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THE EUROPEAN UNION'S SANCTIONS AND THE IMPACTS ON THE RIGHTS' PROTECTION

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Introduction

This thesis will analyse the European Union's approach to imposing sanctions in response to challenges against its fundamental principles and rights, as well as the impact of these ones on the protection of rights. Sanctions, or restrictive measures, have been the EU's most frequently employed tool for achieving the objectives of the Common Foreign and Security Policy (CFSP). Accordingly, the first section of this thesis will examine this branch of the EU's legal framework, including its origins, key institutions, and methods of implementation.

The second section will shift focus to the United Nations, exploring its sanction regimes, with particular emphasis on United Nations Security Council Resolution (UNSCR) 1267 of 1999, which marked a significant turning point in the development of targeted sanctions. A similar analytical approach will be applied to the European context.

In the third section, attention will move on two landmark cases: Kadi I-II and PMOI I-II-III. These cases are crucial as they represent the basis of jurisprudence in this field. The Kadi case addresses the interaction between UN law and EU law, while the PMOI case challenges the adoption of the sanctions by Community institutions, acting in the implementation of Security Council resolutions drafted in general terms, rather than at the UN level. These cases also underscore the roles of various EU institutions and the CJEU's limited jurisdiction in the CFSP domain, with certain exceptions, a topic that will be explored deeply in this thesis.

Finally, the fourth section will provide a comprehensive overview of the Russo-Ukrainian War, tracing its developments from inception to the present day, and examining the different types of sanctions imposed by both the EU and the UN. Additionally, a recent case will be discussed,

highlighting the significance of the Advocate General's opinion on the role of the Court. The final judgment is scheduled for September 2024, at which time it will become clear whether the Court aligns with the Advocate General's opinion or adopts a different position.

Chapter 1 – The failure of the European Defence Community and the Common Foreign and Security Policy

1.1 - General background information

The early European Community did not have a coherent foreign policy, in fact the treaties contained only a few provisions that, year by year, evolved and became substantive.

During the negotiations for the Schuman Plan in 1950, concerns emerged about the possible Germany's rearmament. For this matter, the United States suggested the creation of an integrated operational structure within the Atlantic Alliance, the **North Atlantic Treaty Organization** (**NATO**), within which a German army could participate but under their control.

France and its public opinion rejected the proposal and offered an alternative option: the **Plevan Plan** (1950). It called for the creation of a European army under the control of the international organization and the European Ministry of Defence.

Few countries met in Paris in 1951 to approve the treaty, but the procedures in the single national parliaments met delays, especially in Italy and France.[1]

The **European Defence Community** (**EDC**) was signed in 1952, with a supranational structure and a degree of economic integration; it was an experiment that lasted until 1954 when the French National Assembly rejected it.

The failure of this experience was the key element that stopped any type of supranational initiative of defence, in the critical historical phase of the European institution's birth, favouring the intergovernmental approach instead.

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[1] F. Bindi, The Foreign Policy of the EU: Assessing Europe's Role in the World, 2022

During the evolution of the European Union there was always the necessity to regulate and coordinate external relations with other countries or organizations.
For this matter we must go backwards to the original roots of the European's foreign policy: **European Political Cooperation**. It was created in 1970 with the aim of promoting political and economic integration among the Member States and it introduced a first model of coordination between the foreign policies of the countries, leading to the creation of **common positions**.
Since the entrance into force of the Maastricht treaty in 1993, the so-called *"Pillar System"* was created, and within it the **Common Foreign and Security Policy** (**CFSP**) represented the second pillar; it previewed a stronger cooperation in order to insure to the Union a role at global level and to manage the problems at the end of the Cold War.
Its main aim comprehended the preservation of peace, strengthening international security in accordance with the principles of the United Nations Chapter, promoting international cooperation and developing and consolidating democracy, the rule of law and respect for human rights and fundamental freedoms.
In 2009 with the Treaty of Lisbon, the "*Pillar System*" was abolished, and different new actors were collocated into the sector, such as the **High Representative of the Union for Foreign Affair and Security Policy** that will be also Vice-president of the European Commission and, the president of the European Community. Additionally, there was the creation of the **European External Action Service** (**EEAS**) and the upgrade of the **Common Security and Defence Policy** (**CSDP**) that is an integral part of

the CFSP.[2]

1.2 - Common Foreign and Security Policy's legal basis

The normative references of the Common Foreign and Security Policy are the following:

- *Articles from 21 to 46, Title V, TEU;*
- *Articles from 205 to 222, Part V, TFEU.*

The aim is to provide the EU with the necessary instruments to provide assistance, cooperate with and develop relations and partnerships with non-EU countries, through international agreements, as well as with international, regional or global organizations.

To begin, the strong principles of the CFSP in the international relations' field are indicated in the first paragraph of the **Article 21, Title V of the Treaty of European Union** (**TEU**)[3], modified by the Lisbon Treaty:

1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. The Union (...) ***promotes***

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[2] Foreign policy: aims, instruments and achievements – Facts Sheets on the European Union – European Parliament https://www.europarl.europa.eu/factsheets/en/sheet/158/foreign-policy-aims-instruments-andachievements#:~:text=The%20Common%20Foreign%20and%20Security,law%20and%20respect%20for%20human

[3] Article 21, Title V, Treaty of European Union (TEU) https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF

multilateral solutions to common problems*, in particular in the framework of the United Nations.*

The second paragraph of the same article indicates the main objectives of the CFSP, and in addition requires to ensure consistency between its external action and other policy areas:

2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:
(a) safeguard its values, fundamental interests, security, independence and integrity;
(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
(c) preserve peace, prevent conflicts and strengthen international security (...)
(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
(e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
(g) assist populations, countries and regions confronting natural or man-made disasters; and (h) promote an international system based on stronger multilateral cooperation and good global governance.

The other Articles mentioned are included in the **"Specific Provisions on the Common Foreign and Security Policy"**, that indicate and specify the institutions' competence in the field, the procedures for the entrance into

force of the relating policies and the main aims of the single actors involved.
In detail, the **Articles from 23 to 46 of TEU**[4] mention the responsibilities of the High Representative of the Union for Foreign Affairs and Security Policy such as: brings proposals for the development of CFSP and Common Security and Defence Policy; and ensures implementation of the decisions adopted by the European Council and the Council.

The second normative source is contained in the Treaty on the Functioning of the European Union and explains the main domains of the EU's external actions.
More specifically, the **Articles from 208 to 211 TFEU**[5] highlight the main long-term objective of European development cooperation: eradicate poverty by promoting a sustainable economic, social and environmental development in the developing countries.
This activity is connected to humanitarian aid operations to provide assistance and protection for people victims of war, natural disasters, etc.
We may underline also the trade issue; the EU's common trade policy is an exclusive competence, and the customs union contributes to the development of trade, the increasing abolition of the limits on international trade and FDI and lowering protectionist barriers.
To conclude, the **Article 222 TFEU**[6] deals with the **solidarity clause** which allows the Union and the Member States to collaborate and use

[4] Articles from 23 to 46 of Treaty of European Union (TEU)
https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF

[5] Articles from 208 to 221 of Treaty on Functioning of the European Union (TFEU)
https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF

[6] Article 222 of Treaty on Functioning of the European Union (TFEU)
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016E222

instruments at their disposal to prevent the population from terrorist attacks and assist countries in such event.[7]

1.3 - The Institutions and their role in the CFSP

The Common Foreign and Security Policy is subjected to specific rules and procedures[8]. It is defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The policy is effective through the intervention of the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties. For what concerns the European Parliament and the Commission, their roles in this area are defined by the Treaties. The Court of Justice of the European Union does not have jurisdiction with respect to these provisions, with the exception of its monitoring of compliance with **Article 40** of the Treaty and to ensure the legality of decisions as provided for by the Treaty on the Functioning of the European Union.
The policy must be put into effect by the High Representative and by the Member States, using national and Union resources.

The European Union's competence in matters of common foreign and security policy covers all areas of foreign policy and all questions relating to security, including the progressive creation of a common defence policy.
The Union, within the framework of the principles and objectives of its external action, defines and implements a common foreign and security policy, based on the evolution of mutual political solidarity among

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[7] Part V, Treaty on the Functioning of the European Union (TFEU) https://eur-lex.europa.eu/EN/legal-content/glossary/the-european-union-s-external-action.html
[8] Common Foreign and Security Policy, EUR-lex https://eur-lex.europa.eu/EN/legal-content/summary/common-foreign-and-security-policy.html

Member States, the identification of questions of general interest and the increase of the level of convergence of Member States' actions.
Among the principal interventions that enable the Union to reach these matters, we may mention the definition of the general guidelines, the adoption of decisions relative to positions to be taken and the reinforcement of the cooperation between Member States in the conduct of policy.
For a functional relation between the Union and Member States, the latter must support the Union's external and security policy actively **in a spirit of loyalty and mutual solidarity.** The states work together to increase their mutual political solidarity by avoiding any type of action considered in contrast with the interests of the Union, or likely to impact on its effectiveness.

Among the main European institutions acting in the context of the Common Foreign and Security Policy, we mentioned the **European Council**, the **High Representative of the Union for Foreign Affairs and Security Policy**, the **Council** and the **European Parliament**.

The **European Council** identifies strategic interests and objectives and, also, defines general guidelines for the common foreign and security policy, including for matters with defence implications.
On the basis of the guidelines given by the European Council, the Council of Ministers frames the common foreign and security policy and takes the decisions necessary for defining and implementing it. It may adopt **common actions** that concern each Member State and refer to specific situations in which the intervention of the Union is considered necessary; and **common positions**, that define the Union's position on certain topics and indicate the guidelines to which the Member State's foreign policies must conform.

Another important actor in the field considered is the **High Representative of the Union for Foreign Affairs and Security Policy**. Through his/her proposals, he/she contributes to the development of the topic and ensures the implementation of the decisions taken by the European Council and the Council. He/She represents the Union for issues relating to the topic and conducts political dialogue with third parties.
To complete the mandate, the High Representative is assisted by the **European External Action Service** which works together with the diplomatic services of the States. The HR frequently consults the European Parliament on the main aspects and choices of the CFSP and the common security defence policy.

Beyond assisting the HR, the **European External Action Service** (**EEAS**) has a **key role in the preparation, maintenance and review of sanctions.** In the legislative process regarding sanctions, once having the HR proposals, it jointly with the European Commission prepares a proposal for regulations, which are reviewed and adopted by the Council.
Despite the **European Parliament** had always supported the concept of CFSP, it has a limited role in its decision-making process; it gains authority through the budgetary procedure because it approves the annual budget destined to the CSFP.
Much of the work of Parliament is done by specialized committees with the additional help of the **International Trade Committee** and the **Commercial and Development Committee**. These ones shape the CFSP through reports and opinions they issue by providing recommendations and exchanging views; also, they entertain relations with global or regional organizations, such as the UN, other EU institutions and National Parliaments.
Other competences of the body are consultation, scrutiny and providing of strategic policy inputs and the debates on key elements of the topic with

the High Representative. The involvement of the Parliament helps to enhance the policy's democratic accountability and to create more coherent policies and a more effective CFSP, including also sanctions.

1.4 - The implementation of the CSFP

Among the tools used by the European Union to promote the objective of the CSFP, **restrictive measures or sanctions** must be mentioned[9]

They are instruments to prevent conflict or respond to crises, to promote peace, democracy, respect for the rule of law, human rights and international law.

They allow the EU to **respond to global challenges** and developments that are in contrast with its objectives and values.

Sanctions are not punitive, and they are always targeted at specific policies or activities; the EU aims at minimizing adverse consequences for the population or for non-sanctioned activities or persons. They form part of a comprehensive policy approach involving political dialogue and complementary efforts. These measures are reviewed with regularity and the Council of the European Union decides whether they necessitate renewal, amendments or to be lifted.

Restrictive measures imposed by the Union target governments of third countries, or non-state entities such as enterprises, and individuals such as terrorists.

For most sanctions' regimes, measures are destined at individuals and entities and consist of **asset freezes and travel bans**. The EU can also adopt **sectoral measures**, such as **economic and financial measures,** for example import and export restrictions, restrictions on banking services,

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[9] European Union Sanctions – European Union External Action
https://www.eeas.europa.eu/eeas/european-union-sanctions_en

or arms embargoes like the prohibition on exporting goods set out in the EU`s common military list.

We can highlight three types of sanctions regimes that are active in the European Union.

Firstly, there are **sanctions imposed by the UN** which the **EU translates into EU law**; the UN Security Council can decide on collective sanctions measures for maintaining international peace and security. The EU can also decide on international sanctions within the framework of the Common Foreign and Security Policy; this may be a matter of decisions to jointly implement UN sanctions or independent decisions on sanctions and is done by the Council of the EU adopting a Council decision.

The measures that fall under the competence of the EU are implemented in an EU regulation, which becomes directly applicable in each Member State's law.

Secondly, the **EU may reinforce UN sanctions by applying stricter and additional measures.** In detail, we must focus on the **case DPRK** that is about restrictive measures related to non-proliferation of the weapons of mass destruction.

The nuclear activities of Korea represented a threat to international peace and security, because they undermine the global non-proliferation and disarmament regime of which the EU has been a supporter.

In this context, the EU has implemented the restrictive measures imposed by Resolutions of the UN Security Council and has complemented them through its own measures that target the weapons of mass destruction.

The first set of restrictive measures were introduced with the UN Security Council Resolution 1718 (2006), adopted after DPRK´s first nuclear test. After, for the first time in 2016, the Council of the EU adopted additional autonomous restrictive measures in relation to the case, because it constitutes a threat to international peace and security in the region and

beyond. The EU is determined to combat proliferation and committed to denuclearization, including through the consideration of new restrictive measures.

Finally, the **EU may also decide to impose fully autonomous sanctions regimes**. As example, we can bring the Russia's case that it's about sectoral restrictive measures.
Since March 2014, the EU has imposed restrictive measures against Russia targeting specific economic sectors in response to the illegal annexation of Crimea and Sevastopol and the deliberate destabilization of Ukraine.
The restrictive measures were expanded following Russia's military aggression against Ukraine in February 2022. To hit Russia's revenues to finance its aggression and to deprive its military and industrial complex of key components, the Council expanded the measures, including with new export and import restrictions and additional bans for Russian banks and media outlets.
All the measures adopted by the EU are completely in accordance with international law, including those regarding the respect of human rights and fundamental freedoms.
In 2004, the Political and Security Committee, responsible for the CFSP and CFSD, agreed on some basic principles on the use of sanctions, their implementation and how to measure and control their impact. They are included in the best practices for the effective implementation of restrictive measures, last updated in 2022; and the guidelines on the implementation and evaluation of restrictive measures, last updated in 2018.

Chapter 2 – The sanction regimes

2.1 - The UN's actions and normative references

The **United Nations** (**UN**) is a diplomatic and political international organization whose purposes are to maintain international peace and security, develop friendly relations among nations, achieve international cooperation, and save the following generations from the threat of the war. The conference of San Francisco, California on 25 April 1945 created the organization and represented starting point of the drafting process of the **UN Charter**, which entered into force on 24th October 1945. To pursue the objectives mentioned, the UN has adopted, through the Security Council's resolutions, **restrictive measures** or **sanctions**. The organization defines a sanction as a diplomatic tool crucial for international peace, security, and law, implemented by the Security Council through diplomatic decisions against states, entities, or individuals associated with illegal activities.

The Security Council can take action to maintain or restore international peace and security under **Chapter VII of the United Nations Charter**. In detail, it allows the Council to "*determine the existence of any threat to the peace, breach of the peace, or act of aggression*" and to take military and nonmilitary action to "*restore international peace and security*". Otherwise, the Chapter is used when the Security Council has to authorize a member state, a coalition or regional organization to address the threat – if necessary, with all necessary measures, including the use of force. The use of the wording "*all necessary measures*" is to be taken literally. Any military action performed through land, air, and sea forces is specifically allowed. We are mentioning the right of the Security Council to arrange the use of

both non-armed and armed measures to put its decisions into effect, that refer to the **Articles 41 and 42 of the Chapter VII of the UN Charter**:

Article 41[10]

"The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

Article 42[11]

"Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

2.2 - The main actors

The main actors in this field to be mentioned are the UN Security Council and the Member States.
The competent institution to determine sanctions regime and their structure is the Security Council. It will identify the threat to international

[10] Article 41, Chapter VII, UN Charter
https://treaties.un.org/doc/publication/ctc/uncharter.pdf

[11] Article 42, Chapter VII, UN Charter
https://treaties.un.org/doc/publication/ctc/uncharter.pdf

peace, then define the scope of the proposed sanctions, including relevant exceptions and the identity of the states, groups or individuals against which the sanctions have to be applied.[12]
The body will also list the objective of each sanction's regime and the circumstances in which a designated person or entity should be delisted.
The Security Council generally delegates the administration, execution and monitoring of its sanctions regimes to sanctions committees and bodies pursuant to **Article 29** of the UN Charter.

Article 29[13]

"The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions."

Then, it oversees these committees and amends their mandates and powers case by case, depending on the compliance and behaviour of the targets of the sanctions.
These committees can have a panel of experts responsible for providing relevant information and they will consider written requests from UN Member States to add individuals or entities to the designated list.
The expert panels, consisting of technical professionals, will monitor the implementation of sanctions and then report the results to the relevant committee or directly to the Security Council. The sanctions committee or Security Council can then make any necessary amendments.
It is important to note that the UN itself has no independent means of

[12] UN sanctions – Global Investigation Review
https://globalinvestigationsreview.com/guide/the-guide-sanctions/third-edition/article/un-sanctions
[13] Article 29, Chapter V, UN Charter
https://treaties.un.org/doc/publication/ctc/uncharter.pdf

enforcement, it relies on its Member States instead. Given that many Member States have limited resources, or they are lacking political vivacity to apply to the implementation and enforcement of UN sanctions, there are questions in some instances about their efficacy.
A feature of the UN sanctions framework is the absence of a mechanism for challenging designation imposed by the Security Council; this is considered as a weakness of the UN designation system.

A sanctions regime will then be adopted in a resolution of the Security Council. For it to pass, it must obtain a majority vote from the Security Council, and it must not be vetoed by any of the permanent members of the Security Council.
For what concern the Member States, they are obliged to implement the Security Council's resolutions on sanctions based on the Chapter VII of the UN Charter.
Nowadays, these resolutions include recognition that action taken should be *"in accordance with the Charter of the United Nations and international law including applicable international human rights, refugee and humanitarian law".*
Also, there is increasing recognition that the humanitarian consequences of targeted economic sanctions may lead to collateral consequences; this gives rise to a requirement for sectoral humanitarian exemptions.
They are commonly used in sanctions regimes, because without them there is the risk that targeted sanctions limit humanitarian assistance.
We need to mention the criticism relative to humanitarian exemptions; it may be that humanitarian aid is modified by groups targeted by sanctions, leading to humanitarian organizations indirectly violating sanctions aimed at these groups. There is concern that such groups actively try to exploit this situation by pretending to be people in need of humanitarian assistance, or even humanitarian actors.

The UN sanctions regimes, although having effects on their targets, can have consequences and impacts also on third-party countries (whether a UN Member or not), because they find themselves confronted with "special economic problems" as a result of another state being sanctioned. **Article 50** of the **UN Charter** allows the third party to request special assistance from the Security Council.
The Security Council, in return, will establish a committee to review the request for special assistance submitted and to provide adequate recommendations.

Article 50[14]

"If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems."

However, Article 50 of the UN Charter provides only a right of consultation; the international community has been reluctant in the past and has considered the article an ineffective remedy.

2.3 - From the comprehensive measures to the targeted or smart sanctions

The form of UN sanctions has changed and evolved through the years to meet new objectives. The measures have ranged from **comprehensive economic and trade sanctions**, that prohibited all types of transaction

[14] Art. 50, Chapter VII, UN Charter
https://treaties.un.org/doc/publication/ctc/uncharter.pdf

with sanctioned countries and aimed at blocking commercial trade; to more **targeted measures** such as arms embargoes, travel bans, and financial or commodity restrictions. The Security Council has applied sanctions to support peaceful transitions, to avoid non-constitutional changes, to fight against terrorism, to protect human rights and to promote non-proliferation.

The inability to counter aggressive actions was one of the reasons that led to the design and establishment of effective sanctions**.** Their main aims can be coercing a regime to change its conduct, limiting access to specific resources and/or signalling and stigmatizing.
The international community, by using sanctions, can intervene on the behaviour of countries in the cases in which they are violating human rights, international peace and security.
International sanctions vary based on the state and the context; the main ones include:

- **Financial restrictions;** restrictions related to financial instruments and resources of property of an international public law's subject, a juridical or physical person or other subjects included on the UN Committed Lists;

- **Civil restrictions;** restrictions linked at all the types of transactions about economic resources;

- **Entrance ban;** prohibition of entry, residence and transit of persons included in the UN Committed Lists;

- **Restrictions on the circulation of strategic goods and others ;** prohibition of sale, supply, transfer, export of strategic goods or other goods specified in sanctions legislation or alienation of such or access to them;

- **Restrictions on the provision of tourist services;** ban on offering tourist services for travelling to specific areas;

- **Restrictions on the provision of services relating to specific sanctions** ; prohibition on offering services relating to weapons, munition, military vehicles, and other or services relating to equipment and software for monitoring Internet and telephone communications.

In the early 1990s, the UN experienced adverse humanitarian consequences that were directly/indirectly induced by comprehensive sanctions and it was understood that they were an important but imperfect tool. Since then, the organization has decided to reconsider its goals, measures and consequences of sanctions.
In particular, the reported consequences were linked to the following three sanctions regimes: the comprehensive sanctions imposed against **Iraq** in 1990 because of its invasion and illegal occupation of Kuwait; those against the former **Socialist Federal Republic of Yugoslavia** (FRY) in 1992, in response to its involvement in the war in Bosnia-Herzegovina, and which were extended in 1994 because of FRY's actions against the

Bosnian Serbs; and those imposed on the military junta in **Haiti** in 1994 because of its reversal of the 1991 election results[15].

In all three cases, the sanctions led to deterioration of economic and social conditions but did not lead to changes in the behaviours of the political leaders. The Security Council decided to turn to the use of financial, diplomatic, arms, aviation, travel and commodity sanctions that targeted the responsible fighters and policymakers.
For example, the UN anti-terrorism approach was based only on strategies targeting States and not singular individuals. With the attacks of 1998 at the American Embassies of Nairobi and Dar es-Salaam, for the first time showed to the international community the unpredictability and violence of the terrorists, the situation determined the necessity of a change.
From the beginning of 1991 and continually for the next twelve years, the negative humanitarian impact of sanctions was reported by UN Agencies, NGOs, etc. These bodies documented the continuing nature of the crisis, and by the mid-1990s it became clear that the sanctions were responsible for the human damage.

The transformation of the international system and the new connotations of the war led the UN to look for and actuate new sanctions.
In the mid-1990s, the UN shifted from comprehensive measures to more targeted ones that scholars called **“smart” or “targeted sanctions”**.
This shift to targeted sanctions went hand in hand with more modest and achievable goals such as discouraging adoption of threatening policies or behaviours and asking targets to consolidate peace agreements and human rights norms. Much more attention was brought to the fight against terrorism, especially after the attack of 11th September 2001.
They should be more effective as they target specific individuals, groups

[15] M. Honda, ”UN Targeted Sanctions and Human Rights – Emerging Legal Challenges and Political Concerns”, Waseda Studies in Social Science, Vol.17, No.2, March 2017

and entities with responsibility for breaking international peace and security, and they should have the purpose of avoiding or reducing damage to the innocent target. They were introduced as a more proportionate and nuanced method of pursuing the Security Council's policy objectives; in addition, they are easy to implement, due to their limited nature, and their political support is easier to mobilize since target only those directly responsible.

2.4 - Resolution UNSCR 1267 (1999) and its evolution

The first resolution that celebrated the targeted sanctions regime was the **UNSCR 1267**[16], adopted on 15th October 1999 and strengthened or modified by different resolutions, as a counterterrorism measure with the aim of limiting the Taliban. The main measures adopted are the following:

- **Assets freeze**, the states are required to freeze the funds or other financial and economic resources of designated individuals and entities;

- **Travel ban**, the states are required to avoid the entry in or transit through their territories by designated individuals;

- **Arms embargo**, the states are required to prevent direct or indirect supply, sale and transfer from their territories or by their nationals outside their territories, of arms and related material, spare parts,

[16] Security Council Committee pursuant to resolutions 1267 (1999) 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities - UN Security Council https://www.un.org/securitycouncil/sanctions/1267

assistance or training related to military activities, to designated individuals and entities.

With it, the UN wanted to highlight the real danger represented by terrorism and encourage the countries to put the fight against this organization on top of their foreign policy's Agenda.
The **Resolution 1267** previews the imposition of mired financial sanctions, army embargoes, assets freeze and freedom of movement's restrictions against Taliban in Afghanistan who granted the protection to Osama bin Laden and his collaborators.
The importance of this resolution is incorporated in the creation, within the Security Council, of the **1267's Committee**; it had the aim of designating the individuals and entities to insert in or cancel from the UN Lists, through the listing and de-listing processes and to monitor the correct application of international sanctions.

The resolutions imposed a series of demands on member states as well as on Afghanistan under Chapter VII of the UN Charter. The first included that the Taliban must not allow territory under its control to be used for terrorist training and must turn over Osama bin Laden to the appropriate authorities.
In addition, all countries must deny flight permission to all Taliban operated aircraft, must freeze all financial resources that could benefit the Taliban and must report back within 30 days on what measures they had taken.
On December 19th, 2000, **Resolution 1333**[17] strengthened the regime and imposed additional conditions, such as, the Taliban must eliminate all illicit cultivation of the opium poppy; all countries must prevent the sale

[17] UN Security Council Resolution 1333, 2000
https://www.un.org/securitycouncil/s/res/1333-%282000%29

of all military equipment to the Taliban controlled territories, must restrict the entry and transit of all high-ranking Taliban officials through their territories. At the same time, it subjected Al-Qaida to an asset freeze and financial embargo.
Resolution 1333 also requested that the Secretary-General consult with the 1267 Committee in appointing an expert committee "to make recommendations" to the Security Council concerning the monitoring of sanctions, "to consult with" and "report on" Member States regarding sanction implementation and enforcement, and "to review the humanitarian implications."
Finally, this Resolution required the 1267 Committee to maintain lists of parties "designated as being associated with Osama bin Laden" and to consider "requests for exceptions" to the sanctions based on humanitarian or protective need.

An improvement to the Regime came on July 30th 2001, with **Resolution 1363**[18], which called for the creation of Monitoring Group based in New York; it would be composed by experts that would report to the 1267 Committee, as well as a Sanctions Enforcement Support Team that would report to the Monitoring Group in order to control sanction implementation, assist states bordering Taliban controlled territories, and make recommendations concerning violation of sanctions measures.
With **Resolution 1373**[19] adopted 28th September 2001, the Security Council has imposed to the Member States the adoption of more complex measures; it brought in force a general strategic action plan for the prevention and repression of international terrorism. In particular, the States had to introduce in their national orders the crime of terrorism's

[18] UN Security Council Resolution 1363, 2001
https://www.un.org/securitycouncil/s/res/1363-%282001%29
[19] UN Security Council Resolution 1373, 2001
https://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf

financing and the freeze of assets or economic resources of people involved.

The Council has instituted the Counter-Terrorism Committee, aimed at monitoring the actuation of the resolution based on reports presented by the Member States. Another task is, through the information provided by the countries and regional organizations, founding individuals, groups and entities connected to Al-Qaeda.

Resolution 1390[20], adopted on January 16th 2002, imposed an arms embargo on Al-Qaida and a travel ban on both Taliban and Al-Qaida. Thus, sanctions that were associated only with Afghan territories under Taliban's control now covered "Osama Bin-Laden, members of Al-Qaida and Taliban and other individuals, groups, undertakings and entities associated with them".

Resolutions 1452, 1526, and 1617 were subsequent upgrades to the Regime. The first safeguarded certain funds, assets, or resources from freezing that were necessary to purchase food or housing, or pay utilities, medical expenses, taxes, insurance, professional fees, or other extraordinary expenses. The next created an Analytical Support and Sanctions Monitoring Team, replacing the earlier Monitoring Group, and required periodic reports to the 1267 Committee concerning Member State implementation or non-compliance of sanctions measures while also incorporating recommendations for improvement. The last requested that proposals be submitted with a statement of case, in addition to information identifying the individual's association with the Taliban, Al-Qaida or Osama Bin-Laden as already required by Resolution 1526. Resolution 1617 also requested that states inform listed parties of the measures against

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[20] UN Security Council Resolution 1390, 2002
https://www.un.org/securitycouncil/s/res/1390-%282002%29

them, the procedures involved in the listing and delisting schemes, as well as the availability of exemptions.

A mechanism for the appeal of listing was missing until 2006, when the Security Council, through the **Resolution 1730**[21], requested that the Secretary-General introduce a "**Focal Point**" to accept delisting petitions and inform a petitioner of his/her listing status and procedures. After, with **Resolution 1735**, it was affirmed that listing requests be submitted with a standardize cover sheet, a statement of case supporting that the listing criteria had been met, and any information that demonstrated a connection between the proposal individual and an already listed party. The Resolution also outlined criteria to be evaluated when assessing delisting requests.

Another body was established to review delisting requests, the **Office of the Ombudperson**; it would be an individual "of high moral character, impartiality and integrity with high qualifications" that would act impartially and independently.

A major organizational change to the Regime came in 2011, the Security Council unanimously adopted **Resolutions 1988 (2011)** and **1989 (2011)**[22]; they decided that the list of individual and entities subjected to measure would be split in two. The Committee was called the Al-Qaeda Sanctions Committee, mandated to oversee implementation of measures against the Al-Qaeda associated. A separate Committee was established with the aim of overseeing the implementation of measures against the Taliban's associated.

[21] UN Security Council Resolution 1730
https://www.un.org/securitycouncil/s/res/1730-%282006%29
[22] UNSC Committee pursuant to res. 1267-1989-2253
https://www.un.org/securitycouncil/sanctions/1267

On 17th December 2015, **Resolution 2253[23] (2015)** was adopted, and it expanded the listing criteria to include individuals and entities supporting the Islamic State in Iraq and the Levant (ISIL or Da'esh). The resolution has directed the Monitoring Team to submit reports on the global threat posed by ISIL, Al-Qaeda, and associates. Member States are encouraged to designate national focal points on issues related to the implementation of measures previewed by the resolution, and report to the Committee on obstacles to the correct implementation of the resolution.

In conclusion, **Resolution 2610[24]** was adopted on 17th December 2021 with the objective to reaffirm assets freeze, travel bans and arms embargoes affecting ISIL & Al-Qaeda Sanctions List. **Paragraph 2 to 4 of Resolution 2610** include the so-called "Listing criteria", that allow to add names to the ISIL (Da'esh) & Al-Qaeda Sanctions List. Actions or activities indicating that an individual, group, undertaking or entity is associated with the previous mentioned terrorist organizations include:

- Participation in the financing, planning, facilitating, preparing or perpetrating of acts or activities in support of;
- Supplying, selling or transferring arms and related material to;
- Recruiting for, or supporting the terrorist organizations or any cell, affiliate, splinter group or derivate thereof.

[23] UN Security Council Resolution 2253, 2015 https://www.un.org/securitycouncil/s/res/2253-%282015%29

[24] UN Security Council Resolution 2610, 2021 https://www.un.org/securitycouncil/content/sres26102021

2.5 - Criticism

It has been affirmed that sanctions regime caused difficulties to the population of Afghanistan under the Taliban regime; because they were heavily reliant on international food aid, while failing to satisfy any of its demands. After the US invasion of Afghanistan in 2001, the sanctions have been applied to individuals and organizations in all parts of the world.

The increased use of this type of sanctions[25], especially after the 9/11 attacks, has led to concerns grounded in the rule of law and in fundamental human rights.
In 2008, Council of Europe Commissioner for Human Rights, Thomas Hammarberg, affirmed the necessity of changing the arbitrary procedures for terrorist blacklisting. These types of measures have affected different rights of targeted individuals, including the right to privacy, to property, to travel or freedom of movement and the right of association; there has been no possibility to know all the reasons for the blacklisting, eliminating the right to an effective remedy and due process.
The same path was followed by the UN Special Rapporteur on the promotion and protection of human rights, Martin Scheinin; he claimed that terrorist listing procedures did not meet due process requirements.
A possible solution was proposed, the introduction of an independent review body composed by independent experts which would be part of the Security Council decision-making procedure, or even to abolish the 1267 Committee and move the question of listing to the Counter-Terrorism Committee's jurisdiction, on the basis of resolution 1373 (2001).
Given the lacking standards of transparency on the process of listing, and the number of the list's components, the UN Office of Legal Affairs had

[25] 8962nd Meeting (AM),"*Concerned by unintended negative impacts of sanctions, speaker in Security Council urge action to better protect civilians, ensure humanitarian needs are met*"- United Nations Security Council, 7th February 2022
https://press.un.org/en/2022/sc14788.doc.htm

some doubts about the obligation of UN Security Council to ensure that rights of due process are made available to the individuals or entities targeted with sanctions.
The report, published in March 2006, was theoretical and without references to any of the cases.
While highlighting the fact that the UN was a supra-national body to which none of the human rights treaties were targeted, it did find that there were "*legitimate expectations that the UN itself, when its action has a direct impact on the rights and freedoms of an individual, observes standards of due process (...) on which the person concerned can rely.*"

As said, sanctions and unilateral coercive measures can have negative impacts on populations that are meant to be protected; for this reason, efforts must mitigate this situation.
Various resolutions make it evident that sanctions are not mired to have adverse humanitarian consequences for civilians; the states can minimize the problem reporting requirements on humanitarian actors by keeping the domestic legislation close to Council language. Other actions can be the monitoring by the Council's sanctions committees for possible negative impacts and increasing cooperation with private sector and humanitarian actors.
The international community, for mitigating the humanitarian impacts of sanctions, must continue to review the way sanctions are designed and implemented; in this way, they can ensure that measures applicable in armed conflicts do not impede the assistance and protection of the civil population by humanitarian organizations.

The targeted sanctions' measures have been under growing challenge. Frequently, national and regional courts have found errors with the listing procedures, as well as with the procedures for challenging designations.
Additionally, human rights advocates have criticized the UN, by affirming

that the UN designation procedures violate the norms of due process. As a result, Member States have found themselves in a difficult position: being forced to choose between violating the domestic courts' rules and decisions, and their obligations to implement binding Chapter VII decisions.

In the end, the issue is not only legal, but there is a political problem associated with the legitimacy of targeted sanctions and of actions taken under Chapter VII by the UN Security Council.

There is no contradiction between the defence of fundamental human rights and the maintenance of international peace and security, in fact the UN Charter accords primacy to both goals in Article 1 with the statement of *"the fundamental purposes of the organization"*.

2.5.1 - Human Rights Deficits: Due Process Rights, Substantive Rights and Equal Protection

The 1988 Taliban Sanctions Regime and 1267/1989/2253 Al-Qaida/ISIL Sanctions Regime impact different internationally recognized human rights found in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms.

As stated in its Charter, one of the UN's principal goals is "to reaffirm faith in fundamental human rights, in dignity and worth of the human person, in the equal rights of men and women and of nations.

The Charter repeated the concept in both Articles 1 and 55, where it stated that the UN is to promote and encourage "universal respect for, and observance of human rights and fundamental freedoms for all without

distinctions". Despite the improvements made over the years to mitigate the Sanctions Regime's impact on human rights, violations still exist.

For what concerned the due process rights, we must start from the concept that everyone has the right to be presumed innocent until he/she is granted a fair and public trial before a competent, independent and impartial tribunal. A fair trial encompasses minimum guarantees to a person, such to be pre apprised of the case, to have the opportunity to obtain counsel and interpreters, to prepare a defence, to attend the proceedings, to confront the witnesses without being compelled to testify against him or herself, and to be protected a second trial for the same case. Once the tribunal reaches a decision, the subject must have the opportunity to appeal and there must be a remedy available for any deprivation of rights. The individuals or entities targeted by the Sanctions Regime are deprived of certain rights through a process that does not respect the minimum due process requirements. The justification given by the Security Council is that the measures are "preventative in nature and not reliant upon criminal standards set out under national law". Listing designations are political findings of association with terrorist regimes, and they are intended to be temporary, so they do not require the same standards associated with criminal prosecutions. The open-endedness of UN sanctions has had serious punitive effects; this led courts to find violations of due process.

The decision-making process of imposing the sanctions should be viewed in light of minimum due process standards afforded to those facing deprivation of rights. Those targeted parties do not have a way through which they can be heard prior to the imposition of sanctions. The presumption is not one of innocence, but rather, of guilt. The proceedings only require the participation of Member States, sanctions Committee, and another UN established mechanism. The target is unable to select his/her representative in the proceedings and it is not

notified of the case against him/her until they are listed.
As a result of the Regime's lack of due process safeguards, the deprivation of substantive rights resulting from imposition of sanctions can be characterized as arbitrary.

When we talk about substantive rights, we may start from the concept that all the people are entitled to civil, political, economic, social and cultural freedoms.
For example, a travel ban restricts one's right to freely move and, an asset freeze directly impacts one's individual right to the properties frozen.
In general, sanctions harm people's reputation, limiting their ability to obtain employment and deprive them of economic development. The effects on the listed individuals or entities' reputation certainly reflected into the family life and privacy, causing disequilibrium in a third context.

In the end, taking into account equal protection, we can affirm that all people are born equal, must be seen equal before the law, and are entitled to the applications and protections of the law, without distinctions.
In 2007, the Special Rapporteur Martin Scheinin highlighted the call on states to ensure that counter terrorism measures do not discriminate in purpose or effect.
Relating the fight against terrorism, it is considered a legitimate aim, so it must be assessed in light of whether the practice is a "suitable and effective means of countering terrorism" and what adverse effects flow from the practice.
In order to make an effective and suitable practice, it must be broad enough to include potential terrorists but narrowly tailored to exclude those who do not constitute a concern. Since the practice is over-inclusive, unsuitable

and ineffective, and therefore, disproportionate in that it affects innocent people without reaching the principal aim: counter terrorism[26].

2.6 - The European Union's context

The EU has imposed sanctions against individuals, groups and entities involved in terrorist acts, including Al-Qaida, ISIL/Da'esh, Hamas and the Palestinian Islamic Jihad. The EU Council adopted implementing acts in November 1999, and then regularly adopted updates in order to follow the 1267 Committee's updates. The European measures included the freezing funds and other financial assets of Osama Bin Laden and his associates, as designated by the UN.

To implement the UN's resolutions, a series of **Common Positions** were created with the aim to improve the coordination and cooperation between Member States. It's about Community acts adopted by the Council of the Union, which require Member States to conduct national policies in accordance with the approach previewed by the Union. They are not directly applicable in the Member States: their implementation requires the adoption by each Member State of concrete domestic provisions in the appropriate legal form.

The **initial Common Position was 1999/727/CFSP**, concerning restrictive measures against the Taliban. It was abrogated by **Common Position 2002/402/CFSP** when the United Nations extended the scope of the *Taliban Resolution* to Al-Qaida, Osama bin Laden and/or the Taliban wherever located. The UN measures imposed to the listed individuals and organizations introduced by the *Taliban Resolution* are simply copy-

[26] Special Rapporteur on Counter Terrorism and Human Rights, "*Annual Reports to the Human Rights Council and General Assembly*" https://www.ohchr.org/en/special-procedures/sr-terrorism/annual-reports-human-rights-council-and-general-assembly

pasted into the European Common Positions.
The European Union first adopted restrictive measures against terrorism phenomenon in December 2001, after the terrorist attacks in the US. The EU list was established in order to implement UNSCR 1373 (2001), adopted under Chapter VII of the UN Charter. To that end, the Union adopted the Council **Common Position 2001/931/CFSP**[27] on the application of specific measures to fight terrorism and **Council Regulation (EC) no.2580/2001**[28] on specific restrictive measures directed against persons and entities with a view to fighting terrorism.

Common Position 2001/931/CFSP stipulates that the European Community has to improve police and judicial cooperation and, to impose the freezing of funds, financial assets or other financial resources of the people, groups and entities listed. More in detail, it lays down the listing's criteria and identifies the actions that constitute terrorist acts. All the individuals, entities or groups on the list are subjected to enhanced measures relating to police and judicial cooperation in criminal matters in accordance with **Article 4** of the Common Position.

Article 4[29]**:**

"Member States shall, through police and judicial cooperation in criminal matters within the framework of Title VI of the Treaty on European Union, afford each other the widest possible assistance in preventing and combating terrorist acts. To that end they shall, with respect to enquiries and proceedings conducted by their authorities in respect of any of the

[27] European Union, Common Position 2001/931/CFSP
https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0093:0096:EN:PDF

[28] Council Regulation (EC) no.2580/2001
https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0070:0075:EN:PDF

[29] See Common Position 2001/931/CFSP

persons, groups and entities listed in the Annex, fully exploit, upon request, their existing powers in accordance with acts of the European Union and other international agreements, arrangements and conventions which are binding upon Member States."

Additionally, those targets, which are also subjected to **Articles 2 and 3** and which are also on the list provided for in Council Regulation (EC) no.2580/2001 are subject to asset freeze.

Article 2[30]:

"The European Community, acting within the limits of the powers conferred on it by the Treaty establishing the European Community, shall order the freezing of the funds and other financial assets or economic resources of persons, groups and entities listed in the Annex."

Article 3[31]:

"The European Community, acting within the limits of the powers conferred on it by the Treaty establishing the European Community, shall ensure that funds, financial assets or economic resources or financial or other related services will not be made available, directly or indirectly, for the benefit of persons, groups and entities listed in the Annex."

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[30] See Council Regulation (EC) no.2580/2001

[31] See Council Regulation (EC) no.2580/2001

Common Position 2001/931/CFSP applies to the targets involved in terrorist acts, when a decision has been taken by a competent authority in respect of the target concerned.
Such decision may concern the investigation 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 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.

We must define the meaning that assumes "terrorist act" in the context of the Common Position. The **Article 1 paragraph 3**[32] provide the meaning:

"3. (...)'terrorist act' shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organization, as defined as an offence under national law, where committed with the aim of:

(i) seriously intimidating a population, or

(ii) unduly compelling a Government or an international organization to perform or abstain from performing any act, or

(iii) seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization:

(a) attacks upon a person's life which may cause death;

(b) attacks upon the physical integrity of a person;

(c) kidnapping or hostage taking;

(d) causing extensive destruction to a Government or public facility, (...);

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[32] See Common Position 2001/931/CFSP

(e) seizure of aircraft, ships or other means of public or goods transport;

(f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons (...);

(...) (k) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group."

To correspond to the definition given, these acts must be carried out with the aim of seriously intimidating a population, or unduly compelling a government or an international organization to perform or abstain from performing act, or seriously destroying the fundamental constitutional, political, economic or social structures of a country or an international organization.

For what concern the Regulation 2580/2001, it came into effect to implement Article 2 of Common position 2001/931/CFSP. It provides for a freezing of all funds, other financial assets and economic resources belonging to the persons, groups and entities concerned. In addition, it establishes that no funds or other types of assets may be made available to them, whether directly or indirectly. It also provides for humanitarian exemptions allowing the use of funds in certain circumstances such as payments for foodstuffs, medicines or legal fees.

The EU list is separate from the EU regime implementing UN Security Council Resolution 1390 (2002) on the freezing of funds of persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban (Council Regulation (EC) No 881/2002).

During 2007, the Council conducted a review and consolidation of its listing and delisting procedures of persons, groups and entities pursuant to Common Position 2001/931/CFSP and Council Regulation (EC) no.2580/2001.
As a result, concrete improvements were made in order to establish a more transparent and efficient procedure. The main elements of the applicable procedure include a new working party, the "Working Party on implementation of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism" (CP 931 Working Party). It has been established and charged with examining proposals for listing and delisting and with preparing the regular review of the lists by the Council as mentioned in Article 1 paragraph 6.
The CP 931 Working Party substitutes the informal consultation mechanism among Member States that has been in place since 2001.

Article 1, paragraph 6[33]:

"6. The names of persons and entities on the list in the Annex shall be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them on the list."

Persons, groups and entities can be included on the list on the basis of proposals submitted by Member States or third States. All relevant information should be presented in support of proposals for listings. This information is circulated to the delegations of Member States for discussion in the CP 931 Working Party.
It examines information with a view to listing and delisting persons,

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[33] See Common Position 2001/931/CFSP

groups and entities, and to assessing whether the information meets the criteria set out in Common Position. It will then make recommendations for listing and delisting to be reflected in the necessary legal instruments, which will be adopted by the Council and published in the Official Journal.

For each person, group and entity subject to restrictive measures under Council Regulation, the Council provides a statement of reasons which allow those listed to understand the reasons for their listing and to allow the Courts of the European Union to exercise their power of review where a formal challenge is brought against the listing. The statement of reasons makes clear how the criteria set out in Common Position 2001/931/CFSP have been met. It begins with a statement that the person, group or entity concerned has been involved in terrorist acts. It includes some specific elements, such as terrorist acts committed with reference to relevant provisions of Common Position 2001/931/CFSP; the nature or identification of the competent authority which took a decision in respect of the person, group or entity concerned; and the type of decision taken, with reference to the relevant provisions of Common Position 2001/931/CFSP.

After a listing decision has been taken by the Council, the Council Secretariat informs each target subjected to restrictive measures under Council Regulation, by sending a letter of notification. In addition, a notice is published in the Official Journal informing the targets about these elements.

The Council reviews the list at regular intervals and the Member States inform each other about new facts and developments relating to listings.
For the purpose of the review, the CP 931 Working Party carries out a thorough assessment as to whether the grounds for each listing are still valid. It considers all relevant information, including the person's, group's

or entity's past record of involvement in terrorist acts, the current status and the perceived future intentions. Following this assessment, the CP 931 Working Party makes recommendations to be reflected in the necessary legal instruments to be adopted by the Council. The targets concerned are informed of the outcome of the review with a new letter of notification. Finally, it is possible for the Member States or a third State that had originally proposed the listing question, to request for delisting. This procedure is appropriate wherever the criteria for listing set out in Common Position are no longer met.

Chapter 3 – The relevant European Case Law

3.1 - Introduction to the Kadi case

The Kadi case is one of the most discussed with respect to the others treated by the European Court system.
The peculiarity is that both judgement of the **Court of First Instance (CFI)** and that of the **European Court of Justice (ECJ)** provoke a strong criticism, but there is not a direct way to affirm that one position or the other is unconditionally correct.
In this case is taken into consideration the interplay between UN law, that has begun to consider the individual as owner of rights but also as responsible for acts, and EU law; the possibility of conflicts with EU law, for which growing empowerment of the individual is a main element, is rising simultaneously.
In addition, it tests the supremacy's concept, both in international law and in the context of European law. It makes clear that, when the relationship between international and EU law is compared with the one of EU law and Member States' law, in both cases EU law should prevail.

We must highlight a difference: supremacy of EU law over the law of Member States is a necessary element for autonomy and effectiveness, and at the same time leaving intact the integrity of the law is potentially disruptive for the latter order.

The picture changes when it is introduced, along with the supremacy notion, the question of hierarchy; it is meant between different legal systems, UN system and EU order at one hand, and between general legal orders and human rights systems such as the one of the **European Convention on Human Rights (ECHR)**. It is interesting to notice that the CFI wanted to show deference towards Security Council resolutions,

while the ECJ rejected any hierarchy between the UN system and the EU order, although it did not put the latter first.

Finally, the case deserves attention because it highlights two obstacles of human rights law and policy: on one hand there is pressure for more refinement of human rights protections; on the other, the question arises whether we will reach the limits of human rights protection and whether new challenges, such as international terrorism, could require a partial reversal of this process.

The origin of the problem may lie in the attempt by the Security Council to fight the challenge of terrorism more effectively, and in line with the rules of human rights generally recognized. Both aspirations led to the adoption of the mentioned targeted sanctions.
The sanction regime has been modified several times in order to make it effective and to take into account the human rights of the subjects. At international level, it can be affirmed that effective progress has been accounted towards a sort of rights' protection, after the judgement of Kadi I by the ECJ.
It has been also criticized to be unacceptable in different aspects, but the real reason lies in the fact that the Sanction Committee operates like a Criminal Court without providing similar guarantees. Also, when the facts are assessed and legally qualified there is no transparency; the deliberative process through which people and entities are listed and delisted, takes place behind closed doors[34].

The challenges to the EU sanctions were rejected considering the CFI's interpretation of the relationship between the UN Charter and Community law. According to the CFI, **article 103 of the UN Charter** stipulates that

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[34] C. Michaelsen, *"Kadi and Al Barakaat v Council of the European Union and Commission of the European Communities - The incompatibility of the United Nations security council's 1267 sanctions regime with European due process guarantees".*

Member States' obligations under the UN Charter and Security Council resolutions prevail over all other conventional obligations.

Article 103[35]:

"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail"

The CFI's line of reasoning implied, firstly, that the Community adopts all necessary provisions to allow its Member States to fulfil their obligations, including the ones to implement UN counterterrorism sanctions.

The key question was whether the rights in question had the status of ***jus cogens,*** meaning a group of customary norms to protect the fundamental values of international community as a whole.
In relation to the case considered, the CFI stated that the applicants have not been deprived of that right. The application of the jus cogens test received considerable criticism for being vague.
It introduced an element of uncertainty: the jus cogens; it is not a well-established and defined feature of the case law, and it is not commonly used in the European context.
For instance, the CFI determined that in some circumstances the right to property may form part of jus cogens, and it also failed to make clear how applicants may prove whether jus cogens norms are at stake or not in each case.

[35] Article 103, Chapter XVI of United Nations Charter
https://www.un.org/en/about-us/un-charter/chapter-16

3.2 - The History of the case

3.2.1 - Kadi I

The EU implements all sanctions imposed by the UNSC. In particular, when we consider counter-terrorist sanctions against individuals or entities, the EU has taken over the listing of terrorist suspects on behalf of its Member States.
The EU implements the 1267 Sanctions Regime by instituting asset freezes, travel bans and arms embargoes against those included on the UNSC list. Moreover, the EU may impose autonomous sanctions against suspected individuals and entities, in line with its obligations under UNSCR 1373. The EU insists on the preventative nature of the restrictive measures, and it applies sanctions only within the jurisdiction of the EU.

After the entry into force of the Lisbon Treaty, the EU acquired explicit competence to adopt restrictive measures against individuals and legal persons, groups and non-state actors, under **Articles 75 Area of Freedom, Security and Justice (AFSJ**) and **215(2) CFSP** of the **TFEU**. These provisions are separate legal bases with different aims and functions. Unlike Articles 60 and 301 of the Treaty establishing the European Community (ECT), which they replace, Articles 75 and 215 TFEU establish different procedures for the adoption of sanctions. Article 75 TFEU provides a clear EU competence to adopt autonomous financial sanctions against home-grown terrorists or EU-internal terrorists; this was lacking before the Lisbon Treaty, when the Council could rely only on third-pillar instruments (police and judicial cooperation in criminal matters) and was unable to adopt measures to freeze assets, which remained a competence of the Member States. Article 215 is included in Part V of the TFEU dealing with the Union's external action and, besides

providing for the adoption of sanctions against third countries, its second paragraph includes the possibility of sanctions against individuals.

The EU has imposed sanctions on individuals, groups and entities involved in terrorist acts by adopting different common positions in order to follow the 1267 UNSCR Resolution and to improve the coordination and cooperation between Member States.
It’s about Community acts adopted by the Council of the Union, which require Member States to provide concrete domestic provisions in the appropriate legal form.

The case at stake delt with the implementation of the UNSC Resolution 1267 in the European Union. The ECJ, in its judgement, reviewed the treatment of the case by the CFI, and then divided its conclusions into different but interdependent parts:

- The competence of the Council of the EU to adopt Regulation 881/2002 and others that have followed to amend it, for the freezing of financial resources by states of persons related to organizations considered to engage in international terrorist activities;

- The compliance of the regulation and its provisions with certain fundamental rights.

With regard to the first part, the ECJ found that the Council of EU was competent to adopt the resolution, while it rejected the information of the CFI that the courts of the European Communities had no jurisdiction to review EU regulations implementing UN Security Council resolutions.

Instead, it held that regulations by the Council implementing international legal instruments must comply with the fundamental principles of European Community law including human rights law.

The ECJ engaged its power to review lawfulness of a regulation with regard to fundamental rights, whether or not that regulation was adopted to give effect to international law.

Regarding the nature of the review, the ECJ held that it must ensure the full review of EU legal acts, including those implementing Security Council's resolutions. Accordingly, the ECJ found a breach of Kadi's rights to property and judicial protection, mainly caused by the EU's absolute failure to inform him of the reasons for the listing. Hence, he could not submit his views to challenge the freezing: he was deprived of the rights to defence and effective judicial review.

It may be useful to recall some elements for a better understanding of the events.

In 1999, the UN Security Council passed Resolution 1267 under chapter VII of the UN Charter. This act previewed the freezing of the assets of individuals and organizations suspected of having links with the Taliban. Resolution 1330 (2000) extended the sanctions regime to Al-Qaida and all subjects linked, regardless of a connection with Afghanistan or the Taliban.
A number of resolutions have been passed since, refining and correcting the system, up to Resolution 2083 (2012), whose pages provide the most comprehensive overview of the sanctions machinery.

Resolution 1730 (2006) established a Focal Point entrusted with the channelling of delisting applications to the Sanctions Committee. To assist with these requests, Resolution 1904 (2009) established the Office of the

Ombudsperson, replacing the focal point with respect to Al-Qaida sanctions.

The Kadi I case is composed of two main judgements, firstly by the Court of First Instance and secondly by the European Court of Justice; both Courts, as we will notice, reached different conclusions. After 9/11, more precisely from **19th October 2001** Mr. **Yassin Abdullah Kadi**, a wealthy Saudi Arabian citizen with economic interests in Europe, more in detail in Sweden, found himself on the list of the Sanctions Committee.

On **27th May 2002** the measure was transposed into the Community order: the Council, acting within the Second Pillar to endorse both Resolutions 1267 and 1330, adopted **Common Position 2002/402/CFSP**. In the same day, the **Commission**, acting on the basis of **articles 60, 301 and 308 ECT** (articles 75, 215 and 352 of TFEU), adopted **Regulation 881/2002;** in this way, the EU sanctions regime, mirroring the relevant Security Council provisions, was extended to Mr. Kadi[38]. These articles endowed the Council with the exceptional power to interrupt economic relations with a third country and limit the freedom of movement of capital within the Community, in situations of urgency certified by a CFSP measure. The regulations aimed to enforce economic sanctions against individuals and organizations identified by the Sanctions Committee.

Article 60[36]:

1. If, in the cases envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, ***take the necessary urgent measures on the movement of capital and on payments*** *as regards the third countries concerned.*

2. Without prejudice to Article 297 and as long as the Council has not taken measures pursuant to paragraph 1, a Member State may, for serious political reasons and on grounds of urgency, take unilateral measures against a third country with regard to capital movements and payments. The Commission and the other Member States shall be informed of such measures by the date of their entry into force at the latest.

The Council may, acting by a qualified majority on a proposal from the Commission, decide that the Member State concerned shall amend or abolish such measures. The President of the Council shall inform the European Parliament of any such decision taken by the Council.

Article 301[37]:

Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent

[36] Article 60, Part Three, Title Three of the Treaty establishing the European Community https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A11997E060

[37] Article 301, Part Six of the Treaty establishing the European Community https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A11997E301

measures. The Council shall act by a qualified majority on a proposal from the Commission.

Article 308[38]:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

Subsequently, by application lodged on 18th December 2001, Mr. Kadi claimed a **lack of competence** to adopt **Regulations nos. 467/2001 and 2062/2001** on the basis of articles 60 and 301 ECT (Articles 72 and 215 of TFEU): in Kadi's view, only the Union could have adopted similar acts, using a CFSP source.
The **grounds for annulment**, on which the claim was based, referred to the alleged **violation of fundamental rights**: rights to be heard, property, and effective judicial review, as well as a breach of proportionality.
The fact that the individual was not informed about the elements against him constitutes a deprivation of fundamental right to effective judicial protection (**art. 47 Charter and articles. 7-13 ECHR**).

[38] Article 308, Part Six of the Treaty establishing the European Community
https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A12002E308

Article 47[39]:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 7[40]:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

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[39] Article 47, Title VI of the European Charter of Fundamental Rights https://fra.europa.eu/en/eu-charter/article/47-right-effective-remedy-and-fair-trial#:~:text=Everyone%20is%20entitled%20to%20a,being%20advised%2C%20defended%20and%20represented.

[40] Article 7 of European Convention on Human Rights https://fra.europa.eu/it/law-reference/european-convention-human-rights-article-7

Article 13[41]:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

When **Regulation 467/2001 was replaced by Council Regulation no.881/2002** reference was made also to article 308 ECT (article 352 TFEU).

The CFI held that the Regulation was valid; it found out that the power to sanction individuals was provided by article 308 ECT (art. 352 TFEU) which allows the Council to grant the Community the powers to reach determinate goals. As far as fundamental rights were concerned, the CFI affirmed that a state could not review a UNSC resolution within its legal order.
In addition, the CFI determined that a Security Council resolution was binding on all UN Members (**art. 25 UN Charter**) and prevailed over all treaties; they must be carried out even if in conflict with EU treaties.
The Member States, being parties to the UN Charter before European Treaties, are required to fulfil the Charter's obligations; this means that the resolution prevailed over the EU law because the Union was not bound under international law, but it was bound in its own law.
The Court, in conclusion, affirmed that there was not an infringement of a jus cogens norm by the resolution.

In 2005, Mr. Kadi argued that the EU Council and Commission of the European Communities violated his right to **fair trial**, as well as the

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[41] Article 13 of the European Convention on Human Rights
https://70.coe.int/pdf/convention_eng.pdf

principle of proportionality and his **right to property and judicial review**, by imposing sanctions against him of which he could not challenge the basis.

In the same year, the CFI denied Kadi's claims, affirmed sanctions, and confirm the authority of the Security Council's Chapter VII powers, reasoning that **assets freeze did not violate fundamental rights** or proportionality because they were precautionary, temporary, important to fighting terrorism, and permitted exemptions.

In this framework, the role of the Advocate General's Opinion[42] is important to be mentioned. The AG Maduro made conclusions related to the appeal of the Kadi judgement of the CFI before the ECJ. Before the ECJ issued its judgement, **Advocate General Poiares Maduro** issued an opinion on Kadi's case. He argued that the use of article 308 ECT (art. 352 TFEU) was unnecessary, as article 301 ECT (art. 217 TFEU) also allowed sanctions on individuals from third countries. Maduro also affirmed that the EC should ensure that fundamental rights are protected within the EC legal order, to grant effect to the UNSC regulation.

The case was appealed to the ECJ, who handed down the decision on 3rd September 2008.
The ECJ took the original judgement of CFI and reversed it; the latter referred to a core of constitutional principles included in the rule of law in the EU, which cannot be prejudiced by unconditional compliance with international obligations. Since the legality of EU acts depends on their conformity with the minimum standards of fundamental rights protection, EU courts can review them on that basis.

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[42] Opinion of Advocate General Poiares Maduro delivered on 16 January 2008, Case C-402/05 P, Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities.
https://curia.europa.eu/juris/document/document.jsf?text=&docid=69710&pageIndex=0&doclang=EN

The GC affirmed that the regulations enjoyed immunity from judicial review, since they intended to implement international obligations which left no margin of discretion to the EU.
The GC noted that, since the EU is not a Member of the UN, it is not bound by the UN Charter by virtue of public international law. The EU is bound by the UN Charter by virtue of EU law itself.
By adopting Regulation No. 881/2002, the EU replaced its Member States in fulfilling their obligations under the relevant UN Security Council Resolutions.
On the same side, we have to mention the CFI; it considered that the regulation cannot be questioned, but only in the case of jus cogens violation, there is the possibility to control and review the UN Resolution.

In addition, the GC reasoned that the EU also became bound by the UN Charter; as a result, the GC was precluded from examining the validity of Regulation No. 881/2002 under EU law, since such examination would run against the primacy of the UN Charter.
The GC found that the validity of UN Security Council Resolutions could still be examined in the light of jus cogens: a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.
The level of protection afforded by the fundamental rights was significantly lower with respect to the one granted under EU law and, for the case at stake, this meant that none of the applicants' fundamental rights had been violated.
Firstly, jus cogens only protected the applicants against arbitrary deprivations of property, which is not the case considered. Secondly, whilst acknowledging that the applicants had no right to be heard before the UN Sanctions Committee, the GC found that such limitation was, for the purposes of jus cogens, acceptable in light of the objectives pursued

by the UN Security Council. Thirdly, the GC reached the same conclusion regarding the right to effective judicial protection. As a result, the GC dismissed the action for annulment brought by the applicants.

The ECJ recalled that the EU must respect international law in the exercise of its powers. In the case considered, the approach followed by the GC ran against to the principle that all EU acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the ECJ to review in the framework of the complete system of legal remedies established by the Treaties. An international obligation that is in breach of those constitutional principles cannot form part of the EU legal order.
The ECJ annulled Regulation No. 881/2002 in so far as it concerned the appellants, since their rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected.
Up to this stage, the ECJ had not reviewed the merits of the Security Council's decisions: the failure to safeguard the individual's rights was deemed a sufficient cause for annulment, regardless of whether the listing was warranted or at least justifiable.

The judgements by the CFI and the ECJ as well as the opinion by the Advocate General represent interesting documents on legal and political issues at the intersection between international law and EU law.
The Kadi case contains a lot of elements to be discussed; if a systematic approach is adopted, two main areas can be distinguished.
There is the issue of competence of the Community to adopt the contested regulation and there is the need to define the status to attribute to UN Security Council Resolutions in the EU, in particular if questions of conflict in the field of human rights arise.
With **Regulation no.881/2002**, the contested sanctions against Mr. Kadi were imposed, but this approach led to criticism; within the CFSP, it was

considered doubtful whether the EU was competent in this respect. To remedy this competence problem, with the Maastricht Treaty, which brought CFSP under the roof of the European Union, a connection was created between the political determination on the Union level and the EU where the sanctions had to be materially adopted with apposite measures. A clear competence for the adoption of sanctions by the EU had been created.

Both the CFI and ECJ were not truly convinced that a competence of Union was given in this case; they believed that for the adoption of targeted sanctions by the European Union, it was necessary to recourse not only to articles 60 and 301 ECT but also article 308 ECT (articles 75, 215 and 352 of TFEU).

For the CFI, if articles 60 and 301 ECT provide for the adoption of sanctions but, prove to be insufficient to attain the goals of the CFSP, recourse to the additional legal basis of article 308 ECT is justified.

The ECJ, instead, found the reference to article 308 to be justified, as *"Article 60 and 301 are the expression of an implicit objective, that of making it possible to adopt CFSP measures through the efficient use of a Community instrument"*.
On this basis, the limited ambit of those provisions could be extended by having recourse to article 308 ECT.

The Courts diverged in their opinions on the effects of article 308 ECT. For the CFI this provision was able to cross the bridge between TEU and ECT created with articles 301 and 60 ECT. The ECJ, instead, denied that article 308 could operate on the interpillar level.
In the end, the ECJ judgement seems to be more convincing than the CFI one. The first admits the weakness of the whole approach when it adds a

final consideration on the importance of referring to article 308 from the point of view of democratic policy as thereby the European Parliament was enabled to take part in the decision-making process.
A more pragmatic and more convincing approach was taken by the Advocate General Poiares Maduro. He stated that there was no need to base the contested regulation on article 308 ECT as article 301 represents a sufficient basis for the adoption of targeted sanctions. The refence in the article of "third countries" excludes individual sanctions. As soon as the treaty of Lisbon enters into force, this question will be solved in the sense proposed by the Advocate General Maduro: according to **article 215 par.2 of TFEU** the Council will be enabled to adopt restrictive measures also against individuals.

Article 215[43]:

1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.

2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.

[43] Article 215, Title IV of the Treaty on the Functioning of the European Union (TFEU) https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX

3. The acts referred to in this Article shall include necessary provisions on legal safeguards.

The new article 352 TFEU excludes that this provision can serve as a basis for attaining goals pertaining to the CFSP. In the field of targeted sanctions there will be no longer needed to do so.

Article 352[44]:

1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.

3. Measures based on this Article shall not entail harmonization of Member States' laws or regulations in cases where the Treaties exclude such harmonization.

[44] Article 352, Part VII of the Treaty on the Functioning of the European Union (TFEU) https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A12008E352

4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph of the Treaty on European Union..

3.2.2 - Kadi II

In 2010, Yassin Abdullah Kadi sought the annulment of the Commission's regulation 1190/2008 before the General Court (GC).

In its decision, the **General Court of the European Union (GC)** confirmed the ECJ's previous finding that Mr. Kadi had been deprived access to evidence and the EU had merely adopted the Committee's "*vague*" and "*unsubstantiated*" summary of listing reasons, precluding effective legal review.

After ECJ judgment, the Sanctions Committee authorized the transmission to Kadi of the narrative summary of the reasons for his listing.
In a nutshell, Kadi was listed because he had founded and directed the Muwafaq Foundation, which allegedly belonged to the Al-Qaida network and supported mujahidin groups in Bosnia during the Yugoslavian war. Also, a foundation's director allegedly had contacts with Osama bin Laden for the provision of military training to Tunisian mujahidin. Kadi was also a shareholder of a Bosnian bank where a terroristic plot might have been planned and of other Albanian firms which allegedly funnelled money from and to extremists.
The Commission referred to these facts to motivate the decision not to eliminate Mr. Kadi from the list and gave him the possibility to submit comments. This procedure was designed to meet the procedural requirements indicated by the ECJ and to eliminate the human rights deficiencies contaminating Mr. Kadi's listing. The Commission, in

Regulation No. 1190/2008, considered that Mr. Kadi's submissions could not warrant delisting[45].

Therefore, Kadi's fundamental rights to defence, judicial review, and property had been violated.

The GC also noted that the judicial review should extend to the evidence on which it was adopted. In fact, in the present case, this required an examination of the information available to justify the listing, which could not be barred by reasons of confidentiality.
Finally, the GC considered that the process put in place by the Commission to allow the subject to submit his views was superficial and formalistic.

The main negative point of the procedure was that there was not the possibility of access, from the subject to any of the information used against him, other than what was contained in the summary of reasons. As a consequence, the fundamental rights violations highlighted by the ECJ had not been healed and the General Court annulled the 2008 Regulation.

The GC registered certain criticisms in its rationale, more specifically that the Sanctions Regime would be interrupted, and the Security Council's powers violated by national or regional review, and that such review may be inconsistent with international law. The Court determined that the review was justified in light of the long-lasting effects of fund-freezing measures on fundamental rights[46].

The effectiveness of the review relies on the Court's ability to establish whether the evidence of the sanctions is accurate, reliable and consistent,

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[45] C. Michaelsen, *"Kadi and Al Barakaat v Council of the European Union and Commission of the European Communities - The incompatibility of the United Nations security council's 1267 sanctions regime with European due process guarantees"*
[46] J. Kokott & C, Sobotta, *"The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?"* - The European Journal of International Law Vol. 23 no. 4 - 2012

whether it contains all the relevant information, and whether it can substantiate the conclusions drawn from it.

Restrictions due to confidential issues on state-held information limit effective review, leaving decisions to be based on empty allegations and information shared only between Member States.

In 2013, there was the definitive conclusion of Kadi's case with the decision of the **Grand Chamber of the Court of Justice of the European Union.**

With this decision, the Court dismissed the appeals brought by the Council, by the Commission and by the UK against the General Court's judgment of 30th September 2010.

The Court has confirmed that Mr. Kadi's inclusion in the list of subjects whose resources must be frozen on account of their potential relationship with Al Qaida was in contrast with his fundamental rights. Therefore, the Court sustained the annulment of the Commission Regulation no.1190/2008, in the part providing for Kadi's renewed enlisting in the blacklist found in Annex 1 to Regulation No 881/2002.

The Council, the Commission and the UK appealed the judgment of the General Court. Some Member States intervened in support of the appellants, asking the ECJ to set aside the judgment of the General Court. The grounds of appeal can be summarized as follows:

- The GC failed to recognize that the challenged Regulation is immune from judicial review;

- The GC's review of the contested Regulation was too intrusive, and should have rather been deferential;

- The GC went wrong in assessing the merits of the annulment claim, failing to appreciate the counterbalancing measures that prevent a violation of fundamental rights.

In October 2012, Mr. Kadi was delisted by the Sanctions Committee, following a request for delisting channelled through the Ombudsperson.
The Court dismissed the first point, basing it on the fact that the Union is a legal order based on the rule of law, and protection of fundamental rights is an essential component. It follows that all EU acts must be available to judicial review for compliance with fundamental rights, without prejudice to the primacy of UN Security Council's resolutions.
This confirms the dualist approach inaugurated in *Kadi I:* maintenance of the constitutional values of the EU prevails over the risk of incurring international responsibility for failure to comply with international obligations.
The Charter of Fundamental Rights lists the right to be heard, the right to have access to the file and the right to ascertain the reasons upon which a decision is taken (**Articles 41(2) and 47**)[47].

Article 41[48]:

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

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[47] Judgement of the Court (Grand Chamber), 18 july 2013 https://curia.europa.eu/juris/document/document.jsf?text=&docid=139745&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=1914364

[48] Article 41, Title V of the European Union Charter of Fundamental Rights https://fra.europa.eu/en/eu-charter/article/41-right-good-administration

2. This right includes:
(a) ***the right*** *of every person* ***to be heard****, before any individual measure which would affect him or her adversely is taken;*
(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
(c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Art. 52(1), on the other hand, allows for the necessary restrictions of Charter's rights, subject to a requirement of necessity, proportionality and contribution to objectives of general interest.

Article 52[49]:

1. Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others. (...)

[49] Article 52, Title VII of European Union Charter of Fundamental Rights https://fra.europa.eu/en/eu-charter/article/52-scope-and-interpretation-rights-and-principles#:~:text=1.,of%20those%20rights%20and%20freedoms.

Within this legal framework, the Court turned to the listing procedure, and identified the major cause of problems: whereas the EU is bound to respect fundamental rights when it implements Security Council's resolutions, the Sanctions Committee is under no obligation to disclose the information used to adopt its decisions to the subjects listed or to the EU, the only exception being the summary of reasons.
All issues arise from this mix between the duties of the EU and the lack of duties of UN bodies. In particular, the Court noted that the right to effective judicial protection under Article 47 of the Charter requires that decisions affecting individuals are taken on sufficiently solid factual bases.
In the present case, the Commission could rely on the summary of reasons. The aim of the Court was to discover whether any one of those could be sufficient to justify the listing of the subject.
The Court did not identify the failure to disclose the evidence supporting the summary of reasons with an automatic violation of the right to defence; the EU institutions are not obliged to submit this type of information to the Court. If they chose not to do so, the risk of violation increases together with the summary's vagueness.
If secrecy is not justified, the Court will examine the lawfulness of the contested measures on the basis of the information provided.

Moreover, the Court criticized the General Court for dismissing the probative value of the summary of reasons for lack of detail and, for inferring the breach of Mr. Kadi's rights from the fact that the information held by the Sanctions Committee were not disclosed to anyone. In fact, it is possible that the summary of reasons be sufficient evidence to justify the listing.
The Court agreed with the General Court that one of the reasons of the

summary was too vague but found on the contrary that the other reasons were sufficiently detailed.

The Court then examined the other allegations contained in the summary of reasons, together with Mr. Kadi's comments and the Commission's replies. It noted that the Commission had not been able to answer Mr. Kadi's comments. The contested Regulation, as held by the General Court, is unlawful, and the errors committed in the first instance did not affect the correctness of the order of annulment.
The Court appeared to stand by its precedent. It is about a decision based on principles; its value lies in its systemic impact, as it embodies the idea that certain fundamental rights cannot be silenced under the cover of generic security concerns.

3.3 - People's Mujahedin Organization of Iran case

3.3.1 - A brief introduction and background

Another important case to highlight is the one involving the **People's Mujahedin Organization of Iran (OMPI/PMOI)**.
The legislative framework in **OMPI/PMOI** differs from the one just seen in the Kadi's case.
In this one, the contested sanctions list was not adopted at UN level but by the Community institutions acting in implementation of Security Council's resolutions drafted in general terms.
Practically, the UN Security Council ordered that all UN Members must freeze terrorist financial resources, and it left to the discretion of the States to specify individually the persons and entities whose funds had to be subjected to this sanction. This means that the Community acts, which applied these sanctions, involved the exercise of the Community's own power.
The People's Mujahedin Organization of Iran or **Mujahiddin e Khalq**

(MEK) is an organization founded in 1965 with the aim to replace the Iranian Shah's regime with democracy; after the revolution, the organization also fought against the regime of the Ayatollah Khomeini and engaged in armed actions.
Since June 2001, it stated to have interrupted all the military activities carried out in the past; and in 2002, the Council updated the Community list of individuals and entities whose assets must be frozen including, among the others, the PMOI. The organization was first placed on the **UK terrorist list** in 2001 and then on the **EU terrorist list** in 2002. Several decisions have been taken by the Council in order to give effect to this list; these decisions then gave birth to several judgements by the EU Courts.
In 2002, the PMOI brought proceedings before the CFI to challenge its inclusion in the EU list and, the Court annulled its inclusion on the grounds that the applicants' fundamental procedural rights had been violated. In order to comply with the ruling the Council then issued a notice indicating that it would provide those listed with a statement of reasons; the applicants were kept on the list[50].

All courts which have heard the matter have declared the listing of the PMOI unlawful because of **serious procedural failures** and **lack of evidence** as to its current connection with terrorist activities.
The PMOI saga unveils in considerable detail the deep flaws in the EU terrorist listing system. The CFI's approach had been very cautious, showing a substantial deference to the Council's decisions and also impatient with the Council's attitude to judicial protection and the rule of law. For the first time, the CFI indicates its willingness to carry out not only a review of compliance with the procedural rights of those listed, but

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[50] B. Smith, *"The People's Mujahiddeen of Iran (PMOI)"* - Paper no. CBP 5020 – House of Common Library - 2016

also of compliance with the legal conditions required by the Community instruments.

3.3.2 - OMPI/PMOI I and relative ruling

The first judgement was handed down by the Court of First Instance in 2006; the EU did not inform the organization about its decision to freeze their funds. On 15th July 2008, the Union renewed the prescription of the PMOI and then, on the same year the Court of First Instance annulled the precedent decision for the lack of sufficient statement of reasons and because, during the procedure followed its adoption, the applicant was not placed in a position to effectively make his word known. Moreover, this lack of reasons prevented the Court from reviewing the legality of the decision. The Court therefore found the obligation to state reasons, the right to a fair hearing and the right to effective judicial protection infringed.
Then, the Court rejected as *"in-admissible"* an attempt by EU governments to delay the implementation of the judgement, as a result the PMOI was removed from the list in 2009.

The most important points made by the CFI are the following:

- The right to a fair hearing applies to the Council's decisions to include someone in the list;

- A decision of a national authority is an essential precondition for placing an organization/individual on the EU list;

- The right to fair hearing must be guaranteed first at the national level.

The right to a fair hearing is limited to the legal conditions of application of the Community measure. For reasons of effectiveness, in the case of first inclusion in the list, notification might be postponed to after the decision has been taken. It is different in the case of an initial decision, because there is no right to a hearing, not even after the decision has been taken, since the parties can bring judicial proceedings.

On the other hand, in the case of subsequent decisions, the decision to maintain someone in the list must be preceded by the possibility of a hearing and, if appropriate, notification of new evidence. This is the biggest limitation of the CFI ruling. Overriding considerations of security or of conduct of national/Community/international relations may preclude disclosure of evidence, and the right to a hearing.

In order to guarantee effective review, the Council cannot raise objections to disclosure of evidence on the grounds that such information is secret or confidential.

Finally, the standard of review is restricted to checking that the procedure's rules and the statement of reasons have been respected, that the facts are materially accurate, and there has not been evident error of assessment of facts or misuse of power. Since none of the procedural guarantees described had been respected, the relevant Council decision was annulled; then, the Council did not eliminate the applicant from the list but, it provided it with a statement of reasons as to its inclusion. Theoretically, the ruling considered is constitutionally very important; it

rejects the possibility of a grey legal area in relation to counterterrorism measures.

The ruling is also limited in its impact since it confines the applicants' rights to mere procedural rights, and limits or excludes, the possibility for a meaningful substantive review of the decision to include someone in the list and freeze their assets. As we will discover, some limitations are present in both the PMOI II ruling, and in the PMOI III ruling[51].

In this context, it is useful to highlight the difference between 1373's and 1267's Regime.
On one hand, the Resolution 1267 (1999) targeted specific individuals, entities and, groups as designated by the UN 1267 Committee, and requires Member States to freeze the assets owned by them or by person acting on their behalf.

On the other hand, the Resolution 1373 (2001), targets international terrorism in general and goes beyond the 1267's Regime.
To introduce the regime into EU legal order, the EU adopted Common Position 2001/931/CFSP. It constitutes the basis for **EU autonomous restrictive measures** against individuals, groups and entities suspected of involvement in terrorist activities.
According to this Resolution, each Member State has the authority to designate the individuals and entities that should have their assets frozen. Designations are made by states and not by the UNSC or 1267 Committee. Additionally, to ensure effective cooperation among countries, they should examine and implement, if appropriate, the actions initiated under the freezing mechanisms of the other countries.

[51] E. Spaventa, *"Case T-256/07, People's Mojahedin Organization of Iran v. Council, judgment of the Court of First Instance of 23 October 2008 and Case T-284/08, People's Mojahedin Organization of Iran v. Council, judgment of the Court of First Instance of 4 December 2008"* - Common Market Law Review 46: 1239–1263 – 2009.

3.3.3 - OMPI/PMOI II and relative ruling

Another judgement followed; in this occasion, the Court annulled a decision on the basis that the Council's statement of reasons for decision made it impossible to understand if and to what extent the Council had taken into account the judgement of a British judicial authority, the **Proscribed Organizations Appeals Commission (POAC)**. It is a special tribunal set up to review inclusion in the British list, asking the Appeal Commission to strike off the applicant from the list. The POAC declared the decision to keep the applicants on the list "*perverse*". This authority had in fact ordered to remove the PMOI from the British list of terrorist organizations considering unreasonable the **Home Secretary's** conclusion that the applicant was still an organization linked to terrorism. The Court highlighted that, in adopting Community fund-freezing measures, it is necessary that the Council ensure the existence of a competent national authority's decision, as well as verifying any consequences of the decision at national level. The organization brought also a second challenge, against a new EU decision which kept them on the list. Again, PMOI won the case; in the meantime, a new decision had been adopted and therefore the organization had to bring a third case, which also benefited from the accelerated procedure, and the CFI declared the inclusion in the list unlawful.

As mentioned in the first ruling, the Council provided the applicants with a statement of reasons, which clarified that a decision by a competent authority had been taken regarding the applicant and that it was still in force; that it was subject to review under British law; and that therefore the reasons for including the applicant in the EU list still applied.

The applicants therefore brought new proceedings for annulment in front of the CFI. It should be recalled that whilst the case was pending the Proscribed Organization Appeal Commission (POAC) declared the

Secretary of State's decision as perverse and ordered that the PMOI be struck off the UK list; and the UK Court of Appeal refused the Government's request for leave to appeal, therefore putting an end to the British procedure. After, the Council adopted a new decision, and it maintained the applicants in the list; they were authorized by the Court to amend their recourses to appeal against this decision.

3.3.4 - PMOI III and relative ruling

It has been mentioned that the terrorist list needs to be reviewed every six months. While the PMOI II proceedings were still in course, the Council adopted a new decision **(the July 2008 Decision)**, which included the applicants.

At the time the Decision was adopted, the British Home Secretary, to comply with the decision of the POAC, had already removed the PMOI from the list of organizations proscribed under the Terrorism Act 2000.

The Council held that new information which had been brought to its attention justified maintaining the PMOI on the EU list. Consequently, the PMOI brought proceedings for annulment.

In the preliminary procedure, the Court ordered the Council to provide all documents relating to the adoption of the decision under scrutiny, clarifying that should the document be deemed confidential, they would not, at that stage in the proceedings, be communicated to the applicants. Continuing, the Court ordered the disclosure of all documents relating to the voting procedure leading to the adoption of the decision.

The first issue to be addressed by the Court related to the voting procedure followed for the purposes of the contested decision.

The PMOI argued before the CFI that the voting process leading to the adoption of the July Decision was vitiated by irregularity, since the

Council should consider each individual or organization on its own merits. The CFI decided to investigate the matter and requested the disclosure of the documents relating to the voting process. Those documents showed that the Council had reviewed the names on the list on a case-by-case basis, and that it had written to all Members of the Council specifically in relation to the PMOI.

The second issue for consideration, which in itself was sufficient to determine the illegality of the decision, related to the breach of the right of defence.

The Council had in fact failed to advise the applicants of the new information in the file which in its opinion justified it to be maintained in the list.

Since Council was not able to notify the applicant in advance, the right of the defence had been breached and the decision was vitiated.

The most important part of the ruling is undoubtedly the third part, where the CFI discussed whether the legal requirements provided in **Article 1(4) to (6) of Common Position 2001/931**, and **Article 2(3) of Regulation 2580/2001**, had been satisfied.

Article 1 par. 4-6[52]:

(...) 4. The list in the Annex shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to

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[52] Article 1 par.4-6 of Common Position 2001/931
https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0093:0096:EN:PDF

perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds. Persons, groups and entities identified by the Security Council of the United Nations as being related to terrorism and against whom it has ordered sanctions may be included in the list. For the purposes of this paragraph 'competent authority' shall mean a judicial authority, or, where judicial authorities have no competence in the area covered by this paragraph, an equivalent competent authority in that area.

5. The Council shall work to ensure that names of natural or legal persons, groups or entities listed in the Annex have sufficient particulars appended to permit effective identification of specific human beings, legal persons, entities or bodies, thus facilitating the exculpation of those bearing the same or similar names.

6. The names of persons and entities on the list in the Annex shall be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them on the list.

Article 2 par. 3[53]:

3. The Council, acting by unanimity, shall establish, review and amend the list of persons, groups and entities to which this Regulation applies, in accordance with the provisions laid down in Article 1(4), (5) and (6) of Common Position 2001/931/CFSP; such list shall consist of:

(i) natural persons committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism;

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[53] Article 2 par. 3 Regulation 2580/2001
https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:344:0070:0075:EN:PDF

(ii) legal persons, groups or entities committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism;

(iii) legal persons, groups or entities owned or controlled by one or more natural or legal persons, groups or entities referred to in points (i) and (ii);

(iv) natural legal persons, groups or entities acting on behalf of or at the direction of one or more natural or legal persons, groups or entities referred to in points (i) and (ii).

It might be recalled that Article 1(4) to (6) of the Common Position affirms that the inclusion in the list must be based on a decision by a national authority, based on serious evidence. The authority must be a judicial or an equivalent one. As mentioned above, when the July 2008 Decision was adopted, the British Home Secretary's decision in relation to the applicants was not in force. So, the PMOI had this time been included at the request of the French Government, which based its request on the fact that a judicial enquiry had been opened against the applicants in 2001; and that charges were brought in 2007 against some individuals alleged to be members of the PMOI.

On 24 June 2008, the UK Parliament withdrew the PMOI from the national list; and with a new decision, the Council decided to maintain the organization on the updated Community funds-freezing list on the basis of the new information acquired.
An action for annulment brought by the PMOI before the Court of First Instance (CFI) against this decision followed. According to the Court, the Council adopted decision without first informing the applicant of the new information or material which justified maintaining it on the list.
The applicant's right to defence had been infringed because the

organization was not enabled to give its point of view on the matter before the adoption of the contested decision. In fact, in the Court's view the Council failed to properly substantiate its claim that the necessity to continue the application on the organization of restrictive measures required the replacement of the withdrawn decision with another one based on the new information.

The Court claimed that the Council was in the position to adopt a funds-freezing decision following a procedure respectful of the organization's rights of the defence.
The conclusion was reached on the basis of the principle established in OMPI I. In the mentioned context, the Court stressed how the right to a fair trial must be effectively safeguarded in the Community procedure followed to include or maintain it on the contested list.
On the one hand, in the case of a decision to freeze funds, the legal condition, on which the person concerned shall be afforded the possibility to express his view, is represented by the existence of information or material in the file which shows that a decision meeting the definition laid down in Article 1(4) of the Common Position 2001/931 was taken in respect of him/her by a competent authority.
On the other hand, in the event of any subsequent decision to freeze funds, the targeted person needs to be enabled to make known his/her view on the material which justifies maintaining him/her on the list.
These considerations do not apply to subsequent decisions to freeze funds taken by the Council on the occasion of its re-examinations; at this stage the assets are already frozen, and it is not necessary to ensure the effectiveness of the sanctions.

3.4 - The French Republic v OMPI

This case is the result of the challenge against the **General Court's decision** brought by the **French Republic** before the **European Court of Justice**[54].

In this occasion, the French Republic searched for a ruling that recognized the possibility for a Member State to not release to the Court evidence or other material that may prejudice national security.
The Court dismissed France's appeal and upheld the General Court's decision to remove the PMOI from the EU sanctions list, in the light of the infringement that such decision caused to the PMOI's right of the defence by failing to inform it of the grounds for its inclusion before the adoption of the decision.

First, the Court confirmed the principle according to which the necessity to preserve the surprise effect as a condition for the effectiveness of a restrictive measures applies only to initial decisions to freeze funds but not to subsequent decisions maintaining the person in the list.
In the case in question the Council was bound to inform the PMOI of the incriminating evidence against it before the adoption of the decision.
The Court stressed in fact that the necessity of notification of incriminating evidence and the right to make representations before the adoption of a measure is essential to the rights of defence. In this way, people affected by the measure are allowed to provide their observations before the adoption of the decision in order to enable the competent authority to consider all relevant information.
In detail, the aim is to give to the person concerned the possibility to correct an error or to produce information relating to his personal

[54] Case C-27/09 P French Republic v. People's Mojahedin Organization of Iran [2011] ECR I0000, Judgment of 21 December 2011
https://curia.europa.eu/juris/document/document.jsf;jsessionid=AB3B8A339F6EE6F3BE684B05610F03BE?text=&docid=117189&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2704082

circumstances as will tell in favour of the decision's being adopted or not. This right is also expressly recognized in **Article 41(2)(a) of the Charter of Fundamental Rights of the European Union:**

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

2. This right includes: the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

The French Government circulated in Council three documents, two of them were classified as confidential. In any event, the Council pointed out that it had not been provided by the French Government with any additional evidence than that it had set out in the statement of reasons.

As a result, the Court found that the Council failed to prove that the conditions provided in the Common Position and the Regulation as to the existence of a national decision had been satisfied.

Finally, the Court clarified that it had jurisdiction to review both lawfulness and merits of funds-freezing measures. Consequently, the Court found that the Council had not complied with the requirements of Common Position 2001/931 and Regulation 2580/2001, and that therefore the July 2008 Decision was invalid. The applicants were finally taken off the list in January 2009.

Important elements about how secret evidence should be handled are given by Advocate General Sharpston[55] in her opinion on the case.
The Advocate General did not disagree with the GC's conclusion but, at the same time, she understood the French Republic's position in refusing to allow the Council to disclose the evidence.
In her view, in fact, it was not unreasonable that the French Republic had interest in preserving the confidentiality of certain information with the result that the evidence made available to the General Court is not disclosed to the other party. The Advocate General claimed that what was absent from those rules was a provision which allowed the Court to take into consideration confidential evidence that had not been made available to the other party.
Finally, the Advocate General stressed that it is essential that any amendments to the rules concerning the production of evidence before the General Court take into account these conflicting interests. This entails that the possibility to rely on closed evidence should be granted only if necessary, and the General Court should always first try to establish whether the case in question can be solved by relying on open evidence alone.
With this regard, the Advocate General noticed that it is clear from the

[55] Opinion of Advocate General Sharpston delivered on 14 July 2011. French Republic v People's Mojahedin Organization of Iran.
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CC0027

European Court of Human Right's case-law that the right to disclosure of evidence, as part of the rights of the defence, is not an absolute right. At the same time, however, it is also evident from the same case-law that some minimum guarantees need always to be provided when it comes to security.

The same principles were applied by the Court of First Instance. Moreover, the Court noted that the French authority did not authorize the Council to communicate to the Court certain passages of a document containing a summary of the main points which justified the maintaining of the applicant on the EU list. The French authority claimed the necessary confidentiality of those extracts because containing information related to the national defence.
With this regard, the Court concluded that the Council cannot base its fund-freezing decision on information or material in the file communicated by a Member State, if this one does not agree to authorize its communication to the Community judicature whose aim is to review the lawfulness of that decision.
This refusal had in fact the consequence of preventing the Court from reviewing the legality of the contested decision. Another principle laid out in OMPI had therefore been disregarded.
In OMPI, in fact, the Court also stressed the imperative necessity of an effective judicial review as the only procedural guarantee that a fair equilibrium is maintained between the need to fight international terrorism and the fundamental rights' protection.
It is imperative that the Community Courts carry out, independently and impartially, a judicial review on legality and merits of the contested measure without it being possible to invoke against them the confidentiality of the information or evidence used by the Council. On the basis of the same principle, in the present case the Court concluded that

also the PMOI's fundamental right to an effective judicial review had been infringed. The contested Council's decision was annulled.

As examined, two sets of cases have been considered: the Kadi saga, relating to the UN-based sanctions, and OMPI/PMOI as regards the EU list. What emerges it is that the ECJ adopted a uniform standard of legality which applies to both systems of targeted sanctions.

We must ask ourselves how it could be possible that two European Courts could come to such diverse conclusions as to the required standard of protection. As we have seen in the first case, the technical concept used to justify the results achieved was not convincing; neither was the recourse to the jus cogens idea by the CFI, and it was not coherent with the previous jurisprudence of the ECJ.
It seems that the diverse conclusions reached by the CFI, on one hand, and the ECJ on the other, were the result of a deeply different way in which the conflict between main interests and to pay tribute to the security interests formulated at international level, the ECJ proved to be sensitive towards the criticism caused by the CFI judgement. In order to be able to reach a different conclusion it ignored the international level.
This creates the question why such different attitudes were chosen. The bodies stand for different views; for a Community Court adopting a dualist perspective means to deny relevance to the issue of international security. On the other hand, the choice of mild monism, such as that taken by the CFI, opens the borders of EU for a balancing security consideration.
However, both the EU and the UN will have no other choice than to compromise. It can be denied that the aspirations of both sides are justified. It is about the task of the political institutions to find a useful solution.
In the end, the Kadi case will not be forgotten because, it represents the starting point for the research of a new equilibrium between the necessity

to fight terrorism more efficiently and the parallel necessity to uphold fundamental rights in this struggle. The other case was different; as mentioned before, this case clarifies the consistent defects in the EU terrorist system.

Also in this context, the institutions have different points of view in all the stages of the case. At the beginning, the approach of the CFI was cautious but, after the Court's ruling seems impatient towards the Council's attitude to judicial protection and the rule of law.

For the first time, the CFI shows its willingness to carry out not only a review of compliance with the procedural rights of those listed, but also of compliance with the legal conditions required by the Community instruments.

An important contribution was given by the Advocate General because she has envisaged a system of rules which allows the use of confidential information when necessary to fight terrorism while ensuring the respect of the rights of defence.

Chapter 4 – The sanctions against Russia

4.1 – Russo-Ukrainian War (2014/2021 – 2022/today)

In order to comprehend better the context, we have to mention the key points that took us till the present situation.
The conflict between Ukraine and the Russian Federation broke out following a political crisis in late November 2013. The Ukrainian government of pro-Russian **President Viktor Yanukovych** decided to suspend the process which would have led to the signing of an Association Agreement with the European Union and, as a consequence, demonstrations started in the city of Kyiv.
These demonstrations, called the **Euromaidan protests** or **Revolution of Dignity** led to the ousting of Ukraine's President.
After the revolution, Russia occupied and annexed Crimea and supported pro-Russian separatists fighting the Ukrainian military in the Donbas War.
In March 2014, the assembly issued a declaration of independence and a subsequent referendum on union with Russia was held.
This vote, held outside of the framework established by Ukrainian legislation and characterized by several irregularities, was considered illegal by Ukraine and was not recognized by the international community, including the Russian Federation.
Since then, Russian-backed militants seized towns in the Donbas region and proclaimed the **Donetsk People's Republic (DPR)** and the **Luhansk People's Republic (LPR)** as independent states.

Diplomatic meetings and talks began in June 2014; negotiations were launched in Minsk with the representatives of Ukraine and Russian Federation, mediated by the Chairperson-in-Office of the Organization for Security and Co-operation in Europe (OSCE).
The fighting between Russian-supported separatists and Ukrainian forces has continued in the Donbas despite the negotiation of the **Minsk**

Agreement I which called for a ceasefire, the withdrawal of all foreign armed groups and constitutional reform recognising the special status of Donetsk and Luhansk.

In February 2015, Russia and Ukraine signed the **Minsk Agreement II** to end the conflict, but it was never fully implemented in the followed years. This package of measures set out the operational stages for implementing the Minsk Protocol; its intention was to advance the security situation on the ground and the political process jointly without preconditions. The objective was for the separatist-held zones to be re-integrated under Ukrainian sovereignty with decentralized organization[56].

UNSC Resolution No.2202[57], adopted in the same period, endorsed these measures and call for their full implementation.

Despite all the agreements, the **Donbas War** settled into a static and trench warfare with changes in territorial control; hostilities never ceased for a substantial period of time but continued at a low level despite repeated attempts at ceasefire.

The country of Ukraine, in 2019, was marked by the election of a new president: **Volodymyr Zelenskyy**, with the main purpose of ending the Donbas War.

Since he was elected, several successes have been reached, for example, the ceasefire of 21st of July 2019 that led to a decrease of violence, the exchange of prisoners and additional ceasefire consolidation measures in 2020.

In the beginning of 2021, Ukrainian's borders were interested by a massive

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[56] J. Mankoff, "*Russia's War in Ukraine – Identity, History, and Conflict*", Center for Strategic & International Studies (CSIS), April 2022.

[57] United Nation Security Council Resolution 2202 (2015), S/RES/2202 (2015) https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2202.pdf

military build-up from Russia. At that time, Russian officials and the President Vladimir Putin himself, denied plans to attack Ukraine.

The current conflict began on **24th February 2022** when Russian President announced a "*special military operation*" against Ukraine without the objective to occupy the country; instead, the troops began to invade and control some areas. No formal declaration of war has been issued, however, the presidential statement was considered as such by the Ukrainian government and reported by many international news sources. In fact, few hours later missiles and airstrikes hit across Ukraine, including its capital, shortly followed by a large invasion along multiple fronts. To protect the country, Ukraine's President Zelenskyy introduces **martial law** and closes Ukraine's airspace; he decreed a full military mobilisation and all men aged 18-60 were forbidden from leaving the country. The Russian invasion of Ukraine has been internationally condemned as a **war of aggression**. A UN General Assembly Resolution demanded a full withdrawal of Russian forces, the International Court of Justice ordered Russia to suspend military operations and the Council of Europe expelled Russia.

Many countries imposed and intensified sanctions against the country, which affected the world's economy, and provided humanitarian and military aid to Ukraine.

The UN described this event as the fastest-growing crisis since World War II, and it has resulted in refugee crisis and tens of thousands of deaths. In the first week of the invasion, the UN reported over a million refugees had fled Ukraine; and looking at the data, at August 2023, the total number of Russian and Ukrainian soldiers killed or wounded during the invasion was nearly 500.000, and also more than 10.000 civilians were killed.

4.2 – The European Union's Sanctions

As part of the response to the Russian war against Ukraine, the EU adopted the most comprehensive sanctions in its history, targeting the Russian and Belarusian economies, as well as hundreds of natural or legal persons. Already in 2014, the EU had imposed sanctions on the country in response to the escalation of the conflict in Ukraine.
We will highlight 2022's sanctions imposed at the end of February, after Putin signed the decree recognising the *"independence and sovereignty"* of the Donetsk and Luhansk regions of Ukraine and ordered the Russian armed forces into those areas. From that moment, and even more following the invasion of Ukraine of 24th February 2022, the EU has imposed comprehensive sanctions, which have been adopted, in successive waves, through acts amending the 2014 sanctions. In the context of the war, sanctions were also adopted against Belarus.

The objectives of the measures are the following:

- to damage Russia's ability to wage war by hitting its economy;

- to protect the EU's security;

- to signal a strong condemnation of Russia's behaviour.

These aims are not always harmonious; their goal is to stop Russia's campaign in Ukraine, while protecting the interests of the EU, the Member States and their citizens, and at the same time minimising the negative consequences on the Russian population.
Even though the origin of the legal act is hardly relevant for the purpose of judicial protection, it appears to be, in this case, the result of a compromise that mixes different national security interests, private interests, and political pressures.

More in detail, the sanctions are aimed at the **financial inflows** to Russia, its **defence and security sector** (prohibiting the acquisition of military technology, dual-use goods, or material and services relating to that industry), and other important areas of the **Russian economy** (aviation, luxury, energy, etc).
The EU also sanctioned persons and entities supporting, benefiting from, or providing source of revenue to the Russian Government. The sanctions against individuals target politicians, activists (including pro-Russian Ukrainians), businessmen, judges, lawyers, military commanders, and other persons or entities with links to the people in the previous categories.

As above affirmed, in response to the illegal annexation of Crimea, since 2014 the EU imposed different type of sanctions targeting exchanges with Russia; in detail, the sectors interested are financial, trade, energy, transport, technology and defence. In 2022, since the start of Russia's full-scale invasion of Ukraine, it intensifies the measures under this regime. They also target Belarus, due to its complicity with Russia, and Iran, in response to the manufacturing and provision of drones.
In the first wave of sanctions in 2014, the EU targeted persons close to the Russian power; they were subjected to a freeze of assets. After, the EU targeted Russian undertakings operating in crucial areas, such as the defence sector, the oil and gas sector and the banking and financial sector, with Russian-owned banks such as Sberbank of Russia, VTB Bank, and the Bank for Development and Foreign Economic Affairs being targeted. Most of them were the subject of asset freezes and restriction of access to capital markets and defence, dual-use goods or sensitive technologies. Relative to the situation in Ukraine, the EU also targeted person that were subject to criminal proceedings in the country in connection with misappropriations of public funds, among them there was the former President Viktor Yanukovych. In particular, to support Ukrainian judiciary

in investigation and proceedings, the EU provided for the freezing of the funds and assets of the persons concerned. Most of them were listed in the first EU acts providing for restrictive measures against Ukraine.

Concerning the financial sector, the sanctions previewed are a SWIFT ban for 10 Russian banks, limitations on Russia's access to EU's capital and financial markets and bans on transactions, big deposits, investments in projects co-financed by the Russian Direct Investment Fund, supply of euro-denominated banknotes, etc. The current situation is a result of the decision took, in 2014, by the **European Bank for Reconstruction and Development (EBRD)** with the goal of eliminating Russia as recipient country and denying any type of investment.
In the energy sector, the sanctions include a price cap related to the maritime transport of Russian oil and petroleum products, and bans on imports of crude oil, petroleum products, coal, liquified petroleum gas (LPG), re-exports of Russian LNG in EU facilities, exports of material and technologies of the sector, providing gas storage capacity to Russian nationals and, new investments. These ones penalized the EU's energy security, causing a crisis; EU countries have stood united in their response to increasing energy prices. The emergency measures adopted by the Council to **ensure a sufficient and affordable energy supply** have helped calm the markets. However, EU countries are **shifting away from Russian fossil fuels** with gas imports from Russia going from 40% of the total imports in 2021 to 15% in 2023. The EU is moving fast towards cleaner energy and autonomy. Talking about transport, defence and technology, the measures applied to Russia are the closure of EU airspace to all Russian-owned aircraft and of EU ports to Russian vessels and, bans on exports to Russia of military use's technologies, arms and all the goods that could enhance Russia's defence and security sectors.

The Union has progressively imposed restrictive measures on Russia in response to the **full-scale invasion of Ukraine** and the **illegal annexation of Ukraine's Donetsk, Luhansk, Zaporizhzhia and Kherson regions** in 2022. The measures have been designed to pursue the goal of **weakening Russia's economic base**. From the very start of the Russo-Ukrainian War on February 2022 to nowadays, the EU has created 14 different packages of sanctions: each one progressively more intense and complete than the previous. The last package was introduced on 24th June 2024, and among the sanctions we can highlight a ban on reloading services for Russian **liquified natural gas** (LNG) on EU territory, outlawing the use of the "**System for the Transfer of Financial Messages**" developed by the Central Bank of Russia, a prohibition on **political parties and foundations**, and NGOs to accept funding from Russia and, further **import-export controls** and restrictions.

The European Union is deeply concerned about the deterioration of the human rights situation both in Ukraine and Russia; it severely condemns the significant expansion of restrictive legislation, the systematic and intensifying repression against civil society and human rights defenders, as well as the crackdown on independent media and information, political opposition members and other critical voices active throughout the Russian Federation and outside the country.

The Union has imposed sanctions in response to human rights violations and abuses in Russia under two sanctions regimes which are: **global human rights** and a **country-specific regime**, adopted on 27th May 2024[58].

The restrictive measures target those responsible for serious human rights

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[58] *"EU sanctions against Russia explained"* https://www.consilium.europa.eu/en/policies/sanctions-against-russia/sanctions-against-russia-explained/

violations or abuses, for repression of civil society and democratic opposition, and for undermining democracy and the rule of law in Russia. They consist of **travel bans** for individuals, **assets freeze** for individuals and entities, and a **prohibition on making funds or economic resources available** to those listed.

EU restrictive measures related to actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine apply to a total of over 2.300 individuals and entities. Some of them to be mentioned are the President Vladimir Putin and members of the Duma, governors and local politician.
The list also includes individuals responsible for or involved in the atrocities committed in Bucha and Mariupol, missile strikes against civilians and infrastructures, deportations and **forced adoptions** of Ukrainian children and, recruitment of Syrian **mercenaries** to fight in Ukraine. Some entities, instead, included on the list are political parties, paramilitary groups, banks or financial institutions, media responsible for disinformation and propaganda and, different companies in the energy, IT, aviation and shipbuilding sectors.

Adopted on May 2024, the **country-specific regime** allows the EU to target those who provide financial, technical, or material support for, or are in some way involved in or associated with people and entities committing human rights violations in Russia. In particular, this regime introduces trade restrictions on exporting **equipment which might be used for internal repression**, as well as on equipment, technology or software intended for use in information security and the monitoring or interception of telecommunication.

The current results are the prove that cooperation is important, in fact, sanctions are more effective if a broad range of international partners are involved. The EU has worked closely with partners such as the World

Bank Group, the European Bank for Reconstruction and Development (EBRD), the Organisation for Economic Co-operation and Development (OECD), the United Nations (UN) and other international partners to prevent Russia from obtaining financing from such institutions.

4.2.1 – The European Institutions' Behaviour

In terms of intensity and scope of the prohibitions, the 2022's sanctions are the hardest in the history of EU CFSP and, as a consequence, they are the object of litigation, with currently nearly one hundred cases pending before EU courts. In fact, it is possible to challenge the sanctions either by lodging an action before the ECJ at the conditions laid down in Article 263 TFEU or, indirectly, through a preliminary ruling procedure (**Article 267 TFEU**) originating from an action lodged in the courts of a Member State.

Article 267 TFEU[59]

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

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[59] Article 267 Treaty on the Functioning of the European Union (TFEU) https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX%3A12008E267%3Aen%3AHTML

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

The litigation is related to the EU constitutional structure on its competence to conduct the CFSP. This field is subject to *"specific rules and procedure"'* (**Article 24 TEU**), which concern specific institutional arrangements: executive decision making and a limited role for the Court.

Article 24 TEU[60]

1. The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence.

The common foreign and security policy is subject to specific rules and procedures.(...)

With this background, the role of the judiciary in CFSP is a particularly challenging one as the Court needs to ensure the application of general principles of EU law, among which the protection of fundamental rights,

[60] Article 24 Treaty of European Union (TEU) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M024

while preserving the specific constitutional structure of the competence. In particular, the constitutional structure of CFSP is objective-driven, and it is not defined by policies detailed in the Treaties. It was that there is a connection between the principle of conferral, institutional balance, and the protection of individual freedom. The application of the principle of proportionality by the Court in the sanctions review is a sign of that connection; so, the discretion left to the Council depends on the way legal bases are formulated. In the CFSP context, nothing of this kind exists, leaving the balancing terms to the Council's discretion. As a consequence, the Court does not intervene when it comes to CFSP, as stated in **Article 24 TEU** and **275 TFEU** which limit the Court's jurisdiction. But even when the Court does have jurisdiction, the Court has repeatedly stated the formula that *"the legality of a measure adopted in those fields can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue*". The Court's scrutiny will therefore be limited just to monitoring that an act is not manifestly inappropriate.

The Court's jurisdiction is limited, in principle but not in practice, to scrutinise the CFSP acts only if they are *"restrictive measures against natural or legal person"*, as the **Article 275 TFUE** affirms. In order to understand what constitutes a *"restrictive measure against natural or legal person"*, the Court, to respect that limitation, has delineated a distinction among the provisions contained in sanctions, between *"measures of general application, that they impose on a category of addressees determined in a general and abstract manner a prohibition on making available funds and economic resources to entities"* and *"individual decisions affecting those entities"*. Only the latter matches with the definition provided by **Article 275 TFEU**.

Article 275 TFEU[61]

The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.

However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.

On this matter, there are some technical elements to define in order to understand the meaning associated with *"natural or legal person"*. First of all, a natural or legal person has *locus standi* to annul regulatory acts that are of direct concern to it, or provisions of direct and individual concern to it, or measures addressed to it.

Article 263, par. 4, TFEU[62]

(...)Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to

[61] Article 275, Treaty on the Functioning of the European Union (TFEU) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E275

[62] Article 263, par. 4 Treaty on the Functioning of the European Union (TFEU) https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A12008E263

them, and against a regulatory act which is of direct concern to them and does not entail implementing measures. (...)

Legal persons include third countries, and this enables Russia, Belarus, and even Ukraine to challenge the restrictive measures. The challenge would be admissible only against provisions fulfilling the conditions above mentioned in the Article.
It distinguishes three cases. First, regulatory acts of direct concern to a natural or legal person. The Court has established that a regulatory act refers to acts of general application and does not include legislative acts. Restrictive measures are non-legislative acts; it follows that neither a CFSP decision can be a legislative act, as Article 24 TEU precludes it and, either a TFEU Regulation. In this way, if restrictive measures are of general application, meaning that they have a general goal and affect the applicants by reason of their objective status, then they are regulatory acts. A regulatory act is of direct concern if it does not entail implementing measure; this means that a CFSP Decision cannot be of direct concern, but only a TFEU Regulation can.
Secondly, acts of direct and individual concern, and thirdly, measures addressed to natural or legal persons. We may mention that pre-Lisbon, in Kadi's case the Court appeared to distinguish between the addressee of a sanction, and someone directly and individually concerned by the sanctions; it is clear that a person, who is listed in an Annex, has standing to challenge the measure as it applies to them.

The division criteria between what is and what is not a restrictive measure provided by Treaties and the case law of the Court is based on the effect on the legal sphere of the natural or legal persons concerned.
The case law of the Court may be interpreted as meaning that the CFSP is a competence whose acts, on their own, cannot have legal effects on the

rights of individuals but can only create obligations for EU institutions and its Member States. Following this way, a provision whose matter relates to the EU's external action cannot be adopted exclusively on a CFSP substantial legal bases if it has effects on a right of natural or legal persons.

Looking at Article 24 TEU, a different point of view suggests that the Union is not meant, in the CFSP's field, to adopt acts that lay down general abstract rules creating rights and obligations for individuals. The mentioned article forbids the adoption of legislative acts in CFSP, but that reasoning is not convincing; legislative acts are acts adopted through the ordinary legislative procedure (**Article 289 paragraph 3 TFEU).**

Article 289, par.3, TFEU[63]

(...)Legal acts adopted by legislative procedure shall constitute legislative acts.(...)

The rule that CFSP cannot affect rights of individuals can be derived, instead, from an interpretation of the Treaties.
Given the limited role of the European Parliament and of the CJEU, coupled with the constitutional preference for executive decision making in CFSP, there is a strong case for limiting the effect that CFSP measure may have on individuals.
We must consider that the European Parliament participation in the legislative process is similar, at Union level, to the democratic principle that people should participate in the exercise of power through the intermediary of a representative assembly.

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[63] Article 289, par.3 Treaty on Functioning of the European Union (TFEU) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016E289

On the other case, the Court affirms that if sanctions contain sufficient fundamental rights guarantees for individuals, then this does not affect the democratic character of the EU. In the sector of CFSP, the fact that determines the democratic credential of an act is its content. In this way, the Council can determine the level of protection of EU interests, balancing it with fundamental rights, provided that the latter find sufficient safeguards.

The case for establishing the Court's jurisdiction to provisions rests on the central principle of the EU as a constitutional system subject to the rule of law, in which no institution can adopt acts affecting individual rights which are subtracted from judicial review.

The Court's honours the duty of **Article 47 Charter** to ensure effective judicial protection for individual rights, by adopting a view of what acts carry legal effects, considering different factors among which the act's content, as well as to the factual and legal context of which it forms part[64].

Article 47 Charter[65]

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

Everyone shall have the possibility of being advised, defended and represented.

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[64] L. Leonardo, *"Challenging EU Sanctions against Russia: The Role of the Court, Judicial Protection, and Common Foreign and Security Policy"*, pg. 1-24, Cambridge Yearbook of European Legal Studies, 2023.

[65] Article 47 EU Charter of Fundamental Rights https://fra.europa.eu/en/eu-charter/article/47-right-effective-remedy-and-fair-trial?page=3

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 47 Charter requires the EU Courts to ensure that a decision which affects a person individually is taken on a sufficiently solid factual basis. That entails a verification of the factual allegations underpinning that decision, with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on. On the contrary, it must check whether those reasons, or one of them, are supported by sufficiently specific and concrete evidence. The Court needs to strike a balance between the level of abstraction that information based on intelligence will have, and the right of defence of applicants to concrete information; this could be complex if the Council does not want to share the evidence it relied upon or cannot do so because derives from another source (such as the UN or a third country). In some cases, the statement of reasons is sufficient to justify the listing. What the Court scrutinises is the formal correspondence of the evidence of the Council with the statement for the listing provided by the Council itself. In other cases, instead, sanctions were suspended because the Council used old evidence, which could not justify the listing criterion. In both cases, the measure had to be annulled with regard to the applicant (or suspended), because, since the Council could not prove that the persons fulfilled the main listing criterion, no other commonality of interests could be found to substantiate the association.
Other aspects of effective judicial protection concern the right to access to justice and the right to be heard. On the first, the 2022 sanctions introduced explicit derogations for transactions allowing for legal representation. On the second, it shall be recalled that the right to be heard in all proceedings, laid down in **Article 41 second paragraph (a)** of the **Charter,** is inherent

in respect for the rights of the defence, and guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of a decision in relation to that person that is liable to affect his or her interests adversely.

Article 41, par. 2(a) Charter[66]

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

The Court also considers whether the Council commits a manifest error of assessment of the evidence. For example, in OMPI, a case decided pre-Lisbon, the Court repeated the usual formula that EU institutions enjoy a broad margin of discretion.

Another element that could escape judicial review is if the association criteria is a matter of legal or political choice; the reasons for listing an individual are not outside the scope of judicial review.
The Council enjoys political discretion to decide the abstract reasons for listing people, instead, the Court still monitors not only the cogency in the abstract of those reasons, but also whether those reasons are backed by sufficient evidence.

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[66] Article 41, par. 2(a) EU Charter of Fundamental Rights
https://fra.europa.eu/en/eu-charter/article/41-right-good-administration?page=5

Another reason to exclude the Court's jurisdiction from measures of general application is that sanctioning Russia (or Belarus, or any other third country) is not an automatic consequence of country behaviour, as it is not subject to triggering conditions as a matter of EU law: the choice to sanction a third country is, instead, a political choice left to the discretion of the Council. One could design a system in which the imposition of sanctions must be triggered automatically by some factors, such as a violation of international law, but this is not how EU sanctions are fashioned because **Article 28[67] and 29[68] TEU** (and other CFSP legal bases) identify no definite triggering conditions.

The EU fundamental Treaties, through the rules on CFSP and on the conclusions of international agreements, put the EU and Member States' diplomats charge of bargaining with Russia, a bargaining that is more effective if it contemplates the opportunity to lift sanctions in exchange of concessions by Russia, and to reintroduce them in case of non-compliance by Russia with those concessions. The EU has used strong words to describe and characterize the Russian's actions as a gross violation of international law and the UN Charter's principles and undermining the European and global security and stability, and the so-called disinformation campaigns targeting EU citizens, defined as a direct threat to the Union's public order and security. EU highlights, through the language used in the sanctions and, by supporting international courts in investigating alleged violations of international law committed in Ukraine, the magnitude of the Russian offense.
The end of the conflict does not mean the automatic end of the restrictive

[67] Article 28 Treaty of European Union (TEU)
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016M028

[68] Article 29 Treaty of European Union (TEU)
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016M029

measures. For example, in the case of censorship against Russia-sponsored media outlets, the act affirms that these measures should be maintained until the Ukraine's aggression is finished, and until the Russian Federation, and its associated media outlets, cease to conduct propaganda actions against the EU and its Member States.

As the **Article 5 of TEU**[69] affirms, *"the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States"*. This means that it safeguarded the vertical federalism of individual liberty. The institutional balance's principle is the horizontal correlative, protecting individual liberty horizontally. This is the reason why the Court controls that the EU acts are adopted pursuant to the correct *"legal basis"*; it meant that the Court ensures both that the EU had the power to adopt a measure and that it did so in accordance with the procedural requirements reported on the Treaties. This scrutiny is needed more in the CFSP's area, where **Article 40 TEU (with Article 275 TFEU)** confers jurisdiction to the Court to monitor that the CFSP competences do not mix with the other EU competences.
The correctness of the legal basis of a Union's act, in other words, does not depend on how detailed the act is. As per settled case law, the legal basis is determined by objective criteria that are amenable to judicial review, which include the aim and content of the measure. The actions lodged against the 2022 sanctions contain challenges connected to the appropriateness of the legal basis, and it cannot be excluded that some sanctions may breach **Article 40 TEU**, such as the sanctions adopted to fight disinformation, and of those pursuing energy policy.

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[69] Article 5 Treaty of European Union (TEU)
https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A12008M005

Article 40 TEU[70]

The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.

Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.

4.2.2 – Criticisms

In the last period, CFSP sanctions have become the major aspect of the EU's foreign policy and, they have led to litigation before the CJEU; an example is the adoption of EU sanctions subsequently the Ukrainian's crisis. Due to the features of these restrictive measures, their adoption and implementation has been called into question and some of the authors consider that the legality of the sanctions is arguable and unjustified.

In the majority of the analysed cases, the sanctions imposed by EU were annulled by CJEU; this behaviour of the Court, for what concerns the sanctions against Ukrainian intelligentsia, is maintained. This statement could not be confirmed, instead, by the results of the cases on sanctions against Russians because almost all the targeted measures were approved and maintained by the Court. In other cases, the sanctions were upheld by the General Court but ultimately annulled by the Court of

[70] Article 40 Treaty of European Union (TEU) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M040

Justice.

One of the main reasons for the annulment of the restrictive measures was related to the motivation of the Council decisions pursuant to Article 296 TFEU.

Article 296 TFEU[71]

Where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality.

Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.

When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question.

The CJEU has often sanctioned the fact that the Council relied on information that were not precise enough for establishing the facts. It had to make sure that the targeted persons had threatened such rule of law, since the EU restrictive measures meant to support the rule of law in Ukraine. The same lack of compliance with the obligation to state reasons was sanctioned regarding the measures imposed on Russian persons or entities which were responsible for actions or policies undermining or threatening the territorial integrity, sovereignty and independence of

[71] Article 296 Treaty on the Functioning of the European Union (TFEU) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016E296

Ukraine. To understand better, we have to mention the Rotenberg Case[72]; this person had a personal relationship with the President Putin himself and he was the shareholder of a company that built a bridge connecting Crimea to Russia. He was targeted by sanctions on the ground that he benefitted from one of the Russian decision-makers responsible for the annexation of Crimea. According to the Court, the Council failed to prove that the applicant did control the mentioned company. The persons targeted by the sanctions could not have been aware of the involvement of those decision-makers in the preparation.
Talking about assessing the validity of EU sanctions against Russia and Ukraine, the Court is characterized by a double trend. Firstly, the majority of the sanctions annulled by the Court were those targeting Ukrainians; secondly, most of the sanctions that were annulled due to an insufficient motivation of the Council were those targeting natural persons. This behaviour may be due to the Court's awareness that consequences of such measures can be more damaging for individuals than for undertakings. In this position, it opted to be more severe in its appreciation of sanctions targeting natural persons than when assessing those imposed on legal ones.

Since the Lisbon Treaty, the judicial protection of targeted persons has faced much progress; even if some jurisprudential development had already taken place when the CJEU started adjudicating sanctions against Ukraine and Russia. The EU is trying both to help Ukraine re-establish the rule of law and to pressure Russia to stop destabilising the country. The first step of the ECJ was to regulate the admissibility of actions for annulment brought by targeted entities against ban exports which were applicable to undertakings subject to EU law. Russian undertakings can be considered as directly affected by such export bans in the meaning of

[72] General Court, 30 November 2016, Rotenberg v. Council, T-720/14

Article 263 par.4 TFEU[73], and therefore entitled to challenge them before the Court. As second step, the Court addressed the extent to which the EU could sanction the misappropriation of public funds. The restrictive measures were justified in the view of supporting democracy, the rule of law and the institutional foundations of Ukraine. In the third and last step, the Court has decided to rule on the extent to which the Council could target Russian persons and, in particular, on the notion of active or material support to Russian actions destabilising Ukraine. The CJEU provide the definition of the concept of active support: "*forms of support which, by their quantitative or qualitative significance, contribute to the continuance of the actions and policies of the Russian Government destabilising Ukraine*"[74]. The goal of those measures is to impose economic sanctions on the Russian Federation, in order to increase the costs of its actions of destabilisation.

We already know that the CFSP legal framework is complex and critical, in fact, the CJEU has been unable to impulse strong evolutions; but this does not mean that it has not shown some interest in that area. The Court's case law could be considered as an opportunity to make the CFSP framework evolve, and this is a good starting point for some reflections on the topic.

For some aspects, the CJEU's case law on sanctions against Russians and Ukrainians has not addressed the main issues of the CFSP framework. This is true in the case of the particularly wide margin of appreciation of the Council when adopting restrictive measures. In most of its judgments the Court has recalled the broad discretion of the Council in areas that involve political, economic and social choices. This institution has to make

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[73] See supra note 63

[74] General Court, 15 June 2017, Kiselev v. Council, T-262/15, paragraph 114

complex assessments and must examine if the objectives of the adopted measures are consistent with the objectives of external action set out in Article 21 TEU[75]. The sanctions targeting Russians confirmed this, because they are adopted for the purpose of the protection of EU security interests and the maintenance of international peace and security. The confirmation of the wide margin of appreciation of the Council is also notable in the case of sanctions targeting former Ukrainian leaders. In the latest case law[76], it was asserted that the Council was not obliged to verify if the investigations to which applicants were subjected were well founded, nor the facts on which they relied on in order to carry out the investigations. This Council's wide margin is reinforced by the limited jurisdiction of the Court over restrictive measures in the meaning of Articles 24 TEU and 275 TFEU.
Another aspect of the CFSP framework that might not have been sufficiently addressed by the Court relates to the protection of the fundamental rights of the targeted persons. The Court has had the opportunity to bring equilibrium between the objectives of the CFSP and the fundamental rights of the persons concerned. In most cases, this was done at the expense of the latter, in particular regarding the right to property, the right to reputation and the freedom of expression. The authors affirm that the Court's tendency to give precedence to the goals of the CFSP is much more worrying that the current framework for the imposition and the challenging of restrictive measures is not favourable to the protection of these rights.

The limited impact of the considered case law on the CFSP legal framework is connected to the Court's awareness of the intergovernmental dimension of the CFSP. When we consider the legality's review of

[75] See supra note 3
[76] Ben Ali v Council, T-149/15 par.120; Ezz and Others v Council (Judgment) C-220/14 par.77; General Court, 7 July 2017, Mykola Azarov v. Council, T-215/15 par.145

restrictive measures, the Court is adjudicating in one of the most intergovernmental EU policies, with political and sensitive issues at stake. In the field of foreign policy more than in any other, the Court is aware that the power of its judgments rests on their acceptance by the Member States. The Court's case law has also showed a certain will to ensure the effectiveness of the measures; the judicial body is aware of the complexity of the targeted sanctions implementation because the identification of individuals and entities requires detailed information that is difficult to obtain. This concern of ensuring the effectiveness of restrictive measures is obvious since many judgements have demonstrated the Court's determination to confirm the validity of the sanctions at all costs.

In order to understand the cases in which there is an impact on the CFSP legal framework, we have to paid attention to two important aspects, the Council's practice of adoption of restrictive measures, and the extension of the Court's jurisdiction over restrictive measures. In the first aspect, the CJEU case law has had an impact on the Council's discretion when adopting sanctions based on the decision of a third State authority. This is confirmed in the case of restrictive measures adopted against Ukrainian persons that are being prosecuted in their country for the misappropriation of public funds. In its earliest case law, the Court had confirmed the wide margin of appreciation of the Council when adopting such sanctions. Those measures contributed to facilitating the prosecution of such crimes and re-establishing the rule of law in Ukraine. In the recent case law, the Court has changed approach; the Council must verify whether such decision was adopted in compliance with the rights of the defence and the right to effective judicial protection, before acting on the basis of a Ukrainian prosecutor's decision. The Court has increased the standard of evidence that must be provided by the Council when adopting sanctions;

these developments will inevitably impact the Council's practice of restrictive measures in the future.

For what concern the second aspect, the treaties provide a limited jurisdictional competence of the CJEU over the CFSP acts, this is due to the strong intergovernmental dimension of the sector. Reading Article 24 TEU[77] and Article 275 TFEU[78], some authors noticed that they introduce a derogation to the principle of general jurisdiction of the Court over matters related to EU law. The articles mentioned contain an exception that enable the CJEU to have jurisdiction to review the legality of restrictive measures targeting natural or legal persons. In the Court's Opinion 2/13[79], it stated that it had not had the opportunity to specify the scope of the limitations on its jurisdiction pursuant to Articles 24 TEU and 275 TFEU, and that certain acts adopted in the context of the CFSP are beyond the Court's judicial control. This approach was changed with the Rosneft[80] case law, whose context was the following: the EU had adopted CFSP acts imposing restrictive measures, after UK had enacted domestic implementing measures. Rosneft challenged these domestic acts by bringing, firstly, an action against them before the domestic courts and, secondly, an action for annulment of the EU decision and regulation before the General Court. The domestic court referred the matter to the Court for an assessment of the validity of the contested EU acts. One question asked to the CJEU was about the possibility for domestic judges to issue such a reference for a preliminary ruling on the basis of Article 267 TFEU, given

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[77] See supra note 61
[78] See supra note 62
[79]Opinion 2/13 CJEU
https://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN#:~:text='Nothing%20in%20this%20Charter%20shall,States%20are%20party%2C%20including%20the%20%5B

[80] Court of Justice, Grand Chamber, 28 March 2017, PJSC Rosneft Oil Company v. Her Majesty's Treasury, C-72/15 ; General Court, 13 September 2018, PAO Rosneft Oil Company and others v. Council, T-715/14.

the limited jurisdiction of the CJEU in the field of CFSP. The Court answered this question by establishing its own competence to give such a preliminary ruling on the basis of Article 267 TFEU[81]. It recalled that the preliminary ruling on the assessment of validity is a means of reviewing the legality of Union acts, just like an action for annulment. It can be affirmed that the CJEU case law regarding sanctions against Russians and Ukrainians have an impact on the CFSP legal framework because it has demonstrated a concern of the Court for the respect of the rule of law and the guarantees of an effective judicial protection. The Court want to strength the credibility of the Union's foreign policy on the international scene[82].

In conclusion, we can affirm that the position of the judges, when adjudicating claims that arise from restrictive measures, is difficult; in fact, on one hand, if the CJEU demonstrates an excessive activism in relation to the peculiarity of the CFSP, it might expose itself to some criticism from Member States. While on the other hand, when the CJEU remains too cautious in the field of CFSP, its reasoning is inevitably be called into question. In a global way, the CJEU case law on sanctions following the crisis in Ukraine allow developments in the law of restrictive measures. The Court had the opportunity to rule on a variety of legal issues and to extend its jurisdiction over restrictive measures in order to protect the targeted persons' right to judicial protection. In most of the cases, the Court confirmed the margin of appreciation of the Council when adopting restrictive measures, and in its judgements show the importance of political considerations; it also plays a significant role in strengthening or undermining the credibility of the EU's action on the international scene.

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[81] See supra note 60

[82] C. Challet, *"Reflections on Judicial Review of EU Sanctions Following the Crisis in Ukraine by the Court of Justice of the European Union"*, College of Europe, 2020.

4.3 – The issue of Court's jurisdiction in recent case: C-351/22

Since we have considered the limited jurisdiction of the Court on restrictive measures and the complexity of the CFSP field in the European context, we may mention the case **C-351/22**[83], and more specifically the **Opinion of the Advocate General (AG) Càpeta of 23rd November 2023.** In order to understand the statements and the conclusions of the AG, we have to begin with the narration of the events that occurred.
The Appellant, **Neves 77 Solutions SRL**, is a company created in 2014 with as main activity the brokering in the sale of products in the aviation's field. It brokered a transaction between the Ukrainian state-owned company **SFTE Spetstechnoexport (SFTE)** and the Indian company **Hindustan Aeronautics Limited (Hindustan)**; in 2009, these two companies entered a contract in which STFE supplies and repairs several aircraft for Hindustan using components manufactured in Russia. After the illegal annexation of Crimea by Russia in 2014, STFE stopped purchasing the components from the country. After, on January 2019, SFTE contracted with Neves to supply it with 32 radio sets which were to be delivered to the United Arab Emirates; on the same month, Neves contracted with a Portuguese company to buy the 32 radio sets, 20 of which were produced and exported from Russia to the United Arab Emirates; then, Neves transferred those 20 radio sets to Hindustan in India as per STFE's request.
The **Romanian department of Export Control (ANCEX)**, through a notice, informed Neves that the sets were included in the category "**ML11**" of the **Decree no.901/2019 of the Ministry of the Foreign Affairs**, which

[83] Case C-351/22, Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice (Working Document) https://curia.europa.eu/juris/showPdf.jsf;jsessionid=C6680E64029EF33175B9875344806B29?text=&docid=263323&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=4816141

ratifies the list of the military products subjected to a system of control of exports, imports and other transactions. The notice indicated the availability of doing foreign trade involving that type of products, only on the basis of the registration confirmation and the licenses issued by ANCEX. In addition, ANCEX informed the appellant that its activity relating to those radio sets came within the scope of restrictive measures against Russia introduced by **Decision 2014/512/CFSP**[84]. It introduced restrictions related to financial services, dual-use goods, sensitive technologies and military goods. Nearly after in order to implement the Decision, the Council adopted the **Regulation 833/2014**[85], on the basis of Article 215 TFEU.
It has to mentioned that it did not initially contain a prohibition on brokering services in relation to military goods; only recently, on 23rd June 2023, the Council amended Article 4(1)(a) of Regulation and included the wording “and brokering services”. The amendment is not applicable to the situation in the main proceedings. The Council’s explanation as to why that prohibition was not implemented in an Article 215 regulation was the following: exports of arms is a matter of **Common Position 2008/944/CFSP**[86]. It provides that Member States must issue a licence for any export of military equipment. To facilitate the adoption of the CP, a Common Military List of European Union was created, and all the goods included were subjected to exports controls under the same CP. The Council considers that the Common Position 2008/944/CFSP does not

[84] Council Decision 2014/512/CFSP
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014D0512

[85] Council Regulation (EU) No 833/2014
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0833

[86] Council Common Position 2008/944/CFSP
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008E0944

clearly require Member States to impose licence obligation for brokering services in relation to military goods.

Neves responded that the two ANCEX notices did not apply at the time of the delivery of the goods; **article 2(2)(a) of the Decision** did not apply either, since the goods were not sold in Russia.

Article 2(2)(a) of Decision 2014/512/CFSP[87]

It shall be prohibited:

(a)to provide technical assistance, brokering services or other services related to military activities and to the provision, manufacture, maintenance and use of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts therefor, directly or indirectly to any natural or legal person, entity or body in, or for use in Russia;

On August 2019, the appellant received from the Ukrainian company sums totalling EUR 2.984.961,40 as payment for the radio sets delivered pursuant to the contract. The following year, the defendant, the **Romanian National Tax Administration Agency – Tax Fraud Department (ANAF)** issued an infringement notice against the appellant; it included the offence under **Article 26(1)(b) of Decree-Law 202/2008** for having violated **Articles 3(1), 7 (1) and 24(1)** of that decree-law and Article 2(2)(a) of Decision 2014/512/CFSP. The Decree-Law mentioned regulates the manner of implementation at the national level of international sanctions, including those imposed by the EU. Its provisions provide those

[87] Article 2(2)(a) of Decision 2014/512/CFSP
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014D0512

acts imposing international sanctions (including EU decisions under the CFSP) bind public authorities and all natural or legal persons located in Romania. They also introduce the obligation that natural or legal persons notify the competent authorities if they have established a relationship or have been in a relationship relating transactions covered by international sanctions. In the end, Neves was fined EUR 6.000,00 and the sum of EUR 2.984.961,40 was confiscated.
Although ANCEX had informed Neves that the radio sets were included in the list of products subjected to controls and that the relative brokering transaction came within the scope of the CFSP decision, the appellant had continued the operations relating to the sale of the products by collecting the sum received in a Romanian bank account. Neves contested the infringement notice before the **Court of First Instance of Romania**, which dismissed the complaint as **unfounded**.

The appellant decided to bring an appeal against that judgement before the **Regional Court of Bucharest**, the referring court in the present case. This Court, based on the national measures implementing EU restrictive measures, explains that the appellant incurred an administrative penalty consisting of a fine and the additional confiscation of the amount received for the brokering transaction from STFE. More in detail, it notes that the domestic legislation introduced a separate obligation to notify to the competent authorities of any transaction within the scope of the prohibition on brokering services set out in the CFSP Decision, with a penalty of automatic confiscation of any proceeds resulting from the violation of that obligation.

The Regional Court of Bucharest wonders whether the national implementing measures run counter to certain general principles of EU law and rights included in the Charter of Fundamental Rights of the European Union. Additionally, the referring court asks whether the

prohibition on brokering services applies to the main proceedings' situation, involving goods that come from Russia and that have not been physically imported into Member States. The Court highlights that the CJEU has not previously ruled on the provisions of Decision 2014/512/CFSP whose interpretation is requested, and that the present circumstances differ from those giving rise to the judgement in the Rosneft case. After these considerations, the Regional Court of Bucharest decided to suspend the proceedings and refer three questions to the CJEU for a preliminary ruling.

The first question concerns the interpretation of the Decision 2014/512/CFSP, since the applicant stated the lack of proportionality of the confiscation order applied to the sum received. The second question is related to the interpretation of the Article 5 of the Decision, in detail if that provision precludes the introduction of a separate obligation to inform or/and notify the authorities of any transactions involving goods falling within the scope of Article 2(2)(a) of the Decision. The last question has the aim to precise whether the prohibition in Article 2(2)(a) applies in the case of goods that come from Russia and that have not been physically imported into EU Member States.

Since the final sentence of the Court is previewed on 10th September 2024, currently, we do not know how the Court's behaviour will be. In the meantime, we can consider the AG opinion, which conclusions can be considered by the Court or, it can provide a different resolution of the case.

4.3.1 – The Advocate General Opinion[88]

The Advocate General (AG) Càpeta intervenes in the case, and he started by stating that the Regional Court of Bucharest framed its preliminary ruling as a matter of interpretation of certain provisions of Decision 2014/512/CFSP; it looks for the CJEU's guidance regarding the compatibility of national implementing measures with EU fundamental rights and principles. Romanian law chose to sanction persons involved in brokering services against EU restrictive measures by an administrative fine and confiscation of the whole gain resulting from the crime. Those sanctions constitute a national legislator's choice in application of EU restrictive measures, including those against Russian Federation. Considering this information, the first two questions do not require an interpretation of the Decision, instead, they require that the Court interpret principles of EU law to which the national court refers, which are **legal certainty, nulla poena sine lege, and the right to property.**

The Court would have jurisdiction to interpret general principles of EU law and fundamental rights as stated in the Charter also when interpretation is relevant for the assessment of the lawfulness of the CFSP decision; but this is not the case in the present situation. The confiscation measure imposed by the CFSP Decision has to be implemented by Member States, instead, the reference by a national court would be a reference asking about the validity of CFSP measure. The Court's jurisdiction to hear such a reference is not excluded by **Article 24(1) TEU**[89] and **Article 275 TFEU**[90]. The AG proposed this interpretation of the articles because they are an

[88]Opinion of the Advocate General Càpeta, 23/11/2023 https://curia.europa.eu/juris/document/document.jsf;jsessionid=C6680E64029EF33175B9875344806B29?text=&docid=280080&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=4816141

[89] See supra note 61
[90] See supra note 62

exception to the Court's general jurisdiction under the Treaties. Those Treaty provisions, if interpreted in this way, do not exclude the Court's jurisdiction to review compliance of all CFSP measures, including those of general application, with fundamental rights protected under the EU legal order. The interpretation of Article 24(1) TUE and Article 275 TFEU as excluding the Court's jurisdiction in such cases is not consistent with the constitutional foundations of the European Union; in fact, the constitutional role of the Court, to ensure that EU institutions and bodies do not violate fundamental rights guaranteed by the EU legal order, would be deprived and it would leave individuals without effective judicial protection. What described could not be the intention of the Treaties' authors, in contrast, the intention could have been to exclude the Court's jurisdiction to interpret CFSP measures in order to clarify their meaning for the purpose of their application in the Member States.

Considering the three questions raised by the Regional Court of Bucharest to the CJEU, the AG affirmed that the first two questions relate to the potential unlawfulness of the confiscation measures previewed by the Romanian law. There are different possible reasons of such situation, but the most relevant regards the right to property. The confiscation interferes with the right mentioned, as guaranteed by **Article 17(1) of the Charter**[91]. That right is not absolute and may be limited in a proportional way in order to achieve legitimate public aims. In order to assist the referring court, it is needed to interpret the Charter in order to precise whether the right to property may be limited in order to achieve public goals of Decision 2014/512/CFSP.

As mentioned before, in the Rosneft case, a similar question was

[91] Article 17 of the European Union Charter of Fundamental Rights https://fra.europa.eu/en/eu-charter/article/17-right-property#:~:text=1.,good%20time%20for%20their%20loss.

considered by the Court. It rejected a challenge to the validity of certain provisions of the CFSP Decision imposing individual restrictive measures, and it concluded that some limitation can be justified with respect to the consequences of targeted restrictive measures on the entities subject to those measures. In Rosneft case, the CJEU observed that the goals pursued by sanctions against Russia are the protection of Ukraine's territorial integrity, sovereignty and independence and the promotion of a peaceful settlement of the crisis in that country. Their achievement is part of the wider objective of maintaining peace and international security, in accordance with **Article 21 TEU**.

Article 21 TEU[92]

1.The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

[92] Article 21 Treaty of European Union (TEU)
https://eur-lex.europa.eu/eli/treaty/teu_2008/art_21/oj

2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

(a) safeguard its values, fundamental interests, security, independence and integrity;

(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;

(c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;

(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;

(e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;

(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;

(g) assist populations, countries and regions confronting natural or man-made disasters; and

(h) promote an international system based on stronger multilateral cooperation and good global governance.

3. The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by

Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.
The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.

Those goals were enough to justify interference with the applicant's right to property.
National measures implementing EU restrictive measures must have a dissuasive effect. The Commission suggested, and the AG agreed, that providing the confiscation in addition to a fine may be necessary because applying the fine alone is not possible to produce the desired effect. In the present case the confiscation is imposed as an automatic measure which arises as a consequence of the failure to notify the prohibited transaction. It seems that Romanian law attaches automaticity of the confiscation to the fact that the prohibited and illegal transaction was not notified to the competent authorities. For this reason, the automatic confiscation can be considered as a limitation to the right to property which is proportionate to the aim of dissuading persons from violating restrictive measures against Russia, which were adopted to achieve legitimate public objectives.

For what concerns the third question, the AG stated that the referring court requires the Court's interpretation of a general provision of a CFSP Decision imposing restrictive measures against a third country. The CJEU has not had the opportunity to precise whether Article 24(1) TUE and Article 275 TFEU exclude such jurisdiction. According to Càpeta, these articles exclude the Court's jurisdiction to interpret provisions of CFSP

measures in order to make their meaning clearer. This interpretation is consistent with the aim of the limitation of the jurisdiction described in those Treaty provisions. The authors of the Treaties tried to exclude the Court from policymaking in the CFSP field; but the Court, during interpretation, has to align itself with the authors intentions. We can affirm that the Court is allowed to assess whether a CFSP rule as understood by its authors is permitted in the light of EU fundamental rights and principles.

In the present case, the CJEU is seized in the preliminary ruling procedure with the request to explain the meaning of a CFSP rule which is not clear to the referring court; in the process, the meaning advocated by the authors of the rule is only one and, the Court has to decide which is the correct one. For uniformity's sake, the EU constitutional order gives to the Court the power to choose one of the possible meanings (that power was excluded in CFSP field). If a CFSP decision is implemented, as in the present case, by the EU through **Article 215 regulation**, the Court will enjoy full interpretative jurisdiction in respect of that regulation and can exercise it through the preliminary ruling procedure. An Article 215 regulation is a TFEU measure by which the EU chooses the meaning attributed to a rule of CFSP decision. This means that if the **Regulation 833/2014**[93] had implemented Article 2(2)(a) of CFSP Decision completely, it would be for the Court to interpret whether the notion of brokering services covers transactions relating to goods which were never physically imported into Member States. The Court's interpretation would concern only the regulation and not the CFSP Decision.

Since that, the Commission's argument that the Court has jurisdiction to interpret the Decision 2014/512/CFSP because the prohibition on brokering services should have been implemented through Regulation

[93] See supra norite 86

833/2014 cannot be accepted. According to these information and on the basis of the foregoing, the AG proposed that the Court find that it lacks jurisdiction to answer to the third question; for what concerns the preliminary ruling's questions of the Regional Court of Bucharest, the CJEU should answer that the general principles of legal certainty, nulla poena sine lege and the right to property do not preclude national measures providing for a confiscation of the whole proceeds of a transaction undertaken in violation of Decision 2014/512/CFSP.

4.4 – The Limited United Nations' intervention

As described above, the West had started to impose sanctions on Russia by its annexation of Crimea and Sevastopol in 2014; these ones were intensified at the time of Russian invasion of Ukraine, given the recognition by Russia of the self-proclaimed independence of the Donetsk and Luhansk pro-Russia-separatist-controlled areas of Ukraine on 23 February 2022, just a day before the full-scale invasion. It is useful to think that traces of the Russian invasion were more transparent by December 2021, when there was a rapid build-up of troops near the Ukraine's borders; but still the invasion was not prevented. This three-month period, between the two events, gave Western countries time to build an informal coalition to impose deterrent measures against Russia. Multilateral sanctions were explicitly threatened for months in an effort to deter Russia. They were not the only policy instruments being employed to deter Russia, however.

The UN Security Council met on 31st January 2022 on the request of the US to consider Russia's deployment of troops near its border with Ukraine as a threat to international peace and security. Russia rejected the allegations as a US attempt to mislead the international community and

interfere in its internal affairs. Despite continued US warnings and high-level contacts with the Russian side to avert the imminent invasion, there was widespread incredulity that it would happen; even President Volodymyr Zelenskyy of Ukraine played down the probability of that happening just a few days before it did. On 17th February 2022, the UN Security Council met after the submission of a letter by Russia regarding the implementation of the Minsk Agreements of 2014-2015 in resolving the conflict in East of Europe. As result of the meeting, it became clearer that there was a long history of grievances between Ukraine and Russia and that the measures in the Agreements had not been implemented.

The United Nations Security Council was designed to prevent major powers from abandoning the organisation. Giving the veto to five permanent members removes them from consequences when their actions come under review. This means that globally binding resolutions imposing restrictive measures cannot be applied to the permanent members by the Security Council, since they will invariably veto them. This does not mean, however, that the Security Council has no role. From the beginning, there was no chance for the Russian invasion of Ukraine to be condemned by the UN Security Council because of the Russian veto. Russia has this prerogative as one of the five Permanent Members of the Security Council. After the invasion, Russia used its veto to prevent the Council from adopting a draft resolution.

An emergency special session of the Assembly was called because of the lack of unanimity of the Security Council's permanent members that had prevented the Council from exercising its primary responsibility for the maintenance of international peace and security. The 11th Emergency Special Session of the General Assembly, on 2nd March 2022, has adopted resolution condemning Russia's annexation of four Ukrainian regions and providing the suspension of Russia's

membership in the UN Human Rights Council. Looking at the votes related to these types of resolutions, the abstentions and the non-votes, it becomes evident that some countries' representatives, sitting on the fence, refused to take sides in the conflict. In fact, 141 States voted in favour, 5 contrary and 35 abstentions; only four countries had taken Moscow's side: Syria, Eritrea, Belarus and North Korea. The meeting started with the statement of the Russian ambassador, Vassily Nebenzia, who openly asked not to vote the proposed resolution. Despite the result, some nation's position is more nuanced, for example the one of Serbia, historically near to Russia, which has voted in favour of the resolution even if in neutral position.
Moreover, the General Assembly resolutions do not have the enforcement authority that Security Council resolutions would have if adopted under Chapter VII of the UN Charter, "Action concerning threats to peace, breaches of peace and acts of aggression".

Moving to the UN Human Rights Council, in addition to Russia's suspension from membership by the UN General Assembly for reported, gross and systematic violations and abuses of human rights in Ukraine, Russia has been the subject of several resolutions of the Human Rights Council itself. For example, in May 2022, the Council adopted a resolution on the deteriorating human rights situation in Ukraine as a result of the Russian aggression. The Council demanded an immediate cessation of hostilities against Ukraine and requested the Independent International Commission of Inquiry to investigate potential war crimes and crimes against humanity in four regions of Ukraine; the aim would be to hold those responsible accountable[94].

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[94] G. Kostacos, "*The United Nations and the Russian-Ukrainian War*", *Chapter 23*, pages 383-391, "*Polarization, Shifting Borders and Liquid Governance - Studies on Transformation and Development in the OSCE Region*" by A. Mihr and C. Pierobon, 2023.

Intergovernmental bodies of the broader UN system also took decisions that directly or indirectly castigated Russia for its aggression. Reacting to pressure in various forms, the Russian government and parliament were considering taking the initiative of withdrawing from those bodies, including the World Health Organization (WHO) and the World Trade Organization (WTO).

On 26th February 2022, Ukraine filed an application instituting proceedings against the Russian Federation before the International Court of Justice (ICJ), the principal judicial organ of the United Nations. Ukraine challenged Russia's assertion that acts of genocide had occurred in the Luhansk and Donetsk regions of Ukraine, which Russia had used as an excuse for its invasion. The ICJ agreed with Ukraine and asked Russia to suspend the military operations in the territory of Ukraine.

Investigations opened on 2nd March 2022, and the scope of the case under investigation was to encompasses any past and present allegations of war crimes, crimes against humanity or genocide committed on any part of the territory of Ukraine by any person from 21st November 2013 onwards.

From the beginning of the Russian invasion, the UN Secretary-General (SG) took a principled stance. Speaking at the UN General Assembly on the recognition by Russia of the separatists' regions of Donetsk and Luhansk, A. Guterres stated that the decision of the Russian Federation to recognize the independence of those regions is a violation of the territorial integrity and sovereignty of Ukraine and inconsistent with the principles of the Charter of the United Nations; in addition, he called for restraint, reason and de-escalation. The SG also wanted all parties to make full use of **Article 33 of the Charter** and its diverse instruments of pacific settlement of disputes and, he expressed his full commitment to support all efforts to resolve this crisis without further bloodshed. After the

invasion, he stressed the commitment of the UN and its humanitarian partners to support people in Ukraine in their time of need.

Article 33 Charter of the United Nations[95]

1.The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2.The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

In parallel to the prolonged war misery and the inability and lack of political will to end it, the UN system's humanitarian assistance has remained indispensable for alleviating the suffering of large parts of the Ukrainian population. A couple of days after the invasion started, Secretary-General Guterres appointed a close associate from his previous position as UN High Commissioner for Refugees to be the UN Crisis Coordinator for Ukraine. The UN and humanitarian partners launched a flash appeal for urgent humanitarian support to people in Ukraine and refugees in neighbouring countries. Actions financed include convoys with supplies to hard-to-reach areas, multipurpose cash to hundreds of thousands of people, and providing aid as close as possible to people in need. The Office of the UN High Commissioner for Refugees (UNHCR) has played a unique role in supporting the millions of Ukrainians who have

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[95] Article 33 Charter of the United Nations
https://www.un.org/en/about-us/un-charter/chapter-6

either sought refuge in neighbouring countries or became internally displaced people within Ukraine, to avoid the consequences of the war. Serious concerns about Russian attacks on civilian populations, disrespect for humanitarian law, and war crimes have been expressed by the UN High Commissioner for Human Rights, Special Rapporteurs, and other human rights experts.

The events and data described are concerning with regard the inability of the UN to prevent such a major and primarily foreseen conflict, as well as the failure of its Security Council to deal with an armed conflict that involves one of its five permanent members as an aggressor. The UN Secretary-General, the official associated with global peace-making, has proved unwilling or unable to engage in peace-making beyond statements of principle and humanitarian action. While robust political responses by the UN General Assembly and the Human Rights Council have partly compensated for this. Overall, the UN system responded to the Russian invasion of Ukraine making up for its inability to get a resolution past the Russian veto on the Security Council with an Emergency Special Session of the UN General Assembly and resolutions passed comfortably there, even if with no binding power. Reactions against Russia in other UN system organizations such as ICAO, the statements of the UN Secretary-General, the High Commissioner for Human Rights, Special Rapporteurs, and others, have all stood up to Russian aggression with conviction and determination and mobilized significant humanitarian assistance to help Ukrainians in their country and as refugees abroad. The UN failed in conflict prevention despite the intensifying signs during the days and weeks before the Russian invasion of Ukraine. The biggest test for its survival lies with the role that the UN will play, in ending the violence, establishing a process for the peaceful resolution of the conflict, and avoiding intentional or accidental nuclear war.

Conclusions

In this analysis, we examine the evolution of the Common Foreign and Security Policy (CFSP), tracing its progression from the European Political Cooperation to the present day. The discussion emphasizes the complexity and specificity inherent in this field, as well as the challenges and uncertainties faced by the judiciary in addressing related issues. To respond to global challenges and actions contrary to its principles, the European Union implements restrictive measures. These measures are not intended to be punitive; rather, they are specifically designed to target certain policies and actions. To better understand the characteristics and effects of these sanctions, our analysis includes key cases such as Kadi, PMOI, sanctions against Russia, and C-351/22.

The primary issue discussed in this study is the limited jurisdiction of the Court of Justice of the European Union (CJEU) over the CFSP domain, alongside the broad discretion afforded to the Council. The role of the judiciary within the CFSP is particularly challenging, as the Court must ensure the application of general principles of EU law while maintaining the distinct constitutional structure of competence in this area. The Treaties establish a limited jurisdiction for the CJEU in this field, which reflects the strong intergovernmental nature of the CFSP. In many of its judgments, the Court has reaffirmed the wide margin of appreciation granted to the Council in areas involving political, economic, and social decisions. This is evident in the sanctions targeting Russia, which are adopted to protect the EU's security interests and to maintain international peace and security.
However, certain provisions, such as Article 24 of the Treaty on European Union (TEU) and Article 275 of the Treaty on the Functioning of the European Union (TFEU), provide exceptions to the general principle of limited jurisdiction. These exceptions enable the CJEU to review the

legality of restrictive measures targeting natural or legal persons. When reviewing the legality of such restrictive measures, the Court operates within one of the EU's most intergovernmental policy areas, dealing with politically sensitive issues. In the field of foreign policy, the Court is acutely aware that the authority of its judgments depends on their acceptance by the Member States.

In conclusion, while the Court's jurisdiction over the CFSP is limited in principle, it is not so in practice. The Court can intervene to ensure the legality and respect for the general principles of EU law. Moreover, in the CFSP domain, it can scrutinize acts, particularly when they pertain to restrictive measures against natural or legal persons, to uphold these legal standards.

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