



المركز العربي للأبحاث ودراسة السياسات  
Arab Center for Research & Policy Studies

RESEARCH PAPER

# Hamas: Between Efforts to Politicize the Court and Demands of Justice

Adib Ziadeh | July 2015

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Series: Research Paper

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## Introduction

For the two contending sides in any conflict, the give-and-take of pain-inducing blows is somewhat a given. Hamas, the Islamic Resistance Movement, has suffered a good many such blows over the course of its history. The punches that its military division dealt its Israeli adversary in the 2014 battle it had named "the scattered remnants" (al-'Asf al-Ma'koul), shattered the Israeli army's pride. The latest blow by Hamas, however, is perhaps the most prominent and most devastating of blows delivered to Israel in recent times: in the midst of Hamas' commemorations of the 27th anniversary of the movement's launch, the European General Court, on December 17, 2014, surprised observers with its decision to drop Hamas from the EU's list of terrorist organizations. The decision jolted European and Israeli circles alike, a remarkable development with repercussions that merit examination.

## The Tamil Tigers: Precedent at the European Court

In May 2006 the *Liberation Tigers of Tamil Eelam* were put on the European Union's list of terrorist organizations,<sup>1</sup> following the decision of the United States, Canada, the United Kingdom, Northern Ireland and the Netherlands to designate the guerilla organization as terrorist. On January 13, 2011, the Tigers filed an appeal against the decision, successfully appealing the case to the European court and taking advantage of the very international conventions and relevant treaties of the European Union itself<sup>2</sup>. On October 16, 2014, well before the decision on Hamas, the European Court issued a judgment, the first of its kind, annulling the procedures that had been used by the Council of the European Union to place the Tamil Tigers on the European terrorism list. In the background to this decision, the Court offered the same justifications it would later put forward with Hamas, using almost the exact same wording it did with the Tamil Tigers, to the extent that that a reader might easily confuse the two courts' verdicts.

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<sup>1</sup> European Commission, "Declaration by the Presidency on behalf of the European Union concerning listing of the LTTE as a terrorist organization," (Presse 163, 31 May 2006), <http://bit.ly/1vmIymO>

<sup>2</sup> EU General Court, Judgment of the General Court (Sixth Chamber, Extended Composition), Luxembourg, October 16, 2014, <http://bit.ly/1vGkota>

As expected, the decision encountered severe opposition from the Sri Lankan government and opposition, who contested the judgement and sought re-classification of the organization on the European terrorist list, in the interests of Sri Lankan and European national security alike.<sup>3</sup>

The European Union Council reacted promptly and on December 2, 2014 decided to contest the European General Court's judgment, a month and a half after it had been issued. The Council treaded carefully in contesting some of the issues contained in the Court's judgment, and simultaneously worked to consider actions that would prevent a repeat occurrence of such a verdict.<sup>4</sup> Within the European Union some have the view that the Court had somewhat exceeded its limits, and in so doing had in many ways limited the effectiveness, prestige and dissemination of the Union's policies. It is then not surprising that the Council would resort to amendments that would limit the powers of the court, whether through changes to conventions or through the parliament itself.

## Surprise for Hamas, Shock for its Enemies

The judicial decision on December 17, 2014 to remove Hamas from the European list of terrorist organizations caused great consternation in official European circles. For European decision makers, accustomed since 2003 to both the political and the military wings of Hamas being on the terrorist list, this outcome was to say the least unexpected. The end run that Hamas had carried out to reach European courts constituted a precedent, what is more, one full of implications – should the European Union institution fail to remedy mistakes made with regard to Hamas and other movements and organizations/ individuals with whom it had dealt with along the same defective lines, organizations such as the Islamic Jihad, the Popular Front for the Liberation of Palestine, may be encouraged to follow suit and turn to European courts to bring the European Union Council to remove them from the black list.

Expressing this state of consternation, the European envoy in Israel hastened to reassure the Israeli Foreign Ministry that the European Union would do everything it could to reverse the decision – one he described as regrettable – while calling upon

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<sup>3</sup> Colombo page, "Sri Lanka to contest the European Court decision lifting sanctions on LTTE," October 19, 2014, at: <http://bit.ly/1E3z6tt>; "Ranil requests EU to appeal against Court ruling," *Daily Mirror*, November 11, 2014 <http://bit.ly/1CYjdaB>

<sup>4</sup> "Council of the European Union appeals the Judgment of the General Court," Press Release: Colombo, December 2, 2014, <http://bit.ly/1Dkf1R7>

Israel to avoid amplifying the matter. The Union, he stressed, was in the process of compiling evidence meeting the Court's requirements<sup>5</sup>, just as another group of EU ambassadors in Israel had pledged to do in a meeting with the former Minister of Justice Tzipi Livni.<sup>6</sup> The European Commission proceeded to clarify that it continued to regard Hamas as a terrorist organization, and that it was in the process of reviewing all the options, including that of contesting the decision.<sup>7</sup> Britain was quick to jump on the bandwagon, vowing to work with its partners to revert the status of Hamas to what it was before the European Court's decision, noting that the British government was the first among its European counterparts to put the military wing of Hamas on its terrorism, in 2001.<sup>8</sup>

The EU's state of bafflement followed the crazed sense of outrage emerging in Israeli media and official circles. The European Court's decision stirred fierce attacks by Israeli politicians against Europe, its institutions, countries and peoples. "Hypocritical Europe," said the statements issued by the Israeli government; "did not learn the lesson of the Holocaust", and needed to immediately reverse its decision supporting "a murderous organization whose charter threatens to wipe Israel from the map". The occupation government's Minister of the Economy, Naftali Bennett, described the European law as "corrupt and immoral," a move that allowed Jewish blood to be spilled, and warned that "terrorism that finds justification in Tel Aviv will swiftly spread to London, Paris and Belgium".<sup>9</sup> Such virulent attacks by these and other personalities resonated in the White House, which called upon the European Union to maintain Hamas on the list of terrorist organizations,<sup>10</sup> with Canada following suit.<sup>11</sup> Meanwhile the White House proceeded to mobilize Zionist influence in centers around the world to work full steam

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<sup>5</sup> Barak Ravid, "EU court orders Hamas removed from terror list" *Haaretz*, December 17, 2014, <http://bit.ly/1DIGhck>

<sup>6</sup> Barak Ravid, "EU envoys vow to keep Hamas on terrorist list," *Haaretz*, December 18, 2014, at <http://bit.ly/1vGkGjQ>

<sup>7</sup> EEAS, "Statement by the Spokesperson on the judgment of the General Court of the EU on Hamas," Brussels, December 18, 2014, <http://bit.ly/1zOdhP7>

<sup>8</sup> "Foreign & Commonwealth Office (FCO) responds to EU Court Judgment on Hamas," Press release, December 17, 2014, <http://bit.ly/1zyz9fr>

<sup>9</sup> Herb Keinon, "Netanyahu: We expect the EU to put Hamas back on the terror blacklist immediately," *The Jerusalem Post*, December 17, 2014, <http://bit.ly/1IZJ2L3>

<sup>10</sup> U.S Department of State, "State Department Daily Press Briefing," Press release, December 17, 2014, <http://1.usa.gov/1vGkroT>

<sup>11</sup> "Canada Urges EU to Place Hamas Back on Terror Blacklist," December 18, 2014, <http://bit.ly/1zxxWIA>

with the Europeans to ensure reversal of this unexpected and unprecedented development.<sup>12</sup> The strong reactions suggested that the European decision constituted an important moral victory for Hamas, and that it reinforced the deterioration in the image of Israel and Israeli supporters, world-wide.<sup>13</sup>

## Hamas on the European List of Terrorist Organizations: How and Why?

Across the globe, the events of September 11, 2001 in New York and Washington DC had huge ramifications, particularly with regards to what is termed “combatting terrorism”. As a result of 9/11 the world became divided between “Good Guys”, led by America, and the “Evil Doers” who stood against American and Western interests. Security Council resolutions followed, aimed at combatting terrorism, particularly resolution 1368 of 2001 which called for all states to pursue the fight against terrorism in all of its forms, wherever possible and each from its own vantage point.<sup>14</sup> The Zionist lobby exploited the occasion to designate Hamas and other resistance movements on par with al-Qaida and similar groups, and to declare war upon the former following the declaration of war against the West in the aftermath of the collapse of the World Trade Center towers. Almost immediately, the European Union drew up a list of “Terrorist” organizations that had to be swiftly dealt with, first through freezing of assets and prosecution of branches on the European continent. This is the context in which the military wing of the Hamas movement was placed on this list, on December 27, 2001; the decision stipulated that numerous organizations’ assets worldwide should be frozen, along with those of their subsidiaries and branches, and that any fund-raising or support activities should be prosecuted.<sup>15</sup> The Izz ad-Din al-Qassam Brigades of Hamas figured in this listing.

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<sup>12</sup> World Jewish Congress, “WJC urges EU to act swiftly after court strikes Hamas off list of terrorist organizations,” December 2014, <http://bit.ly/1vmISSE>

<sup>13</sup> Shlomy Eldar, “Hamas scores diplomatic victory in Europe,” *Al-monitor*, December 19, 2014, <http://bit.ly/1711RaV>

<sup>14</sup> UN Security Council Resolution No. 1368, adopted on September 2001 <http://1.usa.gov/1711UUh>

<sup>15</sup> The Council of the European Union, Council Common Position on the application of specific measures to combat terrorism (2001/931/CFSP), December 27, 2001, <http://bit.ly/1CkaelZ>

In 2003 the European Union took a further step of drawing up its own strategy to combat terrorism, as its contribution to the international effort led by America in this front.<sup>16</sup>

Notwithstanding the publication of the European listing of "terrorist" individuals and organizations, and the inclusion of Hamas therein, Alistair Crooke, then the security and political adviser to European Commissioner-General Javier Solana, maintained direct communication with Hamas. Numerous meetings were held between the two parties and resulted in the truce declared by Palestinian factions on June 21, 2003, with Hamas at the forefront.<sup>17</sup> After Israeli infractions of the truce, lasting over 50 days, the Qassam Brigades carried out an attack on August 19, 2003 resulting in dozens of Jewish casualties, both dead and injured. Within days the Israelis retaliated and assassinated the Hamas leader, Ismail Abu Shanab, putting an end to the de facto open-door policy that the European Union had at that time pursued with Hamas. During this period, European states blatantly overlooked infractions committed by Israel – ones concerning which Hamas had provided them with ample detailed reports – and resorted to the criminalization of Hamas, which they saw as having caused the collapse of the truce that had been announced under European auspices.

Subsequently, the British Foreign Minister at the time, Jack Straw, after having met with the American administration (which had pressed for Europe to criminalize Hamas<sup>18</sup>) convinced German Foreign Minister Joschka Fisher of the need to include the political wing of Hamas on the terrorism list, along with its military wing, a decision that was agreed unanimously among 27 European states on September 13, 2003.<sup>19</sup> Britain, unique among its European peers, decided to additionally place four Hamas leaders on the British terrorism list, in March-April of 2004: Khalid Mash'al, head of the political

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<sup>16</sup> EU, "European Security Strategy," in European Council (ed.), (Brussels, December 12, 2003), <http://bit.ly/1CikGWx>

<sup>17</sup> Alastair Crooke, "Permanent Temporariness," *London Review of Books*, 33/5 (March 3, 2011), pp. 22-24, <http://bit.ly/1KMxrwr>

<sup>18</sup> Maurice R Greenberg et al., "Update on the Global Campaign against Terrorist Financing: Second Report of an Independent Task Force on Terrorist Financing," (DTIC Document, 2004), p. 2, <http://on.cfr.org/1ynFIhE>

<sup>19</sup> The Council of the European Union, "Fight against terrorism updating of the list of terrorist organizations," Presse 264, September 15, 2003, <http://bit.ly/1KMxx7d>

bureau, his deputy Moussa Abu Marzook, and two members of the political bureau, Imad al-Ilmi and Osama Hamdan.<sup>20</sup>

In the aftermath of these developments official communications between the European Union and Hamas were broken off, a rupture that lasted until the Palestinian Legislative Council elections of 2006, in which Hamas triumphed. Things grew even more complicated with the election of Hamas, since the European Union could not possibly initiate contacts with a government headed by Hamas, categorized in its own listings as a terrorist movement. Europe, along with numerous other international parties thus began to institute diplomatic, political and financial sanction against the movement and the government associated with it, through the well-known conditions of the Quartet which had been drawn up as prerequisite to establishing relations with Hamas.<sup>21</sup>

## Mistaken Betting on an Overthrow of Hamas

There is no doubt that the parties engaged in maintaining the siege of Gaza over the course of seven years were counting on the fall of Hamas, or at the very least its subjugation. An unprecedentedly vicious siege and three wars waged by Israel over a six year period, with the intention of breaking or corraling the fledgling organization, as had been previously achieved with a good many Arab and Palestinian parties, did not produce the desired results. On the contrary, it proved that the movement is so deeply rooted in its constituency that it cannot be uprooted, broken or even diverted from its cherished project of resistance, one fostered and nourished over the course of its rule.

Given the proven failure of strategies of coercion and pummeling, it would have behooved Europe and other parties concerned with the conflict to turn to diplomacy and political action in order to contain the movement and arrive at understandings with it, rather than keeping their hands tied with ensuring Hamas stayed on the terrorist lists, preventing any official communication channels from opening up. The result was an obvious European diplomatic paralysis. This highlights the importance of the European General Court's decision of December 17, 2014 annulling the procedures followed in

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<sup>20</sup> "Consolidated List of Financial Sanctions Targets in the UK," 2014, <http://bit.ly/16WEqU8>

<sup>21</sup> "Press Release 2706th Council Meeting General Affairs and External Relations," January 2006, <http://bit.ly/1E3zFna>

placing Hamas on the terrorist list.<sup>22</sup> If we leave aside the possibility of Hamas meeting the Quartet's conditions as prerequisites for it being removed from the terrorist list, or any possibility of a consensus emerging among the 28 countries of the European Union on removing the name of Hamas from the list at no cost – as is necessary according to the decision making mechanisms of the European Union – then the court's decision effectively provides a fire escape that Europe could use to descend from the awkward perch to which it has confined itself since 2001 and 2003. If Europe commits to this resolution it could liberate itself from the constraints of decisions that many politicians have acknowledged are wrongful, decisions that were enacted under pressure, and in confusion amid historical moments charged with contradictions.

## The Grounds for Hamas' Petition to the Court

On September 12, 2010 Hamas petitioned the General Court of the European Union in Luxembourg against the European Union Council which had put it on the list of terrorist organizations, with lawyers Liliane Glock and Khaled al-Shouli defending the movement. The movement's defense called for the annulment of the procedures followed by the European Council in classifying it as a terrorist movement, as these failed to abide by the European laws and conventions in force regarding rights and freedoms. Hamas rejected the action of the council on the basis of seven natural and formal procedural grounds, as evidenced in the court records:<sup>23</sup>

- infringement of the third subparagraph of Article 297(2) TFEU in that the applicant did not receive notification of that act and mere publication in the *Official Journal of the European Union* cannot be deemed to be notification of such an act;
- infringement of the second indent of Article 41(2) of the Charter of Fundamental Rights of the European Union in that that act was virtually inaccessible for the applicant;

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<sup>22</sup> General Court of the European Union, "The Court annuls, on procedural grounds, the Council measures maintaining Hamas on the European list of terrorist organizations" (Press Release No 178/14, Luxembourg, December 17, 2014), <http://bit.ly/1DLkAdS>

<sup>23</sup> See Curia. Action brought on September 12, 2010, Hamas v Council (Case T-400/10) <http://bit.ly/1CikKFB>

- infringement of Article 6(3)(a) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) concerning the right of an accused person to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- manifest error of assessment, as Hamas is a legitimately elected government and, in accordance with the principle of non-interference in the internal matters of a State, cannot be placed on lists of terrorists;
- infringement of the applicant's fundamental rights through the infringement of:
  - (a) its rights of defense, and the right to good administration, as the decision to retain the applicant on the list of persons, groups and entities whose funds and economic resources are frozen was not preceded by a notification of the evidence held against it and the applicant was not given the opportunity to present duly its submissions on that evidence;
  - (b) property rights, in that the freezing of the applicant's funds is an unjustified restriction on its property rights;
- Infringement of the obligation to state reasons pursuant to Article 296 TFEU, in that the Council did not provide a specific statement of reasons either in Decision 2010/386/CFSP or in Regulation No 610/2010.

As can be glimpsed in the above, Hamas showed noteworthy political acumen in distancing itself from discussion of the substance of the charge made against it: terrorism. Discussion of the issue of terrorism, were it to take place, would have cast the petition in more of a political light than a legal one. The focus of attention was instead on the legal aspects and the extent to which procedures followed were in line with the conventions and covenants of the Union itself. This rendered the petition a matter of central importance to the work of the Court, which could only reach a judgement that the procedures followed were invalid and built upon flimsy and unsound foundations.

## The Court's Decision and the Merits of the Appeal

It is important to stress what was stated in the European Court's decision. The Court focused on the European Council's failure to base its decision on tested judgments, confirmed by competent national authorities within the scope of the common European position, rather than ones primarily based on press and internet citations, which is unacceptable. The same applies to the freezing of the assets of the movement in Europe; this, argued the Court, was not implemented on clear and well-established grounds. The judgement ruled that the effects of this mistake should remain in force for three months to allow scope to ensure the effectiveness of "any future or renewed sanctions on Hamas that the Council may wish to impose", as the court worded it. It also stipulated that the European Union could appeal the decision before the European Court of Justice within two months, with the force of the judgement remaining in effect until a decision on the appeal of the judgment is reached, within a year and a half of the filing of the appeal request.<sup>24</sup> The period stipulated for the maintenance of Hamas on the terrorism list, even after its presence on the list had been confirmed to be invalid, only serves to highlight the extent of the political satisfaction engendered by the judgment. But the judicial bias towards the legal, (as opposed to the political dimensions of the case) can be a point in favor of the judiciary, though the political dimension is not totally absent – as could become clear in the event a clear appeal of the judgment is taken forward.

The court did not, in any way, make reference to Hamas being a terrorist movement, or otherwise; this was not a subject of the court's inquiry. It is therefore unlikely that any appeal on the part of the European Union's institutions or proxies would go beyond procedural concerns in the case to take up discussion of the subject of terrorism. The appellant, whoever it might be, must demonstrate that the specific procedural issue demanding attention has indeed been attended to in a timely manner, and not conversely, as the court had found. In so far as four years have elapsed with the case remaining on the judiciary's agenda without the European Union's counsel being able to substantiate their statements, it can be anticipated that the court will confirm the invalidity of the procedures followed in this case, and therefore resolve finally in the movement's favor, assuming the matter remains in the legal domain, rather than straying into the political.

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<sup>24</sup> General Court of the European Union, The Court Annuls.

Many of the most Israel-friendly European states have begun to collect evidence supporting the implication of the Hamas movement in terrorism, drawing from their own intelligence agencies' archives and coordinating with the Israeli intelligence agencies, which readily supply powerful evidence that Hamas has practiced and still practices terrorism, and so should remain on the terror list. Significant logistic and financial resources will be harnessed to meet the demands of the task of winning the battle Hamas had taken on with the European Union – unintentionally – within the European continent itself. But the effort undertaken at present by two of the leading European Union states (Britain, which had promised to work with its partners to correct the situation,<sup>25</sup> and Germany, which has special linkages with Israel) will not be very useful, since what is essentially needed for the abrogation of the verdict is to convince the court administration that the procedures it followed when it placed Hamas on the list of terrorist organizations were sound procedures; there is no call for convincing them that Hamas is truly a terrorist movement, or otherwise. The court is unlikely to be interested in discussing or hearing discussion on the matter – a point emphasized by the European Commission in the communique it issues following the court's decision of December 17, 2014.

A concern remains, however, with regard to the nature of the court that will finally decide the matter of the appeal; this time it would be the European Court of Justice, and not the same General Court that originally issued the verdict. In contrast to the latter, the European Court of Justice is equipped with nine public prosecutors working alongside the court bench, six of them appointed by the six largest states in the Union. Despite not being bound by their opinion, on the whole their opinion carries weight, and counts.<sup>26</sup> For this reason, some fear that political considerations will seep into the court during the time available and propel the court into taking political stands, albeit ones clothed in legal garb. But this concern should not be exaggerated, except to the extent that it may drive the Palestinian side to take in hand all the requirements of a successful outcome in its case.

Despite there being an opportunity for the European Union to show itself to be more consistently in line with the values inspiring its policies, as per repeated declarations made in the 2007 Treaty of Lisbon and elsewhere, interests associated with Israel and

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<sup>25</sup> "Foreign & Commonwealth Office (FCO) responds to EU Court Judgment on Hamas."

<sup>26</sup> Court of Justice of the European Union. *Europa* 2014, <http://bit.ly/1CikNI1>

the United States and allied regimes take precedence over consideration of values and the calculations of many European politicians, past and present. Long has the literature of the European Union stressed that European foreign and security policy is founded on democracy, the rule of law, human rights and international law, among other key values expressed in its policies and programs. But the issue of Hamas and its counterparts, and the way in which the European Union deals with them underscores the duality – and hypocrisy – of these criteria, if and when they are applied in reality, on the ground. In practice, the European Union looks at Hamas as an obstacle to peace, one that must be dispensed with by all means, if the possibility of making it bow in submission should be seen to be negligible. At a time when the European Union Council was affirming that there was no way to bring Hamas to fall in line with its diktat, it proceeded, as had been expected, to appeal the European Court's judgment stipulating the removal of Hamas from the list of terrorist organizations on January 19, 2015, one month after that verdict.<sup>27</sup> This was anticipated, given the appeal that the European Council had made to the European Court of Justice with regard to the Tamil Tigers, notwithstanding the differences in the two organizations. With this measure, each of the European Council and Hamas prepare themselves for a legal battle, with weaponry that is both legal and political (if cast in legal armor), in addition to popular arms.

## Israelization within the EU Court's Law: Flawed Politicization

The level of frustration on behalf of the European Union with the issue of Hamas, as well as others who have applied to European courts for redress, is clear. When the Union found no adequate guidance in the abstract legal frameworks, it began to search for alternatives in order to prevent a recurrence of what had taken place with Hamas and others. In this effort, it is striking how matters that seem bizarre and reprehensible even by the standard of tyrannical regimes, may suddenly appear reasonable in the European Union's view. In a strange precedent, and one blatantly incompatible with the values of the Union and the European Convention for Human Rights, the European General Court instigated by political pressures proceeded to adopt judicial procedures reminiscent of those in force in the military courts of the Israeli occupation which had violated the rights of Palestinians over the course of decades.

Under these procedures the European Union Council has the right to refer to secret files which only the judges of the European General Court and European Court of Justice

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<sup>27</sup> "Statement by High Representative/Vice-President Federica Mogherini on the decision to appeal the Judgment regarding Hamas, Jan 19, 2015," <http://bit.ly/16WEDa7>

may inspect; the accused party has no right to view them or to learn about their contents. This echoes the conduct of Israeli intelligence officers under the jurisdiction of administrative courts, detaining Palestinians without charge.<sup>28</sup> Making matters even more outrageous, the procedure is specifically dedicated, exclusively, to cases in which the status of organizations and individuals appearing on the European sanctions listing is under review towards possible removal from the list – meaning that it is a procedure designed for political purposes, without any concern for justice.<sup>29</sup>

Ostensibly designed to protect the institutions and members of the Union from any damage or constraints on their behavior – should there be any disclosure by the Council of information and material based on which accused parties may face incrimination – this kind of measure is brazenly incompatible with human rights and fair and transparent trials, whereby defendants know the nature of the case and the charges against them, as is stipulated by the European Convention on Human Rights and other relevant treaties.<sup>30</sup> The political nature of this legal amendment in the Court's procedures is barefaced, since the information and materials that are meant to be kept confidential relate to a person or an organization condemned by a complainant who considers the matter closed – so why the need to prevent disclosure of the material evidence, in light of which the conviction was made?

Were the confidential information related to a presumed criminal, that would perhaps be more understandable, as it would be logical to retain confidentiality of information and its source, fearing recrimination. But insofar as it is recognized that a person cannot be held under suspicion and that there is no punishment without a crime, the position of the European Judiciary on this issue would support detention of persons on the basis of suspicions – which one cannot disclose – and not on the basis of evidence irrefutably demonstrated to be accurate – as should be the case. This is then clearly motivated by political requirements, and not with matters of justice and law.

The 2014 amendment made by the European General Court was then ratified by the European Court of Justice, receiving the qualified majority vote needed to pass within the European Council which endorsed its adoption. The United Kingdom had refrained

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<sup>28</sup> Council of the EU, "Draft Rules of Procedure of the General Court of the European Union," consolidated version (Ch.7:105), December 2014, p. 5, at: <http://bit.ly/1uIlyUc>

<sup>29</sup> Maya Lester, "EU to Approve New Court Rules to Permit Secret Hearings," January 22, 2015, <http://bit.ly/1CYk37j>

<sup>30</sup> Council of Europe, European Convention on Human Rights (Art.6, 1950), <http://bit.ly/1foTq0D>

from voting in favor of the amendment decision, not because of this strange addition but due to a lack of response to the UK's request for emphasis to be placed on the security of the secret files that would be used in courts, and to the absence of a text in a draft law enabling the owner of such files to withdraw it at any time, contrary to the proposed draft text.<sup>31</sup> In spite of cosmetic attempts to produce a more reasonable ruling, by giving the judiciary the power to decide on what constitutes a secret or a non-secret file, the fundamentally political nature of the amendment, which clearly constitutes a violation of human rights, is undeniable.

Such a procedure, with similar pretexts, is at work in Israeli courts, particularly in those relating to so-called administrative detentions. In these, Palestinians are thrown into prison for extended periods without presentation of the facts of the cases based upon which judges, in coordination with the Public Prosecutor, issued their verdicts against the accused. The existence of a secret file, access to which has been blocked for purposes relating to the security requirements of the occupation, renders the prisoner subject to the whim of intelligence agencies and information for the most part based on files lacking in precision and high professional standards, prepared by the agents of those agencies.<sup>32</sup>

Such Israeli measures have long been open to criticism by human rights organizations all over the world, for they do not afford even a minimal degree of justice or safeguards for human rights. The US judiciary also adopts this procedure; many arrests were made in the United States, (in the 1990s and thereafter) and people were detained, for long periods of time, without any specific charge made against them or their being allowed to see the information based on which they were arrested.<sup>33</sup>

## Europe's Options in Light of the Appeal

The legal team tasked with the filing the appeal will in the meantime monitor the development of the case and ensure the EU remains keenly aware of the possibility of failure. Below are possible scenarios for how the case may be construed to develop in the future.

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<sup>31</sup> House of Commons: European Scrutiny Committee, "Twenty-ninth Report of Session," 2014–2015, p. 63, <http://bit.ly/1DIGb4I>

<sup>32</sup> B'Tselem, "Administrative Detention," 2015, <http://bit.ly/1vGkEsc>

<sup>33</sup> American Civil Liberties Union, "ACLU Seeks Release of Palestinian Immigrant Held for Over Two Years on Secret Evidence," <http://bit.ly/1E3zXdR>

- In the event of despair at the prospect of repealing the decision in the framework of the Court, the Council of the EU would seek to exploit the appeal period in order to arrive at a new decision respecting the foundations and standards that are necessary to remain in accordance with the relevant governing agreements; this would require a consensus, of between eight and twenty members. However, given the prevailing atmosphere in the surrounding region, the stalled peace process and Hamas not having undertaken any notable operations against Israeli civilians, and in the context of the continuing review in European political circles of the use of stigmatizing Hamas with the terrorist label while the movement controls the Gaza Strip and carries weight in the regional balance of power, it may not be possible for the Council to achieve the consensus needed to pass a new resolution putting Hamas back on the list of terrorist organizations. This of course depends on the ability of Hamas supporters to gain at least the vote of one country in the Union to prevent the required consensus and thereby invalidate this endeavor.
- To maintain the consensus decision of the European of the years 2001 and 2003 on political terms, without having to re-visit the file again thus accepting the court's decision on the procedural aspects relevant to the terrorist list, then to resume the work on the measures needed to put the movement once again on the list, according to the legally established criteria. The problem with this possible orientation is that it may be deemed to be an attempt to circumvent the court's decision, which could open up the gateway to a further appeal before the courts. Most probably EU countries would not resort to this option since it carries within it the seeds of a new legal battle that it is not certain to win.
- To accept the matter as it stands and turn the page, considering the court's decision to be an escape route allowing the Union to descend from the high tree it perched upon when it branded Hamas with Terrorism. In light of the statements of many European politicians expressing skepticism at the feasibility of restoring Hamas to the Terrorism list, there might be a chance for the voice of reason to prevail and for the decision to be passed as a step towards a more active and vibrant European role. This would not conflict with a submission of an appeal, which may not necessarily enlist any distinctive legal effort from European Union nations; that is, they would undertake this simply as matter of fulfilling an obligation to Israel and to appease her supporters in Europe.
- In the event of a failure of an all-out, by-all-means-possible attempt to reverse the court's decision, many states - especially those most loyal to Israel - may resort to criminalizing Hamas in the framework of local laws, and in so doing have it be counted as a terrorist organization, prosecuting it on their territory, mirroring what Britain has done with regard to the military wing of Hamas since

2001, along with some of the central figures of the organization, since 2004.

## Soft Power Confronting the Politicization of the Court

There is no doubt that in so far as the European Court's decision provides an opportunity for the European Union to harmonize itself with its core principles, and break free of American hegemony, it also offers Hamas an opportunity it can exploit to ensure a successful outcome. Having its name removed from the list of terrorist organizations would constitute an expansion of its diplomatic and political options, and enables it to better deal with the international blockade currently crippling it. It may in fact enhance its ability to represent what is effectively the resistance option negating the Palestinian Authority's approach to a settlement of the conflict. Any future confrontation with Israel will fortify the narrative of resistance to an unprecedented extent: if liberated from the shackles of the terrorism list, Hamas will be able to address European public opinion directly through its representatives in the various governments and through the media, and dispense with intermediaries.

In addition, also benefiting might be Muslim Brotherhood tendencies by virtue of the symbolism associated with the movement, at a time when it is under siege and being strangled in more than one Arab country. Given the role it will come to play on the European stage if allowed the freedom to act, a Palestinian diplomatic and political mobilization approaching Arab and Muslim communities and friends throughout the European continent could contribute to the gradual change of policies of European decision makers. This is a historic opportunity for the Palestinians to invest all of the forms of soft power at their disposal into Palestinian-European public relations, to ensure success on their terms. Among the possible arenas for action are:

- Diplomacy: the decision to place Hamas on the list of terrorist organizations does not fundamentally prevent European Union states from pursuing contacts and undertaking dialogue with it; the decision specifically entails the freezing of Hamas' assets in those states, and prohibition of any provision of logistic or material support to it on their territories.<sup>34</sup>
- Popular Support: this would entail collecting signed petitions (signed by ministers, political figures, parliamentarians, former and current government officials) calling for the acceptance of the court's decision and allowing an

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<sup>34</sup> "Council Common Position on the application of specific measures to combat terrorism."

opportunity for creating an enabling environment for a future dialogue between Hamas and the European Union, as a prerequisite for an effective European role in the region, and to facilitate the two sides' reaching suitable shared understandings. Here it must be noted that there are foreign ministers, former representatives of the European Union, and politicians who have expressed regret on many occasions at the way in which Hamas had been dealt with; there could be a real opportunity for these individuals to initiate signing of such petitions for use in the court's deliberations.<sup>35</sup>

- **Academia:** Academics enjoy the respect of European political circles. Within their research projects, many have expressed their rejection of the way the European Union dealt with Hamas, and accused the Union of weakening itself by excluding a Palestinian political actor of Hamas' weight. Therefore it would only seem fair that their views should be made known to the Court's bench, by any means possible.
- **The Law:** Providing the defense lawyers with a team of jurists and legal experts whose capabilities and expertise can be brought to the task of confronting the appeal that has been lodged with the European Court of Justice is clearly a matter of extreme importance. Notwithstanding the success and determination evidenced by the defense team to date, the coming legal confrontation will be more intense and more complex, requiring mobilizing legal personalities to the task of support.
- **Pressure Groups:** lobbies can be tasked with applying pressure on European decision-makers to dissuade them from moving forward with the effort to return Hamas to the terrorism list. Here we recall the presence of sympathetic groups of politicians and trade unionists, of all persuasions, who are keen on playing a more effective role in the Palestinian-Israeli conflict and on seeing European decision-making gain a measure of independence from its American counterpart.

Meanwhile, it would benefit Hamas for it to attend with care to its discourse, so as to enhance its international standing. The recent war boosted Hamas' position in world public opinion, in that its adversary's victims were combat troops, such that the media lobby was deprived of material it could use to tarnish the reputation of the resistance, as it sought to do. If Hamas desires to build reasonable international relations, it must be very careful with how it presents itself in the international arena, and prevent the

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<sup>35</sup> For example, former British Foreign Secretary Jack Straw expressed such regret in response to questions from the public following a lecture at the King's College London organized by the British Organization for Middle Eastern Studies (BRISMES).

chances of unauthorized positions emerging which might propel it into unchartered territory. It should also take care during the stage of the appeal that the European decision, not being final, should not befall prey to concessions extorted from the movement that would violate its political essence.

## Conclusion

The European Court's decision is extremely important, and stands to become permanent if the necessary supporting conditions are ensured. It is important to Hamas, and the Palestinians more generally, because of the scope it allows them to build more expansive international relations, through which its program of resistance can be advanced. It is also important for Europe, in that it would revitalize European diplomacy, and free it of the restrictions that are imposed by the terrorist organizations list. It is likely that a great deal of effort will be expended by many parties to prevent Hamas from being removed from that list, but others see the European Court's decision as being an opportunity to re-orient European foreign policy, in the arena of the Palestinian-Israeli conflict, in a more effective way, engaging influential players, in the forefront Hamas. If such developments were to come to successful fruition the Palestinian cause would be the principal beneficiary. As such, the matter warrants the most serious and careful follow-up possible: it represents an historic opportunity that, under the balance of political power between the two parties, may not emerge a second time.

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