to physical security (both from the group and from state actors if suspected of collusion) and to reputation, given the political sensitivities of the task. Likewise running peacebuilding programmes in conflict contexts where armed groups operate is complex and high-risk. If the group is on a terrorist list then these risks only multiply.

“The reason we have access to all is that we do not come with an agenda.”

Director, peacebuilding NGO

For INGOs working with the full range of groups and individuals involved in conflict, relationships of trust built on independence, confidentiality and impartiality are essential. Maintaining those principles and complying with the law has become harder since 9/11 and over the last five years as counter-terrorism (CT) legislation has tightened its focus on international aid.

In 2010 the US Supreme Court ruled in the *Holder vs Humanitarian Law Project* case that ‘material support’ for listed groups, including training and

advice designed to facilitate negotiations to end conflict, is illegal. The impact of this decision and of the vagaries of counter-terrorism legislation regimes on principled humanitarian action have been well documented. However, such impact analysis has not yet been applied to the peacebuilding, conflict prevention and mediation field.

This briefing paper therefore sets out some of the risks facing this sector in relation to working with listed armed groups or in contexts where they operate, as well as the direct and indirect impact of proscription on organisations and their work. Its purpose is to help find ways to mitigate the negative effects of listing and associated legal regimes and regulatory frameworks, and to ensure that peaceful ways to end violent conflict can operate unhindered.

In the UK, humanitarian, peacebuilding and development NGOs and related umbrella groups have come together to raise the attention of the Government and regulatory bodies to the problems facing NGOs as a result of terrorist listing. A dialogue process is emerging between NGOs and relevant Government Departments which may provide a channel through which issues may be discussed and solutions found to some of the problems outlined.

The paper is based on informal discussions and interviews with 15 European based organisations as well as evidence presented in published research reports and articles. The examples do not attribute impact exclusively to one listing regime or jurisdiction unless specified. The findings are by no means exhaustive, and more evidence needs to be uncovered, in particular about the direct and indirect impact of terrorist listing on local partner organisations in conflict settings. Indications suggest that these organisations and individuals can often bear the brunt of the ‘criminalisation’ of their activities, including by their own national governments.

Key findings:

I. The impact on internal decision-making

- a. Don't ask, don't tell
- b. Undue diligence
- c. Information versus reputation

II. The impact on the effectiveness of peacebuilding work

- a. Diminished understanding of armed groups
- b. Changing where we work and whom we work with

III. The impact on the peacebuilding environment

- a. The direction of political winds
- b. Loss of independence

Terrorist listing regimes in the United Kingdom, Europe and beyond:

The basis for the terrorist listing (proscription) regime in the United Kingdom (UK) is the Terrorism Act of 2000. Under this Act, the Home Secretary may list an organisation if she believes it is "concerned in terrorism". According to David Anderson QC, the UK's Independent Reviewer of Terrorism Legislation, "The UK's definition of terrorism is in significant respects broader than those of other comparable countries". 64 armed groups are currently listed as 'international terrorist organisations' under this Act. Groups such as Boko Haram, al-Qaeda, al-Shabaab, the Basque Homeland and Liberty (Euskadi Ta Askatasuna, ETA), LTTE, PKK, military wings of Hamas and the Hezbollah (Home Office 2015).

The UK also applies the:

- European Union (EU) listing regime born out of EU Common Position 2001/931/CFSP which has two sub-lists, one for groups operating within the EU and one for groups operation outside in non-EU member state countries;
- United Nations (UN) Security Council Resolutions 1267, 1988 and 1989 in relation to the Taliban and al-Qaeda.

All these listing regimes are aimed at disrupting listed groups' fundraising activities and travel and are mainly focused on asset freezes and travel bans. So, for example, they all criminalise financial transactions to these groups. But they differ when it comes to how explicitly they criminalise contact with listed groups.

While the EU and UN listings do not mention this, the UK regime allows 'genuinely benign meetings'. In November 2015, as a result of NGO engagement, the Government clarified its interpretation of the law to state that such meetings are those "at which the terrorist activities of the group are not promoted or encouraged, for example, a meeting designed to encourage a designated group to engage in a peace process".

The US legislation on the other hand explicitly criminalises meetings with listed groups. The June 2010 US Supreme Court ruling, mentioned above, made it illegal to provide 'expert advice', 'service' or 'training in human rights enforcement or peaceful conflict resolution' to a listed group. This applies to US nationals and is extra-territorial in scope.

In the UK, if a charity is suspected of having links with terrorism it will first be investigated by the Charity Commission. The Charity Commission is an independent regulatory body, which monitors and investigates UK registered charities. It has the power to take over or close charities. The Charity Commission has a 'compliance toolkit' with a chapter on CT legislation and operational guidance.

To ensure charities do not provide direct support to a listed organisation, the UK Department for International Development (DFID) includes special clauses within its Memorandum of Understanding with partner organisations in areas deemed high-risk. This is done at the discretion of Heads of DFID country offices. Australia, Canada and the US Governments insert specific counter-terrorism clauses in all levels of funding agreements. These obligations are then passed on to all implementing partners.

I. The impact on internal decision-making

*“We feel this is only the tip of the iceberg”
(...) “We are only just uncovering hidden
ways organisations are being affected.”*

Peacebuilding INGO staff

Don't ask, don't tell

The absence of prosecutions of peacebuilding and mediation organisations in the US, UK or EU Member States is neither reassurance of protection under the law, nor proof that terrorist listing and associated legislation is not having a negative impact. David Anderson QC, stated in his 2014 review of the Terrorism Acts that uncertainty about the law can itself be damaging.” He went on to add:

“It is not sufficient to rely on the restrained exercise of very wide discretions by prosecutors (or by the Attorney General) in circumstances where trustees need to be satisfied that NGOs are not exposed to the risk of criminal liability. A prudent approach to such risks may thus result in NGOs discontinuing or not embarking upon necessary or useful work, even in circumstances where prosecutions are unlikely.”

The lack of clarity in terms of what is and is not permissible in relation to contacts with listed groups creates confusion and uncertainty for peacebuilding organisations interpreting legislation. This is compounded by the multiplicity and complexity of CT regimes and broadly depends where an organisation is registered and the nationalities of its staff. In an effort to get clarity, a number of organisations have taken legal advice in the UK, EU and US on their liability and risks. Several of these requests were deliberately made in oral form to avoid a paper trail. Peacebuilding organisations say that CT legislation and frameworks create an atmosphere characterised as, ‘don't ask the question if you don't want to know the answer’. Some organisations refer to an approach involving ‘calculated risks’ within uncertain legal and political parameters.

In one case, a peacebuilding organisation asked its lawyers what would happen if its staff were to engage with Hamas or another listed armed group. The advice suggested that, as no funds were provided (only incidental expenses) and the organisation was acting in good faith for conflict resolution ends, the risk of prosecution was low. In another case, after consulting US lawyers an

organisation developed a specific policy for US national employees, under which the employee signs a document saying they comply with US CT legislation. The organisation also concluded that for non-US citizens, the risk was more political than judicial.

The threat of potential future prosecution is real and the liability of peacebuilding organisations is serious. It inspires the ‘prudent approach’ referred to by David Anderson QC in a field of work which inherently demands the taking of calculated risks.

Undue diligence

Interpreting CT legal norms in order to operate within the law can require legal expertise in order to navigate the complexities of jurisdictions and regulations. Added to that, the legislation and regulations governing engagement with listed groups is often tied up with anti-bribery and corruption (ABC) regimes. The cost of compliance for organisations is steadily increasing across the charity sector. One telling example is the case of two leading UK based charities Oxfam and Islamic Relief Worldwide (IRW) documented by the Overseas Development Institute (ODI) in 2015:

“[...]IRW and Oxfam, are instituting increasingly robust risk management and due diligence procedures based on professional standards for preventing fraud and money laundering, as well as more specifically related to counter-terrorism measures. These and other organisations have begun screening staff, partners and even beneficiaries against lists of proscribed individuals or entities. Using databases/software provided by a range of suppliers, often at significant cost, some INGOs are able to screen against lists provided by inter-governmental bodies such as the UN and the EU and national governments.”

Metcalfe-Hough, Keatinge & Pantuliano, 2015

If the costs of such measures to large and established charities like Oxfam are high, then they will be disproportionately so for smaller organisations, particularly civil society partner organisations in-country, who have limited resources and capacity to navigate the complexity of funding requirements. One organisation supporting local women's peacebuilding organisations related how they struggle with the growing administrative burden of complex and time-consuming procedures,

which they felt to be out of touch with the operational reality involving modest numbers of staff and volunteers operating in challenging environments. Moreover, these core operational and compliance costs are increasingly difficult to cover from restricted donor grants, where the predominant trend is towards projectised funding seeking specific and tangible in-country results.

“Donors have shifted risk onto NGOs in order to protect themselves.”

Participant, Chatham House discussion,
11 November 2015

Liability is being delegated from donors to INGOs and then further down the chain. The 2015 report, *Building Peace in Permanent War: Terrorist Listing & Conflict Transformation*, published by the International State Crime Initiative and Transnational Institute, made the point that peacebuilding NGOs are themselves outsourcing risk to their partners in certain contexts. In Somalia, one organisation reported that it chooses to work through Somali partners as it “lessens our exposure by not having to make those decisions ourselves.”

Another area of growing concern is around access to financial services. Organisations refer to difficulties in opening bank accounts and in transferring funds. In one reported case, despite following advice from the British Banking Association that developing a constructive relationship with the account manager would be sufficient to secure approvals for transfers, the organisation’s difficulties continued. Another organisation based in Europe was refused a second account by a major national bank when the bank learnt the organisation was working in the Middle East and North Africa (MENA) region, even though the grant for the work was coming from the donor government.

These cases chime with similar developments in the humanitarian sector; a recent ODI report cited an INGO which “had foregone £2 million in donations in the preceding 12 months as a result of funds being blocked, and had had to return funds to a donor because it was unable to get them through to their intended destination overseas.” (Metcalf-Hough, Keatinge & Pantuliano, 2015). Worryingly, in terms of transparency and the ability to track funds, a number of peacebuilding organisations admitted to resorting to ‘informal bank routes’ and services such as Western Union for money transfers.

Information versus reputation

Nervousness about liability and the permissible parameters of the law is resulting in information,

as well as money, being conveyed in more informal ways. This mirrors a similar development among humanitarian agencies. A report exploring the impact of CT frameworks on humanitarian agencies found that sectoral transparency had deteriorated due to fear of the consequences of divulging information (Mackintosh & Duplat, 2013).

Officials from donor governments are sometimes the ones keen on discretion, an implicit recognition that knowledge also requires accountability. Yet, in so doing liability is again conferred onto the NGO. One donor government asked an organisation to report orally to avoid written records. Another made it clear that they were reluctant to see a list of participants for an event, clearly aware that the list contained names of those linked to listed groups.

These informal arrangements with donors rely on high levels of trust. Yet, organisations are also aware that by giving less information to donors and by watering down how much information goes into the public domain, their public facing communication looks uninspiring and the value of their work is under-recognised, with consequences for their ability to attract political and donor support.

“We do not shout about our work from the rooftops. This raises the question of who gets the credit for what and the challenge of raising your profile or not on particular activities. We have chosen to go below the radar.”

Director, peacebuilding and mediation support organisation

The partial disclosure of reporting, with some sections of reports not being made public, can also be in tension with the Government’s transparency requirements.

“All our reports are public documents and can be accessed by anybody via the Internet. This pressure of transparency is a good thing in terms of taxpayers knowing how their money is spent, but it creates difficulties. We agree beforehand how the reporting will be done and tend to have oral reporting which is much more detailed.”

Director, peacebuilding organisation

Another UK-based peacebuilding organisation, which has had the same charitable objectives for the last twenty-five years, reported that they were reluctant to attempt to revise them in the current climate as they were concerned that it would invite increased scrutiny from the Charity Commission.

II. The impact on the effectiveness of peacebuilding work

“Many of the international and national measures aimed at countering terrorist financing and the provision of material support have also had a direct and chilling impact on public interest groups, restricting the ability of entirely lawful organisations to secure funding or to operate effectively.”

Ben Emmerson, UN Special Rapporteur on counter-terrorism and human rights

Diminished understanding of armed groups

Effective peacebuilding requires an understanding of all stakeholders in a conflict, including armed groups, whether on a terrorist list or not. This understanding should include not only who they are, where they come from and what they want, but also how they see violence, how they see themselves and their adversaries, their relationship with their constituency, and whether they can envision peace. This kind of information is crucial to exploring options for peaceful resolution of conflict, but it is being affected by the extent to which peacebuilding organisations feel able to be in direct and regular contact with members of armed groups.

Certain organisations have also highlighted the dilemma they face in deciding whether to share their analysis of armed groups with officials in governmental or multi-lateral organisations, especially analysis carried out by local partners: “if we share it the risks are obvious to us, if we don’t share it their [policy-makers/donors] analysis might be wrong.”

Academic research on armed groups is also an important source of knowledge for people working to resolve conflict. But research on listed groups is being increasingly discouraged by ethics committees in UK universities, less fieldwork is being done and funders are increasingly wary of supporting this type of work. In one reported case, a PhD student wanting to do research on the Basque group Euskadi Ta Askatasuna (ETA) was tipped off by the university authorities to the local police. Another student conducting research on the Kurdistan Workers’ Party (PKK) was encouraged by the university to destroy his interview materials and change the focus of his thesis. However, another university deemed research by a PhD student on the Revolutionary Armed Forces of Colombia (FARC) as acceptable as the FARC is not on the UK’s terrorist list.

The risk-averse nature of many research councils in the UK and US compounds the problem. One

academic working on the Middle East conflict said that without Norwegian and Swiss funding for research over the last six years, there would be very little by way of research on Hamas by westerners (cited in Haspeslagh, 2013).

Changing where we work and whom we work with

“Listing conditions the kinds of peacebuilding possible.”

Building Peace in Permanent War: Terrorist Listing & Conflict Transformation, 2015

CT legislation is having a qualitative impact on the work of peacebuilding organisations, their choices and freedom to choose where they work and with whom. This is due to a combination of restrictions in funding, deliberate decisions not to take funds from particular donors, particularly US donors, but also due to self-censorship to minimise perceived legal or reputational risks.

“In the 1990s the LTTE had an office in London, now we do not have meetings (with listed groups) in the UK.”

Peacebuilding NGO staff member

The number of neutral locations for meetings with listed groups has become more limited. Organisations who want to organise meetings involving listed groups cannot do so in the UK, because of visa issues and the lack of clarity over what the law permits. Similarly, due to European CT legislation (mainly travel bans), meetings in other EU countries are also excluded. Instead, organisations typically organise training workshops and meetings in Switzerland and Norway, who have opted out of the EU’s CT regime, or Turkey.

Working in certain high-risk areas and regions is also becoming increasingly problematic and limited, in particular in the Middle East and North Africa, but also Pakistan, Sudan and the Horn of Africa. While the UK Government has listed only the armed wing of Hamas, the EU list applies to the whole organisation, and the UK, as an EU member state, in turn complies with the EU regime. In June 2007 the Quartet (UN, EU, Russian Federation and US) established a ‘no-contact policy’ with Hamas and since 2009 the UK has been instructing NGO partners that contact should only happen “at a technical and lowest possible level” (cited

in Mackintosh & Duplat, 2013). This has led the peacebuilding NGOs who have chosen to remain engaged in the region to lower their level of contact with the listed group. One US NGO has stopped training the Hamas leadership in conflict resolution, for example (Haspeslagh, 2013).

Furthermore, terrorist listing and related legislation is influencing whom peacebuilding organisations choose to work with, either avoiding those carrying the most legal and reputational risk for the organisation, working through elected representatives or proxies, or with members of listed groups in prisons in order to minimise risks to themselves.

It should be noted that the limitations on space for peacebuilding and mediation are not felt equally across the peacebuilding sector. NGOs feel more or

less restricted depending on the nationalities of staff and where the organisation is registered. Some NGOs feel greater security than others because of the status and standing of senior members of the organisation or Board of Trustees.

“In South-Central Somalia one organisation said it had to refrain from carrying out a project that could have been strategic in reducing violence. This organisation made contact with 300 Al Shabaab fighters in the Bakool region of southern Somalia. These fighters said they wanted to defect and traditional elders from the relevant sub-clans had agreed to reintegrate the fighters, but UK and European donors shut down the initiative.”

Building Peace in Permanent War: Terrorist Listing & Conflict Transformation, 2015

III. The impact on the peacebuilding environment

“Losing our independence could fatally compromise the integrity of our work.”

Mediation practitioner

The direction of political winds

Due to the inherent difficulty and nature of their work, peacebuilding and mediation support organisations can tend to be seen as guilty by association. To mitigate this risk, beyond establishing adequate internal due diligence processes, they develop relationships of trust and confidentiality with officials and governments. Staff who feel that their work operates in a grey area of the law, ensure they brief ambassadors, senior officials or in some cases heads of donor governments directly. However, most NGOs do not enjoy this level of access, particularly smaller and local organisations in conflict contexts. The degree of official support and legal and political protection are also dependent on the direction of the political wind at a given time:

“A Dutch organisation was accused of providing ‘material support’ to Kony and the Lord’s Resistance Army (LRA) by the Dutch parliament in 2008. At the time the Dutch Government took a progressive attitude towards the work and the need for engagement. It therefore publicly defended the organisation, confirming that it was supporting government initiatives in the peace negotiations with the LRA. A staff member

reflected that, “if it happened now [in 2015] it would be the end of us.”

Interview with peacebuilding NGO

Loss of independence

The embedding of CT frameworks in donor contracts through disclosure clauses and partner vetting for work in certain regions has added to existing fears that NGOs are increasingly being cast as sub-contractors of government policy. As local partner organisations are linked both contractually and by association, their work can also be stigmatised.

In the UK, concerns were expressed about developments in some funding programmes implemented under the Conflict Stability and Security Fund (CSSF). These include more intrusive monitoring of activities:

“In one case the donor reserved the right to sit in on any meetings, which would make the NGO’s work, based on trust, impossible. The organisation concerned was considering turning down the funding, equivalent to two years worth of funding and activities.”

Interview with mediation support organisation, UK

Peacebuilding organisations’ impartiality in the eyes of all stakeholders to a conflict is core to their effectiveness, yet the framing of funding streams, proposals or of analysis can compromise this. Project proposals from major donors dealing

with violent actors are often pitched in a way that prejudices the conclusions of the work. One UK-based organisation decided not to bid for a research project looking at countering violent extremism in Kenya as it felt that the project excluded a thorough interrogation of the role of state forces.

Finally, the effects of terrorist listing and associated legal frameworks on impartiality are not felt by

NGOs alone. Staff in UN agencies have commented that the broader CT framework is having an impact on the perception of the UN's impartiality; crucial to their ability to engage with armed groups (Conciliation Resources, Centre for Humanitarian Dialogue and Centre on Global Counterterrorism Cooperation 2012).

Conclusion

Peacebuilding practitioners, not least those in closest proximity to violence and conflict, are acutely aware of the risks and threats posed by armed groups, whether listed as terrorists or not. They share a common desire to prevent conflict and support efforts to build lasting peace.

The policy brief presents a snapshot of the ways those engaged in efforts to build peace, support mediation and better understand conflicts are adapting to the direct and indirect constraints and risks associated with terrorist listing and CT legislation. A picture emerges of resilience and adaptability in the face of legal and political uncertainty surrounding their work. In certain contexts, particularly the Middle East, North Africa and the Sahel, the impact is felt in more

tangible ways, and evidence suggests that those organisations who may be losing out the most, such as local women's organisations working on peace and justice, are those whose roles may be the least visible, but also the most valuable in forging more peaceful societies.

“Policymakers must take into account the consequences for mediation and political settlements when crafting counter-terror legislation. Finding a balance between immediate counter-terror measures and long-term strategic plans for conflict resolution is difficult but crucial.”

Chatham House Report, 2010

Ways forward

- 1. Don't proscribe contact:** In conjunction with humanitarian and development organisations, peacebuilding organisations should collectively explore with donor governments the potential for legal exemptions which allow contact which support peaceful change, peace processes and the delivery of life-saving humanitarian support to populations in need;
- 2. Make the public case for conflict prevention and peacebuilding:** Governments funding the work of NGOs in conflict settings, should communicate a more robust public defence of the need for and value of conflict prevention, peacebuilding and mediation, including the constructive engagement with non-state armed groups;
- 3. Better understand the impact of terrorist listing on civil society in conflict contexts:** Support or commission research into the impact of UK, EU, UN listing regimes, including mirror CT legislation introduced by national governments in contexts of conflict or political instability, on local civil society organisations and communities and their contributions to peace;
- 4. Reassess the effectiveness of terrorist listing:** Policymakers should initiate a critical examination of the effectiveness of terrorist listing regimes in incentivising shifts away from violence, as well as in obstructing and containing it;
- 5. Clarify the intention of the law through government-NGO dialogue:** Through standing fora for UK Government and international NGOs the Government should agree a clearer articulation of the intention of UK CT legislation and terrorist listing, and consider and agree, on an ongoing basis, the range of permissible and necessary activities by international NGOs and conflict researchers.

Acknowledgement

This briefing paper and preparatory work was prepared with the financial support of the Joseph Rowntree Charitable Trust. The contents are the sole responsibility of Conciliation Resources and do not necessarily reflect the position of the Joseph Rowntree Charitable Trust.

The briefing paper was authored by Sophie Haspeslagh, Conciliation Resources Associate and PhD candidate at the London School of Economics and Dr Teresa Dumasy, Head of Policy and Learning at Conciliation Resources. We are grateful for the insights and experiences shared by peacebuilding practitioners in its preparation.

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