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# SPECIAL REPORT

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## ABOUT THE REPORT

On October 27, 2009, Berghof Peace Support, Conciliation Resources, the HD Centre for Humanitarian Dialogue, and the U.S. Institute of Peace convened a workshop in Washington, D.C., to foster debate on modes of engagement with proscribed armed groups (e.g., armed groups, such as the LTTE in Sri Lanka and Hamas in the Palestinian Territories), the violent tactics of which lead governments to restrict third parties from engaging with them. High-level mediators and policy experts from various institutional backgrounds discussed how different methods of engagement and lessons from previous cases can favorably affect the practice of mediation, as well as the implications of antiterrorism laws and regulations for mediators. This report summarizes the policy debate at the conference, synthesizing the discussions and recommendations regarding the main criteria and rationale for engaging with armed groups, possible risks of engagement, best practices in mediation, and potential steps to reform proscription regimes and advance peace.

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## Mediating Peace with Proscribed Armed Groups

### Summary

- Reforms to antiterrorism legislation are required to improve its effectiveness and fairness and make it possible to engage diplomatically with proscribed armed groups. The legal bases for proscription should be clarified and the criteria for delisting published. Listing and delisting instruments should be more nuanced and flexible. In addition, a separate legal and political component should facilitate engagement with proscribed groups in peace processes and humanitarian work.
- Political engagement with proscribed armed groups is possible and desirable when, first, the conflict parties (state and nonstate alike) are interested in exploring political solutions to a conflict; second, the parties are seen as legitimate representatives of social, political, or cultural interests by their community; third, parties have the capacity to deliver a cease-fire or peace agreement; fourth, engagement could generate significant behavioral change on the part of the actors involved; and fifth, strategic national interests favor engagement, or there is a strong demand by allies or the conflict victims to engage politically.
- Potential mediators working with proscribed groups should be aware of the risks of conferring legitimacy to a violent group, undermining moderates, and possibly extending the conflict if parties use negotiations to buy time or strengthen themselves militarily. Engagement also is not recommended when the position and demands of an armed group are so radical and outrageous that there is no possibility of finding an acceptable common ground.
- To enhance the chances of effective negotiations, mediators should thoroughly analyze the situation, set realistic expectations, and regularly evaluate the process and outcome of engagement. Various state and nonstate interveners should collaborate and divide labor among themselves. All significant armed groups and unarmed stakeholders should be involved in negotiations through multiple forms and tactics of engagement, recognizing that all conflict parties are entitled to continue pursuing their goals through nonviolent political means.

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The Obama administration has expressed its willingness to engage politically hostile states, such as North Korea, Syria, Sudan, and Iran, and has begun to phase out the nomenclature of the global war on terror. Whether the new U.S. willingness to engage in dialogue will be applied beyond state-to-state diplomacy to include nonstate armed groups (NSAGs) is uncertain. President Obama has hinted at the possibility of holding talks with moderate elements of the Taliban,<sup>1</sup> but generally, the post-September 11 demonization of NSAGs has proved resilient and is unlikely to change; no major shift in policies toward any particular proscribed armed group has been floated. In this political environment, states and international organizations have been increasingly likely to institutionalize their political preferences into more permanent legal frameworks, with consequences for their ability to deal with hostile states and organizations. Terrorist listings and proscription regimes are often crafted in a way that does not obtain the desired effect, and they lack the flexibility necessary to accommodate the nuances of the problem. In addition, the regulatory framework can take on a life of its own, separate from the politics that generated it, creating disincentives and obstacles to removing an organization from an antiterror list once it is placed there—even when there is widespread consensus that the listing is no longer productive or relevant. Finally, the legal framework can affect how organizations calculate the costs and benefits of engagement, as many organizations err on the side of caution even if diplomatic activity is not formally prohibited.

In short, current incentive structures and decision-making processes within the regimes do not give adequate weight to the value and potential benefits of nonmilitary engagement, impairing states' and organizations' abilities to move toward potentially lasting peace agreements with NSAGs. The need for third-party political engagement is great, and while there should be criteria and preconditions for such engagement by state and nonstate actors alike, through past experience, strategies and best practices for mediation within complex conflicts have emerged. Current proscription regimes can be improved, making these regimes more effective and contributing more fully to peace processes.

This report presents the main lessons learned from a policy debate among high-level mediators and policy experts on the challenges to international engagement with proscribed armed groups in peace processes and the implications of antiterrorism laws and regulations for mediators and negotiating political settlements.<sup>2</sup> The workshop was organized jointly by the United States Institute of Peace (Washington, D.C.), Conciliation Resources (London), Berghof Peace Support (Berlin), and the HD Centre for Humanitarian Dialogue (Geneva). These organizations are part of the recently created Mediation Support Network, a forum for discussions and information exchange related to the provision of process-oriented and thematic advice to peace processes.

The participants brought along a wide range of U.S., UN, and European (Swiss, Norwegian, German, UK) experiences in scholarship, policymaking, policy advice, and facilitation of humanitarian dialogue or peace talks in various conflict contexts. The discussions drew most heavily from the cases of Hamas in the Palestinian Territories, the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, the Communist Party of Nepal (CPN), and the Irish Republican Army (IRA), though other cases—Iraq, Afghanistan, South Africa, Somalia, Sudan, El Salvador, Colombia—were mentioned as well.<sup>3</sup>

## Why Talk? The Need for Political Engagement with Armed Groups

Possible forms of interaction with NSAGs can be classified along a spectrum of policy options ranging from hard-power to soft-power interventions (see box 1). The former include pressure or punishment mechanisms used by states and international organizations to contain, exclude, or confront armed groups. The latter imply a range of diplomatic tools

## Forms of Interaction with Nonstate Armed Groups

### Hard-power interaction

- **Counterinsurgency** to defeat an armed group militarily
- **Proscription and related sanctions** or threat of sanctions
- **International criminal prosecution** for war crimes and human rights violations

### Soft-power engagement

- **Humanitarian engagement** to influence the parties to adhere and comply to human rights norms
- **Dialogue, negotiation**, official and unofficial
- **Mediation, facilitation** of negotiations as third parties between a government and NSAGs
- **Capacity building** to train or inform parties, including about negotiation options and skills, as well as issues related to their transition to holding responsibilities for public administration

of direct or indirect engagement. Where a state falls on the spectrum between proscription or counterinsurgency and diplomatic engagement depends not only on the policies of a particular administration, but also on its role in international relations. A state that guarantees international security arrangements has a different attitude toward engagement with proscribed groups than does a state that sees its role as an honest broker and mediator. U.S. policies tend to fall toward the highly regulated, restricted end of the spectrum, while the Swiss approach, with its explicit national policy of holding dialogue with all groups, is at the other extreme of maximizing engagement. In addition, different types of actors—states as compared with non-governmental organizations (NGOs) or international organizations—operate under significantly different constraints and rewards systems regarding engagement with NSAGs. Actions that would be impossible for an official representative of a national government might be routine for a privately funded organization with a lower profile.

How can the different engagement approaches be combined and coordinated to the best advantage? The United States in particular is often overly focused on bringing the policies of others in line with its own. A multipronged approach or division of labor that accepts and even encourages alternate engagement strategies might be more effective. A good cop–bad cop routine, in which some actors apply pressure and others offer dialogue, might have more effect than either exclusion or engagement alone. A more sensitive proposition relates to cooperation between mediation teams and the International Criminal Court (ICC). Although the ICC strongly objects to any political manipulation of the justice process, early consultation on strategies might lead to better outcomes, for both justice and the conflict resolution process.

Could the spectrum of approaches be institutionalized to carve out a protected space, or separate compartment, for engagement in such a way that it would not be demonized? The UN secretary-general, historically, was in a position to be able to talk with everyone, until restrictions on UN envoy engagement with Hamas altered that standard operating procedure. This indicated a shift toward the secretary-general's office limiting its own engagement, instead following the bidding of Security Council members. As a result, some NSAGs see the office as a party to conflict and a legitimate target.

## *Reasons to Engage*

Arguments for engaging with proscribed armed groups encompass both pragmatic and moral perspectives. First, it is almost a truism in the field of mediation that an agreement that does

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not include main stakeholders is unlikely to hold. Groups with grievances and the power to continue a conflict must be part of its resolution. Otherwise, they may use their power to spoil the agreement and continue the violence. For instance, can a durable agreement be made on the Israeli-Palestinian conflict that does not include the Hamas government? Can Hamas be excluded and contained to the point that it can no longer prevent or spoil an agreement, or is the prospect of an accommodation with Hamas so unacceptable to Israel or Fatah that continued conflict is preferable? If not, one must thus find a way to include Hamas and its constituency in a peace process, and the question of engagement perhaps should be widened beyond the United States, the Quartet,<sup>4</sup> and other governments and governmental agencies to consider possible roles for nonstate peacemakers and other actors.

Second, engagement can push an NSAG toward a change in the status quo, forcing it to face hard choices and make a move. This can bring armed groups into the political mainstream. Moderation and compromise often come as a result of engagement rather than the other way around. Conversely, nonengagement—the politics of isolation—can further radicalize a group that sees no option except continued intransigence. Regardless of the direction that engagement pushes, seizing the initiative and forcing a response gives the engager the upper hand.

Third, even if engagement does not result in a resolution to the conflict, it can address humanitarian concerns and save lives by mitigating the effect of violence on populations. The LTTE ceasefire in Sri Lanka, negotiated through the Norwegian channel, is a case in point. Even low-level engagement can be valuable because it allows for a presence in the conflict zone that can monitor humanitarian conditions. In Sri Lanka after 2006, the lack of any engagement made it impossible to monitor or check human rights abuses.

Fourth, engagement can promote democratic principles, while refusal to engage may be perceived to be a violation of principles of inclusion and democratic process. The West's refusal to engage with Hamas after it was democratically elected was interpreted in much of the Arab world—fairly or unfairly—as a dismissal of election results. This interpretation has done considerable damage to the West's standing and its ability to promote democracy.

Finally, there is no such a thing as a bad conversation. If dialogue is unproductive, there is always the option to withdraw. Listening and talking to an actor should not be equated with legitimizing it or endorsing its position—though this equation is often made, as is discussed further below.

Given the advantages of engagement, some conference participants argued that, rather than being treated as an exception to a standard rule of exclusion and confrontation, dialogue could be the first approach that states and organizations take with NSAGs, only giving it up in extreme cases. Other participants, however, highlighted the risks of engagement, arguing that these risks outweigh the potential advantages.

***Pitfalls, Risks, and Possible Side Effects of Engagement***

Even as the realities of peacemaking processes ultimately demand the engagement of all relevant stakeholders, engaging armed groups might have serious negative consequences that require consideration and mitigation. Talking is not cost free. No matter how carefully engagement is framed, some parties are likely to perceive it as conferring a certain legitimacy on the parties engaged. Engagement with armed or extremist actors might also risk marginalizing moderates who had opted for peaceful means. Moreover, although humanitarian engagement, including ceasefires, might save lives in the short term, it could contribute to extending the conflict if parties use it to buy time or strengthen themselves militarily; humanitarian action could reduce the pressure to resolve a conflict.

***No matter how carefully engagement is framed, some parties are likely to perceive it as conferring a certain legitimacy on the parties engaged.***

Opening talks with armed groups might cause them to split or proliferate, as was seen in Darfur. More fundamentally, engagement that seems to reward violence violates ethical imperatives.

As in any peacemaking effort, there is no easy answer or blueprint to follow for whether to engage NSAGs, and it is essential to assess and weigh possible costs and gains before making a decision. Such an evaluation should continue throughout the engagement; the decision to engage should not be a permanent grant. The only guidance that applies to all cases is the self-evident point that mediators should seek to maximize the benefit of engagement while minimizing the costs. The critical question for the field of mediation, and for those working on cases directly, is how to accomplish this.

## **Criteria and Conditions for Political Engagement**

When, with whom, and to what end to engage? Before opting for dialogue with representatives of armed groups in conflict contexts, national foreign-policy advisers and decision makers ought to weigh the advantages and disadvantages of alternative modes of intervention, according to several considerations.

### ***Strategic Interests of Intervener and Allies***

The decision of whether or not to engage is made primarily by assessing whether such a policy complies with strategic national interests, though governments can and regularly do pursue conflicting foreign policy objectives. The policy interests and preferences of key strategic allies, such as foreign governments and the United Nations, as well as concerned communities, such as domestic or foreign NGOs, are an additional decision-making factor. While these criteria are certainly valid for state actors, they might not necessarily apply to human rights NGOs or unofficial mediators, the actions of which are “supposed to be independent. . . . Making [these actors] subject to foreign policy goals is an infringement of [their] rights as citizens.” The interests of the victims of violence and human rights violations also should be considered before any decision to engage politically with conflict stakeholders. This is all the more important as strategic interests in peace talks can be at odds with the ethical imperatives of transitional justice.

### ***Consent and Interest of Parties***

The parties’ consent to intervention—as well as their genuine interest in engaging in a peace process, or at least in preliminary talks about talks—is a strict precondition for humanitarian engagement, political dialogue, or peace facilitation with conflict stakeholders in war-affected countries. Two very dissimilar examples underscore the variation in stakeholders’ readiness for engagement. At one end of the spectrum, the South African peace process represents an ideal case. The main conflict parties—the apartheid state and the African National Congress (ANC)—believed that negotiations could end positively and had faith in both their opponent and their own capacity to pursue that goal. By contrast, the Peruvian guerrilla movement, Sendero Luminoso (Shining Path), never showed any interest in political talks with the government, and no international mediation attempts ever took place. Instead, the rebels were defeated militarily, at tremendous human cost. The South African and Peruvian examples remind us that not all NSAGs are the same, and thus, the nature and features of such movements are important criteria that can influence the strategy of intervention, tilting the balance toward or against political engagement.



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### ***NSAG Beliefs and Objectives***

According to some experienced international mediators, when the position and demands of an armed group are so radical and outrageous that there is no possibility of finding acceptable common ground, engagement is not recommended. Al Qaeda advocates complete eradication of the state system. However, Hamas's position within the spectrum of political Islam is less extremist than is often portrayed.

The famous greed-versus-grievance debate is also a factor in the choice of engagement strategy.<sup>5</sup> While there might be firmer ground for engaging with groups that have clear political agendas, negotiating with organizations that are fomenting conflict mainly for economic gain, that are pursuing purely criminal interests, or that have developed such interests over the course of a conflict might be counterproductive or ineffective. Such groups are unlikely to foresee any interest in a peace deal that would cut off their business opportunities, and war victims might perceive dialogue as offering them undue recognition as legitimate political actors. On the other hand, groups that are primarily driven by greed might be more easily coopted into endorsing nonviolent strategies than movements with strong ideological principles, especially if they can be convinced that peace will allow them to continue pursuing their business interests legally.

### ***Representativeness, Cohesiveness, and Spoiling Capacity***

The size and leverage of armed groups also might influence the decision regarding whether or not to engage them politically. When rebel movements are strong and cohesive, represent valid social or ethnic interests, and enjoy a considerable degree of social legitimacy in their community, they can bring their constituency to the negotiating table with them and enforce compliance with their commitments, be they temporary cessations of hostilities or more comprehensive ceasefires. If a movement with these same characteristics is isolated or excluded from a dialogue platform, it can spoil or derail a peace process. Therefore, it might be argued that irrespective of the nature of the group, engagement might be seen as the default mode of action if there is a possibility that it might bring a peace settlement at best, or at least a reduction in the level of violence. Even the Lord's Resistance Army in northern Uganda, cited several times as the archetype of an irrational organization, with a radical theocratic ideology and extremely brutal methods of rebellion, was deemed to be amenable to moderation through political bargaining—that is, in exchange for a deal at the International Criminal Court, which has indicted its top leaders.

## **Mediation Strategies in Complex Armed Conflicts**

Third-party facilitation or mediation in violent intrastate conflicts is a crucial form of engagement with armed groups. Any decision to intervene, however, should be preceded by extensive analysis of the constantly evolving context, looking for windows of opportunity for mediation. In Somalia, Sudan, and Afghanistan, the conditions of and actors in the conflict shift continuously, for worse and for better regarding chances to begin dialogue. In South Sudan the U.S. administration concluded that the Sudan People's Liberation Movement (SPLM) had evolved and was ready to engage in peace talks with the Khartoum government. In deciding when to intervene, analysts should pay attention to the need to intervene early, before conditions worsen; on the other hand, potential mediators might test the waters through bilateral exploratory talks with each party before facilitating joint dialogue.

## ***Intervention Goals, Framework, and Roadmap***

As mentioned above, dialogue for the sake of dialogue is not recommended. Facilitators should clarify the purposes of their intervention, set reasonable expectations for its desired outcome, and keep their objectives in mind at all times throughout the process. The goals of dialogue initiatives might range from more minimalist humanitarian agendas, such as halting or reducing violence, to more substantive political objectives, such as reaching a comprehensive peace settlement.

Once the purpose of the dialogue has been defined, mediators should devise, together with the parties, an appropriate long-term strategy and process design to reach the intended outcome. Dialogue formats could be very simple, concentrating on the most essential issues only; they could also be quite comprehensive, while still manageable. A possible middle ground is to adopt a gradual, step-by-step format, identifying and insulating some issues that are ripe for mediation, while leaving others (e.g., land disputes) for a later stage, perhaps to be resolved by the parties directly once the level of mutual trust increases. Should one deal with security (e.g., ceasefire, disarmament, prisoners' release) and political (e.g., power-sharing) components of peace processes in parallel or consecutively, and in which order? In subregional conflicts, such as in Darfur, should the discussions on substantive issues proceed from the national to the local level or inversely? Analysts must consider these and other questions in putting together a negotiation process.

Regular evaluation and analysis must be an integral component of mediation frameworks after they are implemented as well, so that interventions can be regularly revisited according to the evolving context. Analysts should pay particular attention to assessing the possible unintended consequences of engagement with armed groups, such as the marginalization of nonviolent or moderate voices. Finally—and especially in situations where all past mediation attempts have proved unsuccessful—the solution might be to stand back and let local parties resolve the conflict themselves. Such a withdrawal strategy could be appropriate in Somalia, which has seen fifteen failed interventions since the early 1990s.

## ***Inclusivity***

As mentioned above, when dealing with conflicts involving a multiplicity of stakeholders, mediators must strive to give a voice to as many interests and affected parties as possible. Every armed movement that has a stake in the conflict and the ability to spoil a peace process should be invited to take part in humanitarian or peace talks, consistent with the pragmatic principle of sufficient inclusion invoked during the South African negotiations between the apartheid government and liberation forces. However, not only armed actors have a say in the mediation process; care must be taken to avoid disenfranchising actors who do not carry arms. Broader constituencies, such as political parties or civil-society actors, including women's groups, should be involved in relevant discussions and substantive negotiations on the conflict's root causes, either by inviting them to the table or through multitrack engagement, by organizing parallel roundtables, or by implementing other consultation mechanisms.

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## ***Coordination and Division of Labor***

It is valuable to combine peace facilitation efforts by state, international (e.g., UN), and nonstate (e.g., international NGO) actors. Such coordination could range from joint decisions at the international level as to who should engage or initiate contact, to the more formal setting up of mediation teams under the aegis of the United Nations to avoid possible competition among intervening countries. In sharing the job of negotiating peace, there should

be a clear partition of roles among foreign facilitators, with some third parties performing public lecturing tasks and others acting as informal facilitators behind the scene. The Norwegians faced challenges when trying to combine these different roles simultaneously in their intervention in Sri Lanka.

U.S. engagement in a negotiation need not be direct; it can be accomplished through the United Nations or NGOs. During the peace process in El Salvador when the U.S. government could not engage directly with the Farabundo Martí National Liberation Front (FMLN), it relied on UN representative Alvaro de Soto, whose mandate entailed talking to all parties. The Italian NGO Sant'Egidio also served as an informal peace broker in Mozambique. Such unofficial interventions help to provide plausible deniability for states wishing to be in indirect dialogue with pariah groups. The U.S. State Department has also encouraged U.S. NGOs to provide legal assistance to nonstate armed groups as a contribution toward sustainable conflict resolution. In highly asymmetric conflicts, providing NSAGs with specific negotiation skills is sometimes required to enhance their ability to devise fair and equitable peace agreements, as well as their readiness to abide by their commitments.

### ***Rules of Engagement in Delicate Negotiations***

When direct engagement with an armed group is impossible for political, ethical, or legal reasons, it might be possible to put a thin veil between a UN, state, or unofficial mediator or negotiating party and the NSAG to bypass such restrictions. In Northern Ireland, engagement with the Republican political party, the Sinn Féin, rather than the IRA directly, made the 1997 Good Friday Agreement possible. However, such ambiguity should remain a short-term option, as it might become counterproductive if the NSAG does not feel the need to abide by the commitments that the surrogate organization makes.

During the negotiations, the parties should not be asked to give up their aspirations. In Northern Ireland, former U.S. mediators expressed in a written statement that parties in peace talks should be allowed to “hold on to their dreams,” provided that they agree to “pursue them exclusively through peaceful and democratic means.”<sup>6</sup> Members of armed groups should not be made to feel that there will be no role for them in a postwar system and should be encouraged to play an active part in peacebuilding. In Iraq, this lesson was brought to light during informal meetings in Amman in 2004 between U.S. officials and Iraqi Sunni sheiks and former officials. The Iraqi representatives made it clear that disbanding the Iraqi army in the wake of the 2003 U.S. victory had fueled anger and strengthened the insurgency. The army’s soldiers should have been invited to participate in the reconstruction of the country in the post-Saddam Hussein era.<sup>7</sup>

Given the value of low-key, private talks with armed groups to complement public forms of engagement, top-level politicians should be brought in when it is most effective, which requires strategic planning and time management. Once the politicians’ engagement becomes publicly known, diplomats should think very carefully about how to explain their involvement to the public. During Norway’s substantive engagement with the LTTE in Sri Lanka, the Norwegian government needed to convince its constituencies back home that, though the sponsorship of the 2002–06 peace process had not brought peace and security, it might have led to thousands of civilian lives being saved.

## **Antiterrorism Proscription Regimes and Their Effect on Mediating Peace Processes**

The legal proscription of suspected terrorist organizations has serious consequences, both intended and unintended, not only for the targeted entities, but also individuals or

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organizations interacting with them—including individuals and organizations facilitating peace processes. Reforms of proscription policies, particularly in U.S. legislation, could improve the policies' effectiveness in enticing or pressuring armed groups to shift their strategies from armed struggle to peace talks and nonviolent politics.

### ***Effects on Conflict Parties and Peace Processes***

Sanctions imposed on blacklisted individuals or groups include travel restrictions, trade bans, or property freezes. They also have a symbolic and diplomatic effect, isolating the target group from the international scene. In some instances, such sanctions—or the threat of sanctions—have pressured conflict stakeholders into changing the course of their actions, joining the negotiation table or moderating their repressive policies (e.g., South Africa, Guinea, Madagascar). However, a number of concerns have emerged regarding the lack of effectiveness of proscription regimes, as well as their possible negative or counterproductive effect in weakening target groups or forcing them to terminate their violent activities. First, blacklists seem to have more leverage on above ground entities, such as governments or army leadership. These groups are more sensitive to the restrictions and moral stigma that sanctions and diplomatic isolation bring, as they have more to lose. By contrast, nonstate actors, such as underground guerrilla organizations, are less likely to be affected by international sanctions.

Second, the broadening of terrorist listings since the September 11, 2001, attacks and the war on terror has led to the listings' trivialization as a tool of U.S. or EU diplomacy, and has blurred the boundaries between legal and proscribed political activities. Blacklisting political or social movements runs counter to more nuanced and targeted sanctions against individuals by turning unarmed activists and their constituencies into terrorists—especially when political or social entities close to armed groups are also added to blacklists. The EU proscription of the proindependence party Batasuna in the Basque country is a case in point, as is the U.S. listing of Al-Shabaab in Somalia—a movement with no formal members but mostly sympathizers—or international sanctions against the Hamas-led government in the Gaza strip, which has effectively led to the blockade and collective punishment of 1.5 million Palestinians.

Third, lawyers criticize proscription policies for their potential unconstitutionality, as their imposition may violate the rights to association and free speech as well as due process. For example, the listing is usually based on classified information; without access to this information, designees and their lawyers have little, if any, chance for a meaningful defense.

Fourth, such counterterrorism measures create impediments for peace negotiations. The proscription of one conflict party that has agreed to a ceasefire and is engaged in an ongoing peace process—such as the LTTE in Sri Lanka or CPN in Nepal—breaks the parity usually assumed to be a precondition for talks in good faith.

Fifth, to be effective as a pressure-and-inducement strategy, counterterrorism measures should not only punish proscribed terrorist activities, but also offer incentives for the targeted individuals or groups to modify their behavior in line with the desired outcome. Existing proscription mechanisms are so rigid and nontransparent that it is extremely difficult for listed entities to subsequently become delisted. The CPN in Nepal argued that it was never informed about the requirements for its delisting by the U.S. Office of Foreign Assets Control (OFAC), and its designation under the Specialist Designated Nationals (SDN) list still has not been revoked, more than three years after they signed a peace agreement, renounced violence, and entered the realm of conventional politics. This lack of flexibility can be attributed to a bureaucratic impediment—namely, the absence of clear criteria and legal mechanisms for delisting groups—but also to a political impediment, as U.S. decision-makers can enlarge the

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list to boost their terror-fighting credentials, but they see no electoral benefits in delisting designated entities.

Finally, proscription regimes can fuel radicalism instead of encouraging moderation from targeted entities. Listing armed groups and their political or social allies tends to disadvantage political actors and strengthen hard-liners and militants, as has occurred in Iraq and Afghanistan. In Sri Lanka, the EU listing of the LTTE led the movement to reject an EU-supported mission monitoring the 2002 ceasefire, which partly caused the peace process to collapse. In the Palestinian territories, the banning and isolation of Hamas after its 2006 electoral victory seems to have halted its willingness to move toward mainstream politics—described as “the sound of a fist unclenching” and led instead to a reradicalization of its discourse and tactics.

### ***Effect on Third-Party Engagement with Armed Groups***

The legal proscription of suspected terrorist organizations has serious consequences for peacemaking intermediaries who are trying to play a constructive role in conflict resolution. In effect, the engagement of mediators in conflict areas becomes contingent on U.S. government (or EU) licensing, which severely impedes their freedom to act. Thus the terrorist lists unintentionally have created disincentives for mediation in conflict zones.

Under OFAC regulations, neither U.S. persons—that is, U.S. citizens and permanent residents, NGOs, or other organizations—nor non-U.S. NGOs contracted by or receiving funds from the U.S. government may engage in transactions with listed groups that can be interpreted as providing material support or resources. In practice, this might include providing transportation, offering coffee during a meeting, giving advice or technical support, or even advising a group to join a negotiation. Third parties providing peacemaking services to listed organizations are thus vulnerable to criminal prosecution in a U.S. court. Although in practice this is unlikely to happen—criminal intent would have to be proven—these restrictions and the ambiguities related to what is permitted under OFAC regulations might discourage any interaction with armed groups. In response, U.S. organizations and policy-makers seem to have introduced a degree of self-censure, by having “taken themselves out of the job [of peace facilitation]” and thus “abdicating their international leadership role.”

The only way for state agencies, embassies, or NGOs to bypass these restrictions is to obtain a specific OFAC license allowing them to interact with designated armed groups, subject to limitations or conditions stated in the license. The flexibility and audacity of individual bureaucrats or diplomats can also provide a certain amount of leeway; within a civil service, the more senior leadership is involved, the more room there is to maneuver. Some U.S. diplomatic staff have sought creative ways to engage with listed entities through international cooperation, such as by attending receptions and events at other embassies, before obtaining an OFAC waiver to be able to invite—that is, offer tea and biscuits to—government representatives from listed political entities in their own embassies.

In Europe, EU proscription regimes may appear to be less restrictive regarding the provision of services to members of proscribed entities, such as consulting or advice, which do not involve financial transactions. But in practice, proscription laws impede most forms of direct engagement. It is no accident that non-EU members—Norway, Switzerland, and Iceland—played prominent roles in the Sri Lanka peace processes. European diplomats argued that they became seriously restricted in their peace facilitation work when several of their dialogue counterparts, such as the National Democratic Front (NDF) in the Philippines, the National Liberation Army (ELN) in Colombia, and the LTTE in Sri Lanka, were added to the EU blacklist. Even actors once characterized by their ability to talk to everyone, such as some international NGOs or the UN secretariat, now feel that they too need to request U.S.

permission before engaging with armed groups. Their capacity to act has become seriously devalued as a result.

Meanwhile, local governments engaged in counterinsurgency operations against armed groups proscribed by the United States or European Union are taking advantage of the terror lists to criminalize and harass international or grassroots NGOs involved in peacemaking, humanitarian, or development activities. This is especially damaging to local community-based organizations that lack the foreign backing or protection that their international counterparts enjoy, making them particularly vulnerable to attack.

## Steps to Reform Proscription Regimes

In the United States, the change in administration presents an opportunity to consider a more innovative approach to engaging with NSAGs and to reform the current proscription regime. Practical steps can be taken to relax the legal and political restrictions placed on international engagement with armed groups for humanitarian and peacemaking purposes. In particular, the Obama administration could

- carry out a proper evaluation of the effectiveness of existing proscription and deproscription regimes in the context of the greater political objectives of promoting successful peace processes and political settlements, leading to improved governance and social and economic development.
- improve the transparency of the designation process and incentivize its effects by publishing information on which activities warrant sanctions, how to obtain a waiver, and what the criteria and procedures are for deproscription.
- design more nuanced and flexible listing and delisting instruments that account for constantly evolving conflict contexts, actors, and behavioral patterns. These instruments should punish violence but encourage or reward moves toward peace talks and peaceful transition. This would imply clarifying and modifying the criteria, conditions, and mechanisms for delisting.
- create separate legal and political compartments or exemption protocols that facilitate mediation and constructive engagement with proscribed groups. Antiterrorism policies should recognize the specificities of peacemaking and peacebuilding work, and clearer distinctions should be drawn between such activities and commercial transactions with—or financial support to—proscribed entities. Possible strategies could include more systematic waivers for mediators engaged in peace processes or humanitarian work to allow contact and dialogue in the interest of finding peaceful solutions, as well as the creation of separate legal entities under proscription regimes for groups engaged in peace talks, as a form of incentive or reward for constructive political engagement.

An online edition of this and related reports can be found on our Web site ([www.usip.org](http://www.usip.org)), together with additional information on the subject.

## Notes

1. "Obama's Interview Aboard Air Force One," transcript, *The New York Times*, March 7, 2009.
2. The content of this report represents the views of participants in the above-mentioned workshop and not necessarily those of the report's author.
3. Direct quotes that are not referenced in this report are excerpts from the October 27, 2009, workshop. The authors of the quotes (workshop participants) are not named, in compliance with the Chatham House rule.
4. The Quartet is composed of representatives from the United States, the European Union, Russia, and the United Nations.
5. According to this debate, rebels choose to take up arms due to either greed (they see armed conflict as a way to improve their economic lot) or grievance (they see armed conflict as a way to settle identity-based disputes, related to, e.g., ethnicity, religion, or class). A focal point in the debate is Paul Collier and Anke Hoeffler, "Greed and Grievance in Civil War," Policy Research Paper no. 2355, World Bank, Washington, DC, which argues strongly that civil wars are motivated mostly by greed, in "contrast with conventional beliefs" (Collier and Hoeffler, summary) that grievances are at the heart of most conflicts.
6. Richard N. Haass and George J. Mitchell, "Irish Lessons for Peace," *International Herald Tribune*, May 7, 2007.
7. See David Rose, "Heads in the Sand," *Vanity Fair*, May 12, 2009.



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