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The European Union Sanctions Policy and Implementation of Targeted Sanctions of the United Nations Security Council : Is the concept of targeted sanctions a phenomenon of one step forward two steps back ?

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**The European Union Sanctions Policy
and Implementation of Targeted Sanctions
of the United Nations Security Council**

**Is the concept of targeted sanctions a phenomenon
of one step forward two steps back ?**

Mémoire présenté pour l'obtention du
Master en études européennes
par Inela AGOLLI

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Genève, Août 2012

Abstract

The relations between the two international organizations, namely the EU and the UN, have been characterized in general as harmonized and cooperative. In this research however, we are more interested to examine cases where the EU has not been characterized as much “cooperative” and has chosen a different path than the UN. In particular this research contributes in the relations between the EU and the UN in imposing sanctions. It has been noticed that in most cases the EU implements the UN sanctions and follows the same logic, but it had been noticed as well cases when the EU unilaterally or multilaterally has imposed sanctions against a state without having supported its decision on UN resolutions and even cases when the EU showed a tendency not to implement UN sanctions, since it noticed that the sanctions are not in a light with fundamental human rights guaranteed by the European Convention for Human Rights. This study highlights the legal and political issues arising from the efforts of the implementation by the EU of the UNSCRs and more specifically Resolutions related to suspects of terrorism.

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Abbreviation list

CFI: Court of First Instance

CFSP: Common Foreign and Security Policy

CSDP: Common Security and Defense Policy

EC: European Community

ECHR: European Convention on Human Rights

ECJ: European Court of Justice

ECSC: European Coal and Steel Community

ECtHR: European Court for Human Rights

EDC: European Defense Community

EEC: European Economic Community

ENP: European Neighborhood Policy

EU: European Union

EUBAM: European Union Border Assistance Mission

FRG: Federal Republic of Germany

JCC: Joint Control Commission

NATO: North Atlantic Treaty Organization

PSC: Political and Security Committee

PSCD: Permanent Structured Cooperation in Defense

RELEX: Working Party of Foreign Relations Counselors

SEA: Single European Act

TEU: Treaty on the European Union

TFEU: Treaty on the Functioning of the European Union

UN: United Nations

UNSC: United Nations Security Council

UNSCR: United Nations Security Council Resolution

WEU: Western European Union

WMD: Weapons of Mass Destruction

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Introduction

As the title indicates, this research is going to focus on the relations between the European Union and the United Nations concerning sanctions and more specifically targeted sanctions. But what sanctions are in the first place? What are their objectives, why do we need sanctions and how the European Union implements the sanctions taken by the United Nations Security Council? After having being familiar with these concerns, the research will be focused more deeply in the EU sanctions policy.

Someone could therefore ask himself since when the EU becomes visible to the sanctions area. Surprisingly enough, the EU sanctions policy is not a new phenomenon; the EU has established its sanctions practice since 1980s¹. However, the EU sanctions policy has not attracted scholar's attention until 2004, when the EU presented first the Guidelines on implementation and evaluation of within the EU framework on 2003 and the Basic Principles on the use of restrictive measures- sanctions on 2004. It is only after this period that the EU started to attract the attention in this subject even if studies conducted by scholars had in fact shown that the EU practice of sanctions existed even before 2004 most particularly by imposing multilateral sanctions even outside from the scope of the UN.

On the same time, the UN comprehensive sanctions strategy had received harsh criticism about the huge impact on innocent population after the Iraq crisis and therefore the concept of the so-called "smart sanctions" or "targeted sanctions" emerged. The concept was welcomed by international community and the EU in particular was a great supporter of the new concept. The main idea of targeted sanctions, was to target only individuals, groups and entities that were responsible for the illicit acts that constituted a threat to the international peace and security, and not to the whole population. Such measures consist to the freezing of funds and other assets of the individuals as well as travel bans and visa.

Furthermore, after the terrorist attacks on 11th September 2001, targeted sanctions concept was largely used in order to combat terrorism. The United Nations Security Council adopted several resolutions in this regard and called all Member State to take any necessary measures to implement the resolution in question. While the EU has been very cooperative in the fight against terrorism, the EU become the focus of international scholars after the decision of the European Court of Justice (ECJ), on its judgment *Kadi versus Council and Commission* in 2008, when the ECJ annulled a regulation that implemented UNSC sanctions against individuals that were suspected to be related to terrorist attack or to have support terrorist in their attacks. The main question therefore of this research is whether the interposition of the Community between the UN and EU Members States distorts, transforms or in any way impacts on the content and implementation of SC sanctions².

For this purpose our research is going to be divided in three chapters. The first one will give a general background of sanctions at the UN level and will explain how we moved from the comprehensive sanctions to targeted sanctions. The second part will be mostly focused on the EU policy toward sanctions, which will first mention in brief the evolution of sanctions through the EU Treaties, afterwards it will present three hypotheses proposed for the EU sanctions policy and finally it will examine the implementation procedure of the UNSCR by the EU. The third part will be focused on our problematic by trying to respond to the question whether the concept of targeted sanctions is a phenomenon of one step forward two steps back. As we mentioned above, this concept was invented in order to improve the sanctions effectiveness and therefore the international community had the impression of making a big "step forward", however at the same time this concept arises many legal issues that come in confrontation with the respect of fundamental human rights and therefore we have the impression to make "two steps back". Which finally is the case for the targeted sanctions, we move forward or we go back? Why the EU plays an important role to this discussion? How this discussion influences the relations between EU, UN

¹ Portela, Carla, *European Union Sanctions and Foreign Policy : When and Why Do They Work ?*, London, ed. Routledge (2010), p.19.

² Gowlland-Debbas, Vera, "The Functions of the United Nations Security Council in the International Legal System", in *The Role of Law in International Politics*, M. Byers (ed.), Oxford, Oxford University Press (2000) p.46.

and the Member States, that are at the same time Member State of both organizations? These are some of the questions that we are indented to respond in this research and the method used will be mostly by examining theory and practice at the same time. The theory is focused on legal provisions and obligations of MS that they have toward both organization, but as well obligations that the EU might have toward the UN. And the practice is mostly based in the analysis of case studies.

Chapter 1

Sanctions on the UN level

“La justice sans la force est impuissante parce qu’il y a toujours des méchants”³.

A. Theoretical framework of sanctions

In the opinion of some scholars sanctions are considered to be necessary in order for the society to work, whereas other support that sanctions are in fact ineffective measures that do not reach the outcome that they are aiming to. We find therefore crucially important to start this research by first examining the theoretical framework of sanctions and most specifically the logic of the imposition of sanctions, the role of sanctions in a society and its necessity. That would help the reader to obtain a general background of sanctions and therefore to better understand the sanctions policy of the United Nations and its Member States.

The logic of imposition of sanctions

The method that we are using in order to examine the logic of the imposition of sanctions is to compare the most important legal schools by referring to some important legal philosopher and their ideas concerning the necessity or not of the imposition of sanction within a society.

We first start our analysis by the legal positivism scholars. A major role in the way of thinking of international law was played by Immanuel Kant and its philosophy toward “perpetual peace”. For Kant the international law is a “purposive system dedicated toward liberalism focused on the centrality of human rights”. Contrary to Hobbes and his belief that “*homo homini lupus est*”, Kant argued for a “law-governed international society among sovereign states, in which the strong ties existing among individuals create mutual interests that cut across national lines”. And he finally believed that “these ties would create moral independence and lead to greater possibilities for peace through international agreement”⁴.

Legal positivism strongly believed that we all have to be bound by a written law in order for the society to work. As Jeremy Bentham was arguing: “in every law, there must be one or more persons, who are bound or in other words coerced by it. Without these a law cannot so much be conceived”⁵.

In the same scholar, we find John Austin who argued that:

“Every law is a command. A command is distinguished from other significations of desire by the power and the purpose of the party commanding to inflict an evil or a pain in case the desire be disregarded. The evil which will probably be incurred in case a command be disobeyed is frequently called a sanction, or an enforcement of obedience”⁶.

³ Quoted in Kunz, Josef, “Sanctions in International Law”, *American Journal of International Law* vol. 54 (1960), pp. 324-348 [hereinafter Kunz, Sanctions in International Law].

⁴ Quoted in Koh, Harold Hongju, “Why Do Nations Obey International Law”, in *Yale Law Journal* vol. 106 (1997), pp. 2599- 2659, p.2610 [hereinafter Koh, Why Do Nations Obey International Law].

⁵ Bentham, “Of Laws in General”, edited by H. L. A. Hart, p.54, in Oberdiek, Hans, “The Role of Sanctions and Coercion in Understanding Law and Legal System”, *American Journal of Jurisprudence* vol.21 (1976), pp. 71-94, p.71 [hereinafter Oberdiek, The Role of Sanctions].

⁶ Austin, “The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence”, introduction by H. L. A. Hart, pp.13-15 in Oberdiek, The Role of Sanctions, *supra* note 5 p.71.

We continue the same logic by following the explanation of Kelsen⁷, when he says that a social authority believes that can achieve a desirable human behavior by threatening an individual with an “evil” and so the latter one will refrain from undesired actions out of fear of punishment. Kelsen defines this “threatened evil”, as well, as a sanction, that can come either by a “superhuman power” and in that case takes “transcendental character”, or sanctions can be given by men and in this case it is a “socially organized sanction”, which have the character of acts of coercion and they are to be carried out even against the will of individuals⁸.

And we finish the overview of legal positivism scholar by mentioning Kunz who supports the opinion expressed by Pascal that: “La justice sans la force est impuissante...parce qu’il y a toujours des méchants”⁹.

Furthermore liberalist like Abram Chayes and Antonia Handler Chayes are expressing the view in which:

“Nations obey international rules not because they are threatened with sanctions, but because they are persuaded to comply by the dynamic created by the treaty regimes to which they belong. The fundamental instrument for maintaining compliance with treaties at an acceptable level is an iterative process of discourse among the parties, the treaty organization, and the wider public opinion”¹⁰.

Later on in the same direction, we find Thomas Franck- who is believed to be a cognitivist or a social constructivist- and argues that “the key to compliance is not so much the managerial process as the fairness of international rules themselves” he continue by saying that “nations obey powerless rules because they are pulled toward compliance by considerations of legitimacy and distributive justice”¹¹.

The “Chayes”¹² view and Franck’s view, according to Koh’s opinion has played a great role on opposing the realist claims that “international law is not really law, because it cannot be enforced”; and rationalistic point of view like in a case of Henkin, who claims that “since there is nobody to enforce the law, nation will comply with international law only if it is on their interest to do so; they will disregard law or obligation if the advantages of violation outweigh the advantage of observance”¹³.

Finally, while Kelsen and Kunz argued that “justice without force is powerless”, Gerhart Niemeyer stays in the exact opposite way by defending that international law must be a “law without force” in his thesis: “the unreality of international law and the unlawfulness of international reality”. To his opinion law must be “functional,” “more political”; its rules “must be effectual because of their inherent appeal,” they must be “based on non-moral values”¹⁴.

After having explained briefly the different opinions of legal philosophers on sanctions, we notice that the United Nations (UN) Charter seems to have been based on a more legal positivism point of view than a legal realism one. Therefore, in the UN Charter, it seems that sanctions are necessary for a society to function. For this purpose we are going to examine where we find the first steps of sanctions in legal international documents under the Covenant of the League of Nations, General Treaty for the Renunciation of War called the Briand-Kellogg Pact and nowadays under the Charter of the United Nations.

⁷ Kelsen, Hans, “Sanctions in International Law Under the Charter of the United Nations”, in *Iowa Law Review* vol. 31 (1945-1946), pp.499-543 [hereinafter Kelsen, Sanctions in International Law].

⁸ *Ibid.*

⁹ Quoted in Kunz, Sanctions in International Law, *supra* note 3, p.324.

¹⁰ Chayes, Abram and Chayes, Antonia Handler, “The new sovereignty compliance with International Regulatory Agreements 3 (1995) in Koh, Why Do Nations Obey International Law, *supra* note 4, p.2601.

¹¹ Thomas Franck, “Fairness in International Law and Institutions (1995)”, Koh, Why Do Nations Obey International Law, *supra* note 4, p.2601.

¹² As Koh calls the views of Abram Chayes and Antonia Handler Chayes in his article, Koh, Why Do Nations Obey International Law, *supra* note 4.

¹³ Louis Henkin, “How nations behave 47” in Koh, Why Do Nations Obey International Law, *supra* note 4

¹⁴ Kunz, Sanctions in International Law, *supra* note 3, p.327-328.

B. Legal framework of sanctions in the United Nations Charter

The first traces of sanctions in legal documents appeared with the first attempts of nations to work under a common international law and the creation of League of Nations in 1919, whose purpose was to achieve international peace and security¹⁵. Its primary goals were collective security, disarmament¹⁶ and settling international disputes through negotiation and arbitration¹⁷. Unfortunately, the League of Nations failed to carry out its prime aim, which was to prevent another war; since the Second World War arrived. Therefore, the functions of the League of Nations stopped and the United Nations replaced the League of Nations in a much more successful way. This opinion is widely accepted, although there are some people believing that there is no real difference between the two organizations, which is going to be discussed later on in this Chapter. For the moment we are going to focus our discussion on which concrete articles of the Covenant of the League of Nations we meet traces of sanctions.

It has to be mentioned at this point that another effort by states to be bound under the same international system, was this of the General Treaty for the Renunciation of War called the Briand-Kellog Pact which was signed in 1928. Nevertheless, the main difference between the Briand-Kellog Pact and the League of Nations, was that the former was not aiming to end the war and did not contain sanctions against countries that might breach its provisions, but was mostly focusing on “moral pronouncement”¹⁸ by giving the main importance in diplomacy and the general opinion that would be so powerful that would prevent nations from resorting to the use of force. Furthermore, it is argued that the Briand-Kellog has not really contribute in the purpose of international peace and security, as the League of Nations tried to do and as the United Nations tries to do currently; therefore we do not find important to analyze its role.

As far as it concerns the League of Nations now, the character of sanctions is appeared under art. 16 (1) which does not deal with the use of force and is similar to art.41 of the UN Charter:

“Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not”.

Another element of sanctions under the Covenant of League of Nations can be found in art.16 (2) but in this case it deals with the use of force and is similar to art.42 of the Charter:

“It shall be the duty of the Council in such case (it means in the case of disregard of its obligations under the league) to recommend to several governments concerned what effective military, naval or air force the members of the league shall severally contribute to the armed forces to be used to protect the covenants of the League”.

Comparison of the UN charter and its precedents

First of all it is important to mention that we are not going to focus on the structure differences or similarities of the organizations, but mostly on the differences regarding the maintenance of international peace and security. But before analyzing these issues, it is important to mention that the “Covenant” become “Charter”, which gives to the Charter of the UN a more democratic character¹⁹.

¹⁵ See preamble of the Covenant of the League of Nations, 28 April 1919, [1919] UKTS 4 (Cmd. 153) [hereinafter the Covenant of the League of Nations].

¹⁶ Art. 8 of the Covenant of the League of Nations, *supra* note 7.

¹⁷ Art. 12 of the Covenant of the League of Nations *supra* note 7.

¹⁸ Mettraux, Guénael, *Perspectives on the Nuremberg Trial*, Oxford, ed. Oxford University Press (2008), p.223.

¹⁹ Cot, Jean-Pierre, *La Charte des Nations Unies : Commentaire article par article*, Paris, ed. Economica (2005), p. 288 [hereinafter Cot, La Charte des Nations Unies].

Moving forward to the preamble, we immediately notice the harm that the two World Wars have cost to the humanity and the situation under which the United Nations was created, by directly mentioning the effort to end the war: “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind”²⁰; when the League of Nations was mentioning in its preamble “the obligation not to resort war”. Another difference that we notice in the preamble of the UN Charter, is the reaffirmation of “faith in fundamental human rights in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”²¹, however we do not find these notions again in the Charter²². Finally, the general overview of the preamble and the main difference between the Covenant and the Charter is that the former is using more a legal language and the latter is more focused on moral considerations²³.

To Kelsen’s opinion and to our as well, the Charter goes beyond its predecessors- the League of Nations and the Briand-Kellog Pact- because it does “not only forbids the use of force but any threat to the use of force”²⁴. To his point of view “the Charter is a perfect realization of the *bellum-justum* principle”²⁵.

Continuing our analysis of specific articles, we find a really innovative article and an important step made by the Charter compared to the Covenant; and it is art.2 (6) in which even: “states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security”.

Extremely important step was made as well by the Charter by giving the primary responsibility to the Security Council²⁶ and not to Member States as it was in the case of the Covenant²⁷ regarding the maintenance of international law and security, in deciding whether there is a breach of international law and what measures to be taken by it in a case of a threat to international peace and security²⁸. Furthermore, not only the Charter gives more power to the Security Council, but it obliged as well the Member States to “carry out the decisions of the Security Council”²⁹.

All those steps and the fact that the Charter of the United Nations is signed by 193 Members States in contrary to League of Nations that was signed at its greatest extent by 58 members, make us believe that the Charter has made much more steps forward in the effort of maintenance of international peace and security, than other international documents. It must be noticed however that 58 Members at the time of the League of Nations, was a considerable number but on the other hand it was not only States that were part of the League of Nations as in the case of United Nations, but as well organizations. Furthermore, even if the United Nations can be criticized for its ineffectiveness by some scholars, we cannot however ignore that it has a role to play at the international, regional and national levels, at a minimum as an important symbol.

More particularly Kunz was one of the first scholars to criticize the effectiveness of the UN, who belonging in the same scholar as Kelsen, he appears to criticize more the UN than his teacher³⁰. According to Kunz, “United Nations is no more than a second League of Nations. It again fails to offer a complete system of peaceful procedures for the settlement of international conflicts; it again has no international courts with compulsory jurisdiction; its provisions for peaceful change are even less significant than the wholly inadequate Article XIX of the Covenant”³¹.

²⁰ Preamble of the Charter of the United Nations, 24 October 1945, 1 UNTS XVI [hereinafter the UN Charter].

²¹ *Ibid.*

²² Cot, *La Charte des Nations Unies*, *supra* note 19, p. 290.

²³ *Ibid.*, p. 290.

²⁴ Art. 2 (4) of the UN Charter, *supra* note 20.

²⁵ Kelsen, *Sanctions in International Law*, *supra* note 7, p.502.

²⁶ Art. 24 (1) of the UN Charter, *supra* note 20.

²⁷ Art. 16 (3) of the Covenant of the League of Nations, *supra* note 15.

²⁸ Art. 39 of the UN Charter, *supra* note 20.

²⁹ Art. 25 of the UN Charter, *supra* note 20.

³⁰ Joseph L. Kunz together with Alfred Verdross, were two of the main students of Hans Kelsen.

³¹ Kunz, *Sanctions in International Law*, *supra* note 3, p.329.

There are several points in the criticism of Kunz though that we find extremely important. First of all he criticizes “the centralization of the sanctioning function in a strictly political organ (the Security Council)”³², which is very important because in some cases the Security Council of the UN (UNSC), in order to restore international peace and security, can undermine human rights issues. In addition Kunz characterizes the Charter as “extremely bad drafting one, from the point of view of legal technique” and he continues by emphasizing that “the character of the measures under Articles 41 and 42 as sanctions is less clear than under Article XVI of the Covenant”. Other points where Kunz believes that the Charter is not satisfactory is “the vague wording in Article 39, the lack of general abstract definitions, the wide discretion given to the Security Council” since the permanent MS have the right of veto which to Kunz’s opinion “destroyed” the whole progress achieved³³. All these problematic however are going to be explored mostly in the third part of this research.

i. Definition of sanctions in the UN Charter

The first definition of sanctions in international law we find on 1919 with the Treaty of Versailles, which referred to “effective collective measures”³⁴ and “preventive or enforcement measures”³⁵ to the application of which all members of the League of Nations shall give all required assistance³⁶. According to Oberdiek the same applies for enforcement measures of the United Nations as well. More specifically Oberdiek defines “sanctions” as following:

“In the law or out, a sanction, as I have come to understand the concept, is any threatened, promised, instituted or declared response on behalf of a group or institution attached to the breach or neglect of a recognized norm, policy, order, law or command done with the implicit or explicit intent of discouraging or preventing any such breach or neglect. More briefly, a sanction is a threat, on behalf of a group, attached to the breach of a norm with the intent of discouraging such breaches”³⁷.

Kunz is defining sanctions as “organized measures, which are to be applied against or without the will of the person against whom they are directed; they are finally to be applied by physical force, if necessary”³⁸.

It is important to notice that no legal definition is given for the term “sanctions” in the Charter or even before the Charter, therefore we have to search in the practice of states and as well in the interpretation of UN Charter provisions. The term “sanctions” has been used in the past only with regard to art.5 and art.6 relating to suspension and expulsion of states from the Organization; and as well to art.19 relating to suspension from voting in the General Assembly³⁹. Art.6 though is not of any particular importance, since firstly it has never been used and secondly, as Kelsen noticed very correctly, even if a state gets expelled from the Organization, it is still obliged to respect the Principles of the Organization under art.2 (6) and so the only difference if it gets expelled, is that it is going to lose some more rights⁴⁰, like the right of vote etc. Another article that has a character of “sanction”, according to Kelsen, is art.102 “every treaty shall be registered by the secretariat”. If it is not registered then the treaty is not recognized in front of the UN and therefore the Member State cannot invoke this treaty in the UN level⁴¹. Kelsen is continuing his reasoning by stating that: “law is by its nature a coercive order. Sanctions have the character of forcible deprivation

³² *Ibid.*

³³ *Ibid.*

³⁴ Art. 1 (1) of the Treaty of Versailles 28 June 1919 [hereinafter the Treaty of Versailles].

³⁵ Art. 2 (5) of the Treaty of Versailles *supra* note 34.

³⁶ Alting von Geusau, Frans A.M., “Recent and Problematic: the Imposition of Sanctions by the UN Security Council”, article in W. Genugten, J. M. Willem, G. de Groot, “United Nations sanctions : effectiveness and effects, especially in the field of human rights : a multi-disciplinary approach” Antwerpen, Intersentia (1999), p.2 [hereinafter Alting Von Geusau, Recent and Problematic: The Imposition of Sanctions by the UN Security Council].

³⁷ Oberdiek, The Role of Sanctions, *supra* note 5, p.75.

³⁸ Kunz, Sanctions in International Law, *supra* note 3, p.324.

³⁹ See Kelsen, Sanctions in International Law, *supra* note 7 and Gowlland-Debbas, Vera and Tehindrazanarivelo, Djacobina Liva, *National implementation of United Nations sanctions a comparative study*, Leiden, M. Nijhoff (2004).

⁴⁰ Kelsen, Sanctions in International Law, *supra* note 7 p.511.

⁴¹ *Ibid.*

of certain possessions, such as life, freedom, economic or other values. They are coercive in so far as they are to be taken even against the will of the subject to whom they are applied, if necessary by the employment of force”⁴².

Taking into account first these theories, then the current practice of States and at the end the fact that the term “sanction” is a part of the vocabulary of Security Council resolutions (e.g. the preamble of resolution 665 (1990) on Iraq), as well as confirmed by the regular reference to “Sanctions Committees”, and the current use of the term “targeted sanctions”⁴³, we consider coercive and enforcement measures under Chapter VII as “sanctions” and therefore we are going to deal only with these measures in this research.

For the purpose of this research we define sanctions under international law, as the restrictive measures that a state or a group of states is taken against a third state, which is believed to constitute a breach under international law. Sanctions are not intended to be repressive or punitive, but rather “coercive”⁴⁴; “the sender does not intend to punish the state for its wrongful act, but mostly to put to an end the continuing situation resulting from the initial action”⁴⁵ and to produce a change in the political behavior of this state”⁴⁶. Taking a look at the UN Charter, we notice that sanctions are separated in two categories under Chapter VII: a) those not involving the use of armed force and b) those involving the use of armed force⁴⁷. Sanctions of the first category are the sanctions under:

art. 39: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”.

art. 40: “In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures”.

art. 41: “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”.

Sanctions of the first category are, *inter alia*, the economic sanctions. For the economic sanctions scholars are giving more easily a definition than the “sanctions” in general⁴⁸. Some of the most important one are those of Bohr: “economic sanction is a government initiated ban or trade with another state in reaction to illegal or politically undesirable acts of that state”; Koutrakos: “sanctions are measures that connote the exercise of pressure by one state or coalition of states to produce change in the political behavior of another state or group of states”; Lukaschek: “trade restricting discriminatory measures imposed by one

⁴² *Ibid.*

⁴³ Gowlland-Debbas, Vera and Tehindrazanarivelo, Djacoba Liva, National implementation of United Nations sanctions a comparative study, Leiden, M. Nijhoff (2004), [hereinafter Gowlland-Debbas, National Implementation of United Nations Sanctions].

⁴⁴ Combacau, C. “Sanctions” (1992), in R. Bernhardt, *Encyclopedia of Public International Law*, Amsterdam : North-Holland, in Portela, Carla, *European Union Sanctions and Foreign Policy : When and Why Do They Work ?*, London, Routledge (2010), p. 21 [hereinafter Portela, European Union Sanctions and Foreign Policy].

⁴⁵ Portela, Carla, *European Union Sanctions and Foreign Policy : When and Why Do They Work ?*, London, Routledge (2010), p.21 [hereinafter Portela, European Union Sanctions and Foreign Policy].

⁴⁶ Koutrakos, Panos, *Trade, Foreign Policy and Defense in EU Constitutional Law*, Oxford, ed. Hart Pub (2001), p.50 [hereinafter Koutrakos, Trade Foreign Policy and Defense in EU Constitutional Law].

⁴⁷ Kelsen, Sanctions in International Law, *supra* note 7, p.514.

⁴⁸ Quoted in Portela, European Union Sanctions and Foreign Policy, *supra* note 45, p.21.

authority against another subject of international law in pursuance of foreign policy objective, namely to alter the conduct of the target state”⁴⁹.

Moving now to the second category of sanctions, are those involving the use of force, which are determined under art. 42: “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”.

Sanctions taken under art. 42 of the Charter are not going to be discussed in details in this research though, because they are fundamentally different from other types of sanctions that we are going to focus our study, such as economic sanctions; and plus would make the subject matter too complex and therefore our work is going to focus mostly in the first category of sanctions and more specifically on art.41 of the Charter. Furthermore, for the purpose of this research when we talk about “sanctions”, we refer only to “direct mandatory sanctions”, which are the sanctions that the UNSC impose after having adopted a resolution. The types of sanctions that we are interested in, are diplomatic and economic sanctions that are related to embargoes on exporting or supplying arms, asset freezes on individual government, government bodies or associated companies or terrorist, travel bans, bans on imports of raw materials or goods from the sanctions target.

Finally, the objective of the UN sanctions is to restore international peace and security⁵⁰. As Grunfeld is explaining, “from a legal perspective, sanctions are a reaction against a wrongful conduct in the past and may be seen as an act of international punishment”⁵¹. However, this concern of “punishment” was clarified by Boutros-Ghali in 1995, when he explains that the purpose of sanction is: “to modify the behavior of a party that is threatening international peace and security and not to punish”⁵². We could argue though that one of the main reasons for punishment is to change as well the behavior of a party that could be a threat in the international peace and security. Another argument that we could advance as well is that another reason for sanctions in general is to modify behavior in others, in other words to set an example to refrain others to demonstrate a similar behavior.

ii. Security Council of the UN and its power to sanction

The SC is established by Chapter III of the UN Charter, art.7: “There are established as principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice and a Secretariat”; the composition of the Security Council is determined by art.23: “The Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution”; the function of SC is defined under Chapter V art.24: “In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf”. For this purpose the SC can under Chapter VI and VII, take any measures that finds necessary to maintain international peace and security.

⁴⁹ *Ibid.*

⁵⁰ See Genugten and Groot, United Nations sanctions, *supra* note 36.

⁵¹ Fred Grunfeld, “The Effectiveness of United Nations Economic Sanctions”, in Genugten and Groot, United Nations sanctions, *supra* note 36, p.115.

⁵² A/50/60- S/1995/1, “Supplement to an Agenda for Peace: Position Paper of the Secretary- General of the Occasion of the Fiftieth Anniversary of the United Nations”, para. 66, at <http://www.un.org/Docs/SG/agstupp.html#SANCTION>, (last visited 07.06.2012).

In addition as we already mentioned in the previous sub-chapter, the UN Charter gave the attributed the power to the Security Council⁵³ to maintain and restore international peace and security and not any more to its MS as it was the case under the League of Nations. The main power given to the Security Council under art.24 and its function to determine whether an act is a threat to international peace and security under art.39, have been criticized a lot, since the “Charter does not require to the SC to evaluate the gravity of the situation to a rising scale of severity of the response, since is not *explicitly* required to adopt the measures provided under Chapter VII in any order”⁵⁴, which leaves to the SC a wider scope to determine if there is a breach of international law. “The state can be considered as in a breach of the peace just by simply being not in a compliance with various recommendations of the General Assembly or “plans” of the SC”⁵⁵.

Furthermore, according to art.39 of the UN charter, sanctions are imposed to maintain or restore international peace and security, which is not necessarily the same as to maintain or restore international law⁵⁶. This is reaffirmed as well by Altting von Geusau, when he says that the Security Council is a “political body, applying the combined power of the permanent members for the purpose of enforcing peace and not judicial body to determine a breach of international law and restore respect for it”⁵⁷. However, it could be argued that this is not necessarily a problem, since the SC’s role has never really been envisaged as one of a court, but rather the closest thing that we have come so far to a world government-bound by the existing international legal framework, but with a great deal of flexibility to choose how and when to act. At the same time, the relationship between decisions of the SC and the GA is naturally not comparable to the relationship between government and parliament.

The Security Council power though is limited by two things. First, it must “act in accordance with the Purposes and Principles of the Charter” under art. 24 (2) and secondly the power of Security Council is “controlled”⁵⁸ by the General Assembly, since under art. 24 (3), the SC “shall submit annual and reports to the General Assembly for its consideration”. However, according to Tzanakopoulos, the reports submitted by the SC to the GA, are not “qualitative” and “receive no substantive consideration”⁵⁹.

Another important problem that we face with the procedure of decision-making by the SC is that of the “veto” of the five⁶⁰ permanent MS that can sometimes block the decision of the SC. As Kelsen puts it correctly: “the SC is not bound, it is only authorized, to take enforcement action (...) It may, for political reasons, not be willing or, due to its voting procedure, not be able to work”⁶¹. This problem was particularly appeared in crisis management, such as the case of Kosovo, Congo, Syria, Iraq and others, where the SC was unable to take a decision because of the right of the “veto”. Furthermore, the “veto” right can create different debates about issue of equality, issue of representativeness, arbitrariness⁶² and others.

⁵³ Altting von Geusau, Recent and Problematic: The Imposition of Sanctions by the UN Security Council, *supra* note 36, p.2.

⁵⁴ Gowlland-Debbas, Vera “The Functions of the United Nations Security Council in the International Legal System”, *The Role of Law in International Politics*, M. Byers (ed.), Oxford, Oxford University Press (2000) p.287 [hereinafter Gowlland-Debbas, The Functions of the United Nations Security Council in the International Legal System].

⁵⁵ Kelsen, Sanctions in International Law, *supra* note 7, p.25.

⁵⁶ Gowlland-Debbas, The Functions of the United Nations Security Council in the International Legal System, *supra* note 54; Kelsen, Sanctions in International Law, *supra* note 7; Altting von Geusau, Recent and Problematic: The Imposition of Sanctions by the UN Security Council, *supra* note 36.

⁵⁷ Geusau, Recent and Problematic: The Imposition of Sanctions by the UN Security Council, *supra* note 36 p.10.

⁵⁸ Tzanakopoulos, Antonios, *Disobeying the Security Council: countermeasures against wrongful sanctions*, Oxford, Oxford University Press (2011) p.11 [hereinafter Tzanakopoulos, Disobeying the Security Council].

⁵⁹ *Ibid.*

⁶⁰ China, Russia, United States, United Kingdom and France.

⁶¹ Kelsen, Sanctions in International Law, *supra* note 7, p.25.

⁶² See Fassbender, Bardo, *U. N. Security Council Reform and the Right of Veto : A Constitutional Perspective*, The Hague, Kluwer Law (1998).

Nevertheless, it is important to mention that there are done some steps to overcome the problem of “paralyzation” of the SC by adopting the United Nations General Assembly (UNGA) resolution 337A, in which was decided that the GA can take a decision in a case where the SC, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for maintenance of international peace and security, the GA shall consider the matter immediately and may issue recommendations to member states, in order to restore international peace and security⁶³. However, this resolution it was only used once in 1956, when it was invoked for a resolution on peacekeeping in the Middle East (UNEF I).

A solution for the “paralyzation” of the SC could be as well the Regional Organizations, that they can take enforcement actions under Chapter VIII. But again we face the same problem, since under art. 53 of the Charter, the Regional Organization must have the authorization of the SC in order to take enforcement measures against a state. So it is a circle to our opinion that the only solution is to rethink the voting procedure of the SC. It is important to mention briefly though that in the case of Kosovo, the North Atlantic Treaty Organization (NATO), acted without the authorization of the SC because of veto from China and Russia; and it had its approval only afterwards. Similar case was that of Iraq by United States and UK, without any approval from the UN, which provoked not only the public opinion, but was considered as well as a “failure”⁶⁴ of the SC and of the UN in general.

Finally, as far as concern the termination of sanctions imposed by the UNSC, the procedure is the same as in the adoption one; which means that the SC has to terminate the sanctions by an official resolution and with consensus among states.

C. Evolution of sanctions

“The only disagreement among sanctions scholars, is related to the degree to which sanctions fail”⁶⁵.

i. Issue of effectiveness of sanctions

Sanctions of the UNSC against Iraq have played an extremely important role in the discussion of the effectiveness of sanctions and for that reason we find it important to give a quick background of Iraq crisis and United Nations Security Council Resolution (UNSCR).

Iraq invaded Kuwait on August 1990 and proclaimed Kuwait as an integral part of its territory. UNSC with resolution 660 declared that Iraq was in a breach of the international peace and asked Iraq to withdraw immediately from Kuwait. After having imposed economic sanctions by resolution 661, the UNSC asked from all member states to ban imports from and exports to Iraq and Kuwait⁶⁶. Since Iraq was not complying with UNSCR 661, the SC took additional sanctions against Iraq by resolutions 662, 665, 666, 669, 670, 678 and asked the strict implementation of sanctions by all member states⁶⁷. By its resolution 678, the SC gave to Iraq a final opportunity⁶⁸ to implement Res. 660 and all other resolutions, if Iraq would fail to do so than the SC would authorize “to use all means to restore international peace and

⁶³ UN General Assembly, Uniting for peace, 3 November 1950 at <http://www.un.org/Depts/dhl/landmark/pdf/ares377e.pdf> (last visited 11.06.2012).

⁶⁴ Glennon, Michael J., “Why the Security Council Failed” (May/June 2003), *Foreign Affairs* at <http://www.foreignaffairs.com> (last visited 05.08.2012).

⁶⁵ Cortright, David, *The Sanctions decade: assessing UN strategies in the 1990s*, Boulder, ed. Lynne Rienner (2000), p. 13 [hereinafter Cortright, *The Sanctions decade: assessing UN strategies in the 1990s*].

⁶⁶ UN Security Council, *Resolution 661 (1990) Adopted by the Security Council at its 2933rd meeting, on 6 August 1990*, 6 August 1990, S/RES/661 (1990).

⁶⁷ Kondoch, Boris. “The Limits of Economic Sanctions under International Law: The Case of Iraq.” Research Fellow, Frankfurt Am Main, Institute of Public Law, Johann Wolfgang Goethe University, in Langholtz Harvey, Kondoch Boris, Wells Alan, *International Peacekeeping: The Yearbook of International Peace Operations*, vol. 12, pp.265- 294, at <http://www.casi.org.uk/info/kondoch01.pdf> (last visited 27.07.2012), p.275 [hereinafter Kondoch, *The Limits of Economic Sanctions Under International Law*].

⁶⁸ *Ibid.*

security”. Since the deadline passed on January 1991, the US-led Gulf-Coalition attacked Iraq and Kuwait was liberated.

The sanction regime though remained after the cease fire for different purposes, although some efforts to lift sanctions was made by the SC by adopting Res.706, 712, 986⁶⁹, but the economical situation in Iraq was deteriorating day by day. These economical sanctions had a huge impact on the population of Iraq and in the public opinion of the world and in particular of the population of the EU⁷⁰. More specifically, the economical sanctions had extremely negative consequences to the population decreasing the supply of food and medicine, which as a consequence increased infant mortality and a general deterioration of the state of health of people concerned⁷¹. To demonstrate the harsh criticism of sanctions against Iraq we will quote the former Secretary of United Nations, Kofi Annan:

“...The humanitarian situation in Iraq poses a serious moral dilemma for the Organization. The United Nations has always been on the side of the vulnerable and the weak, and has always sought to relieve suffering, yet here we are accused of causing suffering to an entire population. We are in danger of losing the argument, or the propaganda war- if we haven’t already lost it- about who is responsible for the situation in Iraq- President Saddam Hussein or the United Nations”⁷².

Most criticism of the economical sanctions was based on the fact that there were imposed to the whole population of a country and not only to the ones who are committing a breach to international law and security, in other words the effects on the society of the target could be disproportionate. Furthermore, the limited sanctions were not being implemented and so could not be effective⁷³. Moreover generally speaking, the economic sanctions does not guarantee political success, they can have serious unintended consequences, the UN system lacks the ability to administer sanctions, there are tensions between the goals of the SC and those of member states, sanctions are sometimes used as an alternative and sometimes as a prelude to war⁷⁴. Furthermore, it is believed that the effectiveness of sanctions, is not only concerning the consequences of the state which is targeted by the sanctions, but as well the effects on third states⁷⁵.

Except from the ethical dilemma of the humanitarian impact of sanctions and their effectiveness, we find more criticism in the sanction policy in relation with lack of transparency, double standards, they are missing legal and Constitutional concept⁷⁶.

Some scholars believe though that sanctions are effective only if their aim is to change the conduct of the target state; in a case that the states change its policy than its reward will be either lifting existing sanctions or postponing their implementation. This kind of influence is much more important and effective to Grunfeld opinion and the state might change its policy in anticipation, without taking any measures at all⁷⁷. The same opinion was expressed in the “Interlaken I”, in which it was believed that “sometimes the threat of sanctions could even be more effective than the actual imposition of sanctions and that “conditional” or “deferred” sanctions should be considered when possible”⁷⁸. Some others though believe

⁶⁹ *Ibid.*, p.9.

⁷⁰ Portela, European Union Sanctions and Foreign Policy, *supra* note 44.

⁷¹ Klein, Eckart, “International Sanctions from a Human Rights Law Perspective: Some Observations on the Kadi Judgment of the European Court of Justice” (2009), *Intercultural Human Rights Review* vol.4, pp.111-122, p.112 [hereinafter Klein, International Sanctions from a Human Rights Law Perspective].

⁷² Kofi Annan quoted in Kondoch, The Limits of Economic Sanctions under International Law, *supra* note 67, p.16.

⁷³ Ian, Anthony, “Sanctions Applied by the European Union and the United Nations” (2002) *SIPRI Yearbook*, pp.203-228, p.206 at <http://www.sipri.org/yearbook/2002/05> (last visited 06.08.2012) [hereinafter Ian, Sanctions Applied by the European Union and the United Nations].

⁷⁴ Cortright, The Sanctions decade: assessing UN strategies in the 1990s, *supra* note 65, p.3.

⁷⁵ Brabant, Koenraad, “Sanctions: the Current Debate” (1999), *Humanitarian Policy Group and Rehabilitation Network at the Overseas Development Institute*, pp.1-48, p.37 [hereinafter Van Brabant, Sanctions: the Current Debate].

⁷⁶ Kondoch, The Limits of Economic Sanctions under International Law, *supra* note 67, p.273.

⁷⁷ Fred Grunfeld, “The Effectiveness of United Nations Economic Sanctions”, article in Genugten and Groot, United Nations sanctions, *supra* note 36, p.117.

⁷⁸ Swiss Federal Office for Foreign Economic Affairs Department of Economy, *Report on the Expert Seminar on Targeting UN Financial Sanctions*, 17-19 March 1998 (Interlaken I), Switzerland, p.65 [hereinafter Interlaken I].

that sanctions could be more effective if were imposed to targeted states, before a breach of the peace or an act of aggression has taken place⁷⁹.

More pessimist scholars though are supporting that the system of sanctions has totally failed⁸⁰. Recognition of this failure was expressed by Boutros-Ghali in the Agenda for Peace:

“Sanctions are a blunt instrument. They raise the ethical question of whether suffering inflicted on vulnerable groups in the target country is a legitimate means for exerting pressure on political leaders whose behavior is unlikely to be affected by the plights of their subjects. Sanctions always have an unintended or unwanted effect (...) they can have severe effects on other countries. They can also defeat their own purpose by provoking a patriotic response against the international community, symbolized by the United Nations, and by rallying the population behind the leaders whose behavior the sanctions are intended to modify”⁸¹.

For all the reasons that we mentioned above, the effectiveness of economical sanctions under art.41, was under important consideration. After the Iraq situation and the effects that the economical sanctions had in the economy and population of targeted state, the SC decided to have a working group on how to improve the effectiveness of UN sanctions. This led to the concept of “smart sanctions” or targeted sanctions.

ii. *From comprehensive to targeted sanctions*

The first step to make more effective economic sanctions, was the “Copenhagen Round Table, 24-25 June 1996”, which was made under OSCE auspice. In this Round Table, the discussion concerned mostly the effectiveness of the implementation of mandatory measures and how to improve operations similar to former Yugoslavia in the future⁸². Next step was the “Conference on United Nations Sanctions: Effectiveness and Effects, Especially in the Field of Human Rights, Netherlands, 27-28 November 1997”, on which there were presented papers concerning the effectiveness of sanctions and the consequences of economic sanctions. However one of the most important steps, came from the initiative of the Swiss government and the *Report on the Expert Seminar on Targeting UN Financial Sanctions, 17-19 March 1998*, known as well as “Interlaken I”. This seminar was mostly focused on the technical points of the financial sanctions, such as on how to identify the target and on how to strengthen the UN sanctions instrument. On 7 December 1998, another step was made by a symposium on targeted sanctions with the title *Towards Smarter More Effective United Nations Sanctions*, sponsored by eight non-governmental organizations with support of the UN activities. In the same period – December 1998- targeted sanctions were under discussion in the conference sponsored by the Overseas Development Institute (ODI) in the United Kingdom, with the title “Can Sanctions be Smarter?”⁸³. Another decisive step for targeted sanctions, was made by the Swiss government again and the so-called “Interlaken II”. The seminar was titled as: “2nd Interlaken Seminar on Targeting United Nations Financial Sanctions, 29-31 March, 1999”, which was divided in four working groups: a) The targeting of financial Sanctions b) Model Law c) Building blocks and d) Definitions. Further steps were done by Germany and Sweden on targeted sanctions. The Bonn-Berlin Process focused on travel and air traffic related sanctions as well as on arms embargoes. The Stockholm Process dealt with the practical feasibility of implementing and monitoring targeted sanctions.

⁷⁹ Ian, Sanctions Applied by the European Union and the United Nations, *supra* note 73, p.208.

⁸⁰ Elliot, Kimberly Ann and Hufbauer, Gary Clyde, “Same Song, Same Refrain? Economic Sanctions in the 1990s” (1999), *American Economic Review*, vol.89, no.2, Papers and Proceedings of the One Hundred Eleventh Annual Meeting of the American Economic Association, pp.403-408. [hereinafter Elliot K. and Hubauer G, Same Song, Same Refrain? Economic Sanctions in the 1990s].

⁸¹ Alting von Geusau, Recent and Problematic: The Imposition of Sanctions by the UN Security Council, *supra* note 36, p.4.

⁸² UN SC, Letter dated 24 September 1996 from the Security Council Committee established pursuant to Resolution 724 (1991) concerning Yugoslavia addressed to the President of the Security Council, S/1996/776, 24 September 1996 at <http://www.un.org/Docs/sc/committees/sanctions/s96776.pdf> (last visited 08.08.2012).

⁸³ *Smart Sanctions, the New Step: Arms Embargoes and Travel Sanctions*, First Expert Seminar, Bonn, 21-23 November 1999.

All these steps and the economic situation in Iraq led to the concept of “smart sanctions” or in other words “targeted sanctions”.

The idea of targeted sanctions was created as a reaction to Iraq situation⁸⁴ and more specifically to “increase their effectiveness, while minimizing the negative humanitarian impact often experienced by large segments of civilian populations as a result of comprehensive sanctions regimes.”⁸⁵ Targeted sanctions are designated to the government leaders⁸⁶ and elites and other groups that can be responsible for the human right violation in a specific state. In order to give a definition of “smart sanctions”, we will adopt the same definition that Cortright and Lopez gave which is the following:

“Smart sanctions policy is one that imposes coercive pressures on specific individuals and entities and that restricts selective products or activities, while minimizing unintended economic and social consequences for vulnerable populations and innocent bystanders”⁸⁷.

These sanctions are mostly involved in restrictions from financial and banking operations, travel and aviation bans, including visas. More specifically targeted sanctions can be applied in the form of :

- Financial sanctions
- Trade restrictions on particular goods or services
- Travel restrictions
- Diplomatic constraints
- Cultural and sports restrictions
- Air traffic restrictions⁸⁸

Portela though observes another distinction of targeted sanctions and is this of *personal* measures and *selective* measures⁸⁹. *Personal* measures are those that cause personal “damage” to decision makers and we are talking about the freezing of personal financial assets, travel and visa bans; and *selective* measures are those reducing the availability of means to continue to use the contested policy and we are talking about arms embargoes etc. To Brzoska’s opinion the latter are measures that can constitute an intermediate between personal sanctions and general trade embargoes.

Targeted sanctions were first imposed in the early 1990s against individuals linked to the state and more specifically, the SC mandated the freezing of assets held by government as well as the personal assets of the leading elites⁹⁰. In 1999 with resolution 1267 the SC for the first time imposed targeted sanctions to individuals and entities that were not linked to the state but they were suspects to international terrorism.

Generally the decision of the UNSC has a great impact in domestic law and the implementation of those decisions by Member State, can be extremely complex. We argue in this research though that the implementation of UNSCRs imposing targeted sanctions on individuals related to terrorism is even harder to accomplish, because of issues that it can raise regarding the balance that must be made between the protection of fundamental human rights and the implementation of UNSCRs. These issues however are going to be discussed in details in the third chapter of this research.

⁸⁴ Portela, European Union Sanctions and Foreign Policy, *supra* note 45, p.7.

⁸⁵ Swiss Federal Office for Foreign Economic Affairs Department of Economy, “Report on the 2nd Interlaken Seminar on Targeting United Nations Financial Sanctions”, 29-31 March, 1999, p.9 [hereinafter Interlaken II].

⁸⁶ Portela, European Union Sanctions and Foreign Policy, *supra* note 45, p.7.

⁸⁷ Cortright, David, Lopez, George A., *Smart Sanctions: Targeting Economic Statecraft*, New York, ed. Rowman & Littlefield Publishers(2002) [hereinafter Cortright and Lopez, Smart Sanctions].

⁸⁸ Official website of the Swiss State Secretariat for Economic Affairs (SECO), at <http://www.seco.admin.ch/themen/00513/00620/00639/index.html?lang=en> (last visited 13.07.2012).

⁸⁹ Portela, European Union Sanctions and Foreign Policy, *supra* note 45, p.8.

⁹⁰ Portela, Clara, "National Implementation of United Nations Sanctions" (2009-2010), *International Journal*, pp.13-30, p.16 [hereinafter Portela, National Implementation of UN Sanctions].

Conclusion of the sub-chapter : This first sub-chapter is provided mostly as a general introduction and background on sanctions, by explaining the necessity of sanctions within a society, the definition of sanctions and the evolution of sanctions during the decades. However, it is generally believed that sanctions are more effective when they are well implemented⁹¹ and this is the reason why we find important to examine in the second part the policy of EU toward sanctions, what is the legal framework of EU sanctions, how the EU has implemented UNSCRs and by whom, and whether the EU has a particular sanctions policy or not.

⁹¹ Gottemoeller, Rose, “The Evolution of Sanctions in Practice and Theory” (2007), *Global Politics and Strategy* vol.49, Issue 4, pp.99-110.

Chapter II

Policy of the EU regarding sanctions

In this chapter we are going to discuss the policy of the EU regarding sanctions and we are going to examine as well how the EU implements SC resolutions under Chapter VII, since there is nothing specific in the UN Charter to indicate a way of implementation. In order to do so, we are going to give first a background of the legal framework of sanctions within the EU through its different Treaties, then we are actually asking ourselves whether there is a specific policy that the EU follows in its sanctions practice and if so what the policy is about? And finally our discussion is focused on how the EU implements the UNSCRs, if it has an obligation to do so and if yes how the institutional procedure is working when it comes to implementation of UNSCRs.

The policy of the EU toward the implementation of the UN sanctions has been changing depending on different times of period. We argue in this chapter that the EU was changing its policy depending on different treaties but as well as on its evolution toward foreign policy. It is really important to mention that there are at least two different types of sanctions: the mandatory one, which all states are obliged to implement under art.25 of the Charter; and the recommended sanctions, which are recommended by the UNSC to be implemented but it is left on the discretion of the state to implement them or not. As we notice, the EU has implemented most of mandatory and even recommended sanctions of the UNSC, except for in a case of embargoes in Georgia in 1993 and Yemen in 1994⁹². Furthermore, we argue that the EU policy toward sanctions is based on specific elements that we are going to try to prove later on by three hypotheses concerning the EU sanctions policy.

A. Legal framework of EU sanctions

The first time that the European Community (EC) faced the issue of implementing sanctions, was in the case of Rhodesia in 1965, in which all member states⁹³ decided to implement sanctions through national legislation, which procedure is known as the “Rhodesian doctrine”⁹⁴.

The second method that the EC used to implement sanctions was under art.113 (2) of the Treaty of Rome, in which article was stipulated that “the Commission shall submit proposals to the Council for implementing the common commercial policy”.

The first sanctions under art.113 were those against the USSR⁹⁵ as a response to Poland events, by the Council Regulation 596/82. This second method is also called the “Malvinas doctrine”⁹⁶. The evolution from the “Rhodesian doctrine” to the “Malvinas doctrine” was explained from Koutrakos on one hand because of the “lack of co-ordination and the ineffectiveness of sanctions of Rhodesia” and from the other hand because Member States “realized that the art. 297 EC could be invoked only under very specific condition”⁹⁷. Generally, the Member States of EC had difficulties to delegate more powers to the EC and they preferred to keep their sovereignty. However, as we are going to notice below with the establishment of Maastricht Treaty, the Member States started to delegate some powers to the EC through

⁹² Kreutz, Joakim, “Hard Measures by a Soft Power? Sanctions Policy of the European Union 1981-2004.” (2005), *Bonn International Center for Conversation*, Paper 45, pp. 3-50, p.16 [hereinafter Kreutz, Hard Measures by a Soft Power].

⁹³ Belgium, France, Germany, Italy, Luxembourg and Netherlands.

⁹⁴ Portela, Clara and Raube, Kolja, “(In)-Coherence in EU Foreign Policy: Exploring Sources and Remedies” (2009), Paper presented at the *European Studies Association Bi-annual Convention*, Los Angeles, pp.1-26, p.11 [hereinafter Portela and Raube, (In)-Coherence in EU Foreign Policy].

⁹⁵ Koutrakos, Trade Foreign Policy and Defense in EU Constitutional Law, *supra* note 46, p.61.

⁹⁶ Portela and Raube, (In)-Coherence in EU Foreign Policy, *supra* note 94, p.12.

⁹⁷ Koutrakos, Trade Foreign Policy and Defense in EU Constitutional Law, *supra* note 46, p.63.

new treaties. This can be explained either by the realization of the common interest of the EU Member States, either by the ambition of Member States to create an international actor through the Union or either as Jones argues, thanks to the end of the Cold War, in which the sanction policy of Member States of the EC was to maintain the control through national legislation, in order to keep a balance between URSS and USA; therefore the Member States preferred to collaborate with the USA than to impose sanctions at each other⁹⁸. In other words, we notice some steps for the EC to be more autonomous and therefore even the sanctions evolution within the EC treaties seems to have a tendency to create an autonomous EU sanction policy, as some scholars argue⁹⁹. In the next paragraph we will briefly review change of the EU sanctions policy regarding its legal basis, by going through the treaties and most important documents that led to the current EU sanction policy.

i. From the Treaty of Rome to the Lisbon Treaty

The first steps to create a united Europe, were done through the creation of the “European Coal and Steel Community (ECSC)” and the creation of “European Defense Community (EDC)” in 1954. Both efforts though failed and therefore the European Community was created by the establishment of “Treaties of Rome” in 1957. The first Treaty established the European Economic Community (EEC) and the second one of the “European Atomic Energy Community” (known as “Euratom”)¹⁰⁰. Although the treaties were mainly focused on the creation of an internal market, we can find some provisions concerning the sanction policy of the EC. Art. 57 of EEC stipulates that “any MS may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions, and war materials”¹⁰¹.

After the Treaty of Rome, we find some traces on the Single European Act (SEA), which was created in 1987, in which the most important difference is that the main responsibility for the implementation of economic sanctions imposed by the UN belongs to the Commission¹⁰².

However, the most important step toward the creation of a common foreign policy and therefore to address the sanction issue, was taken by the establishment of the Maastricht Treaty- the so-called Treaty of European Union- on 1992. It is important to mention that, with the Maastricht Treaty we first started to talk about the EU sanctions policy and the EU as “a new actor in the field of sanction”¹⁰³, whereas before 1992 the practice of sanctions was coming mostly from the Member States of the Community. In a study conducted by Seth. G. Jones from 1950 until 2006, was noticed that between 1950 and 1990 the “member states sanctioned through the EC in two out of seventeen cases (12%)”, whereas between 1991 and 2006 the member states had sanctioned through the EU with a percentage of 78%, which means twenty-one cases out of twenty-seven¹⁰⁴.

The European Economic Community was replaced by the European Union by the Treaty of Maastricht. The “biggest achievement” of the Maastricht Treaty was to introduce the discussion among Member States about “collective security and defense within the EU”¹⁰⁵, whereas until then the focus was mainly in

⁹⁸ Jones, Seth G., "The rise of European Security Cooperation", Cambridge, ed. Cambridge University Press(2007). p.98 [hereinafter Jones, The Rise of Europe Security Cooperation].

⁹⁹ See Portela, European Union Sanctions and Foreign Policy, *supra* note 45; Koutrakos, Trade Foreign Policy and Defense in EU Constitutional Law, *supra* note 46.

¹⁰⁰ Official website of the EU Treaties, at http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_eec_en.htm (last visited 20.08.2012).

¹⁰¹ Kreutz, Hard Measures by a Soft Power, *supra* note 92, p.8.

¹⁰² *Ibid.* p.9.

¹⁰³ Vries, Anthonius W. and Hazelzet, Hadeweych, “The EU as a New Actor on the Sanctions Scene”, in Wallenstein, Peter and Staibano, Carina, *International Sanctions : Between Words and War in the global system*, New York, ed. Frank Cass (2005), pp.95-107, p.95 [hereinafter Wallenstein and Staibano, International Sanctions: Between Words and War].

¹⁰⁴ Jones, The Rise of Europe Security Cooperation, *supra* note 98, p.97.

¹⁰⁵ Koechlin, Jérôme, *La politique étrangère de l'Europe: entre puissance et conscience*, Gollion, ed. Infolio, (2009), p. 59 [hereinafter Koechlin, La politique étrangère de l'Europe].

the creation of an internal market. As for the field of sanctions, the creation of the Common Foreign and Security Policy (CFSP) and the so-called “two-steps procedure”¹⁰⁶, played very important role. In particular, the MS “agree to the imposition of sanctions” and then the sanctions are to be implemented by the Community measures under art.113, or “directly by Member states” when the measures that are taken are not in the competence of the Community¹⁰⁷. The CFSP led to stronger and joint decisions taken by the EU¹⁰⁸, giving the possibility to the EU to take additional measures than those required by the UN and it “enlarged the competence of the EC in the field of sanctions”¹⁰⁹.

The objectives of the Treaty were briefly defined in the preamble of art. B, in which we find *inter alia*, the objective to “promote economic and social progress”, to “assert its identity on the international scene, in particular through implementation of a common foreign and security policy including the eventual framing of a common defense policy, which might in time lead to a common defense” and to “maintain in full the *aquis communautaire*”¹¹⁰. More explicitly under art. J1, the Maastricht Treaty underlines as objectives of the Treaty the cooperation with the UN and the “respect for human rights and fundamental freedoms”¹¹¹.

Art. J2 establishes the common position of the EU and it emphasizes the collaboration of MS in “informing and consulting” each other. Another important point in this article is in its third paragraph, which provides that MS “shall uphold the common positions” in international conferences and international organization. Here we have to deal with the coherence among MS and the fact that even nowadays one of the main criticism to the EU, is that it is not speaking with “one voice”¹¹².

Finally, art. 228a of the Maastricht Treaty, stipulates some types of economical sanctions against third countries that the EU could take in the framework of its foreign policy:

“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 measures. The Council¹¹³ shall act by a qualified majority on a proposal from the Commission.”

This article becomes art.301 with the Amsterdam Treaty, which was created in 1997. Before examining other specific provisions of the Amsterdam Treaty, it is important to mention that the Treaty of Amsterdam focuses, *inter alia* on the enlargement process, since in 2004 ten¹¹⁴ countries would be join the EU. The main focus of the Treaty was therefore on the citizenship and rights of individuals. Moreover, the Schengen Agreement¹¹⁵ was to be incorporated into the legal system of the EU with the Treaty of Amsterdam and the European Parliament will gain more strength, by replacing the cooperation procedure with the co-decision one, which puts the European Parliament and the Council on “equal” positions for

¹⁰⁶ Bohr, Sebastian, “Sanctions by the United Nations Security Council and the European Community” (1993), in Portela and Raube, (In)-Coherence in EU Foreign Policy, *supra* note 94, p.11.

¹⁰⁷ *Ibid*, p.11.

¹⁰⁸ Kreutz, Hard Measures by a Soft Power, *supra* note 92, p.11.

¹⁰⁹ Gowlland-Debbas, National Implementation of United Nations Sanctions, *supra* note 43, p.124.

¹¹⁰ Art. B, Treaty on European Union (Maastricht text), 29 July 1992, O.J. C 191/1, [hereinafter Maastricht Treaty].

¹¹¹ Art. J, Maastricht Treaty, *supra* note, 110.

¹¹² See Portela and Raube, (In)-Coherence in EU Foreign Policy, *supra* note 94.

¹¹³ When we refer to the “Council” in this research we mean the Council of European Union, which is different from the UNSC and the European Council. Whereas when we refer to “Security Council” is the SC of the UN.

¹¹⁴ Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, Malta and Cyprus.

¹¹⁵ The Schengen Agreement was signed first on 1985 by five member states of the ECC and its goal was to abolish internal border control. Currently twenty-six member states of the EU are part of the Schengen Area, except from United Kingdom that still remain outside the Schengen Area.

EC matters¹¹⁶. Moreover, in the foreign affairs area, the Amsterdam Treaty created the High Representative for Common Foreign and Security Policy.

Moving now to the more specific provisions of the Treaty, we notice that in the preamble the principles under which the Union is founded are mentioned as those of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law¹¹⁷. The Council is in the position to determine whether a Member State is in a “breach” of these principles and therefore some measures can be taken against it, by suspending some member’s rights, such as the right to seat and vote in the Council¹¹⁸, under art.309.

Article J1 of the Treaty, defines as objectives of the CFSP, *inter alia*: “(...) to strengthen the security of the Union in all ways” and “to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter”.

Article J7 has a more “military” character, since it incorporates the Western European Union (WEU) as “an integral part of the Union providing the Union with access to an operational capability”. The article emphasizes as well the cooperation of the Union with the NATO.

Article J8 introduces the position of the High Representative for the CFSP, by giving to that person the main responsibility for “expressing the position of the Union in international organizations and conferences”. The duties of the High Representative are more specifically emphasized in article J16.

Finally, under the sixth Declaration of the Treaty of Amsterdam, a Policy Planning and Early Warning Unit was established in order to achieve “an appropriate cooperation” for “full coherence of the Union” in external policy.

Even if the Treaty of Amsterdam brought some changes in the area of the foreign policy, it had been criticized right after its entry into force in as demanding, among other things, for a reform of the Council and the Commission. This led to the Treaty of Nice in 2001, which did not make a lot of changes in the foreign policy area, but it strengthened the structure of the CSFP, by introducing a new Committee under art. 25 namely Political and Security Committee (PSC), which would, *inter alia*, deliver “opinions to the Council” concerning international situation and would “monitor the implementation of agreed policies” in the area of the CFSP.

Article 27 in the Treaty of Nice, gives the possibility for “enhanced cooperation” to “implement common positions or joint actions” in the CFSP area, but it specifically emphasizes that “it shall not relate to matters having military or defense implications”.

After the Treaty of Nice, a most powerful Treaty came into scene in 2009, which introduced many changes in different areas and this is the Treaty of Lisbon, which is the latest Treaty of the EU up to now.

First of all, the Treaty of Lisbon abolished the so-called “three-pillar-structure”, by merging all pillars. It also abolished the so-called “two-steps procedure” by giving the main task for taking decision to the Council, after proposal of the High Representative (art.215). Secondly, the Lisbon Treaty gives a legal personality to the European Union that enables the EU to conclude international agreements and to take actions as one entity. Thirdly, the Treaty of Lisbon created the post of the High Representative of the Union for Foreign Affairs and Security Policy (art.18) that merged the Commissioner for External Relations and Neighborhood Policy and the High Representative for the CSFP. The High Representative is at the same time the Vice-President of the Commission. Fourthly, the Treaty of Lisbon created the European External Action Service (art.27) under the control of the High Representative and has similar

¹¹⁶ Gosses, S. I. H., “Treaty of Amsterdam Marks Another Step on the Way to a European Constitution”, *Thesis*, at <http://www.hri.org/MFA/thesis/autumn97/amsterdam.html> (last visited 15.07.2012).

¹¹⁷ Fischer, Peter, “EU Sanctions on Austria”, article on, Busek, Erhard and Schauer, Martin, “Eine europäische Erregung : die "Sanktionen" der Vierzehn gegen Österreich im Jahr 2000 : Analysen und Kommentare”, Wien, ed. Böhlau, (2003), pp. 257- 265, p.260 [hereinafter Fischer, EU Sanctions on Austria].

¹¹⁸ *Ibid*.

task as a foreign ministry. Fifthly, the Permanent Structured Cooperation in Defense (PSCD) (art.42) was established and in art.42 para.3, MS “shall make civilian and military capabilities available to the Union for the implementation of CSDP. Finally, the Lisbon Treaty is the only European Treaty up to now that contains provisions for restrictive measures against individuals, not only against states.

More specifically the Treaty of Lisbon introduces art.75 of the TFEU in which the European Parliament and the Council must cooperate, by taking a common regulation, to define “a framework of administrative measures” in order to “prevent and combat” terrorism. Those measures can be “freezing of funds, financial assets or economic gains belonging to, owned or held by, natural or legal persons, groups or non-State entities”.

Moreover, the Treaty of Lisbon introduces for the first time under its title IV the word “restrictive measures”, which in amendments treaties was referred more as “actions”¹¹⁹ against third countries. In this title IV of the Lisbon Treaty, while art.215 (1) is an amendment of art. 301 TEC; art.215 paragraph 2 is an innovation of the Treaty, since it states that restrictive measures can be taken against individuals as well, by stipulating that:

“(…) 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”.

Moreover, another novelty regarding art.215 TFEU is that the power to impose restrictive measures is now given to the Council in a joint proposal from the High Representative and the Commission, and the European Parliament are only informed (art.215§1 TFEU). Finally, one of the most important novelties in the Treaty of Lisbon regarding the sanctions against individuals (art.215§2 TFEU), is that those sanctions are now under judicial review, which was emphasized as well in the Declaration appended to the Lisbon Treaty¹²⁰.

Even if in art.75 TFEU we already find the innovation of measures against individuals, the difference between art.75 and art.215 TFEU is that sanctions are mentioned in the former as “administrative measures”, whereas in art.215 TFEU they are clearly mentioned as “restrictive measures”. To Eckes¹²¹ point of view, however the most important difference between those two articles is that art.75 TFEU is reflecting the “autonomous financial sanctions regime” of the EU, whereas in art.215 “financial sanctions against individuals are based on UN lists, irrespective of whether the measures target EU-internal or EU-external terrorists”¹²².

Furthermore, art.275 (2) TFEU, gives the jurisdiction to the Court of Justice of the EU to review the “legality of restrictive measures against natural or legal persons adopted by the Council”. All these provisions seem to promise a better situation for persons listed and sanctioned by the Union¹²³, but as we will discuss in the third part of this research, this assumption is not totally correct.

ii. Guidelines and Basic Principles

Even if the practice of the EU sanctions existed before 2004¹²⁴, many argue¹²⁵ that the documents that attracted the most attention were the two complementary ones: the “Guidelines on the Implementation

¹¹⁹ Art. 228a amendment of Maastricht Treaty, *supra* note 110 and art.301 of Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. C 340/1 [hereinafter Treaty of Amsterdam].

¹²⁰ Graig, Paul, *The Lisbon Treaty : Law, Politics and Treaty Reform*, Oxford, Oxford university Press (2010), p. 396.

¹²¹ Eckes, Christina, *EU Counter-terrorist Policies and Fundamental Rights the Case of Individual Sanctions*, Oxford, ed. Oxford University Press (2009), p.123 [hereinafter Eckes, EU Counter-terrorist Policies].

¹²² *Ibid.*

¹²³ *Ibid.*, p.124.

¹²⁴ Portela, Carla, “Where and Why Does the EU Impose Sanctions?” (2005), *Politique Européenne*, no.17, pp.83-111, p.84 [hereinafter Portela, Where and Why Does the EU Impose Sanctions].

¹²⁵ See e.g Portela, European Union Sanctions and Foreign Policy, *supra* note 45, Kreutz, Hard Measures by a Soft Power, *supra* note 92, Eckes, EU Counter-terrorist Policies, *supra* note 121.

and Evaluation of Restrictive Measures (Sanctions)” of December 2003 and the “Basic Principles of the Use of Restrictive Measures (Sanctions)” of June 2004, both prepared by the Council of European Union.

The first document discusses various issues in order to strengthen the implementation of sanctions in the framework of the CFSP, regarding legal issues, targeted measures, listing and de-listing process, implementation of UNSCRs, jurisdiction¹²⁶ etc. In this document we find detailed information about the administration of sanctions¹²⁷, what they are and how to deal with. Some of the most important provisions of the “Guidelines” are for instance in para.13 that stipulates that the EU decision must respect the fundamental freedoms and human rights in particular in the listing procedure of targeted sanctions. Particular importance is given by the core document as well in the “exemptions” procedure in para.16 and 17, showing the importance that exemptions have for humanitarian needs of targeted persons. Finally, in para.25-30 under “Implementation of UN Security Council Resolutions”, the “Guidelines” gives the mayor importance to the effective implementation of UNSCRs, that could be achieved by implementing sanctions “as quickly as possible” (para.25), ensuring that “EU concerns and implementation needs” are taken into consideration in the negotiation of UNSCR (para.26), and “standard wording for legislative texts” (para.29).

The second core document is that of the “Basic Principles”. This document is more focused on the objectives of EU sanctions, such as promotion of human rights, democracy, fight against terrorism¹²⁸ and other. In both documents the EU seems to receive sanctions as “an alternative approach to military intervention”¹²⁹ and therefore to become more supportive to sanctions. More precisely, para.3 of the Basic Principles document provides the possibility for “autonomous EU sanctions” in three cases: i) efforts to fight terrorism ii) proliferation of weapons of mass destruction and iii) restrictive measures to uphold respect for human rights, democracy, the rule of law and good governance. Restrictive measures are described in para.5 as “political dialogue, incentives, conditionality” and as “last resort the use of coercive measures” in accordance with UN Charter. The policy that the EU should follow according to “Basic Principles” (para.6) and the “Guidelines” (para.10 and 11) is the targeted sanctions instead of comprehensive economic sanctions and measures such as arms embargoes, visa bans, and the freezing of funds, must be taken.

This particular “interest” of the EU to the sanctions area started to be noticed earlier in 2003 on the “Guidelines” document, when the Working Party of Foreign Relations Counsellors (RELEX) Sanctions, was established. Its main task is to “ensure effective and uniform implementation of EU sanctions, as well as revision and implementation of common guidelines for sanctions implementation”¹³⁰. The mandate of the RELEX is *inter alia* to exchange information and experiences on implementation of sanctions imposed by the EU or the UN, assisting and evaluating the difficulties in the implementation of sanctions and to exchange as well views and means on how to “ensure the efficiency of management” of sanctions including their humanitarian provisions¹³¹.

iii. Types of sanctions within the EU

The restrictive measures or sanctions, as we explained above, are used in the framework of the Common Foreign and Security Policy (CFSP) of the EU. More specifically sanctions are applied under art.75 and 215 TFUE, following the objectives that are set out in art.11 TEU. Sanctions are defined in the EU

¹²⁶ Council of the European Union, “Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy”, PESC 757, 15579/03, Brussels, 3 December 2003 [hereinafter EU Guidelines on Implementation of Sanctions].

¹²⁷ Kreutz, Hard Measures by a Soft Power, *supra* note 92, p.13.

¹²⁸ Portela, European Union Sanctions and Foreign Policy, *supra* note 45, p.28.

¹²⁹ Kreutz, Hard Measures by a Soft Power, *supra* note 92, p.14.

¹³⁰ EU Guidelines on Implementation of Sanctions, *supra* note 126, para.2.

¹³¹ Council of the European Union, “Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign Policy” Updated version PESC 1746, 17464/09, Brussels, 15 Desember 2009, Title IV para. 82 [hereinafter EU Guidelines on Implementation of Sanctions- Updated version 2009].

framework as “an instrument of a diplomatic or economic nature which seeks to bring about a change in activities or policies such as violations of international law or human rights, or policies that do not respect the rule of law or democratic principles”¹³².

As many scholars¹³³ have correctly noticed, there are two main types of sanctions¹³⁴ that the EU adopts. On one hand we have the UN-based sanctions regime, in which the EU implements the UN sanctions and they are applicable at the UN level; and on the other hand there are the autonomous European sanctions regime, in which the EU takes further actions than the UN, but those sanctions are only binding for the EU Member States. We argue though, that the EU autonomous sanctions are as well divided in two categories: a) the EU autonomous sanctions following a UNSCR- or in other words the EU additional measures to the UNSCR (e.g. Sudan 2005) and b) the EU autonomous sanctions, in the absence of the UNSCR (e.g. Moldova on 2010).

In both cases the EU according to the updated version of “Guidelines” in 2009, applies the following types of restrictive measures:

- Arms embargoes: Is probably the most frequent type of sanctions¹³⁵ that both the UN and the EU imposes to third states. Arms embargoes are sanctions such as: prohibition to “sale, supply, transfer or export of arms”¹³⁶, assistance to military activities etc.
- Trade and Financial sanctions: Types of this specific category can be export and import bans, flight bans, investments, payment and capital movements etc. This type of sanctions include as well freezing of funds, assets, prohibition on financial transactions and other, that are mostly used in order to implement targeted sanctions to individuals or entities.
- Restriction of admission: This is about the decision of not entering to the EU territory, which is taken jointly by the member states and the EU. These measures are mostly applied in the case of the targeted sanctions.
- Diplomatic sanctions: Diplomatic sanctions are those related to the expulsion of diplomats, suspension of official visits etc. Those measures are employed by states to show the disapproval of the specific behavior of the other state¹³⁷. The same practice is used as well in two other types of sanctions, not frequently used, which are a) the suspension of cooperation with third countries and b) boycotts of sport or cultural events¹³⁸.

B. The EU sanction policy

There are many debates around the subject of what kind of image the EU wants to give about itself; whether its policy is “soft power” or “civilian power” or whether it should strengthen its “hard power” so that the EU achieves to become a global actor. In order to understand better what kind of “power” the EU has and if it is a global actor or not, we are going firstly to see briefly the role of Western European Union. Secondly, we argue that there are two periods of time of the EU sanction policy, an “invisible” period before 2004 and a “visible” one that includes the period from 2004 until 2012. Thirdly, we will examine whether the EU actually has a specific policy toward sanctions and in order to see the EU policy

¹³² Definition is given in the official website of the European External Action Service (EEAS) at: www.eeas.europa.eu/cfsp/sanctions/index_en.htm (last visited 13.08.2012).

¹³³ See Koutrakos, Trade Foreign Policy and Defense in EU Constitutional Law, *supra* note 46, Kreutz, Hard Measures by a Soft Power, *supra* note 92, Eckes, EU Counter-terrorist Policies, *supra* note 121, Portela, Where and Why Does the EU Impose Sanctions, *supra* note 124.

¹³⁴ Eckes, EU Counter-terrorist Policies, *supra* note 121, p.3.

¹³⁵ Eriksson, Mikael, *Targeting Peace : Understanding UN and EU Targeted Sanctions*, Aldershot, ed. Ashgate Publishing Limited, (2011), p.33 [hereinafter Eriksson, Targeting Peace].

¹³⁶ EU Guidelines on Implementation of Sanctions- Updated version 2009, *supra* note 131, para.56.

¹³⁷ Kreutz, Hard Measures by a Soft Power, *supra* note 92, p.6.

¹³⁸ *Ibid.*

we will suggest three hypotheses of the EU sanctions policy. Finally, we are presenting for each hypothesis one case study in order to see if the hypotheses are going to be confirmed or not.

i. The EU seen as a “hard power”- the role of Western European Union

The Western European Union (WEU) origins are back in 1948, under the Brussels Treaty, which was an agreement among France, United Kingdom, Belgium, Netherlands and Luxembourg. One of the main goals of the Brussels Treaty was the mutual defense. The discussion around the European Defense led to the signature of the European Defense Community (EDC) in 1952. The latter however was not ratified by the French National Assembly and therefore did not enter into force. After the failure of the EDC, states of the Brussels Treaty as well as USA, Canada, the Federal Republic of Germany and Italy, finally held a conference in London in 1954, in which FRG and Italy joined the Brussels Treaty. The conference conclusion was the signing of the Agreements of Paris, which amended the Brussels Treaty and the WEU was finally created in 1954.

The main goals of the WEU were, *inter alia*, the economical, social, cultural collaboration and the most important one was the collective defense in case that a MS was a victim of an armed attack¹³⁹ in Europe. This provision was included in articles V of the amended Brussels Treaty that stated that other contracting parties shall provide “all military and other aid and assistance in their power”. By 1992, five more states have joined the WEU: the Federal Republic of Germany (FRG) and Italy in 1954, Portugal and Spain in 1988, and Greece in 1992. The WEU has been a positive contribution to permit the entrance of the FRG in a European organization, regarding the restoration of confidence among Western European states¹⁴⁰.

However, after 1984 its activities gradually slowed down and most of its activities were transferred to the Council of Europe and the European Political Co-operation. Even if the Maastricht Treaty intended to create the WEU as a “bras armé” of Europe¹⁴¹, the Treaty of Nice intended to reinforce military capabilities of the EU itself¹⁴². In 2000, the WEU Ministers agreed to transfer the capabilities and activities of the WEU to the EU under its CFSP and Common Security and Defense Policy (CSDP). Moreover, the main activity of the WEU, its collective defense and mutual solidarity provisions, was retaken by the Treaty of Lisbon that entered into force in 2009. The provisions are similar but not identical under art.42§7 TUE. With the main responsibilities been transferred, the WEU was finally abolished in 2011, when member states started to withdraw themselves from the organization one by one.

One of the main contributions of the WEU was that to the creation of the North Atlantic Treaty Organization (NATO) in 1949. Under art.5 of the North Atlantic Treaty, an attack to a signatory states, should be considered as an “attack to all member states” and each state invoking its right to self defense, would take the necessary actions to “restore and maintain the security of the North Atlantic area”. The most important agreement between the WEU and the NATO was that of “Berlin agreement”, which was an Agreement putting under EU disposal NATO planning capabilities for EU-led crisis management and military needs. This agreement is retaken as well by the European Union and is now called the “Berlin Plus Agreement”, signed in 2002.

Even if the WEU failed to accomplish its mission to create a proper military capability of the EU, we still find it interesting to see that the EU has made - and still does - some steps towards a creation of its own military capacities and even if it is argued that its member states have strong military capabilities individually, the EU as an organization is still weak in the domain of defense and it still does not have its

¹³⁹ Koechlin, La politique étrangère de l'Europe, *supra* note 105, pp.58-59.

¹⁴⁰ Rens, Engelina Johanna Maria Aimée, “Military Cooperation in Europe: From World War Two to the foundation of the Western European Union (WEU)” (2008), *Masterclass Montesquieu Institute*, pp. 1-42, p.16 [hereinafter Van Rens, Military Cooperation in Europe].

¹⁴¹ Koechlin, La politique étrangère de l'Europe, *supra* note 105, p.60.

¹⁴² *Ibid.*, p.60.

own arm capacities. As Werner Fasslabend noted, “the EU is not in a position to guarantee the stabilization of Balkans without American assistance”¹⁴³.

The fact that the EU still does not dispose of a proper military power, that it always refers to the respect of human rights, democracy, fundamental freedoms and other as main objectives of the EU policy, and as well the image that the EU gives about itself; it has always been described more as a “soft power” policy rather than a “hard power” one. But before entering into this discussion, it is interesting to see first of all what the inventor of the “soft power” notion, Joseph Nye, meant when he described the EU as a “soft power” policy.

The “soft power” as Nye described it, is not only about “persuasion or the ability to move people by argument” but it is as well the “ability to attract, which often leads to acquiescence”¹⁴⁴. In other words the “soft power” is about the influence that a state has on other states by promoting values and its power to attract rather than using military forces; using mostly its power to convince rather than impose¹⁴⁵.

It now remains to see whether this “soft power” theory, is applicable as well to the sanction policy of the EU. Does the EU uses a “soft power”, “hard power” or “right power” policy? Does the EU policy is conducted by regional or human rights objectives? These are some of the questions that we will try to respond in the next sub-chapter. Before answering these questions, we should notice firstly that there are few researches conducted for the EU sanctions policy and we had many difficulties to find statistics that have been done in order to prove whether the EU has been very active or not in the past. The only studies that we found that present some statistics numbers are those of Kreutz¹⁴⁶ in 2005 and Portela on 2005. For that reason our analysis for the first period – EU policy before 2004- is mostly based on their statistics. Finally, we argue here that there are two different periods of the EU sanctions policy, in the first period the EU is presented more as “invisible” and this is the period before 2004; and in the second period it seems to our opinion that the EU becomes more “visible” in the sanction scene after the creation of the “Basic Principles” in June 2004 and as Kurtz has correctly noted, the EU showed an “official EU sanction strategy only after June 2004”¹⁴⁷.

ii. Three hypotheses for the EU sanctions policy

In this sub-chapter we argue that before 2004, the discussion around sanctions was not really common within the EU member states. Even if before the MS were implementing sanctions either individually or through the EU, the need to have a uniform implementation of the UN sanctions by the EU, was mostly addressed in the “Guidelines” document. As we have mentioned above, there was a provision even at the time of Maastricht Treaty, to adopt common position about measures to be undertaken¹⁴⁸. However the uniform implementation of UN and EU sanctions was expressed under paragraphs 25-30 in the chapter “Implementation of UN Security Council Resolutions” of the “Guidelines” and as well under “Arms Embargoes” para.5. The most important document however was this of the “Basic Principles”, in which the EU emphasized its commitment toward the UN Charter and expressed its will to impose “autonomous EU sanctions in support of efforts to fight terrorism”, among other things; and to coordinate EU actions in order to ensure “effective and timely implementation”¹⁴⁹ of the UNSCRs.

The above argument is one of the reasons why we distinguish two periods in the EU sanction policy; the EU as “invisible” before 2004 and the EU as “visible” after 2004 in the sanctions area. Other reasons why

¹⁴³ Wogau, Karl, *The Path to European Defence : New Roads, New Horizons*, London, ed. John Harper (2009), p.189 [hereinafter Wogau, *The Path to European Defence*].

¹⁴⁴ Nye, Joseph S., *Soft Power: The Means to Success in World Politics*, New-York, ed. Public Affairs (2004), p.6 [hereinafter Nye, *Soft Power: The Means to Success in World Politics*].

¹⁴⁵ Koechlin, La politique étrangère de l'Europe, *supra* note 105, p. 38.

¹⁴⁶ Kreutz, Hard Measures by a Soft Power, *supra* note 92.

¹⁴⁷ *Ibid.*, p.40.

¹⁴⁸ Ian, Sanctions Applied by the European Union and the United Nations, *supra* note 73, p.211.

¹⁴⁹ Council of the European Union, “Basic Principles on the Use of Restrictive Measures (Sanctions)”, PESC 450, 10198/1/04, Brussels, 7 June 2004, parag. 1-4 [hereinafter EU Basic Principles].

we categorize the EU sanctions policy before 2004 “invisible” and not “inexistent” for instance, is due to the researches done by Ginsberg (1989, 2001), Nutall (1997), Kalbermatter (1999), Hazelzet (2001), Koutrakos (2001), Anthony (2002), Eriksson (2005, 2009), Kreutz (2006), Jones (2007), and Portela (2010). Based on these researches, it can be noticed that the practice of the sanctions imposed by the EU existed even before 2004, even though scholars do not agree on when exactly this practice started¹⁵⁰. And this is shown even better by the research that Kreutz has conducted, in which we notice that the EU has even been more active than the UN in the EU area from 1992 until 2003¹⁵¹ in which period the EU has imposed sanctions in almost the same number of target states as the UN. This research indicates us that the EU was active before 2004 though this practice has not really attracted the attention of scholars and media and this is why we call the EU “invisible” during the first period on its sanctions policy. Some of the main reasons why the EU has not attracted much attention before that period in our opinion, are due to: a) in general the EU has “proceeded or continued UN efforts”¹⁵² and has always imposed arms embargoes after recommended sanctions of the UNSC, except in two cases: Georgia in 1993 and Yemen in 1994¹⁵³, b) cases of the EU autonomous sanctions in the absence of the UN were really few, and c) the EU has been enlarged in almost three times from 9 member states in 1980 to 25 member states in 2004, and this led to a belief that the EU is becoming a global actor.

Therefore, it is only after 2004 that the EU entered in the sanctions scene discussion and we argue that this is the time when the EU becomes “visible” in the sanctions area. The first reason is because no one expected a document like the “Basic Principles” from a “soft power” like the EU. This document is focused not only on restrictive measures but as well on how to implement those measures, what kind of restrictive measures to take, how they can be more effective etc. Furthermore, it puts into question the “soft power” of the EU and we have to see if the policy of the EU toward sanctions has changed. Secondly, the numerous cases¹⁵⁴ brought to the ECJ in relation with targeted sanctions and the violation of human rights, brought into discussion several legal issues such as the relation between UNSCRs and the implementation of those resolutions by member states that are MS of other regional organization at the same time. The most popular case was that of the *Kadi* case on 2008 and the decision of ECJ, which will be developed in details in the third part of this research. Thirdly, autonomous sanctions of the EU have been imposed with increasingly frequency¹⁵⁵ and we will give an example of this argument in a case study under the paragraph regarding Zimbabwe. Lastly, as it can be noticed the EU autonomous sanctions taken in the absence of the UNSCR have been increased as well. Just to mention that currently the EU has 25 sanctions in force against states¹⁵⁶, in which 9¹⁵⁷ of them are autonomous one, outside the framework of the UN and some others that are autonomous EU sanctions going further than the UNSCR¹⁵⁸.

We regret though that - to our knowledge - there is no study done yet that compares UN sanctions to EU sanctions¹⁵⁹ in depth, showing the exact numbers of cases when the EU took autonomous sanctions, when the EU went further than the UN sanctions, when the EU was against the UN sanctions and how the EU implements the UN sanctions. That could be extremely helpful for the purpose of this research. However, there are still some elements that we can derive from studies already conducted regarding the EU sanctions policy. This is why we argue that there are three hypotheses for the EU sanctions policy.

¹⁵⁰ Kreutz, Hard Measures by a Soft Power, *supra* note 92, p.7.

¹⁵¹ See Appendix 1, Table 1: Sanctions in the EU area 1980-2003.

¹⁵² Kreutz, Hard Measures by a Soft Power, *supra* note 92, p.17.

¹⁵³ *Ibid.*, p.16.

¹⁵⁴ See Chapter III of this research.

¹⁵⁵ Portela, European Union Sanctions and Foreign Policy, *supra* note 45, p.1.

¹⁵⁶ Restrictive Measures in Force at http://eeas.europa.eu/cfsp/sanctions/index_en.htm (last visited at 20.08.2012).

¹⁵⁷ Belarus (2010), Egypt (2011), Moldova (2010), Myanmar (Burma) (2010), Tunisia (2011), USA (1996), Yugoslavia (Serbia and Montenegro) (2000), Bosnia and Herzegovina (2011) and Zimbabwe (2011).

¹⁵⁸ See for instance Ivory Coast (2005), Libya (2011), Sudan (2011), Syria (2012).

¹⁵⁹ Current studies are more focused on types of sanctions that the UN and EU uses (Kreutz 2006), autonomous sanctions of EU or evolution of EU sanctions (Ginsberg 1989, Nutall 1997, Koutrakos 2001, Helzetet 2001, Anthony 2002, Kreutz 2006, Portela 2010), implementation of targeted sanctions of the EU (Erikson 2005, Portela 2010).

Hypotheses of the EU sanctions policy

Hypothesis 1 : The EU is more regional-oriented in its sanctions policy

The first hypothesis lies on the assumption that the EU is more active in its sanctions policy when the sanctions are against a State that is in its neighborhood¹⁶⁰ area. For this hypothesis we are mainly based on the research of Carla Portela on 2005¹⁶¹, and we are retaking approximately one of the hypotheses that she used for the research, since it develops well the elements concerning this hypothesis and it corresponds as well to our point of view. The hypothesis that Portela invoked was that: “the EU imposes more frequently sanctions on a region located to the EU”. However, there are two main difference regarding the hypothesis of Portela and ours; the first one is that the research conducted by Portela covered the period time between 1987-2003, whereas we are focusing in the general EU policy from the begging of sanctions practice until 2012 and secondly our research is mostly to see if the EU reacts more quickly by imposing sanctions when it is about a region located to Europe, whereas Portela was more interested in the frequency and in the geographical framework of the EU.

Interestingly enough, Portela found out that “countries in the European vicinity are targeted more frequently than those further afield”¹⁶². The study even showed that 25%¹⁶³ of the Southern Mediterranean neighborhood countries were the object of EU sanctions and less than 5% were outside the European area. Out of this research we can suggest that the EU shows a preference to the regional crisis management more than the rest of the world and therefore our hypothesis could be proven to be correct to a certain extent.

In the same way, Kreutz¹⁶⁴ came to a similar conclusion, when he noticed that from 1982 till 2004, most cases of EU sanctions are located in Europe with the number of 11 cases out of 29¹⁶⁵, followed by Africa with a number of 9 out of 29. But how we can prove that the EU reacts quicker when it comes to regional sanctions decision rather than the rest of the world? In the same research Kreutz argued as well that the EU seems to respond quicker with imposing sanctions or threat of sanctions when a neighborhood state is in a breach with international law.

We have conducted a brief research¹⁶⁶ as well in sanctions imposed by the EU from 2005 until 2012, including those outside the framework of the UN and we have found out that when the EU is implementing sanctions of the UN is not clear whether the EU has a “neighborhood-oriented” policy, but when it comes to autonomous sanctions we notice that the EU with a number of 7 autonomous cases that has taken from 2005 until 2012, 5 of them are in the scope of what the EU calls “neighbors”. The last result makes us to believe that the hypothesis it is correct and that the EU policy has not change from the previous period covered by Portela and Kreutz.

It is difficult though to our opinion to be able to say with certainty if the EU is regional oriented or not because of the lack of other parameters. First, we have to admit that most of the cases- crisis that the UN and the EU had to deal with until now, were located in Europe and in Africa, so we can easily suggest that the EU has a preference in regional or to the former European colonies, but this must be proportionate of the number of cases occurs in the rest of the world and we cannot know by certainty what would happen if we had to deal with other cases. Secondly, we are not sure whether the EU acts more quickly when is

¹⁶⁰ The EU neighborhood consist of the European non-member states as well as Armenia, Azerbaijan, Georgia, Belarus, Moldova, Ukraine, Algeria, Egypt, Israel and Palestinian Authority, Jordan, Lebanon, Libya, Western Sahara, Morocco, Syria and Tunisia. See EU Report on Human Rights 2011, available at: http://eeas.europa.eu/human_rights/docs/index_en.htm but as well in the official website of the European Commission under “European Neighborhood Policy” http://ec.europa.eu/world/enp/policy_en.htm (last visited 14.07.2012).

¹⁶¹ Portela, Where and Why Does the EU Impose Sanctions, *supra* note 124, p.98.

¹⁶² *Ibid.*, p.99.

¹⁶³ See Appendix 1, Table 2: EU near neighborhood.

¹⁶⁴ Kreutz, Hard Measures by a Soft Power, *supra* note 92, p.17.

¹⁶⁵ See Appendix 1, Table 2: EU near neighborhood.

¹⁶⁶ See Appendix 1, Table 4: EU sanctions between 2005-2012.

about a neighborhood crisis, because for example it is “less costly”. Thirdly we have not taken into consideration other parameters such as relationship of the EU with the target states (economic or others). What we can suggest though, is that the EU would be more sensible on reacting in a quicker way, when is about a conflict or a terrorist attack near to its region, because this could be considered to be an “immediate threat”, since the conflict can touch other countries that are member states of the EU, or like Kreutz and Portela put it we have to deal with a “more direct security based consideration”¹⁶⁷.

Hypothesis 2 : The EU is more active when a state is in a breach with its values-principles, more particularly democracy and human rights

First of all we have to explain what are the EU values, objectives or otherwise “principles”. The EU principles are described in art.21 of the TUE as “democracy, the rule of law, the universality and indivisibility of human rights 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”. Portela distinguishes those principles in two categories: the “directly security-related objectives”, in which she puts the terrorism, regional peace and stability (TSP) and Weapons of Mass Destruction (WMD); and the “indirect security-related objectives”, which is consisting by the promotion of democracy and human rights (DHR)¹⁶⁸. Although we are not doing the same distinction here we have to agree with this categorization of the EU principles. However, in our hypothesis we are more interested to prove that the EU is more active when a state is in a breach of the values that the EU tries to promote from the beginning of its creation.

The theory of Portela though is interesting to examine, because if we had the same sub-categories of principles as Portela and if our first hypothesis is still correct, we would have expected that the EU is more active in the “direct security-related objectives”, since it is about “neighborhood” policy and “immediate threat”. But surprisingly enough, Portela found out that the EU has imposed sanctions almost in the same frequency¹⁶⁹ in both cases and there are no clear indications of which case prevails. Therefore, she comes into the conclusion that the EU has not increasingly put sanctions to promote measures such as human rights and democracy¹⁷⁰, which comes to a contradiction with our hypothesis.

Portela argued as well, that the EU has a different approach to each geographical area; it imposes sanctions in the case of conflict management in Europe, in the case of terrorism in the neighborhood area and in the case of human rights and democracy to the rest of the world. Similar argument was supported as well by Joakim Kreutz¹⁷¹, when he found out that the EU sanctions in the EU near neighborhood, is 51% because of intrastate conflicts, whereas in the rest of the world the EU sanctions are imposed with a percentage of 56% to promote human rights and democracy¹⁷². Contrary to Portela thought, Kreutz noticed that the EU in fact “has managed to incorporate a human rights approach to its external policy”¹⁷³ and this assumption is coming as a partial affirmation of our hypothesis. However, Kreutz believes as well, like Portela does, that the EU uses a different policy to different geographical area. Other scholars, such as Klaus Brummer, seem to criticize more the EU sanctions policy and they argue that in the EU agenda “norms and values are only secondary importance of the EU’s sanctions policy”¹⁷⁴. We have to notice here however, that when Brummer is arguing that the “norms and values” in the EU sanctions policy plays a second role, is mostly questioning why the EU does not impose the same sanctions in similar situations, but it refrain its decisions when the member states are having a great interest behind. But in our

¹⁶⁷ Kreutz, Hard Measures by a Soft Power, *supra* note 92; p.22, Portela, Where and Why Does the EU Impose Sanctions, *supra* note 124, p.100.

¹⁶⁸ Portela, Where and Why Does the EU Impose Sanctions, *supra* note 124, p.92.

¹⁶⁹ See Appendix 1, Table 5: Objectives of the EU autonomous sanctions 1987-2003.

¹⁷⁰ Portela, Where and Why Does the EU Impose Sanctions, *supra* note 124, p. 98.

¹⁷¹ Kreutz, Hard Measures by a Soft Power, *supra* note 92, p.19-21.

¹⁷² See Appendix 1, Table 3: EU and the Rest of the World.

¹⁷³ Kreutz, Hard Measures by a Soft Power, *supra* note 92, p.21.

¹⁷⁴ Brummer, Klaus, “Imposing Sanctions: The Not So ‘Normative Power Europe’” (2009), *European Foreign Affairs Review* vol.14, pp.191-207, p.202 [hereinafter Brummer, Imposing Sanctions: The Not So ‘Normative Power Europe’].

analysis, we are mostly focusing on the imposed sanctions and whether they are oriented by the basis of EU principles.

Taking into account the most recent cases that we have in our disposal and taking as well a look at the study¹⁷⁵ that we have conducted using the information of the UN resolutions and EU regulations, it seems to us that we have to disagree with the final conclusion of both Portela and Kreutz. Prior to 2004, we agree with the assumption that the EU was using human rights and democracy objectives to impose sanctions mostly in the rest of the world, but after 2004, it seems like the EU uses the same objectives both to EU near neighborhood area as well as the rest of the world. More precisely, we found that there are 20 cases in which the EU uses the objectives of promotion of democracy and human rights (DRH) to impose sanctions and 9 cases of them are in the near neighborhood area. In total we found that during this period there have been 26 cases in which the EU imposed sanctions, 20 cases as we mentioned are for the DRH, 4 for terrorism, 1 for WMD and 1 for piracy. These final conclusions lead us to believe that the EU is more active in imposing sanctions when a state is in a breach with its principles and therefore this second hypothesis is confirmed as well. As the EU mentioned in its Annual Human Rights and Democracy Report 2011 “human rights and democracy are at the heart of EU action worldwide”¹⁷⁶.

Hypothesis 3 : The EU uses “soft power” instead of “hard power” in its sanctions policy

As we mentioned briefly above, the EU has always been described as a “soft power” policy. But the question here is to see whether the EU has the same policy toward sanctions. We could suggest that at a first glance the EU seems to maintain this title since even the language used in the “Guidelines” and “Basic Principles” is more a “soft power” one. For instance, sanctions are preferred to be called by the EU institutions or representatives as “restrictive measures” and not as “sanctions”, in order to mention that restrictive measures are not meant to be punitive. Secondly, the EU has always presented sanctions as a last resort, giving more importance to other means such as dialogue and diplomacy with third states, giving more importance to “convincing” other states rather than “imposing its power”, or as Joseph Nye already argued the EU uses its “soft power” rather than “hard power” on its external policy.

Among other scholars¹⁷⁷ Hazelzet seems to reaffirm our hypothesis that the EU is a “soft power” sanction policy, by arguing that “if there is any European sanctions policy, it would be a preference to use positive rather than negative measures, or carrots over sticks”¹⁷⁸. This according to Hazelzet is due to the fact that either there is a general belief among the EU Member States that positive measures are “more effective to further respect of international law and human rights” or just because it is “much easier and less costly for MS to agree on positive rather than negative measures”¹⁷⁹. Becher expressed as well similar view regarding “hard power” of the EU, by arguing that if there was a need for the EU to take “negative measures” this would not happen, since the member states would never reach an agreement, because their national security concerns are way too important¹⁸⁰.

The “soft power” image that the EU has given for itself, is criticized by some scholars as the main cause for which the EU cannot be a global actor, but only a regional one¹⁸¹. Some others argue that in order for the EU to be a global actor and to increase its credibility, it has to develop its own military forces and

¹⁷⁵ See Appendix 1, Table 4: European Union Sanctions from 2005-2012.

¹⁷⁶ “European Union Annual Report on Human Rights and Democracy in the World” (2001), p.6 available at: http://eeas.europa.eu/human_rights/docs/2011_hr_report_en.pdf (last visited 14.07.2012) [hereinafter EU Annual Report on Human Rights 2011].

¹⁷⁷ See Kreutz (2005), Portela (2010), Nye (2004), Koechlin (2009), Eckes (2009) and others.

¹⁷⁸ Vries, Anthonius W. and Hazelzet, Hadeweych, “The EU as a New Actor on the Sanctions Scene” in Wallenstein and Staibano, *International Sanctions: Between Words and War*, *supra* note 103, p.95.

¹⁷⁹ *Ibid.*

¹⁸⁰ Klaus Becher, “Has-been, Wannable, or Leader: Europe’s Role in the World After the 2003 European Security Strategy”, in Kreutz, *Hard Measures by a Soft Power*, *supra* note 92, p.3.

¹⁸¹ Eriksson, Mikael, “EU Sanctions: Three Cases of Targeted Sanctions”, in Wallenstein and Staibano, *International Sanctions: Between Words and War*, *supra* note 103, pp. 108- 126, p. 109.

therefore it will influence more effectively international actors by the threat of the use “hard power”¹⁸². Similar view is expressed as well by Eriksson, when he argues that a “mature EU” will have more instruments at its disposal for the foreign policy, including military one¹⁸³. The suggestion to create a proper European Defense, though, is characterized by Merchet as a “big illusion”¹⁸⁴. To his opinion the EU will never be able to have a proper European Defense. Some other scholars though argue that the EU would be more effective if it uses a combination of both “soft power” and “hard power”: the “right power”¹⁸⁵ or in other words the “smart power”¹⁸⁶. To have a “smart power” for the EU policy, according to Joseph Nye, would be to invest more on its “hard power” resources¹⁸⁷.

We find it important here to give the definition of “hard power” in order to be able to understand what policy the EU is currently using. However, we do not have just one definition for the “hard power”, what we can say with certainty is that the “hard power” is a term that it uses in contradiction to “soft power”. It is usually described as a coercive policy to achieve a particular behavior from the other states. This policy contains military intervention, economic sanctions and coercive diplomacy¹⁸⁸. To Nye’s opinion all kind of sanctions are part of “hard power”. Some other scholars though argue that it depends on what kind of sanctions we deal with. Taking all these elements into account, we consider that the EU sanctions policy is changing currently and we have the impression that the EU tries to create perhaps a “smart” or “right” power toward crisis management and this is because of two main reasons. First we have noticed that even in the “Basic Principles” a more comprehensive policy is showed when it mentions that coercive measures would be used as a last resort in case that other means do not bring the desired change¹⁸⁹. This policy can be noticed in our opinion as well by art.42 TUE, in which it is given an important emphasis to the EU military capabilities and art.222 TFUE that integrates the “solidarity clause”. This article provides that all MS are requested to mobilize all the instruments at its disposal, including the military resources, to protect Member States from terrorist attack, natural or man disaster. The second reason why we believe that the EU sanctions policy is changing is due to the sanctions practice of the EU in recent years. We notice that the EU is increasing the number of sanctions imposed to third states and some have even argued that several restrictive measures taken by the EU are near to comprehensive sanctions¹⁹⁰. In particular the EU has been criticized of imposing an important number of targeted sanctions toward Iran (2005), Libya (2011) and now Syria (2012), sanctions which are considered not to make a significant change to the target state’s policy, but there are in place mostly for the purpose of the EU to become visible in the sanctions area. Even If the latter assumption might be correct, we are still arguing that we notice a change to the EU sanction policy and we do not consider it as a simple “soft power”. Finally, the case study of Somalia, that is going to be developed in the next sub-chapter, shows us that the EU is sometime capable of using the “hard power”¹⁹¹.

¹⁸² Hadar, Leon, “The United States, Europe, and the Middle East: Hegemony or Partnership?”, in Kreutz, Hard Measures by a Soft Power, *supra* note 92, p. 5.

¹⁸³ Eriksson, Mikael, “EU Sanctions: Three Cases of Targeted Sanctions”, in Wallenstein and Staibano, “International Sanctions: Between Words and War, *supra* note 103, pp. 108- 126, p.110 and p.105.

¹⁸⁴ Merchet, Jean-Dominique, *Défense Européenne, la Grande Illusion*, Paris, Larousse(2009).

¹⁸⁵ Koechlin, La politique étrangère de l’Europe, *supra* note 105, p.39.

¹⁸⁶ Nye, Soft Power: The Means to Success in World Politics, *supra* note 144, p. 147.

¹⁸⁷ Nye, Joseph S., “Think Again: Soft Power” (2006), *Foreign Policy*, at http://www.foreignpolicy.com/articles/2006/02/22/think_again_soft_power (last visited 20.07.2012) [hereinafter Nye, Think Again: Soft Power].

¹⁸⁸ Definition taken by Public Diplomacy Wiki at http://publicdiplomacy.wikia.com/wiki/Hard_Power#Definition (last visited 18.07.2012).

¹⁸⁹ EU Basic Principles, *supra* note 148, para.5.

¹⁹⁰ Kreutz is arguing that the additional measures outside the UN sanctions regimes, against South Africa in 1985 and Yugoslavia in 1998, were closest to comprehensive sanctions. See Kreutz, Hard Measures by a Soft Power, *supra* note 92, p.43.

¹⁹¹ Koechlin, La politique étrangère de l’Europe, *supra* note 105, p.140.

iii. Case studies

After having explained what sanctions policy the EU has towards sanctions, we find important to confirm or not our hypotheses as well by examining the practice of the EU in particular crisis related to the hypothesis. For our first hypothesis we are going to choose Moldova as an example of the EU as a regional-oriented policy; Zimbabwe is going to be our example for the second hypotheses and the EU being more active when a state is in a breach of the EU values and principles; and as third example for our last hypothesis we are going to give Somalia and to test whether the EU uses “soft power”, “smart power” or “hard power”.

1) Moldova

The facts

The crisis of Moldova started on the 19th of August 1990, when Transnistria declared its independence under the name of “Transnistrian Moldovan Republic”. It led to an armed conflict between Moldovan government forces and Transnistrian forces¹⁹². On 21 July 1992, a cease-fire agreement was signed which gave to Transnistria a “special status” within Moldovan state and therefore Transnistria has existed as an autonomous entity which has not been formally recognized as a state except by Russia¹⁹³. Furthermore, in 1993 the OSCE had made efforts to improve the situation in Moldova and tried to restore peace, but the efforts have remained fruitless¹⁹⁴. Later on, in 1994 an agreement was signed between Moldova and EU concerning the cooperation and partnership and in 2001, the EU included Moldova in its Stability Pact for South-Eastern Europe and therefore the EU gave a great importance in trying to find a solution in the “frozen conflict” in Transnistria¹⁹⁵. Therefore, in 2003, the EU jointly with the US imposed targeted sanctions against Transnistrian leaders.

EU sanctions

The joint sanctions of the EU and the US in February 2003 were imposed in the form of travel sanctions to the leader of Transnistria, in order to pursue the latter in discussion about peace with Moldova. Later on the so-called “school crisis”¹⁹⁶ started provoking in 2004 new targeted sanctions, most particularly ban visa, to officials that were believed to be responsible for the crisis in question. The crisis concerned a closure of several Latin-script schools followed by intimidation of parents, teacher and children, which was considered as a human rights violation¹⁹⁷. These particular restrictive measures are meant to be lifted when a peace settlement of the political conflict will come to an end and when the schools will be allowed to reopen and the children and teachers will stop to suffer from the intimidation¹⁹⁸. Since the situation in Moldova remains the same the EU has continued to expand its sanctions against persons “responsible for preventing progress in arriving at a political settlement of the Transnistrian conflict” and persons “responsible for the campaign against Latin-script schools in the Transnistrian region”¹⁹⁹; those sanctions are valid until 30 September 2012.

¹⁹² Sanctions against Transnistria, Republic of Moldova, Background to the sanctions, Per Saland, Ministry for Foreign Affairs, 20 April 2009, Last updated 17 November 2011, <http://www.sweden.gov.se/sb/d/11881> (last visited 20.08.2012).

¹⁹³ Portela, European Union Sanctions and Foreign Policy, *supra* note 45, p. 95.

¹⁹⁴ *Ibid.*, p. 95.

¹⁹⁵ Kreutz, Hard Measures by a Soft Power, *supra* note 92, p.42.

¹⁹⁶ Portela, European Union Sanctions and Foreign Policy, *supra* note 45, p.95.

¹⁹⁷ ‘Declaration by the Presidency on behalf of the European Union on the continuing deterioration of the situation in Moldova,’ 26 August 2004, at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/cfsp/81775.pdf (last visited 20.07.2012).

¹⁹⁸ Foreign and Commonwealth Office, Moldova, (last updated 21 September 2010), at <http://www.fco.gov.uk/en/about-us/what-we-do/services-we-deliver/export-controls-sanctions/country-listing/moldova> (last visited 20.07.2012).

¹⁹⁹ European Union Restrictive Measures in Force at http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf (last visited 20.07.2012).

Analysis

As we mentioned above Moldova is given as an example to examine the hypothesis no.1 that considers the EU sanctions policy as a “regional-oriented” one. This policy as we discussed above is based on the fact that the EU has to ensure security in its neighborhood area because of firstly “immediate threat”, and to a certain extent as well because of the influential power that the EU has on the neighborhood states. For this purpose the EU neighborhood policy in the case of Moldova and other neighborhood countries, was initiated through the efforts of the former to build up a relationship with its neighborhoods based on mutual commitment to common values, such as democracy, human rights, rule of law, good governance and others; through the European Neighborhood Policy (ENP)²⁰⁰, in order to ensure a zone of security, stability and prosperity with its neighbors²⁰¹.

Therefore, the EU first concern regarding the Transnistrian conflict was related to the projects of the EU enlargement in 2004, when ten new countries would be join the EU²⁰² and this can be shown as well by the Commission statement on the “EU Approaches to Moldova”, on 2002, in which the Commission confirmed that:

“Moldova stability clearly matters to the EU. Within a few years, Moldova will be on the borders of an enlarged EU. It has been destabilized by weak government, armed conflict and secession, near economic collapse, organized crime and emigration...The EU need to help Moldova address these problems”²⁰³.

The EU consideration of Moldova crisis like a “top priority” can be illustrated as well by the confirmation of the Commission in its paper “Moldova Country Strategy Paper” 2002-2006, when it stated that “the internal conflict of the separatist region of Transnistria needs to be settled as a matter of the highest priority”²⁰⁴. Furthermore, the Commission confirmed that the EU is committing itself in an active way to help Moldova to restore a regional peace and stability, because this conflict “will be at the doorstep of the EU after Romania’s²⁰⁵ accession”²⁰⁶.

For this purpose the EU has chosen different ways to achieve stability in the region, such as diplomacy, political dialogue with Ukraine and Moldova, participation in negotiations and trade-related actions. The latter consisted on the double-checking system for the steel exports from Moldova without imposing any quantitative limitations²⁰⁷. Furthermore, in 2007 the EU appointed a Special Envoy in Moldova and in 2008 a meeting was held between the President of Moldova and the Dniester leader, in which the EU and the US had the status of observers, and the purpose was to work on confidence-building measures²⁰⁸. In addition, in 2005, the EU established a Border Assistance Mission (EUBAM), whose purpose was to help improving the capacities of Moldovan and Ukrainian border in order to combat trafficking and smuggling²⁰⁹.

²⁰⁰ Official website of the European Commission, European Neighborhood Policy, at http://ec.europa.eu/world/enp/policy_en.htm (last visited at 19.07.2012).

²⁰¹ Ferrero-Waldner, Benita, “European Neighborhood Policy” (2007), *Baltic Rim Economies*, Bimonthly review Issue 6, p. 11.

²⁰² Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, Malta and Cyprus.

²⁰³ European Union Commission Paper on “EU approaches to Moldova” (2002), quoted on Popescu, Nico, “The EU and Transnistria: From Deadlock to Sustainable Settlement”, *International Policy Fellowships*, p.1-12 [hereinafter Popescu, The EU and Transnistria].

²⁰⁴ Country Strategy Paper 2004-2006, National Indicative Programme 2005-2006 Moldova, at http://www.eeas.europa.eu/moldova/csp/csp04_06_nip05_06_en.pdf p.4 (last visited 16.07.2012) [hereinafter EU, “Moldova Country Strategy 2004-2006”].

²⁰⁵ Romania would become a member state of the EU in 2007.

²⁰⁶ EU, “Moldova Country Strategy 2004-2006”, *supra* note 204, p. 5.

²⁰⁷ Popescu, The EU and Transnistria, *supra* note 203, p. 7.

²⁰⁸ Eriksson, Targeting Peace, *supra* note 135, p. 71.

²⁰⁹ Portela, European Union Sanctions and Foreign Policy, *supra* note 45, p. 95.

Moreover, since 2005, the EU and the US troops had joined the peacekeeping operation namely “Joint Control Commission (JCC)”²¹⁰, which goal is to ensure security by observing the ceasefire between the borders of Moldova and Transnistria.

After explaining the political context and how the EU is actively working in the crisis management of a state near EU borders, we are going to turn our discussion in the sanctions imposed by the EU and the US, to examine whether the sanctions worked or not in this particular case.

As we mentioned above, the sanctions by the EU and US was firstly imposed on the Transnistrian Leader in 2003. Sanctions were expanded in 2004 and they are still in force. However, these sanctions have been criticized as being too limited as they did not aim at other supporters of the regime. Moreover, they are considered to be very unclear and ineffective since Ukraine did not wanted to engage itself in targeted sanctions since was claiming to be a mediator and therefore it could not support just one side or the other; and therefore leaders could travel easily in Russia and Ukraine²¹¹.

As for their impact, sanctions have been as well harshly criticized by targeted persons in Transnistria. More specifically, in interviews that Eriksson had with some of the official of Transnsitria who had been subjected to targeted sanctions, they expressed the view that sanctions were part of a “more general blockade imposed by Moldova against Transnistria and one of them even stated that he had not been informed at all for the sanctions against him and mentioned that the first time that he heard about this blacklist was in the moment of the interview²¹². The latter statement and more specifically the obligation to notify the person or entity that has been imposed to targeted sanctions, is an important element on the debate of targeted sanctions that we will discuss in more details on the third part of this research.

Finally, it is extremely important to mention that even if the sanctions policy of the EU in the case of Moldova, is criticized by several scholars as not being successful, the EU efforts in Moldova cannot be considered as fruitless. Even if the efforts made by the EU up to now are considered to reinforce and confirm the status of Transnistria, the EU by putting a pressure to the Transnistrian leaders and at the same time by supporting Moldova government by political and financial engagement, has succeed to create an important favorable economic conditions in Moldova and therefore from the point of view of Transnistrian people joining Russia is not an alternative²¹³. Furthermore, we should notice that the situation remains stable between Moldova and Transnistria without engaging in an armed conflict and the situation in the borders seems to be under control. We could add at this point that the situation is considered to be alike relations between Cyprus and Northern Cyprus²¹⁴.

2) Zimbabwe

The facts

Since 1980 that Zimbabwe earned its independence, the land issue has always been in the heart of Zimbabwe internal problems. More specifically, almost one third of the land area of Zimbabwe was covered by white-owned large farms and agro-industrial estates remained under colonial structure²¹⁵. Initiatives have been done since then to increase the land relocation, but they have been proved fruitless. Furthermore, the population of Zimbabwe contested the involvement of Zimbabwe in the Democratic Republic of Congo (DCR) and as well was quite disappointed with the lack of economic growth²¹⁶, which started to make people of Zimbabwe being more negative toward the constitutional reform proposed by

²¹⁰ Eriksson, *Targeting Peace*, *supra* note 135, p. 72.

²¹¹ Popescu, Nicu, *The EU in Moldova- Settling Conflicts in the Neighborhood*, Institute Security Studies, Occasional Paper no.60 (2005), pp. 1-50, p.35 [hereinafter Popescu, *The EU in Moldova*].

²¹² Eriksson, *Targeting Peace*, *supra* note 135, p.74.

²¹³ *Ibid.*, p. 72.

²¹⁴ The Turkish Republic of Northern Cyprus (or simply Northern Cyprus), it is well a self-declared state, which is recognized only by Turkey. The conflict between Greek Cypriot and Turkish Cypriot started in 1974 and the situation remains still unsolved, but at the same time stable without armed conflict.

²¹⁵ Kreutz, *Hard Measures by a Soft Power*, *supra* note 92, p.38.

²¹⁶ *Ibid.*, p. 39.

the Prime Minister, Robert Mugabe, that would have give the possibility to Mugabe's government to redistribute the white-owned farmland and therefore supporters of the Mugabe's political party started to invade farms by forcing people to leave their homes and by intimidating political opposition²¹⁷. The EU reacted immediately to the conflict by condemning human rights abuses, political violence, the non respect of property, media freedom and general concerns were expressed for the presidential elections²¹⁸. It is exactly then on 2002 that the EU suspended aid toward Zimbabwe, when the Zimbabwe authorities refused entry to a team of EU electoral observers²¹⁹ and violent and repressive behavior continued toward the opposition party.

EU sanctions

Immediately after the aid suspension the EU imposed arms embargoes, travel sanctions and freezing of assets against individuals responsible for the situation putting their names within the EU blacklist, which was believed to be the longest blacklists the EU had ever produced²²⁰. The EU targeted sanctions concerning arms embargo, ban on exports of equipment for internal repression, ban on provision of certain services, restrictions on admission, freezing of funds and economic resources are still valid until the 20th of February 2013²²¹. It is important to mention though that the US and the UK were involved as well in imposing targeted sanctions toward Zimbabwe and the UK is considered to be one of the "strongest advocates for the sanctions against Zimbabwe"²²².

Analysis

Some scholars argue that when the sanctions first were imposed by the EU, objectives and strategies were not clear²²³. Despite these critics many scholars agree that the EU sanctions prior objectives were related to serious human rights violations and as well sanctions are believed to have been imposed in order to prevent the election in 2002 "from failing to fulfill certain democratic standards"²²⁴. Moreover, the EU in a Common Position taken related to Zimbabwe situation stated that:

"The objective of these restricted measures is to encourage the persons targeted to reject policies that lead to the suppression of human rights, of the freedom of expression and of good governance"²²⁵.

In addition, renewing its targeted sanctions toward Zimbabwe officials in 2009, the EU was more specific about the reason why it imposed sanctions by stating that: "...Certain persons and entities...whose activities seriously undermine democracy, respect for human rights and the rule of law in Zimbabwe"²²⁶ should be added as well to the EU blacklist.

While the above arguments are in line with our hypothesis no.2, that the EU is more actively participating in taking sanctions against state that they are in the breach of principles and values of the EU such as human right, democracy and the rule of law; the sanctions in question have received as well a lot of criticism questioning their effectiveness both by scholars and by individuals that have been imposed to targeted sanctions.

²¹⁷ Grebe, Jan, "And They Are Still Targeting: Assessing the Effectiveness of Targeted Sanctions against Zimbabwe", (2010), *Africa Spectrum*, vol. 45, no.1, pp.3-29, p.6 [hereinafter Grebe, And They Are Still Targeting].

²¹⁸ Kreutz, Hard Measures by a Soft Power, *supra* note 92, p.39.

²¹⁹ Portela, European Union Sanctions and Foreign Policy, *supra* note 45, p. 140.

²²⁰ *Ibid.*

²²¹ European Union Restrictive Measures in Force, at http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf (last visited 20.07.2012).

²²² Grebe, And They Are Still Targeting, *supra* note 217, p.11.

²²³ *Ibid.*

²²⁴ Eriksson, Targeting Peace, *supra* note 135, p. 96.

²²⁵ Council Common Position 2004/161/CFSP, 19 February 2004, OJ L 50, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2004E0161:20050729:EN:PDF> para. 7 (last visited 23.06.2012).

²²⁶ Council Common Position 2009/68/CFSP, 27 January 2009, OJ L 23/43 at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:023:0043:0059:EN:PDF> para. 4 (23.06.2012).

It is argued by some scholars that sanctions against Zimbabwe had a great impact on the economy of, food sector, health sector and education sector²²⁷. Most scholars however agree that the EU targeted sanctions was ineffective and that to a certain extent it is because of the incoherence within the EU level between imposing sanctions on Zimbabwe or continuation of the political consultations. More specifically, Scandinavian countries, the Netherlands and the UK urged for sanctions to be taken as quicker as possible in order to put more pressure to the regime, whereas France and Belgium preferred mostly the way of the engagement through political consultations²²⁸. Another reason why some European countries were supporting that the EU must act quickly concerning the imposition of sanctions, was as well because the EU had initiated a public debate on 2002 on how to identify assets and the intention of imposing targeted sanctions was made well known, therefore that could have as a result for officials to withdraw their assets before the EU manages to freeze their assets²²⁹. Furthermore the EU sanctions had been criticized not only because according to some scholars they have not reached a political change that the sanctions are aiming to, but as well because over the years there have been a lot of elections, that even if it is argued that they do not meet proper democratic criteria, “the reference point for sanctions as well as providing for new goals to have sanctions lifted” have changed²³⁰ and therefore the EU has to change its strategy as well in order to ensure more credibility.

Targets have argued that the EU sanctions are “illegal tool meant to destabilize the internal political affairs of the country”²³¹ and the officials part of the political party of the regime, Zimbabwe African National Union-Patriotic Front (ZANU PF), have even gone more far by mentioning that the EU sanctions is compared to “a renewed form of colonialism”²³². However, these arguments are supported only by the regime and some scholars even support that the EU and the US sanctions against Zimbabwe do actually work, because taking for instance the supporters of the regime that have been objected to targeted sanctions, they are seeing their “personal financial situations as motivation for wanting Mugabe out” and they seek for a new leader that will start to engage itself with international community²³³.

Finally, whether the EU sanctions were actually effective or not in the case of Zimbabwe cannot be estimated by certainty since we ignore in which situation Zimbabwe would be in the case that the EU, the US and the UK had not taken any measures against the perpetrators of the human rights violation. This is the case for sanctions debates in general not only on the case of Zimbabwe; and even if we find the matter of effectiveness of sanctions very important this subject is not going to be developed in this research as it is not in the scope of our study.

3) Somalia

The facts

Since 1991 several attempts have been done to create a functioning central government in Somalia that resulted in the creation of the Transitional Federal Government in 2003. It is believed however to remain ineffective, making the actual political status of Somalia being governed by a systems of clans operating in three “autonomous” regions: Somaliland, Puntland and Central Somalia²³⁴. Furthermore, the Islamist movement *Al Ittihad Al Islamiya* (AIAI) has made its appearance in the 1990s in Somalia and it is believed

²²⁷ Mbanje, Bowden and Mahuku, Darlington, “European Union Sanctions and their Impacts on Zimbabwe 2002-2011: Finding Alternative Means to Survive”, *Sacha Journal of Policy and Strategic Studies* vol. 1 no.2, pp.1-12 [hereinafter Mbanje and Mahuku, European Union Sanctions and their Impacts on Zimbabwe].

²²⁸ Grebe, And They Are Still Targeting, *supra* note 217, p.12.

²²⁹ *Ibid.*

²³⁰ Eriksson, Targeting Peace, *supra* note 135, p. 97.

²³¹ Chingono, Heather, “Zimbabwe Sanctions: An Analysis of the ‘Lingo’ Guiding the Perceptions on the Sanctioners and the Sanctionees” (2010), *African Journal of Political Science and International Relations* vol.4, p. 66-74 [hereinafter Chingono, Zimbabwe Sanctions].

²³² Chingono, Zimbabwe Sanctions, *supra* note 231, p.67.

²³³ Portela, European Union Sanctions and Foreign Policy, *supra* note 45, p.141.

²³⁴ Gilpin, Raymond, “Counting the Costs of Somali Piracy” (2009), *United States Institute of Peace*, pp.4-20, p.5 [hereinafter Gilpin, Counting the Costs of Somali Piracy].

to have been responsible for bombs attacks in public places²³⁵. This Islamist movement is seeking in by taking control over Somalia and at restoring an Islamic regime. In addition to that, Somalia has suffered from very big percentage of unemployment and poverty leading to corruption, arms proliferation and criminal activities that “moved from the land to the sea”²³⁶ creating the phenomenon of Somalian piracy. In 2006 there have been noted 12 attacks and attempted piracy acts, in 2007 the attacks have been double reaching the number of 35 and in 2008 the situation become extremely worried when 170 attacks and attempted piracy acts have been registered with 45 of them successfully. In 2009 there have been other 133 attempts²³⁷. In the view of these events, the UNSC adopted resolutions 1814, 1816, 1838, 1846 and 1851, in which resolutions the UN calls its Member States and “interested organizations” to cooperate with each other and “to provide technical assistance to Somalia and nearby coastal States upon their request to enhance the capacity of these States to ensure coastal and maritime security, including combating piracy and armed robbery off the Somali and nearby coastlines”²³⁸.

The EU policy

In the light of the UNSCRs mentioned above, the EU established in 2008 the European Naval Force Somalia- Operation ATALANTA (EU NAVFOR- ATALANTA), within the framework of the European Common Security and Defense Policy (CSDP)²³⁹. The mandate of ATALANTA is, *inter alia*, the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast and the protection of vulnerable shipping off the Somali coast on a case by case basis²⁴⁰. The EU has extended the operation of ATALANTA until December 2014. Furthermore, in the light of remaining situation the UN has adopted further measures by imposing targeted sanctions under UNSCR 1844, that the EU implemented by adopting EC Regulations 147/2003 imposing arms embargoes and EC Regulation 356/2010, imposing freezing of asset on targeted persons²⁴¹.

Analysis

Except from the establishment of ATALANTA mission, the EU has established an EU training mission working with Somali military personnel in Uganda and provided as well financial support to an African Union peacekeeping mission (AMISON)²⁴².

However, we consider Somalia as a particular case study for our research not because of the implementation of the UNSCRs by the EU, but by the nature of measures that the EU established in order to respond to this crisis. More specifically, the ATALANTA mission is the first maritime mission of the EU that has a specific mandate on combating piracy²⁴³. In addition this operation is extremely interesting for the purpose of our research and especially for the use of our hypothesis no.3, because according to some scholars the ATALANTA mission shows the EU “hard power”²⁴⁴ capacities.

This assumption is illustrated even better by the fact that in 2008 the EU agreed to allow ATALANTA forces to attack both at the sea and on the land area. In 2012, the EU used its forces for the first time

²³⁵ European Commission, “Somalia Joint Strategy Paper for the period 2008-2013”, at http://ec.europa.eu/development/icenter/repository/scanned_so_csp10_en.pdf p.105 (last visited 30.07.2012).

²³⁶ Gilpin, Counting the Costs of Somali Piracy, *supra* note 234, p.5.

²³⁷ Valin, Vice-amiral Gérard, “La lutte contre la piraterie au large de la Somalie : de l’action nationale à l’action européenne” (2009), *EchoGéo* no.10, p.3 [hereinafter Valin, La lutte contre la piraterie].

²³⁸ United Nations Security Council Resolution 1846 (2008), adopted by the Security Council at its 6026th meeting, para.2.

²³⁹ Official website of the European Union External Action, EUNAVFOR Somalia, at <http://www.consilium.europa.eu/eeas/security-defence/eu-operations/eunavfor-somalia?lang=el> (last visited 26.07.2012).

²⁴⁰ Official website of EUNAVFOR at <http://www.eunavfor.eu/about-us/mission/> (last visited 26.07.2012).

²⁴¹ European Union Council Regulation 356/2010, OJ L 105/1, of 26 April 2010, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:105:0001:0009:EN:PDF> (last visited 21.08.2012).

²⁴² European Council on Foreign Relations, “Crisis Management in Somalia” (2010), at <http://www.ecfr.eu/scorecard/2010/crisis/62> (last visited 22.08.2012).

²⁴³ Valin, La lutte contre la piraterie, *supra* note 237, p.4.

²⁴⁴ Koechlin, La politique étrangère de l’Europe, *supra* note 105, p.140.

during their onshore raid on a suspected pirate lair in Somalia²⁴⁵. Furthermore, the action against piracy was described by Michael Mann, spokesman for EU Foreign Policy as “a part of a comprehensive EU approach to the crisis in Somalia, where we support a lasting political solution on land”²⁴⁶. We can though interpret this phrase in the general light of the EU foreign policy when it is believed to have a “soft power” and when it realizes that the “soft power” policy after “a lasting political solution” does not work, then perhaps the EU tries to create a new policy the “smart power” by taking a more “comprehensive EU approach”. This can be confirmed as well by the statement of the European Commissioner for Maritime Affairs, Joe Borg, concerning the situation in Somalia in 2009, in which he stipulated that:

“The EU is committed to doing all it can to play its part in deterring and stamping out acts of piracy. We need an integrated civilian/military approach where all concerned work together”²⁴⁷.

This comprehensive approach of the EU is supported by other scholars as well that believe that the EU policy in combating piracy in Somalia should be even more comprehensive²⁴⁸ and therefore there might be more possibilities to combat better this concept.

C. Theoretical and legal framework of the EU in implementing UNSCRs

Before moving to the actual practice of the EU in implementing UN sanctions, we have first to give some answers to several practical questions, that are related to the obligation or not of the EU to implement the UN sanctions, since is obviously not a MS of the UN, then we will discuss who is in charge of this implementation within the EU area regarding the institutional procedure.

i. Does the EU have an obligation to implement the UN sanctions ?

Generally speaking under international law, international legal actors are bound by the treaties that they are contracting parties to and by customary international law. The EU is not a contracting party of the UN and therefore is not bound by it on this basis. Certain provisions of the UN Charter are considered to be of a customary character; however, the obligation to follow the rules of customary international law does not mean that the EU is bound by the UN Charter itself, especially by procedural rules which are not customs. If a rule is considered to be a custom, then the EU would be bound as a subject of international law by customary international law and not the UN Charter. Therefore, legally speaking the EU is not formally bound by the UN Charter obligations.

However, according to Eckes there are two different ways in which the UN Charter could be binding for the EU. First, the UN could be in a position to impose obligations to non-member states, as it is emphasized in art.2 (6) of the UN Charter, but as well as by some UNSCR²⁴⁹, such as Res. 661 (1990), which explicitly refers to the implementation of the resolution by all member states as well as international organizations. The second way is the EU to be considered to replace the EU member states “in a de facto

²⁴⁵ “Somali piracy: EU forces in first mainland raid”, 15 May 2012, *BBC News*, at <http://www.bbc.co.uk/news/world-africa-18069685> (last visited 29.07.2012).

²⁴⁶ Guled, Abdi and Lecik, Slobodan, “EU Somalia Pirates Air Strikes: Europe Carries out First Strikes Against Pirate Targets”, 15 May 2012, *The International Newspaper*, at http://www.huffingtonpost.com/2012/05/15/eu-somalia-pirates-air-strikes_n_1517015.html (last visited 29.07.2012).

²⁴⁷ “Maritime Security: Protecting maritime Transport from Piracy”, IP/09/83, Press Release, Brussels 21 January 2009, at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/83&format=HTML&aged=0&language=en&guiLanguage=en> (last visited 29.07.2012).

²⁴⁸ Ehrhart, Hans-Georg and Petretto, Kerstin, “The EU and Somalia: Counter-Piracy and the Question of a Comprehensive Approach” (2012), *European Free Alliance*, Hamburg, pp.2-50, p.46 [hereinafter Ehrhart, *The EU and Somalia*].

²⁴⁹ Bohr, Sebastian, “Sanctions by the United Nations Security Council and the European Community” (1993), *European Journal of International Law* vol. 4, p. 256-268, P.263 [hereinafter Bohr, *Sanctions by the UNSC and the EC*].

succession”²⁵⁰. There are several other reasons to believe that the EU is bound by the UNSCR which will be explained below.

In addition, we could find some answers under Chapter VII where the UN Charter deals with the relation between the UN and other international organizations, by art.52, 53 and 54, in which articles the Charter settle up the cooperation between the UN and regional organizations for the purpose of the maintenance of international peace and security, but “no enforcement action” are about to be taken by regional organizations without the authorization of the UNSC. Those articles although they express the willingness of the UN to cooperate with regional organizations do not give an answer to the question whether ROs are bound by UNSCR. However, we can notice that the UN has the primary task to maintain international peace and security.

Moving further, two other provisions seem to give an answer to our question and those are art.2 (6) and art.103 of the UN Charter. Art.2 (6) referring to the obligation of even non UN Member States to act in accordance with UN Principles. Even if at first glance this seems to be an answer to our question, the problem that we face here is that the EU is not a state, but an international organization and the UN provides the opportunity only for States to become member states of the UN (art.4 (1)). Furthermore, art. 25 of the Charter, stipulates that the Member States of the UN must carry out the UNSCR, in other words the UNSCR are binding for its MS, therefore “states do not have a right, but a duty to take action to implement the UNSCR”²⁵¹. Taking though into account the fact that the UN has a universal power since almost all countries in the world are MS of the UN, and that all MS of the EU are as well Member States of the UN, the EU could be considered indirectly bound by the UNSCR, as its decisions must not put in conflict EU obligations of MS with UN obligations. But even when this problem occurs, the UN is giving as well the answer by its art.103, by stipulating that if there is a conflict between the UN obligations of a state and its obligations under any other international agreement, the obligations of the UN shall prevail. Therefore, if the EU is taking a different position of that of the UN, the MS will still have to implement UNSC decisions, since the latter prevails to the former.

Moving now to the analysis of current EU Treaty, the Lisbon Treaty refers at least nine times to the UN, in most of the cases in order to emphasize the cooperation of the EU with the UN for the purpose of the maintenance of international peace and security. In its art.21 TUE, the Treaty mentions that the Union in international scene should be guided, *inter alia*, by respect for the principle of the UN. Furthermore in art.34 (2) TUE, it is emphasizes that Member States that are as well Member States of the UN, should defend the positions and the interest of the Union, “without prejudice to their responsibilities under the provisions of the UN Charter”. By those provisions, it seems that the EU is recognizing this universal power of the UN and by art.34 (2) it seems that the EU is recognizing as well the primacy of the UN obligations of its Member States upon EU obligations; but these provisions still are not giving the answer whether the EU is bound by UNSCRs.

Some other reasons to assume that the EU is bound by the UNSCRs, is that the UN is partially codifying customary international law and therefore this is the reason why it is universally binding²⁵². But as Eckes has well noticed, it is more vise-versa, which means they are binding because it is customary international law, but not because the UN is “unique”. Furthermore she argues that the Chapter VII of the UN Charter, “cannot be said to be customary law”²⁵³. Moreover, even if art.48 of the UN Charter gives the opportunity to MS to implement the UNSCR through an international organization, this does not mean that the international organization itself is bound by the UNSCR.

However, another important provision of the current Treaty is that of art.347 TFUE. It states that the MS should consult each other, taking joint steps in order to “prevent the functioning of the internal market being affected by measures which a MS may be called upon to take ...in order to carry out obligations it has accepted for the purpose of maintaining peace and international security”. This provision is believed

²⁵⁰ Eckes, EU Counter-terrorist Policies, *supra* note 121, p.229.

²⁵¹ Gowlland-Debbas, National Implementation of United Nations Sanctions, *supra* note 43, p.19.

²⁵² Eckes, EU Counter-terrorist Policies, *supra* note 121, p.229.

²⁵³ *Ibid.*, p.230.

to be a reference to binding decisions of the UNSC²⁵⁴. Taking into account the fact that the EU member states discussions and decisions take place within the EU institutions, the EC “is obliged to take all necessary measures to implement the EPC decisions”²⁵⁵ and therefore the EC is responsible for implementing UNSCR.

As we can notice the question whether the EU is bound by UNSCR is a complex one and there are many different interpretations of the UN and the EU provisions. For that purpose, we will analyze briefly two more elements: a) the CFI interpretation in the *Kadi* case and b) the willingness of the EU to be bound by UNSCRs.

In the *Kadi* case, that is going to be discussed in the third part of this research, the CFI examined as well the question whether the EU is bound by UNSCR and came into the conclusion that the UN Charter is not directly applicable to the EU, however “the EC is still bound by UNSCRs by virtue of art.297 and 307 of the EC Treaty”²⁵⁶.

Turning now to the question of whether the EU is willing to be bound or not by the UNSCRs, we have to take a look on the reasons why the EU prefers to be bound by the UNSCRs. Some of the reasons are that the EU prefers to implement sanctions through EU law instead of national legislation, because i) measures taken through EU legislation give a more uniform interpretation of the UNSCRs within the EU member states and ii) the EU legislation “can be adopted faster than national legislations”²⁵⁷. The willingness of the EU to implement UNSCR can be showed as well in the “declarations concerning provisions of the Treaty” in the Lisbon Treaty, and most specifically Declaration no.13 concerning the CFSP, which stipulates that “the EU and its MS will remain bound by the provisions of the Charter of the UN and in particular, by the primacy responsibility of the SC and its members for the maintenance of international peace and security”²⁵⁸.

To conclude, we argue that even if the EU is not directly bound by UNSCR, taking into account the reasons analyzed above and especially the decision of CFI, we believe that the EU it is actually indirectly bound to implement UNSCR. Who is responsible for the implementation of these resolutions though and how the EU actually implements the UNSCR is the topic of our discussion in the next sub-chapter.

ii. *Who is responsible for implementing UNSC sanctions and how the EU implements such resolutions ?*

The first question to ask is *who* is charge to implement sanctions within the EU? The primer responsibility to implement sanctions according to the Lisbon Treaty, is given to the Council of the EU in a joint proposal from the High Representative and the Commission, and the European Parliament is only informed (art.215§1 TFEU). However, it depends as well on the types of sanctions. *Arms embargoes* are implemented under the competence of each member states of the EU²⁵⁹, *trade and financial sanctions* are implemented exclusively by the Council²⁶⁰ in a joint proposition the High Representative and the Commission, *restriction of admission* even if the EU decisions are taken jointly by the member states and the

²⁵⁴ Lauwaars, Richard H., “The Interrelationship between United Nations Law and the Law of Other International Organizations” (1983-1984), *Michigan Law Review* vol. 82, pp. 1604-1619, p.1608 [hereinafter Lauwaars, The Interrelationship between UN and the Law of Other International Organizations].

²⁵⁵ Bohr, Sanctions by the UNSC and the EC, *supra* note 249, p.268.

²⁵⁶ Biersteker, Thomas and Eckert, Sue, “Strengthening Targeted Sanctions through Fair and Clear Procedures” (2006), *Watson Institute for International Studies*, Brown University, p.21 [hereinafter Biersteker and Eckert, Strengthening Targeted Sanctions through Fair and Clear Procedures].

²⁵⁷ Vries, Anthonius W. and Hazelzet, Hadeweych, “The EU as a New Actor on the Sanctions Scene”, in Wallenstein and Staibano, *International Sanctions: Between Words and War*, *supra* note 103, p.96.

²⁵⁸ Treaty on European Union (Lisbon Treaty) 2007, OJ C 306/255, Declaration 13 concerning the Common Foreign and Security Policy, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0231:0271:EN:PDF> (last visited 20.08.2012) [hereinafter Lisbon Treaty].

²⁵⁹ Kreutz, Hard Measures by a Soft Power, *supra* note 92, p.8.

²⁶⁰ Jones, The Rise of Europe Security Cooperation, *supra* note 98. p.115.

EU, the implementation of these measures is done by each member state individually. Particularly in targeted sanctions, the EU call upon all member states to take all necessary measures not to allow the persons listed to enter or transit the territory of the EU. Finally *diplomatic sanctions* are implemented as well by the Council in a joint proposition of the High Representative and the Commission.

The next question that arises is *how* the EU is implementing the UNSCR? According to Portela, there are two different ways of implementing international law into domestic law: i) by adoption of “general piece of legislation specifically in allowing transposition of these measures into domestic framework” or ii) “case-by-case transposition of resolutions into law”²⁶¹. In the second method it can be argued that the legislator will have more flexibility to implement the UNSCR into domestic law, but it is more time consuming²⁶² and in the case of the EU it would mean a less harmonized interpretation of the UNSCR among its Member States.

However, the first years of the EU sanctions implementation, the EC had not chosen any of those measures. In fact, as we have already seen above, with the Maastricht Treaty an article specifically designated for the joint implementation of financial sanctions had been created, but it was not used by member states in the application of the financial measures in the following years. Instead, member states preferred to use national legislation.²⁶³ This can be explained as well by the fact that the EU Members States were not really willing to delegate more power to the Union, but preferred to keep as much control as possible preserving their sovereignty.

Later on, the Member States of the Union started to delegate more power to the EC and they started implementing sanctions through the EU legislations, by taking a common regulation, which is more and more the case today. It is important to mention though that even if an EU member state wants to implement the UNSCR directly through national legislation, this would still have to be in line with community law, as the EU is the only regional body whose decisions are directly applicable within member states legal order²⁶⁴.

Speaking at the EU institution level, the daily work on sanctions, negotiations of the text that it is received by MS of the EU, is made by the Foreign Relations Counselors Working Group (FRCWG) of the Council of the EU, as well as DG RELEX²⁶⁵. The implementation of sanctions is mainly made by the Council, since the latter has the power to determine whether further action is needed in order for the Union to implement certain sanctions. After that the Council has to decide whether the EU must take further measures, enabling the High Representative of the Union for Foreign Affairs and Security Policy, as well as the Commission to propose a Regulation implementing the measures that falls under the EU competence²⁶⁶. In the targeted sanctions, the Commission apart from proposing regulations, has as well the duty to publish the list of targeted persons, groups or entities and as well it has the function of monitoring the process of implementation of Regulations imposing sanctions and to ensure whether the Council Regulation is actually implemented by Member States (art.260 TFUE). Furthermore, the European Parliament must be informed for restrictive measures taken by the Council or decisions to implement UNSCR (art.215 TFUE).

The EU procedure in various fields is a quite complex one and this is the case as well in the domain of foreign policy and in particular the sanctions decision. This is the reason why the EU has frequently been criticized of been incoherent²⁶⁷ in its foreign policy. The EU is “required to speak with one voice”²⁶⁸ both in its foreign policy and in its decision-making. Sometimes the representative of the EU is the

²⁶¹ Portela, National Implementation of UN Sanctions, *supra* note 90, p.18.

²⁶² *Ibid.*

²⁶³ *Ibid.*, p.19.

²⁶⁴ Gowlland-Debbas, Vera, "Implementing Sanctions Resolutions in Domestic Law", in Gowlland-Debbas, National Implementation of United Nations Sanctions, *supra* note 43, pp. 33-73, p.45.

²⁶⁵ Eriksson, Targeting Peace, *supra* note 135, p.174.

²⁶⁶ EU Guidelines on Implementation of Sanctions, *supra* note 126, p.16.

²⁶⁷ See Portela and Raube, (In)-Coherence in EU Foreign Policy, *supra* note 94.

²⁶⁸ *Ibid.*, p.19.

Commission at the UN level for instance, but some other times can only be an EU MS who speaks “on behalf of the Union”. In other words the question of Henry Kissinger: “Who do I call if I want to call Europe?” is still up to the point. Even if the creation of the High Representative, seems to be the answer to this question and a solution to the inherence problem, this new position is receiving a lot of criticism and plus some scholars believe that the Council of the EU and the European Council remains the two main institutions of the CSFP²⁶⁹.

Conclusion of the sub-chapter: It can be seen by the analysis undertaken above that the EU has given a major importance and support to the new concept of “targeted sanctions”, since it considers those sanctions as more effective than general economic sanctions and they minimize painful consequences for those who are not responsible for the policy and actions of a group of person in their country²⁷⁰. However, the event that attracted the attention of the whole world was the “new” phenomenon of “terrorism”. For that purpose in its meeting in 2001 the Council declared that “terrorism is a real challenge to the world and to Europe and that the fight against terrorism will be a priority objective of the European Union”²⁷¹. The EU High Representative for the Common Foreign and Security Policy, Javier Solana, mentioned the terrorism phenomenon as the “more fanatical, more lethal, more global than anything we have known so far”²⁷². Therefore the targeted sanctions are not only used in officials of a state who commit human rights violation in their own population, but as well in suspects associated with terrorism.

In the three cases that we have examined above, were cases that showed the EU as a main actor in the sanctions policy in order to confirm the hypotheses that we addressed in this second chapter. Therefore we had to focus mostly on autonomous multilateral sanctions of the EU and not the sanctions pursuing the UNSCRs. In this case we would agree with Portela when she is arguing that the sanctions of the EU must be seen as complementary to the UN sanctions, because they can be used in a case when the UN fails to take a decision²⁷³. This is one of the main roles of the regional organization that many scholars have argued as well, but what is interesting to see is what kind of problems may arise when the EU implements the UNSCRs and what is happening in the case that the EU values and principles and more specifically the EU Community Law in not in the line with resolutions taken by the UNSC?

²⁶⁹ Portela and Raube, (In)-Coherence in EU Foreign Policy, *supra* note 94, p.19.

²⁷⁰ EU Guidelines on Implementation of Sanctions, *supra* note 126, p.7.

²⁷¹ EU Council Common Position on the application of specific measures to combat terrorism, 2001/931/CFSP, OJ L 344/93, 28 December 2001.

²⁷² EU High Representative for the Common Foreign and Security Policy, Javier Solana, “Terrorism in Europe: How does the Union of 25 Respond to this Problem?”, S0266/04, Berlin 7 October 2004, p.2, at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/discours/82163.pdf (last visited 13.07.2012) [hereinafter Solana, Terrorism in Europe].

²⁷³ Portela, Where and Why Does the EU Impose Sanctions, *supra* note 124, p.85.

Chapter III

Is the concept of targeted sanctions a phenomenon of one step forward two steps back ?

We find it important to mention that there are two different types of EU sanctions regarding terrorism. Those that the EU reproduces from the “blacklist” of the UN according to Resolutions 1267, 1333, 1390 targeting in particular Taliban and Al-Qaida members and on the other hand we have the second type of sanctions, in which the EU adopts regulations for the implementation of the UNSCR 1373, that calls in general for the fight against terrorism²⁷⁴. This chapter focuses only on the implementation of the UNSCRs by the EU concerning targeted sanctions and more specifically those taken in order to fight terrorism. The chapter aims to discuss the implementation of those resolutions by the EU, what legal problems might occur between international and EU law and by the end of this chapter we will try to provide some answers regarding these issues by trying to give some suggestions and solutions. The main question to answer in this chapter is whether targeted sanctions are a phenomenon of one step forward and two steps back in the evolution of sanctions.

The question that we intend to respond in this chapter is whether the idea of targeted sanctions is the *solution* or the *problem*? As we discussed in the first chapter, it is believed that the “targeted sanctions” or as they are called as well the “smart sanctions”, is the solution to comprehensive sanctions in order for innocent people not to suffer from coercive measures that are taken against the state, like for instance when economic sanctions are imposed to a state, they usually increase the poverty and unemployment. However, cases brought in different national and regional court from all over the world has shown that the “targeted sanctions” might be actually considered more a *problem* than a *solution*. Furthermore, in most of the cases, as we have already mentioned in the second chapter, the EU has adopted regulations to implement UNSC sanctions or has imposed autonomous sanctions when the UN could not react, due to the veto procedure within the SC. Hence, a more interesting question arises when or if the UNSCR is not in line with the EU values and principles? This is the main question of this research that we are going to answer through case studies in the European Court of Justice (ECJ). It has to be mentioned though that this chapter is mainly focused on suspects related to terrorism that are been listed in the so-called “blacklist”.

Background of targeted sanctions

There is a need firstly to take a look at the background of targeted sanctions against suspects related to terrorism, in order to understand what kind of legal issues the UNSCRs poses between the UN decisions and the EU legislation.

The first time that the SC imposed targeted sanctions on individuals and entities associated with Osama bin Laden, Al Qaeda and Taliban, was with the adoption of Res.1267 (1999). Under this resolution a Sanction Committee was established, which mandate was attributed by UNSCR 1333 and consisted in the identification and putting in a “consolidated list” persons and entities associated with Taliban government and Al Qaeda. Member States were having a duty against persons or entities that were listed in this “consolidated list” - known afterwards as “blacklist”- to freeze their assets, funds and other financial resources²⁷⁵. This list is drawn by the Sanction Committee based on “unspecified information provided by

²⁷⁴ Eckes, EU Counter-terrorist Policies, *supra* note 121, p.43.

²⁷⁵ UNSCR 1267 adopted by the Security Council at its 4051st meeting on 15 October 1999.

governments and regional organizations”²⁷⁶ and consensus is required in order to add a person or entity in the list.

The sanctions against persons and entities related to terrorism strengthened a lot after the events on the 11th of September 2001. That day, four airplanes were hijacked by members of the terrorist group “Al Qaeda”²⁷⁷ in order to crash the planes in the buildings of New York City and Washington, as a manifestation against the US troops in Saudi Arabia and sanctions against Iraq. These attacks cost around 3000 of deaths²⁷⁸ and had a major effect on the economy of New York City. The attacks were denounced by the media and governments worldwide and therefore the international community changed immediately its policy toward fight against terrorism in a more powerful way. The UN gave the prior responsibility to take actions to the SC²⁷⁹ who adopted immediately Res.1368, “in which the SC condemned the terrorist attacks and called on all states to work together to bring to justice the perpetrators of the attacks and called the international community to “redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation”²⁸⁰ of the UNSCR. Member states and regional organizations reinforced their legislation related to fight against terrorism and some of persons related to terrorism were prosecuted in national courts.

Even after the fall of the Taliban in 2001, the sanctions still remained, but they took a more general anti-terrorist sanctions regime under the UNSCR 1373 (2001). The first difference between SC Res. 1267 and Res.1373 is that the Res. 1267 was very narrow and targeted specific persons or entities related to Al Qaeda and Taliban, whereas the Res. 1373 had a general character of fighting against terrorism going beyond borders. The second difference between those two resolutions is in the listing procedure. The principal organ to design the “consolidated list” of the UN under SC Res. 1267 was the SC itself through the Sanction Committee, whereas in SC Res. 1373, this mandate was given to the UN member states²⁸¹.

While the international community was struggling to find solutions to combat terrorism, the international lawyers had immediately identified the issues that would be created between the obligations toward SC resolutions and the protections of fundamental rights and freedoms²⁸². Which finally was the case in 2002, as we are going to examine later on, when Abdirisak Aden and two other Somali-born Swedish citizens requested the delisting from the “consolidated list” under UNSCR 1276 for being related to groups of terrorism.

As we are going to discuss below, there are numerous similar cases that occurred worldwide in national and regional courts. After trying to give a definition of terrorism, we are going to focus on some of those cases in which individuals contested their listing under UNSCR 1267, but particular attention will be paid to *Kadi* case, which has raised several legal and political issues.

Definition of terrorism

First of all, we will try to give a *definition* of the word “terrorism”. As in the case of “sanctions” there is not just one definition of terrorism and it is extremely complicated to get one single definition at universal level. This is the reason why a lot of efforts have been done to give a precise definition of terrorism, however the historical overview of the definition of terrorism, is not in the scope of our analysis. Just to

²⁷⁶ Lehnardt, Chia, “European Court Rules on UN and EU Terrorist Suspect Blacklists” (2007), *American Society of International Law Insights* vol.1, p.1 [hereinafter Lehnardt, European Court Rules on UN and EU Terrorist Suspect Blacklists].

²⁷⁷ The responsibility of Al Qaeda for these attacks was initially denied, but eventually confirmed by Osama Ben Laden.

²⁷⁸ Almost 42% of victims from September 11th attacks, are still not identified.

²⁷⁹ Rostow, Nicolas, “Before and After : the Changed UN Response to Terrorism since September 11th” (2001-2002), *Cornell International Law Journal* vol. 35, pp. 475- 490, p.482 [hereinafter Rostow, Before and After: the Changed UN Response to Terrorism since September 11th].

²⁸⁰ UNSCR 1368, adopted by the Security Council at its 4370th meeting, on 12 September 2001.

²⁸¹ Tzanakopoulos, Antonios, “Kadi II: The 1267 Sanctions Regime (Back) Before the General Court of the EU”, *Blog of the European Journal of International Law*, 16 November 2010 [hereinafter Tzanakopoulos, Kadi II].

²⁸² Portela, National Implementation of UN Sanctions, *supra* note 90, p.11.

mention that the first definition was adopted back in 1937 by the adoption of the Convention for the Prevention and Punishment of Terrorism, by the League of Nations²⁸³. More recently a definition was given by the United Nations General Assembly (UNGA), by its resolution 51/210 in 1994 similar to the current definition at UN level, in which the SC adopted the resolution 1566 by defining terrorism as:

“criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act”²⁸⁴.

Some scholars believe that this definition is “acceptable”²⁸⁵, whereas some other believe that this definition is too vague²⁸⁶. In the effort of the EU to implement the UN targeted sanctions related to terrorism, we notice that the EU tries to give a more specific definition of the word “terrorism” than the UN. Terrorist acts according to Art.1 of the Council Common Position 2001/931/CFSP, are:

“intentional acts (that) may seriously damage a country or an international organization (...) where committed with 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 (...)”²⁸⁷.

In order to fight terrorism the EU has taken several regulations implementing UNSCR or autonomous sanctions following the UNSCR. The *objectives* of the EU when adopting restrictive measures against groups or entities, is to bring a change to the policy of the persons that are targeted²⁸⁸. For that purpose the EU imposes different *restrictive measures* against entities and groups of targeted sanctions such as:

“freezing of funds and economic resources, restrictions on admission, arms embargoes, embargoes on equipment that might be used for internal repression, other export restrictions, import restrictions, and flight bans. A ban on the provision of financial services, including in connection with bans on the export of certain products, has also been used as well as investment bans”²⁸⁹.

While international community has tried to make some steps in order to make sanctions more effective and to cause less consequences to the innocent population, by adopting the new concept of “smart sanctions”, in this chapter we realize that this new concept is under consideration both because it can arise problems regarding the implementation of sanctions by Member States and because it affects some fundamental rights of individuals. This is an important issue especially in a supranational organization like the EU that gives a great importance to the respect of human rights. Even in the “Guidelines”, the EU outlines that regulations taken in order to implement UNSC resolutions, must be in line with human rights and must respect fundamental rights guaranteed by the European Convention on Human Rights (ECHR)²⁹⁰ and this is directly applicable to all Member States of the EU. As we will see in our research below the implementation of UNSCR and respect of fundamental rights under the ECHR can be sometimes problematic. This is the reason why we ask the question in the beginning of this chapter whether the targeted sanctions concept is a one step forward two steps back phenomenon. We will try to

²⁸³ Weigend, Thomas, “The Universal Terrorist: the International Community Grappling with a Definition” (2006), *Journal of International Criminal Justice* vol.4, pp.912-932, p.916 [hereinafter Weigend, The Universal Terrorist].

²⁸⁴ UNSCR 1566, adopted by the Security Council at its 5053rd meeting, on 8 October 2004.

²⁸⁵ Cassese, Antonio, “Terrorism is Also Disrupting Some Crucial Legal Categories of International Law” (2001), *European Journal of International Law*, vol. 12 no.5, pp.993-1001, p. 994 [hereinafter Cassese, Terrorism is Also Disrupting Some Crucial Legal Categories of International Law].

²⁸⁶ Weigend, The Universal Terrorist, *supra* note 283, p.15.

²⁸⁷ European Union Council Common Position on the application of specific measures to combat terrorism, 2001/931/CFSP, OJ L 344/93, 27 December 2001.

²⁸⁸ EU Guidelines on Implementation of Sanctions- Updated version 2009, *supra* note 131, p.4.

²⁸⁹ *Ibid.*, p.7.

²⁹⁰ *Ibid.*

respond to this question by reviewing some of the most important cases brought in the ECJ and what problems can occur between UN law and EU law regarding targeted sanctions.

A. Problems arising in implementation of UNSC sanctions by the EU

As we discussed in our second part, the Member States are obliged to implement the UNSCRs, because they are bound by art.25 of the Charter. We also found out by our analysis in the second part, that the EU is indirectly bound by the UNSCR and as well that it prefers to implement the resolutions under its community law in order the law to be more harmonized within its Member States and the EU appears more coherent. The fact that the decisions of the UNSC are binding, does not mean though that some of them cannot pose problems about its legality²⁹¹. Furthermore, the UNSCRs can pose some practical issues regarding their implementation into community legislation and national legislation.

The first difficulty that arises from the fact that the UN does not provide a particular model for member states to implement UNSCR. Therefore, the Member States are using two types of implementation policy, as we saw in chapter II: a) adopting general legislation to allow transposition of measures into domestic legal framework and b) case-by-case transposition into national law²⁹².

However, in the case of targeted sanctions, and more specifically the implementation of UNSCRs at the national level, regarding fight against terrorism and more particularly Resolutions 1267 and 1333, the procedure followed is: i) either based on specialized law for automatic implementation ii) or through *ad hoc* executive decisions or iii) based on existing criminal codes²⁹³. The EU uses the second option as we have already seen in the second chapter, through community regulations that are binding for all member states.

We realize though that the UNSCRs regarding terrorist suspects are more complicated and difficult to implement by MS and the EU than comprehensive sanctions and this is mainly because it is believed that targeted sanctions are more complex than the comprehensive one²⁹⁴. Some of the reasons why this is the general belief, are based on the fact that targeted sanctions are more “sophisticated” than comprehensive sanctions therefore there is a need for more highly specialized personnel²⁹⁵ and this requires more work and time. Furthermore, the UNSCR are often too vague and they are not defining key concepts, such as for instance, the definition of terrorism, humanitarian exceptions etc. From one hand the latter can be seen as giving more flexibility to the legislator, whereas on the other hand it is an obstacle to homogeneity and delays as well the transposition of the resolution into domestic legislation²⁹⁶. The latter is of extremely importance, since as we argued in the first chapter, the time when sanctions are imposed, can be an element to determine whether the sanctions are effective or not. In addition, sometimes the UNSC is putting a time limit to the implementation of sanctions, as for example UNSCR 1337, which stipulated that a report should be submitted within 90 days by Member States explaining the steps that are made in order to implement this resolution into domestic law²⁹⁷. The pressure on MS of the UN can be even harder sometimes, like for instance the creation of the Counter Terrorism Committee under UNSCR 1373, in order to monitoring the implementation of the resolutions by Member States²⁹⁸.

²⁹¹Gowlland-Debbas, “Sanctions Regimes under Article 41 of the UN Charter”, in Gowlland-Debbas, National Implementation of United Nations Sanctions, *supra* note 43, pp. 3-25, p.9.

²⁹² Portela, National Implementation of UN Sanctions, *supra* note 90, p.6.

²⁹³ Eckes, EU Counter-terrorist Policies, *supra* note 121, p.52.

²⁹⁴ Eriksson, Targeting Peace, *supra* note 135, p.34.

²⁹⁵ Portela, National Implementation of UN Sanctions, *supra* note 90, p.9.

²⁹⁶ *Ibid.*

²⁹⁷ Gowlland-Debbas, “Sanctions Regimes under Article 41 of the UN Charter”, in Gowlland-Debbas, National Implementation of United Nations Sanctions, *supra* note 43, pp. 3-25, p.22.

²⁹⁸ Bianchi, Andrea, “Assessing the Effectiveness of the UN Security Council’s Anti-terrorism Measures: The Quest for Legitimacy and Cohesion” (2007), *European Journal of International Law*, vol.17 no.5, pp. 881-919, p.883 [hereinafter Bianchi, Assessing the Effectiveness of the UN Security Council’s Anti-terrorism Measures].

Apart from issues arising in the EU efforts to implement UNSCR, another problem that occurs within the EU level is the “power balance”, as Eckes calls it, between the European Union and its Member States²⁹⁹. As many scholars have argued the EU Member States had always tried to preserve their sovereignty and to give to the EU the less power possible. This is one of the reasons why the EU politics is often criticized for its incoherence decision making and foreign policy³⁰⁰. Therefore, even if the EU is taking regulations to implement the UNSCR, Member States can always take further regulations in their internal law, like in a case of the UK and Germany or they can simply not implement them, even if those regulations are binding for all EU member states. The *Maastricht decision*, can perfectly illustrate this tendency of Member States to transfer to the EU the less power possible. In this decision, the Federal Constitutional Court outlined its power to determine the limits of the EC and it mentioned that “legal acts of the Union which exceed the competences outlined in the treaty, as interpreted by the German Court, will not be legally binding in Germany”³⁰¹.

However, in the next sub-chapter we are more interested in seeing what happens when the UNSCR asks Member States to implement resolutions that are not in the line with the fundamental rights and freedoms guaranteed under community law. We will try to respond to this question in the next sub-chapter, by examining the response of the ECJ in different cases concerning this issue. After examining the cases brought in ECJ, we are going to summarize all the legal issues in the third sub-chapter and finally we will try to give some suggestions and solutions to these issues in the sub-chapter four.

B. European values versus UNSCRs

“While fully committed to the fight against terrorism, it is our duty to protect human rights... Is a matter of preserving our basic values”.
Javier Solana³⁰²

First of all, it is important to explain why we choose in particular the implementation of UNSCR by the EU and not another regional organization or UN Member State. The first reason is that the EU is the most successful regional model that has even been argued to be a global actor. Secondly, as a supranational organization, the EU decisions are binding to all Member States of the Union. Thirdly, because the EU has a greater number of cases brought before ECJ³⁰³ than in any other state or regional organization, with 13 cases followed by 7 cases in the US courts, which gives a percentage of 42%³⁰⁴. It is important to say though that 16% of cases are also brought before national courts of MS of the EU that are not counted in the percentage of 42% of the EU³⁰⁵. Fourthly, because the *Kadi* case brought in the ECJ in 2008, has attracted a lot of attention worldwide and has put in the surface important legal issues that are going to be discussed later on in this sub-chapter.

But first it is important to remind, as we have already mentioned in the second chapter, that there are two types of “terrorists”: the first one are those listed at the UN level – in accordance with SCR 1267- and the second one are the autonomous listing of the EU³⁰⁶- in accordance with SCR 1373-. According to Eckes

²⁹⁹ Eckes, EU Counter-terrorist Policies, *supra* note 121, p.114.

³⁰⁰ See Portela and Raube, (In)-Coherence in EU Foreign Policy, *supra* note 94.

³⁰¹ Boom, Steve, “The European Union After the Maastricht Decision: Will Germany Be the “Virginia of Europe?” (1995), *American Journal of Comparative Law*, vol. 43 no.2, pp. 177-226, p.177.

³⁰² Solana, Terrorism in Europe, *supra* note 272, p.2.

³⁰³ For the purpose of this document when we refer to “ECJ” cases we include as well those that have been brought in Court of First Instance (CFI). As in 1988, the ECJ has become a two-headed jurisdiction transferring to the CFI competences of ECJ. If the complaint is not satisfied by the CFI decision can appeal against a ruling of the CFI to the ECJ. This possibility will be showed as well in the *Kadi* case.

³⁰⁴ See Appendix 2, Table 1: Geographical distribution of cases related to terrorism.

³⁰⁵ The statistics are taken from Biersteker, Thomas and Eckert, Sue, “Addressing Challenges to Targeted Sanctions: An Update to the ‘Watson Report’” (2009), *Watson Institute for International Studies*, Brown University, p.49. Must be noted though, that the number of 31 cases is a reduced number since some cases get merged later on. But the real number is 48 cases. However, still EU is in the first rate with 35% cases brought before ECJ, followed by USA with 23%. Furthermore, we must note that this statistics are until 2009, the cases have been increased since then.

³⁰⁶ Eckes, EU Counter-terrorist Policies, *supra* note 121, p.22.

those two kinds of sanctions deal with different notion of terrorism: at the UN level we deal with “international terrorists” and at the EU level we deal with “national and regional terrorists”. However, in this research we are not going to specify the different types of terrorism that exists, since our work is more focused on general legal issues that can occur when SCR are in conflict with fundamental freedoms and rights.

As we noticed above the EU has chosen to implement UNSCRs through EC Regulations. Therefore, regarding SCR 1267 the EU adopted the Council Common Position (CCP) 1999/727 and implemented the UN resolution by adoption of the EC Regulation 337/2000³⁰⁷. In the case of SCR 1373, which gives the possibility to the EU to come up with its own “blacklist”, the EU adopted a CCP 2001/931/CFSP on 27 dec. 2001 and implemented UNSCR by the adoption of EC Regulation 2580 (2001)³⁰⁸. By SC Res. 1267 and 1373 it derives that the EU maintains two “blacklists”: the “blacklist” designed by the UN under resolution 1267, in which the Sanction Committee decided for the persons and entities to add upon suggestion of UN Member States; and the EU “blacklist” in which terrorist suspects are designed by Member States of the EU implementing UNSCR 1373.

As we mentioned above, numerous individuals have been protesting against their listing either in the UN blacklist or in the EU blacklist. However, the case that attracted the most attention from scholars is that of *Kadi* case and this case will be as well in the focus of this sub-chapter. Before going to the details of the *Kadi* case and the legal issues that arises, we are going to discuss briefly two other cases. First case to be discussed will be the case of *Abdirisak Aden and others v. Council and Commission* of 2002, since is the first case that individuals protested their listing under UNSCR 1267. Subsequently, we are going to examine the *Organisation des Modjahedines du Peuple d'Iran (OMPI)* case in 2001, which its particularity is that is challenging UNSCR 1373, which as we explained above is about the EU proper list and not the UN one. Finally, we will consider in details the *Kadi* case in 2008 and legal issues that this case brought to surface. Afterwards, we summarize the problems of the three cases, and all other similar cases, and we explain some steps that are done by the SC in order to solve some of these issues. However, as it is going to be proved there are still some legal issues that remains regarding individuals suspects related to terrorism and this is showed as well by the *Kadi II* case that we are going briefly to examine, in order to determine whether there are new legal challenges and what can be done in order to overcome these legal challenges.

i. Abdirisak Aden and others v. Council and Commission

The facts

In 2001, Abdirisak Aden, Abdi Abdulaziz Ali and Ahmed Ali Yusuf, Swedish citizens were added to the EU blacklist by EC Regulation 467/2001 - following the SCR 1276 - which was implemented by Commission Regulation 2199/2001. They were added to the list due to their association with the Sweden based Al Barakaat Foundation, which was suspected by USA to be related to terrorist groups. Therefore, their assets were frozen under application of SCR 1333 and the three Swedish citizens contested their listing under SCR 1267. They brought the case to the European Court for First Instance (ECFI or simply CFI) on 7th of May 2002. In the meantime the complaints asked the Swedish government to provide them any evidence that justified the penalties or to delist them³⁰⁹, but the Swedish government was not in a position to provide them this information, since it was meant to be confidential.

Alleged violations of the rights

The applicants argued that the EU Council by adoption of the Regulation 467/2001 and as well under art.60 EC and 301 EC, had exceeded its powers in freezing the resources associated of the Taliban regime. They argue, *inter alia*, that the right to a fair and equitable hearing had been disregarded, since they had “no

³⁰⁷ European Union Council Regulation 337/2000 concerning a flight ban and a freeze of funds and other financial resources in respect of the Taliban of Afghanistan, OJ L 43, 14 February 2000.

³⁰⁸ European Union Council Regulation 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ L 344/70, 27 December 2001.

³⁰⁹ Serrat, Javier, “The Evolution of Economic Coercion: From Sanctions to Targeted Financial Measures” (2011), *World Politics Review*, Coercive Diplomacy, pp. 11-16, p.13 [hereinafter Serrat, The Evolution of Economic Coercion].

possibility of domestic review and of verification of the evidence”³¹⁰ and therefore they asked for annulment of Regulations 467/2001 and 2199/2001.

Decision of Court of First Instance

In its decision 7 may 2002, the Court of First Instance (CFI) based its reasoning on whether the measures taken to implement the SCR “would cause the applicant serious and immediate harm which no subsequent decision could repair”³¹¹. It concluded therefore that there was “no risk of grave and irreparable damages since the claimants had a minimum subsistence”³¹², hence refused to annul the EC Regulations, implementing SCR 1267.

Analysis

Abdirisak Aden and others v. Council and Commission, hereinafter referred to as “*Aden v. Council*”, was the first case to have challenged EC Regulations regarding implementation of SCR 1267. One of the most important statements in the CFI decision, for our research, is that the Court mentioned that: “Effective judicial review is impossible because the very basis for the sanctions cannot be checked by the courts. It is impossible to review the evidence and investigations on which the sanctions were based since the former are not conceived as the legal consequence of a specific accusation”³¹³. Therefore, the first problem of effective judicial review was now well recognized not only by international lawyers and individuals but by a powerful judicial body.

As for the delisting procedure at the time that the case was brought to the CFI, according to the Sanctions Committee Guidelines adopted on 30 November 2002³¹⁴, the applicants could petition his government of residence or of citizenship to be delisted³¹⁵. Afterwards, according to the procedure described in para.7 of the Sanctions Committee Guidelines, the government of residence or citizenship would have to consult the state that listed the specific person or entity at first place and then a joint or a unilateral request for delisting is made by those governments to the Sanction Committee (para.7 b). If the Sanction Committee would not approve the delisting, then the matter is referred to the Security Council.

This procedure was used as well in the case of *Aden v. Council*, in which case the applicants petitioned to the Swedish government and the latter consulted the USA, which had put Aden in the list at the first place. The Swedish government found that the “information received by the USA was not convincing”³¹⁶. Therefore, the Swedish government filed a request to the Sanction Committee and asked the latter to review the UN sanctions list that allowed finally Abdirisak Adem and Abdi Abdulaziz to be delisted on 2002 and Ahmed Ali Yusuf, was finally removed from the list in 2006.

³¹⁰ Gowlland-Debbas, National Implementation of United Nations Sanctions, *supra* note 43 p.64.

³¹¹ Case T-306/01 R, Abdirisak Aden and Others v. Council of the European Union and Commission of the European Communities (2002) [hereinafter Aden case].

³¹² Gowlland-Debbas, National Implementation of United Nations Sanctions, *supra* note 43, P.64.

³¹³ Almqvist, Jessica, “A Human Rights Critique of European Judicial Review: Counter-terrorism Sanctions” (2008), *International and Comparative Law Quarterly* vol. 57, pp.303-331, p.326 [hereinafter Almqvist, A Human Rights Critique of European Judicial Review].

³¹⁴ UN Security Council Committee pursuant to Resolutions 1267 (1999) and 1899 (2011) concerning Al-Qaida and associated individuals and entities, “Guidelines of the Committee for the Conduct of its Work”, adopted on 7 November 2002, as amended on 10 April 2003, 21 December 2005, 29 November 2006, 12 February 2007, 9 December 2008, 22 July 2010, 26 January 2011 and 30 November 2011 [hereinafter UNSC Committee, Guidelines].

³¹⁵ Aust, Anthony, “The Role of Human Rights in Limiting the Enforcement Powers of the Security Council : a Practitioner’s View”, in De Wet Erika; Nollkaemper André and Dijkstra Petra: *Review of the Security Council by member states*, Antwerp, ed. Intersentia (2003), p.37 [hereinafter Aus, The Role of Human Rights in Limiting the Enforcement Powers of the Security Council].

³¹⁶ Eckes, EU Counter-terrorist Policies, *supra* note 121, p.34.

ii. *Organisation des Modjahedines du Peuple d'Iran v. Council and UK -OMPI I*

The facts

In 2001, the *Organisation des Modjahedines du Peuple d'Iran* (OMPI) or *People's Mojahedin Organization of Iran* (PMOI), was added in the list of organization under the Terrorism Act 2000, by the United Kingdom (UK)³¹⁷. The applicants brought the case immediately in the national court of UK, in which their complaints were dismissed. However, in the meantime the SC had adopted UNSCR 1373, in which all member states were asked to “combat terrorism by all means”, and specifically in para.1 c of the resolution, the MS were asked to “freeze without delay funds and other financial assets or economic resources”³¹⁸ for persons and entities who were associated with acts of terrorism. Therefore, the Council of the EU, in order to implement the SCR 1373, adopted CP 2001/930/CSFP on combating terrorism and CP 2001/931/CFSP on the application of specific measures to combat terrorism. For the implementation of measures described in CP 2001/930/CFSP, the Council adopted EC Regulation 2580/2001, that allowed the Union to freeze the assets of persons suspected to be associated with terrorism and as well the Council would have to review and amend the “blacklist” of the EU. In the updated version of the CP 2001/930/CFSP, the so-called CP 2002/340/CSFP, the OMPI organization was included into the EU “blacklist”. Furthermore, the organization was listed as well in the updated list of suspect of terrorism, by Council Decision 2002/334/EC, implementing EC Regulation 2580/2001. Finally, on June 2002, the Council adopted CP 2002/462/CSFP, updating CP 2001/931 and repealing CP 2002/340 and Council Decision 2002/334, in which the applicant's name was maintained in the lists provided by CP 2001/931 and by Regulation 2580/2001³¹⁹. In all further decisions, common positions and regulations until 2005, the applicant's name has been maintained in the two lists that we mentioned above, which means the lists provided by CP 2001/931 and by EC Regulation 2580/2001, hereinafter referred to as “EU lists”.

The applicants therefore, protested their listing under both EU lists (by CP 2001/931 and by EC Regulation 2580/2001) and they brought the case to the CFI. The judgment was rendered in the second chamber of the CFI on 12 December 2006. The applicants claimed that the Court should annul CP 2002/340 and 2002/462 and also Decision 2002/460 and therefore to remove OMPI organization from both EU lists.

Alleged violations of the rights

The applicants argued, *inter alia*, that since they had not be informed about the evidence against them for the listing in the EU “blacklists”, in order to have the opportunity to respond effectively³²⁰, their right to a fair hearing, the obligation to state reasons and the right to effective judicial protection, were violated³²¹.

Decision of the CFI

In its reasoning, the Court mentioned the difference between the “Kadi case”³²² rendered on 2005 and the decision of OMPI case on 2006, by emphasizing in its paragraphs 99-100, that the latter case was not at the UN level as Kadi case, in which the Community “transport into the Community legal order...resolutions of the Security Council and decision of its Sanctions Committee”³²³, and therefore did not “benefit from the primacy effect”³²⁴. In the continuity of it reasoning the Court examined one by one

³¹⁷ Case T-228/02, *Organisation des Modjahedines du Peuple d'Iran v. Council of the European Union* (2006) [hereinafter OMPI case].

³¹⁸ UNSCR 1373, adopted by the Security Council at its 4385th meeting, 28 September 2001.

³¹⁹ OMPI case, *supra* note 317.

³²⁰ Tridimas, Takis and Gutierrez-Fon, Jose, “EU Law, International Law, and Economic Sanctions Against Terrorism: the Judiciary in Distress?”, *Fordham International Law Journal* vol.32 Issue 2, pp.660-730 p.709 [hereinafter Tridimas and Gutierrez-Fon, EU Law, International Law and Economic Sanctions Against Terrorism].

³²¹ Biersteker, Thomas and Eckert, Sue, “Addressing Challenges to Targeted Sanctions: An Update to the 'Watson Report'” (2009), *Watson Institute for International Studies*, Brown University, p.39 [hereinafter Biersteker and Eckert, Addressing Challenges to Targeted Sanctions].

³²² Case T-315/01, *Yassin Abdulah Kadi v. Council and Commission* (2005).

³²³ OMPI case, *supra* note 317, para.100.

³²⁴ *Ibid.*

all three fundamental rights that the complaints claimed to have been violated. First, as the right to a fair hearing is concerned, the CFI argued that this right “cannot be denied to the parties concerned solely on the ground relied on by the Council and the UK...that neither the ECHR nor the general principles of Community law confer on individuals any right whatsoever to be heard before the adoption of an act of a legislative nature”³²⁵. Furthermore, it noted that the right to a fair hearing must be safeguarded in the Community procedure when the Council adopts a decision to include or maintain a person or an entity to the EU list³²⁶. Moreover, the Court reaffirmed that at “no time before the action was brought was the evidence adduced against the applicant notified to it...and that the decisions do not even mention the ‘specific information’ or ‘material in the file’”³²⁷, that was under obligation to do so according to art.1 (4) of the CP 2001/931.

In addition, concerning the obligation to state reasons, the Court reminded that the statement of reasons “must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review of the lawfulness thereof”³²⁸.

Finally, as for the judicial protection, the CFI, even if agreed with the Council, that under the listing policy the judicial review right should be limited (para.135), the CFI confirmed that the effective judicial protection is “effectively ensured by the right the parties concerned have to bring an action before the Court against a decision to freeze their funds”³²⁹ under art.230 para.4 EC. Moreover, the CFI reaffirmed that the power of the Court to review “extends to the assessment of the facts and circumstances relied on as justifying it (the imposition of a sanction) and the evidence and information on which that assessment is based”³³⁰. Therefore, by the end of its reasoning, the CFI concluded that the measures in question are violating the right of hearing, the obligation to state reasons and the right to effective judicial protection of the applicants and hence the Court annulled both EU lists, provided by CP 2001/931 and by EC Regulation 2580/2001.

Analysis

The *Organisation des Mojabedines du Peuple d'Iran v. Council of the European Union* on the CFI judgment on 2006, hereinafter referred to as “OMPI I”, constitutes a good example of targeted sanctions against an entity which is suspected to be associated with terrorism, as the decision of the Court was followed as well in several other cases like for instance in the case of *Jose Maria Sison v. Council of the European Union and the Commission of European Community* on 2007. Furthermore, OMPI case is believed to be “one of the most important judgments delivered by the Community courts on the right to hearing”³³¹, since its reasoning was extremely detailed and the Court paid a particular attention to the respect of the right of hearing. The third reason why we chose OMPI case is because it was the first time that the CFI annulled the Community regulation freezing the assets of terrorist suspects designated by the EU³³² and therefore it constitutes an extremely important case for our research.

Looking now to the reasoning of the Court, one of the most important elements to discuss in *OMPI I*, as Azarov and Ebert well noticed, is that the Court in its reasoning related to the right to fair hearing, “extended the application of the right to a hearing to economic sanctions imposed in the interests of preventing terrorism and consistent with art.52 (3) of the EU Charter, appeared to view ECtHR as providing a minimum rather than a maximum of human rights protection in the EU legal order”³³³.

³²⁵ *Ibid.*, para.94.

³²⁶ *Ibid.*, para.120.

³²⁷ *Ibid.*, para.161.

³²⁸ OMPI case, *supra* note 317, para.141.

³²⁹ *Ibid.*, para.152.

³³⁰ *Ibid.*, para.154.

³³¹ Tridimas and Gutierrez-Fon, EU Law, International Law and Economic Sanctions Against Terrorism, *supra* note 320, p.710.

³³² Eckes, EU Counter-terrorist Policies, *supra* note 121, p.306.

³³³ Tridimas and Gutierrez-Fon, EU Law, International Law and Economic Sanctions Against Terrorism, *supra* note 32, p.710.

In addition it must be noted that in the period of *OMPI I* case under Council Decision 2002/460/EC, allowed “hardly any information to be provided to the individuals concerned”³³⁴. Therefore, the individuals are listed without even knowing the reason and the evidence against them and hence they do not have the right to defend themselves.

However, scholars argue that the decision of the CFI did not “undertake subsequent review of the decision” and the outcome of the judgment was most a result of “procedural flaws”³³⁵. This is the reason why when the Council improved the listing procedure in line with requirements of the Court, the *OMPI* reappeared on the EU list in 2007, on the bases of this improved procedure³³⁶. Therefore, even if the CFI annulled the listing of *OMPI* in the EU lists in 2006, the Court was obliged to annul the listing of the same organization in two more cases, namely “*OMPI II*”³³⁷ on October 2008 and “*OMPI III*”³³⁸ on December 2008.

The most important legal issue that was raised in relation to our research in the *OMPI II* case, by the CFI, was focused on the obligation of statement of reasons. In fact even if the Court acknowledged the “broad discretion” of the Council in the adoption of measures concerning economical and financial sanctions, the CFI still insisted on the fact that the Court must be in the position to review all the facts provided by both the Council and the applicants, in order to be able to decide if there are reasonable grounds to maintain the applicant in the EU list³³⁹ and this “broad discretion” of the Council does not mean that the Court cannot review “the interpretation made by the Council of the relevant facts”³⁴⁰. Therefore, the CFI argued that the Council “must attend in a hearing to credible information that is brought to its attention indicating that a Member States acted unreasonably in requesting the listing of a specific person”³⁴¹. More specifically, the Court dealt with the problem concerning “classified information”³⁴². The documents that presented evidence to believe that *OMPI* was associated with terrorism circulated in the EC Council of Ministers, but could not be provided to the CFI, because they were classified by France as confidential³⁴³. However, the Court did not accept the claims of confidentiality among MS of the EU and held that the “Council is not entitled to base its funds-freezing decision on information or material in the file communicated by Member State, if the Member State is not willing to authorize communicating to the Community judicature whose task is to review the lawfulness of that decision”³⁴⁴. Moreover, the Court stated that the refusal of the French authorities to communicate the information on which was based the listing of Kadi, rendered the Court “unable to review the lawfulness”³⁴⁵ of the regulation in question. Therefore, the Court concludes by annulling again the Council decision 2007/868/EC, implementing EC Regulation 2580/2001.

³³⁴ Azarov, Valentina and Ebert, Christina, “All Done and Dusted ? Reflections on the EU standard of Judicial Protection Against UN Blacklisting After the ECJ’s Kadi Decision” (2009), *Hanse Law Review*, vol.5, pp.99-114, p.108 [hereinafter Azarov and Ebert, Reflections on the EU standard of judicial protection against UN blacklisting].

³³⁵ Van Den Herik, Larissa, “The Security Council’s Targeted Sanctions Regimes: In Need of Better Protection of the Individual” in Skouteris, Thomas; Vermeer-Kunzli, Annemarieke, *The Protection of the Individuals in International Law: Essays in Honour of John Dugard*, Cambridge, ed. Cambridge University Press (2007), pp.69-79, p.75 [hereinafter Van Den Herik, The Security Council’s Targeted Sanctions Regimes].

³³⁶ *Ibid.*

³³⁷ Case T-256/07, *Organisation des Modjahedines du Peuple d’Iran v. Council of the European Union* (2008) [hereinafter *OMPI II* case].

³³⁸ *Ibid.*

³³⁹ *OMPI II* case, *supra* note 337, para.119.

³⁴⁰ *Ibid.*, para.138.

³⁴¹ Eckes, EU Counter-terrorist Policies, *supra* note 121, p.319.

³⁴² Classified information is the information that a state has obtained by intelligence agencies and the state in question cannot easily disclose the information due to its confidential character.

³⁴³ Biersteker and Eckert, Addressing Challenges to Targeted Sanctions, *supra* note 321, p.20.

³⁴⁴ *OMPI II* case, *supra* note 337, para. 73.

³⁴⁵ *Ibid.*, para. 76.

Despite the second annulment of Council Decision, OMPI remained listed in the EU list. Therefore, in the so-called *OMPI III* case, the CFI maintained its previous positions regarding the specific information why a person or an entity should be maintained in the EU list. More specifically, the Court made clear in this case that “the Court will annul a listing if the Council does not or cannot demonstrate the specific reasons why a person was listed”³⁴⁶ and it is putting the limits on the Council in exceeding its power concerning listing of persons or entities suspected to be related to terrorism. After the OMPI III case, the organization was finally removed from the EU list on January 2009.

iii. *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*

The facts

Under UNSCR 1267, Ahmed Ali Yusuf, Al Barakaat Foundation and Yassin Abdullah Kadi, were listed in the UN list. The EU in order to implement the resolution in question, adopted Council Regulation 881/2002. The annex to this regulation contained a list of persons and entities suspects of associated with terrorism, identical to the UN list, provided by the Sanction Committee. In 2005, the complaints in two different cases, namely *Kadi* case and *Yusuf* case³⁴⁷, brought the matter into the CFI requesting the annulment of EC Regulation 881/2002 and therefore their delisting from the consolidated list, claiming that they were wrongly listed and that their fundamental rights were violated; in particular their right to property, the right to a fair hearing, and the right to an effective judicial remedy, that it is guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms³⁴⁸. However, the CFI held that it had “no jurisdiction to review measures adopted by the Community giving effect to resolutions of the United Nations Security Council”³⁴⁹ and therefore dismissed the request for annulment of the EC Regulation in question.

Contrary to the outcome in the *Aden v. Council* case, where Ahmed Ali Yusuf was removed from the list in 2006, Yassin Abdullah Kadi (hereinafter referred to as “Kadi”) and the Al Barakaat organization remained listed. Therefore, they contested the decision of the CFI by bringing the case into the ECJ on 3 September 2008.

Alleged violations of the rights

In their appeal against the CFI judgment, the applicants claimed that the CFI had “made an error in law when it found that the EC was obliged under the UN Charter to implement SCR 1267 and subsequent resolutions without an independent review procedure for persons claiming to have been wrongly put on the list”³⁵⁰. Furthermore, they argued that the CFI was in the “breach of several rules of international law”³⁵¹, when it concluded that their rights to a fair hearing and effective legal remedy were not violated.

Decision of ECJ

In order to explain the ECJ decision, it is necessary to refer to some elements from the CFI decision that we find very important. First of all, the CFI emphasized that the SCRs “clearly prevail over any other domestic or international law”³⁵² and found the EU “bound by the obligations of the United Nations Charter, in the same way like the Member States, by virtue of the Treaty establishing it (the Community)”³⁵³. The CFI mentioned not only the aspect of primacy under art.103 of the UN Charter, but as well the obligation of the EU to implement SC decisions under art.25 of the UN Charter.

After affirming the primacy of the UN Charter over the Community law, the CFI argued that:

³⁴⁶ Eckes, EU Counter-terrorist Policies, *supra* note 121, p.322.

³⁴⁷ Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission (2005) and Case T-315/01, Yassin Abdullah Kadi v. Council and Commission (2005).

³⁴⁸ Portela, National Implementation of UN Sanctions, *supra* note 90, p.11.

³⁴⁹ Aulik, Siiri, “Judgment of the European Court of Justice in Kadi: Challenges to International Law, the United Nations Sanctions Regime and Fundamental Rights” (2009-2010), *Acta Societatis Martensis*, vol.4, pp.25-50, p.26 [hereinafter Aulik, Judgment of the European Court of Justice in Kadi].

³⁵⁰ Biersteker and Eckert, Strengthening Targeted Sanctions through Fair and Clear Procedures, *supra* note 256, p.23.

³⁵¹ Case T-315/01, Yassin Abdullah Kadi v. Council and Commission (2005) [hereinafter Kadi case 2005].

³⁵² *Ibid.*, para.181.

³⁵³ *Ibid.*, para.193.

“Any review of the internal lawfulness of the contested regulation...would...imply that the Court is to consider, indirectly, the lawfulness of those resolutions (UNSCRs). In that hypothetical situation...the origin of the illegality alleged by the applicant would have to be sought, not in the adoption of the contested regulation but in the resolutions of the Security Council which imposed the sanctions”³⁵⁴.

Therefore, the CFI declined any authority to call in question, even indirectly, the lawfulness of UNSCRs. What was unexpected though by the decision of the CFI, is that at the end of its reasoning the CFI considered itself indirectly empowered to prove whether the resolution is lawful in the light of *jus cogens*³⁵⁵, understood as a body of higher rules of public international law binding on all other subjects of international law, including the bodies of the UN, and under which no derogation is possible³⁵⁶. After examining the latter assumption, the CFI concluded that “neither the right to a fair hearing nor the right to judicial process – insofar as these are protected as part of *jus cogens* – had been violated”³⁵⁷.

As we already mentioned, both *Kadi* case and *Yusuf* case, appealed against the decision of the CFI to the ECJ, but since Yusuf has been already delisted, the ECJ rendered its decision in joint cases of *Kadi* and *Al Barakaat* organization³⁵⁸. The cases were assigned at the first place to the Advocate General Miguel Poiares Maduro³⁵⁹ (hereinafter referred to as “Advocate General”). The latter presented an important opinion “defending European law as an autonomous legal order able and ready to defend both the rights of its citizens and its constitutional framework”³⁶⁰. The Advocate General, did not agree with the CFI argument that the Community must apply “unconditionally any rule of international law to which it is bound”³⁶¹. Furthermore, the Advocate General argued that the Court “should not confine its scrutiny to the violation of peremptory law, but should apply its normal judicial standards to the protection of fundamental human rights”³⁶². The question for the Advocate General is whether there:

“Is there any basis in the Treaty for holding that the contested regulation exempt from the constitutional constraints normally imposed by the Community law, since it implements a sanctions regime imposed by Security Council Resolutions? Or, in other words, does the Community legal order accord supra-constitutional status to measures that are necessary for the implementation of resolutions adopted by the Security Council?”³⁶³.

The answer for the Advocate General was a negative one, since he argued that “the Community Courts have jurisdiction to review whether the contested regulation complies with fundamental rights as recognized by Community law”³⁶⁴. Finally, the Advocate General concluded that right to be heard, the

³⁵⁴ *Kadi* case 2005, *supra* note 351, para.215.

³⁵⁵ Røcker, Sebastian “European Court of Justice Secures Fundamental Rights from UN Security Council Resolutions” (2009), *Göttingen Journal of International Law*, vol.1, pp. 159-178, p.164 [hereinafter Røcker, European Court of Justice Secures Fundamental Rights from UN Security Council Resolutions].

³⁵⁶ *Kadi* case 2005, *supra* note 351, para.226.

³⁵⁷ De Burca, Grainne, “The European Court of Justice and the International Legal Order After *Kadi*” (2010), *Harvard International Law Journal*, vol. 51, pp.1-50, pp.21-22 [hereinafter De Burca, The European Court of Justice and the International Legal Order After *Kadi*].

³⁵⁸ C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission* (2008), [hereinafter *Kadi* case in ECJ 2008].

³⁵⁹ Michaelsen, Christopher, “*Kadi* and *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 ” (2009), *Melbourne Journal of International Law*, vol. 10, pp.329-345, p.338 [hereinafter Michaelsen, *Kadi* and *Barakaat* v. Council and Commission].

³⁶⁰ Eckes, EU Counter-terrorist Policies, *supra* note 121, p.226.

³⁶¹ Aulic, Judgment of the European Court of Justice in *Kadi*, *supra* note 349, p.37.

³⁶² Portela, National Implementation of UN Sanctions, *supra* note 90, p.12.

³⁶³ Opinion of the Advocate General Poiares Maduro, delivered on 16 January 2008, in Case C-402/05 P, *Yassin Abdullah Kadi v. Council and Commission*, para.25, at http://blogeuropa.eu/wp-content/2008/02/cnc_c_402_05_kadi_def.pdf (last visited 20.06.2012) [hereinafter Opinion of Advocate General on *Kadi* case].

³⁶⁴ Michaelsen, *Kadi* and *Barakaat* v. Council and Commission, *supra* note 359, p.339.

right to judicial review and the right to property of the appellant were violated by the Regulation in question³⁶⁵ and therefore the Court should annul the Council Regulations.

However, as we know the opinions of the Advocate General are advisory ones and do not have binding power, nevertheless these opinions are usually very important for the ECJ and quite influential, since they are considered to be impartial opinions given before the judgment is delivered. It is believed that the ECJ follows the Advocate General opinion in the most of the cases, and in this case in question, the ECJ took as well the “European standpoint”³⁶⁶ following the reasoning of the Advocate General.

Making the contrast with the decision of the CFI, the ECJ argued that the CFI made an error in law, stating that the EC regulations that were designed in order to give effect to a resolution adopted by the UNSC, “must enjoy immunity from jurisdiction”³⁶⁷ and therefore that it cannot review the EC Regulations in question. The ECJ noted on the contrary that Community judiciary “must ensure the full review of the lawfulness of all Community acts in the light of fundamental rights forming an integral part of the general principles of the Community law, including review of Community measures...designed to give effect to resolutions adopted by the UN”³⁶⁸. The ECJ highlighted once again the importance of the respect of human rights and fundamental freedoms within the Community, by arguing that “respect for human rights is a condition of the lawfulness of Community acts...and that measures incompatible with respect for human rights are not acceptable in the Community”³⁶⁹.

It is important to mention though another main difference between the decision of the CFI and that of the ECJ. The latter did not examine the primacy issue at all, however it clarifies that “the reference to infringements either of fundamental rights as protected by the Community legal order or the principles of that legal order cannot affect the validity of a Security Council measure or its effect in the territory of the Community”³⁷⁰.

Furthermore, the ECJ made a distinction between the UNSCR 1267 and the implementation of those sanctions by the EU; by arguing that the EC Regulations that are taken in order to implement UNSCRs, are “bound by fundamental rights” and as a consequence the Regulations, “must ensure” that a person or an entity that are listed get informed about the reasons for the listing and as well to give the possibility to the person or entity in question, to “contest those reasons before an independent body”³⁷¹.

Finally, the ECJ concluded that the “right of defense and in particularly the right to be heard, and the right to effective judicial review, were patently not respected”³⁷² and therefore annulled the EC decisions. However, the ECJ provided that the effects of the contested regulation would still remain for a delay of three months and after this delay the regulations would be null and void.

Analysis

The first decision to be analyzed is that of the CFI, which had received a lot of criticism. It seems to some scholars that in its effort to find a “compromise” between EU law and UN law³⁷³, the CFI did not defend the Community law. However it also did not accept unconditionally the binding character of the SCR and it reviewed the latter in the light of *jus cogens*. This “radical monism” approach of the CFI, has led scholars to argue that the CFI put itself in a “similar situation as between EC and national law”³⁷⁴, as it set aside part of the art.230 EC.

³⁶⁵ Opinion of Advocate General on Kadi case, *supra* note 363, para.55.

³⁶⁶ Eckes, EU Counter-terrorist Policies, *supra* note 121, p.227.

³⁶⁷ Kadi case in ECJ 2008, *supra* note 358, para. 327.

³⁶⁸ Kadi case in ECJ 2008, *supra* note 358, para. 326.

³⁶⁹ *Ibid.*, para. 284.

³⁷⁰ Kadi case in ECJ 2008, *supra* note 358, para.224 and para.231.

³⁷¹ Biersteker and Eckert, Addressing Challenges to Targeted Sanctions, *supra* note 321, p.9.

³⁷² Kadi case in ECJ 2008, *supra* note 35, para. 334.

³⁷³ Eckes, EU Counter-terrorist Policies, *supra* note 121, p. 262.

³⁷⁴ Stephen Griler, quoted on Aulik, Judgment of the European Court of Justice in Kadi, *supra* note 349, p.39

Furthermore, the CFI seemed to satisfy no one, because firstly the sanctions remained and therefore the applicants did not enjoy of effective remedy; and secondly, the CFI gave itself a power that is not under its jurisdiction, which means that of reviewing whether the SCR was in a breach of *jus cogens*³⁷⁵. However, the reasoning of the CFI concerning norms of *jus cogens* can also be accepted as a logical one, since according to the opinion of Judge ad hoc Dugard “once it is accepted that the Security Council must respect the rules of *jus cogens*, it is a short step to finding that the Court is the appropriate body to determine whether the Council has exceeded its powers”³⁷⁶. Nevertheless, it has to be mentioned that this opinion was expressed regarding the International Court of Justice and not a regional one, however the CFI reasoning could found some grounds on this opinion.

From the CFI reasoning, we could suggest that the CFI has less difficulties to annul EC Regulations implementing SCR 1373, in which the list is drawn only by EU member states, than putting into question EC Regulations implementing SCR 1267 in which the list is drawn by the Sanctions Committee of the UN.

Furthermore by finding the EU bound by the SCR in the same way as of its Member States, the CFI seemed to treat the Union as a MS regarding implementation of SCRs. This is particularly important since indirectly the CFI gave no autonomy to the EU as a Union and it seems like it confirms the criticism that the EU had received, concerning its weak power and the strong tendency of the Member States to keep their sovereignty.

While, this approach from the CFI is seen as defending the UN system, the ECJ approach is more seen as defending community fundamental rights. The reasoning of the ECJ, in many scholars view was a clearly “dualist” approach³⁷⁷ and this is due to the fact that the ECJ emphasized the autonomy of the EC from the international legal order, “giving the priority to the EC’s fundamental rules”³⁷⁸. Furthermore, of much importance is the fact that the *Kadi* case was rendered in the Grand Chamber, which means that the ECJ not only considered the *Kadi* case as a case of great importance but it shows that the ECJ intended as well to set down certain principles.

One of the criticism that the ECJ decision has received, is that while it mentioned several times that it did not attempt to rule the validity of the UNSCR, in the CFI decision was already noticed that the “ECJ reasoning led to a *de facto* review of the UN listing as the EC institutions do not have any autonomous discretion in the implementation process”³⁷⁹. This assumption has led to a more harsh criticism of the ECJ decision, that of “undermining the binding force of international obligations”³⁸⁰.

While the ECJ reasoning, that implemented measures should be reviewed, created a lot of criticism some could agree that the ECJ simply confirmed the logic followed by the ECtHR in the *Bosphorus* case, in which the Court stated that “when a contracting party has taken steps to implement a Council Resolution in its legal order, such measures are attributable to that party and therefore amenable to review”³⁸¹.

Moreover, the ECJ had been criticized as well when it argued indirectly that the fundamental rights are not fully protected at the UN level, by mentioning that:

³⁷⁵ Eckes, EU Counter-terrorist Policies, *supra* note 121, p.262.

³⁷⁶ J.Dugard, “Judicial Review of Sanctions”, quoted in the article Van Den Herik, The Security Council’s Targeted Sanctions Regimes, *supra* note 335, p. 73.

³⁷⁷ See De Burca, The European Court of Justice and the International Legal Order After Kadi, *supra* note 357, Michaelsen, Kadi and Barakat v. Council and Commission, *supra* note 359, Ziegler, Katja, “Strengthening the Rule of Law, but Fragmenting International Law: the Kadi Decision of the ECJ from the Perspective of Human Rights” (2009), *Human Rights Law Review*, vol. 9, pp. 288-305.

³⁷⁸ De Burca, The European Court of Justice and the International Legal Order After Kadi, *supra* note 357, p.23.

³⁷⁹ *Ibid.*, p.19.

³⁸⁰ Portela, National Implementation of UN Sanctions, *supra* note 90, p.13.

³⁸¹ *Ibid.*, p.14.

“In that regard, although it is now open to any person or entity to approach the Sanctions Committee directly, submitting a request to be removed from the summary list at what is called the ‘focal point’, the fact remains that the procedure before that Committee is still in essence diplomatic and intergovernmental, the persons or entities concerned having no real opportunity of asserting their rights and that committee taking its decisions by consensus, each of its members having a right of veto”³⁸².

This statement according to Eckes is “an open challenge to the legitimacy of the UN sanctions regime”³⁸³ and this loose of legitimacy in the UN members states and in the public opinion, has been argued as well by other scholars such as Portela³⁸⁴. Furthermore, this criticism can be even confirmed by the proposition of the Commission for a new Council Regulation³⁸⁵, as a response to *Kadi* case, in which the EU would change the current system of automatic listing to a “duty upon the Commission to consider the appropriateness of the listing independently and to provide as well a method by which to consider classified information”³⁸⁶.

Another important element to the ECJ reasoning is that the decision of the ECJ is binding for all Member States of the EU. Since the ECJ annulled the EC Regulation that had an identical list of suspects of terrorist with that of the UN Sanctions Committee, the attention is brought to the question of whether the EU member states will have to follow the ECJ decision or not, since they are bound by both EU and UN decisions at the same time. What makes it more complicated is that after the ECJ decision, the Commission decided “to re-instate the designations of Kadi and Al Barakaat”, putting doubts to many scholars of whether the EU would “select”³⁸⁷ the UNSCRs that it would implement based on the respect of its own fundamental rights.

It is important to pay attention to it for two reasons. The first lies to the fact that the UNSC loses its credibility to take measures to restore international peace and security if a regional organization with the importance of the EU denies to implement the SCRs under Chapter VII and somehow we even loose the whole idea of the UN if the SCRs which are meant to be taken in order to preserve international law cannot be applied due to different domestic law. The second reason why this “selectivity” would be dangerous, is the influence that the EU has to other nations and regional courts, as it is believed to be the more successful regional organization. And this is exactly where the concept of “soft power” of the EU comes again to our discussion. As is has already been noticed by some scholars, one of the main fears that the ECJ reasoning created, was that the EU would “pave the way for other national and regional bodies to do the same”³⁸⁸, who would be to “select” the SCRs under the Chapter VII that they would implement to their national laws.

This “fear” was expressed as well by Gattini when he argued that: “on the one hand, one cannot but welcome the unbending commitment of the ECJ to the respect of fundamental human rights, but on the other hand the relatively high price, in terms of coherence and unity of the international legal system...is worrying”³⁸⁹.

However, some Member States of the UNSC seem to be less “worried” about the effects that the *Kadi* case may have and they consider that “*Kadi* case is a European problem” and that the judgment of the

³⁸² Kadi case in ECJ 2008, *supra* note 358, para.323.

³⁸³ Eckes, EU Counter-terrorist Policies, *supra* note 121, p.253.

³⁸⁴ Portela, National Implementation of UN Sanctions, *supra* note 90, p.14.

³⁸⁵ EU Commission proposal of 22 April 2009, namely COM/2009/0055 for a Council Regulation amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0187:FIN:EN:PDF>.

³⁸⁶ Hovell, Devika, “A House of Kadis? Recent Challenges to the UN Sanctions Regime and the Continuing Response to the ECJ Decision in Kadi”, *Blog of the European Journal of International Law*, 7 July 2009 [hereinafter Hovell, A House of Kadis].

³⁸⁷ Biersteker and Eckert, Addressing Challenges to Targeted Sanctions, *supra* note 321, p.9.

³⁸⁸ *Ibid.*

³⁸⁹ Quoted on Portela, National Implementation of UN Sanctions, *supra* note 90 p.16.

ECJ is “unreasonable” one³⁹⁰. Nevertheless these arguments are supported by number of people, whereas in the public opinion, *Kadi* case is of a great importance and the ECJ judgment cannot be disregarded.

Concerning the discussion about the difficulties that Member States are confronted in their efforts to implement SCRs under Chapter VII, a debate took place on 15 November 2010 in New York, entitled: “United Nations Security Council: Debate on Implementation of Resolutions 1267, 1373, and 1540”, in which the Head of the Delegation of the European Union to the United Nations, Pedro Serrano, stated that:

“The EU remains committed to ensuring the implementation of the decisions adopted by the Committee in its own legal order. The most recent judgment of the EU’s General Court in the *Kadi* case...indicated that legal challenges remain ahead. However, we are confident that these challenges can be overcome. They should not be considered as putting in question the EU’s commitment to upholding the principles of the UN Charter and the collective obligations of its Member States there under”³⁹¹.

Turning our discussion now to the “soft power” concept, we could argue that the “human-rights sanction policy” of the EU - which was our second hypothesis in the second part of this research- is confirmed, since the ECJ annulled the EC Regulations based on violation of fundamental rights, even if that makes the procedure of implementing of targeted sanctions harder for the Member States after the *Kadi* case. Furthermore, if we agree with the assumption that the EU is actually a “soft power” policy, the ECJ reasoning could influence not only all the EU member states to act in a similar way but as well other countries in Europe having the status of candidates or potential candidates of joining the EU. Furthermore, similar cases challenging UNSCR 1267 for its listing procedure have been brought to many other national courts, such as in the US, Pakistan, Turkey³⁹². That makes the listing procedure under SCR a global problem and not only a regional one. Therefore, in the way that we see it the ECJ decision plays the role of an “alarm” for the SC sanctions policy regarding targeted sanctions on individuals, putting indirectly some limits to the power of the SC to act under Chapter VII. Moreover, the call for the UNSC to take measures to improve the listing procedure of the SRC 1267, has been indirectly mentioned as well by the Advocate General when he stated that:

“Had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the UN, then this might have released the Community from the obligation to provide a judicial control of implementing measures that apply with the Community legal order. However, no such mechanism currently exists...and...the right to judicial review by an independent tribunal has not been secured at the level of the UN”³⁹³.

Finally, as we noticed the ECJ decision has received both merits and criticism. Let’s see therefore in practice what could be done in order to overcome this conflict between UNSCRs and the defense of fundamental human rights, after first summarizing the rights that all applicants have been claimed to be violated; and what the UNSC has done in order to respond to these legal challenges.

iv. Summary of rights affected by targeted sanctions and steps done by the UNSC in order to improve targeted sanctions procedure

After numerous cases that were brought into national and regional courts regarding targeted sanctions against individuals and most specifically their listing under SCR 1267 and 1373, the first problem that was detected for the implementation of SCR 1267, in freezing all assets of individuals that are being listed, was the fact that the resolution in question was not providing the possibility for any *exemptions*. The solution

³⁹⁰ Hovell, A House of Kadis, *supra* note 386.

³⁹¹ Statement on behalf of the EU by H. E. Pedro Serrano, acting Head of the Delegation of the European Union to the United Nations Security Council Open Debate on the Implementation of Resolutions 1267, 1373 and 1540, New York, 15 November 2010, at http://www.eu-un.europa.eu/articles/es/article_10425_es.htm (last visited 18.07.2012).

³⁹² Biersteker and Eckert, Addressing Challenges to Targeted Sanctions, *supra* note 321, p.9.

³⁹³ Opinion of Advocate General on *Kadi* case, *supra* note 363, para.54.

that was given by the SC was the adoption of the UNSCR 1452 by stipulating that the freezing of assets do not apply to funds relevant to be “necessary for basic expenses, including payments for foodstuffs, rent...medical treatment, taxes, insurance, public utility charges”³⁹⁴. It is believed that the SC has done an important progress in the area of exemptions, as it gave the “definition of basic needs, established general criteria for exemptions and as well it considered to the need for extraordinary expenses on a case-by-case basis”³⁹⁵.

There are two resolutions that were taken by the SC not so much to respond to the cases brought into national and regional courts, but mostly to address the general issue of acts of terrorism. With its resolution 1566 the SC tried to give a definition of what “terrorism” mean. Even if this definition as we argued above received a lot of criticisms, we acknowledge the effort of the SC to give a definition that could be useful to the Member States of the UN, when they were about to implement UNSCR related to terrorism. Furthermore, in its resolution 1617, the SC tried to explain what “associated with” terrorism means, that was very helpful for the listing procedure, so that the Member States could have a common idea of whom they should propose to be listed³⁹⁶.

Moreover, as we saw in the *Aden v. Council* case, the only way for a person or an entity to get himself delisted from the “terrorist list”³⁹⁷, was to submit a petition for *delisting* through the intermediary of their state of nationality or residence, hence through some kind of diplomatic protection³⁹⁸. For that purpose the SC adopted resolution 1730, establishing a Focal Point, through whom the individuals could directly send a petition to be delisted³⁹⁹. This is a very important step as it is argued that the establishment of the Focal Point provides *accessibility* for persons and entities that are listed⁴⁰⁰.

In addition, in *OMPI* case, we examined *inter alia*, that applicants claimed that the *obligation to state reasons* was not respected. Furthermore since they could not have access to information regarding the reasons for their listing, they could not know the case against them, because the government and the Court were not able to provide him with the information in question, since it was considered to be “classified information” that could not be communicated to the applicant. As we noticed the Court argued that the applicants should be able to be provided with “specific information” regarding the reasons of listing. In regard to this problem, the SC adopted resolution 1735, in which it stated that the individuals that are listed should be notified and “a copy of the publicly releasable portion of the statement of case together with a description of the effects of designation”⁴⁰¹ should be provided to them. Furthermore, the SCR 1735 gave the possibility to individuals to be informed not only of the basis for their listing but as well about exemptions and delisting procedure. Furthermore, another important step by the adoption of the resolution in question is the fact that it extended the “Non Objection Period” (NOP)⁴⁰² from 48 hours to 5 days, giving the possibility to states for a more serious review of the case, which is an important element for the respect of the *right to a fair hearing*⁴⁰³.

Furthermore, as we noticed in all three cases that we examined above, the right to *judicial review* is claimed to be affected in all cases concerning targeted sanctions against individuals that are suspects of acts of terrorism. For this reason, the SC adopted resolution 1822, in which the Council established an ongoing annual review of the listing persons and improved the notification process together with the procedure of

³⁹⁴ UNSCR 1452, adopted by the Security Council at its 4678th meeting, 20 December 2002, para.1 a.

³⁹⁵ Biersteker and Eckert, Addressing Challenges to Targeted Sanctions, *supra* note 321, p.33.

³⁹⁶ Van Den Herik, The Security Council’s Targeted Sanctions Regimes, *supra* note 335, p.76.

³⁹⁷ For the purpose of this research « terrorist list », « blacklist » and « consolidated list », would be considered as synonyms.

³⁹⁸ Biersteker and Eckert, Strengthening Targeted Sanctions through Fair and Clear Procedures, *supra* note 256, p.18.

³⁹⁹ UNSCR 1730, adopted by the Security Council at its 5599th meeting, 19 December 2006, para.1.

⁴⁰⁰ Biersteker and Eckert, Addressing Challenges to Targeted Sanctions, *supra* note 321, p.14.

⁴⁰¹ UNSCR 1735, adopted by the Security Council at its 5609th meeting, 22 December 2006, para.10.

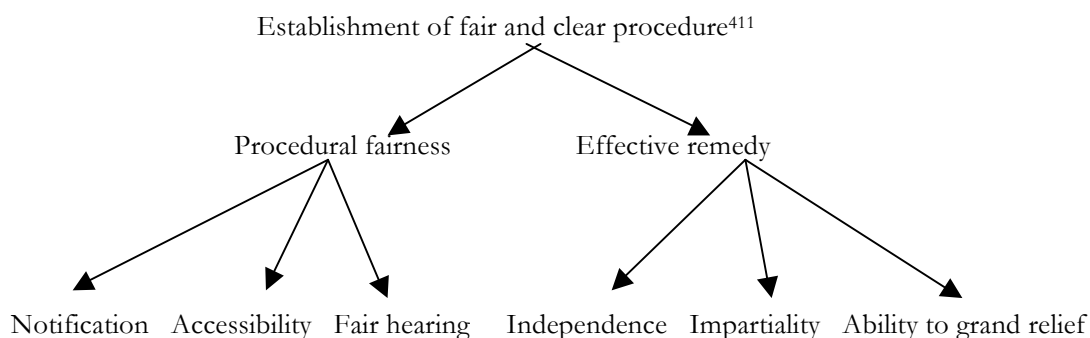
⁴⁰² Non Objection Period, is the period that Member States of the UN have the possibility to object the adding of the particular person or entity into the list. And as the procedure is by consensus, if an objection by a MS is made, than the person or entity in question will not be added in the list and the MS that proposed his name must provide further information stating the reasons why the state believe that this person or entity must be added in the list.

⁴⁰³ Biersteker and Eckert, Addressing Challenges to Targeted Sanctions, *supra* note 321, p.15.

providing information on reasons of listing⁴⁰⁴. Moreover, the SCR 1822 required, *inter alia*, summaries of all listing individuals which are published on the committee website and explain the basis that the individual in question was added to the list⁴⁰⁵.

As we have noticed, up to now we have noticed that there had been much done from the SC to improve in particular the listing procedure. However, when bigger number of cases was brought to national and regional courts contesting not only their listing but as well the delisting procedure, which can be perfectly demonstrated by the *OMPI II* and the *OMPI III* cases. We noticed as well in the *Kadi* judgment that the ECJ gave a particular importance to the fact that an *effective remedy* must be ensured for the persons listed in the “consolidated list”. The SC took into account these cases and in particular the ECJ decision of the *Kadi* case and adopted resolution 1904, by which it established an impartial organ namely the Ombudsman. The Ombudsman was designed by the SC to be a person with “high moral character, impartiality and integrity with high qualifications and experience in relevant fields, such as legal, human rights, counter-terrorism and sanctions...that...would perform the tasks in an independent and impartial manner”⁴⁰⁶. The main task of the Ombudsman was, *inter alia*, to review requests from individuals and groups requesting their removal from the consolidated list.

To sum up, taking into account what the scholars have argued, what the Courts have stated and what the applicants have claimed, the UNSC tried to address some of the legal issues by adopting the resolutions referred above. In order to see what is already done by the SC and if there are any areas that still remains uncovered; we are going to put in a schema the arguments given by the research conducted by the *Biersteker and Eckert* on 2006, entitled: “Strengthening Targeted Sanctions through Fair and Clear Procedures”⁴⁰⁷. We consider that this research is the most suitable response to the legal challenges that the SCRs are confronted regarding targeted sanctions against individuals and therefore many scholars⁴⁰⁸ would agree at least to the conclusion of the authors⁴⁰⁹ that in order to improve the concerns that both individuals and courts are confronted to, we have to establish of fair and clear procedure. The establishment of a fair and clear procedure requires a procedural fairness and an effective remedy⁴¹⁰; the procedural fairness in order to be guaranteed requires: i) notification ii) accessibility and iii) fair hearing; whereas the effective remedy requires: i) independence ii) impartiality and iii) ability to grant relief. Therefore, following these arguments, our schema takes the following structure:



⁴⁰⁴ UNSCR 1822, adopted by the Security Council at its 5928th meeting, 30 June 2008, para.13, 17 and 22.

⁴⁰⁵ Biersteker and Eckert, Addressing Challenges to Targeted Sanctions, *supra* note 321, p.17.

⁴⁰⁶ UNSCR 1904, adopted by the Security Council at its 6247th meeting, 17 December 2009, para.20.

⁴⁰⁷ Biersteker and Eckert, Strengthening Targeted Sanctions through Fair and Clear Procedures, *supra* note 256.

⁴⁰⁸ Van Den Herik, The Security Council's Targeted Sanctions Regimes, *supra* note 335, p.78.

⁴⁰⁹ Biersteker and Eckert, Strengthening Targeted Sanctions through Fair and Clear Procedures, *supra* note 256.

⁴¹⁰ Biersteker and Eckert, Strengthening Targeted Sanctions through Fair and Clear Procedures, *supra* note 256, p.22.

⁴¹¹ The schema is created by the ideas and propositions of Biersteker and Eckert Strengthening Targeted Sanctions through Fair and Clear Procedures, *supra* note 256; as well Van Den Herik, The Security Council's Targeted Sanctions Regimes, *supra* note 335, p.78.

Taking this schema as an example and examining the measures taken by the UNSC, we realize that the SC took several steps, by the period that the first case in the CFI against targeted sanctions has been occurred, *Aden v. Council* case, until the most important case regarding this matter that was brought into the ECJ, the *Kadi* case. These measures were mostly based on the left side of our schema, which means that the measures taken were mostly to ensure procedural fairness, by adopting Resolutions 1730, 1735, 1822. However, after the *Kadi* case the UNSC seemed to turn into the direction of ensuring effective remedy by adoption of SCR 1904 at the end of 2009 which put in place an independent and impartial Ombudsman to review requests from individuals. So the question that remains to be answered is whether all these UN Resolutions gave an answer to the legal issues regarding targeted sanctions against individuals? It seems like the answer is a negative one, since the General Court of the EU⁴¹² had to give its opinion to a new case concerning Kadi on September 2010.

C. New legal challenges against UNSCR 1267 : Yassin Abdullah Kadi v. Commission (2010)

The facts

After the period of three months that the ECJ required in *Kadi* case in 2008, the European Commission sent a summary of reasons provided by the Sanctions Committee to Kadi and invited him to comment on those reasons⁴¹³. Right after the Commission informed Kadi that he would be relisted to the consolidated list, under a new EC Regulation 1190/2008, hereinafter referred to as “contested regulation”, implementing UNSCR 1267. When Kadi asked the Commission for evidence that were against him, the Commission did not answer to him back, since the judgment of the ECJ did not require to the Commission to disclose further evidence and therefore it adopted a new Regulation by which Kadi’s assets remained frozen. Therefore, Kadi brought the case into the General Court of the European Union, hereinafter referred to as the “General Court”.

Alleged violations of the Rights

After Kadi had been informed by the Commission that he would be relisted again, he asked the latter for further evidence to his case that was not provided to him due to the fact that the evidence against him was “classified information”. He then claimed that since he cannot have access to this evidence but only general and vague information, he would not be able to defend his case, therefore the right to a fair hearing and the right of effective remedy were violated. This is the reason why he asked from the General Court to annul the EC Regulation 1190/2008 that was giving effect to the UNSCR and therefore to be delisted from the consolidated list.

Decision of the General Court of the EU

In the case of 30th September 2010, the General Court rendered the decision concerning *Yassin Abdullah Kadi v. Commission*, hereinafter referred to as *Kadi II*, in which case the General Court decision followed more or less the same reasoning as the ECJ in *Kadi* case.

First of all, the General Court examined whether it had jurisdiction to review the contested regulation and by refereeing to the ECJ conclusion at *Kadi* case, it came to the same conclusion that it “has a task to ensure the full review of the lawfulness of the contested regulation”⁴¹⁴. The importance of the judicial review was even more reinforced by the General Court’s reference to the *OMPI II* case, in which it had stated that “review...constitutes the only procedural safeguard ensuring that a fair balance is struck between the need to combat terrorism and the protection of fundamental rights”⁴¹⁵.

⁴¹² The CFI was renamed the “General Court of the European Union” under the Lisbon Treaty.

⁴¹³ General Court of the European Union, Judgment in Case T- 85/09 Yassin Abdullah Kadi v. Commission, Press Release No. 95/10, 30 September 2010, at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-09/cp100095en.pdf> (last visited 23.06.2012).

⁴¹⁴ Case T-85/09, Yassin Abdullah Kadi v. Commission (2010), para. 126 [hereinafter Kadi case General Court 2010].

⁴¹⁵ Kadi case General Court 2010, *supra* note 414, para. 144.

In order to define whether the right to defense had been violated, the General Court examined whether the statement of reasons was satisfied⁴¹⁶ and the possibility for Kadi to comment on them. In this regard the Court stated that the “few pieces of information and the imprecise allegations” in the summary of reasons that the Commission sent to Kadi, are “clearly insufficient” to give the possibility to the applicant to “launch an effective challenge to the allegations”⁴¹⁷, as a result the applicant’s right to defense had not been observed.

In order for the right to defense to be protected, the General Court stated that the procedure might need to be changed in order to make it possible to review confidential information, either by providing the information to the applicant itself or to his lawyer; or only to the Court⁴¹⁸.

Furthermore, the Court stated that the Commission failed not only “to take due account to the applicant’s comments and as a result he was not in a position to make his point of view known to advantage” but as well to grant to the applicant “the most minimal access to the evidence against him”⁴¹⁹. Therefore no actual balance was provided between the interest of the applicant and that of the need to protect the confidential information and as a result the right to effective judicial review and the right to property were also infringed.

Finally, the General Court came to the conclusion that the contested regulation had been adopted without “any real guarantee being given as to the disclosure of the evidence used against the applicant or as to his actually being properly heard in that regard”. Hence, the regulation neither respected the right to defense nor the principle of effective judicial protection⁴²⁰ and therefore the Court annulled the contested regulation.

Analysis

First of all comparing the General Court reasoning on *Kadi II* case and the ECJ reasoning on *Kadi* case, two main differences can be detected. The first difference is that the General Court while confirmed its task to review the contested regulation according to ECJ judgment on *Kadi* case rendered on the Grand Chamber, at the same – as Tzanakopoulos well noticed it- the General Court expressed its regret that “there is nothing the Court can do if the Security Council wants Kadi blacklisted, except communicate to him the summary of the reasons for the listing and give him the opportunity to be heard and then go on and blacklist him as per the Security Council’s command”⁴²¹. This is the reason why the General Court called for a need to establish a standard review.

Second difference of the Courts reasoning, is that the General Court by stipulating that the UN context do not justify immunity from the Community jurisdiction, “so long as the re-examination procedure before the Sanctions Committee does not offer guarantees of judicial protection”⁴²², seems from one hand to agree with what the Advocate General Miguel Poiares Maduro had expressed in the *Kadi* case⁴²³ and on the other hand to follow at the same time the Court reasoning of the *Solange* case. In that case it was stipulated that “the General Federal Constitutional Court reserved the right to review the computability of Community law with German Constitution as long as the Community does not have a catalogue of fundamental rights which is equivalent to the catalogue of fundamental rights guaranteed by the German Constitution”⁴²⁴.

Concerning now the new legal challenges, at first glance, one could argue that the *Kadi II* case did not present any new challenges, since it is repeating the precedent one. However, for the purpose of this

⁴¹⁶ *Ibid.*, para. 143.

⁴¹⁷ *Ibid.*, para. 174.

⁴¹⁸ *Ibid.*, para. 147.

⁴¹⁹ *Ibid.*, para. 172-173.

⁴²⁰ *Ibid.*, para. 184.

⁴²¹ Tzanakopoulos, *Kadi II*, *supra* note 281, p.4.

⁴²² *Kadi* case General Court 2010, *supra* note 414, para. 20.

⁴²³ Opinion of Advocate General on *Kadi* case, *supra* note 363, para. 19.

⁴²⁴ Colneric, Ninon, “Protection of Fundamental Rights through the Court of Justice of the European Communities”, p.9 at <http://denning.law.ox.ac.uk/iecl/pdfs/working2colneric.pdf> (last visited 20.06.2012).

research this is completely wrong, since the question that we are intended to respond by examining *Kadi II* case, is whether the UNSC has taken all the measures needed in order to ensure the respect of the fundamental rights in the effort to combat terrorism.

Regarding these questions there are two new elements that derives from *Kadi II* case that constitutes new challenges regarding UNSCR 1267. First of all, it is extremely important to mention that the General Court questioned in its reasoning whether the targeted sanctions purpose is punitive or preventive. More precisely the General Court reminded that the targeted measures are meant to be “temporary precautionary measures” and according to the UNSCR 1822 those measures have a “preventive nature and they are not reliant upon criminal standards set out under national law”⁴²⁵. The General Court continued by affirming that ten years of human life are “a substantial period of time” and therefore it is probably time to question the character of targeted sanctions, whether they are “preventative or punitive, protective or confiscatory, civil or criminal”⁴²⁶. To support this argument the General Court quoted as well the opinion of the United Nations High Commissioner for Human Rights, given in a report of the General Assembly of the UN on 2 September 2009, namely “Report on protection of human rights and fundamental freedoms while countering terrorism”, who stated as follows:

“Because individuals listings are currently open-ended in duration, they may result in a temporary freeze of assets becoming permanent which, in turn, may amount to criminal punishment due to the severity of the sanction. This threatens to go well beyond the purpose of the United Nations to combat the terrorist threat posed by an individual case. In addition, there is no uniformity in relation to evidentiary standards and procedures. This poses serious human rights issues, as all punitive decisions should be either judicial or subject to judicial review”⁴²⁷.

The nature of targeted sanctions questioned by the General Court, has attracted comments of many scholars and even in the UK Supreme Court argued that “persons designated in this way meaning having access to the evidence against them are effectively “prisoners” of the State”, because their freedom to movement is limited, they do not have access to their funds and the listing in fact can have important consequences not only for the person that is been listed but as well for his family⁴²⁸.

A second new element that derives from *Kadi II* case, is that the Court seems to affirm the fact that even if there are a lot of efforts done by the SC to ensure protection of fundamental rights in its policy in combating terrorism, there are still things that must be done, since the Court seems to find that the UN system is still not guaranteeing the fundamental rights protection of individuals. This can be shown when the Court stated that:

“In essence, the Security Council has still not deemed it appropriate to establish an independent and impartial body responsible for hearing and determining, as regards matters of law and fact, actions against individual decisions taken by the Sanctions Committee. Furthermore, neither the focal point mechanism nor the Office of the Ombudsperson affects the principle that removal of a person from the Sanctions Committee’s list requires consensus within the committee. Moreover, the evidence which may be disclosed to the persons concerned continues to be a matter entirely at the discretion of the State which proposed that he be included on the Sanctions Committee’s list and there is no mechanism to ensure that sufficient information be made available to the person concerned in order to allow him to defend himself effectively...For those reasons...the creation of the focal point and the Office of the Ombudsperson cannot be equated with the provision of an effective judicial procedure for review of the decisions of the Sanctions Committee”⁴²⁹.

⁴²⁵ Kadi case General Court 2010, *supra* note 414, para. 150.

⁴²⁶ *Ibid.*

⁴²⁷ Kadi case General Court 2010, *supra* note 414, para. 150.

⁴²⁸Knook, Allard, “Case T-85/09, Kadi II”, ECJBlog, 26 October 2010, at <http://courtofjustice.blogspot.ch/2010/10/case-t-8509-kadi-ii.html> (last visited 2.07.2012).

⁴²⁹ Kadi case General Court 2010, *supra* note 414, para. 128.

Therefore our question whether the adoption of UNR 1452, 1730, 1935, 1822 and 1903 is sufficient in order to ensure the respect of fundamental human rights of individuals that are listed, is automatically responded in a negative way by the above reasoning of the General Court. In addition, we must mention that currently Kadi still remains listed even if the Court annulled twice the EC Regulation implementing SCR 1267. It is even believed that there is going to be a third *Kadi* case with the same outcome. Therefore, the subsequent question to address is to see what can be done in order to establish a fair and clear procedure for the persons listed? This question will be responded in the next sub-chapter through various propositions and suggestions.

D. Solutions- Suggestions

First of all we have to acknowledge that the SC is still continuing making efforts to overcome the legal issues that are creating from the policy of targeting individuals, however we consider that these efforts are minor and that the SC has not yet fully addressed the problem of a judicial review and effective remedy. Taking for instance the adoption of the UNSCR 1988, the SC created more specific criterias of when a person, group and entity is eligible to be designated and it creates as well a new Sanctions Committee that tasks are focused on listing, delisting and review of the Consolidated list, and as well to make reports to the Council concerning the process of the implementation of measures⁴³⁰. However, up to now we consider that the right to accessibility of the evidence that are against a person who is listed and therefore his right to defense is still not protected, even after the reforms that have been made by the UNSCR.

Therefore, in this sub-chapter we are going to present some suggestions that are done by scholars in order to overcome the legal challenges of the targeted sanctions in international law. It seems that scholars do agree on four basic options that the international community could adopt in order to avoid the legal challenges and to be able to find an equilibrium between the protection of fundamental human rights and the fight against terrorism.

The first option is based on improving the actual procedure of the Sanction Committee. The improvement would be focus on the two following elements:

- providing to the states or regional organization concerned sufficient information in order the applicant to be able to contest the implementation of the listing by the Member States or the regional organization before a national or regional court⁴³¹.
- changing the decision making procedure of the Committee into a consensus without unanimity or possible voting in Committee⁴³².

As we noticed above, these two criteria were mentioned as well by the General Court in the *Kadi II* case, that the Court only or as well the lawyer or the individual itself should have access to the evidence that are against the person listed, so that the latter can bring the case before the Court in order to obtain a judicial review. Secondly, the Court criticized as well the voting procedure within the Sanctions Committee and it indirectly suggested that there is nothing done yet to address this issue, since for a person to get delisted requires consensus within the Committee⁴³³. However, the problem of the classified information and the protection of confidential information still remains.

The second option is that of a national or regional review. This option would ensure that the listing procedure is in the light with the national or regional law in question⁴³⁴ and would probably facilitate the

⁴³⁰ UNSCR 1988, adopted by the Security Council at its 6557th meeting, 17 June 2011, para.30.

⁴³¹ Statement of the Special Reporter, Martin Scheinin, on the "Promotion and Protection of human rights and fundamental freedoms while countering terrorism", 63rd session of the General Assembly, 22 October 2008 [hereinafter Scheinin, Promotion and Protection of human rights and fundamental freedoms while countering terrorism].

⁴³² Biersteker and Eckert, Addressing Challenges to Targeted Sanctions, *supra* note 321, p.26.

⁴³³ Kadi case General Court 2010, *supra* note 414, para. 128.

⁴³⁴ Biersteker and Eckert, Addressing Challenges to Targeted Sanctions, *supra* note 321, p.26.

implementation procedure. However, as the cases that we examined in this research showed and especially the *Kadi* case, even if a review is done at national level and the Court annuls the listing of a person, the delisting can only be made at the UN level. Therefore the solution could be that if a regional and national court found that the listing of a particular person, group or entity was not justified, then these decisions could be binding for the Sanction Committee⁴³⁵. However, this option would undermine the legitimacy⁴³⁶ of the UNSC and the review will depend on the different “political context and legal culture” of the various national jurisdictions⁴³⁷.

The third option is based on the proposition of abolishment of the UNSCR 1267. This option presents the idea that by abolishing the UNSCR 1267, the terrorist lists are abolished as well and therefore the Member States would have to be bound only by UNSCR 1373 and therefore they will only have their own terrorist lists⁴³⁸. While the UN would still provide information collection, expertise and assistance⁴³⁹, this option undermines the collective effort that is done by the SC to combat terrorism, plus there would be a lot of issues concerning different definitions and even if we could find common definition through Guidelines and other documents, still this option seems weak since the collaboration between states will be more difficult and review by other states will not be practiced, whereas in the current Sanctions Committee other states are reviewing a particular person, group or entity by simply voting for the listing or delisting procedure.

The fourth option would be the creation of an independent review mechanism at the UN level. This option will require the following elements:

- to ensure a fair hearing by providing to the individual sufficient information for the case against him; to ensure the right to be heard by a relevant decision-making body; the right to effective remedy by an independent review mechanism⁴⁴⁰.
- to establish an independent judicial body which would be in a position to review decisions of the Sanctions Committee in a case of denial to delist a person, group or entity⁴⁴¹.

The option of a creation of an independent review mechanism at UN level seems to be for scholars the most effective one, since it is believed to address better the current legal challenges against the UNSCR 1267. Moreover, the Special Reporter Martin Scheinin has even proposed the establishment of a “quasi-judicial review body composed of security classified experts serving in their independent capacity”, since to his opinion this option would be more easily recognized by national and regional human rights Courts, because it will be considered to protect the due process while leaving the possibility for the Court to exercise difference in the respect of the outcome⁴⁴². However, a lot of criticism regarding this option is related to the fact that this option is believed to be an extremely costly one for relatively few cases⁴⁴³.

Finally, having examined all possible options provided by scholars up to now, even if we agree with Bierteiker and Eckes, and the Special Reporter that the last option would be the most effective one, we believe that the SC would probably prefer to choose the first option and to continue doing reforms to the present Sanctions Committee, listing and delisting procedure, rather than to establish an entire new mechanism that would require not only a considerable cost but as well a significant amount of work. This

⁴³⁵ Biersteker and Eckert, Addressing Challenges to Targeted Sanctions, *supra* note 321, p.26.

⁴³⁶ Scheinin, Promotion and Protection of human rights and fundamental freedoms while countering terrorism, *supra* note 431 and Portela, National Implementation of UN Sanctions, *supra* note 90, p.17.

⁴³⁷ Biersteker and Eckert, Addressing Challenges to Targeted Sanctions, *supra* note 321, p.26.

⁴³⁸ Portela, National Implementation of UN Sanctions, *supra* note 90, p.17.

⁴³⁹ Scheinin, Promotion and Protection of human rights and fundamental freedoms while countering terrorism, *supra* note 431.

⁴⁴⁰ *Ibid.*

⁴⁴¹ Biersteker and Eckert, Addressing Challenges to Targeted Sanctions, *supra* note 321, p.29.

⁴⁴² Scheinin, Promotion and Protection of human rights and fundamental freedoms while countering terrorism, *supra* note 431.

⁴⁴³ Biersteker and Eckert, Addressing Challenges to Targeted Sanctions, *supra* note 321, p.29.

can be showed as well by the opinion expressed by the Monitoring Team when it mentioned that: “one reason to create a panel or other review mechanism is simply to get ahead of the law in this area to establish it, rather than allow national or regional courts of Member State practice to do so...the Committee might be well advised to establish the desired standard of review, rather than effectively cede this role to others”⁴⁴⁴.

Conclusion of the sub-chapter : In order to respond to our question whether the concept of targeted sanctions is a phenomenon of one step forward to steps back, two more questions have to be answered first. The first one is based on what are finally the objectives of imposing targeted sanctions? What is the ultimate aim? Are they preventive or punitive? In order to be able to respond these sub-questions, we have to be based on a study that focuses on the effectiveness of targeted sanctions. However, we have a difficulty to find studies concerning this issue since it seems like international scholars are not so interested about this problematic and this can be said by the fact that there are only few studies⁴⁴⁵ that have been done regarding the effectiveness of targeted sanctions and in one of this studies (Lopez and the other) it is basically argued that targeted sanctions are less effective than comprehensive one⁴⁴⁶.

Furthermore second question to be answered is the impact of targeted sanctions in the “targets”, basically in the individual lives. As Eriksson⁴⁴⁷ well noticed there are only two studies that had tried to address this question⁴⁴⁸ and therefore we don’t know in which extent those sanctions are affecting individual rights. We could suppose though that except from the economical lost and freedom to leave from their country, there are as well other issues like their psychology, their reputation and in certain extent we could even imagine a fear for their lives. The impact of targeting sanctions on targets, was raised as well by the General Court in the *Kadi II* case when it stipulated that:

“Such measures (targeted sanctions) are particularly draconian...All the applicant’s funds and other assets have been indefinitely frozen nearly 10 years now and he cannot gain access to them without first obtaining an exemption from the Sanctions Committee...the UK Supreme Court till the view that it was no exaggeration to say that persons designated in this way are effectively “prisoners” of the State: their freedom of movement is severely restricted without access to their funds and the effect of the freeze on both them and their families can be devastating”⁴⁴⁹.

Therefore the question whether the targeted sanctions concept is a one step forward two steps back phenomenon, is not an easy question to respond and we cannot suggest with certainty since we don’t have a lot of information on the two questions mentioned above. However, we still consider that the international community has done big steps to avoid painful consequences to innocent population by introducing the concept of targeted sanctions, but since is a concept relatively new, we consider that this concept has to be improved and better developed.

⁴⁴⁴ Letter dated 28 September 2009 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council, S/2009/502, para. 42, available at: http://www.un.org/ga/search/view_doc.asp?symbol=S/2009/502 (last visited 16.08.2012).

⁴⁴⁵ Eriksson, Targeting Peace, *supra* note 135.

⁴⁴⁶ Cortright, David and Lopez, George, *Smart Sanctions: Targeting Economic Statecraft*, New-York, ed. Rowan and Littlefield Publishers,(2002), p.9 [hereinafter Cortright and Lopez, Smart Sanctions].

⁴⁴⁷ Eriksson, Targeting Peace, *supra* note 135, p.19.

⁴⁴⁸ Biersteker and Eckert, Strengthening Targeted Sanctions through Fair and Clear Procedures, *supra* note 256 and Elliot K. and Hufbauer G, Same Song, Same Refrain? Economic Sanctions in the 1990s, *supra* note 80.

⁴⁴⁹ Kadi case General Court 2010, *supra* note 414, para. 149.

General Conclusion and Remarks

The cases that we examined in the third part of this research, gave us the impression that the targeted sanctions policy against individuals is more a legal issue, however we realize that this issue arise as well a lot of political concerns, since the legitimacy of the UNSC itself but mostly its decisions under Chapter VII, are been putting into question⁴⁵⁰. Therefore, since most of UNSCR requires domestic implementation in order to be effective⁴⁵¹, fear dominates of whether the EU would decide not to implement certain categories of UNSC sanctions because they are not in the light with the Community law and more specifically the European Convention on Human Rights.

This “fear” comes due to the fact that the EU has a great influence not only on its member states, which means 27 Member States of the UN at the same time, but most probably as well to states that would like to join the EU, such as candidate states, potential candidates etc, which increases the number of states at the UN level. Furthermore, we can even argue that the African Union is as well influenced by the EU, since the latter is considering the most successful regional organization.

The non-implementation of the UNSCRs by the EU would mean that the EU is undermining the role of the UNSC and that would challenge the legitimacy of the SC at the same time. In other words, the public opinion concerning the ineffectiveness of targeted sanctions could do “extensive damage both to the instrument of targeted sanctions and to the reputation of the UNSC”⁴⁵².

Furthermore, the implementation of the UNSC resolution by the EU is important not only by the standpoint of the UN but as well by the standpoint of the EU and its Member States. In fact a number of Member States of the EU have incorporated the EU law in their constitutional law and as some states are using the monist strategy, the EU law is directly applicable in national law. The EC regulations have direct effect in the domestic orders of States and in this sense, the ECJ constitutes the apex of the national judicial system. The ECtHR, for its part, is the guardian of a Convention that has been given quasi-constitutional ranking in many of the States of the Council of Europe⁴⁵³, which makes again relevant our discussion about the influential power of the EU in third countries, especially on its neighboring area.

Finally, we argue that the implementation of the UNSC by the EU it is important as well because it can make sanctions more effective, since the implementation is supposed to be quicker under a common voice of the EU. This argument is based in the fact that instead of having 27 members states trying to implement in their national law the UNSC resolution, we take this decision under EU auspice and since the EU law has a direct effect on its member states, it makes it more easily applicable and plus in that way we avoid a conflict created between EU law and national law. There are several arguments though as Debbas is explaining in her article, that quicker implementation of the UNSC resolution does not mean that sanctions are more effective⁴⁵⁴ but we do believe that in order for sanctions to be effective the time do pay an important role and we do believe that the faster a UNSC is implemented the more effective it is, because it shows to the state concerned that the international community is willing to respond quickly in the crisis and perhaps would lead the persuasion of the state intended without even using further sanctions.

⁴⁵⁰ Biersteker and Eckert, Addressing Challenges to Targeted Sanctions, *supra* note 321, p.5.

⁴⁵¹ Bianchi, Assessing the Effectiveness of the UN Security Council’s Anti-terrorism Measures, *supra* note 298, p.4.

⁴⁵² *Ibid.*

⁴⁵³ Gowlland-Debbas, National Implementation of United Nations Sanctions, *supra* note 43, p.59.

⁴⁵⁴ *Ibid.*

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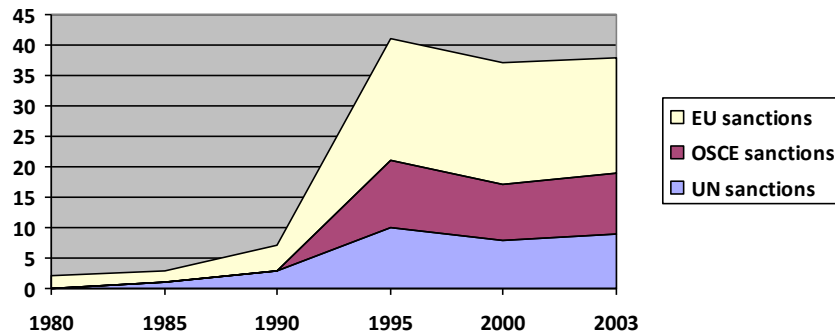
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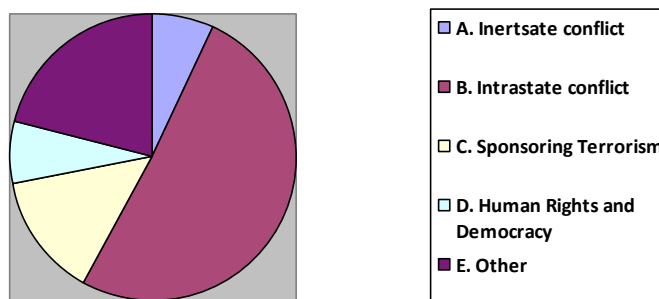
Appendix 1- European Sanctions and UN Sanctions

Table 1: Sanctions in the EU area, 1980-2003



Source: Adapted diagram taken from: KREUTZ, Joakim. “Hard Measures by a Soft Power? Sanctions Policy of the European Union 1981—2004”, in *Bonn International Center for Conversation* , Paper 45 (2005), p.15

Table 2: EU near neighborhood

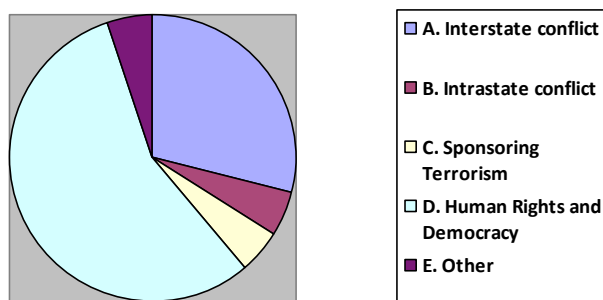


A : 7% C : 14% E : 21%

B : 51% D : 7%

Source: Adapted diagram taken from: KREUTZ, Joakim. “Hard Measures by a Soft Power? Sanctions Policy of the European Union 1981—2004”, in *Bonn International Center for Conversation* , Paper 45 (2005), p.15

Table 3: EU and the Rest of the World



A: 29%

C: 5%

E: 5%

B: 5%

D: 56%

Source: Adapted diagram taken from: KREUTZ, Joakim. "Hard Measures by a Soft Power? Sanctions Policy of the European Union 1981—2004", in *Bonn International Center for Conversation*, Paper 45 (2005), p.15

Table 4: European Union Sanctions from 2005 until 2012

Target State	Reasons of sanctions	Year of sanctions	Autonomous sanctions	Implementing UN sanctions	H. 1	H. 2
Former Yugoslavia	DHR	2005		√	√	√
Lebanon	Terrorism	2005		√	√	
Ivory Coast	DHR	2005		√		√
Ethiopia and Eritrea	DHR	2005		√		√
Somalia	Piracy	2005		√		
Sudan	DHR	2005		√		√
Afghanistan	Terrorism	2005		√		
DRC	DHR	2005		√		
Timor Leste	DHR	2005		√		
Haiti	DHR	2005		√		
Liberia	DHR	2005		√		√
Sierra Leone	DHR	2005		√		√

Iraq	Terrorism	2005		√		
Bosnia and Herzegovina	DHR	2006 and 2011	√ (2011)	√ (2006)	√	√
Iran	WMD	2006		√		
Palestine and Israel	Terrorism	2009		√		
Guinea	DHR	2009		√		√
Libya	DHR	2011		√	√	√
Syria	DHR	2012		√	√	√
Belarus	DHR	2010	√		√	√
Moldova	DHR	2010	√		√	√
Myanmar (Burma)	DHR	2010	√			√
Egypt	DHR	2011	√		√	√
Tunisia	DHR	2011	√		√	√
Uzbekistan	DHR	2005	√			√
Zimbabwe	DHR	2011	√			√
Total 25 sanctions	20 DHR, 4 Terrorism 1 WMD and 1 Piracy		7 autonomous sanctions	19 according to UN sanctions	9 neighborhood countries	20 DHR

DHR: Democracy and Human Rights

WMD: Weapons of Massive Destruction

H. 1: Hypothesis one: “The EU sanctions policy is regionally oriented”

H. 2: Hypothesis two: “The EU is more active when a MS is in a breach of its principles and values, most particularly democracy and human rights”

Source: This table is made by our proper analysis by finding information for the crisis in the official website of the UN and the EU.

Table 5: Objectives of EU autonomous sanctions (1987-2003)

	1987-1991	1992-1997	1998-2003	Total
Regional Peace and Stability Terrorism Support of Peace Process	1	5	0	6
	2	0	1	3
	0	1	1	2
Directly security related	3	6	2	11
Promotion of HR	3	1	3	7
Promotion of democracy	1	3	2	6
Indirectly security related	4	4	5	13
Bilateral diplomatic relations	0	0	1	1
Total	7	10	8	25

Source: Adapted diagram taken from: PORTELA, Clara, “Where and Why Does the EU Impose Sanctions?”, in *Politique Européenne*, L’Harmattan, no.17 (2005), p.14

Appendix 2: Geographical distribution of courts cases concerning targeted sanctions against individuals suspected to be associated with acts of terrorism

Table 1: Geographical distribution of cases related to terrorism

Geographically, these 31 cases (on the stringent reading) break down as follows:

- 13 cases before the European Court of Justice 42%
- 5 cases before courts in European Union member states 16%
- 2 cases before courts in Switzerland 6%
- 2 cases before courts or appeal bodies in Turkey 6%
- 2 cases before courts in Pakistan 6%
- 7 cases before US courts 23%

For the 48 cases (on the coarse reading) the picture is different, but not substantively:

- 17 cases before the European Court of Justice 35%
- 1 case before the European Court of Human Rights 2%
- 1 case before the Human Rights Committee (body established by the 2^o International Covenant on Social and Political Rights)
- 8 cases before courts in European Union member states 17%
- 4 cases before courts in Switzerland 8%
- 3 cases before courts or bodies in Turkey 6%
- 3 cases before courts in Pakistan 6%
- 11 cases before US courts 23%

Source: MT reports, own research, in BIERSTEKER Thomas and ECKERT Sue, “Addressing Challenges to Targeted Sanctions: An Update of the ‘Watson Report’”, in Watson Institute, October 2009, p. 49.

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