



OXFORD INSTITUTE FOR
ETHICS, LAW AND
ARMED CONFLICT



**COUNTER-TERRORISM AND HUMANITARIAN ACTION IN GAZA –
THREE KEY ELEMENTS OF THE REGULATORY FRAMEWORK**

Policy Paper

March 2020

Emanuela-Chiara Gillard
Oxford Institute for Ethics, Law and Armed Conflict

The Minerva Center for the Rule of Law under Extreme Conditions
Faculty of Law and Department of Geography and Environmental Studies,
University of Haifa

Table of Contents

A. PRESENTING THE CHALLENGE	3
B. PROHIBITIONS IN COUNTER-TERRORISM SANCTIONS	6
1. EU COUNTER-TERRORISM SANCTIONS.....	8
<i>a. The legal source of the prohibition</i>	<i>8</i>
<i>b. The prohibition</i>	<i>8</i>
<i>c. The designated entity.....</i>	<i>10</i>
2. UNITED STATES MEASURES	11
<i>a. The legal sources of the prohibitions</i>	<i>11</i>
<i>b. The prohibitions.....</i>	<i>13</i>
<i>c. The designated entities</i>	<i>14</i>
C. US FALSE CLAIMS ACT LITIGATION.....	18
D. ISRAEL COUNTER-TERRORISM LAW	21
1. THE SOURCE OF THE PROHIBITIONS	21
2. THE PROHIBITIONS	21
3. THE DESIGNATED ENTITY	24
4. CASE LAW	24
E. CONCLUSIONS	29

In May 2019 the Minerva Center for the Rule of Law under Extreme Conditions at the University of Haifa, in cooperation with the International Association of Jewish Lawyers and Jurists, and the Israeli School of Humanitarian Action, convened a workshop on Legal Aspects of Relief Operations. This Policy Paper builds upon the workshop discussions, by presenting a key contemporary legal challenge to humanitarian relief operations: that posed by counter-terrorism measures.

This is a particularly pertinent issue for humanitarian organisations operating in Gaza, as Hamas, a political group with a military wing designated as terrorist by several states and by the European Union (EU), won the 2006 Palestinian Legislative Council elections and took control of Gaza in 2007, assuming responsibility for its nearly two million inhabitants. This brought into play a complex series of counter-terrorism measures, including, in particular, prohibitions on providing funds, financial assets or economic resources directly or indirectly to Hamas. Humanitarian actors operating in Gaza must comply with these restrictions.

A. PRESENTING THE CHALLENGE

Choking financing to groups designated as terrorist is a key element of international and national counter-terrorism strategies. As a matter of law, this is achieved by two principal means: first, by financial sanctions against groups designated as terrorist. These require their assets to be frozen, and prohibit providing such groups funds, financial assets or economic resources or financial or other related services directly or indirectly. The second means are criminal counter-terrorism measures, which make it an offence to carry out a range of activities that may provide funds or assets to designated groups directly or indirectly.

The groups designated under these counter-terrorism measures are frequently organised armed groups parties to non-international armed conflicts with control over civilian populations in severe need. These include Al Shabaab in Somalia, Al Qaeda in the Arab Peninsula in Yemen, Boko Haram in Nigeria, and Hamas in Gaza.

Problems arise because the prohibitions on making funds or assets available, directly or indirectly, have been interpreted extremely broadly. There is a risk that transactions and activities carried out by humanitarian actors may fall within the scope of the restrictions. These can include incidental payments that humanitarian actors may have to make to designated groups as part of their operations; or relief consignments that may be diverted and end up in the hands of the designated groups.

The approach states have adopted in giving effect to obligations under counter-terrorism measures and sanctions in national law is by no means uniform. Some have broadened the scope of the offences, or designated different persons and entities. This means that support to a group that may be permissible under law of one state may be criminal under that of another. Moreover, as many states have granted their courts extraterritorial jurisdiction over these offences, more than one state's laws may be applicable.

In addition, funding agreements between humanitarian actors and institutional donors also frequently include restrictions and obligations aimed at ensuring that funds are not provided directly or indirectly to designated groups. These restrictions have the same effects on humanitarian actors' capacity to operate in a principled manner, and in particular, with the principle of impartiality that requires response to be prioritised on the basis of need alone.

These restrictions give rise to a complex legal landscape that humanitarian organisations and their staff must navigate to avoid civil or criminal liability. Concerns about falling foul of the prohibitions have led to over-compliance with the law, and placing unwarranted limits on humanitarian operations. Some humanitarians have curtailed their operations in certain areas, despite the existence of severe needs. This opens humanitarians to allegations of not operating in a principled manner, and leaves people in need without the assistance they require.

The problem is aggravated as it is not just humanitarian actors that must comply with counter-terrorism measures. Private actors such as banks must also do so, freezing the assets of designated individuals and groups, and not providing funds or other assets to them, directly or indirectly, including *via* the humanitarian organisations to whom they provide

banking services. Fears of violating these measures, coupled with a perception that the ‘non-for profit’ sector as a whole is vulnerable to abuse and the reality that international non-governmental organisations (INGOs) are rarely profitable clients, has led to a significant restriction in the financial services they provide to INGOs.¹

INGOs operating in what banks consider ‘high-risk jurisdictions’, in or near areas where designated groups are based or operate, have been particularly affected. They are experiencing significant difficulties in accessing the financial services that are crucial to their capacity to fundraise and disburse funds, and thus operate. They have been unable to open accounts, receive donations or transfer funds; have experienced delays or significantly increased charges; or have had their accounts closed. The impact on INGOs operating in Gaza has been severe: in the eighteen months from June 2018 to December 2019 just under half of the INGOs who responded to a survey have had their bank accounts in Israel frozen or closed.²

The present Policy Paper considers three sets of counter-terrorism restrictions relevant to humanitarian operations in Gaza: prohibitions in counter-terrorism sanctions, with a particular focus on those imposed by the European Union (EU) and the United States (US); proceedings under the False Claims Act in the US; and the relevant provisions in Israel’s counter-terrorism measures. The Paper focuses on how these measures apply to Hamas, because of its role in Gaza and its responsibilities towards the civilian population, and the implications that its designation as a terrorist entity by some states can have for humanitarian action.

¹ Tom Keatinge and Florence Keen, *Humanitarian Action and Non-state Armed Groups: The Impact of Banking Restrictions on UK NGOs*, (2017), Royal Institute of International Affairs, www.chathamhouse.org/publication/humanitarian-action-and-non-state-armed-groups-impact-banking-restrictions-uk-ngos.

² Itay Epshtain, *Bank De-Risking and Financial Transaction Modalities in Occupied Palestinian Territory Workshop*, Outcome Document, March 2019, <https://drive.google.com/file/d/1zJ1oba8c3PsSrlgwKlcdpshtkbN7MmpI/view>.

B. PROHIBITIONS IN COUNTER-TERRORISM SANCTIONS

United Nations Security Council Resolution 1373 (2001) is the first in a series of resolutions aimed at strengthening the international community's counter-terrorism response following the attacks of September 11. It requires states to take a number of measures to prevent and criminalize terrorist activities. Of particular relevance to humanitarian action, it requires states to prevent and suppress the financing of terrorist acts, including by:

[p]rohibit[ing] their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons.³

This prohibition is essentially an asset freeze akin to those in financial sanctions.

Resolution 1373 does not include exceptions for humanitarian activities. The prohibition is violated if relevant assets are made available directly or indirectly to designated persons or groups – there is no need that they be used for the commission of a terrorist *act*. Moreover, the mental element required for a violation of the asset freeze is low. No intent to support the listed entity is required; it is sufficient that a natural or legal person violates the relevant prohibitions, for example by making funds available to it.

Security Council Resolution 1373 does not set out a list of designated entities or persons to whom funds and assets must not be made available. It is left to states and relevant regional inter-governmental organisations, such as the EU, to develop their own lists. This has led to a challenging lack of uniformity and a further element of complexity, as different states have designated different entities. Moreover, some states do not have lists for the purpose of the criminal law measures, but only a definition of a terrorist group, leaving it to courts

³ Security Council resolution 1373 (2001), OP 1(d).

to determine whether a particular group meets the definition.⁴ This approach adds a further degree of uncertainty to the regulatory framework.

The next two subsections of the Policy Paper present the approach adopted in the counter-terrorism sanctions of two key actors for humanitarian action in Gaza: the EU and the US. For each they

- outline the legal sources of the restrictions
- identify the designated entity
- present the precise prohibition.

The two sets of measures have similar bases for application: they apply within the territory of EU Member States or the US respectively; and to their nationals - natural or legal persons.⁵

Moreover, when INGOs receive funding from the EU they commit to comply with EU measures, so are ‘indirectly’ bound by these restrictions by means of the funding agreement. In the same vein, USAID Mission Order 21, the instrument setting out the counter-terrorism policies and procedures that recipients of USAID funding for the West Bank and Gaza must comply with implicitly requires recipients to ensure compliance with US Executive Orders

⁴ This is the approach adopted by Italy and Ireland for example, and, beyond the EU, by Switzerland, which focuses on terrorist offences rather than groups. Ireland, Sections 4 and 13, Criminal Justice (Terrorist Offences Act) 2005; Italy, Article 270 Criminal Code; and Switzerland, Article 260 quinquies Criminal Code.

⁵ EU measures apply:

- within the territory of EU Member States;
- to any person who is a national of an EU Member State;
- to any legal person, entity or body which is incorporated or constituted under the law of an EU Member State; and
- to any legal person, entity or body in respect of any business done in whole or in part within the EU.

Article 10, *Council Regulation (EC) No 2580/2001 of 27 December 2001*.

As far as US sanctions are concerned, the prohibition on making any contribution of funds, goods, or services to designed persons in *Executive Order 13224* applies to all transactions in the US or by US persons – individuals or legal entities anywhere, (EO 13224 section 2(a)). Similarly, for the purposes of the crime under Title 18 USC § 2339B, US courts have extraterritorial jurisdiction over alleged crimes committed by US nationals – individuals or legal entities – anywhere (18 USC 2339 B (d) 1-2).

and laws prohibiting the provision of resources to designated entities.⁶ This renders the US measures applicable for entities that might not otherwise have been subject to them – as a matter of *contractual* obligations.

1. EU Counter-Terrorism Sanctions

a. The legal source of the prohibition

Council Common Position 27 December 2001 on the Application of Specific Measures to Combat Terrorism (2001/931/CFSP), among other things, gives effect to Security Council Resolution 1373 for the EU and its now 27 Member States. Of particular relevance to humanitarian action, it requires the European Community to:

ensure that funds, financial assets or economic resources or financial or other related services will not be made available, directly or indirectly, for the benefit of persons, groups, and entities listed in the Annex.⁷

b. The prohibition

Of key importance for INGOs operating in Gaza is understanding precisely what the EU measures prohibit. Colloquially, there is a tendency to refer to a prohibition on providing ‘material support’. This is both inaccurate and detrimentally misleading. The prohibition on providing ‘material support or resources’ is the basis of *US criminal offences* under Title 18 of the US Code and has been defined and interpreted extremely broadly by the US Supreme Court.⁸

⁶ Updated Anti-Terrorism Procedures, Update to Mission Order #21, October 5, 2007, 2007-WBG-26, Addendum D.

⁷ Article 3, *Council Common Position 27 December 2001 on the Application of Specific Measures to Combat Terrorism* (2001/931/CFSP). Two measures give effect to the Common Position at Community level: Regulation (EC) No 2580/2001, which prohibits making funds, other financial assets and economic resources available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity included in a list to be elaborated by the Council; and *Council Decision 2001/927/EC*, which establishes the list referred to Article 2(3) of Regulation No 2580/2001.

⁸ 18 US Code § 2339 A (b)

1. the term “material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification,

The EU asset freeze is significantly narrower in scope, prohibiting making available directly or indirectly ‘funds, financial assets or economic resources or financial or other related services’.⁹ These are defined as follows:

‘[f]unds, other financial assets and economic resources’ means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers' cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit.¹⁰

While this is a broad definition, it is nonetheless clear that it is limited to *assets*, and does not, for example, include training or the provision of services other than *financial* or related services as defined.¹¹

Moreover, while US courts apply the notion of ‘fungibility’, which means that *all* contributions to designated entities fall within the scope of the prohibition, including those for seemingly benign purposes, as they also further the group’s terrorist activities because

communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials;

2. the term “training” means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and
3. the term “expert advice or assistance” means advice or assistance derived from scientific, technical or other specialized knowledge.

See also the interpretation of ‘material support’ by the US Supreme Court in the landmark decision of *Holder v Humanitarian Law Project*, 561 U.S.1 (2010).

⁹ Article 3, *Council Common Position 27 December 2001 on the Application of Specific Measures to Combat Terrorism* (2001/931/CFSP).

¹⁰ Article 1, *Council Regulation (EC) No 2580/2001 of 27 December 2001 on Specific Restrictive Measures Directed against Certain Persons and Entities with a View to Combating Terrorism*.

¹¹ Article 3 of Council Regulation 2580/2001 defines ‘financial services’ as ‘any service of a financial nature, including all insurance and insurance-related services, and all banking and other financial services (excluding insurance)’.

any support can free up resources to be put to violent ends, this concept has been rejected at EU level.¹²

c. The designated entity

The first list of designated persons and entities adopted by the EU in December 2001 included ‘ Hamas-Izz al-Din al-Qassem (terrorist wing of Hamas) ’.¹³ The list was regularly updated, and this name remained on the list until 12 September 2003, when the Council adopted Common Position 2003/651/CFSP, which broadened the designation to ‘ Hamas (including Hamas-Izz al-Din al-Qassem) ’.¹⁴ The designation has remained unchanged since. No explanation was provided for the initial listing of Hamas-Izz al-Din al-Qassem, nor why this was amended to Hamas in 2003.

EU measures provide no guidance on how to ‘ Hamas ’ is to be understood for the purpose of the prohibition, and there does not appear not to be any European Court of Justice (ECJ) jurisprudence on this specific point. To date, it has also not been possible to find any guidance on this point from Member States when giving effect to the EU measures at the domestic level.

¹² In a preliminary ruling relating to the EU’s implementation of the Al-Qaeda sanctions, which include an asset freeze like the one in Regulation 2580/2001, the ECJ had to determine whether the payment of social security benefits to the spouses of designated persons fell within the prohibition on making funds and assets available indirectly to listed individuals.

The Advocate General and the ECJ found that they did not do so, even though listed persons might benefit from or consume some of the goods and services acquired by means of the social security payments. There were a number of reasons for this conclusion, and while this was not taken up by the Court, the Advocate General rejected the argument that allowing a third party to take responsibility – by means of social security payments - for the basic expenses of a person included in the list in Annex I to the regulation relieved that person of the burden of providing for those expenses himself and allowed him to assign to terrorist ends the assets of which he might manage to gain possession by other means.

Case C-340/08, M (FC) and Others v Her Majesty’s Treasury, Opinion of Advocate General Mengozzi, delivered on 14 January 2010, para 104, and Judgment of the Court (Fourth Chamber), 29 April 2010.

¹³ *Council Decision 2001/927/EC*.

¹⁴ *Common Position 2003/65/CFSP updating Common Position 2001/931 on the application of specific measures to combat terrorism and repealing Common Position 2003/482/CFSP*.

2. United States measures

a. The legal sources of the prohibitions

Under US domestic law there are a number of different legal avenues for designating groups and prohibiting the provision of resources to them. This Policy paper only sets out those of direct relevance to humanitarian actors operating in Gaza.

i. Specially Designated Terrorist Organizations

In 1995 the US Department of the Treasury designated ‘ Hamas ’ as a ‘ Specially Designated Terrorist Organization ’ (SDTO).¹⁵ One of the consequences of this designation is prohibition to make or receive ‘ any contribution of funds, goods, or services to or for the benefit ’ of Hamas.¹⁶

The Global Terrorism Sanctions Regulations (GTSR) implement Executive Order 13224, which, following a restructuring of the regulatory framework in 2019, now also regulates SDTOs.¹⁷ Among other things, the GTSR repeat the prohibition on ‘ making of any contribution or provision of funds, goods, or services by, to, or for the benefit of ’ any designated person’, including SDTOs like Hamas, subject to any exceptions that may be provided in regulations, orders, directives, or licenses.¹⁸

A number of licences exist, the most relevant to humanitarian action in Gaza being General License 7 of October 2007 which authorises US persons to engage in all transactions otherwise prohibited with the Palestinian Authority. For purposes of this authorisation only, the term *Palestinian Authority* means the Palestinian Authority government of Prime

¹⁵ *Executive Order 12947 of January 23, 1995 Prohibiting Transactions With Terrorists Who Threaten To Disrupt the Middle East Peace Process*. The listing of Hamas is in 52650 Federal Register / Vol. 62, No. 195 / Wednesday, October 8, 1997 / Notices, www.govinfo.gov/content/pkg/FR-1997-10-08/pdf/97-27030.pdf.

¹⁶ Section 1b, *Executive Order 12947*.

¹⁷ *Executive Order 12947* was revoked on 9 September 2019 by *Executive Order 13886 on Modernizing Sanctions to Combat Terrorism*. However, persons and entities designated pursuant to *Executive Order 12947* immediately before the adoption of *Executive Order 13886* are to be considered as listed under *Executive Order 13224 of September 25, 2001 Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism*. *Executive Order 13224* repeats the prohibition of making or receiving of any contribution of funds, goods, or services to or for the benefit designated persons or entities.

¹⁸ GTSR, §594.204, Prohibited transaction or dealing in property; contributions of funds, goods, or services.

Minister Salam Fayyad and President Mahmoud Abbas, including all branches, ministries, offices, and agencies (independent or otherwise) thereof.¹⁹

The ‘background’ to General License 7 explains that it was issued ‘[b]ased on foreign policy considerations resulting from recent events in the West Bank and Gaza, including the appointment of Salam Fayyad as the new Prime Minister of the Palestinian Authority and of other ministers not affiliated with HAMAS’, authorising U.S. persons ‘to engage in all transactions with the Palestinian Authority as defined’. It adds that ‘[t]ransactions with HAMAS, or in any property in which HAMAS has an interest, not covered by the general license remain prohibited’.²⁰

ii. Foreign Terrorist Organizations

In addition, in October 1997 the US Department of State also listed ‘Hamis’ as a Foreign Terrorist Organization (FTO) under Section 219 of the Immigration and Nationality Act.²¹

¹⁹ GTSR, §594.516. *General Licence 7*.

Other relevant licences include *General Licence 1*, authorisation to conduct otherwise prohibited transactions and activities with the Palestinian Authority that are for the conduct of the official business of the United Nations, (GTSR, §594.510); *General Licence 2*, authorisation to engage in all transactions with the Palestinian Authority otherwise prohibited that are ordinarily incident to persons’ travel to or from, or employment, residence or personal maintenance within, the jurisdiction of the Palestinian Authority, including, but not limited to, receipt of salaries, payment of living expenses and acquisition of goods or services for personal use, (GTSR, §594.511); *General Licence 3*, authorisation to pay taxes or fees to, and purchase or receive permits or public utility services from the Palestinian Authority where such transactions are necessary and ordinarily incident to persons’ day-to-day operations (GTSR, §594.512); *General Licence 4*, authorisation to engage in all otherwise prohibited transactions with

- the Palestinian Authority Presidency, including only the Office of the President, Presidential Security, General Intelligence Apparatus, Governors and Governorate staff, the Attorney General’s Office, the Palestine Investment Fund (PIF), the Border Crossings Administration, and the Palestine Broadcasting Corporation;
- the Palestinian Judiciary, including the Higher Judicial Council;
- members of the Palestinian Legislative Council (PLC) who were not elected to the PLC on the party slate of Hamas or any other Foreign Terrorist Organization (FTO), Specially Designated Terrorist (SDT), or Specially Designated Global Terrorist (SDGT); and
- the following independent agencies: the Central Elections Commission; the Independent Citizens Rights Commission; the General Audit Authority/External Audit Agency; and the Palestinian Monetary Authority,

(GTSR, §594.513); and *General Licence 6*, authorisation for nongovernmental organizations that are US persons to provide in-kind donations of medicine, medical devices, and medical services to the Palestinian Authority Ministry of Health, provided that such donations are strictly for distribution in the West Bank or Gaza and not intended for resale, (GTSR, §594.515).

²⁰ Federal Register / Vol. 72, No. 210 / Wednesday, October 31, 2007 / Rules and Regulations 61517, www.treasury.gov/resource-center/sanctions/Documents/fr72_61517.pdf.

²¹ 8 USC 1189: Designation of foreign terrorist organizations.

Of relevance to the present discussion, the effect of this designation is to freeze the FTO's assets in US financial institutions, and to bring into play the *crime* of providing 'material support or resources' to FTOs in Title 18 USC §2339 B.²²

The Foreign Terrorist Organizations Sanctions Regulations (FTOSR) implement the financial restrictions imposed against FTO. They essentially mirror the provisions of the GTSR, in terms of prohibitions, definitions and licences.

b. The prohibitions

The scope of the prohibitions under the *sanctions* regime of Executive Order 13224/the GTSR differs to those under the *criminal law* regime of Title 18 US Code §2339B.

Executive Order 13224 and the GTSR prohibit 'making of any contribution or provision of funds, goods, or services by, to, or for the benefit of' a designated person.²³

Title 18 US Code §2339B, on the other hand, prohibits providing 'material support or resources'. These are defined as

(1) the term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials;

²² 18 USC 2339B: Providing material support or resources to designated foreign terrorist organizations

(a) Prohibited Activities-

(1) Unlawful conduct - Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

²³ Global Terrorism Sanctions Regulations, §594.204 Prohibited transaction or dealing in property; contributions of funds, goods, or services.

(2) the term “training” means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and

(3) the term “expert advice or assistance” means advice or assistance derived from scientific, technical, or other specialized knowledge.²⁴

There is no definition of ‘services’ for the purpose of Executive Order 13224/the GTSR, and it is unclear whether it is narrower in scope than ‘material support’.

c. The designated entities

Both designations – as a Specially Designated Terrorist Organization (SDTO) and as a Foreign Terrorist Organization (FTO) – are of ‘ Hamas’.

The designation as SDTO under Executive Order 12947 was of ‘Islamic Resistance Movement (HAMAS)’, with no further clarification. In implementing the Executive Order, the GTSR define ‘ Hamas’ as

(a) The entity known as HAMAS and designated by the Secretary of State as a foreign terrorist organization pursuant to section 219 of the Immigration and Nationality Act (8 U.S.C. 1189); or

(b) Any person:

(1) The property and interests in property of which are blocked pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*); and

²⁴ Title 18 US Code § 2339 A(b).

(2) Who is identified on the Specially Designated Nationals and Blocked Persons List (SDN List) maintained by OFAC as an agent, instrumentality, or affiliate of HAMAS.²⁵

The 1997 designation as FTO is of:

HAMAS also known as the Islamic Resistance Movement, also known as Harakat al Muqawama al-Islamiya, also known as Students of Ayyash, also known as Students of the Engineer, also known as Yahya Ayyash Units, also known as Izz Al-Din Al-Qassim Brigades, also known as Izz Al-Din Al-Qassim Forces, also known as Izz Al-Din Al Qassim Battalions, also known as Izz al-Din Al Qassam Brigades, also known as Izz al-Din Al Qassam Forces, also known as Izz al-Din Al Qassam Battalions.

For the purposes of the present Policy Paper it is important to note two things:

- the US measures equate ‘ Hamas ’ with the Al-Qassim Brigades; and
- none of the civil administration structures in Gaza whose activities humanitarian actors are likely to support (eg ministries, departments, municipalities, various boards) are included in the SDN List.

Importantly, in addition to the designations, a determination made in May 2006, following the elections that brought Hamas into power, by the US Office of Foreign Assets Control (OFAC), the entity in the US Treasury that administers and enforces sanctions, is also of key relevance to humanitarian actors. The determination clarifies how the sanctions against

²⁵ GTSR, §594.319. In addition to a number of individuals, the ‘agent[s], instrumentalit[ies] or affiliate[s]’ of Hamas on the SDN List are:

- Al-Aqsa Satellite Television and its various aliases;
- Al-Osama Trading Co. Ltd and its various aliases;
- Hamas, also known as Harakat Al-Muqawama Al-Islamiya; Islamic Resistance Movement; Izz Al-Din Al Qassam Battalions; Izz Al-Din Al Qassam Brigades; Izz Al-Din Al Qassam Force; Izz Al-Din Al-Qassim Battalions; Izz Al-Din Al-Qassim Brigades; Izz Al-Din Al-Qassim Forces; Students of Ayyash; Students of the Engineer; Yahya Ayyash Units; and
- Radin Money Exchange and its various aliases.

Hamas are to be interpreted following this development.²⁶ As explained in the introduction to the determination:

HAMAS, members of which now form the majority party within the Palestinian Legislative Council and hold positions of authority within the government including the position of Prime Minister, is a target of each of these sanctions programs, resulting in the blocking of any property and interests in property of HAMAS that are in the United States or hereafter come within the United States, or that are in or hereafter come within the possession or control of a United States person. These restrictions prohibit U.S. persons from dealing in property or interests in property of HAMAS. OFAC has determined that, as a result of the recent elections, *HAMAS has a property interest in the transactions of the Palestinian Authority*. Accordingly, pursuant to the TSR, the GTSR and the FTOSR, *U.S. persons are prohibited from engaging in transactions with the Palestinian Authority unless authorized*.²⁷ (Emphasis added)

This determination imputes to Hamas a ‘property interest’ in all transactions of the *Palestinian Authority*, with the consequences that these transactions fall within the scope of the prohibition, unless otherwise permitted pursuant to the various licences.

This May 2006 determination must be read in light of General License 7 of June 2007. As set out above, this licence authorised all otherwise prohibited transactions with the Palestinian Authority, and explained that for purposes of this authorisation only, ‘the term *Palestinian Authority* means the Palestinian Authority government of Prime Minister Salam Fayyad and President Mahmoud Abbas, including all branches, ministries, offices, and agencies (independent or otherwise) thereof’.²⁸

²⁶ Federal Register / Vol. 71, No. 90 / Wednesday, May 10, 2006 / Rules and Regulations, www.treasury.gov/resource-center/sanctions/Documents/fr71_27199.pdf.

²⁷ This determination is reflected in Global Terrorism Sanctions Regulations, §594.411.

²⁸ §594.516. General Licence 7, 20 June 2007, www.treasury.gov/resource-center/sanctions/Programs/Documents/pal_guide.pdf.

The effect of License 7, and in particular its interplay with the 2006 OFAC determination, is unclear. Does the License ‘nullify’ the determination, meaning it is now possible to carry out transactions with the Palestinian Authority? Or does it draw a distinction between those parts of the Palestinian Authority that are under the control Prime Minister Salam Fayyad and his successors and President Mahmoud Abbas, with which *all* transactions are permissible, and other parts that are not under his control which are subject to the prohibition?

Moreover, how should ‘all branches, ministries, offices, and agencies (independent or otherwise)’ of the Palestinian Authority as defined in License 7 be understood? For example, is the Ministry of Education a *single* entity with offices and projects in the West Bank and Gaza or are there two distinct Ministries, one that forms part of the government of President Abbas and thus of the ‘Palestinian Authority’ as defined in General License 7, and a separate one in Gaza? While there has not been a formal separation there do appear to be two parallel structures in the West Bank and Gaza.

These are key questions in determining the scope of the US prohibitions relevant to humanitarian action in Gaza but on which there is little clarity.

Moreover, always according to OFAC, in addition to transactions that are permitted pursuant to the licences, transactions with public entities that do not form part of the Palestinian Authority are also permissible. OFAC explains that ‘local government authorities and municipalities are not part of the Palestinian Authority’.²⁹

²⁹ US Department of the Treasury Resource Center, Palestinian Authority, www.treasury.gov/resource-center/sanctions/Programs/Pages/pa.aspx.

‘Can financial institutions and Palestinian agents/distributors of U.S. corporations transact with the local governments, public utilities, municipality, etc. in the West Bank and Gaza?’

- Local government authorities and municipalities are not part of the Palestinian Authority. However, the Palestinian Water Authority is a part of the PA Agriculture Ministry and is therefore subject to sanctions.’

Incidentally, the statement that ‘the Palestinian Water Authority is a part of the PA Agriculture Ministry’ does not appear to be factually correct.

While potentially helpful for humanitarian actors operating in Gaza, this statement also raises numerous questions. The basis for this conclusion is unclear, but as far as the municipalities are concerned, it is probably due to the fact that municipalities predate the Palestinian Authority. More significantly, it is unclear what OFAC considers a ‘local government authority’ that does not form part of the Palestinian Authority.

This complexity and lack of clarity is regrettable first, because it makes it extremely difficult to determine the scope of the sanctions *themselves*. Second, because it is carried on into other elements of the US regulatory framework relevant to INGOs operating in Gaza, including most notably, the False Claims Act. As outlined below, the certification that INGOs applying for USAID funding must sign requires an appreciation of – as a minimum – precisely what an entity on the SDN List is, and also of whether licences are applicable to transaction with that entity. And as just explained as far as ‘Hamas’ is concerned, there is little clarity on both questions.

C. US FALSE CLAIMS ACT LITIGATION

The False Claims Act (FCA) is a US federal statute that allows third parties to bring whistleblower proceedings ‘on behalf’ of the US Government for alleged fraudulent use of government funds.³⁰ In recent years proceedings have been brought against humanitarian and peacebuilding actors on the basis of a certification that applicants for USAID funding must sign. Applicants must certify that:

to the best of its current knowledge did not provide within the previous ten years, and will take all reasonable steps to ensure that it does not and will not knowingly provide material support or resources to any individual or entity that commits, attempts to commit, advocates, facilitates or participates in terrorist act or has committed, attempted to commit, facilitate or participated in terrorist acts.³¹

³⁰ 31 U.S.C. §§ 3729 to 3733.

³¹ *USAID Certifications, Assurances, Representations, and Other Statements of the Recipient, A Mandatory Reference for ADS Chapter 303*, Partial revision 06/07/2018, Certification Regarding Terrorist Financing, Implementing Executive Order 13224.

The certification is *not* applicable to resources or other ‘material support’ provided pursuant to an authorization contained in applicable licenses issued by the OFAC. While this is helpful, it does not resolve the problem because the activities authorised by licences are not co-terminous with those that amount to ‘material support’ referred to in the certification, which is a broader notion.

Three cases have been made public to date; all have a Gaza connection and have been brought by the same plaintiff, the Zionist Advocacy Center. The plaintiff claimed that the recipients of USAID funding had violated the certification and, thus, defrauded the US Government.³² It is important to note that none of these cases reached the merits stage before a court: the first settled; the courts accepted the Department of Justice’s motion to dismiss in the second; and the plaintiff voluntarily withdrew the third complaint following the Department of Justice’s motion to dismiss the third case in November 2019. In view of this, at present, it is only possible to speculate as to the approach that the US courts might adopt.

The problem is not the FCA *per se*, but the USAID certification used as a basis for the claims. The certification is problematic in a number of ways: because of the breadth of the prohibited support; the lack of clarity as to which actor should not be receiving the support; the time period it covers; and the source of the funds with which support must not be provided.

Looking at each of these issues in turn, the USAID certification uses the extremely broad definition of ‘material support’ in Title 18 of the US Code:

currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances,

³² IRIN, *A Q&A with the pro-Israel lawyer rattling NGOs on counter-terror compliance*, 25 September 2018, www.irinnews.org/interview/2018/09/25/qa-pro-israel-us-lawyer-rattling-ngos-counter-terror-compliance.

explosives, personnel, transportation, and other physical assets, except medicine or religious materials.³³

But while Title 18 of the US Code identifies the entities to which material support must not be provided - those designated as Foreign Terrorist Organizations³⁴ - the USAID certification does not do so. It provides some guidance as to where lists of designated persons and entities may be found, but the certification is not limited to these.³⁵ Moreover, the categories of persons or entities to whom support must not have been provided under the certification is extremely broad, and include those who may have *attempted* to commit terrorist acts, something INGOs are simply not in a position to determine. This specific aspect is less of a problem in Gaza, as the US has designated Hamas as a Foreign Terrorist Organization. However, as discussed above, the scope of the designation is far from clear. One key issue for the application of the USAID certification and, consequently, the possibility of FCA proceedings in relation to Gaza, is, therefore, understanding how ‘Hamas’ should be interpreted.

In addition to being unmanageably vague, the USAID certification is also extremely broad, in terms, first, of the timeframe during which no material support must have been provided: the ten years preceding the signature of the certification; and, second of the source of the funds with which such support must not be provided. The settlement in the first case suggests that the certification applies to ‘material support’ provided with the funds received from *any* donor, not just from the US Government. This would mean that an INGO that at any time in the ten years prior to signing the USAID certification carried out an activity funded by a different donor that did not include similarly broad restrictions on providing material support and/or that had a different list of designated entities from those of US,

³³ 18 U.S.C. §2339A (b) (i).

³⁴ 18 U.S.C. § 2339B (a). The prohibition also applies to organizations that are or have engaged in ‘terrorism’ or in ‘terrorist activities’, broadening the scope to entities that are not listed.

³⁵ Paragraph 2 of the certification requires applicants to verify that individuals or entities do not appear on the master list of Specially Designated Nationals and Blocked Persons, maintained by OFAC, or (ii) is not included in any supplementary information concerning prohibited individuals or entities that may be provided by USAID to the Recipient; and has not been designated by the UN Security sanctions committee established under UNSC Resolution 1267 (1999).

could, by virtue of these entirely permissible activities, nonetheless be violating the USAID certification and exposing itself to the risk of FCA claims.

This line of litigation significantly changes the dynamics relating to restrictions and obligations in state funding agreements. Any leeway that recipients of funding may have been (implicitly) granted by USAID in the past has been removed. If claims under the FCA are brought, the US Government is obliged to investigate them. Moreover, US courts are entitled to award punitive damages of three times the amount received from the respondent organisation from the relevant US Government agency.

D. ISRAEL COUNTER-TERRORISM LAW

1. The source of the prohibitions

In 2016 Israel adopted Counter-Terrorism Law 5776-2016.³⁶ This statute consolidated into a single instrument various domestic criminal and administrative counter-terrorism measures. Amended in 2018 to also incorporate the Prohibition on Terrorist Financing Law 5765-2004, it is now the source of the prohibitions to provide resources to designated entities, including to give effect to UN counter-terrorism sanctions.

2. The prohibitions

The Counter-Terrorism Law as amended contains a number of prohibitions of direct relevance to humanitarian actors operating in Gaza. The key provisions are set out below, together with various questions that warrant closer examination.

- Section 23 - Providing a service or resources to a terrorist organization, where doing so may assist or promote the organization's activity.

Questions for consideration:

³⁶ www.justice.gov.il/En/Units/IMPA/MainDocs/The%20Counter%20Terrorism%20Lw.%205776-2016.pdf.

- what is the mental element for the commission of this offence?
- How are ‘service’ and ‘resources’ interpreted?
- How is ‘assist’ interpreted? In particular, does Israeli law adopt the same approach as the US to ‘fungibility’?
- Which of a terrorist organisation’s activities must not be assisted or promoted? *Any* activities – including legitimate ones - or just terrorist ones activities?

A 2017 decision of the Supreme Court, discussed below, addresses some of these questions.

- Section 25 - Providing resources for committing a terrorist act, in circumstances in which doing so may facilitate, directly or indirectly, the commission of an offense that is a terrorist act or ease its commission.

The ‘resources’ referred in this provision are

- providing another with transportation service or a place to sleep, stay or hide, or with the means to obtain a place to sleep, stay or hide;
- providing another with money, food, clothing, information, means of communication, documents, vehicles, gasoline, land, a structure, or any other resource.

Questions for consideration:

- what is the mental element for the commission of this offence?
- How interpret should ‘facilitate directly or indirectly’ be interpreted? The approach of Israeli law to ‘fungibility’ is also relevant to this offence?
- What constitutes ‘any other resource’? Is it limited to assets or can it include services?

- Section 31 – Conducting transactions in property for purposes of terrorism, ‘with the intention of assisting, advancing or financing the commission of a grave terrorist offense or rewarding its commission, or with the intention of assisting, advancing or financing the activity of a terrorist organization’.

Questions for consideration:

- which ‘activities of a terrorist organization’ may not be advanced or financed? Just terrorist ones or also any legitimate activities?
 - Again, the approach to ‘fungibility’ is relevant.
- Section 32 - Conducting transactions in terrorist property. These include
 - (1) A property transaction that is capable of assisting, advancing or financing the commission of a grave terrorist offense or rewarding its commission, even if the recipient of the reward is not the person who committed the terrorist offense or the person who intended to commit it.
 - (2) A transaction in property of a terrorist organization or property connected to a grave terrorist offense;
 - (3) Transfer of property to a terrorist organization.

Questions for consideration:

- These offences are extremely broad. What is the mental element required for their commission?
- How should ‘capable of assisting, advancing or financing’ the commission of terrorist offence be interpreted? The approach to ‘fungibility’ is also relevant to this offence.

- Section 32(3) is the prohibition of making funds available to designated entities element of asset freezes.³⁷ How should ‘property’ be interpreted?

3. The designated entity

In 1989 Israel declared ‘ Hamas, aka the Islamic Resistance Movement’, a terrorist organization under the Prevention of Terrorism Ordinance No. 33 of 5708-1948.³⁸ Counter-Terrorism Law 5776-2016, superceded the Ordinance, and entities that had been designated under the Ordinance are deemed to have been permanently designated under the Counter-Terrorism Law.³⁹

Hamas thus remains designated. No guidance exists of how this designation is to be understood, including in particular, how it relates to the civil administration structures in Gaza, now that Hamas is the political party exercising executive authority over Gaza.

4. Case law

In 2017 Israel’s Supreme Court decided a case that shed some light on how the offence of providing a service or resources to a terrorist organization under Article 23 of the Counter-Terrorism Law applies in the context of Gaza.⁴⁰ The decision related to two separate cases of businessmen in Gaza who traded various electrical and electronic appliances (batteries, power cables, telephones, computers) with Hamas operatives, and were charged *inter alia* with violations of Section 23.⁴¹

³⁷ The related prohibition of performing any transaction in the property of the designated entity is set out in Article 34(c) Counter-Terrorism Law 5776-2016 as amended in 2018.

³⁸ Official PUBLICATIONS BRIEF, No. 3675, page 3474, 22 June 1989.

³⁹ Article 101 Counter-Terrorism Law 5776-2016 as amended in 2018.

⁴⁰ The summary of the decision in the present Policy Paper is based on an unofficial translation of the original texts in Hebrew.

⁴¹ Supreme Court, Criminal Appeal 6434/15, *The State of Israel et al v Abd El Hakim Shabir et al*, 4 July 2017.

In 2017 the State Attorney issued a ‘Policy for prosecuting a resident of the Gaza Strip for violation of providing services or resources for the Hamas terrorist organisation’.⁴² The policy notes that the offence under Section 23 consists of two cumulative elements. First, the services or resources must be provided to aid the organisation's activities or to promote them. In this regard, the Policy emphasises that it is not essential that the service or resources are provided in the context or for the purpose of promoting a *military* purpose. Assistance that appears to be essentially ‘civilian’ or strengthening the infrastructure enabling the organization's activities, and not only its activities against Israel *per se*, may also establish the foundations of the offense.⁴³

The second element is awareness (including wilful ignorance) that support is given to a terrorist organization. In view of the declaration of Hamas as a terrorist organization and the publication of the declaration in official records, there is a presumption of awareness that Hamas is a designated organisation.⁴⁴

Bringing these two elements together, the Policy concludes that the focus should be on whether the service or resources made available to the organization are such, that leads to a conclusion, in a manner that leaves no reasonable doubt, that they may assist the activities or promotion of the organization, and whether the suspect was aware of it.⁴⁵

The Policy then sets out a non-exhaustive list of factors to be taken into account to determine whether it would be in the public interest to prosecute residents of Gaza for having provided a service or resources to Hamas, considering fact the latter is the ‘governmental entity ruling’ over the Gaza Strip.⁴⁶ These include:

- The **nature** of the service and/or resources provided – there is a greater public interest in prosecuting the provision of services and/or resources that are a way

⁴² State Attorney’s Guide No. 2.30 - Policy for prosecuting a resident of the Gaza Strip for violation of providing services or resources for the Hamas terrorist organisation, 5 February 2017.

⁴³ *Ibid.*, para 8.

⁴⁴ *Id.*

⁴⁵ *Ibid.*, para 9.

⁴⁶ *Ibid.*, para 10.

of promoting hostile activity against the State of Israel, such as digging tunnels, supplying military products or materials (including ‘dual-use’ items). However, the provision of ‘civilian’ services or resources could also justify prosecution.

- The supply of **products that require special permit** by Israel to enter into the Gaza Strip is a factor tending in favour of prosecution, as the requirement of special authorisation is an indication that these are assets that can be used for terrorist acts.

- The **identity** of the person to whom the service and/or resource is provided. The provision to a senior figure in Hamas, or to a person identified with Hamas, if the provider was aware of this, will also be a factor in favour of prosecution.

- Who **initiated the connection** that led to the provision of services and/or resources. Initiation of the connection is initiated by the suspect will be a factor tending in favour of prosecution, while initiation by the terrorist organisation will tend against it.

- The **security climate** when the service and/or resources were provided. Provision during an active military confrontation between Hamas and Israel will increase the tendency to prosecution.

- The **frequency** of the provision of services and/or resources.

- **The length of time** the service and/or resources were provided. The longer, the greater the tendency towards prosecution.

- The **scope** of the provision of services and/or resources, including the quantity and type of service or resources provided.

- The **circumstances** in which the service and/or resources were provided, including the question of whether they were provided to the organization to assist it, as opposed to personal service to the individuals associated or belonging to it.
- The existence of **free choice** to provide the service and/or resources, and the absence of coercive circumstances.

The Policy adds two important limitations. As a general rule residents of the Gaza Strip will not be prosecuted if the service and/or resource provided

- is a compulsory payment which a Gaza resident is required to make to Hamas, such as the payment of taxes;⁴⁷or
- is minimal in terms of value, substance, accessibility and availability. For example, selling products that can be purchased by the general public anywhere at any time such as electric bulbs would not justify prosecution except under exceptional circumstances.⁴⁸

The Policy concludes by noting that the fact the service and/or resources were provided in their essence and circumstances, to cause a material and serious injury to the State of Israel, would constitute a major, and sometimes crucial, consideration in favour of prosecution⁴⁹.

In its decision the Supreme Court referred to the Prosecutorial Policy, and also addressed the question of the nature of ‘services’ or ‘resources’ that could be used to assist a terrorist organisation within the meaning of the crime. This is not specified in the Counter-Terrorism Law. There is no doubt that the supply of goods or services of a ‘distinct military nature’ would do so. The question is whether a person can fall within the scope of the crime if s/he

⁴⁷ *Ibid.*, para 11.

⁴⁸ *Ibid.*, para 12.

⁴⁹ *Ibid.*, para 13.

sells or supplies to members of a terrorist organisation goods or services such as food, clothing and electrical appliances that could be provided in the same way to persons not connected to a terrorist organisation. The Court referred to the Explanatory Notes accompanying the Bill which because the Counter-Terrorism Law which note that the offence is intended to take a broad approach to assistance to a terrorist organisation and also includes 'legitimate services' provided by external service providers such as computer companies, accountants and transportation services.

This said, the Court noted the unique character of the cases before it – services provided by Gaza residents to Hamas - stemming from Israel's control over trade with Gaza on the one hand and Hamas' day-to-day control of the territory on the other. This advocated against an expansive interpretation of the offence when it came to a resident of the Gaza Strip providing a member of Hamas a service as part of 'routing civilian conduct'. A key feature of past cases that had led to convictions was a close connection between the service provided and Hamas' 'military-operational activities'. A second aspect of such cases was that the services in question has not been provided as part of the defendants' 'normal course of business'.

The Court concluded that this last element - whether the service or resources had been provided as part of the defendant's normal course of business - was a consideration to be added to the others in the prosecutorial policy. In applying this test consideration should be given to whether the services was provided as part of a professional occupation. If this was the case it was necessary to consider whether the defendant had acted in accordance with his/her 'regular, daily practice' or whether s/he had exceeded the course of action that characterises professionals engaged in field in question. Consideration should also be given to whether the defendant had a special intention to assist the terrorist organisation. This would be the case, for example, if the products had been provided to Hamas with the intention that they be used for terrorist purposes, rather than just in the knowledge that Hamas would acquire ownership in them.

Applying these criteria to the two cases before it, the Court concluded that the defendants should be acquitted. the items they had sold the Hamas operatives – batteries, power cables

etc – were essentially civilian equipment that could enter Gaza without the need of any special permit and could be purchased by the general public in Gaza everywhere and at any time. They were intended for civilian use, and had been sold in the ordinary course of business to junior members of Hamas who did not play an operational role. Moreover, the Court also determined that there was no indication that the goods had been provided to cause a material and serious harm to Israel.

The Prosecutorial Policy and Supreme Court decision related to items sold by Gaza residents in the course of commercial activities and not to services or resources provided by humanitarian actors. However, the same indicators in the policy and the same considerations referred to by the Court about the context in which the ‘transactions’ take place - Israel’s control over the entry of goods into Gaza on the one hand and Hamas’ day-to-day control of the territory – are also relevant to humanitarian action. They should lead to a similarly narrow interpretation of the offence that considers whether the humanitarian action was part of an organisation’s ‘normal course of business’.

E. CONCLUSIONS

In terms of prohibitions, EU sanctions are less restrictive than US ones: EU measures focus on *assets* and do not, for example, include training or the provision of services other than *financial* or related services as defined.⁵⁰ US sanctions prohibit the provision of goods, funds and assets, and US criminal measures prohibit the provision of ‘material support’ more broadly.

In terms of designated entities, in view of the lack of clarity as to the designations under the US measures, it is not possible to reach a definitive conclusion as to whether the designations under EU measures are narrower. However, if it were concluded that General License 7 only applies to *parts* of the Palestinian Authority structures, then the effect of the May 2006

⁵⁰ Article 3 of *Council Regulation 2580/2001* defines ‘financial services’ as ‘any service of a financial nature, including all insurance and insurance-related services, and all banking and other financial services (excluding insurance)’.

OFAC determination would be to impose more extensive restrictions than the EU measures, which are limited to ‘*Hamas*’ *per se*.

This said, while the EU measures may be narrower in scope, the possibility exists that False Claims Act litigation may lead to the ‘imposition’ of the US approach in terms of prohibited transactions and interpretation of the designated ‘terrorist entity’ on all INGOs that have received US Government funding for any operations anywhere in the world in the ten years prior to the signing of the USAID certification and since its signature. Even if the US measures would not be otherwise applicable *per se* to the INGOs, the references in the USAID certification may be interpreted in accordance with the meaning of the terms under US law, bringing the US law approach into play for INGOs that would not otherwise be bound by it. As noted, US courts have not addressed the merits of the claims brought to date, so it is only possible to speculate as to the approach they might take.

Israel’s legal framework has received far less attention than that of other states and the EU, even though it is clearly of direct relevance to humanitarian actors conducting operations in Gaza. As set out above, the prohibitions in the 2016 Counter-Terrorism Law raise numerous questions. Some of these may have already been answered in decisions that do not relate specifically to humanitarian action. It is essential that humanitarian actors inform themselves of the approach adopted by the courts.

Further research must also be conducted on the approach adopted by the courts and other relevant parts of the state of Israel, such as the Ministry of Defence, which is responsible for making the designations, in interpreting what should be understood by ‘*Hamas*’ in the designation.

Indeed, the question of how ‘*Hamas*’ should be understood in relation to all these measures, and in particular in terms of its relationship with civil administration structures in Gaza, is central to the application of the regulatory frameworks, and thus to humanitarian action in Gaza, but remains insufficiently explored.

The Minerva Center for the Rule of Law under Extreme Conditions at the University of Haifa Faculty of Law and the Geography and Environmental Studies Department, is an international venue and transnational forum - together with the University of Hamburg, for study, research, training, education and publication. Its mission is to focus on the rule of law, broadly defined to include policy and regulation, under three main types of extreme conditions: natural disasters (epidemics, floods, storms, fires, earthquakes); national security challenges (wars, terrorism, counter terrorism, cyber-terrorism and military actions); and socioeconomic crises (economic meltdowns and severe sociopolitical fragmentation).

The Oxford Institute for Ethics Law and Armed Conflict - ELAC is an interdisciplinary research program based at the Blavatnik School of Government. It looks at different aspects of armed conflict from the perspective of law, international relations, and philosophy. Our aim is to strengthen law, norms and institutions to restrain, regulate, and prevent armed conflict.

Emanuela-Chiara Gillard is a Senior Research Fellow at the Oxford Institute for Ethics, Law and Armed Conflict, and an Associate Fellow in Chatham House's International Law Programme.