Building Peace
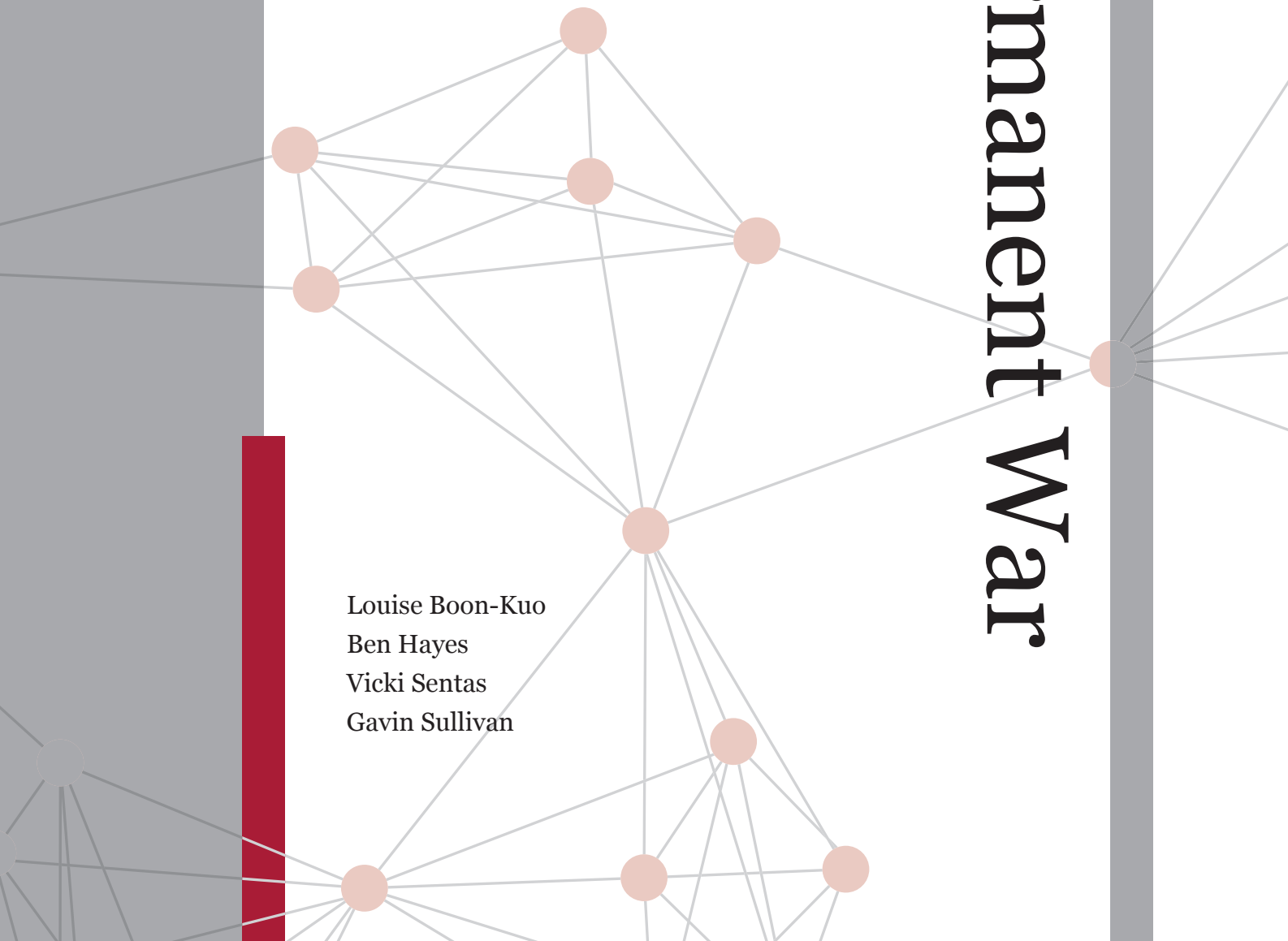
Terrorist Listing and Conflict Transformation

in Permanent War

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Building Peace in Permanent War

Terrorist Listing and Conflict Transformation

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Preface

"Building peace in permanent war", the title chosen for this ground-breaking report, perfectly illustrates the paradox of terrorist listing and its pernicious impact on contemporary armed conflicts. Intra-state conflicts are asymmetrical in nature, with internationally-legitimised state actors opposing non-state armed groups (NSAGs) – often labelled or legally proscribed as 'terrorist organisations'. National and international blacklisting regimes were allegedly introduced as legal instruments to prevent violent extremists from carrying out terrorist attacks and incentivise a behavioural change towards de-radicalisation. Instead, such regimes have been found to exacerbate conflicts by encouraging state repression of unarmed dissidents and thus fuelling radicalism.

When it comes to the impact of counter-terrorism measures on a broader range of actors beyond their targeted entities and alleged constituencies, a number of critiques have been raised with regards to their negative effects on third parties such as charities, diaspora organisations, humanitarian agencies, or development actors. Until now, scant scholarly evidence existed on how they impact peacebuilding actors (e.g., mediators and trainers) who support political dialogue between armed groups and national governments or 'bridge-builders' working towards (re)conciliation between and within conflict-ridden communities.

Fourteen years after the 9/11 attacks with their subsequent 'war on terror' and five years after the US Supreme Court ruling on 'material support' to foreign terrorist organisations (which interpreted peacebuilding as providing legitimacy to non-state armed groups), this report provides much awaited empirical data on how counter-terrorist legislation affects the work of local and international peacebuilders alike. It does so by relying on extensive interviews with practitioners and policy-makers involved in conflict transformation efforts across three ongoing conflicts (Somalia, Israel/Palestine, and Turkey/Kurdistan). All three cases share a common denominator: The primary non-state conflict party – namely Al-Shabaab, Hamas, and the Kurdistan Workers' Party (PKK) respectively – have been designated as terrorist entities.

This research stems from a fruitful collaboration between the authors and the Berghof Foundation. Motivated by the conviction that political conflicts require political solutions and that engaging with non-state armed groups is an essential ingredient for conflict transformation towards sustainable peace and justice, my colleagues and I co-organised a series of policy/expert workshops in Washington, D.C., Brussels, and Berlin on the impact of counter-terrorism on conflict transformation (the various publications that emerged from these events are cited in Chapter 2) between 2009 and 2011. It was then that we came across the report, "Blacklisted: targeted sanctions, pre-emptive security and fundamental rights", which two of the authors, Gavin Sullivan and Ben Hayes, released in 2010 together with the European Center for Constitutional and Human Rights (ECCHR) in Berlin. Converging interests and geographic proximity led to inspiring conversations between our respective teams. These eventually resulted in the Berghof Foundation funding this research project through our annual grant-making programme.

We saw in this initiative a golden opportunity to better inform and thus benefit our own practical experience of engaging with non-state armed groups (many of whom are affected by terrorist listing regimes) in supporting their conflict transformation efforts. The authors were also keen to complement their legal expertise and local contacts (as legal advisors to diaspora groups or peacebuilding organisations working on the ground) with our thematic knowledge and familiarity with the peacebuilding practice and research worlds.

The promises made by this project team have been more than fulfilled by the present report. It confirms the concerns that actors in our field have voiced for the past decade, namely that terrorist lists 'shrink the space' for international peace facilitation in intra-state conflicts by, for instance, criminalising third-party mediation and negotiation support, and impeding confidence-building with listed actors and 'insider mediators'. Moreover, the report also advances a more fundamental argument that peacebuilding actors should take extremely seriously: that far from representing mere 'unintended consequences' for peacebuilders and mediators, terrorist listing might deliberately target sincere attempts at conflict transformation, and that the fundamental norms of conflict resolution as such might be reshaped by this legal and political environment.

In a rather provocative fashion, the authors describe the liberal peacebuilding logic which lies at the heart of counter-terrorism measures (i.e. when demilitarisation and peaceful behaviour are defined as preconditions for soft-power dialogue engagement with 'terrorists'). They go even further by analysing the progressive securitisation of peacebuilding taking place in settings such as Turkey, Israel/Palestine, and Somalia. They note that "counter-terrorism is not just something that impacts on peacebuilding organisations, but something that ends up being transmitted through and practised by them, as security actors in their own right... Peacebuilders are in many cases now forced to work in ways that go against their core values as peacebuilders". Across all three case studies, the authors identify numerous aversion and management strategies employed by peacebuilding agencies, donors, and NGOs to avoid the liability risks associated with providing 'material support' to terrorists – including due diligence, partners vetting, withdrawal, or the outsourcing of risk. These appear, among other consequences, to enhance distrust between peacebuilding organisations and the very people that they are supposed to support.

The conclusions from the report are of direct concern and relevance to both theorists and practitioners. On one hand, they address a problem that has been understudied in the peacebuilding, sanctions, and security fields to date, bringing about innovative empirical data to illustrate the 'security-peacebuilding nexus' at play in many contemporary conflicts. On the other hand, they provide provoking food for thought for peacebuilders themselves, answering many questions practitioners have asked themselves with regards to the legal and practical implications of engaging with terrorist-listed groups, the consequences local civil society suffers in response to blacklisting, and, above all, how such policies impact the nature of peacebuilding itself. As voiced by the authors, "The peacebuilding community has much to learn... from the many others who are voicing concerns about the deleterious effects of terrorist listing policies". While colleagues in the humanitarian, development, and human rights sectors have been vehemently and outspokenly challenging counter-terrorism laws, "the response of the peacebuilding sector to date on these issues has been marked by uncertainty, internal confidentiality and acquiescence". The political change advocated by the authors goes far beyond cosmetic or substantive reform options to improve counter-terrorist frameworks and enhance their capacity to foster armed groups' behavioural transitions from violent to non-violent strategies. Instead, they call for a real paradigm shift that questions the very rationale behind, and need for, sanction regimes as such.

This study represents the first concerted and systematic attempt to assess the transformative impact of terrorist proscription on conflict resolution and peacebuilding, combining legal and political analysis with testimonies offered by those engaged in conflict transformation. I am proud to have our name associated to this ground-breaking work.

Acknowledgements

Disclaimer

Abbreviations

AIAI	Al-Itahaad Al-Islaami
AKP	Justice and Development Party (Turkey)
ANISOM	African Union Mission in Somalia (United Nations Security Council)
AQ	Al-Qaida
ARPCT	Alliance for Restoration of Peace and Counter-Terrorism
AU	African Union
BDP	Peace and Democracy Party (Turkey)
BDS	Boycott, Divestment and Sanctions
CIA	Central Intelligence Agency (US)
CFT	Counter the Financing of Terrorism
CITF	UN Counter-Terrorism Implementation Task Force
CSO	Civil society organisation
CTC	UN Counter-Terrorism Committee
CTITF	UN Counter-Terrorism Implementation Task Force
DFID	Department for International Development (UK)
DFID	UK Department for International Development
DHKP-C	Devrimci Halk Kurtuluş Partisi-Cephesi
DTK	Democratic Society Congress (Kurdish NGOs)
DTP	Democratic Society Party (Turkey)
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EIJM	Eritrean Islamic Jihad Movement
EUTCC	EU Turkey Civic Commission
FATF	Financial Action Task Force
FCO	Foreign and Commonwealth Office (UK)
FTO	Foreign Terrorist Organisation (US designation list)
HDP	People's Democracy Party (Turkey)
HMT	HM Treasury (UK)
HPG	People's Defence Force (military wing of the Kurdistan Workers' Party)
ICG	International Crisis Group
ICU	Union of Islamic Courts (Somalia)
IGAD	Intergovernmental Authority on Development
IGO	Intergovernmental organisation
IHL	International Humanitarian Law
INGO	International non-government organisation
ISIS	Islamic State
KCK	Kurdistan Communities Union
KNK	Kurdistan National Congress
LTTE	Liberation Tigers of Tamil Eelam
MASAK	Financial Intelligence Unit (Turkey)
MEPP	Middle East Peace Process

MI5	Military Intelligence, Section 5 (UK)	TFG	Transnational Federal Government (Somalia)
MİT	National Intelligence Organization (Turkey)	TIDE	Terrorist Identities Datamart Environment (US)
MOD	Ministry of Defence (UK)	TNG	Transitional National Government (Somalia)
NGO	Non-government organisation	TSC	FBI's Terrorist Screening Centre (US)
NPO	Non-profit organisations	UN	United Nations
OECD	Organisation for Economic Co-operation and Development	UNISOM	United Nations Operation in Somalia
OFAC	Office of Foreign Assets Control, U.S. Department of the Treasury (US)	UNRWA	UN Relief and Works Agency for Palestine Refugees
OPT	Occupied Palestinian Territories	UNSCR	United Nations Security Council Resolution
PA	Palestinian Authority	USAID	US Agency for International Development
PFLP	Popular Front for the Liberation of Palestine		
PKK	Kurdistan Workers' Party		
PLF	Palestine Liberation Front		
PLO	Palestine Liberation Organisation		
PYD	Democratic Union Party (Syria)		
SDGT	Specially Designated Global Terrorist (US designation list)		
SDN	Specially Designated Nationals (US designation list)		
SIC	Shari'a Implementation Council (Somalia)		
SRRC	Somali Reconciliation and Rehabilitation Council		
SSDF	Somali Salvation Democratic Front		
TAK	Kurdish Freedom Falcons		

Introduction:

Peacebuilding In A War Without End

As the global 'war on terror' continues to unfold, a new enemy 'even more extreme' than Al-Qaida has breathed new life into a legal, political and military campaign that many people thought, or hoped, would be temporary or exceptional. Instead, the 'age of permanent war' envisaged by some of its principal architects is back with a vengeance. As the bombs fall on Islamic State in Iraq and Syria, a swathe of new individuals and groups are designated by the UN Security Council as 'associated with' Al-Qaida, and counterterrorism statutes across the world are transformed to prevent 'foreign fighters' joining ISIS and to counter radicalisation, recruitment and extremism domestically.

For those interested in peace and the non-violent resolution of conflict the prognosis is not good. Not just because the war on terror keeps producing enemies with whom, it is said, there is no negotiating, but because the legal and political framework it has engendered has transformed the way in which political violence and armed conflict is understood and managed. At the heart of this transformation is the freedom for governments to apply the terrorist label to groups and individuals on the basis of very broad definitions of what 'terrorism' entails, or in the absence of any meaningful criteria at all – leading to a glut of terrorist designations. Longstanding armed conflicts between states and non-state actors have been recast into domestic wars on terror, undermining principles of international law that govern the legitimate use of violence. Meanwhile, counterterrorism has been used by repressive governments to systemise state violence, and as a pretext to repress opposition of every political stripe: from social and religious, to protest and separatist. The research that follows explores the impact of terrorist proscription and counterterrorism laws on peacebuilders and peacebuilding more generally.

Counterterrorism and peacebuilding are understood as distinct responses to political violence that may be deployed independently or in tandem by local and national governments and international actors. We are concerned with the tensions between these strategies that emerge at the legal, political and practical level. This report represents the first study to connect analysis of counterterrorism laws together with an attempt to assess the impact of terrorist proscription on peacebuilding.[1] The report combines legal and political analysis with in-depth case studies including the testimony of those engaged in conflict transformation. It focuses on the use of counterterrorism law and policy in the management of conflict with Al-Shabaab in Somalia, Hamas in the Occupied Palestinian territories, and the Kurdistan Workers' Party in Turkey.

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1   It builds on prior studies of the impacts of counterterrorism listing on peacebuilders: Sophie Haspeslagh, ""Listing terrorists": the impact of proscription on third-party efforts to engage armed groups in peace processes - a practitioner's perspective," Critical Studies on Terrorism 6, no. 1 (2013); Veronique Dudouet and Sophie Haspeslagh, "Mediating Peace with Proscribed Armed Groups: A Policy Workshop Report on the Implications of European Union Counter-Terrorism Legislation for Mediation and Support for Peace Processes," (London and Berlin: Conciliation Resources and Berghof Peace Support, 2011).

The impetus for the report was the authors' own experience and engagement with counterterrorism laws. We have long been concerned that terrorist proscription regimes – the laws and powers that allow executive actors to designate individuals and entities as terrorist – do not stop at those who perpetrate, or threaten acts of violence for political ends. Rather, they are designed to ensnare the financial, material and ideological supporters of groups listed as terrorist as well as broader forms of social affiliation – that is, to delegitimise both listed groups and the networks around them by disrupting forms of association.

A plethora of international, regional and national lists now span the globe, containing thousands of designated terrorist entities and their perceived and alleged supporters. As well as implementing UN sanctions regimes, a number of UN Security Council Resolutions impose legal obligations on states to institute domestic counterterrorism laws. In addition to criminalising non-state armed groups, political parties, non-government organisations (NGOs), charities, activists, dissidents and others have inevitably been caught in the net, whether listed directly or through association with listed parties. The effects vary according to the applicable legal regime, but the sanctions typically include asset-freezes, travel bans, arms embargoes and the criminalisation of membership and support for banned groups.

While practices of rendition, torture and drone strikes have elicited far more interest on the part of the media and human rights organisations, academic lawyers have spent more than a decade discussing the fundamental problems of terrorist listing. Initially these concerns focused on issues pertaining to executive power (who decides on listing?); the nature of the supranational legal order (what effects do UN lists have on national legal systems?); due process (how does someone get off the list?) and individual rights (can the interference with property, reputation, association and movement etc. be legally justified?). Over time, political scientists, criminologists, security scholars and others have stressed the increasing pervasiveness of preemption to advance the war on terror, both within and well beyond the confines of criminal law.

More recently, attention has focussed on the impact of these regimes on aid and development organisations, who have found themselves unable to carry out their mandates for fear of breaching terrorist sanction regimes or falling foul of laws criminalising 'material support' for terrorism or the financing of terrorism. This has resulted in some states granting very limited 'humanitarian exemptions' for organisations providing aid and relief to populations in areas controlled or frequented by proscribed terrorist organisations.

In 2010, this debate expanded to encompass the activities of other non-governmental organisations engaged with proscribed groups. The non-profit Humanitarian Law Project's pre-enforcement challenge to the material support provisions in the USA's PATRIOT Act sought to overturn what it saw as overbroad provisions in the law. Instead, the US Supreme Court found that the Project's proposed assistance to the proscribed Kurdistan Workers' Party (PKK) in Turkey and Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka – which took the form of training in humanitarian and international law for conflict resolution – could indeed constitute material support as envisaged by the legislature. And because those provisions can be applied extra-territorially, anyone providing this kind of material support to proscribed groups *irrespective of location or nationality* could potentially face prosecution and incarceration in the US.

Although the ruling sent shockwaves through the peacebuilding community, there have been surprisingly few attempts to reconcile the idea that counterterrorism measures which target associations are not simply 'unintended consequences'. The prosecution of the war on terror had already presented a formidable challenge to those seeking the peaceful resolution of conflicts caused by legitimate or long-festering grievances. In this context, how could professional mediators, peacebuilding organisations and other conflict resolution actors continue to engage in confidence that their activities were both legitimate and lawful? This uncertainty was exacerbated because as terrorist listing has proliferated around the world, US laws have become embedded in a complex, global legal regime. If this globalised regime also views aspects of peacebuilding as providing legitimacy to non-state armed groups, are the fundamental norms of conflict resolution being reshaped?

In our view, these questions have not been answered satisfactorily. There is a growing consensus that laws prohibiting support to listed entities have contributed to a 'shrinking space' for those seeking to establish the conditions conducive to peace. Peacebuilders have pointed to a reduced engagement with listed entities and compromised neutrality as evidence that listing erodes inclusive conflict transformation norms and a focus on addressing the root causes of conflict. There is, however, very little certainty regarding the legal and political implications of the lists for third-party engagement with entities and individuals designated as terrorist. In findings that should give the sector pause for thought, we suggest that disrupting and undermining core elements of emancipatory peacebuilding work are a central feature of the international counter-terrorism framework.

1.   Scope of the study

In critically examining the effects of global counterterrorism listing on peace processes with non-state actors involved in armed conflicts, we address a problem that has been understudied in the peacebuilding, sanctions and security fields to date. As noted above, when the impacts of listing on conflict resolution *are* acknowledged they are usually categorised as 'unintended consequences', echoing the broader 'collateral damage' narrative. This study challenges this prevailing assumption, exploring these collateral, granular effects in detail to better understand their dynamics and open up a much-needed space for political and policy debate. The key research questions we have sought to address throughout the study include:

- What are the legal and political implications of terrorism lists for third-party engagement with listed entities and individuals?

- In what ways does terrorism listing strengthen, undermine or otherwise transform the nature of existing armed conflicts?

- What are the broader political effects of counterterrorist listing regimes and how might these adverse impacts be most effectively addressed?

To examine these issues we have adopted a deliberately broad definition of what constitutes 'peacebuilding' - one that extends to include conflict resolution actors, NGO and civil society organisations undertaking peace, development and human rights advocacy work, diaspora groups, professional mediators and others whose work is aimed (either directly or indirectly) at transforming or managing the dynamics of armed conflicts.[2] We have largely excluded humanitarian actors from the scope of our analysis because the impact of counterterrorism on humanitarian access has already been subjected to limited investigation and humanitarian actors and peacebuilders are differentially positioned vis-à-vis international humanitarian law.[3] But where humanitarian actors have engaged in peacebuilding activities we have sought to include their views. Further, many of the key findings of this study concerning impacts on peacebuilding may also apply analogously in the humanitarian domain.

A key aim of our research is to provide a resource for peacebuilders to reflect upon the significance of their own practices in relation to counterterrorism laws. We do this in Chapter 1 by developing an analysis of the global counterterrorism listing

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2   On civil society peacebuilding see in particular, Thania Paffenholz (ed) 2010. *Civil Society and Peacebuilding: A Critical Assessment* (Boulder: Lynne Rienner Publishers). The literature on diasporas as conflict resolution actors is vast. For a good introduction see Bahar Baser and Ashok Swain, 'Diasporas as Peacemakers: Third Party Mediation in Homeland Conflicts', (2008) 25(3) International Journal on World Peace 7 - 28.

3   See, for example, Kate Mackintosh and Patrick Duplat (2013) *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action* (OCHA and NRC). See also the numerous research publications on this topic issued by the *Counterterrorism and Humanitarian Engagement Project* at Harvard University, now Program on International Law and Armed Conflict: Available at: http://pilac.law.harvard.edu/counterterrorism-and-humanitarian-engagement-project/

regime applicable to peacebuilders, and in Chapter 2 by charting the broader structural changes to the legal regulation of armed conflict. We also do this in subsequent chapters by analysing these broader dynamics in respect to each of the case studies.

By 'counterterrorism listing' we refer to the practice of designating a group or individual as terrorist, targeting them with sanctions and legally prohibiting others from associating with or otherwise supporting them. We take a multi-scalar approach analysing terrorist proscription policies at the global, regional and national levels. Whilst we have tried to focus our research on the singular effects of terrorist listing, this is difficult to achieve in practice because listing is usually deployed as one part of a much broader array of preemptive security and military techniques designed to disrupt, undermine or even destroy non-state armed actors deemed terrorist. This renders the effects of listing difficult to gauge in isolation from complex, transnational, political strategies.

2.   Selection of case studies

In the empirical case-studies presented in Chapters 3 – 5 we examine the development and impact of counterterrorism measures against Al-Shabaab, Hamas and the Kurdistan Workers' Party respectively. We provide some background to the conflicts and focus specifically on the relationship between these counterterrorism measures and formal peace processes - analysis that is frequently omitted from comparable studies. We then analyse the interview material to demonstrate the different ways in which counterterrorism listing is understood to be impacting upon, and transforming, contemporary peacebuilding practices by those who are intimately involved in them.

We selected these case studies for specific reasons. At the time Al-Shabaab was designated as a terrorist organisation they effectively controlled much of south-central Somalia. Scores of peacebuilding and humanitarian organisations have long been operating in that region in circumstances where they "were forced to engage, directly or indirectly, with the group in order to continue working".[4] Somalia was also chosen because one of us had previously provided legal advice to peace organisations working there. As such, we already had some understanding of the issues involved and were more readily able to access peacebuilding networks engaged there. Whilst the impact of counterterrorism measures on humanitarian access in Somalia has had some public attention, the impacts on peacebuilding has not. Organisations undertaking peace and development work in the region have been forced to navigate a complex array of laws and regulations to avoid potential prosecution for 'supporting terrorism'. How these complexities are being mediated, and the effects of this process for both peacebuilding and security, are subject to examination in Chapter 3.

Unlike the other listed groups we analysed, Hamas won free and fair elections in the Occupied Palestinian Territories (OPT) and constitute the *de facto* government in the Gaza Strip. One of our main intentions was to better understand how peacebuilders can continue to engage in their work when the government of the territory they inhabit is itself listed as a terrorist organisation. For the OPT, the impact of the counterterrorism measures imposed by external actors is inextricable from the wider architecture of Israel's occupation and concerted efforts to undermine Palestinian resistance and international support for Palestinian self-determination. The paralysis in the formal Middle East Peace Process (MEPP) was intimately related to the decision to criminalise and exclude Hamas. These external attempts to delegitimise the organisation were impacting on broader conflict transformation efforts. Chapter 4 therefore examines the way in which the proscription of Hamas fits into the history and politics of the MEPP and how this decision has constrained or transformed the perceptions and activities of peacebuilders themselves.

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4   Ashley Jackson and Abdi Aynte, *Talking to the Other Side: Humanitarian Negotiations with Al-Shabaab in Somalia* (HPG Working Paper, December 2013) at 9.

The conflict between Turkey and the PKK was selected primarily because of the evidence that large-scale counterterrorism operations directed against Kurdish civil society have exacerbated the causes and effects of the conflict, while undermining attempts to build a Kurdish political movement capable of shifting the PKK away from armed struggle. One of the Study's authors also has considerable prior experience working with members of the Kurdish diaspora investigating how counterterrorism laws affect their political engagement in the conflict. Unlike Somalia and the OPT, the Kurdish conflict is marked by the relative absence of publically engaged international peacebuilding organisations, as conventionally understood. Chapter 5 explores the particular role that terrorist listing has played in disrupting and delimiting possibilities for resolving this conflict – both within Turkey and beyond, amongst the Kurdish diaspora. The recent rise of ISIS has served to broaden the international legitimacy of the PKK. The changing geopolitics in this region may ultimately prove a game-changer in terms of determining whether the PKK remain listed as terrorists and are able to engage in a meaningful peace process.

3.   Methodology

This study is based on more than 60 semi-structured interviews undertaken with key actors engaged in the conflict resolution field. Interviewees primarily included (i) peacebuilders, professional mediators, human rights and social justice advocates working with international NGOs (INGOs) in proximity to listed groups and individuals and (ii) national government and EU officials responsible for conflict resolution, development, security and foreign policy issues in our case study regions. Chapter 5 also builds on interviews with two Kurdish negotiators who are themselves subject to individual US sanctions.

Although this report is about the impact of global counterterrorist regimes on peacebuilding, we are neither peacebuilders nor international lawyers. Our methodology reflects our 'observant participation' in legal advocacy, law and policy reform and in community based campaigns about counterterrorism. We see global counterterrorism laws as distinct practices within warfare and counterinsurgency, and we adopt a socio-legal approach to understanding law as a practice brought into being through interaction between actors and events. We do not therefore assert the disinterested position claimed by some social scientists, nor dwell on the limited prospects for proposed reforms, such as peacebuilding exemptions, which carry their own ethical and political dilemmas. We are concerned instead with provoking a more critical discussion of issues that get to the heart of peacebuilding – despite being talked about by so few peacebuilders.

Our analysis necessarily engages with the key counterterrorism laws applicable at the international, regional and national levels – including various UN Security Council Resolutions, EU restrictive measures and state counterterrorism legislation prohibiting support to listed terrorist groups and individuals. It would be impossible to comprehensively analyse all laws that might apply to peacebuilders working in proximity to listed groups. The laws applicable in any given situation will always be fact and context specific. To be clear: our analysis of counterterrorism law in this study does not in any way purport to offer legal advice. Nor have we been able to review all relevant case law; we have instead highlighted the key provisions and themes common across the different legal jurisdictions.

Each chapter draws upon relevant academic and policy literature, however we have not delved into the key scholarly debates with the detail they deserve so as to keep the study publicly accessible and relatively succinct.

While counterterrorism laws and sanctions lists are publicly accessible, the operation of listing policies, the reasons for specific decisions and the enforcement of dissociation is usually secret. Thus we have supplemented our analysis with US Embassy Cables released by Wikileaks in 2010. These cables provide crucial insights into how the US government and other executive actors around the world understand and seek to govern the threat of groups and individuals deemed terrorist and how state security measures practically intersect with conflict resolution processes.

It is precisely because of the capacity of the global counterterrorism legal regime to target anyone providing any form of indirect assistance to listed parties that confidentiality was crucially important to all of those that we spoke with. Interviewees were each offered the opportunity for named reporting about these matters of concern, but most declined and opted to speak on condition of anonymity. We have therefore anonymised all interviews for consistency. The reasons given were varied. Most were concerned about the risk of unnecessarily involving the organisations they work with in legal and political conflict. Some were worried that by drawing attention to these issues their relationships with funders would be compromised. Others were concerned that openly expressing their views could even make themselves targets of preemptive security intervention. The fact that such a large group of participants from such diverse locations and institutional settings were all reluctant to talk openly about the impact of counterterrorism policies on their work highlights just how contentious these measures are in practice, and underscores the urgent need for open public discussion about their adverse effects. We hope that this report helps encourage and facilitate such debate.

Chapter 1

Counterterrorism Laws and Peacebuilding

Introduction

This chapter outlines the legal frameworks produced by different counterterrorism listing and proscription regimes. Its aim is twofold. First, to introduce the complex global legal terrain that comes into play when conflict resolution occurs in proximity to armed groups listed as 'terrorist'. Second, to underscore how these laws aim at the preemptive disruption of social affiliations and indirect associations with listed parties and not merely the prevention of terrorist acts. Reframing global counterterrorism law in this way helps demonstrate that its adverse effects are not merely 'unintended consequences'. The fact that peacebuilding is captured by counterterrorism law is part of the preemptive security logics these laws put into effect.

We start our analysis by highlighting key features of United Nations (UN), European Union (EU) and national counterterrorism measures that potentially apply in this domain. Properly understanding their effects, however, requires three lines of enquiry. First, these frameworks should be analysed *in relation* to each other rather than in isolation as distinct jurisdictions. Second, we need to move beyond the 'letter of the law' to examine how counterterrorism measures unfold in practice.[1] Finally, a *global* analysis is required because peacebuilding in proximity to listed groups always operates in a transnational setting where the laws of multiple jurisdictions overlap and potentially apply. Knowing *what* laws apply *where* in any given situation is an uncertain and complicated affair. To address these concerns, we use a global socio-legal approach to understand how security listing and sanctions regimes affect peacebuilding practices.[2]

The chapter is divided into two main parts. Sections 1-3 outline the most important prohibitions imposed by UN, EU and national counterterrorism measures and examine how they apply to peacebuilding in proximity to listed groups. Emphasis is placed on both the key legal provisions and their underlying preemptive rationale, including the targeting of indirect associations with listed parties. Since 9/11, due largely to Security Council activity in this area, counterterrorism listing has proliferated worldwide. It is therefore imperative that peacebuilders adopt a comparative, global legal perspective when assessing the legality of their operations.

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1   The exercise of discretion, the disruptive rationale of these measures and the manifold ways that peacebuilders regulate their own behaviour are all important elements, for example, that define what counterterrorism law 'is' in this domain.

2   Eve Darian-Smith, *Laws and Societies in Global Contexts: Contemporary Approaches* (New York: Cambridge University Press, 2013), 12-15.

The second section draws together key elements that emerge through the interaction of the supranational, regional and national counterterrorism frameworks – including the targeting of indirect associations through disruption, the proliferation of preemptive security listing across different public and private domains, and the plural legal context these frameworks establish. The fact that relatively few (if any) peacebuilders have been prosecuted under counterterrorism laws – the number depends upon the scope of the definition that is employed – might suggest that they are only tangentially entangled in the law's scope. To measure the effects of these laws by focusing solely on criminalisation, however, would be to miss how preemptive, administrative security regimes work. Counterterrorism lists realise their coercive potential through disrupting otherwise lawful associations and forcing actors to change their behaviour to avoid liabilities, rather than simply through initiating criminal proceedings. In this way, as detailed in the following chapters, sanctions, listing and terrorist proscription can produce radical effects on peacebuilding without ever having recourse to criminal prosecution or implementation of administrative sanction.

1. Global counterterrorism, targeted sanctions and terrorist proscription regimes

1.1 UN targeted sanctions: the global legal architecture of the war against terror

Under Chapter VII of the UN Charter, the Security Council has the power to determine threats to international peace and security and take steps to counter them using methods other than military force (such as sanctions). All Member States are bound to implement Security Council measures adopted under Chapter VII of the Charter.[3] Between 1945 and 1990, due largely to Cold War deadlock, the Security Council only reached agreement on multilateral sanctions on two specific occasions – against Rhodesia in 1966 and South Africa in 1977. But with the end of the Cold War, a new era of political possibility opened within the Council that allowed them to use their coercive sanctioning powers more broadly. The 1990s thus saw an unprecedented expansion of UN sanction activity and has been described as 'the sanctions decade'.[4] After the disastrous experience of comprehensive multilateral sanctions against Iraq - which were widely condemned for having a minimal impact against the regime yet a devastating impact upon the wider population they ultimately aimed to support - the UN increasingly used 'targeted' sanctions against specific individuals and groups rather than entire populations. All UN sanctions regimes that have been created since 1994 have been 'targeted' rather than comprehensive in scope.[5]

UN targeted counterterrorism sanctions first emerged during this time. In 1992, the Security Council used sanctions to pressure Libya to extradite officials suspected of involvement in the bombing of the 1988 Pan Am Flight over Lockerbie Scotland.[6] In so doing, they took the ground-breaking step of construing Libya's failure to extradite terrorism suspects as a threat to international peace and security. Then in 1999 - following the Al-Qaida attacks on the US embassies in Kenya and Tanzania – the Security Council passed Resolution 1267. The aim of the Resolution - which called upon all states to freeze the funds and other financial resources, either directly belonging to or indirectly benefiting, the Taliban - was to exert pressure on the Afghan regime to extradite Osama bin Laden. To facilitate this coercion, the Resolution set up a Sanctions Committee, consisting of all permanent members of the Security Council, tasked with drafting and administering a blacklist of individuals and entities 'associated with' the Taliban, whose assets were to be targeted. The attacks of 11 September 2001, however, radically altered the substance, reach and coercive power of UN counterterrorism sanctions and empowered the Security Council as a key actor in the fight against global terrorism. Two measures, briefly outlined below, are critical to understanding the Security Council's

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3   UN Charter, Arts. 39, 41
4   David Cortright and George Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Boulder Colorado: Lynne Rienner Publishers, 2000).
5   Thomas J. Biersteker et al., "The Effectiveness of United Nations Targeted Sanctions: Findings from the Targeted Sanctions Consortium,"
     (Providence, Geneva: Targeted Sanctions Consortium; The Graduate Institute Geneva; Watson Institute for International Studies, November 2013).
6   Vesselin Popovski, "Fighting the Colonel: Sanctions and the Use of Force," Jindal Journal of International Affairs 1, no. 1 (2011).

post-9/11 expansive counterterrorism functions and the case studies presented in Chapters 4 and 5. Additional measures (relating to Somalia) are also outlined because they are crucial to the findings presented in Chapter 3.

(i)   Resolution 1373 (2001) and the policy of global proscription

In the immediate aftermath of the 9/11 attacks, the Security Council adopted Resolution 1373. This resolution - which has been described as "the most sweeping sanctioning measures ever adopted by the Security Council"[7] - requires all states to introduce laws to criminalise, prevent and disrupt terrorist financing by freezing the funds of those who commit terrorist acts and those *associated* with them.[8] It also requires states to prohibit making funds, financial assets, economic resources or financial or related services available for the benefit of persons or entities that commit terrorist acts, either directly or indirectly. This mandatory prohibition is extremely broad. It includes acts that attempt, facilitate or participate in terrorist acts. The resolution also created the UN Counter-Terrorism Committee (CTC) to monitor state compliance.

Resolution 1373 created a new legal framework for globally prohibiting the provision of 'material support' and has led to the worldwide introduction of state criminal liability for terrorist financing. Rather than establishing a specific UN terrorist sanctions list, the resolution devolves power to Member States to enable them to either amend their existing laws or introduce new measures to implement the prohibition. Whilst state compliance reporting under earlier comprehensive sanctions regimes was "sporadic and often laconic",[9] Resolution 1373 required states to report to the CTC within 90 days to explain what they had done to comply with the measures. In this way, the resolution provides a crucially important international law source for legitimising domestic and regional counterterrorism proscription regimes. Whilst it demands that states criminalise the support and financing of terrorism, 'terrorism' is itself left undefined in the resolution and has no globally agreed meaning.[10] It is instead left open for states to define terrorism on their own terms, which helps explain why it has been so rapidly implemented by national executives worldwide.[11] The "compliance with Security Council resolutions", such as Resolution 1373, "has strengthened both the Security Council… and also the absolute power of national executives".[12] Resolution 1373, and the global proscription policy that it creates, is therefore central to what Kim Lane Scheppele terms the post-9/11 'international state of emergency'.[13]

The implementation and coercive effects of Resolution 1373 are further supplemented by the international standards issued by the Financial Action Task Force (FATF). In 2001 the FATF extended their money-laundering monitoring mandate to intervene in this domain, issuing recommendations and policy guidance on measures to counter the financing of terrorism (CFT). These recommendations expand the scope of Resolution 1373's prohibitions in critically important ways. According to the FATF, for example, states "should criminalise not only the financing of terrorist acts but also the financing of terrorist organisations and individual terrorists *even in the absence of a link to a specific terrorist act or acts*."[14] Whilst these recommendations do not have binding legal effect, members of the FATF are committed at ministerial level to putting them into practice or transposing them into national law. Moreover, because non-compliant states are 'named-and-shamed', good compliance ratings – as determined by FATF evaluations – are of particular importance for "developing countries seeking aid, trade and investment",[15] giving

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7   Christina Eckes, EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions (Oxford: Oxford University Press, 2009), 38.

8   UNSCR 1373 (2001) para. 1(c).

9   Vera Gowlland-Debbas, "Sanctions Regimes under Article 41 of the UN Charter," in *National Implementation of United Nations Sanctions: A Comparative Study*, ed. Vera Gowlland-Debbas (The Hague: Martinus Nijhoff, 2004), 21.

10   Ben Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2008).

11   Kim Lane Scheppele, "The International State of Emergency: Challenges to Constitutionalism after September 11," in *Yale Legal Theory Workshop* (New Haven: Princeton University, 21 September 2006).

12   Ibid., 6.

13   Ibid.

14   Financial Action Task Force, "International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations," (Paris: Financial Action Task Force, February 2012), Recommendation 5, p13.

15   Ben Hayes, "Discussion paper on the unintended consequences of AML-CFT standards for civil society and fundamental rights," *Prepared for the Open Society Foundations (OSF) - Human Security Collective (HSC)* Unpublished (March 2014): 2.

added weight to this highly contested approach to criminalisation. The indirect leverage exerted by the FATF has dramatically hastened the global uptake of counterterrorism laws. Although they arise from different sources of formal legal authority, Resolution 1373 and the FATF CFT Recommendations need to be understood as complementary though disparate elements within the same global legal assemblage.

(ii)   Resolutions 1267 (1999), 1390 (2002) and the targeting of global terrorist networks

The UNSCR 1267 targeted sanctions regime was also subject to radical modification in response to global terrorist attacks. As outlined above, the regime was originally aimed at the Taliban in Afghanistan. A Sanctions Committee was set up, composed of all members of the Security Council, to draft and administer a list of individuals and entities subject to sanction.[16] After the Al-Qaida bombing of the USS Cole in Yemen in October 2000, however, the Security Council broadened the scope of the regime's asset freeze to include assets not only of the Taliban, but also Osama bin Laden any others deemed 'associated with' him ("including those in the Al-Qaida organisation") as listed by the UNSCR 1267 Sanctions Committee.[17] Following the 9/11 attacks in September 2001 the sanctions were dramatically modified once more.[18] The need for any geographic connection with Taliban-controlled, Afghan territory was removed and the time limitations on the sanctions were effectively abolished. As a result, the Security Council's Chapter VII targeting powers were redefined as spatially and temporally *unlimited*. Previously, UN sanctions had targeted either states or the political elites connected with states. But since these changes in 2002, the UNSCR 1267 regime has targeted suspected terrorist networks around the world.[19]

The UNSCR 1267 sanctions regime therefore operationalises a 'netwar' approach to counterterrorist financing built upon the preemptive targeting and disruption of potential associational networks.[20] Networked warfare is commonly perceived by security analysts and counterterrorism sanctions officials as a threat that is leaderless, loose and dispersed - rather than hierarchical and tightly structured – and something that is developed through familial, friendship and other social affiliations.[21] Because terrorist network recruitment and support is assumed to be deeply integrated into social networks, it is seen as "unrecognisable in form and strategy from transnational political movements or diaspora networks, but for the deployment of violence."[22] Charities, non-government organisations, social groups or clans who work in proximity to designated groups or individuals are all potential terrorist 'associates' according to this prevalent 'netwar' logic.[23]

The targeting of distributed and socially embedded terrorist networks necessarily requires broad associational standards to be deployed. In 2005 the Security Council sought to clarify what kind of 'association' could trigger listing. 'Associated with' extends to:

• participating in the financing, planning, facilitating, preparing or perpetrating of acts or activities by, in conjunction with, under the name of, or in support of;

• supplying, selling or transferring arms and related material to;

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16   UNSCR 1267 (1999), para. 6
17   UNSCR 1333 (2000)
18   UNSCR 1390 (2002)
19   See, for example, Gavin Sullivan and Ben Hayes, "Blacklisted: targeted sanctions, preemptive security and fundamental rights," in *10 years after 9/11 Publication Series*, ed. ECCHR (Berlin2010), 12.
20   Vicki Sentas, *Traces of Terror: Counter-terrorism law, policing and race* (Oxford: Oxford University Press, 2014); Sullivan and Hayes, "Blacklisted: targeted sanctions, preemptive security and fundamental rights." On 'netwar' see John Arquilla, David Ronfeldt, and Michele Zanini, "Networks, netwar, and information-age terrorism," in *The Changing Role of Information in Warfare*, ed. Zalmay M. Khalilzad and Whitem Jon P. (Santa Monica: RAND, 1999).
21   Sentas, *Traces of Terror: Counter-terrorism law, policing and race*: 238-80.
22   Ibid., 252.
23   See, for example, FATF Recommendation 8, which expressly warns of the risks that charities pose in terrorist financing: Financial Action Task Force, "International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations," 13.

• recruiting for; or

• otherwise supporting acts or activities of;

Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof. [24]

Targeting through association was at first a relatively novel approach for the Security Council. Earlier sanctions directed against Iraq, for example, were confined to those who were "owned or controlled, directly or indirectly" by already listed entities.[25] However, it has since become more prevalent for UN targeting and has been extended to numerous other sanctions regimes – including those concerned with the Taliban, Eritrea, Somalia, Liberia and Libya. It is crucial to remember that the isolation and disruption of potential association is a specific aim of this kind of preemptive security measure. Moreover, intention or knowledge that funds might be used to support terrorist acts is expressly *not* required to justify designation according to this logic. As detailed in our case studies in chapters 3 - 5, it is principally by potential inclusion within such broad associational networks that peacebuilders come to be indirectly targeted by counterterrorism measures.

(iii) Resolutions 751 (1992), 1844 (2008) and the targeting of Al-Shabaab

Somali sanctions partly complement the UN Al-Qaida sanctions regime and provide the legal context for the empirical case study discussed in Chapter 3. UN sanctions were first applied to Somalia in 1992 with the adoption of Resolution 751, which enforced an arms embargo on the country.[26] But in 2008, with the adoption of Resolution 1844, this comprehensive regime was transformed into a more calibrated, targeted one. The Somali Sanctions Committee were empowered to list individuals and groups deemed to threaten either the Somali peace process, the Transitional Federal Institutions or African Union Mission in Somalia, as well as those who violate the arms embargo or obstruct the delivery or distribution of humanitarian assistance in the country.[27] Those listed are subject to asset-freezing, a travel ban and arms embargo. At first glance, the criteria for listing in the Somali sanctions regime appears to be narrower than that used in the Al-Qaida context because it is limited to those who support *acts* that threaten peace. But involvement in recruitment and/or solicitation of funds for Al-Shabaab or any other listed group provides sufficient grounds for targeting, confirming that these sanctions target associations, despite utilising different language.[28]

Almost all of those listed in the Somali sanctions regime are either suspected members or otherwise deemed to be associated with Al-Shabaab. A number of those targeted are subject to UN sanctions under both the Somali and Al-Qaida regimes. Unlike the Al-Qaida list - which at its 2009 peak reached 504 designations (397 individuals and 107 entities)[29] - the Somali sanctions list has remained relatively small. The most recent revision (from March 2014) lists, for example, Al-Shabaab and 12 individuals. The Somali sanctions regime prohibits the provision of technical support, training and financial services to those listed.[30] More importantly, however, it obliges states to target the material support to, and potential association with, Al-Shabaab by preventing the provision of "funds, financial assets or economic resources… from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit" of those listed.[31]

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24 UNSCR 1617 (2005) para. 2
25 UNSCR 1483 (2003) para. 23(b).
26 UNSCR 733 (1992); UNSCR 751 (1992).
27 UNSCR 1844 (2008) para. 8.
28 See the 'List of individuals and entities subject to the measures imposed by paragraphs 1, 3 and 7 of the Security Council Resolution 1844 (2008)'.
29 Thomas J. Biersteker and Sue E. Eckert, "Addressing Challenges to Targeted Sanctions: An Update of the "Watson Report" " (Geneva; Providence, Rhode Island: The Graduate Institute; Watson Institute for International Studies, Brown University, October 2009), 7.
30 UNSCR 1844 (2008) para. 3.
31 UNSCR 1844 (2008) para. 3.

1.2   The European Union: a regional approach to countering terrorism

All of the UN Security Council resolutions and sanctions lists outlined above are separately implemented by the European Union.[32] Because the EU interconnects the legal systems of 28 different Member States, including some of the most influential in the security and peacebuilding domains, it is one of the most powerful jurisdictions in the world. Understanding the prohibitions and possibilities imposed by EU security measures is critical in assessing the impact of global counterterrorism policies on peacebuilding.

Since 2001, the EU has implemented Resolution 1373 through its own 'autonomous' terrorism list which is binding on all EU Member States. The autonomous EU list currently designates 25 individuals and 29 groups as entities involved in 'terrorist acts' - including Hamas, Palestine Liberation Front, Popular Front for the Liberation of Palestine, the Kurdistan Workers' Party, the Liberation Tigers of Tamil Eelam and the US-based charity, the Holy Land Foundation for Relief and Development.[33] Decisions to designate a group or individual as terrorist on the autonomous EU list are formally taken at ministerial level by the Council of the EU. All EU states are obliged to prevent "funds, other financial assets and economic resources" from being made available (either directly or indirectly) to listed individuals and groups.[34] Knowingly and intentionally circumventing these measures is separately prohibited.[35] Although the EU measures implement the legal prohibitions, it is left up to Member States to determine violations and handle enforcement.

Separate regulations implement the UN Al-Qaida sanctions into EU law.[36] Whilst amendments to the UNSCR 1267 list are not automatically incorporated at the EU level, EU authorities have precisely copied every amendment that has been made at the UN level to date,[37] without considering whether the names have been justifiably included. This has led to a plethora of due process litigation brought by targeted individuals before the European Courts - including a politically controversial 2008 decision where the European Court of Justice (ECJ) held that the implementation of UN Al-Qaida sanctions into the EU legal order was unlawful for breaching fundamental defence rights.[38] Many of these due process protections have since been extended by the Courts to also apply to those listed under the EU autonomous terrorism regime.[39] In addition to freezing the assets and banning the travel of those designated on the UNSCR 1267 list, the EU Al-Qaida regulations prohibit making funds and economic resources available to, or for the benefit of, those listed. It is irrelevant whether funds or economic resources are made available *directly* to those listed or provided *indirectly* through third party intermediaries, expanding the reach of the lists significantly.

UN Somalia sanctions are translated into EU law using very similar regulatory provisions.[40] As with the Al-Qaida regulations, the EU Somalia regulations prohibit the provision of funds and economic resources to listed individuals and groups. 'Funds' are defined extremely broadly to include "financial assets and *benefits of every kind*" whilst 'economic resources' expansively

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32 The EU is, of course, not the only regional organisation to take action in this area. Implementation of Resolution 1373 has also been encouraged by the African Union, the Organization of American States, the Association of South-East Asian Nations, the Commonwealth of Nations, and the Organization for Security and Cooperation in Europe. For details of the specific plans adopted by regional bodies see Scheppele, "The International State of Emergency: Challenges to Constitutionalism after September 11," 17-18.

33 Council Common Position 2009/468/CFSP and EC Regulation 2580/2001 (27 December 2001). Al Qaida and Al-Shabaab are separately targeted by EU regulations implementing the UN1267 and UN1844 regimes respectively, as outlined below.

34 EC Regulation 2580/2001, Art. 2.

35 EC Regulation 2580/2001, Art. 3.

36 Common Position 2002/402/CFSP, EC Regulation 881/2002.

37 Cian Murphy, *EU Counter-Terrorism Law: Pre-emption and the Rule of Law*, Modern Studies in European Law (Oxford: Hart Publishing, 2012), 123-24.

38 Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, [2008] ECR I-6351. For a summary of the key litigation to 2010, see Sullivan and Hayes, "Blacklisted: targeted sanctions, preemptive security and fundamental rights," 41-75.

39 Murphy, *EU Counter-Terrorism Law: Pre-emption and the Rule of Law*: 130-36.

40 Council Decision 2010/231/CFSP, Council Regulation No. 356/2010

include "assets of every kind… which are not funds but may be used to obtain funds, goods or services". [41] Knowledge that funds or resources are provided to carry out acts that 'threaten the peace, security or stability of Somalia' or 'obstruct the delivery of humanitarian assistance' is not required to breach these regulations. [42] Instead, it is enough that one either knows, or ought to have known, that the recipient is Al-Shabaab or an individual included on the Somalia sanctions list. [43]

Whilst EU decisions implementing UN sanctions have been subjected to considerable litigation in the EU courts, most cases have turned on the violation of due process and fundamental rights protections. [44] There have been few decisions where the meaning and scope of the prohibitions have been subject to clarification by the EU courts. This is particularly troubling for peace organisations and others working in proximity to listed parties where the provision of administrative fees or minimal resources to those involved in conflict transformation processes may become a contentious issue. It is even more problematic where a proscribed organisation is in *de facto* government, as is the case for Hamas in the Gaza Strip.

The 2010 case of *M and Others v HM Treasury*, for example, was brought by several spouses of individuals listed under the EC Al-Qaida Regulation, which prohibits indirect support to listed individuals. [45] The UK government had interpreted this to mean that the welfare benefits of the spouses of listed individuals required restriction to prevent indirect support to those on the list. But the ECJ rejected this interpretation, determining that only funds that could be used to support terrorist activities (that is, not welfare benefits) were subject to prohibition. [46] This case suggests that in the EU not all provisions of resources to listed parties will amount to terrorist financing and that the purpose for which someone provides material support may influence the scope of the prohibition. But a subsequent decision renders this common-sense understanding of EU counterterrorism law problematic. The case of *E & F* involved two defendants who faced criminal proceedings in Germany for transferring funds to the listed group Devrimci Halk Kurtuluş Partisi-Cephesi (DHKP-C), a Turkish Marxist-Leninist group that is also proscribed in the US and UK. [47] Unlike in *M & Others*, the Court held here that the distinction between resources capable of being used to support terrorist acts and those that were not so capable was irrelevant for the purposes of the prohibition. [48] They also rejected the argument, developed from *M & Others*, that it had not been shown that the funds were actually used by DHKPC to finance terrorist activities. Instead, the Court held that funds provided to listed entities, irrespective of intended purpose, "carry with them the danger that they may be diverted in order to support such activities". [49] The precise scope and meaning of EU regulations prohibiting indirect support to listed parties therefore remains uncertain, [50] and will likely remain subject to ongoing dispute into the future.

It is often said that the EU takes a less exceptional and more criminal justice based approach to the countering of terrorism than key national states in this area such as US. The *Framework Decision on Combating Terrorism* (the 'Framework Decision') issued by the Council of the EU, for example, requires member states to criminalise various acts related to terrorist acts and

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41 See Council Regulation No. 356/2010, Art. 1(a)
42 Council Regulation No. 356/2010, Art 2.
43 Ibid.
44 Sullivan and Hayes, "Blacklisted: targeted sanctions, preemptive security and fundamental rights," 41-75.
45 *Case C 340/08, M (FC) and Others v Her Majesty's Treasury,* Judgment of the European Court of Justice (Fourth Chamber) (29 April 2010) ('*M & Others*')
46 *Case C 340/08, M (FC) and Others v Her Majesty's Treasury,* Judgment of the European Court of Justice (Fourth Chamber) (29 April 2010), para. 59
47 Case C-550/09, *Criminal Proceedings Against E & F,* Judgment of the European Court of Justice (Grand Chamber)(29 June 2010) ('*E & F*')
48 Case C-550/09, *Criminal Proceedings Against E & F,* Judgment of the European Court of Justice (Grand Chamber)(29 June 2010) paras. 69-74.
49 Case C-550/09, *Criminal Proceedings Against E & F,* Judgment of the European Court of Justice (Grand Chamber)(29 June 2010) para. 77.
50 Cian Murphy, "Case C-117/06, Proceedings brought by Gerda Möllendorf and Christiane Möllendorf-Niehuus, Judgment of the European Court of Justice (Second Chamber) of 11 October 2007, [2007] ECR I-8361; Case C-340/08, M & Others v. Her Majesty's Treasury, Judgment of the European Court of Justice (Fourth Chamber) of 29 April 2010, nyr; Case C-550/09, Criminal Proceedings Against E & F, Judgment of the European Court of Justice (Grand Chamber) of 29 June 2010, nyr.," *Common Market Law Review* 48(2011): 260.

targets associations with 'terrorist' groups, broadly defined.[51] It is arguably the key EU policy document framing and informing the different counterterrorist sanctions regimes implemented at the EU level. The Framework Decision requires states to make "participating in the activities of a terrorist group" an offence, which is defined to include "supplying information or material resources, or by funding its activities in any way, *with knowledge* of the fact that such participation will contribute to the criminal activities of the terrorist group".[52] Though the scope of prohibited support is nominally broad, the requirement that it be provided in the knowledge that it contributes to terrorist activities narrows its potential scope in important ways. This contrasts with the US approach, as detailed below, where even support to listed groups for nominally lawful purposes (eg, human rights training, expert advice or assistance and potentially assistance in peace negotiation) is prohibited because it is thought to 'free up' their resources for terrorist activities.[53] Yet it would be mistaken to overstate the distinction or draw too firm a line between the EU and US in such matters. The preemptive approach to counterterrorism is now central and well established within EU security strategy – as exemplified in the Framework Decision on Terrorism, the EU strategies on terrorist financing and 'radicalisation and recruitment', and various instruments mandating the blanket retention of private data in case it is needed by police or security agencies.[54]

1.3   The counterterrorism laws of nation-states and list-based liabilities

UN and EU security measures create the legal architecture of global counterterrorism law, but it is through the laws of national states that implementation and enforcement takes place. Yet, there remains considerable diversity between states regarding implementation. For some, Security Council counterterrorism measures generate a 'fragmented' global legal landscape that makes national laws necessarily inefficient[55] and homogenous sanction implementation "impossible to achieve".[56] For others, such measures are seen as part of an emerging global constitutionalism reshaping national constitutional orders and disciplining states in accordance with new security principles articulated by the Security Council.[57]

In this report we deploy a global socio-legal approach to understand how counterterrorism listing and proscription regimes work.[58] In doing so, we start from the assumption that consistency and uniformity in state implementation is neither possible nor normatively desirable. National counterterrorism laws have long been guarded as prerogatives of states and pre-exist Security Council resolutions in this domain. Divergences in the ways counterterrorism laws are applied are exacerbated by the lack of agreed definition of 'terrorism'. Whilst in some states 'terrorism' amounts to "virtually any politically motivated challenge to the state", other states clearly distinguish 'terrorism' from self-determination struggles against foreign occupation.[59]

This 'vagueness' of counterterrorism law[60] offers a significant challenge to any comparative endeavour. The following section does not aim to exhaustively set out the relevant counterterrorism laws of all selected states, but rather highlight key themes

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51   Council of the European Union, *Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA)* amended by *Council Framework Decision 2008/919/JHA f of 28 November 2008*. See also Eugenia Dumitriu, "The E.U.'s Definition of Terrorism: The Council Framework Decision on Combating Terrorism," *German Law Journal* 5, no. 5 (2004).

52   Council of the European Union, Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA) Art. 2.

53   *Holder v Humanitarian Law Project*, 561 U.S (2010)., 130 S. Ct. 2705; No. 08-1498, slip op. (June 21, 2010) ('*Holder v HLP*')

54   Marieke De Goede, "The Politics of Preemption and the War on Terror in Europe," *European Journal of International Relations* 14, no. 1 (2008).

55   Clara Portela, "National Implementation of United Nations Sanctions: Towards Fragmentation," *International Journal* 65, no. 1 (2009-10): 20.

56   Vera Gowlland-Debbas, ed. *National Implementation of United Nations Sanctions: A Comparative Study* (The Hague: Martinus Nijhoff, 2004), 649.

57   Jean Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism* (Cambridge: Cambridge University Press, 2012), 266-319.

58   Darian-Smith, *Laws and Societies in Global Contexts: Contemporary Approaches*.

59   Scheppele, "The International State of Emergency: Challenges to Constitutionalism after September 11," 18-19. Scheppele points to Vietnam and Brunei as examples of the latter.

60   For a review of the definition of terrorism in international law, Australia, the US, UK, New Zealand, Canada and South Africa see: Ben Golder and George Williams, "What is Terrorism - Problems of Legal Definition," *University of NSW Law Journal* 27, no. 2 (2004). For a review of terrorism definitions in international and regional treaties, the United Nations, customary international law, and international humanitarian law, see Ben Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2008).

and/or points of contention relevant to those engaged in peace and conflict resolution processes.[61] Our review focuses on the type of knowledge requirements imposed by various national listing regimes and the types of activities they set out to prohibit. Our analysis is grounded in the following jurisdictions: Australia, Canada, Denmark, France, Germany, Japan, Kenya, Kuwait, Israel, New Zealand, Norway, Qatar, Saudi Arabia, Sweden, Turkey, the United Kingdom and the United States.[62] These jurisdictions were selected for being either (i) a state where significant donors for peacebuilding are located; (ii) a state where leading peacebuilding organisations are constituted or (iii) a territorial state in which peacebuilding activities currently take place.

(i)   Legal liabilities

Two main approaches are adopted by states to the prohibition of material support to listed groups or individuals. The first approach requires that one knows or intends to provide support for terrorist acts. The second approach is far broader in scope and deems such intentions or prior knowledge of the prohibition to be irrelevant. This issue is not just an abstract point of legal principle; it is fundamental in determining whether the actions of those engaged in conflict resolution where listed groups are present constitutes lawful peacebuilding or unlawful support of terrorism. Both are outlined in more detail below.

The minority approach: no liability without intention to support terrorism

All states examined have made it an offence to provide support to listed parties when the provider *knows* or *intends* the support be used to commit a terrorist act. For the minority of the states examined, however, this provides the sole basis for criminal liability under these counterterrorism laws. This means that support inadvertently provided to listed parties by peacebuilders will likely be lawful *unless* those peacebuilders know or intend it to support terrorist acts. Likewise the provision of support to non-listed parties (that amounts to indirect provision to listed parties) will incur criminal liability only if the provider knows or intends to support terrorist acts. This approach has been variously adopted in EU law, France, Germany, Japan, Kuwait and Turkey. Though the language differs across jurisdictions, all require that the provider either have some form of knowledge, intention[63] or foresight that the support will be used to commit a terrorist act.[64] For jurisdictions without specific counterterrorism laws, analogous criminal laws similarly require that the provider intended to participate in a criminal group or otherwise intended to commit an offence, irrespective of whether a terrorist act ultimately materialises.[65]

The dominant approach: list-based liability

An intention-based understanding of material support, however, represents a minority approach. The vast majority of states impose *criminal and/or administrative consequences* for any support provided to listed parties, irrespective of the knowledge or intention of the provider – that is, most states make providers legally liable even when they do not intend to support terrorist acts nor know that would be the effect of their support. According to this dominant approach, support provided *for any reason* to those proscribed as terrorists is viewed as material support for terrorism. In this view, it is the identity of the recipient (eg, whether they are listed or not) that is the crucially important factor in determining legal liability. In this report we refer to this dominant approach as the *list based liability model*. Both criminal and administrative prohibitions apply, as outlined below.

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61   For an overview of 14 nation-states and the EU, see Kate Mackintosh and Patrick Duplat, "Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action," (United Nations Office for the Coordination of Humanitarian Affairs, Norwegian Refugee Council, July 2013), 19-44.

62   As EU Regulations are directly applicable in EU member states, reference will be made at times to EU law in this section as well.

63   See for example: France (Code Pénal Art. 421-2-2), Turkey (Law on the Prevention of the Financing of Terrorism (Law No. 6415) Art. 4); European Union (Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA) Art. 2).

64   See for example Germany, which requires not only the provider be reckless as to whether such support will be used for terrorist acts, but also that the provider share the organisation's goals (*Criminal Code* s. 129(a)).

65   See for example Japan (*Act on Punishment of Financing of Offences of Public Intimidation* Art. 2), and Kuwait (Penal Code Art. 30)

List-based *criminal liability* models are variously utilised in Australia, Canada, Denmark, Israel, Kenya, Norway, New Zealand, Qatar, Saudi Arabia, Sweden, United Kingdom and the United States. In some states, providers are guilty of an offence if they provide support knowing that a party is listed under a UN or EU sanctions regime or intending that support be provided to that party,[66] or made available for the benefit of a terrorist group (whether listed or unlisted, but otherwise considered terrorist).[67] Because UN sanctions measures are implemented divergently across the different Member States, there remains considerable uncertainty about the intention necessary to trigger an offence.[68] The strictest approach to this issue is taken in the US. When support is given to non-listed parties under the control of organisations proscribed under US material support laws, prosecutors needn't show that the provider *knew* the recipient was controlled by a listed organisation.[69] The fact that providers may have undertaken due diligence enquiries into the status of recipients will likely be immaterial under US material support legislation.[70]

Under the list-based *administrative liability* measures imposed by most states (implementing UNSCR 1267 and 1373 or the analogous EU regulations), those deemed to provide support to listed parties can have their own assets made subject to freezing orders. Such administrative consequences can be imposed even if support is in potential form only (ie, has not taken place); has no immediate relation to specific terrorist acts and where the provider simply knows that an organisation is listed[71] or otherwise described[72] as terrorist. Indeed, the very *raison d'etre* and 'value-add' of counterterrorist asset-freezing for states is that it can be applied preemptively in circumstances where more rigorous standards of criminal proof cannot be satisfied. As former US Treasury Secretary Paul O'Neill described the rationale for adopting counterterrorism asset-freezing measures in the US: "[We] moved on… setting up a new legal structure to freeze assets on the basis of evidence that might not stand up in court… Because the funds would be frozen, not seized, the threshold of evidence could be lower and the net wider".[73]

These forms of list-based liability aim to isolate listed parties from receiving *any* support and target direct and *indirect* association through the imposition of severe consequences. It is this kind of targeting logic that has motivated calls for exceptions to be made for the provision of humanitarian assistance (such as food and water). And it is through such strict list-based liability that those engaged in peacebuilding or conflict resolution processes have necessarily become entangled within the broad net of preemptive counterterrorism measures.

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66 See for example Australia (*Criminal Code* (Cth) Division 102.6, 102.7) but note that under Australian law liability may be established where the provider is reckless as to whether the organisation is terrorist; Canada (*Criminal Code* ss. 83.01, 83.03); European Union and EU states relying on the Regulation (Combating Terrorism Regulation 2580/2001, Al-Qaida Regulation 881/2002 , Somalia Regulation 356/2010); Kenya (*Prevention of Terrorism Act 2012* ss.2, 5); New Zealand (*Terrorism Suppression Act* ss20, 22); Norway (*Penal Code* s.147b); United States (18 U.S.C. § 2339A).

67 See for example Australia where a court may find an organisation to be terrorist during the course of a criminal trial (*Criminal Code* (Cth) Division 102.1); Canada (*Criminal Code* ss. 83.01, 83.03); Denmark (*Criminal Code* ss.114b, 114e); Kenya (*Prevention of Terrorism Act 2012* ss.2, 5); Qatar (*Penal Code* Arts. 1, 4, *Combatting Money Laundering and Terrorism Financing* Art. 4); Saudi Arabia (*Anti-Money Laundering Law of 2003* Art. 2); United Kingdom (*Terrorism Act* 2000 s1(5))

68 Murphy, "Case C-117/06 and other ECJ proceedings," 258. On the uncertainty of the intention requirement under Dutch law, see Mackintosh and Duplat, "Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action," 32-33.

69 *United States v. Holy Land Foundation for Relief and Development, Shukri Abu Baker, Mohammad El-Mezain, Ghassan Elashi, Haitham Maghawri, Akram Mishal, Mufid Abdulqader, and Abdulrahman Odeh*, No. 04-CR-240G, Indictment (N.D. Tex. July 26, 2004) at 12-20.

70 Noah Bialostozky, "Engaging for Peace: What Are the Legal Limits to Working With Terrorists?," *Center on Global Counterterrorism Cooperation Policy Brief* (February 2011): 2.

71 Australia for example requires only recklessness: *UN Charter Act* (Cth) s15 and *R v Vinayagamoorthy* 2010 VSC 148; Vicki Sentas, "Terrorist Organisation Offences and the LTTE: R v Vinayagamoorthy," *Current Issues in Criminal Justice* 22, no. 1 (2010).

72 See for example Turkey which implements UNSCR 1267 sanctions, does not maintain a separate list for sanctions, but nevertheless Turkish Police consider certain organisations such as the Kurdistan Workers Party (PKK), the Revolutionary People's Liberation Party-Front (DHKP-C), Hezbollah and al-Qaida as 'terrorist organisations in Turkey'.

73 Cited in Ron Suskind, The Price of Loyalty: George W. Bush, the White House, and the Education of Paul O'Neill (New York: Simon and Schuster, 2004), 192.

The US prohibition on 'material support or resources' to listed organisations (Box 1)

The scope of activities prohibited under US material support and counterterrorism laws are the broadest of all the jurisdictions examined and have led to widespread concerns being voiced by peace and humanitarian organisations.[74]

Providing material support *knowing* that either an organisation is a listed Foreign Terrorist Organisation (FTO) or otherwise engages in 'terrorism' is considered a criminal offence.[75] Providing support to those included on the US Specially Designated Nationals (SDN) list can additionally result in one's assets being subjected to freezing order.[76] The US FTO list is significantly shorter than the SDN list, with less than 60 entities currently included. However, all of the main groups analysed in the case studies presented in Chapters 3-5 of this report - including Al-Shabaab, Hamas, and the Kurdistan Workers' Party - are listed as both FTOs and SDNs.[77]

The material support prohibitions include *any property*, whether tangible or intangible - including currency, financial securities; financial services; communications equipment; lodging; false documentation; weapons; facilities; and transportation and more. They also include the provision of training (provided it imparts a specific skill) and expert advice or assistance (where it is derived from specialised knowledge) to listed parties.

In the 2010 US Supreme Court decision of *Holder v HLP* the Court declined to say whether providing assistance to an FTO in negotiation of a peace agreement would constitute material support to terrorism.[78] Whilst the Court acknowledged that FTOs might engage in lawful and humanitarian activities, they held that even support "meant to promote peaceable, lawful conduct... can further terrorism by foreign groups in multiple ways", including by "...free[ing] up other resources within the organisation that may be put to violent ends".[79] In this way, legitimate support for the lawful activities of FTOs is made inherently problematic because it is legally inextricable from the resourcing of terrorism.[80]

(ii)   Scope of Prohibited Support: peace-building within the net of preemption

A plethora of activities undertaken by those engaged in peace and conflict work is potentially prohibited under national counterterrorism law. The following section outlines those activities with most state consistency in relation to legality before moving onto those issues with most differentiation. Four activities that are particularly relevant to peacebuilders are highlighted: providing funds, property and/or training and technical assistance to those listed parties, and acting as go-betweens.

Providing funds

The provision of *funds* to listed parties or those otherwise considered terrorist constitutes a criminal offence or attracts asset freezing in all of the jurisdictions we have examined. This prohibition applies regardless of whether money is provided directly (that is, to those listed themselves) or indirectly (via intermediaries). "Funds" are broadly defined to include financial assets and

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74   For general legal analysis see Justin A. Fraterman, "Criminalizing Humanitarian Relief – Are US Material Support for Terrorism Laws Compatible with International Humanitarian Law?," *SSRN* (2011); Charles Doyle, "Terrorist Material Support: A Sketch of 18 U.S.C. 2339A and 2339B," (Washington, DC Congressional Research Service, 19 July 2010). For discussion of the specific applicability to peacebuilders see: Bialostozky, "Engaging for Peace: What Are the Legal Limits to Working With Terrorists?," 3.

75   18 U.S.C. § 2339B (a)(1)

76   US Executive Order 13224 (23 September 2001).

77   US Department of State, Foreign Terrorist Organizations List, Available at http://www.state.gov/j/ct/rls/other/des/123085.htm

78   *Holder v Humanitarian Law Project*, 561 U.S (2010)., 130 S. Ct. 2705; No. 08-1498, slip op. (June 21, 2010) ('*Holder v HLP*') at 17.

79   Ibid, at 25

80   Ibid, at 25-26, 33

economic benefits of every kind - including cash, traded securities and debts, documents evidencing an interest in financial resources. The reason why funds may have been provided is immaterial in jurisdictions that utilise list-based liability as detailed above, and is also immaterial for administrative sanction.[81] This prohibition therefore extends to include such activities as the provision of money for reimbursement of expenses connected with meeting attendance; travel reimbursement; fees for facilitating access with other listed members or top-tier leadership; stipends to members of a listed groups at a peace conference or track II negotiation; tolls/payment for entry to particular areas.

Providing property

Whilst slight interpretative differences persist, all UN Member States examined here prohibit the direct or indirect provision of funds, financial assets and economic resources to listed individuals or groups. The prohibition on "economic resources" is important. It is deliberately broader than "funds" and intended to capture anything fungible (such as property) that can in turn be used to obtain funds, goods or services.[82] The main difference, as outlined above at section 1.2 and box 1 of this chapter, concerns divergent US and EU interpretations on the scope of the economic resources that are subject to prohibition by these measures. In short, the provision of property to listed parties - including transport tickets, phone cards, telephones, rental vehicles, fuel costs and money incurred on rental accommodation - is treated differently in these jurisdictions. For states following EU Regulations,[83] goods that cannot be turned into funds capable of use for terrorism (such as food, non-transferable transport tickets and so on) *might* be permitted.[84] In the US, as discussed above, the provision of property is treated identically to the provision of funds. Both acts are defined as "material support" if provided to a listed foreign terrorist organisation.[85]

Providing training, advice and/or technical assistance

Most EU Member States allow the provision of training to listed parties in activities such as negotiation, law, communication skills and UN peace processes. The provision of technical assistance, such as professional mediation, is also generally permitted. Only the provision of training for terrorist activity is expressly prohibited.[86] Whilst EU law requires states to prevent technical assistance or training, this prohibition only relates to "military activities" and the supply of weapons and military equipment to those listed, which makes it inapplicable to peacebuilding.[87]

In other jurisdictions, notably the US and the UK, the legality of providing training to listed parties is either forbidden or much more uncertain. Whilst UK counterterrorism law prohibits training to proscribed groups, it only applies to training conducted within the UK.[88] The rationale, however, is that any training furthering the activities of proscribed groups should be prohibited, regardless of whether such activities might otherwise be lawful. Under US laws - which apply extraterritorially to non-citizens outside the US - training and expert advice or assistance to listed organisations constitutes material support to terrorism if it imparts a 'specific skill' rather than general knowledge or is derived from "specialised knowledge".[89] In the *Holder v HLP* case, outlined in Box 1 above, the Court held that teaching members to petition the UN for relief amounted to "expert advice or

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81 With the proviso that in some jurisdictions such as the EU, states may authorise the provision of funds to cover the subsistence of the listed person and their family such as for foodstuffs, medicine, rent or mortgage, taxes, and reasonable legal fees so that asset-freezing provisions do not apply. See for example *EC Regulations* 2580/2001 Art. 5, 881/2002 Art. 2, 356/2010 Art. 5.

82 See, for example, Council Regulation No. 356/2010, Art. 1(a)

83 Including for example Sweden, Norway, and the UK.

84 See discussion above in section 1.2 of this chapter.

85 18 U.S.C § 2339B, 2339A.

86 See for example Australia (*Criminal Code* Div. 101.2), Canada (*Criminal Code* 83.18)

87 EC Al-Qaida Regulation 881/2002 Art. 3, Somalia Regulation 356/2010 Art. 8.

88 For the UK see *Terrorism Act* 2000 s.12. However For this offence to apply to activities outside the UK, it must be connected to specified domestic offences (such as murder, manslaughter kidnapping and property offences), and is not relevant for peacebuilders (*Terrorism Act* 2000 (UK) s.63B); for the US see 18 U.S.C § 2339B and *Holder v HLP*.

89 18 U.S.C § 2339A and 2339B. The issue of extraterritoriality is discussed in more detail below at 2.3(iv).

assistance" and training on the use of humanitarian and international law for peaceful conflict resolution imparted a "specific skill", and so both are prohibited under US material support laws.[90] Beyond these two examples, however, the Court provided little guidance on how broadly these measures should be construed, emphasising that future applications of US material support laws needed to be assessed on a case-by-case basis.[91] As the term "material support" is utilised in both US criminal law and asset-freezing sanctions,[92] this uncertainty has broad implications.

Acting as go-between

The jurisdictions examined all adopt broadly consistent approaches to the legality of third-parties acting as intermediaries with listed parties - including by directly speaking with listed actors, sharing information between conflict parties and providing facilitators to enable interaction between conflict actors. Acting as a go-between in these ways, or otherwise engaging with listed actors *per se*, is not prohibited in any of the jurisdictions examined with a number of significant exceptions. Australia is the only jurisdiction that directly prohibits association with proscribed organisations.[93] It is a crime to associate on two or more occasions with members, promoters or those who direct the organisation, if the association provides support which is intended to either assist the organisation expand or continue to exist.[94] As support is envisaged as anything from organising a meeting venue to facilitating introductions between the organisation and a service provider,[95] acting as a go-between conceivably contravenes this law. UK law specially creates the crime of providing 'support' to a proscribed organisation that is not the provision of money or other property. It makes it a crime to invite support for a proscribed organisation; and to arrange or manage a meeting knowing the meeting will either further the activities, or be addressed by a member of a proscribed organisation.[96] Both UK and Australian law thus has the potential to criminalise go-between work. However, only Australian law empowers prosecution for activities outside the national territory by non-nationals, and thus has broader application to peacebuilding activities.[97]

Peacebuilders have expressed concerns in interview that US counterterrorism laws (as interpreted by the Supreme Court) equate independent political advocacy for listed organisations as an activity that bestows legitimacy upon them, and thus constitutes material support to terrorism.[98] Yet in *Holder v HLP* the court explicitly stated that "...any independent advocacy in which the plaintiffs wish to engage is *not* prohibited" under the material support laws.[99] For advocacy to violate US material support laws it would need to amount to a "service" - which, according to the Court, comprises of work done under the command and control of a terrorist organisation and not the kind of independent activities that ordinarily characterise peacebuilding.[100] Contrary to what is often assumed amongst peacebuilders, therefore, *Holder v HLP* does not establish that the mere lending of legitimacy upon a listed organisation, such as might arguably occur through acting as a go-between amounts to the provision of material support.[101] Nevertheless, activities undertaken as a go-between might come within the scope of material support if they amounted to expert advice or assistance.

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90 *Holder v HLP* at 32.
91 *Holder v HLP* at 34.
92 See for example US Executive Order 13224: Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism (23 September 2001) which empowers the designation and freezing of assets of those who provide material support to listed Specially Designated Global Terrorists, which is a much more extensive list than the US Foreign Terrorist Organisation list.
93 Criminal Code Act 1995 s 102.8.
94 Criminal Code Act 1995 s 102.8 also sets out specific limited exemptions to permit association with close family members, association arising from religious practice, providing humanitarian aid or legal advice.
95 Sentas, *Traces of Terror: Counter-terrorism law, policing and race*: 257-62.
96 Terrorism Act 2000 s 12
97 Criminal Code Act 1995 s 16.1
98 *Holder v HLP*
99 *Holder v HLP* at 19.
100 *Holder v HLP* at 18.
101 *Holder v HLP* at 25.

In sum, there remains considerable uncertainty about the precise kinds of peacebuilding activities that might be made subject to criminalisation or asset-freezing as an effect of list-based liability regimes. Uncertainties are not, however, an aberration simply awaiting clarification to enable more effective counterterrorism law. Rather, as detailed in the following section of this report, preemptive sanctions and listing measures are specifically valued as security tools that cast a wide net for capturing a diverse range of potential and/or indirect forms of association.

2. Targeting 'networks', catching 'supporters'

2.1 From compelling compliance to constraint

Preemptive sanctions and listing measures have been explained within two key perspectives: as international sanctions and as part of counterterrorism laws and strategies. We draw on both to develop our analysis of how the global legal architecture empowers the targeting of peacebuilders, and the features which institute such disruption.

Historically, sanctions were imposed by international actors on an identified target state, were economic in nature, and applied comprehensively to the state. Sanctions were designed to either punish targets by deprivation of some value, or to compel compliance with certain international norms.[102] In contrast, the targeted or 'smart' counterterrorism sanctions examined in this report do not explicitly identify all those potentially subject to sanctions, instead targeting those specifically listed *and* their associates. Nor do counterterrorism sanctions seek to coerce compliance of those listed. Because terrorists are viewed as 'outlaws', "there can be no requests made to them aside from the one of halting all their activities".[103]

Even in the late 1960s, the theory that comprehensive economic sanctions result in state compliance was held to be 'naïve', given the potential for the economic deprivation produced by sanctions to consolidate social and political integration and thus frustrate the goal of bringing 'rogue states' into conformity.[104] Recently, Francesco Giumelli has theorised that sanctions may go beyond coercing compliance and may intend to:

- "coerce" a change of behaviour in the target;

- "constrain" a target, limiting its capacity to pursue its objectives as well as its alternatives;

- "signal", sending a message to target/s, may be to a domestic or an international audience.[105]

This typology has been taken up by the Targeted Sanctions Consortium (TSC), an international group of scholars and practitioners undertaking an ongoing evaluation of the effectiveness of all UN targeted sanctions.[106] TSC measures the 'effectiveness' of UN targeted sanctions by evaluating whether the intended target was coerced, constrained or signalled. The TSC has found that the constraining and signalling effect of sanctions is more pronounced than the traditional focus on the capacity of sanctions to coerce compliance with international norms.[107] However, whereas the project measures the effectiveness of specific sanctions in terms of their stated political goals vis-à-vis threats to peace and security, there is no attempt to measure the impact of counterterrorism sanctions on peacebuilders themselves, which are not viewed as intended targets of such sanctions.

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102 Johan Galtung, "On the Effects of International Economic Sanctions: With Examples from the Case of Rhodesia," *World Politics* 19, no. 3 (1967): 379.
103 Francesco Giumelli, *Coercing, Constraining and Signalling: Explaining UN and EU Sanctions after the Cold War* (Colchester: ECPR Press, 2011), 113.
104 Galtung, "On the Effects of International Economic Sanctions: With Examples from the Case of Rhodesia."
105 Giumelli, *Coercing, Constraining and Signalling: Explaining UN and EU Sanctions after the Cold War*: 34-35.
106 Biersteker et al., "The Effectiveness of United Nations Targeted Sanctions: Findings from the Targeted Sanctions Consortium," 21.
107 Ibid.

The global counterterrorism laws we have examined seek to cut off those listed from sources of funding (through asset freezing sanctions), isolate those listed by direct sanctions (travel bans) as well as by imposing consequences for those that associate with them. These purposes certainly seek to 'constrain' those targeted. But as noted above, counterterrorism laws' explicit targeting of associates means that doing "as much as possible to limit ['terrorists']",[108] means expansion of the methods adopted for such constraint. In attempting to ascertain impacts, we identify below 7 specific features of the global counter-terrorism regime that help explain why peacebuilders are firmly in its sights. But first we examine counterterrorism law literature that augments the sanctions perspective on listing regimes.

2.2   Casting the net as widely as possible: preemption and disruption of 'association'

In the post UNSCR 1373 rush to introduce counterterrorism provisions in domestic criminal laws, lawyers and legal scholars made important observations that have paved the way for our analysis. The concerns expressed were remarkably similar, despite the differences between legal regimes – that counterterrorism laws challenge the basic principles of both criminal responsibility and democratic values in a number of important ways. As a consequence, many legal scholars worldwide called for the abolition of domestic terrorist proscription laws.

An important criminal law principle provides that no person should be culpable for an act unless they intended to undertake that criminal act, that is, had a 'guilty mind'. Counterterrorism laws that make financial or other support a crime without requiring the accused know or intend to contribute to a terrorist act offend this basic principle. Such laws thus challenge the principle that individuals should be held responsible only for their own misdeeds and not without some knowledge of or contribution to, the criminal acts of others.[109]

While inchoate offences such as attempt or conspiracy have long formed part of the criminal law, these offences require sufficient proximity to the criminal act, or are justified on the basis that an individual has organised or planned crimes. Without the intent to support terrorist acts, and where no such terrorist act eventuates, arguably the connection between 'support' and terrorism is simply too remote to justify criminalisation. Terrorist listing triggers criminalisation of a broad range of conduct,[110] making it harder to confidently state that such acts contribute to an eventual terrorist act.[111] The controversy lies in 'how far back the criminal law should reach into the chain of causation'.[112] That laws may criminalise activities remote from violent acts shows that the rationale of such laws does not accord with the traditional criminal law justification of preventing violence.[113]

Many legal experts have argued that terrorism was already sufficiently criminalised by existing laws prohibiting diverse preparatory acts with a violent intent. Matters such as religious or racial motivations, were viewed as better accounted for as aggravating factors that would increase sentence severity.

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108 Giumelli, *Coercing, Constraining and Signalling: Explaining UN and EU Sanctions after the Cold War*: 115, discussed in the context of analysing the Al-Qaida sanctions.

109 Ben Saul, "Criminality and Terrorism," *Sydney Law School Legal Studies Research Paper No. 10/106* (October 2010): 15.

110 Patrick Emerton, "Australia's Terrorism Offences - A Case Against," in *Law and Liberty in the War on Terror*, ed. Andrew Lynch, Edwina Macdonald, and George Williams (Leichhardt: The Federation Press, 2007).; Andrew Lynch, Nicola McGarrity, and George Williams, "The Proscription of Terrorist Organisations in Australia," *Federal Law Review* 37(2009): 17.

111 Saul, "Criminality and Terrorism," 14-15, citing: Andrew Goldsmith, "Preparation for Terrorism: Catastrophic Risk and Precautionary Criminal Law," in *Law and Liberty in the War on Terror*, ed. Andrew Lynch, Edwina Macdonald, and George Williams (Leichhardt: The Federation Press, 2007), 59.

112 Ibid., 14.

113 The irrelevance of this traditional criminal law rationale is further shown as the violence of one group (such as Hamas) will prompt listing, but that of another, such as Israeli state agencies, will not: Emerton, "Australia's Terrorism Offences - A Case Against," 81-82. Counterterrorism proscription also undermines criminal law principles in numerous others ways. For instance, in many states, special security rules for counterterrorism trials erode protections long viewed as essential to a fair criminal trial. Specifically, the principle that an accused is entitled to know the details of the case against him/her, and the right of defendants to select their own legal representation: Andrew Lynch and George Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (Sydney: University of New South Wales Press, 2006), 78-84.

Listing is also at heart anti-democratic. This is not only because listing decisions involve extensive discretion for national executives that elude compatibility with the rule of law and democratic accountability.[114] Much has also been written on the selective nature of listing and counterterrorism laws that frustrate democratic traditions. Listing criminalises matters that should be resolved through political debate.[115] In those states in which the religious, ideological or political motivation of a group is integral in determining whether it should be listed, the disturbance of civic and political and religious freedom of association, belief and speech is even more explicit.[116] The lack of neutrality degrades liberal democratic traditions by signalling that distinct communities are criminal or security threats, undermining equality before the law, and the mutual respect crucial for plural democracies.[117]

The above scholarship attends to the criminal law of counterterrorism, but the critiques are also relevant to the administrative regime, which features punitive qualities that are ostensibly only justified as the outcome of criminal adjudication of guilt. Both the UN Special Rapporteurs on counterterrorism have noted the criminal or quasi-penal quality that arises from the severity of the administrative asset-freezing sanction.[118] As asset freezing measures may operate indefinitely, they are strongly analogous to criminal property confiscation.[119] In fact, many on the UN lists have been subject to asset-freezes lasting 13 years since their initial listing in the post September 11 2001 period. These observations highlight the connection between the qualities of the administrative and criminal counterterrorism law regimes: preemptive logic, extensive discretionary power at all levels of the process and punitive consequences for breach. Analysis thus of *how* counterterrorism listing regimes work – by disrupting those in proximity to those listed - is applicable to both regimes.

The analysis set out above provides a productive base to argue that counterterrorism laws operate through preemption and disruption in two main ways. Firstly, critiques - on the vagueness of the counterterrorism laws, the imposition of liability for acts remote from terrorist acts, criticism that individuals should not be responsible acts where there is no intent to support terrorist – are also factors that prompt questions as to *how* such laws are envisaged to affect behaviour. The inherent vagueness in counterterrorism laws shows that the laws are simply not designed to provide good guidance as to what conduct is criminal.[120] Rather, counterterrorism laws adopt the logic of the preemptive military strike, to permit punishment for crimes that have not been committed.[121]

Our argument that peacebuilders are intended targets of the global counterterrorism sanctions and proscription regimes rests on our analysis of the regime, like other counterterrorism laws, as an example of preemptive security law.[122] Its focus,

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114 Lynch, McGarrity, and Williams, "The Proscription of Terrorist Organisations in Australia," 12-19. Gavin Sullivan and Ben Hayes, "Blacklisted: targeted sanctions, preemptive security and fundamental rights," in *10 years after 9 / 11 Publication Series*, ed. ECCHR (Berlin2010), 83.

115 Emerton, "Australia's Terrorism Offences - A Case Against," 85. Note also that non-state armed groups have been listed for foreign policy reasons, diplomatic interests and domestic politics: Iain Cameron, "European Union Anti-Terrorist Blacklisitng," *Human Rights Law Review* 3(2003).

116 Agnes Chong et al., "Laws for Insecurity: A Report on the Federal Government's Proposed Counter-Terrorism Measures," (Public Interest Advocacy Centre; Australian Muslim Civil Rights Advocacy Network; Civil Rights Network; National Association of Community Legal Centres, 23 September 2005), 4-5.

117 Patrick Emerton, "Submission No. 23 to the Parliamentary Joint Committee on Intelligence and Security's Review of the Listing Provisions of the Criminal Code Act 1995," (2007): 5-6.; Chong et al., "Laws for Insecurity: A Report on the Federal Government's Proposed Counter-Terrorism Measures," 5-6.

118 Martin Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism UN Doc A/63/223*, 6 August 2008; Special Rapporteur Ben Emmerson, *Report on the Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms UN Doc A/67/396*, 26 September 2012.

119 Sullivan and Hayes, "Blacklisted: targeted sanctions, preemptive security and fundamental rights," 83.

120 Emerton, "Australia's Terrorism Offences - A Case Against," 81, citing Russell Hogg's evidence to the PJCIS, Parliament of Australia, Canberra, 4 April 2007, 16.

121 Jenny Hocking, "Counter-Terrorism and the Criminalisation of Politics: Australia's New Security Powers of Detention, Proscription and Control" *Australian Journal of Politics and History* 49, no. 3 (2003); Jude McCulloch, "Blue Armies, Khaki Police and the Cavalry on the New American Frontier: Critical Criminology for the 21st century," *Critical Criminology* 12(2004).

122 Lucia Zedner, "Pre-crime and post-criminology?," *Theoretical Criminology* 11, no. 2 (2007); Jude McCulloch and Sharon Pickering, "Pre-Crime and Counter-Terrorism: Imagining Future Crime in the 'War on Terror'," *British Journal of Criminology* 49(2009); Gabe Mythen and Sandra Walklate, "Criminology and Terrorism: Which Thesis? Risk Society or Governmentality?," *British Journal of Criminology* 46(2006).

as evident from countless official policy documents, is to take preemptive action to control the potential for terrorism. The UN Global Counter-Terrorism Strategy, for example - which represents the first time that all Member States agreed to a common counterterrorism approach - emphasises preemptive action to control the potential for terrorism by seeking to address "the conditions conducive to the spread of terrorism" and to "prevent and combat terrorism".[123] The UN Counter-Terrorism Implementation Task Force (CTITF) Working Group on Tackling Financing of Terrorism and the aforementioned FATF specifically target non-profit organisations (NPOs) preemptively on the basis that these entities are particularly prone to abuse by terrorist groups. EU counterterrorism strategies are similarly predicated on the disruption of emergent terrorist networks at an early stage, [124] through the prevention of financing, radicalisation and recruitment,[125] by countering 'public support' and, again, specifically targeting NPOs.[126] All of these practices are triggered by the initial listing of specific groups and individuals deemed 'terrorist'.

Even the label 'terrorism' itself is preemptive in character, in that it is designated by political decisions and prior to determination by a court, unlike the judicial identification of 'criminal' acts.[127] Counterterrorism law thus departs from the traditional task of criminal law to censure wrongs done in the past, and also goes beyond crime prevention. Instead it looks to the future, mobilising an anticipatory 'pre-crime' logic to identify and counter threats which have not yet occurred (and may not occur).[128] Thus laws that target associations with terrorists intervene ever earlier to preempt eventual anticipated acts,[129] and view even tenuous connections as suspect.

Second, the practical effect of the anti-democratic qualities of counterterrorism law is the selective identification of those for policing and intelligence attention.[130] Analysis of the racial dimensions of counterterrorism particularly highlights that the true legacy of such laws is their authorisation of policing practices that disrupt associations. Whilst the rationale for counterterrorism intervention is to disrupt terrorist entities and plans, an Australian study found that police questioning practices created suspect Islamic and ethnic minority communities and disrupted material ties to homeland and legitimate social associations.[131] Critically, such disruption was effected by self-policing by those communities. This scholarship enables us to appreciate how evidence of the targeting of peacebuilders working in proximity to listed actors manifests itself. Such targeting is *not* contingent upon evidence of criminal prosecution, nor on the actual implementation of asset-freezing sanctions. It is:

> ...concerned less with gathering evidence, prosecution, conviction and subsequent punishment than in targeting and managing through disruption, restriction and incapacitation those individuals and groups considered to be a risk.[132]

2.3 Targeting and disrupting peacebuilders: 7 key features

Seven key features of the global targeted sanction and proscription regimes reveal both law's explicit targeting of peacebuilders' associations, as well as the preemptive logic that demands the disruption of a broad range of associations and activities for prudent risk management.

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123 United Nations, "Global Counter-Terrorism Strategy and annexed Plan of Action," (A/RES/60/288, 8 September 2006).
124 Council of the European Union, "The European Union Counter-Terrorism Strategy " (14469/4/05 REV 4, 30 November 2005), para 22, 9, 31.
125 ———, "The European Union Strategy for Combating Radicalisation and Recruitment to Terrorism," (14781/1/05 REV 1, 24 November 2005).
126 ———, "Revised Strategy on Terrorist Financing," (11778/1/08 REV 1, 17 July 2008), page 7.
127 McCulloch and Pickering, "Pre-Crime and Counter-Terrorism: Imagining Future Crime in the 'War on Terror'," 630.
128 Zedner, "Pre-crime and post-criminology?," 262.
129 McCulloch and Pickering, "Pre-Crime and Counter-Terrorism: Imagining Future Crime in the 'War on Terror'," 633, drawing on:. Zedner, "Pre-crime and post-criminology?," 265.
130 Emerton, "Submission No. 23 to the Parliamentary Joint Committee on Intelligence and Security's Review of the Listing Provisions of the Criminal Code Act 1995," 4.
131 Vicki Sentas, *Traces of Terror: Counter-terrorism law, policing and race* (Oxford: Oxford University Press, 2014), 194-237.
132 McCulloch and Pickering, "Pre-Crime and Counter-Terrorism: Imagining Future Crime in the 'War on Terror'," 631.

(i)   Counterterrorism prohibitions encompass many peacebuilding activities

The analysis advanced in section 1.3 of this chapter demonstrates that the law itself explicitly captures the activities of peacebuilders. In this sense, peacebuilders are targets of counterterrorism law. As we have shown, the dominant legal approach worldwide means that peacebuilders providing support, whether direct or indirect, to listed organisation may breach laws though such provision is not intended to provide support to terrorist acts. While some peacebuilding activities (such as acting as a go-between and providing training or advice) can be carried out without breaching counterterrorism regimes in most jurisdictions, these activities attract criminal penalties or sanctions in others. In sum, counterterrorism prohibitions encompass both association with entities that peacebuilders' may seek to engage, as well as types of association relevant to peacebuilding. Legal scholars, writing about the US crime of material support, have duly described the punishment of material support as "a twenty-first century version of guilt by association",[133] and this assessment is equally applicable to the laws of other jurisdictions.

(ii)   Policy concerns about the vulnerability of non-profit organisations

As noted above, for example, the FATF have specifically justified measures against non-profit organisations (NPOs) due to perceived vulnerability to exploitation by terrorist groups, and recommend states and financial institutions take steps to prevent such exploitation. [134] This does not emerge from the particular identification of NPOs as criminal, but from the understanding of terrorist finance as comprised of both illicit and licit sources. Specifically, the FATF views NPOs as vulnerable to misuse:

> (a) by terrorist organisations posing as legitimate entities;

> (b) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and

> (c) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.[135]

The empirical basis for this focus on NGOs as high risk has been strongly disputed by charitable organisations.[136] Yet the FATF approach (and influence over state practice), coupled with the broad reach of the counterterrorism laws, policies and practices, suggests that listing and proscription regimes are designed to capture many of the activities and forms of engagement that are ordinarily contemplated by peacebuilders.

(iii)   No specific exemptions for peacebuilders

It is significant that exemptions for peacebuilding organisations and activities from asset-freezing sanctions have not been implemented at ether the UN, EU or state level. This is in direct contrast to the two existing, though limited, types of exemptions. The Al-Qaida 1267 and Somalia 751 regimes enable Member States to grant exemptions for the provision of funds and other economic resources necessary for essential human needs, such as payments for food, rent, medical treatment, legal expenses and so on.[137] Further, in response to problems encountered in delivering relief to the Somalia famine, in 2010 the Security

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133 David Cole, "Terror Financing, Guilt by Association and the Paradigm of Prevention in the 'War on Terror'," in *Counterterrorism: Democracy's Challenge*, ed. Andrea Bianchi and Alexis Keller (Oxford: Hart Publishing, 2008), 250.

134 Financial Action Task Force, "International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations," Recommendation 8, p.13.

135 Ibid.

136 Linda Gerber-Stellingwerf David Cortright with Alistair Millar, George A. Lopez, Kristen Wall, Eliot Fackler, and Joshua Weaver, "Friend, Not Foe: The Role of Civil Society In Preventing Violent Extremism," *Notre Dame Journal of International and Comparative Law* 2, no. 2 (2012).

137 See UNSCR 1452 (2002) para. 1, 1844 (2008) para. 4, and examples of EU implementation: EC Regulations 2580/2001 Art 5, 881/2002 Art 2a, 356/2010 Art 5.

Council resolved that the Somalia 751 asset-freezing requirements did not apply to humanitarian delivery by specific types of UN affiliated organisations.[138] Similar exemptions apply to the Eritrea 1907 regime.[139] This recognises that the prohibition on support for proscribed organisations can have devastating material consequences on those who bear little relation to the ostensible targets of these security measures.[140] Yet in practice, both these provisions for exemption have been criticised. State authorisations for both types of exemptions are allegedly inconsistent, and some states have established separate licensing schemes to recognise basic needs, and some license specific limited forms of humanitarian provision.[141]

Potentially, peacebuilding activities might be exempt under the basic needs exemption in EU law. EU Policy indicates that a third party wishing to make funds or economic resources available to benefit a designated person may apply for an exemption,[142] and policy intends to 'ensure that the basic needs of designated persons can be satisfied'.[143] However, this extrapolation sits uneasily with FATF recommendations and international counterterrorism strategies, as well as with the non-exhaustive list of basic expenses listed in the Regulations. The absence of a specific peacebuilding exemption strongly indicates that such activities are intended to remain open to prosecution or sanction.

Despite these characteristics of counterterrorism laws which show that the law envisages that peacebuilders come within its purview, to the best of our knowledge, there have been no prosecutions of *international* NGO peacebuilders. In contrast, Islamic charities providing funds for humanitarian relief have been prosecuted for indirect provision of funds to terrorist organisations,[144] and the prosecution of human rights organisations and civil society is detailed in the subsequent case study chapters. Regardless, prosecution forms only part of the evidence of targeting. Particular features of the global regimes also encourage NGOs to self-police their associations.[145]

(iv)   A global regime: overlapping laws and extraterritorial application

The complexity of determining whether a particular peacebuilding activity is lawful is demonstrated by the general rules that determine which national law is applicable. The laws of multiple jurisdictions may apply, including:

- the law applicable at the location where peacebuilding organisations are legally constituted;

- the law applicable in the specific territory where peacebuilding activities concretely take place;

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138 See UNSCR 1916 (2010) para 5, 1972 (2011), 20160 (2012) para 7 and examples of EU implementation: EC Regulations 356/2010 OJ L 105 (27 April 2010) Art 4.

139 UNSCR 2111 (24 July 2013) paras. 12-13.

140 Charity and Security Network, "Deadly Combination: Disaster Conflict and the U.S. Material Support Law," (Washington DC: Charity and Security Network, April 2012).

141 See for example the US Treasury Department Office of Foreign Assets Control (OFAC) provision for license to transfer funds otherwise prohibited to listed entities. OFAC issued a broad license to the US State Department and USAID for humanitarian provision of aid in Somalia in response to the famine, which acted to exempt liability from Executive Order 13536 Blocking Property of Certain Persons Contributing to the Conflict in Somalia (2010). Also see guidance on the licensing policy at http://www.treasury.gov/resource-center/sanctions/Programs/pages/somalia.aspx

142 Council of the European Union 'Restrictive measures (sanctions) – Update of the EU Best Practices for the effective implementation of restrictive measures' 8666/1/08 (24 April 2008) para. 59.

143 See Council of the European Union 'Restrictive measures (sanctions) – Update of the EU Best Practices for the effective implementation of restrictive measures' 8666/1/08 (24 April 2008) para. 54. See also Council of the European Union 'Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy' 11205/12 (15 June 2012) para. 25

144 See for example the *United States v. Holy Land Foundation for Relief and Development, Shukri Abu Baker, Mohammad El-Mezain, Ghassan Elashi, Haitham Maghawri, Akram Mishal, Mufid Abdulqader, and Abdulrahman Odeh*, No. 04-CR-240G, Indictment (N.D. Tex. July 26, 2004). See further case studies of the terrorist designation of Islamic charities at Kate Mackintosh and Patrick Duplat, "Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action," (United Nations Office for the Coordination of Humanitarian Affairs, Norwegian Refugee Council, July 2013), 108-11.

145 Mythen and Walklate consider the tools Foucault's governmentality thesis brings to understanding risk-based techniques utilised in counterterrorism. See in particular Mythen and Walklate, "Criminology and Terrorism: Which Thesis? Risk Society or Governmentality?," 384-385, 388-393

- the laws that regulate donor agencies may apply to the provision of funds to peacebuilding organisations;

- the laws of the country of citizenship (and sometimes country of residence) of staff or participants in peacebuilding projects may apply to those individuals;

- the laws applicable at the location peacebuilders' bank accounts may also apply .

Further, some jurisdictions provide their laws apply extraterritorially to non-nationals, outside the relevant national jurisdiction. This approach goes beyond demands made by the Security Council sanctions regimes which merely call for nations to ensure their laws apply to their nationals and those within their territory. Similarly, the EU has adopted a strong stance against the legality of extraterritorial application of third country state laws, and does not impose liability on non EU nationals or non EU entities.[146] And a number of states also limit their jurisdiction (or parts of their counterterrorism laws) to that established by the Security Council sanctions regimes. In contrast, the US claims jurisdiction to apply US material support and terrorist financing laws to any person for activity anywhere in the world.[147] The scope of applicability of US laws prohibiting material support to FTOs is so broad that a non-US national may be captured by US laws for activities undertaken elsewhere (ie, outside the US) when they enter (or are brought into) the US, provided the offence affects interstate or foreign commerce. Other states have also claimed jurisdiction over non-nationals for the alleged offences but in more restricted circumstances - such as for limited offences, where such jurisdiction accords with the *Terrorism Financing Convention,* where activities affect state interests, or where it was also a crime where the act took place.[148]

The jurisdiction that is effected through interconnected global security laws, therefore, is always patchy, variable and case-specific. By decentring a single institution as having the power to define contravention of terrorism laws, the self-policing role of those potentially affected by such laws is emphasised.[149] A plural legal environment (particularly one where the same activity may be legal or illegal) brings subjects into relation to law through risk management techniques. Thus, it is not simply that the legal regime draws its disruptive power from its potential applicability, it is that a plural legal environment encourages people to manage the risks of contravention in a particularly prudent manner. Given US laws have extraterritorial application and are therefore always potentially applicable, and in general represent the strictest regime, they arguably set the global standard for regulating peacebuilding activities in proximity to listed groups. Considerable uncertainty over the scope of support prohibited by US law persists, yet a risk management logic encourages disruption of potentially lawful associations.

(v)   The process of listing: intelligence material and executive powers

Listing imposes highly punitive measures that restrict the freedom of movement and property rights of those listed for effectively unlimited periods. The seriousness of asset-freezing consequences, together with the listing process itself, is a feature of how the global legal regime institutes disruption of associations. This is achieved through the practice of listing which straddles the boundary between politics and law,[150] and the indifference shown by the process to "false positive identifications"[151] which highlights the vulnerability of peacebuilders to such sanctions.

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146 See for example: EC Regulations 881/2002, Art. 11, and 356/2010 Art. 17.
147 John De Pue, "Fundamental Principles Governing Extraterritorial Prosecutions - Jurisdiction and Venue," *U.S. Attorneys' Bulletin* March(2007): 5. Alex Lakatos and Jan Blöchliger, "The Extraterritorial Reach of U.S. Anti-Terrorist Finance Laws: Criminal prosecution and civil litigation risk for non-U.S. financial institutions arising from operations outside the United States," *GesKR* 3(2009).
148 For example Australia, France, Germany, Japan, New Zealand, the Netherlands, Norway.
149 See Dupont and Pearce's approach to governmentality cited in Mythen and Walklate, "Criminology and Terrorism: Which Thesis? Risk Society or Governmentality?," 385.
150 Elspeth Guild, "EU counter-terrorism action: A fault line between law and politics?," in *Justice and Home Affairs, Liberty and Security in Europe Papers* (Brussels: Centre for European Policy Studies, 29 April 2010).
151 Richard V Ericson, *Crime in an Insecure World* (Cambridge: Polity Press, 2007), 48.

Deficiencies and inequities of listing process have been challenged most forcefully in relation to UN sanctions against Al-Qaida, which have long been criticised for being 'remarkably opaque'.[152] Following the 11 September attacks almost all US proposals for listing were accepted by the Security Council, even without Council access to classified intelligence which provided the base for the designation, leading to the sanction list's rapid expansion.[153] Indeed in departure from conventional criminal law standards of evidence and adjudication, listing is ordinarily based on intelligence material. Growing concern about 'toxic designations' based on erroneous information, highlighted the human rights impact of the listing process: the lack of a fair hearing prior to listing, lack of access by those listed to confidential or classified information that supposedly justifies their designation, the absence of access to judicial review and effective remedy to challenge that listing, and the absence of due process generally.[154]

These problems are further compromised by barriers to delisting. It was not until 2006, after the United Nations World Summit called for improved procedural safeguards,[155] that the Security Council first introduced a focal point to receive de-listing requests. This simple reform enabled individuals to directly request de-listing from the UN, rather than (as had previously been the case) being solely reliant on their state of nationality to initiate such a request.[156] Nevertheless, the focal point remained little more than an administrative 'postbox' and few people who tried to use it were ever removed from the UNSCR 1267 list. The 'crisis of legitimacy' for the UNSCR 1267 listing regime produced by the 2008 European Court of Justice decisions in *Kadi* and *Al-Barakaat* spurred on further procedural reforms.[157] Specific review of the Al-Qaida/Taliban 1267 regime list resulted in the removal of 45 of the 488 listed by its 2010 conclusion, and the list is now subject to annual review.[158] The establishment of an Ombudsperson for the Al-Qaida 1267 Sanctions Committee in December 2009 was another key reform, and from mid-2011 the Ombudsperson's recommendations for delisting are final unless set aside unanimously by the committee or referred to the Security Council by a committee member.[159] Yet the Ombudsperson mechanism remains confined to the UN Al-Qaida sanctions regime only. All attempts to extend it to other sanctions regimes have so far been thwarted by opposition from the Security Council P5. In any event, notwithstanding these procedural reforms, it is still the Security Council, rather than the Ombudsperson, that retains ultimate decision-making power with respect to individual delisting decisions. The political character of listing and flawed process thus cast a wide and unpredictable net that emphasises the serious consequences of engagement with those listed or their associates.

(vi)   A plethora of further lists: practical challenges in identification of legal requirements

Security lists are best analysed through their variable transnational interconnections rather than in isolation, as regulatory instruments confined to singular legal jurisdictions. Whilst UN Security Council counterterrorism measures carry particular importance because their implementation is mandatory by all states worldwide, their effects are supplemented, extended and modified by a plethora of other national and regional listing measures that operate simultaneously. As outlined earlier in

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152 Sullivan and Hayes, "Blacklisted: targeted sanctions, preemptive security and fundamental rights," 13.

153 Thomas J. Biersteker, "Targeted sanctions and individual human rights," *International Journal* 65, no. 1 (2009/2010): 102. Biersteker and Eckert, "Addressing Challenges to Targeted Sanctions: An Update of the "Watson Report" " 7, 24.

154 See for example: Eugenia López-Jacoiste, "The UN Collective Security Sydney and its Relationship with Economic Sanctions and Human Rights," *Max Planck Yearbook of United Nations Law* 14(2010); Watson Institute for International Studies, "Strengthening Targeted Sanctions Through Fair and Clear Procedures," (Providence, Rhode Island: Watson Institute for International Studies, Brown University, 30 March 2006).

155 United Nations, General Assembly, World Summit Outcome (New York: UN, 2005). Available at www.un.org/summit2005/documents.html.

156 UNSCR 1730 (19 December 2006).

157 Sullivan and Hayes, "Blacklisted: targeted sanctions, preemptive security and fundamental rights," 103. Referencing Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, [2008] ECR I-6351; *Ahmed and others v HM Treasury* [2010] UKSC 2 which held that the lack of an effective remedy for individuals listed by the UN consequently rendered the UK implementing legislation unlawful.

158 United Nations Security Council, Press Release No SC/9999 'Security Council Al-Qaida and Taliban Sanctions Committee Concludes Review of its Consolidated List, Pursuant To Resolution 1822 (2008)' (2 August 2010). Available at http://www.un.org/News/Press/docs/2010/sc9999.doc.htm Accessed 14 June 2013.

159 UNSCR 1904 (17 December 2009); UNSCR 1989 (17 June 2011).

this chapter, the Council of the EU maintains its own autonomous Terrorist List of those subject to 'restrictive measures' or financial sanctions. Many national states have developed domestic terrorist lists pursuant to UN Security Council Resolution 1373 that identify further individuals and groups made subject to sanctions. The US Treasury Department's Office of Foreign Assets Control's (OFAC) Specially Designated Nationals (SDN) list identifies thousands of individuals subject to asset freezing, and to whom assets cannot be provided. This list extends far beyond those deemed terrorist to comprise alleged narcotics traffickers and others. In addition to the financial sanctions, dedicated terrorist lists are also in operation at airports and borders. The US for example, like other states, maintains a 'no-fly' list, a Terrorist Exclusion list, and a terrorist 'watch list'. These are supplemented by the dedicated Terrorist Identities Datamart Environment (TIDE) database used by the intelligence community which currently holds over 1.1 million entries.

Taken together, these lists add substantially to the total number of individuals targeted by counterterrorism measures worldwide. They also enrol an ever-expanding and unlikely variety of actors into the wider global security listing process. Leaked US Watchlisting Guidance documents, for example, identify the US Agency for International Development (USAID) as a conduit for collecting and verifying intelligence on foreign nationals they come into contact with as part of USAID funded peace and development projects and confirm that USAID have their own intelligence analysts embedded within the FBI's Terrorist Screening Centre (TSC) specifically for this task.[160] The global interconnection of different security lists makes it increasingly difficult for those concerned about their legal liability for association with listed entities to determine who has been listed by whom and to what effect.

(vii) Due diligence and the private sector: expanding the risk based net

To meet this challenge, governments, financial institutions, peacebuilders and other public and private actors have little choice in practice but to seek the assistance of a burgeoning compliance industry. Companies like Lexis Nexis and Thompson Reuters' World-Check offers their customers access to consolidated databases comprising national and international lists and additional due diligence services that assess the risk posed for new and existing customers. World-Check for example draws in over 400 sanction, watch and regulatory law and enforcement lists (including lists unrelated to counterterrorism) as well as public and other information sources.[161] It claims that it "currently exceeds terrorist coverage on the four leading sanctions (OFAC, EU, UN, UK HMT) by more than 70,000 records" and that the risk intelligence included in individual profiles on their database shows networks and links to associated entities not found on official lists.[162] In 2012, World-Check claims that it identified over 180 entities as associates of terrorist groups *before* they were included on the US SDN list.[163] FATF guidance encourages public and private bodies to use services like these to meet their due diligence obligations, with the effect that those treated as 'suspected' and 'alleged' associates far exceeds the more formalised listing practices of states and international bodies like the UN and EU. It also maintains records on groups and individuals who have been de-listed, with the effect that the stigmatisation and risk aversion associated with listing may continue to exclude them from access to financial services, for example, long after they have been formally cleared of suspicion.

World-Check have been criticised for listing people with marginal associations on the basis of unsubstantiated allegations. In at least one example, this resulted in a bank's initial refusal to transfer donor funds to a UK-based Islamic NGO, impacting

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160 Jeremy Schahill and Ryan Devereauz, "The Secret Government Rulebook for Labelling You a Terrorist," *The Intercept* (24 July 2014), https://firstlook.org/theintercept/2014/07/23/blacklisted/.

161 Thomson Reuters, "Accelus World-Check," Thomson Reuters, http://accelus.thomsonreuters.com/products/world-check.

162 Ibid.

163 Ibid.

on their delivery of humanitarian aid.[164] As a private institution, World-Check lies outside the limited scope for accountability and redress instituted at the UN level. This is problematic because its database is now reportedly used "by more than 2,000 institutions and 200 government agencies in more than 120 countries" worldwide.[165] In practice then, the private sector has substantially expanded the net of suspects and associates beyond the official terrorist lists and enhanced their disruptive and isolating consequences, with no mechanisms for redress or accountability. These private sector lists are not formally 'law'. Yet as preemptive measures are characterised by the extension of responsibility for security against risk from the state to private agents and civil society,[166] private sector lists must be understood as a key practice of disruption within the global legal regime. By facilitating decisions about myriad forms of engagement, list-checking services reflect the function of lists as "a way of bringing people, places and things into lawful relation".[167]

Conclusion

This chapter has sought to outline the legal frameworks produced by different counterterrorism proscription and listing regimes, and explore whether and how these regimes target peacebuilding practices. Our analysis of these regimes shows these laws do indeed target social affiliations and indirect associations with listed parties, not solely the prevention of terrorist acts. This is apparent on the face of the legal texts – both criminal and administrative - examined. Otherwise legal activities - such as training, organising meetings, and providing support in the course of peacebuilding – come within the remit of counterterrorism laws when undertaken in proximity with those listed. In viewing terrorist actors as simply one node in a network, the expansive focus on disrupting associations is premised on an anticipatory preemptive logic that seeks to prevent potential future threats from materialising. A foundational conclusion thus is that that far from adverse impacts on peacebuilders being simply 'unintended consequences', counterterrorism law's preemptive rationale views peacebuilding squarely within its focus.

Further, the particular mode of analysis adopted in this chapter has enabled a more nuanced picture of counterterrorism laws to develop. Considering the UN, EU and national counterterrorism measures *in relation* to each other has helped explain the complex terrain produced by these overlapping and sometimes contradictory laws, as well as their proliferation. The *global* analysis has identified particular real-world challenges facing peacebuilders in determination of the legality of diverse practices. Lastly, by exploring the global and interrelated *practice* of counterterrorism beyond legal text, the chapter has revealed key features of the legal regime, in both the public and private domain, which conditions peacebuilders relation to such laws. It is this last part of the chapter which attends to the novel aspect of our argument, as these key features provide measure for how the legal regime seeks to regulate without necessity for recourse to criminal prosecution or administrative sanction. Comparison with the exemptions, though limited, available to some humanitarian provision, coupled with the explicit identification of surveillance of NPOs detracts from arguments that counterterrorism laws do not contemplate capturing peacebuilders. Further, the overlapping and extraterritorial application of laws, proliferation and expansive coverage of lists and the flawed process of listing itself all embed the disruption of peacebuilders' activities. These elements encourage risk-based self-regulation, and adoption of the most stringent legal requirements as a baseline for legality. A second conclusion directs research into the adverse effects of counterterrorism laws towards documentation of how such laws constrain peacebuilding practices.

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164 Mackintosh and Duplat, "Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action," 110. Note research into selected jurisdictions in Europe and the Middle East highlighted the key regulatory role banks play, and their overly risk averse approach: IASC survey on the humanitarian impact of counter-terrorism measures, August 2012, cited by Mackintosh and Duplat, "Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action," 110.

165 This figure cites the use of the Politically Exposed Persons category in the World-Check database: George Gilligan, "PEEPing at PEPs," *Journal of Financial Crime* 16, no. 2 (2009): 139. However in practice there is only one database and queries search across all categories, so the prevalence of its institutional use provides insight into access to its counterterrorism data.

166 Zedner, "Pre-crime and post-criminology?," 262.

167 Fleur Johns, "The List plus the Algorithm as Global Law," *Environment and Planning D: Society and Space* (forthcoming 2015): 18.

As a final conclusion, the disruptive method of counterterrorism law implies the potential for contestation of its adverse effects. The agency and involvement of peacebuilders in materialising such disruption is evident – whether this be through concrete organisational decisions to maintain distance from listed entities, or broader shifts in conceptualising possibilities for conflict transformation. The next chapter examines peacebuilders' reports of the impact of counterterrorism listing and proscription.

Chapter 2

Transforming Peacebuilding: The Impacts of Listing

Introduction

The aim of this chapter is two-fold. The first is to introduce the existing literature on the impact of terrorist listing on peacebuilding. How do peacebuilders and peace scholars understand the relationship between banning non-state actors as terrorist and conflict transformation? How do they understand the impacts of listing on the diverse forms of peace work? The second aim of this chapter is to establish a framework for understanding the impacts of listing as part of broader structural transformation of the norms and practice of conflict transformation.

This chapter is structured in three parts. It starts with a brief comparison between the aims of listing and peacebuilding. Theoretically, a fundamental conflict between conflict transformation and counterterrorism listing emerges because of their divergent approaches as to whether the use of violence by non-state actors precludes political negotiation. The second part of the chapter draws on existing scholarly and NGO/policy literature to thematically introduce the key impacts of counterterrorism listing on peacebuilding. The chapter reports the differing effects of listing, as they are understood on a range of entities including governments, diplomats, mediators and INGOs. There is, however, a need for further attention to the impact on civil society, an effect of listing we consider in the section which follows.

The last part of the chapter charts the structural transformations to peacebuilding we argue have deepened through global counterterrorism. Two factors are important in understanding the evolving connection between peace building and counterterrorism: (i) the resolution of armed conflicts is conditioned and shaped by listing and the counterinsurgency logic which underpins it. We explain how legal strategies of not only prosecution, but isolation, disruption and containment (see chapter 1) function as weapons of war (a form of 'lawfare') consistent with conflict *management*, but not with conflict *transformation*. (ii) Consequently, fundamental norms in international law that could resource conflict transformation are eroded and conceptually marginalised (such as recognition of armed conflicts and their regulation through IHL; proportionality and non-interference). We consider how international norms recognising political claims by non-state actors are supplanted by counterterrorism, and contribute to conditioning the space for peacebuilding towards security ends.

1. Terrorist listing and peacebuilding: conflicting aims?

Are counterterrorism laws and sanctions and peacebuilding incompatible? Certainly there is a strong current of both scholarly and civil support for the potential of targeted sanctions *generally* as a tool of international peacebuilding. The Kroc Institute for International Peace Studies at the University of Notre Dame (Indiana US) has sought to improve the design of targeted sanctions specifically for that purpose.[1] Further, calls for the imposition of UN targeted sanctions to address human rights violations and humanitarian access in conflicts has become a routine part of the advocacy of organisations such as Amnesty International.[2] However this report focuses not on the impact of the broader range of United Nations Security Council targeted sanctions, but specifically on the impact of the global *counterterrorism* proscription and listing regimes (necessarily including domestic counterterrorism laws), as discussed in the previous chapter.

The designation of organisations as terrorist aims to *isolate* listed entities (by removing financial and material support); *disrupt* associates of those listed (by setting consequences for specified associations); name, stigmatise and *delegitimise* listed entities and their associates; and thereby end political violence. As outlined in the previous chapter, many of the activities undertaken by peacebuilders potentially contravene the letter of counterterrorism law. The disruption of material support through asset-freezing sanctions, the 'chilling' effect of criminal prohibitions, and the consequences of risk identification by commercial list-checking services apply broadly because these effects rest on an associational logic in the law. This associational logic potentially captures inclusive peacebuilding because listing is intended to target not simply violent acts, but the broader social relations which allegedly cause, support and legitimate them.

Conflict between peacebuilding and terrorist proscription depends essentially on whether such frameworks diverge in their normative approach to violence. Peacebuilding has "no grand theory in the field" nor agreed unifying principles.[3] Simply asserting so-called distinct models of peacebuilding can also homogenise and de-politicise the role of power held by different peacebuilding actors. Nevertheless, a brief outline of conflict transformation, liberal and hybrid peacebuilding approaches provides a basis for differentiating the practices and norms associated with each approach. The brevity of the following discussion necessitates the presentation of somewhat flattened and static representations of global peacebuilding 'models'. The aim is to identify the idealised norms regarding *who* must be involved in peacebuilding to achieve peace, whether the *use of violence* disqualifies armed actors from peace negotiations, what the appropriate stage for *demilitarisation* is, and how peacebuilders know that *peace* has been achieved. Identifying these norms grounds our subsequent evaluation of how the reported impacts of counterterrorism listing condition the type of peace possible in practice.

1.1 Peacebuilding norms: contrasting approaches to violence

(i) Conflict transformation

Conflict transformation practices seek to address the root causes of conflict, involve gradual change over a long period, and aim to ultimately facilitate constructive ways of dealing with conflict.[4] The approach is not focused on statebuilding, but rather the

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1   See for example David Cortright et al., *Integrating UN Sanctions for Peace and Security*, Sanctions & security Research Program (Goshen, Indiana: Fourth Freedom Forum and the Kroc Institute for International Peace Studies at the University of Notre Dame, October 2010).

2   Most recently in Syria (see http://www.amnesty.org.au/news/comments/34441/). This is not a new approach: Human Rights Watch and the International Commission of Jurists joined AI in calling for targeted sanctions on Nepal's top officials in 2006 (see http://www.hrw.org/fr/news/2006/04/17/nepal-three-human-rights-organizations-call-targeted-sanctions).

3   Louis Kriesberg, "The State of the Art in Conflict Transformation," in *Berghof Handbook for Conflict Transformation*, ed. Beatrix Austin, Martina Fischer, and Hans J. Giessmann (Berlin: Berghof Foundation, 2011), 52.

4   John Paul Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies* (Washington DC: United States Institute of Peace Press, 1997), 20. Berghof Foundation, "Conflict Transformation - Our Interpretation " http://www.berghof-handbook.net/profile/conflict-transformation-our-interpretation/. Accessed 5 May 2014.

transformation of structural, behavioural and attitudinal aspects of the conflict, as necessary prerequisites for a 'just peace'.[5] The conflict transformation approach to 'terrorist' actors is shaped by its key value of *inclusive engagement*. Engagement with all parts of society is seen as essential: civil society; political and military actors; *and* armed conflict actors.[6] Conflict transformation thus envisages a multiplicity of actors engaged as *peacebuilders*:[7] state and inter-governmental organisations, INGOs, and importantly, a number of actors not conventionally recognised as peacebuilders, including charities, social and human rights organisations, and those working outside formal institutions. Further, the *impartiality* of external peacebuilders is needed to support multi-party engagement, including non-state armed actors, for an inclusive process. In the conflict transformation tradition, the underlying causes of a conflict cannot be understood without inclusive engagement. This is because the entirety of societal relationships that maintain violent conflict are sought to be transformed.

Importantly, a conflict transformation approach acknowledges that both state and non-state actors utilise violence and does not presuppose the legitimacy of state violence and repression. It views the *political legitimacy* of all parties to the conflict as a necessary precondition for dialogue, the importance of which is exemplified in claims based on communal identity and self-determination in "protracted social conflict".[8] Accordingly, unlike other approaches to peacebuilding, the use of violence is not a disqualifier from engagement. Conflict transformation does not require the *demilitarisation* of non-state armed actors prior to engagement in peace negotiation. Rather, prematurely requiring disarmament is understood to potentially jeopardise peace negotiations. This is largely because some symmetry between conflict parties is needed for the possibility of political negotiations.[9] Demilitarisation involves non-state actors giving up a key leverage as well as a critical resource for their safety and that of their constituency.[10] Consequently, demands for demilitarisation risk the success of any talks as non-state actors struggle to re-establish their legitimacy with their constituency from its basis in force and opposition.[11] Thus conflict transformation approaches emphasise the value of reciprocal demilitarisation, self-managed decommissioning, and situating arms management in the context of broad structural reform.[12]

From this perspective, the logic of counterterrorism which targets those associated with listed individuals and entities is antithetical to key norms of conflict transformation. However, the peacebuilding reality is made up of heterogeneous, relational practices, not a static set of norms. From this methodological standpoint, our case studies chart how peacebuilding practices manage contradictions around the question of non-state violence, with different effects, and from different positions.

(ii) Liberal peacebuilding

The liberal discourse of peacebuilding promises the establishment of a positive peace premised on representative democracy, rule of law, humanitarianism, market-based economic reform and development.[13] Together, these elements are said to foster respect for individual rights, and introduce economic incentives for the development or maintenance of peace.[14] Liberal

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5   Sophie Haspeslagh and Véronique Dudouet, "Conflict resolution practice in conflicts marked by terrorist violence: A scholar-practitioner perspective," in *Researching Terrorism, Peace and Conflict Studies: Interaction, Synthesis and Opposition*, ed. Ioannis Tellidis and Harmonie Toros, *Routledge Critical Terrorism Studies* (London: Routledge, 2015).

6   Lederach, *Building Peace: Sustainable Reconciliation in Divided Societies*: 37-55.

7   Ibid.

8   Edward Azar, *The Management of Protracted Social Conflict* (Darthmouth: Aldershot, 1990); Berghof Foundation, "Conflict Transformation - Our Interpretation".

9   Véronique Dudouet, "Introduction," in *Civil Resistance and Conflict Transformation: Transitions from armed to nonviolent struggle*, ed. Véronique Dudouet (London: Routledge, 2014), 6.

10   Véronique Dudouet, Hans J. Giessmann, and Katrin Planta, "From Combatants to Peacebuilders: A Case for Inclusive, Participatory and Holistic Security Transitions, Policy Report," (Berlin: Berghof Foundation, 2012), 17-19.

11   Liz Phillipson, "The challenge of asymmetries," *Accord* 16 *Choosing to Engage: Armed Groups and Peace Processes* (2005): 71.

12   Dudouet, Giessmann, and Planta, "From Combatants to Peacebuilders: A Case for Inclusive, Participatory and Holistic Security Transitions, Policy Report," 20-22.

13   Michael Doyle, "Three Pillars of the Liberal Peace," *American Political Science Review* 99, no. 3 (2005).

14   Ibid.

peacebuilding aims for the global adoption of liberalism to enable such values to prevent violent conflict. However, in practice liberal peacebuilding has been critiqued for its deployment of liberalism for illiberal and often colonial ends.[15] Thus, while in an idealised sense liberal and realist traditions of peacebuilding remain distinct, in practice they are conjoined through a common focus on statebuilding as security.[16] One reason offered for this is that the introduction of liberal institutions is treated as proxy for the development of liberal norms, yet its top-down approach, which is not especially sensitive to specific local contexts, hinders their realisation. Others suggest that post Cold-War post-conflict intervention has not in fact been informed solely by liberal policy.[17] In practice, the norms associated with 'liberal peacebuilding' depart somewhat from its discourse.

A focus on achieving formal social stability but not necessarily addressing the underlying causes of conflict frames liberal approaches to violence. First, a liberal peace is signified by the absence of war and direct physical violence, rather than addressing the underlying causes of the conflict. Second, the focus liberal peace has on stability encourages the containment and repression of conflict, rather than its transformation.[18] The demilitarisation of non-state actors is often a precondition to commencing peace talks, because liberal peacebuilding's equation of peace with stability:

> ...normally rests on the exclusion of terrorist actors as well as perceived "non-liberal" actors, at least until they renounce the use of violence, producing a "catch 22" situation where they must give up their leverage before arriving at the negotiating table... [19]

The danger is that such 'stability' focused approaches lead to a 'victor's peace' where the potential for conflict persists.[20] Terrorist proscription is not necessarily challenged or contradictory to liberal peace practices, because designation forms part of the conditionality within which 'liberal' peace is determined.

(iii) Hybrid peacebuilding

In recent years, increasing interest has focused on 'hybrid' forms of peace. Hybrid peace processes intermingle the 'everyday' practices and values of both local and international peacebuilding, and is thus often viewed as a mix of non-liberal and liberal practices respectively.[21] The form of peace established varies from the victor's peace of Sri Lanka, to the durable peace established in Northern Ireland following resolution of the root causes of conflict.[22] The development of hybrid peacebuilding that works with and incorporates local norms has been explained as a response to the crisis of legitimacy faced by international liberal approaches to peacebuilding. Through such engagements, the *potential* for a post-liberal peace is said to emerge, which not only addresses poverty and historical injustice (as liberal traditions purport to do) but also opens the space for recognition of political claims otherwise foreclosed by counterterrorism frameworks predicated on the exclusion of listed actors.[23] The

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15   Oliver P. Richmond and Ioannis Tellidis, "The Complex Relationship Between Peacebuilding and Terrorism Approaches: Towards Post-Terrorism and a Post-Liberal Peace?," *Terrorism and Political Violence* 24, no. 1 (2012): 121.

16   Ibid.

17   David Chandler, "The Uncritical Critique of 'Liberal Peace'," *Review of International Studies* 36 (2010).

18   Edward Newman, ""Liberal" peacebuilding debates," in *New Perspectives on Liberal Peacebuilding*, ed. Edward Newman, Roland Paris, and Oliver P. Richmond (Tokyo: United Nations University Press, 2009).

19   Richmond and Tellidis, "The Complex Relationship Between Peacebuilding and Terrorism Approaches: Towards Post-Terrorism and a Post-Liberal Peace?," 121.

20   Anna K. Jarstad and Roberto Belloni, "Notes on hybrid peace governance: impact and prospects of liberal peacebuilding," *Global Governance* 18, no. 1 (2012).

21   See for example Roberto Belloni, "Hybrid Peace Governance: Its Emergence and Significance," *Global Governance* 18, no. 1 (2012); Richmond and Tellidis, "The Complex Relationship Between Peacebuilding and Terrorism Approaches: Towards Post-Terrorism and a Post-Liberal Peace?."; Roger Mac Ginty, "International Peacebuilding and Local Resistance: Hybrid Forms of Peace." (Basingstoke: Palgrave Macmillan, May 2011); Oliver P. Richmond and Audra Mitchell, eds., *Hybrid Forms of Peace: From Everyday Agency to Post-Liberalism*, Rethinking Peace and Conflict Studies (Basingstoke: Palgrave Macmillan, 2011).

22   Richmond and Tellidis, "The Complex Relationship Between Peacebuilding and Terrorism Approaches: Towards Post-Terrorism and a Post-Liberal Peace?."

23   Ibid.

apparent distinction between hybrid and liberal approaches is contested in crucial ways relevant for our normative comparison of peacebuilding traditions.[24] Both approaches "rest... on the state's (restored) monopoly over the use of force and the rule of law,... and 'non-violent' politics as the exclusive pathway to peace and emancipation".[25] In both traditions, the use of violence tends to disqualify non-state armed actors from the peace process until demilitarisation and the disavowal of violence. Further, the notion of the 'local' valorised for inclusion in hybrid peace processes is that found in "forms of local and everyday civility, tolerance, cooperation, care".[26] This approach to the 'local' depoliticises emancipation claims, because whilst it accepts that there may be local support for the political goals of armed actors,[27] it rejects the validity of local support for the violent means utilised by such groups. This involves "*a priori* disqualification" of the political claims of self-determination movements who seek autonomy or statehood such as the Turkish-Kurds and Palestinians respectively.[28] Ethnic or other identity based claims are reduced through 'localism' to individualised needs.[29] The *inclusivity* envisaged is thus far from the recognition of political legitimacy of communal identity claims associated with conflict transformation traditions. Nevertheless, hybridity alerts peacebuilders to the need to critically and strategically negotiate the tensions between counterterrorism laws and peacebuilding norms, and to be attentive to what claims are encompassed within discourses of inclusive peacebuilding.

A fundamental conflict is evident between political transformation and counterterrorism security. Counterterrorism measures seek to disrupt social affiliations that are critical to the exchange needed for conflict transformation, isolate listed actors, and exclusively determine political legitimacy for participation in peace processes. Is this contradiction borne out in practice? The impacts of terrorist listing as reported in peacebuilding scholarship are considered in the next section.

2. The impacts of terrorist listing: insights from peacebuilders

The overall message emerging from existing literature is that counterterrorism laws and sanctions have reduced the space for peacebuilding. This is primarily evidenced through the outright withdrawal of peacebuilders from various forms of engagement as well as erosion of the perceived impartiality of peacebuilders that diminishes their effective involvement (2.1-2.3 below). Whilst the ongoing use of arms is often identified as an impediment to the commencement of peace talks in practice, the literature disputes the assumption that listing encourages demilitarisation by non-state armed actors. In fact, listing undermines the openness of state conflict actors to engage in dialogue with those listed (2.4-2.5 below).

2.1 Peacebuilders' decisions to engage or withdraw

The key concern that emerges from both scholarly and practitioner literature is that counterterrorism laws have reduced the space for peacebuilding, primarily by affecting *whether* third party peacebuilders engage with armed actors in the preparatory steps necessary for eventual peace talks between conflict actors. This is central to understanding how counterterrorism laws disrupt peacebuilding including debates about self-censorship by peacebuilders, and relatedly, perceptions of the political risk involved in engaging with armed actors. The reasons government/inter-governmental and NGO peacebuilders withdraw from engagement vary, as a result of their very different perceptions of the likely consequences of engagement.

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24 Suthaharan Nadarajah and David Rampton, "The limits of hybridity and the crisis of liberal peace," *Review of International Studies* September (2014).
25 Ibid., 15.
26 Ibid., 16.
27 Richmond and Tellidis, "The Complex Relationship Between Peacebuilding and Terrorism Approaches: Towards Post-Terrorism and a Post-Liberal Peace?," 124.
28 Nadarajah and Rampton, "The limits of hybridity and the crisis of liberal peace," 16.
29 Ibid.

A 2010 workshop of NGOs hosted by Berghof Peace Support and Conciliation Resources, attended by 30 high-level EU officials, mediators and civil society experts, provides important insight into how listing affects EU government engagement decisions. A participant at this workshop revealed that 30-40% of Swiss government engagement with armed groups was undertaken on the request of EU member states that felt constrained from engagement with specified non-state groups.[30] The factors underlying decisions by EU governments not to engage remain largely unclear, though at the same 2010 workshop it was stated that since Hamas won the 2006 Palestinian parliamentary elections, its proscription by the EU "often became a pretext for not engaging with Hamas".[31] Further, the 2009 EU diplomatic delegation for a cease-fire between Israel and the Gaza Strip met only with the Fatah-controlled Palestinian Authority in Ramallah, not with the Hamas government.[32] The EU's exclusion of Hamas from diplomatic relations has consequently resulted in the EU's "progressive marginalisation as a regional facilitator".[33] In contrast, Norway withdrew from the EU listing regime after the EU proscribed the LTTE in 2006, a turning point in the peace process which subsequently deteriorated. Norway prioritised protection of a neutral facilitation role over counterterrorism listing, indicating its discretionary power as a non-EU member state to apply the EU listing regime.

For NGO peacebuilders, withdrawal from engagement with listed actors has been reported to be a consequence of donor-imposed funding restrictions, and a desire to avoid civil or criminal liability. In 2009, funding restrictions imposed by US and Canadian donors caused the termination of a Berghof peer-learning exchange project involving senior members of armed groups and ex-negotiators of former armed groups.[34] Sophie Haspelagh's interview-based research with third-party peacebuilders also reports that US organisation 3P Human Security withdrew from their training and mediation work with Taliban in Afghanistan following proscription.[35] 3P had contacted US diplomats but were unable to receive reassurance that their activities would comply with US material support laws. Further, after the US Supreme Court decision in *Holder v the HLP* (2010), the US-based Carter Center, which had conducted conflict resolution workshops for the Hamas leadership, stopped this program and went on to train non-listed organisations.[36] The Charity & Security Network also documents examples of peacebuilding activities that did not proceed due to US terrorist listing. These include (i) projects that planned direct provision of support to listed actors (such as funding the travel of listed actors from the Philippines to share their experiences of successful localised peace agreements or the provision of training to the LTTE leadership at a critical juncture); (ii) the attendance of technical advisors and facilitators at talks involving listed parties (such as the Nepalese Maoists and Hamas); and (iii) a number of cases where the project involved a risk that participants might include listed actors (including an invitation to train religious school teachers on non-violence and religious plurality in the OPT; and training students in Gaza in peaceful dispute adjudication through a 'student parliament').[37]

That listing has resulted in peacebuilders' withdrawal from engagement is well established. The consequent lost opportunities for peacebuilding work by both third party governmental actors and NGOs is patently clear from these examples, and highlights the incompatibility of listing regimes with the norms of inclusive engagement.

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30 Sophie Haspeslagh, ""Listing terrorists": the impact of proscription on third-party efforts to engage armed groups in peace processes - a practitioner's perspective," *Critical Studies on Terrorism* 6, no. 1 (2013): 194.

31 Conciliation Resources, Zahbia Yousuf, and Sophie Haspeslagh, "What's in a label? EU listing of Hezbollah and challenges to Lebanon's peace " (London: Conciliation Resources, June 2013), 1.

32 Gavin Sullivan and Ben Hayes, "Blacklisted: targeted sanctions, preemptive security and fundamental rights," in *10 years after 9 / 11 Publication Series*, ed. ECCHR (Berlin 2010), 90-91.

33 Véronique Dudouet, "Anti-Terrorism Legislations: Impediments for Conflict Transformation," in *Berghof Policy Brief 02* (Berlin: Berghof Conflict Research, 2011), 9.

34 Ibid.

35 Haspeslagh, ""Listing terrorists": the impact of proscription on third-party efforts to engage armed groups in peace processes - a practitioner's perspective," 197.

36 Ibid., 204.

37 Charity and Security Network, "Examples: Impacts of the Material Support Prohibition on Peacebuilding,"(13 June 2011), http://www.charityandsecurity. org/system/files/Impacts%20of%20the%20Material%20Support%20Prohibition%20on%20Peacebuilding.pdf.

The impact of listing on civil society varies in accordance with understandings of civil society organisations' contribution to peacebuilding. There is some evidence of the withdrawal of local civil society peacebuilders in Pakistan, Sri Lanka and north-eastern India, arising from concerns about the potential effect on their peacebuilding work, and in particular of travel ban consequences which would constrain the mobility required to undertake such work.[38] Véronique Dudouet and Haspelagh also note the impact of listing on civil society support for armed actors, discussed below at 2.4. Civil society is valued in these accounts as necessary participants to the success of conflict transformation, facilitating discussion and shaping the legitimacy of peace processes. Others focus attention on listing's adverse effects on those civil society organisations committed to nonviolence and who condemn terrorism,[39] providing a contrast to conflict transformation traditions in which violence does not preclude contributions to peacebuilding. From this perspective non-violent civil society work addressing social and political inequality is valued because such organisations hold a potent capacity to "dry up the wells of extremism" said to cause armed conflict.[40]

Counterterrorism laws have hampered the work of CSOs undertaking humanitarian and peacebuilding work, particularly CSOs addressing gender equality, CSOs operating in the Middle East and Muslim states, and Islamic NGOs.[41] The disproportionate effect on the CSOs mentioned arises primarily from reduced funding. Risk-averse donors have become "reluctant to fund initiatives that address controversial issues or challenge inequalities" and prefer to fund a smaller number of larger organisations.[42.] Further, laws and practices implemented in some states restrict remittances and foreign funding, and other states such as the US label charities working in areas with terrorist activity identified as "high risk".[43] The strong emphasis generally on the importance of civil society in achieving conflict transformation prompts the need for greater attention to how effects on civil society shape the potential for peace. Part 3 of this chapter argues that the impact of listing on civil society is one of the major transformations to the norms of conflict transformation, whereby civil society actors are being constructed as the objects of listing.

Apart from withdrawal from engagement, there is a gap in empirical evidence of the ways that third party peacebuilders *adapt* their activities in response to counter terrorism laws. In part this may reflect a silence generated by peacebuilders' fear that their activities in fact contravene counterterrorism laws, as expressed by a high level EU mediator.[44] The research in this report finds that the impact is much more diverse than simply withdrawal from peace building activities, and includes changes in operational practices and strategies that respond to counterterrorism laws and practices.

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38 Haspeslagh, ""Listing terrorists": the impact of proscription on third-party efforts to engage armed groups in peace processes - a practitioner's perspective," 200.

39 David Cortright and Linda Gerber-Stellingwerf with Alistair Millar, George A. Lopez, Eliot Fackler, and Joshua Weaver, "Friend not Foe: Opening Spaces for Civil Society Engagement to Prevent Violent Extremism, A report to Cordaid from the Fourth Freedom Forum and Kroc Institute for International Peace Studies at the University of Notre Dame," (May 2011), 6-7.

40 Ibid., 6. See also David Cortright and Alistair Millar with George A. Lopez, Linda Gerber-Stellingwerf, "Friend not Foe: Civil Society and the Struggle against Violent Extremism, A report to Cordaid from the Fourth Freedom Forum and Kroc Institute for International Peace Studies at the University of Notre Dame," (October 2008).

41 Cortright et al, "Friend not Foe: Opening Spaces for Civil Society Engagement to Prevent Violent Extremism, A report to Cordaid from the Fourth Freedom Forum and Kroc Institute for International Peace Studies at the University of Notre Dame," 20-21; Kate Mackintosh and Patrick Duplat, "Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action," (United Nations Office for the Coordination of Humanitarian Affairs, Norwegian Refugee Council, July 2013), 108-11.

42 Cortright et al, "Friend not Foe: Opening Spaces for Civil Society Engagement to Prevent Violent Extremism, A report to Cordaid from the Fourth Freedom Forum and Kroc Institute for International Peace Studies at the University of Notre Dame," 20.

43 Ibid., 20- 21.

44 Sophie Haspeslagh, ""Listing terrorists": the impact of proscription on third-party efforts to engage armed groups in peace processes - a practitioner's perspective," *Critical Studies on Terrorism* 6, no. 1 (2013): 196.

2.2   Impartiality and neutrality: critical stages in the peace process

Peacebuilders are markedly concerned that listing compromises their impartiality, and thus their legitimacy.[45] Perceptions of peacebuilders' impartiality is particularly critical at two stages of the peace process: pre-negotiation, and during negotiation.

Access to armed groups in the pre-negotiation phase relies on armed groups' trust of third parties.[46] This stage of the peace process is fragile, and sometimes volatile, precisely because formal talks have not commenced. Practitioners have argued that the role of international NGOs in engagement with armed groups is particularly important at this stage. This is because NGOs undertake activities that enable often isolated armed actors to develop the understanding and skills (through, for example, mediation training) to address conflict asymmetries, which otherwise hinder armed actors' participation in peace processes, and consequently peace progress.[47]

Understanding armed groups' aims, perceptions and attitudes to violence is seen as a necessary "prerequisite for any type of engagement",[48] particularly because governmental actors often "work through" NGOs "to feel out possible grounds for talks at a stage when official engagement would be deprecated".[49] Armed actors' perceptions that peacebuilders' are not impartial also presents serious safety issues, disproportionately affecting local community-based peacebuilders that do not have the protection offered by international connections.[50] The operational impact of loss of neutrality of third party peacebuilders requires further attention (and is documented in chapter 3) and consideration as a potential outcome of the non-recognition of armed conflict.

The need for *mediators* to be perceived as neutral in order to effectively bring conflicting parties into dialogue is also evident. As discussed above, Norway's need to protect its role as a neutral facilitator in the Sri Lankan conflict was the rationale for its withdrawal from the EU proscription regime.[51] In fact, most of the international monitoring mission was forced to leave Sri Lanka after various countries proscribed the LTTE (after high profile assassinations attributed to the LTTE in 2005), which is testament to the adverse effect on perceptions of neutrality.[52] Listing effectively aligns those connected with the proscribing government/inter-governmental body with one side of the conflict, in what is generally "...a deeply factionalised political and social system".[53] Thus the ELN in Colombia questioned France and Spain's involvement as facilitators after its EU listing, and this led to the disbanding of the group of facilitators.[54]

The incompatibility between listing and the inclusion of listed parties in peace processes is evident, and reveals the limits of partial legal reform to address this issue. Even if peacebuilders successfully obtained an exemption from asset-freezing

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45   See for example Dudouet, "Anti-Terrorism Legislations: Impediments for Conflict Transformation."; Véronique Dudouet, "Mediating Peace with Proscribed Armed Groups (Special Report 239)," (Washington: United States Institute of Peace, May 2010); Véronique Dudouet and Sophie Haspeslagh, "Mediating Peace with Proscribed Armed Groups: A Policy Workshop Report on the Implications of European Union Counter-Terrorism Legislation for Mediation and Support for Peace Processes," (London and Berlin: Conciliation Resources and Berghof Peace Support, 2011); Phillipson, "The challenge of asymmetries."

46   Haspelagh refers to access and trust as the two necessary preconditions for third party engagement with armed groups: Haspeslagh, ""Listing terrorists": the impact of proscription on third-party efforts to engage armed groups in peace processes - a practitioner's perspective," 195.

47   Phillipson, "The challenge of asymmetries."

48   Haspeslagh, ""Listing terrorists": the impact of proscription on third-party efforts to engage armed groups in peace processes - a practitioner's perspective," 199-201.

49   Ibid., 197.

50   Ibid., 205.

51   Dudouet and Haspeslagh, "Mediating Peace with Proscribed Armed Groups: A Policy Workshop Report on the Implications of European Union Counter-Terrorism Legislation for Mediation and Support for Peace Processes."

52   K Höglund, "Tactics in Negotiations between States and Extremists: The Role of Cease-Fires and Counterterrorist Measures," in *Engaging Extremists: Trade-Offs, Timing and Diplomacy*, ed. W. I. Zartman and G.O. Faure (Washington, DC: USIP, 2011).

53   Conciliation Resources, Yousuf, and Haspeslagh, "What's in a label? EU listing of Hezbollah and challenges to Lebanon's peace ".

54   Dudouet and Haspeslagh, "Mediating Peace with Proscribed Armed Groups: A Policy Workshop Report on the Implications of European Union Counter-Terrorism Legislation for Mediation and Support for Peace Processes."

sanctions, such an exemption would not ameliorate perceptions that peacebuilders are not neutral because the entity would remain listed. Similarly, even if decisions to list individuals and entities were more 'nuanced', the listing of some may still affect armed groups' (and their constituencies) perception of peacebuilders' impartiality. Compromised neutrality arises, we suggest, from the wholesale redefinition of armed conflict into terrorism. As discussed in chapter 1, many legal practitioners and scholars argue for the entire repeal of domestic proscription laws because proscription undermines the basic principles of the rule of law and criminal responsibility central to liberal democracy. Rather than a system which attributes liability to individuals on the basis of their association, many experts have argued that terrorist acts are more effectively targeted and criminalised by existing laws prohibiting a range of preparatory offences with a violent intent.

2.3   Exemptions for peacebuilders: the intensification of listing's selectivity

Terrorist listing is deeply selective. As discussed in chapter 1, not all actors who use violence are deemed terrorist. The potential for peacebuilders to be either formally or informally exempt from the application of counterterrorism laws demonstrates how the technique of listing manages the inclusion or exclusion of listed groups from peace talks. Exemptions thus enable (and consequently intensify) the selective effects of proscription on listed actors and their associates in two main ways.

Firstly, the success of peacebuilders in negotiating exemptions, to permit otherwise prohibited forms of engagement with listed actors has been different for government and NGO peacebuilders. Government and inter-governmental peacebuilders display a greater capacity to negotiate exemptions. Ironically, that *governments* claim exemptions underscores the tensions in the use of listing as a tool in both peacebuilding and warfare. For example, following the 2008 election of the Communist Party of Nepal (the Maoists, designated under US law),[55] the US Office of Foreign Assets Control (responsible for these financial sanctions) granted the U.S. Ambassador in Nepal an exemption to enable the provision of financial aid to the Government of Nepal.[56] This humanitarian aid was seen by the US government as an important goodwill gesture supportive of the peace process, and was granted on the condition that the Ambassador did not enter into direct contracts with the Maoists. Nevertheless, the delay in obtaining the sanctions exemption, and more critically the symbolic message of the US labelling part of the Nepalese government terrorist arguably compromised the potential for US influence over peace mediation in the Nepal conflict.[57]

Government and inter-governmental peacebuilders also rely on "personal discretion and tacit member state approval" when their practices may be in breach or of unclear legality.[58] UN staff enabled the Taliban (a listed entity) to regularly bypass the travel ban, and operated on the implicit understanding that US prosecution would not proceed against them for their human rights and humanitarian based contact with the Taliban.[59] In any case, in 2008 the Afghan government expelled two EU and UN diplomats, including the then acting head of the EU mission, from Afghanistan for holding talks with the Taliban.[60]

Peacebuilding NGOs have not been successful in obtaining explicit exemptions from the application of counterterrorism laws. There has been limited exemption from the UN and EU legal regimes for *humanitarian* delivery in Somalia,[61] and the US-licensed USAID similarly in response to the Somali famine.[62] Although the US Treasury is empowered to license transfers

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55   The entity had been listed as a Specially Designated Terrorist group under US administrative sanctions (US Executive Orders 13224 and 13372).

56   Joshua Gross, "Proscription Problems: The Practical Implications of Terrorist Lists on Diplomacy and Peacebuilding in Nepal," *Praxis: The Fletcher Journal of Human Security* 26(2011).

57   Ibid.

58   Haspeslagh, ""Listing terrorists": the impact of proscription on third-party efforts to engage armed groups in peace processes - a practitioner's perspective," 196.

59   Ibid., 196-97.

60   Ibid; Dudouet, "Anti-Terrorism Legislations: Impediments for Conflict Transformation," 9-10.

61   See chapter 1 for details.

62   Office of Foreign Assets Control, "Frequently Asked Questions Regarding Private Relief Efforts in Somalia," U.S. Department of the Treasury, http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#133

to those listed under the US sanction laws,[63] there has been no similar broad license for peacebuilding. A campaign by peacebuilding organisations called for the US material support laws to exempt peacebuilding activities "designed to reduce or eliminate the frequency and severity of violent conflict, or to reduce its impact on non-combatants".[64] The campaign was prompted by the *Holder v HLP* decision in mid-2010.[65] Yet law reform did not eventuate. Exemptions from listing liability thus enable states significant control over *which* peacebuilders will be permitted to engage in particular activities with listed actors. Whilst the effect on peacebuilders' decisions about whether and how to engage with listed actors in the absence of exemptions is an empirical question, informal and formal 'exemptions' allow distinctions in the manipulation of the legal risk environment for various peacebuilders.

Secondly, exemptions empower decisions about engagement to be made by high-level arms of government, and start from the position of prohibition with consequential sanctions. This is significant because it facilitates a highly nuanced selectivity as to when practices supportive of inclusive engagement with listed actors will be permitted, including for example payment for transport or the transfer of resources. Moving from the default position of prohibition, exemption decisions encompass selection as to whether such practices should be permitted in the context of a particular conflict, the timing of such practices, and the form of permitted engagement. Consequently, the grant of exemptions narrates government priorities in a given context. It reveals not just whether peace or war objectives are prime, but also what activities and relationships constitute peace. For instance, exemption for the delivery of humanitarian aid in Somalia might indicate a discourse of peace (and security) through development (explored in chapter 3), and in other cases might gesture towards international confidence in peaceful resolution.[66]

The next two sections review the impact of listing on parties to the conflict: listed actors and governments.

2.4   Impacts on listed entities: the use of violence and group legitimacy

The use of violence is often identified as a practical barrier to the commencement, or continuation, of peace talks. Peacebuilders' analysis of whether terrorist listing (or other forms of labelling) encourages or dissuades listed entities' commitment to violence therefore reflects the importance of this issue to peace processes. The danger identified is that proscription does precisely as intended, that is, isolate the banned group, and undermine the groups' trust in a political resolution.[67]

Whether listing strengthens or weakens a commitment to armed conflict appears to depend firstly on armed groups' *perceptions* of listing, and its effect on their legitimacy in the conflict. It is reported that some groups, specifically Al-Qaida in the Islamic Maghreb, do not understand the significance of being listed and thus their decisions on violence remain unaffected.[68] In contrast, the successive state proscription of Hamas, in particular by the EU in 2003, was reported to have been read by Hamas as sending a "'green light' to Israel to try to assassinate their leadership".[69] Listing thus potentially also affects civil society perceptions of the relative legitimacy of peacebuilders and listing authorities, and armed actors:

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63 Project on Counterterrorism and Humanitarian Engagement, "Counterterrorism and Humanitarian Engagement Project: OFAC Licensing Background Briefing" (Cambridge: Harvard Law School, March 2013). Note this does not provide exemption from prosecution for material support to terrorist organisations under the US criminal laws.

64 See for example: Kay Guinane, "Sec. Clinton Should Use Exemption Powers to Legalize Conflict Prevention and Resolution Programs,"(21 June 2011), http://www.charityandsecurity.org/node/597. Thomas R. Pickering and Nancy Soderberg, "Time to let peace builders do their job," *CNN World* (27 June 2013), http://globalpublicsquare.blogs.cnn.com/2013/06/27/time-to-let-peace-builders-do-their-job/.

65 See chapter 2 for details.

66 See 2.4 in this chapter.

67 Dudouet and Haspeslagh, "Mediating Peace with Proscribed Armed Groups: A Policy Workshop Report on the Implications of European Union Counter-Terrorism Legislation for Mediation and Support for Peace Processes," 5.

68 Ibid.

69 Alastair Crooke, "In Search of Respect at the Table: Hamas Ceasefires 2001-03," in *Choosing to Engage: Armed Groups and Peace Processes*, ed. Robert Ricigliano (London: Conciliation Resources, 2005).

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.[70]

In this instance, listing was used by Hamas (and elsewhere by Al-Shabaab) "as a propaganda tool to raise their status with domestic constituencies or to enhance their perceived 'victimhood'".[71] Ultimately, the listing of Hamas discouraged belief in a political solution. This effect of listing is not isolated. The listing of the Communist Party of Nepal was similarly taken as a signal that the international community would support a policy of isolating and defeating Maoists, and is credited with encouraging the continuation of war.[72]

The implications of terrorist listing depend very much on the context relevant to the conflict and its resolution. In Sri Lanka, terrorist labelling "… though prevalent, became relatively meaningless. It was understood by both Tamils and Sinhalese as part of the state's criminalisation of Tamil agitation for political independence/autonomy".[73] It was in the international context that listing was seen to have a significant impact on the LTTE losing confidence in political resolution, as the basis for the global proliferation of listing was not for any security threat to foreign states but signified the international denial of the political project of Tamil self-determination.[74] In particular, the LTTE's proscription in jurisdictions such as the US materially hampered its project for self-determination by introducing obstacles to the investigation of federal constitutional models as a path out of conflict.[75]

Importantly, conflict case studies emphasise that a policy of non-engagement with a particular entity may affect the commitment to violence by other armed opposition groups or internal factions within the listed group. The Chechen conflict illustrates how decisions to negotiate with one group can be divisive, as factions within groups assess options differently, and isolation can strengthen the position of those who see force as the only effective strategy.[76] Although counterterrorism measures are ostensibly consistent with disarmament, there is significant evidence of the opposite effect.

Conversely, certain cases have been cited as examples where the 'tool' of listing (or classification as terrorist) has weakened the norms of violence within listed groups. In the Basque conflict, the 2003 banning of the Euskadi Ta Askatasuna (ETA) linked political party Harri Batasuna reportedly reduced violence by the ETA,[77] which in 2014 saw ETA's decision to commence unilateral arms decommissioning.[78] Yet the causal link is difficult to establish given it followed counterterrorist measures including assassinations in the 1980s and the regional proliferation of travel bans to places where ETA had previously sourced support. Insider experts assess that though counterterrorist measures may have contained ETA, the most significant impetus for its behavioural shift was ETA's realisation of its constituency's diminishing support for violence.[79]

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70 Dudouet and Haspeslagh, "Mediating Peace with Proscribed Armed Groups: A Policy Workshop Report on the Implications of European Union Counter-Terrorism Legislation for Mediation and Support for Peace Processes," 5.
71 Ibid.
72 Phillipson, "The challenge of asymmetries."; Gross, "Proscription Problems: The Practical Implications of Terrorist Lists on Diplomacy and Peacebuilding in Nepal."
73 Suthaharan Nadarajah and Dhananjayan Sriskandarajah, "Liberation struggle or terrorism? The politics of naming the LTTE," *Third World Quarterly* 26, no. 1 (2005): 92.
74 Ibid.
75 Ibid.
76 Conciliation Resources, "Policy Brief: Choosing to engage: armed groups and peace processes " (London: Conciliation Resources, 2009).
77 Höglund, "Tactics in Negotiations between States and Extremists: The Role of Cease-Fires and Counterterrorist Measures."
78 Haspeslagh and Dudouet, "Conflict resolution practice in conflicts marked by terrorist violence: A scholar-practitioner perspective."
79 Ibid.

In Egypt, in 1997 after over two decades of repression of Gama'a Islamiya (the largest armed group in Egypt at the time), the leadership announced a unilateral ceasefire. Gama'a Islamiya's behavioural and ideological departure from its prior military commitment occurred while reportedly about 15,000 of its members and most its leaders, were imprisoned. State repression did play a role prompting evaluation of the utility of armed conflict.[80] But positive "selective inducements" by the state, including the release of groups of prisoners, which by 2007 had diminished to just a few hundred, were critical to the sustained policy shift within the group.[81] Leaders attributed the continuation of ceasefire primarily to discussions within the group.[82] This enabled members to transform their theological interpretation, consider the effect of their violence, and ultimately led to their public announcement that Al-Qaida had misunderstood jihad.[83] The Egyptian government had facilitated the Gama'a Islamiya leaders' tour across prisons for dialogue with members, access to religious scholars and literature, and dialogue with those external to the group.[84] The cessation of violence has stood the test of time, and the group rallied in opposition to armed resistance to the July 2013 military coup.[85] In both the Basque and Egyptian conflicts, behavioural change to abandon violence emerged from armed actors' political decisions, not the use of state coercion through terrorist listing and repression.

If listing does or could encourage political negotiation by armed groups, then listing potentially has value as a tool for coercive diplomacy. The potential value of de-listing to reward steps towards negotiation, incentivise norms of non-violence, and operate as a threat, is a theme running through the peacebuilding literature. Certainly, there have been instances where de-listing has been critical for the commencement of peace talks - such as the Sri Lankan government delisting of the LTTE in 2002.[86] In another scenario, both the Philippine government and the Moro Islamic Liberation Front in the Philippines viewed the prospect of listing of the group as an act that would escalate conflict, and listing was thus not pursued.[87] Further, the US lifting of the ban against Gerry Adams' entry into the US and grant of permission for Sinn Fein fundraising was said to strengthen the non-violence faction within the listed IRA, and is commonly cited for its encouragement of an IRA ceasefire.[88] However, the impact on the Northern Ireland conflict arguably rested upon the existence of the political wing, which enabled partial recognition of the group as a political actor.[89] Ultimately, the 'blunt' nature of listing, which compromises its potential utility, is widely acknowledged. Listing may not necessarily distinguish between the political and military wing of a group, nor does labelling a particular entity terrorist reflect the diversity of objectives nor methodologies that may be present within a group.[90] Importantly, the slowness of delisting processes means that listing mechanisms are "very difficult to calibrate... to the dynamics of conflict escalation and de-escalation",[91] undermining its potential function.

Moreover, as a number of authors have noted in passing, listing regimes displace other frameworks that have developed to solidify expectations of participants to peace talks and cement commitment towards non-violence by *all parties* to the conflict.[92] The *Mitchell Principles of Democracy and Non-Violence* ('the Mitchell principles'), developed in the course of the Northern

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80 Omar Ashour, "Egypt's revolution and the transformation of armed Islamist movements towards unarmed activism,," in *Civil Resistance and Conflict Transformation: Transitions from Armed to Nonviolent Struggle*, ed. Véronique Dudouet (London: Routledge, 2014), 181.

81 Ibid., 182-83.

82 Ibid., 179.

83 Carolin Goerzig, "Egypt's Gama'a Islamiya: Change through Debate?," in *Engaging Extremists: Trade-Offs, Timing and Diplomacy*, ed. W. I. Zartman and G.O. Faure (Washington, DC: USIP, 2011).

84 Ibid.

85 Ashour, "Egypt's revolution and the transformation of armed Islamist movements towards unarmed activism,," 187.

86 Nadarajah and Sriskandarajah, "Liberation struggle or terrorism? The politics of naming the LTTE," 95.

87 Harmonie Toros, "'We Don't Negotiate with Terrorists!' Legitimacy and Complexity in Terrorist Conflicts.," *Security Dialogue* 39, no. 4 (2008): 421.

88 Höglund, "Tactics in Negotiations between States and Extremists: The Role of Cease-Fires and Counterterrorist Measures."

89 Ibid.

90 Phillipson, "The challenge of asymmetries."

91 Dudouet and Haspeslagh, "Mediating Peace with Proscribed Armed Groups: A Policy Workshop Report on the Implications of European Union Counter-Terrorism Legislation for Mediation and Support for Peace Processes," 5, 6

92 Dudouet, "Anti-Terrorism Legislations: Impediments for Conflict Transformation," 13; Chatham House and Conciliation Resources, "Rapporteur Report: The Impact of UK Counter-Terrorism Legislation on Peace Processes and Mediation with Armed Groups," (London 19 November 2010); Haspeslagh, ""Listing terrorists": the impact of proscription on third-party efforts to engage armed groups in peace processes - a practitioner's perspective," 205; Höglund, "Tactics in Negotiations between States and Extremists: The Role of Cease-Fires and Counterterrorist Measures," 229.

Ireland conflict, emphasise that arms demilitarisation prior to talks is unrealistic. All parties must commit to six principles before participation, including a commitment to use exclusively peaceful means for resolving political issues, renunciation of the use of force to influence negotiations, and a commitment to eventual disarmament subject to independent verification. Rather, counterterrorism listing functions as the primary framework for decisions about non-state armed actors' inclusion in peace talks. Listing marginalises the Mitchell principles by pre-determining the illegitimacy of violence by non-state listed actors, whilst obscuring the issue of state violence.

Thus far, we have discussed the impact of listing on armed actors in general. Non-state armed actors all share the capacity to be both "spoilers" to peace processes as well as "governance-actors" critical to sustainable conflict transformation.[93] However, whether listing will change behaviour differs according to the interests and type of armed actor concerned.[94] Resistance movements have very different interests to mercenaries, whilst listing adopts a one-size fits all approach. Ulrich Schneckener's typology, developed from International Relations theory, highlights how realist approaches reliant on the coercion, containment and marginalisation of armed actors may result in altered behaviour only so long as coercion remains.[95] This highlights a key limitation of strategies such as listing, which do not aim for policy shifts within armed groups, and generate limited potential for changing commitment to armed conflict.

In sum, the diverse case studies documented do not convincingly establish that listing reduces a commitment to armed conflict, or that terrorist listing and its consequences universally undermine the legitimacy of the armed group. What listing, and terrorist discourse does achieve is the degradation of the legitimacy of listed entities' as political actors with whom engagement is appropriate. That is, listing creates significant barriers for government to engage with those that have been stigmatised as terrorist.

2.5   Impacts on state conflict parties: willingness to engage listed actors in peace talks

An essential conflict is apparent between listing, which denies legitimacy to the armed actor, and peace talks which require mutual political recognition.[96] The effect of terrorist proscription on government conflict parties' willingness to talk with listed actors highlights the popular political dimensions of terrorist discourse utilised by states. On the one hand, states stigmatise non-state actors in the contestation of legitimacy that lies at the heart of conflicts; and on the other, terrorist discourse also becomes an obstacle in moving away from conflict.

The broader discourse of terrorism creates barriers for popular support of peace talks. So in Sri Lanka, terrorist discourse, which conflated the Tamil political project (and Tamil ethnicity more generally) with the LTTE, generated a political culture competing over punitive approaches to the 'Tamil issue', and became an impediment to peace.[97] In Chechnya, characterisation of Chechens as enemies of the state and animalistic wolves dated from the early 20th century. Yet arguably it was Putin's direction that the Chechen opposition be referred to as 'terrorists' soon after the 1999 apartment bombings that stymied potential for political settlement. In particular, commitment to this rhetoric has led to the reframing of self-determination claims to that of 'Islamic terrorism'.[98] Terrorist listing also plays into extending the broader discourse of terrorism. This is evident in

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93   Ulrich Schneckener, "Spoilers or Governance Actors? Engaging Armed Non-State Groups in Areas of Limited Statehood," In *SFB-Governance Working Paper Series*, ed Research Center (SFB) 700 "Governance In Areas of Limited Statehood - New Modes of Governance?". (Berlin: DFG Research Center (SFB) 700, 2009).

94   Ibid., 8-18.

95   Schneckener draws on International Relations theory to develop a realist, institutional and constructivist typology as a resource for understanding the rationale of approaches to armed groups, and their effect on behavioural change: ibid., 19-24.

96   Michael Bhatia, "Fighting words: naming terrorists, bandits, rebels and other violent actors," *Third World Quarterly* 26, no. 1 (2005): 13.

97   Nadarajah and Sriskandarajah, "Liberation struggle or terrorism? The politics of naming the LTTE," 98.

98   J. Russell, "Terrorists, Bandits, Spooks and Thieves: Russian Demonisation of the Chechens before and since 9/11," *Third World Quarterly* 26, no. 1 (2005).

the way for example the EU listing of the PKK is held to have helped "justify further proscription of pro-Kurdish political parties by the Turkish state",[99] supporting the intransigence of progressing peace.

The reason why terrorist labelling may create such barriers for government conflict actors is illuminated by the broader literature on whether engagement per se bestows legitimacy upon the non-state armed group. The rationale for policies of non-engagement with armed actors posit that engagement signifies state acceptance of the use of violence for political ends, such that it would, "weaken the norm of nonviolence in politics".[100] This overstates the effect of engagement decisions in producing the broader social legitimacy of non-state armed actors.[101] Indeed as practitioner literature reminds, perceptions of legitimacy in conflicts do not automatically rest with the state nor with legal definitions. In fact for "non-state actors, the coercive capacity to defend vulnerable people is often a key source of their legitimacy", whereas the use of state violence may not have unanimous support.[102] As we have seen, from the discussion above, it is because legitimacy in conflicts is always contested, that engagement itself is not definitive of the legitimacy of the non-state armed actor.

At stake is the ultimate exclusion of listed groups who enjoy a democratic mandate or significant social legitimacy from the peace dialogue, something which is widely acknowledged to risk spoiling or derailing peace processes.[103] Without dialogue as to the root causes of the conflict, the emancipatory potential for conflict transformation is elusive. Yet the effect of terrorist labelling, we argue, extends beyond the issue of commencing or progressing talks with listed actors. As the next section outlines, terrorist designation shapes the kind of peacebuilding possible.

The literature surveyed in this chapter indicates that conflict transformation has been contained and compromised by counterterrorism listing. In sum, listing undermines a number of the key norms and practices of conflict transformation; (i) impartiality and independence; (ii) inclusivity, including the ability to meaningfully engage with both armed actors and CSOs connected to militants; (iii) recognition that the use of political violence by non-state actors should not of itself be a 'redline' foreclosing political negotiation, and (iv) addressing the root causes of both state and non-state violence.

3. Transforming peacebuilding through counterterrorism listing

The overarching view is that counterterrorism listing limits the space available for peacebuilding, despite peacebuilding efforts continuing apace since the war on terror. This section introduces the conceptual tools used in this report to understand how listing impacts on peacebuilding in each of our case studies. We argue that global listing regimes contribute to an evolving 'convergence' between the domains of security (specifically, counterterrorism) and peacebuilding.[104] To what extent does the convergence between listing and peacebuilding determine what kind of 'conflict transformation' practices are possible? Has the convergence between counterterrorism and peacebuilding shaped peace efforts in particular conflicts away from emancipatory practices or goals such as justice or self-determination?

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99 Dudouet and Haspeslagh, "Mediating Peace with Proscribed Armed Groups: A Policy Workshop Report on the Implications of European Union Counter-Terrorism Legislation for Mediation and Support for Peace Processes."

100 Toros, "'We Don't Negotiate with Terrorists!' Legitimacy and Complexity in Terrorist Conflicts.," 412.

101 Ibid.

102 Conciliation Resources, "Legitimacy and Peace Processes, Joint Analysis Workshop Report, London, 24 – 25 June 2013. Workshop report prepared by Achim Wennmann," (London: Conciliation Resources, 2013), 10.

103 Dudouet, "Mediating Peace with Proscribed Armed Groups (Special Report 239)," 6.

104 We use Mark Duffield's framing of 'a convergence between peace and development', or a 'security-development nexus'. Mark Duffield, *Global Governance and the New Wars: The Merging of Development and Security* (London & New York: Zed Books, 2001/2014); Mark Duffield, "The Liberal Way of Development and the Development—Security Impasse: Exploring the Global Life-Chance Divide" *Security Dialogue*, 2010 vol. 41 no. 1, 53-76.

The historical enmeshing of peace and security has been well documented. It is beyond the scope of this chapter to give it detailed attention. Our focus is instead on how terrorist organisation listing functions as a counterinsurgency practice that conditions peacebuilding. Our argument is that terrorist listing is best understood as a technique of counterinsurgency warfare, a process that places conflict intervention practices at the centre of how non-state armed actors are constructed and governed as security threats. Just as listing is a technique, so too is conflict transformation – both are resources that can be mobilised for particular, variable ends. It also prompts consideration of how peace practices might undo and reshape security processes for emancipatory purposes. We discuss two significant dynamics in how listing shapes the kind of peacebuilding possible: the non-recognition of armed conflicts, and the construction of civil society actors into security objects.

3.1   The convergence between peace and development as techniques of security

Global counterterrorism listing instruments and practices have deepened an operational convergence between peacebuilding and security in the conflicts considered in this report. To put it another way, listing regimes add another layer to the security contexts and logics of peacebuilding. The oft used concept of 'securitisation' captures the processes by which issues are constructed as threats by political interests, rather than as a result of their material significance. The aim of securitisation as a method of inquiry is "to gain an increasingly precise understanding of who securitises, on what issues (threats) for whom (referent objects) why, with what results, and, not least, under what conditions (i.e. what explains when securitization is successful)".[105] In addition, the convergence between peacebuilding and counterterrorism can be usefully understood to function as a set of beliefs, practices and institutions that create conditions of possibility within a particular field.[106] There is a danger that 'securitisation' suggests a romantic view of peacebuilding as a positive pursuit contaminated or captured by the security logics of listing. Rather, we use the term securitisation to indicate a method for understanding the nuanced dynamics and effects of counterterrorism listing on the diverse practices and goals of peacebuilding at play in each of our conflict case-studies.

The security contexts of diverse peace interventions have been well documented and produce conflicting standpoints for how the relationship between peace and security should be characterised.[107] For some, it was peacebuilding since the 1990s that bridged the divide between security and development that characterised the Cold War international system. Liberal peace, with its emphasis on *people* rather than *states* as the referent for security, understood socio-economic development as foundational to conflict resolution.[108] While development held out the promise of bringing about human security, donor-led peacebuilding has been critiqued for in practice, proliferating programs prioritising statebuilding and security over other goals such as justice, redistribution and self-determination.[109] Others locate the convergence between peace and development well before the 1990s. The use of development as a security technique is as old as industrial capitalism and finessed through counterinsurgency efforts to contain and pacify the political claims of colonised populations in wars of national liberation (see next section).[110] Rather than an emancipatory liberalism, the emphasis on development shifted from targeting *states* to targeting *people* through diverse forms of repression and inequality.[111] The 'security-development nexus' is not a static dynamic. Peacebuilding is part of an evolving security agenda,[112] an agenda shaped by and through the listing of non-state actors as terrorist organisations.

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105 Buzan et al 1998 as cited in Edward Newman, "Peacebuilding as Security in 'Failing' and Conflict-Prone States", *Journal of Intervention and Statebuilding*, vol.4, no.3, 2010, 313.

106 Mark Duffield citing Spence drawing on Foucault's concept of 'dispositif', in "The Liberal Way of Development".

107 Mac Ginty (2011); Newman, "Peacebuilding as Security" (2010); Necla Tschirgi, "Peacebuilding as the Link between Security and Development: Is the Window of Opportunity Closing?", International Peace Academy Studies in Security and Development, December 2003; Necla Tschirgi, "Securitization and Peacebuilding" in *Routledge Handbook on Peacebuilding*, ed Roger Mac Ginty (Routledge, 2012).

108 Newman, "Peacebuilding as Security"; Tschigiri, "Securitization and Peacebuilding".

109 Mandy Turner, "Peacebuilding as Counterinsurgency in the Occupied Palestinian Territory" *Review of International Studies*, October 2014, 8-9.

110 Duffield "The Liberal Way of Development", 2010.

111 Duffield "The Liberal Way of Development", 2010.

112 Newman, "Peacebuilding as Security", 310.

After 9/11, one strand of thinking finds that state-centric, realist conceptions of peace have dominated policy. Broadly, the impact of the war on terror on peacebuilding has been understood to be the deepening of a *state building* agenda in so-called fragile or conflict prone states, 'a breeding ground for security threats'. Thus, the notion of sustainable peace is refigured through stabilisation and state building agendas.[113] For example, the OECD state building agenda for preventing violent conflict is focused on bolstering sovereign power – on strengthening the state, through engagement and cooperation with state authorities.[114] Critiques of state-centric ontology in peace and conflict literature have long suggested that while liberal discourse may conceive of peacebuilding as 'stabilising the current order', this does not make it a legitimate form of conflict transformation.[115] What some commentators characterise as post 9/11 'realism' simultaneously relies on (whilst sometimes in conflict with) norms of liberal peace, itself a 'hybrid' concept.[116] For example, the security discourse of various states at times employ the rule of law, human rights and inclusive community engagement for counterterrorism purposes, whilst simultaneously marginalising political aspirations for justice or self-determination.[117] Inclusion and engagement are not *a priori* emancipatory practices, but have diverse consequences for peacebuilding dynamics. For example, alongside techniques of preemption, isolation and disruption, the exclusion of 'illiberal' violent actors proscribed as terrorist, anticipates the *inclusion* of liberal non-violent actors.[118]

3.2   Counterinsurgency, law and conflict

One of the most significant critiques of the impacts of the war on terror has been that peacebuilding has been incorporated into the *counterinsurgency* logics of conflict management.[119] As Mandy Turner has explained, the argument that peacebuilding functions as counterinsurgency should not be controversial - many western states have explicitly stated that their development strategies are in pursuit of counterinsurgency.[120] We briefly introduce counterinsurgency doctrine before returning to the relationship between peacebuilding and counterinsurgency.

Counterinsurgency is a military doctrine developed primarily by Britain and France to first quell civil wars and other uprisings against colonial rule since the end of World War II.[121] As a doctrine, counterinsurgency drew from a collection of writings by British and French military officials after the first generation of counterinsurgency warfare. Consequently, counterinsurgency also conventionally refers to strategies deployed in more recent armed conflicts fought by established governments against sectarian or ethno-nationalist forces seeking independence or regime change.[122] The proliferating sites of counterinsurgency reflect its ascendancy as a modern and global form of control. Counterinsurgency has also characterised intra-state conflicts by proxy, where foreign governments have strategic interests in maintaining an existing regime, providing direct or indirect support to that regime. This is typical of US approaches to counterinsurgency in South-East Asia and Latin America.[123] The structure of contemporary US military policy is directly influenced by classic counterinsurgency,[124] developed through the

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113 Newman, "Peacebuilding as Security".

114 Tschirgi, "Securitization and Peacebuilding".

115 Richmond and Mac Ginty (2014) 'Where now for the critique of the liberal peace?' *Cooperation and Conflict,* 10.

116 Nadarajah and Lafferty 2013.

117 For a discussion of how community engagement for social inclusion has been deployed coercively in Australian counter-terrorism see Sentas, *Traces of Terror* Chapter 5

118 For an insightful discussion of the ways in which the concept of 'inclusion' shapes liberal peacebuilding see Nadarajah and Rampton "The limits of hybridity and the crisis of liberal peace" 2014.

119 Tschirgi, "Securitization and Peacebuilding"; Duffield, "The Liberal Way of Development"; Mandy Turner, "Peacebuilding as Counterinsurgency in the Occupied Palestinian Territory" *Review of International Studies*, October 2014; Mandy Turner, "Completing the Circle: Peacebuilding as Colonial Practice in the Occupied Palestinian Territory", *International Peacekeeping*, vol 19, no. 4, 2012.

120 Mandy Turner, "Peacebuilding as Counterinsurgency in the Occupied Palestinian Territory", 6.

121 These include uprisings against the British in Palestine (1944-1947), Malaya (1948-1960), Kenya (1952-1960), Cyprus (1955- 1959), South Yemen (1963-1967) and Oman (1965-1975), and against the French in Vietnam (1946-1954) and Algeria (1954-1962).

122 For example, Rhodesia (1962-1980), Northern Ireland (1967-1998), Sri Lanka (1983-2009).

123 For example, Philippines (1946-1954), Vietnam (1956-1973), Guatemala (1981-1983), Nicaragua (1981-1990), and Colombia (1998-present).

124 Keiran Hardy, *Ruthlessness and Sympathy: Smart Power Thinking in Counter-Terrorism and Counter-Insurgency*, PhD thesis, UNSW, 2014; Miller and Sabir 2012.

US-led Coalition governments state stability projects in Afghanistan (2001-present) and Iraq (2007-2011) as part of a post-invasion occupying force. Critically, the Israel-Palestine conflict is understood as a "global node in the history and development of counterinsurgency strategies" in the evolution of strategies first deployed by the British in the mandate period and then by Israel after 1948 to today, through the policies of an occupying state.[125] More broadly, the discourses of security deployed in the Israel-Palestine conflict both influence, and are influenced by the contemporary global war on terror (reframed by the US in 2011 as the 'war on violent extremism'). Counterinsurgency logic is incorporated into the structure and practice of counterterrorism law and policing.[126] Specifically, we argue that counterinsurgency logic organises global listing regimes, as explained shortly.

Counterinsurgency is an evolving historical and globalised practice; a state-defined way of thinking about its conflicts with non-state actors, their causes and strategies to end them. 'Insurgency' refers not simply to guerrilla tactics of violence, but to the larger civil and political movements which support the overthrow of government. Insurgents require the support and consent of the larger population for legitimacy and for the success of their political claims. The concept of insurgency itself, is a colonial articulation of the objects of warfare as an 'ideological' or political will or desire for liberation, itself an incipient violence to be variously managed, suppressed or eliminated, alongside the militant body.[127] Today in the global war on violent extremism, the transnational political claims and ideologies which are said to sustain terrorism remain the object of evolving counterinsurgency strategies. The key features of counterinsurgency are as follows.

(i) *Population management to prevent insurgency*

Classic counterinsurgency comprises a series of techniques targeting not only 'insurgents' but the broader population within which they move. Two assumptions ground counterinsurgency theory. The first is that population management plays a central role in determining the outcome of the struggle between insurgents and the government. Both sides must therefore struggle for the consent of the population in the same way that armies struggle for control over territory in conventional warfare.[128] The control of broader populations targeted for their 'political subversion', was associated with campaigns to win 'hearts and minds'. Historically, population management was accompanied by a broad range of social reforms, civic reconstruction and development, socio-economic prosperity as well as the use of communicative activities (including psychological operations) to influence, contain and pacify civilian populations.[129] For example, counterinsurgent warfare in Malaya was premised on defeating the political aspirations of the insurgents by winning over the population with claims to reduce poverty through progress, inclusion and development.[130] Modern counterinsurgency continues to be characterised by the coupling of hard and so called soft strategies of power to insulate a population from resistance: coercion with consent, suppression with engagement, elimination with social and economic development. Instead of military force and killings as the primary strategy, counterinsurgency relies on establishing security through development, relief, political programs in order to pacify a population. The integration of civilian with military efforts is critical to counterinsurgency.[131] The US Army counterinsurgency field manual characterises NGOs engaged in alleviating poverty, human rights, conflict resolution and the like, as 'non-military counterinsurgency participants' because of their 'important role in resolving insurgencies'.[132] Mandy Turner has carefully detailed the 'deep structural symbiosis' between the inter-related principles, goals and activities of western donor-lead

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125 Turner, "Peacebuilding as Counterinsurgency in the Occupied Palestinian Territory" drawing on the work of Laleh Khalili, 3.

126 Jenny Hocking *Terror Laws: ASIO, Counter-terrorism and the Threat to Democracy*, (Sydney: UNSW Press, 2004); Jude McCulloch and Sharon Pickering 2009; Miller and Sabir 2012; Sentas 2014; Harding 2014

127 Sentas, *Traces of Terror* 2014.

128 Hardy, *Ruthlessness and Sympathy,* 2014.

129 Miller and Sabir, "Counter-terrorism as counterinsurgency in the UK 'war on terror', in *Counter-terrorism and State Political Violence*, ed Scott Poynting and David Whyte, Routledge, 2011; Hocking 1993; Hardy, *Ruthlessness and Sympathy,* 2014.

130 Duffield, 60.

131 *The U.S Army Marine Corps Counterinsurgency Field Manual*, 54.

132 Ibid, 64.

peacebuilding and counterinsurgency. The institutionalised dimensions of the convergence is underscored by the shared understandings of "the causes, consequence and technique of dealing with societal violence" that posit insecurity as cause of violence, and security as its solution.[133]

(ii) *Preemptive legal warfare*

Whilst winning the support of the population through co-option and pacification is COIN's prime focus, it is underpinned by the use of as much force as necessary whilst acting in accordance with, and through law. The doctrine of 'minimal force within the law' existed alongside state crimes like the razing of villages. In a contemporary understanding of warfare as a *legal relation*,[134] influential counterinsurgency theorist, David Kilcullen puts it this way:

> [M]ake no mistake: counterinsurgency is war, and war is inherently violent. Killing the enemy is, and always will be, a key part of guerrilla warfare. Some insurgents at the irreconcilable extremes simply cannot be co-opted or won over; they must be hunted down, killed or captured, and this is necessarily a ruthless process conducted with the utmost energy that the laws of war permit.[135]

From its inception, counterinsurgency warfare relied on the force of law as much as it did on military force in reinstating the state's monopoly on the use of violence. Criminalisation (detention with or without charge or prosecution) is one manifestation of the force of law. In wars against national liberation struggles from the 50s to the 70s, the use of exceptional and emergency legislation developed and normalised preemptive techniques of control targeting 'ideology' and associations, suspending due process rights and other criminal law norms.[136] The use of preemptive law in counterinsurgency intended law as a weapon of war, a practice we refer to in the report as 'lawfare'. The concept of lawfare popularised by Major General Charles Dunlap after 9/11 was concerned with both the 'positive' and 'negative' use of law as a weapon of war whereby law is substituted for traditional military techniques but for the same effects or objectives.[137] Dunlap credits lawfare as "a critical piece of our counterinsurgency strategy in Iraq", citing the example of the "Rule of Law Complex" established by the U.S to promote Iraqi security self-governance as a positive way to defeat insurgency. Dunlap expounds lawfare as an "ideologically neutral" 'tool' that may be used by both sides of a conflict for a range of purposes.[138] Lawfare has, however, most commonly been used as a pejorative ideological term characteristic of the Bush-era administration to discredit, "virtually any attempt to apply the rule of law to the conduct of the war on terror".[139] The use of international human rights and humanitarian law by non-state actors, NGOs and civil society have variously been criticised as 'lawfare', as advocacy of these laws is said to hinder state military objectives.[140] Attempts to analyse law's counter-hegemonic potential on the same level playing field as dominant state uses of law are not however attentive to questions of power in the international system. In 2001, the same year as Dunlap's now popular interpretation of lawfare, postcolonial scholar John Comaroff identified colonial law as 'lawfare': "the effort to conquer and control indigenous peoples by the coercive use of legal means".[141]

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133 Turner, "Peacebuilding as Counterinsurgency in the Occupied Palestinian Territory", 9. This is not a question of language - Turner points out that the peacebuilding and development community do not refer to counter-insurgency but to the dominance of stabilisation as goal and strategy in human security and the 'security-development nexus'.

134 For a detailed discussion of how war is a legal institution, see David Kennedy, *Of War and Law,* (Princeton: Princeton University Press, 2006).

135 David Kilcullen, *Counterinsurgency* (Oxford: OUP 2010), 4.

136 Jenny Hocking, *Beyond terrorism: The Development of the Australian Security State* (Sydney: Allen & Unwin, 1993).

137 Charles J. Dunlap, Jr., "Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflict" (Carr Centre for Human Rights, John F Kennedy School of Government, Harvard University, Working Paper 2001); Charles J. Dunlap, Jr., "Lawfare Today: A Perspective", *Yale Journal of International Affairs* (Winter, 2008))

138 Charles J. Dunlap, Jr., Lawfare Today...and Tomorrow, in *International Law and the Changing Character of War* 315-325 (Raul A. "Pete" Pedrozo & Daria P. Wollschlaeger eds., 2011) (US Naval War College International Law Studies, Vol. 87, 2011, 315.

139 Melissa Waters, "Lawfare in the war on terrorism: A reclamation project", *Case W. Res. J. Int'l L.* 2011, Vol. 43 Issue 1/2 (2010).

140 Luban "Carl Schmitt and the critique of lawfare"; Waters "Lawfare in the war on terrorism"; Wouter Werner "The Curious Career of Lawfare", 43 Case W. Res J. Int'l L. 61, 69 (2010).

141 John L. Comaroff "Colonialism, Culture and the Law: A Foreword", Law & Social Inquiry, Vol. 26, No. 2 (Spring, 2001), 306.

In chapter 1 we identify terrorist listing as a coercive exclusion, consistent and continuous with military strategies of isolation and eradication. Listing can best be understood as counterinsurgency lawfare because it serves the same effects or goals (eradicating the resistance of non-state actors) as traditional military ends, albeit deploying different strategies. Neither neutral nor objective, terrorist listing is a state strategy of asymmetric warfare that warrants attention as 'lawfare'. If listing as a legal weapon aims to maintain military-like effects of eradication and pacification, it is germane to explore any tensions between listing and traditional conflict transformation goals such as addressing the political causes of conflict.

(iii) Listing as counterinsurgency

Counterinsurgency remains the organising framework and practice of contemporary counterterrorism law and operations today.[142] Critically, the anti-colonial counterinsurgency campaigns of the 20th Century profoundly shaped how governments today understand the question of political violence, the role of civil society in supporting insurgents, and strategies to end it.[143] It is significant that classic counterinsurgency theorists advocated laws banning non-state actors "in the early stages of an insurgency, when insurgent activities remain largely legal and non-violent".[144] In 1964, David Galula, who served in the French war against Algeria, advises states to "'nip the insurgency in the bud' by banning their organisations, censoring their publications, impeaching them in the courts and restricting their ability to contact other people",[145] a logic evident in the structure of contemporary listing regimes (chapter 1). Preemptive law was central to counterinsurgency because it complied with the military doctrine of 'minimal force', simultaneously disavowing outright 'war':

> This is, in essence, a police operation directed not against common criminals but against men whose motivations, even if the counterinsurgent disapproves of them, may be perfectly honorable. Furthermore, they do not participate directly, as a rule, in direct terrorism or guerrilla action and, technically, have no blood on their hands. As these men are local people, with family ties and connections, and are hunted by outsiders, a certain feeling of solidarity and sympathy automatically exists toward them on the part of the population. Under the best circumstances, the police action cannot fail to have unpleasant aspects both for the population and for the counterinsurgent personnel living with it. This is why elimination of the agents must be achieved quickly and decisively.[146]

As outlined in chapter 1, listing regimes rely on an associational logic which criminalises the provision of financing, training, material and even affective support to terrorist organisations in order to target the 'networks' through which they relate. Listing operates as counterinsurgency in the intended effects of disruption and isolation (and sometimes prosecution) of the networks of social and political affiliation understood to give non-state actors legitimacy. These are 'police actions' authored by the criminal law, not military operations.[147] Classic counterinsurgency theory required that due process requirements for punishing insurgents should be suspended or otherwise circumvented. Galula's advice in 1964 on 'Destruction of the Insurgent Political Organisation' presages the contemporary operation of counterterror law as disruption rather than prosecution:

> Automatic and rigid application of the law would flood the courts with minor and major cases, fill the jails and prison camps with people who could be won over, as well as with dangerous insurgents. The main concern of the counterinsurgent in his propaganda during this step is to minimize the possible adverse effects produced on the population by the arrests.

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142 McCulloch and Pickering, 'Pre-Crime and Counter-Terrorism': Imagining Future Crime in the "War on Terror"' (2009) 49(5) *British Journal of Criminology* 628; Sentas, *Traces of Terror*, 2014; Miller and Sabir "Counter-terrorism as counterinsurgency in the UK 'war on terror'".

143 Sentas, *Traces of Terror*, 2014, Harding 2014.

144 Hardy, *Ruthlessness and Sympathy,* 271.

145 Cited in Harding 272.

146 David Galula, *Counterinsurgency Warfare: Theory and Practice* (Praeger Security International, 1964, 2006 ed), 87.

147 The hybrid civil-military nature of contemporary counter-terrorism law, and its legacy in counter-insurgency wars, is well noted, see Hocking 2004; Jude McCulloch, "Blue armies, khaki police and the cavalry on the new American frontier: critical criminology for the 21st century", *Critical Criminology*, vol 12, 3, 2004.

He will have to explain frankly why it is necessary to destroy the insurgent political cells, and stress the policy of leniency to those who recognize their error.[148]

The case study conflicts in this report comprise of distinct dynamics and diverse modes of convergence between law, counterinsurgency and peacebuilding. In some case studies, disruption is internalised by peace builders as 'risk aversion' (Somalia, the Occupied Palestinian Territories). In other case studies, police action disrupts and prosecutes civil society actors integral to conflict transformation (Turkey, the OPT). What is shared across the distinct conflicts in this report, are the tensions between the aims of counterterrorism and peacebuilding in relation to the question of state and non-state violence. Understanding the counterinsurgency logics in counterterrorism law and practice better reveals the tensions and contradictions between listing and emancipatory approaches to peace. The specific forms of negotiation over these tensions reveals the differing material effects for different groups, including states, non-state armed actors, CSOs, INGOs, amongst others.

(iv)   Tracing the effects of counterterrorism on inclusive peace building

In our case study investigations we build on three key insights from the literature on the effects of the convergence between peace, development and security to explain how listing conditions the kind of peace building possible.

First, conflict transformation is part of the process for understanding how objects of security are constructed and governed, how threats and challenges are framed and addressed and the effects.[149] Critically, in colonial contexts like that of the OPT, peacebuilding and counterinsurgency can function as "two interlocking methods of control".[150] A peacebuilding focused on goals of stabilisation and securing a population is consistent with colonialism in spite of discourses of building sustainable peace.[151]

Non-state parties to armed conflicts are transformed into objects of security through 'the lists' of proscribed organisations and individuals, and through the broadly defined subsidiary offences enacted at the domestic level (chapter 1). As discussed, diverse conflict actors can be categorised as associates, members and supporters of terrorist organisations. Listing transforms non-state actors into terrorist organisations in order to deny them legitimacy. To achieve this goal, listing targets and excludes peoples otherwise important in the inclusive peace building tradition, transforming them into 'insurgent populations'. Our case studies differentially examine how listing can target peace building and civil society actors, criminalising and otherwise constraining or shaping a range of relationships with listed organisations.

Second, the convergence between peace and security generates selectivity and (de)politicisation of peace interventions in accordance with strategic interests.[152] Transformational peacebuilding is premised on continuous engagement with all parties to conflicts and civil society. It is relational, providing a platform for diverse political expressions, considered necessary to excavate the root causes of a conflict. Principles of inclusivity and impartiality are in fundamental conflict with the aims of counterterrorism listing. The aim of listing is to delegitimise groups, by acting preemptively before threats materialise, through disruption of social relations, associational ties and financial supports and isolation. This report identifies one of the most profound impacts of listing to be how it shapes where, how and with whom, legitimate peace building can take place.

Third, the convergence between peace and security has been critiqued for its emphasis on top-down mediation rather than bottom-up community driven peace building. Divisive politicised policy undermines engagement with affected peoples because

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148 David Galula, *Counterinsurgency Warfare: Theory and Practice* (Praeger Security International, 1964, 2006 ed).
149 Newman "Peace building as security".
150 Turner, "Peacebuilding as Counterinsurgency in the Occupied Palestinian Territory", 4.
151 Ibid.
152 Newman "Peace building as security"; Duffield, "The Liberal Way of Development".

of distrust and resentment.[153] In combination, these three related factors constitute fundamental contradictions between listing and inclusive peacebuilding by ignoring the systemic sources of conflict, and excluding civil society actors imputed to be 'terrorist' sympathisers.

3.3 Transforming armed conflicts into terrorism: the question of justifiable political violence

One of the most far-reaching impacts of counterterrorism listing has been to treat the political violence of select non-state actors as unlawful 'terrorist acts', transforming and criminalising the non-state actors themselves as 'terrorist organisations'. Terrorist listing draws no distinctions between attacks on civilians or military hostilities. Neither does listing recognise or distinguish political violence pursued in resistance against an oppressive regime, or in furtherance of the right to self-determination. These distinctions, however, should matter if we are concerned with remedying the causes of conflict, including socio-economic and political dispossession, colonisation, racism and egregious human rights abuses. Indeed, international law long avoided criminalising either liberation movements or state terror as terrorism. The "political unease about criminalising (as terrorism) the conduct of freedom fighters similar to those in Europe during the war" has been noted as the reason for the European Union's 2002 Framework decision draft statement which sought to carve out exemptions for resistance movements, but was ultimately not adopted.[154] The continued objection of some states, that violence in pursuit of self-determination is not terrorism, reflects disagreements that ultimately made the prospect of an international definition of terrorism, untenable.[155] The case for excluding actions taken in armed conflicts from the definition of terrorism, were most notably advanced by the Organisation of the Islamic Conference, but international debate has continued apace.[156]

That violence committed in defence of fundamental human rights against an oppressive state is sometimes justified has its trace in the history of de-colonisation struggles, as well as in critical readings of international law. There is however no accepted positive right in international law to a right to violently resist, nor for self-determination movements which fall outside of Additional Protocol I to the 1949 Geneva Convention (those under colonial domination, alien military occupation or racist regimes). Respected legal theorist Tony Honoré, has argued that a right to resist must exist as "to deny it would be to assert that people may be bound indefinitely to submit to conditions of life which we and they recognise as intolerable".[157] The politics of mandatory non-violence is neither an option for many peoples, and may serve to reproduce injustices. There is hence an argument by some international lawyers that we should differentiate terrorist violence from justifiable forms of political violence, not least to better define terrorism.[158]

It has also been widely noted that terrorist listing is in tension and contradiction with International Humanitarian Law (IHL),[159] the body of international law regulating hostilities in armed conflicts. We will consider some of these tensions because they foreground why the transformation of armed conflicts into terrorism impact on peacebuilding. IHL governs the behaviour of parties to armed conflicts, and is made up of treaty law and customary international law, the latter of which binds all states regardless of whether they are parties to the various treaties. From a legal standpoint, the concept of 'armed conflict' in international law is a factual determination that activates a series of laws and regulations governing the conduct of war. From the standpoint of resolving the causes of conflict, some commentators argue the recognition of 'armed conflict' can

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153 Newman "Peace building as security"; Duffield, "The Liberal Way of Development".

154 Ben Saul "Defending 'Terrorism': Justifications and Excuses for Terrorism in International Criminal Law" *Australian Year Book of International Law*, vol 25, 2006.

155 Ibid, 178; Christian Walter, "Terrorism", in Max Plank Encyclopedia of Public International Law, April 2011; Yildiz and Breau, 140-145.

156 In 2006, the Parliamentary Joint Committee of Intelligence and Security in Australia attempted to exclude armed conflicts from the domestic definition of terrorism. The recommendation was not however accepted by the Government of Australia. See Sentas, *Traces of Terror* 2014, Chapter 7.

157 Tony Honoré, "The Right to Rebel" (1988) 8 *Oxford Journal of Legal Studies*, 43.

158 See for example, Saul "Defending 'Terrorism': Justifications and Excuses for Terrorism in International Criminal Law"; Walter, "Terrorism", 2011.

159 See for example, Jelena Pejic, Armed Conflict and Terrorism: There is a (Big) Difference, in Counter-Terrorism: International Law and Practice, eds. Ana Maria Salinas de Frias, Katja LH Samuel and Nigel D White (Oxford: OUP).

strategically be used to limit and mitigate the effects of war, through regulation of the use of violence by all the parties to the conflict. Moreover, the political recognition of a non-state actor as a party to a conflict can help facilitate conflict transformation. Before we return to these arguments, the relationship between terrorist listing and the recognition of armed conflict are important contexts shaping peacebuilding.

Two categories of armed conflict are recognised in IHL: i) international armed conflicts between two or more states, and ii) non-international armed conflicts between state and non-state actors or between non-state actors only.[160] Wars of national liberation (involving armed struggle against colonial domination, alien occupation and racist regimes, in the exercise of their right to self-determination)[161] that are recognised by states party to Additional Protocol 1, fall within the category of international armed conflict. Only in international armed conflicts do non-state actors have combatant immunity from punishment under the criminal law, for hostile acts carried out in accordance with IHL. Combatants should not be treated as having committed 'terrorist acts' in so far as those particular actions are concerned. This recognition imposes duties on combatants to observe the rules of IHL. However, very few international armed conflicts have been legally recognised.[162] Whilst there are rights to self-determination there is no *jus ad bellum* right to use force to secure the right, and self-determination movements are routinely criminalised as terrorist, even if their force is contained to military objectives.[163]

To qualify as a non-international armed conflict, hostilities must reach a minimum threshold, such as the use of military force, and generally exclude internal disturbances, riots or other less serious forms of violence.[164] Non-state actors must have organised 'armed forces' subject to an organised command structure in order to be considered 'parties to the conflict' who have the ability to implement, and a duty to adhere to IHL.[165] States who are not party to Protocol I, understand self-determination movements to be non-international armed conflicts.[166] Non-state actors in non-international armed conflicts do not have combatant status and no immunity from prosecution.

Each of the three conflicts under study is an armed conflict.[167] The extensive, complex and unsettled legal debates on the precise characterisation of each of our case study conflicts are not considered here.[168] The absence of a positive international legal *norm* on the right to external self-determination (independent statehood), do not extinguish the diverse self-determination claims and political movements in the OPT and in Turkish-Kurdistan. Critical accounts of self-determination understand it not as a norm to be applied, but as an evolving set of principles and political claims with a "counter-hegemonic function", capable of not only exposing the inequalities of international law, but influencing its interpretation.[169] Regardless of the legal strictures, the fundamental principles of international humanitarian law (and in most cases, international human rights law) apply to all armed conflicts.[170]

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160 ICRC, 'How is the Term "Armed Conflict" defined in International Humanitarian Law?" Opinion Paper, March 2008.
161 As defined in Additional Protocol 1 (1977) to the 1949 Geneva Convention
162 Pejic, "Armed Conflict and Terrorism", 177-179.
163 Saul "Defending 'Terrorism'", 183-184.
164 As defined in Additional Protocol II which governs non-international armed conflicts, alongside common Article 3.
165 ICRC, 'How is the Term "Armed Conflict" defined in International Humanitarian Law?" Opinion paper March, 2008.
166 Saul "Defending 'Terrorism", 185; Additional Protocol I has a high ratification record, ratified by 170 states as of 2011; Emily Crawford "Armed Conflict, International" *Max Planck Encyclopedia of Public International Law,* para 38.
167 The Turkish-Kurdish conflict is at the very least, of a non-international character and argued by some to meet the criteria of an international armed conflict (see Yildiz and Breau). The conflict in Somalia is a non-international armed conflict. (http://www.genevaacademy.ch/RULAC/applicable_ international_law.php?id_state=204)
168 There are differing expert views on whether the conflict over the OPT and over Kurdistan, is an international or non-international armed conflict.
169 Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge; Cambridge University Press, 2002); Thurer and Burri put the right to self-determination this way "...it cannot realistically be interpreted, applied or implemented like a legal norm and thus primarily possesses a very strong moral and political force in guiding the organise of the UN in the exercise of their powers and functions". Daniel Thurer, Thomas Burri, "Self-determination" Max Planck Encyclopedia of Public International Law, 2008.
170 http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=113

A fundamental rule of IHL (established as a customary norm of international law) distinguishes between attacks against civilians and civilian objects, which are prohibited, and lawful attacks against military objects or personnel, which are not prohibited ('the principle of distinction').[171] Under IHL, the targeting of civilians and other acts of terror by state and non-state entities is unlawful and can be criminalised as war crimes by any state. Violence can be directed against military objectives under IHL, subject to various restrictions. However, acts of lawful violence in IHL are *unlawful terrorist acts* by virtue of UNSCR 1373. Global listing regimes neither distinguish between different acts of violence, nor envisage remedies for the victims of any form of violence: listing delegitimises 'terrorist organisations' through their banning, and is an end unto itself. Listing regimes find all non-state violence to be criminal, regardless of its purpose and target. Likewise, in the logic of listing, non-state actors' use of violence should preclude political status and participation in peace negotiations.

The question arises whether armed conflicts are legally excluded from the ambit of Resolution 1373. Resolution 1373 represents an attempt to constrain the principle of self-determination in favour of the concept of terrorism, by specifically excluding mention of either armed conflicts or self-determination that characterised previous UN resolutions during the 1970s, 1980s and 1990s. Husabo argues that Resolution 1373 cannot be taken to not be subject to the principle of self-determination.[172] Specifically, some scholars argue that acts of war that are lawful in IHL should not be criminalised by domestic legislatures, as required by UNSCR 1373.[173] There is also an argument in the literature that both lawful and *unlawful* conduct governed by IHL falls outside the scope of UNSCR 1373.[174] The law of non-international armed conflict is however, weighted heavily to states and legally consistent with counterterrorism. The General Court of the European Union has affirmed that listing is applicable to the non-state actors of armed conflicts in spite of the application of IHL. On 16 October 2014, the Court annulled regulations listing the LTTE on the European Union's 'autonomous list'[175] on "fundamental procedural grounds" stressing these annulments "do not imply any substantive assessment of the question of the classification of the LLTE as a terrorist group...".[176] The Court rejected the LTTE's argument that the concepts of armed conflict and terrorism are incompatible in international law and found that the European Council's intention is that there be no exemption for armed conflicts.[177]

The limits of IHL as a tool in shifting international politics to recognise and respond to justice issues are palpable. Most critically, IHL does not address the political claims at the heart of non-international armed conflicts: the legitimacy of a party's aims and objectives (*jus ad bellum*). Rather, IHL governs the ways in which war is conducted (*jus in bello)*. By limiting combatant status to effectively only states, IHL perpetuates the power dynamics that set up non-state actors to fail. As respected international legal scholar Ben Saul puts it, "... denial of combatant status to movements resisting the forcible denial of self-determination implicates international law in oppression."[178] Paradoxically, the limits and incoherence of the international legal order - and moreover, the critiques of it - may provide self-reflexive resources for peacebuilders in facilitating political solutions to the causes of violence. Importantly, the recognition of an armed conflict, limited as it is, may mirror some of the normative bases for conflict transformation.

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171 For an overview of the customary rules in IHL governing non-international armed conflicts see: http://www.geneva-academy.ch/RULAC/pdf_state/Summary-of-the-rules-applicable-in-armed-conflicts-of-a-non-international-character.pdf

172 See the discussion at Erling Husabo and Ingvlid Bruce, *Fighting Terrorism through Multilevel Criminal Legislation: Security Council Resolution 1373, the EU Framework Decision on Combating Terrorism and their Implementation in Nordic, Dutch and German Criminal Law* (Brill, 2009), 364-367.

173 Husabo and Bruce, *Fighting Terrorism through Multilevel Criminal Legislation,* 367; Saul "Defending 'Terrorism'".

174 Husabo and Bruce, Chapter 11. One ground for the argument is past state practice and the explicit undertaking of the EU Framework decision which sets out that: "Actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a State in the exercise of their official duties are not governed by this Framework Decision." Whether non-state actors can be considered 'armed forces' is another unsettled aspect to the debate.

175 Pursuant to Common Position 2001/931/CFSP.

176 Cases T-208/11 and T-508/11, Judgment of the General Court, 16 October 2014, para 226.

177 Ibid, para 76.

178 Saul "Defending 'Terrorism'", 186.

(i)   Conferral of legal and political status: parties to the conflict

IHL is understood by some to provide a basis for impartial peacebuilding. Yildiz and Breau argue that recognition of an armed conflict gives "the parties to the conflict" the basis for engagement without giving recognition to the parties' tactics or goals. IHL prohibits acts of terror but does not prevent engagement with those who perpetrate these acts.[179] In contrast, banning non-state actors as terrorist organisations denies legal and political status and is inconsistent with the conferral of "party status" through the ability to implement and be bound by IHL. The mechanism of listing characterises all of an armed actors' violence as terrorist, and intends that a non-state actor renounce and desist from violence as a condition of future engagement. Listing demands complete demilitarisation as a precondition for "legal" status, a logic arguably at odds with "party status" in IHL. Listing is also at odds with the norms of conflict transformation that do not require non-state actors to renounce violence, in advance of political negotiations. However, criminal and counter terrorism law applies to non-state actors regardless of the legal status as a party to the conflict.[180]

In contrast, the practice of amnesty in IHL can be a critical tool in conflict transformation, and can bolster peacebuilding norms otherwise compromised by counterterrorism listing. In relation to non-international armed conflict, Article 6(5) of the 1977 Additional Protocol II provides:

> At the end of hostilities the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

In practice, amnesties are granted to non-state actors not only in negotiated peace agreements to apply at the end of a conflict, but take diverse forms and at different times, including during conflicts in order to encourage peace talks.[181] Louise Mallinder argues that amnesty can support conflict transformation processes at the individual, communal, national and international level by addressing some of the barriers that forestall civil society participation, and fuel the root causes of the conflict, in conjunction with other transitional justice mechanisms.[182] Amnesty from domestic terrorism offences for listed organisations who observe the principle of distinction could support conflict transformation goals.[183] Amnesty would countervail against the human rights impacts of broadly defined terrorism detentions and sentences that criminalise membership, association and support of a terrorist organisation, as well as criminalising individuals engaged in military force. We suggest that recognising that listed actors may also be a non-state party to an armed conflict and entitled to consideration of amnesty can be tools that interact with wider conflict transformation processes.

(ii)   Accountability and responsibility for violence

Whilst widely ratified by parties to the Geneva Convention, the two 1977 Additional Protocols to the Convention have not been ratified by Turkey, Israel and Somalia. All three states prefer to characterise their armed conflicts as terrorism. Yet counterterrorism law has been ineffective in regulating the decisions and strategies of armed actors, and obfuscates states human rights and IHL

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179 Yildiz and Breau, *The Kurdish Conflict*, 231.

180 Yildiz and Breau, *The Kurdish Conflict*.

181 Louise Mallinder "The Role of Amnesties in Conflict Transformation " in Cedric Ryngaert (ed) *The Effectiveness of International Criminal Justice* (intersentia, Antwerp) 2009.

182 Mallinder, "The Role of Amnesties in Conflict Transformation"

183 Notably, in its consideration of the LTTE's delisting application, the General Court of the European Union considered that the amnesty clause did *not* apply to the Council's listing of the LTTE because that listing did not involve criminal proceedings and sanctions at the EU level, but rather a preventative measure. In making the distinction, the Court did not suggest that amnesty should not be available for listed organisations at the domestic level. See Cases T-208/11 and T-508/11, Judgment of the General Court, 16 October 2014, para 78.

obligations.[184] Labelling the non-state party as terrorist undermines attention to state violations of the laws of war, and importantly may foster state impunity for violations during the course of a conflict. Yildiz and Breau suggest that states are reluctant to recognise armed conflicts for the perception that this confers legitimacy to non-state actors. As the authors note, IHL is heavily weighted towards states, and does not prohibit a non-state party to a conflict being proscribed as terrorist.[185]

In contrast, public recognition by both parties of the existence of an armed conflict is an important first step for establishing the shared, normative grounds for conflict transformation:

> Recognising an armed conflict under international humanitarian law activates rules governing the conduct of hostilities that are binding on non-state actors and entail an international responsibility for their implementation; they are thus more likely to be observed than other legal regimes, and reduce levels of violence (due to the emphasis on necessity, proportionality and distinction).[186]

IHL provides a basis for requiring accountability and responsibility by both parties implementing IHL themselves. Recognition of an armed conflict is a first step for acknowledging experiences of trauma, loss and collective suffering by populations subject to state and non-state actor violence.[187] State denial of responsibility for any war crimes committed during the course of the conflict can regenerate a sense of collective injustice, and contribute to root causes of continuing violence. Terrorist listing obscures a thorough understanding of conditions of violence by redefining state violence as legitimate counterterrorism. Whilst IHL is not concerned with resolving conflicts but with regulating the conduct of violence, recognition of an armed conflict is foundational to questions of responsibility for the conduct and effects of violence. In this way, recognition can sustain reconciliation and justice mechanisms towards peace.[188] Recognition of an armed conflict also "triggers an international obligation to respond to the interests of international peace and security".[189] Theoretically, violations of IHL are meant to put an onus on the international community in order for it to become harder for parties to the conflict to ignore. Yildiz and Breau argue that multilateral organisations should use IHL as the basis for promoting the regulation of violence as precursors to negotiations for peace.[190]

For the purposes of transforming conflicts, Yildiz and Breau argue an initial focus on the *jus in bello* issues is a pragmatic, confidence building measure for both parties and a necessary resource for conflict transformation. They argue that further classification and application of the *jus ad bellum* issues, should then be determined by an appropriate body in the future.[191] Saul has a larger reform agenda for IHL. He argues that self-determination violence must be differentiated from terrorism, and that extending IHL to give *all* liberation violence combatant status (where Protocol I does not apply) would help to depoliticise and define terrorism:[192] "IHL is an appropriate normative framework for dealing with self-determination claims and internal rebellions that cross the threshold of an armed conflict, effectively decriminalising non-state violence that otherwise complies the laws of war."[193] The question here for peacebuilders is that justifiable, defensive violence in pursuit of just causes (and compliant with IHL), should be recognised, not criminalised as prima facie terrorist. Recognition is a critical first step in addressing the structural conditions which enable violence to be transformed. The prevailing limits of IHL and international law elevate the importance of political responses to the question of violence and its illegality as terrorist.

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184 Yildiz and Breau, 228, 231.
185 Ibid, 228-229.
186 Ibid, 230.
187 Ibid., 231.
188 Ibid., 227.
189 Ibid., 231.
190 Ibid., 231.
191 Ibid, 229.
192 Saul, "Defending 'Terrorism'", 186.
193 Ibid., 226.

(iii)   Non-interference with self-determination and institutionalised violence

Listing at the UN and EU levels requires member states to effectively criminalise most contacts with listed organisations. Arguably, the listing of liberation movements with claims to self-determination would be, if such movements where recognised as such, contrary to customary international principles that states should not militarily or otherwise deny the exercise of rights to self-determination. International law scholar Antonio Cassese describes measures structured to prevent peoples from exercising their right to self-determination as "institutionalised violence". Drawing on Cassese, Mark Muller QC discusses in detail the three ways in which this institutionalised violence functions specifically through banning self-determination movements as terrorist organisations.[194] First, listing has completely undermined "the international rules" prohibiting the use of military force and "coercive mechanisms or measures short of military force"[195] by oppressive states to suppress lawful goals, such as self-determination. Second, listing has also delegitimated the potential license to use military force as a last resort as defence against oppressive or occupying regimes. Lastly, Muller argues that proscription has fundamentally reversed the principle that prohibits third states from supporting oppressive states in denying the legitimate claims of liberation movements for self-determination in international law.[196] To be clear, these principles are brought into fundamental conflict with state interests, as they are intended to limit state authority - consequently the application of these principles are consistently rejected in the international system by states.[197]

The institutionalised character of the violence of listing is accomplished through its normalisation as a legitimate counterterrorism tool. In this way, global listing regimes condition the space in which peacebuilding operates, further marginalising conceptual resources around self-determination and other human rights relevant to peacebuilders in seeking to address the root causes of conflicts. Listing legitimates acts of state violence as part of the counterterrorism context which peace building is expected to adapt to.

Conclusion

The aim of this chapter has been to identify the existing concerns of peacebuilding practitioners and scholars with the effects of listing on conflict transformation. There is a fundamental conflict between the aims of listing and the norms of conflict transformation. The significance and extent of the conflict between listing and peacebuilding turns on divergent approaches as to whether non-state actors' use of violence should preclude political negotiations. The incompatibility between listing and conflict transformation is borne out by the impacts peacebuilders have thus far observed on their own practices. The literature illustrates the problem of listing most apparently when peacebuilding activities that involve (or could involve) listed actors, are abandoned. Peacebuilders' concerns regarding their compromised neutrality and the lack of political legitimacy of non-state actors, for example, are indicative of the problems listing has produced through its broader structural transformation of peacebuilding. These are not the unintended consequence of counterterrorism policies and laws, but indicate that listing conditions the kinds of peacebuilding possible. Piecemeal law reform to listing will therefore not address the core conflicts between listing and the political transformation of conflicts.

The final part of the chapter reframes the effects of listing as part of a broader and evolving convergence between peace and security. We have argued that listing is a technique of security with its origins in colonial counterinsurgency wars after World

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194 Mark Muller "Terrorism, Proscription and the Right to Resist in the Age of Conflict" *KHRP Legal Review* vol 14, 2008.

195 Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge; CUP, 1995) 336.

196 Muller "Terrorism, Proscription and the Right to Resist in the Age of Conflict".

197 Ibid, 119.

War II. As a form of 'lawfare', listing targets the broader populations understood to give non-state actors legitimacy. The same political legitimacy and concept of 'grassroots interest' paradoxically grounds the logic of inclusive peacebuilding. The shift from recognising armed conflicts in IHL to targeting and eliminating them in global security law significantly regenerates the realist bent of liberal peace; at once state-centric and population targeted. Defining the non-state party as prima facie terrorist justifies the counterinsurgency strategies of state parties targeted against populations as a whole. Listing interferes with the recognition of armed conflicts and the normative basis IHL could provide for conflict resolution. More controversially, listing has further devalued political claims of self-determination already marginalised in the international system since the era of decolonisation, specifically, the right to resist against colonial domination, occupation or a racist regime. In each of our case study conflicts which follow, some, or all of these entwined dynamics create particular conditions of possibility.

Chapter 3

Conflict Resolution and Counterterrorism in Somalia: The Security-Peacebuilding Nexus

Introduction

Whilst the most visible excesses of the global 'war on terror' (such as torture and rendition) are now apparently behind us, the more imperceptible effects of widespread securitisation and the politics of enmity it activates are in many ways only beginning to be felt by the actors enlisted within it. The 9/11 attacks and ensuing 'global war on terror' highlighted much of what was obsolescent in dominant Cold-War deterrence thinking - which had "promised severe punishment in the event of certain actions *and* withholding that punishment in the absence of the actions".[1] Three far-reaching policy shifts swiftly ensued. The fight against transnational terrorism became increasingly framed as against heterogeneous networks rather than a single entity. Deterrence thus required punitive measures that cast a broad net of liability over "a variety of different actors and processes, including those … only superficially involved" or associated with terrorism.[2] Counterterrorism was preemptively framed as a process of targeting risks and threats before they materialised. The use of intelligence-led preventative measures - such as detention without charge, deportation based on security threats, data mining, terrorist proscription and targeted sanctions – were therefore deployed as critical security techniques. Finally, failed states in the developing world came to be viewed as the incubators of global insecurity. Immunising western actors from the threats of global terrorism accordingly demanded liberal statebuilding and securitised development in these 'ungoverned spaces'.

This chapter analyses these shifts in security strategy and 'operational battlespace' through their concrete entanglement with peacebuilding processes in South-Central Somalia. Two key arguments are advanced. First, that the effects of counterterrorism on conflict resolution processes in Somalia can best be understood through a 'security-peacebuilding nexus' that is deepening the operational convergence between these two distinct domains. Many interviewed for this report expressed real unease and uncertainty about the long-term effects of this process. It is forcing practitioners, for example, to go against what they perceive as core peacebuilding values by engaging in statebuilding projects that most believe exacerbate, rather than resolve, underlying conflicts. Yet there is no shared means for making sense of such changes as anything other than 'unintended consequences' of counterterrorism policies and a genuine reluctance to openly acknowledge their political effects. Second, when global coercive

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1   Paul K. Davis, "Simple Models to Explore Deterrence and More General Influence in the War with Al Qaeda" (occasional paper, RAND National Defense Research Institute, Santa Monica, 2010), 1.

2   Ibid.

instruments like sanctions are mediated through this nexus their localised effects are far more variegated than conventionally suggested. Reframing the problem in this way places conflict resolution at the cutting edge of how objects of security threat are constructed and governed. It also prompts peace workers to squarely confront their own securitisation and rethink how these processes might be made visible and undone.

It is toward such problematic and understudied intersections of peacebuilding and security practice that this chapter aims to make a contribution. Whilst the relationship between counterterrorism and humanitarian access has recently been made subject to examination and critique, there has been very little socio-legal research undertaken concerning the impact of counterterrorism measures on *peacebuilding* in Somalia. Two salient differences between these fields warrant initial mention. First, international humanitarian law (IHL) applicable to humanitarian actors does not extend to those engaged in peace, conflict resolution or mediation processes. Second, whilst limited operational concessions have been afforded to humanitarian actors, no similar concessions have been afforded to peace workers, rendering debates about NGO protection through exemption of limited relevance in this field. Whilst targeted sanctions have been widely criticised by jurists and academics for their human rights shortcomings, their impact on peacebuilding is gravely understudied. This partly reflects an underestimation by peace practitioners of the veracity and scope of counterterrorism measures and a general reluctance to openly confront their effects. But it also speaks to the absence of shared conceptual vocabularies capable of connecting the transformative effects of these measures across divergent domains.

To develop these arguments this chapter is divided into two sections. The first section maps some of the political, strategic and legal terrain within which counterterrorism measures and peace processes intersect in South-Central Somalia. It does so by situating the emergence of preemptive sanctions in this area within a broader genealogy of failed liberal peacebuilding, counterterrorism initiatives and the phenomenal rise of Islam as a political force in post-dictatorship Somalia. This approach is important because it helps reposition Somali sanctions as legal weapons of warfare for disrupting potential associations with Al-Shabaab, rather than abstract supranational norms that incidentally produce adverse consequences on peacebuilders and others. The second section builds on this analysis through detailed empirical investigation, positing the emergence of a 'security-peacebuilding nexus' as a core effect of the entanglement of counterterrorism and conflict resolution processes. Framing the problem in this way provides a clearer picture of the terrain of conflict and the gravity of what is at stake – underscoring that the space for peacebuilding is not merely 'shrinking', but is being thoroughly repurposed, qualitatively transformed and securitised in novel ways. This part of the chapter critically examines the idea that sanctions - broadly defined to include UN Security Council, US and EU terrorist listing regimes - are producing a 'chilling effect' on peaceworkers and forcing operational changes due to perceived liability threats. Whilst such threats are indeed altering the nature of peacebuilding in South-Central Somalia, this risk is being differentially distributed and mitigated in a multiplicity of divergent and potentially contradictory ways. Four emergent risk mitigation strategies are analysed - (i) risk aversion and withdrawal; (ii) political immunity and protection; (iii) formal compliance/informal practice and (iv) indifference. Finally, the advantages and problems of each of these strategies are critically assessed and their implications for peace work practice are highlighted.

In terms of methodology, our analysis in this chapter draws on more than 20 semi-structured interviews undertaken in 2012-2014 (principally in Nairobi, Brussels and London) with individuals working in the peace, development and security fields within Somalia - including (i) national government and EU officials engaged in sanctions, peacebuilding, development and foreign policy; (ii) members of international NGOs engaged in Somali peace and mediation initiatives and (iii) local Somali actors engaged in on-the-ground governance and peace work. Because of the secrecy of counterterrorism policies – which are often based on confidential, security-sensitive information - the analysis is also supplemented throughout with classified US Embassy Cables released by Wikileaks.

1.   Understanding counterterrorism and peacebuilding in Somalia

1.1   Origins of conflict and failure of 'top-down' peace

Since the overthrow of the Siad Barre military dictatorship in 1991 Somalia has been without a functioning centralised state, marked by protracted civil war, violent inter-clan hostilities, warlordism, regional proxy conflicts, famines and internal displacement. The most intense and destructive period of civil warfare took place in the immediate aftermath of the dictatorship - with an estimated 35,000 civilians killed in urban conflict; 300,000 killed by rural famine and 700,000 displaced and forced to seek refuge in Kenya, Ethiopia, Europe, USA and other states.[3] Dictatorship gave way to unpredictable "rule by warlord … turn[ing] much of Somalia into a patchwork of fiefdoms" in the violent struggle for political control.[4]

In April 1992 the UN authorized a peacekeeping mission (UNISOM) to facilitate safe humanitarian aid delivery. Following warlord resistance to the original UNISOM mission, in December 1992 the Security Council authorised a much larger, US-led intervention (code-named 'Operation Restore Hope') to secure the delivery of aid, repurposing UNISOM II to try and broker reconciliation and facilitate state building. In June 1993 militia led by the warlord General Mohammed Farrah Aideed attacked and killed 24 Pakistani peacekeepers as part of a campaign to expel the UN mission from Somalia. In October 1993, during an ill-planned attempt to capture some of Aideed's men, two US helicopters were shot down in Mogadishu and eighteen US soldiers killed in what became known as the 'Black Hawk Down' incident. Shortly after this humiliating defeat US troops withdrew from Somalia, with the UN mission following suit in March 1995. UNISOM and Operation Restore Hope - like almost all other international interventions that followed - failed to achieve their self-stated aims of peace enforcement, humanitarian assistance and nation building, and left Somalia in a state of civil war and state collapse. This mission was one of "the most dramatic example[s] of getting Somalia wrong".[5] It "entrenched the predatory warlord structures, spawned a new class of entrepreneurs and perpetuated Mogadishu as a locus of conflict".[6] It also prompted a less directly interventionist approach to resolving the Somali conflict, with the US avoiding 'boots on the ground' and intervening militarily through proxy states and clan actors instead.

The failure of these interventions prompted a strategy of peace building through international conferences and the formation of 'virtual' governments. Between 1997 and 2004, more than five such peace conferences were held outside of Somalia with UN, EU and Arab League support to try and forge national reconciliation and initiate statebuilding processes.[7] One of the most promising initiatives was the Djibouti Conference of 2000, which formed a Transitional National Government (TNG) and was hastily given recognition by the UN as the legitimate government of Somalia. Yet despite international enthusiasm, the TNG was effectively "doomed from the start".[8] It was financially supported by the Arab states, Islamist in composition and favoured a strong, centralised state.[9] But it was dominated by the Mogadishu-based *Haber Gedir Ayr* clan and was opposed by a coalition of powerful warlords who formed the anti-Islamist *Somali Reconciliation and Rehabilitation Council* (SRRC) as an Ethiopian-backed armed opposition movement that advocated for a federalist solution. Unable to secure popular support or effectively govern, the TNG soon became acknowledged as an illegitimate statebuilding experiment. A further conference convened in Nairobi in 2004 led to agreement on a new Transnational Federal Government. Yet by early 2005 the TFG was deeply divided with conflict along clan and religious lines - split into those elements supporting President Yusuf (who was virulently anti-

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3   Human Rights Watch, *Shell-Shocked: Civilians Under Siege in Mogadishu* (New York: Human Rights Watch, 2007), 13; Ioan Lewis, *Making and Breaking States in Africa: The Somali Experience* (New Jersey: Red Sea Press, 2010), 123.
4   Mary Harper, *Getting Somalia Wrong: Faith and War in a Shattered State* (London: Zed Books, 2012), 57.
5   Ibid., 62.
6   Mark Bradbury, *Becoming Somaliland* (Suffolk: James Currey, 2008), 92.
7   Including the National Salvation Conference, Ethiopia 1997; Cairo Peace Conference, Egypt 1997; Somalia National Peace Conference, Djibouti 2000; Somalia Reconciliation Conference, Eldoret, Kenya 2002; Nairobi Conference, Kenya 2002–04.
8   See Lewis, *Making and Breaking States in Africa*, 183–6 for a succinct overview of the key problems and conflicts.
9   Ken Menkhaus, "The Crisis in Somalia: Tragedy in Five Acts," *African Affairs* 106, no. 424 (2007): 357–90.

Islamist) and elements in the 'Mogadishu Group' opposed to the TFG (which was criticised as an Ethiopian puppet regime) - and was forced to govern remotely from nearby Jowhar and (then) Baidoa. Despite its international recognition as the national legitimate authority, within two years the TFG was widely criticised as another stillborn Somali statebuilding experiment. "In retrospect", notes Ioan Lewis, "one can only marvel at the ethnocentric naivete of the Western advisers who had encouraged this enterprise".[10]

The failures of these various statebuilding initiatives highlight three themes that underpin the analysis and arguments developed in this chapter. First, it shows the incongruence between 'top-down' international peace building interventions in Somalia and the more localised mechanisms of Somali politics that provide a modicum of stability and conflict resolution in the absence of a centralised state. Somali politics are heterogeneous, largely informal, built upon shifting, pragmatic associations. Here the state simply "does not have a privileged position as the political framework that provides security, welfare and representation; it has to share authority, legitimacy and capacity with other structures".[11] Hybrid political orders grounded in the autonomy of local actors and the informal agency they exercise are those most likely to work as peacebuilding strategies in South-Central Somalia.[12] Second, these failures highlight the central importance of the clan system in Somali politics – which "directs the lines of political alliance and division"[13] and is "stronger and more durable than any form of government",[14] yet dynamically and fluidly adapts to the changing political environment.[15] Policies insufficiently attentive to the messiness of clan dynamics are more likely to be repurposed by Somali actors and therefore fail to meet their self-stated aims.[16] Finally, the entanglement of peace building and security politics within Somalia cannot be grasped without appreciating the growing importance of Islam in Somali political life, which this chapter now turns to consider.

1.2 The rise of political Islam

(i) Islamic awakening and the emergence of AIAI

Islam is a crucially important part of Somali identity and has long been a central organising force in Somali society, "compet[ing] with and at times replac[ing] clan identity".[17] Somali Muslims (who are predominantly Sunni) have historically practised a moderate form of Islam with a relatively relaxed application of Islamic laws. Sufi theosophy has predominated, women have usually been unveiled and Sharia law has traditionally had little traction outside of the context of family law. Yet the Ikhwan (Muslim Brotherhood), Salafist and Wahhabist orientations of Islamic thought - all of which are much stricter in terms of religious proscription and together constitute what is often referred to as 'Islamism' or 'political Islam'[18] - have been present in

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10 Lewis, *Making and Breaking States in Africa*, 193.

11 Volker Boege et al., *On Hybrid Political Orders and Emerging States: State Formation in the Context of Fragility* (Berlin: Berghof Research Center for Constructive Conflict Management, 2008), 10.

12 On hybridity and peace building see, *inter alia*, Oliver Richmond and Audra Mitchell, eds., *Hybrid Forms of Peace: From Everyday Agency to Post-Liberalism* (London: Palgrave Macmillan, 2011); Roger Mac Ginty, "Hybrid Peace: The Interaction between Top-Down and Bottom-Up Peace," *Security Dialogue* 41, no. 4 (2010): 391; Boege, *On Hybrid Political Orders*; Oliver Richmond and Ioannis Tellidis, "The Complex Relationship Between Peace-building and Terrorism Approaches: Towards Post-Terrorism and a Post-Liberal Peace?," *Terrorism and Political Violence* 24, no. 1 (2012): 120; Gilberto Carvalho Oliveira, "'New Wars' at Sea: A Critical Transformative Approach to the Political Economy of Somali Piracy," *Security Dialogue* 44, no. 1 (2013): 3.

13 Ioan Lewis, *Understanding Somalia and Somaliland: Culture, History, Society* (London: Hurst & Co., 2011), 23.

14 Harper, *Getting Somalia Wrong*, 11.

15 Whilst six clans were represented in the first Djibouti conference (1991), for example, fifteen clans were represented in the subsequent conference at Addis Ababa in 1993 and twenty-eight factions attended the Cairo conference of 1997. See Afyare Abdi Elmi, *Understanding the Somalia Conflagration: Identity, Political Islam and Peacebuilding* (London: Pluto Press, 2010), 36.

16 Ken Menkhaus, "Governance without Government in Somalia: Spoilers, State Building and the Politics of Coping," *International Security* 41, no. 3 (2006): 77.

17 Elmi, *Understanding the Somalia Conflagration*, 50.

18 The meaning of these terms is much disputed. We use the terms 'Islamism' and 'political Islam' interchangeably, drawing on the definition by Höhne:

[Islamism] refers to actors that combine strict adherence to the written sources of Islam, including the Koran, hadith and authoritative commentaries, with 'Islamic activism', that is, the active assertion and promotion of beliefs prescriptions, laws or policies that are held to be Islamic in character. Islamism covers social reform movements as well as global jihadists. Possibly the only common goal of all Islamists is to erect Islamic states – and in the long run, a new Caliphate – in which divine law (shari'a) rules, but the strategies for achieving this aim differ tremendously.

Markus Virgil Höhne, *Counter-Terrorism in Somalia: How External Interference Helped to Produce Militant Islamism* (Halle/Salle, Germany: Max Plank

Somalia since at least the 1960s and have played an increasingly important role in shaping Somali politics.[19]

During the military dictatorship, political Islamists were violently repressed and leading religious clerics were executed, forcing the different movements to operate in secrecy. However, the collapse of the military regime in 1991 saw a proliferation of Islamic organisations advocating for the adoption of 'authentic' Islamic governance and various (ultimately unsuccessful) attempts by Islamist groups to take political control of Somali territory.[20]

The most influential group to emerge during this period was *Al-Itahaad Al-Islaami* (AIAI). AIAI was formed in the early 1980s as an umbrella organisation of different Salafist and Wahhabist groups aiming to establish a pan-Somali Salafist emirate.[21] In January 1991 AIAI seized control of the strategic port town of Kismayo but was driven out shortly after by United Somali Congress (USC) forces led by General Aideed. One of Aideed's leading fighters, Colonel Hassan Dahir Aweys, defected to AIAI during negotiations, going on to become one of Somalia's most influential Islamist leaders. There had previously been major internal rifts within AIAI about the legitimacy of armed struggle. But the Kismayo defeat convinced a majority of members that their religious mission could only be achieved through jihad, thus strengthening the overall influence of AIAI's military wing.[22] Subsequently, AIAI took control of the north-eastern port town of Boosaaso, but it was retaken shortly after by Somali Salvation Democratic Front (SSDF). They then seized the South-Western commercial town of Luuq, and administered it as an Islamic emirate - with a Sharia Court, free Islamic schooling and an Islamic police force - until 1996, when it was crushed by Ethiopian forces. During this time AIAI – which was said to be financially supported by patrons and charities from Saudi Arabia, the Gulf states and the Somali diaspora in Kenya, Europe and the US – also established militant training camps and trained foreign fighters from outside Somalia with operational assistance from Al-Qaida, then based in Sudan.[23] Although it was primarily focused on developing Islamist politics within Somalia and resisting Ethiopian rule in the Somali-inhabited border areas, AIAI was also interconnected from the outset with global Islamist and Salafist networks.[24] Yet the number of Somalis who supported AIAI as part of a global jihadist struggle remained extremely limited.[25] After its defeats in 1996 – 1997, AIAI effectively ceased to function as an organisational entity, although key Islamist networks underpinning AIAI persisted and would subsequently emerge in other forms.[26]

(ii)   Al-Qaida in East Africa

Al-Qaida (AQ) maintained a cell in East Africa during the 1990s and played an important part in the militant Islamist politics of this period. AQ were partly based in Sudan between 1989 and 1991 with the knowledge and tacit support of the Sudanese

Institute for Social Anthropology, 2010). See also Sheri Berman, "Islamism, Revolution, and Civil Society," *Perspectives on Politics* 2, no. 1 (2003): 258; Elmi, *Understanding the Somalia Conflagration*; Ken Menkhaus, "Political Islam in Somalia," *Middle East Policy* 9, no. 1 (2002): 109; Ken Menkhaus, "Somalia: They Created a Desert and Called It Peace(building)," *Review of African Political Economy* 36, no. 120 (2009): 223; International Crisis Group (ICG), *Somalia's Islamists*, Africa Report No. 100 (International Crisis Group (ICG), 2005).

19   The proper relationship between the Ikhwan, Salafist and Wahabbist orientations of Islamic thought is the source of much disagreement and beyond the scope of this paper to explore. For an overview, see Elmi, *Understanding the Somalia Conflagration*, 55–58.

20   International Crisis Group (ICG), *Somalia's Islamists*, 2.

21   Ibid., 3.

22   Ibid., 5.

23   Martin Murphy, *Somalia: The New Barbary? Piracy and Islam in the Horn of Africa* (New York: Columbia University Press, 2011), 69–70; Stig Jarle Hansen, *Al Shabaab in Somalia: The History and Ideology of a Militant Islamist Group 2005–2012* (London: Hurst & Co., 2013), 17. At least two AIAI members involved in these camps—Muktar Robow and Aden Hashi Ayro—went on (as detailed below) to become key members of Al-Shabaab.

24   Matt Bryden, "No Quick Fixes: Coming to Terms with Terrorism, Islam and Statelessness in Somalia," *Journal of Conflict Studies* 23, no. 2 (2003): 36; International Crisis Group (ICG), *Somalia's Islamists*, 7–8.

25   Menkhaus, 'Political Islam in Somalia', 118.

26   Elmi, *Understanding the Somalia Conflagration*, 58. AIAI subsequently split into two splinter groups—*Al Itisam*, led by Sheikh Mohammed Ise, which was based in Mogadishu and refrained from fighting militarily; and *AIAI*, led by Colonel Hassan Dahir Aweys, which remained military focused in western Somalia. According to Hansen, the split was stimulated by 'ideological differences over how Wahhabism should be promoted and clan differences'. See Hansen, *Al Shabaab in Somalia*, 21.

government.[27] Osama bin Laden moved to Khartoum in 1991 and resided there until expelled in 1996, following pressure from the US government. In Sudan, AQ established training camps for instruction in the use of weapons and explosives, trained more than 2000 recruits from such groups as Egyptian Islamic Jihad and the Eritrean Islamic Jihad Movement (EIJM) and established political connections with other African Islamist parties and armed groups.[28] They also sent instructors to Somalia during this period, trained Somali militants in Sudanese camps[29] and sent foreign fighters to Mogadishu to mount armed resistance against the UNISOM mission.[30] Most importantly, a small Mogadishu-based AQ cell was responsible for carrying out the 1998 attacks against the US embassies in Kenya and Tanzania as well two further attacks in Kenya in 2002.[31] As detailed below, the elimination of this cell has been one of the core objectives driving US security and foreign policy toward Somalia.

AQ have never enjoyed popular support in Somalia, due largely to the strength of the clan system and the pragmatic parochialism of Somali politics. Recent analyses based on seized and declassified AQ documents suggest that AQ faced precisely the same kind of political and logistical obstacles operating in Somalia as most other international actors – namely, clan opposition and unwitting involvement in clan conflicts, excessive operating costs, dangerous operating environments for foreigners and a strong ideological opposition to jihad by most Somalis.[32] As a result, the number of Somali AQ recruits was negligible[33] and their interest in Somalia as a stage for global jihad had largely receded by the early 2000s. With the subsequent rise of Al-Shabaab and their formal merger with AQ in February 2012, however, the power of AQ in Somalia expanded.[34]

(iii) Islamic courts and the emergence of Al-Shabaab

Local *Shari'a* courts – administered by an ensemble of clan elders, businessman and Muslim clergy and militia - have long been an important stabilising factor in Somali politics and a central vector in the growth of political Islam in Somalia. The first courts were set up in north Mogadishu in 1994 to provide order and security and were hugely successful (and popular) in reducing criminality. In the beginning, the courts functioned primarily as mechanisms of local clan power, with judgments enforced by clan militia and their authority emanating from clan elders.[35] Early attempts to seek further autonomy from the clans were met with opposition, resulting in the first courts being disbanded by warlords who feared usurpation of their authority. More militant *Shari'a* courts – such as the influential Ifka Halane court - were set up in Southern Mogadishu from 1996 with the active involvement of key AIAI members like Sheikh Hassan Dahir Aweys. In 2000 these southern Mogadishu courts came together in a collective body [the *Shari'a Implementation Council,* (SIC)] with Aweys as secretary-general. The SIC soon came to exercise significant political power, extending well beyond Mogadishu into the surrounding Lower Shabelle region. By amalgamating the different court militias the Council created "the first significant non-warlord controlled… military force"[36] of South-Central Somalia. However, the Council broke down organisationally after the TNG sought to annex the courts and their militias into the

27   The request for AQ to move to Sudan was made by the National Islamic Front (NIF) of Sudan, who provided the popular power-base for the Sudanese government that came to power in 1989. See David H Shinn, "Al-Qaeda in East Africa and the Horn," *Journal of Conflict Studies* 27, no. 1 (2007).

28   Ibid., 50.

29   Hansen, *Al Shabaab in Somalia*, 24.

30   Murphy, *Somalia: The New Barbary?*, 72.

31   The leaders of this cell were Fazul Abdullah Mohammed, Tariq Abdullah and Saleh Ali Saleh Nabhan—all three of whom went on to become important figures within Al-Shabaab. In the 1998 US Embassy attacks, Somali participants played only a minor role with most of the planning carried out in Pakistan. However, the 2002 attacks were organised by Somali and Kenyan operatives with safe houses in Mogadishu and Kismayo used to store arms and shelter AQ members. See Hansen, *Al Shabaab in Somalia*, 25.

32   See, in particular, Combating Terrorism Center at West Point, *Al-Qaida's (Mis)adventures in the Horn of Africa* (New York: US Military Academy, 2007), 17–22; Ken Menkhaus, "Somalia: State Collapse and the Threat of Terrorism," *Adelphi Papers* 44, no. 364 (2004): 71–75.

33   Lorenzo Vidino, Raffaello Pantucci and Evan Kohlmann, "Bringing Global Jihad to the Horn of Africa: Al Shabaab, Western Fighters and the Sacralization of the Somali Conflict," *African Security* 3, no. 4 (2010): 220.

34   There is much policy and academic disagreement on the relationship between al-Shabaab and al Qaeda. Arguably, the best analysis remains Hansen, *Al Shabaab in Somalia*. For the announcement of the February 2012 merger between AS and AQ see "Somalia's al-Shabab join al-Qaeda," *BBC News Africa*, last modified February 10, 2012, http://www.bbc.co.uk/news/world-africa-16979440.

35   International Crisis Group (ICG), *Somalia's Islamists*, 20.

36   Cedric Barnes and Harun Hassan, "The Rise and Fall of Mogadishu's Islamic Courts," *Journal of Eastern African Studies* 1, no. 2 (2007): 153.

transitional justice system, provoking many of the judges to leave.

In 2004, a new organisation was founded called the *Supreme Council of Islamic Courts of Somalia*, which brought eleven Mogadishu courts together. This council was militarily powerful with a joint militia of around 400 men. It was also financially powerful, enjoying the backing of local businessmen and international contributors. The Council secured widespread inter-clan support for its effective provision of security and order. It was such a heterogeneous coalition of Islamists, businessmen, ex-militias and different clan members that 'attempts to label …' the *Shari'a* system 'extremist', 'moderate' or any other single orientation [were] futile".[37] At inception, only two of the eleven courts maintained militant Islamist views and they held little sway over the overall direction and everyday activities of the Council. In 2005, however, the Ifka Halane court led by Aweys appointed a young Islamist militant (Aaden Hashi Ayro) as the head of its militia. Shortly after, Ayro was made head of the courts' 'youth organisation' – a militant Islamist movement that came to be known as *Al-Shabaab*.

There is much scholarly dispute over the precise origins of Al-Shabaab. For some, it began with "a small sub-group of AIAI" dominated by individuals who fought as mujahedeen against the Soviets in Afghanistan, some of whom were friends with East African AQ cell members.[38] For others, it was formed in 2004 in camps – created by Aweys and coordinated by Ayro - built to train 'Troops of the Islamic Courts' (Mu'askar Mahkamad), later renamed *Jamaa'a al-Shabaab* (Youth Group).[39] Both trajectories (pre-existent Islamist networks and militant training camps) were undoubtedly important in the organisation's evolution. At the beginning of 2005 Al-Shabaab were a small, but effective, network of around thirty-five militant Islamists firmly embedded within the structure of the Council of Islamic Courts (ICU). By 2009, however, the organisation was one of the most powerful Islamist groups in the world, maintaining *de facto* control over much of South-Central Somalia.

1.3   Counterterrorism, preemption and immunity through containment

Understanding the phenomenal rise of Al-Shabaab requires analysis of the security measures used by external actors to try and contain the threat of political Islam in Somalia. Three interconnected strategies have been deployed - (i) military intervention, targeted killing and counterinsurgency (both direct and by proxy); (ii) the application of the liberal 'failed state' doctrine to contain the Islamist threat and securitise Somalia's 'ungoverned space' and (iii) the use of counterterrorist sanctions and financing measures to disrupt and incapacitate Somali Islamist groups and their perceived supporters worldwide.

(i)   Military intervention, targeted killing and counterinsurgency

By 2005 the ICU had grown into one of the most formidable political and military forces in South-Central Somalia, threatening the authority of the warlords in Mogadishu and stimulating considerable international concern and opposition from external actors such as Ethiopia and the United States. Southern Somalia had long been the site of a "simmering proxy war" between Ethiopia and Eritrea, with each state sponsoring different armed groups in order to achieve their political aims.[40] Similarly, US policy toward Somalia has long been driven by counterterrorism concerns. In a leaked US Embassy Cable from December 2005, for example, the US Ambassador in Nairobi plainly stated that, "*the basis of our policy to date, and the driving force behind a review, has been our focus on the terrorist threat that emanates from Somalia*".[41] A small AQ cell was based in Mogadishu and supported by Islamists within the city. The individuals comprising this cell – including Fazul Abdullah Mohammed, Abu Talha al-Sudani and Saleh Ali Saleh Nabhan – were designated as high-value targets by US. Killing these individuals, and disrupting the Mogadishu

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37 International Crisis Group (ICG), *Somalia's Islamists*, 21.

38 Hansen, *Al Shabaab in Somalia*, 19–29.

39 Roland Marchal, "A Tentative Assessment of the Somali Harakat Al-Shabaab," *Journal of Eastern African Studies* 3, no. 3 (2009): 388–90.

40 Andre Le Sage, "Somalia and the 'War on Terrorism': Political Islamic Movements & US Counter-Terrorism Efforts" (dissertation, University of Cambridge, 2004), 106.

41 US Embassy, "05NAIROBI5156" (embassy cable, December 16, 2005).

network of Islamists who provided them with material support, has been one of the primary priorities of the US policy in the region.

To that end, the CIA fostered close operational links with particular Mogadishu warlords to assist in the capture, rendition, interrogation and targeted killing of Islamist leaders, enrolling them in what one classified US Embassy Cable describes as the "short term strategy of locating and nullifying high value targets" within Somalia.[42] To effect this strategy, the CIA paid Hawiye warlords such as Mohammed Qanyare and Bashir Rage between USD $100,000 and USD $150,000 per month for their services and use of airport facilities to assist covert US targeting operations within Somalia. According to Qanyare, "their intention and our intention [was] the same, [namely] … to eliminate al Qaeda representatives in the Horn of Africa."[43] According to one secret US Embassy Cable entitled *Somalia: A Strategy for Engagement*, high-value targets:

> …*must be removed from the Somali equation*… Use of non-traditional liaison partners (eg, militia leaders) to gather intelligence and pressure AQ networks may seem unpalatable choices, particularly in light of civilian casualties in recent rounds of fighting in Mogadishu. However, these partners are the only means currently available to remove these… individuals from their positions in Mogadishu, from whence they are able to continue planning to strike US interests.[44]

The warlords were to identify, locate and/or transfer Al-Qaida representatives and other High Value Targets (HVTs) to US operatives. These individuals would then be either rendered to sites such as the US military facility in Djibouti and secret prisons in Mogadishu for coercive interrogation or killed by the warlords who captured them. Numerous cables emphasise that US targeting in Somalia was supposed to be narrowly focused on "the [foreign] Al Qaida presence and the handful of Somalis who protect them", so as to avoid exacerbating the civil war through the killing of Somali residents.[45] However, most of those captured by the warlord coalition - which became known as the *Alliance for Restoration of Peace and Counter-Terrorism* (ARPCT) - were not foreign Al-Qaida HVTs but either foreigners or Somali religious leaders with suspected Islamist sympathies.[46] Moreover, because many of those captured were innocent and had no intelligence value for the US, they were subsequently killed by the warlords upon return to Somalia to prevent them from talking about their rendition, imprisonment and interrogation.[47]

Between 2002 and 2006 scores of Somali Islamists were abducted and killed in this way by US-backed warlords operating within ARPCT. In one US Embassy Cable documenting a 2006 meeting between the former President of the TFG (Abdullahi Yusuf) and the US Ambassador in Nairobi, Yusuf "wondered aloud why the US would want to start an open war in Mogadishu", noting that despite US assurances to the contrary, Mogadishu residents believe that the US proxy war is targeting Islam rather than foreign AQ fighters.[48] Somali warlords have also used the 'war on terror' as an opportunity to generate external

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42 US Embassy, "06NAIROBI2425" (embassy cable, June 2, 2006).

43 Mohammed Qanyare cited in Jeremy Scahill, *Dirty Wars: The World is a Battlefield* (London: Serpents Tail, 2013), 120.

44 US Embassy, "06NAIROBI2425"; emphasis added.

45 US Embassy, "06NAIROBI1601" (embassy cable, March 12, 2006).

46 A 2005 ICG report noted, for example, that:

> the scramble by Mogadishu faction leaders to nab al-Qaeda figures for American reward money has spawned a small industry in abductions. Like speculators on the stock market, faction leaders have taken to arresting foreigners -- mainly, but not exclusively Arabs -- in the hope they might be on a wanted list. According to one militia leader who has worked closely with the Americans in counter-terrorism operations, as many as seventeen suspected terrorists have been apprehended in Mogadishu alone since 2003 - all but three apparently innocent.

See International Crisis Group (ICG), *Counter-Terrorism in Somalia: Losing Hearts and Minds?*, Africa Report No. 95 (Brussels: International Crisis Group (ICG), 2005), 16.

47 Skeikh Sharif Sheikh Ahmed, former chairman of the ICU, has stated in interview that:

> … when the US military leaders in Djibouti return religious scholars, the warlords killed them in the airports they controlled because they do not want people to find out what happened … As many as fifty individuals have disappeared, and we suspect the number is even more than fifty.

Cited in Elmi, *Understanding the Somalia Conflagration*, 83. See also Scahill, *Dirty Wars*, 128, 192.

48 US Embassy, "06NAIROBI1484" (embassy cable, April 3, 2006).

backing for the elimination of clan and business rivals. The practice of groups "attempting to de-legitimise [their] opponents and garner international support through accusations of 'terrorism' [became] a vital currency of power in Somali politics after 9/11".[49] In 2005, for example, a violent conflict broke out between two rival Mogadishu businessmen (Bashir Rage and Abuker Omar Adane) over real estate that was to house a potential charcoal port.[50] Rage was connected to US-allied warlords whilst Adane was a prominent financial supporter of the ICU. When Adane requested the support of the ICU in 2006, they came to his assistance, leading the ARPCT alliance to declare war on the ICU and the 'jihadists' that controlled it. The ICU replied in turn, calling on all Somalis to 'join the jihad against the enemies of Somalia'. After a bloody four-month conflict between the ICU and the warlord alliance - in which hundreds of civilians were killed and thousands more displaced[51] - the ICU took control of Mogadishu in June 2006 and with it, most of South-Central Somalia.

The ICU enjoyed widespread popularity during its short reign. It "achieved the unthinkable, uniting Mogadishu for the first time in sixteen years and re-establishing peace and security".[52] Checkpoints long controlled by the warlords were removed, Mogadishu's international air and seaports were reopened and a modicum of political stability returned to the city. Like the other court alliances that had preceded it, the ICU was a heterogeneous organisation that brought together a diverse spectrum of people "from moderate and extreme wings of political Islam".[53] Its only common aims were the removal of warlord control and establishment of an Islamic state in Somalia.[54] However, the conflict with the US-funded warlord alliance served to internationalise the struggle, prompting AQ to call on Muslims to defend the ICU from US intervention and to help "establish the nucleus of the Caliphate" in Somalia.[55] More importantly, it served to bolster the influence of militants within the Union (such as Aweys, Godane, Robow and Ayro) and radically expand the power of Al-Shabaab. Six of the ICU's eighteen Executive Council seats came to be held by AIAI and Al-Shabaab members.[56] Moreover, both the size of Al-Shabaab and their popular support swelled in the face of what was perceived to be a united, anti-Islamic common enemy (the United States and Ethiopia). The US strategy toward Somalia had been to first eliminate the Islamist threat through secret rendition and high-value targeting and then install the ARPCT warlords within the TFG, increasing its military strength and creating a united front against the ICU.[57] However, this approach ended up radically backfiring and producing the very threat it was supposed to counter.[58]

Soon after taking power an internal struggle took place within the ICU between Islamic moderates and hardliners, culminating in the December 2006 ICU declaration of jihad against Ethiopia. This hardened US opposition, enabling them to condemn the ICU as an AQ front and catalysed plans for a US-backed Ethiopian military invasion.[59] On 6 December 2006 the UN Security Council adopted Resolution 1725, demanding that ICU sever all links with terrorism and authorising military deployment by the African Union (AU) and the Intergovernmental Authority on Development (IGAD) to 'protect' the TFG. The adoption of this resolution clearly signalled that "confrontation was the only item on the Western agenda".[60] On 25 December 2006 Ethiopia

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49 Ashley Elliot and Georg-Sebastian Holzer, "The Invention of 'Terrorism' in Somalia: Paradigms and Policy in US Foreign Relations," *South African Journal of International Affairs* 16, no. 2 (2009): 215.

50 Roland Marchal, "Somalia: A New Front Against Terrorism," *Social Science Research Council* 5 (2007): 4.

51 Elmi, *Understanding the Somalia Conflagration*, 83.

52 Barnes and Hassan, "Rise and Fall of Mogadishu's Islamic Courts".

53 Ibid., 155.

54 On the heterogeneity of the ICU see, in particular, Höhne, *Counter-Terrorism in Somalia*, 11–16. The ICU included at least fourteen neighbourhood shari'a courts, the majority of which lacked a jihadist agenda; al-Shabaab, AIAI, Ahlu Sunna Wal Jam'a (ASWJ) and leading religious leaders from Majuma Ulema.

55 Scahill, *Dirty Wars*, 206.

56 Höhne, *Counter-Terrorism in Somalia*, 17.

57 See US Embassy, "06NAIROBI2456" (embassy cable, June 6, 2006), which plainly states that 'we had hoped to work on bringing the Mogadishu warlords together with the TFIs, both to strengthen the governing institutions and to create a more united front against the UIC.' But that the sacking of 'four warlord/ministers leaders of the ARPFAT' by Prime Minister Gedi 'render[s] hopeless such an effort, at least in the near term'.

58 Höhne argues that 'Somalia since 2006 is possibly the clearest example of the failure of US (and Ethiopian) counter-terrorism policy, which actually has produced what it was supposed to counter.' Höhne, *Counter-Terrorism in Somalia*, 26.

59 See, for example, comments by Jendayi Frazer (then Assistant Secretary of State for African Affairs) that 'al-Qaidah was controlling the leadership of the Courts', cited in Marchal, "Tentative Assessment of the Somali Harakat Al-Shabaab," 392.

60 Ibid.

commenced its military offensive with full support and logistical assistance from the US. Within a week it had taken control of South-Central Somalia out of the hands of the ICU and had installed the TFG in Mogadishu.

The invasion was used strategically by the US as a means of dividing, conquering and destroying the Islamist movement underpinning the ICU. On the one hand, 'moderates' were identified, isolated and protected by US intelligence and offered political inducements in exchange for their commitment to fight terrorism. The former head of the ICU, Skeikh Sharif Sheikh Ahmed, was singled out for grooming and protection in this way. According to leaked US Embassy Cables, Sharif was told by the US Ambassador that "it was the US view that he could play an important role in helping to promote peace and stability in Somalia" and that "the US was prepared to recommend that Kenya help bring [him] to Nairobi if he were prepared to … support peace and stability in Somalia… [and] reject terrorism".[61] He was subsequently provided with safe passage to Yemen and later installed as the president of the TFG. On the other hand, the Ethiopian invasion was used as cover for an aggressive and coordinated targeted killing campaign aimed at foreign fighters and Somali Islamists. As ICU members and militants fled Mogadishu for the Kenyan border areas after the invasion, they were targeted by Task Force 88 [a secret US unit within the Joint Special Operations Command (JSOC) based at Camp Simba, Manda Bay, Kenya]; predator surveillance drones (from Camp Lemmonnier, Djibouti) and a fleet of US AC-130 Gunships (based at an airfield near Dire Dawa, Ethiopia). From January 2007, US forces began undertaking strikes at HVTs within Somalia - mostly missing their ostensible targets, but killing scores of civilians in the process.[62] The Ethiopian invasion sparked "the beginning of a concentrated campaign of targeted assassinations and snatch operations by JSOC in Somalia", which continues in much the same form to the present day.[63]

The invasion soon turned into fully-fledged military occupation, generating widespread anger from ordinary Somalis who have long considered Ethiopia an historic enemy. Within weeks a complex insurgency began against the TFG and occupying Ethiopian forces. Whilst the government tried to blame this insurgency on political Islamists, the primary resistance in Mogadishu actually came from the clans that deeply distrusted the transitional government.[64] In 2007 more than 6000 civilians were killed in fighting in South-Central Somalia and approximately 700,000 of Mogadishu's population of 1.3 million were internally displaced.[65] Originally, it was the intention to remove the Ethiopian army because their presence was thought to be fuelling the insurgency and replace them with African Union (AU) peacekeeping forces. Yet because of the limited number of troops committed to the UN Security Council-authorised AU mission (ANISOM), Ethiopian forces remained within Somalia for more than two years following the invasion.[66] In any event, because ANISOM troops were from Uganda and Burundi they ended up being branded as foreign supporters of the TFG and similarly rendered targets of insurgent attack.[67]

The foreign occupation and counterinsurgency stimulated the rapid expansion of Al-Shabaab. By the end of 2007 Al-Shabaab had launched more than half of all insurgent attacks and commenced a suicide bombing campaign against Ethiopian, TFG and AU forces - often led by recruits who had joined Al-Shabaab as radicalised diaspora members. At the same time Al-Shabaab significantly globalised the conflict, principally by engaging in online jihadist propaganda. This had the effect of consolidating their political break from the moderate positions taken by the ICU, garnering public support from Al-Qaida and facilitating the migration of foreign fighters hostile toward the Ethiopian invasion. In the years that followed, Al-Shabaab emerged as the most resilient, politically unified and powerful force in the conflict. By mid-2009 it maintained effective control over much of

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61   US Embassy, "07NAIROBI5406_a" (embassy cable, January 2, 2007)

62   On 7 January 2007, for example, a US airstrike within Somalia killed between eight and twelve individuals but the target (Al-Shabaab commander, Aden Ayro) escaped with minor injuries. Former US covert op veteran Malcolm Nance has said that 'we were wiping out groups of civilians.' See Scahill, *Dirty Wars*, 220.

63   Ibid.

64   Barnes and Hassan, "Rise and Fall of Mogadishu's Islamic Courts," 158.

65   Menkhaus, "Somalia: They Created a Desert," 223.

66   Whilst the Ethiopians formally withdrew from Somalia as part of the Djibouti Agreement in January 2009, approximately 8000 Ethiopian troops are currently deployed within Somalia as part of the ANISOM force.

67   Ken Menkhaus, *Somalia: A Country in Peril, a Policy Nightmare* (strategy paper, ENOUGH, Washington DC, 2008).

South-Central Somalia. In this way, the policy of seeking to eliminate the threat of terrorism in Somalia through military and counterterrorism measures proved to be a resounding failure. It ultimately served to strengthen the very jihadi Islamist forces that it had aimed to destroy.[68]

(ii) *Failed State doctrine*

The second key way that external actors have sought to contain the threat of terrorism and political Islam in Somalia has been through the re-appropriation and application of the 'failed state' doctrine. A failed state is technically defined by the "loss of physical control of its territory;... erosion of legitimate authority to make collective decisions;... an inability to provide reasonable public services; and an inability to interact with other states as a full member of the international community".[69] Because Somalia has been marked by protracted civil wars, violent inter-clan hostilities, widespread internal displacement and regional proxy conflicts for more than twenty years following the overthrow of dictatorship, it has been pervasively represented within academic, policy and popular discourse as the quintessential example of a 'failed state'.[70]

In the early 1990s, failed states were posited as key foreign policy problems requiring distinct and novel forms of western political intervention to resolve. In Kaplan's influential prediction, the "classificatory grid of nation-states is going to be replaced by a jagged-glass pattern of city-states, shanty-states, nebulous and anarchic regionalisms".[71] The inexorable descent of failed states into 'violence and anarchy' was thought to threaten both their own citizens and those of their neighbours, thus demanding that external actors take preventative action by saving them from collapse through governmental intervention.[72] From the outset, failed states have been posited and framed as security threats rather than simply political and economic problems.[73] With the 9/11 attacks in New York, however, the strategic security dimension of the doctrine dramatically expanded its influence amongst western governments. It is now widely accepted as given amongst policymakers in the US, UK and elsewhere that state failure is the primary cause of international insecurity and terrorism. As discussed below, this relatively recent policy shift is having increasingly profound effects on the ways that peacebuilding in Somalia is framed and practiced.

Three interconnected fears have informed and enabled the assemblage of the doctrine over this period. First, failed states are considered particularly dangerous because their 'ungoverned spaces' are thought to provide 'breeding grounds' and 'safe havens' for the formation of terrorist groups.[74] According to van Evera, who somewhat stridently explains the mainstream view: "Al-Qaeda and other terror groups grow and thrive in failed states, using them as havens in which they can establish secure

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68   Hansen, *Al Shabaab in Somalia*, 57; Höhne, *Counter-Terrorism in Somalia*, 26. See also Marchal, 'Tentative Assessment of the Somali Harakat Al-Shabaab', 393; International Crisis Group (ICG), *Can the Somalia Crisis be Contained?*, Africa Report No. 116 (Brussels: International Crisis Group (ICG), August 10, 2006).

69   Definition is from the Fund for Peace Fragile States Index. "Fragile States Index FAQ," Fund for Peace, last modified 2014, www.ffp.statesindex.org/faq#5.

70   See, for example, Robert I. Rotberg, "Failed States in a World of Terror," *Foreign Affairs* 81 (2002): 127; Eben Kaplan, "Somalia's Terrorist Infestation," Council on Foreign Relations, last modified June 6, 2006, http://www.cfr.org/somalia/somalias-terrorist-infestation/p10781; Andrew Cockburn, "Somalia," *National Geographic Magazine*, July 2002, 5; Tonya Langford Langford, "Things Fall Apart: State Failure and the Politics of Intervention," *International Studies Review* 1, no. 1 (1999): 59; Francis Fukuyama, "The Imperative of State Building," *Journal of Democracy* 15, no. 2 (2004): 17. According to former US Assistant Secretary for African Affairs, Jendayi Frazer: Somalia is 'the classic failed state. It may be even the only failed state, real failed state.' Jendayi Frazer, US Department of State, "Briefing on Somalia Contact Group Meeting," news release, June 16, 2006, http://2001-2009.state.gov/p/af/rls/rm/2006/67998.htm.

71   Robert D Kaplan, "The Coming Anarchy: How Scarcity, Crime, Overpopulation and Disease Are Rapidly Destroying the Social Fabric of Our Planet," *Atlantic Monthly* 273, no. 2 (1994): 44.

72   See, *inter alia*, Robert Irwin Rotberg, ed., *When States Fail: Causes and Consequences* (Princeton: Princeton University Press, 2003); Gerald Helman and Steven Ratner, "Saving Failed States," *Foreign Policy* 89 (Spring 1993) 3; I. William Zartman, *Collapsed States: The Disintegration and Restoration of Legitimate Authority* (Boulder, CO: Lynne Rienner, 1995).

73   Christian Bueger and Felix Bethke, "Actor-Networking the 'Failed State'—An Enquiry into the Life of Concepts," *Journal of International Relations and Development*, 2013, 30.

74   See, for example, Chuck Hagel, "A Republican Foreign Policy," *Foreign Affairs* 83, no. 4 (2004): 64; Princeton Lyman and J. Stephen Morrison, "The Terrorist Threat in Africa," *Foreign Affairs* 83, no. 1 (2004): 75; Stephen Krasner and Carlos Pascual, "Addressing State Failure," *Foreign Affairs* 84, no. 4 (2005): 153; Stephen van Evera, "Bush Administration, Weak on Terror,' *Middle East Policy* 13, no. 4 (2006): 28.

bases to mass-produce trained, motivated killers".[75] Second, failed states are also thought to provide conditions conducive to the spread of insurgency. According to leading counterinsurgency theorist David Kilcullen, for example, "insurgency today follows state failure, and is not directed at taking over a functioning body politic but at dismembering or scavenging its carcass, or contesting an 'ungoverned space'".[76] Third, failed states are considered to be dangerous in a globally interconnected world because they lack a state capable of containing security threats within national borders. Because global security is said to rely on states to "protect against chaos at home and limit the cancerous spread of anarchy beyond their borders and throughout the world", it is feared that failed states function as vectors of terror that "not only threaten... the lives and livelihoods of their own peoples, but [also] endanger... world peace".[77] In this way, the failed state doctrine enables a collapse of global scale, rendering threats from the 'periphery' of the global south or 'elsewhere' more proximate and dangerous to populations 'here' within the Western 'core'.

Since 9/11 the failed state doctrine has profoundly affected government security policy. The 2002 US National Security Policy claimed that "America is now threatened less by conquering states than we are by failing ones".[78] The 2003 European Security Strategy also identified state failure as one of the five core threats facing the EU.[79] The UK National Security Strategy similarly argues that "currently, most of the major threats... emanate from failed or fragile states", which are dangerous because they "provide the environment for terrorists to operate as they look to exploit ungoverned or ill-governed space".[80]

But the effects of the doctrine have moved far beyond the field of security strategy, narrowly construed. It is also facilitating the securitisation of novel and traditionally non-securitised domains such as development and peacebuilding, enabling them to be effectively reframed as important preemptive conflict prevention measures.[81] From intergovernmental organisations such as the UN and OECD to global financial institutions such as the World Bank, the idea of saving failed states has been absorbed into policy, allowing development and governance work to be redefined as essential component of international security. As the doctrine has become normalised as the unspoken way that most external states seek to deal with countries such as Somalia, it has driven the creation of new national executive institutional alliances and new collaborative working practices between hitherto distinct actors based on shared security assumptions - including those working in foreign affairs; military, intelligence, peace building and development. These institutional and policy changes are hybridising liberal peacebuilding and preemptive warfare in novel ways, producing far-reaching effects on the ways peace work is undertaken. The empirical effects and consequences of this shift will be explored in more detail later in this paper. For now we note merely that the failed state doctrine has become embedded as a crucially important device for assembling and governing contemporary Somali threats.[82]

(iii) Targeted sanctions, terrorism lists and counterterrorist financing measures

The third means of containing the threat of terrorism and political Islam in Somalia has been through using counterterrorist sanctions and financing measures. Sanctions are usually framed in academic literature as means of economic statecraft or coercive diplomacy. Yet to understand how they function in the Somali context they are best understood as novel instruments of 'financial warfare' (or 'lawfare') that complement other forms of preemptive security by disrupting and financially incapacitating

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75 Van Evera, "Bush Administration, Weak on Terror".

76 David Kilcullen, "Counter-insurgency Redux," *Survival: Global Politics and Strategy* 48, no. 4 (2006): 111.

77 Rotberg, "Failed States in a World of Terror," 128.

78 White House, *National Security Strategy of the United States of America*, (Washington, DC: White House, 2002), 1.

79 Council of the European Union, *A Secure Europe in a Better World: European Security Strategy* (Brussels: Council of the European Union, 2003), 4.

80 UK Cabinet Office, *The National Security Strategy of the United Kingdom: Security in an Interdependent World* (London: UK Cabinet Office, 2008), 14; and UK Government, *A Strong Britain in an Age of Uncertainty*: *The National Security Strategy* (London: UK Government, 2010), 28, para. 3.21) respectively.

81 Mark Duffield, "Social Reconstruction and the Radicalization of Development: Aid as a Relation of Global Liberal Governance," in Jennifer Milliken, ed., *State Failure, Collapse and Reconstruction* (Oxford: Blackwell, 2003), 291.

82 On the idea of the 'device', see John Law and Evelyn Ruppert, "The Social Life of Methods: Devices," *Journal of Cultural Economy* 6, no. 3 (2013): 229.

Somali Islamist groups and their perceived supporters worldwide.[83]

The global legal framework for counterterrorism listing is already detailed in Chapter 1 of this report and so is only briefly recounted here. At the supranational level, three different UN sanctions regimes are of particular relevance – the Somalia sanctions regime; the Al-Qaida sanctions regime and international terrorist financing measures stemming from Resolution 1373 (2001). First, Somalia sanctions target individuals and groups designated by the Security Council as threatening the Somali peace process through the imposition of travel bans, arms embargoes and assets-freezes.[84] These sanctions - which designate Al-Shabaab and leading Islamist figures such as Hassan Dahir Aweys - oblige States to "ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of such individuals or entities", and imposes broad prohibitions on the provision of technical assistance and training to those listed.[85] To mitigate adverse impacts, an exemption is carved out for funds "necessary to ensure the timely delivery of urgently needed humanitarian assistance".[86] But this exemption is narrowly circumscribed, applicable only to assistance delivered by UN agencies or those with General Assembly observer status and does not extend to those engaged in conflict resolution or peacebuilding work in Somalia. Second, the Al-Qaida sanctions regime compels states to "freeze without delay the funds … of [listed] individuals [and] groups" and make sure that "neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly for such persons' benefit".[87] All listed parties are similarly subjected to worldwide asset-freezes and travel bans and it is prohibited to provide them with any material support. In the weeks following 9/11, AIAI and Hassan Dahir Aweys were listed for their alleged association with Al-Qaida.[88] The Al-Barakaat Bank and group of companies that controlled much of Somalia's remittance and telecommunications trade were also designated at this time, in what was announced by George W. Bush as "another step in our fight against evil".[89] Finally, UN Security Council Resolution 1373 (2001) requires states to "prevent and suppress the financing of terrorist acts" by prohibiting the support of "persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts".[90] This measure essentially sets up a global proscription regime devolving the power to blacklist to the national level and compelling states to enact their own domestic legislation criminalising terrorist financing.

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83 Juan Zarate, *Treasury's War: The Unleashing of a New Era of Financial Warfare* (New York: Public Affairs, 2013). 'Lawfare' is used here to refer to the idea of law as a weapon of warfare. See, for example, US Embassy, '06USUNNEWYORK1609' (embassy cable, August 22, 2006), which proposes modifying the UN charter 'to *use it more effectively as a weapon in the war against terrorism*'.

84 United Nations Security Council (SC), Resolution 1844, "Somalia," November 20, 2008, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1844(2008), para. 8. The sanctions also target those who are deemed to obstruct the delivery of humanitarian assistance and/or threaten the Transitional Federal Institutions (TFIs) or ANISOM. The Somalia regime was first created by United Nations Security Council (SC), Resolution 733, "Somalia," January 23, 1992, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/733(1992); and United Nations Security Council (SC), Resolution 751, "Somalia," April 24, 1992, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/733(1992); which implemented a complete arms embargo, authorised the deployment of UN peacekeepers in Somalia and created a Sanctions Committee to administer the regime. An expert Monitoring Group was created in 2003 to advise the Committee (United Nations Security Council (SC), Resolution 1519, "Somalia," December 16, 2003, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1519(2003)). The scope and mandate of both was radically extended through the adoption of United Nations Security Council (SC), Resolution 1844, "Somalia," November 20, 2003, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1844(2008).

85 Ibid., United Nations Security Council (SC), Resolution 1844 (2008), paras. 3 and 7.

86 United Nations Security Council (SC), Resolution 1916, "Somalia," March 19, 2010, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1916(2010).

87 United Nations Security Council (SC), Resolution 1390, "Afghanistan," January 16, 2002, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1390(2002), para. 2(a); restated most recently in United Nations Security Council (SC), Resolution 2083, "Threats to International Peace and Security Caused by Terrorist Acts," December 17, 2012, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1390(2002), para. 1.

88 AIAI were designated on 6 October 2001. Security Council Committee Pursuant to Resolutions 1267 (1999) and 1989 (2011) Concerning Al-Qaida and Associated Individuals and Entities, "QE.A.2.01. Al-Itihaad Al-Islamiya / Aiai Qe.A.2.01. Al-Itihaad Al-Islamiya / Aiai," last modified April 7, 2011, www.un.org/sc/committees/1267/NSQE00201E.shtml. Aweys was designated on 9 November 2001. Security Council Committee Pursuant to Resolutions 1267 (1999) and 1989 (2011) Concerning Al-Qaida and Associated Individuals and Entities, "QE.A.2.01. Al-Itihaad Al-Islamiya / Aiai Qe.A.2.01. Al-Itihaad Al-Islamiya / Aiai," last modified March 28, 2011, http://www.un.org/sc/committees/1267/NSQI04201E.shtml.

89 "Bush announces al Qaeda crackdown," *The Washington Post*, November 7, 2001, http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushtext_110701.html. Al-Barakaat companies were first listed on 9 November 2001 and removed on 17 February 2012.

90 United Nations Security Council (SC), Resolution 1373, "Threats to International Peace and Security Caused by Terrorist Acts," September 28, 2001, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1373(2001), para. 1(d).

The EU independently implements all these UN measures. The Somali and AQ sanctions are implemented as EU regulations prohibiting the provision of 'funds' and/or 'economic resources' to designated individuals and groups, both of which are defined very broadly.[91] Resolution 1373 is implemented by an autonomous EU terrorist list targeting those deemed 'involved in terrorist acts' – which includes Hamas and the PKK but currently no Somali Islamist groups.[92] These measures apply to EU nationals; entities legally constituted in EU member states or doing business within the EU and are enforceable "within the territory of the Union" or "on board any aircraft or vessel" under EU member state jurisdiction.[93]

Because all states are required to criminalise terrorist financing there are scores of different national terrorist lists potentially restricting conflict resolution work in Somalia. How these different regimes work in practice depends largely on the nationalities of the staff involved, the scope of the different legal jurisdictions engaged and the discretion of different prosecution authorities.[94]

US legislation prohibiting 'material support' to foreign terrorist organisations has been defined very broadly by the US Supreme Court[95] and applies *extra-territorially* to non-US citizens in relation to conduct undertaken outside the US. That is, activities undertaken by *anyone* in *any* part of the world could potentially lead to criminal liability and imprisonment within the US under these material support provisions. In late 2012, these measures applied to British and Swedish nationals suspected of attending militant training camps in Somalia - who were interrogated by the CIA in Djibouti before being rendered to the US for criminal trial.[96] Because these laws set the liability threshold so low and cast the liability net so broadly and strictly, the provision of resources by non-US peace organisations to individuals or clans indirectly associated with Al-Shabaab could readily fall within their scope, even if that association is unknown to the peace organisations at the time they provided assistance. Other counterterrorism regimes from the East Africa region are also important sources of liability risk for those working in Somalia. Most international organisations engaged in Somali peace work, for example, have regional headquarters in Nairobi where Kenyan legislation prohibiting support to designated terrorist organisations (including Al-Shabaab) applies. In addition to the recently introduced regulations implementing Resolutions 1267 and 1373 that require the Kenyan government to domestically designate terrorist groups,[97] existing organised crime and money-laundering legislation prohibits (on a strict liability basis) the provision of any 'property' or 'anything of value' to Al-Shabaab.[98]

The dynamic between sanctions and their targets is ordinarily framed as a relatively straightforward cause and effect relation. The empirical question, if it ever arises, remains whether the intended effects of the sanctions are achieved and whether there are any unintended consequences. Yet counterterrorism sanctions are uneasily contained within such simple normative structures and theories of causality. In practice, there are a plethora of different legal regimes potentially applicable to peace organisations operating in Somalia. These regimes overlap in dynamic ways to form complex fact-specific mosaics of liability risk and the precise meaning of what is and what is not prohibited differs according to the particular jurisdictional lens we use to view the situation. As detailed below, the relationship between global coercive instruments and their local effects in Somalia is far more complicated and heterogeneous than conventional accounts suggest.

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91 The Somalia sanctions are implemented by Council Decision 2010/231/CFSP and Regulation No. 356/2010. The AQ sanctions are implemented by Common Position 2002/402/CFSP and Regulation No. 881/2002.

92 United Nations Security Council (SC), Resolution 1373 (2001) is implemented by Common Position 2001/9312/CFSP and EC Regulation 2580/2011.

93 See, for example, Regulation No. 356/2010, Article 17.

94 If an international peace organisation working in south-central Somalia has Somali, Kenyan, British, American and Swedish staff, for example, then all the different national counterterrorist sanctions regimes from these countries could potentially apply criminal liability and/or prohibit association with listed parties.

95 Holder v. Humanitarian Law Project, 561 U.S. 1 (2010); no. 08-1498, slip op. (June 21, 2010).

96 See, for example, Alice K. Ross, "Missing British-Somali Man Reappears in New York Court," Bureau of Investigative Journalism, last updated December 22, 2012, http://www.thebureauinvestigates.com/2012/12/22/missing-british-somali-man-reappears-in-new-york-court/.

97 Prevention of Terrorism (Implementation of the United Nations Security Council Resolutions on the Suppression of Terrorism) Regulations, 2013, amending Prevention of Terrorism Act, 2012. This regulation was introduced after considerable pressure and criticism from the Financial Action Task Force (FATF), which had placed Kenya on their list of non-compliant states for failing to implement counterterrorist financing measures.

98 See Prevention of Organised Crimes Act, 2010 (OCA), s. 3; Proceeds of Crime and Money Laundering Act, 2010, s. 7. In November 2010, Al-Shabaab was listed as an 'organized criminal group' for the purposes of the OCA.

2. Counterterrorism, peace-building and the effects of entanglement

The preceding section of this chapter provided a political and legal genealogy of counterterrorism in South-Central Somalia. The following section builds upon this diagram by empirically examining the variegated effects and microphysics of power produced by the entanglement of counterterrorism and conflict resolution.[99]

2.1 Convergence: the 'Security-Peace-building' nexus

The first core effect of this interrelationship is a deepening operational convergence between peacebuilding and security. Put differently, we are witnessing the creation of a 'security-peacebuilding' nexus grounded in two interlinked assumptions – (i) that "the pathologies of conflict-prone and underdeveloped states" are the prime breeding ground for security threats; and (ii) that it is only through liberal peace and statebuilding initiatives that durable peace and stability can be realised.[100] Crucially, this nexus does more than simply 'shrink the space' for peacebuilding. It radically transforms it, redefining the foundational assumptions of peacebuilding through securitised logics of risk, threat and danger.[101]

This convergence can be clearly observed at the national level with multi-sectoral governance networks that assume the security-peacebuilding nexus as given. The UK government's Somalia Unit exemplifies this trend, which is now mirrored in most other external donor states. Founded in 2012 as a joint institutional group with a single coordination strategy, the Unit brings together officials working on Somalia from the Foreign and Commonwealth Office (FCO), the Home Office, the Department for International Development (DFID) and the Ministry of Defence (MOD). The Unit aims to facilitate a linked-in, securitised approach to policy between the different Whitehall departments. Its strategic direction and day-to-day running is coordinated by the National Security Council Somalia Officials Group, chaired by the Deputy National Security Council Advisor and is comprised of senior representatives from government departments working on Somalia and UK security services. Intelligence agencies provide the material information that forms the basis of the Unit's policy drafting.[102] As one FCO official explained in interview:

> Security underpins everything [we do]… There are *causes* of insecurity and *symptoms* of insecurity… Piracy and terrorism are symptoms of the underlying causes of insecurity - which are basically, in Somalia, the comprehensive failure of the state. And so a lot of our interventions to improve security are based on addressing the underlying causes – trying essentially to build up state capacity to manage their own security…. Clearly, if state failure is the major cause of conflict [then] state building, we assume, would be the antidote.[103]

All UK development and peacebuilding projects relating to Somalia are therefore now designed and assessed at the highest levels of government to ensure that they further UK security policies. This means that only peacebuilding projects aligned with core security objectives – that eschew contact with listed groups and those affiliated with them – are institutionally supported and funded.

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99 For Michel Foucault, a 'microphysics of power' presupposes that power is 'not exercised simply as a … prohibition on those who 'do not have it';
    it invests them, it is transmitted by them and through them'. Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Pantheon, 1977),
    26–27.
100 Edward Newman, "Peacebuilding as Security in 'Failing' and Conflict-Prone States," *Journal of Intervention and Statebuilding* 4, no. 3 (2010): 306.
101 Rita Abrahamsen, "Blair's Africa: The Politics of Securitization and Fear," *Alternatives* 30 (2005): 55.
102 Interview, London, February 2014.
103 Ibid.

One of the most tangible effects of this nexus concerns *selectivity* regarding where and with whom peacebuilding can legitimately take place. As one official of a multinational Somali peace and development project explained in relation to this issue: "it's not about the type of activities that are happening, but about *where* they are happening and *with whom*".[104] Peace projects are increasingly not undertaken in parts of South-Central Somalia where Al-Shabaab and their supporters are perceived to be present because of the undue risk of association and the payment of taxes that might be required. As one official explained:

> I think there is a difference here between… doing this [*that is, paying taxes*] for peacebuilding and statebuilding and doing this for humanitarian access… I think it's possible for one to rationalise paying for humanitarian access. You know,… would you give food aid knowing that the concentration camp guards are going to take some so that the inmates can do better? You might [or] you might not… *But if your objective is to build peace and the state, it just doesn't stand up*. If I thought Al Shabaab were creeping off money or using that to finance the war against ANISOM, the west, the Somali government and the rest of the world then I would cut it out… *You can't do that if you're trying to build the state*.[105]

The operational impacts of this securitised approach to peacebuilding can be profound. One organisation interview explained how they had recently obtained international funds to undertake small-scale conflict resolution and local governance projects in 21 communities across South-Central Somalia deemed 'recently liberated' from Al-Shabaab. Upon internal review and dialogue with local partners, however, they determined that 14 of these 21 communities were still under the de facto control of Al-Shabaab or clans affiliated with them and that taxes would likely need to be paid to work there. 4 other areas remained infeasible for logistical reasons. As such, they were only able to undertake conflict resolution work in the 3 of the 21 target areas (14%) under control of pro-government forces, even though the need for assistance was just as pronounced in the other, excluded areas.[106]

Because of the potential liability risks of association with Al-Shabaab, this organisation said that the only kind of peace projects they could legitimately carry out in South-Central Somalia at present were those aligned with the central statebuilding project. This meant that their peace work was now effectively "rewarding the ones who decided to go on the right side, the pro-government side" and punishing "those who happen to be on the wrong side" through withdrawal of assistance and funding.[107] The divisiveness of this policy was undermining their capacity to engage affected communities in the longer-term because of the distrust and resentment it generates. It also forced them to go against their core peacebuilding values by preventing them from engaging all parties of the conflict:

> I mean, you should engage, that is the thing. Al-Shabaab gets their support from the clans. So you should be able to engage the clans and say, 'Come on this side'. But the moment you say, 'No, we can't work with you clans because you happen to be controlled by an entity that is listed', then you [simply] cannot do it.[108]

Another organisation working in South-Central Somalia framed the value problem as follows:

> What we believe is right is to keep this principle of inclusivity in peacebuilding and… engage with the reality of who is there. Now with Al-Shabaab we are not talking about a minor movement, but the biggest movement in South-Central Somalia. So for us, any peacebuilding process that does not include or does not consider the biggest actor is a recipe for failure.[109]

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104 Interview, Nairobi, May 2013.
105 Ibid.
106 Ibid.
107 Ibid.
108 bid.
109 Ibid.

The security-peacebuilding nexus functions as a *dispositif* or "set of beliefs, practices and institutions that create conditions of possibility within a particular field".[110] On the one hand, the nexus enables *spatial* ordering practices built upon the selective provision of assistance, as peace work is "concentrated in areas of strategic interest, to the detriment of other needy but less 'important' regions".[111] Such selectivity helps reframe peacebuilding as a part of a securitisation-through-statebuilding process that aims at stability through containment of threat. As Newman notes:

> Policies and funding – albeit selectively – target conflicted or weak states, not necessarily to bring true conflict resolution, but… to stabilize and contain conflict in order to ameliorate the negative international consequences which are seen to flow from these situations… The empirical reality of failed states is in many ways actually less important than the perception of powerful actors towards the concept and the security threats inherent in them. *Viewing peacebuilding as part of the security agenda is therefore part of the process by which threats and challenges are constructed and responded to.*[112]

On the other hand, the nexus creates important *temporal* divisions between the extended present, the longer-term and the indefinite future that are having important effects on the ways conflict resolution is directed and practised. Peacebuilding has conventionally been understood as something requiring inclusive engagement - demanding continuous "contact, consultation and dialogue" with all parties to a conflict as well as "a wider set of people and stakeholders at multiple levels of society".[113] Such peacebuilding works in "relational spaces"[114] and understands itself as transformational for giving "expression to local voices, desires and forms of politics".[115] Engagement is fundamental because it is assumed that conflict resolution can only take place if one first understands the root causes of violence.

However, this logic of inclusive engagement is in significant ways simply inconsistent with the emerging paradigm of preemptive security.[116] Counterterrorism sanctions aim to harm targets *in advance* of threats materialising through *disruption* (of the financial circuits thought to be necessary for their survival) and *isolation* (by imposing costs and consequences on those who directly and indirectly associate with them). Indirect engagement with listed groups (for whatever reason) thus interferes with the key delegitimising function of these measures.[117] The coercive power of these sanctions is applied broadly because terrorist targets are conceived as nodes embedded within distributed networks. Thus much of what are often described as 'unintended consequences' of sanctions are arguably foreseeable effects of the broad associational logics and wide liability nets that they cast.

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110 Oliveira, "'New Wars' at Sea," 12. The Oliveira quote draws from Mark Salter, "Imagining Numbers: Risk, Quantification and Aviation Security," *Security Dialogue* 39, no. 2–3 (2008): 243. But the framework of *dispositif* comes from Foucault: Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings* (New York Harvester Press, 1980) at 194.

111 Newman, "Peacebuilding as Security," 317.

112 Ibid., 313.

113 John Paul Lederach, "Addressing Terrorism: A Theory of Change Approach," in *Somalia: Creating Space for Fresh Approaches to Peacebuilding* (Uppsala: Life and Peace Institute, 2011), 7.

114 Ibid., 10.

115 Newman, "Peacebuilding as Security," 319.

116 The nature of global jihadist politics also challenges conventional notions of inclusivity. As one mediator explained (Interview, Nairobi, May 2013):
> [For] the global jihad element[s] within Shabaab, rather than those who have very specific grievances around the way Somalia is governed, the concept of resolving the conflict is completely antithetical to their objectives. They want the conflict to continue – because part of continuing the conflict is creating the chaotic environment that allows them to do the things they need to do for the broader international conflict. So it becomes a completely different set of positions and agendas … to try and actually have an engagement with a group like this.

117 See comments by the court in Holder v. Humanitarian Law Project, 561 U.S. 1 (2010); Zarate, *Treasury's War*. Numerous US Embassy Cables highlight how various initiatives from a different countries in the region trying to engage Hassan Dahir Aweys in peace talks were either refused or promptly shut down by the US government during the time that Aweys held considerable power and influence within AS. See US Embassy, "08ASMARA609" (embassy cable, December 31, 2008); US Embassy, "09STATE38036" (embassy cable, April 16, 2009); US Embassy, "09CAIRO1341" (embassy cable, July 13, 2009); US Embassy, "09DOHA238" (embassy cable, April 2, 2009); US Embassy, "09DOHA276" (embassy cable, April 27, 2009); US Embassy, "09DOHA343" (embassy cable, May 26, 2009).

The security-peacebuilding nexus mediates such tensions by giving effect to realist forms of peace that assume only strong liberal states can promote international stability by repressing conflict and eliminating security threats.[118] As the former US Ambassador to Kenya (William Bellamy) explained to the former President of the TFG (Abdullahi Yusuf):

> The return of governance to Somalia is… the only *long-term* solution to the terrorism problem in Somalia. However, there is an immediate *short-term* need to deal with the terrorist threat - specifically the ongoing presence of Al Qaeda elements within Somalia… *[We] do not have the luxury of time to wait* for all to be on board in the TFG before undertaking counter-terrorist activities.[119]

Other leaked cables and interview material demonstrates the same kind of temporal partitioning of the Somali peacebuilding problem.[120] First, the most important task is the creation of *stability* through elimination of terrorist threats in the extended present, with the urgency of the threat demanding immediate action. Then, there is the creation of a *strong state*, which is understood as essential but ultimately a longer-term objective. Finally, there is the idea of sustainable peace capable of addressing the root causes of the conflict - which is either made conditional upon the creation of a strong state or deferred into an indefinite future to be revisited (or not) at some later time once potential peace conditions have been realised. It is no coincidence, as one UK government official working in Somalia confirmed, that these stages correspond to those of classical counterinsurgency doctrine - where "you *clear the area*, and that requires force; you *hold the area*; and then *you build trust* [which] consists of bringing development in and… trying to engage a contract between citizen and state in which the citizen says, 'I think my interest is better off with the state'".[121]

If inclusive engagement and 'transformational' peace were once thought to be necessary starting points and fundamental means of resolving conflict, in Somalia they are being thoroughly supplanted by realist forms of peace that more effectively co-join liberal ideals with preemptive warfare. The security-peacebuilding nexus renders "the very notion of peacebuilding [based] upon competing ideas of legitimacy" subjective and *contingent*, exposing core conflicts between "vying conceptions of what peacebuilding [is]" and what it "should seek to accomplish".[122] It mobilises an externally generated form of securitised liberal peace that excludes *a priori* the main protagonists of the conflict, disregards "the deeper contexts from which violence emerges", and that bears strong similarities with the failed top-down international Somali peace initiatives of the past.

Existing studies suggest that the use of counterterrorism measures means that "humanitarian actors are not perceived as neutral, impartial or independent" contrary to principles of international humanitarian law (IHL).[123] But the politicised nature of the peacebuilding-as-state-building project in South-Central Somalia today is not simply an 'unintended consequence' of counterterrorism law understandable through a conflict of law paradigm. It is an effect of broader qualitative shifts taking place in the very nature of global warfare and conflict resolution and articulated through the security-peacebuilding nexus we have outlined.

2.2   The differential distribution of liability risk

Existing literature suggests that counterterrorism sanctions are producing a 'chilling effect' prompting peacebuilding organisations to change their day-to-day operations to avoid the perceived liability risks that sanctions impose.[124] Our empirical

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118 Mark Duffield, *Global Governance and the New Wars: The Merging of Development and Security* (New York: Zed Books, 2001), 10–11; Newman, 'Peacebuilding as Security," 319.

119 US Embassy, "06NAIROBI1484".

120 See, for example, US Embassy, "06NAIROBI2453" (embassy cable, June 5, 2006); US Embassy, "06NAIROBI1601".

121 Interview, London, February 2014.

122 Newman, "Peacebuilding as Security," 306–07.

123 Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor CounterTerrorism Measures on Principled Humanitarian Action* (United Nations Office for the Coordination of Humanitarian Affairs, 2013), 81.

124 See, for example, Véronique Dudouet, *Anti-Terrorism Legislation: Impediments to Conflict Transformation*, Berghof Policy Brief No. 02 (Berlin: Berghof

research confirms that liability risk is indeed concretely affecting the nature of peacebuilding in Somalia, but that this risk is being differentially distributed and mitigated by organisations in a variety of different and inconsistent ways. Whilst a 'chilling effect' is certainly being generated, other practices and strategies have emerged that enable peacebuilders to continue working in proximity to listed groups. The approach adopted by different actors appears to have little to do with the actual legality of their operations (which is something almost all those interviewed remain uncertain about). Instead, strategies taken seemingly depend on (i) the domains that actors operate in and draw their political support from and (ii) their proximity to powerful actors with potential to impose (or refrain from) enforcement. Because those affected are reluctant to talk about these issues in an open and collective manner, these mitigation strategies risk embedding new structural inequities and ethico-political problems within and across the Somali peacebuilding spectrum.

(i)   Risk aversion and withdrawal

Most interviewees said they had been forced to either shut down or refrain from undertaking peace projects in South-Central Somalia because of perceived liability threats from counterterrorism measures. In this sense, the 'chilling effect' has been rendered very much operational within Somalia.

We have already outlined how one organisation was prevented from working in 14 of 21 target areas in South-Central because of the potential liability associated with proximity to listed groups. Another organisation recounted how they had made contact with 300 youth fighters in the Bakool region of southern Somalia who wanted to defect from Al-Shabaab. A proposal was put together whereby traditional elders from relevant sub-clans would reintegrate these disaffected fighters into their communities in exchange for the provision of economic incentives to the clans (such as self-employment projects, vehicles or infrastructure) "so that the community can get something out of it". But when donor states (from the US and Europe), the TFG and the Bakool regional government were informed, they promptly shut the initiative down: "They came to my face [directly] and said, 'You know what, come on, dealing with Shabaab. You *cannot* deal with Shabaab. You just *cannot* talk with these people'… They said to us, 'No'. We cannot go back to our networks or our links… everybody thought this idea was a hot potato". As this negotiator and proposed project lead stated:

> Sometimes you need to be creative. And you need to deal with this… If we could remove 200 – 300 kids - and we are talking about foot soldiers of Al Shabaab – and… put them back into the community, that would have been a sweet victory for god's sake! It was cheap… and there was nothing to lose. But this legal framework thinking – you know, talking to Al Shabaab, negotiating, this cannot be done, how can this money be assured - prevents us from being creative. You really have to be as creative as they are to fight with these people. But the current laws don't have that space to be… engaging… The problem is that ideas cannot be destroyed by a gun. Ideas must be destroyed by counter-ideas, for god's sake.[125]

Another organisation recalled how a local governance and conflict resolution project they were piloting in Al-Shabaab controlled areas in Hiran was shut down in 2009 "because the sanctions really did not allow us to continue it".[126] Given concerns about potential liability risks, a third-party consultant was engaged to assess "whether it was possible to implement that program given the sanctions regime". Whilst the project was found to be delivering its stated aims, the consultant found irregularities in the accounting. This was due to the fact that suppliers and contractors "had to pay taxes (*to Al Shabaab*), but had to pretend

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Research Center for Constructive Conflict Management, 2011); Gavin Sullivan and Ben Hayes, *Blacklisted: Targeted Sanctions, Pre-emptive Security and Fundamental Rights* (Berlin: ECCHR, 2011); Sophie Haspeslagh, "Listing Terrorists: The Impact of Proscription on Third-Party Efforts to Engage Armed Groups in Peace Processes—A Practitioner's Perspective," *Critical Studies on Terrorism* 6, no. 1 (2013): 189; David Cortright et al, *Friend Not Foe: Civil Society and the Struggle against Violent Extremism: A Report to Cordaid from the Fourth Freedom Forum and Kroc Institute for International Peace Studies at the University of Notre Dame* (University of Notre Dame, 2008).
125 Interview, Nairobi, May 2013.
126 Ibid.

that they… did not". These findings were subsequently compiled into a comprehensive report for the consideration of the donor state. As a result of the report, the donor government decided not only to shut down this specific project, but to suspend *all* peace and development funding to Al-Shabaab controlled areas. This decision remains in force today.

These examples, and the many others that interviewees provided, highlight some of the most tangible effects of counterterrorism measures – including the heightening risk aversion amongst donors, the securitisation of conflict resolution practices and the continuing foreclosure of possibilities for peacebuilding in Somalia.

(ii)   Political immunity and protection

Not all peacebuilding organisations are experiencing the 'chilling effect' that these measures generally impose. Some organisations are using different risk mitigation techniques to protect themselves from prosecution threat whilst continuing their work in proximity to armed groups and maintaining their commitment to inclusive peacebuilding principles. As one mediation organisation explained:

> We factor it in [that is, *liability risk from counterterrorism measures*], but it is not a limitation for us… If a regime is on a terrorist list or is specifically sanctioned by the UN… but are one of the main protagonists in a conflict and are willing to come to a table - and we are able to facilitate that table and we feel that they are credibly coming - that legislation would not stop us from trying to talk with them. It just makes it more difficult for us to talk with them for a range of reasons… [As mediators] we are not who the sanctions committee on Somalia is going to be having a look at because we are not offering anything of material value… So I think we are occupying a secondary space in that sense.[127]

For this organisation, the primary impact of the sanctions lies in the more securitised framing of their work and the legal partitioning of peace work into friends and enemies:

> The main effect it has had on us… is… psychological. And it stems from adopting a narrative at the very beginning of the war against terror – either you are with us or you are against us, [with] no nuance in between. Our work is about talking to all parties that have an influence on conflict to try and address their grievances and find a way to mend the differences. [Yet] the environment we are working in, at least on the western side, says that you cannot – there is no dialogue possible, there is no possibility of dealing with terrorist groups and ostracism is the only way out. So from Hamas… to Shabaab… we say that it's a state of mind that's not very healthy from the perspective of conflict resolution.[128]

Peacebuilding organisations who described the material impact of the sanctions on their work as limited tended to mitigate risk using two key strategies. First, they obtained legal advice or used due diligence procedures to boost organisational confidence by seeking to ensure that no funds were provided to listed groups or those associated with them. As one organisation explained: "so long as we do not give financial support… - so we don't give money, we don't pay for interviews, we don't transfer sums of money to the people that we interview and it's just about talking… - then we will be able to [act] without entering the area of criminal offence".[129] Other organisations mitigated risk by "pay[ing] for everything directly up front… so there is no risk of that money then being transferred to buy weapons or these sorts of things".[130] Creatively conceiving of ways to engage in Al-Shabaab controlled areas without payment of fees presented practical difficulties and slowed down peace projects considerably. Whilst sanctions made peace work "extremely difficult and challenging", obtaining legal advice and implementing

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127 Ibid.
128 Ibid.
129 Ibid.
130 Ibid.

due diligence made their work easier ("because the alternative was not doing anything").[131]

The second mitigation technique used had little to do with formal law, but involved strategically developing networks with powerful actors to offset the risk of prosecution:

> There were a number of organisations that came together virtually to discuss the *Holder v Humanitarian Law Project* decision. Because it's so expansive, it covers just about everything. But is it just a theoretical threat? Will it ever really be implemented against us? A number of organisations that did seek specific legal advice about it said to us that its expansive enough that is just basically says don't do it [*that is, engage in peacebuilding with listed groups*]. But if we are not going to abide by that then what are the mitigating factors that you can identify? And one of them is very much how do you develop the right political networks.[132]

For one organisation - who claimed to have the trust of the US government for this kind of work – "being very transparent with both sides with what we are doing" was an essential means of mitigating risk. This meant, however, keeping "the right people informed" which required for the most part keeping things confidential: "So you don't brief the Embassy, you brief the Ambassador. You brief whoever is specifically on the intelligence file. And you don't brief more broadly".[133] In this way, "you're sort of inching these governments along with you" as a part of politically sensitive peace processes with listed groups. But doing so in circumstances where "there is always an element of deniability... so that if something did happen they can say, 'Well you've been way out on a limb and we don't have anything to do with you'".[134]

Most peace organisations interviewed simply lacked this degree of political capital. If political capital is indeed a critical factor in offsetting liability risk, then peacebuilding organisations may need to organise far more assertively and collectively (as humanitarian actors are doing) to effectively counter the securitisation of their functions.[135]

(iii)   Formal compliance/informal practice: operating in the 'grey area'

Another device for managing perceived risk is the formal law/informal practical reality distinction. Almost all interviewees highlighted the gap between the polemic logic of counterterrorism measures (as something that prohibited contact with listed parties) and the messy, more complex political reality of Somalia (as something that required contact with listed parties) as something that powerful international actors implicitly understood:

> When you speak in many frameworks with diplomats or with inter-governmental agencies there is an official policy [position]. And then, when the meeting is finished and you have coffee they tell you, 'You guys are right; we understand what is going on. So let's talk more about this' ... But there is an official politics that prevents [that].[136]

As one NGO stated: "there is an off the record understanding from the foreign ministry [that funds us] that yes, engagement [with listed groups] is needed. But they are not willing to make an official [ie, open] engagement because they were told that the EU would not [allow them to] negotiate".[137] Another mediation organisation highlighted this disjunction as a critical factor

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131 Ibid.
132 Ibid.
133 Ibid.
134 Ibid.
135 See, however, the Humanitarian Assistance Facilitation Act, 2013—a bill prepared to 'remove barriers to providing aid and promoting peace created by U.S. counterterrorism policy'—see "Humanitarian Assistance Facilitation Act (HAFA) Will Remove Barriers to Charity and Peacebuilding," *Charity & Security Network*, www.charityandsecurity.org/solutions/Humanitarian_Assistance_Facilitation_Act.
136 Interview, Nairobi, May 2013.
137 Ibid.

delimiting their Somali peacework. Whilst "you can discuss [engaging AS] with certain individuals within the US government on a personal... basis... you cannot take it any further because... they have a [strict] policy of non-engagement".[138] Yet there remains support at the highest levels of government for the important work they undertake:

> The US government - or at least the military side and, to my knowledge, the diplomatic side... - has always privately welcomed the establishment of channels of communication with... Shabaab... because they are acutely aware... that such channels may be useful one day... From experience, they know that there will have to be some negotiation at some stage along the line. So there is tolerance for the work that we do and a bit of hypocrisy in the system.[139]

This problem lies partially in the friend/enemy divisions of the 'war on terror' narrative framing the peacebuilding domain. But there is also a conflict between the static targeting of counterterrorism sanctions and the shifting relations of groups like Al-Shabaab:

> What is or who is Al Shabaab? Al-Shabaab grows and shrinks based on people making individual decisions. There is a core group of extremists that are the driving force... But... the majority [are] people that either have some sympathies in that direction who see that, 'Ok. In this current state it's in my benefit to be a part of Al-Shabaab so I will'. And then they leave when they see that there are other opportunities and they go back. These are ordinary... people that make that choice and then go back. So it's difficult to... point your finger because this person was Al-Shabaab last week, they are not this week and they [might be] next week. There are a lot of people [who are] in that fluid and grey zone [who] might have sympathies but at the same time realize that Al-Shabaab is not the future... So this whole notion of who's a terrorist/what's a terrorist is extremely problematic from our perspective. Working with partners and religious leaders in Somalia [for example] they don't view Al Shabaab as terrorists. They are members of the same communities and same religious communities that are taking a more radical interpretation of Islam. So there is a desire by our partners to engage with Al Shabaab.[140]

South-Central Somalia is a site where the binary logics of the global war on terror come face to face with the complex dynamics of political Islam and insurgency. It is a space where 'dealing with the devil' – or having contact with listed groups or those affiliated with them - is seen as an unavoidable, day-to-day reality for most peacebuilding organisations. As one interviewee put it: "the laws and policies existing at a global level sound good in a context where things are black and white. But when you come to a grey area where there is very little black and white it becomes very problematic".[141]

A correlated advantage put forward for working in the 'grey area' is that it indefinitely defers determination of illegality. Numerous interviewees said that difficult legal issues were best left unresolved because confronting them would result in peace projects being shut down:

> Right now, everyone is shooting in the dark in some ways and making up their own rules... Within our programming there isn't a clear sense of what is and what isn't permissible. And even from our discussions with USAID or the EU they don't have a clear sense of what it is when they are crossing boundaries. The crossing of these boundaries is not something anyone wants to discuss because it's so problematic... It's a Pandora's Box, and we are not alone in not wanting to open it.[142]

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138 Ibid.
139 Ibid.
140 Ibid.
141 Ibid.
142 Ibid.

Such distinctions - between official policy and unofficial practice or between what the law requires and what practical necessity demands - are discursive devices enabling the containment of what might otherwise be experienced as an unbounded prohibition against peacebuilding. They dissipate the force of law by privileging local knowledge - for example, about what peacebuilding *really* means in Somalia - and the 'grey area' within which peacebuilding practice necessarily takes place. But by operating within the prism of 'insider knowledge' they also preclude articulation of a more explicit response to the security-peacebuilding nexus – that is, they have an important depoliticising function.

When asked why affected peacebuilding organisations had not collectively coordinated a response to these liability problems, for example, one interviewee said: "If it was tabled at a meeting to discuss… everyone would just say, … 'We know these [laws] exist, but we know the operational environment'. And [for] anyone who brings it up it would be like, *'What do you know, have you ever been to Somalia, do you know what the context is like?'*".[143] The key problem with 'grey area' strategies is that they rely upon executive discretion, perceptions of good favour and weak assurances of protection that could readily change direction given the vicissitudes of security politics. Whilst they boost organisational confidence to continue contentious peace work in the immediate term, they also help reposition that work in a zone of indistinction where criminalisation looms as an ever-present future possibility.

(iv) Indifference and the outsourcing of risk

A related response towards the counterterrorism liability risks is that of indifference. Security laws are seen as largely irrelevant because of their limited enforcement potential and the inventiveness of Al-Shabaab to forever diversify their revenue streams into unregulated areas. As one interviewee plainly observed: "The anti-terror laws might work from the outside, coming in. But inside Somalia, from district to district, I really doubt that they have *any* significance".[144]

Indifference is partly driven by widespread perception of the embedded nature of Al-Shabaab - who are seen as a "very elusive, very powerful… money making machine"[145] that continues to adapt to changing circumstances; retain enormous access to the Somali business community and have proven to be a more sophisticated and resilient adversary than conventionally suggested. Numerous interviewees shared the view (in 2013) that in spite of their military expulsion Al-Shabaab still very much controlled Mogadishu: "A lot of the analysis that comes out today… [is] politicised to serve a specific purpose – which is essentially that there is success and progress… But I don't believe that. I think Shabaab is everywhere… it [remains] the biggest group and [also] the most powerful".[146] Many peacebuilders feel counterterrorism measures are largely symbolic in the face such an adaptable and intelligent adversary. Another factor fuelling such indifference was the perceived impotence of the Somali state. As one interviewee put it:

> You have an institution that is extremely weak, that doesn't have the capacity to implement [law], that can't even control the office of the President and Prime Minister [and is without] a viable functioning police. So whatever law comes in [*ie, from outside Somalia*] is just useless in my view.[147]

The key problem with strategies of indifference is that they misunderstand the indirect, associational logic of counterterrorism regimes – which do not need a strong Somali state, or enforcement in general, to effectively perform their disruptive functions. Preemptive security measures operate *in advance* of threats materialising and (as we have seen) can work just as well by perceived threat of application and the withdrawal of peacebuilding operations from non-state controlled areas. They are not

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143 Ibid. (emphasis added).
144 Ibid.
145 Ibid.
146 Ibid.
147 Ibid.

merely designed to affect those designated on terrorism lists, but to cast a broad net over all those indirectly associated with listed groups and their affiliates. Associational networks, rather than individual terrorists, are also key targets of targeted counterterrorism regimes.

Whilst many interviewees talked about the imposition of increased due diligence and reporting for counterterrorism purposes, most described them as symbolic gestures aimed at assuaging the concerns of donor states. As one interviewee stated: "It's just completely impractical to even think of such procedures as anything more than a smoke screen to make donors happy", because the Somali economy is largely informal (ie, no receipts) and payments to Al-Shabaab are so embedded into the fabric of everyday business.[148]

Troublingly, a number of international organisations interviewed said that working with local Somali partners for project implementation was an important means of mitigating the legal risks associated with counterterrorism measures:

> We try to work through local partners, and there are two reasons [for that]. One is in terms of sustainability... And second, to enable partners to work with the restrictions that we have lessens our exposure by not having to make those decisions ourselves... [So] working with local organisations is also risk mitigation. We realise that. And we have a lot of discussions on how much we are transferring our risks to the local partners. And we try to find a balance because we don't think that's right either – that we just push local partners to do things that we wouldn't do ourselves because they are the guinea pigs or do the dirty work for us.[149]

As donor states have introduced restrictive funding provisions requiring compliance with counterterrorism sanctions, most international peace organisations have passed those restrictions down the line to their local implementing partners with little guidance on how to actually act in a legally compliant manner. This outsourcing of liability risk usually takes place in the full knowledge that local partners would need to make 'taxation' payments to Al-Shabaab:

> Officially we will say that we haven't ever paid anything - that we do not accept this [ie, taxation] and that we do not pay, that's what we say in the media. But the reality is our local partners are put in situations where they *have to* use some money... We like to officially say that it's their own money and what they do with their own money is their own business and that is not our funding. But really, that is just running away from the problem.[150]

Mitigation by outsourcing risk in this way is a particularly concerning development because local actors are the least proximate to powerful international actors and thus potentially the most vulnerable to prosecution. Moreover, given that the international organisations are most likely vicariously liable for the actions of their local partners, such transferral and indirect provision is unlikely to actually serve any practical legal purpose. In addition to entrenching inequitable working relations it merely defers, rather than confronts, the core problems at stake.

Al-Shabaab's continual diversification of revenue streams might suggest the sanctions are of limited utility. But it might also indicate that they are having a very real material impact, albeit one that is continually ameliorated and minimised through inventive adaptability. In the absence of further empirical research it is difficult to draw strong conclusions regarding efficacy. The prevailing view, as stated by one UK official, is that "anything we can do to squeeze them is a good thing".[151] But if these sanctions are facilitating creative recomposition of terrorist support networks then this symbiotic effect demands further

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148 Ibid.
149 Ibid.
150 Ibid.
151 Interview, London, February 2014.

analysis. Just as earlier counterterrorist measures designed to eliminate Al-Shabaab produced the very threat they sought to counter, so too may the current sanctions policy be counter-intuitively stimulating the group's expansion, sophistication and resilience.

Conclusion

This chapter has provided a detailed account of the current entanglement of security and peacebuilding in South-Central Somalia. It has situated the emergence of preemptive sanctions in this area within a broader genealogy of counterterrorism initiatives and the phenomenal rise of Islam as a political force in post-dictatorship Somalia.

Two key arguments have been advanced. First, that the effects of counterterrorism on conflict resolution processes in Somalia can best be understood as an instantiation of a 'security-peacebuilding nexus' driving a deepening operational convergence between these domains. This nexus does more than unintentionally 'shrink the space' for peacebuilding. It functions as a *dispositif* that transforms the very rationale of inclusive peacebuilding by absorbing and reframing it within broader securitisation processes and logics of risk, threat and danger. Whilst the effects of this convergence are manifold, our analysis highlights the development of relatively novel spatial and temporal ordering patterns involving selectivity of assistance, inversion of core peacebuilding values and the creation of divisions between the extended present, the longer-term and the indefinite future. These patterns mirror classic counterinsurgency doctrine and are having important effects on the ways conflict resolution is practised. When framed through the prism of the security-peacebuilding nexus, these impacts are not simply incidental, unforeseen effects of the sanctions *per se*, but part of much broader and more complex processes of "transnational legal assemblage" that are redefining conflict resolution and contemporary warfare.[152]

Some studies have suggested that counterterrorism sanctions are producing a 'chilling effect' prompting conflict resolution practitioners to change their operations to avoid associated liability risks. This chapter shows, secondly, that the relationship between global coercive instruments and their localised effects is far more variegated than conventional accounts suggest. Perceived liability risk is indeed altering the nature of peacebuilding in South-Central Somalia, but this risk is being differentially distributed and mitigated through a multiplicity of potentially contradictory means. Four predominant risk mitigation strategies have been highlighted, each of which present their own specific advantages and problems - namely, (i) risk aversion and withdrawal; (ii) political immunity and protection; (iii) formal compliance/informal practice and (iv) indifference. The response of the peacebuilding sector to date on these issues has been marked by uncertainty, internal confidentiality and acquiescence. The outsourcing of risk to actors further down the chain merely renders these problems more urgent rather than resolving them in any real manner. If political capital is indeed a key variable in risk mitigation, then peacebuilders may yet need to organise more openly and effectively in order to counter their own securitisation.

This chapter highlights some of the key elements assembling the security-peacebuilding nexus. It has done so with the aim of helping peacebuilders organise more openly and collectively to counter their own securitisation. There are, of course, many practical obstacles to this kind of concrete political work taking shape - the lack of extant empirical research and reluctance to put one's head above the parapet, potentially jeopardising one's relationships with donor states and funders being the most obvious. However, there is genuine unease amongst those interviewed about the long-term effects of these changes which are forcing them not only to go against their core values as peacebuilders, but also engage in peacebuilding-as-statebuilding projects that few practitioners actually believe in. In short, there is an acute sense amongst practitioners that

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152 Gavin Sullivan, "Transnational Legal Assemblages and Global Security Law: Topologies and Temporalities of the List," *Transnational Legal Theory* 5, no 1 (2004): 81.

securitised peacebuilding exacerbates conflict and will ultimately fail, as with previous top-down international peace initiatives in Somalia. But there is no analytic or shared discourse for making sense of these disparate changes being experienced as anything other than ad hoc, 'unintended consequences' of counterterrorism law.

Framing these problems through the security-peacebuilding nexus helps give meaning to these variegated effects. It provides the key actors with a much clearer picture of the terrain of conflict and the gravity of what is at stake – for example, by underscoring that the space for peacebuilding is not merely 'shrinking', but is being thoroughly repurposed, qualitatively transformed and securitised in novel ways. In so doing, it speaks to what Duffield has called "the lack of an adequate language for describing the social and organisational effects of the new wars".[153] The idea of nexus also enables participants from different domains - legal, peacebuilding, security, humanitarian - to better understand their role as agents within broader global security assemblage processes, introducing a greater degree of complexity into our framing of the current conjuncture.[154] In shifting the focus away from normative principles (such as IHL) and a conflict of laws paradigm, it can help forge new ways for peace and humanitarian actors to see points of commonality. And because it is grounded in a more nuanced understanding of the contemporary convergences between liberal peace and preemptive warfare it retains the capacity to counter the somewhat depoliticised framing of these issues to date.

This is an area that is left almost entirely neglected in the academic and NGO policy literatures from the sanctions and peacebuilding fields concerning Somalia. Although recent studies have investigated the impact of counterterrorism measures on humanitarian access, most of their key findings - relating to the protection of international humanitarian law and applicability of humanitarian exemptions – arguably do not apply here, despite the persistence of similar impacts and problems across the two domains.

The entanglement of counterterrorism and conflict resolution processes in Somalia is changing what peacebuilding and security means today, concretely affecting conflict resolution in ways that are both profound and variable. Our findings underscore the need for further empirical research to be undertaken on this issue and for these empirical effects (and the security-peacebuilding nexus) to be taken into account when assessing the efficacy of counterterrorism sanctions measures. It is noteworthy that none of the sanctions officials interviewed for this research were able to provide *any* reliable indication about how the effectiveness of these measures is, or could possibly be, measured. When pressed, it's clear that what governments often put forward as 'effectiveness' could more accurately be described as 'impact'. That these measures have material impacts is without question. Whether these impacts translate into effectiveness - for example, by ultimately preventing the financing of terrorism - simply remains to be seen because the effectiveness of these measures is not being assessed in any meaningful way. The obvious danger is that unpredictable and adverse consequences will continue to proliferate, generating as yet unforeseen legal and political problems that make conflicts more intractable and difficult to resolve.

Looking back on the recurrent failures of liberal statebuilding projects in Somalia, Ioan Lewis has stated:

> Reflecting on this tragic mess, it is easy to see how once again the process that led to the formation of the TFG had repeated all the major mistakes of previous steps in the circular and unproductive Somalia 'peace process'. The most critical was to fail to insist on the parties actually making peace before trying to make a government. This was the usual denial of the importance of proceeding on a bottom-up basis, with the development of governance as a result of satisfactory peace agreements at the grass roots, instead of proceeding in the reverse top-down direction. These

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153 Duffield, *Global Governance and the New Wars*, 141.
154 On using assemblage theory in international relations, see *inter alia* Michele Acuto and Simon Curtis, eds., *Reassembling International Theory: Assemblage Thinking and International Relations* (Basingstoke: Palgrave Macmillan, 2014); Nick Srnieck, "Conflict Networks: Collapsing the Global into the Local," *Journal of Critical Globalisation Studies* 2 (2010); Christian Bueger, "Orchestrating the Response: Somali Piracy and Ontological Complexity," *Global Policy* 4, no. 1 (2013).

repeated errors probably wasted billions of dollars and caused correspondingly enormous human suffering.[155]

In prioritising the immediacy of stability through repression of conflict and deferring engagement into the indefinite future, the security-peacebuilding nexus privileges "top-down mediation amongst power brokers and building state institutions rather than bottom up, community driven peacebuilding or the resolution of the underlying sources of conflict".[156] If earlier liberal statebuilding initiatives in Somalia have demonstrated anything, it is that 'hybrid political orders' grounded in the autonomy, engagement and informal agency of multiple, local actors are critically important to conflict resolution. The challenge "for both scholarship and policy", then, "is to consider hybridized approaches to peacebuilding which acknowledge the 'realities' of power but which strive for some degree of conflict transformation and legitimacy, both of which are necessary for sustainable peace and stability".[157] This in turn demands the adoption of a "critical transformative approach" capable of forging paths between the competing demands of liberal peace and engagement.[158] As *dispositif* the security-peacebuilding nexus continually functions to create and expand its own objects of security governance. Should this nexus proceed to be immunised from challenge by those most affected by it, then the securitisation of peacebuilding will undoubtedly become further embedded and the terrain of preemptive warfare forever extended.

155 Lewis, *Understanding Somalia and Somaliland*, 91.
156 Newman, "Peacebuilding as Security," 317.
157 Ibid., 320.
158 Oliveira, "'New Wars' at Sea," 16.

Chapter 4

Proscribing Hamas, Punishing Gaza, Paralysing the Peace Process

Introduction

This chapter examines the impact of the decision by the USA, EU and other mainly (but not exclusively) western governments to designate Hamas (and to a lesser extent other groups) as a "terrorist" organisation on attempts at peacebuilding and conflict resolution in Israel-Palestine. Specifically, it seeks to understand the legal, political and operational constraints on actors engaged in such efforts in order to better assess how these and other inter-related counterterrorism and security policies function in practice. It is based on more than 20 semi-structured interviews with a broad range of actors engaged in "peacebuilding" and "conflict transformation" in the Occupied Palestinian Territories (OPT) and Israel including government representatives, development policy actors, grant-makers, relief agencies and international and local NGOs and civil society organisations, solidarity groups, and professional peacebuilding and mediation organisations. This research has been supplemented in places by information derived from the diplomatic cables published by Wikileaks.

Three caveats are helpful in framing the chapter. First, as discussed in Chapter 2, the very idea of what "peacebuilding" in or between Israel and Palestine entails is itself hugely contested, with markedly different strategies and activities employed by different actors at different times and in different ways. For western governments largely allied to Israel, "peacebuilding" means the formal Middle East Peace Process (MEPP); for people in the OPT and for some, but by no means all, of the international organisations that support them it means ending the Israeli occupation, dismantling Israel's illegal settlements and oppressive security apparatuses, and supporting campaigns like "Boycott, Divestment and Sanctions" (BDS). Broadly speaking however, and despite the wide variation in approaches, the activities of the non-governmental actors interviewed for this research fell into one of three activity groups: (i) mediation, diplomacy and support for the MEPP, (ii) relief and development in the OPT, including support for Palestinian civil society, as well as "pro-peace" Israeli organisations, (iii) conflict transformation premised specifically on ending the occupation and supporting Palestinian human rights and self-determination. Inevitably these areas overlapped within institutions and across programmes, not least because of the political and operational difficulties in carrying out conventional "peace" work in the OPT. It is important to stress that this chapter is not concerned with the agenda or effectiveness of NGOs in this regard – which some analysts have strongly criticised[1] – but focuses on the impact of proscription regimes upon those actors.

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1   See for example Ismail Daiq, "Palestinian Civil Society and the Peace Programs," *Palestine-Israel Journal* 12, no. 1 (2005), http://www.pij.org/details.php?id=327.

Second, in terms of the "international community", more interviews were conducted with government representatives based in Europe than the USA. This was partly due to circumstance – the research was based and funded in Europe and European officials were more willing to discuss their position on Hamas than their US counterparts – and partly deliberate; whereas the USA's political and military alliance with Israel is well documented, Europeans have traditionally taken a more nuanced position that is ostensibly more concerned with Palestinian self-determination. The differences between these approaches – real and imagined – are a central theme for the chapter.

Third, it is also important to recognise that from the perspective of external actors trying to work in the OPT, the impacts of the blacklisting of Hamas, the official boycott of its *de facto* government in Gaza and the prohibitions on material support are interwoven into other policies and practices of the occupying power and its allies. These include the wider economic blockade, the strict controls on access to Palestinian territory imposed by the Israeli security apparatus and the activities of Zionist organisations who seek to undermine the work of "pro-Palestinian" international NGOs and solidarity groups. Thus while the proscription of Hamas is, at least for the EU, a distinct legal act and policy decision with its own professed rationale, its impacts are inextricable from the wider architecture of Israel's occupation and concerted efforts to undermine Palestinian resistance and international support for Palestinian self-determination.

These themes are explored further below. Section 2 provides necessary background to the conflict and describes the context in which peacebuilding now occurs. The intention of this section is to show how the proscription of Hamas fits into the history and politics of the MEPP and how the launch of the global "war on terror" has transformed the context for "peacebuilding" in Israel-Palestine. Section 3 explores the ways in which the proscription of Hamas and related measures have constrained or transformed the perceptions and activities of peacebuilders themselves. Because the problems they face are so endemic and entrenched, the findings, summarised in the conclusion to this chapter, are particularly relevant for NGOs, more than 1,000 of whom have declared themselves actively concerned with the 'question of Palestine',[2] as well as policymakers interested in its just and peaceful resolution.

1. Background

1.1   The occupation, the PLO and the Oslo process

The state of Israel was created in 1948 after the Arab-Israeli war that followed the United Nations partition proposal to give the Jewish people a state in what was previously "British Mandate Palestine". The mandate, part of the carve-up of the Middle East by colonial powers in the name of the League of Nations, included a Jewish Agency for Palestine that oversaw the immigration of around a quarter of a million Jews fleeing increasing persecution from Europe before the British introduced restrictions in the build-up to the Second World War. An Arab uprising against British rule in Palestine that began in 1936 with strikes and other forms of peaceful protest developed into an armed insurrection which was quashed in 1939 by British forces – with the support of the Jewish paramilitaries they were by now arming. After WWII it was the Jewish nationalists who turned their arms on the British in pursuit of their own state. Although their insurgency was also contained militarily, the British referred the "question of Palestine" to the UN which proposed the creation of two independent states, provoking a civil war out of which the state of Israel was established in 1948, then a full blown international conflict between the newly-formed and rapidly growing Israeli Defence Force and neighbouring Arab League forces from Egypt, Jordan (then Transjordan), Syria, Lebanon and Iraq. A UN brokered ceasefire brought an end to the conflict, but whereas the UN partition agreement had envisaged an Israeli state on just over half of British Mandate Palestine territory, all that now remained for the Arabs – some 750,000 of whom had been expelled or exiled as the IDF advanced – was 22% of historic Palestine: the Gaza Strip which was controlled by Egypt and the West Bank and Arab East

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2   United Nations, "The question of Palestine: NGO Network," http://unispal.un.org/.

Jerusalem which was governed by Jordan. Following the "Six Day War" in June 1967, Israel took control of what remained of the Palestinian territory, at the same time capturing the Sinai Peninsula from Egypt and the Golan Heights from Syria. The Egyptian and Syrian territories were ultimately returned but Gaza, the West Bank and East Jerusalem would remain under Israeli control in an increasingly high-tech military occupation that continues to the present day.[3] According to the outgoing Special Rapporteur on the situation of human rights in the Palestinian territories, writing in January 2014:

> Through prolonged occupation, with practices and policies of apartheid and segregation, ongoing expansion of settlements, and continual construction of the wall arguably amounting to de facto annexation of parts of the occupied Palestinian territory; the denial by Israel of the right to self-determination of the Palestinian people is evident… [Violation of Palestinian human rights] discussed in the context of the prolonged occupation appear deliberate, organised, institutionalised and longstanding.[4]

Contemporary resistance to the occupation grew out of the pan-Arab nationalist movement which developed under the tutelage of Egyptian President Nasser in the form of the Palestine Liberation Organisation (PLO), an umbrella group to which many different groups belonged. It was established by the Palestinian National Council at the Arab League Summit in Cairo in 1964; among its "revolutionary" aims were the recapture of its "sacred homeland" and the "battle to liberate the usurped part from it".[5] The resounding defeat inflicted on the PLO's Arab League backers by Israel during the 1967 "Six Day War" radicalised the Palestinian population. Under the leadership of Yasser Arafat, the PLO stepped up its attacks against both occupying forces and targets in Israel, then later carrying out operations further afield. Israel responded with mass arrests and killings of suspected militants and pursued the PLO to its bases in Jordan, then Lebanon, sowing the seeds of its recent conflict with Hizbolah, then Tunis, where the leadership remained in exile until 1994.

The First Palestinian "Intifada" (or uprising) against Israel's occupation erupted in December 1987 following a period of escalating violence and tension. It included general strikes, boycotts of Israeli administrative institutions in the Gaza Strip and the West Bank, civil disobedience, a refusal to work in Israeli settlements and pay taxes and widespread throwing of stones and Molotov cocktails at the Israeli military. In response Israel deployed some 80,000 soldiers to put down the uprising and adopted a policy of "breaking Palestinians' bones", also using live ammunition against civilians.[6] In 1993 the PLO secretly negotiated the Oslo Accords, recognising Israel's right to exist within the proposed pre-1967 borders in return for the promise that the Palestinians too would be allowed to set up their own state in the West Bank and Gaza, with its capital in East Jerusalem. They were not allowed to do so and in the meantime Israel prospered and expanded its settlement programme while the economy, health, education and security of the Palestinians deteriorated significantly. By the end of the Oslo process, at Camp David in 2000, all that was an offer for the Palestinians was

> 80 percent of the remaining 22 percent of historic Palestine; a network of roads, bridges and tunnels accessible only to Israeli settlers and permanently guarded by Israeli soldiers; permanent loss of water resources; no shared sovereignty in Jerusalem; the right of return for refugees not even up for discussion; and with 80 percent of the illegal settlers to remain in place.[7]

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3   See further Phyllis Bennis, *Understanding the Palestinian-Israeli Conflict: A Primer* (Northampton, Massachusetts: Olive Branch Press, 2012).
4   Richard Falk, "Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967" (United Nations Human Rights Council, twenty-fifth session, January 13, 2014), para. 78.
5   Ahmad Shukairy, "Statement of Proclamation of the Organization" (Jerusalem, May 28, 1964), http://www.un.int/wcm/content/site/palestine/pid/12355.
6   Norman Finkelstein, *The Rise and Fall of Palestine: A Personal Account of the Intifada Years* (Minneapolis: Minnesota University Press, 1996).
7   Bennis, *Understanding the Palestinian-Israeli Conflict*, 146.

1.2   Hamas

Hamas is the acronym of the Palestinian "Islamic Resistance Movement" (Ḥarakat al-Muqāwamah al-'Islāmiyyah).[8] Despite having gained notoriety as a terrorist organisation, Hamas has extensive social and political programmes that are grounded in a spiritual and religious movement with roots in the pan-Arab Muslim Brotherhood (an organisation that has long been repressed by dictatorships across the Middle East and was ousted from power in Egypt by the military coup that followed widespread social unrest in 2013). Hamas was founded in Gaza in 1987 during the outbreak of the first Intifada and like the PLO before it pledged to drive Israel from historic Palestine, albeit in notoriously anti-Semitic terms.[9] Hamas was supported by Brotherhood-affiliated charities and social institutions that had emerged in the OPT from the mid-1970s after Israel's seizure of Gaza from Egypt saw the previously harsh restrictions against the Brotherhood and other Islamists relaxed. Whereas it had fought and repressed the PLO movement with classic counterinsurgency and "dirty war" tactics, Israel tolerated and even tacitly encouraged the growth of the conservative Islamist organisations in the belief that they would undermine the secular Palestinian nationalist movement, whose politics and membership was condemned and attacked by the Islamists.[10] At the same time, Hamas gained popularity and support among many Palestinians for providing basic services in health, education and social welfare where the PLO-affiliated groups had failed.

It was not until Hamas carried out its first guerrilla operation in 1989, abducting and then killing two soldiers that Israel began to systematically undermine the organisation in the same way as it had its predecessors in the Palestinian resistance movement.[11] Hamas's military wing, the Izz ad-Din "al-Qassam Brigades", was created in 1992; its relationship with Hamas has been likened to that of the IRA and Sinn Fein.[12] In April 1993, al-Qassam carried out its first suicide bombing, in the West Bank, and in February 1994 commenced suicide attacks inside Israel. The tit-for-tat conflict intensified with the outbreak of the second Intifada in 2000, sparked by General Ariel Sharon's walk on the Muslim holy site of Haram al-Sharif in East Jerusalem. More violent than the first, an estimated 3,000 Palestinians and 1,000 Israelis were killed. While western media focused on the rockets fired by al-Qassam and the other militants, Israel's response to the second Intifada was swift and harsh. Live ammunition, tank fire and 24 hour curfews backed up by helicopter gunships and F16s replaced the tear gas and rubber bullets that the IDF had used to quell the first Intifada. Small armed Palestinian factions took the place of the mass public mobilisations. Israel encircled Gaza, increased its troop presence in the West Bank and began construction of its notorious "Separation Wall".

In January 2004, Hamas leader Sheikh Ahmed Yassin offered to end armed resistance against Israel in exchange for a Palestinian state in the West Bank, Gaza Strip, and East Jerusalem. A senior Hamas official, Abdel Aziz al-Rantissi, then offered a 10-year truce in return for the establishment of such a state and the complete withdrawal by Israel from the territories captured in 1967. People on both sides doubted the sincerity (and enforceability) of these offers, but in any case both men were killed within months by Israeli airstrikes. Israel subsequently "disengaged" from Gaza by withdrawing troops and settlers but only to the extent that it maintained complete control of Gaza's borders and airspace, and with it the ability to carry out the airborne 'targeted assassinations' that have become a central plank of the occupation.[13] Hamas called a unilateral ceasefire in 2005, allowing elections to go ahead in which it won a majority, ending 40 years of Fatah/PLO dominance of Palestinian politics in a ballot that the former US President

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8   The Arabic word "Hamas" also means religious devotion and zeal, which the Hamas covenant interprets as "strength and bravery".

9   "The Covenant of the Islamic Resistance Movement, 18 August 1988," *The Avalon Project*, last modified 2008, http://avalon.law.yale.edu/20th_century/hamas.asp.

10   Matthew Levitt, *Hamas: Politics, Charity, and Terrorism in the Service of Jihad* (New Haven: Yale University Press, 2007), 24.

11   It immediately arrested Sheikh Ahmed Yassin, one of the founders and "spiritual leader" of Hamas, sentencing him to life in prison (he was released in 1997 in a deal with Jordan) and deported 400 Hamas activists to South Lebanon, which at that time was also occupied by Israel.

12   Ilana Kass and Bard E. O'Neill, *The Deadly Embrace: The Impact of Israeli and Palestinian Rejectionism on the Peace Process* (Lanham: University Press of America, 1997), 267.

13   Eyal Weizman, "Thanato-Tactics," in *Beyond Biopolitics: Essays on the Governance of Life and Death*, eds. Patricia Ticineto Clough and Craig Wiltse (London: Duke University Press, 2011), 177–212.

Jimmy Carter and other ex-Heads of State called "peaceful, competitive, and genuinely democratic".[14] Just as the Second Intifada had been born out of popular discontent with the Palestinian Authority (PA) and the Oslo peace process, the election result can be seen less as a Palestinian expression of support for an overtly Islamist or militarist agenda than a rejection of the status quo by a young and frustrated electorate.[15]

1.3   Designation of Palestinian organisations as terrorist

Whereas Israel had long declared the PLO a terrorist organisation, the United Nations General Assembly had recognized the PLO as the "sole legitimate representative of the Palestinian people" in 1974 and many nations viewed its armed resistance as entirely consistent with the UN Charter.[16] Although popular perceptions began to change in the 1980s, as acts of political violence by non-state actors provoked increasing outrage and condemnation as "international terrorism", only the USA, in 1987, formally designated the PLO as a terrorist organisation. A Presidential waiver to that designation was issued the following year to permit diplomatic contacts with the organisation and it was de-listed as part of Oslo agreements in 1993. Hamas, along with other Islamist groups and ex-PLO factions, opposed the Oslo peace process from the outset and was designated as a "terrorist organisation" by the USA in 1993, first as a group "known to use terrorist means", then in 1997 as specially designated "Foreign Terrorist Organisation" (FTO).[17] It should be noted here that right-wing and militant Israeli organisations were also opposed to Oslo, including Benjamin Netanyahu's Likud party which campaigned against the accords before coming to power in 1996.

Hamas is one of eight OPT-based organisations still designated as FTO by the USA.[18] With the onset of the global "war on terror", many of these determinations have been replicated by the USA and Israel's allies, not least in the European Union, which included the military wing of Hamas in its very first "terrorist list", adopted without debate on 27 December 2001.[19] The more controversial decision to proscribe the political wing of Hamas came almost two years later, with the positions of the USA, the United Nations, the European Union and Russia now being coordinated through a "Quartet" representing the foursome involved in the mediation of the MEPP. The EU proscribed the whole of the Hamas organisation in September 2003,[20] citing two suicide attacks in Israel in which 15 people died, though it is clear from the Wikileaks' cables that the USA and UK had exercised substantial pressure on the EU member states in the previous 18 months.[21] Javier Solana, the EU's High-Representative, announced the decision to outlaw Hamas as "an unequivocal message from the EU that terrorism will achieve nothing in the Middle East... Hamas leaders know that if they reverse their position, renounce violence and enter the political process, they can come off the list".[22] The Quartet had in fact determined that renouncing violence was but one of three conditions for entering the political process: they also had to recognise

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14   "Preliminary Statement of the NDI/Carter Center International Observer Delegation to the Palestinian Legislative Council Elections," *National Democratic Institute*, January 26, 2006, https://www.ndi.org/files/1791_wegz_prelim_011005.html.

15   Michael Schultz, "Palestinian Civil Society," in *The Routledge Handbook on the Israeli-Palestinian Conflict*, eds. Joel Peters and David Newman (New York: Routledge, 2012), 250.

16   UN General Assembly, Resolution 3210, "Invitation to the Palestine Liberation Organization," October 14, 1974, http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/3210(XXIX)&Lang=E&Area=RESOLUTION; UN General Assembly, Resolution 3236, "Question on Palestine," November 22, 1974, http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/3236(XXIX)&Lang=E&Area=RESOLUTION; UN General Assembly, Resolution 3237, "Observer Status for the Palestine Liberalisation Organization," November 22, 1974, http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/3237(XXIX)&Lang=E&Area=RESOLUTION.

17   Foreign Terrorist Organizations (FTOs) are designated by the Secretary of State in accordance with section 219 of the Immigration and Nationality Act (INA), as amended, see further State Department website: Bureau of Counterterrorism, "Foreign Terrorist Organizations," *U.S. Department of State*, http://www.state.gov/j/ct/rls/other/des/123085.htm.

18   The others are the Abu Nidal Organization (ANO), the Palestine Liberation Front (PLF), the Islamic Jihad Group, the Popular Front for the Liberation of Palestine (PFLP), the PFLP-General Command (PFLP-GC), the Al-Aqsa Martyrs' Brigades and the Army of Islam.

19   "EU Announces First Lists of Terrorists and All Refugees to Be Vetted", *Statewatch News Online*, January 2002, http://www.statewatch.org/news/2002/jan/02euterr.htm.

20   In September 2010 Hamas launched a legal challenge to the EU's decision to maintain the organisation on the blacklist at the EU Court of Justice. A hearing was held in February 2014 and a judgment is expected in 2015. Hamas v. Council, Case T-400/10, *Official Journal of the European Union*, OJ C (2010) 317/32.

21   See for example US Embassy, "02STATE250963" (embassy cable, December 7, 2012); US Embassy, "03THEHAGUE1586" (embassy cable, June 19, 2003); US Embassy, "03ROME4022" (embassy cable, September 4, 2003); US Embassy, "03ROME4133" (embassy cable, September 10, 2003).

22   "EU Blacklists Hamas Political Wing", *BBC*, September 11, 2003, http://news.bbc.co.uk/1/hi/world/middle_east/3100518.stm.

Israel and accept the agreements already reached by the other parties to the conflict.[23]

Whereas the EU decision covered the entire Hamas organisation, key EU member states including the UK had earlier opted to ban only the military wing of Hamas under domestic terrorism legislation. France and Germany had also been opposed to the EU blacklisting of Hamas on the express grounds that it would be counterproductive for the peace process,[24] with the European Commission, which did not have a formal say on the issue, also opposed. According to an EU official involved in the deliberations, the Commission did not think it wise to ban Hamas at the same time as various governments were beginning to have "back channel" (unofficial, secret) contacts with them.[25] In December 2005, a month before the elections in Palestine, Solana warned voters that the EU may cut aid if Hamas were to win.[26] If his message was supposed to influence the Palestinian people it had precisely the opposite effect, though in any event his threat was not carried out and the EU's support to the PA in Ramallah stumbled on. But voters in the Gaza Strip were punished by a crippling economic blockade imposed by Israel and Egypt and a diplomatic boycott, or "no contact" policy, imposed by the USA and Europe (insiders speak of a "pincer movement" by Jack Straw and Condoleeza Rice to ensure the latter acquiesced).[27] In sanctions terms, the significance of these additional measures cannot be understated. As noted in chapter 3, the rationale for proscribing entities and individuals rather than entire countries was that so-called "smart sanctions" was so that the population as a whole did not suffer collectively because of the actions of their rulers; the economic and diplomatic siege of Gaza effectively reversed this principle at a stroke.

1.4   The "peace process" and the "war on terror"

The ultimate failure of the Oslo process, followed by the USA's election of George Bush Jr., the 9/11 terrorist attacks and the onset of the global "war on terror", transformed the landscape for peacebuilding in four fundamental ways. First, it meant that the prospects for peace would become inexorably linked to the USA-UK led invasion of Iraq and the aspirations of the Bush administration and Tony Blair for the Middle East as a whole. Second, it saw Hamas placed squarely in the bracket of "Jihadist" political Islam within the counterterrorism doctrines and policies of western states, providing cover for Israel to enact or extend a whole host of hitherto unacceptable policies and practices. Third, it saw the Quartet, led by the USA, impose counterterrorism obligations on the Palestinian Authority, escalating the feud between Fatah and Hamas into a deadly conflict. Fourth, as suggested above, it resulted in the European Union, which prior to 9/11 was beginning to play an independent diplomatic role with regard to Israel and the occupation,[28] following the United States down the "cul-de-sac of proscribing Hamas".[29] These factors combined to produce geopolitical legitimacy for Israel's occupation and collective punishment of the Palestinians in the name of a wider struggle against Al-Qaida-style terrorism: a "war on terror" designed by neo-conservatives and made permanent by liberal democratic governments.[30]

The inevitable failure of Bush and Blair's take-it-or-leave-it "Road map for Peace" amid their own occupations of Afghanistan and Iraq meant paralysis in what remained of the Israel-Palestine "peace process". Not only did the negotiations and the "Road map" exclude Hamas from any stake in the process, it demanded that the PA "undertake visible efforts on the ground to arrest, disrupt, and restrain individuals and groups conducting and planning violent attacks on Israelis anywhere" followed by "sustained,

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23   Ben Smith, "Hamas, Fatah and the Middle East Quartet Principles," *UK Parliament*, Standard Note SN/IA/5968, May 17, 2011.

24   "EU Blacklists Hamas Political Wing".

25   Interview, Brussels, February 2014. See also US Embassy, "07BRUSSELS2475" (embassy cable, August 2, 2007), which states that "many European Commission working level contacts have consistently questioned the wisdom of isolating Hamas".

26   "EU May Cut Aid if Hamas Wins at Polls," *Associated Press*, December 19, 2005.

27   Interview, Brussels, February 2014.

28   Bennis, *Understanding the Palestinian-Israeli Conflict*, 116–17.

29   This term was used by a former UK government official during an interview in London in May 2014.

30   Arun Kundnani, *The Muslims Are Coming: Islamophobia, Extremism, and the Domestic War on Terror* (New York: Verso, 2014). See also Robert Fisk, *The Great War for Civilisation: The Conquest of the Middle East* (London: Fourth Estate, 2005), 464–65.

targeted, and effective operations aimed at confronting all those engaged in terror and dismantlement of terrorist capabilities and infrastructure".[31] In line with Israeli strategy,[32] the PA was already alienating ordinary Palestinians in its efforts to keep Hamas and other "uncooperative Palestinians under control",[33] and the Quartet now effectively placed "Fatah pre-eminence and Israeli security as the *sine qua non* of any successful peace process".[34] The US and Israel sponsored the training in Jordan of National Security Forces and Presidential Guards loyal to Fatah. Their deployment exacerbated the feud with Hamas, leading to the bloody clashes in 2006 and 2007 in which more than 600 Palestinians were killed and Fatah ousted from the Gaza Strip.[35]

Bush's 'last ditch', electorally-motivated effort to revive the peace process was the November 2007 "Peace Summit" in Annapolis, which excluded Hamas and was anyway given short shrift by the government of Ehud Olmert, who described the talks as "in no way an outright pledge of commitment to the two-state solution" which was "unequivocally tied to the realization of all the terms of the Road Map, most importantly ensuring Israel's security".[36] Yet more West Bank settlement authorisations followed. For all the high hopes for and early promise of the Obama Administration, its achievements to date are barely worth noting. Meanwhile, despite the crippling damage caused by the siege and Israel's military offensives in 2008-9, 2012 and 2014, Hamas appears more popular than ever within Palestine, precisely because of its armed resistance.

The Quartet's position, however, remains unchanged. Hamas is expected to renounce violence, recognise the state of Israel and accept previous agreements. Many observers believe that these conditions offer Hamas no tangible route to the negotiating table (see Chapter 2),[37] though Norway has argued, in calling for a lifting of the economic blockade, that the conditions were effectively satisfied at Mecca in 2007, prior to Annapolis, in the aborted agreement between Fatah and Hamas on the formation of a unity government.[38] It has been a moot point until the moves toward reconciliation and unification in 2014. These are big 'ifs', but *if* the truce holds (and it has been welcomed repeatedly by the EU), *if* elections are allowed take place, and *if* a unity government emerges, the Quartet's stance will be tested again.

To conclude, in the absence of international diplomacy exerting any meaningful pressure to end the occupation since the outbreak of the second Intifada,[39] Israel has consolidated its own highly-militarised version of the "war on terror" in symbiosis with that of the "international community", at terrible cost to Palestinian human rights. As noted above, the fact that the "international community" has declared Hamas a terrorist organisation is intrinsically related to the unchecked perpetration of many of the measures that Israel had earlier adopted in the name of counterterrorism: administrative detention without charge or trial, the widespread use of torture, frequent military incursions , the targeting of Hamas' leaders and membership, and attacks on Palestinian civil society organisations – some of which are clear violations of human rights and IHL. Hamas is guilty of frequent human rights violations as

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31 U.S. Department of State, Bureau of Public Affairs, "Roadmap for Peace in the Middle East: Israeli/Palestinian Reciprocal Action, Quartet Support," (Place: U.S. Department of State, 2003), paras. 3, 4. On the development of the roadmap, which saw a European Union proposal disregarded in favour of the USA's draft, see Institute for Palestine Studies, "Special Documents: The Road Map," *Journal of Palestine Studies* 32, no. 4 (2003), 83–99.

32 As Ariel Sharon had argued in 1993: "Why should we chase the Hamas when the PLO can do it for us?". Beverley Milton-Edwards and Stephen Farrell, *Hamas: The Islamic Resistance Movement* (London: Polity, 2010).

33 Bennis, *Understanding the Palestinian-Israeli Conflict*, 99.

34 Madeline Kristoff, "Policing in Palestine: Analyzing the EU Police Reform Mission in the West Bank," in *Security Sector Reform Issue Papers* 7 (Waterloo, Canada: Centre for International Governance Innovation, 2012), 15.

35 "Over 600 Palestinians Killed in Internal Clashes since 2006," *Reuters*, June 6, 2007, http://www.ynetnews.com/articles/0,7340,L-3409548,00.html.

36 "Olmert: Annapolis Strength Lies in Absence of Hamas", *Ynetnews*, November 26, 2007, http://www.ynetnews.com/articles/0,7340,L-3476001,00.html.

37 See further Carolin Goezig, *Transforming the Quartet Principles: Hamas and the Peace Process* (Paris: EU Institute for Security Studies, 2010), 13: "According to paper published by the EU Institute for Security Studies: "The EU demands that Hamas renounces violence and simultaneously recognises Israel. Whereas cases like Northern Ireland show that insisting on the renunciation of violence as a precondition for engagement in negotiations is not necessarily conducive to a militant group adopting a more moderate posture, the Quartet principles allow for no room to reflect on how Hamas might realistically embark on the path of moderation and rejection of violence, and thus propagate a vicious circle. Hamas' agreeing to adopt a more moderate posture becomes a necessary precondition to engaging the group in peace talks, which are themselves aimed at its moderation. Seen from this perspective, the inflexible and self-constraining nature of the Quartet principles becomes apparent".

38 Patrick Searle, "The Tragedy of Condi Rice," in *Washington Report on Middle East Affairs*, April 2007, 12–13.

39 Khaled Elgindy, "The Middle East Quartet: A Post-Mortem," in *Saban Center at Brookings Analysis Paper* 25 (Washington DC: Brookings Institute, 2012).

well, including beatings, torture, the assassination of political opponents, the execution of "traitors", the harassment of journalists and civil society organisations, and the repression of women.[40]

The climate of fear that hangs over Gaza is compounded by the economic blockade. According to the "EU Heads of [member state diplomatic] Missions' Report on Gaza", writing before the damage inflicted by Israel's latest military offensive:

> Today, Gaza is facing a dangerous and pressing humanitarian and economic situation with power outages across Gaza for up to 16 hours a day and, as a consequence, the closure of sewage pumping operations, reduced access to clean water; a reduction in medical supplies and equipment; the cessation of imports of construction materials; rising unemployment, rising prices and increased food insecurity... Overall, the root of the current economic and humanitarian situation in Gaza is first and foremost of a political nature and is based on an unsustainable policy of severe movement and access restrictions. The primary duty bearer in this regard is Israel as the occupying power.[41]

There can be little surprise at the widespread disillusionment with the MEPP in the OPT, where a majority of Palestinians surveyed in 2013 thought that the two-state solution is no longer practically viable due to settlement expansion and the barriers to Palestinian statehood.[42] Palestinian self-determination is also threatened by the fact that Palestinian communities are geographically scattered and the emergence of a new generation schooled in war that is alienated from traditional Palestinian forms of political action.[43] These sentiments are particularly pronounced among the OPT's young population, with only three percent of Palestinians aged 15-29 reported to believe that negotiations alone can deliver Palestinians their rights.[44] This pessimism is by no means limited to Palestinians, with seasoned observers seeing little traction beyond "further entrenchment of the occupation", which: "as hope for a two-state solution fades will make the parallels with apartheid South Africa increasingly difficult to ignore. Sanctions and international isolation will follow; and an eventual bloody catastrophe seems more probable than a 'Rainbow Nation' sequel".[45] This cynical backdrop provides the context for contemporary peacebuilding efforts.

2.   The Impact of Hamas' designation as terrorist on peacebuilders

This section explores the impact of the west's decision to proscribe Hamas from the perspective of western actors trying to transform the broader conflict and bring about its peaceful resolution. The first section focuses on the "meta-level" transformative effects and how these shape, constrain or transform the activities of peacebuilders. Further sections explore the differentiated impacts on individual actors through three distinct categories: (i) risk aversion, self-censorship and withdrawal; (ii) the securitisation of intergovernmental organisations (IGOs), NGOs and peacebuilding activities; and (iii) a "grey zone" of formal compliance coupled with the informal practice that has necessarily developed to circumnavigate these restrictions.

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40 Human Rights Watch, *World Report 2013: Israel Palestine*, http://www.hrw.org/world-report/2013/country-chapters/israel-palestine.

41 "EU Heads of Missions' Report on Gaza", *ECC Palestine*, http://www.eccpalestine.org/wp-content/uploads/2014/03/HoM-report-on-GAZA.pdf.

42 58 percent of Palestinians believe that the two-state solution is no longer practical due to settlement expansion, while 69 percent believe that chances for the establishment of a Palestinian state in the next five years are slim to non-existent. Palestinian Center for Policy and Survey Research, Poll Number 48, June 2013, http://www.pcpsr.org/sites/default/files/p48e.pdf.

43 Nathalie Tocci, "The Conflict and EU-Israeli Relations," in *European Involvement in the Arab-Israeli Conflict*, ed. Esra Bulut Aymat (Paris: EU Institute for Security Studies, 2010), 52.

44 Sharek Youth Forum cited in Alexander Kouttab and Mattia Toaldo, *In Search of Legitimacy: The Palestinian National Movement 20 Years after Oslo* (London: European Council on Foreign Relations, 2013), 2.

45 Nick Witney, *Europe and the Vanishing Two-State Solution* (London: European Council on Foreign Relations, 2013), 6.

2.1 From sanction to siege: the transformative effects of proscription on peacebuilding in the OPT

As explained in earlier chapters, the interplay between the various legal instruments, jurisdictions and terrorist lists have produced a complex landscape in which peacebuilders have struggled to come to terms with their potential liability in respect to contact and perceived support for Hamas. It is worth stressing this point again because the effects are so pronounced. To recap: the EU has, firstly, criminalised the provision of funds or economic resources and, secondly, the EU institutions and member state governments have adopted a "no contact" policy in respect to Hamas' leaders and membership, including the institutions of government in Gaza. This approach differs markedly with the USA, where the material support provisions are much more restrictive (see Chapter 1). As one exasperated Palestinian peacebuilder explained:

> I believe that we need to talk to Hamas to educate them and we need to let them know what's going on. But we cannot make a workshop, we cannot offer a Nescafe or *cappuccino* for any one of them. It's considered as materialistic support. This is what I heard from the American people! Can you imagine that! You cannot offer them a coffee!

Within Europe there appears to be a significant degree of confusion between the EU and US criminal sanctions and the EU's "no contact" policy, which is aimed at isolating Hamas diplomatically, but is interpreted by some as assuming that *any* contact with Hamas is illegal.[46] As we shall see, this interpretation filters down into the risk management strategies adopted by some peacebuilding organisations. In practice, as noted earlier, potential liability varies greatly depending on the jurisdiction, location and nature of the contact. In the UK, for example, the Terrorism Act 2000 contains a broad prohibition on inviting support for terrorist organisations, including helping to arrange or manage or address a meeting either with, or encouraging support for listed groups.[47] Only Hamas' military wing is designated as such, so it is by no means forbidden to engage or even meet with Hamas political officials. Whether non-governmental organisations in the UK understand this is another matter. Even if they do, they must contend with the possibility that such conduct may be criminalised by the USA, and the possibility that they could face prosecution in that country irrespective of where the alleged offences took place. However, whereas the USA criminalises material support, the UK outlaws expressions of support, so anyone seeking a meeting with Hamas – or engaged in any other events or advocacy involving Hamas, regardless of whom is present – must ensure that their activities cannot be construed as knowingly providing encouragement to Hamas' military activities. The importance of the potentially imperceptible line between *recognising* and *encouraging* Hamas' right to resist occupation militarily is underscored by new guidance from the UK Charities Commission on the sector's obligations not to provide a 'platform' for proscribed and other 'extremist' organisations,[48] a theme which also runs through the centre of the EU's strategy on "Radicalisation and Recruitment".[49] It is fair to say that the policy makers and officials interviewed for this project, while well aware of their own "no contact" obligations vis-à-vis Hamas, did not appear to have a strong grasp of the interrelationship and implications of the wider counter-terrorism framework for NGOs engaged in conflict transformation, or for the solidarity groups who appear to be the target of these laws.

Any concerns that organisations have as regards the various sanctions regimes and material support provisions have been amplified by dozens of investigations and prosecutions relating to organisations working in the OPT or supporting projects financially. These have resulted, *inter alia*, in non-profit organisations and charities around the world being closed down or having their charitable status revoked; staff being prosecuted and jailed; governments, parliaments and regulators launching enquiries into

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46 See for example "Israeli Mayor of Bombarded Border Town Offers to Break Ranks and Talk to Hamas," *Guardian* (London), February 23, 2008, which states that there is an "international ban on contact with the militant Palestinian organisation".

47 Terrorism Act, 2000, c. 11, s. 12.

48 Charity Commission of England and Wales, "Protecting Charities from Abuse for Extremist Purposes and Managing the Risks at Events and in Activities – guidance for Trustees," in *Protecting Charities from Harm: Compliance Toolkit*, ed. Charity Commission, (London: Charity Commission, 2013), ch. 5.

49 Council of the European Union, *The European Strategy for Combating Radicalisation and Recruitment*, 14781/1/05 REV 1, November 24, 2005.

the activities of NGOs and the use of aid; and bank accounts being summarily closed.[50] Even where organisations and individuals have been acquitted or exonerated, the adverse press coverage their cases have attracted has resulted in significant reputational damage. And even though an organisation may have been formally cleared, the consequences endure: that organisation may still be refused financial services or denied permission to enter or operate in Gaza by Israel, for example. Just being associated with an organisation that has been accused or convicted of supporting a Palestinian organisation designated as terrorist by Israel or the international community can therefore add significantly to the already immense obstacles to working in Gaza.

Muslim NGOs have borne the brunt of the domestic terrorist-financing prosecutions that proscription has inspired, but the broader climate that proscription has engendered affects all international actors trying to work in the OPT. *Save the Children*, for example, explains of its work in the OPT: "We face legal restrictions on how we can operate, and obstacles to movement that make almost every aspect of our programme, even an ordinary meeting of staff, a challenge".[51] Moreover, because the Israeli government has at its disposal some of the most sophisticated surveillance capabilities in the world, peacebuilders are denied the political space (and hence autonomy) they require, rendering almost impossible the kind of "quiet diplomacy" that has underpinned successful conflict resolution efforts elsewhere. NGOs, particularly those advocating for Palestinian self-determination or the end of the Occupation – and the donors that support them – also face intense scrutiny from Zionist groups, some state-funded, who seek to undermine and disrupt their activities through asymmetric "lawfare". This is perpetrated by a small army of bloggers who fill the internet with accusations about aid organisations and NGOs funding OPT-based terrorist groups, and then use these allegations as a basis for formal complaints.[52] This concern was raised by all of the INGOs with conflict transformation programmes in the OPT. As one explained:

> Israeli funded org's like NGOmonitor are monitoring what we are supporting, what our partners are saying and sending reports to politicians and diplomats and bureaucrats including in the Ministry of Foreign Affairs that we are anti-Israel and supporting the delegitimisation of Israel.[53]

Proscription has thus engendered complex multi-jurisdictional restrictions on operating in the OPT that are not just legal but highly political in effect. International actors must tread carefully around both the legal restrictions and the fear of political ramifications, leading to self-censorship and the intrusive vetting of partners, which is in turn fuelling distrust between organisations with a mandate to help and support the OPT and the very people they are supposed to be supporting. As noted elsewhere in this report, the dominant theoretical and analytical narrative of the effect of terrorist proscription on peacebuilding is one of "shrinking space" and the notion that proscription leaves less room for formal peacebuilding. While this appears self-evident from any analysis of the effect of these laws, our research suggests that the legal and political environment outlined above has had a much more transformative effect, both in terms of the prospects for peace and the actions of peacebuilders themselves. Three key meta-level impacts on the broader peacebuilding environment emerge: paralysis of the MEPP, the transformation of those countries that have banned Hamas into proxies for Israel's security, and the subordination of other policy objectives and programmes to the delegitimisation of Hamas.

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50 Among the many organisations subject to accusations, investigations or prosecutions are, in the USA, the Holyland Foundation, Benevolence International Foundation, Islamic American Relief Agency, KindHearts for Charitable Humanitarian Development and KinderUSA; in the UK, Interpal, Human Appeal International, Islamic Relief and the Palestinian Solidarity Campaign; in the OPT, the Union of Good and the Palestinian Authority ; in Canada, the International Relief Fund for the Afflicted and Needy; in France, the Committee for Charity and Assistance to the Palestinians (CBST); in Italy, ABSPT; in the Netherlands, CORDAID, ICCO and Oxfam-Novib; in Austria, Belgium, Denmark and Sweden, the Al-Aqsa Foundation; in Norway, Muslim Aid and Islamic Forum of Europe; and in Australia, WorldVision and AusAID. Note that this list is provided for illustrative purposes; it is far from comprehensive and the outcome of the investigations varies widely.

51 "Where We Work: Gaza," *Save the Children*, http://www.savethechildren.org.uk/where-we-work/middle-east/occupied-palestinian-territory.

52 Among the best known groups are NGOMonitor, Palestinian Media Watch, the American Israel Public Affairs Committee, Jihad Watch and Sharia Finance Watch.

53 Telephone interview, April 2014.

(i)   The exclusion of Hamas and paralysis of the MEPP

First, in respect to the MEPP, contingent on the designation of Hamas as a terrorist organisation is the denial of its status as legitimate party to an armed conflict and consequent exclusion from that process. Whereas counterterrorism officials appear content that their objective of isolating and undermining support for Hamas has been an unqualified success,[54] other observers suggest their actions have fatally undermined the diplomatic role that the Quartet might otherwise play in terms of tangible conflict resolution.[55] Contrary to regular claims about "back channel" contacts between EU member state governments and Hamas,[56] experienced mediators suggested that these have been minimal and ineffective:

> I don't think that there is the level of contact [with Hamas] that people think there is. There's very, very little contact and I think that's one of the big problems because how can they have a proper analysis of the situation, how can they have informed policies, how can they shift forward on issues if they're not engaged directly themselves?

Rather than simply limiting (or "shrinking") their diplomatic capacity, the exclusion of Hamas has paralysed the MEPP since the collapse of the Oslo process. As a former EU member state Ambassador to the United Nations puts it:

> The tactic of proscribing Hamas as a terrorist movement and not getting rid of Hamas that way by one of the two routes [assimilation/war] has blown back in the faces of those who instituted that policy and has left them with the extreme difficulty of not being moved to another form of negotiation because they've proscribed themselves out of it. And that's what [US Secretary of State] Kerry and the others are facing at the moment and this is what, these arguments, are beginning to change some European minds who believe that they followed the Americans down a cul-de-sac in a way which is shaming and impolitic – in two different categories of thinking - for the European Union, and that they are stuck with it until they find some way out of it. And that's why you're getting in Brussels now: much more of a conversation about basing a [EU] position on rights and on justice and on legitimacy which is not good news for Israel as has been signified by the European decision on products coming out the settlements.[57]

This in turn has a significant impact on peacebuilders because it entrenches the very militancy that terrorist designation ostensibly seeks to combat:

> making it more difficult for people who would want to change policy and move forward to do so because all it does is enhances the role of the militants within an organisation and it undermines the political visionaries, you might say, who really want to change from a military to a political process; that transition it inhibits. I think in 2006, had the Europeans remained open to Hamas and had engaged in the way they should, the situation on the ground would be quite different... We've proscribed ourselves into a corner and we wonder why we're not effective at solving this conflict.[58]

(ii) Creating proxies for Israeli security

The second key transformative effect that the terrorist designations have is to effectively turn those states that are bound by such determinations into proxies for Israeli security. This manifests itself in two distinct but interrelated ways. The first is classic 'divide-and-rule'. Israel's Occupation and continued settlement programme is predicated on dividing Palestine, both geographically and

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54 Ibid.

55 Jeroen Gunning, "The Conflict and the Question of Engaging with Hamas," in *European Involvement in the Arab-Israeli Conflict*, ed. Esra Bulut Aymat (Paris: EU Institute for Security Studies, 2010).

56 "Hamas Claims Increased Contact with European Countries", *Guardian* (London), July 12, 2013.

57 Interview, London, May 2014.

58 Ibid.

politically. In this context, amid paralysis of the MEPP, the policy of isolating Hamas can only be considered a success if Israel's "security" – which is intimately tied to its colonial project – is taken as the baseline objective of that policy.[59] In any case, the international community has "not achieved their intended results of weakening or moderating Hamas", but rather contributed to "the lawlessness and lack of governance in Palestine" and "fuelled polarisation and confrontation… leading most dramatically to a civil war in the Gaza, the ensuing political split between the West Bank and Gaza, and with it the disappearance of any realistic prospect for a two-state solution".[60] This policy has also had a tangible effect on peacebuilders in the OPT, both Palestinian civil society and those working internationally. As the Director of a Palestinian peacebuilding NGO explained, the failed MEPP and Israel's Occupation are coming to be seen as "two sides of the same coin", which is:

> increas[ing] the haters: the bad image of the West in our area because this has given another indication that the international funds is very politicised. You don't do it for humanitarian purposes, you do it for political reasons. So you cannot claim to us: 'oh we are here to help you'. No, no, no: you are not here to help us, because you have your own agenda. So it becomes difficult for us as Palestinians to defend the international cooperation, the EU cooperation with the Palestinians. Of course the EU cooperation is different to the American, because for example the EU they never stopped support for the Palestinian Authority… I keep saying this to Europeans, of course they can be more influential.[61]

The securitisation of international funding is also putting those Palestinian civil society organisations who receive it in a difficult position vis-a-vis their domestic constituencies:

> The image of some civil society activists in Gaza becomes very negative because we are in the middle of the sandwich. We are considered by Hamas as 'oh you are pro-American, you are speak English, you go to a Brit uni'… Of course I have good relations with everybody but there are some people who are working with NGOs who found themselves in the middle of the sandwich and I hear some Palestinian people who try very hard to please their manager so they have to neglect their principles of good work, of good governance, of serving all people equally because they don't want to have a problem… We as civil society were put in a very difficult position: how can you serve all people equally [if you're forced to exclude certain factions]? It's against humanitarian principles.[62]

These sentiments were echoed by professional mediators based in Europe, who stated that proscription had fundamentally undermined their work insofar as it has:

> Left Europe and the United States open to the accusation that we always put interests before values and principles and we claim on the one hand to promote democracy and when they [Hamas] make a major decision to move to accepting and believing in the democratic process and then we proscribe them so they can't effectively work it [democratic government]. So why do we do it? Because we say it's in the interest of security or its whatever but it shows that we're not a principled people and I think the long term impact that has on the broader relationship between the Arab-Muslim world and the West is very serious because we're no longer credible people in the eyes of a lot of young people, especially in places like Gaza. We're just not credible.[63]

The second means through which the designation of Hamas as a terrorist organisation turns western states into proxies for Israeli

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59 Mandy Turner (2014) "Peacebuilding as counterinsurgency in the occupied Palestinian territory", *Review of International Studies* 41, no. 1, 73-98.

60 Ibid. See further Richard Youngs, "How Europe's Mediterranean Policy Went So Badly Wrong," *Europe's World* 4 (Fall 2006), cited in Rouba Al-Fattal, *The Foreign Policy of the EU in the Palestinian Territory*, CEPS Working Document No. 328 (Brussels: Centre for European Policy Studies, 2010).

61 Telephone interview, May 2014.

62 Ibid. On this matter see further Michael Schultz, "Palestinian Civil Society," *The Routledge Handbook on the Israeli-Palestinian Conflict*, eds. Joel Peters and David Newman (New York: Routledge, 2012), 250.

63 Interview, London, June 2014.

security is derived from the practices through which potential violations of the sanctions regime are policed, both by Israel and its international partners, affecting peacebuilders of every kind, from those with a presence on the ground in the OPT to Palestinian solidarity groups trying to transform the conflict from afar. This was another central theme of the interviews with NGOs and civil society representatives conducted for this project, including senior representatives of five INGOs with significant programmes in the OPT. In every case they encountered practical problems relating to access to territory, and in particular Gaza, linked to criticism and sanction for supporting actions such as BDS and the "Freedom Flotilla". As one of those interviewed explained:

> It [security and counterterrorism] goes in every single little detail [of our work] actually. It's very difficult to enter Gaza. So you have to – they scrutinise you before you go in. They want to know what the purpose of your visit is, if you have any other intentions. They screen you. The people you work with: they screen. When we did training in Gaza you notice that in the group there are always young men who are afraid of being noticed because they might run into trouble. Organisations run into trouble. It has financial implications. It's more and more difficult to do financial transactions to Gaza so it's actually in every little detail – you feel that counterterrorism measures have a huge, huge impact at the local level.[64]

(iii)   Securitising conflict transformation programs

The third 'meta-level' impact of the proscription regime is to subordinate and constrain the international community's other stated policy objectives under the rubric and practice of counterterrorism, with an almost exclusive focus on the violence committed by the Palestinians. In addition to directly fuelling the tensions between Hamas and Fatah that led to the 2006-7 civil war, this is, as suggested above, severely undermining the claims of neutrality that international actors need to carry out their mandates. As one US peacebuilding organisation with long-standing programmes in the OPT explained:

> We have these official leaflets explaining what our work in the Middle East is. The first thing that it says is that 'we are not USAID funded'. We're a US-based organisation, but we're not – it's the first thing you say, literally. And this is true not only in Gaza but also in the West Bank in the sense of just the credentials: you say it. I don't think it's as strong, I mean, we do kind of get German government funding, that's never been an issue. USAID: definitely.[65]

It is often noted that USAID and other US-based donors have long included counterterrorism clauses in their grant agreements whereas the EU institutions any many (though not all) member states do not, and it's a difference that European's cherish. But does it mean that counterterrorism regimes are any less pervasive in practice? The EU has long been the largest bloc provider of humanitarian aid and development funding to the Palestinians, with the institutions and member states reportedly providing around as much as one billion euros per annum over the last decade through a complex array of instruments including EuropeAid, the PEGASE programme of support for the PA and UN Relief and Works Agency for Palestine Refugees (UNRWA), humanitarian assistance, technical assistance, democracy and human rights, peacebuilding, European Investment Bank initiatives and several police missions.[66] The EU's financial support for the OPT is put into context by the EU's broader political and economic alliance with Israel, which Javier Solana described in 2009 as a "member of the European Union without being a member of the institutions".[67]

After the outbreak of the second Intifada, the EU moved from grants and loans in support of political and economic development – much of it spent on construction and infrastructure including road networks, water pipelines, sewage disposal and Gaza's harbour and airport, (much of it laid to waste to by Israel's military offensives) – to direct support for the PA and emergency humanitarian

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64   Telephone interview, March 2014.

65   Interview, Cape Town, July 2014.

66   For overview of instruments see "EU Financial Assistance to the occupied Palestinian territory", European Parliament Policy Department on Budgetary Affairs, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/budg/dv/2010_fayyad_eu_financial_assistance_/2010_fayyad_eu_financial_assistance_en.pdf.

67   David Cronin, *Europe's Alliance with Israel Aiding the Occupation* (London: Pluto, 2011), 2.

aid.[68] Despite the boycott of Hamas-controlled authorities in Gaza, the EU has maintained its support for the PA, and continued its programmes in the OPT (with the exception of the monitoring mission at the Rafah border crossing). Many commentators argue that these policies have simply prolonged the conflict by failing to address its root causes, paying for the destruction wrought by Israel and instituting a "dependency culture" in the OPT, though it is equally clear that the withdrawal of this support would severely intensify the existing humanitarian crisis. [69]

Interviews were conducted with five senior EU officials working across the EU's foreign policy portfolio to ascertain the impact of the proscription of Hamas on the implementation of European Union programmes in the OPT and particularly in Gaza, with an emphasis on the impact on peacebuilding. The differentiated impacts are analysed further below. What is striking in talking to EU officials is how proscription affects everything that the EU is trying to do in Gaza, from economic development to aid and humanitarian assistance. As one official put it:

> How can you do development in one part [of the OPT, Gaza] where you are not negotiating with the authorities? It's very difficult... You had some ministries of the Palestinian Authorities who had technical work with the technical directorates in Gaza, so there was a way to work at the technical level for some development but there other ministries that cut completely their relationships with the *de facto* authorities and there we were blocked directly so of course there are implications.[70]

According to officials, health and education were among the areas most affected by the no-contact policy. An EU project supporting the provision of mental health services in Gaza, for example, collapsed because of the prohibition on dialogue with relevant officials. A crucial consequence of the "no-contact" policy is not simply that projects fail but that the EU is forced to work through NGOs (rather than engaging the Gaza authorities directly), effectively outsourcing some of the risks and difficulties of operating in the OPT from governments to non-governmental organisations:

> The biggest issue we have is over non-contact with Hamas in Gaza... This hasn't stopped us from operating in the Gaza Strip. We operate either through the Palestinian Authority or non-governmental organisations. So it hasn't had effect of pushing us out of the territory we want to work in. On the other hand it does mean that realistically we can't engage with the authorities there on anything relating to matters from security to health to education.[71]

In tandem with the sanctions against Hamas, the blockade of the Gaza strip has also significantly undermined the EU's economic development policies:

> The real problem we have in Gaza is frankly related to the blockade rather than Hamas *per se* who haven't really cooperated but they haven't really obstructed us... I'll give you an example of where we've really been blocked from working: we've spent quite considerable sums of money on private sector development in Gaza and realistically if we were to go there from the classic development perspective that we would do in other countries we wouldn't touch it because the companies that have been damaged by Cast Lead or by other sanctions can't import the raw materials they need to restart their production and even if they do manage to produce their goods they can't export them to the traditional markets... What we're facing is a complete meltdown of the economy in Gaza and a territory which used to be more or less the engine room of the Palestinian economy has become a huge drain on the resources of Palestine.[72]

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68 Dimitris Bouris, "The European Union's Role in the Palestinian Territory after the Oslo Accords: Stillborn Statebuilding," *Journal of Contemporary European Research* 6, no. 3 (2010).

69 Witney, *Europe and the Vanishing Two-State Solution*, 6. See further Rosemary Hollis, "The Basic Stakes and Strategy of the EU and Member States," in *European Involvement in the Arab-Israeli Conflict*, ed. Esra Bulut Aymat (Paris: EU Institute for Security Studies), 32.

70 Telephone interview, June 2014.

71 Ibid.

72 Ibid.

Per capita GDP in Gaza has now fallen to $600 per year (as compared to $27,500 for Israelis). One peacebuilder suggested:

> The European funding strategy has been utterly self-defeating and just created these highly militarised structures at the centre of the Palestinian Authority without doing anything in terms of building the state or building any form of deeper structures of society… we're just militarising all the groups around Ramallah and that's it.[73]

As noted above, many EU officials clearly recognise this problem but a change in official position appears unlikely because it requires agreement among the now-28 member states. As one senior official explained:

> in terms of the European position there was a quite an interesting shift in 2012 when people started to think about what was happening in Area C [Gaza] and question why the EU is putting in one billion [euros] per year in the name of statebuilding for state that's not going to exist… The difficulty is that there are always one to three countries that will prevent these discussions going anywhere because they take their line from Israel.[74]

The official policy of isolating and undermining Hamas has then, directly or indirectly, affected the parameters for almost everything else that western states profess to support in Palestine: from human rights to social and economic development to the "life support" mechanisms on which Gaza now depends. As one mediator with more than 20 years' experience put it, the:

> policy [of proscribing Hamas] is just crazy because what it has done is created an impotence on the official level actually to engage a meaningful way in finding solutions to conflict. The European Union has almost cut its ability to be a serious actor. In my experience most officials are frightened – even people that I highly respect are frightened – to be seen in anyway to be engaged because they're fearful that (a) it will have implications for themselves personally, and (b) it'll have implications for their government. Or if they're in an official capacity, let's say in Israel, how the Israelis will react to this, and you know prevent them doing their job. I think what it's created is a psychological barrier. And it's a very brave official who steps outside the portal you might say and acts independently.[75]

2.2   From silent diplomacy to silencing advocacy: risk aversion, self-censorship and withdrawal

How has this environment affected different kinds of peacebuilders, and what strategies have they adopted to avoid or mitigate these risks? The idea that counterterrorism policies can have a 'chilling effect' is widely used as a means of describing the excesses or perceived 'externalities' of the war on terror; what we see in the OPT is that these impacts affect different types of organisations in different ways. Primarily, and reflecting the findings of other research in this area,[76] almost all the civil society groups interviewed for this project believed that the difficulties engendered by the climate described above *had* made organisations more risk adverse and led to the withdrawal of donors and organisations engaged in conflict transformation.

> A lot of people [in NGOs and funders] don't dare to even speak about it [Israel-Palestine] anymore, or to link with certain organisations. We've seen in different EU countries that people are becoming more careful and certain support which was there is no longer there. It silences criticism it really does. Some donors are becoming more careful so they start funding things which are less critical or they stop support to certain organisations and provide it only to others.[77]

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73   Ibid.

74   Interview, Brussels, February 2014.

75   Interview, London, June 2014.

76   David Cortwright et al., *Friend Not Foe: Civil Society and the Struggle against Violent Extremism* (The Hague: Cordaid, Fourth Freedom Forum and Kroc Institute, 2010).

77   Telephone interview, March 2014.

As suggested earlier, these effects are felt particularly keenly by Muslim NGOs based in the west, where a spate of high profile investigations and prosecutions has left numerous organisations unable to operate in the OPT or banned from operating in their country of origin.

> So you find people get very nervous and they make such decisions [to withdraw] because they hear about court cases with people getting dragged through the courts, especially Islamic charities, and there is a presumption of guilt that is portrayed to the public in such court cases and of course people then go on with caution and they decide to stop their projects.[78]

The negative impact of this risk aversion is brought into sharp relief by the fact that state and non-governmental actors outside of those jurisdictions that have proscribed OPT-based groups are relatively unencumbered by the west's restrictions, which one interviewee suggested could undermine peacebuilding efforts in the long-term:

> In the past seven years: more catholic charities created in Gaza, more Turkish charities created in Gaza, more from Malaysia. So now in Gaza we have the divide. These NGOs are taking funding from the West. And these NGOs are taking funding from the East. And there is no cooperation… This affected very badly the social fabric because the ideology. Imagine a Saudi-based NGO, or a charity in Saudi, they will never support women rights or youth empowerment as we do, so they support their own ideology which has created another society… Like the Jewish religious groups you see that they are different… What is the danger of that? The danger of that is if the Palestinians decide to go for a peace process with Israel, you cannot bring the whole society with you because some of the society are already affiliated with somebody else.[79]

The activities of international solidarity organisations, who, as noted in chapter 2, play an integral role in peacebuilding movements, are also strongly impacted by the proscription regime, to the extent that groups that openly support Palestinian self-determination and oppose the occupation have to be very careful about how they express their solidarity with Palestinian resistance and any perceived association with banned organisations. The activist organisations we spoke to reported concerns and frustrations about the difficulty in avoiding members of proscribed groups who were "part of the general discourse" on the OPT, for example at events like the World Social Forum in Tunis. They reported pulling out conferences and campaigns because they were concerned about the actual or perceived participation of those organisations.[80] They also reported fears about having to effectively police participants in their own events:

> They don't represent in any sense partners of ours – we've never partnered with Islamic Jihad or Hamas or indeed any of the political parties… [but] there was a situation where [redacted] – not a low official within Hamas – joined an event by skype or by video link which was being relayed in London at the time of the bombing of Gaza [by Israel in in 2009], and he was there in order to speak about what was happening in Gaza at that moment. It was a not a thing that we had arranged but we were one of the organisations that had been involved in organising the event of the whole. That gives you a sort of sense of how in the future we would have to be doubly careful of that sort of thing.[81]

This UK-based organisation was referring to the aforementioned UK Charities Commission guidance on "extremism", which threatens registered charities – as many NGOs in the UK are – with sanctions if they give a platform to proscribed terrorist organisations.[82] A key impact of proscription, then, is to be to impose potential liability for past associations with militant organisations, on would-be peacebuilders of the present.

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78 Telephone interview, May 2014.
79 Ibid.
80 The representative of one US-based organisation, for example, felt unable to speak at a conference at the Islamic University of Gaza, because of its perceived association with Hamas. Telephone interview, June 2014.
81 Telephone interview, April 2014.
82 Charities Commission, "Protecting Charities from Abuse", ch. 5.

This is something where we are concerned because [our] partners not just in Israel-Palestine but also the Philippines and Colombia are obviously partners and organisations which have been politically involved in a situation where they can very easily be listed as terrorist entities… Given that a lot of people who currently run [Palestinian] NGOs and who currently are engaged in the Boycott National Committee and are currently engaged in civil society more generally within Palestine cut their teeth in the PLFP [Popular Front for the Liberation of Palestine, a proscribed organisation], it's an interesting one… There is a fundamental problem there… if people wanted to drill down deep enough they would probably be able to find situations where individuals who have some relation with those groups have appeared… With all of these things to be absolutely frank the threat to us is more from Zionist groups using these regulations against us. That's always been it. The Charities Commission has only ever acted on the instigation of Zionist groups.[83]

This is closely related to another key impact, censorship and self-censorship, which has the effect of muting dissent on the part of many of those organisations seeking to transform the conflict. As one European INGO with a conflict transformation programme in the OPT put it:

I think if you are really committed towards doing this work you have to be as smart as possible so there's no point coming out with bold statements when you still want to work in Gaza, so you have to be very careful about how you go about it. It doesn't mean that we avoid speaking the truth because that's one of the principles of or organisation, we try to raise all of the grievances that people are going through, but we do it as an engagement strategy rather than going into the streets.

Another international peacebuilding organisation, based in the USA, suggested that:

International organisations are much more vulnerable than Israeli ones because of not only the permits to Gaza but also all our international employees who need visas. There was actually two years ago a report issued around settlement goods production that was mainly calling for a boycott of settlement goods. And it was issued by fifteen mostly European-based NGOs, so anyone from Danish Church Aid, Norwegian Church Aid, Norwegian Refugee Council – like all of the big Europeans. They were all summoned to the permit department, for visas, to talk about that, making very clear the connection between – 'do political work we don't like, you just won't be able to work here'. So there is a lot of censorship, there is a feeling that US-based organisations censor themselves much, much more than European ones. Just recently a [redacted] employee that's been there [Gaza] for four years was denied entry and deported for 10 years. She's an employee. She has a work visa. She's been in and out of Gaza. She's been through all the security checks possible. And it was very clearly, like, 'you're too political', because she also did a protest and things like that. You see it very clearly with the international employees. They are very careful themselves, as organisations they sometimes can take political stands; as individuals they're afraid of protest… It's not only for international employees. A lot of the NGOs have West Bank employees with permits to Jerusalem or Israel which are even easier to revoke, and that's where the self-censorship comes in. We have an advocacy strategy meeting next week and the conversations that we have in preparation for it with our facilitator and stuff is saying the first thing we need to try and understand is what is the risk of our advocacy in the US to our work here [in the OPT] and then decide if it's worth it before we even start developing the advocacy.[84]

Peacebuilding organisations based in Israel also reported tremendous difficulties in carrying out their mandates, but these tended to be related less to the proscription of Hamas *per se* and more to do with a concerted attempt by Israeli governments to introduce tighter restrictions and delegitimise the work of NGOs. This includes a new law, currently the subject of challenge in Israel's Supreme Court, allowing Israeli companies affected by BDS to pursue civil claims for damages against citizens of Israel who call for a boycott of their products. Domestic NGOs who called for boycotts have all but stopped, undermining what many in the

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83   Telephone interview, April 2014.
84   Interview, Cape Town, July 2014.

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peacebuilding community view as legitimate, non-violent activism.[85] Israel also uses counterterrorism measures to disrupt the work of Palestinian NGOs, a policy that several interviewees suggested was "deliberately" designed to "provoke moderate groups into adopting more radical positions".[86] But to the extent that all of these measures are about undermining resistance to Israel's colonial project, these initiatives are inextricably related.

Repeated attempts to pass a new law making it more difficult for NGOs in Israel to receive foreign funding is also causing significant concerns among Israeli peacebuilding organisations.[87] Access to funding and the restrictions imposed by the inclusion of counterterrorism clauses in grant agreements was also raised by US and European peacebuilding organisations, both as a measure of risk adversity on the part of donors, and as a means of disciplining dissent. One European organisation engaged in peacebuilding with activists and civil society groups in Gaza said, it was:

> very aware of the fact that this kind of project is not feasible with USAID funding. We did an event in Tunisia with an American organisation who wanted us to avoid any discussion of "the occupation" because of fears about their relationship with USAID.[88]

Although USAID refused requests for an interview, another INGO confirmed that these clauses were affecting the activities of European peacebuilding organisations:

> As a donor partner we also suffer from the clauses which USAID and Ford and Save and other mainly American and also sometimes European funds apply to contracting Palestinian organisations where they, for USAID you have to list the names of each and every person and declare that the jurisdiction in case of X will be handed over to the New York State court and I think that is very problematic... When it comes to clauses that USAID applies we have a policy in place that we will not sign such clauses and surrender jurisdiction to a state court of the US which we think is immoral.[89]

Whereas some peacebuilding organisations find themselves severely constrained, officials providing financial support for peacebuilding in the OPT are much clearer about the impact of proscription on their work. A central plank of the EU's peacebuilding strategy is its "Partnership for Peace" programme which has three priorities: (i) direct (track 1) support for the formal Middle East Peace Process, (ii) peacebuilding education intended to increase public support for the MEPP and reconciliation between the Palestinian and Israeli populations, and (iii) cross-border socioeconomic development in deprived areas aimed at "neutralising" radical Palestinian positions. The programme is open to NGOs in the OPT, Israel and Jordan, in partnership with international actors where necessary, and has an annual budget of €5 million. The proscription of Hamas and other Palestinian groups places obvious limitations on the implementation of the programme, particularly the objective of reaching "blocking communities". It also prevents the EU providing any direct financial support for initiatives to reconcile Hamas and Fatah, despite the EU openly supporting reconciliation between the two groups. But whereas the exclusion of Hamas from EU peacebuilding activities may seem inherently contradictory to the stated objective of reaching "blocking communities", EU officials simply posit this in the context of other political restrictions on their work.

> [O]bviously in the context that we're working in we have radical groups on the Palestinian side and we have radical groups on the Israeli side. We also have a very political question especially now after the EU's published guidelines about where EU funding can go in terms of Israeli territory, i.e. it cannot go beyond '67 borders. We have the issue of where do the settlers come in?... For us it's very easy: we're not allowed to fund them and we don't work with any officials, so we would never

85 Ibid.
86 Interview, The Hague, November 2013; telephone interview, May 2014.
87 Telephone interview, May 2014.
88 Telephone interview, April 2014.
89 Ibid.

work with any official settlers groups and we'd never work with any official Hamas groups. But that doesn't mean that people who support either of those causes are not involved in projects. And people who are involved in projects don't get funding, at most they'll get maybe transport costs or something like that covered but no-one gets a fee to be involved in a project as a participant.[90]

That the EU is apparently content that their projects could include members or supporters of proscribed organisations as long as no *direct* funding is involved arguably gives the EU something of a monopoly on conflict transformation efforts aimed at "blocking communities" and, more significantly, outsources at least some of the risks to their partners, who may in practice be much more concerned about inadvertently engaging members of proscribed organisations.

2.3 The secure and the securitised: outsourcing, risk management and "due diligence"

Whereas counterterrorism laws are predicated on undermining designated terrorist organisations, with respect to Palestine the impacts are just as strongly felt by international solidarity organisations and civil society networks that support the cause of Palestinian self-determination, regardless of their relationship with the proscribed groups. As noted in Chapters 2 and 3, a deeper analysis of the underlying laws suggests that this was precisely their intent.

Just as the risks of working on conflict transformation in support of Palestinian self-determination associated with terrorist proscription (material support, terrorist financing charges, reputational damage caused by Zionist interlocutors, etc.) impact different kinds of peacebuilders in different ways, so the strategies developed to mitigate the risks vary according to the nature of the work undertaken, and who is undertaking it. Nearly all of the international NGOs interviewed for this project reported having taken legal advice about the impact of terrorist proscription on their work or having had to deal with allegations about support for terrorism or extremism at the highest levels of the organisation, often at great expense. Yet European governments appear to be adding to the risks facing NGOs. For example, one representative of a European INGO interviewed for this project said that they had been asked to act as a "go-between" for a national government seeking to engage Hamas:

Which we refused for your information…. Also for our public image we have to be very careful not to be seen with these groups in public. We put corporate complicity on the agenda and if you go into discussions with these groups: that's another profession.[91]

A Palestinian civil society activist engaged with European governments also claimed to have "taken messages from European embassies to Hamas".[92]

Where does all this leave the professional mediators, whose work depends upon association and interaction with proscribed organisations? Paradoxically, they appeared much less concerned about the impact of counterterrorism laws upon their activities than other civil society organisations engaged in conflict transformation in the OPT. As explained above, this is not to say that proscription does not affect their work; on the contrary, by paralysing the MEPP and nullifying the role that western governments can and do play, the prospects for successful mediation are of course greatly diminished. But in terms of their own perceived liability for breaches of sanctions or material support regimes, the mediators themselves clearly feel less inhibited than, for example, the solidarity groups described above. As the Director of one of seven European mediation organisations that is active in Israel-OPT explained:

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90 Telephone interview, May 2014.
91   Telephone interview, April 2014.
92 Telephone interview, May 2014.

I can never perceive a situation where in [an EU member state] a prosecution takes place because you're engaged in trying to make peace. It would be inconceivable to me. So I think one would need to be risk averse to a degree that it would be impossible to work in this field if you were to give too much attention to those laws.[93]

This is not to say that there is no perception or assessment of risk, but that the risk is mitigated by the relationship that these groups have with governments and through a strategy of being transparent toward their partners without seeking publicity.[94] The interviewees were also well aware of their relatively privileged position, both in regard to other actors working under proscription regimes and US organisations faced with the threat of material support prosecutions.

We are very fortunate... I wouldn't judge any American who says 'look I can't afford the risk that', it [engagement] will financially destroy me if someone feels that they want to act on this and I have court cases and have to pay my own legal fees. It just, I think... exposes the craziness of the current international law here. Because the basic principle: you cannot resolve conflict in a durable way without an inclusive process and working at multiple levels.[95]

Whereas professional mediators are broadly content that their reputation and mandate gives them a degree of immunity when it comes to contact with Hamas, other peacebuilders are going to great lengths to ensure that they avoid contact at all costs. For example, to ensure that members of proscribed organisations do not receive EU Partnership for Peace funding, beneficiaries and partners – including the organisations, staff and Board members – are screened against *Thomspon Reuters' World-Check* and *Lexis-Nexis' Global Compliance* databases (see further Chapter 1).[96] Only in one instance have these checks led directly to a grant being refused, when the searches identified a beneficiary that included a Mayor who was a member of Hamas, though European Commission representatives also explained that sometimes people had been "flagged-up" as "a terrorism risk" by these databases but that upon further checks they decided to continue with the funding anyway.[97] Again, the possibility that the individuals in question could again be 'flagged-up' by other groups with malevolent intentions effectively outsources the risk to the project beneficiaries.

Despite the formal exclusion of proscribed organisations from EU programmes and the extent of screening to ensure that their members and supporters are excluded, no formal guidance on these issues is provided to applicants – unlike in the USA, where the Treasury has long provided guidance on "material support" to NGOs.[98] As one EU official acknowledged:

[i]t's a very interesting question: if you didn't already know [about the EU proscription regime as it applies to the OPT] how would you know that it [support for proscribed organisations] is not allowed? There's definitely a line [clause] somewhere but I imagine that it would be a very general line and not something specifically relating to a decision in the Palestinian context.[99]

The lack of guidance about how the sanctions function in practice is even more problematic when it filters down to organisations implementing projects on the ground. As one British-based INGO recalls, after being invited to a seminar by the UK Department for International Development (DFID) to discuss the impact of the 2003 decision to proscribe Hamas:

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93 Interview, London, June 2014.
94 Ibid.
95 Ibid.
96 Telephone interview, May 2014.
97 Ibid.
98 "Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities", *U.S. Department of the Treasury*, last modified December 2005, http://www.treasury.gov/press-center/press-releases/Documents/0929%20finalrevised.pdf.
99 Telephone interview, May 2014.

We were asking a lot of questions and you could see a lot of people were very nervous and steered clear about how it would practically work on the ground, and a lot of questions were coming from the people on the ground and saying how could you practically expect us to make – say, if you are buying goods in the Gaza Strip, and let's say fuel, and you know that Israel has stopped the fuel going in so you could be sure that the fuel coming in has been smuggled through the tunnels at that point in time. The only other option was to get fuel through the UN agencies. Another example was if you wanted to buy pencils you couldn't get them because the border was closed with Israel, you couldn't get them unless they had been smuggled through the tunnels coming from Egypt. So on a very practical level people were saying, if we did very basic projects, if you were doing rebuilding projects a lot of the building materials people assumed to have been smuggled through the tunnels because the amount of materials available on the market were much greater than what could be brought in from Israel so there were practical difficulties for organisations. It was just, if you like, that DIFD were trying to say 'look we are complying with – we are making sure that now you are responsible and you understand the risks and you're taking on this responsibility', which isn't very helpful when you know that you're working in an environment where, OK of course you'll not be giving money to Hamas and you will not be supporting them in any way, but how can you be expected to make sure that whoever you're buying goods from is, if you like, 'legitimate'. And that was a big challenge I think not for only for [our organisation] but for others.[100]

The interviewee also explained that DFID subsequently introduced a clause into partner agreements explaining the EU prohibition on financial support for Hamas, adding that "I wouldn't call it guidance; it just said that you had to follow the EU decision".[101] In adopting such far-reaching measures while failing to clarify their scope or intent, the impact of states who have proscribed Hamas outsourcing the inherent risks in working in the OPT to civil society organisations is amplified. To mitigate these risks, all of the IGOs and INGOs we spoke to have adopted policies of only supporting civil society organisations who have formally registered as such and been accredited in either Ramallah (by the PA) or Jerusalem (by Israel). Some INGOs have gone much further and introduced strict vetting procedures that mirror those adopted by the EU (described above). As one former INGO executive with responsibility for "due diligence" explained:

We could see in 2003 that it was necessary not just to look at the capacity of the organisations that [our organisation] works with but to also do a level of screening that previously had not been done, and that it is to look at the individuals and organisations and screen them against lists of proscribed individuals and organisations. I would say that from there it kept increasing and it continued [to do so] until I left the organisation [in 2011]… More lists were being looked at; the level of scrutiny and paperwork that is being conducted is very extensive… There was a very steady escalation and I don't think it's ever waned.[102]

Whereas in 1990s the screening of partners by INGOs had only concerned their competence and track record, the introduction of much more intrusive 'partner appraisal forms' after 9/11 had a significant active impact, both on operations and relations with partners:

No question about it. If you're going into partnership with an organisation on the ground and you want to give them money to do some programmes it seems a little bit intrusive when you go follow it up by saying can we please have the names written in the passport and ID information and so on. Because the level of scrutiny which existed previously, where you were saying to partner organisations you want the names of key officers wasn't adequate. As things escalated you became cautious and you were asking for names as spelt in the passport, you wanted names as spelt in English because obviously the screening exercise was becoming complicated, especially when you're trying to translate names from foreign

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100 Ibid.
101 Ibid.
102 Ibid.

languages. And this level of intrusive questioning that a humanitarian organisation carries out, as you can imagine, would have caused a lot of discomfort for the people we were working with, not least with our staff because our staff immediately of course understood when they were signing contracts with us that there is a clause saying that the organisation would conduct such screening. So people were thinking about the amount of intrusive screening going on and people were getting nervous about where their names would appear and where this data was held.[103]

The interviewee went on to explain that the organisation concerned had gone to great lengths to implement robust data security and protection policies. However, in the light of disclosures by Edward Snowden about the extent of government surveillance capabilities, concern that these policies could have been compromised had increased. The consequences of this "intrusive questioning" included increased distrust between funders and their partners on the ground, and INGOs being accused of being "foreign agents" by proscribed organisations themselves.[104] It is easy to see how this mistrust festers. According to documents released in July 2014 by *The Intercept*, data supplied to United States intelligence agencies during partner vetting by USAID has been used to expand the Terrorist Identities Datamart Environment (TIDE) database, which now includes records on more than one million people, 95% of them foreigners.[105] In this way, vetting is not just an administrative burden, as many NGOs report, but a practice that potentially enrols peacebuilders into the intelligence-gathering process. This was identified as a significant problem by Palestinian peacebuilders, who explained that as:

The local employee they have to bring very detailed information about the persons who are supposed to be the beneficiaries [of the project] and sometimes they use some questionnaires which are perceived badly by the people. And it happens that the Hamas government, Hamas authority in Gaza, prevented some of these NGOs to continue because when they looked at the questionnaires they found that there was some information that made them feel suspicious about it... It becomes very difficult for me or for my employee at that time if I send him to a house to look for the data - how many TV, how many house, how many rooms, how many family members, what do you work, what did you have been doing before? All these kind of information is requested by an American or British NGO in Gaza. This! You are not working for the office of statistics or an official PA institution! If such information is requested by the municipality that could be understood. But from a British or Danish organisation it is very difficult.[106]

The reasons cited by INGOs for vetting their partners are related not just to their legal obligations vis-à-vis sanctions regimes but the need to satisfy external auditors and banks, who are reportedly demanding more and more information about the nature and purpose of financial transfers to satisfy their own extensive "due diligence" and compliance procedures.[107] Many of the organisations that we spoke to reported problems in executing financial transactions to entities registered in both the OPT and Israel. As one Israeli peacebuilding organisation explained:

Four or five months ago we got a phone call from the [Israeli] bank saying that we'd got this big donation that we knew we were going to get from a [European] foundation, 'what is it for?'. So our Treasurer said it's for [redacted] and they said 'OK, we need a copy of the proposal'. We said we'd get back to them and then asked for them to put their request in writing and they were like "OK, we're just going to transfer the money now but next time we're going to need the proposal... We called a few other NGOs to see if that's been happening to them and at least one other NGO got the same kind of phone calls. I don't know where that's going, it's pretty recent.[108]

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103 Ibid.
104 Ibid.
105 "Blacklisted: The Secret Government Rulebook For Labeling You a Terrorist," *The Intercept*, July 23, 2014, https://firstlook.org/the-intercept/2014/07/23/blacklisted/.
106 Telephone interview, May 2014.
107 Ben Hayes, "How International Rules on Countering the Financing of Terrorism Impact Civil Society," in *State of Civil Society Report 2013: Creating an enabling environment*, eds. Andrew Firmin, Ciana-Marie Pegus, and Brian Tomlinson (Johannesburg: CIVICUS, 2013).
108 Interview, Cape Town, July 2014.

The risk management strategies adopted by both NGOs and banks show the extent to which both have been impacted by proscription regimes and to a certain extent drafted into the apparatus of the surveillance of conflict zones. Outsourcing liability for countering terrorist financing to these institutions has had the effect not just of 'securitising aid' and 'shrinking space', as is often suggested, but transforming key economic and socio-political institutions into security actors in their own right. Within this security and peacebuilding nexus, banks are forced to police their customers and grant-makers are forced to police their partners and beneficiaries.[109] Just as proscription has excluded Hamas from the formal MEPP, these practices mean its supporters and associates and even ex-members face exclusion from broader conflict transformation efforts, with the result that the prospects of success are surely undermined or greatly diminished.

2.4   Indiscipline and creativity: formal compliance and informal practice

Palestinian and Israeli civil society organisations – seen by many western donors as the key vehicle for long term, sustainable peacebuilding – face growing difficulties then in both accessing and receiving international funds because donor-partner relations have been transformed by the proscription regime. "Some of the most important [Palestinian] NGOs who are really active are not able to get international funding" while "others lie about not working with Hamas to keep their funding".[110] Between these two extremes are a range of informal practices through which peacebuilders navigate the restrictions described above. Prime among them is concealing the truth:

> We [our European peacebuilding project] are able to enter Gaza under the pretext of being a consultant... That's very different from the work we are doing now.[111]

Another European peacebuilding organisation, which organises visits to the West Bank via Israel for members of parliament and private citizens, including Palestinian solidarity activists, has adopted a similar strategy, while a US-based peacebuilding organisation explained how it has been forced to circumnavigate the rigid funding restrictions imposed upon US donors:

> We've been working with some grassroots groups – so not registered – just to fundraise for legal aid, basic legal aid, for the different protests going on... [W]e're trying to get funding for both the legal aid and bails, because bail is now one of the main issues [following mass arrests by Israel]. The thing is that one of our big US donors – a donor that would like to be a donor [to this particular project] – is a big US Foundation, so their legal team literally said that we can't be funding the legal aid especially not bail for someone who is not only a Hamas member but [a member of] like half the Palestinian parties [which are proscribed], so we would either need you to vet everyone or [redacted].[112]

A creative solution, well within the strictures of the law, was found. Similarly, a Palestinian peacebuilder who was formerly employed by a humanitarian organisation working in Gaza suggested that it would have been impossible to fulfil their mandate and implement specific projects without flouting the restrictions on working with Hamas:

> I never applied to USAID but I was working before with an American NGO, I was the head of office for nine years before I resigned. But it was not easy for us as a relief organisation at that time to work with Gaza because we need – most of our effort was focusing to separate between the people which create a bad image for us. Frankly speaking I did not obey that.

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109 On USAID requirements see Counterterrorism and Humanitarian Engagement Project, "Partner Vetting in Humanitarian Assistance: An Overview of Pilot USAID and State Department Programs," *Research and Policy Paper*, (Cambridge, Massachusetts: Harvard Law School, November 2013).
On similar requirements in other jurisdictions see Sara Pantuliano, Kate Mackintosh and Samir Elhawary with Victoria Metcalfe, "Counter-terrorism and humanitarian action: Tensions, impact and ways forward", *Humanitarian Policy Group Policy Brief 43* (London: Overseas Development Institute, October 2011).

110 Telephone interview, May 2014.

111 Telephone interview, March 2014.

112 Interview, Cape Town, July 2014.

I lied in my post in Jerusalem. I work with the municipality. I worked with NGOs who are affiliated with Hamas because they are my people. For [my projects] I need the municipality to give me the land. And this [project] is to benefit the people, the children, the women, the families. But you need to have the land from the municipality. So if I would have obeyed I would never have [implemented my projects].[113]

Even EU officials based in the OPT acknowledge having found creative solutions to the practical problems faced by NGOs and the restrictions imposed by proscription and the 'no contact' policy:

We contact regularly NGOs in Gaza, either NGOs that we finance or in fact other NGOs who may not be financed by us but whom we want to contact in terms of more general contacts with civil society in Palestine. It [the EU proscription of Hamas] doesn't have any impact on our contact with civil society organisations which is not to say that down the line these organisations don't have problems with the *de facto* authorities, because in many cases they do. And in some cases because they are working with us... there have been some issues which have come up, over confiscation of equipment, low level harassment if you like, the tax authorities from Gaza, *de facto* authorities, being particularly attentive to one or another NGO, removing their computers, they usually manage to get them back.[114]

Another EU official explained that following the imposition of taxes on NGOs by Hamas – which they are logically unable to pay without breaching the material support provisions – it was the European Commission who reached out to some of the affected NGOs and, working through the Swiss government and UNRWA, neither of which are bound by the no contact policy, made representations to Hamas in order to resolve the situation.[115] These are just some of the ways that terrorist proscription regimes, rather than simply preventing the flow of funds to designated organisations, have a massive impact on the perfectly legitimate activities of a whole range of actors concerned with conflict transformation in the OPT.

Conclusion

This chapter has sought to understand the legal, political and operational constraints on actors engaged in peacebuilding and conflict resolution in Israel-Palestine imposed by terrorist proscription regimes and other inter-related counterterrorism and security policies. While only canvassing a small group of relevant actors (albeit from a fairly broad spectrum of the peacebuilding community) and merely scratching the surface of the many issues raised, the chapter has identified various, differentiated impacts on both peacebuilding itself and specific actors engaged in that endeavour. These dynamics frame a question at the heart of this report: has conflict transformation simply been affected by counterterrorism laws, or have those laws gone as far to reshape conflict transformation itself? Five thematic conclusions suggest that in the case of the OPT, at least, the latter is true.

First, it is clear that terrorist proscription and the "war on terror" more broadly *has* had a paradigm-shifting impact on the landscape in which peacebuilding takes place. Designating one side of a long-standing armed conflict as "terrorist" has very real and pronounced effects. In this case it denies Palestinians many if not all of the protections of international humanitarian law, which should apply to their armed conflict with Israel, and excludes Hamas and other important actors from the formal negotiations pursued under the Middle East Peace Process. It also serves to legitimise flagrant breaches of international law and Palestinian human rights by Israeli forces in the name of counterterrorism. As one peacebuilder interviewed for this project suggested, at a

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113 Telephone interview, May 2014.
114 Telephone interview, April 2014.
115 Ibid.

very basic level terrorist proscription "dumbs things down to the point that progress is impossible".[116] There is little novelty in these findings; they reflect long-standing concerns about the policy and practice of terrorist proscription and appear to be reasonably well understood by peacebuilders.

Second and more novel is the idea that terrorist proscription in the OPT has transformed those states who have proscribed Hamas and others into proxies for Israel's security. It is a common misconception that proscription is simply designed to prohibit financial or material support for banned groups. Rather, it is at the heart of a counterterrorist paradigm – built on classic counterinsurgency strategy – which seeks to criminalise association and undermine public support for armed resistance, which in the OPT manifests itself as a concerted attempt to disrupt and punish those whose activities or beliefs do not correspond to the wishes of Israel and the Quartet. That is for Palestinian representation and resistance to take place exclusively under the auspices of Fatah and the Palestinian Authority.

Third, the way that association with proscribed organisations is policed, both by Israel and its international partners, affects peacebuilders of every kind, from those with a presence on the ground in the OPT to Palestinian solidarity groups trying to transform the conflict from afar. These impacts are part of a complex, multi-jurisdictional set of international restrictions which have together extended the diplomatic "no-contact" policy into a much broader exclusionary regime within which international actors operating in the OPT must tread very carefully. As many reported, they have to watch everything they say, everything they do and everyone they work with – for fear of breaking the law, attracting the attention of Zionist interlocutors armed with allegations of support for terrorism or anti-Israel bias, or both. The psychological impact of these socio-legal relations should not be underestimated.

Fourth, the subordination of conflict transformation with the aim of delegitimising Hamas and other banned groups has transformed peacebuilding programmes and securitised many of the most prominent actors in the OPT. That the fear of counterterrorism laws produces risk aversion, self-censorship and withdrawal from conflict zones is increasingly well-documented. To these concerns we must add the pernicious impact of risk management, due diligence and the intrusive vetting of partners, which in this case appears to be strongly enhancing distrust between organisations with a mandate to help and support Palestine and the very people that they are supposed to be supporting.

Finally, while it is important to stress that not all of these impacts are experienced equally (different actors are impacted, securitised or marginalised in different ways), it is apparent that 'civil society' – itself a contested and amorphous concept – is bearing the brunt of these measures, both within Palestine and Israel, and among their international partners. Given the crisis of leadership in the OPT, caused in no small part by the "divide-and-rule" tactics of Israel and the Quartet, this is significant because many countries and donors are pinning their hopes on the strengthening of a Palestinian civil society that can somehow overcome the factional, militant approach that dominates their politics. This is reflected in the broader discourse on the creation of an "enabling environment" for civil society by liberal peace- and statebuilding actors, but begs the obvious question as to how this can possibly succeed when such a *disabling* environment has already been instituted by the international community's counterterrorism efforts? It is in this light that the indiscipline and creativity demonstrated by some peacebuilders – to stick to their mandates and principles by circumventing the draconian restrictions imposed by counterterrorism – may offer a glimmer of hope. But only by transforming resistance to the intent and effect of these policies into a much broader challenge to counter-productive counterterrorism paradigms can such hopes bear fruit.

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116 Interview, London, June 2014.

Addendum (January 2015)

On 17 December 2014 the European Union's Court of Justice (ECJ) annulled the Council of the EU's Decision to include Hamas on the EU terrorist list (see section 1.3 of Chapter 4, above, for background to the EU's Decision). The Court did not take a position on the substantive issue of whether Hamas is or is not a "terrorist organisation" in accordance with EU law. Rather, it struck down the Council's Decision on the grounds that the EU had not followed the correct procedure for including and maintaining such groups on its list. This stipulates that the EU must first rely on the decision of a competent national authority classifying an organisation as terrorist, and secondly that such decisions must be reviewed by the EU as time passes to ensure that they are still relevant.

The EU's terrorist list is re-adopted annually. Although the EU Council refers to the UK's 2001 decision to proscribe the military wing of Hamas, it has also justified more recent decisions to maintain Hamas on its terrorist list (those taken since 2011) on information which it obtained from the press and the internet. The Court found therefore that:

> instead of taking as the factual basis of its assessment decisions adopted by competent authorities which had taken precise facts into consideration and acted on the basis of those facts, and then ascertaining that those facts are indeed 'terrorist acts' and that the group concerned is indeed 'a group', within the meaning of the definitions in Common Position 2001/931, before eventually deciding, on that basis and in the exercise of its broad discretion, to adopt a decision at EU level, the Council, in the statements of reasons for its measures of July 2011 to July 2014, did the opposite (paragraph 114, Court judgment).

The Court maintained the effects of the annulled measures (the asset-freeze etc.) for three months, or until the Court rules on any subsequent appeal.

Although the ECJ's ruling was presented in the mainstream media as a "technicality" that EU governments could remedy by simply adopting a fresh Decision declaring Hamas a "terrorist organisation", it actually poses a significant challenge to the EU's counter-terrorism policy and its current position on the OPT. This is primarily because the EU Council actively extended its 2001 designation of "'Hamas-Izz al-Din al-Qassem (terrorist wing of Hamas)" to the entire organisation in 2003, when the listing became "Hamas (including Hamas-Izz al-Din al-Qassem)". As noted above, this Decision was very controversial at the time and resisted by several European governments and many EU officials who wished so see the distinction between Hamas' military and political wings maintained, and who were concerned moreover with the adverse impact the decision would have on the EU's conflict resolution capacity.

Whereas the EU Council referred to the USA's 2012 Decision to outlaw Hamas in its entirety, corresponding EU member state decisions are rather thin on the ground. Moreover, at a time when a minority of EU member states, led by Sweden, have chosen to recognise the state of Palestine, and when the EU is formally backing reconciliation between Fatah and Hamas in the hope that a unity government may be formed, a unanimous EU Decision declaring the political wing of Hamas a terrorist organisation may not be the formality that many observers have implied. It therefore came as little surprise that on 19 January 2015, the EU Council meeting in Brussels confirmed that it would appeal the ECJ's ruling. Given the clarity of the Court's judgment, the Council's appeal is clearly designed to defer any substantive political discussions, not to defend a Decision in which it has full confidence.

For documentation see Case T-400/10, Hamas v Council, available at: http://curia.europa.eu/juris/liste.jsf?language=en&num=T-400/10.

Chapter 5

Listing the PKK, Transforming Peacebuilding

Introduction

Recent years have renewed tentative steps towards a political solution to the 30 year armed conflict over the 'Kurdish Question' for Kurdish rights and self-determination within the Turkish state. Both the Kurdistan Workers' Party (PKK) and the ruling government, the Justice and Development Party (AKP) now publicly commit to developing a process towards negotiations for peace. The PKK has engaged in a unilateral ceasefire since March 2013. There is not yet, however, a sustainable 'peace process'. Many of the political conditions that might support transformation of the conflict are absent. In spite of sporadic bilateral talks since 1991, the PKK are not formally recognised by Turkey as a party to an armed conflict with political status.

Rather, Turkey and most western states ban the PKK as a terrorist organisation. Unsatisfactory progress made towards granting constitutional rights for the Kurds, and sporadic PKK and Turkish military encounters, have contributed to the impasse. In particular, Turkey has required that the PKK demilitarise in advance of finalising a political agreement, while the PKK insist on political assurances before giving up arms. April 2014 saw an upsurge in state militarisation with the continued construction of military bases in the south-east Kurdish regions.[1] Rapidly shifting dynamics in the entire region could radically alter the course of the conflict. Since September 2014 the PKK and its Syrian counterpart, the Democratic Union Party (PYD) have been defending the Kurdish town of Kobane in the autonomous cantons of Rojava (Northern Syria) against attacks by the Islamic State (ISIS), with United States air strikes providing cover from 14 October. Peace negotiations are in flux, with the Turkish military's killing of 40 Kurds who were protesting Turkey's then refusal to open its borders to Syrian refugees fleeing ISIS. Amid allegations that Turkey had indirectly supported ISIS attacks against Kobane, the PKK warned that it would end its ceasefire with Turkey. The unpredictable reshaping of power over the Kurdish regions has changed the stakes considerably for the PKK and Turkey, and potentially for how the west understands its ban of the PKK.

This chapter examines the impacts of listing the PKK as a terrorist organisation on peacebuilding through two key arguments. First, we explain how global listing instruments have further entrenched the conflict. As with previous chapters, we ground our analysis of listing in the broader context of preemptive security, counterinsurgency and warfare. Legal sanctions against terrorist organisations are largely thought of as distinct from, and in opposition to, military action. We explain how listing at the global and domestic levels, complements and extends forms of warfare against the PKK. The listing of the PKK amplifies

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1   Thousands of locals demonstrated in fear that the Turkish military was preparing for a large-scale operation. "Thousands Protest at Turkish Military Build-UP in Hakkari," *Firat News*, last updated April 8, 2014, http://kurdistantribune.com/2014/thousands-protest-at-turkish-military-buildup-hakkari/.

political barriers to addressing the root causes and consequences of the conflict.

The second argument of this chapter is that listing the PKK functions as a technique of security that limits inclusive conflict transformation, primarily by excluding civil society from the peace process. Listing has significantly impacted on the key peacebuilding actors in the conflict; Kurdish civil society, Kurdish political parties and negotiators, as well as Kurds in the diaspora are targeted through listing for criminalisation and disruption. Each conflict in this study sees distinct actors conducting diverse forms of 'peacebuilding', with differential impacts and effects. The Turkey case study demonstrates how listing enables the political claims of civil society to be reshaped as security threats.

There are a very small number of INGOs publically engaged in conflict transformation work in Turkey, unlike Somalia and Palestine. This is perhaps a reflection of the broader lack of visibility of the political causes of the conflict internationally. There are a range of complex geopolitical factors that have shaped the invisibility of the Kurds. Yet misrecognition of the conflict as a terrorist insurgency to be militarily defeated, and marginalisation of Kurdish political claims to self-determination, both in Turkey and by the international community, are relevant - if not sufficient - explanations.

Work supporting the political resolution of the Kurdish conflict broadly includes the following activities:

- public research and advocacy into the causes and dynamics of the conflict (to support the political process) and into human rights violations (including those triggered by counterterrorism laws and political repression against the Kurds);

- grassroots international campaigns supporting Kurdish civil society in Turkey (organised for example, around human rights violations; the delisting of the PKK; the release of Abdullah Öcalan, the leader of the PKK imprisoned on the island of Imrali since 1991 and the interlocutor for negotiations; legal monitoring and advocacy on terrorist prosecutions in Turkey);

- structured reconciliation dialogues between Kurdish and Turkish civil society actors in Turkey, and in the diaspora;

- IHL liaison with parties to the conflict;

- private third party mediation of the conflict.

This chapter by no means captures the entirety of activities represented above. We draw on 14 in-depth semi-structured interviews with individuals and one focus group of six individuals (20 participants in total). Nine respondents represented five different INGOs working in conflict transformation and human rights work. Interviews were conducted with two Kurdish negotiators in Europe subject to individual sanctions; with six individuals engaged in Kurdish civil society campaign work in the diaspora; and with three personnel within institutions of the EU. This chapter also draws on qualitative research conducted by one of the authors with Kurds in the diaspora (UK, Australia) between 2009-2011.

The chapter begins with a brief background to the conflict before outlining the legal regimes listing the PKK in section 2. It then turns to how listing the PKK has interfered with key norms of conflict transformation in section 3. Section 4 considers how 'doing justice work with peace work' offers opportunities for how INGOs might undo the impacts of listing on conflict resolution. We summarise our key findings in the conclusion.

1.   Background to the conflict

The political causes of the conflict remains the unresolved Kurdish Question: "At its roots the Kurdish conflict is a political disagreement concerning the governance of the Kurdish region and its relationship to central power".[2] Today, Kurdish self-determination is expressed as a constitutional claim for recognition of Kurdish identity and culture and attendant rights, and regional autonomy within the Turkish state. The effects of the conflict have been disproportionately borne by the Kurds. Over 3 million people have been displaced, thousands died or experienced violence, torture, intimidation and the disappearance of relatives and psycho-social and economic harm.

The partition of Kurdish lands after the breakup of the Ottoman Empire resulted in the formation of the states of Turkey, Iran, Iraq and Syria. European powers ensured that the original settlement (the 1920 Treaty of Sevres) which sought to grant an independent state to the Kurds in the south-east of the country was overturned (by the 1923 Treaty of Lausanne). Founded on an exclusionary constitution which proclaimed a single Turkish identity and put the military at the centre of state power, the Turkish republic relied on the violent denial of the existence of Kurdish and other ethnic identities.[3] Consequently, expressions of ethnic identity were understood as a security threat to the Turkish nation.[4] As Yildiz and Breau put it: "Turkish state policy has been based on the denial of the existence of the Kurds; therefore the state has narrowly viewed the Kurdish problem as a security problem disregarding its broader social and legal foundations".[5]

After Kurdish rebellions against state repression in 1925 and 1930, state sanctioned eradication and assimilation escalated into a counterinsurgency campaign directed at the Kurdish population as a whole. The imposition of martial law and a large military presence in the south-east, saw the destruction of Kurdish villages and the wholesale displacement of their inhabitants, massacres, and wide spread disappearances. The ban on all use of the Kurdish language and cultural expression in 1924 ensured decades of formal programs of assimilation, accomplishing the systematic exclusion of Kurdish people from education and the economic underdevelopment and political isolation of the Kurdish south-east regions which continues today.[6] Consistent with counterinsurgency doctrine, a diverse range of laws aimed to disperse the Kurdish population in order to assimilate Kurdish identity. These early laws included the division of Turkey into three zones in 1934 and enabled the state to compulsorily transfer Kurdish land for the official purpose of assimilation.[7]

A series of military coups in 1960, 1971 and 1980 escalated violence and repression against diverse forms of Kurdish dissent and identity. The earliest prosecution of individuals for Kurdish separatism related to 'organisations' were for charges of carrying out communist propaganda for the Workers Party of Turkey, in 1971. This strategy was followed by the closure of leftist and Kurdish political parties (a strategy which continues today), the banning of union meetings and the detention and torture of activists and trade unionists.[8] Following the 1980 military coup, the suspension of Parliament and the constitution, martial law was extended to the entire country, ruled by the armed forces for three years in the name of national unity. Kurds were a particular target for state repression during this period, subjected to arbitrary arrests, disappearances and the militarisation of everyday life. In 1983 the use of the word 'Kurdish' was banned as was use of the Kurdish language and giving children Kurdish names.[9]

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2   Kerim Yildiz and Susan Breau, *The Kurdish Conflict: International Humanitarian Law and Post-conflict Mechanisms* (New York: Routledge, 2010), 251.

3   Desmond Fernandes, *The Armenian, Assyrian, Aramean, Syriac, Kurdish, Greek, Greek Cypriot and "Other" Genocides and the Politics of Denialism* (Stockholm: Apec, 2010).

4   Umit Cizre, "Turkeys Kurdish Problem: Borders Identity and Hegemony," in *Rightsizing the State*, ed. B. O'Leary et al. (Oxford: Oxford University Press, 2001); Nathalie Tocci and Alper Kaliber, *Conflict Society and Transformation of Turkey's Kurdish Question*, SHUR Working Paper Series, May 2008.

5   Yildiz and Breau, *The Kurdish Conflict*, 12.

6   Ahmet Kahraman, *Uprising, Suppression, Retribution: The Kurdish Struggle in Turkey in the Twentieth Century* (London: Paravana, 2007); Michael Gunter, *The Kurds Ascending: The Evolving Solution to the Kurdish Problem in Iraq and Turkey* (New York: Palgrave MacMillan, 2008).

7   Yildiz and Breau, *The Kurdish Conflict*, 11.

8   Ibid.

9   Ibid.

Formed in 1978, the Kurdistan Workers' Party's conflict with the Turkish army began in 1984 in response to the escalated persecution of the Kurds. From 1987 until 2002, emergency rule was established over ten provinces of the southeast. The use of repressive penal and counterterrorism laws gave rise to a dual legal system restricting the civil rights and freedoms of civilian Kurds alongside military warfare. During this period lengthy imprisonments were given for nationalist Kurds and those imputed as PKK supporters in jails notorious for the routine use of torture, and in some instances, death.[10] Throughout the course of the conflict, repressive laws formed part of a counterinsurgency strategy that targeted the Kurdish population as a whole.

1.1 The PKK and the Kurdish movement

The question of the nature of the PKK's use of violence, and hence, its characterisation as terrorist, has been highly contested. The PKK maintain a military wing, the People's Defence Force (the HPG), based in the Qandil mountains in Northern Iraq, numbered at between 5 000-8000 militants. The PKK are primarily engaged militarily with the Turkish army but admit to killing village guards and civilians in charge of assimilation programs during the brutal height of the conflict in 1990s. The PKK however deny the sporadic bomb and suicide attacks against civilians attributed to it but claimed by the Kurdish Freedom Falcons (TAK) between 2004 and 2011. The PKK maintain TAK is a separate group not under its control, while Turkey and western states credit TAK as the PKK's proxy and proscribe it as one the PKK's aliases.[11] Some of the attacks ascribed to the PKK as reasons for its listing as a terrorist organisation in Europe and elsewhere, have since been found to be committed by either the Turkish military or paramilitary organisations.[12]

A secular organisation, the PKK have Marxist-Leninist origins, with an anti-imperialist and socially progressive political program which places emphasis on democratisation of Turkish society and mobilising young people, women and socially disadvantaged and minority peoples to this end.[13] The PKK has been long criticised for its authoritarian tendencies and questionable violent tactics at the height of the conflict, also reflected in the self-critique of Öcalan in his prison writings.[14] By 1991 Öcalan abandoned both Leninism and an independent Kurdish state and since July 2011 has called for 'democratic confederalism and democratic autonomy';[15] a devolved form of participatory, grassroots and regional government within the Turkish state (autonomy), and for recognition of Kurdish identity and other rights in the Turkish constitution (confederalism). Based on libertarian socialist and anarchist philosophies of communalism, democratic autonomy is focused not with traditional state power but with assembly based governance and broad-based societal participation in decision making: the "autonomous capacities of people, a more direct, less representative form of political structure."[16] The PKK proposes reorganisation of Turkey's 81 provinces into 25-30 regions each with their own parliaments, which would decide on all matters except for defence, foreign affairs and finance. The objective is to increase regional control over national expenditure. Municipal governments currently have control of around 10% of the national budget. Decentralisation aims to redistribute the socio-economic inequalities between wealthy metropolitan regions and the under-developed Kurdish south-east.

The PKK is a multidimensional movement comprised of several institutions within a broad based political movement, as well as its own party structure, and a larger "party-complex" encompassing PJAK (Iran), Iraq (PCDK) and Syria (PYD) and their

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10 Kahraman, *Uprising*; Gunter, *The Kurds Ascending*.

11 Yildiz and Breau, *The Kurdish Conflict.*

12 For example, a bombing killing 10 civilians on September 12, 2006 attributed to the PKK was later found by the Courts to have been committed by the paramilitary group the Turkish Revenge Brigades, several members of whom were convicted. Tim Jacoby, "Political Violence, the War on Terror and the Turkish State," *Critical Studies on Terrorism,* vol 3, no. 1 (2010).

13 Ana Villellas, "The Kurds in the Spotlight Local and Regional Challenges", Norwegian Peace Building Resource Centre, Report, April 2014.

14 Abdullah Öcalan, *Prison Writings III: The Road Map to Negotiations* (Cologne: International Initiative Freedom for Öcalan—Peace in Kurdistan, 2012)

15 Abdullah Öcalan, *Democratic Confederalism* (Cologne: Transmedia Publishing Ltd. International Initiative Edition, 2011), http://www.free-ocalan.org/wp-content/uploads/2012/09/Ocalan-Democratic-Confederalism.pdf.

16 Joost Jongerden and Ahmet Hamdi Akkaya, "Democratic Confederalism as a Kurdish Spring: The PKK and the Quest for Radical Democracy" in *The Kurdish Spring*, edited by Mohammed M.A. Ahmed, Michael M. Gunter, 2013, 171.

corresponding guerrilla forces.[17] The PKK maintains a political wing, or legislative assembly (the Kongra Gel, 'the Kurdistan People's Congress') which represents a larger political formation, the KCK (Kurdistan Communities Union). The KCK is a network of people's councils at the village, city and regional levels, and an important component of the PKK's project of radical democracy through self-organisation.[18]

More broadly, the PKK encompasses 'the Kurdish movement', both within Turkey and the Kurdish diaspora. For example, the Kurdistan National Congress (KNK) is a pan-Kurdistan coalition of organisations across the Middle East, Europe, North America and Australia, formed by exiled Kurdish politicians, lawyers, and activists. The KNK lobbies national governments, the EU, the UN, as well as human rights and peace building NGOs to bring attention to political issues and human rights violations in Kurdistan in order to promote a political solution to the Kurdish Question.[19] At the local domestic level, many Kurdish community organisations across Europe, Australia and North America, engage in service provision for migrant Kurds, such as resettlement services and language classes. Critically, community centres work to maintain Kurdish cultural identity and often, political engagement on the resolution of the Kurdish Question.

The PKK are not simply a non-state armed actor with a 'political wing' but embody a broader social movement. For many Kurds, their political subjectivity is conjoined with the PKK, even for those who disagree with its tactics, or who have never engaged with the organisation. As such, the PKK are understood to represent the political aspirations of a large number of Kurds in Turkey and in the diaspora. The emergence of the PKK is largely understood as the last opportunity for Kurds' collective survival against state repression and genocidal practices aimed at eradicating Kurdish cultural identity. The PKK thus "reinforces the idea of ethnic membership that bonds diaspora Kurds to the larger cause of Kurdish political social and cultural rights".[20] Consequently, the relationship between the PKK and the Kurdish movement has great importance for supporting prospects for a sustainable political settlement. The most directly observable effects of terrorist listing on peacebuilding has been the targeting of Kurdish civil society in Turkey and the diaspora, understood as a source of legitimacy for the PKK, as this chapter will explain. Recognition of the broader Kurdish movement as actors in the peace process is an important step in uncoupling peace from security objectives and strengthening conflict transformation.[21]

The logic of the conflict (and of its resolution) is shaped by the highly securitised nature of the Turkish state, in spite of promising - yet limited efforts in recognising - identity and governance rights for the Kurds over the last five years. These significant developments in managing (rather than transforming) the conflict do not however represent a substantial break with the counterinsurgency logic of the conflict.[22] As we explain, a key barrier to politically transforming the conflict has been Turkey's continued targeting of Kurdish populations, enabled through the ban of the PKK.

2. The listing of the PKK: global coercive instruments

Turkey's counterterrorism laws have been an integral part of its contemporary counterinsurgency against the PKK. However, each of the regional listing regimes discussed below have had important inter-relationships and have shaped the kind of conflict resolution possible.

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17 Ibid, 165-166.

18 Ibid, 166.

19 Kurdistan National Congress, "Kongreya Neteweyî ya Kurdistanê," http://www.kongrakurdistan.org/.

20 Vera Eccarius-Kelly, "Political Movements and Leverage Points: Kurdish Activism in the European Diaspora," *Journal of Muslim Minority Affairs* 22, no. 1 (2002): 94.

21 See section 4 of this chapter.

22 See discussion in chapter 2. Others see these events as significant breaks with the prior military logic. See Kerim Yildiz, "Turkey's Kurdish Conflict: Pathways to Progress," *Insight Turkey* 14, no. 4 (2012): 154.

2.1   Turkey

Turkey's terrorism laws and penal code have profoundly shaped the state's contemporary 'lawfare' response to the conflict – that is, law has been deployed as a tool of counterinsurgency. Alongside the Penal Code, terrorism laws have long been used during the course of the conflict alongside military repressions, to repress association and non-violent forms of political. Very few prosecutions for 'terrorism' have concerned actions resulting in the loss of life or injury and have instead systematically treated expressions of Kurdish identity as manifestations of the PKK.[23] The use of terrorist organisation prosecutions to repress and depoliticise Kurdish civil society has been a distinctive and systematic feature of the conflict, in recent years (section 3.4).

Both the political and armed wings of the PKK are banned as a terrorist organisation in Turkey under Article 5 of the *Anti-Terror Act 1991*. Key subsidiary offences which flow from being a terrorist organisation include aiding and abetting, providing assistance, and making propaganda for a terrorist organisation. In 2006, the UN Special Rapporteur described the lack of transparency in relation to terrorist organisation designation in Turkey:

> Despite repeated inquiries, the procedure, the criteria, the responsible bodies, and the consequences of being categorized as a terrorist organization remained unclear. Many officials indicated that it is 'common knowledge' which groups are terrorist and which are not. A number of interlocutors referred to a list of terrorist organizations, claiming that its authors were the Ministry of the Interior, the National Intelligence Service, the National Security Council and the Jandarma. However, none of the above bodies confirmed that such a list existed and judicial authorities did underline that such a listing would not be binding in a court of law.[24]

The Turkish State Security Courts (now the Serious Felony Court) reached several verdicts declaring the PKK to be a terrorist organisation.[25] However in a large number of cases before the European Court of Human Rights (ECtHR) the State Security Courts were found not to be an impartial and independent tribunal because they used military judges, breaching the separation of powers, in contravention of Article 6 of the European Convention on Human Rights. Whilst abolished in 2005, many of the military judges of the Security Courts continued in the new 'civilian' Serious Felony Court.[26] Legislative changes in 2014 have now placed Turkish courts almost exclusively under the control of the executive, amplifying concerns about the independence of the courts in relation to terrorism prosecutions. Influential US think tank, the Bipartisan Policy Centre, describe the 2014 reforms as part of broader structural changes, "more dangerous to Turkish democracy than the abuses of power in which [Turkey's Prime Minister] Erdogan has engaged thus far", that have "put Turkey on the road to authoritarianism".[27]

Executive control of terrorist organisation prosecutions is enabled through the definition of terrorism itself in the *Anti-Terror Act*, as it is defined with regard to an organisation's aims, namely:

> ...the aim of changing the characteristics of the Republic as specified in the Constitution, its political, legal, social, secular and economic system, damaging the indivisible unity of the State with its territory and nation, endangering the existence of the Turkish State and Republic, weakening or destroying or seizing the authority of the State, eliminating fundamen

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23 For a detailed analysis see Human Rights Watch, *Protesting as a Terrorist Offence: The Arbitrary Use of Terrorism Laws to Prosecute and Incarcerate Demonstrators in Turkey*, (New York: Human Rights Watch, 2010).

24 Martin Scheinin, Special Rapporteur on the promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, *Report: Mission to Turkey*, Human Rights Council, U.N. Doc. A/HRC/4/26/Add.2 (November 16, 2006).

25 These verdicts arose from prosecutions of individuals for terrorism from the early 1990s through to 2004.

26 Scheinin, *Mission to Turkey*, para. 24.

27 Bipartisan Policy Centre, *Legislating Autocracy? Recent Legal Developments in Turkey*, National Security Program, Foreign Policy Project (Washington, DC: Bipartisan Policy Centre, 2014).

tal rights and freedoms, or damaging the internal and external security of the State, public order or general health by means of pressure, force and violence, terror, intimidation, oppression.[28]

The definition of terrorism does not require any act of violence to have been committed in pursuing these aims,[29] like most definitions of terrorism adopted by western states since 9/11. In Article 2, the *Anti-Terror Act* stipulates that a terrorist offender is: "any member of an organization, founded to attain the aims defined in article 1, who commits a crime in furtherance of these aims… or any member of such an organization, even if he does not commit such a crime" (para. 1) and also persons who commit (any) crime in the name of such an organization, without being a member (para. 2). The Special Rapporteur concluded that: "Organizations are linked to terrorism because of their aims, and mere membership in such an organization makes a person a 'terrorist offender'".[30] Kurds are routinely prosecuted under Turkish Penal Code Articles 220/6 and 314/2-3 ("committing a crime on behalf of the PKK" and "membership in the PKK") where there is no evidence of preparing for violent activities.[31]

In July 2006, the Turkish parliament passed a series of amendments expanding the breadth of the *Anti-Terror Act* 1991.[32] This included amendment to Article 7/2 concerning the offence of "making propaganda for a terrorist organization," so it could be applied more directly to demonstrators and others committing an offense by means of a speech, in writing or over a broadcast. This provision is widely used in Turkey to restrict nonviolent expression of journalists, authors, academics, lawyers, as well as political organising on the Kurdish issue.[33] Human Rights Watch document the arbitrary and extensive use of terrorism laws over the past 6 years against Kurdish political activists as reflective of a broader "authoritarian drift".[34] Section 3.4 outlines how counterterrorism repressions targeting Kurdish civil society adversely impact on the peace process.

2.2 The international ban of the PKK

The PKK was first listed by the United States as a Foreign Terrorist Organization (FTO) in 1997, and as a Specially Designated Global Terrorist in 2001 pursuant to Executive Order 13224. The *Anti-Terrorism Act* of 2011 makes it a criminal offence to provide material support to the PKK as a listed FTO. The US material support laws apply extraterritorially, meaning that non-US organisations may be criminally liable for support provided to the PKK outside the US. The PKK was listed as a terrorist organisation by the UK on 29 March 2001 pursuant to the *UK Terrorism Act* 2000. No prosecutions have been finalised in either the UK or US in relation to the listing of the PKK. The PKK was first listed by the Council of the European Union on 2 May 2002[35] widely understood to be at Turkey's request[36] and remain on the list. The effect of the EU listing of the PKK is to freeze its funds and prohibit the direct or indirect provision of financial support. There have been several prosecutions of Kurds for financing and supporting the PKK, including in Germany, France, Belgium, Denmark and Italy.

Additionally, the PKK were listed on 30 May 2008 by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) under the *US Foreign Narcotics Kingpin Designation Act* ('Kingpin Act') as significant foreign narcotics traffickers. The use of this regime to list a number of Kurdish leaders directly engaged in peace talks, is discussed at 3.2. Whilst the Financial Action Task Force (FATF) is not a listing mechanism,[37] it fosters a highly contested approach to criminalisation that calibrates

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28 Anti-Terror Act (Act No. 3713/1991) (Turkey), Article. 1 (1)
29 Scheinin, *Mission to Turkey*, 2006.
30 Ibid.
31 Human Rights Watch, *Protesting as a Terrorist Offence* (New York: Human Rights Watch) 2010, 20-28.
32 Act to Fight Terrorism (Anti-Terror Act), 1991.
33 Human Rights Watch, *Protesting as a Terrorist Offence*, 2010.
34 Human Rights Watch, *Turkey's Human Rights Rollback* (New York: Human Rights Watch) 2014.
35 Council Common Position 2002/340 and Decision 2002/334/EC implementing Council Regulation (EC) No 2580/2001.
36 Mark Muller, "Terrorism, Proscription and the Right to Resist in the Age of Conflict," *Denning Law Review* 20 (2008): 127.
37 See chapter 1.

some of the objectives of listing the PKK in disrupting the Kurdish movement, as discussed in section 3.3. In combination these regimes present a more complex mosaic of criminalisation, disruption and surveillance, beyond the well-noted sources of sanction in public international legal literature.

3.   The effects of listing the PKK on conflict transformation

The designation of the PKK as terrorist organisation in Turkey and amongst western states creates immense obstacles to state (as well as civil society) engagement with the PKK as a legitimate party to resolution of the conflict. This section examines how listing the PKK has interfered with conflict transformation by replacing political recognition of an 'armed conflict' with counterterrorism (3.1); limiting the political potential of traditional peacebuilding tools such as ceasefires and private talks (3.2); and disrupting and containing Kurdish diaspora and Turkish-Kurdish civil society (3.3 and 3.4).

3.1   Recognition of the armed conflict: why legitimising and delegitimising the PKK matters

Chapter 2 outlined how recognition of an armed conflict is a necessary pre-condition to addressing its root causes whilst sustaining reconciliation and justice mechanisms towards peace. Recognition of the armed conflict forms part of the dispute between Turkey and the PKK. Turkey has resisted the classification of armed conflict, preferring to pursue security objectives against the PKK as a terrorist insurgency as governed by domestic terrorism law. In 1995 the PKK communicated to the Swiss its commitment to observe the Geneva Conventions and Protocol 1 of 1977 in its conduct. However, Turkey has argued that IHL gives undue legitimacy to the PKK.[38] The fact remains that Turkish state denial of its responsibility for repressions, disappearances and massacres during the course of the conflict, regenerate an experience of injustice for the Kurds. The framework of defeating terrorism at all costs simply legitimates and masks state crimes. Recognising that there is an armed conflict is required in order to recognise trauma, loss and collective suffering of both Kurds and Turks, and importantly provides a framework for addressing both the state and the PKK's abuses of the laws of war.[39] Critically, there has been renewed advocacy by INGOs that Turkey must address impunity for past crimes in the conflict in order to support the peace process.[40]

As a party to the armed conflict, the PKK is the proper party to peace negotiations with Turkey in order to end the conflict. While this appears a common sense political claim, it is undermined by the PKK's listing as a terrorist organisation. The PKK has engaged in protracted litigation since 2002 in the European Courts to seek annulment of the Council's listing. On April 3, 2008, the Court of First Instance decided that the listing should be annulled due to a failure to provide specific reasons for the decision; however the Council of the EU has not implemented the annulment.[41] The PKK argue that as a party to an armed conflict, the listing should not apply to it, and that listing disrupts the peace process. In its 2014 action for annulment,[42] the PKK argues that "the EU unduly interferes with the internal politics of Turkey, thereby disrupting the peace process."[43] At the time of writing, it remains to be seen how these legal arguments will be understood by the court.

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38   Yildiz and Breau, *The Kurdish Conflict*, 228.
39   Yildiz and Breau, *The Kurdish Conflict*, 227.
40   Human Rights Watch, *Turkey's Human Rights Rollback*, 2014; International Crisis Group, *Turkey and the PKK: Saving the Peace Process*, Europe Report No 234, 6 November 2014.
41   Judgment of the Court of First Instance (Seventh Chamber), April 3, 2008. Case T-316/14, Kurdistan Workers' Party (PKK) v. Council of the European Union.
42   Case T-316/14, Kurdistan Workers' Party (PKK) v. Council of the European Union, action for annulment submitted to the European General Court on May 1, 2014. A hearing is expected in the first part of 2015.
43   Case T-316/14, Kurdistan Workers' Party (PKK) v. Council of the European Union, action for annulment, 15.

More broadly, the Kurdish movement has engaged in grassroots campaigns in support of delisting the PKK, identifying listing as a barrier to peace. Global petitions for delisting organised by the UK based CSO, Peace in Kurdistan, and the European Association of Lawyers for Democracy and Human Rights, argue that proscription gives Turkey little incentive to approach the negotiation process with the PKK as equal partners and that de-listing is central to achieving a lasting political settlement.[44] In the UK, parliamentarians raised concerns that listing would have a detrimental impact on a peace process, and that the impacts of listing on the peace process must be part of the consideration. De-listing the PKK is also advocated within Turkey as central to the political process by key Kurdish parliamentary actors, the Peace and Democracy Party (BDP) and the new left unity party established in 2014, the People's Democracy Party (HDP). The PKK and PYD rescued thousands of Yezidi ethnic minorities trapped on Sinjar mountain from imminent genocide from ISIS in September 2014, and continue to resist ISIS' attacks against the Syrian Kurdish town of Kobane, at the time of writing. Since these events, media commentators routinely note the contradictions between the west's campaign against ISIS and the listing of the PKK. In response to the stalled negotiations, peacebuilding expert and former foreign policy advisor to the US Department of State, David L. Phillips argues that because the PKK has already demonstrated its commitment to peace, the US should de-list the PKK as a FTO in order to bolster the PKKs transformation into a non-armed political actor.[45] For Turkey, delisting functions not as an incentive but as a technicality after the PKK's disarmament.[46]

In sum, listing triggers inter-related processes that delegitimate the PKK and impede the peace process. Firstly, listing undermines public recognition of the PKK as a non-state party to a non-international armed conflict, and subject to international law alongside Turkey for its breaches of the laws of war.[47] Secondly, listing makes it more difficult for the PKK to be recognised as the proper political party to the negotiations. Thirdly, listing impedes recognition of the effects of the armed conflict and their contribution as 'root causes' to be prioritised in conflict transformation. In contrast, de-listing by the international community legitimises the PKK as the proper party to negotiations. We now discuss how listing has conditioned the peace process by changing the parameters for participation and action normally required in a conflict transformation framework.

3.2   Listing constrains political processes: ceasefires and Track 1 negotiations

The opportunities presented by successive unilateral PKK ceasefires and preliminary talks have failed to translate into sustainable political processes. The listing of the PKK has played some part in this. Turkey has long had a policy of stating it will not meet with the PKK or any party that has not publically denounced the PKK as terrorists, in spite of internal debate on this question and external pressure.[48] It appears difficult to reconcile this continued public discourse with the practice of government contact with the PKK privately. Since the 1990s there have been various attempts at dialogue between Turkey and the PKK. Listing hasn't impeded Turkey and third party mediators starting secret negotiations with the PKK, at least up until 2011 when negotiations became public. While listing has not stopped mediation, it has changed the possibilities that are expected to flow from mediation in important ways. Listing structures the kinds of negotiations that can take place, limits the political status and opportunities of the PKK and Kurdish mediators, and criminalises both formal and informal relations of support from the Kurdish movement which might otherwise progress political mechanisms. Listing gives Turkey much tighter control over how and in what circumstances engagement takes place and the political outcomes.

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44 "Solidarity Message on the Occasion of the 35th Anniversary of the PKK," *Peace in Kurdistan*, last modified November 29, 2013, http://peaceinkurdistan-campaign.wordpress.com/resources/pik-campaign-statements/solidarity-message-on-the-occasion-of-the-35th-anniversary-of-the-pkk/;
ELDH Statement, 29 October 2014, http://www.eldh.eu/publications/publication/european-lawyers-declare-remove-pkk-from-the-eu-terror-list-lift-the-activity-ban-support-the-peace-process-legal-reassessment-necessary-205/

45 David L. Phillips "Why the US should take PKK off the terror list" 25CNBC, 9 October 2014, http://www.cnbc.com/id/102068092

46 See International Crisis Group, "Turkey and the PKK: Saving the Peace Process", Europe Report No 234, 6 November 2014.

47 Yildiz and Breau, *The Kurdish Conflict*.

48   Ibid., 231.

A key theme in stalling talks has been Turkish political, military and police pressure on the PKK and the Kurdish nationalist movement to disarm in advance of any agreement for political settlement. In contrast, best practice in conflict transformation recognises that requiring non-state actors in armed conflicts to disavow violence in advance of established negotiations with clear agreements to political compromises, are unrealistic.[49] Here we see the clash between the norms of conflict resolution that recognise an armed conflict, and the logic of banning organisations who engage in violence as *prima facie* terrorist.

The proposition that unilateral ceasefire should lead to political concessions as a form of confidence building for the PKK have been repeatedly frustrated. Steps toward democratisation during the first years of government under the Justice and Development Party (AKP) from 2002 – partly linked to a rapprochement with the European Union – partially eased discrimination against the Kurds, but has not addressed the root causes of the conflict. Between 1993 and 2010 the PKK implemented 8 unilateral ceasefires, returning to armed conflict on each occasion after a lack of progress in negotiations.[50] The PKK ceasefires were enabled through political openings in part made possible by positive EU gestures to Turkish accession.[51] The EU accession process made Turkish state violence a matter for international concern and has been a mitigating factor against Turkey's return to outright military conflict with the PKK. The government is aware that a peace process is non-negotiable for Turkey's acceptance into the EU and, to halt the electoral potential of the BDP-HDP.[52] But EU accession also plays a role in maintaining an ambivalent cycle of negotiations with the PKK, which fall short of delivering the political conditions which could support sustainable peace.[53] In the context of counterterrorism operations against Kurdish politicians, activists, lawyers and journalists, the BDP point to the uneven impacts of the EU accession process: "While the AKP carries out 'reforms' for the harmonization process with the EU, implementations are worse than totalitarian regimes".[54] The problem is that the AKP's counterterrorism stance against Kurdish civil society both in Turkey, and in the diaspora, remains consistent with the global security regime which lists the PKK, and thus, with the European accession process.

Importantly, the Kurdish diaspora and NGOs engaged in IHL roles in direct contact with the PKK have played a key role in supporting the PKK towards ceasefire positions. Kurdish leaders argue that the PKK's ceasefires have been understood by Turkey as signs of weakness to which Turkey responded with conspiracies, provocations and acts of violence.[55] In the absence of political recognition by the state of the authenticity of the PKK's ceasefires, there have been few concessions made by Government to progress ceasefire into lasting political negotiation.

There is a supportable perception that EU listing contributed to sabotaging the PKK's unilateral ceasefire then in place from 1999, and supported Turkey's militarised approach to the conflict. At the time of the 2001/2002 US/EU listing decisions, the PKK was engaged in preliminary contacts, and a channel for dialogue existed between jailed PKK leader, Abdullah Öcalan and the authorities. However, listing is understood to have bolstered the Turkish government's subsequent hardening of its position against the PKK and the Kurds more broadly.[56] Whilst there are, of course, multiple intersecting factors regenerating the return to conflict at that time, the delegitimation of the PKK as a political actor appear to have contributed to closing the progress of preliminary dialogue.

49 Liz Phillipson, "The Challenge of Asymmetries," *Accord* 16 *Choosing to Engage: Armed Groups and Peace Processes*(2005): 71.
50 Adem Uzun, *"Living Freedom": The Evolution of the Kurdish Conflict in Turkey and the Efforts to Resolve It*, 2014, Berghof Transitions Series No. 11, 24, 27.
51 Kerim Yildiz and Mark Muller, *The European Union and Turkish Accession: Human Rights and the Kurds* (London: Pluto Press, 2008).
52 Sarphan Uzunoğlu, "Erdogan's Choice: Between Hubris and Sustained Peace," *Open Democracy*, http://www.opendemocracy.net/arab-awakening/sarphan-uzuno%C4%9Flu/erdogan%E2%80%99s-choice-between-hubris-and-sustainable-peace.
53 Bahar Rumelili, "What Turks and Kurds 'Make of Europe': Subversion, Negotiation and Appropriation in the European Periphery", in *Hybrid Forms of Peace: From Everyday Agency to Post-Liberalism*, ed. Oliver Richmond and Audra Mitchell (London: Palgrave MacMillan, 2011).
54 BDP, *International E-Bulletin*, January 2013, https://peaceinkurdistancampaign.files.wordpress.com/2011/11/bdp-bulletin-january-2013.pdf
55 Uzun, *Living Freedom*.
56 Uzun, *Living Freedom*, 20; Sophie Haspeslagh, and Veronique Dudouet, *Mediating Peace with Proscribed Armed Groups: A Policy Workshop Report on the Implications of European Union Counter-Terrorism Legislation for Mediation and Support for Peace Processes* (London and Berlin: Conciliation Resources and Berghof Peace Support, 2011); Muller, "Terrorism, Proscription and the Right to Resist."

(i)   The Oslo Peace Process 2009-2011

A delegation of state officials appointed by Prime Minister Recep Tayyip Erdoğan carried out a series of secret negotiations with representatives of Öcalan between 2009 and 2011. The high level negotiations were reportedly brokered by British intelligence and Norway and occurred in Oslo and in other locations in Europe and the United Kingdom, resulting in approximately a dozen rounds of talks. The Oslo negotiations are acknowledged as a turning point whereby a consensus was reached that only a political solution to resolving the conflict was possible. Respondent negotiators interviewed for this research reported talks to be productive and moving towards consensus on the inclusion of Kurdish rights in the constitution and a process for staged disarmament.

The talks were abruptly called off by Turkey in June 2011. An account of the Oslo talks editorialised in Öcalan's prison writings document that up until June 2011 there was state agreement to three protocols establishing a Truth and Reconciliation Commission; a committee to progress a democratic constitution; and concrete procedures for the PKK's withdrawal and subsequent disarmament. The PKK signed the protocols also promised to be signed by the state:

> But no written or verbal response ever arrived at Imrali. The delegation was never seen again. In July 2011, Öcalan stated that under these conditions he had to withdraw from the talks.[57]

Competing narratives have been offered as to why the Oslo talks failed. Most commentators attribute the collapse to the recalcitrant military attacks of one or the other party, citing a clash between Turkish soldiers and the PKK on 14 July 2011, in which 14 Turkish soldiers and 7 PKK militants were killed. Turkey blamed the PKK for a pre-meditated attack, while the PKK said they were defending themselves after a run in with Turkish army patrol, and that most soldiers died in a resultant brushfire. The PKK argue the talks failed because of the earlier, ongoing military operations against them by the Turkish army during the Oslo negotiations in spite of the PKK's unilateral ceasefire, and the prosecution of hundreds of Kurdish activists since the 2009 KCK operations.[58]

It is believed by some Kurdish leaders that the state withdrew from the Oslo process as a considered strategy to maximise the nationalist vote in the June 2011 parliamentary elections. It is widely understood that the AKP's decisions regarding the peace process are shaped by electoral politics – that is, increasing the Kurdish vote, especially amongst religiously observant Kurds. BDP leader Selahattin Demirtaş believes that negotiations were carried up until the 2011 elections as a tactic to stall the PKK, if not initially intended for this purpose.[59] President of Kongra-Gel in exile in Europe, Zubaydir Aydar believes that the stalling process until after the June elections was intended to end with the PKK's military annihilation.[60] After the talks failed, the conflict escalated rapidly, with some of the heaviest fighting seen in three decades.

The PKK's status as a designated terrorist organisation also functioned to move the Oslo negotiation space towards collapse. This is exemplified by the Turkish state's reaction to the leaking of an audio recording of one Oslo meeting to the Turkish press in September 2011. The leak, from an unknown source, is widely understood as an attempt to influence Turkish public opinion against the AKP government.[61] The existence of the secret talks subjected Erdogan and the AKP to rigorous censure from

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57 Editorial notes by the International Initiative, in Abdullah Öcalan, *Prison Writings III: The Road Map to Negotiations* (Cologne: International Initiative, 2013) 7.

58 Interviews x 2, September 2013, Brussels.

59 Selahattin Demirtaş, quoted in Jake Hess, "'The AKP's "New Kurdish Strategy" Is Nothing of the Sort': An Interview with Selahattin Demirtaş," *Middle East Research and Information Project*, published May 2, 2012, http://www.merip.org/mero/mero050212. See also "The Secret Oslo Talks That Might Have Brought Peace to Turkey," *Chris Kutschera*, http://www.chris-kutschera.com/A/Oslo.htm.

60 Interview, September 2013, Brussels.

61 "Karayılan: Oslo Talks with PKK Leaked to Harm MIT Chief," *World Bulletin*, last updated April 29, 2013, http://www.worldbulletin.net/news/107693/karayilan-oslo-talks-with-pkk-leaked-to-harm-mit-chief.

nationalist opposition parties for conspiring with a terrorist organisation to carve up the country. The head of the National Intelligence Organization (Milli İstihbarat Teşkilatı, or MİT), Hakan Fidan, represented the state in the peace talks. After the negotiations became public knowledge, Fidan was prosecuted for engaging with a terrorist organisation. The government claimed the prosecution was an effort by 'deep state' forces, including sections of the military and judiciary, to sabotage the peace process. Parliament subsequently passed a law making any prosecution of Turkish intelligence subject to the prime minister's approval and the case was dismissed. In April 2014, the AKP passed additional executive powers exempting MİT from risk of prosecution *across the board* in Turkish law. The expansion of MİT's immunity from prosecution was justified in order to put negotiations between Turkish intelligence and the PKK on a secure legal footing.[62]

The Oslo talks cast some light on the interior logic of listing and what kind of peacebuilding is possible when shaped by counterterrorism. Private negotiations or 'backchannels' set the groundwork for future political compromise. Private negotiations of course have an important function, but unless delisting is put on the table as a future option, the premise of listing (political illegitimacy) is kept intact. Confidential mediations can thus be had with a listed organisation and do not need to be premised on the recognition of an armed conflict. The Turkish state's expansion of MİT powers to 'exempt' them from the logic of the ban shows they favoured maintaining control over negotiations through terrorist labelling. The Oslo process communicated to the Kurds that if peace negotiations could conceivably end with the prosecution of the Head of Intelligence, then there should be little hope that the Kurdish side would be spared from criminalisation.

(ii)   The relationship between peace and security in the aftermath of Oslo

The discourse of a new approach to the Kurdish issue through incremental democratic reforms again resurfaced after the AKP won a third term in the July 2011 parliamentary elections. In practice, negotiations had stalled amid PKK-army clashes and political repression of the Kurdish movement. From 27 July 2011 Öcalan was refused visits from his lawyers, and several of his lawyers had their certificates to practice law revoked. In August, Turkish aircraft bombed the border region in south Kurdistan (northern Iraq) targeting civilian settlements as part of a campaign to eradicate the PKK's base. During this time the Turkish media debated a preferred 'Tamil solution' to the Kurdish problem, meaning a military annihilation, which in Sri Lanka led to thousands of deaths. On 28 December 2011, airstrikes killed 34 unarmed civilian men and boys from Roboski, an isolated village on the Turkish-Iraqi border, on the false basis that they were PKK operatives when in fact they were engaged in cross border trade. In January of 2014 the Military Prosecutors Office declined to initiate prosecutions against those responsible.[63]

When negotiations reopened in early 2012, the AKP sought to negotiate with the BDP to the exclusion of the PKK and Öcalan from the process. The BDP engaged in these political negotiations, simultaneously arguing the process would fail without the involvement of the PKK. Demirtaş understood this "new negotiation strategy" as a continuation of the militarised war against terror conducted during the course of the conflict: "negotiate with politicians, fight against terror."[64] INGOs have also opposed the idea that the PKK be recognised as the legitimate representatives of the Kurds, on the basis of progressing conflict resolution. In 2012, the International Crisis Group (ICG) argued that the PKK needed to vacate the space of negotiations and allow the BDP to develop into the legitimate, non-violent political spokesparty, solely representing the interests of the Kurds.[65]

The resumption of dialogue was publically acknowledged by the Government for the first time in late 2012, finally recognising Öcalan as a valid interlocutor. This difficult period post-Oslo speaks to the persistent obstacles to sustained negotiations arising from the PKK's terrorist status. In March 2013 as part of the new dialogue process, Öcalan announced a ceasefire and

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62 "Human Rights Watch: MİT Laws Opens Door to Abuse," *Today's Zaman*, last modified April 29, 2014, http://www.todayszaman.com/news-346485-human-rights-watch-mit-law-opens-door-to-abuse.html

63 Penny Green and Saniye Karakas, "State crime in Turkey: the Roboski Massacre," *OpenDemocracy*, May 12, 2014.

64 Hess, "The AKP's 'New Kurdish Strategy'".

65 International Crisis Group, "Turkey: The PKK and a Kurdish Settlement," Europe Report No. 219 (Brussels: International Crisis Group, 2012).

the withdrawal of PKK forces from Turkish territory ('the Newroz declaration'). This was the first of a three-step process that according to Öcalan, should include:

- Stage one: ceasefire and parliamentary mechanisms;

- Stage two: new legislation to meet Kurdish demands;

- Stage three: release of prisoners and agreement as to the future of the guerrillas, and the transformation of the PKK into a political actor.

The PKK began withdrawing from Turkey in May 2013 in order to facilitate the first stage of negotiations, in expectation that the government would respond with concessions. But the PKK's withdrawal was met with increased militarisation of the predominantly Kurdish south-east with the construction of at least 130 military outposts. Respondents from the Kurdish leadership in the diaspora interviewed before the PKK's withdrawal, expressed deep misgivings about the strategy, citing how the PKK's 1999 withdrawal ended in the ambush and killing of its retreating fighters by the Turkish military and a return to hostilities.[66] On 28 June 2013, demonstrations against the military colonisation of Kurdish regions were met with open fire in Lice, killing an 18 year old and wounding 10 others. The PKK responded to military provocations and the inadequacy of the democratisation reform package announced in September 2013 by halting withdrawal that September, but maintaining its unilateral ceasefire. At the time of writing, the PKK have partially withdrawn from Turkish territory and, at least since March 2014, have been focused on defence of Kurdish minorities against ISIS in Iraq and Syria.

Significant recent developments at the domestic level to revive the stalled negotiation process illustrate how listing has conditioned the kind of peace possible. On 1 October 2014 a law came into force to give peace negotiations a legal basis. The *Law to End Terror and Strengthen Social Integration* puts Government personnel on a legal footing to continue negotiations with the PKK without prosecution, authorizing all "security, disarmament, and human rights, as well as political, legal, socio-economic, psychological and cultural" measures government considers legitimate to end the PKK's 'terrorism'. The Law is a significant measure supported by the PKK and pro-Kurdish parties and favourably noted by the European Commission and many commentators as positive contribution towards implementing a political settlement.[67]

Nevertheless, the law has also been criticised for falling short of base pre-requisites to adequately support the peace process, and will require additional legislation in order to be effective, prompting concerns about a lack of accountability and transparency.[68] The most significant failing of the Law is that it continues to construct the conflict as terrorist rather than recognising the Kurds and the PKK as part of the solution.[69] The Law does not identify the PKK as the interlocutor for negotiations, nor does it appear to give the PKK any explicit protection from counterterrorism measures. The state is 'exempted' from the counterterrorism framework dominating the peace process, whilst maintaining its power to determine how and when Kurds remain subject to a counterterrorism framework. Thus, the Law, with both its positive and negative elements, is a product of an approach to peace building that remains shaped by counterterrorism listing.[70]

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66 Interviews, September 2013.

67 European Commission, *Turkey Progress Report,* October 2014, 6; Democracy Progress Institute, *Turkey 'On the Ground' Assessment*, January – September 2014, 71-79.

68 For a detailed overview of criticisms of the Law, see Democracy Progress Institute, *Turkey 'On the Ground' Assessment*, 73-79.

69 Ibid., 72, 79.

70 Cf. the Democracy Progress Institute argue that in spite of its shortcomings, the Law "represents, to an extent, the parties' *defacto* recognition of the conflict", and that it strengthens recourse to international consequences if there was a renewal of violence. Ibid., 76.

(iii)   Sanctions against Kurdish negotiators

US listing regimes have been used to criminalise and destabilize Kurdish negotiators, designating them as foreign narcotics traffickers under the *US Kingpin Act*. The PKK was listed as a significant foreign narcotics trafficker under the Kingpin Act in May 2008 "for its 20-year history of using its European network to produce, transport, and traffic opiates and cannabis".[71] The US Treasury states: "Drug trafficking is one of the PKK's most lucrative criminal activities and it uses the illicit proceeds to obtain weapons and materials".[72] On 14 October 2009 and 20 April 2011, the US Treasury designated a total of eight PKK leaders pursuant to the Kingpin Act. More than 1,000 individuals and entities have been listed, pursuant to the Act since June 2000, largely South American drug cartels:

> Penalties for violations of the Kingpin Act range from civil penalties of up to $1.075 million per violation to more severe criminal penalties. Criminal penalties for corporate officers may include up to 30 years in prison and fines up to $5 million. Criminal fines for corporations may reach $10 million. Other individuals face up to 10 years in prison and fines pursuant to Title 18 of the United States Code for criminal violations of the Kingpin Act.[73]

On 14 September 2009, Murat Karayilan (commander of the HPG), Ali Riza Altun and Zübeyir Aydar were listed by OFAC as Specially Designated Narcotics Traffickers pursuant to the Kingpin Act.[74] Aydar, who is resident in Brussels, is a former parliamentarian for the Kurdish political party DEP, banned in 1994, and a senior political leader of the PKK in Europe. Aydar was a negotiator for the PKK during the Oslo process that began before he was designated under the Act.

On the 20 April 2011, Cemil Bayik, Duran Kalkan, Remzi Kartal, Sabri Ok and Adem Uzun were also listed by OFAC under the Kingpin Act. On the 21 April 2011, Turkey announced its $3.5 billion dollar contract with US companies to build military helicopters (blackhawks).[75] Three of the listed persons are described by OFAC as follows:

> Remzi Kartal is the chief Kongra-Gel operative in Europe. Sabri Ok is a senior Kongra-Gel leader responsible for the group's finances in Europe, and Adem Uzun operates on behalf of the Kongra-Gel in northern Iraq.[76]

Bayik is a senior military commander of the PKK, and Duran Kalkan serves on the group's chairmanship council. Uzun, Aydar and Ok acted as facilitators in the Oslo process, meeting with the PKK leadership in Iraq in order to communicate the PKK's position at the negotiation table. Aydar and Uzun believe that they, alongside the others, were subject to the Kingpin Act as a result of US cooperation with Turkish requests to list them. These listings occurred just before the Turkish parliamentary elections on 12 June 2011, potentially indicating these counterterrorism measures were deployed at that time to garner electoral support. Under the Act, once the PKK is designated, individuals may be designated so long as they are considered members of the organisation. Europol Director, Patrick Byrne has been reported as stating that there was no independently verifiable evidence that the PKK traffics drugs.[77]

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71   U.S. Department of the Treasury, "Treasury Sanctions Supporters of the Kurdistan Workers Party (PKK) Tied to Drug Trafficking in Europe," press release, February 1, 2012, http://www.treasury.gov/press-center/press-releases/Pages/tg1406.aspx

72   Ibid.

73   U.S. Office of Foreign Assets Control (OFAC), "Narcotics Sanctions program," media release, July 28, 2014, http://www.treasury.gov/resource-center/sanctions/Programs/Documents/drugs.pdf, 6.

74   U.S. Department of the Treasury, "Treasury Designates Three Leaders of the Kongra-Gel as Significant Foreign Narcotics Traffickers," press release, October 14, 2009, http://www.treasury.gov/press-center/press-releases/Pages/tg318.aspx.

75   "Sikorsky UH-60 Black Hawk," *Wikipedia*, last modified October 3, 2014, http://en.wikipedia.org/wiki/Sikorsky_UH-60_Black_Hawk#Turkey.

76   U.S. Department of the Treasury, "Treasury Designates Five Leaders of the Kongra-Gel as Specially Designated Narcotics Traffickers," press release, April 20, 2011, http://www.treasury.gov/press-center/press-releases/Pages/tg1148.aspx.

77   "No evidence of PKK involvement in drug trafficking" February 1, 2012, http://www.ekurd.net/mismas/articles/misc2012/2/turkey3728.htm

Uzun's listing by the OFAC (US), and his subsequent prosecution in France for alleged weapons trafficking (annulled by the courts, as discussed below) is understood by lawyers and NGOs working on the Kurdish Question to be a politically motivated interference with the peace process. The EU Turkey Civic Commission (EUTCC) issued a press release stating:

> Mr Uzun has been working politically on the Kurdish question for years. His impressive diplomatic capability and the way he represents the Kurdish issue and the Kurds on an international level, and particularly within the EU sphere, has helped pave the way toward promoting peaceful Kurdish diplomacy in Europe. It is obvious that the reason for the US officials' accusations is not drug-trafficking but rather to inhibit the successful and effectual diplomatic representation of the Kurds in Europe, the US and elsewhere. Well-known Kurdish diplomats are being criminalised and efforts made to compel Interpol to hunt them. In this way the USA and Turkey are trying to stop the peace process in Turkey, to which Kurdish politicians in Turkey and Europe contribute the most.[78]

Given the Head of Turkish Intelligence was prosecuted for his role in the Oslo process, it is likely the targeting of the Kurdish negotiators through listing mechanisms was deliberate and intended. Aydar and Uzun believe that their OFAC designations were issued to stop them from travelling abroad and thereby hinder their advocacy within the Schengen area.[79] Aydar described having been detained and questioned by domestic authorities each time he crosses European borders. Describing the impact of asset freezing on his everyday life, "I cannot open a bank account or even receive money. This is imprisonment without guilt."[80] Aydar says that since the designation, he has been subject to death threats by unknown persons, including an attempted attack on his life in 2011 averted by Belgium police. Two of the Kurdish negotiators fled Europe in early 2013, fearing for their safety after the murders of three Kurdish activist women in Paris on 9 January 2013.[81] The murders of Sakine Cansiz, Fidan Dogan and Leyla Söylemez had a direct effect on negotiations, with Öcalan suspending talks for 5 weeks demanding that those responsible be identified. For the Kurdish negotiators, their involvement in the Oslo peace process was punished by being listed as narcotraffickers, alongside the threat of older legacies of elimination. Listing is a counterinsurgency strategy that both structures and disrupts the peace process, as further illustrated by the entrapment and prosecution of Adem Uzun.

(iv)   The entrapment and prosecution of Adem Uzun[82]

After the unilateral break off of the Oslo process by the AKP in July 2011, Uzun continued his advocacy work, spending the latter part of 2011 and 2012 meeting with Nobel prize winners including Ramos Horta, Desmond Tutu, Jimmy Carter and the Dalai Lama, in order to strengthen an appeal to renew peace talks. In April 2012, an 'anonymous source' (understood to be Turkish intelligence) informed French intelligence it had information that Uzun would travel to France to buy weapons for the

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78   "Release Kurdish Political Campaigner Adem Uzun!" *Kurdistan Tribune*, last modified October 20, 2012, http://kurdistantribune.com/2012/release-kurdish-political-campaigner-adem-uzun/.

79   Interviews, September 2013.

80   Interview, September 2013.

81   Allegations that the murder of Sakine Cansiz was ordered by the Turkish MIT have been fuelled by a recording allegedly made by Guney of a telephone order by MIT directing the execution. A classified document purportedly from MIT identifying Cansiz for 'elimination' was also leaked to the press. In a rare public statement issued on January 15 2014, MIT denied any involvement in the murders and reportedly stated: "The reports are an operation aimed at tarnishing our organisation which has played an active role in the peace process with Kurdish militants. An internal probe concerning the claims has been launched". "Turkish Spy Agency Denies Link to Paris Kurd Murders," *France 24*, last updated January 18, 2014, http://www.france24.com/en/20140117-turkey-france-paris-kurds-murders-pkk/. Jörg Diehl, Özlem Gezer and Fidelius Schmid, "Paris Investigation: Tensions Grow over Murder of Kurdish Activists," *Spiegel Online International*, last modified February 12, 2014, http://www.spiegel.de/international/europe/suspicions-grow-of-turkish-involvement-in-murder-of-pkk-activists-a-952734.html. Families of the murdered women have since lodged a request to French magistrate to issue international arrest warrants for the 4 MIT officials named in the leaked document: "Paris Massacre Families Demand Arrest Warrant For MIT Officials," *Firat News*, last updated July 19, 2014, http://en.firatnews.com/news/news/paris-massacre-families-demand-arrest-warrant-for-mit-officials.htm.

82   Unless specifically referenced, the narrative of events is drawn from composite sources: the Paris Court of Appeal: Investigating Chamber Request for Annulment of Evidence, Judgment of 27 February 2014 (transcribed from the original French into English for this report); an interview conducted with Adem Uzun and a public presentation made by his lawyer, Selma Benkhelifa in August 2014: http://vimeo.com/99219642.

PKK. Surveillance intercepts on Uzun's phone and email commenced on 26 April 2012 for several months. Police services quoted in the Court judgement state that "Uzun's extreme prudence in telephone conversation prevented the detection of illegal activities, namely the search for military weaponry, which the authorities had been alerted to by an anonymous source".[83] The instructing Judge reasoned that the absence of any discussion of arms trafficking by Uzun in telephone intercepts nonetheless indicated Uzun was adept at concealing his true intentions. According to Uzun's lawyer, Selma Benkhelifa, the instructing Judge's conclusion not only breached the presumption of innocence, but indicated a security operation intended to bring Turkey's tip off into being.

On 6 October 2012 Uzun was arrested for attempting to procure arms in Paris, where he was to attend a conference on Western Kurdistan (Syria) that week. The prosecution's case was that Uzun acted as an intermediary to guarantee a (fake) arms deal for the PKK. The meeting at which Uzun was arrested has since been accepted by the Paris Court of Appeal to be an illegal entrapment constructed within French intelligence. A mercenary figure, Noel Debus was retained unofficially to arrange the entrapment. Debus was previously convicted for multiple frauds "often entangled with murky episodes of espionage in the Comoros islands or in the Ivory Coast".[84] Debus represented himself to Uzun as a member of a thinktank working on peace issues, and they met several times to discuss a report Debus was said to be preparing on Kurdish human rights.

The court record indicates that French intelligence began an infiltration operation on 12 July 2012. On 25 July, 'Antoine', a French intelligence operative posing as an arms supplier, was introduced to Osman Kaya by Debus. Kaya is a weapons trafficker of Kurdish background who routinely visited Turkey from varied destinations in Europe. The prosecution did not submit any evidence, nor did the court find, that Kaya had links to the Kurdish movement.

The key disputed issues in the case pertained to the contested nature and significance of a series of planned meetings alleged to involve Uzun. Between July and October Kaya and Antoine met on five occasions to procure the sale of anti-tank weapons and anti-aircraft missiles for the sum of two million euros,[85] with Kaya acting on behalf of his unnamed clients in Iraqi Kurdistan. Debus told Kaya "that he was a secret services agent to make him think that the French government condoned the arms transaction".[86] As part of the lucrative procurement, it was the defence's case that Antoine required Kaya arrange for Antoine to meet Uzun. Antoine wanted a political guarantee from a Kurdish leader in exchange for staggering the payment of the false transaction. The prosecution argued that "Uzun's central role in the organisation allowed him to arrange meetings for Osman Kaya in Kurdistan who would receive instructions in negotiating the transaction". Further, the prosecution claimed that Kaya put forward Uzun's name as a guarantor for the transaction in response to Antoine's insistence that the PKK provide an upfront advance of $50 000: "the only reason for Uzun's presence was to convince the supplier to retract his request for a deposit".[87] The defence denied Uzun attended such meetings, and that he knew of the alleged weapons procurement arrangement. Rather, according to Uzun's lawyer, Kaya got in touch with Uzun through the Kurdish Cultural Centre in Paris and suggested he might like to meet someone introduced to him by Debus – whom Uzun already knew – who worked for the same thinktank as Debus. Uzun agreed to meet Antoine to discuss political issues. On the 6 October, Uzun met with Kaya and Antoine at a bar. Approximately 10 minutes into the meeting, Uzun was arrested by the French police.

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83 Paris Court of Appeal, 27 February 2014.
84 F. Labrouilier and D. Le Bailly, "Stripped of His Papers, He Tries to Leave France by Buying a False Passport at Top Dollar … from Some Petty Con Artists," *Paris Match*, July 4–10, 2013. (translated from the original French to English for this report). In 2012 Debus entrapped Lebanese French arms dealer, Ziad Takkieddine, into breaching his control order. Takkieddine facilitated large scale arms deals between France and several countries including Saudi Arabia, Pakistan, Syria and Libya. In June 2013, Takkieddine told French investigators that he paid kick-backs on arms deals with Pakistan and Saudi Arabia that helped illegally fund the failed presidential campaign of former Prime Minister Edouard Balladur in 1995 (known as 'the Karachi Affair'). In 2002 a suicide bomber killed 14 people in Karachi including 11 French naval engineers working for the French Naval Construction Executive (DCN). The investigations into the bombings as reprisals for the halting of the commission's scheme triggered inquiry into corruption by French politicians.
85 Paris Court of Appeal, 27 February 2014.
86 Ibid.
87 Ibid.

In sum, the prosecution alleged Uzun was the political guarantor of an attempt to traffic arms from France to Iraqi Kurdistan. Uzun was portrayed as having the authority to agree to purchase weapons on behalf of the PKK. The court, however, found that the undercover operations were illegal investigations, as they induced Kaya into the commission of a crime, in order to implicate and commence an investigation into Uzun. Uzun remained in detention for 10 months before being released on bail in August 2013. The Court of Appeal annulled the prosecution on 27 February 2014, finding that the security services engaged in an illegal operation.[88]

Uzun's case can be plainly understood as an aggressive deployment of counterterrorism sanctions, and abuse of the legal system. In order to support an allegation from the Turkish state, a case was fabricated with the apparent endorsement of French security. As Benkhelifa makes clear, this case has pernicious implications for democratic life:

> Turkey said something and they made it true. It's the same as if a policeman came into your house and put drugs in your house and then charged you with being a drug seller. It's not a Hollywood film about spies, it's a reality. France did that to make information from Turkey, to make it true…. This story is disturbing not just for the Kurdish movement but a danger for all democracy if you can be charged for nothing and with a built accusation.[89]

Critically, the object of this constructed prosecution was to connect the Kurdish movement to direct military activity:

> On the same day that Uzun was arrested, France made a statement in press: that for the first time we will prove that the legal part of the movement, the political part of the movement is linked to the armed part of the movement. This is exactly what Turkey is doing with the KCK process. They want to mix it up – you are a terrorist whether you are a guerrilla, or whether you are a lawyer or an advocate. And France did exactly the same.[90]

An international campaign in support of Uzun argued complicity between Turkey and France, and the detrimental impact on Uzun's engagement in the peace process.[91] Uzun's case reflects the normalised use of counterterrorism strategies to target the political efforts of the PKK leadership as the object of preemptive counterterrorism. Uzun, Aydar and Kurdish activists, understood Uzun's entrapment as a collective warning to Kurds to not get involved in the movement. Uzun understood his arrest as part of a broader Turkish strategy to have as many Kurds arrested in Europe as possible, in order to weaken the Kurdish movement in the diaspora. Uzun thinks he was targeted because of his work in Brussels, creating a centre for action in Europe on the Kurdish question. For Aydar, it was telling that Uzun was targeted, pointing out he would not have otherwise come to the attention of the authorities if not for his involvement in the Oslo process.[92] It is difficult to tell if Uzun and his colleagues were targeted for having engaged in a peace process, or that they were brought into a peace process so that they could be more effectively identified and targeted. Regardless, these disparate effects reflect the ways in which the global regime listing the PKK regenerates a mode of counterinsurgency through 'peace'. In these case studies proscription functions as a weapon to destabilise the transformative possibilities of the peace process by excluding the Kurdish leadership through criminalisation and disruption.

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88 Ibid.
89 Selma Benkhelifa, August 2014: http://vimeo.com/99219642
90 Ibid.
91 The EU Turkey Civic Commission (EUTCC) passed a special resolution at its Conference, Brussels, December 5–6, 2013, calling on the French authorities to immediately release Adem Uzun: "As a leading legitimate politician of the Kurdish political movement Mr. Uzun is well known for his advocacy of a democratic and peaceful solution to the Kurdish problem for which he was chosen to be one of the negotiators in the Oslo Peace Talks," The resolution urged the "expeditious conclusion to his case by dropping the accusations against him'. Peace in Kurdistan coordinated a Postcard campaign directed to the Judges.
92 Interview, September 2013.

3.3   The impact of listing the PKK on diaspora Kurds

The international community's involvement was central to the resolution of the Northern Ireland conflict, partly bolstered by the strong Irish diaspora in the US. Kurdish communities have significant numbers in Europe in particular, but face structural difficulties in effectively exerting political pressure due to a lack of social and political capital.[93] As explained earlier in this chapter, the Kurdish diaspora are recognised as important actors in bringing about a political solution to the conflict. In his 2013 Newroz statement, Öcalan renewed a declaration for a peaceful solution, positioning the diaspora as an indispensable 'voice' for peace: "Our people dispersed around the world, Europe in particular, will be our voice to speak out for peace and a dignified free life to the world".[94] Listing aims to disrupt diaspora support for the PKK and adds an additional structural impediment to the diaspora's already disadvantaged political position.[95]

The Kurdish diaspora have been a key target of security operations in order to interdict financial and other support to the PKK. Turkey has publically criticised the EU and member states for not arresting and prosecuting the Kurdish PKK leadership, funders and supporters in Europe. Wikileaks Embassy cables reveal the extensive nature of Turkey's (and the US's) frustrations with Europe in this regard.[96] In turn, EU member states express concern with being pressured to cross boundaries in authorising arrests outside their lawful authority and without evidence of wrong doing.[97]

(i)   Suppressing terrorist financing

Between at least 2005-2007, the US had three priorities regarding counterterrorism operations against the PKK: first, to work in partnership with Turkey to shut down money flows from Europe to the PKK. Second, to use the FATF as an instrument to deepen Turkish surveillance on the financing of terrorism within its territory. The US was concerned that MASAK (Turkey's financial intelligence unit) lacked the capability to identify or interdict PKK financing.[98] In particular, the US pushed Turkey to "make undeclared bulk cash transfers illegal, seize bulk cash assets and identify cash transfers through the banking system that are headed to the PKK". Alongside cash couriers and Hawala banking used in rural Turkey, "foreign workers in Europe" were identified by the US Treasury as key targets.[99] The FATF's 'special recommendations' are conventionally understood as setting out a host of due diligence obligations that states must undertake to ensure they do not fund listed groups, as explained in chapter 1. But the role of the FATF in deepening surveillance of the Kurds is potentially significant. Embassy cables indicate the US pressured Turkey to prioritise implementing money laundering laws over amendments to its notorious penal code and democratisation packages required by EU accession.[100] Rather than democratisation reform, the US sought for Turkey to take regional leadership in financial surveillance through the introduction of restrictive finance laws.

The third priority for the US, has been to maintain pressure on European countries to prosecute or extradite PKK financiers, identifying Germany, France, Switzerland and the UK as the top four countries for PKK fundraising. The aim is "cutting off PKK support networks, *including* financing in Western Europe".[101] Whilst the US believes it has identified PKK fundraising leaders it has "limited actionable intelligence on how the money flows to the PKK".[102] The Treasury undersecretary highlighted that

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93   Yildiz and Breau, *The Kurdish Conflict*, 250.
94   For Abdullah Öcalan's Newroz statement, 2013 see "Öcalan's historical Newroz 2013 Statement," *Freedom for Abdullah Öcalan*, http://www.freeÖcalan. org/?p=531. Newroz is the Kurdish New Year celebration.
95   Vicki Sentas, *Traces of Terror: Counter-terrorism Law, Policing and Race* (Oxford; Oxford University Press, 2014), chapter 7.
96   US Embassy, "05Ankara3863_a," (embassy cable, July 5, 2005).
97   Ibid.
98   Ibid.
99   Ibid.
100 US embassy, "05," (embassy cable, July 5, 2005), text file.
101 US embassy, "06Ankara323_a," (embassy cable, January 27, 2006), text file. (emphasis added)
102 US embassy, "07Ankara2917," (embassy cable, December 7, 2007), text file.

"understanding the financing mechanisms was useful not only to interdict the financing, but also to understand the group's network".[103]

For the US Treasury, a broad range of activities are to be surveilled:

> Funding of PKK activities is done through a wide variety of methods. These include fundraising, cultural, social, and sporting events sponsorship, membership fees and commercial business ventures. PKK financiers also traffic in narcotics, smuggle both people and goods and charge extortion and protection fees.[104]

Importantly, US Treasury identifies that while drug trafficking, smuggling and extortion can be prosecuted as criminal offences, "the former activities can only be prosecuted under terror finance laws when clear ties to PKK activities can be proven".[105] That is, ordinary community based fundraising and events are under scrutiny for relationships to the PKK.

(ii)   *Disrupting the diaspora*

Since the PKK's proscription by the EU in 2002, the Kurdish diaspora has been subject to increased scrutiny across Europe for its relationship to the PKK, with periodic arrests and prosecutions for allegedly financing the PKK.[106] The Kurdish diaspora is predominantly characterised as the PKK's network in Europe, providing it with political support in the form of financing, logistical support, training and recruits. Europol identify what might be otherwise characterised as political lobbying and democratic free speech within the diaspora as "the PKK's media wing", "exploiting television, radio, websites and newspaper portals in various EU Member States. All provide propaganda and revenue opportunities".[107] The first and only successful prosecution in Europe for speech acts in support of the PKK was the decision upheld by the Danish Supreme Court to disqualify the license of community broadcaster Roj TV, finding it guilty of promoting PKK activities.[108] Likewise, Europol understood Roj TV to be a "mouthpiece of the PKK".[109] The characterisation of diaspora organisations as 'fronts' for terrorist organisations collapses political affiliations and desires into domestic member state offences such as 'promotion', 'membership' or 'support'. This effectively imputes diverse relationships otherwise legitimate in democracies as a cover for the activities of the proscribed organisation.[110]

It is beyond the scope of this chapter to overview and assess the major operations against Kurds in Europe. We briefly consider the characteristics of disruption-led operations through the example of how Kurds have been policed by UK counterterrorism law. There have been two prosecutions of Kurds in the UK in relation to the proscription of the PKK, both of which failed. On 16 March 2002**,** four Kurds travelling to France to participate in a peaceful Kurdish convoy to the Turkish border, were arrested at Dover. They were carrying £20 000 in contribution to the costs of the convoy, collected from UK Kurdish communities. The men were detained at Belmarsh Prison for 9 months, and prosecuted under the *Terrorism Act* 2000 for providing support and funding to the PKK. The Court acquitted the defendants in November 2002. In March 2003 Gultekin Onur and Soner Koyuncu from the Halkevi Centre were detained in Preston for 2 months on charges that funds they raised for Kurdish TV were for a terrorist purposes. The case was dismissed for lack of evidence.

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103 US embassy, "05Ankara3863_a," (embassy cable, June 5, 2005), text file.
104 US embassy, "07Ankara2917," (embassy cable, December 7, 2007), text file.
105 Ibid.
106 Europol, *TE-SAT 2013: EU Terrorism Situation and Trend Report* (Deventer, Netherlands: European Police Office, 2012).
107 Ibid., 11.
108 The court is reported as finding that "the television channel in a variety of programs unilaterally and indiscriminately had relayed the PKK's messages, including incitement to revolt and to join the organization." Deniz Serinci, "Historic Danish Court Decision Against Roj TV Not Backed by All MPs" *Rudaw,* 28 February, 2014.
109 Europol, *TE-SAT 2013*, 14.
110 Sentas, *Traces of Terror*, chapter 7.

The strategic aim of proscription in the UK is targeted 'disruption' not prosecution. Proscription polices the Kurdish diaspora in the UK largely without arrest, charge and prosecution for criminal offences. This is because proscription functions primarily as an executive, preemptive policing power. In a study of the MI5 raids of 16 Kurds in London over a two month period in 2011,[111] the pattern of encounters indicated neither investigation for the commission of an offence, nor visited for the purposes of intelligence collection. Those visited by MI5 were warned not to collect or send funds to the PKK, not to associate with 'PKK leaders', with some informed that they were 'members' of the PKK, and to desist. A number of Kurds believed they were being indirectly warned away from collecting money for Kurdish community centres, as these were the only organisations for which they had fundraised. All interviewees believed that their 'legitimate' rights to support Kurdish self-determination were being criminalised because they supported the political goals of the PKK and because they frequented Kurdish community centres believed to be pro-PKK.

Practices of disruption targeted against Kurds active in their community centres shared three features. First, repeated visits within a community - both over years and of multiple people within a confined period of time - function as collective harassment of the Kurdish people. In this study, disruption relied on deportation threats or communicating to those targeted that they are subject to extensive surveillance. Second, whilst not charged with an offence, disruption practices reproduce notions of legality and illegality premised on the logic of the PKK ban. Kurds were consistently told by authorities that they could engage in 'legal' activities to support human rights but not in support of the PKK, for this was illegal. 'Kurdish rights' were depoliticized and discursively detached from the specificity of the PKK. Furthermore, the subject positions being disrupted are not formally 'illegal'. Tellingly, at least in 2014, none of the disrupted individuals had since been charged with an offence. Third, the effects on those disrupted were to generate fear and anxiety for a marginalized refugee community, alienating individuals from each other through the duress implicit in MI5 requests for 'secrecy'.

The activities of security services and prosecutions across Europe have a debilitating role in entrenching the marginalisation of the Kurdish diaspora as political actors who could contribute to a peace process.[112] There is a danger that disruption operations against the Kurdish movement, particularly in Europe, for membership or financing of the PKK are becoming normalised, as an expected function of the lists in domestic policing. These developments directly undermine the norms of inclusive conflict transformation. Yet the nature and extent of the criminalisation of the Kurdish diaspora has not been subject to extensive attention in either research or in public policy work. In contrast, NGO advocacy supporting diaspora peace building efforts can develop transnational civil society work and inclusive peacebuilding norms.

3.4   The impact of listing the PKK on Kurds in Turkey

Sustainable peacebuilding in Turkey cannot be understood outside of civil society participation. Track 1 or back channel talks are a necessary but insufficient condition to progressing negotiations. In sum, research demonstrates that broader civil society participation can strengthen mediation processes by: generating public pressure on the parties; building democratic norms through participation; enhancing the legitimacy of the peace process; reducing opposition to agreements and enhancing their quality and sustainability.[113] The AKP Government's continued, and now public, talks with the PKK rely upon civil society consent to a political solution to the conflict and practices of reconciliation.[114] The AKP has used its electoral success in recent years to suggest a majority support for a peace process and recent referenda on constitutional changes towards democratisation indicate the support of 58% of the population. Erdogan appointed a 'Wise Men Commission' in 2013 to promote and explain the benefits of a peace process to the Turkish people. It received broad support, whilst also being subject to criticisms that it

111 Sentas, "Policing the Diaspora: Kurdish Londoners, MI5 and the proscription of Terrorist Organisations in the UK" (forthcoming).

112 Ibid.

113 Thania Paffenholz, *Broadening Participation in Peace Processes*, (Place: Centre for Humanitarian Dialogue, 2014).

114 Yildez, "Turkey's Kurdish Conflict," 159.

was a fabricated form of civil society engagement.[115] Historically, civil society in Turkey has tended to be fragile, a result of the authoritarian and repressive character of the Turkish state with its documented limits on freedoms of expression, association and assembly. The concept of 'civilian society' itself has been closely associated with the push for democratisation and human rights and treated as security threats by the state.[116]

This is why for a number of INGOs, supporting society-wide democratisation and strengthening civil society is a key focus of their work in Turkey. For the EU Turkey Civic Commission (EUTCC), a sustainable and democratic peace requires:

> ...not only further changes in legislation, but a change in the ideology and mentality at all levels of Turkish society. From a state seeing the expression of Kurdish culture and language as a threat to the state, Turkey must become a state that recognizes differences and sees cultural diversity and freedom as positive and necessary elements of a true democracy.[117]

The Berghof Foundation and Democracy Progress Institute are engaged in significant collaborative projects aimed at preparing civil society for the reconciliation process, through Turkish-Kurdish dialogue and reconciliation. 'Intergroup mediation' has been one method to bring together people from a similar profession or other commonality in order to solve smaller, common problems rather than create solutions to the Kurdish question. Civil society participation in developing a peace process is particularly important because of the lack of trust between the parties to conflict; between NGOs and government bodies, and the polarisation of public institutions by Government.[118]

Kaliber and Tocci explain that the Kurdish Question has shaped how civil society organisations (CSOs) have been positioned politically by the state since the 1980s, as either a security threat, or part of the national security project.[119] Those CSOs promoting Kurdish or other ethno-cultural linguistic identity rights are either imputed as PKK supporters or otherwise constructed as existential threats to the state's homogenous framing. CSOs who may have pushed for greater democracy, but within the limits of the state's republican project (individual rights rather than collective rights to identity/self-determination), occupy establishment positions.[120] The authors argue that CSOs can positively influence conflict transformation so long as they contribute to *desecuritizing* the Kurdish question, whilst CSOs which have tended to securitize the Kurdish Question contribute to conflict escalation.[121]

Research in this field suggests that CSOs can support the transformation of the conflict by socialising the founding conditions for peace and generating broad public acceptance of the causes of the conflict. That is, addressing the lack of recognition of Kurdish identity, assimilation, racism, socio-economic underdevelopment arising from the course of the armed conflict, helps to 'internalise democracy'. But for some segments of establishment civil society, defining the conflict in this manner is perceived to be antagonistic and itself 'violent'. For Kaliber and Tocci, claims made by CSOs "underlining the state's responsibility in the persistence of violence" with reference to the language of policies of denial, assimilation and massacre are themselves "couched in security terms". They argue that some Kurdish CSOs have securitised the Kurdish question by "failing to distance themselves from the PKK and its separatist agenda, or by advocating Kurdish collective rights exclusively".[122] Their study recognises Kurdish CSO claims are marginalised and misrepresented by establishment bodies. However the suggestion that

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115 The Wise Men Commission was comprised of 63 religious leaders, human rights advocates, academics, business people, actors and entertainers appointed by Turkish Prime Minister Erdogan.
116 Alper Kaliber and Nathalie Tocci, "Civil Society and the Transformation of Turkey's Kurdish Question," *Security Dialogue* 41 (2010): 191.
117 "EU Turkey Civic Commission," *EU Turkey Civic Commission*, http://www.eutcc.org/articles/5/about.ehtml.
118 Democracy Progress Institute, "Why Civil Society and Conflict Resolution?" Roundtable Meeting, Istanbul, April 6, 2013, 20.
119 Kaliber and Tocci, 'Civil Society," 41.
120 Ibid., 192–96.
121 Kaliber and Tocci, "Civil Society".
122 Ibid., 199.

Kurdish CSOs should adapt their political claims and distance themselves from the PKK, is in tension with conflict transformation practices that seek to address, rather than manage political grievances.

Projects aimed at strengthening Kurdish civil society dialogue risk being substantially undermined or conditioned through the global ban on the PKK. The repression and criminalisation of CSOs who advocate Kurdish ethno-cultural rights remains a palpable means by which the listing regime defines Kurdish advocacy on the Kurdish Question as an object of security. One effect of Turkey's established public stand of non-negotiation with the PKK as banned terrorists, is to legitimate its prosecutorial responses to the political claims and associations of Kurdish civil society. Counterterrorism has long maintained egregious human rights abuses and systemic repression of Kurds during the course of the conflict. Listing, by targeting NGO and CSO networks for prosecution, increases surveillance, limits debate about self-determination, expands new forms of securitisation, erodes recognition of the role of human rights in conflict transformation and ultimately, undermines the possibility of a democratic political solution.

(i)   The KCK Operations and sabotage of the peace process: the largest counter-terrorism prosecution in the world?

In 2009, the AKP launched the 'Democratic Opening', promising reforms, liberalising repressive restrictions on the expression of Kurdish culture and heralded as an opportunity to resolve the Kurdish Question.[123] The piecemeal reforms implemented have been considered insufficient by the Kurds and have largely floundered as a confidence building measure to support a peace process. We discuss the case study of the 'KCK operations' as an effect of how the PKK ban undermines the democratisation efforts vital to civil society participation in the process.

The approach of banning the PKK has legitimated Turkish state violence primarily through counterterrorism measures targeted at the Kurdish people as a priori 'terrorist'. Since April 2009 up until the time of writing in October 2014, Turkey's strategy has been a renewed program of mass arrest and prosecution of Kurdish civil society in an operation against the Kurdistan Communities Union (KCK), established in 2005 as an 'umbrella organisation'. The KCK is understood by Turkey as the urban expression of the PKK, and charged with aiming to create a 'parallel state'. When the PKK reorganised itself through the principles of democratic autonomy and confederalism, the KCK was imagined as a societal organisation to coordinate this goal. As discussed earlier, the KCK presents as a localised governance alternative to seeking a nation state based on grass-roots, direct democracy.[124] The KCK is thus integral to the transformation of the PKK from a military to a political formation.[125]

The counterterrorism operations against the KCK rely on the characterisation of the PKK as terrorist, and are a direct effect of listing. We suggest that the KCK operation remakes a counterinsurgency paradigm of peace building in Turkey through the breadth and repetition of the Kurdish civil society it targets. The KCK operation targets NGOs and CSOs engaged in the peace process, as well as disrupting the very possibility of political organisation by Kurdish civil society as a necessary social condition for conflict transformation.

In the four years between 2009 and 2013, during the democratic opening, Turkey prosecuted almost 40 000 people for offences of membership of a terrorist organisation; aiding and abetting a terrorist organisation; and attempting to destroy the

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123 Parliament adopted a series of reforms on November 13, 2009, including a plan to establish a commission to combat discrimination, and to end obstacles to all-day broadcasting by private television channels in languages other than Turkish. The latter was introduced on the same day.

124 Jongerden and Akkaya, "Democratic Confederalism as a Kurdish Spring". In contrast, the International Crisis Group refer to the "PKK/KCK's dogmatic unity and strong central controls". International Crisis Group, *Turkey and the PKK: Saving the Peace Process*, 33.

125 Democratic Process Institute (DPI), *Turkey's Kurdish Conflict: An Assessment of the Current Process* (London: Democratic Process Institute, 2013), 17, citing Turkone's work.

country's unity and integrity.[126] On numbers of prosecutions alone, Turkey's campaign against the Kurds appears to be one of the largest counterterrorism operations in the world. The KCK operation targeted the widest possible array of Kurdish civil society actors, narrowing the scope for Kurdish political participation in ending the conflict. 8 000 people, including activists, lawyers, parliamentarians, mayors and journalists have been detained as alleged members or supporters of the KCK. Charges have been based on allegations that public statements, or otherwise implicit support for the goals of the KCK, are support for separatism.[127] Key pro-Kurdish civil society organisations have been singled out for disruption. These include the Human Rights Association of Turkey (the largest and oldest human rights organisation in Turkey) and the Democratic Society Congress (DTK), a general assembly of delegates of Kurdish NGOs, political parties and elected individuals from the population.[128]

Pro-Kurdish political parties have also been targets of the KCK operations. Contradicting democratisation plans, in December 2009 the Constitutional Court banned the pro-Kurdish Democratic Society Party (DTP), accusing it of separatist activity.[129] Consequently, two DTP MPs were expelled from the Turkish parliament and another thirty-five party members were banned from joining any political party for five years. By June 2010, 151 officials of the banned DTP and its successor, the pro-Kurdish Peace and Democracy Party (BDP), were indicted for membership in the KCK. Significantly the BDP - the fourth largest political party in the country - has had six of its elected parliamentarians, 32 mayors, and hundreds of its provincial counsellors, party officials and activists arrested and detained.[130] The BDP describe the KCK operations as "political massacre against Kurdish Politicians".[131] As noted, the BDP has been a pivotal player in the peace process focusing on democratisation of Turkish society more broadly as well as supporting dialogue efforts and acting as an intermediary between the PKK and the AKP.

The KCK prosecutions have directly targeted lawyers central to the negotiation process. Since 2011, 44 lawyers, by virtue of acting as PKK leader Öcalan's lawyers, were arrested and detained on charges of having committed terrorist offences. A Kurdish lawyer at the firm representing Öcalan described the purpose of the action against the lawyers as a sabotage of the peace process:

> The indictment against us is nothing 'illegal', it's all about our intention and that we provided a channel of communication to [the PKK insurgent leadership on the northern Iraqi mountain of] Qandil. It's actually an operation against the [peace] process, to show that everything about us is illegal, everything we do, even for the health of our clients.... They wanted to put the blame of the failed Oslo Process on the lawyers. *What they targeted was the negotiation process itself*.[132] (emphasis added)

It is widely believed by Kurdish actors that the mass prosecution KCK strategy was a response to the beginning of the peace negotiations of 2009.[133] The arrests commenced on April 14, 2009 shortly after the beginning of the İmralı and Oslo negotiations. BDP leader, Demirtaş argues:

> We can safely conclude that the government used the judiciary to carry out these political operations in order to strengthen its hand in negotiations with the PKK and its leader.... The government's fundamental goal in these negotiations was not to find a solution, but to impose its own version of a settlement by weakening, disempowering and defeating the other

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126 İsmet Kayhan and Ojan Koç, "Turkey's Terrorism Report," *Firat News*, http://en.firatnews.com/news/features/turkey-s-terrorism-report.htm.
127 "Solidarity Message on the Occasion"; "Human Rights Watch".
128 Jongerden and Akkaya, "Democratic Confederalism as a Kurdish Spring", 180-182.
129 Whilst the Constitutional Court also attempted to close down the AKP, it was unsuccessful. Commentators have noted that whilst the closure of the DTP was not the AKP's decision it subsequently controlled and directed all state police and security agencies in the KCK operations.
130 Figures current as of January 2013; BDP, "International E Bulletin".
131 BDP, "International E Bulletin".
132 As quoted in International Crisis Group, "Turkey: The PKK and a Kurdish Settlement," 3.
133 "British Intelligence Played Mediator Role for Oslo Talks," *Today's Zaman*, last modified June 18, 2012, http://www.todayszaman.com/news-283920-british-intelligence-played-mediator-role-for-oslo-talks.html.

side. Furthermore, the AKP itself gave the judiciary the ability to do these things by passing certain legislation, and the ruling party has also tried to legitimize the operations and win support through influencing the media. It's not correct to characterize these political operations as a judicial decision independent of the government.[134]

Government figures are mindful of the critique that KCK prosecutions undermine resolution of the conflict, but adopt a different position underpinned by the logic of proscription. Yalcin Akdogan, Deputy and advisor to Prime Minister Erdogan stated: "I see the KCK operations not as something to impair the (peace) process but rather a necessity of law and a natural extension to combatting terrorism".[135] Counterterrorism laws and proscription have not stopped talks, but are shaping and redefining the assumptions of peacebuilding. As in the Somalia and Palestine case studies, listing emboldens realist forms of peace and supplants inclusive engagements that would support conflict transformation. In the case of Turkey, the ban of the PKK sustains and compliments the military conflict, rather than operating as the unintended consequence of laws otherwise compatible with peace.

Limited public attention to the KCK prosecutions by the international community has contributed to the Kurd's marginalisation.[136] Kurdish respondents believed the lack of visibility of the KCK prosecutions is consistent with Europe and the US's support of Turkey's campaign against the Kurds.[137] Regarding the KCK operations, the International Crisis Group suggest "[i]nternational reaction has been muted, partly because Turkey justifies this as part of an anti-terrorist effort".[138] Outside of Turkey, public advocacy work about the KCK operations has been conducted by campaign groups such as the London based, Peace in Kurdistan[139] and Human Rights Watch.[140] If the KCK operation is compromising an inclusive peace process, how can peacebuilders take a more robust response to the operation? We discuss how justice work can undo the legitimation of counterterrorism and support inclusive conflict transformation principles and practices.

4. Doing justice with peace: INGOs and support for the peace process

Addressing human rights and justice for the Kurds is vital to transforming the conflict through greater democratisation of Turkish society. Conceptions of justice and peace are often juxtaposed as dichotomous methods in transitional justice/human rights and conflict transformation literatures, respectively. In one manifestation of the division of 'justice versus peace', justice work is defined narrowly as individualised responsibility for guilt for crimes. In this frame, justice is a *post-conflict* remedy because criminal prosecutions for perpetrators of violence interfere with reaching political agreements to end violence.[141] One respondent from an INGO working on human rights in Turkey understood it this way:

What clashes in conflict resolution with human rights work most of all is the question of accountability for past abuses for both sides/one side. That is a difficult one, the justice question – are we going to write things off that happened in the past in the interests of having a deal, now? I think that's one of the things that we find enormously difficult as a human rights organisation, to give up – to somehow sacrifice the rights of the victims to justice, in attempting to cut a deal, and

134 Hess, "The AKP's 'New Kurdish Strategy'".
135 Quoted in International Crisis Group, "Turkey: The PKK and a Kurdish Settlement," 3.
136 Whilst Turkey's counter-terrorism operations have received more criticism and attention from the UN's Human Rights Council than any other country, the KCK operations have received sparse commentary. See however; European Commission, Commission Staff Working paper, *Turkey 2011 Progress Report* at 7: "The detention of elected representatives is a challenge to local government and hampers dialogue on the Kurdish issue."
137 Interviews, September 2013, Brussels.
138 International Crisis Group, "Turkey: The PKK and a Kurdish Settlement," 3.
139 See, International observation of the KCK Trial of Kurdish lawyers, http://peaceinkurdistancampaign.com/activities/delegations/international-observation-of-the-kck-trial-of-kurdish-lawyers/
140 Human Rights Watch, "Protesting as a Terrorist Offence", 2010; Human Rights Watch, "Turkey's Human Rights Rollback", 2014.
141 Yildiz and Breau, *The Kurdish Conflict*, 258.

to attempt to secure peace in the future. Resolution of a conflict is all bound up with facing the past and some kind of reckoning with the past through justice. But in conflict resolution we know that is not always the case.[142]

Conflict transformation theory and practice has however, long grappled with the productive intersections between human rights and peacebuilding, characterised as a 'justice with peace' approach.[143] From our particular standpoint as legal researchers, we suggest that a 'justice with peace' approach to the Kurdish question at base requires engaging with the following:

(i)   Recognition that Kurdish human rights violations in Turkey are obstacles to political resolution of the conflict

Human rights violations of the Kurds (civil, political, cultural and socio-economic rights, including the right of a people to self-determination) are both root causes of the conflict *and* continuing effects of the conflict. As outlined in the previous section, counterterrorism regimes impact on Kurdish human rights in a manner that undermines civil society and its participation in a political solution to the conflict. The global designation of the PKK as terrorist structures and legitimate this dynamic to the extreme that Kurdish human rights are shifted outside the arena of legitimate peace building activities.

(ii)   Acting against impunity: supporting justice work in diverse, intersecting forms

A Truth and Reconciliation framework has been identified by many commentators as appropriate to Turkey as part of transforming the conflict through an inclusive approach to peacebuilding. Establishing a record of events during the conflict provides an important counter-balance to the marginalisation of Kurdish history, culture and politics during the conflict.[144] In this framework, justice and reconciliation is achieved through engagement in political reform and advocacy to address the root causes and effects of the conflict.[145] Targeting state impunity and accountability for past abuses by all parties during the conflict is critical for the peace process. To this end, Human Rights Watch have highlighted how a 20 year statute of limitations on the prosecution of unlawful killings, will soon bar state accountability for thousands of killings during the height of the conflict between 1993-1995.[146] Other examples of justice work that can support conflict transformation include the PKK and pro-Kurdish parties' claims for constitutional recognition of Kurdish ethnicity and language, and urgent reform to counterterrorism laws that target Kurdish civil society.

(iii)   Repeal of Turkey's Anti-Terror Law has been a key demand from the Kurdish movement and is considered vital to a resolution of the conflict[147]

INGOs, lawyers and diaspora Kurds engaged in justice work report concerns that international peace efforts haven't engaged enough around the effects of terrorism laws in Turkey. In a 'justice with peace' methodology, the globalised listing of the PKK is incompatible with devising local justice reforms capable of reversing the criminalisation of civil society. Addressing the effects of listing on the PKK's political status, and on CSOs, activates cross-jurisdictional systemic advocacy, as part of the sequence of conflict transformation. Alongside law reform, this could include monitoring, reporting and supporting Kurdish defendants in counterterrorism trials and supporting efforts to delist the PKK at regional and domestic jurisdictional levels.

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142 Interview, September 2013, London.
143 Beatrix Schmelzle and Véronique Dudouet "Towards Peace with Justice," in *Human Rights and Conflict Transformation: The Challenges of Just Peace*, Berghof Handbook for Conflict Transformation, Dialogue Series Issue No. 9, eds. Véronique Dudouet and Beatrix Schmelzle (Berlin: Berghof Conflict Research, 2010).
144 Yilidiz and Breau, *The Kurdish Conflict*, 264.
145 Ibid., 264.
146 Human Rights Watch, "Time for Justice"; Human Rights Watch, "Turkey's Human Rights Rollback: Recommendations for Reform", 2014.
147 Interviews, London and Brussels, September 2013. See recommendations made by Human Rights Watch, "Turkey's Human Rights Rollback: Recommendations for Reform", and; Democratic Progress Institute (DPI), *Turkey's Kurdish Conflict*, 44, 48.

(iv) Listing the PKK makes human rights and justice work an object of security

The dominant counterinsurgency approach of conflict management we trace in this report tends to construct and marginalise human rights claims as 'conflict escalating'. This imposes a counter-productive 'justice versus peace' dichotomy onto conflict resolution that warrants robust debate within the sector. Even when framed in universalist language, the concept of human rights in Turkey is not a symbol of universalist humanism but a signifier for 'separatism'. Human rights work is associated historically in Turkey with the left and with the Kurds in particular because human rights emerged historically as a social movement after the 1980 coup and the mass imprisonment, torture and disappearance of Kurds. The Human Rights Association was founded by Kurdish political prisoners, those who were the direct victims of human rights abuses. A human rights worker explains their battle with challenging this conception of human rights:

> Those we've most focused on the most, are the egregious abuses and that's been the left and Kurds. You can't deny that. It's tainted the perception of the work we do – you work with terrorists. You work for particular people and organisations. Human rights have always been seen as politically partisan in Turkey. It's been a great effort to break that down and we still haven't succeeded. The war on terror and the listing is a disincentive for NGOS to work on this issue....[148]

There were material difficulties for human rights INGOs in working in Turkey in the 1990s, with Amnesty researchers banned and a Human Rights Watch researcher expelled as late as April 2006. But respondents suggest the environment for INGOs undertaking human rights work in Turkey today has markedly improved, and cite real opportunities for agonistic dialogue with Government and establishment civil society groups about democratisation.

(v) Recognising there is an armed-conflict governed by IHL

Yildiz and Breau argue there are two key differences between efforts in resolving the Turkish-Kurdish conflict and the Northern Ireland conflict. The first is that Turkey has failed to recognise the existence of an armed conflict. Secondly, that there has been a lack of international engagement in supporting the resolution of Kurdish conflict.[149] The two assessments are interconnected. The absence of international NGOs in supporting the Kurdish movement is partly due to the hegemony that Turkey is dealing with a domestic counterterrorism issue and not an armed conflict governed by IHL.[150]

An agenda for normalising an inclusive conflict transformation premised on justice, human rights and IHL, rather than counterterrorism, could come from peace building practitioners. The question of the nature of the PKK's violence, has presented as an important debate between some human rights advocates in Turkey:

> People got annoyed that the cases you are working on are for membership for illegal organisations - not only the PKK but far left organisations - and why are you taking up their cases? Even some members of Amnesty would say that to us. Amnesty has always faced that charge – therefore there was a concern not to focus on those who might be involved in violence. Trying to correct the perception of Amnesty as well, was a focus.[151]

The question of violence, namely, the PKK's engagement in violence against military, and at times, civilian targets remains a barrier for some INGOs in their engagement with the Kurdish question. No respondents suggested that the listing of the

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148 Interview, September 2013, London.
149 Yildiz and Breau, *The Kurdish Conflict*, 237.
150 See chapter 2 for discussion of the relationship between counter terrorism and IHL.
151 Interview, September 2013, London.

PKK presented a reason for why they did not directly engage in counterterrorism justice work, citing that it was neither their mandate nor their expertise. We suggest that part of the justice work essential to conflict transformation requires INGOs to engage in public critique of the designation of the PKK as a terrorist organisation.

Conclusion

This chapter has sought to explain the effects on the peace process of listing the PKK, with a specific focus on its most damaging effects targeted to specific Kurdish actors and Kurdish civil society more broadly. The entanglement of counterterrorism prosecutions and bilateral private talks are constituted through the broader frameworks of preemptive security, counterinsurgency and warfare, which have foreclosed political consideration of the Kurdish Question until quite recently. This is not to deny a palpable shift by the AKP in steps towards a political solution to the conflict. Rather, the global security assemblage banning the PKK as a political actor has conditioned a realist form of peace structured by counterinsurgency practices. In this counterinsurgency paradigm of peace, four conclusions are warranted.

First, the ban of the PKK amplifies the key barriers to addressing the root causes and consequences of the conflict, which are normatively bound up with the recognition of an 'armed conflict' in international law. Turkey's continued non-recognition of measures to address Kurdish self-determination has become not simply an *effect* of the conflict, but in turn, regenerates 'root causes' of the conflict. The designation of the PKK as a terrorist organisation has undermined the PKK's political status and eroded confidence building measures and stalled periodic negotiations.

Second, the contemporary period of mass prosecutions of the Kurds in Turkey should be understood as part of the listing dynamic, structuring and hindering negotiations for peace. All political opportunities for Kurdish civil society to explore self-determination options are effectively criminalised in Turkey until substantial repeal of the terrorism laws are effected. Third, the global security assemblage that enlivens listing, does not simply erode the recognition of armed conflict and IHL norms. Listing undermines and reshapes the inclusive norms of conflict transformation. Listing is a barrier to peace because it gives international support and political leverage to Turkey's military offensives and domestic use of counterterrorism against the Kurds - laws formerly isolated in the ECtHR as anti-human rights. After the hyper-repressions at the height of the armed conflict in the 1990s, the banning of the PKK in 2001/2002 by the west consolidated and internationalized a lawfare approach to the conflict.

Lastly, international NGOs engaged in conflict transformation have not been the targets of Turkish, European or US counterterrorism. There is a productive opportunity for INGOs to reflect upon and challenge the impact counterterrorism measures are having on the incipient peace process. The risks are low but the stakes are great.

Conclusion

Our research set out to assess the impact of terrorist listing on peacebuilding and conflict transformation more broadly. Our overarching finding is that rather than simply shrinking or reducing the space available for peacebuilding, terrorist listing is re-shaping peacebuilding practices in novel and disturbing ways. In addition to risk mitigation measures peacebuilders take such as withdrawing from contact and guarding against proximity to listed groups, terrorist listing strongly influences how, when and if conflict transformation principles are put into practice. Three core tensions arising from the relationship between counterterrorism listing and peacebuilding stand out.

The first tension concerns how we understand the impact of counterterrorism law on peacebuilding communities and civil society more broadly. Counterterrorism practitioners view the targeting of these communities in the context of terrorist support networks as perfectly legitimate; part of a broader strategy of targeting those on the periphery to effectively coerce and disrupt the core. Yet as we have demonstrated in this report, this 'associational' approach is unduly hindering peacebuilding efforts, as well as disrupting the activities of non-violent resistance, solidarity and civil society groups. There need not be a conscious intentional strategy to target peacebuilders for this disruption to take effect. The global scope of the listing regime, together with peacebuilders' accountability to funders and state laws, means peacebuilders themselves play a central part in counterterrorism laws' structural transformation of peacebuilding.

The second tension is between contradictory sources for the normative regulation of armed conflict. The global counterterrorism law approach is a coercive model predicated on the suppression and elimination of non-state armed groups. In contrast, IHL and conflict transformation traditions provide resources that support a different, normative basis for conflict resolution. Global terrorist listing regimes have enabled the adoption of counterinsurgency strategies based on deligitimising and disrupting non-state armed actors using state-centric approaches that justify the targeting of whole populations deemed to 'harbour' terrorists. In obstructing the principles of distinction (between military and civilian targets), proportionality, non-interference and impartiality, terrorist listing has further undermined political claims of self-determination and the right to resist colonial domination and occupying or repressive regimes. These trends are particularly pronounced in respect to Israel and Turkey's suppression of claims for self-determination and armed resistance, with military offensives, targeted killings, mass incarcerations and prosecutions undertaken in the name of the global war on terror. The fusing of the regulation of armed conflict with counterterrorism entrenches a counterinsurgency approach to political conflict, and shapes the context within which peacebuilding operates.

The third tension in the relationship between peacebuilding and counterterrorism concerns the basic question of whether it is legitimate to negotiate with non-state armed actors. Conflict transformation norms provide that the use of violence by non-state actors does not preclude political negotiation with them. In contrast, the act of listing a terrorist organisation itself distinguishes

between 'acceptable' and 'terrorist' actors, and their respective use of violence. Listing is also a legal determination of the kinds of contact permitted with listed actors. This effectively prohibits many forms of contact viewed as essential for peace processes to proceed – from the mundane provision of transport to attend meetings, to training that facilitates readiness for talks. These observations are not new, though our research has elaborated the nature, extent and impact of these prohibitions in the context of complex global legal arrangements. In essence, listing serves primarily to disqualify listed actors from political negotiation, on the basis of an *a priori* assessment as to the legitimacy of their aims and means, regardless of the purpose or targets of violence, be it in self-defence, in furtherance of self-determination, in resistance toward a repressive regime, or directed against military assets. In making this distinction between legitimate and illegitimate violence, terrorist listing can be characterised as an act of 'lawfare' that is central to contemporary war and conflict management efforts. Crucially, this tension highlights that what is at stake in ascertaining the relationship between peacebuilding and listing is the *kind* of peace that is being sought and constructed – and as such the kinds of peace that are impossible.

In conclusion, we briefly assess how these core conflicts play out in respect to the case studies in chapters 3-5. We also consider what the variations in our research findings suggest about the impact of terrorist listing in different conflict environments. Finally, we discuss some of the challenges posed by our research for key actors with stakes in these issues – including policymakers, academics and, most importantly, peacebuilders themselves – and ask what kind of public debates might more proactively confront and address some of these complex political problems.

The disruptive effects of terrorist listing and preemptive security

Our research shows that counterterrorism measures and terrorist listing have a significant impact on peacebuilders, whether they work at close proximity to armed groups or at distance as part of the broader conflict transformation community. This echoes the research findings of similar studies that have examined impacts on other sectors, including humanitarian and development actors.

At issue is whether these impacts are the foreseeable effects of preemptive, disruption-based counterterrorism paradigms, or merely the 'unintended consequences' of targeted sanctions regimes aimed at terrorist groups. This question matters because the unintended consequences narrative helps legitimise counterterrorism listing in public discourse and suggests to those affected that they must live with those consequences because nothing can be done – to the obvious detriment of those advocating for peace and justice. As explained in our introductory chapters, the preemptive rationale of counterterrorism listing includes distinctive peacebuilding practices squarely within its focus. These laws explicitly target social affiliations and indirect associations with listed parties. They are not just directed at the prevention of terrorist acts, as ordinarily understood. Otherwise legal activities – such as training, organising meetings, and providing support in the course of peace work – potentially fall within the remit of counterterrorism laws when undertaken in proximity or association with listed parties, who are often the main protagonists in armed conflict situations.

Our research builds on previous studies that document the withdrawal of peacebuilders from contact with listed actors and the impact on peacebuilders' impartiality. Our study suggests that counterterrorism listing is having a profound effect on both the practices of peacebuilding organisations themselves and the prospects for conflict transformation. Specifically, in all three case studies we identify numerous indicators of risk aversion - including the withdrawal of some international actors, donors and NGOs - and a range of emerging risk management strategies. This has led some international actors to police their relationships with local civil society partners and others to marginalise or exclude them from international peacebuilding efforts. Many interviewees told us these laws were making their peacebuilding efforts increasingly ineffective and were exacerbating, rather than helping, in the resolution of complex armed conflicts.

We have also shown that the targeting of civil society actors by state and non-state actors in the name of domestic counterterrorism policy is legitimised and compounded by the disruptive effect of international terrorist listing regimes. In Turkey, where all political opportunities for Kurds to explore self-determination are effectively criminalised by counterterrorism legislation, the proscription of the PKK and others has left Kurdish civil society both isolated by the international community and inadequately protected from Turkish state repression. In the OPT, where the international community is committed to working with Palestinian civil society, whole communities face potential exclusion because of fears about their support or association with Hamas. In both case studies, terrorist listing has consolidated and internationalised a counterinsurgency and lawfare approach to the conflict, as evidenced by the international targeting of solidarity groups and diaspora civil society actors and charities that support Kurdish or Palestinian self-determination. These impacts in turn have a palpable effect on amplifying the root causes of these conflicts.

The impact of conflict management on conflict transformation

We have argued that global terrorist listing regimes have enabled the adoption of counterinsurgency strategies that justify the targeting of whole populations in order to delegitimise and incapacitate non-state armed actors. The suppression of political claims with military offensives, targeted killings, mass incarcerations and prosecutions undertaken in the name of counterterrorism, function as a form of conflict management. In contrast, conflict transformation norms of inclusive participation and engagement with the political claims animating the root causes of conflict, are marginalised. In listing Hamas, the PKK and other organisations, Israel and Turkey's allies have conferred their tacit support for these conflict management paradigms and endorsed military offensives and the use of counterterrorism measures against civilians in a way that was, at least prior to 9/11, viewed much more critically (through the lens of human rights) as unduly and unacceptably repressive.

And although the international community may view its counterterrorism policies as a judicious form of liberal democratic solidarity that conforms with their obligations to international law and UN Security Council Resolutions, its acquiescence to the human rights abuses meted out by Israel and Turkey may be having the effect of regenerating the 'root causes' of the conflict and ultimately undermining the prospects for peace. Failed attempts to undermine the Islamists in the OPT, for example, have left many Palestinians (and their sympathisers) with such contempt for the MEPP that it is coming to be seen as aiding the occupation.

For the Kurds in Turkey at the time of writing in September 2014, thanks to the new war against ISIS in Syria and Iraq, the journey from freedom fighter to terrorist is coming full circle, or at least it would do if it were not for the conflict management practices of Turkey. As our case study on Somalia shows, the entanglement of counterterrorism and conflict resolution processes prioritises the immediacy of stability through the repression of conflict. It further privileges top-down mediation amongst power brokers and building state institutions over bottom-up, community driven peacebuilding or the resolution of the grievances underlying and perpetuating the conflict. In turn, the less tenable that liberal peace or statebuilding initiatives become, the more likely they are to end in bloody failure.

The security-peacebuilding nexus

Global, regional and national counterterrorism listing measures overlap to create a complex transnational legal apparatus that produces real-world challenges for peacebuilding practitioners. The increased threat of liability is leading peacebuilders to self-regulate their behaviour and creates newly securitised means of undertaking peacebuilding. As we have noted repeatedly throughout this report, the exercise of counterterrorism power is not just something that happens to peacebuilders in the abstract or impacts upon them inadvertently. Rather, it is something that is exercised, at least in part, *through* them. As our case studies demonstrate, the space for peacebuilding is not merely 'shrinking', but being repurposed, qualitatively transformed and securitised in novel ways.

In Somalia, for example, the proxy war against Al-Shabaab is transforming the very rationale of inclusive peacebuilding by absorbing and reframing it within broader logics of risk, threat and danger. One effect of these changes is that peacebuilders are in many cases now forced to work in ways that go against their core values as peacebuilders. Many interviewees engaged in south-central Somalia told us that terrorist listing laws were making their peacebuilding efforts increasingly ineffective and were exacerbating rather than resolving the complex conflicts in that region.

In the OPT, the subordination of conflict transformation under the aim of delegitimising Hamas and other banned groups has transformed peacebuilding programmes and securitised many of the most prominent actors in the OPT. Risk management, due diligence and the extensive vetting of partners appears to be enhancing distrust between organisations with a mandate to help and support Palestine and the very people that they are supposed to be supporting.

In Turkey, the banning of the PKK has turned the entire Kurdish movement into an object of security, and justified mass criminalisation of non-violent political formations associated with the PKK. Ironically, it is Turkey and the international community's recognition of these political forms of organisation that would support the PKKs transition to demilitarisation alongside the political measures to address the causes of the conflict. In its most acute manifestation, peace negotiations blur into counterinsurgency with the criminalisation of several Kurdish negotiators on the US 'Kingpin' list.

We have used the term 'security-peacebuilding' nexus throughout our study to describe the operational convergences taking place between counterterrorism and conflict transformation. This term speaks to 'the lack of an adequate language for describing the social and organisational effects of the new wars'[1] and is used analytically to understand the development of the novel securitised peacebuilding practices we have observed. Framing these changes in this way places peacebuilding at the frontline of contemporary security practice and exposes inconsistencies and tensions about what peacebuilding is. The discourse of 'shrinking space' and 'unintended consequences' simply misses the gravity of these changes. The securitisation of peacebuilding is similar to shifts taking place in fields of humanitarian access and development. It is our hope that using this approach prompts peacebuilders to identify points of commonality and divergence with those facing securitisation in these other domains.

Political challenges ahead

Our study opens up some difficult questions and complex challenges for discussion and debate amongst policy makers, scholars and peacebuilding practitioners themselves. The main problem that our study has addressed in various ways is the following: *What does it mean to build peace in times of permanent war?*

For many governments, engaging with armed groups that are listed as terrorist is not only legally problematic but socially and politically constructed as morally reprehensible. The aim of terrorist listing regimes is to delegitimise and incapacitate the enemy. When the enemy is understood as a diffuse network, diverse forms of association come within the scope of counterterrorism measures. Listed groups are considered qualitatively different from other armed actors, and 'beyond the pale' of political negotiation. So the prevalent assumption is that they need to be 'removed from the equation' or militarily defeated before one can realistically consider prospects for peace. Most practitioners therefore view listing as one part of a broader ensemble of security and military measures used to counter perceived terrorist threats. Few policy practitioners that we engaged were able to articulate whether terrorism lists were successful in achieving their stated objectives or creating adverse impacts on third parties. Our research and analysis has shown that counterinsurgency (COIN) doctrine is increasingly informing state peacebuilding policies. The sequence of events in COIN is relatively clear: first, you *clear* the area (with force); then you *hold* the area (with a strong state) and peace is assembled with what remains.

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1   Mark Duffield, *Global Governance and the New Wars: The Merging of Development and Security* (New York: Zed Books, 2001), 141.

For many peacebuilders engaged in conflict transformation work on the ground the situation is quite different and far less clear-cut. Engaging with all relevant parties involved in armed conflict is commonly understood as the necessary starting point for any form of meaningful conflict transformation. "The problem", as one Somali interviewee stated, "is that ideas cannot be destroyed by a gun. Ideas must be destroyed by counter-ideas", but terrorist listing actively works to preclude such possibilities.[2] Or, as one conflict resolution organisation that has worked in Israel and Palestine for several decades observed, terrorist listing "dumbs things down to the point that progress is impossible".[3] This is because many listed groups retain widespread political support - either as part of broader resistance movements, as elected political parties or as expressions of political Islam. Laws prohibiting 'association with' them are often seen as unworkable by peacebuilders because listed groups are either primary conflict actors or affiliated with people that peacebuilders ordinarily engage with. Few peacebuilders we spoke with had obtained formal legal advice about these issues, and even among those who had, there was considerable uncertainty about what activities might be prohibited and allowed. This uncertainty appears to generate two significant forms of disruption. First, listing measures are stimulating new practices of disavowal, securitisation and risk mitigation amongst peacebuilders themselves. The outsourcing of risk from international organisations to local peace workers; the wholesale withdrawal of peacebuilding from regions where affiliations with listed parties might persist; the inability of state and regional actors to meaningfully participate in peace processes; and, the increasing alignment of peacebuilding and statebuilding efforts are just some of the examples we have found of how terrorist listing is actively undermining peacebuilding in practice. Second, enhanced liability risk and moves toward peacebuilding in the legal 'grey area' have deeply depoliticising effects. Despite peacebuilding being profoundly affected by global terrorist listing policies, most peacebuilders (and the organisations they work with) are understandably reluctant to openly discuss the troubling effects they are experiencing.

Confronting these problems through public debate is a first necessary step in addressing them. But what kinds of discussions could be productively developed between protagonists with such divergent approaches and objectives? How can transnational security policies that are now so entrenched and implemented by such a wide range of global, regional, national and local actors operating across multiple jurisdictions, be made subject to critique and modification? And how can those most affected come to lead the public debate, and put their 'heads above the parapet', when doing so might threaten their peacebuilding efforts and expose them to the withdrawal of institutional and financial support?

Unfortunately there are no easy answers to these questions. However, as a first step, the case studies in this report point to clear opportunities to challenge listing's normative reframing of armed conflict into terrorism, whilst denouncing both state and non-state human rights violations. Our study shows that listing makes forms of peacework an object of security. This includes human rights and justice work addressing the historical and contemporary repressions that even liberal peacebuilding views as essential for peace progress. Coordinated support and solidarity for justice work that addresses the root causes of various conflicts, including repressive terrorism laws and human rights violations, provides one avenue for resisting the overt securitisation of peacebuilding.

Second, we suggest that the peacebuilding community has much to learn in this task from the many others who are voicing concerns about the deleterious effects of terrorist listing policies. Humanitarian actors, for example, have been particularly outspoken in articulating how counterterrorism laws are adversely impacting issues of humanitarian access, transforming humanitarian practices and politicising the distribution of humanitarian aid. They have undertaken detailed empirical studies to gauge effects, organised international networks of practitioners and policy makers to identify and consolidate their concerns, and sought to ameliorate the worst effects through legislative reform and open political debate. Human rights advocates, civil society organisations, scholars from diverse disciplines and constitutional lawyers have also long raised concerns about how terrorist listing undermines fundamental rights and freedoms. High-profile litigation by listed parties in national and regional

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2   See chapter 3.

3   See chapter 4.

courts since 9/11, for example, has challenged the legitimacy of Security Council listing regimes and forced the creation of new procedural mechanisms to try and mitigate the unfairness of these measures. It has also exposed the limits of strategic litigation as a strategy of change, leading jurists to question the foundational assumptions of preemptive security and the erosion of fundamental rights in the name of countering terrorism. Others have highlighted how global listing regimes have radically transformed the UN collective security system, undermined collective rights to self-determination and effectively criminalised resistance movements as terrorist organisations.

Bringing these problems and critiques together into productive relation will help the peacebuilding community begin more clearly articulating the conflicts between counterterrorism listing and peacebuilding practices. The response of the peacebuilding sector to date on these issues has been marked by uncertainty, internal confidentiality and acquiescence. Identifying how the concerns of peacebuilders overlap, augment or diverge from the concerns of humanitarian actors could help in better understanding the effects that are currently being experienced and mapping out a tentative reform agenda or program of action. Sharing experiences with human rights lawyers and others challenging the inequities of the preemptive security paradigm in other domains could deepen the analysis, open up common points of intersection and help clarify the profound issues at stake in these conflicts. Working together as a part of a broader and more diverse coalition is a necessary first step for the peacebuilding community to politically organise on this issue and build a collective voice capable of addressing these problems.

Third, there is a clear need for more empirical research on how the security-peacebuilding nexus is variously unfolding in practice, a convergence we have identified that listing has exacerbated. The fact that this study is the first to examine the effects of terrorist listing on conflict transformation in detail suggests that the peacebuilding community has more work to do in order to develop a cogent evidence-based case for political change. Whilst the securitisation of development has been the subject of much scholarly debate, there has been little cross-fertilisation with scholars operating in the peacebuilding and legal fields. Further attention needs to be paid to the particular practices and strategies that peacebuilders are creating to negotiate the complexities of these problems. As we have suggested throughout this study, these are not just 'unintended consequences' of counterterrorism policies but rather new ways that peacebuilding is being securitised at the granular level of everyday practice. Another troubling finding of our research is that the impacts of these measures are being differentially distributed, creating new lines of stratification and division across the peacebuilding field. Our study further suggests that counterterrorism listing may be exacerbating armed conflicts rather than ultimately enabling them to be more effectively resolved. We suggest that such findings go to the core of what peacebuilding means in practice. But for such effects to be properly identified and challenged, further research is clearly required. If the security-peacebuilding nexus is ignored by those most affected by it, then the securitisation of peacebuilding will inevitably become more embedded and difficult to reverse.

Finally, we believe this research speaks to policymakers as much as those engaged in conflict transformation efforts on the ground. Few of the policy practitioners that we engaged were able to articulate whether terrorism lists were effective in achieving their self-stated objectives. In fact, policy makers often expressly endorse terrorist sanctions because of the strong political signal (of illegitimacy) that they send and the relatively low political costs associated with using them. Our research suggests, however, there are potentially profound effects generated by the use of terrorism lists that are not being included in the cost-benefit policymaking calculus. And that the policy of disrupting and delegitimising groups listed as terrorist through proscription regimes may not only be ineffective, but may actually be rendering complex armed conflicts more protracted and difficult to resolve.

Such issues go to heart of the strategy of isolation underpinning the policy of terrorist listing – that is, that armed non-state groups are terrorists, 'beyond the pale' of political engagement and can only be dealt with through robust counterterrorism and military means. As Jonathan Powell, former Chief of Staff to Tony Blair and mediator in the Northern Ireland and Basque peace processes has recently said:

When it comes to terrorism, governments seem to suffer from a collective amnesia. All of our historical experience tells us that there can be no purely military solution to a political problem, and yet every time we confront a new terrorist group, we begin by insisting we will never talk to them... [But] if there is a political cause then there has to be a political solution.[4]

Our study suggests there is an urgent need to revisit this historical insight, reaffirm the importance of engagement and challenge the prevailing assumption that the policy of terrorist listing is an unqualified good. Peacebuilders have a central role to play in these debates. We hope this study goes some way towards catalysing this important political process.

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4   Jonathan Powell "How to talk to terrorists" *Guardian* (London), October 7, 2014.
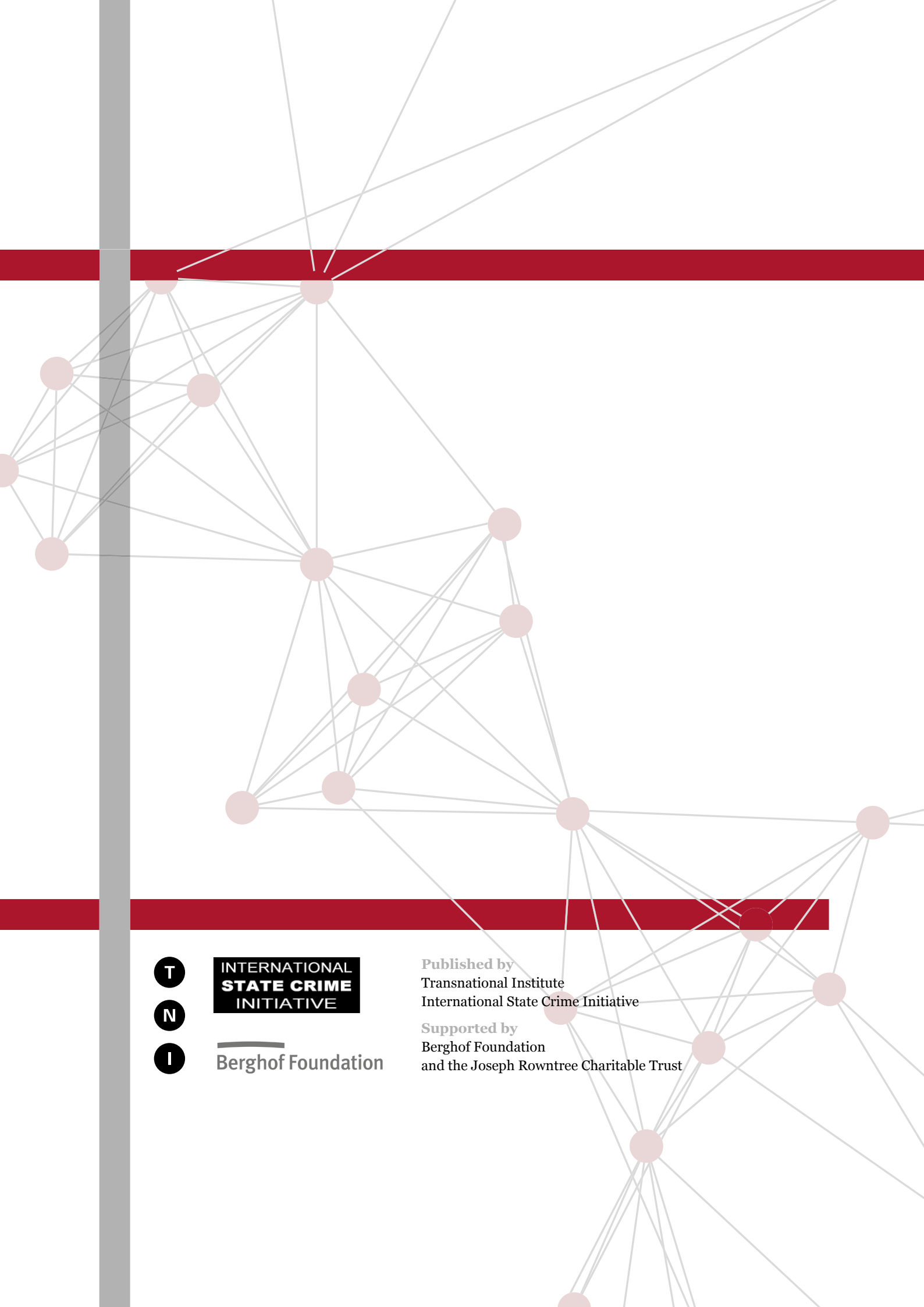
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