INDEPENDENT REVIEWER OF TERRORISM LEGISLATION

HIDDEN IMPLICATIONS: ISLAMIC REVOLUTIONARY GUARD CORPS AND TERRORISM PROSCRIPTION

Introduction

1. The IRGC is an Iranian military body and State entity answerable to Iran's supreme leader. It is an oppressor at home and exporter of violence abroad, whose members have been responsible for gross human rights violations[1].

2. The purpose of this Note is to address a single point raised by any decision that might be made to proscribe the IRGC.

3. In summary, proscribing a State entity under the Terrorism Act 2000 would depart from consistent and decades long UK policy, and calls into question the definition of terrorism which, to date, has proven practical and effective.

Proscription

4. The Secretary of State may only proscribe an organisation if she "believes that it is concerned in terrorism"[2].

5. If that statutory threshold is met, the Secretary of State exercises her discretion taking into account 5 factors:

    - The nature and scale of an organisation's activities;
    - The specific threat that it poses to the UK;
    - The specific threat that it poses to British nationals overseas;
    - The extent of the organisation's presence in the UK; and
    - The need to support other members of the international community in the global fight against terrorism.[3]

6. The effect of proscription is that members and supporters (moral and financial) are criminally liable, and various counter-terrorism measures become available[4].

Concerned in terrorism

[1] Foreign Affairs Committee, 'No prosperity without justice: the UK's relationship with Iran' (16.12.20), Council on Foreign Relations, 'Iran's Revolutionary Guards' (6.5.19).
[2] Section 3(4) Terrorism Act 2000.
[3] Home Office, 'Proscribed terrorist groups or organisations' (26.11.21).
[4] Described in Terrorism Acts in 2018 at 3.17 et seq.

7. An organisation is concerned in terrorism if it commits or participates in acts of terrorism, prepares for terrorism, promotes or encourages terrorism, or is otherwise concerned in terrorism[5].

8. Terrorism is, in summary, the use or threat of serious violence against a person (or other serious harms), which is designed to influence any government or intimidate the public or a section of the public, and made for the purpose of advancing a political, religious, racial or ideological cause[6].

    - The person who is harmed or at risk of harm may be anywhere in the world[7].
    - The public includes the public of a country other than the UK[8].
    - Government means any government, not just the government of the UK[9].

9. The approach of the courts has long been that the actual or believed justness of the cause provides no form of defence to charges of terrorism or mitigation of sentence[10].

Application of the Terrorism Act 2000 to States

10. Modern states, from the Jacobins in the 1790s, have been responsible for the most lethal instances of terrorism[11] and the word terrorism is understood to have been first used in connection with the French Revolution[12]. Terrorism as a tactic adopted by the State is the most prevalent and devastating form of all[13].

11. Despite this, the enduring policy of the UK government has been to treat terrorism by states as falling outside the Terrorism Act 2000. This appears to be a policy position rather than a view on the interpretation of the Act.

12. The best illustration of this is the treatment of the Salisbury attack by Russia in March 2018. The government was scrupulous in treating this as hostile state activity, and no counter-terrorism powers were used[14].

13. There is no authoritative ruling by the courts on whether state terrorism is included or excluded from the Terrorism Act, although in 2006 the High Court observed that even though its words were "taken by themselves, broad enough to cover all lawful acts of war", it was "misconception of the definition" for acts by Israel to fall within the definition[15].

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[5] Section 3(5).
[6] Section 1.
[7] Section 1(4)(b).
[8] Section 1(4)(c).
[9] Section 1(4)(d).
[10] Terrorism Acts in 2019 at 7.40.
[11] Burleigh, M., 'Blood and Rage: A Cultural History of Terrorism' (Harper, 2008).
[12] Hoffman, B., 'Inside Terrorism' (Columbia University Press, 2006).
[13] Walker, C., 'Blackstone's Guide to The Anti-Terrorism Legislation' (3rd Ed, Oxford, 2014) at 1.08.
[14] Terrorism Acts in 2018 at 2.2.
[15] R. (on the application of Islamic Human Rights Commission) v Civil Aviation Authority [2006] EWHC 2465 (Admin), Ouseley J, at para 44.

14. The National Security Bill which is currently before Parliament, and Schedule 3 of the Counter-Terrorism and Border Security Act 2019, both relate to "hostile state activity". The premise for both is that Terrorism Act offences and powers are not available with respect to the acts of, or on behalf of, States. In principle the National Security Bill could contain a power to proscribe state bodies on the basis of their hostile activity, but does not.

15. At the international level, attempts since 1996 to draft a comprehensive Convention on Terrorism have foundered on whether to acknowledge State terrorism[16]. My understanding is that the UK's position internationally has been that States cannot commit acts of terrorism for the purposes of such a Convention.

Implications for the definition of terrorism

16. The effect of proscribing the IRGC would be to accept, contrary to the UK's longstanding policy position, that state forces and therefore States can be "concerned in terrorism" within the Terrorism Act 2000.

17. Like the IRGC, all state forces are liable to use or threaten serious violence against persons, to influence a government (typically the government of the opposing forces), and for the purposes of advancing (at least) a political cause.

18. The logic would be that all state forces, including those of allies, must also "be concerned in terrorism" some or all of the time. It is one thing to characterise paramilitaries and individuals who would subvert the state through violence as terrorists; but quite another to apply the word terrorist to state bodies who conventionally are considered to enjoy a monopoly over the legitimate use of violence.

19. To avoid this absurdity, some way must be found of distinguishing the activities of those state forces from the activities of the IRGC.

20. This is far from straightforward, considering the width of the terrorism definition.

    - No distinction can be drawn between the IRGC and other state forces because of the *methods* used by the IRGC. Serious harm within the Terrorism Act may be caused by bullet, or bomb, or poison, or improvised explosive, or radioactive device, by targeted assassination or heavy artillery.
    - Nor can a distinction be drawn because the IRGC has an impact on the *UK* government or public. Terrorism applies to influencing any government or intimidating any section of the public.

[16] Lord Anderson KC, 'Terrorism Acts in 2012' at ft.61; R v Gul [2014] AC 1260 at 46, citing the unsuccessful attempt made by the ad hoc general committee established by General Assembly resolution 51/210 of 17 December 1996 to exempt "The activities of armed forces during an armed conflict, as those terms are understood under International Humanitarian Law, which are governed by that law…" from the terms of the draft comprehensive international convention on terrorism.

- The fact that some states such as Iran are sponsors of terrorism adds nothing: the point of proscribing the IRGC would be that it engages in terrorism itself, not simply that it sponsors terrorism being committed by others.
- Finally, no distinction can be drawn between the *ideology* promoted by the IRGC and the political ideologies advanced by other armed forces. The Terrorism Act definition is ideology neutral.

21. There are two other possible candidates.

22. The first is superficially attractive but hopeless. It could well be said that the IRGC is especially wicked, or its programme of action particularly harmful. But there is no intensity threshold when considering the application of the Terrorism Act. It is not defence to a charge under the Terrorism Acts that the conduct in question was morally justified[17], or could have been worse.

23. The second possibility, which merits greater consideration, is based on the proposition that when other state forces use or threaten violence they usually comply with the laws of war (also known as International Humanitarian Law), and that such activity necessarily falls outside the definition of terrorism[18].

Terrorism and International Humanitarian Law

24. In 2013 Lord Anderson KC noted that the current definition, unlike in Canada[19], "contains no express exemption for acts carried out overseas that constitute lawful hostilities under International Humanitarian Law" and could in principle cover the activity of UK armed forces abroad[20]. In 2014, the Supreme Court drew attention to these observations, endorsing Lord Anderson's concern about the width of the statutory definition of terrorism but noting that "…the issue is ultimately one for Parliament"[21]. The Supreme Court rejected attempts to read down the definition of terrorism in light of International Humanitarian Law.

25. Despite these concerns, the terrorism definition has remained unaltered. Indeed, the width of the terrorism definition has continued to prove – as Lord Carlile KC put it in 2004 – "practical and effective" [22].

[17] R v F [2007] QB 960.
[18] Alternatively, as the government argued in R v Gul in the Court of Appeal [2012] 1 WLR at para 30, the forces of the state might enjoy combat immunity in customary international law which forms part of common law. The Court did not need to express a concluded view on this: the logical implication would be that forces of the state do commit acts of terrorism, even during armed conflict, but are simply immune from prosecution.
[19] As well as South Africa, Austria and Belgium.
[20] This observation must be read subject to the scope of the Terrorism Act 2000, applying R (on the application of Black) v Secretary of State for Justice [2017] UKSC 81: the Terrorism Act it does not apply to the Crown.
[21] R v Gul, supra, at para 61.
[22] Lord Carlile KC, Report on the operation in 2004 of the Terrorism Act 2000, (Report, Independent Reviewer of Terrorism Legislation, United Kingdom, 2004) at 28; Lord Carlile KC , Report on the operation in 2005 of the Terrorism Act 2000, (Report, Independent Reviewer of Terrorism Legislation, United Kingdom, 2005) at 32.

- Its width has meant that juries have been able to consider terrorism prosecutions connected with overseas conflict without having to be directed on the boundaries of International Humanitarian Law.
- This has proven particularly relevant for terrorism prosecutions connected to armed conflict in Afghanistan, Syria and Iraq[23].

26. The courts have suggested several reasons why terrorism prosecution of individuals who travel out to armed conflicts may be desirable:

    (i) the fact that amateur soldiers are less trained and therefore more likely to cause collateral damage to civilians, or conduct themselves contrary to International Humanitarian Law, than professional soldiers;
    (ii) the risk to themselves of being killed or traumatised (especially in the case of amateur soldiers with pre-existing mental illnesses);
    (iii) the impact on British foreign policy in the area if they are taken hostage;
    (iv) the risk posed to British society if they return traumatised and "experienced in killing";
    (v) the risk that amateur soldiers may end up, through ignorance or reliance on partial information, acting against the cause they intend to promote or acting in a way that is contrary to the national interest[24].

27. The current position, in light of the Supreme Court's binding ruling in 2014[25], is that there is no exemption from the Terrorism Acts for violence carried out in accordance with International Humanitarian Law by non-state parties to a conflict.

28. It follows that if the IRGC were proscribed on the basis that its violence amounted to terrorism, the argument would have to be that acts of violence carried out by friendly *state* forces such as the French army are not terrorism because, by contrast, they are carried out in accordance with International Humanitarian Law.

29. But there is no basis for such a distinction in the current Terrorism Acts. It would be open to Parliament to amend the Terrorism Act 2000 to exclude state activity in accordance with International Humanitarian Law from the definition of terrorism (for example, by adding a clause to the National Security Bill which is currently before Parliament), but this could not be achieved by Parliament approving a proscription order for the IRGC[26].

30. Debates on proscription orders do not offer the opportunity for full debate on the full implications of altering the current approach to the terrorism definition, and these are deep waters. In 2014, Lord Anderson KC considered whether there should be an armed conflict exemption from the terrorism definition but was unable to recommend

[23] R v Gul, supra, concerned conflicts in Iraq and Afghanistan.
[24] See Terrorism Acts in 2019 at 7.51.
[25] R v Gul, supra.
[26] Proscription orders are subject to the affirmative resolution procedure: section 123(4) Terrorism Act 2000.

a change. He identified ten issues that needed to be considered in a legally-informed policy debate before such a step could be taken[27].

31. Consideration would also need to be given to how the lawful activity of state forces outside armed conflict could be exempted from the scope of terrorism. Undoubtedly the IRGC is involved in internal oppression which the Secretary of State (as a result of any proscription decision) may regard as terrorism, but state forces may also be called upon legitimately to deal with emergencies within states, including through use or threats of force, and should not fall within the definition of terrorism for that reason alone.

32. Even friendly armed forces will not always act in accordance with IHL[28]. If the distinction between the IRGC (concerned in terrorism) and friendly state forces (not concerned in terrorism) rested entirely on the application or compliance with International Humanitarian Law, it would have to be acknowledged that on occasion friendly states would also be "concerned in terrorism".

33. Finally, if there was an International Humanitarian Law distinction which applied to force used by state forces, it is foreseeable that the Supreme Court's ruling that the application of International Humanitarian Law was irrelevant to violent acts by non-state forces would start to come under pressure.

Conclusion

34. Although I share Lord Carlile KC's view that the current definition is both practical and effective, the purpose of this Note is not to argue for or against any changes to the terrorism definition.

35. Rather, the purpose of this Note is to point out that any decision to proscribe the IRGC has profound implications. If state forces are capable of being "concerned in terrorism", the question of how the definition of terrorism applies to other state forces will have to be addressed, at risk of upsetting the settled meaning of terrorism in domestic law.

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[27] Terrorism Acts in 2013 at 10.64 et seq.
[28] Inspector-General of the Australian Defence Force, 'Afghanistan Inquiry Report' (2020) ('the Brereton Inquiry').