

## Humanitarian Policy

International Law, Humanitarian Relief and Protection Consultancy

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### Parliamentary Joint Committee on Intelligence and Security Review of the Listing and Re-listing of Hamas

Committee Secretary

Parliamentary Joint Committee on Intelligence and Security

Parliament House

Canberra

P please see the below submission in connection with the listing of 'Hamas' as a terrorist organisation pursuant to Criminal Code Act.

#### I. Background

1. The Izz al-Din al-Qassam Brigades, a non-state armed group was first listed in Australia as a terrorist organisation on 5 November 2003, and most recently re-listed on 4 August 2021. Since 2001, Australia has listed Hamas in its entirety as a terrorist entity for financial sanctions under part 4 of the Charter of the United Nations Act 1945, as part of implementing United Nations Security Council Resolution 1373. On 4 March 2022, The Minister for Home Affairs announced she had listed the entirety of Hamas as a terrorist organisation under the Criminal Code.
2. On 31 March 2022, the Parliamentary Joint Committee on Intelligence and Security commenced a review of the listing Hamas as terrorist organisations under the Criminal Code Act 1995. The designation of Hamas as whole, while it would have implications for Australian diplomatic relations, these possibly adverse consequences - are outside the remit of humanitarian and development organizations operating in Gaza.
3. While several jurisdictions equate 'Hamas' with the Izz al-Din al-Qassem Brigades (a non-state armed group) and the political party, **in no jurisdiction are the civil administration structures in Gaza (e.g., ministries, departments, municipalities, various boards and agencies) subject to counterterrorism restrictive measures of any kind.**
4. That said, with expanding the listing of Hamas-Izz al-Din al-Qassem Brigades (IQB, the non-state armed group) to include the listing of the political party, **there is a risk of conflating 'Hamas' – as a**



humanitarian policy

political party, and an armed group, irrespective of the relationship between the two – with the civil administration in Gaza. A risk that the Committee should be cognizant of and guard against.

## II. Comparative Analysis

### *The Position of the United States*

5. There are a number of legal avenues for designating groups and stemming the flow of resources to them under US law. In 1995 ' Hamas ' was designated by the US Department of the Treasury as a 'Specially Designated Terrorist Organization' (SDTO) under Executive Order 12947. This instrument prohibited 'making or receiving of any contribution of funds, goods, or services to or for the benefit' of designated persons. In addition, in October 1997 the Department of State listed ' Hamas ' as a Foreign Terrorist Organization (FTO) under Section 219 of the Immigration and Nationality Act.
6. It is important to note that while the US equates ' Hamas ' with Izz al-Din al-Qassam Brigades and the political party, **none of the civil administration structures in Gaza (e.g., ministries, departments, municipalities, various boards) are included in the SDN List.**

### *The Position of the United Kingdom*

7. Hamas Izz al-Din al-Qassem Brigades was proscribed in March 2001, with the UK noting that it 'aims to end Israeli occupation in Palestine and establish an Islamic state.' The consolidated list names HAMAS INCLUDING IZZ AL-DIN AL-QASSAM BRIGADES referring to the UK Sanctions List last updated on 9 May 2022, providing that Hamas including Izz al-Din al-Qassam Brigades is the subject of a UK asset freeze and arms embargo for having claimed responsibility for numerous terrorist attacks and rocket strikes, and statements that praise acts of terrorism.
8. On 19 November 2021, UK Home Secretary Patel laid before Parliament an order to outlaw Hamas in its entirety, following an assessment that it should be proscribed in its entirety. Proscription makes it a criminal offence to be a member of, or invite support for the group, with those found guilty facing up to 14 years in prison.
9. Guidance provided by the UK Charity Commission provides that humanitarian organizations can work with, and give support to, beneficiaries associated with terrorist activities, as long as this work is "lawful, furthers the charity's purposes, and you and your co-trustees comply with your charity law duties."
10. Moreover, the Commission opined that the "need to ensure respect for relevant UK counter-terrorism legislation and sanctions regulations **should not, however, impede the effective delivery of humanitarian assistance to persons in need in accordance with humanitarian principles and international humanitarian law. Partners are therefore not expected to vet or screen end-beneficiaries.**"
11. While making funds or economic resources (assets of every kind – tangible or intangible, movable or immovable) available to a designated person without the necessary licence or exception is precluded, **"it is considered inappropriate and disproportionate to cross-check each beneficiary**

**with the consolidated list of financial sanctions targets"** when a program takes in a range of beneficiaries, purely on the basis of need. In regards to individuals who benefit from capacitation or training, humanitarian organizations could as part of the risk assessment cross-check the designated list. However, given that only a few individuals are designated (and are highly unlikely to attend such sponsored training and workshops), that would not form the basis for exclusion. **Any other basis for exclusion, including ethnicity, religion or belief is precluded.**

12. To the extent meetings with Hamas political party or IQB take place, **humanitarian organization subject to UK law are not prevented from interacting with proscribed organisations.** For example, a meeting designed to encourage a proscribed organisation to facilitate delivery of humanitarian aid where this does not involve knowingly transferring assets to a proscribed organisation would be permissible. The explanatory notes to TACT 2000 explain that the defence in section 12(4) is intended to permit the arrangement of 'genuinely benign' meetings, in that they are not designed to promote or encourage the terrorist activities of the group. They are therefore in line with guidance in the Terrorism Act 2000.
13. **Incidental and necessary expenses to facilitate the genuinely benign meetings do not make funds or economic resources available either directly or indirectly to any entity subject to designation,** which can facilitate terrorist activity. **The activity is therefore in line with the regulations and the expenditure therefore does not require a licence for the provision of funds or economic resources to designated entities.**

#### ***The Position of the European Union and its Member States***

14. On 27 December 2001, the EU Council adopted Common Position 2001/931/CFSP and Regulation (EC) No 2580/2001 on the application of specific measures to combat terrorism, thus enabling the Council to designate persons and entities involved in terrorist activities. The designation entails an asset freeze and a prohibition from making funds and economic resources available. The designations are reviewed at regular intervals and at least every six months to ensure that there are sufficient grounds for keeping them on the list.
15. The July 2021 iteration of subjected entities includes Hamas (including Hamas-Izz al-Din al-Qassem), applicable 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.
16. It should be noted that the first list included 'Hamas-Izz al-Din al-Qassem' (the NSAG)'. 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 changed the designation to 'Hamas (including Hamas-Izz al-Din al-Qassem)'. **The designation has remained unchanged since.**
17. A 2019 European Union Court of Justice (ECJ) ruling on the matter of Hamas designation revealed that in 2015, the Council disclosed to the Hamas agent the grounds on which it was proposing to maintain the its name on the fund-freezing lists.

18. The court was of the view that it cannot be concluded that Hamas-Izz al-Din al-Qassem is an organisation separate from Hamas. That is particularly so since, although it has been subject to fund-freezing measures for several years, Hamas did not seek to demonstrate to the Council that it was not in any way involved in the acts that triggered the adoption of those measures, by dissociating itself unequivocally from Hamas-Izz al-Din al-Qassem, which, according to the applicant, was solely responsible for them.
19. However, of significance to the distinction between Hamas and the civil administration of the Gaza Strip, it should be noted that the Hamas agent claimed that, by adopting the measures, the Council breached the principle of non-interference which stems from Article 2 of the Charter of the UN and constitutes a principle of *jus cogens* that flows from the sovereign equality of States in international law and which precludes a State, as well as the government of a State, from being considered a terrorist entity.
20. Yet the court maintained that the principle of international law is set out for the benefit of sovereign States, and not for the benefit of groups or movements, **and since it is neither a State nor the government of a State, Hamas cannot benefit from the principle of non-interference. That observation reinforces the differentiation of the political party, or movement, from the administration which it heads as executive – which would be applicable to the circumstances in Gaza.**

### **III. Implications for Humanitarian Relief in Gaza**

21. Hamas as a political party, whichever its connection to the armed wing may be, has been exercising executive authority over Gaza since 2007. The restrictions found in the EU and US sanctions prohibit making available funds and other relevant assets available to the political party.
22. However, there is a distinction as a matter of constitutional and administrative law between a political party and civil administration structures such as ministries and departments. This distinction continues to exist even when a party becomes the 'governing party' or party in power.
23. **Equating Hamas with the civil administration of Gaza would turn targeted financial sanctions into measures that can have a far broader impact on an entire civilian population**, similar to the overly broad comprehensive sanctions from which the international community moved away in recent decades.
24. **In keeping with current good practices, most states, including EU member states, do not adopt comprehensive sanctions.** Instead, they adopt measures prohibiting transactions with individuals or specific ministries that it considers particularly responsible for the behaviour the sanctions aim to end and whose activities the sanctions aim to impair.
25. In Syria, for example, the EU has imposed sanctions against the Ministries of Defence and of the Interior, because of their activities 'in support of the regime'. This indicates that the EU avoids broad designations of governments as a whole.

26. This supports a narrow interpretation of the sanctions on Hamas, as applying just to the political party. Recent EU practice in relation to Syria provides further support for this interpretation. In late 2020 the EU designated a number of ministers on the ground that 'they share responsibility for the Syrian regime's violence against the civilian population'. These have included the Minister for Education and the Minister for Health.
27. There was no suggestion that these designations, and the consequent prohibitions on making funds or other assets available to the ministers, meant that it was no longer possible to provide support to the ministries they headed. Issues would only arise if the designated ministers appropriated funds or other any assets provided to the ministry they head for their personal benefit or to undermine the policy objectives for which the sanctions were imposed. Even in those cases, the effect would not be to bring the ministry within the scope of the designation. Instead, the issue would have to be addressed from a prevention of diversion point of view.
28. Applying this reasoning to the designation of Hamas in the current situation in Gaza, **ministries, departments and other parts of the civil administration do not form part of 'Hamas' the designated entity – whether we take that designation to include the political party or not – so consequently, do not fall within the scope of counterterrorism sanctions and asset freezes.**
29. If it were demonstrated that funds or other assets were transferred from civil administration structures to Hamas – which to date, is unprecedented – this would have to be addressed from a risk of diversion perspective, which has been adequately addressed through a suite of anti-diversion and due diligence measures adopted by implementing partners and verified by the Australian Government on a number of occasions.
30. In the Explanatory Statement issued by the authority of the Minister for Home Affairs, the offence of associating with a terrorist organisation in section 102.8 of the Criminal Code is interpreted as non-applicable if the "association is with a close family member and relates to a matter of family or domestic concern, or takes place in the course of practicing a religion in a place used for public religious worship, **or the association is only for the purpose of providing humanitarian aid, or only for the purpose of providing legal advice or legal representation.**"
31. **Nevertheless, there is a risk of conflating bona fide humanitarian work with support provided to proscribed entity, and a more robust approach to firewalling the principled delivery of humanitarian relief is desirable.** To guard against unintended consequences, a recent European Commission Guidance Note provides official clarification of its application to humanitarian action. The guidance note provides that "in accordance with International Humanitarian Law where no other option is available, the provision of humanitarian aid should not be prevented by EU restrictive measures."
32. This asserts that humanitarian assistance takes priority over any inconsistent restrictions in sanctions. In particular, the note states that sanctions do not require the screening of final beneficiaries of humanitarian programs. The note established the following:

- EU sanctions are not meant to stand in the way nor impede the supply of humanitarian aid. Any action not explicitly prohibited under EU sanctions is considered permitted, unless otherwise stated by a national competent authority (NCA). Over-compliance should not lead to undermining the provision of humanitarian aid.
- EU sanctions contain exceptions which enable otherwise restricted actions to be carried out in order to provide humanitarian aid [...] restricted activities may be exceptionally allowed even in the absence of explicit exceptions, if there is no other means to ensure the provision of humanitarian aid.

#### **IV. Recommendations**

- a) Reconsider the value added of listing Hamas as whole under the Criminal Code, given both that Hamas in its entirety is subject to financial sanction, and the possibly of unintended consequences of the listing on Australian funded humanitarian relief destined to the Gaza Strip;
- b) Opine that there is a distinction as a matter of constitutional and administrative law between a political party and civil administration structures such as ministries and departments. This distinction continues to exist even when a party becomes the 'governing party' or party in power;
- c) Opine that issues of concern would only arise if the designated ministers appropriated funds or other any assets provided to the ministry they head for their personal benefit or to undermine the policy objectives for which the sanctions were imposed. Even in those case, the effect would not be to bring the ministry within the scope of the designation, current or otherwise. Instead, regulatory compliance would have to be addressed from a prevention of diversion point of view, and the Australian Government should advise implanting humanitarian organization on how to approach enhanced due diligence in such situations;
- d) Opine that Gaza ministries, departments and other parts of the civil administration do not form part of 'Hamas', so consequently, do not fall within the scope of listing under the United Nations Act 1945 (Resolution 1373) or Criminal Code Act 1995. If it were credibly demonstrated that funds or other assets were transferred from civil administration structures to Hamas, this would have to be addressed from a risk of diversion perspective.

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Please accept, Excellency, the assurances of my highest consideration, and my willingness to present verbal evidence to the Committee online at your convenience.

  
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