



Statewatch Analysis

Terrorising the rule of law: the policy and practice of proscription

Introduction

The policy of "proscription", or "designation", of groups and individuals as "terrorist" is an integral part of the global "War on Terrorism" led by the United States. "Proscription" is a legal sanction that criminalises the named "terrorists". However, the criminal courts are all but excluded from what is a highly politicised process that obviously has very serious implications for those who may be included on the "terrorist lists". In the aftermath of "September 11" the policy has been embraced uncritically by the "international community" - despite the obvious problems it poses for understandings of "due process" and the application of human rights standards.

This analysis explores the emergence of the policy of proscription, its global extension under the "War on Terrorism" and the implications for groups and individuals who are now proscribed in law as "terrorist". It borrows much of the legal argument and many of the quotations from the Joint Opinion on proscription by Professors Bill Bowring and Douwe Korff of London Metropolitan University (1).

Background

Proscription was first introduced in the UK in 1974 under the "Prevention of Terrorism (Temporary Provisions) Act". The Secretary of State was empowered to ban any organisation in Northern Ireland "that appears to him to be concerned in terrorism ... or in promoting or encouraging it". This policy continued throughout the "Troubles" to the present day. The United States introduced proscription in the mid-1990s, under the Clinton administration. Even then, the US was keen to combat "international terrorism" wherever it occurred and proscribed 30 "foreign terrorist organisations". In 2000 the UK followed suit, extending proscription to foreign groups where the Secretary of State "believes" that they are "concerned in terrorism" - most of the 21 groups proscribed by the UK were on the US list.

In a process known as "policy laundering", the US and the UK have encouraged other states to adopt this policy. (2) Since 2002, Canada has proscribed 35 groups (29 of which are on the US list and 4 on the UK list) and Australia has proscribed 18 organisations (15 of which are on both the UK and US lists). (3) In

2002 New Zealand also introduced proscription. The US/UK policy of proscription has also been "laundered" through the intergovernmental frameworks of the UN and EU, giving it a truly global reach.

The UN introduced "designation" (a form of proscription) in 1999 under a Security Council Resolution in the sanctions framework against the Taleban - part of the United States' attempt to force the regime to hand over Osama Bin Laden by freezing its assets and resources. Twelve days after "September 11" 2001, the US President signed an executive order blocking the assets of 189 "organisations and individuals linked to terrorism". The UN quickly followed, extending its Taleban sanctions framework to all groups and individuals associated with Bin Laden and "Qaida".

In the EU, the UN sanctions regime was quickly incorporated into EU law. The EU then went further, introducing its own list of groups and individuals "involved in terrorism" (including "domestic terrorism") and extended the asset-freezing regime to the "foreign terrorists" on the list.

It is worth noting that the US also maintains a "Terrorist Exclusion List" (TEL; 59 groups currently designated) under the PATRIOT Act of 2001, for the purposes of excluding "aliens associated with entities on the TEL from entering the United States". In addition, the US maintains "no-fly" and "lookout" lists - said to contain 20,000 and 120,000 names respectively (4) - as well as a "most-wanted" list of terrorists. These domestic measures, which are pursued by many countries, are not considered any further in this analysis but obviously raise the same kind of concerns.

Scope and effect

The United States has now proscribed 41 "foreign terrorist organisations" and designated more than 350 under the Executive Order on asset freezing. The United Kingdom has 25 "international terrorist organisations" on its list (with another 14 in Northern Ireland), and the European Union has agreed on the designation of 47 groups and 45 individuals suspected of involvement with terrorism. The United Nations list is the longest, designating 322 individuals and 115 groups as suspected members or associates of Qaida and the Taliban.

As noted above there is considerable overlap, though only 12 groups are common to the UK, US and EU lists, these are:

Abu Nidal Organization (ANO, an anti-Israeli group)

Qa'ida

Continuity IRA

ETA (Basque Fatherland and Liberty)

Gama'a Islamiyya (GI)

Hamas

KADEK (formerly PKK)

Lashkar-e Tayyiba (LT, Kashmir)

Mujahedin-e Khalq Organization (MEK, aka People's Mujahadeen of Iran, PMOI)

Palestinian Islamic Jihad (PIJ)

*Real IRA
Revolutionary People's Liberation Army/Front (DHKP/C, Turkey)*

The legal effect of inclusion on the list varies according to the jurisdiction. The proscription of "terrorist groups" by the US and UK allows the prosecution of their members - including for acts committed outside the two countries - and the prosecution anyone providing financial, material or even ideological support. The UN and EU lists provide for the freezing of assets and resources connected to the designated groups and individuals. The UN framework obliges "states" to refrain from "providing any form of support, active or passive" to "entities or persons involved in terrorist acts". The EU framework, which is modelled on the UN mechanism but goes further, requires EU states to prevent "the public" from offering "any form of support, active or passive". (5)

Proscription thus carries extremely serious consequences, particularly for individuals subject to asset freezing. As Iain Cameron notes:

"The effect[s] of a freezing order, if it is effectively implemented, are devastating for the target, as he or she cannot use any of his or her assets, or receive pay or even, legally speaking, social security." (6)

Before examining the judicial remedies available to groups and individuals on the various lists it is worth examining how they came to be placed there in the first place.

Selection criteria and political process

The process is fairly straightforward. "Intelligence", much of it secret, provides the basis for including groups and individuals on the various lists. The judiciary is excluded and parliaments play only a minimal role. Except in the EU and UN frameworks where there is no democratic scrutiny whatsoever.

In the US and UK the "intelligence" is evaluated by the offices of the Secretary of State/Home Secretary, who then proscribe groups they believe are involved with "terrorism" after "consulting" Congress/Parliament. In the UN and EU frameworks the "intelligence" on groups and individuals comes from the member states; the executive bodies of the UN (Security Council) and EU (Council) then agree their lists - there is no consultation of the UN General Assembly or the European Parliament.

None of the regimes provide for notification to the accused that designation is pending or opportunity for the accused to contest any allegations before proscription: the normal judicial process is entirely discarded.

UK parliamentary debate over the first list of 21 foreign terrorist groups was limited to an hour and half, late at night. Menzies Campbell, the respected Liberal Democrat spokesman, asked:

"Does the Secretary of State understand the discomfort that some of us feel at the notion that 21 organisations should appear in the motion

that we are debating, and that there has not been an opportunity to deal with each on an individual and separate basis?"

Jeremy Corbyn MP questioned the motivation and political influence on the government's decision, stating that he was:

"very well aware that the Indian government, the Turkish government, the Sri Lankan government, the Iranian government and undoubtedly many other governments have been constantly pressing the British government to close down political activity in this country by their opponents."

The first EU "terrorist" list was agreed, together with the EU legislation allowing proscription, by "written procedure" on the 27 December 2001. This meant that the four legal texts were simply faxed round to the foreign ministries of the 15 EU member states and adopted if none raised any objection, which two days after Christmas was surely unlikely. The various UN Security Council Resolutions have been adopted in similar fashion - at least in terms of the absolute lack of debate. Both the UN and EU lists have been amended so many times it is very difficult to keep track of the decisions being taken.

Many of the groups named contest their designation as "terrorists", suggesting it is politically motivated. In September 2002, 331 MPs (a Commons majority) and 122 Peers (in the House of Lords) declared in a statement that they "support the struggle of the people of Iran and the People's Mojahedin Organisation [of Iran, PMOI] to achieve democracy and human rights as an essential part of the defeat of terrorism at home and abroad." Support for a banned organisation is a criminal offence under the Terrorism Act 2000; the show of support in the UK parliament leaves the law looking something of an ass. As does Jack Straw's recent meeting with Hamas.

Though it is hard to conceive of any justification for the exclusion of the judiciary and marginalisation of democratic institutions over such politicised and potentially devastating measures as proscription, "terrorism" and the current political climate provide one. As Bill Bowring and Douwe Korff explain: "It is plain in our view that the US legislation is a recipe for arbitrary, secretive and unjust executive decision-making, shielded from the scrutiny of the courts, and equally removed from most public debate precisely because of the 'chilling' effect of the use of the term 'terrorism'."

The same can be said of the UK, EU and UN frameworks for proscription, all of which carry a:

"manifest risk of arbitrary, in particularly politically motivated abuse of such law".

Definitions of terrorism

Since the criteria for inclusion on the terrorist lists is a connection with "terrorism" (or Qaida or the Taleban in the UN framework), it is impossible to separate the politics of proscription from the way in which terrorism is defined

in the various jurisdictions. It is notable that the UN is the only one of the four that does not have an agreed definition of terrorism. The UN attempted to elaborate such a definition for most of the 1970s but failed:

"because the Group of 77, the formerly colonised states, repeatedly emphasised the legitimacy of actions by national liberation movements, and demanded that such actions should in no way be confused with terrorism" (Bowring and Korff).

The degree of subjectivity arguably makes it impossible to find a definition that could provide such a guarantee. As Judge Rosalyn Higgins, of the International Court of Justice, said in 1997:

"Terrorism is a term without any legal significance. It is merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both."

When the concerns about the criminalisation of liberation struggles are taken out of the equation, as they have been in the US, UK and EU, the very similar definitions of "terrorism" adopted have been very broad indeed. The UK definition, which was clearly modelled on the earlier US definition, and provided the basis for the EU definition that followed, is:

"The use or threat of action designed to influence the government or to intimidate the public or a section of the public, for the purpose of advancing a political, religious or ideological cause"

As Bowring and Korff note, in no definition is there any actual mention of "terror", leaving open the possibility that acts or groups that clearly do not cause "terror" in any tangible sense could be criminalised. This concern was voiced by *Statewatch* and many others during the adoption of the EU definition of terrorism.

How then, ask Bowring and Korff:

"can it then be possible to move to proscribe organisations with any degree of legal certainty, adherence to the rule of law, or proportionality?"

Cameron identifies a number of specific problems in defining terrorism in the proscription process, including:

1) *There is no requirement that the group has recently committed acts of terrorism - for example, the decision to include the PKK in May 2002 several years after it had renounced violence.*

2) *There is no requirement that the terrorist act be directed against a non-military target, as is the case with the International Convention for the Suppression of the Financing of Terrorism.*

3) *There is no requirement that the acts be directed against a democratic government.*

Criminalising solidarity, criminalising communities

Thus, as Helena Kennedy QC has pointed out, it is:

"hard to have confidence that struggles for self-determination and other political activities will not be wrapped up in accusations of 'terrorism'."

Moreover, as Bowring and Korff note:

"Very often, in countries in which there are serious political tensions, or serious repression, there will both be organisations using violence which claim that their use of violence is legitimate, and political groups which espouse similar aims to the violent groups, but which deny that they are in hock with those groups. Here too the lines are difficult to draw."

These concerns, which have been stated repeatedly by solidarity groups and critics of arbitrary anti-terror laws, have proved well founded with the UK and US governments moving to proscribe groups involved in liberation struggles or resistance to occupation and tyranny. The complex situations in the Basque country, Colombia, India, Iran, Palestine, Sri Lanka, The Philippines, Turkey - each with its own history and context - have all been lumped together under the banner of "international terrorism" and subjected to the same sanctions as Osama bin Laden and Qaida. This is devastating for these movements, criminalising not only the proscribed/designated "terrorist" groups and named individuals, but their members (and suspected members), supporters, associates and their family members and so on. The criminalisation of "passive support" goes as far as to criminalise all solidarity with any of the groups named, whatever the basis and motivation for that solidarity. Incredibly, long established networks like the *Palestine Solidarity Campaign* and *Columbia Solidarity Campaign* now find themselves on the wrong side of the law.

In European countries that have large resident populations associated with these movements - for example the Kurds in the UK and Germany and the Iranians in France - we are witnessing the criminalisation of entire communities. Along with resident Muslim and Arab populations, foreigners from areas associated with "terrorism" are demonised in the media and treated as "suspect communities", fuelling racism and resentment. The "laundering" of the "terrorist lists" through the intergovernmental frameworks of the EU and the UN means this criminalisation impacts not only locally but globally. The UN Security Council resolutions and the EU measures oblige member states to afford one another full cooperation in the "war on terror" generally and as regards the freezing orders and specific investigations.

Review and appeal mechanisms

What then can an organisation or individual who appears on any of the various terrorist lists do about it? In the UK, the Terrorism Act 2000 provides for appeal

to the Home Secretary to remove an organisation from the list. If this application is refused the applicant may appeal to the Proscribed Organisations Appeals Committee (POAC). In turn POAC judgments may be appealed to the Higher UK Courts. Several of those listed did jointly challenge the legality of the proscription regime in 2002 but this was dismissed on the grounds that the provision to appeal POAC judgments provided affected groups with adequate judicial remedy (7). POAC is similar in structure to the controversial SIAC tribunals that ruled on the detention without trial of foreign nationals under provisions now repealed of the Anti-Terrorism, Crime and Security Act 2001: government appointed judges, secret hearings and secret evidence etc. Ultimately the POAC decisions could be appealed to the European Court of Human Rights.

In the United States the (Federal) Court of Appeals denied the PMOI's application for judicial review of the Secretary of State's decision to designate them a "foreign terrorist organisation" because it felt - wrongly in the view of many - that it could not examine the basis for that decision:

We reach no judgment whatsoever regarding whether the material before the Secretary is or is not true ... [T]he record consists entirely of hearsay, none of it was subjected to adversary testing, and there was no opportunity for counter-evidence by the organizations affected. [The Secretary of State's] conclusion might be mistaken, but that depends on the quality of the information in the reports she received - something we have no way of judging."

The UN and EU lists make no provision for appeal to the courts whatsoever. Groups and individuals on the lists may make diplomatic representations to their government, or the government that they believe proposed their proscription. An individual EU member state may grant a "specific authorisation" to unfreeze funds and resources after consultation with the other Member States, the Council of the EU and the European Commission (the issue of whether to continue to include someone on the EU list is decided by the Council). In the UN framework the requested member state may then make "diplomatic" representations to the Security Council Committee with a view to informal resolution of the issue (and failing this, resolution by the Security Council itself).

As far as the courts are concerned, individuals and groups could challenge the application of the EU/UN measures in the national courts on the basis that they contravene human rights or constitutional standards - though such appeals could well be denied on the grounds that international sanctions regimes are binding on member states.

Groups and individuals have indirect recourse to the EU Courts and can seek annulment of the Council measures implementing the freezing regime, or damages for unlawful Council acts at the European Court of First Instance (and subsequently the full European Court of Justice). However, the proceedings in these courts would be directed at the EC/EU rules; they would not really concern the national measures implementing them. Finally, once all other

avenues for appeal have been explored, proscription may be challenged at the European Court of Human Rights.

A number of groups have taken case to the EU Courts and claim sizeable damages. (8) Legal experts, however, have argued that the composition and functioning of the CFI and ECJ as international courts leaves them inadequately equipped to deal with the complex issues raised by proscription cases. In such a situation they offer no real prospect of adequate judicial redress for groups and individuals proscribed as "terrorist" by the EU. However, the European Court of Human Rights has so far held that all judicial remedies (including the ECJ) must be exhausted before it can consider any cases - leaving applicants facing lengthy procedures. This position is rejected by Bowring and Korff on the grounds that there is no prospect of an effective remedy at the EU Courts. They are also concerned that a conservative judgment by the EU Courts could set a bad precedent for any subsequent Strasbourg judgment.

The upshot of this highly complex legal landscape is that no proscribed group has yet had full "access to court", with the (domestic) court being able to address the underlying matters of law and fact in full. The only successful challenges to terrorist blacklisting have been diplomatic representations to the United States - for example in the Barakaat case (9). In these situations the United States offers to remove groups and individuals in return for "anti-terrorist" commitments (which may include renouncing the movements with which they are associated). This underscores the political nature of the international proscription regimes and the power that the US enjoys within these frameworks.

An affront to justice and human rights

In their submissions to the UK's POAC tribunal on behalf on the PMOI (10), Lord Lester QC and Rabinder Singh QC raised the following Human Rights Act complaints:

- (i) infringement of the right to freedom of expression (article 10)*
- (ii) infringement of the right to freedom of peaceful assembly and freedom of association (article 11)*
- (iii) interference with the right to a good reputation pursuant to article 8*
- (iv) arbitrary and discriminatory treatment (article 14)*
- (v) lack of due process and procedural unfairness*
- (vi) lack of proportionality, and*
- (vii) failure to comply with the requirements of legal certainty and "prescribed by law".*

The proscription regimes also clearly breach the Council of Europe "Guidelines on Human Rights and the Fight against Terrorism", adopted by the Committee of Ministers on 11 July 2002. These include:

II. Prohibition of arbitrariness: All measures taken by states to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.

III. Lawfulness of anti-terrorist measures: 1. All measures taken by states to combat terrorism must be lawful. 2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.

XIV. Right to property: The use of the property of persons or organisations suspected of terrorist activities may be suspended or limited, notably by such measures as freezing orders or seizures, by the relevant authorities. The owners of the property have the possibility to challenge the lawfulness of such a decision before a court.

As Bowring and Korff point out, these principles clearly echo the ECHR and the case-law of the European Court of Human Rights and expressly affirm that it must be possible to challenge freezing before a court - something precluded by the EU blacklisting regime.

Conclusion

Proscription has extremely serious consequences, not just for the groups and individuals that are named expressly on the lists, but their associates, supporters and contact networks. Given these implications for fundamental rights, the failure to provide adequate mechanisms for appeal and redress for groups and individuals affected by proscription is extremely alarming. The broader criminalisation of complex internal conflicts is no less alarming. The lessons of the WWII and German and Italian fascism meant the United Nations was born with the ethos that the "international community" should show solidarity with those resisting occupation and tyranny. What has happened in the post-"September 11" world is precisely the opposite. Resistance is instead defined as "terrorism" by tyrannical and occupying states, while the international community shows solidarity not with the oppressed, but the oppressor, in a framework geared toward the global criminalisation of all "terrorists". This criminalisation impacts locally and globally, criminalising communities and solidarity networks.

The process of proscription takes place in a secret realm which has marginalised democratic institutions and sidelined the judiciary. Those outlawed as "terrorists" have little possibility of a fair hearing at which they can challenge the evidence against them and the laws being used. This type of "preventative action" by the state - based on the criminalisation of all those "believed" to be associated with "terrorism", based on extrajudicial convictions, secret "intelligence" and guilt by association - is fast being normalised under

the "war on terrorism". And it is to the extreme detriment of established norms for the protection of human rights and the administration of justice.

Ben Hayes, June 2005

Notes

1. This analysis was developed from a talk given by Ben Hayes at the European Social Forum in London: "Proscription without process: the UK, US, EU and UN "terrorist" lists", (CAMPACC, Institute of Race Relations and Statewatch ESF seminar), 15 October 2004.

Much of the legal argument follows the Joint Opinion by Professors Bill Bowring (Director of Human Rights and Social Justice Research Institute, London Metropolitan University) and Douwe Korff (London Metropolitan University), "Terrorist Designation with Regard to European and International Law: The Case of the PMOI" (November 2004):

<http://www.statewatch.org/news/2005/feb/bb-dk-joint-paper.pdf>

2. For an explanation of policy laundering see:

<http://www.policylaundering.org/>

3. See organisations proscribed by Canada: http://www.psepc-sppcc.gc.ca/national_security/counter-terrorism/Entities_e.asp and Australia: http://www.ag.gov.au/agd/www/nationalsecurityhome.nsf/Page/Listing_of_Terrorist_Organisations

4. See "Terrorist Exclusion List" on US State Department website: <http://www.state.gov/s/ct/rls/fs/2004/32678.htm>. On "no fly" etc see US Report on airline passenger screening, *Statewatch news online* (April 2005): <http://www.statewatch.org/news/2005/apr/07us-passenger-screening.htm>

5. For information about the legal basis, scope, effect and procedures etc. regarding the various lists see the comparative overview prepared by *Statewatch*: <http://www.statewatch.org/temp/terrorlists/listsbground.html>

6. Iain Cameron (2003) European Anti-Terrorist Blacklisting, in *Human Rights Law Review*, vol. 3, no. 2. Cameron is quoted at length by Bowring and Korff (see note 1, above).

7. See transcript of case no's. CO/2587/2001, CO/4039/2001 and CO/878/2002 (PKK, PMOI and Nisar Ahmed): <http://hei.unige.ch/~clapham/HRClass2002/NationalDecisions/UK/pkk.doc>

8. A number of groups have taken case to the EU Courts. For annotated links to full-text documentation see "challenging proscription" produced by *Statewatch*: <http://www.statewatch.org/temp/terrorlists/listschallenges.html>

9. The al-Barakaat case is also explained in "challenging proscription", above.

10. See note 6, above.

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<http://www.policylaundering.org/>