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# Terrorist Sanctions: The Clash in US and EU Approaches

By Peter Margulies    Wednesday, February 17, 2016, 7:31 AM

## Omphalos: Middle East Conflict in Perspective

Imposing sanctions on terrorist groups has revealed pathologies on both sides of the Atlantic. In the US, as David Phillips and Kelly Berkell recently noted, both politics and bureaucratic inertia make lists too “sticky,” hindering the removal of groups when circumstances change. Conversely, in the EU, inertia and the rigid approach of the European Court of Justice (CJEU) hinder needed efforts to impose sanctions and make them stick. The PKK is perhaps the poster child for the US tendency, while Hezbollah illustrates the equal and opposite impulse in the EU.

In the US, there are asymmetric political incentives for listing and delisting terrorist groups. Listing allows members of Congress to burnish their anti-terror credentials. Contrast the possible delisting of a group like the PKK—which has arguably played a constructive role in mobilizing Kurds to fight ISIS—and note that urging delisting has only modest political benefits and substantial downside risk. There are few Kurdish voters in the US, and a legislator who urges delisting risks being tarred as “soft on terror” during the next primary. President Obama’s nuclear deal with Iran, which included lifting some sanctions on Iran, escaped this dynamic only because it did not require legislative authorization. Legislators who seek sanctions are typically sincere and in many cases there is ample reason to impose more sanctions, for example against Hezbollah, as I’ll discuss below. But when political incentives all skew in one direction, a deliberative dialogue becomes difficult.

Bureaucrats too have their own incentives to keep the terrorist sanctions list “sticky.” An official who sticks his or her neck out to remove a designation risks losing an essential part of his anatomy if a group back-slides into terrorist tactics. The safest move is to take cover in the status quo—a familiar bureaucratic refuge.

The difficulties inherent in the political and bureaucratic dynamics suggest that the judiciary should be less deferential. The DC Circuit performed this function well in the People’s Mojahedin (PMOI or MEK) litigation, prodding the executive branch to make additional findings on the anti-Iranian group to justify its designation. The PMOI’s anti-Iran stance also provided some political cover for proponents of delisting; perhaps the PKK’s anti-ISIS stance can provide a comparable umbrella.

That brings us to the EU’s puzzling reticence on sanctions for Hezbollah. As Gil Avriel, legal advisor to Israel’s National Security Council, recently pointed out in the Harvard National Security Journal, Hezbollah is a substantial threat. Hezbollah’s adverse impact has only grown as it expands its power in Lebanon, abets the Assad regime’s atrocities in Syria, and deploys more sophisticated missiles from Iran. While the US has designated Hezbollah as a terrorist organization for years, the EU elected to only list Hezbollah’s military wing after the group blew up a bus carrying Israeli tourists in Bulgaria in 2012. The EU has declined, however, to designate Hezbollah as a whole as a terrorist organization, asserting that this move would destabilize Lebanon.

Unfortunately, the EU’s reluctance to designate Hezbollah as a whole ignores the realities on the ground. For all practical purposes, Hezbollah’s formidable infrastructure of violence has supplanted Lebanon’s nominal military. Both Avriel, and Ben Wittes and Gabby in their book, *The Future of Violence* (p. 116) note that, in many respects, Hezbollah embodies the worst of both worlds: state and non-state. This intersection of violence was evident on a December trip to Israel—which Carrie Cordero discussed in this post on ISIS in Sinai—which included a visit to Israel’s tense northern border. Hezbollah is able to project force like a state, but its cunning placement of military hardware in civilian neighborhoods gives Hezbollah cover from attack—and more closely resembles the behavior of similar non-state groups such as Hamas in Gaza. The EU failure to impose sanctions on Hezbollah as a whole ignores that money is fungible and therefore the political wing of the group is able to subsidize the military wing, rendering the EU’s current sanctions toothless.

The failure of the EU policy is best illustrated by Hezbollah’s operations in Syria. The sanctions did not temper the group’s operations in Syria; instead the killing in Syria has continued. Positive movement—to the extent there has been any—has stemmed not from sanctions but from talks between US, Russia, and Iran. True, one could argue that toughening sanctions on Hezbollah might reduce Iran’s efforts to find a peaceful solution to the Syrian conflict. And negotiations about Syria are certainly fragile. However, the negotiations will be ineffective if they do not address the civilian carnage that Hezbollah and others have enabled. Viewed in this light, the EU’s reluctance to target Hezbollah is a Faustian bargain—the deal with the devil is probably best viewed as a cautionary tale, not an agenda for future accommodations with terrorist groups.

For its part, the CJEU has further tied down counterterrorism officials. In a 2013 decision, *Kadi v. Council*, the CJEU struck down on due process grounds the EU's implementation of UN Security Council sanctions against terrorist groups. The CJEU, which is based in Luxembourg, discounted the Security Council's naming of an ombudsperson who had been effective in persuading the Security Council to delist groups when the evidence pointed in that direction. (See my critique of *Kadi* here.) According to the CJEU, only a formal due process model would suffice. The court took this formalist stance despite the ombudsperson's success, and the risk that a more formal process would disclose data about intelligence sources and methods, thereby inhibiting international cooperation in the sanctions regime.

(Incidentally, an ombudsperson also figures in the new EU-US Privacy Shield data transfer agreement that replaces the Safe Harbor framework struck down by the CJEU in *Schrems*. According to published reports, the US State Department will appoint an ombudsperson to respond to EU residents' complaints about wrongful US surveillance. The court's lack of deference to the UN sanctions regime could signal peril for the new agreement. The Privacy Shield ombudsperson's review will have to be both robust and independent to have a chance at prevailing at the CJEU.)

In sum, listing terrorist groups has deepened pathologies on both sides of the Atlantic. Perhaps the US and the EU can engage in better communication in the future, and develop a set of best practices that will heighten incentives for groups like the PKK to emerge from the sanctions regime, while confronting bad actors such as Hezbollah. That would be a welcome step, but one that would entail tamping down politics, wishful thinking, and doctrinal rigidity in Washington, Brussels, and Luxembourg.

**Topics:** Omphalos

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