

**MACQUARIE LAW SCHOOL'S FINANCIAL INTEGRITY HUB  
RESEARCH AND ACTION DEDICATED TO MITIGATING MONEY  
LAUNDERING AND TERRORIST FINANCING RISKS****February 2023****How Can the EU Designate the IRGC as a Terrorist Group?****Executive Summary**

Upon analysis of the legal framework, it appears that there is no structural obstacle – namely, the need for a judicial decision on the matter – that would prohibit the European Union from designating the IRGC as a terrorist organisation pursuant to CP 931.

**Introduction**

On 19 January 2023, the European Parliament voted in favour of a measure calling for the European Union to designate Iran's Islamic Revolutionary Guard Corps (IRGC) as a terrorist organisation:<sup>1</sup>

Members called on the Council and Member States to add the IRGC to the EU list of terrorist organisations and to ban all economic and financial activities involving companies and businesses linked to the IRGC or persons affiliated to it, irrespective of the country of activity.

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<sup>1</sup> European Parliament, Resolution on the EU response to the protests and executions in Iran (2023/2511 (RSP)), 19 January 2023, <https://oeil.secure.europarl.europa.eu/oeil/popups/summary.do?id=1730748&t=d&l=en>; European Parliament, 'Parliament Calls for More Sanctions against Iranian Regime' (Press Release, 19 January 2023), <https://www.europarl.europa.eu/news/en/press-room/20230113IPR66652/parliament-calls-for-more-sanctions-against-iranian-regime>.

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The terrorist list is decided, reviewed and amended not by the European Parliament, but by the European Council, which is comprised of the heads of each EU country.<sup>2</sup> Persons groups and entities can be added to the list on the basis of proposals submitted by member state or the High Representative for Foreign Affairs and Security Policy (HR) regarding listings on the basis of decision(s) by third States' competent authorities. The Working Party on restrictive measures to combat terrorism, examines and evaluates information with a view to listing (and delisting) and then makes recommendations to the Council.<sup>3</sup> As such, the listing of the IRGC must be decided by the Council.<sup>4</sup>

Josep Borrell, EU High Representative for Foreign Affairs and Security Policy, has argued that any such listing would first require a decision by a European Court:<sup>5</sup>

But it is something that cannot be decided without a court. A court decision [is needed] first. You cannot say: 'I consider you a terrorist because I do not like you'. It has to be [done] when a court of one [of the EU] Member States issues a legal

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<sup>2</sup> Council Regulation (EC) No 2580/2001 of 27 December 2001, art 2(3), <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0070:0075:EN:PDF>. Note: Regulation 2580/2001 came into effect to implement Article 2 of Common Position 2001/931/CFSP. It orders the freezing of all funds, financial assets and financial resources that are in the possession of, are the property of, or are held by a natural person or a legal person, group or entity as referred to in the non-EU resident part of the list.

<sup>3</sup> Council of the European Union, Fight against the financing of terrorism – Establishment of a Council Working Party on restrictive measures to combat terrorism (Brussels, 23 November 2016) ANNEX II para 3.

<sup>4</sup> Ibid.

<sup>5</sup> European Union, 'Foreign Affairs Council: Remarks by High Representative Josep Borrell upon Arrival' (23 January 2023), [https://www.eeas.europa.eu/eeas/foreign-affairs-council-remarks-high-representative-josep-borrell-upon-arrival-2\\_en?s=210](https://www.eeas.europa.eu/eeas/foreign-affairs-council-remarks-high-representative-josep-borrell-upon-arrival-2_en?s=210).

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statement, a concrete condemnation. And then we work at the European level, but it has to be first a court decision.

However, Mr Borrell's assertion may not fully consider the EU's legal framework for designating a terrorist organisation. That framework, which offers an alternative path to designation, is discussed below.

### **The Legal Framework**

#### ***Security Council Resolution 1373 (2001)***

The attacks perpetrated in the United States on 11 September 2001 were a clear indication that greater international cooperation was required in fighting terror and the financing of terrorism. In response, UN Security Council Resolution (SC Res) 1373 (2001) was adopted on 28 September 2001 under Chapter VII of the UN Charter.<sup>6</sup> The resolution contains three sets of general obligations for states, the first two of which are phrased as mandatory ('The Security Council ... Decides') while the third is in hortatory terms ('The Security Council ... Calls upon all States').<sup>7</sup> Of the two mandatory obligations, one deals entirely with financing, requiring states to criminalise the collection of funds that support terrorism in any form; to freeze the resources of persons who commit, or attempt to commit, terrorist acts, as well as those of any entities controlled by such persons or acting under

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<sup>6</sup> UN Security Council, Security Council Resolution 1373 (2001) [on threats to international peace and security caused by terrorist acts], 28 September 2001, S/RES/1373 (2001).

<sup>7</sup> Ibid paras 1–3.

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their direction; and to prevent their nationals and any person in their territories from providing any form of financial or related service to those who commit, or attempt to commit, terrorist acts, or to any entities under their control or direction.

The second mandatory obligation requires states to refrain from providing any form of support to terrorists, and to prevent terrorist acts from occurring, though specific steps set out in that paragraph. Those steps include suppressing recruitment to terrorist groups, denying safe haven to anyone connected to terrorism, prosecuting terrorists and punishing them in a manner that reflects the seriousness of their crimes, and ensuring that the state's border controls prevent terrorists from moving between states. There is a strong emphasis on international cooperation, with states being required to exchange information in order to provide early alerts to each other regarding planned acts of terrorism, and to aid each other in criminal investigations.<sup>8</sup>

SC Res 1373 (2001) consists largely of language taken from the Terrorist Financing Convention,<sup>9</sup> which for some time lacked sufficient ratification to come into force. Unlike international conventions – which require signing, ratification and implementation by states in order to have a

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<sup>8</sup> Ibid para 2.

<sup>9</sup> International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, entered into force 10 April 2002, UN Doc A/54/49 (Vol I) (1999).

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binding effect on them – a Security Council resolution adopted under Chapter VII of the UN Charter is binding on all UN member states and requires only transformation into domestic legal order.

***Common Position 2001/931/CFSP***

The EU also engaged in a long series of meetings, developing an action plan for ensuring a comprehensive European counterterrorism policy. Important to the legal framework were the introduction of the European Arrest Warrant; specific measures for police and judicial cooperation to combat terrorism; joint investigation teams; the European Union Agency for Criminal Justice Cooperation; a framework on combatting terrorism; decisions and regulations on money laundering and the identification, tracing, freezing and confiscation of property related to crime; and the Common Position on the application of specific measures to combat terrorism, known as Common Position 2001/931/CFSP (CP 931).<sup>10</sup>

Adopted by the Council of the European Union, CP 931 (which is, like other Common Positions, aimed at improving coordination and cooperation among member states) requires EU member states to conduct national policies that are consistent with the approach laid down by the Union in a particular field. CP 931 is, therefore, directly applicable in all member states and its

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<sup>10</sup> Oldrich Bures, 'EU Counterterrorism Policy: A Paper Tiger?' (2006) 18(1) *Terrorism and Political Violence* 57, 72. See also Oldrich Bures, 'Ten Years of EU's Fight against Terrorist Financing: A Critical Assessment' (2015) 30(2–3) *Intelligence and National Security* 207. Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP) (CP 931), <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0093:0096:EN:PDF>.

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implementation requires the adoption by each state of concrete domestic provisions in the appropriate legal form.<sup>11</sup>

The EU terrorist list was established in order to implement SC Res 1373 (2001).<sup>12</sup> Its purpose is guided by logic: terrorists need money and resources to survive and function; if the flow of money can be shut down, so too can the terrorist activities that it was intended to finance.<sup>13</sup> In some cases, the prospect of being included on the list can inspire a group to abstain from using terrorist practices in order to distance itself from the 'terrorist' label.<sup>14</sup>

CP 931 lays out the criteria for listing persons, groups or entities involved in terrorist acts and identifies the actions that constitute terrorist attacks.<sup>15</sup> Article 1(3) of CP 931 sets out the meaning

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<sup>11</sup> Martin Scheinin and Mathias Vermeulen, 'Unilateral Exceptions to International Law: Systematic Legal Analysis and Critique of Doctrines that Seek to Deny or Reduce the Applicability of Human Rights Norms in the Fight against Terrorism' (Working Paper, EUI Law, 2010/08).

<sup>12</sup> Council of the European Union, 'The EU List of Persons, Groups and Entities Subject to Specific Measures to Combat Terrorism' (Factsheet, 14 January 2015), <https://www.government.se/4ad8f7/contentassets/29f8d11a200f413c89cb6ef398562cd6/eu-fact-sheet-on-terrorism.pdf>.

<sup>13</sup> Goldbarsht, D. (2020). *Global Counter-Terrorist Financing and Soft Law: Multi-Layered Approaches*. Cheltenham: Edward Elgar Publishing.

<sup>14</sup> Sophie Haspeslagh, "'Listing Terrorists": The Impact of Proscription on Third-Party Efforts to Engage Armed Groups in Peace Processes – a Practitioner's Perspective' (2013) 6(1) *Critical Studies on Terrorism* 205.

<sup>14</sup> For example, in 2016 the EU suspended sanctions and removed the listing of the Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia), known as FARC, after it reached agreement on a peace deal to end more than 50 years of armed conflict. See Council of the European Union, 'Colombia: EU Suspends Sanctions against the FARC' (Press Release, 27 September, 2016), <https://www.consilium.europa.eu/en/press/press-releases/2016/09/27/colombia-eu-suspends-farc/>.

<sup>15</sup> CP 931 (n 10).

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of 'terrorist act'. Referring to the definition of 'terrorist offence' in the 2002 Council Framework Decision 2002/475/JHA,<sup>16</sup> CP 931 defines 'terrorist act' as a specified intentional act, 'which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law'.<sup>17</sup>

In order to constitute terrorism, the act must be carried out with the aim of seriously intimidating a population; unduly compelling a government or an international organisation to perform or abstain from performing any act; or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.<sup>18</sup>

The EU sanctioning regime – including its listing procedure – has become increasingly transparent in the wake of criticism for its negative impact on human rights.<sup>19</sup> In 2006, the Court at First Instance (CFI) annulled an EC Council decision which had declared a legal entity a terrorist organisation and

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<sup>16</sup> Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA).

<sup>17</sup> Specified acts include attacks upon a person's life which may cause death; attacks upon the physical integrity of a person; kidnapping or hostage taking; causing extensive destruction to a government or public facility, a transport system, or an infrastructure facility; seizure of aircraft, ships or other means of public or goods transport; manufacture, possession, acquisition, transport, supply or use of weapons, explosives or nuclear, biological or chemical weapons; and participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group. CP 931 (n 10) art 1(3).

<sup>18</sup> CP 931 (n 10) art 1(3).

<sup>19</sup> Bures, 'Ten Years' (n 10) 221.

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frozen its assets.<sup>20</sup> The Court was particularly concerned with the fact that those listed were not notified of their listing or informed of the underlying reasons, and they could not exercise their rights of defence or effective judicial remedy.<sup>21</sup> This led to the introduction of the considerable procedural safeguards that operate today. A sufficiently detailed statement of reasons must now be provided for each person subject to an asset freeze. Those listed are notified of their listing, as well as the possibilities for submitting a request for de-listing and the option of bringing legal action before the CFI.<sup>22</sup> A formal Council working party has been charged with the implementation of CP 931 to ensure that the criteria in Article 1(3) (discussed above) and Article 1(4) (discussed below) are met.<sup>23</sup>

According to Article 1(4) of CP 931, a terrorist designation must be based on:<sup>24</sup>

precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate,

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<sup>20</sup> *Organisation des Modjahedines du peuple d'Iran v Council and UK* (Court of First Instance of the European Communities, Case T-228/02, 12 December 2006). See Christina Eckes, 'Sanctions against Individuals: Fighting Terrorism within the European Legal Order' (2008) 4(2) *European Constitutional Law Review* 205.

<sup>21</sup> Eckes (n 20) 206.

<sup>22</sup> *Ibid* 218.

<sup>23</sup> Sarah Léonard and Christian Kaunert, 'Between a Rock and a Hard Place?' The European Union's Financial Sanctions against Suspected Terrorists, Multilateralism and Human Rights' (2012) 47(4) *Cooperation and Conflict* 473, 480; Eckes (n 20) 218.

<sup>24</sup> Council of the European Union, 'The EU List' (n 12).



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participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds.

Thus, although conviction or condemnation by a court is one way of achieving a terrorist designation, a judicial decision is not an absolute requirement. It seems that the initiation of an investigation by a competent authority could be enough to support a terrorist designation based on the criteria for listing prescribed by CP 931. Additionally, according to the European Union, persons, groups and entities can be included on the list on the basis of proposals submitted by member states or even by third states.<sup>25</sup> This means that convictions, investigations or designations by countries outside of the European Union could be relevant considerations for terrorist designation by the European Council.

Moreover, in its criteria for listing, the European Council defines 'competent authority' as a judicial authority<sup>26</sup> or, where judicial authorities have no competence in the relevant area, an equivalent competent authority.<sup>27</sup> In other words, it is not essential that the relevant decision be made by the court.

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<sup>25</sup> Ibid.

<sup>26</sup> "Judicial authority" is not limited to only judges or courts, but more broadly to the authorities participating in the administration of justice in each Member State, as distinct from ministries or police services which are part of the executive. See for example Joined Cases C-539/10 P and C-550/10 P (at paras 66-77); Joined Cases T-208/11 and T-508/11 (at paras 104-110); Case T-289/15 (at paras 69-79), and with regards to arrest warrant, Joined Cases C-508/18 and C-82/19 PPU EU:C:2019:456 (27 May 2019) and the case law cited.

<sup>27</sup> Ibid.

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Inclusion on the EU terrorist list ensures that those involved in the financing, planning, preparation and perpetration of terrorist acts, or in supporting terrorist acts, are brought to justice. When a person, group or entity is included on the terrorist list, it becomes subject to specific restrictive measures, including the freezing of funds and other financial assets or economic resources, as well as enhanced measures related to police and judicial cooperation in criminal matters.<sup>28</sup>

According to the CP 931 framework, the EU may designate the IRGC as a terrorist organisation if there is evidence that it engages in what the EU defines as 'terrorist acts' and if the CP 931 criteria can otherwise be met. It is not necessary that a member state has issued a judicial ruling against the IRGC.

While this opinion does not address the evidentiary basis for designating the IRGC as a terrorist organisation, it concludes that the legal framework for designation need not rely on a judicial decision passed by a member state. It may instead evoke a decision made by a competent authority in a member state, or in a third state, concerning the mere instigation of an investigation or prosecution for a terrorist act. A 'competent authority' is not necessarily the court.

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<sup>28</sup> Council Regulation (EC) No 2580/2001 (n 2).

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