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THE UN SANCTIONS REGIME

Striking a balance between the maintenance of international security and the protection of individual rights

Angelo De Lauro

Abstract

Sanctions have become nowadays one of the most seminal and used non-forceful instruments of international relations. Over the last decades, the United Nations Security Council has incredibly increased the resort to binding resolutions disposing of the application of sanctions against States alleged for having perpetrated a threat to or a breach of international peace and security. Nevertheless, the international community has continued to formulate doubts over their implementation, particularly due to the human rights concerns emerged following the humanitarian disaster occurred in Iraq after the establishment of the 661 Sanctions Regime. This has led the UN Security Council to initiate an evolutive process which resulted in the emergence of a new typology of such measures: targeted sanctions. Despite it is clear that through their application the UN has progressively lowered the probability of negatively impacting on the population of the targeted State, targeted sanctions have also ultimately generated new concerns over their application, particularly within the dimension of individual procedural rights.

1. Introduction

Since the creation of the United Nations (UN) as an international organization devoted to the protection of the collective security system that emerged from the war, as well as to maintain the pledge of peace within the international community, several international academics gradually begun to argue that eventually the UN Security Council would have ultimately enlarged its mandate in the view of protecting also individual human rights.[1] Nevertheless, throughout the 1990s, the international community has known growing humanitarian concerns related especially to the sanctioning activity of the UN Security Council. Therefore, what was becoming evident in the eyes of many international scholars was that the UN Security Council, in its practice of protecting the international peace and security, was also jeopardizing the human rights of many civilian populations impacted negatively by UN sanctions. The present work proposes as a comprehensive study on the evolution of the UN practice on sanctions, investigating also on the procedural and substantive transformations such measures went on, as well as the main criticalities the two sanctions models present. For instance, this work further analyzes the impacts both comprehensive and targeted sanctions exercised on the enjoyment of individual human rights, and which were the kinds of legal reactions that subsequently emerged, both internally and externally.

2. Defining the term "sanction" within the spectrum of international law

Even though sanctions are generally acknowledged as tools of coercive diplomacy, a well-supported and official definition of the term is still lacking within the world scenario. Indeed, around the legal and diplomatic terminology of the word "sanction", there is an indefinite agglomeration of different definitions originating from the angle of analysis used to approach the concept. *Stricto sensu*, the terminology can be applied to define a set of coercive "measures taken by an international actor (the sanctioner, a State or an international organization) in reaction to an undesirable, most often allegedly illegal behavior of another actor (the sanctionee) for the purpose of making the sanctionee desist from that behavior".[2] By using the mentioned definition provided by Michael Bothe, what is clear is that three different, but relevant, units can be identified anytime we deal with the concept of "sanction": (i) the *nature of the measure* enacted by competent organs as a reaction to the illegal behavior of the

[1] B. Fassbender, *Securing Human Rights? Achievements and Challenges of the UN Security Council*, Oxford University Press, 2011, p. 9

[2] M. Bothe, "Compatibility and Legitimacy of Sanctions Regimes", in N. Ronzitti, *Coercive Diplomacy, Sanctions and International Law*, Brill Nijhoff, 2016, p. 33.

wrongdoer; (ii) the *type of actors* (or better, sanctioners), involved in the performance of the measure; and, (iii) *the objective* at the core of the undertaken measure.

Prima facie, despite most of the international scholars on sanctions focus only on the "punitive strategy" residing on the application of such measures on the targeted State, the international community resort to sanctions in order to achieve three potential purposes. Indeed, sanctions are mainly political instruments with the following objectives: (i) to *coerce*, meaning that sanctions are enforced with the logic of inducing the targeted country to change its behavior by means of coercion; (ii) to *constrain*, whereby sanctioning measures are applied with the rationale of restricting assets and resources of the targeted country which appeared to be necessary for the achievement of its objectives through its misconduct; and, (iii) to *signal*, whereby the international wrongful act is signaled and the responsible State is stigmatized within the international community.[3] These three objectives are not mutually exclusive, meaning that it may happen to have simultaneously more than one of the above-mentioned objectives in the same sanctioning regimes. Nonetheless, despite sanctions can have various objectives, each of them operates following different enforcing mechanisms.

The logic of sanctioning a State that has previously committed an international wrongful act resides on an array of assumptions. A paramount notion that is often taken into consideration by international scholars on sanctions is the one assuming that States within the international community are *lato sensu* rational beings capable of assessing by their own whether it is more cost-effective for them to continue to perpetuate the wrongful act and to be presumably sanctioned in a second instance by the international community, or if it is more convenient, always in terms of costs and benefits, to stop the norm violation in order to fulfill again the international obligations. Therefore, in most of the cases, sanctions, or the threat of sanctions, have a "sobering effect" on the wrongdoer. For instance, financial sanctions, especially those involving the interruption of economic and trade relations with the rest of the international community, may be too costly for the targeted State, since resulting into the deprivation of a variety of benefits that are commonly obtained by participating within the international world arena.[4] Consequently, sanctions have proven during time to be a fundamental tool of foreign

[3] F. Giumelli, "The Purposes of Targeted Sanctions", in T. J. Biersteker, S. E. Eckert and M. Tourinho, *Targeted Sanctions: the impacts and effectiveness of United Nations action*, Cambridge University Press, 2016, p. 38-40; S. E. Eckert, "The Evolution and Effectiveness of UN Targeted Sanctions", in L. van den Herik, *Research Handbook on UN Sanctions and International Law*, Edward Elgar Publishing, 2017, p. 58.

[4] D. W. Drezner, *The Sanction Paradox: economic statecraft and international relations*, Cambridge Studies in International Relations, Cambridge University Press, 1999, p. 15-17.

policy within the international community, not only for State actors, but also for international and regional organizations (particularly the UN and the EU). Apart from the "punitive strategy" that is generally inherent of sanctioning measures, they do possess a vital and intrinsic foreign policy dimension. As previously mentioned, one of the three main objectives that are generally addressed by such measures is the one consisting on *signaling and stigmatizing* which generally result into the diplomatic isolation of the targeted country.[5]

3. The UN charter and the sanctions' legal basis

In the quarter century that followed the collapse of the bipolar system established in the years of the Cold War, the resort to sanctions by the UN Security Council clearly intensified and diversified in relation to the distinct environments in which they were to be subsequently applied. Nevertheless, despite the several procedural and substantive transformations the UN sanctions regimes underwent over time, it has to be noted that the legal basis for resorting to such measures has remained unvaried.

In its mandate of being the guardian of the international security within the world community, the UN Security Council may decide to impose sanctions regimes, pursuant to the invocation of Chapter VII of the Charter, anytime it detects a threat to or a breach of international peace. Article 39 of the UN Charter confers upon the Security Council the power to establish whether there exists a threat to or a breach of international peace, as well as a material act of aggression, subsequently triggering the invocation of article 41 or 42 as the basis for non-forcible or forcible actions. Being sanctions generally acknowledged as non-forcible measures, it is clear that the invocation of article 39 by the UN Security Council unequivocally results into the application of article 41.

4. The Iraqi Sanctions Regime

Although the first comprehensive sanctions regimes on Southern Rhodesia (1968) and on South Africa (1977) were fundamental in order to set the basis for the subsequent Security Council's practice on sanctions, the real turning point in the final evolution of UN sanctions profoundly resulted from the events that characterized the Iraqi experience throughout the 1990s. The enforcement of the Iraqi sanctions regime originated from the military invasion of Kuwait by the Iraqi forces led by Saddam Hussein on 2 August 1990, which subsequently led to the outbreak of the Gulf War. The aggression was immediately condemned by the UN Security

[5] J. Forrer, *Economic Sanctions: sharpening a vital foreign policy tool*, Atlantic Council, Global Business and Economics Program, 2017, p. 3.

Council, sitting in an emergency meeting, through the adoption of Resolution 660.[6] However, Resolution 660 not only was an instrument for the Security Council to simply condemn the invasion perpetrated by the Iraqi government against Kuwait, but rather was adopted with the final objective of determining the aggression as a serious breach of the international peace and security, pursuant to the authority conferred to the Council by article 39 of the UN Charter, and to demand the unconditional withdrawal of the Iraqi army from the Kuwaiti territorial space. Because of the failure of the Iraqi government to fully comply with the demands requested by the Security Council, a second resolution was further adopted by the Council, which finally provided, under the umbrella of Chapter VII of the UN Charter, for mandatory sanctioning measures and consequently established the 661 sanctions regime against the Iraqi State.[7] From the outbreak of the Gulf War, several resolutions on the Iraqi case came after, all reinforcing the invocation of Chapter VII of the UN Charter and with the general purpose of elucidating and or expanding the scope of application of the 661 sanctions regime.

Nevertheless, by the end of the Gulf War in February 1991, the legal basis for the prolonged application of the sanctions regime against Iraq changed. Indeed, in the subsequent decisions, starting from Resolution 687,[8] the Security Council, while determining the nature of the Iraqi wrongful behavior, pursuant to article 39 of the Charter, did not refer anymore to a breach of peace, but rather to a threat to the international peace or security posed by the widespread presence of WMDs in the area.[9] This shift by the Security Council, from the determination of a breach of the international peace and security in Resolution 661 to the determination of a threat to the collective security system in Resolution 687, advanced legal reservations on the faith of the sanctions regime against Iraq. As a matter of fact, two possible interpretations can be derived from such a change in the nature of the Security Council's determination of the relevant circumstances: first, the conclusion of the Gulf War in February 1991 could mean, in the Security Council's perspective, also the parallel dissolution of the existence of a breach triggering the invocation of Chapter VII of the UN Charter, which resulted, for instance, into the adoption of the "threat" terminology; second, the decision to change the qualification of the situation from "breach" to "threat" simply meant for the Security Council a way for reiterating the persistence of such a breach of the international peace and security, without *de facto* necessarily using the same terminology.[10] Clearly, we cannot determine with complete certitude

[6] *UN Security Council Resolution 660* (August 2, 1990), UN Doc. S/RES/660.
[7] *UN Security Council Resolution 661* (August 6, 1990), UN Doc. S/RES/661, operative clauses 2-4.
[8] *UN Security Council Resolution 687* (April 3, 1991), UN Doc. S/RES/687.
[9] J. Matam Farrall, *United Nations Sanctions and the Rule of Law*, Cambridge University Press, 2009, p. 262-263.
[10] *Ivi*, p. 263.

which was the reason behind the decision by the Security Council to modify the qualification of the situation. Nevertheless, both interpretations enable us to better understand some specific elements contained in Resolution 687. By following the former interpretation, it is clear that it was then necessary for the Security Council to determine an additional motivation, in the form of a threat to the peace and security of the international community, able to justify the invocation of Chapter VII of the UN Charter and the enforcement of a sanctions regime against Iraq. For instance, this reasoning enables us to understand why Resolution 687 effectively stresses the need for condemning Iraq for the widespread presence of weapons of mass destruction within the territory, which arguably represented for the Security Council an additional incentive for qualifying such a circumstance as a threat to the international peace and security. Conversely, by following the latter interpretation, Resolution 687 configures as a further device with the objective of strengthening and expanding the already existing sanctions regime against Iraq. Accordingly, in this case the continuation of the comprehensive sanctions regime was not explicit, but rather implicit, as confirmed, firstly, by the reiteration of all the previous resolutions adopted on the conflicts derived from the Iraqi invasion of Kuwait, among which there was also Resolution 661, and, secondly, by the decision of the Security Council to expressly mention that, pursuant to the compliance with the disarmament demands, the entire comprehensive sanctions regime against Iraq would have permanently ceased.[11]

Following the overthrow of Saddam Hussein and the collapse of his regime in 2003, which occurred in the framework of the Second Gulf War, the Security Council adopted Resolution 1483,[12] reiterating in its pre-ambulatory clauses the notion of complying with the previous disarmament demands as an essential condition for terminating the sanctions regime against the Iraqi State. In addition, noting that the situation still constituted a threat to international peace and security and that it was acting under the legal framework of Chapter VII, the Security Council modified the arrangement of the sanctions regime against Iraq: indeed, among all the sanctions imposed, only the arms embargo still remained effective, together with new financial measures in the form of the funds and assets freezing. The main reason behind this decision by the UN Security Council was to alleviate the hardship for the Iraqi citizens caused by the comprehensive sanctioning measures. Finally, through the adoption of Resolution 1518,[13] the Security Council launched a new monitoring administrative committee, replacing the 661 Sanctions Committee, with the additional mandate of identifying additional entities, whether

[11] *Ivi*, p. 266.
[12] *UN Security Council Resolution 1483* (May 22, 2003), UN Doc. S/RES/1483.
[13] *UN Security Council Resolution 1518* (November 24, 2003), UN Doc. S/RES/1518.

enterprises or individuals attached to the regime, whose financial funds and assets should be frozen.[14]

5. The humanitarian concerns resulted from The 661 Iraqi Sanctions Regime and the transition towards "smart" sanctions

The comprehensive sanctions enforced against Iraq pursuant to Resolution 661 has been one of the most controversial and questioned sanctions regimes in the UN Security Council's history and practice. As a matter of fact, never before has a sanctions regime caused such sustained economic distress for a country, turning the Iraqi financial levels and performance comparable to the ones of the poorest nations, not only in the Middle-Eastern region, but in the entire globe.[15] Most importantly, the humanitarian impacts of the comprehensive international sanction on the Iraqi population marked one of the most profound human tragedies during the 1990s. For instance, many Iraqi people, already under the oppression exercised by the totalitarian regime led by Saddam Hussein, also suffered the massive humanitarian consequences derived from one of the harshest economic sanctions in the human history. Therefore, the Iraqi population has harshly suffered from the financial and humanitarian impacts the international comprehensive sanctions regime, particularly embargoes, exercised on the country. This has been reported by several international organizations, as well from the United Nations, which in 1995 adopted Resolution 986,[16] also known as "oil for food", whose main objective was to literally exchange the incomes obtained in trading Iraqi oil with foods, medicine and other primary goods, as a temporary device to ensure humanitarian needs for the Iraqi population, as well as to compensate the victims of the war between Iraq and Kuwait. Despite the enforcement of Resolution 986 has evidently improved the overall humanitarian and health condition within the Iraqi State, especially in the Kurdish territory which was no longer under the authority of Hussein's regime, it failed to solve the profound human tragedy the Iraqi population was still living.

As an evidence of that, in the following years, several international organizations, also within the UN framework, such as the United Nations Children's Fund (UNICEF), the Food and Agriculture Organization (FAO) and the World Food Programme (WFP), reported throughout the mid-1990s the enormous intensity of the social impacts exercised by the sanctions regime

[14] J. Matam Farrall, *United Nations Sanctions and the Rule of Law*, cit., p. 274.
[15] A. H. Cordesman and A. S. Hashim, *Iraq: Sanctions and Beyond,* Boulder, CO: Westview Press, 1997, p. 127.
[16] *UN Security Council Resolution 986* (April 14, 1995), UN Doc. S/RES/986.

on the Iraqi population, especially on women and children: in 1996, each month more than 4500 children under the age of five years died from hunger and disease.[17] In several of his reports to the UN Security Council, Secretary-General Kofi Annan admitted the increasing humanitarian concerns derived from the harsh human tragedy the Iraqi population was experiencing and explicitly identified as a principal cause for such a humanitarian distress the long-term destructive impacts of the general embargo imposed by UN member-States pursuant to the decision by the Security Council disposing the establishment of the sanctions regime against Iraq. Using Secretary-General Kofi Annan's words: *"in the case of Iraq, a sanctions regime that enjoyed considerable success in its disarmament mission has also been deemed responsible for the worsening of a humanitarian crisis – as its unintended consequence".* [18]

The humanitarian crisis in Iraq, resulted from the unintended impacts of the comprehensive international sanctions against the country, generated wide debate over the faith on the use of sanctions, not only among international scholars, but rather also within the United Nations. The general idea was that sanctions should configure as instruments of the system of international relations, capable of coercing the targeted State to change their illegitimate policies or behavior, as well as constraining its capability to access resources needed to achieve its objectives through its misconduct, but at the same time able to avoid possible unintended repercussions on innocent civilians, as occurred in the Iraqi case, which could lead to a situation of violation of international human rights. This ultimately resulted into a gradual transformation of UN sanctions which epitomized into the shift from comprehensive sanctions, impacting not only on the economic performance of the targeted State, but also on the civilian population, as in the case of Iraq in the early 1990s, to the use of more "smart" or targeted measures, with the general purpose of impacting exclusively on those individuals and entities responsible for the actions posing a threat to the international collective security system, and thus limiting the effects of such measure on the alleged wrongdoer.

6. Understanding UN targeted sanctions and how they differ from comprehensive sanctions

In modern times, international targeted sanctions have become the most vital and indispensable instrument at the disposal of the UN Security Council, which might resort to such measures whenever addressing threats to the peace and to the international security system. As a matter

[17] UNICEF Press Release, *Disastrous Situation of Children in Iraq*, (New York: UNICEF, 1996).
[18] UN Press Release SG/SM/7360 - *Secretary-General Kofi Annan Reviews Lessons Learned During "Sanctions Decade" in Remarks to International Peace Academy Seminar*, (April 17, 2000).

of fact, especially starting with the beginning of the new century, the UN Security Council has substantially expanded its activities of enforcing targeted sanctions against member-States, as well as other international legal entities. Moreover, this practice has also enlarged due to the increased skepticism many UN member-States have in resorting to the use of armed military force, pursuant to the right of self-defense enshrined in article 51 of the UN Charter, in response to breaches of international peace and security. Despite the procedural and substantive transformations the UN sanctions regimes underwent beginning with the Iraqi experience, which resulted into the adoption of targeted sanctions, it has to be noted that the legal basis for resorting to such measures has remained completely unvaried. Even in the case of targeted sanctions, as for comprehensive sanctions, the constitutional basis must be found on the conjunctive use of article 39, for the determination of the threat to or breach of the international peace and security, and article 41, or more generally Chapter VII of the UN Charter, for the disposition of non-forceful measures.

Nowadays, the UN Security Council resorts to the use of targeted sanctions in order to address an array of different threats to international peace and security. If in the last century, the main reasons for enforcing sanctioning measures against a State were mainly civil wars and acts of aggression, in the last decades, the Security Council has disposed international targeted sanctions in order to respond particularly to three specific contemporary threats linked to the proliferation of weapons of mass destruction, international terrorism and the violation of human rights. Nevertheless, it must be noted that the Council has further expanded its practice by enforcing targeted sanctioning measures also in order to address nontraditional threats to international peace and security.

For instance, UN targeted sanctions do not differ from comprehensive sanctions either in terms of altered constitutional framework or in the types of international threats addressed therein. Rather, the main difference between UN targeted and comprehensive sanctions lies in the distinctive notion of the former measure. Indeed, targeted sanctions are "discriminatory policy measures",[19] as they exclusively focus on targeting the individuals and decision-makers responsible for perpetrating the illegitimate wrongful act. Instead, being comprehensive sanctions indiscriminatory measures, since they did not address specific targets, they rather were enforced comprehensively against the entire responsible State, also impacting on the innocent civilians which subsequently were forced to suffer from the adverse effects exercised by such sanctions regimes. Nonetheless, this does not necessarily mean that targeted sanctions regimes may not negatively impact *a priori* on societies and on the lives of innocent people. As

[19] S. E. Eckert, *The Evolution and Effectiveness of UN Targeted Sanctions*, cit., p. 52-53.

a matter of fact, targeted sanctions, being discriminatory policy measures, which means that they specifically address individuals responsible for the illegitimate wrongful act, and whose prolonged perpetration *de facto* triggered such measures, may still impact negatively on societies, but certainly will do it limitedly to respect to comprehensive sanctions. For instance, despite they may lead to unintended humanitarian negative effects on the civilian population of a targeted State, these impacts may still be more normatively tolerable to respect to the ones exercised on the population by comprehensive sanctions.[20]

7. UN targeted sanctions as counter-terrorism measures

The modern diversification and complexity achieved by UN targeted sanctions strictly depend also on the typologies of threats the UN Security Council must confront with. As a matter of fact, the last few decades have witnessed the further emergence within the international community of untraditional threats to the international peace and security, which have exercised a huge pressure on the Security Council in adapting its decision-making activity, as well as the diplomatic instruments and devices at its disposal, to respond effectively to these new circumstances menacing the stability of the international collective security system. In this light, one of the major examples is the UN counter-terrorism sanctions regime which *de facto*, starting from the post-9/11, completely epitomized the process of transformations experienced by UN sanctions, as instruments of international diplomatic relations, during the last decades. For instance, UN targeted sanctions as counter-terrorism measures have progressed towards individualization, and subsequently also towards formalization, as never before and as no other sanctions regime had done within the UN framework.

In order to understand the substantive and procedural transformations the UN sanctions have experienced especially in the international terrorism dimension, it is first relevant to explore the structure of the original counter-terrorist sanctions regime, meaning the 1267 Al Qaeda Regime. For instance, the 1267 sanctions regime established by the UN Security Council in 1999 against Al Qaeda has opened the way towards the individualization of UN sanctions, and consequent formalization. The Al Qaeda Sanctions Regime is highly relevant in the present discussion, since one of the first targeted sanctions disposed of by the UN Security Council as a counter-terrorism measure. Indeed, the primary mandate of the 1267 sanctions regime was specifically that of targeting the Taliban regime that was *de facto* exercising authority in the territory of the

[20] T. J. Biersteker, M. Tourinho, and S. E. Eckert, "Thinking about United Nations Targeted Sanctions", in *Targeted Sanctions: the impacts and effectiveness of United Nations Actions*, Cambridge University Press, 2016, p. 13.

Afghani State. Thus, the above-mentioned sanctions regime perfectly fit within the new practice of the UN Security Council's "smart sanctions",[21] as it addressed exclusively the decision-makers responsible for the perpetration of internationally wrongful acts, and not the State of Afghanistan, which *de facto* was under the control of the Taliban and thus unable to stop by its own the continuation of the misconduct.

Nevertheless, the peculiarity and relevance of the 1267 sanctions regime does not lie only on the concept of being one of the first smart sanctions established by the Security Council when confronted with a terrorist threat, but rather on the fact that its mandate was further enlarged after the Council passed Resolution 1390[22] in 2002, creating also a huge debate on sanctions and their related legitimacy among international law scholars and academics. Indeed, by adopting Resolution 1390, the Security Council disposed that the 1267 sanctions regime was no longer aimed at addressing the political leadership in Afghanistan, as the Taliban were almost being totally removed from power as requested with Resolution 1267, but rather the entire Al Qaeda terrorist network that was behind the Taliban regime in the country. Resolution 1390, for instance, resulted to be a real turning point in the UN Security Council practice, as it represented the first sanctions regime adopted by the United Nations against a legal entity that was not a State. This implied that, being not linked to a territorial dimension, the 1267 sanctions regime was to become the very first experience of a UN targeted sanctions regime with global reach.[23]

Furthermore, the innovative nature of Resolution 1390 not only lied in the concept of turning the 1267 sanctions regime into a regime addressing individuals belonging to an international terrorist network, and thus with a global dimension, but also on the fact that was adopted by the Security Council exclusively in response to acts of international terrorism.[24] This meant that for the first time the Security Council was determining, pursuant to the provision contained in article 39 of the UN Charter, acts of international terrorism, committed by groups of individuals belonging to a terrorist organization, as threats to international peace and security. For instance, this notion comported also a parallel shift in the interpretation of article 39 of the Charter which, before the advent of international terrorism as a global threat within the international

[21] D. Cortright and G. Lopez, "Reforming Sanctions", in D. Malone, *The UN Security Council: from the Cold War to the 21st century*, (Lynne Rienner Publishers 2004).
[22] *UN Security Council Resolution 1390* (January 16, 2002), UN Doc. S/RES/1390.
[23] I. Cameron, *UN Targeted Sanctions and the ECHR*, 72 Nordic Journal of International Law, 2003, p. 159-164.
[24] L. Ginsborg, "UN Sanctions and Counter-Terrorism Strategies: moving towards thematic sanctions against individuals?", in L. van den Herik, *Research Handbook on UN Sanctions and International Law*, Edward Elgar Publishing, 2017, p. 75.

community, was necessarily resorted by the UN Security Council to determine whether acts committed only by States could represent a threat to or a breach of peace and security. Clearly, in order to include international terrorism as an act of aggression committed by non-State actors, such as individuals and groups of individuals, within the set of international threats triggering a UN counter-response, the growing adoption by the Security Council of individual sanctions also resulted into a simultaneous procedural individualization of the interpretation of article 39 or, more broadly, of the entire UN Charter, which instead was initially framed by the founding fathers to address specifically the inter-state dimension of the traditional body of international law.

The 1267, taken in conjunction with Resolution 1390, had become, for instance, the point of departure for developing a new practice within the UN Security Council, rooted into the adoption of sanctioning measures with global reach and against individuals, belonging to an international terrorist network, responsible for the commitment of acts of international terrorism. Finally, it has to be noted that another novelty epitomized in the 1267 sanction regime, derived by the application of Resolution 1390, was the increased degree of indeterminacy of UN targeted sanctions.[25] Therefore, taking past targeted sanctions regimes disposed of by the Security Council as evidence, what emerges is that the category of individuals addressed by Resolution 1390 is profoundly widened and clouded. As a matter of fact, to respect to previous resolutions targeting individuals, Resolution 1390 does not address decision-makers, the political or the militia leadership, but rather individuals and entities associated to Al Qaeda, the Taliban, and most importantly, Osama bin Laden. This profoundly increased the level of indeterminacy of targeted individuals, as it was much more complex for the responsible authority, as well as for the UN member-States enforcing such sanctions regime within their own territory and within the international community, to clearly determining and identifying individuals meeting those criteria.

8. The listing procedure of the 1267 Sanctions Committee

Beginning with the 1267 Al Qaeda Sanctions Regime, the UN targeted sanctions started to further move towards individualization and formalization, as well as globalization of sanctions, resulting into the listing of individuals on the basis of their presumed attachment to the international terrorist network, and subsequent determination of representing possible threats to the international peace and security. The requests of listing suspected individuals, groups and other entities associated with Al Qaeda, since supporting or financing terrorist activities, into

[25] *Ibidem*.

the 1267 sanctions committee, also known as the "Consolidated List", are generally submitted by UN member-States. Nevertheless, only in 2005, after the adoption of Resolution 1617[26] and Resolution 1822,[27] was a clear delineation of the activities determining whether an individual, group, undertaking and legal entity could be associated to the international terrorist network brought in. Accordingly, UN member-States started to request the listing of individuals anytime they possessed the evidence of their participation into the financing and planning of terrorist activities, as well as anytime their efforts were directed towards supporting Al Qaeda as an international terrorist network.

When requesting to add into the Consolidated List a suspected individual, UN member-States should also submit, but are not necessary obliged to so, an irrefutable evidence to the 1267 Sanctions Committee – whose nature, meaning whether it had been obtained through media, the explicit admission by the suspect or intelligence, had also to be demonstrated – proving the association between the suspected individual and the terrorist organization.[28] Once the member-State submits the request for listing an individual assumed to be associated to international terrorist activities, the name of the suspected individual is added into the Consolidated List in the circumstances in which there is no opposition by one of the members sitting in the 1267 Sanctions Committee. This implies that individuals are enlisted into the Consolidates List pursuant to a tacit consensus of each member-State within the Sanctions Committee. If consensus is not achieved, then the listing request must be submitted to the Security Council which will decide therein. It must be noted, however, that similar circumstances are generally unlikely. As a matter of fact, the idea that there is not a mandatory requirement for UN member-States to present supporting evidence when requesting to add individuals in the Consolidated List, makes the possibility of an objection of one State sitting in the Committee to the listing of an individual much more infrequent. Three days after the Committee accepts the listing of an individual or entity within the Consolidated List, the country in which the individual is national, as well as the country in which the individual or entity resides, are notified and they subsequently have to undertake all the possible actions to inform as soon as possible the listed subject. This last notion has been one of the major debated issues related to the activity of sanctioning individuals suspected to be associated with international terrorist networks. Indeed,

[26] *UN Security Council Resolution 1617* (July 29, 2005), UN Doc. S/RES/1617.
[27] *UN Security Council Resolution 1822* (June 30, 2008), UN Doc. S/RES/1822.
[28] A. Ciampi, "Security Council Targeted Sanctions and Human Rights", in Bardo Fassbender, *Securing Human Rights? Achievements and Challenges of the UN Security Council*, Oxford University Press, 2011, p. 107.

the absence of any type of *ex ante* form of protection of listed individuals has always been assumed to infringe upon the integrity and due process of such mechanism.

Despite the lack of *ex ante* protection, there exist forms of *ex post* remedies individuals can apply to request to be de-listed. Prior to 2009, the only possible procedure to request the delisting of the name of an individual or legal entity from the Consolidated List was by referring to the Focal Point, as established in Resolution 1730.[29] Nevertheless, as later criticized by international scholars, the maximum that a petitioner could achieve by referring his delisting request to the Focal Point, was to have his demand included in the political agenda of the Consolidated List, something that was subsequently considered not particularly adequate in terms of guarantees of individual procedural rights. Following the growing human rights concerns related to the listing and delisting procedures to the Consolidated List, in 2009 the UN Security Council provided in Resolution 1904[30] also for the establishment of the Office of the Ombudsperson with the mandate of flanking both the Sanctions Committee and the Focal Point in the delisting activities. Particularly, the Office of the Ombudsperson has to gather information on the individuals requesting to be delisted, as well as it has to maintain dialogue, as a mediator, with the petitioner during the entire procedure. Indeed, at no point the petitioner will be heard by the Sanctions Committee, nor he has the right to directly access to and dialogue with the Committee.

Therefore, as provided by Annex II of Resolution 1904, the Ombudsperson should provide to the Sanctions Committee a "Comprehensive Report" containing all the relevant information and data collected by the Office concerning the petitioner and his request to be delisted. Accordingly, the Sanctions Committee has thirty days in order to review the report and decide whether the name of the petitioner will remain within the Consolidated List by rejecting his request, or whether it will be delisted, and thus accepting his request. Nevertheless, it must be recalled that in both cases the outcome of the entire procedure must be obtained through general consensus among the member-States sitting in the Sanctions Committee. This also implies that, during the overall procedure, each State can prevent the delisting at any time, bringing the request to the Security Council. Following, in the cases in which the request should be referred to the Security Council, the approval or rejection of the delisting request will occur through the normal decision-making mechanisms inherent to the Council.[31] For instance, the delisting would be rejected pursuant to a majority vote against the petitioner's request or any time,

[29] *UN Security Council Resolution 1730* (December 19, 2006), UN Doc. S/RES/1730.
[30] *UN Security Council Resolution 1904* (December 17, 2009), UN Doc. S/RES/1904.
[31] A. Ciampi, *Security Council Targeted Sanctions and Human Rights*, cit., p. 110.

despite obtaining a majority vote in favor of disposing of the delisting of the individual, one of the permanent members of the Security Council decides to exercise its veto power.

9. Unintended consequences: the impacts of UN targeted sanctions on civilians' human rights

As already maintained in the course of this present work, the main reason at the basis of the rationale for the UN to initiate a process of reform of the structural design of sanctions, which eventually led to the establishment of targeted measures, was fundamentally rooted on the growing humanitarian concerns generated by many of the comprehensive sanctioning regime imposed by the Security Council by the beginning of the 1990s, which ended to infringe the security and safety of many the innocent civilians populations of those States under the sanctions regime. Paradoxically, however, also targeted sanctions, despite in lower measure, do generate unintended humanitarian effects impacting on individual human rights. As a matter of fact, especially UN targeted sanctions implemented as policy measures to counter fight the terrorist threat to the international peace and security have generated an extensive debate among international law scholars and academics over their potential implications on individual human rights, particularly individual procedural rights, as also underlined in the previous chapter. Some international law scholars have tried to justify the existence of unintended consequences on the procedural rights of listed individuals by identifying such impacts as necessary side effects of UN sanctions whose aim is that of guaranteeing the maintenance of the international peace and security, thus the security of the world society against the rights of the single individual. This would imply the identification of the UN Security Council as an international decision-making body that is, in order to completely perform its functions and mandate as provided by the Charter, necessarily *legibus solutus*. Indeed, in the case of targeted sanctions on individuals, by assuming the UN Security Council to be a *legibus solutus*, one may also justify the reason for which the Council can exercise its authority to limit the enjoyment of certain rights, such as the right to fair hearing, by individuals suspected to be associated with international terrorist networks.[32] Nevertheless, such reasoning based on the identification of the Security Council as a *legibus solutus*, as further advanced by the majority of international law scholars, cannot be assumed to be lawfully correct. Rather, it is extremely inconsistent with the provisions contained within the UN Charter, which evidently recognizes an extensive authority upon the Security Council, but acknowledging at the same time that its power must

[32] M. Lugato, "Sanctions and Individual Rights" in N. Ronzitti, *Coercive Diplomacy, Sanctions and International Law*, Brill Nijhoff, 2016, p. 185.

always be exercised in accordance with the Charter and the body of international law norms and principles, among which we find also individual human rights.[33] Therefore, the resort by the UN Security Council to targeted sanctions on individual, especially under the framework of the 1267 Al Qaeda and Taliban Sanctions Regime has *de facto* resulted into the creation of an extensive debate on the question as to which extent the Security Council can push itself when dealing with sanctioning measures ultimately addressing individuals and other international entities and restricting their own liberties as well as procedural rights on the basis of their presumed involvement, whether direct or indirect, to activities and acts perpetrated by the international terrorist organizations. As UN sanctions started targeting private entities and individuals, without granting them the complete guarantee of procedural rights as suspected to be attached to international terrorist organizations, concerns over the question of legitimacy of such measures started to emerge within the international scholarship on sanctions. The sanctions regime against Al Qaeda and the Taliban did not actually generated *per se* the fair process questions, but simply intensified the already existing concerns related to lack of *a priori* protections of enlisted individuals and private entities, as well as the absence of concrete means of reviewing the listing of their names.[34] This inevitably led the international scholarship to contest this seminal legal *lacunae*, considering that was to be perpetrated by the UN Security Council, meaning the primary guardian of the international collective security system, as well as the main institution in charge of protecting individual human rights. Following the emerging position of the majority of international scholars on the sanctions discipline, the necessity for the UN Security Council to further protect the stability of the international system, as well the safety and security of the world population from the threat posed by international terrorism, was not a plausible rationale justifying the absence of fair and clear procedures enabling enlisted individuals to be heard and to request to be removed from the Consolidated List. Finally, it was also generally maintained that not only had the Security Council to respect human rights being the guardian of the international security system, but also because the UN Charter itself advances throughout its clauses the obligation for the Council to respect the body of international law norms and principles, among which there is also human rights law, when fulfilling its mandate and functions. Nonetheless, it is noteworthy to underline the idea that this political criticism on UN individual sanctions was not only directed by the international scholarship, as well as some State within the international community, but rather was emerging

[33] M. Lugato, *Sono le Sanzioni Individuali Incompatibili con le Garanzie Processuali?*, Rivista di diritto internazionale, 2010, p. 320.
[34] K. Prost, "Security Council Sanctions and Fair Process", in L. van den Herik, *Research Handbook on UN Sanctions and International Law*, Edward Elgar Publishing, 2017, p. 216.

even internally in the UN system. As a matter of fact, in 2005, both the UN General Assembly and Secretary-General Kofi Annan mobilized in order to enhance the need and paramount obligation for the Security Council to ensure the complete protection of individual procedural rights in its counter-terrorism commitment. Following, the next year, Secretary-General Annan reiterated the need for the Security Council to reconsider the sanctioning mechanism on individuals with the view of setting minimum standards of protection as well as increasing the transparency of the listing and delisting procedures. Furthermore, he also identified four main pillars, derived by the due process standards applied domestically by most of the UN member-States, which were to be ultimately addressed by the Security Council while reforming the listing mechanism of UN individual sanctions: (i) the right of the enlisted individual to be informed; (ii) the right of the enlisted individual to be hear by competent organs; (iii) the right of the enlisted individual to review; (iv) the duty of the Security Council to periodically review the targeted sanctions directed towards individuals.[35]

Evidently, the extensive debate questioning the fairness process of UN individual targeted sanctions highly impacted on the consequent activity of the Security Council as gradual improvements on the listing procedure were initiated to be discuss internally to the organization and subsequently implemented. Several resolutions were adopted by the UN Security Council, with the view of further amending the 1267 Sanctions Committee, through the introduction of new devices increasing the level of protection of individual procedural rights. This demonstrated how the Security Council itself acknowledged the lacuna of the individual sanctions system on the degree of protection of the rights of enlisted individuals, to the point of introducing new measures specifically addressing such issue, such as the notification of the targeted individual, the provision of a narrative summary explaining the reasons for the listing of the name of the suspected individual, periodic review and, most importantly, the establishment of a new mechanism, called Focal Point, accessible by the listed individuals to request to be delisted from the Consolidated List. These modifications to the 1267 Sanctions Committee evidently resulted into advances in the general discourse of fair process of UN individual sanctions, as prior to the establishment of the Focal Point there was no mechanism acting as a mediator between the targeted individuals and the Sanctions Committee. As a matter of fact, these improvements were ultimately welcomed by the international scholarship on sanctions, despite they proved quite immediately to fall short in the protection of individual procedural rights. Indeed, despite the establishment of the Focal Point was certainty a step forward in the protection of enlisted individuals' rights, *de facto* it lacked many of the aspects

[35] *UN Security Council 5474th Meeting*, (June 22, 2006), UN DOC S/PV.5474, p. 4-5.

that were previously highlighted by Secretary-General Annan, such as the authority to make decisions over the possibility to review the listing of a targeted individuals, as well as the power to provide remedies.[36]

From the establishment of the Focal Point, further improvements on the listing and delisting mechanisms were only achieved following the judicial intervention of external actors, meaning regional courts, such as the European Court of Justice in Luxembourg and the European Court of Human Rights in Strasbourg. The key case that ultimately shed lights on the question of fair process and which consequently initiated a new wave of reforms inside the sanctions system under the UN framework was the *Kadi* judgment by the ECJ. The relevance of the *Kadi* saga lied essentially on the catalyst function it exercised on the jurisprudence of other national and regional courts. Indeed, many were the courts that, founding themselves in front of similar cases, subsequently took inspiration from the final judgment by the ECJ, further pointing out the inadequacy of the Focal Point mechanism as for what concerned the protection of individual procedural rights. Accordingly, international law scholars agree in maintaining that the intervention of the ECJ has certainly contributed to better understand the criticalities of the UN system of individual sanctions. Viewed from this perspective, the process of judicial intervention started by the ECJ with the seminal case on *Kadi* induced the Security Council, as a driving political force, to rethink the primary features at the basis of the sanctioning system under the UN framework.[37] This subsequently resulted into the establishment in 2009 of the Office of the Ombudsperson through the adoption of Resolution 1904. The new body was for instance framed as an actor internal to the UN framework in charge of reviewing and assessing the validity of the individual delisting request. For instance, it is clear that the ECJ decision on *Kadi* has contributed to further democratize the UN system, affirming the urgency for the Security Council's measures to be necessarily consistent with the human rights principles contained in both the international customary and treaty law, including the UN Charter.[38] For the very first time, indeed, the UN had introduced a reviewing mechanism for individual sanctions which ultimately increased the degree of protection of individual procedural rights by the 1267 Sanctions Committee, including the previously mentioned features which were demanded in 2006 by Secretary-General Kofi Annan, meaning the right to be informed, the right to be heard and the right to review.

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[36] K. Prost, *Security Council Sanctions and Fair Process*, cit., p. 219.
[37] *Ivi*, p. 223.
[38] F. Francioni, "Kadi and the Vicissitudes of Access to Justice", in M. Cremona, F. Francioni and S. Poli, *Challenging the EU Counter-Terrorism Measures through the Courts*, EUI Working Paper, AEL, 2009/2010, p. 29.

10. The European Union and the Kadi case: the review on UN sanctions

The role of the European Union, particularly through the work of the European Court of Justice, has acquired considerable relevance in the recent discussions over the protection of the individual procedural rights related to the debate on UN sanctions. As we have seen in the previous chapters, the UN system has recently failed to grant full procedural rights to individuals enlisted to the Sanctions Committees. This has led those persons to contest the validity of the UN sanctions, on the basis of breaches of individual rights – among which the most relevant for our discussion is the right to a fair hearing – , by bringing those cases in front of both domestic and regional courts, such as the ECJ and the ECtHR, with the view of reviewing those measures. In order to understand whether reviewing UN sanctions is possible, it is first necessary to explore the rules of interpretations of the Security Council's resolutions, meaning the legal instruments used by the UN in order to dispose of sanctions. In order to do so, international scholars have started to refer to the rules of interpretation of international treaties stipulated in the Vienna Convention of the Law of Treaties (VCLT).[39] Drawing on the provisions contained in the VCLT, international academics have acknowledged the notion identifying the Security Council as the ultimate interpreter of UN binding resolutions, being fundamentally also their author, which must be interpreted in compliance with the UN Charter, meaning the legal and constitutional framework on which they should be based on. Nonetheless, despite there is an overall consensus in drawing on the rules of interpretation of treaties provided by the VCLT in order to understand how to interpret the UN Security Council's resolutions, some international scholars have moved the critique that the transposition of such model basically from the context related to practice of States to bargain treaties to the one of UNSC resolutions may not be completely satisfactory. Indeed, as subsequently argued by some scholars throughout their deductions, being the UN an international organization, with universal purposes and functions, it is not fully appropriate to maintain that only the UN Security Council may interpret its own resolutions, as they will ultimately be enforced by its member-States. Accordingly, it is clear that *stricto sensu* domestic and regional courts do not have jurisdiction to interpret resolutions adopted by the UN Security Council; nonetheless, they do possess an "incidental jurisdiction"[40] to interpret measures enforcing UN resolutions at both the domestic and regional level anytime there subsists in the view of the responsible court a question of law undermining their validity. Reasonably, these interpretations will have a binding effect only the

[39] *Vienna Convention of the Law of Treaties*, entered in force on January 27, 1980.

[40] P. Nevill, "Interpretation and Review of UN Sanctions by European Courts: comity and conflict", in L. van den Herik, *Research Handbook on UN Sanctions and International Law*, Edward Elgar Publishing, 2017, p. 420.

State, in the case of the domestic court, and on the member-States, in the case of the ECJ. One of the most relevant law disputes related to the implementation of UN sanctions on individuals is the *Kadi* saga as ruled by the ECJ. The focal point at the basis of the *Kadi* case lies in the procedure of listing individuals as framed with the 1267 Sanctions Committee, established after the adoption by the Security Council of Resolution 1267, as mentioned in the previous chapters, in response to the emerging threat represented by the terrorist network of Al Qaeda, as well as the EU measures subsequently enacted in order to guarantee uniformity in the implementing activity among the EU member-States. Indeed, the Security Council's Resolution 1267 dated 1999, as well as the subsequent resolutions part of the 1267 Sanctions Committee, were immediately implemented by the EU through the use of Common Positions and Common Regulations intended to ensure uniformity in the application of the sanctions regime at the domestic level.[41] Mr. Kadi firstly challenged, in *Kadi v. Council and Commission* (2005),[42] the validity of the EU Council regulation enforcing the UN individual sanctions in front of the European Court of First Instance (CFI), explicitly demanding the dissolution of the Regulation implementing the listing procedure of targeted individuals under the Al Qaeda and Taliban Sanctions Committee, on the basis of the violation of his right to fair hearing. *Stricto sensu*, the CFI, and subsequently the ECJ, were requested to define whether the implementation of the Security Council Resolution 1267 through the adoption of EU Regulation 881/2002 had consequently made the relevant UN sanctioning measures immune from review since this would have undermined the principle of primacy contained in article 103 of the UN Charter.[43] Accordingly, the difference between the final decisions achieved by the two courts, the CFI and the ECJ, resides perfectly in the diverging approaches used by the CFI and the ECJ relative to the interpretation of the previous rationale. For instance, we may argue that the CFI opted to rely on a more "internationalist approach",[44] as it recognized the principle of UN primacy as a paramount feature in its own judgment; contrarily, the ECJ relied more on a "conservative approach", due to its primary tendency of advancing, and further protecting, the EU

[41] E. de Wet, "Human Rights Considerations and the Enforcement of Targeted Sanctions in Europe: the emergence of core standards of judicial protection", in B. Fassbender, *Securing Human Rights? Achievement and Challenges of the UN Security Council*, Oxford University Press, 2011, p. 144.
[42] Case T-315/01, *Kadi v. Council and Commission* (2005), ECR II-3649 (Kadi(CFI)).
[43] C. Tomuschat, "The Kadi Case: what relationship between the Universal Legal Order under the auspices of the United Nations and the EU Legal Order?", in M. Cremona, F. Francioni and S. Poli, *Challenging the EU Counter-Terrorism Measures through the Courts*, EUI Working Paper, AEL, 2009/2010, p. 12; K. Lanaerts, *The Kadi Saga and the Rule of Law within the EU,* SMU Law Review, Vol. 67, Issue 4, Art. 4, 2014, p. 709.
[44] K. Lanaerts, *The Kadi Saga and the Rule of Law within the EU,* cit., p. 709.

constitutional identity.[45] Therefore, the CFI immediately rejected the request made by Mr. Kadi. The rationale behind such a decision was clearly based on the reasoning conducted by the CFI over the legitimacy of the measures disposed of by the UN Security Council. As a matter of fact, following the reasoning of the CFI, since the Council Regulations adopting the contested UN listing procedure had substantially and almost literally transposed the UN measures, as previously agreed by the Security Council, reviewing the validity of such EU measures necessarily meant to conduct also a substantive review of the validity of the pertinent Council's measures.[46] Accordingly, the CFI subsequently recognized the fact that the present court had not jurisdiction to initiate a review procedure over the legality of the Security Council's measures, as also confirmed by interpreting article 103 of the UN Charter, which enhances the supremacy of Council's decisions over other international law obligations, with the only exception of those derived from the body of international *jus cogens* norms. Consequently, the European CFI concluded that it would have rejected the claimant's demand not only on the basis of the lack of jurisdiction in reviewing the Security Council's measures, but also because, as derived from its interpretation of article 103 of the UN Charter, the Council had broad authority to temporarily suspend the right to fair hearing of an individual suspected to be associated to international terrorist networks, as this present right does not belong to the body of *jus cogens* norms.[47] In 2008, Mr. Kadi appealed the CFI's decision, bringing the case in front of the ECJ, which ultimately overturned the 2005 conclusions over the primacy of the Security Council's decisions. The ECJ in *Kadi v. Council of the European Union* (2008)[48] ruled that, following the cardinal principles at the foundations of the EU law, individuals listed under the 1267 Sanctions Committee were thus entitled to enjoy judicial protection. Therefore, these conclusions were achieved by the court through a dualist approach.[49] As a matter of fact, the reasoning of the ECJ centered on the notion of the body of EU law as an independent and autonomous legal system, which could not be "prejudiced by an international agreement",[50] meaning the UN Charter, despite it still maintained primacy in terms of international law.

[45] *Ibidem.*
[46] C. Tomuschat, *Primacy of United Nations Law – Innovative features in the Community Legal Order*, 43 CMLR, 2006, p. 543.
[47] E. Cannizzaro, "Security Council Resolutions and EC Fundamental Rights: some remarks on the ECJ decision in the Kadi case", in M. Cremona, F. Francioni and S. Poli, *Challenging the EU Counter-Terrorism Measures through the Courts*, EUI Working Paper, AEL, 2009/2010, p. 39; P. De Sena and M. C. Vitucci, *The European Courts and the Security Council: between dédoublement fonctionnel and balancing values*, 20 EJIL, 2009, p. 193-206.
[48] Case C-402/05P, *Kadi v. Council of the European Union* (2008), ECR I-461 (Kadi I).
[49] E. de Wet, *Human Rights Considerations and the Enforcement of Targeted Sanctions in Europe: the emergence of core standards of judicial protection*, cit., p. 146.
[50] Case C-402/05P, *Kadi v. Council of the European Union* (2008), ECR I-461 (Kadi I), paragraph 316.

Finally, the ECJ disposed the annulment of the EC listing of Mr. Kadi on the grounds of violation of the right to effective judicial review and fair hearing, as well as the breach of his property rights.[51]

The 2008 ECJ's decision on *Kadi I* was of seminal importance for an array of different reasons, among which the most relevant was the identification of a fallacy within the judicial protection foreseen by the UN system in the sanctioning procedures targeting individuals. As a matter of fact, the ECJ's conclusive decision on *Kadi* demonstrated the concreteness of one of the most relevant doubts moved by international academics on the practice of UN targeted sanctions on individuals. Therefore, the *Kadi* case showed that the UN system on individual sanctions had *de facto* failed to completely guarantee individual procedural rights to the persons that were enlisted in the Consolidated List. Prior to the ECJ's judgment on the *Kadi* case, indeed, the only possible procedure to request the delisting of the name of an individual or legal entity from the Consolidated List was by referring to the Focal Point, as established in Resolution 1730. Nevertheless, as this system did not grant the possibility to individuals to be heard directly by the Security Council, the Focal Point, as structured and framed, was far from guaranteeing full and effective protection of individual procedural rights. Consequently, many international scholars have maintained the idea that the intervention of the ECJ has contributed to shedding light on the criticalities of the UN system of individual sanctions. Viewed from this perspective, the recognition by the UN itself to reform the system of individual sanctions, which subsequently resulted into the establishment of the Office of the Ombudsperson, as the body in charge of reviewing and assessing the validity of the individual delisting request, must be understood as a derivation of the influential power exercised by the ECJ through its final judgment in *Kadi*.[52] For instance, the relevance of *Kadi I* was consequently embodied and expressed by the extensive commentary that immediately generated within the international law and European law academia. Therefore, analyzing the case from a European constitutional perspective, *Kadi I* was emblematic in that it underlined the autonomy of the European legal order from the body of international law.[53] The ECJ *de facto* clearly maintains in its judgment that the incorporation of international law within the body of European law may not appear

[51] *Ibidem*, paragraphs 354-366.

[52] P. Nevill, *Interpretation and Review of UN Sanctions by European Courts: comity and conflict*, cit., p. 429.

[53] C. Tomuschat, *The Kadi Case: what relationship between the Universal Legal Order under the auspices of the United Nations and the EU Legal Order?,* cit., p. 15-17.

automatic in the case in which fundamental rights, as also recognized by the EU in its functions of advancing and protecting the principle of rule of law, are at stake.[54]

As for what directly concerns Mr. Kadi, by June 2008 the UN engaged in starting to reform the 1267 Sanctions Committee against Al Qaeda and the Taliban. Accordingly, as established through the adoption of Resolution 1822, the Sanctions Committee had to communicate a summary of reasons for the decision of listing an individual, as well as to engage in periodic review of the names contained in the Consolidated List. Consequently, the 1267 Sanctions Committee provided such a summary to the French government, which subsequently communicated it to the EU Commission. Ultimately, the Commission informed on the same day Mr. Kadi that it would have not proceeded to delisting its name, but rather was to reconfirm his presence in the Council Regulation 1190/2008. This led Mr. Kadi to challenge again the validity of his listing which then resulted into the annulment of the relevant Regulation in 2010 and the subsequent ECJ's *Kadi II* judgment of 2013.[55] At the origin of *Kadi II*, both the EU Commission and the Council, together with the United Kingdom, challenged the previous decision by the ECJ. Accordingly, the two EU institutions, plus the UK, argued that the ECJ had resulted in erring in law since the level of the intensity of judicial review it had applied in *Kadi I* was too disproportionate and excessive due to an already erred examination on Mr. Kadi's arguments over the violation of his procedural rights.[56] Nevertheless, the ECJ immediately rejected the appeal arguing, in essence, that it was its duty to guarantee the review of EU measures, also when implementing UN Security Council Resolutions, in the light of the protection of fundamental human rights as a paramount feature of the EU constitutional identity. Despite the creation of the Ombudsperson, in the view of the ECJ, the UN had still not established a fully partial and independent judicial body with the mandate of ensuring the effectiveness of the delisting procedure and its conformity with the protection of the fundamental rights and disclosing sufficient information to those individuals added within the Consolidated List and thus affected by the sanctioning measures.[57]

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[54] K. Lanaerts, *The Kadi Saga and the Rule of Law within the EU,* SMU Law Review, Vol. 67, Issue 4, Art. 4, 2014, p. 711.

[55] Joined Cases C-584/10P and C-595/10P *European Commission & Ors v. Kadi* and *United Kingdom v. Kadi (Kadi II)*, Grand Chamber, 18 July 2013.

[56] *Ibidem,* ¶ 74.

[57] P. Nevill, *Interpretation and Review of UN Sanctions by European Courts: comity and conflict*, cit., p. 431.

11. Conclusion

In conclusion, this work has been conducted with the general purpose of exploring the main features at the basis of the international sanctions regime in the view of retracing its evolutive process in the course of the last two decades and the main effects brought by its transformative pattern. Indeed, the present work has proposed as an overall study on the progressive evolution of the UN practice on sanctions, investigating both on the procedural and substantive transformations such measures went on, as well as discussing on the main criticalities the two sanctions' models have originated throughout their application.

As may be deduced from the chapters composing this present work, the word "sanctions" still suffers the absence of an internationally recognized ultimate conceptualization of the terminology. Indeed, whenever referring to the word "sanctions" in general terms as an international instrument of coercive diplomacy, applicable both unilaterally and multilaterally within the international community, one of the first features international academics may take into consideration is the legal *lacuna* derived from the definitional question on international sanctions. Furthermore, despite the ILC has provided a legal distinction between sanctions, countermeasures and retorsions, which tends to be generally accepted, at least in theory, by international law scholars as it provides valuable criteria for determining the legal validity of international measures adopted within the collective security system, this ends up not to be totally applied by States when committing in the practical application of similar non-forcible measures.

Nonetheless, despite they differ in the structural design, as well as in the legal consequences as to the legality of the measures undertaken, sanctions, countermeasures and retorsions are commonly resorted within the international community with the general objective of inducing the targeted State to permanently change its wrongdoing behavior, so to conform with the obligations derived from the body of international law norms and principles. It is clear, for instance, that the main scope of those measures is that of coercing the targeted State as they commonly possess a punitive character in their nature. However, it must be recalled, as pointed out during the course of the present work, that this "punitive feature" has begun less evident, at least within the UN framework, after the sanctions regime has underwent the processive evolution that resulted into the shift from comprehensive to targeted measures. Indeed, differently from comprehensive sanctions, which were basically framed as punitive measures since their purpose was that of substantially halting the diplomatic, financial and economic relations of the sanctioned State with other countries in the international community, UN targeted sanctions are in their nature correcting policy measures which, in response of the

changing attitude and the subsequent actions undertaken by the targeted State, may be easily manipulated as to increase or decrease, when necessary, the degree of trade restrictions and further measures. This, however, as pointed out throughout the discussion over the differences concerning the precedent and the modern practices on UN sanctions, does not necessarily mean that targeted measures disposed of by the Security Council cannot be framed as punitive policy measures, since, in some circumstances, the effectiveness of such measures is ultimately counted on their ability to induce or to coerce the targeted State to permanently change its attitude towards the international community, as well as, in the case of individual sanctions, emerged as a counter-terrorism device, to enable the enlisted individuals and private enterprises to commit terrorist attacks or to financially support international terrorist networks.

The doctrine on international sanctions has acquired over decades seminal importance as global governance institutions, such as the UN Security Council, are resorting to such measures with more frequency in order to respond to the growing emerging untraditional threats to the international peace and security. Despite that, however, it has been demonstrated that targeted measures, in the form of individual sanctions, are still generating an extensive debate among international law scholars as they may negatively impact on the enjoyment of individual procedural rights. As some improvements have been achieved throughout the last decade in relation to the question of fair process, the protection of procedural individual rights due to the implementation of individual sanctions still falls short to be sufficiently guaranteed, especially if we consider that such violations are committed by actors such as the UN Security Council, meaning the guardian of the collective security system. By the same token, however, it must be considered that when applying such individual sanctions the Council confronts with the difficult task of striking a balance between the maintenance of international security and the protection of individual rights. Certainly, improvements are still recommended in order to lower as much as possible the impacts that sanctions may originate on the enjoyment of individual rights.

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