

EU Court Annuls Hamas Terrorist Designation

by [Matthew Levitt \(/experts/matthew-levitt\)](/experts/matthew-levitt)

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ABOUT THE AUTHORS



[Matthew Levitt \(/experts/matthew-levitt\)](/experts/matthew-levitt)

Matthew Levitt is the Fromer-Wexler Fellow and director of the Reinhard Program on Counterterrorism and Intelligence at The Washington Institute.



Brief Analysis

The group's legal challenge will likely succeed for now, but the EU can reinstate the ban by relying on the plethora of evidence from European terrorism cases involving Hamas.

In the latest sign of the legal troubles facing the European Union's designation regime -- the authority under which governments can freeze funds and economic resources of illicit actors -- the EU General Court is expected to annul the terrorist designation of Hamas on December 17. The judgment comes on the heels of a similar action in October that annulled the Council of the European Union's designation of the Liberation Tigers of Tamil Eelam (LTTE) on similarly procedural grounds. Although the new judgment is not expected to acquit Hamas of charges related to violence, it comes at a time when the group's terrorist and militant activities are on the rise. And like the LTTE, Hamas will surely point to the judgment as "evidence" that it is not a terrorist entity.

BACKGROUND

On September 12, 2010, Hamas appealed its designation as a terrorist entity under the EU's Common Position 931. In 2002, the EU had banned the group's military "wing," the Izz a-Din al-Qassam Brigades, but not its social or political branches. Yet in September 2003, following a series of Hamas suicide bombings during the second intifada, the EU expanded the listing to include the entire group, though several European countries agreed to the action only skeptically.

Several years passed before the first of several Hamas-related appeals made its way before the General Court. The first, Case T-400/10, is the case at hand today. Two others involved the designation of the al-Aqsa Foundation -- a Hamas-linked charity -- and were dismissed by the court (cases C-539/10 P and C-550/10 P). Another amounted to a second Hamas appeal of its designation (T-531/11) and was therefore "dismissed as manifestly inadmissible" since it duplicated the preexisting case; in June 2012, Hamas was ordered to bear its own costs and to pay those of the Council of the EU as well.

CASE T-400/10: THE HAMAS LEGAL CHALLENGE

The Hamas appeal laid out seven "pleas in law" in support of its action, all procedural in nature:

1. The group asserted a lack of due process, asserting that it did not receive notification of the act and insisting that "mere publication" of the EU decision in the Official Journal of the European Union "cannot be deemed to be notification of such an act."
2. Hamas asserted that its rights were infringed according to the standards laid out in the Charter of Fundamental Rights of the EU, namely because "the act was virtually inaccessible for the applicant."
3. Hamas asserted that its rights were infringed based on the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6(3)(a), "concerning the right of an accused person to be informed promptly, in a language he understands and in detail, of the nature and cause of the accusation against him."
4. Hamas explicitly challenged the premise that it is a terrorist entity and alleged the designation was a "manifest error of assessment." Since Hamas "is a legitimate elected government," it argued that "in accordance with the principle of non-interference in the internal matters of a State, [Hamas] cannot be placed on lists of terrorists."
5. The group asserted infringement of its fundamental right to defend itself and its right to "good administration," since the designation decision "was not preceded by a notification of the evidence held against it and the applicant was not given the opportunity to present duly its submission on that evidence."
6. Hamas argued that "freezing of the applicant's funds is an unjustified restriction on its property right."
7. Hamas asserted infringement of its fundamental rights since "the Council did not provide a specific statement of reasons" for its actions either in notice of its decision or in the regulation enacting the decision.

THE EXPECTED JUDGMENT

The court is expected to rule along strictly procedural grounds, much as it did with the LTTE. In that case, the court rejected the LTTE's contention that its designation as a terrorist group was a manifest error of judgment. Specifically, it rejected the argument that as an actor in an armed conflict, the LTTE should be subject to international humanitarian law but not antiterror legislation (i.e., that the group was a legitimate militia, not a terrorist group). Indeed, the court emphasized that the annulment of the terror designation was "on fundamental procedural grounds [and does] not imply any substantive assessment of the question of the classification of the LTTE as a terrorist group within the meaning of Common Position 2001/931." A similar caveat is expected to accompany the Hamas annulment.

Due-process and transparency challenges to the EU designation regime are not new, so the court is likely to concur with most of Hamas's arguments regarding sufficient notification, opportunity to challenge the designation, and a lack of transparency. Yet the court will probably deny challenges regarding the right to freeze property, as well as the contention that Hamas is a "legitimate elected government" and therefore cannot be placed on a terrorist list.

The most critical part of the decision will likely center on the technical question of what may be considered as evidence to underscore an EU designation. CP 931 requires information to come from "a competent authority." In the case of the LTTE, the court determined that that designation was based on information from Indian authorities as a "third state outside the EU." The court determined further that some of the information was "derived from the press and the internet," and that the Council did not carry out sufficient checks in determining "competent authority." The court will likely make a similar determination in the Hamas case regarding information from "third states" outside the EU -- namely, Israel and the United States, both of which reportedly provided information to support the Hamas designation.

The question of "competent authority" is an odd one in general, and especially in the context of Hamas, given that CP

931 lays out its standards rather clearly:

"Common Position 2001/931/CFSP applies to persons, groups and entities involved in terrorist acts, when a decision has been taken by a competent authority in respect of the person, group or entity concerned. Such decision may concern the instigation of investigations or prosecution for a terrorist act, an attempt to carry out or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds. A competent authority is a judicial authority or, where judicial authorities have no competence in the area, an equivalent competent authority."

In this case, Israel and the United States reportedly provided information based on their respective designations of Hamas and evidence from criminal court cases within their jurisdictions. Moreover, information underpinning the Hamas designation likely came from at least one EU government, Britain, which banned the group's Qassam Brigades on its own in March 2001.

Meanwhile, another "third state" -- Qatar -- may have played some undetermined role in the Hamas appeal. A publicly available document on the EU website regarding this case includes a section entitled "Procedural Analysis Information." Under that heading is a section on "Nationalities of the parties," which simply states: "non-member countries, Qatar."

MOVING FORWARD

As with the LTTE, the Hamas judgment will likely include a three-month period during which frozen funds will remain blocked to ease the process of enacting the annulment. Meanwhile, EU officials will decide whether to appeal the court's decision and present additional evidence to support the designation.

While many European diplomats resent the designation of Hamas, pointing to the group's dominance of the Gaza Strip and its centrality to regional events, the EU will likely work assiduously to reinstate the designation for two reasons: first, to protect its designation regime from further legal challenges and defend the Council's original ban on Hamas, and second, to prevent an inherently apolitical, independent judicial action from damaging the prospects for peace and stability in the Middle East. The very same day the EU court issues its judgment, the UN Security Council is expected to vote on a Palestinian resolution setting a November 2016 deadline for outlining a final Israeli-Palestinian peace deal, including Israeli withdrawal from lands sought for a Palestinian state. These two actions will be seen by many, especially in Israel, as intertwined. And Hamas will no doubt point to the decision as vindication of its claim that it is not a terrorist group -- its recent kidnappings, rocket salvos, and tunnel attacks notwithstanding.

The good news is that a plethora of Hamas criminal cases have been opened within EU member states over the past few years, providing plentiful information derived from strictly European sources regarding the group's terrorist nature. Indeed, EU authorities have been working closely with Israel to counter the burgeoning Hamas fundraising network that has been taking root in Europe despite the EU ban (see "[Kidnapped Israeli Teens Compel Scrutiny of Hamas's International Finances](http://www.washingtoninstitute.org/policy-analysis/view/kidnapped-israeli-teens-compel-scrutiny-of-hamass-international-finances)" (<http://www.washingtoninstitute.org/policy-analysis/view/kidnapped-israeli-teens-compel-scrutiny-of-hamass-international-finances>)). Those investigations should now serve as the basis for a renewed terrorist designation of Hamas.

Matthew Levitt is the Fromer-Wexler Fellow and director of the Stein Program on Counterterrorism and Intelligence at The Washington Institute. His publications include the 2006 book [Hamas: Politics, Charity, and Terrorism in the Service of Jihad](http://www.washingtoninstitute.org/policy-analysis/view/hamas-politics-charity-and-terrorism-in-the-service-of-jihad) (<http://www.washingtoninstitute.org/policy-analysis/view/hamas-politics-charity-and-terrorism-in-the-service-of-jihad>). ❖

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