



DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT



**THE IMPLICATIONS OF
EU ANTITERRORISM
LEGISLATION ON POST-
CONFLICT POLITICAL
PROCESSES AND ON
THE STANDING OF THE
EU AS A MEDIATOR IN
REGIONAL CONFLICTS**

AFET



DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION

DIRECTORATE B

POLICY DEPARTMENT

AD HOC BRIEFING

**THE IMPLICATIONS OF EU ANTITERRORISM LEGISLATION
ON POST-CONFLICT POLITICAL PROCESSES AND ON
THE STANDING OF THE EU AS A MEDIATOR
IN REGIONAL CONFLICTS**

Abstract

The effects of EU antiterrorism legislation are ambivalent. Banning whole organisations provides hardly an incentive for behavioural change but may strengthen extremism and belligerence. In territories with limited statehood the effects of listing can disrupt essential social and humanitarian services which the organisations offer and for which they are backed by larger parts of the society. The lack of transparent criteria for de-listing is another critical issue. As a means of 'prevention' the listing practice seems to be easy to apply, but hardly to remove. Moreover, the sanctions impede efforts by third parties to provide support as mediators and facilitators.

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EXECUTIVE SUMMARY

The implications of EU antiterrorism legislation on post-conflict political processes are ambivalent. Aiming at weakening the influence of terrorism it seems also to strengthen the hardliners in non-state armed groups and to disadvantage actors within those groups who tend to be willing to achieve a political settlement of the conflict. Banning organisations as a whole affects larger constituencies more than the targeted persons or entities. In territories with limited statehood the effects of listing can even disrupt essential social and humanitarian services which the listed organisations offer to local constituencies in the territories under their control and for which they are backed by larger parts of the society. In addition, imposed proscription measures that do not offer precise incentives to change current behaviour may bring about counterproductive effects of encouraging extremism and belligerence. The lack of reliable and transparent criteria for de-listing is a critical deficit of the current antiterrorism legislation. As a means of 'prevention' the listing practice seems to be easy to apply, but hardly to remove. Moreover, the sanctions against political actors affect also impartial third party or insider mediators and facilitators and they may close the doors for a negotiated conflict settlement.

1. THE NATURE OF CONTEMPORARY ARMED CONFLICTS AND THE ROLE OF 'ARMED NON-STATE ACTORS' (POWER CONTENDERS)

Almost all contemporary armed conflicts are asymmetrical, with 9 out of 10 being non-international and with governmental actors involved at least as one of the conflicting parties. Challengers of an existing state rule – power contenders – or, according to the language of international legal instruments 'Armed Non-State Groups (ANSA), are often also labelled as 'terrorist organisations', particularly by the owners of power in states affected by non-international armed conflict. However, against the background of poor governance, fragile socio-economic conditions and lacking rule of law a nominal state (respectively a government of such a state) cannot be automatically considered more legitimate than a (non-state) power contender, particularly if the case of the latter is justified by international Human Rights Law (Giessmann 2013a).

Armed conflicts in 'fragile states' are often rooted in the adoption of violent strategies by power contenders who dispute the legitimacy of a rule that they perceive to be unable or unwilling to provide sufficient security and welfare to all of its citizens, often based on direct experiences of discrimination and oppression (Dudouet et al. 2012, p. 2). Their violent resistance is based on collective grievances that are recognised under international law, such as the right to self-determination or other fundamental freedoms (Muller 2008).

The self-image of power contenders is that of being legitimate resistance and liberation movements and defenders of human rights (Giessmann 2013a). Some power contenders – most often only their military arms, or splinter groups and cells – may resort occasionally to the same means and tactics that are used by terrorists. More often than not they act in contradiction to mainstream opinions within their own larger constituencies. Identifying the various factions within fragmented power contender movements, and especially assessing the importance of functional or splinter groups in relation to other organised sub-groups, is not an easy task. Yet for sanctions to become effective, differentiation is indispensable. This is all the more so important since in political transitions from war to peace and in the subsequent political settlement, inclusive patterns of conflict transformation and state-building are the prerequisite for sustained peace.

2. DILEMMAS OF NON-DISCRIMINATION BETWEEN TERRORISTS AND POWER CONTENDERS

The term 'terrorist' is as vague as the common terminology of 'Armed Non-State Actors'. It does not take into consideration the wide scope within the groups of affected social actors, which is ranging from rebels, guerrilla fighters, militias, clan chiefs, warlords, marauders and criminals to mercenaries and even private military companies. All of these groups may be also connected to means and tactics of terrorism, but it is not terrorism that these actors (primarily) are interested in. An over-simplified 'armed', 'non-state' or 'terrorist' branding, which tends to protect and privilege nominal states fails to discriminate perpetrators from followers and sympathising constituencies. It is counter-productive for engaging influential political and social interest groups for conflict transformation processes. More importantly, it tends to impose collective punishment on larger social groups and may result in radicalising collective identities detrimental to long-term peace- and state-building.

Admittedly, a blueprint for successful inclusive patterns of peacebuilding does not exist, but it can be taken for granted that sustained peace is in the need of engaging large ethnic, religious or social constituencies and their institutional representatives – be it because those representatives may have the power to impede or to obstruct the process as a whole, but prior to all because they play important constitutive roles. Therefore the Italian Foreign Minister Pistelli has rightly stated with respect to Hezbollah during a recent visit in Berlin: 'You can't take out from the game a relevant part of the Lebanese society.'

3. THE EFFECTIVENESS OF 'BLACKLISTING'

The causality of sanctions, particularly 'blacklisting', and behavioural change is debatable. On the one hand the freezing of assets and other financial or travel restrictions limit the room to manoeuvre for listed actors. Actors who are concerned about their public image might feel inclined to change their behaviour. But this may take either a very long time (as in the case of Libya after the Lockerbie plot) or may never happen (as in the case of Saddam's policy after the 2nd Iraq War).

But what is already questionable for states seems to be even less promising for non-state actors: Insurgents and rebels care less about their international image, at least as long as the international community does not support them in defending their case. Insurgents might consider listings even as a sign of being recognised internationally as a relevant political actor. Most groups who have been listed since 2001 under the various international sanction regimes (EU and others) are still active. Three exceptions seem to exist: LTTE, ETA and PKK. But the LTTE has become militarily defeated, ETA has given up its armed struggle in order to open the doors to a political settlement, and the PKK has most recently relocated their combatants from Turkish soil to Iraq for the same reasons. In all three cases neither a causal relationship between blacklisting and change of behaviour can be identified, nor has the change had any altering impact on the sanctions imposed. The lack of a positive resonance to unilateral moves by the listed organisations has caused a great deal of frustration within their nationalist constituencies, particularly in the Basque country and in Kurdistan.

3.1 Implications on listed persons, groups and entities

The legal effects of EU listing entail only the freezing of designated persons', groups' and entities' assets within the European Union. The impact of proscription, however, may stretch far beyond direct financial

implications. It may for example provide a reference for the decision on a denial of visa or, in a more general sense, may deter other states, investors or civil society actors, to provide 'material support' whatsoever to the listed actors or to institutions located in territories under their control.

Hence implications may affect not only those who are listed, but also those larger constituencies who the listed actors represent or who feel represented by them. Since the boundaries between organisations and constituencies are often blurred, listing practices may be perceived in the larger constituencies as (implicit) criminalisation – and non-discriminatory sanctions may trigger dismay and solidarity across those constituencies. Timing plays also an important role. Ironically, 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'. (Dudouet 2011: 5)

Reluctance to share information, to inform proscribed organisations about the circumstances of designation, to ignore court rulings (cf. PKK vs. EU and the related 2006 ECFI ruling), to disregard process requirements, and a lack of transparent criteria and precise information (Sick 2013: 59), may undermine basic trust that the EU would handle issues of proscription in a fair manner and in compliance with its own standards and rules. In the eyes of the affected constituencies and organisations the EU would become considered a biased and partisan actor. As Sick has noted, imprecise sanctions 'damage the senders' legitimacy and impartiality'. (ibid: 62)

A de-listing is possible, but merely upon request. Only few of the designated actors have the resources to engage in a legal challenge of the EU for it could last years if not a decade. Hence the number of reported attempts to get de-listed is very small. As a result, sanctions once imposed on persons, groups or entities tend to have an unlimited duration.

3.2 Implications on post-conflict political processes

The implications of antiterrorism legislation on post-conflict political processes are ambivalent.

Antiterrorism legislations aim at disrupting 'the activities of terrorist groups by criminalising their members, cutting off their access to funds and undermining their support'. (Sullivan and Hayes 2010; cited in Dudouet 2011: 4). If legally justified, targeted, smart and – based on transparent criteria – revocable, sanctions may be effective in supporting post-conflict efforts to (re-)establish rule of law.

However, this objective is facing a variety of challenges and serious caveats. The implementation of the EU antiterrorism legislation shows deficits with regard to definitions, accuracy, transparency, political impact and timing. Moreover, the US and EU legislation has provided an appreciated reference for non-democratic states to establish and implement own exclusionary legislations in order to persecute ethnic minorities and resistance groups on their territories:

- *Definitions*: The use of the term 'terrorism' is subject to varying political stakeholders' interests. (Giessmann 2013b) The currently different handling of the Hezbollah case in the national listing practices of France (non-listing), the UK (armed wing listed) and the Netherlands (listed as terrorist organisation) is an example for the diversity of interests. The EU Council's definition of terrorism as a crime perpetrated with the goal of gaining political advantages which could be achieved by legal means 'obscures the fact that many armed groups operate in fragile or authoritarian states where the rule of law is dysfunctional or politicised.' (Dudouet 2011: 6).

- *Accuracy:* Contrary to its intentions the current EU and U.S. listing practice is most often not precisely targeted and smart, as it affects broader social communities instead of individuals or membership-based organisations which are held accountable for having committed terrorist crime. Strategies of exclusion hit also the constituencies which the perpetrators (pretend to) represent and are often used by the latter to justify violence. Some of the organisations that have become listed in the past do not have formally enlisted members while others have different functional wings in a spectrum from armed resistance to social service. As in the case of Hezbollah it is difficult to distinguish an 'armed wing' from the whole of the organisation. As such Hezbollah is rather a 'relevant political player' in Lebanon (Italian FM Pistelli).
- *Transparency:* Blurring the boundaries between proscribed and legal activities seems to make the use of antiterrorism legislation in the eyes of the affected constituencies a tool of random choice. For example, the Turkish separatist Partiya Karkerên Kurdistan (PKK) was added to the EU list in May 2002, although the guns had been silenced for several years and the PKK had declared to dissolve and reorganise itself to become an organisation to apply 'entirely peaceful and democratic methods.' The decision to add the PKK to the antiterrorism-list inspired Kurdish activists to re-radicalise and eventually resulted in a relapse of violence. Similarly, the proscription of the separatist political party Batasuna in the Basque by the Spanish state in 2003 led to an isolation of the pragmatic political activists from their social constituencies, thereby cutting off the communication links between those political actors in Spain who were apparently willing to negotiate a peaceful settlement. If criteria of listing and de-listing are not discernible and comprehensible, they fail to be incentives for change.
- *Political impact:* Banning organisations with a democratic mandate (Hamas, potentially Hezbollah) does not only contradict efforts to promote democratic standards but does also stir furious anger among their political and social supporters due to the perceived application of a political and also legal double standard. A denial of recognition may contribute to the radicalisation within a larger constituency and thus strengthen the influence of hardliners within the political movements and parties. In the case of Hamas the organisation has increasingly aligned itself to powerful neighbours who amplified their ideological positions instead of paving the way to a participatory political system. The same may happen in the case of Hezbollah if 'blacklisting' would become effective.
- *Timing:* Sanctions according to the antiterrorism legislation have proven to be turned into permanent punitive measures, partly because it is considered a political risk to lift sanctions 'prematurely'. (Eriksson 2010) But if sanctions are considered to be a form of a collective punishment the incentive for modifying current behaviour is low. The EU Council is obliged to review and update its lists every six months, but only two cases of de-listing have been reported: the PMOI and Jose Maria Sison, the alleged leader of the CPP in the Philippines who is living in the Netherlands as a recognised refugee. The discussed banning of Hezbollah (or parts of it), i.e. of an organisation that has strong national political stakes and influential social constituencies particularly in the southern parts of country, which is an elected, mandated and thus legitimatised part of the political system, would have grave repercussions for Lebanon's fragile attempts to build peace and reconciliation through an inclusive National Dialogue. This is all the more so true in light of the upcoming elections that are scheduled for 2014. Timing matters. Notwithstanding the ambivalent nature of Hezbollah its participation in the political system and the National Dialogue of Lebanon has led to a gradual stabilisation of security and peace in the country. If sanctions were imposed on this organisation prior to the elections next year and if a

substantial share of the population would become politically isolated or stigmatised, the fragile political system would inevitably be exposed to risk.

- *Spill-over*: The antiterrorism legislation provides a reference to those states and governments who seek justification for proscribing (and for the suppression) of political oppositions such as happened by the governments in Sri Lanka, Ethiopia, and in the People's Republic of China, where national antiterrorism laws have become inspired by the exclusionary approach of the US and EU.

3.3 Implications on mediating and facilitating parties, including the EU

Governmental and non-governmental actors are equally affected by the antiterrorism legislation. In the last two decades both types of actors have increasingly engaged in mediation efforts in order to facilitate transitions from war to peace in asymmetrical armed conflicts, and to support political settlement, economic reconstruction and state-building. Engaging power contenders through mediation has become a recognised alternate approach of peacebuilding in order to bring protracted violent conflicts to an end.

Examples for such international support are the Spanish and French recognition of the FMLN guerrilla in El Salvador in the 1980s, the US support in the context of the negotiations on the Good Friday Agreement, the Finnish, Swiss and Norwegian support for the peace processes in Southern Thailand and Myanmar.

Hard sanction approaches, however, as being applied by the US and partly the EU after 2001, tend to restrict the room for third parties to manoeuvre. For example, Norwegian facilitators became 'seriously restricted, when some of its dialogue partners in the Philippines, Colombia, Sri Lanka and Palestine were added to the EU blacklist'. (Dudouet 2011: 9)

If strictly applied the antiterrorism legislation practice may lead to a self-imposed captivity of the EU to engage as an impartial honest broker and mediator in peace negotiations and post-conflict political processes because a partisan EU will be hardly accepted in a mediating capacity by relevant conflict actors.

Non-governmental mediators and facilitators are also affected. The hardest challenge is provided by the widely-commented US Supreme Court judgement against the Humanitarian Law Project (2010) which comprises a broad interpretation of the 'material support' clause, stipulating that all forms of support (including advising) to listed entities are punishable no matter if the actors know about the actors' activities or not. In some European countries interactions with proscribed organisations are also punishable by imprisonment. The EU antiterrorism legislation, while less restrictive, than the US system and some of its member states, may pose a reference for punishment by third countries and contributed to a climate of uncertainty and fear on the side of mediators and facilitators. This may apply also to the National Dialogue in Lebanon which is technically supported by third parties and civil society experts.

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