

What is the Purpose of the U.S. Foreign Terrorist Organizations List?

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Mar 18, 2010

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Brief Analysis

The United States maintains a range of "terrorist lists," of which the Foreign Terrorist Organizations (FTO) list is one of the better known. But in two recent court cases, the U.S. government has offered arguments that raise questions about the purpose of the list.

FTO List vs. State Sponsors List

Another list is that of state sponsors of terrorism. The act of naming a foreign government as a terrorism sponsor is one instrument among many to affect the general foreign policy stance of the country concerned. Yet in practice, the state sponsors category has become a list of governments Washington simply does not like, often with little connection to terrorism; witness the continued presence of Cuba and the longtime presence North Korea. By contrast, governments that actually do sponsor terrorism but that Washington does not wish to single out are omitted from the list. A case in point is Lebanon, whose governing coalition includes Hizballah, the terrorist activities of which are protected and defended by the Lebanese government.

The decision to attempt to affect a state's foreign policy differs substantially from that of prohibiting material support to an organization, the latter being the objective specified in the law mandating the FTO list. Whereas the decision to influence a state's foreign policy is political in intent, blocking support to terrorist groups is much more like a policing matter, on which the United States can hope for cooperation from foreign governments irrespective of their views about U.S. foreign policy. If decisions about listing organizations as sponsors of terrorism are made based on general foreign policy considerations rather than on evidence about terrorist activities, the list may well be seen as a political tool, in which case other governments will be less likely to cooperate in blocking material support to listed groups.

The Intelligence Reform and Terrorism Prevention Act of 2004 stipulates that even if an organization is engaged in terrorism or retains the capability and intent to do so, national security considerations may warrant its removal from the FTO list. The law, however, does not provide for the reverse -- that is, maintaining a listing for nonterrorist national security reasons. Instead, the law requires that a group be maintained on the list only if it "engages in terrorist activity." When in 1999 the State Department dropped three groups from the FTO list, officials seemed to

endorse the position that to remain on the list after the biennial review, a group had to have been involved in terrorist activities during the preceding two years.

The PKK Case

In February 2010, the U.S. Supreme Court heard arguments in *Holder v. Humanitarian Law Project*, in which the latter entity wanted to provide legal advice to the Kurdistan Workers Party (PKK). The PKK has changed names several times, with the most recent being Kongra Gele Kurdistan (Kurdistan People's Congress). Further, it is worth noting that the PKK has a history of claiming to abandon terrorism but not doing so. Six months after Turkey captured PKK leader Abdullah Ocalan in February 1999, the organization declared a ceasefire and said it would disband in February 2002. But the PKK moved its terrorists from Turkey to northern Iraq and, within a few years, resumed its terrorist activities. This scenario illustrates the risk of taking at face value a group's claim that it has abandoned terrorism.

Much of the argument against the Humanitarian Law Project in the Supreme Court case turned on the scope of the term "material support." But an additional issue involved the character of the support provided, including advice on why and how to stop terrorist activities. Solicitor General Elena Kagan, who represented the U.S. government, asked, "Can you say to an organization, look, you guys really should lay down your arms?... Well, now you can't. Because when you tell people, here's how to apply for aid and here's how to represent yourself within international organizations or within the U.S. Congress, you've given them an extremely valuable skill that they can use for all kinds of purposes, legal or illegal." In this statement, Kagan suggests that it is illegal to advise groups to abandon terrorism. And yet one struggles to see how such a position advances the objective of countering terrorism. The State Department's website states, "FTO designations...are an effective means of curtailing support for terrorist activities and pressuring groups to get out of the terrorism business." Surely it is appropriate to encourage groups to drop their terrorist activities, as the United States successfully did with some extremist Irish Republican groups and the Palestine Liberation Organization (PLO).

The People's Mujahedin of Iran Case

The People's Mujahedin of Iran (PMOI), aka Mujahedin-e Khalq (MEK), has been on the FTO list since the list was started in 1997. More than thirty years ago, a faction arising from PMOI engaged in terrorism against Americans. Yet if the criterion for being on the FTO list is whether a group has ever engaged in terrorism, then many organizations with which the U.S. government has important dealings, such as the PLO, belong on the list.

Every two years after 1997, the FTO listing of PMOI was reviewed and retained, until 2004, when the time period for mandatory review was increased to five years. The decision by Secretary of State Condoleezza Rice in 2009 to maintain the FTO listing of PMOI did not set forth detailed reasons or criteria, other than stating that "the circumstances that were the basis for the 2003 redesignation...have not changed in such a manner as to warrant revocation."

In repeated yet unsuccessful bids, PMOI has sought to have its designation overturned by U.S. courts, in cases decided in 1999, 2001, 2003, and 2004. By contrast, the group has had greater success in more recent attempts in Europe. Listings of PMOI as a terrorist organization by the European Union (EU) were in 2006-2008 repeatedly overturned by the European Court of Justice, and the EU Council of Ministers removed PMOI definitively from its terrorist list in January 2009. Two years prior, Britain's Proscribed Organisations Appeal Commission (POAC), which exists solely to review terrorist designations and has access to all classified British government information, ruled, "Having carefully considered all the material before us, we have concluded that the decision [made] at the First Stage [that PMOI was engaged in terrorism] is properly characterised as perverse. We recognise that a finding of perversity is uncommon." In 2008, the English Court of Appeal stated, "The reality is that neither in the open material nor in the

closed material was there any reliable evidence that supported a conclusion that PMOI retained an intention to resort to terrorist activities in the future."

In January 2010, oral arguments were completed in the U.S. Court of Appeals-D.C. Circuit in the case of PMOI v. U.S. Department of State regarding the 2009 listing of the group. During the hearing, the government's counsel acknowledged that the public portion of the administrative record was devoid of any evidence to justify the secretary of state's decision. In other words, no unclassified statement had been released that summarized, or even hinted at, the classified evidence used by Secretary Rice in reaching her decision.

The 2009 decision to continue listing PMOI was striking on several grounds. First, according to the New York Times, the State Department's top counterterrorism official, Ambassador Dell Dailey, pushed to have PMOI delisted, but Secretary Rice overruled Dailey and other counterterrorism professionals. Second, the secretary's decision came after the European court cases won by PMOI, in which the group prevailed against repeated efforts by European governments to continue listing it -- listings widely perceived to be for foreign policy purposes rather than based on counterterrorism principles. Third, the State Department's Country Reports on Terrorism contain numerous nonterrorist allegations against PMOI without offering any indication that the group continues to engage in terrorism. The most recent episodes cited are several years old, and those incidents arguably fit the Geneva Conventions' criteria for irregular warfare rather than terrorism.

In light of these factors, and given that the original designation was described by the official then serving as assistant secretary of state for Near East affairs as an action taken after the Iranian government raised the matter, one can only wonder if the secretary's decision was based on foreign policy considerations outside the criteria set out in the law.

It would seem to be in the U.S. interest to encourage PMOI to disengage from all terrorist activities. Perhaps the U.S. government does not accept the group's oft-repeated claim to have abandoned terrorism. If so, Washington should inform PMOI of steps it must take to establish its bona fides. Failure to do so will only feed the perception that the continued FTO listing of PMOI is for reasons other than terrorism.

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