The EU Terror List and the Islamic Revolutionary Guard Corps (IRGC): About the Law as an Alleged Obstacle to Political Action

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Abstract

This article examines the legal requirements for a listing on the so-called European Union (EU) terror list, an aspect that remains underdeveloped in both legal scholarship and policy debates on counter-terrorism measures. The analysis elucidates the substantive requirements governing listings on the EU terror list and applies them to the case of the Islamic Revolutionary Guard Corps. It highlights the two-tiered nature of the EU terror listing process, in which an EU terror listing relies on a national authority's decision regarding the potential target. Furthermore, an analysis of recent Court of Justice of the European Union (CJEU) case-law outlines prospective developments in the Court of Justice's scrutiny of restrictive measures. It will be shown that the CJEU exercises judicial deference in its examination of restrictive measures adopted by the Council, particularly in cases involving threats to the EU's legal and democratic order or international security orchestrated by foreign state actors.

Keywords

EU Terror List – EU Sanctions – Islamic Revolutionary Guard Corps (IRGC) – Iran – CJEU

I. Introduction

The arrest of Jina Mahsa Amini by the Iranian morality police, which led to her death on 16 September 2022, sparked major protests across Iran last autumn.[1] In the European Union and its Member States, the debate on the appropriate political response is ongoing.[2] A key issue in this context is the question of whether the Council of the EU (Council) should place Iran's Islamic Revolutionary Guard Corps (IRGC) on the so-called EU terror list. In the political realm, the legal requirements for such a decision are often

1 See e. g. Golineh Atai, 'Iran: Zwischen Repression und Hoffnung', Bl. Dt. & Internat. Pol. 68 (2023), 99-111.

2 Indicative for the EU level is the European Parliament's resolution calling on the Council to list the IRGC, European Parliament, 'EU Response to the Protests and Executions in Iran' 2023/2511(RSP) of 19 January 2023, C-214/14, para. 11. Indicative for the German level is the debate in Bundestag on 'Protests in Iran after the Death of Mahsa Jina Amini in Police Custody', 57th session, 29 September 2022, Minutes 20/57, 6302.

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discussed in a surprisingly simplified manner,[3] considering the extensive judicial review of restrictive measures by the CJEU.[4] Although the Court has indeed generated an abundance of case-law on counter-terrorism sanctions, scholarly analysis on this subject is scarce, especially on recent developments that may target state entities such as the IRGC.[5]

Until recently, an increasing number of European policy-makers are expressing that a listing is politically desirable, but that legal requirements prevent the EU from taking this step. A case in point is Josep Borrell's reaction when he was asked why the EU would not place the IRGC on the terror list. The High Representative asserted that a group cannot be listed simply because one 'does not like' it. Instead, he maintained that, for a group to be listed, a judgement of a Member State court is necessary.[6]

This paper will show that this statement is at odds with the CJEU's case-law. The analysis is divided into four main sections. First, the article elucidates the legal basis of the EU terror list (section II.) and the substantive requirements for a listing (section III.). Building upon these foundations, it discusses the potential listing of the IRGC by scrutinising relevant national decisions (section IV.). Finally, an analysis of recent sanctions case-law reveals that the CJEU exercises judicial deference when it reviews EU sanctions aimed at countering threats to the EU order or to international security orchestrated by foreign states (section V.). I conclude that EU law does not obstruct political action in the case of listing the IRGC. While it is improbable that the Council's legal experts lack the ability to comprehensively

3 See, e. g. the generic reference to the law in the statement of the High Representative Borrell at the margins of the Foreign Ministers Council, 23 January 2023, available at <eeas.europa.eu>, last access 23 February 2024.

4 Ground-breaking judgement in case *Organisation des Modjahedines du people d'Iran v. Council (PMOI)*, for the first time annulling a restrictive measure adopted by the Council: CJEU, *PMOI*, judgement of 12 September 2006, case no. T-228/02, ECLI:EU:T:2006:384. The CJEU assumed jurisdiction to review restrictive measures without a corresponding explicit primary law provision. The Court's jurisdiction to review targeted restrictive measures is now anchored in Art. 275 para. 2 TFEU. For a detailed overview, see Christina Eckes, 'EU Restrictive Measures Against Natural and Legal Persons', CML Rev. 51 (2014), 869-906 (870).

5 See Eckes, EU Restrictive Measures (n. 4); Celia Chalet and Dorian-Ciprian Grumaz, 'EU Restrictive Measures and Third Countries' Evidence', European Foreign Affairs Review 28 (2023), 9-29.

6 Statement by High Representative Borrell (n. 3). Meanwhile, the Council's legal service has reportedly completed a legal opinion on the listing of the IRGC, which has not been published. According to European politicians, the legal service concluded that it is currently impossible to list the IRGC, see, e. g. German Government's Commissioner for Human Rights and Humanitarian Assistance Luise Amtsberg, 21 February 2023, available at <twitter.com>, last access 23 February 2024; see also Jean-Philipp Baeck, 'Terrorlistung von Irans Revolutionsgarde: Hinters Rechtsgutachten geduckt', Die Tageszeitung (taz), 18 December 2023.

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analyse the CJEU's case-law, it appears that politicians exploit the law to transform a political decision into a legal one, creating the perception of a straightforward choice for policy-makers – one dictated by the law. However, EU decision-makers bear the political responsibility to actively shape those measures that are deemed politically desirable in the light of the legal framework established by the CJEU. Most importantly, from a political perspective, generic references to the law are inadequate for the people in Iran who are fighting for an Iranian democracy at the risk of their lives and those of their families.

II. The Legal Basis of the EU Terror List

The so-called EU terror list is based on the Council's Common Position 2001/931 of 27 December 2001 (CP)[7] which was adopted following the 9/11 attacks in the United States (US).[8] It initially implemented at EU level sanctions that had already been adopted by the United Nations Security Council (UNSC), as described in recital five of the CP. Nonetheless, persons and groups not targeted by the UNSC may also be listed. Over the years, this has increasingly been the case, establishing the EU terror list as a policy instrument in its own right, politically and legally independent of the UNSC.[9]

Established in 2001, the EU terror list has been one of the first EU legal regimes to adopt any kind of targeted restrictive measures. The CP itself does not contain any provisions governing the concrete implementation of those restrictive measures that result from a terror listing. These specifics are laid down in a separate legal act of the Council, namely Regulation 2580/2001.[10] This construction differs from other sanction regimes, of which the EU has created numerous examples to date, significantly increasing the use of restric-

7 Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, OJ 2001 L 344/90. Common Position was the term for what is now referred to as a decision pursuant to Art. 31 para. 1 TEU. In the pre-Lisbon era, the term Common Position referred to a type of executive law-making in foreign policy according to Art. 15 EU Treaty (Treaty of Amsterdam), OJ 2002 C 325/15.

8 Christina Eckes, 'The Legal Framework of the European Union's Counter-Terrorist Policies: Full of Good Intentions?' in: Christina Eckes and Theodore Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice* (Cambridge University Press 2011), 127-158.

9 Eckes, Legal Framework (n. 8), 144.

10 Regulation EC 2580/2001/EC of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combatting terrorism, OJ 2001 L 344/70.

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tive measures.[11] These more recent sanction regimes usually consist of two separate legal acts as well, namely a Regulation according to Art. 215 Treaty on the Functioning of the European Union (TFEU) and a unanimous Common Foreign and Security Policy (CFSP) decision adopted under Title V Treaty on European Union (TEU).[12] However, these two legal acts regularly are identical in their respective contents.[13] Hence, in more recent sanction regimes, there is no separation between the substantive requirements of a restrictive measure, on the one hand, and its concrete implementation on the other.

Furthermore, there is an essential substantive difference between the EU terror list and other sanction regimes: An EU terror listing is inherently dependent on a decision by a competent national authority according to Art. 1 para. 4 CP. This decision may, inter alia, consist of a national court's judgement following a terrorist act or a decision by the executive branch to designate a group as a terrorist organisation under national law.[14] The national decision pursuant to Art. 1 para. 4 CP then provides the legal possibility for the Council to add a person or group to the terror list by unanimous decision. In essence, this creates a 'two-tiered system' which ensures that the rights of the individuals and groups concerned are protected from the consequences of a terrorist label.[15] Other legal regimes, resulting from the Council's competence to adopt restrictive measures, anchored in Art. 215 TFEU, do not require such a 'national trigger'. Therefore, although the EU has already adopted restrictive measures targeting the IRGC and certain of its subdivisions (such as the so-called Quds Force) under different legal regimes,[16] this does not per se provide the legal possibility to include the IRGC on the terror list. Rather, the specific requirements of Art. 1

11 For a systematic overview see Francesco Giumelli, Fabian Hoffmann and Anna Książczaková, 'The When, What, Were and Why of European Union Sanctions', European Security 30 (2021), 1-23; Christina Eckes, 'The Law and Practice of EU Sanctions', in: Steven Blockmans and Panos Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (Elgar 2018), 206-229; a descriptive overview is provided by the EU Sanctions Map, established under the Estonian Council Presidency in 2017, available at <sanctionsmap.eu>, last access 23 February 2024.

12 Title V TEU governs the CFSP.

13 Eckes, Legal Framework (n. 8).

14 CJEU, *PKK v. Council*, judgement of 30 November 2022, case no. T-316/14 RENV, ECLI:EU:T:2022:727, para. 50 and cited case-law.

15 CJEU, *PKK* (n. 14), para. 37 and cited case-law.

16 Regulation 267/2012/EU of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) 961/2012, OJ 2012 L 88/1; Regulation 2020/716/EU of 28 May 2020 implementing Regulation (EU) No. 26/2012 concerning restrictive measures in view of the situation in Syria, OJ 2020 L 168/1.

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para. 4 CP must be met. These requirements will therefore be discussed in more detail in the following section.

III. The Listing Requirements According to Art. 1 para. 4 CP

When adding an individual or group for the first time, a range of procedural and substantive requirements must be observed. The procedural requirements – such as the obligation to state reasons, arising from Art. 296 TFEU, or the right to be heard, which has been significantly shaped by the CJEU[17] – concern procedural aspects and not the question of whether a listing is possible in general. As this article specifically explores the potential listing of the IRGC, the substantive requirements will be at the centre of attention. As briefly mentioned above, an EU terror listing necessitates a decision by a competent authority in the sense of Art. 1 para. 4 CP. Both the concept of a competent authority and the content of the decision are frequent bones of contention.

1. The Type of the Authority – Courts Only or Administrative Authorities As Well?

The wording of Art. 1 para. 4 sentence 1 CP does not specify which type of authority is to be considered competent. Art. 1 para. 4 subpara. 2 CP defines a competent authority as a 'judicial authority or, where judicial authorities have no competence in the area covered by this paragraph, an equivalent competent authority in that area'. This results in a certain preference for judicial decisions, as the General Court of the EU (General Court) held in the *PKK* case, referring to the CJEU's settled case-law.[18] Yet, this preference does not exclude decisions by other types of authorities, such as administrative or executive ones. A prime example of such an authority is the British Home Secretary, who has the legal authority to include an organisation on the UK's national terror list.[19] Nonetheless, according to the CJEU, in order for an administrative authority to be considered competent, it must

17 See, e. g. CJEU, *French Republic v. People's Mojahedin Organization of Iran*, judgement of 21 December 2011, case no. C-27/09 P, ECLI:EU:2011:853, para. 61.

18 CJEU, *PKK (*n. 14), para. 51; CJEU, *LTTE v. Council I*, judgement of 16 October 2014, Joined cases no. T-208/11 and T-508/11, ECLI:EU:T:2014:885, para. 107; CJEU, *LTTE v. Council II*, judgement of 24 November 2021, case no. T-160/19, ECLI:EU:T:2021:817.

19 CJEU, *PKK* (n. 14), para. 50.

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(1) be vested with the power to adopt preventive or restrictive measures relating to terrorism under domestic law, and (2) be equivalent to judicial authorities.[20] The latter is particularly the case if there is a judicial remedy for the decision.[21] Whether an administrative authority is equivalent to a judicial authority has to be decided on a case-by-case basis, depending on the extent to which legal protection against the decision is available, both formally and in practice.

2. The Location – EU-Based Authorities Only or Authorities Worldwide?

Another important issue is the authority's location. Some observers claim that the authority must be based in the EU.[22] Looking at Art. 1 para. 4 CP, such a requirement is not implied by the wording. Nonetheless, it is to be borne in mind that the requirement of a national decision is intended to protect the individual rights of the persons concerned which are severely affected by the 'terrorist' label. In the case of Member States authorities, the protection of individual rights is generally to be assumed due to the primary law principle of mutual trust pursuant to which the Member States trust each other's legal proceedings. This primary law principle does not apply in relation to third states, thus potentially endangering the individual rights of the persons concerned if a listing is based on a decision by a third state authority.

The CJEU, however, held that the concept of a competent authority pursuant to Art. 1 para. 4 CP does include third state authorities.[23] The Court came to this conclusion by referring to the wording of Art. 1 para. 4 CP which does not contain any territorial limitations. Moreover, imposing a territorial limitation would contradict the objective of the terror list, which is to combat terrorism globally.[24] In turn, this does not imply that any authority is to be considered competent pursuant to Art. 1 para. 4 CP. Rather, the Council must ensure that proceedings before a third state authority ensure the rights of the defence and effective judicial protection as

20 CJEU, *Gamaa Islamya Égypte v. Council*, judgement of 10 April 2019, case no. T-643/16, ECLI:EU:T:2019:238, para. 111 and cited case-law.

21 CJEU, *PKK* (n. 14), para. 52.

22 Minutes, Press Conference by the German Government, 9 January 2023; Statement by High Representative Borrell (n. 3).

23 CJEU, *PKK* (n. 14), para. 85; CJEU, *Hamas v. Council,* judgement of 14 December 2018, case no. T-400/10 RENV, ECLI:EU:T:2018:966, para. 244.

24 See, e. g. recitals five and seven CP; CJEU, *LTTE I* (n. 18), para. 127.

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enshrined in Art. 47 of the Charter of Fundamental Rights of the EU.[25] These standards compensate for the fact that the principle of mutual trust does not apply in relation to a third state. Whether an authority fulfils these requirements must be assessed on a case-by-case basis, taking into consideration the level of legal protection that is available against the authority's decision.[26]

3. Content of the Decision

Another recurring issue pertaining to Art. 1 para. 4 CP is the content of the national decision. The wording of Art. 1 para. 4 CP mentions the 'instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds'.

a) The Concept of a Terrorist Act According to Art. 1 para. 3 CP

Firstly, the national decision has to relate to a terrorist act in the sense of the EU terror list. Art. 1 para. 3 CP defines this concept, which comprises several elements. It necessitates intent and must consist of one of the acts listed in Art. 1 para. 3 lit. a) to k) CP; for example, an attack upon a person's life or physical integrity. Furthermore, the act, by its nature or context, must be capable of seriously harming a country or an international organisation and be defined as a criminal offence under national law. Moreover, it must be committed with a specific aim, such as to intimidate the population, coerce a government, or seriously destabilise the fundamental structures of a country. Prima facie, the definition seems to impose comparatively high benchmarks, considering particularly the requirements as to the specific aims. In the case-law of the CJEU, however, there have been only a few disputes regarding the definition in Art. 1 para. 3 CP.[27]

25 CJEU, *PKK* (n. 14), para. 87 and cited case-law; Sarah Poli, 'Article 47 of the Charter of Fundamental Rights in the Common Foreign and Security Policy: Does it Afford an Adequate Protection of the Right to Effective Judicial Protection to Private Parties?' in: Matteo Bonelli, Mariolina Eliantonio and Giulia Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection*, Volume 1: The Court of Justice's Perspective (Bloomsbury 2022), 177-194 (189).

26 CJEU, *PKK* (n. 14), para. 87 and cited case-law.

27 This is evident from the *répertoire de jurisprudence*, which the CJEU compiles on its own responsibility, available at <curia.europa.eu>, last access 23 February 2024. It contains far fewer cases relating to Art. 1 para. 3 CP than those relating to Art. 1 para. 4 CP.

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A noteworthy aspect of the concept of a terrorist act, however, concerns the interaction between Art. 1 para. 3 CP, a provision of EU law, and international law. In a case brought by Hamas applying to annul their listing on the EU terror list, the applicants submitted that the actions of state actors or legitimate governments cannot be terrorist acts pursuant to Art. 1 para. 3 CP.[28] In other words, the applicants claimed that Art. 1 para. 3 CP contains an exception for acts committed by state actors. Originally, the terror list was created for non-state actors. Indeed, the IRGC would be the first state entity to be included in the EU terror list.[29] Unlike, for example, the relevant Canadian regulations,[30] the wording of Art. 1 CP does not contain any explicit exemptions for state actors acting in an official capacity. In turn, the Council might have implicitly assumed such an exception in light of the customary principle of state immunity.[31] The CJEU, however, rejects such an exception in its case-law. In the *Hamas* case, the Court held that the relevant factor in determining whether someone is a terrorist is linked to the acts that they perform and not to the nature of that person or that entity.[32] A similar approach to international law's influence on the concept of a terrorist act under EU law can be seen in the *PKK* case. The applicants claimed that their actions in the conflict with the Republic of Turkey were justified by the Kurdish people's right to self-determination and were therefore not terrorist in the sense of Art. 1 para. 3 CP.[33] In this instance, too, the CJEU rejected an interpretation of the PKK's acts in the light of the principle of self-determination. According to the Court, irrespective of whether the principle of self-determination was applicable to acts committed in the conflict between the PKK and the Republic of Türkiye, 'underlying' or 'ultimate' objectives (such as the self-determination of the Kurdish people) were not to be considered within Art. 1 para. 3 CP.[34] Instead, if a group commits acts such as those mentioned in Art. 1 para. 3 CP, these acts are

28 CJEU, *Hamas* (n. 23), para. 147 et seq. Interestingly, the judgement does not mention a specific international legal norm (such as the principle of state immunity) on which an exception to the notion of a terrorist act in the sense of Art. 1 para. 3 CP might be based.

29 This applies to the EU terror list pursuant to CP 931/2001. Restrictive measures have already been imposed on state(-related) actors under different EU sanction regimes.

30 Canadian Criminal Code, Section 83.01, R.S. C. 1985; see also Jessica Davis, Thomas Juneau and Leah West, 'Canada's New Sanctions Against Iran: To List or Not to List', lawfare, 3 November 2022, available at <lawfareblog.com>, last access 23 February 2024.

31 ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy), merits, judgement of 3 February 2012, ICJ Reports 2012, 99.

32 CJEU, *Hamas* (n. 23), para. 153. In this context, it is nonetheless interesting to note that the CJEU did reassure its conclusion that Art. 1 para. 3 CP does not include an exception for state actors by stating that even if an exception existed for state actors and legitimate governments, the applicant Hamas is not to be considered a state actor, see para. 155 of the judgement.

33 CJEU, *PKK* (n. 14), paras 119-146.

34 CJEU, *PKK* (n. 14), para. 131.

subject to EU counter-terrorism norms, which can thus also be countered by an inclusion on the EU terror list.[35] As can be seen, the CJEU has so far been sceptical about using international law to establish exceptions to the concept of a terrorist act in the sense of Art. 1 para. 3 CP. This reluctance, on the one hand, may be perceived as a missed opportunity to strengthen the interaction between the EU legal order and fundamental rules and principles of international law. On the other hand, it follows the EU terror list's underlying logic of a two-tiered listing process which foresees a restrained control of the Council and which places the national authority's decision at the heart of the process. Moreover, the CJEU avoids dealing with customary international principles that, by their nature as customary law, are a particularly challenging to interpret or apply. Finally, the reluctance to narrow the substantive scope of what constitutes a terrorist act is in line with the CJEU's general approach to protect the rights and interest of groups concerned by establishing, first and foremost, procedural requirements, while granting the Council room for manoeuvre in its substantive (and ultimately political) evaluation of persons and groups as terrorists.[36]

It may be added that even if one, contrary to the CJEU's reasoning, allowed the concept of a terrorist act according to Art. 1 para. 3 CP to be interpreted in light of international law and furthermore found the principle of state immunity to apply to executive actions such as an inclusion on the EU terror list,[37] there is a distinction to be made between the substantive

35 CJEU, *PKK* (n. 14), para. 126; *LTTE I* (n. 18), para. 58 and cited case-law.

36 For the inherently political nature of classifying a person or group as a terrorist see Alex Schmid, 'Terrorism – The Definitional Problem', Case W. Res. J. Int'l L. 36 (2004), 375-419. The potential imperilments for individual rights associated with the political (ab)use of the terrorist label were pointed out, e. g. by Elspeth Guild, 'The Uses and Abuses of Counter-Terrorism Policies in Europe: The Case of the Terrorist Lists', J. Common Mkt. Stud. 46 (2008), 173-193. It remains to be questioned whether a more substantial engagement by the CJEU with the notion of a terrorist act would prove beneficial in countering potential threats to individual rights, given that the majority of a court may be influenced by political, societal, or other factors as well. Therefore, the CJEU's approach to strengthen procedural and factual aspects and focusing on whether the rights of the defence and essential interests have been safeguarded in the process seems to be a reasonable judicial approach.

37 From an international law perspective, this is not uncontroversial. Scholars argue that immunity does not apply to executive actions such as restrictive measures, see Tom Ruys, 'Immunity, Inviolability, and Counter-Measures – A Closer Look at Non-UN Targeted Sanctions' in: Tom Ruys and Nicolas Angelet (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019), 683. If, however, one applies the principle of state immunity to executive actions – as it is often concluded in international legal scholarship – immunity might moreover ab initio not apply to terrorist acts, as recent US and Canadian legislation (see section IV.) suggests. The existence of such a terrorism exception is, nonetheless, a bone of contention in international legal scholarship, see Ruys (n. 37), 684 and as yet undecided by the ICJ. This might change in the near future, since the Islamic Republic

illegality of an act and the decision on any such illegality by domestic courts or tribunals. The principle of state immunity concerns the latter only, leaving the substantive (il-)legality of the act itself – and hence its classification as a terrorist act pursuant to Art. 1 para. 3 CP – unaltered.[38] The IRGC being a state entity thus does not legally prevent its actions from being classified as terrorist acts in the sense of Art. 1 para. 3 CP.[39] Nevertheless, from a political perspective, such a listing would be a substantial development of the EU terror list.

b) Instigation of Investigations or Prosecution, or Condemnation

According to Art. 1 para. 4 CP, the decision has to concern an 'instigation of investigations or prosecution […] or condemnation'. The CJEU assumes that, in light of the objective of the EU terrorist list, the decision does not have to concern criminal proceedings stricto sensu.[40] Instead, the national proceedings need to aim at combatting terrorism in the broad sense through the adoption of preventive or punitive measures.[41] Particularly,

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brought a case before the ICJ following Canadian judicial decisions granting compensation to victims of acts committed by Iranian state actors (see section IV.), ICJ, *Alleged Violations of State Immunities* (Islamic Republic v. Canada), application instituting proceedings, 27 June 2023; Valentin von Stosch and Felix Herbert, 'Jurisdictional Immunities, all Oover Again?', EJIL:Talk!, 7 July 2023, available at <https://www.ejiltalk.org/jurisdictional-immunities-all-over-again/>, last access 23 February 2024. Iran made a first attempt to get an answer to the legality of terrorism exceptions in a case brought against the US. In this case, the ICJ nonetheless did not provide an answer on the merits, as its jurisdiction did not include issues of customary international law such as the principle of state immunity, see ICJ, *Certain Iranian Assets* (Islamic Republic of Iran v. United States of America), preliminary objections, judgement of 13 February 2019, ICJ Reports 2019, 7, para. 80. Interestingly, the CJEU has not ruled on possible immunities in conjunction with restrictive measures. Applicants before the CJEU have, as yet, not raised the issue of immunity (explicitly) to argue for the illegality of restrictive measures, see in this vein also Ruys (n. 37), 674. Considering that the CJEU rejects an interpretation of EU provisions governing the EU terror list in light of international legal norms, this finding seems surprising merely at first sight.

38 ICJ, *Jurisdictional Immunities* (n. 31).

39 The listing itself, however, could – as any other non-UN restrictive measure that targets state actors – violate state immunity or even the customary principle of non-intervention, flowing from the sovereign equality of states. The debate on this issue in international legal scholarship is ongoing, see Ruys (n. 37). As the issue of non-UN sanctions and their general compatibility with international law is related not solely to counter-terrorism sanctions such as the EU terror list, but applies to all sanctions targeting state actors, this article will not undertake a further in-depth analysis of this legal issue.

40 CJEU, *LTTE II* (n. 18), para. 119; CJEU, *Gamaa Islamya Égypte* (n. 20); CJEU, *Hamas* (n. 23), paras 269-271.

41 CJEU, *LTTE II* (n. 18), para. 119 and cited case-law.

decisions by national authorities designating a group as a terrorist organisation suffice.[42]

c) Decision 'in Respect of the Persons, Groups and Entities Concerned'

Moreover, pursuant to Art. 1 para. 4 CP, a decision must be made 'in respect of the persons, groups and entities concerned'. The notions of a person, group, or entity are defined in Art. 1 para. 2 CP. In practice, these concepts pose few problems and, read in conjunction with Art. 1 para. 3 CP, become relevant only if the internal coherence and affiliation of a group is in doubt to the extent that the group as such does not (or no longer) exist(s). As far as the IRGC is concerned, this is not an issue considering its professional organisation.

4. Precise Information or Material in the Relevant File of the Council

Finally, the listing must be based on precise information or material in the relevant file. The CJEU deems this requirement necessary to ensure that the listing is based on a sufficient factual basis.[43] It does not entail an obligation for the Council to independently re-examine whether the acts referred to in the national authority's decision have indeed occurred. According to the CJEU, the Council's obligation is limited to verifying that the decision has actually been made.[44] In the case of Member State authorities, this follows from the principle of mutual trust. Concerning third state authorities, this approach is justified as the conditions of equivalence established by the CJEU aim precisely at ensuring the comparability between EU and non-EU standards of legal protection. Furthermore, the Council must ensure that the act referred to in the national decision corresponds to the definition of a terrorist act according to Art. 1 para. 3 CP.[45] This limited control of the Council regarding the national authority's decision illustrates the two-tiered architecture of the listing process, which places the decision of the national authority at the centre of an initial EU terror listing.

42 CJEU, *PKK* (n. 14).

43 CJEU, *Council v. Hamas,* judgement of 26 July 2017, case no. C-79/15 P, ECLI:EU:C2017:584, para. 24; CJEU *Al-Aqsa v. Council and Pays-Bas,* judgement of 15 November 2012, Joined cases nos C-539/10 P and C-550/10 P, ECLI:EU:C:2012:711, paras 69, 79 and 81.

44 CJEU, *PKK* (n. 14), para. 37 and cited case-law.

45 CJEU, *PKK* (n. 14), para. 114 and cited case-law.

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5. Preliminary Conclusion

This section delineated the requirements for an EU terror listing resulting from Art. 1 para. 4 CP. It has shown that the EU's terror listing process is essentially two-tiered, meaning that it depends on a national authorities' decision according to Art. 1 para. 4 CP, the elements of which are divided into different legal issues. These issues have been dealt with in detail by the CJEU. The extensive body of case-law starkly contrasts with the rather simple evaluation presented by Josep Borrell,[46] which supports the thesis that the High Representative used the law to give the impression of an easy decision dictated by legal limits, rather than politically engaging with an executive action such as an IRGC listing. The following section will therefore examine whether there are indeed decisions by national authorities within the meaning of Art. 1 para. 4 CP which could form the basis of a listing of the IRGC.

IV. Possible Decisions on the IRGC Within the Meaning of Art. 1 para. 4 CP

1. The United States

The US debate on how to deal with the IRGC differs from the EU's approach to the matter. The following subsection examines two decisions by US authorities to evaluate their potential as a legal basis for adding the IRGC to the EU terror list.

a) The Secretary of State's Decision to Designate the IRGC as a Terrorist Organisation

Since 2019, the IRGC has been designated as a Foreign Terrorist Organisation under the Immigration and Nationality Act. Under US law, the Secretary of State has the authority to issue restrictive measures to combat terrorism.[47] The CJEU, however, has so far been sceptical about the level of legal protection available against the Secretary's decisions.[48] Since – as explained

46 Statement by High Representative Borrell (n. 3).
47 US Immigration and Nationality Act, Section 219.
48 CJEU, *PKK* (n. 14).

above – the guarantee of effective legal protection is a necessary requirement for a third state authority to be considered competent under Art. 1 para. 4 CP, listing the IRGC based on the Secretary of State's decision is not legally possible. In a recent ruling, the General Court stated that a US listing does not constitute a decision of a competent authority pursuant to Art. 1 para. 4 CP, as the reasons for a listing are practically unavailable to the entity concerned and the authorities' obligations to publish their decision are poorly defined.[49] Although this case is currently pending before the Court of Justice,[50] it is unlikely that the Court will come to a radically different conclusion, given the General Court's numerous references to the CJEU's convincing case-law on this legal issue and the unchanged practice of US authorities.[51]

b) Judgement of the District Court for the District of Columbia from 2018

Another interesting decision is a judgement of the District Court for the District of Columbia (District Court), ordering the IRGC to pay damages.[52] The plaintiffs in this case sought an order requiring the IRGC and the Islamic Republic of Iran to pay damages under the terrorism exception to the Foreign Sovereign Immunities Act for their involvement in the 1995 attack on the Khobar Towers in Dhahran, Saudi Arabia.[53] The court found that the IRGC had organised and sponsored the Khobar Towers attack.[54] The District Court, as a US federal court, is a judicial authority based in a third state and must therefore provide sufficient legal protection to be considered as an authority in the sense of Art. 1 para. 4 CP. The theoretical possibility of exercising rights of the defence is not sufficient. They must be respected in the authority's practice.[55] Nonetheless, pursuant to Art. 1 para. 4 subpara. 2 CP, there is a certain preference for decisions of judicial authorities.[56] As a result of this preference, it could be assumed

49 CJEU, *PKK* (n. 14), paras 84 et seq.

50 CJEU, pending case no. C-44/23 P.

51 CJEU, *PKK* (n. 14), paras 84 et seq.

52 US District Court, District of Columbia, *Todd Akins et al. v. Iranian Islamic Revolutionary Guard Corps and Islamic Republic of Iran* (Todd Akins v. Iran), case no. 17-675, 10 September 2018.

53 Foreign Sovereign Immunities Act, 28 U. S. C. § 1605A.

54 District Court, *Todd Akins v. Iran* (n. 52), 44.

55 CJEU, *PKK* (n. 14), para. 87 and cited case-law.

56 CJEU, *PKK* (n. 14), para. 51; CJEU, *LTTE I* (n. 18), para. 107; CJEU, *Hamas* (n. 23), para. 259.

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that the defendant's rights within a trial before a US federal court are sufficiently protected.

Yet, according to the CJEU, sufficient protection is a matter of individual circumstances, which necessitates an analysis based on the facts of the individual decision.[57] What constitutes sufficient legal protection against third state decisions must be measured against the level of protection that is to be expected in the case of an EU-based authority, as the standards for third state authorities are designed to ensure a level of legal protection similar to that in EU Member States. In this respect, two issues deserve particular attention, namely the judgement being rendered in absentia and its nature as a civil law case. Regarding judgements in absentia, neither the requirements of EU law nor the procedural traditions of its Member States suggest that a judgement in absentia is impossible. While in most Member States judgements in absentia are limited to a certain extent, in many Member States they are possible.[58] It follows that a judgement in absentia does not violate any of the essential safeguards that would lead to a dismissal of a decision under Art. 1 para. 4 CP.

The second aspect, namely the civil law nature of the judgement, is more complex. In the case *Sison I* of 2009, the General Court held that judgements which rule 'only incidentally and indirectly on the possible involvement of the person concerned in such an activity, in relation to a dispute concerning, for example, rights and duties of a civil nature' do not constitute a decision according to Art. 1 para. 4 CP.[59] The case concerned a decision of a Dutch court in a matter of residence and asylum law, ergo an administrative law case. The General Court went on stating that the national proceedings were not directed at the applicant's involvement in terrorism but were 'solely concerned with the review of the lawfulness of the decision of the Secretary of State for Justice refusing to grant him refugee status and a residence permit in the Netherlands'.[60] Since *Sison I* did not concern a national civil law judgement, the General Court's comment on civil procedures was not strictly necessary and can thus be considered as an *obiter dictum*. Interestingly, this *obiter dictum* was not explicitly confirmed by the Court of Justice, as no

57 CJEU, *PKK* (n. 14), para. 87 and cited case-law.

58 For civil proceedings, see, e. g. German civil procedural code, paras 330-347 Zivilprozessordnung. Even within criminal procedures, a categorial incompatibility is not to be assumed, see Sonja Klitsch, 'Der neue EU-Rahmenbeschluss zu Abwesenheitsverurteilungen – ein Appell zur Revision', Zeitschrift für Internationale Strafrechtsdogmatik 4 (2009), 11-21; Pierre Hauck, 'Europarechtliche Vorgaben für das nationale Strafverfahren' in: Martin Böse (ed.), *Europäisches Strafrecht* (Nomos 2021), 543-632.

59 CJEU, *Sison v. Council I*, judgement of 30 September 2009, case no. T-341/07, ECLI:EU:T:2009:372, para. 111.

60 CJEU, *Sison I* (n. 59), para. 113.

listing case based on civil law decisions has reached the Luxembourg Court to date. Rather, the Court held in more recent decisions that not only 'criminal proceedings *stricto sensu*' constitute decisions pursuant to Art. 1 para. 4 CP.[61] According to the CJEU, it is necessary to focus on the purpose of the national proceedings, which must primarily serve to combat global terrorism in the broad sense by adopting preventive or repressive measures.[62] Given the Court's slightly changed approach to decisions taken outside criminal proceedings, a general exclusion of civil proceedings does not seem to be in line with the established body of case-law. Instead, the individual circumstances of the national proceedings are to be assessed on a case-to-case basis. Thus, the specific provision that is applied by the national authority is decisive. The District Court applied – inter alia – the terrorism exception to the Foreign Sovereign Immunities Act, 28 U. S. C. § 1605A. Pursuant to the legislative materials of the US Congress, this law aims at preventing state or semi-state entities from escaping liability for terrorist acts.[63] The fight against terrorism is therefore the central objective of this provision. In order to award damages under this provision, the US court must examine whether the defendant committed the terrorist act in question, which the District Court has done comprehensively.[64] In summary, neither the judgement rendered in absentia nor the case being a civil one prevents the District Court's 2018 ruling from being classified as a decision according to Art. 1 para. 4 CP.

2. Canada

In Canada, too, there has been a fierce debate on how to deal with the IRGC. In October 2022 Prime Minister Justin Trudeau announced that the IRGC would be listed as a terrorist organisation,[65] which has not yet happened.[66] There are, nonetheless, two interesting Canadian decisions that will be discussed below.

61 CJEU, *LTTE II* (n. 18), para. 119; CJEU, *Gamaa Islamya Égypte* (n. 20), paras 119-121; CJEU, *Hamas* (n. 23), paras 269-271; CJEU, *Hamas v. Council*, judgement of 6 March 2019, case no. T-289/15, ECLI:EU:T:2019:138, paras 82-84.

62 CJEU, *LTTE II* (n. 18), para. 119 and cited case-law.

63 District Court, *Todd Akins v. Iran* (n. 52), 40, quoting Congressional legislative materials: 'aim to prevent state sponsors of terrorism-entities particularly unlikely to submit to this country's laws-from escaping liability for their sins'; see also ICJ, *Certain Iranian Assets* (Islamic Republic of Iran v. United States of America), merits, judgement of 30 March 2023, para. 25.

64 See the extensive findings compiled in District Court, *Todd Akins v. Iran* (n. 52).

65 Statement by Prime Minister Justin Trudeau, 7 October 2022.

66 On possible reasons see Davis, Juneau and West (n. 30).

a) Judgement of the Ontario Superior Court of Justice from 2021

In a case similar to the one decided by the US District Court in 2018, the Ontario Superior Court of Justice in 2021 ordered the IRGC and the Islamic Republic to pay damages for the downing of civilian flight 752, airline Ukraine International Flights.[67] This was preceded by a separate ruling in which the same court considered the downing of the aircraft to be an intentional terrorist act.[68] This ruling was a civil judgement in absentia, as was the US judgement described above. Thus, the same considerations apply mutatis mutandis. The provision applied in this case is the Justice for Victims of Terrorism Act. According to the legislative materials, it aims to deter and prevent terrorism by establishing a legal remedy for victims of terrorist acts.[69] The Act furthermore cites UNSC Resolution 1373/2001 in its preamble – the very resolution on which the EU terror list is based. The purpose of the national procedure is thus to combat terrorism. In view of the foregoing, the ruling of the Ontario Superior Court of Justice constitutes a decision pursuant to Art. 1 para. 4 CP.

b) Listing of the IRGC's Quds Force

A second Canadian decision concerns the following case: Canada added a branch of the IRGC, the so-called Quds Force, to its national terror list in 2012.[70] Whether Canadian terror listings may serve as decisions according to

67 Incidentally, Canada, Sweden, Ukraine, and UK brought a case in this incident before the ICJ claiming a violation by Iran of its obligations under the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, ICJ, *Aerial Incident* (Canada, Sweden, Ukraine and United Kingdom v. Islamic Republic of Iran), joint application instituting proceedings, 4 July 2023.

68 Ontario Superior Court of Justice, *Zarei v. Iran*, 20 May 2021, ONSC 3377.

69 Justice for Victims of Terrorism Act Section 3: The purpose of this Act is to deter terrorism by establishing a course of action that allows victims of terrorism to sue perpetrators of terrorism and their supporters, Canada S.C. 2012, c. 1; In this vein also Leah West and Michael Nesbit, 'Noble Cause, Terrible Reasoning: Zarei v. Iran, 2021 ONSC 3377', INTREPID, 5 June 2022, available at <https://www.intrepidpodcast.com/blog/2021/5/25/noble-cause-terrible-reasoning-zarei-v-iran-2021-onsc-3377>, last access 23 February 2024. The Islamic Republic recently brought a case before the ICJ alleging a violation of its jurisdictional immunities due to this legislation and its subsequent judicial decisions, see ICJ, *Alleged Violations of State Immunities* (Islamic Republic v. Canada), application instituting proceedings, 27 June 2023.

70 The Canadian terror list is based on the Anti-Terrorism Act. Listings are published in the official Gazette. For the listing of the Quds Force, see Canada Gazette Part II, Vol. 146, Extra, 20 December 2012, SOR/DORS/2012-300.

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Art. 1 para. 4 CP remains unanswered by the CJEU.[71] Applying the Court's standards, this question is to be answered in the affirmative: pursuant to the Canadian Anti-Terrorism Act amending several Canadian laws such as the Criminal Code, the Governor in Council on recommendation of the Minister of Public Safety can decide on a listing if there are reasonable grounds of an involvement in terrorist activities.[72] The decision is subject to regular review and, most importantly, Art. 83.05 Canadian Criminal Code provides for a two-step appeal procedure against a listing decision.[73] If the Minister rejects an application for removal, the person affected may appeal against this decision before a judge, who, according to Art. 83.05 para. 11 Criminal Code, must be the Chief Justice of a Federal Court or a judge appointed by the Chief Justice. Thus, a judicial remedy is available against the decision of the Minister of Public Safety which is the key element within the CJEU's case-law to classify an administrative authority as equivalent to judicial authorities.[74] Art. 83.05 para. 6 Criminal Code furthermore provides a rather detailed list of requirements which ought to be adhered to in the case of an appeal to the judge, such as the right to be heard or certain publication obligations of the authorities. Thus, the decision to include an entity on the Canadian terror list fulfils the requirements of Art. 1 para. 4 CP. However, as described above, the Canadian decision specifically pertained to the IRGC's Quds Force. Whether it may still serve as a decision to list the IRGC as a whole will be discussed below.

The IRGC's Quds Force is primarily responsible for international operations, in particular by supporting – among others – the Taliban, Hezbollah, or Hamas.[75] The Quds Force being a subdivision of the IRGC, its actions

71 See in this vein also Friederike Grischek, 'Why Declaring the Iranian Revolutionary Guards a Terrorist Group is a Trickier Business Than One May Think', Verfassungsblog, 2 February 2023, doi: 10.17176/20230203-113242-0; Matthew Levitt, 'The EU Can, and Should, Designate the IRGC as a Terrorist Group', Lawfare, 8 February 2023, available at <https://www.lawfaremedia.org/article/the-eu-can-and-should-designate-the-irgc-as-a-terrorist-group>, last access 23 February 2024.

72 Anti-Terrorism Act, S.C. 2001, c. 41, available at <https://laws-lois.justice.gc.ca/eng/ACTS/A-11.7/index.html>, last access 23 February 2024.

73 Canadian Criminal Code, (R.S. C., 1985, c. C-46), available at <Canadian Criminal Code, (R.S. C., 1985, c. C-46)>, last access 23 February 2024.

74 CJEU, *PKK* (n. 14), para. 52 and cited case-law.

75 Saeid Golkar, 'The Islamic Republic's Art of Survival: Neutralizing Domestic and Foreign Threats', The Washington Institute for Near East Policy, 7 June 2013, available at <https://www.washingtoninstitute.org/policy-analysis/islamic-republics-art-survival-neutralizing-domestic-and-foreign-threats>, last access 23 February 2024; Bernard Hourcade, 'The Rise to Power of Iran's Guardians of the Revolution?', Middle E. Pol'y 16 (2009), 58-63; Akram Kharief, 'Iran – Bedingt verteidigungsbereit' in: *Iran Theokratie und Republik* (Edition Le Monde Diplomatique no. 27 2020), 90-91.

are in principle attributable to the IRGC in its entirety. The Ontario Superior Court of Justice used similar reasoning in a November 2022 ruling, in which the court held that by listing the Quds Force, the IRGC in its entirety is to be considered a listed group.[76] Although attributing the acts of a subdivision to the entirety of the group would be in line with the objective of the EU terror list to combat global terrorism in a broad sense, it will be analysed in the following whether the CJEU has already applied such reasoning in its case-law. In this respect, some remarkable parallels can be drawn from the long-running legal dispute between the Council and Hamas.

Both the General Court and the Court of Justice have already handed down numerous judgements in cases between Hamas and the Council. Of particular interest is the General Court's judgement of 6 March 2019.[77] The case concerned the listing of Hamas as a whole, based (inter alia) on a 2001 decision by the UK Home Secretary designating Hamas-Izz al-Din al-Quassem, the armed wing of Hamas, as a terrorist organisation.[78] Hamas argued in the proceedings before the CJEU that it was not possible to list the organisation in its entirety, as the Home Secretary's decision did not refer to the organisation as a whole, but solely to its armed wing. The CJEU rejected this line of argument by stating that no meaningful distinction could be made between Hamas and its armed wing, Hamas-Izz al-Din al-Quassem.[79] In support of this, the Court referred to the application file by Hamas in earlier proceedings. In that application, Hamas stated that the wing enjoyed relative independence but remained subject to the strategies of the Political Bureau, which were respected due to the solidarity stemming from the movement's religious component.[80] The Court also noted that despite the adoption of several sanctions against the armed wing, Hamas had never attempted to 'dissociate itself unequivocally' from it.[81]

Applying this reasoning to the Iranian Quds Force, striking parallels emerge. The Quds Force is a subdivision of the IRGC that enjoys relative

76 Stewart Bell, 'Iran's Revolutionary Guard is Listed Terrorist Group "by Association", Canadian Court Rules', Global News Canada, 28 November 2022.

77 CJEU, *Hamas v Council*, judgement of 6 March 2019, case no. T-289/15, ECLI:EU:T:2019:138, confirmed in judgement of 10 September 2020, case no. C-386/19 P, ECLI:EU:C:2020:691.

78 CJEU, *Hamas* (n. 77), paras 5, 13.

79 CJEU, *Hamas* (n. 77), para. 107.

80 CJEU, *Hamas* (n. 77), para. 103.

81 CJEU, *Hamas* (n. 77), para. 108.

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independence, yet is formally integrated into the IRGC structure.[82] The IRGC has never condemned or adequately distanced itself from the Quds Force's actions, which comes as no surprise, given that the Quds Force is a subdivision of the IRGC and both pursue the same objective.[83] Moreover, as it was the case of Hamas, the various branches of the IRGC are bound together by a common worldview, reinforced by the IRGC's 'ideological and political training'.[84] Even after the EU adopted restrictive measures against the Quds Force under a different sanction regime, namely following the situation in Syria in 2012, the IRGC did not distance itself from the Quds Force.[85] Thus, according to the principles set out by the CJEU in *Hamas*, a national authority's decision targeting solely a subdivision of a group may, under certain circumstances, allow adding the entire group to the EU terror list. In the case of the IRGC and its subdivision, the Quds Force, the parallels with the *Hamas* case are striking. Hence, the Canadian listing of the Quds Force could serve as a third decision within the meaning of Art. 1 para. 4 CP.

3. United Kingdom

Decisions by British authorities have traditionally played a major role in EU terror listings, as the CJEU considers the UK Home Secretary's decision to add a group to the British national terror list to be a decision according to Art. 1 para. 4 CP.[86] The CJEU has not yet commented on the implications of the UK's withdrawal from the EU. In future, the Council may have to examine the level of legal protection available against the British Home Secretary's decisions. Before Brexit, this was not necessary due to the principle of mutual trust. However, this additional requirement may only be of a formal nature. In fact, the CJEU has already examined the level of legal

82 Golkar (n. 75); Kharief (n. 75); Council on Foreign Relations, Iran's Revolutionary Guards, Backgrounder, 6 May 2019; Ben Hubbard and Farnaz Fassihi, 'Iran's Loyal Security Forces Protect Ruling System That Protesters Want to Topple', New York Times, 24 October 2022. The importance of the Quds Force for the IRGC and the Islamic Republic is also highlighted by the targeted assassination of Quds Force leader Qassim Soleimani by US forces in Iraq, see Michael Crowley, Falih Hassan and Eric Schmitt, 'U.S. Strike in Iraq Kills Qassim Suleimani, Commander of Iranian Forces', New York Times, 9 July 2020.

83 As to the IRGC's constitutional role, see Art. 150 Constitution of the Islamic Republic of Iran, translated in Firoozeh Papan-Matin, 'The Constitution of the Islamic Republic of Iran (1989 Edition)', Iranian Studies 47 (2014), 159-200.

84 Saeid Golkar, 'Iran's Revolutionary Guard: Its Views of the United States', Middle E. Pol'y 21 (2014), 53-63; Hourcade (n. 75), 58-63.

85 Regulation 2020/716/EU of 28 May 2020 implementing Regulation (EU) No. 36/2012 concerning restrictive measures in view of the situation in Syria, OJ 2020 L 168/1.

86 Most recently in CJEU, *PKK* (n. 14).

protection available against the Home Secretary's decision over several paragraphs, citing especially the appeal procedure before the so-called Proscribed Organisations Appeal Commission.[87] Thus, after Brexit, a decision by the Home Secretary will still constitute a decision according to Art. 1 para. 4 CP. Although there has been a heated debate about whether or not to take this step, the British Home Secretary has not (yet) taken the decision to add the IRGC to the UK's national terror list.[88]

4. Germany

Finally, the article analyses whether any decisions by German authorities may serve as a basis for a listing of the IRGC. As has been extensively documented, the IRGC has been active in Europe for many years.[89] So far, there have been no German decisions against the IRGC as such. An interesting decision, however, is the judgement by the Kammergericht Berlin in its infamous *Mykonos* case.[90] The ruling, convicting four Lebanese and one Iranian individual for murdering Iranian-Kurdish politicians in a Berlin restaurant, led to a major foreign policy crisis between Germany and the Islamic Republic.[91] The Kammergericht compiled evidence of the Iranian authorities' (including the IRGC's) involvement in the murder, leading the court to conclude that the crime was at least partly ordered by Iranian officials.[92] The judgement was not directed against any Iranian entity as such, but against individuals acting on their behalf. This raises the question of whether this judgement qualifies as a decision under Art. 1 para. 4 CP to list the group itself.

To date, no such case has reached the Luxembourg Court, as the Council has not yet based a group's listing on a national court's criminal conviction of individuals acting on the group's behalf. When listing groups, the Council regularly used national decisions directed against the respective group as

87 CJEU, *PKK* (n. 14), paras 49 et seq. See on the consequences of Brexit Chalet and Grumaz (n. 5), 18.

88 UK Government policy on Iran, House of Commons, Debate Pack, CDP-0117, 1 June 2023.

89 Matthew Levitt, 'Trends in Iranian External Assassination, Surveillance, and Abduction Plots', CTC Sentinel 15 (2022); Answer of the German Government to a parliamentary inquiry (Kleine Anfrage), submitted by parliamentary group DIE LINKE regarding activities and criminal offenses by the IRGC in Germany, 8 February 2023, BT-Drs. 20/5595.

90 Kammergericht Berlin, *Mykonos*, 10 April 1997, 2 StE 2/93.

91 Andreas Baum, 'Als das Urteil im Mykonos-Prozess fiel', Deutschlandfunk (dlf), 10 April 2022; Michael Thumann, 'Berlin 1992', Die ZEIT, 7 November 2020.

92 Kammergericht Berlin, *Mykonos* (n. 90).

such, typically in the form of a listing on the respective national terror list.[93] If, however, a national court finds an act to be ordered by leading figures of a group, such an act is adequately attributable to it. Otherwise, the group could easily evade responsibility by using outside persons to execute its acts. Furthermore, under German law, criminal proceedings (in the narrower sense) may, in principle, be lodged against natural persons only, making it impossible to direct a criminal conviction against a legal entity.[94] Allowing the use of criminal judgements against individuals acting on a group's behalf would enable the Council to rely more easily on judicial decisions – which will consist almost exclusively of (criminal) judgements – for group listings instead of relying solely on administrative decisions taken against a group, as it has been the regular practice of the Council. In turn, this would enhance the use of judicial decisions which Art. 1 para. 4 subpara. 2 CP expressly prefers.[95] Finally, attributing acts of an individual to the group would be consistent with the objective of the EU terror list to comprehensively combat global terrorism and the Council's restrained control in the two-tiered listing process.

There is one final point to be made about the Kammergericht's judgement. The judgement was handed down in 1997, prior to the establishment of the terror list itself. This raises the question of whether the Council may rely on a comparatively old national decision to list a group. The national authority's decision might not provide sufficient factual evidence as to the group's recent terrorist activities. This issue has not been decided by the CJEU. Looking at Art. 1 para. 4 CP, however, the wording does not include such a restriction. Furthermore, according to the CJEU, a distinction must be made between the Council's initial listing decision (governed by Art. 1 para. 4 CP) and the Council's subsequent decisions to maintain a group on the list.[96] The latter are governed by Art. 1 para. 6 CP, which specifies that the names on the list must be reviewed 'at least once every six months to ensure that there are grounds for keeping them on the list'. Hence, if the Council wishes to maintain a name on the list, it must independently re-examine the factual grounds for a listing. In contrast to the initial decision according to Art. 1 para. 4 CP, the Council must not rely on a national authority's examination.[97] Yet, as Art. 1 para. 4 CP does not require an independent examination for the initial listing decision, there is no rigid 'deadline' after which a decision cate-

93 See, e. g. CJEU, *PKK* (n. 14); CJEU, *Hamas* (n. 77).

94 See Hans Joachim Hirsch, 'Strafrechtliche Verantwortlichkeit von Unternehmen', ZStW 107 (1995), 285-323.

95 CJEU, *PKK* (n. 14), para. 51 and cited case-law.

96 CJEU, *PKK* (n. 14), para. 37 and cited case-law.

97 CJEU, *PKK* (n. 14), para. 33 and cited case-law.

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gorically loses its ability to serve as a decision pursuant to Art. 1 para. 4 CP. In summary, considering the foregoing reasoning, the judgement of the Kammergericht constitutes a decision according to Art. 1 para. 4 CP. Nonetheless, the legal issue of using a criminal judgement condemning an individual acting on behalf of a group has not yet been decided by the CJEU. Thus, relying on such a line of reasoning comes with a certain legal risk.[98]

5. Preliminary Conclusion

In sum, there are a few decisions by national authorities that could be used to add the IRGC to the EU terror list. As described above, these include three judicial decisions: the judgement by the US District Court for the District of Columbia, the decision taken by the Canadian Ontario Superior Court of Justice as well as the Kammergericht's *Mykonos* ruling. The Council may also rely on the Canadian administrative decision to add the IRGC's subdivision, the Quds Force, to the Canadian terror list. The following final section provides an outlook as to how the EU terror list and its judicial review by the CJEU may evolve in the future against the backdrop of a changed geopolitical environment in which the EU and its Member States operate.

V. Outlook: the CJEU's Sanctions Case-Law in the Face of State-Directed Threats

Having outlined the potential of different national decisions according to Art. 1 para. 4 CP for the inclusion of the IRGC on the EU terror list in the previous section, the subsequent and final section offers a prospective assessment of how EU counter-terrorism sanctions, along with their judicial review by the CJEU, may evolve in the future against the backdrop of a shifting geopolitical environment. It will be shown that the CJEU exercises judicial

98 On 19 December 2023, the Oberlandesgericht Düsseldorf, a German Higher Regional Court, handed down a similar decision within the context of an attempted attack on a synagogue in Western Germany. In its press release, the court stated that the attempted attack can be traced back to an Iranian state actor without disclosing the specific unit which was responsible. The potential of this decision to serve as a decision within the meaning of Art. 1 para. 4 CP can only be analysed once the full ruling, including the reasons for the decision, is available, see OLG Düsseldorf, 19 December 2023, III-6 StS 1/23; Jean-Philipp Baeck, 'Terror im Auftrag Teherans', Die Tageszeitung (taz), 21.12.2023, available at <https://taz.de/Iran-in-Anschlagsplaene-verwickelt/!5981160/>, last access 22 February 2024.

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deference in its examination of restrictive measures adopted by the Council, particularly in cases involving threats to the EU's legal and democratic order or international security orchestrated by foreign state actors.

1. State(-related) Actors as Targets of Restrictive Measures

As mentioned above, adding the IRGC, as the first state actor, to the EU terror list would change the political dimension of the EU's main policy instrument to combat terrorism. While previously applied to non-state actors only, declaring a state actor as a terrorist organisation would indeed reformulate the role of the EU terror list as a foreign policy tool. This – although an entirely novel step regarding the terror list – would be in line with a general policy trend in the EU's targeted sanctions practice. In recent years, the Council has created manifold instruments to impose sanctions on individuals or groups.[99] Examples include restrictive measures in response to cyber-attacks,[100] systematic human rights violations,[101] on the non-proliferation of chemical weapons,[102] or in the context of the Ukraine war.[103] These new instruments have increasingly targeted state-related actors. For example, the measures adopted under the cyber sanctions regime targeted Russian and Chinese nationals as well as organisational units that have acted on behalf of the Russian and Chinese state respectively.[104] Similarly, the sanctions following the Ukraine war prohibit certain Russian media outlets (Russia Today being one) from broadcasting their programmes within the

99 Giumelli, Hoffmann and Książczaková (n. 11); Eckes, Legal Framework (n. 8); EU Sanctions Map, available at <sanctionsmap.eu>, last access 23 February 2024.

100 Regulation 2019/796/EU of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States, OJ 2019 L 129/1.

101 Regulation 2020/1998/EU of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJ 2020 L 410/1.

102 Regulation 2018/1542/EU of 15 October 2018 on restrictive measures against the proliferation and use of chemical weapons, OJ 2018 L 259/12.

103 Regulation 2023/426/EU of 25 February 2023 amending Regulation (EU) No. 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ 2023 L 59/1.

104 Council Decision 2020/1127/CFSP of 30 July 2020 amending Decision (CFSP) 2019/797 concerning restrictive measures against cyber-attacks threatening the Union or its Member States, OJ 2020 L 246/12; Council Decision 2020/1537/CFSP of 22 October 2020 amending Decision (CFSP) 2019/797 concerning restrictive measures against cyber-attacks threatening the Union or its Member States, OJ 2020 L 351/5. However, the adoption of restrictive measures against these persons or entities did not amount to an attribution of those acts to the Russian or Chinese state. According to the Council, the attribution explicitly remained a Member States' sovereign decision, see Recital 9, Council Decision 2019/797/CFSP (n. 104).

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EU.[105] Russia Today is funded by the Russian state and is under the permanent direct or indirect control of the leadership of the Russian Federation, as the General Court found.[106]

This trend in the sanctions practice is partly due to an evolving (geo-) political environment, at the latest since February 2022. This does not only concern the EU's relations with the Russian Federation but can also be observed regarding the Islamic Republic of Iran, which is increasingly active within its neighbouring states and the EU, asserting its interests more aggressively since autumn of 2022.[107] The change of the (geo-)political environment and the subsequent changes in EU sanctions practice also lead to a modified legal assessment of these measures.

2. Modified Legal Assessments in View of State-Directed Threats to the EU or International Order

While, as described above, the CJEU has been fairly active in limiting the Council's room for manoeuvre in the implementation and use of counter-terrorism sanctions, this may change in the near future. The first glimpses of this changing role of the CJEU have been indicated in the *RT France* case.[108] Although this case concerned another type of sanction within a different policy environment, by way of abstraction, interesting findings as to the future legal development of EU counter-terrorism sanctions can be identified.

a) The General Court's Decision in RT France – Judicial Deference Regarding the Council's Actions

The General Court in *RT France* confirmed the broadcast ban against Russian media outlets such as RT France. The appeal before the Court of

105 Regulation 2022/350/EU of 1 March 2022 amending Regulation (EU) No. 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ 2022 L 65/1.

106 CJEU, *RT France v. Council*, judgement of 27 July 2022, case no. T-125/22, ECLI:EU:T:2022:483, para. 171 et seq.

107 Ali Fathollah-Nejad, 'The Islamic Republic in Existential Crisis: The Need for a Paradigm Shift in the EU's Iran policy', Chaillot Paper 178, EU Institute for Security Studies, (June 2023).

108 Carolyn Moser and Berthold Rittberger, 'The CJEU and EU (de-)constitutionalization', I.CON 20 (2022), 1038-1070 (1069); Björnstjern Baade, 'EU Sanctions Against Propaganda for War – Reflections on the General Court's Judgement in Case T-125/22 (*RT France*)', HJIL 83 (2023), 257-282; Viktor Szép and Ramses Wessel, 'Balancing Restrictive Measures and Media Freedom: RT France v. Council', CML Rev. 60 (2023), 1384-1396; CJEU, *RT France* (n. 106).

Justice was discontinued as RT France withdrew its application after the oral hearings.[109] The Court not only held that the absence of a hearing of the entities concerned was irrelevant to the legality of the restrictive measure. Rather, it established principles for balancing the fundamental rights of those affected and the Council's interest in effective sanctions. More specifically, the Court considered the significant restriction of the media outlet's fundamental rights, namely their freedom of expression and information, to be justified in view of the need to protect the EU's democratic order from propaganda of war.[110] It thus appears that the CJEU is willing to accept significant restrictions on individual rights in favour of collective interests, such as the maintenance of public order and security.[111] This has already been indicated in the *Baltic Media Alliance* case, where the CJEU recognised that countering incitement to hatred on account of nationality in the form of propaganda for war is a legitimate public policy objective.[112]

The Court states that, in adopting the broadcasting ban, the Council sought to protect the EU's public order and security, which corresponds to the CFSP's objective under Art. 21 para. 2 lit. (a) TEU. The EU order was threatened by the Russian Federation's systematic actions 'to destabilise neighbouring countries, the Union and its Member States'.[113] The broadcast ban was part of an 'overall strategy of responding in a rapid, united, graduated and coordinated manner […] with the ultimate aim of exerting maximum pressure on the Russian authorities'.[114] According to Art. 21 para. 2 lit. (c) TEU, the CFSP objectives also extend to 'strengthen international security in accordance with the purposes and principles of the Charter of the United Nations'.[115] In order to specify this objective, the Court in *RT France* also referred to resolutions of United Nations (UN) bodies, such as the General Assembly.[116]

109 CJEU, order of 28 July 2023, case no. C-620/22 P, ECLI:EU:C:2023:615.

110 Moser and Rittberger (n. 108), 1069; CJEU, *RT France* (n. 106), paras 49-64.

111 The intensive restriction of fundamental rights guaranteed under EU law and the ECHR, namely the freedom of expression and information, has been criticised, see, e. g. Igor Popović, 'The EU Ban of RT and Sputnik: Concerns Regarding Freedom of Expression', EJIL: Talk!, 30 March 2022, available at <https://www.ejiltalk.org/the-eu-ban-of-rt-and-sputnik-concerns-regarding-freedom-of-expression/>, last access 23 February 2024. Arguing in favour of the proportionality, Björnstjern Baade, 'The EU's "Ban" of RT and Sputnik', Verfassungsblog, 8 March 2022, doi: 10.17176/20220308-121232-0.

112 CJEU, *Baltic Media Alliance Ltd v. Lietuvos radijo ir televizijos komisija*, judgement of 4 July 2019, case no. C-622/17, ECLI:EU:C:2019:566; Baade, EU Sanctions (n. 108).

113 CJEU, *RT France* (n. 106), para. 161; Baade, EU Sanctions (n. 108).

114 CJEU, *RT France* (n. 106), para. 163.

115 See in this vein CJEU, *Dimitrii Konstantinovich Kiselev v. Council*, judgement of 15 June 2017, case no. T-262/15, EU:T:2017:392, para 81.

116 CJEU, *RT France* (n. 106), para. 165.

In a distilled form, the CJEU is willing to deviate from (or at least adapt) its requirements (such as the right to be heard), or to alter its balancing of individual rights and interests, if a state(-related) actor is targeted who systematically threatens the EU's democratic order or international security.[117] The CJEU might transfer this reasoning to other types of restrictive measures, such as counter-terrorism sanctions, for reasons discussed in the following subsection.

b) Factual and Structural Parallels Between RT France and the IRGC's Potential Listing

Firstly, the parallels are obvious, looking at the facts of both cases. The IRGC, as described above, is highly active in Iran's neighbouring regions, but also in Europe, with the aim of destabilising foreign state entities, conduct abductions and assassinations of political opponents and spreading disinformation.[118] In response to the IRGC's increasingly aggressive approach, an EU terror listing would be part, at least since fall 2022, of an overall strategy to exert pressure on Iranian authorities.[119] The destabilising effect of Iranian activities has also been recognised by UN bodies, such as the Human Rights Council.[120]

Secondly, and most importantly, a structural parallel exists which is why the newly established approach in *RT France*, resulting essentially in a restrained control by the General Court, will also inform the assessment of counter-terrorism sanctions targeting state actors: evaluating a potential

117 The utilization of the EU's democratic order to justify measures adopted by the Council may also be viewed as a step towards the judicial mobilisation of EU legal norms that lay down objects and values of the EU, such as Art. 21 TEU concerning the external action of the EU. Interlinkages may be drawn to the provision of Art. 2 TEU which has been successively used by the Court of Justice within internal issues such as the protection of the rule of law, see Luke D. Spieker, *EU Values Before the Court of Justice. Foundations, Potential, Risks* (Oxford University Press 2023). For the use of the objective of international security within the judicial review by the CJEU see also Eckes, Law and Practice (n. 11), 226.

118 For an extensive documentation see Levitt (n. 89); Answer of the German Government to a parliamentary inquiry (*Kleine Anfrage*) (n. 89), BT-Drs. 20/5595.

119 See restrictive measures due to systematic human rights violations by Iran, Regulation 2023/379/EU of 20 February 2023 implementing Regulation (EU) No. 359/2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Iran, OJ 2023 L 51/13; discontinuation of foreign trade instruments, see, e. g. Bundesministerium für Wirtschaft und Klimaschutz, Press release, 23 December 2022; declaration of employees of the Iranian embassy in Berlin as personae non gratae, see Felix Huesmann, 'Ausgewiesene Diplomaten: Deutschlands Beziehungen zum Iran werden immer eisiger', Redaktionsnetzwerk Deutschland (RND), 1 March 2023.

120 UN Human Rights Council, Res S-35/L.1 of 24 November 2022, A/HCR/S-35/L.1.

IRGC listing is not related to fundamental rights concerns (as it was the case in *RT France*), but structurally it represents the same phenomenon. Once a state(-related) actor is subject to a targeted restrictive measure, the relation between the Council and the affected entity changes. The vertical relation of sub-/superordination (typical in sanction cases between citizen and the Council) shifts into a horizontal relation of parity between the Council and the foreign state (actor). This is how either severe restrictions of fundamental rights can be justified (as it was the case with state-controlled media outlets in *RT France*) or a looser interpretation of the requirement of a national authority's decision according to Art. 1 para. 4 CP. For the latter is designed precisely to protect the (subordinate) individual from excessive action of the Council by ensuring that they are included on the terror list only on a sufficiently solid factual basis and under safeguard of their individual rights.[121] By tightening or loosening its interpretation of Art. 1 para. 4 CP, the CJEU can recalibrate the balance between the Council's margin of appreciation and the targeted persons' rights and interests.[122] Ever since the EU terror list came into existence, the CJEU has extensively pursued the protection of the individual by repeatedly declaring terror listings null and void. In view of the severe impact of terror listings for those affected and the sparsely developed legal protection against these listings, both at the EU and UN level, this was appropriate to strike an appropriate equilibrium between the Council's interest in effective counter-terrorism measures and the rights and interests of the individual.[123] With a view to state(-related) targets, the relationship between the EU and the targeted entity changes. Put differently: the closer a potential target is related to a foreign state, the more equal the relation between the Council and the concerned actor becomes. This, in turn, does not imply that the state entity concerned is stripped of its legal protection altogether. It does, however, justify a greater margin of appreciation for the Council acting, as laid down in Art. 21 para. 2 lit. (a), (b) and (c) TEU, in order to combat threats to the EU order or international security posed by an 'equal opponent' that is embodied by the affected state actor. In this respect, the procedural rights of the latter are given less emphasis in contrast to the Council's political margin of appreciation. In *RT France*, this did not lead to the media outlet generally losing its access to procedural or individual rights because it is state-controlled, but their interests were given significantly less importance in the balancing process.[124] Within the evaluation of

121 CJEU, *PKK* (n. 14), para. 33 and cited case-law.
122 See in this vein Chalet and Grumaz (n. 5); Guild (n. 36).
123 See also Guild (n. 36); Chalet and Grumaz (n. 5); Poli (n. 25).
124 CJEU, *RT France* (n. 106).

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EU terror listings, a similar approach is feasible. Unresolved legal issues, such as using a listing of a subdivision for an entire group (section IV. 2. b)), using civil law judgements (section IV. 1. b)) or the feasibility of a criminal judgement against an individual acting on the group's behalf (section IV. 4.), may reasonably be decided in a way that increases the Council's political margin of appreciation.

VI. Conclusion

Public statements by European politicians, as exemplified by Borrell's statement of 23 January 2023, do not take adequate account of the CJEU's case-law. By generically referencing EU law and claiming that it is the law that ostensibly prevents certain political action, European decision-makers are deliberately limiting their own political room for manoeuvre in order to suggest that their decision is without alternative. As shown above, current EU law, as interpreted by the CJEU, does not prevent the IRGC from being placed on the EU terror list. The analysis carried out in this article does not address the political advantages or disadvantages of such a step, neither does it seek to convey a political evaluation or recommendation in this regard. The paper rather aims to show that politicians have used the law to turn a political decision into a legal one by creating the impression that EU law forecloses a listing of the IRGC. If listing the IRGC is politically desirable, as European politicians have stated,[125] it is their responsibility to ensure that the listing is designed in compliance with the legal standards outlined above. Section IV. identified some starting points that could be considered by the Council in such an endeavour. These are by no means the only ones, but they serve as a first orientation. Given the dynamic political situation, it is likely that further national decisions will be made. Finally, assuming political responsibility that is not based on generic references to the law but rather relies on political arguments would be appropriate considering the sacrifices made by the people in Iran.

125 See Minutes, Press Conference by the German Government, 9 January 2023.