

ROUNDTABLE: WOMAN, LIFE, FREEDOM: REFLECTIONS ON AN ENDURING CRISIS

What's in a Name? To Call or Not To Call the Revolutionary Guards a Terrorist Organization

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To make sense of the Woman, Life, Freedom uprising (*Zan, Zendegei, Azadi*; WLF), some have asked straightforward questions: Why now? What are the reasons for it? Who is behind the uprising? The Islamic Republic of Iran, its supporters, and its allies have responded to the last question by labeling protestors as spies or provocateurs influenced and supported by foreign governments or activists. By raising the possibility of outside interference to bring about regime change through the participation of willing or even unsuspecting Iranians, the Islamic Republic defends its extreme responses to the WLF uprising and dismisses the international community's condemnations of human rights abuses.

International rights groups levied numerous accusations against the Islamic Republic in the four months after Amini's killing. They include (but are not limited to):

1. the unnecessary, disproportionate, and lethal use of force;
2. the widespread use of live ammunition, birdshot, and other metal pellets against peaceful protestors, bystanders, and children;
3. the arbitrary arrest and detention without the due process guarantees of Iranian citizens (estimated to affect 19,000 citizens);
4. the regular use of torture, sexual violence, and other ill treatment, including forced confessions; and
5. the regular use of the death penalty without due process or fair trial procedures (estimated to affect over 480 individuals).¹

These serious accusations, if proven, mean Tehran breaches not only its own constitutional and criminal laws, but its international legal obligations.² Given the gravity of the charges, in historic firsts, the United Nations Human Rights Council (UNHRC) voted to remove Iran from participation in its body, and the UN's Commission on the Status of Women promptly followed suit. The overwhelming number of reports and accompanying evidence compelled the UN to establish a fact-finding mission to investigate the allegations of human rights

¹ "Iran: Brute Force Used in Crackdown on Dissent," Human Rights Watch, 20 January 2023, <https://www.hrw.org/news/2023/01/12/iran-brute-force-used-crackdown-dissent>; "Iran: Possible Crimes against Humanity, Absence of Accountability—Top Rights Expert," UN News, 20 March 2023, <https://news.un.org/en/story/2023/03/1134782>.

² Analysis of these violations is beyond the scope of this roundtable. Elsewhere I have addressed, also in a limited manner, actions taken at the UN. Neda Bolourchi, "Iran and the United Nations: Breaking New Ground at the Human Rights Council; Is the Commission for the Status of Women Next?" Foreign Policy Research Institute, Middle East Program, 13 December 2022, <https://www.fpri.org/article/2022/12/iranand-the-united-nations-breaking-new-ground-at-the-human-rights-council-is-the-commission-for-the-status-of-women-next/>.

abuses. Other international organizations have contemplated taking additional measures against Iran. The European Union Council (EUC) has considered designating the Islamic Revolutionary Guards Corps (IRGC) a terrorist entity—a subject of heated public debate.³ These actions beg the questions: Do such international organizations have the legal right to hold states to their humanitarian obligations? If so, under what circumstances?

Allegations about WLF: International Law and Claims of Sovereignty

Spurned by the power of an authoritarian state, Iranian activists and protestors have turned to international law to buoy their interests and objectives. The EU, America, and their allies have largely responded positively to the calls to engage international law as well as individual country measures, such as the imposition of sanctions. International lawyers and human rights advocates have condemned the Islamic Republic and supported calls for an independent fact-finding mission. These actions by the international community are both an emotional and professional response to the serious and criminal actions of the Islamic Republic. Contrary to the school of realism's focus on material interests and power as well as claims of international law's irrelevance, these international responses help support the importance of international law and may buoy claims of its medium- to long-term efficacy, through a complex transnational legal process of changing states' policies.⁴

Iran regards international condemnations as “politics,” orchestrated by its “enemies,” and the WLF uprising as a “foreign-backed riot” planned and executed by enemies of the Islamic Republic.⁵ That the uprising has backing from various quarters remains undisputed: in newspapers and on TVs around the world, supporters have publicly joined marches, led protests, made speeches, appeared on media, fundraised, held conferences, and more. Iran has proffered a standard response to political unrest.⁶ Rather than acknowledge the existing demands for freedom and accountability, the Islamic Republic sees the uprising as another front in its ongoing gray war with the US and the West.⁷ In turn, Tehran's actions have not changed much over the past twelve months: even though Supreme Leader `Ali Khomeini offered amnesty and reduced sentences for “tens of thousands” in February 2023, legal warnings went to women by text in April, patrols to enforce the mandatory hijab returned to the streets during the summer, and reports continue to circulate about laws denying women access to education and medical care if they are dressed “inappropriately” or without hijab, as do reports of forced closures of businesses that allow women without head coverings.⁸

³ The IRGC is a branch of the military outside the “regular” army charged with protecting the Islamic Republic. Considered one of most powerful organizations in the Middle East, the guards control large parts of the Iranian economy and have a history of operating outside Iran's borders.

⁴ “The Roscoe Lecture: Transnational Legal Process,” *Nebraska Law Review* 75, no. 1 (1996): 181–207; “Why Do Nations Obey International Law?” *Yale Law Journal* 106 (1997): 2599–2659; Harold Hongju Koh, *The Trump Administration and International Law* (New York: Oxford University Press, 2018).

⁵ “Iran Acknowledges It Has Detained ‘Tens of Thousands’ in Recent Protests,” NPR, 5 February 2023, www.npr.org/2023/02/05/1154584532/iran-acknowledges-it-has-detained-tens-of-thousands-in-recent-protests.

⁶ On what the Islamic Republic sees when political agitation occurs, and why, see Neda Bolourchi, “Tehran, It's Time to Listen and Take a Realistic View of the Protests in Iraq,” *Responsible Statecraft*, Middle East Program, 14 November 2019 <https://responsiblestatecraft.org/2019/11/13/tehran-its-time-to-listen-and-take-a-realistic-view-of-the-protests-in-iraq>. See also, “Iran Protests: Supreme Leader Blames Unrest on US and Israel,” *BBC News*, 4 October 2022, <https://www.bbc.com/news/world-middle-east-63118637>; and “Iran Leader Says, ‘Enemies’ May Target Workers as Protests Rage,” *Reuters*, 19 November 2022, <https://www.reuters.com/world/middle-east/iran-leader-says-enemies-may-target-workers-protests-rage-2022-11-19>.

⁷ “Iran Says Nine Nationals of European Countries Detained for Role in Unrest,” *Reuters*, 30 September 2022, <https://www.reuters.com/world/middle-east/iran-says-nine-nationals-european-countries-detained-role-unrest-2022-09-30>; “Iran's Top Leader Rules Out Referendum on Divisive Issues,” *Associated Press*, 19 April 2023, <https://apnews.com/article/iran-politics-khomeini-protests-cb861be29bf5bdf1c2aa341edb27cfa1>.

⁸ “Iran Acknowledges,” 5 February 2023; “Iran Finds New Ways to Crack Down on Women Not Wearing Hijab,” *Middle East Eye*, 6 April 2023, <https://www.middleeasteye.net/news/iran-hijab-women-not-wearing-new-ways>.

Tehran's assertion about foreign agents and attempts at regime change imply that the WLF leadership, supported by at least one Western government according to the Islamic Republic, is committing an international crime: violating state sovereignty. As a core principle and basis of international law, sovereignty signifies independence in relations between states, and independence in a geographical territory is the right to exercise in that territory, to the exclusion of any other state, the functions and power of a state.⁹ Violations of sovereignty by another state are not limited to physical invasion, "boots on the ground," or other conventional interventions. Violations of state sovereignty by another state (or states) include using information and communication technology.¹⁰ Violations of sovereignty constitute an "internationally wrongful act" if there is (1) a breach of a legal obligation owed by one state to another under international law, and (2) attribution of the act to the former.¹¹

The allegations about protestors and external actors by the Islamic Republic strive to shift the blame and move the narrative away from disproportionate violence and human rights violations to claims of defense against violations of sovereignty. In a clever maneuver pivoting on the history of US intervention and current law and politics, Tehran provides a dual-pronged defense: the Islamic Republic asserts (1) sovereignty over its territory (defense of property); and (2) sovereignty to defend (defense of self and others).¹² This is in response to at least two international wrongful actions: (1) disrespecting the sovereignty of another state, and (2) intervening in the internal affairs of another state.¹³ In other words, the Islamic Republic posits a justification defense whereby the use of force may constitute a legitimate act to prevent or redress harm that is being, will imminently be, or has been committed by external actors and domestic collaborators. Defense is, after all, a means to thwart, prevent, or redress injury to the sovereign.

The notion of defense is so central the law codifies that "society must be defended." Legal structures around the world permit the use of violence to form, maintain, and perpetuate the state and its government. Governments have the right (and are often required by founding state documents) to defend themselves against "all enemies, foreign and domestic." This social contract breaks down, however, when state violence becomes disproportionate, and segments of society refuse, reject, or otherwise no longer agree to the control techniques, security mechanisms, or even the ideological foundation of governance. In this sense, the WLF uprising and the support it engendered in the first months appeared to threaten the core of the state: protestors called for the death of the Supreme Leader, an end to the Islamic Republic, and the creation of a democratic state. Although turnouts did not mobilize diverse enough sectors of society to pose an imminent danger or bring the silent majority to the streets, the regime nevertheless needed to deflect attention away from its failures and the

cracking-down; "Iran: International Community Must Stand with Women and Girls Suffering Intensifying Oppression," Amnesty International, 26 July 2023, <https://www.amnesty.org/en/latest/news/2023/07/iran-international-community-must-stand-with-women-and-girls-suffering-intensifying-oppression>.

⁹ Island of Palmas (*Netherlands v US*), *Reports of International Arbitral Awards*, vol. 2 (Geneva: United Nations, 2006), 831–71.

¹⁰ Distinguishing between the state groups that follow the sovereignty-as-rule versus the sovereignty-as-principal approach to information and communication technology is beyond the scope of this article. See *Tallinn Manual 2.0: On the International Law Applicable to Cyber Operations*, ed. Michael Schmitt (Cambridge, UK: Cambridge University Press, 2017).

¹¹ See Michael Schmitt, "'Virtual' Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law," *Chicago Journal of International Law* 19, no. 1 (2018): 3–67.

¹² Michael Wines, "U.S. Aid Helped Hussein's Climb; Now, Critics Say, the Bill Is Due," *New York Times*, 13 August 1990, A1; Bethany Allen-Ebrahimian, "64 Years Later, CIA Finally Releases Details of Iranian Coup," *Foreign Policy*, 20 June 2017, <https://foreignpolicy.com/2017/06/20/64-years-later-cia-finally-releases-details-of-iranian-coup-iran-tehran-oil>; Benjamin Allison, "Disaster in the Desert: 40 Years after Operation Eagle Claw," *CE Think Tank Newswire*, 21 April 2020.

¹³ Although it has not made this specific claim with regard to the WLF uprising, the Islamic Republic previously accused and received acknowledgment of the US breaching the due diligence obligation that requires states to ensure cyber operations with serious adverse consequences are not mounted from their territory. Kim Zetter, "An Unprecedented Look at Stuxnet, the World's First Digital Weapon," *Wired*, 3 November 2014, <https://www.wired.com/2014/11/countdown-to-zero-day-stuxnet>.

loud, if not wide, rejection of its principles.¹⁴ The Islamic Republic invokes aspects of international law to make criminal allegations against dissenters. In this way, the state complicates the decision-making of international organizations.¹⁵ This partly explains why the EUC has designated the Republican Guard's Quds Force a terrorist organization for its activities inside Syria but not for its alleged crimes committed inside Iran. In other words, the IRGC has a sovereign defensive claim inside Iran but not Syria.¹⁶ Arguably for similar reasons, although for a different reason, the EUC (following actions by the UN Security Council) sanctioned the Revolutionary Guard for its role in nuclear proliferation.¹⁷

The debate about designating the IRGC a terrorist entity reached a crescendo when, on January 18, 2022, the European Parliament overwhelmingly voted (598-9-31) in favor of doing so. Supporters of the vote have argued for the validity of this designation because of the Islamic Republic's provision of drones to Russia and its disproportionate use of violence against WLF protestors.¹⁸ The European Parliament has no power to compel the EUC to follow suit. The latter instead decided on January 23, 2023 to list 18 individuals and 19 entities for human rights abuses, imposing travel bans and sanctions on them.¹⁹ Josep Borrell, the EU foreign policy chief, explained the decision of the EUC, saying,

It [the designation] 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 statement, a concrete condemnation. And then we work at the European level, but it has to be first a court decision.²⁰

¹⁴ Sociologist Hamidreza Jalaeipour, located inside Iran, estimates that approximately 70 percent of Iranians constitute this silent majority. He describes it as distressed by the Islamic Republic's actions and aligned with the civic aspirations of demonstrators. The silent majority, he says, differs from other groups, especially "diaspora Iranians" and "radicals," who advocate for the Islamic Republic's violent overthrow. Jalaeipour argues that although most Iranian citizens have strong feelings against the Islamic Republic, the silent majority also harbor hostility toward the opposition abroad, and this inhibits revolutionary action inside Iran. Jalaeipour does not address the monopoly on violence the Islamic Republic has and uses against its citizens. "Khizsh Ehterazi-ye Mahsa az Pa-yiz-ye 1401 ta Aknun" (The Mahsa Uprising from the Fall of 1401 till Now), *Anjoman-e Ja'ame Shenasi-ye Iran*, 8 July 2023, <http://www.isa.org.ir/بادداشت-ماه/6376-خیزش-اعتراضی-مهسا-از-پاییز-۱۴۰۱-تاکنون>.

¹⁵ Parts of the international community have sought to rectify the previous handling of violations of humanitarian law that were not raised during the Cold War because of political expediency. Since 1989, some in the international community have sought out criminals hiding behind the veil of sovereignty. Doing so is complicated, labor intensive, and requires support across geographical boundaries. Some argue that doing so has only been the case for those in the Global South, with exceptions in the case of Yugoslavia and now, possibly, Russia. Discussion of the subject is beyond the scope of this article.

¹⁶ Council Decision 2011/782/CFSP, 1 December 2011, "Concerning Restrictive Measures against Syria and Repealing Decision 2011/273/CFSP," *Official Journal of the European Union*, 2 February 2011, L319/56-L319/70: L319/67.

¹⁷ Council Decision 2010/413/CFSP, 26 July 2010, "Concerning Restrictive Measures against Iran and Repealing Common Position 2007/140/CFSP," *Official Journal of the European Union*, 27 July 2010, L195/39, Document 32010D0413 consolidated and updated on 26 April 2023, Document 02010D0413-20230426. See US Department of State's Annex 2 of the JCPOA, listing those designated and sanctioned in relation to the Islamic Republic's nuclear program, <https://2009-2017.state.gov/documents/organization/245319.pdf>. Although Europe is trying to defend the sanctions architecture this summer (as are the UN and UK; Attachment 2, parts 1 and 2), as I edit, the termination date is set for October. I thank Benham Ben Taleblu for sharing this link.

¹⁸ "US Asks Iran to Stop Selling Drones to Russia," *Reuters*, 16 August 2023, <https://www.reuters.com/world/us-asks-iran-stop-selling-drones-russia-ft-2023-08-16>.

¹⁹ Council of the European Union, Press Release, 23 January 2023, www.consilium.europa.eu/en/press/press-releases/2023/01/23/iran-eu-adopts-further-restrictive-measures-against-human-rights-violations/?utm_source=twitter.com&utm_medium=social&utm_campaign=2023-01-23-press-release-iran-puc&utm_content=card; *Office Journal of the European Union*, Council Decision (CFSP), 2023/422, 24 February 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023D0422>.

²⁰ Delegation of the European Union Council to the People's Republic of China, Foreign Affairs Council: Remarks by High Representative Joseph 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=166.

Prior to Borrell's statement, German Member of the European Parliament Hannah Neumann tweeted that any listing of the IRGC must be "legally waterproof."²¹ No court of an EU member state has made a terrorism decision on the IRGC, but multiple decisions have been made against the Islamic Republic, its Quds Force (as noted above), its officials, and individual Iranians.²² In contrast to the EUC, the US, Saudi Arabia, Bahrain, and Israel have designated the IRGC a terrorist entity.²³

The decision of the EUC has raised many questions. On one side, critics fault Borrell for stopping at nothing to reestablish some version of the Joint Comprehensive Plan of Action (JCPOA), or the nuclear deal. His statements on the issues do not help assuage critics. He insists,

We do not have a better option than the JCPOA to ensure that Iran does not develop nuclear weapons. *This remains in our own interest.* This is why, I still believe that we have to separate the sanctions on human rights and arms provisions to Russia from the nuclear programme[,] the escalation of which is of great concern.²⁴

Unsurprisingly, then, as the Europeans "continue engaging as much as possible in trying to revive this deal," according to Borrell in the same statement, they are not moving forward on human rights. On the other side, others view the EUC as pandering to the Islamic Republic or acquiescing to its threats as a matter of political expediency and self-interest. For example, in one instance, the Iranian Foreign Ministry responded to the European Parliament vote by saying European countries had been warned that such a move would violate the UN Charter and is an attack on the security of the Islamic Republic of Iran, against which the government has "the necessary will to respond" and "impose more than this cost of bilateral relations."²⁵ In addition, multiple EU citizens remain jailed in Iran. In this way, in response to a possible terror designation, the Islamic Republic asserts that such an action is a violation of sovereignty, against which it is already making defensive claims for future actions it may take against those who voted for the designation and so knowingly voted to damage "bilateral relations."

In the meantime, calls to designate the IRGC a terrorist organization have continued. Since January 2023, Iranians across the West have urged the EUC, the US Congress, and international entities to designate the IRGC a terrorist group.²⁶ In March, Belgium's Iranian born parliamentarian stated somewhat optimistically that "obstacles" to the designation were being worked out.²⁷ Yet the EUC has still taken no action against the IRGC. Instead,

²¹ Hannah Neumann, *Twitter* (now X) post, 11 January 2023, 12:38pm, <https://twitter.com/HNeumannMEP/status/1613228912728805394>.

²² Judgment of the Court (Second Chamber), 7 April 2016, *Central Bank of Iran v EUC*, Case C-266/15 P1, Doc. No. 62015CA0266, *Journal of the European Union*, 13 June 2016, C 211/20; Judgment of the Court (Fourth Chamber), *IRI Shipping Lines et al. v EUC*, Case C-225/17 P, Doc. No. ECLI:EU:C:2019:82, 31 January 2019.

²³ Suzanne Maloney briefly explains why the Trump Administration's terror designation of the IRGC does not substantively add to the layers of existing penalties and restrictions already applied to the IRGC and its associates. "What Both Trump and His Critics Get Wrong about the IRGC Terrorist Designation," Brookings Institution, *Commentary*, 11 April 2019, <https://www.brookings.edu/articles/what-both-trump-and-his-critics-get-wrong-about-the-irgc-terrorist-designation>.

²⁴ "Foreign Affairs Council: Press Remarks by High Representative Josep Borrell," European Union External Action, 12 December 2022, https://www.eeas.europa.eu/eeas/foreign-affairs-council-press-remarks-high-representative-josep-borrell-after-meeting-3_en (emphasis added).

²⁵ "Iran: Listing Revolutionary Guards as Terror Outfit Is an Attack on 'National Security,'" *Middle East Monitor*, 23 January 2023, <https://www.middleeastmonitor.com/20230123-iran-listing-revolutionary-guards-as-terror-outfit-is-attack-on-national-security>.

²⁶ US Senate Foreign Relations Committee Letter to Borrell, 23 March 2023, https://www.foreign.senate.gov/imo/media/doc/03-22-23_eu_irgc_letter.pdf; US House of Representatives Letter to Borrell, 10 April 2023, *House of Representatives Letter to Borrell*.

²⁷ "Iranian-Born Belgian MP: EU Ministers Working toward IRGC Terrorist Designation," VOA, 16 March 2023, <https://www.voanews.com/a/iranian-born-belgian-mp-eu-ministers-working-toward-irgc-terrorist-designation/7008839.html>.

negotiations around Iran's nuclear program have gained traction, while Tehran has concluded a truce with Saudi Arabia, executed a hostage-trade deal with the US, and expanded its ties to Russia and China.²⁸ All of this political activity appears to undercut the efficacy of international law, at least in the short term, and it begs new questions about whether the international community has abandoned the WLF uprising. What of the human rights violations about which many spoke so passionately in the first five months? Was Borrell, as the High Representative for Foreign Affairs and Security Policy, correct about the necessity of a court decision to designate an organization or entity a terrorist?

The EU Legal Structure to Designate a Terrorist

On its face, the question about whether Borrell's reasoning is legally correct appears simple: the EUC may list the IRGC as a terrorist entity without an EU member state's court decision.²⁹ The foundational document is Common Position 931 (CP 931). As part of the response to 9/11, CP 931 enacted UN Security Council Resolution 1373. Resolution 1373, the basis of the EU's terror laws, requires member states to implement measures to "prevent and suppress the financing of terrorist acts" and calls on members to criminalize terror financing, freeze the funds or other assets of those who commit or facilitate terrorist acts "without delay," and prevent those engaged in such activities from using one's territory to "finance, plan, facilitate or commit terrorist acts against other states or their citizens."

Because of Resolution 1373, the EUC produced CP 931. It does not limit the EUC by geography. Instead, the terror designations—legal decisions to categorize a person, organization, or entity as a terrorist—apply to those physically located within or outside EU territory. These designations have included Spain's separatist organization Basque Euskadi Ta Askatasuna (Basque Homeland and Liberty, otherwise known by its abbreviation ETA) as well as Hamas, al-Qa'ida, and Da'esh.

CP 931 provides a two-step mechanism to define terrorism. First, it defines a "terrorist act" to be an intentional act that, given its nature or context, may seriously damage a country or international organization and that is defined as an offense under national law.³⁰ The EUC gives eight examples. They include the following:

1. attacks upon a person's life that may cause death;
2. attacks upon the physical integrity of a person;
3. kidnapping or hostage taking; and
4. the manufacture, possession, acquisition, transport, supply or use weapons, explosives, or of nuclear, biological, or chemical weapons.³¹

The individuals and entities of the Islamic Republic have been accused of these actions by EU governments, parts of the US government, and international human rights organizations

²⁸ "Saudi Arabia and Iran Restore Relations: A Victory of Necessity," Wilson Center, 5 June 2023, <https://www.wilsoncenter.org/article/saudi-arabia-and-iran-restore-relations-victory-necessity>; "A Welcome Humanitarian Deal between the US and Iran," International Crisis Group, 18 September 2023, <https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/iran/welcome-humanitarian-deal-between-us-and>; Henry Rome, "The Iran Hostage Deal: Clarifying the \$6 Billion Transfer," Washington Institute for Near East Policy, 18 September 2023.

²⁹ Specific analysis of the "comment period," "professional secrecy," and other similar matters are beyond the scope of this article.

³⁰ Article 1.3 of Common Position 2001/931/CFSP; Article 1, EU Council Framework Decision, 13 June 2002, on combating terrorism (2002/475/JHA).

³¹ Council of the European Union (EUC), "Factsheet: The EU List of Persons, Groups and Entities Subject to Specific Measures to Combat Terrorism," 14 January 2015, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/138098.pdf (hereafter Factsheet to Combat Terrorism).

The second step in the EUC determination categorizes an action terrorism if said act requires the perpetrator of the act in question have a specific intent. The act must intend to do one of the following:

1. seriously intimidate a population;
2. unduly compel a government or an international organization to perform or abstain from performing any act; or
3. seriously destabilize or destroy the fundamental political, constitutional, economic, or social structures of a country or an international organization.

Again, the same organizations have also found that the individuals and entities of the Islamic Republic have taken actions with the intention to produce all of these effects. An EU court decision is not required as a first step or a step at all in the terror designation process as originally written.

Like many founding and early documents, the EU's terror designation text used general and sweeping language. Unsurprisingly, defendants challenged the original text to acquire fundamental and due process rights. Moreover, EU terrorism designation lists have been difficult to implement as ambiguities arise over fairness and clarity. The European Court decided on several landmark terror cases in the years after 9/11.

European Court of Justice Decisions

EU policymakers initially encountered problems that largely stemmed from evaluation, compliance, and efficacy issues. More specifically, questions arose over "appropriate review mechanisms" of the designation procedures, which became "trapped in a quandary" because proposals that would fulfill the due process requirements of international human rights law were "politically infeasible," and those that may have gained support from the EUC contained "shortcomings as far as internationally guaranteed due process rights [were] concerned."³² Tensions between counterterrorism and human rights obligations arose: debate centered on the compelling duty of the state to protect the general interest of public security—defense of the sovereign, territory, and others—and the necessity to protect core human rights tenets. The judiciary helped resolve the "quandary" and debate.

Among its first decisions on terrorist designations, the EU General Court decided that they must be based on two factors.³³ One, there must be "acts examined and confirmed" and, two, the examination or confirmation of the acts in question must be done by "competent authorities."³⁴ Core texts consistently use the phrase "competent authority." The

³² George Lopez, David Cortright, Alistair Millar, and Linda Gerber-Stellingwerf, "Overdue Process: Protecting Human Rights while Sanctioning Alleged Terrorists," Report to Cordaid from the Fourth Freedom Forum and Krock Institute for International Peace Studies at the University of Notre Dame, April 2009, 7.

³³ The EU judiciary is collectively named the Court of Justice of the European Union (CJEU), and it has twenty-seven judges. The CJEU's purpose is to ensure the uniform interpretation and application of EU law, in cooperation with the national courts and tribunals of member states. Much like the US system, the CJEU is composed of courts of different jurisdiction. The highest entity is the European Court of Justice (ECJ), which is the final court of appeal. The ECJ may sit as a full court of twenty-seven judges, as a Grand Chamber of fifteen judges, or in smaller chambers of three or five judges, which is typical. The full court is reserved for cases prescribed by the Statute of the Court, including those proceedings to dismiss the European Ombudsman or a Member of the European Commission, and other exceptional instances. The court sits in a Grand Chamber for special cases, as when a member state is party to the litigation. Beneath the ECJ is the General Court or what was previously known as the Court of First Instance, which is the trial court of general jurisdiction. Like the ECJ, the General Court typically sits in small chambers of three or five judges, but it may sit as a full court or as Grand Chamber in special cases. In addition, there is the Civil Service Tribunal, which resolves disputes between the EU and members of its civil service and is not pertinent here.

³⁴ EU General Court, Press Release No. 178/14, Luxembourg, Judgment in Case T-400/10, 17 December 2014. See ECJ, Joined Cases T-208/11 and T-508/11 (*Stichting al-Aqsa v EUC and Kingdom of the Netherlands v Stichting al-Aqsa*; hereafter *Al-Aqsa v Council*), Case No. C-593/10P, Doc. No. ECLI: EU: C: 2012:321.

European Court of Justice (ECJ), as the final arbiter, explained that competent authorities must be “national” in nature and “within the meaning of the Common Position”; in other words, each member state determines its national competent authorities.³⁵ This applies to each subject area: that is, there is a competent authority for security of network and information systems, for authorizing the use of medical devices, for examination of minerals, and so on.

What or who is a competent authority is the issue, because Borrell’s statement indicates that an EU Member State court is the only competent authority. However, this is not accurate. In addition to the above criteria (in this and the prior sections), a potential designation must also fulfill five additional provisions, including the competent authority provision: (1) The use of precise information or materials (2) in the relevant file (3) indicating a “judicial or equivalent competent authority” (4) made a finding or decision (5) regarding the person, group, or entity in question.³⁶

Here again the EU points out that a judicial authority, a court, is not required.³⁷ Instead, an authority equivalent to a court may make a terror decision based on its area of expertise. Again, respective governments designate national authorities based on subject or functional expertise. This means that in lieu of a court decision, the US Department of Defense could be a nationally designated, competent authority regarding terrorist designations by the US. And, to be clear, the EUC has said multiple times: “Persons[,] groups[,] and entities can be added to the list on the basis of proposals submitted by Member States based on a decision by a competent authority of a Member State or a third country.”³⁸ The courts agree that non-EU states may make terror designation recommendations.³⁹ Because administrative decisions that do not impose criminal penalties may suffice for a terrorist designation, the EU courts have accepted decisions of home secretaries and ministries of foreign affairs as competent authorities.⁴⁰ Nevertheless, the matter is not resolved.

The above analysis shows the inaccuracy of Borrell’s statement about EU court decisions, yet the issue of fundamental rights returns. In some of its earlier cases, the General Court found that terror listings must be made based on “acts examined and confirmed” and “precise information.”⁴¹ Sitting as the Grand Court, the ECJ established parameters to protect potential designees by procedurally ensuring their inclusion on the terror list did not arise because of rumors, innuendos, or bias of, in, or repeated by the press or the Internet, but rather on a “sufficiently solid factual basis.”⁴² In addition, sitting as a Grand Chamber, the ECJ makes clear that designations and listings are to conform with

³⁵ European Commission, “List of National Competent Authority (Authorities) and Contact Points,” https://home-affairs.ec.europa.eu/policies/internal-security/counter-terrorism-and-radicalisation/prevention-radicalisation/terrorist-content-online/list-national-competent-authority-authorities-and-contact-points_en; https://finance.ec.europa.eu/system/files/2023-01/national-competent-authorities-sanctions-implementation_en.pdf (accessed 31 October 2023).

³⁶ EUC, “Factsheet to Combat Terrorism.”

³⁷ The wording of Article 1(4) of Common Position 2001/931 expressly provides that a nonjudicial authority may also be classified as a competent authority. ECJ, Joined Cases C-539/10 P and C-550/10 P (*Al-Aqsa v Council*), EU: C:2012:711, para. 66–77, 15 November 2012.

³⁸ Council of the European Union (EUC), “Factsheet: The EU List of Persons, Groups and Entities Subject to Specific Measures to Combat Terrorism,” 14 January 2015, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/138098.pdf (hereafter Factsheet to Combat Terrorism).

³⁹ General Court, Joined Cases T-208/11 and T-508/11 (*Liberation Tigers of Tamil Eelam v EUC*), Case No. T-208/11, Doc. No. ECLI: EU: T:2014:885, 16 October 2014.

⁴⁰ ECJ, Joined Cases C-539/10 P and C-550/10 P (*Al-Aqsa v Council*), Doc. No. ECLI: EU: C: 2012: 711, 15 November 2012, para. 75–77 and 102–5; General Court, Case T-289/15 (*Hamas v EUC*), Doc. No. ECLI:EU:T:2019:138, 6 March 2019, para. 71–74; General Court, Joined Cases T-208/11 and T-508/11 (*Liberation Tigers of Tamil Eelam v EUC*), Doc. No. ECLI: EU:T:2014:885, 16 October 2014, para. 98–123.

⁴¹ See footnote 31.

⁴² ECJ, Joined Cases C-402/05 P and C-415/05 P (*Kadi v Council and Commission and Yusuf and al-Barakaat International Foundation v Council and Commission*), Doc. No. ECLI:EU:C:2008:461, 3 September 2008.

“fundamental rights” because many third states are not bound by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and none of them is subject to the provisions of the Charter of Fundamental Rights of the European Union.⁴³

This means that if the EUC wants to list a person, group, or entity based on the decision of a non-EU country, that country must fulfill certain criteria in its decision-making. These are as follows:

1. The country must state the reasons for its decision(s) and finding(s).⁴⁴
2. Decisions and findings must be made in accord with the rights of defense and the right to effective judicial protection.
3. The EUC must explain how it ascertained that the third country respected fundamental rights.⁴⁵

Within the scope of the second requirement and returning to the issue of competent authorities, a nonmember state authority may be considered a competent authority if the EUC verifies that the nonmember state ensures protection of the rights of defense and the right to effective judicial protection “*equivalent to that guaranteed at the EU level.*” If evidence exists that the nonmember does not provide such protection, then the nonmember’s decisions and findings do not equal that of a competent authority.⁴⁶

US courts have dozens of decisions against the Islamic Republic dating back decades. However, only Secretary of State Mike Pompeo officially designated the IRGC a terrorist entity; he did so in 2019. Members of the US Congress as well as parliamentarians and activists across the West have encouraged the EUC to follow suit, arguing that this official US designation suffices to fulfill the Common Position provisions. A former FBI counterterrorism analyst and US Treasury Department deputy assistant secretary has published extensive information on the Iran’s activities aimed at individuals, organizations, and governments abroad and encouraged the EUC to make the IRGC terror designation.⁴⁷ Such encouragements do not adhere to the conditions and case law above.

Moreover, the EU court has specifically decided that the American decision to label a group a “Foreign Terrorist Organization” (FTO) cannot be considered a decision of a competent authority. The court has held this position on multiple occasions because US decisions lack the required legal safeguards on fundamental rights, the rights to defense and the rights to protection.⁴⁸ In particular, the court held that the ability of US authorities to make FTO decisions without an obligation to give a statement of reasons or even to publish the decision violated fundamental rights provided for by the EU.⁴⁹ Therefore, numerous US administrative decisions that appear to fulfill the “competent authority” of the “third country”

⁴³ ECJ, Joined Cases C-584/10 P, C-593/10 P, and C-595/10 P (*EUC and UK of Great Britain and Northern Ireland v Kadi*), Doc. No. ECLI:EU:C:2013:518, 18 July 2013; ECJ, Case C-599/14 P (*EUC v Liberation Tigers of Tamil Eelam*), Doc. No. ECLI:EU:C:2016:723, Op. Advocate General Sharpston, 22 September 2016, para. 21 and 61–67.

⁴⁴ In the legal context, a finding is the result of research or an investigation, whereas a decision is a court’s determination or judgment regarding the parties’ rights and obligations based on facts and law.

⁴⁵ ECJ, Case C-599/14 P (*EUC v Liberation Tigers of Tamil Eelam*), Doc. No. ECLI:EU:C:2017:583, 26 July 2017.

⁴⁶ General Court, Joined Cases T-208/11 and T-508/11 (*Liberation Tigers of Tamil Eelam v EUC*), Doc. No. ECLI:EU:T:2014:885, 16 October 2014 (emphasis added). Note that whether to initiate a terror designation based on the decision of a non-EU State rests with the High Representative for Foreign Affairs and Security Policy, the position currently held by Joseph Borrell. EUC Foreign Relations Counsellors Party, “Establishment of a Council Working Party on Restrictive Measures to Combat Terrorism (COMET WP),” Doc. No. 14612/1/16 REV 1, Brussels, 23 November 2016, 6.

⁴⁷ Matthew Levitt, “Trends in Iranian External Assassination, Surveillance, and Plots,” *CTC Sentinel*, February 2022; Matthew Levitt, “The EU Can, and Should, Designate the IRGC as a Terrorist Group,” *Lawfare*, 30 January 2023, www.lawfaremedia.org/article/the-eu-can-and-should-designate-the-irgc-as-a-terrorist-group#google_vignette.

⁴⁸ General Court, Case T-643/16, Doc. No. ECLI:EU:T:2019:238, 10 April 2019, para. 78–106 and 182–84.

⁴⁹ General Court, T-298/15, Doc. No. ECLI:EU:T:2019:138, 6 March 2019, para. 13–17, 52–67, and 99–100; General Court, T-182/21, Doc. No. ECLI:EU:T:2022:807, 14 December 2022.

requirements are not sufficient to designate the IRGC a terrorist group or entity within the European Union.

Conclusion

The WLF movement and its allies have urged international bodies and governments around the world to take actions against the Islamic Republic for its disproportionate use of violence against peaceful protestors and its infringement of human rights law. Although successful at the UN, with the EUC they face the legal hurdle of determining whether such a listing necessitates a court decision from an EU member state's court. The simple answer to the question is no. Therefore, Borrell's assertion as stated is incorrect. A non-EU member state's administrative decision may fulfill the "competent authority" requirement and be used by the EUC to designate a terrorist organization. In fact, after repeated questioning by lawmakers, Borrell had to augment his reasoning for not designating the IRGC a terrorist organization to include a decision by a national authority or member state court. He then repeats that neither exists.⁵⁰

Although the US designation of the IRGC does not qualify according to the European courts, additional questions and mechanisms may be analyzed to ascertain a qualifying competent authority. For instance, would the United Kingdom qualify as a competent authority? Would Canada's designation of the IRGC's Quds Force suffice?⁵¹ Is there a point at which the numerous member state court decisions regarding individuals acting on behalf of the Islamic Republic become sufficient to qualify as decisions by a competent authority against the IRGC? Is there a point at which the EUC's own designation of IRGC individuals could reach a critical mass and serve as the basis for an IRGC designation?

Borrell, as the high representative for foreign policy and security policy and the person who decides whether to initiate proceedings based on the decision of a non-EU state, has not entertained such questions. His refusal to do so and his inaccurate and misleading use of the law (with the implicit assumption that non-EU states would not know better) leads Woman, Life, Freedom supporters to believe he is untrustworthy. This new characterization of Borrell compounds the belief of WLF activists, lawmakers, and allies that he is sacrificing the people of Iran to reach some watered-down version of the nuclear deal. In the attempt to do so, politics and European interests appear to override questions about legitimate claims to defense and sovereignty. This explains in part the public's fixation on the terror designation. The Iranian people do not see open channels of communication and diplomacy changing behavior or moving the needle on the Islamic Republic's nuclear stance. Instead, they want to know, given the Islamic Republic of Iran's disproportionate use of violence, possibly amounting to crimes against humanity, does the Islamic Republic deserve to be shielded from the terrorist designation and its public shaming?

⁵⁰ "Verbatim Report of Proceedings," European Parliament, 12 September 2023, https://www.europarl.europa.eu/doceo/document/CRE-9-2023-09-12_EN.html#creitem26.

⁵¹ "Currently Listed [Terrorist] Entities," Public Safety Canada, 25 June 2021, <https://www.publicsafety.gc.ca/cnt/ntrl-scrnt/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx>.