Mediating Peace with Proscribed Armed Groups

A Policy Workshop Report on the Implications of European Union (EU) Counter-Terrorism Legislation for Mediation and Support for Peace Processes

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Berghof Peace Support

conciliation resources

On 21 October 2010, Berghof Peace Support (Berlin) and Conciliation Resources (London) convened a policy workshop at the European Foundation Centre (Brussels), with funding from the Joseph Rowntree Charitable Trust (UK). The aim of the workshop was to initiate a debate about the direct and indirect implications of EU counter-terrorism legislation on EU led or supported peace processes and to identify possible steps forward. This report summarises discussions and recommendations among 30 participating high-level EU officials, mediators and civil society experts.

KEY FINDINGS OF THE WORKSHOP:

1. The EU's mediation and support roles and capacities are inadequate considering the number of protracted violent conflicts around the world. They could be enhanced through increased training, the use of a mediator roster system and the use of best practice models.

2. Engaging with non-state armed groups is an essential component of any peace process support strategy and a key ingredient to reaching a practicable peace agreement and its successful implementation.

3. There is a general lack of understanding of EU counter-terrorism legislation among the public and the peacebuilding and diplomatic communities.

4. Though the legal impact of the EU's counter-terrorism legislation on mediation is relatively limited, the political effects of EU proscription are far-reaching. It has increased the political risk for EU envoys and member states and has reduced European mediators' credibility and perceived neutrality with some conflict parties. It has also had counter-productive impacts on armed groups' willingness to engage in peace processes and has created perceptions of criminalisation among some communities living in the EU who have shared aspirations with banned organisations.

5. Proscription is a blunt tool. As currently exercised it does not reflect the differences of behaviour between various armed groups; nor does it effectively incentivise their decision to abandon the use of violence.

6. If the EU wishes to strengthen its mediation role it will need to better calibrate its counter-terrorism legislation to enable constructive political engagement. **See the recommendations below.**

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WHY ENGAGE WITH NON-STATE ARMED GROUPS?

Any official conflict response strategy requires a political dimension. When the causes of a conflict are at least in part political, there can be no military-only resolution of these issues, though security measures might be used to apply the necessary pressure to enable the pursuit of a political solution. Engagement does not imply appeasement or agreement with one's interlocutors; nor does it mean giving in to their demands. It takes many forms, from back-channel exchanges to 'talks about talks' and formal negotiations.

Pre-negotiation contact and dialogue with an armed group can serve several purposes. It can play a 'socialisation' function by helping to build trust and foster the political will essential to making concessions and moderating demands or behaviour. Political engagement and dialogue can make it harder for armed groups to perpetrate violence. Contact can be educative for both sides:

- Dialogue with an armed group contributes to a better understanding of who they are and what they are thinking, which, in-turn can inform strategy.

- Engagement also helps to prepare armed groups for negotiations, encouraging them to think about peace process requirements and to develop a negotiable political agenda. For instance, the US travel visa granted to Sinn Fein leader Gerry Adams in 1994 was instrumental in exposing him to alternative views among the Irish diaspora, which likely contributed to his movement generating more realistic political perspectives.

No group is 'beyond the pale.' There are many historical examples of 'terrorists' who have transitioned to statesmen, Nelson Mandela being one. General Petraeus, Commander of US forces in Afghanistan recently commented, "one needs to talk to people with blood on their hands the most." Talking to the 'real' leadership or hardliners might be central to ensuring the successful implementation of a peace settlement. Inclusive engagement also helps to avoid the emergence of splinter groups. It is better to make peace once, not many times.

THE EU'S ROLE IN MEDIATING PEACE

The EU's current mediation practice is heterogeneous and *ad-hoc*. EU institutions are now rarely directly involved in Track 1 mediation. One instance is its co-chairing of the Geneva Talks on security in the south Caucasus. But EU Special Representatives (EUSRs) and sometimes delegations facilitate important government engagement with non-state actors. Mediation training will also likely play an increased role in exit strategies of Common Security and Defence Policy (CSDP) deployments such as the EU Bosnia Herzegovina police mission. The most common form of EU mediation support is financial assistance. Since 2007 the Instrument for Stability has provided short-term, flexible funding for crisis response activities, for instance support for the International Contact Group in Track I negotiations in the Philippines.

The November 2009 EU Concept on Strengthening Mediation and Dialogue Capacities (15779/09) provides recommendations for enhanced, systematic EU mediation support. It **calls for more mediation training, knowledge management and best practice development**. This could entail setting up a roster of experienced mediators and a mechanism for their rapid deployment. It also recommends increased funding for (non-EU) mediators and ambitiously advocates for mediation to be the first EU crisis response tool. However it does not clearly outline structures to manage this involvement. The establishment of the EEAS represents a golden

opportunity for institutionalising a stronger EU conflict resolution role.

Should the EU play a bigger role in mediation and peace processes? There is an international need and a strategic opportunity, and the EU brings strong added value. EUSRs wield the legitimacy and leverage of 27 member states, but navigating their individual political concerns can be constraining, and whether the EU has enough internal coherence to play an effective role is questionable. Another stumbling block may be squaring a peace support role with EU counter-terrorism legislation.

EU COUNTER-TERRORISM LEGISLATION IN PRACTICE

There is still no globally agreed legal definition of terrorism. States and intergovernmental agencies are therefore able to define and interpret it with some flexibility. Terrorism is broadly defined by the EU as "a crime perpetrated with the goal of gaining political advantages which could be achieved by legal means", though many armed groups commit acts of violence and terror in fragile or authoritarian states where rule of law is dysfunctional or politicised.

Proscription as a legal and political instrument to counter the threat of terrorism

Proscription involves placing groups that meet stipulated criteria on a blacklist, which effectively freezes their assets within the EU. The declared aim of this legislation is to disrupt and delegitimise groups' activities and to incentivise a change of tactics. While the EU's legal measures are more limited than other national and international proscription regimes, the political implications are still wide-ranging, particularly for those seeking to negotiate peace settlements.

EU implemented 'blacklists' can be divided into two categories: the list that directly implements the UN Al-Qaida and Taliban list linked to UNSC Resolutions 1267; and the EU's own autonomous list of terrorist suspects and groups, which implements UNSC Resolution 1373. The autonomous EU list is given effect in the European legal order through Common Position 2001/931/CFSP. The EU list comprises two sub-lists: one for groups operating within the EU, and one for groups operating outside the EU in non-member states countries. The remainder of this report is concerned with the autonomous **EU external list, which currently comprises 54 designated groups**.

The ***listing mechanism*** starts at the national level and requires nomination by only one member state. Once a member state proposes to list a group or endorses the proposal of a third country, the EU Council reviews the case and decides if the legal and political conditions are satisfied (eg investigation and prosecution at the national level; compliance with the strategic interests of EU member states). The decision to list a group needs unanimity in the Council. A 'Statement of Reasons' is then sent to the targeted group, which is given the opportunity to respond. EU lists are then reviewed every six months.

The ***legal effects*** of EU listing can be described as fairly 'soft' or limited in comparison with the US "Foreign Terrorist Organizations" (FTO) blacklist for instance. It entails the freezing of a designated group's assets within the EU. However, it also creates an 'echo chamber' for member states, by legitimising the introduction of wider and more stringent sanctions at the national level, such as formal or informal travel bans, and the criminalisation of group membership or contacts with listed groups. Visas and contacts can also be opposed at the EU level through political decisions superseding legal procedures.

Listed groups can now submit a request to the Council at any time asking for their designation to be reconsidered. However, the **de-listing process** still relies on unanimity

among the 27 member states. If a member state withdraws its support for the listing, or the judicial basis on which a group was listed is no longer valid, the EU is forced to review the judgement. But the European Council has not published criteria for exercising its discretion and is very slow to respond to requests for clarification. In addition, a member state can nominate a group for which another has withdrawn its support. Deference to member states makes the listing process highly politicised. In practice, it is very hard for a group to get off the list. It is easier to get unanimity to include a group rather than to de-list it.

It is important to consider the cumulative impact of EU proscription policies combined with UN and member state's own policies, as well as those of non-EU states that have some impact on some EU residents.

The impact of EU proscription on armed groups

Experienced mediators report that **listing most often has a counter-productive impact both on groups designated as terrorist and their constituencies**.

Some armed groups or networks, such as Al-Qaeda in the Islamic Maghreb, seem unaffected by the listing and have difficulty grasping its meaning. Many seem to be unaware of the de-listing mechanism, or find it too complicated and believe they are listed for life. This effectively removes any incentive for behavioural change and instead tends to isolate and radicalise groups further, reducing the chances for a negotiated settlement.

Others, such as Al-Shabaab in Somalia or the Palestinian group Hamas, have used proscription as a propaganda tool to raise their status with domestic constituencies or to enhance their perceived 'victimhood'.

Some groups use de-listing as a prerequisite for peace talks. But where de-listing requests are difficult to implement, their 'pull factor' is negated. They can instead further undermine the group's confidence in a political solution. So proscription is likely to be counter-productive when no realistic alternative is offered. Proscribing a group can generate a sense of vilification and isolation among its associated constituency population. The listing of Hamas has fostered anger and a sense of marginalisation among a large segment of the Palestinian population (including, of course, its supporters). As Hamas enjoys a democratic mandate its blacklisting gives rise to perceptions of Western double standards. This inhibits the EU's ability to play a constructive role in brokering peace.

Counter-terrorism law is statist in nature as it supports ruling authorities. Certain aspects sit in tension with international legal principles of self-determination and democracy. Blacklisting enables governments to criminalise domestic adversaries, to legitimise their own positions as part of a globalised fight against terrorism, and to employ military counter-insurgency tactics. Such tendencies have been observed in Sri Lanka and Ethiopia for example.

The impact of proscription on EU supported peace processes

While technically EU proscription does not prevent mediation or dialogue, it imparts political stigma that can severely constrain the ability of third-parties to engage.

Proscription can undermine the political will (or increase the political risk) of EU envoys or member states to engage in talks with listed actors and can provide a pretext for inaction. In the Middle East for example, the EU could use its significant financial leverage to apply political pressure or play a more constructive facilitation role between Israelis and Palestinians or Palestinian factions. Instead, restraint has led to its progressive marginalisation in the region.

Mediators need the full range of options when preparing for talks with armed groups. Though (unlike US legislation) EU proscription does not legally prohibit contacts it seriously reduces European mediators' credibility and perceived neutrality. This has been especially the case where the EU has listed groups when simultaneously seeking to engage them in peace negotiations or 'talks about talks' with the concerned government:

- Between 1999 and 2000 an agreement was reached between the (Kurdish) PKK and the Turkish government to begin a peace process. In May 2002, while the PKK had not engaged in any overtly violent activities for three years, it was put on the EU terrorist list in response to demands from the Turkish government. In fact, the PKK had announced a few days earlier its decision to dissolve itself and reorganise its work "using entirely peaceful and democratic methods." The EU listing severely disrupted efforts to find a political solution, and instead helped to justify further proscription of pro-Kurdish political parties by the Turkish state.

- France and Spain were part of a group of *Friends of the Peace Process* between the ELN and the Colombian government. In 2002 the EU added the ELN to its terrorist list, leading the ELN to question Paris' and Madrid's commitment. The group of facilitators was soon discontinued after several years of existence.

- In Sri Lanka, the 2006 EU proscription of the LTTE at a fragile stage in the peace process undermined Norwegian mediators' good offices. Norway then withdrew all support for the EU listing regime, asserting that it could undermine Oslo's role as neutral facilitator.

Proscription makes it harder for mediators to include groups that can help implement (or disrupt) a peace deal. The ongoing Israeli-Palestinian negotiation process is deeply flawed because one of the main parties to the conflict has been excluded from the talks. In Afghanistan, proscription of the Taliban leadership reduces meaningful engagement with that group.

EU proscription policies tend to shrink the space for EU-led or supported mediation, and to diminish the influence of member states in the field of conflict resolution, leaving these roles to be filled by non-EU actors such as Switzerland or Norway.

Both mediation and proscription are tools designed to transform armed conflicts into peaceful political processes. Proscription is a blunt instrument; as currently constructed it has proved inadequate to reflect the differences in behaviour between various armed groups or to effectively incentivise their abandoning violence. Because of the complexity and slowness of listing mechanisms, they 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. If the EU wishes to increase its mediation role it will need to revise its counter-terrorism legislation to enable flexible, constructive political engagement.

Fostering a legal and political environment that supports peace. There are a range of ways that the EU could improve complementarity between its counter-terrorism legislation and its support for mediation and peace processes. Options include making the legislation more transparent, flexible and nuanced to improve its legitimacy and effectiveness; improving communications around the legislation to encourage constructive engagement by EU bodies, staff and member states, and NGOs; and clearly stating and institutionalising EU support for mediation.

RECOMMENDATIONS TO THE EU

A number of recommendations emerged from the workshop discussions and are summarised here:

Improve EU counter-terrorism legislation

- Introduce greater transparency on the justifications for listing a group and provide clear criteria and procedure for de-listing. A more formalised proscription commission could be developed to deal with applicants, building on Article 75 of the Lisbon Treaty which proposes a new, more explicit legal basis for listing.

- Reform listing procedures by making them time-limited and subject to renewal rather than simply reviewed periodically. This could set a precedent for a non-automatic renewal.

- Explore mechanisms of temporary waiver or suspensions from the lists subject to a positive behavioural change (like the US Treasury model). This option could provide flexibility in negotiation processes.

Endorse policies of engagement with all conflict parties for conflict resolution

- Clarify that meetings, dialogue, training and mediation support to proscribed groups are not illegal and where done appropriately, are important. Educate EU staff and member states that current legislation allows scope for constructive engagement with proscribed groups.

- Explore options to extend a formal 'political umbrella' mechanism for mediators to provide greater security and flexibility to engage in confidential contacts with proscribed groups. Empower EU envoys to play proactive political roles.

- Provide political and financial support to third-party non-state intermediaries to constructively engage proscribed armed groups: effective mediation is often the collaborative effort of complementary players.

Reposition the EU to play a constructive conflict transformation role

- De-link mediation capacity from the political decision-making process of the 27 member states - delegate it to the EU High Representative's authority.

- Review the EU's role in conflict transformation: What is the political objective? What is the added value in comparison with other international mediators such as Switzerland or Norway? What institutional structures and mechanisms are needed to support mediation effectively?

- Increase information exchange between EU institutions concerned with external political objectives, including the Director Generals' crisis platform, EUSRs, military and CSDP mission staff. Wider EU instruments should also be calibrated to support peace, such as the accession process (eg with Turkey), or trade agreements and development assistance (eg Israel-Palestine).