

LEGAL CONDITIONS

For inclusion of the Islamic
Revolutionary Guard
Corps (IRGC) on the
European Union

TERROR LIST.



July 2024

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ISRAEL and INTERNATIONAL LAW

**LEGAL CONDITIONS FOR INCLUSION
OF THE ISLAMIC REVOLUTIONARY
GUARD CORPS (IRGC)
ON THE EUROPEAN UNION TERROR LIST**

EXECUTIVE SUMMARY

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THE HAGUE INITIATIVE
for INTERNATIONAL CO-OPERATION

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EXECUTIVE SUMMARY

1. This report addresses the question whether, from a legal perspective, the Islamic Revolutionary Guard Corps (IRGC) can and should be included on the EU terror list.

IRGC AND GLOBAL TERROR

2. Iran strategically employs global terrorism to achieve its foreign policy objectives. This global terrorism agenda is planned and carried out primarily by the IRGC. The IRGC's terrorist capabilities and activities have increased over time. Notably, many of the IRGC terrorist attacks and plots are perpetrated on EU soil.
3. In recent years, European intelligence agencies noted an increasing and troubling presence of IRGC's operatives within EU member states. These operatives primarily target dissidents of the Tehran regime as well as pro-Israel and pro-Jewish entities. The IRGC has a well-documented record of employing political assassination and intimidation tactics in Europe.
4. Many, both within and outside the EU, advocate that the EU Council should urgently designate the IRGC as a whole as a terrorist organization, following the precedents set by the United States in April 2019 and, more recently, by Canada in June 2024. These two designations underscore that the IRGC's patronage of other listed entities like Hezbollah, Hamas, Palestinian Islamic Jihad, and the Taliban has helped to advance Iran's and foreign policy and interests.

THE COMMON POSITION

5. This report undertakes an inquiry into the objects and terms of the relevant EU legislation, and whether the legal and factual conditions contained therein have been satisfied. Those conditions are set out in Common Position 2001/931 and Regulation (EC) No. 2580/2001, which

are to be interpreted and applied in accordance with the jurisprudence of the European Court of Justice (ECJ).

6. It is important to recall that the Common Position and Regulation were adopted to implement the obligations of the EU Member States pursuant to UNSC Resolution 1373/2001, a binding resolution that was passed in the wake of the 9/11 terrorist attacks in the United States. This resolution requires UN Member States, inter alia, “to work together urgently to prevent and suppress terrorist acts, including through increased cooperation”, and to “take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information”.
7. Common Position 2001/931’s purpose is therefore to protect the lives and integrity of EU citizens and residents in the common area by enabling the relevant authorities of EU Member States to work together, and with relevant authorities outside the EU, to prevent and suppress acts of terror. By adopting Common Position 931/2001, the European Union has recognized the critical importance of addressing international terrorism collectively. By pooling their security resources and expertise, the EU Member States strengthen their collective ability to prevent and combat terrorist threats.
8. To this end, the Common Position entrusts the Council with responsibility for ensuring that persons, groups and entities are placed and retained on the EU terror list, where doing so will enable the Member States to prevent acts of terror from taking place. The listing mechanism established under the Common Position is thus an essential part of the legal infrastructure in Europe to prevent acts of terror. Placing a person, group or entity on the list ensures that the relevant authorities in Member States will collaborate in a wide range of measures to prevent such a person, group or entity from committing an act of terror.
9. This means that when the conditions set out in the Common Position are satisfied in relation to a person, group or entity, the Council not only is

entitled to include and maintain such a person, group or entity on the terror list, it has a *legal responsibility* to do so. Furthermore, the absence of provisions granting the Council discretion to designate a person, group or entity reinforces the view that the Council has a legal duty to act once the factual and legal requirements are satisfied.

THE CONDITIONS THAT MUST BE SATISFIED

10. There are two main conditions that must be satisfied for placing and maintaining a person, group or entity on the EU terror list:
 - a. the person, group or entity must be “involved in terrorist acts”;
and
 - b. a recent decision to investigate, prosecute or convict for an act of terror must have been made by a judicial or other competent authority in relation to such person, group or entity.
11. The High Representative for Foreign Affairs, Josep Borrell, has misled public opinion by stating that a person, group or entity can only be placed on the EU terror list if a decision is made by a judicial authority in an EU Member State. Mr. Borrell’s statement is plainly wrong. The European Court of Justice has confirmed that the Common Position allows the Council to base a decision to include a person, group or entity on the EU list on a decision by a judicial or other competent authority. It also allows EU listing when such a decision is made by an authority in a third state, provided the decision is relatively recent, and allows for judicial review.
12. Further, in anticipation of possible assertions that only non-state entities can be placed on the EU terror list, we note that Common Position 931 imposes no such constraint. Third states like the USA and Canada have designated the IRGC or parts thereof as a terror organization, despite the fact it is an instrumentality of the Iranian regime.
13. To withstand any potential request for review of a possible IRGC listing, it is crucial for the Council to provide a statement of reasons making

clear the criteria for designation have been met. The statement must spell out clearly:

- a. the evidence that the person, group or entity is “involved in terrorist acts”;
- b. the specific terrorist act underlying the relevant decision by a competent authority;
- c. the nature or identification of the competent authority that issues the decision; and
- d. the type of decision that serves as a basis for the designation.

14. According to the European Court of Justice, the Council must ensure that its statement of reasons enables the relevant entity to understand the reasons for listing and to exercise its right of review. Accordingly, it is necessary for the Council to ascertain the relevant information that enables it to draft a statement showing that all the factual conditions are satisfied. It should be noted, however, that the Council is entitled to rely on the verity of decisions made by the authorities in EU Member States; it is not the task of the Council to “second-guess” the factual and legal robustness of the relevant decision.

THE FIRST CONDITION: IS THE IRGC “INVOLVED IN TERRORIST ACTS”?

15. Reflecting the broad objective of Resolution 1373 to ensure that states counter the threat of global terrorism, the Common Position casts a wide net. The words “involved in terrorist acts” include any person, group or entity that is committing, or attempting to commit, terrorist acts or who participate in, *or facilitate*, the commission of terrorist acts. It includes any person, group or entity that provides finances or any other material or immaterial support to a person, group or entity that commits an act of terror. It also includes persons, groups and entities owned or controlled *directly or indirectly* by such persons; and persons, groups and entities acting on behalf of, or under the direction of, such persons, groups and entities, including funds derived or generated from property

owned or controlled directly or indirectly by such persons and associated persons, groups and entities.

16. Global terrorism is an integral element of Iran's foreign policy. This global terrorism agenda is planned and carried out primarily by the IRGC. The IRGC's terrorist capabilities and activities have increased over time. It can be safely assumed that the IRGC is either responsible for or involved in all terrorism-related activities of the Iranian regime outside Iran.
17. There is abundant and robust evidence that the IRGC (directly through its agents and operatives, and indirectly through its proxies) has been directing, facilitating and participating in, and continues to direct, facilitate and participate in, the preparation and commission of terrorist acts within the meaning of the Common Position, both in Europe and around the world.
18. These activities pose a significant threat to world peace and security, and to security in Europe in particular. They justify concluding that the IRGC is "involved in terrorist acts" within the meaning of the Common Position.

THE SECOND CONDITION: HAS A RELEVANT DECISION BEEN MADE BY A COMPETENT AUTHORITY IN RELATION TO THE IRGC?

19. According to the jurisprudence of the European Court of Justice, a national authority qualifies as an "equivalent competent authority" if it satisfies both of the following conditions:
 - a. the authority is actually vested, in national law, with the power to adopt restrictive decisions against groups involved in terrorism (such as the power to investigate, prosecute or convict for terror acts, or to designate an entity as a terror entity); and
 - b. its decisions are open to a judicial review that covers matters both of fact and of law.
20. In order for a person, group or entity to be included in the EU list, there must be a decision to "investigate, prosecute or condemn" a person,

group or entity for the commission of a terrorist act, or an attempt to carry out or facilitate such an act. This means that a court decision is not a necessary condition for designation: even the initiation of an investigation (carried out by police or other investigative authorities, prosecutors, national designating authorities) suffices to support a designation, provided the relevant entity has the authority to adopt restrictive measures.

21. In order for inclusion on the list, there does not have to be a decision convicting for terror acts based on established criminal standard of proof; a decision to investigate based on intelligence is sufficient.
22. It is not necessary that the person, group or entity that is being listed at the EU level is the subject of the national decision. For example, a national decision concerning the commission or preparation of a terror act by an individual controlled or directed by the IRGC, or an act by such individual to facilitate or participate in a terror act planned or executed by the IRGC, would constitute a decision “in relation to the IRGC” enabling listing of the IRGC by the Council.
23. Further, it is not for the Council to verify whether the events found to have occurred in the national decisions actually took place and who is responsible for them.

THE RIGHT TO DEFENCE AND EFFECTIVE JUDICIAL PROTECTION

24. If the decision is made by an authority in a third country, the statement will also need to explain how the authority secured the right of defence and right to effective judicial protection (due process) of the designated organization. In the EU, we face a dilemma where such decisions are based on classified intelligence — which is often the case. As is well known, “classified information is the lifeblood of counterterrorism.” While Common Position 931 and COMET WP explicitly entitle the Council and COMET WP to handle and consider classified information, an initial designation of a terrorist organization can only be based on a decision by a competent authority. This is the result of the so-called two-tier system employed by the EU, which is not a sovereign state but rather a supranational entity to which member states have delegated part of

their national security powers. The Council is wholly dependent on investigations and decisions by Member States. This can be contrasted with designations of FTOs in the United States, for example, where the Secretary of State does not need to rely on any previous “decision” by competent authorities; rather he/she will typically rely on open-source information and classified information regarding the designated entity and its ongoing terror capabilities.

25. In our view, the correct approach to this dilemma is that a person, group or entity listed under the Common Position should be regarded as having been accorded sufficient procedural safeguards, pursuant to EU law, if, during judicial review proceedings, it is given full access to the unclassified portions of the designation file, while the classified information portion will be shown to it only in a manner that does not compromise national security (typically by redacted texts, summaries, or state attorneys with special clearance).
26. It is clear that the EU designation system is still subject to further developments. Pending any changes, however, the EU court system should allow the EU Council a wide scope of discretion on matters of designation of terrorist organizations since they involve EU-wide security concerns (the concept of EU-wide security is similar to national security but operates on a broader scale).

DECISIONS TAKEN BY COMPETENT AUTHORITIES IN RELATION TO THE IRGC

27. Numerous decisions have been taken by competent judicial and non-judicial authorities in relation to the IRGC within the meaning of Article 1(4) of Common Position 931. These include decisions by authorities in EU Member States and in third states: administrative decisions, court decisions, and prosecutorial decisions relating to investigating and prosecuting individuals for terrorism and terrorism-related crimes (as defined under national law) within the definition of “terrorist act” as outlined in the Common Position.

- a. Decisions concerning IRGC-related persons, groups and entities are the subject of investigations in several EU Member States, including Germany and Austria, as well as the UK. For example, German security authorities have been investigating for years reports that members of the IRGC are involved in espionage and attacks.
 - b. We found several decisions made by judicial authorities (courts) in EU Member States that satisfy the terms of the Common Position. Amongst them, the most compelling decisions are the recent judicial decisions in Germany. In particular, the decision of the German Federal Court in March 2017 specifically refers to the fact that the IRGC was responsible for the planning of terror acts. The Court found that the Quds Forces, a special unit of the Iranian Revolutionary Guards, has its own intelligence department, a security service and a counterintelligence unit that operate independently of the actual intelligence service of the Revolutionary Guards and procures information abroad using their own agents.
 - c. Additionally, several judicial and administrative decisions have been made in third countries (UK, USA, Argentina and Canada) that also qualify as decisions by competent authorities in relation to the IRGC under the Common Position. They are consistent and based on credible evidence.
28. All of these decisions secured interested parties the right of defence and effective judicial protection satisfying the requirements set out in Common Position 931 for precise information, effective identification and facilitation of exculpation in accordance with principles of rule of law and judicial review.
29. Our report specifically investigates the US designation of the IRGC as a foreign terrorist organization (FTO) of 15 April, 2019. We conclude that it constitutes a decision by a competent authority under the Common Position. According to Prof. Steve Zipperstein, a former US federal

prosecutor and UCLA Professor of Law, the procedural safeguards and guarantees afforded to the designated entity offer “protections [that] more than satisfy due process standards and norms”; the designation thus affords the right of judicial review required by the European Court of Justice.

30. Further, the recent (February 2024) US Department of Justice (DOJ) prosecution of IRGC individuals should serve as a solid basis for EU designation. It falls within the scope of “a decision that has been taken by a competent authority” under Article 1 (4) of Common Position 931. The criminal charge was “conspiracy to provide material support to the IRGC”, a charge which squarely fits the description of “terrorist act” of Article 1 (3) (k) of the same legal body.
31. Similarly, the Criminal Complaint brought by the US Department of Justice against an Iranian national and IRGC member (May 2022) for providing material support to a transnational plot to murder former National Security Advisor, John Bolton, on US soil, should also serve as a solid basis for EU designation, as it falls within the scope of “a decision that has been taken by competent authorities” under Article 1 (4) of Common Position 931. Furthermore, the criminal charge pursued therein squarely fits the description of “terrorist act” of Article 1 (3) (iii) (a and b) of the same legal body.
32. Further, Canada’s recent designation of the IRGC is also a decision by a competent authority under the meaning of the Common Position. The announcement of Canada’s designation follows, to a certain extent, the structure of announcement of the US designation of the IRGC in 2109. It is clear that Canada’s decision to designate the IRGC has been taken in light of recent developments in the Middle East. As is known, Iran through the IRGC attempts to destabilize the region and, by corollary, the world. The designation does not directly link the IRGC with the attack on Israel on 7 October, however it links directly the IRGC with Hamas and Palestinian Islamic Jihad (PIJ), which carried out the attack. There is no doubt that the IRGC played, at the very least, a supportive

role in that attack. Certainly, Canada's designation is yet another decision from a competent authority under the meaning of the Common Position, upon which the EU Council-COMET WP may designate the IRGC as a terrorist organization. Nobody can doubt the transparency and integrity of the Canadian designation system. From another perspective, Canada's designation is a new blow to Mr. Borrell's reluctance to list the IRGC on the EU terror list.

33. The Common Position provides that only one of the decisions referred to above is enough for inclusion of the IRGC on the EU terror list.

CONCLUSIONS CONCERNING THE IRGC

34. In light of the foregoing, we conclude that the conditions for inclusion of the IRGC on the EU terror list are satisfied. The Council is both politically and legally obliged to place the IRGC on the EU terror list.
35. For the reasons set out above, in light of the abundance of evidence that it is involved in terrorist acts, there is in our view a *legal obligation* on the Council to place the IRGC on the list.
36. A decision *not* to place the IRGC on the list would in fact be a *political* decision that not only infringes the legal obligation of the EU Member States to take all necessary action to prevent and suppress terror acts, it would conflict with the political obligation to respect the democratic will of the people of the European Union as expressed by the recent resolution of the EU Parliament calling on the Council to place the IRGC on the EU terror list.
37. Contrary to what some argue, the designation of the IRGC as a terrorist organization would have immediate, tangible and beneficial effects for the security of citizens in the EU common area, exceeding the current sanctions regimes. The designation of the IRGC itself would mean a new, strong warning or in practice a higher level of alertness about the ongoing terrorist risk posed by this organization, prompting various mechanisms to enhance exchange of information and judicial cooperation among EU members.

38. Here, Eurojust plays a crucial role as a hub for exchanging information and coordinating investigations and prosecutions. When a terrorist organization is designated, Eurojust ensures that the relevant information about the organization, its connections and activities is promptly shared among national authorities, potentially through the formation of Joint Investigation Teams (JITs) with prosecutors and investigators from different EU countries, aiming to dismantle the designated organization's networks across the common area as early as possible.
39. Likewise, for Europol, which functions as a kind of centralized EU law enforcement agency, the IRGC's designation would enhance its operational capabilities to exchange classified and intelligence-based information among member states in a concerted effort to foil new terrorist attacks and plots by the designated entity on EU soil. Of course, the designation would also facilitate the freezing of funds and restrictions of transfers for the designated entity. Latest developments in the Middle East, including the IRGC's financial and material support provided to Hamas in the years leading to the October 7th attack on Israel, reveal that the ongoing terrorist threat posed by the IRGC has become a pressing EU-wide security concern.
40. EU listing also triggers obligations on Member States under international law to take legislative and executive measures to *prevent* the IRGC from carrying out terrorist acts.
41. Finally, our report addresses the question how a proposal to list the IRGC should be initiated. Common Position 931 and the COMET WP provide that either the High Representative for Foreign Affairs and Security Policy or Member States are entitled to initiate a proposal for placing a person, group or entity on the list. However, the High Representative, who, on the delegated authority of Member States, is vested to run these matters, is in a better position to initiate the proposal, particularly when the IRGC designation may be based on decisions by competent authorities from third countries and coordination with them will be required. In fact, in our view, the High Representative has a duty

to initiate the proposal for placing the IRGC on the list, reflecting the fact that the Common Position 931 was adopted to ensure that the Member States fulfil their obligations under UNSC Resolution 1373/2001 and customary international law on counterterrorism.

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