

SUBMISSION IN RELATION TO THE RE-LISTING OF HIZBALLAH'S EXTERNAL SECURITY ORGANISATION AS A TERRORIST ORGANISATION

My general views on the proper approach to the listing of organisations under the *Criminal Code* are well known to the Committee, and so this submission will not rehearse them in detail. In summary, those views are that the merits of the listing or re-listing of an organisation ought to be evaluated keeping in mind the potential impact of the listing on Australia's democratic political culture. It is inconsistent with Australia's standing as a pluralist liberal democracy for organisations to be listed as "terrorist organisations" in a way which fails to take account of the links (if any) between those organisations and Australia, and which generates an appearance that the principal goal of the listing is the pursuit of foreign policy goals.

Concerns raised by the statement of reasons in relation to Hizballah's External Security Organisation

The statement of reasons prepared by ASIO notes that Hizballah has a multi-faceted structure, including political and military elements. It describes the External Security Organisation (ESO) as "a distinct terrorist wing within Hizballah's structure". Assuming that "terrorist" here has the meaning given by the *Criminal Code*, this is no doubt true – virtually any military organisation satisfies that definition. But as the Committee has made clear in its earlier reports,¹ what is important is to understand how and why particular organisations are singled out for listing from the myriad candidates that satisfy the statutory test. In this respect, as the rest of this section will indicate, the statement of reasons is unfortunately deficient.

To begin with, the statement of reasons does not discuss the place of Hizballah in Lebanon's democratic polity, nor the degree of popular political support (if any) that Hizballah enjoys. To point out that Hizballah enjoys the support of the Iranian and Syrian governments,² for example, does not demonstrate that it does not also enjoy popular domestic

¹ Beginning with its *Review of the listing of the Palestinian Islamic Jihad (PIJ)* (2004).

² *Statement of Reasons*, p 1.

support among (some elements of) the Lebanese people. Further questions about democratic legitimacy are raised, but not answered, by the following passage in the statement of reasons:

Hizballah elements ... provide training, operational support and material to Palestinian extremist groups, including ... Hamas' Izz al-Din al-Qassam Brigades.³

Hamas is, of course, the democratically elected government of the Palestinian territories, and following recent events in those territories has largely uncontested control of Gaza. The apparent inference, in the statement of reasons, from links to Hamas to terrorist status, therefore stands in need of greater elaboration. So does ASIO's understanding of the contrast between, or possible coincidence of, terrorist status and democratic legitimacy.

To state, as the statement of reasons does, that “[u]ltimately, Hizballah aims to create a Shia Islamic state in Lebanon and remove all Western and Israeli influences in the region”⁴ is not to identify any matter of relevance to the statutory criteria for listing, nor to the more narrow criteria of the sort that the Committee has insisted upon, beyond the mere existence of a political goal. By way of analogy, there may be political organisations in Australia whose goals are to establish a Christian state in Australia, and to eliminate all Chinese and Indonesian influence in the South-Western Pacific region. Such goals would seem to have no bearing on whether or not such an organisation should be listed under Division 102. Political questions within a democratic community should be resolved by the political processes of that community, not by executive decision implemented through means of the criminal law.

The statement of reasons notes that Hizballah is “committed to armed resistance to the state of Israel and aims to liberate all Palestinian territories and Jerusalem from ‘Israeli occupation.’”⁵ It is not clear why the statement of reasons uses scare quotes at this point. Although it is the official view of the government of Israel that the West Bank and Gaza are *disputed*, rather than *occupied*, territories,⁶ the government of Israel does not appear to deny that those territories have been subject to Israeli occupation.⁷ The goal of ending Israeli rule of those territories is not an obviously illegitimate one – in a sense, it is the goal of anyone

³ *Statement of Reasons*, p 1.

⁴ *Statement of Reasons*, p 1.

⁵ *Statement of Reasons*, p 1.

⁶ As per the discussion at <http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2003/2/DISPUTED%20TERRITORIES-%20Forgotten%20Facts%20About%20the%20We> accessed July 2, 2007.

⁷ See the argument for the international legality of Israeli occupation of the West Bank and Gaza, *ibid*.

who supports a two-state solution. That this goal should be achieved by military means is of course a further matter, but a commitment to the use of military means to resolve international conflict does not seem to be a sufficient criteria for the listing of an organisation as a terrorist one. For example, the governments of the United States and the United Kingdom have not been listed as terrorist organisations, although they are obviously committed to the resolution of certain international conflicts (for example, in Iraq and Afghanistan) by the use of military means. Like the ESO,⁸ the government of the United States has also been implicated in acts of kidnapping and torture, but it has not been listed, and nor has the particular agency that carried out those acts (namely, the Central Intelligence Agency).⁹

The statement of reasons therefore fails to make clear the relationship between the matters discussed – particular political goals, combined with particular means for realising them, such as the use of military tactics, kidnapping and torture – and the criteria for the listing of an organisation. This failure contributes to a perception that the listing of the ESO is driven primarily by political and foreign policy considerations, rather than by considerations of preventing political violence either in Australia or overseas. This perception is only strengthened by the failure of the statement of reasons to identify any links between the ESO and Australia or Australian interests.

The statement of reasons also fails to discuss the relationship (if any) between Hizballah's political activities and its military activities, and the relationship (if any) between the military activities of the ESO and those of the Lebanese army. This is a serious oversight, because a proper understanding of these relationships is crucial to understanding both the democratic legitimacy (if any) that the ESO enjoys, and the role played by the ESO in last year's war between Israel and Lebanon.¹⁰ Without this context, it cannot be determined whether the current and probable future military activities of the ESO should be understood as essentially criminal, or as connected to legitimate acts of national self-defence.

⁸ *Statement of Reasons*, p 2.

⁹ *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*, p 6, available at <<http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf>> accessed July 2, 2007.

¹⁰ Mentioned in the *Statement of Reasons*, p 1.

The statement of reasons also appears to raise some essentially irrelevant matters. For example, it is not a sufficient grounds for the listing of an organisation that it has access to Iranian-supplied military resources (as the statement of reasons notes¹¹) – this is also true of the Iranian government and armed forces, but those organisations have not been listed. Nor is it obvious why it is relevant to the listing of the ESO that Hizballah raises money from drug smuggling and/or product piracy.¹² Such allegations are made against many organisations, including the governments of some states (such as North Korea), but the government of those states have not been listed. Indeed, such sources of funding appear to have no bearing even on the statutory criteria for listing, let alone on the more narrow criteria of the sort that the Committee has insisted upon.

Concerns relating to the process of listing

The Attorney-General's explanation of the process of re-listing for the ESO does not indicate that any community consultation was taken out. This is of particular concern for two reasons.

First, as the previous section of this submission indicates, ASIO's statement of reasons does not address the question of the democratic legitimacy (if any) enjoyed by Hizballah within the context of Lebanese politics. This is a matter on which consultation with members of the Australian community, and particularly those with connections (cultural, familiar and/or political) to Lebanon might have shed some light.

Second, there is some evidence that there are members of the Australian community who oppose the listing of the ESO as a terrorist organisation. This evidence consists in the request, put last year put to the Prime Minister by Dr Ameer Ali, head of the Muslim Advisory Group, that the ESO be de-listed.¹³ According to media reports that request appears to have been dismissed by the Prime Minister without any consultation being undertaken, or even any serious attention being paid to the views, allegedly widespread among many Australian Muslims, that gave rise to the request.

¹¹ *Statement of Reasons*, p 1.

¹² *Statement of Reasons*, p 1.

¹³ "Calls to remove Hezbollah from terrorist list rejected by Australian Government", *PM* (August 2, 2006) available at <<http://www.abc.net.au/pm/content/2006/s1704339.htm>> accessed July 2, 2007.

The continuing failure to consult relevant sections of the Australian community both prior to and subsequent to the listing of organisations under Division 102 further contributes to the perception of that process as driven primarily by political and foreign policy considerations.

Conclusion

The Committee has made it clear that, when it comes to the re-listing of organisations, the onus is on the Attorney-General to make out a case for this “fresh exercise of executive discretion”.¹⁴ In light of the concerns raised above, relating both to the content of the statement of reasons and the lack of any community consultation, I conclude that the case has not been made out. If better evidence is not presented, the Committee ought therefore to recommend disallowance.

To reach this conclusion is not to form any view on the legitimacy, or otherwise, of the activities undertaken by Hizballah in general, or the ESO in particular. Rather, it is to note that insufficient evidence has been marshalled to allow such a view to be formed (that is, *the statement of reasons is deficient*) in a manner that is consistent with Australian political values (that is, *the democratic process of justifying a listing, including via community consultation, is deficient*).

Until there is a change in the government’s process for the listing of organisations under Division 102 of the *Criminal Code*, it is likely that those members of the Australian community whose social, cultural and political life is adversely affected by such listings will continue to experience these listings not as legitimate steps taken in order to keep Australians safe from harm, but as politically motivated and discriminatory. It is for this reason that I believe that the current approach to the listing of “terrorist organisations” is damaging to Australia’s democratic political culture. Conversely, for the Committee to recommend disallowance on the grounds put forward in this submission would be to make a strong statement in support of political democracy in Australia.

¹⁴ *Review of the re-listing of ASG, JuA, GIA and GSPC* (2007), para 1.18.