LUISS Guido Carli
LIBERA UNIVERSITÀ INTERNAZIONALE DEGLI STUDI SOCIALI

Department of Political Science

Chair of International Organization and Human Rights

THE FIGHT AGAINST TERRORISM AND THE RESPECT OF HUMAN RIGHTS: THE USE OF TARGETED SANCTIONS AND THE AFTERMATH OF THE KADI CASE IN THE EUROPEAN UNION

SUPERVISOR
PROF. FRANCESCO CHERUBINI

CANDIDATE
LUDOVICA LUCARELLI
MATR. 634622

CO-SUPERVISOR
PROF. GIUSEPPE SCOGNAMIGLIO

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TABLE OF CONTENTS

INTRODUCTION:

This research project analyzes the relationship between two concepts that have been protagonist of the international relations of the last decades: the fight against international terrorism and the protection of human rights. The contents and the information regarding these two concepts are dealt, on a day-to-day basis, by media, newspapers, televisions and social networks, so that they are the center of the international policies news of this latest period, which are well known by the majority of the population. On one side, there is the phenomenon of terrorism which is considered the most dangerous threat to the international security of years 2000s[1]. As it is known, it officially became a real threat to western world after the terrorist attacks committed by Al-Qaida on 9/11, which also stated the naissance of a new type of war, well different from the 'traditional' ones that the collective imagination used to know before: in fact, the *modus operandi* of this phenomenon is particularly characteristic and in constant evolution, with the collateral damage of rendering a specific categorization of its strategy very difficult. Due to this, it has been extremely hard to eradicate this phenomenon from its roots. On the other side, there are the fundamental values of liberal democracies: human rights. They are the corollary principles of every liberal State but, more important, also of the two principal international organizations of the world, meaning the United Nations and the European Union. These basic rights have to be respected and preserved by every member State and they have to be granted to each individual by avoiding any form of discrimination. Nonetheless, it happens really often that these provisions are not protected as they should be. Especially in the field of counter-terrorism programs, it has often been asked if these two concepts could effectively run in parallel: in fact, the question that has mostly influenced this research has been whether in the fight against terrorism, human rights are effectively preserved or not. It is obvious that the responses to such a vague question can be incredibly numerous, so that it is impossible to collect them all in just one work. For this reason, this study will be categorized by focusing on the use of a specific tool for counter-terrorism strategies, to investigate on the relation between this kind of 'weapon' and the respect of human rights. The means in questions are the so-called 'targeted sanctions' which are doctrinally analyzed in the first chapter. In the general believing, sanctions have been always connected to the so-called 'general sanctions' which have been commonly used by a State or by an international organization to coerce another State to follow specific rules, particularly regarding the political field. The shift from general to targeted sanctions started during 1990s[2], and it was principally due to the will of avoiding the collateral damages generated by the formers, whose effect has usually mostly affected the civilians, by leaving unaltered the position of the

[1] BIERKSTER (2010: 99-102).
[2] *Ibidem.*

government, which was supposed to be the real target of the measures. On the contrary, targeted sanctions are imposed against specific subjects, by preventing any repercussion over innocent people, so that they seemed to represent the solution to the above-mentioned problem. Due to this, in the fight against terrorism, these kinds of measures have been regularly used with the objective of imposing restrictive financial measures against individuals, entities or groups connected to terrorist activities. The beginning of the use of this 'weapon' in this context is related to the implementation of the resolution 1267 of the United Nations Security Council[3], where was also issued the first 'blacklist'. The concept of 'blacklist' is formally considered as an effective list, which collects all the people, entities and organization that are connected and involved in terrorist activities, and that, starting from the official inclusion of their names on the list, are immediately affected by the freezing of their funds. The principal question posed within the first chapter is if the imposition of these kind of measures could actually preserve the total respect of human rights. To answer to this question, within this chapter it is possible to comprehend the way the targeted sanctions are implemented by both the United Nations and the European Union, considering that for the research purpose, the focus is mostly directed to the analysis of the activities carried out by the European Union in this field. Due to this, it is important to underline that according to article 2 of the Treaty on European Union[4], among its corollary principles are also included the European Convention on Human Rights[5] and the Charter of Fundamental Rights of the European Union[6], which both listed all the fundamental rights that have to be respected without derogations. In this case, the question posed in the chapter is also referred to the fact that many of the provisions contained in these documents can easily be violated by the imposition of targeted sanctions. In relation to this, it is impossible to do not analyze the case of law which is considered to be the turning point within this debate: the Kadi proceeding. This trial is considered one of the most important and evolutionary cases of the latest decades, due to the innovative findings of the Court of Justice of the European Union in this context. In fact, the judgment of the Court regarding this litigation represents not only an important response to the balance between the fight against terrorism and the respect of human rights, but also a variation of the relationship between the European Union and the United Nation Security Council. In practice, it is known how the Court recognized that due to the inclusion of the appellant's name in the blacklist, an effective violation of human rights occurred, as a consequence of the measures imposed against him which affected also his family, with the result that all those impositions (for the part concerning the subject) have been annulled, and the appellant has also

[3] Resolution of the United Nation Security Council of 15 October 1999, S/RES/1267(1999).
[4] Maastricht Treaty (or Treaty on European Union), Maastricht, 7 February 1992, art. 2.
[5] European Convention on Human Rights, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1,4,6,7,12,13 and 16, Rome, 4 November 1950.
[6] Charter of Fundamental Rights of the European Union, Nice, 7 December 2000.

received a compensation. This decision is considered a turning point also because for the first time, the Court of Justice of the European Union went against a conclusion of the United Nations, by recalling the importance of preserving all the roots on which the Union is founded, which include also the preservation of fundamental rights that cannot be violate neither in the context of the fight against terrorism. In any case, the core of the research is to analyze the aftermath of the Kadi proceeding, to understand if this judgment has been a real beginning to a new jurisprudence of the Court, or if it has been only an exception to the rule. With this purpose, in the third chapter, six following cases, similar to the Kadi one, are analyzed, to comprehend whether or not the Court has followed the same line of thought: *Abdualbasit Abdulrahim* v *Council and Commission*, *Liberation Tigers of Tamil Eelam ("LTTE")* v *Council and Kurdistan Workers' Party ("PKK")* v *Council, Hamas* v *Council*, *Al- Faqih and others* v *Commission* and *Al-Ghabra* v *Commission.* In particular, to determine if the Kadi judgment has been influenced only by the will of the Court to prevail the Security Council, among the proceedings analyzed, three of the cases have been accepted and three have been rejected, to also understand the arguments that have justified both the positive and the negative findings. By the end of the third chapter, it is already possible to realize if the Kadi judgment has been considered as the common thread to the resolution of the other following litigations regarding this matter, but to understand the real impact that this new jurisprudence of the Court had, it is worthwhile also to analyze the aftermath of the Kadi case on the political field. Due to this, to conclude the research, the fourth chapter is focused on the study of the major European counter-terrorism policies of the latest decades, to realize the role given to the protection of human rights in this more practical field and to reach a more comprehensive final conclusion over the impact that the jurisprudence adopted by the Court in the Kadi case had on the counter-terrorism issue.

1. TERRORIST BLACKLISTING: A DIFFICULT BALANCE BETWEEN THE COUNTER-TERRORISM PROGRAM AND THE RESPECT OF HUMAN RIGHTS

1.1. From general sanctions to targeted sanctions

The individualization of sanctions principally refers to the shift from comprehensive to targeted sanctions[7]. To better understand the blacklisting system, it is important to analyze its origin and the reason why it has been preferred over general sanctions as a weapon in the counter-terrorism strategy. Generally, it is possible to say that 'general (or comprehensive) sanctions' refer to the traditional concept of sanctions as it was assumed in the twentieth century within the international arena: a combination of economic measures directed against a targeted government[8]. The United Nation's Security Council ("UNSC") use of sanctions has considerably grown in the last decades; after the end of the cold war, the UNSC became more active in exercising its powers provided by the chapter VII[9] of the UN charter and suddenly started to be criticized for it. More specifically, with regard to the use of the sanctions, the most important critics started in 1991 after the end of the Gulf War. In fact, the sanctions imposed against Iraq have been accused of not taking into account human rights because of the widespread suffering that they have caused to the civilians: up to 100000 Iraqi children may have died as a result[10]. It was the first time that the human rights impact of sanctions emerged at the international level. The aftermath of this case was an increasing criticism towards the UN activity, which, in turn, gave rise to an important debate on how the sanctions may better be imposed, with a series of projects, workshops and studies in order to find a better solution. The result was the idea of using sanctions that were targeted to specific individuals. There were two ideas behind targeted sanctions; first of all, these types of restrictions would have been imposed for the sake of humanity. Indeed, due to them, the collateral damage and the harm of innocent people would have been avoided. The second idea behind this choice was related to the fact that comprehensive sanctions were not considered particularly effective[11]: in fact, they produced a serious harm for innocent civilians but, at the same time, they left the possibility to the real responsible for the wrongdoing to escape or to be protected by their power or their high position in the society of the country concerned[12]. So, it is possible to say that, at the beginning, 'targeted sanctions' were considered as a branch of the comprehensive ones' regime, and they were used to affect a specific individual in order to contain the humanitarian

[7] VAN DEN HERIK (2017: 5 ss.).
[8] HERSEY (2013: 1235 ss.).
[9] Charter of The United Nations, San Francisco, 26 June 1945.
[10] HAPPOLD (2016: 2).
[11] HAPPOLD (2016: 3).
[12] *Ibidem.*

damage against the civilians. Especially after the events of 11 September 2001 ("9/11"), individual sanctions have grown their importance and, in particular within the United Nations, they have been used as one of the major weapons in the fight against terrorism. Following this chapter, it will be possible to analyze all the features of this system in order to understand why, during the last decade, there has been an international litigation over the legality of these measures under the principles of international law. At first, it is fundamental to examine in a deeper way the concept of sanction.

1.1.1. What is a sanction

The concept of 'sanction' is a specific feature of the international relations of the last decades, often used by the media as headlines for the news. This term can have a wide variety of meanings which are very often used in a simplistic way and this make impossible to determine a single authoritative definition. This is the reason why, in this section, in the first place, we will delineate the three scholastic approaches used to study this kind of 'weapons'; then, we will explain the functions of the sanctions and finally in the next two sections, it will be possible to analyze their two main categories: the comprehensive sanctions and the targeted ones. At the beginning, with order, we will explore the three approaches that some scholars have tried to highlight in order to define the concept of 'sanction'. The first one is purpose-oriented, and it is focus on the objective of the sanction used in order to punish a breach of any legal norm. This approach is 'borrowed' from the national sphere in which a sanction is define as the actions that can be taken against a person who has transgressed a legal norm[13]. On the international field Jonathan Law and Elizabeth Martin have determine their definition of sanctions which are "taken against the State to compel it to obey international law or to punish it for a breach of international law"[14]. Instead, the second approach is based on the identity of the author of the measures concerned (author-oriented) and, in particular, to those measures adopted by international organizations and in accordance with the organization's rules[15]. This approach is linked to the work of the International Law Commission ("ILC") in its draft articles on the responsibility of States for internationally wrongful acts ("ARSIWA")[16] in which the term 'sanction' is absent but, at the same time, the term 'retorsion' is frequently used; nonetheless, within this work, sanctions are understood not as retorsions, but as 'counter-measures' because they are considered as an instrument of international organization (especially under Chapter VII of UN charter[17]) to adopt in case of non-compliance of its members with the organization's rules[18]. The difference is very important because counter-

[13] RUYS (2017: 19 ss.).
[14] *Ibidem.*
[15] *Ibidem*.
[16] RUYS (2017: 20 ss.).
[17] RUYS (2017: 21 ss.).
[18] *Ibidem.*

measures and retorsions have to be distinct from one and another: according to international law, the first one refers to an act which is basically illicit but that can become licit if it is a reaction to the illicit act made by the State against which these measures are implemented; on the contrary, the retorsion is simply considered as an unfriendly act from one State to another[19].
In this case, the expression 'international sanction' is linked to the role of the organization considering the membership that comprehends, while the sanctions made from one State to another are simpler called 'counter-measures'[20]. Finally, the third approach defines sanctions in relation to the type of measures taken and it is the most prominent approach in the international relations theory. In this view, the type of sanctions is generally linked to economic restrictions: *embargo*, which is an official ban on trade of particular goods (such as arms or certain minerals) or other commercial activities, *import and export restrictions* and *targeted sanctions* (such as travels ban and freezing assets) which are increasingly popular[21]. This approach includes as sanctions also the possibility for an international organization to expel or to suspend the right of vote within their bodies for any of its member States. Undoubtedly, the first and most known international organization which has used this type of measures has been the United Nations, thanks to the sanctions adopted by the Security Council pursuing article 41 of the UN charter[22] which are mostly monitored by one of the Council's sanction committee[23]. Obviously, UN is not the only organization which has adopted this kind of measures, but especially in the last decades, numerous regional and sub-regional organization have used them as well. The African Union ("AU") and the European Union ("EU") are two examples of it, with the difference that while in the AU the sanctions are always applied against its member States in the EU, they are mostly applied against individuals[24]. It is important to add that even before the advent of the 'sanction decade' of the UN Security Council, individual States used to adopt general economic sanctions as an instrument of foreign policy, because they were considered less destructive than military force but more effective than diplomatic policies[25]. Now-a-days, the majority of the sanctions implemented by the individual States are adopted to comply binding decision of UN Security Council, especially for what concerns the restrictions taken with the targeted sanctions that will be analyze in the next section. This does not

[19] RONZITTI (2013: 387).
[20] RUYS (2017: 21).
[21] *Ibidem.*
[22] Charter of the United Nations, chapter VII, 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".
[23] RUYS (2017: 21).
[24] RUYS (2017: 22).
[25] *Ibidem.*

preclude the possibility that an individual State could individually adopt a sanction against another one, as was the case of Russian Federation intervention in Ukraine of 2014 that triggered numerous autonomous sanctions from several European States as well as United States, Canada, Australia, New Zealand and Japan[26]. As it was anticipated, it is also important to delineate the functions of the sanctions in order to better understand this concept. Generally, it is to say that a sanction can be preemptive, punitive and reparatory. In the first case, sanctions are adopted following the fear of a possible breach of a legal norm, in order to avoid the actual violation of the above-mentioned. This happened because it is believed that the fear of punishment exponentially reduces the transgressors. The punitive function is the most frequent one and happens when there is a real breach of a legal norm that needs to be penalized to prevent a re-occurrence. Finally, the sanction shall act as reparatory when it tries to "repair" at the breach caused by the transgressor, usually with a considerable amount of money. More specifically, in international relations the concept of 'sanction' refers to certain types of measures that can have different purposes and functions[27]:

I. To coerce or change certain behaviors;
II. To limit the availability to access resources which are needed to pursue certain activities;
III. To warn and denounce;
IV. To punish.

As it is possible to notice, sanctions can have a wide variety of purposes: prevention of proliferation of weapons of mass destruction, counter-terrorism program, peace-building strategy and human rights promotion are just some of the numerous examples that can be mentioned. What it is important to highlight is that both comprehensive and individual sanctions are not necessarily due to a previous breach of an international legal norm. They do not always have a punitive function, even if it used to be the most frequent one. Particularly in the last period, the UN Security Council does not need a real breach of international law in order to adopt binding decisions: it must only find a "threat to the peace a breach of the peace or an act of aggression"[28]. under the article 39 of the UN charter[29]. Of course, if sanctions can be considered lawful or not has to be analyzed case by case; it is impossible to give an authoritative or general statement on this matter. For this reason, at this point, it is necessary to go through the research by deeper analyzing both general and targeted sanctions.

1.1.2. Comprehensive Sanctions

[26] *Ibidem.*
[27] RUYS (2017: 22).
[28] LAW, MARTIN (2014).
[29] Charter of United Nations, chapter VII, 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".

As it has been mentioned before, general sanctions are referred to the traditional economic measures of the twentieth century taken against a targeted State. More specifically, according to Professor Reisman and Stevick economic sanctions are defined as it follows: *"*involving a purposive threat or actual granting or withholding of economic indulgences, opportunities and benefits by one actor or group of actors in order to induce another actor or group of actors to change policies"[30]. All the sanctions are implemented after a plan organized by the sending State or the sending group of States which are members of a certain organization, such as UN and EU. Of course, in the latter case, the resolution is taken after the sign of a multilateral agreement or after a collective decision by all the member States against a targeted State that could be both part of the organization or not. Usually, general sanctions had a preventive function and not a punitive one. Moreover, they are addressed against the whole targeted State to reach the objective which is the State's government[31]. In fact, the most frequent goals of these measures included: the removal of a leader or of the leader party of a country (which often led to the total reorganization of the government's structure); the promotion of the respect of human rights; the interruption of nuclear tests; etc[32]. One of the things that permitted the rise of these type of sanctions was the conviction within the general believing that they were useful in order to promote the resolution of international dispute by avoiding the use of force: they were considered peaceful and not-destructive weapons of maintaining international policies[33]. In point of fact, they were also not-expensive and it was possible to easily gain domestic support for their implementation. Unfortunately, the actual matter was that comprehensive sanctions had two major disadvantages. The first one is related to the fact that their success was dubious. There is a strong debate on the effectiveness of these measures and the rates are not always clear and precise, considering also the different position taken by the scholars who have analyzed the cases[34] and, in addiction, in the majority of the episode the targeted government often operated in order to avoid the restrictions. The second drawback is related to the 'collateral damages' of the sanctions. In particular, the harm that they can cause to innocent people who live in the targeted State. Very often, civilians who do not have a voice in these cases, are the one who suffer the most due to the restrictive measures; indeed, they are the ones who mostly need the resources hit by the sanctions and, for this reason, they very often need humanitarian aid from the international community. Unfortunately, this aid is not always enough to solve the situation and some of the most devastating cases need more attention and more assistance from the international arena. Due to this, these humanitarian problems are considered the worst collateral damages of general sanctions.

[30] REISMAN, STEVICK (1998: 87).
[31] HERSEY (2013: 1237).
[32] HERSEY (2013: 1238).
[33] *Ibidem.*
[34] HERSEY (2013: 1239).

One practical examples of how general sanctions can be both ineffective and harmful for innocent people, is the already mentioned case of Unites States' attack against Iraq in the 1990s. After the Iraqi invasion of Kuwait and after the Iraq's refusal to comply with the UN Security Council's resolutions, the Security Council decided to impose a total ban on trade with this country which comprehended both import and export. It lasted for seven years, from 1990 to 1997, and even if there was a mitigation of the restriction under the Oil-for-food Program, they tightened them again in 2001. As a consequence of these measures, the Iraqi economy was deadlocked. The target of these sanctions was the overthrown of the leadership of Saddam Hussain but, as it is known, the outcomes were not the hoped ones. On the contrary, as it was predictable, the ones who suffered the most were the civilians, who faced unemployment, malnutrition and diseases. Moreover, humanitarian aid did not help them enough because it was limited and not very effective. This has been one of the emblematic cases in which general sanctions showed all of their disadvantages: they have been both in-effective and harmful for innocent people. For this reason, for the general believing, the advent of targeted sanctions can be explained as the aftermath of this episode, in order to solve the problem of humanitarian collateral damages and general ineffectiveness.

1.1.3. Targeted Sanctions

Targeted sanctions have been imposed for the first time by United Nations from the second half of the 1990s[35]. The first case of a sanction directly targeting individuals was in 1994 with the UN Security Council's resolution 917[36] which imposed travel ban and authorized States to impose the freezing assets of all officers of the Haitian military and police (including their families) and all the other person connected with the *coup d'état* of the General Raoul Cedras in Haiti[37]. Furthermore, the first time that these targeted restrictions have were used against non-State actors was within the situation in Angola in 1997, when the members of the rebel group National Union for the Total Independence of Angola ("UNITA"), were targeted[38]. As a general point, in her work Elizabeth Hersey gives a definition of targeted sanctions,

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[35] BIERKSTER (2010: 99-102).

[36] Resolution 917 of the United Nations Security Council of 6 May 1999: "The Security Council, […]Acting under Chapter VII of the Charter of the United Nations, […]Decides that all States shall without delay prevent the entry into their territories: (a) Of all officers of the Haitian military, including the police, and their immediate families; (b) Of the major participants in the coup d'état of 1991 and in the illegal governments since the coup d'état, and their immediate families; (c) Of those employed by or acting on behalf of the Haitian military, and their immediate families, […]Strongly urges all States to freeze without delay the funds and financial resources of persons falling within paragraph 3 above, to ensure that neither these nor any other funds and financial resources are made available, by their nationals or by any persons within their territory, directly or indirectly, to or for the benefit of such persons or of the Haitian military, including the police".

[37] HAPPOLD (2016: 3).

[38] Resolution of the United Nation Security Council of 28 August 1997, S/RES/1127(1997).

which are considered as "measures that are designed and implemented in such a way as to affect only those parties that are held responsible for wrongful, unacceptable, illegal or reprehensible behavior"[39]. The 'parties' mentioned in the quote could be individuals, legal entities and also non-State actors (like it happened in the Angolan case above-mentioned) and the measures are implemented by national legislation in a way that permits to the government to freeze the assets of the targeted individuals and prohibits their travel among the country[40]. These kinds of sanctions are increasingly used in the last decades as an important tool for international policies not only by the UN but also by other regional organizations and by individual States. Within United Nations and the European Union, they have been progressively implemented especially after the events of 11 September 2001 as a counter-terrorism strategy. In fact, seventeen UN sanctions committees have been created with the task to administer the targeted sanction and, on the European field, since 2015, thirty-seven restrictive measures regimes have been implemented under the article 215[41] of the Treaty on the Functioning of the European Union ("TFEU")[42]. At this point, it is important to delineate three types of targeted sanctions which have been really important in the international relations of the last decades.

1.1.3.1. Three types of targeted sanctions: UNSC resolution 1267, USA Magnitsky act and Russian Yakdev's law

In order to better understand the character of the targeted sanctions, it is important to analyze them in the practice by exploring the most important measures adopted both by States and by international organization. The first group of sanctions that we take into consideration are the one included in the UNSC resolution 1267[43], which is part of the 'Al-Qaida sanctions regime' adopted by the Security Council in order to weaken and to overcome the above terrorist group. This resolution represents a new and different approach of the United Nations to fight against terrorism and it provides, first of all, the creation of the Taliban Sanctions Committee. This committee has the object to identify and to insert within the 'consolidated list' all the name of alleged

[39] HERSEY (2013: 1240).
[40] HERSEY (2013: 1241).
[41] Treaty on the Functioning of the European Union, Title IV, on *Restrictive Measures*: "(ex article 301 TEC) 1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof. 2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities. 3. The acts referred to in this Article shall include necessary provisions on legal safeguards".
[42] Treaty on the Functioning of the European Union, Lisbon, 13 December 2007.
[43] Resolution of the United Nation Security Council of 15 October 1999, S/RES/1267(1999).

terrorist, suspected to be part of Al-Qaida, or other individuals or entities suspected to be connected with the terrorist organization. Moreover, the legal binding character of the resolution obliged all the member State to comply with the specified measures: this included the freezing of the assets of the listing people, an arms embargo and the impossibility for the listed individuals to enter in the member States' territories. Generally speaking, the blacklisting procedure is logical and useful, and it avoids the risk of the collateral humanitarian damage by targeting only the real responsible of a wrongful international act (like terrorist attacks). The problems within this system started only years later, particularly when these types of sanctions were used the most against suspected terrorists and terrorist organizations. On late 2012, for example, UN member States were charged with the proposal of names to be inserted in the 'consolidated list'. They had to submit the names to the Sanctions committee having regard to provide as much details are possible to the motives of the inclusion of certain names on the list and therefore of their connection with terrorist activities or terrorist groups[44]. After the addition of these names to the list, a small team supervise State's compliance and informed the committee. At this point, the committee informed the States of the listed individuals of the status and then reported everything to the Security Council, whose role was to directly inform the targeted people. The problem is that initially individuals were not informed of their inclusion in the list and there was not a simple way to remove names from it[45]. The research will more specifically address about the blacklisting system in the fight against terrorism in the next paragraph, at this stage, it is also important to mention two other types of 'smart' sanctions: United States' Magnitsky Act[46] and Russia's Yakovlev's Law[47]. Both the documents are focus on restrictions after violations of human rights. Regarding the first mentioned act, it was the attempt to restore the trade and commercial activities with Russia after the end of the cold war. The main problems were the wide spreading corruption, political prosecution and human rights violations in Russia which brought to the Congress a real concern on accepting a new deal with Russian federation. For this reason, the Magnitsky Act also included the duty of the President to submit to the appropriate congressional committee a list of each person who was considered (based on credible information and after an accurate investigation) responsible for gross violations of human rights. More specifically, the act states that the individuals added on the list should be "[…]

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[44] HERSEY (2013: 1243).
[45] *Ibidem.*
[46] Act of the United States of America of 14 December 2012, Pub. L. No. 112-208, *to authorize the extension of nondiscriminatory treatment (normal trade relations treatment) to products of the Russian Federation and Moldova and to require reports on the compliance of the Russian Federation with its obligations as a member of the World Trade Organization, and for other purposes* (Russia and Moldova Jackson-Vanik repeal and Sergei Magnitiky Rule of Law Accountability Act).
[47] Federal law of Russian Federation of 22 December 2012, no. 272-FZ, *On Sanctions for Individuals Violating Fundamental Human Rights and Freedoms of the Citizens of the Russian Federation* (Dima Yakovlev Law).

responsible for […] gross violations of internationally recognized human rights committed against individuals seeking to expose illegal activities carried out by officials of the Government of the Russian Federation"[48]. Together with the President, also specific Senators and representatives could propose names to add to the list, that, however, were previously reviewed by the President himself before the final added. The final list should be published on the Federal register unless the President decides that for national security the list must be confidential and protected. People in the list are unable to enter in the United States' territories and, if they are already in possess of a visa, that is immediately revoked; moreover, all of their assets are frozen. It is the President's discretion to decide whether or not a person should be removed from the list; it can happen only if the concerned individual has been appropriately prosecuted or if there is evidence of a significant change in behavior[49]. There is not, in any case, the possibility for the listed people to contest listing and, often, people who are listed are not even immediately informed about their situation. The Russian Federation's Government responded by enacting legislation named "On measures against individuals involved in violations of fundamental human rights and freedoms, the rights and freedoms of citizens of the Russian Federation" better known as "Yakovlev's Law"[50]. This act was very similar to the previous mentioned with the differences that it goes even further. The first two articles are really similar to the Magnitsky Act; article I forbids any American citizen who is accused of having violated human rights from entering in Russia while article II implemented property-related restrictions[51]. The step forward is represented by the suspension of the activities of all non-profit organizations that operate in Russia and receive funds and support by American entities if their programs are considered to threat Russian interests[52]. Very famous was the suspension of the activities of adoption organizations due to this law which also bans the adoption of Russian children by American citizens[53]. Another major difference with the American act is the fact that here there is not any removal provision. Comprehensively, the two documents are very similar, and they create a list of individuals against whom specific sanctions are implemented. Moreover, in both cases (such as also in the Resolution 1267 mentioned above) there is not any assurance of the fact that listed people will immediately know about their listing.

After having generally analyzed the concept of targeted sanctions and how they have been firstly used within international policies, it is now the moment to shift the research to the specific item of the work, the analysis of the use of targeted sanctions in combating terrorism.

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[48] Russia and Moldova Jackson-Vanik repeal and Sergei Magnitiky Rule of Law Accountability Act.
[49] HERSEY (2013: 1246).
[50] The Dima Yakovlev Law.
[51] *Ibidem.*
[52] HERSEY (2013: 1247).
[53] *Ibidem.*

1.2. Targeted sanctions in the fight against terrorism: the blacklisting system

As mentioned above, targeted sanctions have been used in the last decades as one of the main weapons in fight against terrorism. This strategy started to be implemented in this field after the failure of the comprehensive sanctions' regime imposed by the Security Council against Iraq during the late 1990s. After that fiasco, in which civilians have been the real victims of the sanctions, UNSC decided to shift from general to targeted sanctions in order to put pressure onto individual and entities and to avoid humanitarian emergencies in its counter-terrorism strategy. The aim is to identify targeted individuals (who are suspected to be connected with terrorist organizations) or legal entities or terrorist organizations and to insert them on a 'blacklist'. The names on the blacklist can come from different sources: also, the UN secretariat can propose names, even if the majority of them are proposed by the members of the UNSC. For what concerns the responsibility within these projects, even if different aspects of the evaluation and implementation of targeted sanctions may be controlled by the UN secretariat, the majority of the responsibilities and duties are allocated with the Security Council[54]. In fact, the real and complete blacklist and all the measures applicable to the listed individuals/entities/organizations are strictly and directly controlled by the Security Council. In more detail, the listing procedure is the following[55]:

i. Member States (but also bodies of the UN like the secretariat[56]) can at any time submit to the appropriate committee a list requesting the inclusion of specific individuals, entities, organizations or group in the Al-Qaida (or now-a-days ISIL) sanctions list;
ii. Before proposing names or the inclusion in the specific list, the member State is encouraged to approach to the State of residence/nationality of the targeted individual/entity/group in order to get more information;
iii. The names have to be officially submitted only after having reached a considerable evidence of the subjects' responsibility;
iv. The requesting list have to contain a detailed statement of cases in support of the inclusion of those subjects in the sanction list and, moreover, it has to contain all the specific criteria that have been used to propose them. In particular, it has to include:
    a. Precise judgments and reasoning to demonstrate that the listing criteria are respected;
    b. Any contact with a subject which is already in the sanction list;

[54] CAMERON (2013: 4).
[55] United Nation Security Council, Sanction List Material, available online.
[56] CAMERON (2013: 3).

c. Information about activities of the individuals/entities etc;
d. Supporting evidence;
e. The nature of those evidence (for example: media, intelligence, admission by subject etc.);[57]

v. The applicants have to submit the official request of inclusion by following the standard criteria of the UNSC, including also specific information about the family (if the subject is an individual) and about the origin (if the subject is an organization/entity/group);
vi. Finally, the committee after having analyzed the requesting list, decides whether or not to include them in the sanction list and notify the decision.

Even if the rise of the blacklisting system in the counter-terrorism strategy is due to United Nations, it is important to say that its strategy of implementation derived from the United States, whose experience within the cold war trade sanctions has been important in developing a strategy for the counter-terrorism project[58]. Right after the implementation of those sanctions within UN, also European Union followed suit. Nonetheless, this approach brought a lot of problems; the problem regarding the suspected violation of fundamental human rights due to these individual sanctions will be analyzed later, also considering that it is the core of the research. For the moment, it is enough to say that there is a difference on using sanctions against a government and on using them against individuals suspected to be linked or part of a terrorist organization. First of all, within a terrorist organization the best-known personalities are the one who are in charge; but the majority of those groups are organized in a 'pyramid' network and the ones who physically do the job are the rank of the files that nobody knows and that are really challenging to identify and to insert in the blacklist. Moreover, the newest terrorist groups are less organized than they used to be before; the advent of the 'lone wolves' makes it very hard to identify the core of the organization and, very often, there is not even a core anymore[59].
In order to better understand the origin of this system, it is important to deeper analyze the group of sanctions which are considered the real starting point of the blacklisting as a weapon against terrorism: the Al-Qaida sanctions regime.

1.2.1. Al-Qaida Sanctions Regime

The Al-Qaida sanctions regime is a group of UN Security Council's resolutions implemented in order to destroy the Taliban regime which was accused of protecting Bin Laden and in order to stop the financing of terrorism. In this research, we take into consideration the UNSC resolutions 1267, 1333, 1373 and 1390. The first resolution of this group is the above-

[57] *Ibidem.*
[58] CAMERON (2013: 5).
[59] *Ibidem.*

analyzed 1267 of 15 October 1999[60] which was explicitly implemented against the Taliban regime. First of all, it created the UN Security Council committee and the 'consolidated list' comprehending all the suspected individuals and entities linked with Al-Qaida or with the Taliban. This resolution imposed as an executive order the sanction regime implemented by the United States on July 1999. Moreover, it outlined several requests made to the member States and to the Taliban regime based on an extensive interpretation of the article 39 of the UN charter[61]. The most important are[62]:

- The Taliban must not permit the use of the territory that they control for terrorist training;
- The Taliban had to stop protecting Osama Bin Laden and turn him over the requesting authorities;
- All the member States must refuse flight permission to all the Taliban aircraft;
- All the member States must freeze all the assets that could be useful for Taliban.

There have been suspects over the humanitarian situation in Afghanistan and on the impact that those sanctions could have on the civilians, but only Malaysia among all the member States opposed. The following explained sanction is the provided for by UNSC resolution 1333 of 19 December 2000[63]. This sanction was implemented to reaffirm the positions already taken. in fact, always under the chapter VII of the UN charter, there was a formal request to comply with the provision included in the preceding resolution, a request to cease the relationship with the terrorist organizations (which included the close of all the training camps of Al-Qaida on the Taliban territory)[64]. More specifically the resolution asked[65]:

- The Taliban must eliminate the cultivation of opium;
- All the member States must not sell any military equipment to Taliban;
- All the member States must restrict the entry of the high rank Taliban officials in their territories;
- All the offices of Ariana Afghan Airlines must be closed;
- If Taliban would comply with the previous request, some sanctions would be remitted.

Besides, for the first time the Security Council realized that there was an emergency with the humanitarian situation of Afghan people and, due to this, the aircraft restriction was not applied over humanitarian flights and a list of

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[60] UNSC Resolution 1267.
[61] United Nations Charter, Chapter VII, art. 39: "The Security Council shall determine he 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 r restore international peace and security".
[62] UNSC Resolution 1267.
[63] Resolution of the United Nation Security Council of 19 December 2000, S/RES/1333(2000).
[64] *Ibidem.*
[65] *Ibidem.*

humanitarian organizations appointed to provide humanitarian assistance to the population was drafted. Nonetheless, there was much concern about the humanitarian condition of the civilians and Malaysia and China decided to abstain from voting. To continue, the resolution 1373 of 28 September 2001[66] was implemented right after the terrorist attacks of 11 September 2001 and was directed for the most part to the member States so that they could engage in combating terrorism. The resolution and all the measures included in it had a biding effect over member States. In sum, it is possible to delineate the major points of it[67]:

- All the member States must prevent and suppress the financing of terrorist activities and organizations by freezing assets and funds of people suspected to be connected with terrorist groups or suspected to be involved in terrorist activities;
- All the member States must prevent the spreading of terrorist activities within their territories by avoiding the traveling of suspected individuals;
- All the member States must ensure that any person who is involved with terrorist activities would be brought to the authorities and giving assistance for the proceeding;
- Restricting immigration rules especially with more precise and deeper borders control;
- All the member States are exhorted to intensify and to accelerate the exchange of information about terrorist activities and terrorist networks;
- All the member States are exhorted to increase cooperation, to join the multilateral and bilateral agreements regarding this matter, especially for what concerns the International Convention for the Suppression of the Financing of Terrorism (1999)[68];
- The UN Security Council decided to establish the UN Security Council Committee.

The critics against this resolution regard the missing definition of terrorism; the point was that even if this phenomenon started to be considered as the worst threat of the 21st century, and the main purpose of the international scenario was to combat it, the 'concept' of terrorism has not been well delineate yet. Furthermore, this is a problem even today because there is still not a general accepted definition of 'terrorism'. Due to this, the critics were also against the fact that sanctions have been made only against individuals and entities linked with Al-Qaida and that in this case the concept of 'terrorism' was connected only with that organization, without taking into

[66]Resolution of the United Nations Security Council of 28 September 2001, S/RES/1373(2001).
[67] *Ibidem.*
[68] The International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 is a multilateral treaty whose purpose was: "[…]to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators".

consideration the many other terrorist groups that had a working activity but that were not linked with the 9\11 attacks or that were not Islamist. Finally, the last resolution of the group is the 1390 of 1 January 2002[69]. In this document, the Security Council stressed the positions taken before and reaffirm the necessity of the Talibans to comply with them. Moreover, new sanctions are introduced against Osama Bin Laden, Al-Qaida and the Taliban. The development of this resolution was the introduction of targeted sanctions implemented without any territorial connection[70]. In conclusion, it is possible to delineate some consideration about this sanctions' regime. First of all, it can be noticed that there is not any possibility for the listed subjects to appeal. Especially at the beginning, the right for the listed people were not well respected nor preserved and for this reason there have been several critics made against this system even before the Kadi case which is considered the starting point of the debate regarding the balancing between the respect of human rights and combating terrorism and that will be analyzed later. The possibility of appeal against listing was introduce only on December 2006 with the UNSC Resolution 1730[71] in which it is included the de-listing procedure, and which has created the 'focal point' as the body appointed to receive and analyze all the requests of de-listing. It works as it follows[72]:

i. Receiving the de-listing request by the applicant and verify is it is a repetition or if it is a new one: if it is a repeated request and it does not contain any additional information it can be send back to the petitioner;
ii. After having received the request, with the creation of the 'focal point' in order to be definitely eliminate by the list, it is necessary that one specific State (that could be: the one promoter of the previous inclusion of the petitioner in the list; the State of origin of the petitioner; the State of residence of the petitioner) calls for the exclusion directly to the above-mentioned body;
iii. if the request of de-listing is accepted by the 'focal point', the demand is given to the committee, where the members can recommend or not the exclusion. If there is not any definitive decision, the President can request new consultations;
iv. If neither in this case the final decision is taken, the practice goes directly to the Security Council;
v. If also in this case, there is not an agreement, the request will be considered as rejected[73].

Even if resolution 1730 seemed to improve the blacklisting system, the procedure of de-listing above-mentioned is still unsatisfactory; this happens because the petitioner is not able to participate to the proceeding of decision about the request and the final statement is taken by States or by the Security

[69] Resolution of the United Nations Security Council of 1 January 2002, S/RES/1390(2002).
[70] *Ibidem.*
[71] Resolution of the United Nations Security Council of 19 December 2006, S/RES/1370(2006).
[72] *Ibidem.*
[73] *Ibidem.*

Council in which exist the veto rule for the five permanent members and that many time has been used with political and personal purposes without actually been objective. Considering the importance and the important role that the blacklisting system has within the UN counter terrorism strategy, it is now time to understand whether or not those measures have been really effective.

1.2.2. The effectiveness of UN targeted sanctions

After having analyzed, theoretically speaking, the characteristics of targeted sanctions and the type of sanctions adopted by the Security Council, it is important to understand if they have actually been effective. As we know, the Al-Qaida sanctions regime has been strengthened after the tragic events of September 2001 with the two resolutions 1373 and 1390. Even if the former does not embody a new regime of targeted sanctions, it had a twofold effect: first of all, it gave *carte blanche* to the member States to target the assets of the subjects that are included in the blacklist[74]; secondly, it represented a huge escalation of the previous regime introduced by the resolution 1267[75]. For what concerns the latter resolution (the 1390), the most important evolution was the implementation of targeted sanctions against Bin Laden, Al-Qaida and the Talibans, without any territorial connection. Within the first consolidated list, targeted subjects were 162 individuals and seven entities[76] but after the terrorist attacks of 2001 the list grew rapidly and within ten years it included 443 names[77]. The most recent list has been updated on December 2015 and it included 621 individuals and 398 entities[78]. With the purpose of thoroughly evaluating the effectiveness of those sanctions, the analytic research made by the scholars Bierkster, Eckert, Tourinho and Hudàkovà on November 2013 will be taken into consideration. Their analysis is based on the study of 62 episodes of UN targeted sanctions over the past twenty-two years. The measure of sanctions effectiveness is considered as a function of two variables: policy outcome and UN targeted sanctions contribution to that outcome[79]. The first variable is evaluated with a scale of five points, from 1 to 5, while the second one is evaluated on a scale of six point, from 0 to 5. A sanction is considered well effective only if the policy outcome is a 4 or a 5 and the UN sanction contribution to that outcome is at least evaluated a 3. The research is more informative and complete by taking into consideration also three different (and most frequent) purposes of the sanction which are coercion, constraint and signaling[80]. The following table explains better the results of the research, expressed in percentage:

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[74] EDEN (2015: 4).
[75] *Ibidem.*
[76] *Ibidem.*
[77] *Ibidem.*
[78] EDEN (2015: 5).
[79] BIERKSTER, ECKERT, TOURINHO, HUDÀKOVÀ (2013:21).
[80] *Ibidem.*

[81]	Effective	Mixed	Ineffective
Coerce	10%	27%	63%
Constrain	28%	22%	50%
Signal	27%	44%	29%

As it can be seen, the total percentage of effective sanction is low. The majority of the sanctions, regardless of the purpose, records ineffective results. Only the sanctions with signaling purpose register more positive results by having the 44% of mixed effect which equally means that there is something that should be ameliorated. With the purpose of understanding what does not work with the UN targeted sanctions, and what should be improved in order to have better results, we will analyze the sanctions depending on the purposes. Firstly, speaking about coercive sanctions, according to this research the episodes in which they have been ineffective are by far more numerous than the ones they had a positive result. This happened because of several reasons and among them: the absence of the cooperation with special court and tribunals; the ability of the targeted subject to develop substitutes for sanctioned commodities; the arms embargo imposed without complementary measures; or the absence of cooperation with regional organizations[82]. Due to this, according to the authors we have an effective coercive targeted sanction when: goals are well defined; when it is not focused on terrorism or terrorist/rebel groups; when there is a direct political impact on the target; when it is helped by legal bodies like tribunals; when it is accompanied also by regional targeted sanctions[83]. For what concerns the targeted sanctions which have the purpose of constraining the subject, the negative aspects especially reside in the incapacity to precisely delineate the target of the measures. In this case, the subjects against which the restrictions are imposed should be well defined, including family members[84]. According to the authors, the features needed in order to have an effective targeted sanction having this purpose are: the primary object or target should be a terrorist group; commodity sanctions and aviation bans should be imposed; freezing assets; the use of diplomatic sanctions; cooperation with other legal bodies, like tribunals[85]. Finally, to conclude, the targeted sanctions with the purpose to signal will now be analyzed. We should remember that these types of individual sanctions are the only ones to have a good percentage of mixed results, which is better than the effects had by the sanctions having the other two purposes. Speaking about the reasons of ineffectiveness, according to the scholars, they are caused by: the absence of any direct political or social impact on the target, the absence of targeted sanctions imposed also against the government of the State of origin of the targeted subject; the absence of

[81] *Ibidem.*
[82] BIERKSTER, ECKERT, TOURINHO, HUDÀKOVÀ (2013: 25).
[83] BIERKSTER, ECKERT, TOURINHO, HUDÀKOVÀ (2013: 32).
[84] BIERKSTER, ECKERT, TOURINHO, HUDÀKOVÀ (2013: 28).
[85] BIERKSTER, ECKERT, TOURINHO, HUDÀKOVÀ (2013: 32).

commodity sanctions[86]. So, the sanctions with this type of purpose result to be effective when: the primary object is the promotion/safeguard of democracy; commodity and secondary sanctions are imposed; when a panel of experts cooperate with other relevant actors[87].
At this point of the research, it is possible to have a clear scenario of UN targeted sanctions regime, how it works, and which should be the efforts to be made in order to improve its effectiveness on international policies. At this stage, it is important also to have an overall vision on how individual sanctions are implemented in the European Union and if the European policy is different from the one of the United Nations, especially for what concern the protection of human rights.

1.3. European Sanction Regime: 'internal' and 'external' blacklisting

First of all, it is important to say that even if the United Nations was the promoter of the use of targeted sanctions in the fight against terrorism, also European Union has implemented numerous acts in order to impose those restrictive measures. The difference is that in this case there are two types of targeted sanction: the 'external' ones which refer to the ones implemented following a resolution of the UNSC (which are mandatory) to support the activities of the United Nations; and the 'internal' ones which are the autonomous sanctions and are the ones decided by the European Union itself, but even them can be a reflection of the decision previously made by the UN[88].
For an 'internal' blacklisting decision is necessary that a competent national authority makes the decision to start investigating on targeted individuals/entities/groups in order to have enough information of their involvement with terrorist activities. An evidence of the engagement in the investigation of a National Authority is necessary and it is important that the blacklisting decision is based on precise and adequate information or materials that can led to a real evidence of guiltiness for such deeds[89]. The difficult balance between 'external' and 'internal' blacklisting is due to the difficult relationship between the will of the European Union to have a stronger inter-European cooperation in criminal law matters and the desire to have a stronger supranational definition[90]. Nonetheless, both types of blacklisting have been used by the EU during the last decades, even if, according to many, the relationship between EU acts and UNSC Resolution has always been very strong. In fact, since 1999, the activity of the European Union has been fundamental in the implementation of the targeted sanctions imposed by the

[86] BIERKSTER, ECKERT, TOURINHO, HUDÀKOVÀ (2013: 31).
[87] BIERKSTER, ECKERT, TOURINHO, HUDÀKOVÀ (2013: 32).
[88] ANDERSSON (2013: 69).
[89] ANDERSSON (2013: 72).
[90] *Ibidem.*

United Nation for combating terrorism. The sanctions regime adopted by the UN have been implemented in the EU system with 'common positions' and regulations that are important to analyze. Before the attacks of 11 September 2001, in order to implement the Security Council resolutions 1267 and 1333, the EU institutions had to delineate a counter-terrorism strategy themselves. They acted on the basis of the European community treaty (which is also known as the first Pillar) and of the Treaty on the European Union[91] ("TEU") in which are particularly taken into consideration the second pillar ('the Common Foreign and Security Policy') and the third one ('Justice and Home Affairs')[92]. Hence, the European Union adopted acts finalized at implementing the measures included in resolution 1267, and it decided to adopt also updates in order to follow the upgrades made by the UN. Those measures involved the freezing of financing assets of Osama bin Laden and individual and entities associated with him or with the terrorist organization that he supported, Al-Qaida, exactly like it was request by the binding acts of the UNSC. An additional step made in the UN direction was the adoption of the regulation 467/2001[93] of 6 March 2001, which stated:

- The freezing of the assets of targeted people insert in the blacklist contained into the annex no. 1 of the regulation (this is the evidence that it is a case of 'external' blacklisting due to the fact that the list was exactly the same of the one issued by the UNSC);
- The prohibition of giving financial resources (directly or indirectly) to the Talibans or to other individuals/entities/organizations listed;
- The prohibition of selling arms to the Talibans and the prohibition to support directly or indirectly any of their military activities;
- A strengthening of the flight bans with the only exception of the humanitarian flight from organization accepted by the sanction committee;
- The closing of the Ariana Afghan Airlines with all its office and branches[94].

The main update of this regulation was the introduction of targeted sanctions also against the Talibans, that within the previous acts were not mentioned. After the events of September 2001, the measures taken by the UNSC, as we know, have been strengthened. In the same way, also the European Union implemented two new acts in order to update its counter-terrorism strategy and its individual sanctions. From a legal point of view, the two instruments that has been used in order to execute the measures were the 'common position' and the regulation. Right after the attacks above mentioned and after the implementation of the Resolution 1373 of 2001, the EU was urged to

[91] Treaty on the European Union, Lisbon, 13 December 2007.
[92] PORRETTO (2008: 241).
[93] Regulation of the Council of 6 March 2001, (EC) No. 467/2001, *Prohibiting the export of certain goods and services to Afghanistan, straightening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No. 337/2000*.
[94] *Ibidem.*

update its counter-terrorism policy and, due to this, on 27 December 2001 adopted two 'common positions' and the regulation 2580/2001[95]. This is the first case of 'internal' blacklisting, because for the first time a 'personal' list edit by the member States was issues with direct effect[96]. From this point on, the measures freezing the assets of targeted subjects take place first at the national level and then at the community level. For this reason, the implementation of those measures and the inclusion of certain targets into the blacklist is divided into two different phases[97]: within the first one a 'competent national authority' which should always be a judicial body, decides to add certain subjects to the blacklist; within the second one, the final decision is taken by the Council of Europe. The most important 'common position' among the two adopted in December 2001 was the 2000/931 which took into account article 34[98] of the Treaty on European Union and stated[99]:

- The meaning of the concept of persons and groups involved in terrorist acts; of terrorist group; of terrorist act;
- Freezing of the assets of all the subjects included in the blacklist;
- The subjects included in the blacklist have to be controlled every six months to investigate if there are still grounds for their position in the list;
- Cooperation through member States for preventing and combating terrorism and all the measures taken with this common position are binding;

For what concerns the regulation implemented on the same day, it reflected the plan included into the 'common position' reaffirming[100]:

- That all the people/entities/organizations/groups contained into the blacklists are subjected to economic restriction which included

[95] Regulation of the Council of 27 December 2001, (EC) No. 2580/2001, *on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.*
[96] ANDERSSON (2013: 72 ss.).
[97] PORRETTO (2008: 243).
[98] Treaty on European Union, art.3: "1. Member States shall coordinate their action in international organisations and at international conferences. They shall uphold the Union's positions in such forums. The High Representative of the Union for Foreign Affairs and Security Policy shall organise this coordination. IN international organisations and at international conferences where not all the Member States participate, those which do take part shall uphold the Union's positions.2. In accordance with Article 24(3), Member States represented in international organisations or international conferences where not all the Member States participate shall keep the other Member States and the High Representative informed of any matter of common interest. Member States which are also members of the United Nations Security Council will concert and keep the other Member States and the High Representative fully informed. Member States which are members of the Security Council will, in the execution of their functions, defend the positions and the interests of the Union, without prejudice to their responsibilities under the provisions of the United Nations Charter. When the Union has defined a position on a subject which is on the United Nations Security Council agenda, those Member States which sit on the Security Council shall request that the High Representative be invited to present the Union's position".
[99] Common Position of the Council of 27 December 2001, (2001/931/CSFP), *on the application of specific measures to combat terrorism.*
[100] Regulation (EC) No. 2580/2001.

freezing of assets, of all insurance and insurance-related services and of banking and other financial services;

- Member States must avoid to directly or indirectly finance any of the subjects included in the lists;
- It is settled, taking references of the 'common position' 2000/931, a list of features/positions/characteristics/statuses that a person/entity/group/organization should meet to be included in the blacklist;
- All the necessary measures to include a subject in the blacklist are explained;
- Each member State is able to decide which kind of measures to apply in the cases above mentioned.

As we know, after 2001 the adoption of UNSC resolutions regarding the fight against terrorism by using blacklists did not stop, and for this reason, also European Union had to implement new acts in order to keep up with UN positions. On 2002, the EU adopted a new regulation (EC) No 881/2002 which strengthens even more the previous adopted measures, but at the same time, it introduces a system of exemptions to the sanctions previously imposed[101]. This was implemented especially because after the former acts there were several critics about the lack of respect of the humanitarian situation in those territories and for the mild consideration of the human rights of the listed ones. The regulation is once more an example of 'external' blacklisting because it is referred to the UNSC resolution 1390 and also the list issued in it is the duplicate of the UN blacklist under the above-mentioned resolution of the Security Council. More deeply, the regulation[102]:

- Reaffirms the freezing of the financial assets and the other restrictive measures implemented by the previous regulations against Al-Qaida, Osama bin Laden (and whoever is linked with him) and the Talibans;
- States that all the member States determine the types of measures to adopt that should be effective, proportionate and dissuasive and each member State is responsible to initiate the legal proceeding against any listed subject who is living under its jurisdiction.
- States that the Commission can amend the blacklist (which is annexed to the regulation) at any time on the basis of the new Security Council conclusions or following the information given by the member States.
- At article 9, it states that the regulation is applied leaving aside any obligations derived from any international agreement or contract signed before the implementation of this act.
- Finally, at article 6 the Regulation stated an exception to the sanctions previously imposed by saying that: "The freezing of funds, other financial assets and economic resources, in good faith that such action

[101] PORRETTO (2008: 244).

[102] Regulation of the Council of 27 May 2002, (EC) No. 881/2002, *on imposing certain specific restrictive measures directed against certain persons and entities associated with Usama Bin Laden, the Al-Qaida network and the Taliban.*

is in accordance with this Regulation, shall not involve the natural or legal person, group or entity implementing it, or its directors or employees, in liability of any kind unless it is proved that the freezing was due to negligence"[103].

The stipulation of blacklists and the adoption of targeted sanctions against the listed subjects has risen numerous legal difficulties. These problems have a major impact over the EU system because of the importance given to the European Convention of Human Rights[104] ("ECHR") whose purpose was to preserve human rights and fundamental freedoms in Europe, and which is binding for all the member States. The most common critics made against this system are the fact that freezing assets happens without a fair trial and they violate the right to dispose of private property under the ECHR[105]. The counterarguments to these critics are basically three: the first one relies on the reasoning that individual sanctions have a provisional nature and are necessary for combating the financing of terrorism; the second one is based on the fact that these sanctions have not criminal nature and due to this it is normal that human protection does not apply in this case; finally, the third reason is based on a law argument according to which under international law every State has an obligation to honor its commitments in agreements unconditionally[106]. Basically, according to these counterarguments, the supremacy of the UN over the other organizations within the international law imposed to all the member States to adopt the binding decisions made by the Security Council, without even taking into consideration national constitutional law or even the ECHR[107]. In other words, judicial review should not be applied over the domestic implementation of UNSC resolutions. With specific regard to the European Union, we know that ECHR is considered as the fundamental basic convention which has to be respected by all the Member States. The relationship between the EU law and the ECHR has always been complex. It can be said, that the principles included in the charter have often been recalled by the European Court of Justice with its proceedings, that they have been recognized as general principles of the community with the Treaty of Maastricht[108] and that human rights have been included in the charter of Nice[109]. Still, the charter only became binding after the reform of the Lisbon Treaty[110] with the inclusion in the TEU of the article 6[111] which is totally focused on human rights and states:

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[103] Regulation (EC) No.881/2002.
[104] European Convention on Human Rights, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1,4,6,7,12,13 and 16, Rome, 4 November 1950.
[105] ANDERSSON (2013: 73 ss.).
[106] *Ibidem.*
[107] *Ibidem.*
[108] Maastricht Treaty (or Treaty on European Union), Maastricht, 7 February 1992.
[109] CHERUBINI (2015: 176 ss.).
[110] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Union, Lisbon, 13 November 2007.
[111] Treaty on European Union, Title I *on Common Provisions*, article 6.

> "1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
>
> The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
>
> The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
>
> 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
>
> 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law"[112].

The article explain in an accurate way the present relationship between the EU law and the ECHR; the first paragraph gives judicial value to the charter of Nice of 2000, which has been adapted and then recalled on 2007; the second paragraph states that the EU will join the Convention of 1950, that is really important because it settled the control of the European Court of Human Rights over the European Union's institutions and their actions to avoid the damage of any of the rights recognized as fundamental, but the issue behind the accession of the Union in the convention will be better analyzed later in the research; finally, the third paragraph which is also considered as the most important, states that the fundamental rights guaranteed by the convention are fully-fledged part of the European Union law as general principles[113]. Above all, it has been really difficult to find a balance between the respect of human rights and the fulfillment of internationally binding decision from the UN. We are now facing one of the most important dilemmas of the European Union: whether to consider more important the fight against terrorism and accept the strategy and the measures taken by the United Nations or to respect its fundamental principles contained in the ECHR and in the charter of Nice which are binding for all the member States as it has been explained with the analysis of article 6 of TEU. This issue is the core of this research and the following paragraph will analyze it more in depth in order to reach a conclusion about the EU position about this topic. To conclude this first chapter, in the next paragraph the ECHR and the fundamental rights that the blacklisting system and the consequent targeted sanctions could violate will be studied.

[112] *Ibidem.*
[113] VILLANI (2016: 47 ss.).

1.4. The ECHR and the breach of fundamental rights in the blacklisting system

Human rights are considered those rights which are fundamental, inalienable and unalterable for each human being and the violation of which by any State or entity should directly lead to a trial and a sentence. After the Second World War, in order to promote democracy and the respect of human rights the Council of Europe was founded, and its first purpose was to draft a treaty to secure fundamental rights for any individual within their borders whether these individuals were European or of other nationalities. Due to this, the European Convention on Human Rights was signed in Rome in 1950[114] and it came into force in 1953. It was signed by all the Member States of the Council of Europe and it recalled the Universal Declaration on Human Rights[115] of 1948. The purposes of the convention are listed in the preamble, in particular it is important to mention that the ECHR was draft as[116]:

a) Minimum standard of living: meaning the creation of a common base of protection of fundamental rights;

b) Form of collective assurance: due to this on article 19 of the convention the creation of a European Court of Human Rights is planned whose purpose is to implement and to make the rights listed in the convention be respected;

c) Reinstate the name and the reputation of Europe within the rest of the world. In fact, after the two world wars, it was important to show within the international arena that the European Countries were effectively able to promote human rights, to respect, protect and spread democracy and to preserve the rule of law.

The European Convention on Human Rights is composed by fifty-nine articles and sixteen Protocols (but only fifteen are in force) which expresses all the substantial and procedural human rights that must be respected. Among all, it is important to mention[117]:

- Art. 1: obligation to respect human rights;
- Art. 2: right to life;
- Art. 3: prohibition of torture (which includes also all 'inhuman or degrading punishments');

[114] European Convention on Human Rights.
[115] The Universal Declaration of Human Rights (UDHR) is a document adopted by the United Nations' General Assembly on 10 December 1948. It was adopted with the purpose of listing all the fundamental human rights that should be respected, especially in that historical period, after the end of two world wars. Even if the declaration is not a treaty, it has been inserted within the UN Charter whose also documents are binding for all the Member States.
[116] European Convention on Human Rights.
[117] *Ibidem*.

- Art. 4: prohibition of slavery and forced labor;
- Art. 5: right to liberty and security;
- Art. 6: right to a fair trial;
- Art. 7: no punishment without law;
- Art. 8: right to respect for private and family life;
- Art. 10: freedom of expression;
- Art. 13: right to an effective remedy;
- Art. 18: limitation on use of restriction of rights;
- Art. 19: establishment of the European Court of Human Rights (generally called 'The Court').

As it was mentioned before, the introduction of targeted sanctions and the blacklisting system in the counter-terrorism strategy has been protagonist of numerous critics especially regarding the legal field. It can be noticed that at least some of the articles mentioned above could be breached due to the implementation of the restrictive measures that have been previously analyzed. Therefore, it is necessary to understand the relationship that those measures have with human rights with particular regard to the rights listed in the ECHR, to better apprehend the internal conflict that European Union is living between security and respect of fundamental rights. First of all, it is important to distinguish between substantial human rights (which are basic rights possessed by people) and procedural rights (which are the rights to information, access to justice, and rights to public participation)[118]. It is also important to reaffirm that the blacklisting system consists in including into a specific list any individual or entity suspected of terrorist activity or having any connection with terrorist organizations and targeted them with specific restrictive measures such as: freezing of financial and assurance assets, restriction of access to financial market, travel ban, arms embargo etc. Consequently, taking into consideration the substantial rights it is possible now to understand if and how any breach of them exists. With regard to the 'freezing of a person's assets' some scholars have argued that the impossibility for a person to access to any of his fund is considered as a 'inhuman and degrading' treatment (hence, against art.3 of ECHR) if it impacts the necessities of life. Current sanctions regime does have some exceptions to the freezing of assets with regards to humanitarian needs, even if such exceptions have to be authorized case by case and for this reason not always have been taken in total consideration[119]. The general rule should provide that the freezing of assets should be avoided if there is not possibility

[118] HAPPOLD (2016: 8).
[119] HAPPOLD (2016: 9).

for the targeted individual to benefit from 'basic expenses'[120]defined as: payment for food, medical treatments and medicines, taxes etc. Another right that is thought to be violated is the right to property which is provided by art. 1[121] of the first additional Protocol of the ECHR. However, in this case, the right in question is not considered as an absolute right and it is not even necessarily permanent. Moreover, in most cases the restriction to the individual property would be proportionate and given in order to fulfill to the international or national security interest. This is the view taken into regard by the Court of Justice of European Union specifically referring to the targeted sanctions imposed by the Council. Concerning this issue, the Court of First Instance in the case *Bank Melli* v *Council* states that: " Given the primary importance of maintaining international peace and security, the disadvantages caused are not inordinate in relation to the ends sought, especially because, first, those restrictions concern only part of the applicant's assets and, secondly, […] provide for certain exemptions allowing the entities affected by fund-freezing measures to meet essential expenditures"[122]. One objection that can be made to the statement of the court regarding the right to property is that targeted sanctions should not include also family members if there is no evidence of their involvement in the actions of the applicant. Concerning the relationship of the targeted individual with family members, there have been several critics regarding the use of both the freezing of assets and the travel bans. Those critics are based on art. 8 of ECHR (which protects the right to respect for private and family life) and, consequently, on the facts that travel bans could prevent family reunification and could destroy the private life not only of the individual but also of his family members, and the same matter could arise in case of freezing of assets wherever the family necessity of life was based on those funds[123]. After having analyzed some possible breaches of substantial rights due to blacklisting, it is possible to say that even if there have been cases of violation of those right officially recognized by the Court, they are way less frequent than the violation of procedural rights. Moreover, whether or not there has been a breach of any substantial right it depends on the accusations made against the individual and if they are well-founded or not. But in case of dispute this has to be solved within a judicial proceeding, which leads to the real concern of the balancing between the blacklist system and the respect of fundamental rights: the breach of procedural rights. In fact, the primary issue with regard to targeted sanctions has been the compatibility

[120] *Ibidem.*
[121] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, at article 1: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".
[122] Court of First Instance Judgment of 14 October 2009, case T-390/8, *Bank Melli* v *Council*, paragraph 71.
[123] HAPPOLD (2016: 12).

of those measures with procedural rights which are: the right of a fair trial, the right to access to a court and the right to an effective remedy. As it has been said before, the targeted subjects are included in the blacklist by member States or by bodies of the UN or of the EU. It is mentioned that there should be a deep investigation over the suspected ones and that they should be added only after a strong evidence of their involvement in terrorist activities. But in none of the cases, there was a trial before the addition to a member list. Moreover, the de-listing procedure has been added only in 2006 and also in this case, the applicant does not have the possibility to take part to the procedure whereby it is decided whether the request of de-listing can be accepted or not. With regard to the position of the European Union, the great dilemma is to understand, in particular, whether the external sanctions should be implemented with or without judicial review. The main focus is to apprehend if the obligations of the European Union with respect to the United Nations and the respect of the principle of 'loyal cooperation' between the two organizations has a greater role and importance compared to the protection of human rights as it has been drafted in the ECHR. It is possible to say that the turning point in this debate has been the famous 'Kadi case' who totally changed the vision of the European Court of Justice and that set out a new approach in the implementation of targeted sanctions by the EU. For this reason, the next chapter will be focused on the deep analysis of this case to understand the reasons of the Court's final decision and, particularly, to discover the aftermath of this proceeding.

2. CASE OF STUDY: THE KADI CASE AND THE DISPUTE BETWEEN UNSC AND ECJ

The second chapter of this thesis is focused on one of the most famous proceedings of the last decade, which is also considered the 'turning point' in the change of the European Court of Justice's jurisprudence in the field of counter-terrorism strategy and the respect of human rights, in connection with the principle of loyal cooperation which characterizes the relationship between the European Union and the United Nations. The Kadi Case was a litigation that lasted for twelve years, and it signed a great loss of monopoly over decision-making power of the Security Council, not only over individuals but also over international security[124]. As it was explained in the previous chapter, the 'targeted sanctions' decade' inaugurated by the Security Council was full of criticism especially for what regards the low consideration of the procedural human rights, especially concerning the due process deficiencies. The Kadi case, in some ways, changed the cards on the table thanks to the change of direction of EU which led the UNSC to undertake a valuable procedural reform with, *inter alia*, the creation of the office of Ombudsperson[125]. This chapter will analyze the long route of the case and also the considerations made by the European Court of Human Rights (ECtHR) in respect to the episode. To start, it is important to delineate the background of the proceeding, in order to go deeper within the various steps until the final decision.

Mr Kadi is a Saudi Arabian business man who was for the first time included in a blacklist issued by the Security Council in the Resolution 1267 of 1999. The allegation made at his charge was the suspicion of a connection with Osama bin Laden and with his terroristic organization 'Al-Qaida'. As it was explained before, there are two different sanctions' types for the European Union: the 'internal' ones (which are the autonomous sanctions directly decided and imposed by the EU Member States and EU institutions) and the 'external' ones (which are the most frequent ones and that depend on the blacklists issued by the UN Sanctions Committee and that are directly insert on the European legal order). The list in which the subject in question was included was an 'external' type of blacklist, because it was drafted within the UNSC Resolution 1267[126] and it directly entered into the EU system with an annex to the Regulation 467/2001[127]. Even after the 9/11 attacks, the situation deteriorated and the several blacklists issued by the UNSC, in which Kadi was again included, were directly introduced into the European legal system. At the time of his listing Kadi was 47 years old and according to him, the inclusion in this list, destroyed his life for the following ten years. After the end of the proceeding, in a presentation for a sanction conference on 2013, he publicly blamed public institutions for his misfortune and he stated that the

[124] HOVELL (2016: 2).
[125] *Ibidem.*
[126] Resolution 1267 of the United Nation Security Council.
[127] Regulation (EC) No. 467/2001.

source of the injustice that he faced resided in the 'denial of the rule of law'[128]. The core of this statement was the fact that at the time of the subject's listing there was not any possibility for appeal over the decision of the UN Sanction Committee or any procedure of delisting was accepted or provided: there was not any chance for Mr. Kadi to challenge the accused made against him. At that time, the only possibility for listed people to try to be de-listed was to count to the ability of the diplomatic lobbying of their state of nationality to make pressure over Security Council's members. Considering that the individual in question is a Saudi Arabian citizen, it was really impossible to access to this kind of solution. Due to this, the subject decided to challenge his listing by referring to numerous courts of both domestic and regional jurisdiction; he started by bringing the case before the domestic court in Switzerland, then in the United Kingdom, then in the United States and finally he appealed to the court of the European Union. The case of law that became internationally more important and fundamental was the one deriving from the litigation before the EU courts and that we are going to analyze. The main question was to determine whether and to what extent it was possible for the European union to consider as legal the measures adopted in order to satisfy the requirements requested by the blacklist system imposed by the United Nations. In the first place, the chapter will analyze the judgment of the Court of First Instance ("CFI"), then the judgment of the European Court of Justice ("ECJ") and in conclusion the judgment of the General Court of the European Union ("GC") and the final one of the Court of Justice of the European Union ("CJEU). In addition, the last two paragraphs of this chapter deal with the analysis of the point of view of the European Court of Human Rights regarding this matter, especially in accordance with article 15 of the European Convention of Human Rights. To start, it will be analyzed the four famous judgments which are respectively also known as 'Kadi I, Kadi II, Kadi III and Kadi IV'.

2.1. Kadi I

Mr. Kadi submitted an application to the Court of First Instance on 18 November 2001. His aim was to quest the annulment of the EU regulation which aimed to implement the Security Council blacklist in which he was included, and that comprehended the freezing of his assets[129]. The subject in question brought before the court three arguments at his favor as evidence of an unfair listing procedure[130]:

1) Breach of the right to a fair hearing;
2) Breach of the right of property and the principle of proportionality;

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[128] HOVELL, (2016: 3).
[129] HOVELL (2016: 4).
[130] Judgment of the Court of First Instance of the European Union of 21 September 2005, case T-315/01, *Kadi* v *Council of the European Union and Commission of the European Communities.*

3) Breach of the right of an effective judicial review from the EU institutions.

He stated that considering the visible and evident breach of those right which are considered as fundamental (expecting for the right to property), the annulment should be granted. The principal argument of the European Council and Commission against those motions was the fact that the institutions were bound to the United Nations resolutions following a principle of 'loyal cooperation' under international law. More specifically, this bound was referring to two different articles of the UN charter, respectively the art. 25 and the art. 103. They state that:

a. At art. 25: *"*The members of the United Nations agree to accept and to carry out the decisions of the Security Council in accordance with the present Charter"[131]*;*
b. At art. 103 "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail"[132]

The content of these two articles is the basis of the duties that the European Union had in relation to the UNSC resolutions, and it was considered as imperative and unquestionable. They state the superiority of the UN charter and of any decision, political strategy or resolution of the United Nations compared to the ones of any other organization or international treaty. Moreover, both the Council and the Commission sustained that, always following those articles, the judicial review of any binding act of the Security Council made by any of the European courts would be unacceptable. This statement was also based on the conviction that a review of a resolution of the UNSC would have brought to a rupture of what was settled on 1945 with the creation of the UN[133]. The claim of the sentence was, for the applicant, the annulment of regulations Nos. 467/2001[134] and 2062/2001[135], plus the payment of all the costs by the Council and the Commission; for the EU institutions, the claim was to reject the request of the applicant and to let him pay all the costs[136]. After having analyzed the evidence of prosecution that Mr. Kadi held against the Council and the Commission, and after having understand the main arguments of defense of the two institutions, it is now important to go deeper to the findings of the CFI issued in the sentence of 2005. One of its focal points was the question about the relationship between the legal order of the UN and the legal system of any other community or

[131] Charter of the United Nations.
[132] *Ibidem.*
[133] HOVELL (2016: 4).
[134] Regulation (EC) No. 467/2001.
[135] Regulation of the Commission of 19 October 2001, (EC) No. 2062/2001, *amending, for the third time, Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan and repealing Regulation (EC) No 337/2000.*
[136] *Kadi* v *Council of the European Union and Commission of the European Communities*.

regional organization. The response of the court to this question was the recognition of the 'rule of primacy' of international law over internal law according to customary international law. In addition, with specific regard to UNSC resolutions, the article 103 above-mentioned, explicitly states that the obligation under the resolution for all the UN member States shall prevail over any other obligation emanating from any other international agreements, which includes also the EC treaties. Regarding this, the CFI particularly attested that: "Member States may, and indeed must, leave unapplied any provisions of Community law, whether a provision of primary law […] that raises any impediment to the proper performance of their obligations under the Charter of United Nations"[137].

The second main finding of the court within this sentence, concerns the dilemma about the judicial review. As it was anticipated before, one of the main arguments expressed by Mr. Kadi in favor of his claim, was the total absence of judicial review on UNSC resolution before the implementation within the EU legal order. He stated that the judicial review is fundamental in order to verify if the policy issued by the UNSC can principally fulfil with the protection of human rights. With regard to this matter, the CFI agreed with the European institutions by saying that a judicial review over any UN resolution would have been totally inappropriate, adding that the power of the European Union to review was really limited. The tribunal also referred to the principle above-mentioned of loyal cooperation which is connected to the two articles 25 and 103 and stated that: "The Resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court Judicial review and […] the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community Law[138]". The CFI continued its explanation about judicial review and stated that, even if EU courts do not have any power to review the UNSC resolutions under community law, it was accepted the check (but only indirectly) of the lawfulness of this resolution under the *jus cogens*[139]. The expression '*jus cogens*' literally means binding law and it refers to certain customary norms of international law which are considered as unavoidable and unable to be affected by any other norms, included in other legal systems or agreements[140]. Consequently, it is considered as the highest body of rules of international law, binding all the subjects including the United Nations institutions[141]. Therefore, according to CFI there is only one possibility of limit over the UNSC Resolutions which is the obligation, for this body, to respect the norms provided by the *jus cogens.* Considering the high debate over the norms that should be included within the *jus cogens*, the view adopted by the Tribunal in this case was that all the human rights are part of it. Nonetheless, considering that also the United Nations have to deal and respect the *jus cogens* according to art. 24 (2) of the

[137] *Ibidem.*
[138] *Ibidem.*
[139] HOVELL (2016: 5).
[140] RONZITTI (2013: 161 ss.).
[141] *Kadi* v *Council of the European Union and Commission of the European Communities*.

UN charter[142], the CFI took an additional step, by saying that none of the breach previously listed by the applicant was actually put in place by the resolution 1267[143] and the consequent blacklist issued. Of course, the findings of the Court of First Instance have been targeted by numerous critics. First of all, the conclusions have been criticized for the relationship adopted between international legal order and the communitarian one, which is considered as monist and hierarchical[144]. As it was explained, this approach derived from the interpretation of two articles of UN charter: 25 and 103. First of all, in neither of articles human rights are mentioned and it turns out that what is implemented or decided by the UN should be followed no matter what. This is part of the anachronistic consideration that the UN has the main power and possibility to have a 'salvific' scope within the international arena and that everything that comes out from it has the purpose to do good. It is a totally positive and almost ideological view of how the organization could have been when it was created, but there are evidences that it is impossible to consider UN exempted from making any mistakes, sometimes even pretty serious. The estimation of this organization as always salvific, is not appropriate any more: it has been seen how also international institutions are capable to misbehave, to omit, to be the authors of human rights violations[145]. For this reason, the Security Council should not count only on hierarchy to make its resolution to be implemented: it must guarantee that all its values and interests are took into account in order to achieve widespread acceptance and compliance within its resolutions[146]. Furthermore, the approach of the CFI regarding the relationship between the legal orders can be also criticized from the normative point of view. In fact, the CFI adopted a position at this regard that can be considered at its best, inappropriate and at its worst as a terrible abdication of judicial responsibility[147]. Going forward in this research, it is now the moment to analyze the following step of the Kadi litigation.

2.2. Kadi II

On 3 September 2008, the European Court of Justice pronounced its decision on appeal in the Kadi case. The findings of the Court have been influenced in the first place by the opinion of the Advocate General Poiares Maduro, who in January 2008 issued an opinion regarding the case. The Advocate General ("AG") is a judicial officer who provides an opinion concerning the case of the European Court of Justice, in particularly by giving advices on how a

[142] Charter of the United Nations, Chapter V, art. 24 (2): "[…]in discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council or the discharge of these duties are laid down in Chapters VI, VII, VIII, XII". The purposes and principles mentioned in the articles are defined in the articles 1 and 2 of Chapter I of UN Charter".
[143] Resolution 1267 of the United Nation Security Council.
[144] HOVELL (2016: 6).
[145] HOVELL (2016: 8).
[146] *Ibidem.*
[147] *Ibidem.*

litigation should be resolved. Even if the opinions of the Advocate General are not binding, the ECJ in practice usually follow them to its final conclusion about a case[148]. Within this episode, AG Maduro suggested to the ECJ "(to) make use of the possibility to give a final judgment in this case"[149]. By focusing on what he thought were the principal aspect of the case: the violations of human rights. In fact, in the conclusions of his opinion, Maduro adopted a strong position, and he went against the findings of the Court of First Appeal by stating that: "[…] the appellant's claim that the contested regulation infringes the right to be heard, the right to judicial review, and the right to property is well founded. The Court should annul the contested regulation in so far as it concerns the appellant"[150]. Due to this, as a consequence, the AG proposed the following conclusion:

> "I propose that the Court should:
>
> 1) Set aside the judgment of the Court of First Instance of 21 September 2005 in the case T-315/01 Kadi v Council and Commission;
>
> 2) Annul, in so far as it concerns the appellant, Council Regulation (EC) No 881/2002 […] and repealing Council Regulation No 476/2001 […]"[151].

The opinion issued by the AG, publicly admitted that the violation of human rights against the applicant (Mr. Kadi) which was also the base of the accuse made by Kadi against European institutions, was considerable valid. Indeed, due to the implementation of Regulation (EC) No. 476/2001[152] (EC) and Regulation No. 881/2002[153], a violation of the right to be heard, the right to judicial review and the right of property occurred. For this reason, according to Maduro both regulations and the previous judgement of the CFI should be annulled[154]. The result was that, the European Court of Justice in his judgment of 2008 followed the opinion of AG and it contrasted in total the previous decision of CFI. In fact, the ECJ in the sentence took a particular and strong stand by invalidating the two regulations above-mentioned which implemented the resolutions of the Security Council that included the appellant in the blacklist and that condemned him to targeted sanctions. The reasoning of this decision is to find in the expressed violation of fundamental

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[148] DE BURCA (2009).
[149] Opinion of Advocate General Poiares Maduro of 16 January 2008, cases C-402/05P and C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v *Council of the European Union and Commission of the European Communities*.
[150] *Ibidem.*
[151] *Ibidem.*
[152] Regulation (EC) No. 467/2001.
[153] Regulation (EC) No. 881/2002.
[154] Opinion of Advocate General Poiares Maduro of 16 January 2008, case C-402/05P and C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v *Council of the European Union and Commission of the European Communities*.

rights protected by the European legal order[155]. The findings of the ECJ did not mentioned in detail neither the article 25 nor the article 103 of the UN charter, on the contrary, the Court mentioned its previous judgment in *The Queen, ex parte Centro- Com v HM Treasury*[156], in which it considered article 307 of the EC treaty (now art. 351 of TFEU)[157] as a possibility for all member States of derogation of certain duties in case of international obligations. Concerning this case, the ECJ adopted a different approach, and it explained that none of the articles, so that neither art. 307, permits to avoid the obligations deriving from EU's general principles and values, therefore including the respect of human rights and the rule of law. Hence, even if the Court recognized the rule of primacy and the supremacy of the Security Council resolutions, it also stated that it can be valid only with regard to secondary community law: meaning that none of UNSC regulations could in any way allowed a derogation of the protection of individuals human rights and fundamental freedoms which are a key aspect of the foundation of European Community legal system and which are considered as primary law[158]. Consequently, it can be notice that the real verdict of ECJ's judgment was the acknowledgment that "[…] The EC treaty [is considered] as an autonomous legal system which is not to be prejudiced by an international agreement"[159]. Moreover, how it is repeated at paragraph 282 of the sentence "[…] an international agreement cannot affect the allocation of powers fixed by the treaties or, consequently, the autonomy of the Community Legal system"[160]. By confirming the separate origin and character of the two legal systems, the ECJ also stated that the conclusion is not due to judge the lawfulness of a resolution of another international body (the UNSC), but it is referred only to the community act that have been implemented to execute the resolutions in question which are not in line with the communitarian primary

[155]Judgment of the European Court of Justice of 3 September 2008, cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v *Council of the European Union and Commission of the European Communities*.

[156] Judgment of the Court of Justice of the European Communities (now Court of Justice of the European Union) of 14 January 1997, case C-124/95, *The Queen, ex parte Centro-Com* v *HM Treasury*.

[157] Treaty on the Functioning of the European Union, art. 351 (ex art. 307 EC treaty) : "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty. To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude in applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States".

[158] *Ibidem.*

[159] *Ibidem.*

[160] *Ibidem.*

law, its values and the respect of human rights. Furthermore, the final and the most important step made by the Court in its findings has been the recognition of the violation of several human rights at the expenses of Mr. Kadi, with particular reference to[161]:

a) The right to defense, which includes also the right to be heard and the right of an effective judicial protection;

b) The right to respect for property.

After having officially stated that the violation actually occurred, the Court announced the following conclusions[162]:

a) The sentence of the CFI of 21 September 2005 is annulled;

b) The Regulation (EC) 881/2002 of 27 May 2002 which imposes restrictive measures against people connected with Osama Bin Laden and his organization or with the Talibans, are annulled for what concerns the sanctions imposed against Mr. Kadi and the Al Barakat International Foundation;

c) The effects of the above-mentioned regulations are maintained for the applicants for a period not exceeding three months from the enacting of the sentence;

d) The Council and the Commission have to bear the costs of both themselves and the applicants.

Regarding the critics arise after these findings of the Court, the reactions of the scholars have been mixed, especially because the sentence has been interpreted in different ways. In any case, the majority of the critics derived from the approach that the ECJ had with regard to the Security Council and, more generally, with regard to the international arena. In fact, it has been said that the judgment was too imperialistic, as it was a way to prove the magnitude and the power of the European Union to the disadvantage of the general values of international law. Moreover, the Court has been accused of having adopted a too nationalistic approach, unwilling to international dialogue which has always been one of the main virtues of the European Union as a global actor[163]. More specifically, Gràinne de Bùrca commented the conclusions of the sentence by saying that the ECJ has now determined the relationship between the European Union and the rest of the global arena "[…]in accordance with

[161] *Ibidem.*
[162] *Yassin Abdullah Kadi and Al Barakaat International Foundation* v *Council of the European Union and Commission of the European Communities* Case.
[163] DE BURCA (2009)

its own internal values and priorities rather than in accordance with any common principles or norms of international law."[164]. From another and more practical point of view, the real fear was that the new jurisprudence of the ECJ would have de-stabilized the status quo of the international politics and it could also have been a real turning point for the collapse of the sanctions' regime[165]. On the contrary, other scholars have not interpreted the judgement as that isolationist as it has turn out in the previous critics; some of them has made a comparison between this case and the *Solange*[166][167] decision by the German *Bundesverfassungsgericht* which is the constitutional court of the Federal Republic of Germany. During the 1970s, there was a complicate relationship between the EC law and the constitutional courts of the member States especially for what concerned the effective protection of basic rights[168]; the 'Solange affair' is a response to this issue, in order to find a balance between the EC law and the German legal order. The first sentence of this case is the so-called Solange I of 1974 in which the main issue was that the autonomy and independence of both the EC legal order and the German one. This brought to the inability of the EC judge to rule on the validity of the norms of the German legal order and vice versa. According to the *Bundesverfassungsgericht* the EC law had a supremacy role only for what concerned the ordinary German law, but not on the constitutional one. Moreover, the most important point of the affair was the protection of basic rights that was well conducted by the German constitutional law, but, on the contrary, there was a lack of provisions for fundamental rights within the European treaties of that time. Due to this, the final decision of the German constitutional court was that there should been the possibility for German courts to review the EC acts in order to be sure of their conformity with German constitution "[…] as long as the integration process has not progressed so far that Community law [recognizes] a catalogue of fundamental rights […] which is adequate in comparison with the catalogue of fundamental rights contained in German constitution"[169]. Afterwards, the *Bundesverfassungsgerich* was again involved in a proceeding which is known as Solange II, because it is considered the following act of the first sentence and also the conclusion of the affair. The second act was handled in 1986 when the German constitutional court was re-called to judge if the regulations of the Commission were breaching fundamental rights. In this case, the body ruled that it has not the power nor the competence to intervene in the cases in which the EC institutions and, in particularly, the European Court of Justice was able by itself to satisfy the requirements of protection of basic rights for every individual. For this reason, at the end, the *Bundesverfassungsgerich* decided to reject the appeal. It is impossible to do not notice the similarities

[164] *Ibidem.*
[165] HOVELL (2016: 10).
[166] Judgment of Bundesverfassungsgericht of 29 May 1974, 52/71, *Solange I-Beschluß.*
[167] Judgment of Bundesverfassungsgericht of 22 October 1986,197/83, *Solange II.*
[168] HOVELL (2016: 11).
[169] *Ibidem.*

between the Solange affair and Kadi II: it is the same matter of competences but comprehending the international scenario and not only the communitarian one. The real difference between the two cases regard the approach had by the two courts with respect on one side to the EC law and on the other to UNSC resolutions. In fact, while the *Bundesverfassungsgerich* always tried to have a dialogue with the EC institutions in order to find a solution that could be favorable to both of them, the ECJ adopted a stronger position, it was not interested in entering into a dialogue with the Security Council, it refuse to find a common solution between the two legal orders and it only emphasized the fact that its decision concerned the relationship between the regulation and the respect of human rights which is at the core principles of the European Union, as it is specified in the article 6 (1) of TEU[170]. In a first phase, the finding of the ECJ was seen more as an act of rebellion against the UNSC, then a real turning point in the European approach to the respect of fundamental rights; in fact, the Kadi II decision was considered, first of all, as an exception to strengthen the role of the ECJ within the international scenario. As a consequence of it, the Security Council's response was the creation of the office of UN Ombudsperson, which is a subsidiary office of the UNSC; it was establish with the UNSC resolution 1904[171], and its purpose was to help the sanctions committee in the delisting procedure, in order to permit to the listed individuals to have a better possibility of being excluded from the blacklists in case of wrong listing, and in order to avoid the unjustified violations of human rights. The creation of this body was the attempt of the Security Council to avoid the collapse of the blacklisting system due to the change of course of the ECJ in this matter. Moreover, the Security Council was afraid of the general public thought regarding its capacity of protecting human rights after the issuing of the ECJ judgment, and the creation of this new body was the attempt to prove that also within the UN a step forward for the preservation of fundamental rights was done. In conclusion, it is important to understand if the judgement of the European Court of Justice had a real impact over the following sentences of the case, or if it was just an 'exception' due to the will of the Court to increase its straight at the global level.

2.3. Kadi III and Kadi IV

On 8 September 2008, the UN French permanent representative, asked, on behalf of the EU institutions, to the sanctions committee to publish on its website a summary of the reasons that brought to the inclusion of Mr. Kadi in the blacklist. On 21 October 2008, the president of the sanctions committee

[170] Treaty on European Union, art. 6 (1): "The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasburg, on 12 December 2007, which shall have the same legal value as the Treaties".

[171] Resolution of the United Nations Security Council of 17 December 2009, S/RES/1904(2009), par. 20-21.

gave the summary of the reasons to the permanent representative and, moreover, he gave the authorization to submit the document to the appellant and to his lawyers. To summarize the script, it listed all the main reasons for which Kadi was enlisted, and among all, he was accused of financing Al-Qaida, of providing materials and weapons to the terrorist organization, and to help it to recruit individuals. On 22 October 2008, the document was delivered to the European Commission and after that it was read by the appellant and his lawyers, on 10 November 2008, the applicant brought its considerations before the Commission and in particular[172]:

a) He asked to the Commission to produce evidence in support of the allegations made in the document;

b) He asked to have a possibility of brought once again its considerations before the Commission after having received the requested evidence;

c) He tried to defend himself and to deny all the allegations made against him.

In response, the Commission issued the regulation (EC) No. 1190/2008[173], in which it states that after having showed to Mr. Kadi the summary of the reasons of his enlisting and after having given to him the possibility to present his considerations about it, these consideration has been examined and the final statement was that the restrictive measures against the appellant were more than justified and he has to remain in the blacklist[174]. Due to this, on 26 February 2009, the appellant contested the decision and brought the case before the General Court of European Union ("GC") which exposed its conclusions on 30 September 2010. First of all, the GC presented the conclusions of the two parts: Mr. Kadi wanted the annulment of the regulation 1190/2008 for what concerned himself and, moreover, he wanted to condemn the Commission to the costs of proceeding; on the other side, the Commission wanted to reject the appeal and to condemn the appellant to pay all the legal costs[175]. The GC judgment follows some considerations about the previous decision of the ECJ, and it states that the adopted approach has risen some problems for the relationship between the member States and the UN, especially for what concerns the implementation of UNSC resolutions[176].

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[172] Judgment of the General Court of the European Union of 30 September 2010, Case T-85/09, *Yassin Abdullah Kadi* v *European Commission*, par. 49-62.
[173] Regulation of the European Commission of 28 November 2008, (EC) 1190/2008*, on imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban.*
[174] *Ibidem.*
[175] *Yassin Abdullah Kadi* v *European Commission*, par. 71-74.
[176] *Yassin Abdullah Kadi* v *European Commission*, par. 118-126.

Nonetheless, the GC at point 126, also states that, as it was decided by the ECJ in its sentence at points 326 and 327, the Tribunal has

> "[…] to ensure […] in principle the full review of the lawfulness of the contested regulation in the light of fundamental rights, without affording the regulation any immunity from jurisdiction on the ground that it gives effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations."[177].

Due to this, in its conclusions[178] the GC affirms that:

a) The contested regulation was adopted without giving any real guarantee for the appellant to have the possibility to expose his own reasons to the competent authorities, and this is happening in a contest in which his restriction to the right of property should be significant, also considering the high rank of targeted measures applied against the appellant;
b) Hence, the regulation No. 881/2002 which listed the subject and targeted him with the freezing of capitals has to be considered as an unjustified restriction of the right to property of the appellant;
c) Hence, the accuses made by the appellant against the Commission regarding a violation of the principle of proportionality in relation to the right of respect of property are well-founded;
d) Hence, the contested regulation has to be annulled in the part regarding the appellant;
e) The Commission has to support the proceeding costs both of itself and the appellant.

To summarize the findings of the so-called Kadi III, the General Court of the European Union stated that the deficiencies at UN level for what concerns the right to a fair process and the right to a judicial review, previously found by the ECJ, were still in place. Due to this, even if it recognized the step forward made by the UN with regard to this matter, the tribunal also realized the necessity to review the implementing measures in accordance with EU human rights law.

The European Commission, The Council and the United Kingdom of Great Britain and Northern Ireland did not well accept the decision taken by the General Court and for this reason, they contested the judgement. Due to this, the Court of Justice of the European Union ("CJEU"), on 18 July 2013, was obliged to give the final judgment which is also called Kadi IV. The arguments of the appellants were based on the belief that the judgement given by the

[177] *Ibidem.*
[178] *Yassin Abdullah Kadi* v *European Commission,* par. 192-197.

General Court was not considerable valid: first of all, the Council, supported by Ireland, Spain and Italy, accused the GC of having made a great mistake by refusing of considering the jurisdictional immunity to the contested regulation. Moreover, the Council affirms that by not considering the above-mentioned regulation as protected by immunity represents a violation within international law; in fact, this refusal does not take account of the responsibility with regard to the work of the Security Council in order to maintain peace and international security and, in addition, it does not take into account the obligations deriving from the UN charter, which are above all other international treaties/obligations/duties. Hence, it would violate the duty of acting in a good faith and the obligation of mutual assistance which have to be observed in the execution of the UNSC measures. The approach adopted by the GC would mean to control the legitimacy of the UNSC resolution on the basis of the EU law and this would bring to the UN member States which are also part of the EU, to a significant uncertainty regarding the hierarchy of obligations to respect[179]. Furthermore, by denying the immunity of the contested regulation would bring also to a breach of the EU law because it would obstruct both international law and the decision taken by UN bodies. The appellants also sustain that the sentence of the GC was wrong due to the consideration that the protection of human rights within the United Nation is not sufficient; in fact, according to the appellants the steps made by the UN with the creation of the office of ombudsperson are more than useful as a guarantee to the respect of fundamental rights, as the exclusion of several names by the lists gave evidence. In conclusion, according to the appellants, the decision taken by the General Court could not be considered valid in any cases, and for this reason, the contested regulation could not be annulled. Hence, the Commission, the Council and the United Kingdom requests the annulment of the sentence of the General Court of 30 September 2010[180]. Thus, the CJEU concluded as follows:

a) EU Courts have to guarantee a complete control over the legitimacy of the EU acts which refer to the fundamental rights because they are a fundamental part of the EU law. It does not matter if these acts are issued to implement a resolution or any other measure of the UN, they cannot be immune to review. This condition is particularly stated by the article 275 (2) of TFEU which affirms: "However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against

[179]Judgment of the Court of Justice of the European Union of 18 July 2013, joined cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and others* v *Yassin Abdullah Kadi*, par. 60-64.
[180] *European Commission and others* v *Yassin Abdullah Kadi*, par. 1.

natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union."[181];

b) Within the fundamental rights recognized in the EU law there are, *inter alia*, respect of the rights of defense and the rights to effective judicial protection. The first one is proclaimed by the article 41[182], paragraph 2, of the Charter of Fundamental Rights of the European Union and it also include the right of a fair hearing. The second one, is proclaimed by article 47[183] of the charter and it includes the possibility for the subject to know the reason of the decision adopted against him to give to the subject the possibility to defend himself and his rights in the best conditions possible. Due to this, the European Union Courts have to verify if the EU competent authority respected the procedural guarantees and the duty of motivation;

c) Moreover, considered that the restricted measures adopted against individuals have preventive nature, it is fundamental for the Courts to verify all the reasons that have brought the committee to include the individual in the list. If even just one of the reasons is considered by the courts as a valid justification for the inclusion of the name in the list, the regulation would be accepted. on the contrary, the regulation would be annulled[184]. This control is necessary for two particular reasons: first of all, because the targeted sanctions produce a significant and negative impact over the freedoms and rights of the subject; secondly, because even if there have been step forward within the UN for the protection of the rights of the listed people in order to make an appeal for the so called 'wrong listing', a real judicial protection is not guaranteed[185];

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[181] Treaty on the Functioning of the European Union, article 275 (2).

[182] Charter of Fundamental Rights of the European Union, Nice, 7 December 2000, article 41: "1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. 2. This right includes: the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; the obligation of the administration to give reasons for its decisions. 3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. 4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.".

[183] Charter of Fundamental Rights of the European Union, article 47: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.".

[184] *European Commission and others* v *Yassin Abdullah Kadi*, par. 130.

[185] *European Commission and others* v *Yassin Abdullah Kadi*, par. 134.

d) With particular regard to the situation of Mr. Kadi, the CJEU stated that after an analysis of the file issued by the sanctions committee, the accuses made against the subject are not considerable valid to justify the adoption of targeted sanctions against him. This happened both for insufficient motivation and for absence of information elements. Due to this, the CJEU considers the accuses made against the subject as not valid and rejected the appeal[186].

The Judgment of the CJEU, which recalled the previous judgment of the ECJ in Kadi II, has particular implication also for international law. In fact, the approach taken by the court in Kadi IV has been a lot criticized because it was accused to prefer the European Union law over the international law. The criticisms have risen especially for what concerned the member States of both United Nations and European Union; the fear was that they could have obligations within international law that they could not fulfill due to the inconsistency of these obligations with EU law[187]. The implications of the Kadi case with EU law and with the jurisprudence of the Court of justice will be deep analyzed in the next chapter; now it is important also to understand what kind of approach was adopted by the European Court of Human Rights regarding the balance between the fight against terrorism and the respect of the fundamental rights included in the charter.

2.4. European Court of Human Rights' position on the balance between the fight against terrorism and the respect of human rights: Nada v *Switzerland.*

How it will be possible to see in this paragraph, also the European Court of Human Rights ("ECtHR") has always stated that States have to balance the fight against terrorism with the respect of human rights. It is also important to say, that the European Convention on Human Rights concedes to the States a certain room of manoeuvre to deal with emergency situations. This room of manoeuvre is stated in article 15 which is a derogation clause. The article states that:

> "1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
>
> 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (§ 1) and 7 shall be made under this provision.

[186] *European Commission and others* v *Yassin Abdullah Kadi*, par. 164-165.
[187] SHIRLOW (2014: 8).

> 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed"[188].

This article affords to contracting States the possibility, in circumstances of emergency, to derogate their obligations but always in a limited and supervised form. Of course, it does not mean that the States are justified to do not guarantee any of the rights or freedoms included in the convention for that particular period; instead, it means that there could be a derogation from the convention and that in any case in which an applicant complains that any of his or her rights have been violated, it will be the European Court of Human Rights to decide whether the measures taken by the State in question have been proportionate and can be justified. The article is divided into three parts; the first one sets three conditions for a justified derogation[189]:

a) It must be in time of war or other public emergency that could be a threat to the life of the State;
b) The measures taken under the derogation have to be strictly required by the exigencies of the situation;
c) Those measures must not be incompatible with the obligations of the State in question with international law.

For what concerns the point a) of the list, the 'public emergency that could be a threat to the life of the State' means a real situation of national crisis; the emergency has to be actual and imminent and could regard also only a region of the State as long as the situation is really dangerous that could bring to a crisis within the entire Nation. Regarding the point b) of the list, it means that the measures taken within the particular situation do not let the State to have unlimited power and, due to this, the Court have the power to examine any of the complaints on the merit and to decide whether or not the State has acted in a proportionated way, which means that the measures taken should have as a purpose the protection and the safeguard of the democratic order (including the democratic society, pluralism and tolerance) from any threats against it. In relation to point c) of the list, it simply means that the Court will accept the derogation over the convention and the measures that are derived from it, only if they do not erode the obligations of the State under international law[190]. The second part of the article 15 concerns the non-derogable rights. It implies that certain rights are protected from derogation. In particular, the articles 2, 3, 4 (1) and 7 are listed. Article 2 is the rights to life, and it has the only exception

[188] European Convention on Human Rights.
[189] European Court of Human Rights, Guide on Article 15 of the European Convention on Human Rights, Derogation in time of emergency, 31 December 2018, available online.
[190] *Ibidem.*

with respect to deaths in case of acts of war; article 3 is the prohibition of torture and other forms of ill-treatment; article 4(1) is the prohibition of slavery or servitude and, finally, article 7 settles that there must not be punishment without law[191]. To conclude the analysis of article 15, the third part is relative to the notification requirements[192]. Once the contracting party has decided to avail himself of the right to derogation, it has to inform the secretary general of the Council of Europe of the measures that it intends to implement and of the reasons that have brought him to that particular situation. Moreover, it has also to inform the secretary general when the measures ceased to be in force and when the convention will be fully executed. The main purpose of this notification is to make the derogation public and in case of missing notification to the secretary general, the article 15 is to consider not applied for the contracting party in question[193]. In order to better understand, the real position of the European Court of Human Rights in relation to this issue, it is important to analyze the practice of its jurisprudence. With this purpose, one famous case held by the ECtHR, which has similarities with the Kadi case, will be studied: *Nada* v *Switzerland*.

2.4.1. Nada v *Switzerland*

On 12 September 2012 the grand chamber of the ECtHR ruled on the appeal presented by Youssef Moustafa Nada against Swiss, regarding the implementation of targeted sanctions issued by the UNSC against subjects which were suspected to be connected with international terrorism. Mr. Nada was born in 1931 and has been living since 1970 in the Swiss enclave *Campione d'Italia*, he is a practicing Muslim and a businessman working both in the financial and in the political field. He always stated that he was against the means and the ideology of Al-Qaida and he always condemned international terrorism. Nonetheless, after the UNSC resolution 1390 of 16 January 2002[194], he was included in the blacklist and he was targeted with restrictive measures. Swiss, that at that time was not in the United Nations yet (the State became a member of the UN later in September 2002), decided to implement in any case the measures adopted by the Security Council with a federal order so that it disposed the inclusion of the subject in the blacklist[195]. Due to these measures, the appellant was subject to a travel ban and also to the freezing of financial assets. Mr. Nada, after that all domestic remedies have been exhausted, appealed to the ECtHR with the request that the violation by Switzerland of articles 5 (the right of personal freedom), 8 (the right to respect personal and family life), 9 (the right of freedom of thought,

[191] European Convention on Human Rights.
[192] European Court of Human Rights, Guide on Article 15 of the European Convention on Human Rights, Derogation in time of emergency, 31 December 2018, available online.
[193] *Ibidem.*
[194] Resolution 1390 of the United Nations Security Council.
[195] Judgment of the European Court of Human Rights of 12 September 2012, application No. 10593/08, *Nada* v *Switzerland*, Par. 11-40.

conscience and religion) and 13(the right to have an effective judicial review)[196] of the European Convention on Human Rights was ascertained. Before the ECtHR, the government requested to the court to declare the inadmissibility of the appeal because of its incompatibility *ratione personae* and *ratione materiae* with the convention: first of all, because the government only implemented measures that have been based on UNSC resolutions, that are binding above all others international agreements, so it could not be considered responsible for the implementation of those measures; secondly, because these issues are outside the jurisdiction of the Court, for being issued by the United Nations Security Council[197]. In addition, the government also stated that the restrictive measures against the appellant have been stopped on 2009 when the name of Mr. Nada was deleted from the blacklist by the sanction committee and for this reason, the appellant should not be considered as a real victim. In response to this consideration, Mr. Nada stated that even if the measures stopped to have effect on 2009, it did not mean that he has not suffered during the previous years, when they were still into force. In addition, the applicant complained that for the period in which the measures were still in place, he was not able to pass or to enter in Switzerland and it has breached his right to respect of his private life, including his professional and family life, provided by article 8 of the convention. He stated that the travel ban that was implemented against him prevented him from seeing his family and the addition of his name on the blacklist destroyed his honor and reputation and also damaged his career[198]. Hence, according to the applicant, the violation of article 8 existed on various counts. Always regarding the consequences of the travel ban, the appellant also claimed a violation of article 5 of the convention: he stated that by preventing him from entering or pass through Swiss, he was deprived of his liberty. He also claimed that any of the authorities had undertaken a review in relation to the lawfulness of the restrictions to his freedom of movement[199]. Moreover, Mr. Nada complained that there was also a violation of article 13, according to which everyone has a right to have an effective judicial remedy before a national authority if the breach was committed by an individual acting in his/her official capacity. In fact, he stated that the conformity of the targeted measures against him with articles 5, 8 and 9, of the convention were not analyzed by any domestic court and for this reason, also a violation of article 13 existed[200]. After having analyzed the accuse and the defense of this proceeding, the Court states that:

a) According to article 1 of the convention "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of [the] convention"[201], which

[196] European Convention on Human Rights.
[197] *Nada* v *Switzerland*, Par. 102-103.
[198] *Nada* v *Switzerland*, Par. 149.
[199] *Nada* v *Switzerland*, Par. 215.
[200] *Nada* v *Switzerland*, Par. 200.
[201] European Convention on Human Rights.

means that the contracting party is responsible for all the acts and the omissions of its bodies regardless if they derives from the implementation of a national legal norm, or to respect a norm of international law. In this case, the resolution of the UNSC has been implemented at national level thanks to a federal ordinance. Hence, considering that the resolution has entered into force in Switzerland due to a national act, the responsibility for the violation of the convention is attributable to the Swiss government and the Court also dismisses the objection according to which the appeal is not valid for *ratione materiae*[202];

b) Declares the complaints concerning articles 13 and 8 as admissible and for this reason the request of the government to reject the appeal is inadmissible;

c) Regarding the complaints in relation to article 8, the Court states that this article provides the respect of private and family life and due to his travel ban, Mr. Nada suffered a violation of this right, especially because he had not the possibility of consulting his doctors even if he suffered of problematic healthy issues. For these reasons, the complaint subsisted, and the breach of the above-mentioned article existed[203];

d) Concerning the alleged violation of article 5 of the convention, the Court stated that the applicant was not deprived of his total liberty even if he was targeted by a travel ban. Moreover, the ECtHR stated that there was not a real detention and that the applicant was free to live in his house without being under a house arrest. For this reason, according to the Court, the breach of article 5 did not exist[204];

e) According to the Court, the circumstances for the applicant were aggravated by the fact that he had not the possibility to challenge the merits of the accuses made against him. The Court observed that even if the appellant was able to request to the national authority the removal of his name from the blacklist, these authorities did not analyze the appellant's complaints regarding the violations under the convention. Due to this, the court stressed again that, even if the Swiss federal court was acting bound to the Security Council, it did not have the power to permit a violation of the rights provided by the convention. As a consequence of it, the ECtHR declared that also a violation of article 13 existed[205].

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[202] *Nada* v *Switzerland*, Par. 116-125.
[203] *Nada* v *Switzerland*, Par. 150-159.
[204] *Nada* v *Switzerland*, Par. 124-134.
[205] *Nada* v *Switzerland*, Par. 207-214.

It is important to notice, how the conclusions of this case are really similar to the ones deriving from the Kadi proceedings. First of all, before the ECtHR, the Swiss government brought as example the conclusions of the CFI in Kadi I, trying to support its position by giving the blame to the implementation of international norms which are binding above all other agreements and which have the rule of priority given by article 103 of UN charter. To contrast this position, the ECtHR exposed the conclusions deriving from Kadi II of the ECJ, by saying that there is not rule of priority that can justify a clear and wrongful breach of the fundamental rights provided by the convention. More specifically, within the findings of the Court in the Nada case, the article 103 is not even taken into consideration to try to justify the actions of the Swiss government. The point of view of the ECtHR embraced the one of the ECJ in Kadi II, by stated that the issue is not on the international plane with the UNSC resolutions, but it is on the European plane due to the implementation of internal acts aimed to apply measures that can infringe the rights provided by the convention. Hence, once again, it is evident the incompatibility between the targeted sanctions and the respect of fundamental rights, and more specifically, the ECtHR stressed the importance of combatting the phenomenon of terrorism also considering as an important aim the protection of human rights. This does not mean that for the ECtHR it is not provided any possibility of breach in cases of emergency; as we have seen at the beginning at article 15 of the convention it is settled a derogation clause for situations of crisis which can also include international terrorism, especially right after 9/11 attacks. The problem is that in this case, the measures adopted against Mr. Nada were not justified especially because its inclusion on the blacklist was not even correct and the allegations made against him were not sufficient. This was mostly due to a lack of judicial control, exactly like it happened in the 'Kadi Saga', especially because at the time of the listing of the two individuals, there was not any possibility of appeal for wrong listing. The situation is now a little bit different, because some steps forward have been made. The issue is now to understand if these steps have been really useful or are still not enough. In any case, the balance between the international or national security and the protection of fundamental rights is an issue that the European Court of Human Rights has always tried to solve. After the latest events, especially after the attacks of the 9/11, the Court has settled some guidelines that every State should follow with regard to the fight against terrorism and, more specifically, with regard to the implementation of targeted sanctions.

2.5. A new turn in the practice of the ECtHR: the guidelines to balance security and human rights

The fight against terrorism in one of the main issues of the last decades, and the international scenario is focus on finding the right means to combat it. As we have previously seen, also the European Court of Human Rights recognizes that in some particular situations of crisis a derogation of the

convention is necessary. Nonetheless, the Court also sets some specific guidelines to try to balance international security and the protection of the suspects' human rights:

a) The margin of appreciation allowed to the authorities in combatting terrorism is not *carte blanche.* This means that the ECtHR examines all the cases and all the complaints in order to understand if there is a proper balance between the protection of the democratic system and the protection of individual rights. the Court realizes that the fight against this phenomenon is really important for the international arena but, at the same time, also considers this combat as not sufficient to justify an excessive interference of the public authorities with some fundamental rights owned by every individual, also the ones suspected of being involved with terrorist organizations or activities[206];

b) More rigid restrictions are allowed by public interest when there is a plausible suspicion of terrorist threat, but, in any case, this not provide the excessive individual suffering. In relation to the fight against terrorism, the ECtHR recognized that in order to prevent important losses of human lives, the adoption of measures based on less strict parameters than usual, is allowed such as it is justified that the amount of information/accuses held by the authorities can be inferior to the conventional standards. Nonetheless, the Court has the power to examine the measures taken against the suspected individuals in order to verify if the parameters of necessity and proportionality are met. Which means that the measures need to respond to an imperative need and that the interference of the public authority need to be restricted to the level that is necessary in order to obtain the followed aim[207]. The Court also states that the pre-trail detention of the suspected terrorist does not amount to a violation of article 3[208] of the convention (prohibition of torture and other inhuman or degrading treatment or punishment) but, in any case, it has to be justified and necessary[209];

c) The most important guarantee is the access to a court. This criterion means that all the domestic courts need to deal with the complains of every individual who believes that any of the rights provided by the convention has been violated. Otherwise, the ECtHR will analyze the complaint and will find a violation of article 13 which, as we have said before, states that in case of a breach of any of the rights provided by the convention, there should be an effective remedy provided by a

[206] DRAGHICI (2009: 13-17).
[207] *Ibidem.*
[208] European Convention on Human Rights, article 3, prohibition of torture: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".
[209] DRAGHICI (2009: 13-17).

national authority if the violation has been committed by a person acting in official capacity[210];

d) The suspected individual need to be in possess of sufficient information regarding the allegations made against him, in order to let him prepare his defense. This means that even if some intelligence sources need to be protected, the Court stresses that the suspect has the right of been promptly informed about the nature and the causes of the accusation in order to be able to challenge it. Hence, the national authority cannot avoid informing the individual even if the sources of the proceeding are considered confidential. It is not necessary to disclose all the information, but the ones which are essential for the suspect's defense need to be public[211];

e) The restrictions of the rights must be temporary. This means that the rights limitations due to a mere suspicion should be counterbalanced by the judicial examination of the case right after the entry into force of these limitations. As we have said before, it is possible to adopt certain measures against an individual on the basis of the only (but evident) suspicion of his/her connection with terrorist activities, due to the difficult of the authorities to find real evidences and due to the gravity of the consequences of further terrorist attacks. In any case, these actions need to be accompanied by a judicial remedy, especially in order to remove unnecessary restrictions[212]. Moreover, the lawfulness of the limitations depends on whether the case has been well-examined, and whether the public authorities acted diligently during the investigations and have offered to the suspect means of appeal[213].

After having studied these criteria adopted by the European Court of Human Rights, it is possible to notice that the blacklisting system does not respect the majority of them in most of the cases. As we have seen in the practice of the Kadi case, but also in the Nada one, the targeted sanctions imposed against the suspects have been very harsh and based on very limited information. In these cases, the amount of restrictions against the individuals were not proportionate to the evidences against them, moreover considering that those people could be innocent. In fact, the main problem within the blacklisting system is the little opportunity for suspects to challenge the decision before an independent review body and it is really difficult also to obtain reparations

[210] European Convention on Human Rights.
[211] DRAGHICI (2009: 13-17).
[212] *Ibidem.*
[213] *Ibidem.*

in case of wrong listing. Even admitting that the international terrorism is probably one of the most important threat of the last decade and that we are facing a situation of crisis, targeted sanctions should work in a more precise and correct manner. First of all, even if the first listing could be based on a mere suspect and the quantity of information against the individual can be inferior to the regular standards, once the list is issued the real investigation should start and all the listed individuals should promptly know about their inclusions and about the allegations made against them. The investigations should be limited on time mostly because, if real evidences against the individuals are not found, they cannot be under targeted sanctions' regime for no reason; these measures hit also the family of the suspects and can destroy lives also of people that are not even involved in the case. Moreover, the most important thing is the creation of an external body which is capable to deal with the appeals of the listed individuals and, more important, which is capable of de-listing procedure. As it was previously seen, after the Kadi II proceeding and after the decision and the indirect attacks made by the ECJ, the UNSC decided to create the office of ombudsperson which is of course a step forward, but it should definitely be improved, especially considering that the time of investigation over the request of de-listing are really long such as the actual de-listing procedure.

The Kadi case was considered as a turning point in the blacklisting system, because for the first time the ECJ recognized the impossibility of dealing with targeted sanctions if the individual fundamental rights are not also considerated. It is for sure a difficult situation to balance: on one side there is the international duty of fighting against one of the most dangerous threat of this period, but on the other side, there is the duty to respect what is considered the base of the European Union, the human rights provided by the convention. Like it has been placed on a scale, the ECJ decided to protect human rights above anything else, and this decision had important consequences also regarding its jurisprudence. What it is important to understand now, is if the decision regarding the Kadi case was an exception or it has become the rule within the jurisprudence of the European Court of Justice. Due to this, in the next chapter will be analyzed the aftermaths of the case and also other, more recent, proceedings dealt by the Court, in order to apprehend whether and how the line of the ECJ has changed regarding this issue.

3. THE AFTERMATH OF THE KADI CASE: THE DEVELOPMENT OF A RIGHT-BASED JURISPRUDENCE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

In the previous chapter, we have seen how the European Court of Justice adopted an approach focus on the respect of individual human rights in relation to the fight against terrorism and, particularly, regard the implementation of targeted sanctions against the individual suspected to have connections with terrorist activities. We have analyzed it in the Kadi saga, and we have seen that the same approach has been used by the European Court of Human Rights in the case *Nada* v *Switzerland*. The aim of this third chapter is to understand if the approach used by the ECJ in the Kadi case has been only an exception to the general rule or it has been a real start for a new jurisprudence of the Court based on the completely preservation of human rights. Due to this, several more recent cases regarding the same matters will be analyzed, in order to understand what kind of procedure has been adopted by the Court. In addition, it is important also to understand the level of relationship between the European Court of Justice and the European Court of Human Rights, especially regarding the approach that the EU has with regard to the European Convention on Human Rights. Concerning this, after having refuse to join the convention, several scholars have attacked the Court by saying that this decision was against the values expressed in Kadi, and that it has shown its incoherence. In order to understand if these allegations made against the ECJ are true, the first paragraph of this third chapter is focus on this matter and on the debate behind the join of the EU in the ECHR.

3.1. The principle of equivalent protection and the importance of the relationship between the CJEU and the ECtHR.

Suddenly after the end of the Kadi saga, the Court of Justice of the European Union was again in the middle of the spotlight due to the debate regarding whether or not the EU should formally join the European Convention on Human Rights. The opinion 2/13[214] issued by the Court is now considered as 'historical' because it delineated even more, the line of the jurisprudence of this institution. This paragraph deals with this event also because this opinion is considered very connected to the Kadi decision, and it is important to delineate both the similarities and the differences between the two cases. Moreover, as it has been told before, the aim of this chapter is to understand how the jurisprudence of the Court has developed in the aftermath of the Kadi case and the analysis of this circumstance could be helpful. Before to start, it is important to highlight the background of the issued opinion. As we know,

[214] Opinion of the Court of Justice of the European Union of 18 December 2014, case opinion 2/13, *Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties.*

the European Convention on Human Rights is a multilateral agreement which was signed within the Council of Europe (which means that all the members of the Council are contracting party of the Convention) and it entered into effect on 3 September 1953. On 1996, the Court already affirmed that, considering the communitarian law of that time, there were not juridical basis for the European Union to join the Convention[215]. Due to this, on 2000, the European Parliament, the Council of the European Union and the Commission issued the Charter of Fundamental Rights of the European Union[216] signed in Nice, which has, thanks to the Lisbon treaty of 2009, the same juridical value of the treaties. Moreover, the Lisbon treaty modified article 6 of the TEU, which now provides, from one side, that the fundamental rights disposed by both the charter and the convention are considered as fundamental principles of the Union, and, on the other, that the EU 'shall' accede to the convention, without affecting its competences defined in the treaties[217]. The conditions of accession to the convention are better stated into the protocol n. 8 related to article 6 (2) TEU, which at article 1 specifies that:

> "The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms […] shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to:
>
> a) The specific arrangements for the Union's possible participation in the control bodies of the European Convention;
> b) The mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate"[218].

The article 1 of the protocol focus on the protection of the structure of the EU in case of admission to the convention, while the articles 2 and 3 are much more focus on the protection of the competences and of the powers of the Union and its institutions. In particular, article 3 states that none of the

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[215] Opinion of the Court of Justice of the European Union of 28 March 1996, case opinion 2/94, *opinion pursuant to Article 228 of the EC treaty- accession of the European Union to the Convention for Protection of Human Rights and Fundamental Freedoms.*

[216] Charter of Fundamental Rights of the European Union.

[217] Treaty on European Union, Article 6: "1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

[218] Treaty on European Union, protocol No. 8 relating to article 6 (2).

provisions issued in the agreement of accession to the ECHR could in any way affect what is declared in article 344 of the TFEU, meaning: "Member States undertake not to submit a dispute concerning the interpretation or the application of the Treaties to any method of settlement other than those provided for therein"[219], so that the competences of the judicial bodies of the EU must remain unchanged. Hence, starting from 2009 the European Union has the legal basis to join the convention, and, due to this, on 2010 the negotiations started, and the Commission was nominated as negotiator. Once the negotiations materialized in an effective project of agreement regarding the accession, the Commission asked to the Court of Justice of the European Union an opinion (following article 218 (11)[220] of the TFEU) concerning the compatibility of the project with the European Union law.

Now that the background of the episode has been analyzed, it is the time to study the opinion of the Court. The analysis of this opinion will be useful to understand the jurisprudence of the Court and to comprehend why it is considered so connected to the Kadi case. Moreover, it will be important also to understand why this advice has attracted so many criticisms.

The Court, in the opinion 2/13 of 18 December 2014, answered to a question posed by the Commission, which was related to the compatibility of the project of agreement with the EU treaties. First of all, the CJEU states that the lack of judicial basis for the entrance of the Union in the convention was now possible thanks to the Lisbon treaty, but, nonetheless, the accession to the ECHR must respect the particular characteristics of the Union as it was settled in the article 6 (2) TEU, which means that the EU must not be considered on a par of a regular State. Moreover, it is necessary to protect the autonomy and the power of the European Union law not only for the institutions but also for the member States. The Court also mentioned the importance of the preservation of the provisions issued by articles 3 and 4 of the TEU, which consolidate the division of competences between the Union and the member

[219] Treaty on the Functioning of European Union, article 344.

[220] Treaty on the Functioning of European Union, article 218 (11): "11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised".

States and which establish the principle of loyal cooperation[221][222]. Subsequently, the Court states that the ECHR, after the accession, would be considered alongside of any other international agreement signed by the EU, so that it would become part of the European law and, due to this, it would bind both the institutions and the member States. Because of this, both of them would be subjected to the control mechanism provided by the convention and, moreover, to the decisions taken by the ECtHR. With regard to this, the CJEU commented by saying that although accepting the jurisprudence of the ECtHR concerning all the issues disposed by the convention, its interference could not be accepted with regard to cases of interpretation of the European Union law or of the Charter of Fundamental Rights of the European Union and, more important, the division of the competences and the structure of the EU must be respected[223], such as it was reminded in the case *Yassin Abdullah Kadi and*

[221] Treaty on the European Union, article 3: "1. The Union's aim is to promote peace, its values and the well-being of its peoples. 2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime. 3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity and shall ensure that Europe's cultural heritage is safeguarded and enhanced.4. The Union shall establish an economic and monetary union whose currency is the euro. 5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter. 6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties".

[222] Treaty on the European Union, article 4: "1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States. 2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State. 3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives".

[223] *Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties*, par. 183.

Al Barakaat International Foundation v *Council of the European Union and Commission of the European Communities* (Kadi II) at paragraph 282, which states: "It is also to be recalled that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction […]"[224]. In addition, if the rights provided by the convention are equals to the ones provided by the charter, it would be necessary that the power given by the ECHR to the member States does not affect the level of protection given by the charter and the power and effectiveness of the European law. Therefore, the proposal of the Court is to find a coordination between the ECHR and the Charter of Nice which is not granted by the project of agreement presented. Furthermore, the Court adds that the ECHR would lead the member States to verify the respect of the convention's provision also by the other member States, even if the EU law requires mutual trust between them. So that, the accession to the ECHR could compromise the equilibrium obtained by the Union and, more important, the autonomy and the power of the EU law. The cause of this is related to the approach used by the ECHR in considering the European Union on a par of a regular State and this violate the real nature of the EU, as it was mentioned before. Also in this case, the Court states that nothing in the project of agreement has been insert in order to avoid this evolution. Additionally, the protocol n. 16[225] of ECHR signed on 2013 refers to the possibility given to the member States to ask opinions to the ECtHR regarding the interpretation or application of the rights provided by the convention. As it has been said before, in case of accession the ECHR would become part of the European law, and the mechanism provided by the protocol 16 could lead to a damage of the autonomy and effectiveness of the preliminary ruling procedure provided by the TFEU, especially when the rights disposed by the charter[226] correspond to the ones disposed by the convention. This, according to the Court, is not acceptable because it leads to a violation of article 344 of the TFEU which is, as it was previously explained, infrangible[227]. According to the Court, the accession of the European Union to the ECHR would also bring to a weakness of the division of competences between the Union and its member States, due to the introduction of the co-respondent mechanism which would permit, on one side, to the EU to become co-respondent in case of a violation regarding the compatibility of a norm of EU law with the convention, and, on the other side, to the member States to become co-respondent in case

[224] *Yassin Abdullah Kadi and Al Barakaat International Foundation* v *Council of the European Union and Commission of the European Communities*, par. 282.
[225] Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 2 October 2013.
[226] Charter of Fundamental Rights of the European Union.
[227] *Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties*, par. 210-212.

of allegation of a violation that can challenge the compatibility of a norm of the treaties with the convention[228]. To conclude, the Court analyzes the characteristics regarding the judicial control in matters of common foreign and security policy ("CFSP") and it states that, in case of accession, the ECtHR would be able to rule on the compliance to the ECHR of determinate actions put in place within the framework of the CFSP; due to this, the exclusive judicial control of the acts of the EU would be appointed to another organ which is totally external from the Union. Hence, the project of agreement also breaches the rules of European law regarding the judicial control in matters of CFSP[229]. Considering all the aspects above-analyzed, the final statement of the CJEU was that the project of agreement was not compatible neither with article 6 (2) of the TEU nor with the relative protocol (n. 8) regarding the possibility of admission of the European Union in the European Convention on Human Rights. The negative opinion given by the CJEU arose so many criticisms, but in order to better understand both the criticism and the approach used by the Court in issuing this opinion, it is better to sum up its decision[230]:

a) The project of agreement could prejudice the particular characteristics of the European Union provided by article 6 (2) of the TEU and by its relative protocol. This means that the EU would be considered on a par of a regular state and it goes against its nature and against the treaties on which it is based;
b) It can damage the principle of loyal cooperation and the autonomy of European Union law due to the lack of coordination between the Charter of Fundamental Rights of the European Union and the ECHR;
c) The project of agreement could lead to a breach of the principle of mutual trust that bind the member States of the Union;
d) The project of agreement could also have negative effects on article 344 of the TFEU and on the preliminary ruling provided by the Union, considering that it does not exclude that matters concerning both provisions of the convention and European Union law can be brought before the ECtHR instead of before the CJEU;
e) The mechanism of co-respondent could damage the characteristics and the nature of the EU and of EU law;

[228] *Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties*, par. 215-235.
[229] *Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties*, par. 249-257.
[230] *Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties*, par. 258.

f) The last consideration made by the CJEU regards the judicial control in matters of CFSP. By acceding to the convention, the ECtHR could have the power to rule in all the matters which regards the foreign policy, and which are connected to the rights and freedoms provided by the convention. The meaning of this is that the exclusive judicial control of these issues would be given to an organ which is external to the EU and, of course, it is against the provisions of the European Union law.

After having sum up the considerations made by the Court in order to better understand the grounds of the negative answer, it is now important to analyze them. First of all, it is necessary to say that this opinion has attracted many criticisms, but the most important of all regards the lack of protection of human rights: in fact, according to many, the decision taken by the Court gives more importance to the power and autonomy of the institutions of the Union, instead of caring about the protection of human rights. Following this idea, the opinion of the Court would create damage to the individual by depriving them of a fair and full protection. The critics are also based on the fact that the CJEU is a political court which is more interested in ruling on political matters than on the protection of fundamental rights. All matters regarding human rights should be considered as a competence of the ECtHR. In addition, it has been made a comparison between this opinion and the Kadi final decision, by saying that while in the latter the main goal was the protection of fundamental rights, in this case it seemed like the CJEU has totally change purpose. In fact, the question that arises after having studied the opinion 2/13 is: why in this circumstance human rights do not have a special role in the jurisprudence of the CJEU? The fact that triggers the most after having analyzed both cases is the fact that the Court, in this opinion, seems to care more about its power and autonomy than about the protection of fundamental rights of every individual. So that, it seems that there is not continuity within its jurisprudence and that the decision taken in the Kadi saga was only an exception. For this reason, it is important to examine the circumstance at best. First of all, also in the Kadi decision the Court has often underline the importance of preserving the autonomy and the power of the Union, especially for what concerns the fundamental principle on which it is based: they comprehend both the protection of fundamental rights and the specific characteristics of the EU, as they are stated in the treaties. Which means that the importance given to the principles, to the nature and to the autonomy of both the Union and the EU law was already one of the main goals of the Court even before this opinion, and it was also well underlined in the Kadi decision. For what concerns the alleged lack of protection of fundamental rights in this opinion compared to the one of the Kadi saga, it is possible to say that the situation is different. The grounds of the Kadi case were that the protection given to the individuals suspected to have connections with terrorist organizations/activities within the UN was very low, and the office of ombudsperson was created only after the promulgation of Kadi II: at the outbreak of the case, the de-listing procedure

was not even considered. For this reason, in this circumstance it is necessary to ask whether or not the fundamental rights provided by both the charter and the ECHR are already well-protected by the European Union organs even without the official admission to the convention. Regarding this matter, it is important to mention the considerations made by the ECtHR in the case *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi* v *Ireland* of 2005, which became famous for the so-called 'Bosphorus presumption' which regards the principle of equivalent protection. In this context, the ECtHR states, at paragraph 153, that the all the contracting parties are responsible for acts of omission of their organs even if they were acting following an international obligation, but, at the same time, at paragraph 150, it recognizes the growing importance of international cooperation and the relevance of protecting the proper functioning of international organizations[231]. In order to find a coordination between these two positions, the Court institutes the above-mentioned presumption of equivalent protection, by stating that:

> "155. In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides […]. By "equivalent" the Court means "comparable"; any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued […] However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.
> 156. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. […]"[232].

Hence, it is clear that the ECtHR does recognize the role and the importance of the international organizations, that includes the European Union, at one condition: there should be a protection at least 'equivalent' of the fundamental rights provided by the convention. 'Equivalent' means 'comparable' which is not 'identical', and considering that the European Union is founded on the respect of human rights (article 2 TEU) and it considers as unbreakable values the provisions issued both in the Charter of Nice and in the European Convention on Human Rights (article 6 TEU), it is possible to say that there is a right considerations of the fundamental rights as it was explained by the Bosphorus presumption. Hence, in its policy the Court has given proofs of its duty in protecting human rights, as it is happened in the Kadi case and other

[231] Judgement of the European Court of Human Rights of 30 June 2005, application No. 45036/98, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi* v *Ireland*, par. 150-153.
[232] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi* v *Ireland*, par. 155-156.

following cases that will be analyzed in the next paragraph. Moreover, the CJEU did not expressed its no confidence in the convention and in its work; the only problem was that this project of agreement could damage the structure, the roots and the law of the EU.
To conclude, in my opinion it is possible to find a connection between the two approaches adopted by the CJEU both in the Kadi decision and in the opinion 2/13: in both the circumstances the focus was given to the inviolable principles and on the nature of the European Union which have to be preserved above all. If in the first cases human rights had a privilege position, was because they have not been fully respected before; in the opinion 2/13 the focus shifted to other inviolable aspects of the Union because human rights have always been respected and promoted even without the formal accession of the EU in the ECHR. Due to all these reasons, it is plausible to find continuity regarding the jurisprudence of the Court since the Kadi saga, and it is also possible to see how the relationship between the Union and the ECHR has always been characterized by the principle of mutual trust, even before the project of agreement.
In order to proceed in the analysis of the aftermath of the Kadi case, it is now important to analyze some recent cases, similar to the Kadi one, to understand if the approach of the Court has changed with regard to the balance between the respect of human rights and the fight against terrorism, which is also the focus of the thesis.

3.2. Following Kadi: the other accepted appeals that deserve attention.

The approach used by the CJEU in the Kadi case reflects a jurisprudence based on the respect of human rights as fundamental principles of the European Union. This paragraph deals with the analysis of other cases of law, regarding the same matters of the Kadi one, in order to understand whether or not this jurisprudence lasted. The proceedings that will be examined are: *Abdualbasit Abdulrahim* v *Council and Commission*, *Liberation Tigers of Tamil Eelam ("LTTE")* v *Council and Kurdistan Workers' Party ("PKK")* v *Council*.
The first case that will be analyzed is *Abdualbasit Abdulrahim* v *Council and Commission.*

3.2.1. *Abdualbasit Abdulrahim* v *Council and Commission.*

On 21 October 2008, Mr. Abdulrahim was added to the list issued by the sanction committee within the UNSC resolution 1267 of 1999[233]. The regulation (EC) No. 1330/2008[234] of the Commission implemented the

[233] Resolution 1267 of the United Nations Security Council.
[234] Regulation of the Commission of 22 December 2008, (EC) No. 1330/2008*, amending for the 103rd time Council Regulation (EC) No. 881/2002 imposing certain specific restrictive*

resolution and provided the freezing of the founds of the appellant, which have been explained with the following motivations:

a) He was involved in the fund-rising for the Libyan Islamic Fighting Group[235];
b) He was invested of important roles in the above-mentioned group in the United Kingdom;
c) He was connected to the directors of the Sanabel Relief Agency[236] in the United Kingdom, and, above all, to Ismail Kamoka who was found guilty of having financed terrorism and he was condemned in the United Kingdom on 2007[237].

On 15 April 2009, Mr. Abdulrahim made an appeal against the Council of the European Union and the European Commission, with the requests of obtain the annulment of the regulation 1330/2008 (for the part concerning him) and a reparation for the damage that was caused by these measures. The appellant justified his appeal by stating that he was not informed about the allegations against him and there was a violation of his right to be heard. In addition, according to him, the freezing of his founds appeared to be a breach of his right to property and to the private life, and it was not proportionate. Moreover, Mr. Abdulrahim stated that he was never part of Al-Qaida nor connected to bin Laden or to the Talibans: he explained that even if he was actually part of the Libyan Islamic Fighting Group and even if most of the participants joined Al-Qaida since 2007, he was not among them and moreover, he was not even in the group since 2001 anymore[238]. On 22 December 2010, the sanctions committee excluded the appellant from the

measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban.

[235] The Libyan Islamic Fighting group is an extremist Islamic group established on 1990. Initially, its purpose was to overthrow Gheddafi and to establish an Islamic State. On 1990's, this group organized several operations within the Libyan territory and on 1996 there has also been an attempt of attack to Gheddafi himself. After the action of the Libyan government which arrested many of the members of the group, several of them decided to leave the Libya. On 2007, the Libyan Islamic Fighting Group officially merged with Al-Qaida and it keeps threating the security and the peace of the global arena. Due to this, the group was added to the UNSC blacklist of people and organizations accused of being connected with terrorist activities.

[236] The SANABEL Relief Agency was a charity organization of the United Kingdom that was founded on 2000 with the main purpose to relieve poverty, sickness, and distress and to advance education of persons who are in need especially after natural disasters. Its help was mostly given thanks to the provision of funds. On 2006 the agency was added on the UNSC blacklist after the allegations of having financed the Libyan Islamic Fighting Group and other terroristic activities. On 2013 the agency was delisted because it ceased to exist.

[237] Judgment of the General Court of the European Union of 15 January 2015, case T-127/09 RENV, *Abdulbasit Abdulrahim* v *Council of the European Union and European Commission,* par. 3.

[238] Judgment of the European Court of Justice of 28 May 2013, case C-239/12 P, *Abdulbasit Abdulrahim* v *Council of the European Union and European Commission,* par. 6.

blacklist and on 18 January 2011 with regulation (EC) No. 36/2011[239] of the Commission, his name was also expelled by the European list. The problem arose when on March 2011, the appellant asked to pursue with the appeal and the General Court of the European Union rejected the request and dismissed the appellant's claim for damages by stating that there was no need for it. Due to this, Mr. Abdulrahim appealed against "the order of no need to adjudicate"[240]. The judgment of the Court of Justice of the European Union of 28 May 2013[241] states that the GC made a mistake with the conclusion that the appellant had no more interest in pursuing the appeal and, for this reason, the CJEU refers the case back to the General Court. As it was mentioned before, Mr. Abdulrahim listed four main reasons for his appeal, which are:

1) A breach of his right to be heard (included in article 6 of the ECHR);
2) A breach of his right to have an effective jurisdictional control and a fair process (articles 6 and 13 of ECHR and article 47 of the Charter of Fundamental Rights of the European Union);
3) A breach of his right of property (article 1 of the additional protocol of the ECHR);
4) A breach of his right to respect the private and family life (article 8 of the ECHR).

Moreover, the appellant always declared himself 'not guilty' and he always denied of being connected in anyway with Al-Qaida. Due to this, the GC in his sentence, recalls the words pronounced by the ECJ in Kadi II by saying that in case of complaint by the listed individual in finding his name in the blacklist, the EU judge have to investigate in order to understand if the allegations made against the individuals have solid grounds[242]. With this purpose, it is important for the judge to ask to the competent institutions of the EU to provide all the necessary information or proofs in order to justify the inclusion of the individual in the list. After that the specific institution has provided all the elements to the Court, it is a judge's duty to investigate and to study the evidences and to rule regarding the validity of the accusations. With this regard, the GC, by recalling the words used by the ECJ in Kadi II, stated:

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[239] Regulation of the Commission of 18 January 2011, (EC) No. 36/2011, *amending for the 143rd time Council 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*.

[240] Judgment of the European Court of Justice of 28 May 2013, case C-239/12 P*, Abdulbasit Abdulrahim* v *Council of the European Union and European Commission,* par. 21.

[241] Judgment of the European Court of Justice of 28 May 2013, case C-239/12 P, *Abdulbasit Abdulrahim* v *Council of the European Union and European Commission.*

[242] Judgment of the General Court of the European Union of 15 January 2015, case T-127/09 RENV, *Abdulbasit Abdulrahim* v *Council of the European Union and European Commission,* par. 63.

> "Having regard to the preventive nature of the restrictive measures at issue, if, in the course of its review of the lawfulness of the contested measure,[…] the Courts of the European Union consider that, at the very least, one of the reasons mentioned in the summary provided by the Sanctions Committee is sufficiently detailed and specific, that it is substantiated and that it constitutes in itself sufficient basis to support that decision, the fact that the same cannot be said of other such reasons cannot justify the annulment of that measure. In the absence of one such reason, the Courts of the European Union will annul the contested decision"[243].

Concerning the case of Mr. Abdulrahim, the allegations were based on the presumption of his connection with Al-Qaida due to his participation in the Libyan Islamic Fighting Group, considering its merge with the terrorist organization. Still, the GC states that the allegations were not based on solid grounds and the involvement of the subject with the above-mentioned group results demonstrated only from 1996 to 2000, hence, in a period in which there was not any connection between the group and Al-Qaida. For this reason, the General Court considers the addition of the appellant's name on the blacklist as unjustified and it rules on the annulment of the regulation (EC) No. 1330/2008 for what concerns the appellant and orders to both the Council and the Commission to bear their own cost and the ones of Mr. Abdulrahim with respect to the action of annulment and the legal aid[244].
The analysis of this case has made evident the similarities with the approach used by the ECJ in Kadi II, considering that most of the jurisprudence used in it has been also mentioned within the proceeding here studied; in fact, it is possible to see, how the statement of the ECJ within Kadi II has been used just as standards of law which have been essential in order to take the final decision.
Of course, the analysis of the latest proceeding is not over, and as support of this thesis another one case will be analyzed: *Liberation Tigers of Tamil Eelam ("LTTE")* v *Council.*

3.2.2. *Liberation Tigers of Tamil Eelam ("LTTE")* v *Council.*

The Liberation Tigers of Tamil Eelam ("LTTE") was a communist militant group which was founded on May 1976 by Velupillai Prabhakaran. Its area of influence was the northern part of Sri Lanka and it fought a violent secessionist campaign against the official government of the country with the purpose to establish a socialist State Tamil in the northern and in the eastern part of Sri Lanka. This led to the outbreak of the civil war in the country, until 2009 when the group was finally defeated by the Senegalese army. As it has been mentioned before, after the attacks of 9/11, the measures against the

[243] Judgment of the General Court of the European Union of 15 January 2015, case T-127/09 RENV, *Abdulbasit Abdulrahim* v *Council of the European Union and European Commission,* par. 68.
[244] Judgment of the General Court of the European Union of 15 January 2015, case T-127/09 RENV, *Abdulbasit Abdulrahim* v *Council of the European Union and European Commission,* par. 98-101.

suspected terrorist have been tighter and on 2001 the UNSC adopted the resolution 1373[245] which listed all the measures that should have been adopt in order to block the spread of the international terrorism and, in particular, to block the financing of the phenomenon. Within this resolution, at point 1, it has been ruled that all the States have to promptly freeze all the funds of people or organizations which are suspected of committing terrorist acts. In any case, this resolution did not include any list of people to who those measures have to be applied. Due to this, the Council adopted on 27 December 2001, the common position 2001/931/CFSP[246] which was related to the application of specific measures to combat terrorism. Following the EU law, a regulation is necessary in order to implement the measures of the above-mentioned common position at a communitarian level, hence, the Council adopted the Regulation (EC) No. 2580/2001[247], that we have already analyzed in the first chapter, and which included an official blacklist. With the decision 2006/379/EC[248], the Council officially added the LTTE to the list. According to the motivations provided by the Council, the LTTE was described as a terrorist group and several terrorist acts that the group should have done since 2005, have been mentioned as evidences[249]. Within these motivations, the Council also stated that even if the military power of this group has fallen and its structure is not as strong as it used to be before, it has no intention of stopping terroristic attacks in the Sri Lanka territory[250]. Due to the addition of LTTE to the blacklist, the group decided to appeal against on 11 April 2011, with the purpose of obtaining the annulment of the Council implementing regulation No. 687/2011[251] and of the regulations Nos. 1375/2011, 542/2012, 1169/2012, 714/2013, 125/2014 and 790/2014[252] which respectively

[245] UNSC Resolution 1373.
[246] Common Position (2001/931/CFSP).
[247] Regulation (EC) No. 2580/2001.
[248] Decision of the Council of 29 May 2006, 2006/379/EC, *implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2005/930/EC.*
[249] Judgment of the Court of Justice of the European Union of 26 July 2017, case C-599/14 P, *Council of the European Union* v *Liberation Tigers of Tamil Eelam (LTTE)*, par. 10.
[250] *Ibidem.*
[251] Implementing Regulation of the Council of 18 July 2011, (EU) No. 687/2011, *implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, and repealing Implementing Regulations (EU) No 610/2010 and (EU) No 83/2011.*
[252] Implementing Regulation of the Council of 22 December 2011, (EU) No. 1375/2011, *implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Implementing Regulation (EU) No 687/2011*; Implementing regulation of the Council of 25 June 2012, (EU) No. 542/2012, *implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Implementing Regulation (EU) No 1375/2011;* Implementing Regulation of the Council of 10 December 2012, (EU) No. 1169/2012, *implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Implementing Regulation (EU) No 542/2012*; Implementing Regulation of the Council of

abolished and replaced all the previous implementing regulations, in the part in which they regarded the organization. The LTTE brought as grounds of their appeal seven reasons, which are[253]:

1) The inapplicability of the regulation No. 2580/2001[254] in relation to the civil war Sri Lanka;
2) The wrong classification of the LTTE as a terrorist organization;
3) The decision was not made by a competent authority;
4) The absence of the review requested in the article 1 paragraph 6 of the common position 2001/931[255];
5) The violation of the duty of motivation;
6) The violation of the right to defense and to an effective legal protection for the appellant;
7) The violation of the principles of proportionality and subsidiarity.

The General Court of the European Union, in the appeal, rejected the first reason, it accepted the fourth, the fifth and the sixth reasons, it, in part, accepted the third reason and due to this, it decided to annul the acts in the part regarding the LTTE[256].
After the statement of the GC, the Council decided to contest this decision and asked to the CJEU[257]:

1) To annul the contested judgement;
2) To permanently rule in the matter regarding the LTTE and to reject the appeals made by the organization;
3) To condemn the LTTE to pay the costs of the Council.

On the other side, the LTTE asked to the Court[258]:

1) To reject the Council's contestation;
2) To confirm the contested judgment;
3) To condemn the Council to pay the costs.

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25 July 2013, (EU) No 714/2013, *implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, and repealing Implementing Regulation (EU) No 1169/2012;* Implementing Regulation of the Council of 10 February 2014, (EU) No. 125/2014, *implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Implementing Regulation (EU) No 714/2013*; Implementing Regulation of the Council of 22 July 2014, (EU) No. 790/2014, *implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combatting terrorism, and repealing Implementing Regulation (EU) No 125/2014.*

[253] *Council of the European Union* v *Liberation Tigers of Tamil Eelam (LTTE)*, par.14.
[254] Regulation (EC) No. 2580/2001.
[255] Common Position (2001/931/CFSP).
[256] *Council of the European Union* v *Liberation Tigers of Tamil Eelam (LTTE)*, par.15.
[257] *Council of the European Union* v *Liberation Tigers of Tamil Eelam (LTTE)*, par.16-17.
[258] *Ibidem.*

Also, in this case, the Court, in the exposition of its judgment, recalls parts of the Kadi case, in particular of *European Commission and others* v *Yassin Abdullah Kadi*[259], which is also known as Kadi IV. More specifically, the CJEU mentions in its judgement points 97 and 98 of the Kadi sentence above-mentioned, in relation to the respect of the fundamental rights: it states that in the implementation of restrictive measures against individuals suspected to have connection with terrorism or terrorist activities, the Council always have to respect the fundamental rights of the European Union, including the respect of the right to defense and the right of having an effective legal protection[260]. In addition, the Court also declares that before the inclusion of an individual in the blacklist, all the investigations have to be done under the supervision of a competent authority and this inclusion have to respect all the fundamental rights, starting from the right, for the convicted, of having a legal protection and a fair trial. With regard to the motivation given by the Council to justify the inclusion of LTTE on the blacklist, the Court recalls the previous considerations made by the General Court, by stating that the Council based its investigations only on the fact that the Indian government registered the group as a terrorist organization on 2004, but there are not evidences of any verification by the Council that the action of the Indian government was adopted with the respect of the right to a fair trial for the suspected. Due to this, the GC in its sentence, states that the acts of the Council were vitiated by insufficient motivations[261]. Regarding the request of review of the inclusion of the LTTE on the list after the significant military defeats, the CJEU states that a considerable period of time has passed since the organization was formally added to the blacklist for the first time on 2006; in the meanwhile, the group suffered important military defeats and its power substantially decreased, but, nonetheless, the council implemented other acts in which the LTTE was still part of the list. Due to this, the Court declares that the Council should have investigate whether or not the organization was still a threat to the peace and whether or not it was still pursuing terrorist activities.
Mostly considering the lack of protection of the right to a fair trial, the lack of control by a competent authority and the lack of sufficient motivation for the continuous inclusion of the organization in the list (despite the loss of power and the military defeats), the CJEU declares in its conclusions that the appeal made by the Council is rejected and that the costs of the LTTE will be pay by the Council itself.
Now, to conclude the analysis of these recent cases of law, it is the time to analyze the case of the *Kurdistan Workers' Party* ("PKK") v *the Council of the European Union.*

3.2.3. *Kurdistan Workers' Party ("PKK")* v *Council*

[259] *European Commission and others* v *Yassin Abdullah Kadi*, par.97-98.
[260] *Council of the European Union* v *Liberation Tigers of Tamil Eelam (LTTE)*, par.25.
[261] *Council of the European Union* v *Liberation Tigers of Tamil Eelam (LTTE)*, par. 38.

The Kurdistan Workers' Party is a paramilitary organization founded on 1978, working on the southeastern area of Turkey, which is mostly populated by the Kurdistan ethnicity. The former ideology of the organization was Marxist-Leninist and for this reason, it found the support of the mass of people, especially the rural one. Its objective was to establish an independent Kurdistan State, in an area that was between Turkey, Iraq, Iran and Syria, and to obtain the recognition of the Kurds' right to self-determination[262]. Since 1990, the PKK also had representatives in parliament who were legally added in the lists of the Turkish parliament. Since 1999, the leader Ocalan decided to change ideology and to renounce at the communist one, to embrace democratic confederalism. After the implementation of the UNSC resolution 1373 of 28 September 2001[263] and after the implementation of the regulation (EC) No. 2580/2001[264] (issued to implement the decisions taken in the common position 2001/931[265]), the name of PKK was always maintained in the list of people and entities subjected at restrictive measures due to connection with terrorism or terrorist activities. In particular, on February 2014, the Council adopted the implementing regulation (EC) No. 125/2014[266] through which the restrictive measures against the PKK have been maintained. The reasons were mostly based on an UK ordinance, which considered the organization as a terrorist group especially because of several episodes between 2003 and 2011 in which the subject was accused of having committed several terrorist attacks. Due to this, the PKK, on May 2014, appeal asking, first of all, for the annulment of the regulation (EC) No. 125/2014 for the part concerning itself and, secondly, for the recognition of inapplicability of the regulation (EC) No. 2580/2001 in its regard. Following the appeal of the organization, on 15 September 2014, the Council has submitted a counterclaim, in which it has also attached, above all, the ordinance of the United Kingdom as a proof of the validity of the decision and the Commission, on September 2014, asked to intervene in favor of the Council.
To analyze the position of both side of the proceeding, it is important to delineate the reasons that have brought the PKK to appeal against the above-mentioned regulation and, at the same time, the response given by the Council, in which the institution justified the inclusion and the maintenance of the organization in the blacklist. First of all, there is the position of the PKK, which listed eight motives in support of its findings[267]:

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[262] Judgment of the Court of First Instance of the European Union of 3 April 2008, case T-229/02, *Osman Ocalan acting on behalf of Kurdistan Workers' Party (PKK)* v *Council of the European Union*, par. 15-16.
[263] UNSC Resolution 1373.
[264] Regulation (EC) No. 2580/2001.
[265] Common Position (2001/931/CFSP).
[266]Implementing Regulation (EU) No. 125/2014.
[267] Judgment of the General Court of the European Union of 15 November 2018, case T316/14, *Kurdistan Workers' Party (PKK)* v *Council of the European Union*, par. 39.

1) A violation of the international law for what concerns the armed conflicts;
2) The consideration of PKK as a terrorist organization;
3) The fact that the contested acts are based on a valuation of a third-country (UK), while they should be based on a decision of a competent national authority;
4) A violation of article 51[268] of the Charter of Fundamental Rights of the European Union, because most of the information have been obtained due to torture and inhuman treatments;
5) Lack of review in order to understand if the PKK need to be maintained in the list after a significant period of time;
6) A violation of the principles of proportionality and subsidiarity;
7) A violation of duty to motivation provided by article 296 TFEU;
8) A violation of the right of defense and legal protection.

On the other side, the Council explained the addition and the maintenance of the PKK in the blacklist with the following grounds[269]:

1) The PKK fulfilled the criteria of 'terrorist organization' in accordance with the common position 2001/931[270];
2) The Council based the inclusion of the organization in the list on three national decisions (one of the UK and two of the France) that have been taken by competent national authorities;
3) It attached examples of actions and events made by the organization that can be considered as terrorist acts and that can be judge as valid reasons for the inclusion;
4) It stated that there was a further investigation to verify if, after a considerable period of time, the conditions were still sufficient to justify the targeted sanctions against the PKK and it realized that none of the previous grounds ceased to exist. Hence, there was no reason to exclude the organization from the list.

Due to all these reasons, the Council asked to dismiss the action and to condemn the appellant to all the costs.
At this point, it is fundamental to analyze the judgment of the GC, which starts delineating its considerations with a focus to the seventh of the eight reasons listed by the PKK: the breach of the duty to motivation. First of all, it is

[268] Charter of Fundamental Rights of the European Union, art. 51: "1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties".
[269] *Kurdistan Workers' Party (PKK)* v *Council of the European Union,* par. 20-21.
[270] Common Position (2001/931/CSFP).

important to say that, as the GC states in the sentence, the duty to motivation is provided by both the TFEU and the Charter of Fundamental Rights of the European Union[271]. Regarding the former, at article 296 (2) states that: "Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties"[272]. Likewise, the Charter of Fundamental Rights of the European Union rules at article 41 (the right to a good administration) (2)(c) "the obligation of the administration to give reasons for its decisions"[273]. Both these provisions are, foremost, a corollary of the principle of the respect of the right to defense and, secondly, they have the purpose of giving enough information to the interest party to permit, in case of vitiated act, the contestation of it before the judges of the EU. Regarding the motivations needed to justify the implementation of an act, the GC states that they need to present all the acts and the judicial considerations that have an essential role in the matters of the act and that the motivation need to be connected to the nature of the adopted act and with the contest in which it was issued. The duty of motivation, as it has been settled by the GC in this proceeding, represents a fundamental principle of the EU that can be derogated only for imperative reasons[274], and, as it was also said within the Kadi case, the motivation needs to be notified to the interest party concurrently with the issuing of the act. Hence, in relation to the maintenance of restrictive measures against an individual or an entity, the EU judge has the duty to verify that the duty to motivation has been respected and that the reasons given are sufficient. Always regarding the preservation of a subject on the blacklist, the GC, quoting the *Council* v *LTTE* case analyzed before, states that after a considerable period of time, there should be a review to understand if the grounds against the subject once added in the list are still reasonable to justify the continuation of the restrictive measures; due to this, the Council must base

[271] *Kurdistan Workers' Party (PKK)* v *Council of the European Union,* par. 43.
[272] Treaty on the Functioning of the European Union, article 296: "Where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality. Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties. When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question".
[273] Charter of Fundamental Rights of the European Union, article 41: "1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. 2. This right includes: (1) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (2) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (3) the obligation of the administration to give reasons for its decisions. 3.Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. 4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language".
[274] *Kurdistan Workers' Party (PKK)* v *Council of the European Union,* par. 48.

the maintaining of the subject within the list only after an always updated valuation of its situation, especially in view of the latest episodes and not only considering the most ancient ones[275].
After having delineate these general principles, the GC focuses on the present case, and it starts with the evaluation of its considerations.
First of all, it states that the Council must verify that the ordinances of the third-countries in question have been implemented in accordance with the respect of the right to defense and of the right of legal protection; the GC also adds that none of the documents provided by the Council show that it has effectively verified if the measures have been adopted in the respect of the above-mentioned rights, and the Tribunal also adds that the Council cannot abstractly determine that the ordinance have been adopted in accordance with the rules of the EU. Secondly, the GC refers to the second reason given by the Council to justify the inclusion and the maintain of the subject within the list; the Council stated that its decision was based on ordinances made by competent national authorities, but the GC replies by stating that there are no grounds to justify the competence of those authorities. Moreover, the reasons for the implementation of those acts against the applicant do not contain the grounds that led to the issuing of the ordinance by the third-countries.
Thirdly, the Tribunal focuses on the review for the inclusion of the subject within the list; as we have said before, if an individual or an entity has been listed for a considerable period of time, in order to maintain the name on it, a review of the situation is necessary. The Council stated that this review took place, also with a detailed investigation that brought the institution to the decision of continuing the restrictive measures against the applicant; on the other side, the applicant accused the Council of not-having done the review taking into consideration the latest develops of the organization, but only considering the ancient episodes. With this regard, the GC declares that since 2009, the PKK announced several 'ceased fire' and that between 2012 and 2013 there have been also several peace negotiations between the organization and the Turkish government. Due to this, the GC states that the Council, in its review, should have investigated with more attention on the latest developments, also considering the lack of information given by the Council for the justification of the maintenance of the appellant in the list[276].
To conclude, the GC rules that due to lack of motivation and due to the violation by the Council of article 296 TFEU, the acts contested by the PKK should be annulled for what regard the part concerning the appellant[277].
With the analysis of these recent proceedings, it has been possible to see how there is a correlation between the Kadi saga decision of the CJEU and the following ones. To sum up, it can be seen that there are few characteristics that arose from all the cases:

[275] *Kurdistan Workers' Party (PKK)* v *Council of the European Union,* par. 53.
[276] *Kurdistan Workers' Party (PKK)* v *Council of the European Union,* par. 62-79.
[277] *Kurdistan Workers' Party (PKK)* v *Council of the European Union,* par. 80-120.

a) A violation of the right to have a fair trial;
b) A violation of the right to respect of property and personal life;
c) A lack of review in case of ancient inclusion of the name in the list in order to justify the maintenance and, hence, targeted sanctions for an unjustified long period of time;
d) A lack of sufficient and reasonable motivations for the addition of the individuals to the list;

With regard to these circumstances, the Court always responded as it did in the Kadi saga, meaning by placing in the forefront the respect of human rights as the cardinal principles of the European Union. However, this new approach of the Court also arose several critics because it is considered too week with regard to the fight against terrorism. The fear was that, after the Kadi case, all the appeals with its same characteristics presented before the Court would have been accepted. In order to discredit this belief, it is not sufficient to examine only the proceeding accepted by the Court; in fact, the next paragraph deals with the study of other recent proceedings that the Court did not accept or that rejected, in order to understand on which grounds it has taken these decisions and also to understand if there is a guiding principle (following the Kadi case) also in the rejected proceedings.

3.3. Following Kadi: the most important rejected proceedings

This paragraph deals with the analysis of three proceedings rejected by the Courts, which are: *Hamas* v *Council*, *Al- Faqih and others* v *Commission* and *Al-Ghabra* v *Commission.*

3.3.1. *Hamas* v *Council*

Hamas is a Palestinian paramilitary organization which was founded on 1987 after the first *intifada* as the army of the Muslim Brothers to combat Israel with terrorist acts. Between 2000 and 2005, during the second *intifada*, this organization was guilty of having committed several suicidal terrorist attacks at the damage of Israeli civilians, which have caused many deaths. The purpose of this organization is the establishment of a Palestinian State with the return at its pre-colonial condition. Due to its *modus operandi,* Hamas is officially recognized as a terrorist organization by many nations of the world, including the European Union. The dispute between Hamas and the EU started when on 2001, with the UNSC resolution 1373[278], the sanction committee added its name to the blacklist for the imposition of targeted sanctions. In order to implement this resolution, the EU issued, as it was already said, the regulation (EC) 2580/2001[279], which applied at Union level the measures

[278] UNSC resolution 1373.
[279] Regulation (EC) No. 2580/2001.

decided in the common position 2001/931/CFSP[280], and which included in the list the name of Hamas. Moreover, the name was maintained in the list also with the following acts which have updated the previous one. With the purpose of understanding better the proceeding, it is important to analyze the contested acts, also to understand the actions made by both the Council and the organization.

a) Acts of 2010: on July 2010 the Council adopted the decision 2010/386/CFSP[281] which updated the list of people and entities subjected at restrictive measures for connection with terrorist activities. The Council suddenly informed all the interested individuals/entities for the reasons why their names were still in the list, including Hamas. The Council also informed the listed subjects of the possibility to ask to competent national authorities the authorization of using funds in case of extreme necessity. In addition, the Council stated that it was possible for the listed ones to ask a further question to the institutions for a better clarification regarding the listing motivations and that it was possible to ask for the review of the decision at any time[282];
b) Acts of 2011: on January 2011, the Council adopted the decision 2011/70/CFSP[283] that updates the blacklist, in which the organization Hamas was still included. Due to this, on February of the same year, the Council communicated to the advocate of the organization all the reasons why the name was maintained to the list: firstly, due to the numerous attacks (which have been qualified as terrorist acts) at the damage of Israeli targets in the period between 1988-2010; secondly, because the organization, in 2011, has been the object of two decisions adopted by the UK and two decisions adopted by the USA, and all of these acts recognized Hamas as a terrorist organization and have frozen its funds. The Council stated that the national authorities of both UK and USA can be considered as competent and for this reason their acts could be considered as a good motivation for the maintenance of the name in the EU blacklist. However, the Council still gave the possibility to the organization to send questions to further clarifications regarding the motivations. On November 2011, the Council sent to the advocate of Hamas a letter to inform of having received new

[280] Common Position (2001/931/CFSP).
[281] Decision of the Council of 12 July 2010, 2010/386/CFSP, *updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism.*
[282] Judgment of the General Court of the European Union of 14 December 2018, case T-400/10 RENV, *Hamas* v *Council of the European Union*, par. 8-12.
[283] Decision of the Council of 31 January 2011, 2011/70/CFSP, *updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism.*

information regarding the motivations for the inclusion within the list and it left to the organization the possibility of sending its considerations about it. Hamas did not react. Due to this, on December 2011, the Council adopted a new decision (2011/872/CFSP[284]) to update the list in which Hamas was still included and it sent to the organization all the motivations that introduced three new events of 2011[285];

c) Acts of 2012: on June and December 2012 the Council adopted two new decision (2012/333/CFSP[286] and 2012/765/CFSP[287]) with an update of the list and Hamas was still included with the same motivations of 2011[288];
d) Acts of 2013 and 2014: during these years the Council implemented new decisions to update the blacklist and still Hamas was included due to the same motivations of the previous years[289];
e) Acts of 2017: on August 2017 the Council adopted a new decision 2017/1426/CFSP[290] which update the list that still comprehended Hamas by giving new motivations[291].

On 12 September 2010, Hamas appealed against the Council by asking to annul the acts of 2010 and to condemn the Council to the costs. At the end of 2014, after the several more recent decisions implemented by the Council, the appellant adapted all of its requests and conclusions, and appealed against all the acts from 2010 to 2014. With the sentence of 17 December 2014, the General Court of the European Union annulled all the acts from July 2010 to July 2014 with regard to the parts in relation to the appellant due to the lack of consideration for the development of the organization and for the violation of the duty to motivation[292]. The Council rejected the decision taken by the GC and appealed asking for the annulment of the first sentence. On July 2017 the Court of Justice of the European Union accepted the appeal and annulled the sentence of the GC, by stating that the tribunal committed a mistake for

[284] Decision of the Council of 22 December 2011, 2011/872/CFSP, *updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Decision 2011/430/CFSP.*
[285] *Hamas* v *Council of the European Union*, par. 26-37.
[286] Decision of the Council of 25 June 2012, 2012/333/CFSP, *updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Decision 2011/872/CFSP.*
[287] Decision of the Council of 10 December 2012, 2012/765/CFSP, *updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Decision 2012/333/CFSP.*
[288] *Hamas* v *Council of the European Union*, par. 38-45.
[289] *Hamas* v *Council of the European Union*, par. 46-57.
[290] Decision of the Council of 4 August 2017, 2017/1426/CFSP, *updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision (CFSP) 2017/154.*
[291] *Hamas* v *Council of the European Union*, par. 58-61.
[292] *Hamas* v *Council of the European Union*, par. 93-94.

addressing to the Council a violation of the duty to motivation. Either way, the Court referred back the case to the General Court.
At this point, the appellant, Hamas, officially asked to the tribunal to annul all the acts from July 2010 to July 2014 to the extent concerning it. On the other side, the Council, supported by the Commission, asked to declare the appeal clearly unfunded[293]. On 14 December 2018, the GC manifested its conclusion regarding the case as follows.
Regarding the annulment of the acts of 2010, according to the appellant, the acts should be annulled due to: wrong evaluation, a violation of the right to defense and of the right of property and due to a breach of the duty to motivation. The GC starts analyzing the first reason and states that regardless the political character of the organization, the decision of the authorities to include it in the blacklist is related to the acts committed not to its nature. Regarding the violation of the rights to defense, the GC states that the Council always and sufficiently managed to inform the subject of the measures taken against it. In relation to the violation of the right of property, the GC refers to the Kadi case and states that while in that situation the violation of the right to property was valid for a lack of judicial guarantee for the listed subject, in this case it cannot be considered as valid because the appellant always knew about its listing and it had all the possibility of presenting observations regarding the allegations made against it, but it never did. Concerning the breach of the duty to motivation, the Tribunal recognizes that, despite the accuses made by the appellant, the Council published the acts and the relative motivations on the official journal and it was not supposed to inform personally and individually all the listed people, also considering that there is not an official address of the organization so that it would have been impossible to send a personal communication to Hamas. In the light of all these considerations, the GC sustains that the appeal against the acts of 2010 should be rejected[294].
Regarding the request of annulment for the acts of 2011, the appellant presents the same motives of the acts of 2010. The GC states that regarding the wrong evaluation and the violation of the right of property, its considerations correspond to the ones given in response to the request of annulment of the acts of 2010, so that they are rejected. In relation to the violation of the right to defense and the breach of the duty to motivation, for the acts of this year, the Council also sent a letter to the advocate of the organization by giving them the possibility of sending their considerations and observations. So that, neither of these two violations occurred. Consequently, the appeal for the annulment of the acts of 2011 is denied[295].
In conclusion, in relation to the request of annulment of the acts from July 2011 to July 2014, the appellant claims several reasons, mostly the same used in the previous claims, among which: wrong evaluation regarding the terrorist nature of the organization, violation of the principle of non-interference, no

[293] *Hamas* v *Council of the European Union*, par. 101-104.
[294] *Hamas* v *Council of the European Union*, par. 146-204.
[295] *Hamas* v *Council of the European Union*, par. 206-225.

consideration for the developments of the organization throughout time, violation of the right of property and the right of defense and the breach of the duty to motivation. In relation to the first reason listed, the appellant sustains that the Council's qualification of the acts of Hamas as 'terrorist' is excessively generic and not-precise, but the GC sustains that the clarifications given by the institutions are more than sufficient and detailed. In addition, according to the Tribunal, the characteristics of the actions carried out by the organization satisfied all the standard required to characterize them as terrorist acts, so that this argument cannot be accepted. Moreover, Hamas sustains that the Council could not consider these acts terrorism because they are actions committed during the Palestinian war, so that they have to be treated according to international law in matters of armed conflicts. The GC responds by saying that according to a consolidated jurisprudence, the existence of an armed conflict in accordance to international humanitarian law, does not exclude the application of European Union law in matter of terrorism prevention, especially regarding the terrorist acts committed in that contest. To sum up, considering that one of the main purposes of the EU is the fight against terrorism, the possibility that those acts have been committed in the context of an armed conflict does not preclude the possibility of the Council to issue acts in order to combat the phenomenon[296]. About the alleged violation of the principle of non-interference, it is provided by article 2 of the Charter of the United Nations[297] and it embraces a principle of *jus cogens* which emanates the sovereign equality among States of international law, and which prevents that a State can be considered as a terrorist entity on par with the government of a State[298]. The GC declares that this principle regards the right of each State of acting without external intervention and it is a corollary of the principle of the parity among States. At the same time, the GC agrees with the Council in considering this principle at vantage of the States and not of groups of organizations; due to the fact that Hamas is not a State nor a government, it cannot benefit from the principle of non-interference[299]. In relation to the non-consideration of the development of the organization over time, the appellant states that the Council did not take into considerations the changes of the situation between July 2011 and July 2014, so that the review made by the Council to justify the maintenance of Hamas in the list was not correct. The GC responds with the clarification that the Council was not obliged to present the modality of the review, but it was sufficient to demonstrate that the maintenance of the organization in the list was still justified; with this regard the Tribunal sustains that the Council did provided all the justification needed and that it also took into account the changes over time[300]. Concerning the

[296] *Hamas* v *Council of the European Union*, par. 346-354.
[297] Charter of the United Nations, article 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".
[298] *Hamas* v *Council of the European Union*, par. 365-370.
[299] *Ibidem.*
[300] *Hamas* v *Council of the European Union*, par. 355-364.

allegation of the violation of the right to defense and the right of property made by the appellant, the GC states that, even if Hamas accused the Council of not giving enough information, the institutions provided on informing all the listed subject regarding the motivations and the allegations suddenly after the publication of the acts; so that, the organization had the time to present to the Council all the requests of clarifications that were needed, and it had the possibility and the time to prepare a defense. Moreover, several of the notifications made by the council have been sent directly to the advocate of the organization, even before the official notification of the acts of December 2011; so that, there is not any evidences of a lack of the right to defense. About the alleged violation of the property right, considering the legitimacy of the acts issued by the Council between 2011 and 2014, this right cannot be considered violated[301]. In conclusion, regarding the alleged breach of the duty to motivation the Council, in support of its decision to maintain Hamas in the blacklist, presented facts and evidences that according to the Tribunal are sufficient, well-presented, detailed and precise to satisfy article 296 TFEU. In the light of the analysis made, the General Court has decided to integrally reject the appeal presented by Hamas.

3.3.2. *Al- Faqih and others* v *Commission*

The dispute started in 2006, when Al-Bashir Mohammed Al-Faqih, Ghunia Abdrabbah, Taher Nasuf and the Sanabel Relief Agency have been included, for the first time, in the blacklist by the Commission with the regulation (EC) No. 246/2006[302]. This happened after an amendment made by the UN sanction committee at the original list of 2001, by adding the names of the appellants. After the Kadi sentence of 2008, the Council adopted the regulation (EC) No. 1286/2009[303], to place a procedure more focus on the respect of human rights (particularly for what concerns the right to be heard and the right of judicial protection) in the process of blacklisting. On 2010, the names of the appellants have been excluded from the list, but after only a few months, with the regulation (EC) No. 1138/2010[304], the Sanabel Relief Agency was added again; the Commission provided to the subject all the motivations behind the new inclusion and the Agency responded with its observations. Right after this event, also the names of Al-Faqih, Abdrabbah and Nasuf have been once

[301] *Hamas* v *Council of the European Union*, par. 371-395.
[302] Regulation of the Commission of 10 February 2006, (EC) No. 246/2010, *amending for the 63rd time Council 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, and repealing Council Regulation (EC) No 467/2001.*
[303] Regulation of the Council of 22 December 2009, (EC) No. 1286/2009, *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.*
[304] Regulation of the Commission of 7 December 2010, (EC) No. 1138/2010, *amending for the 140th time Council 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.*

more added to the blacklist, due to regulation (EC) No. 1139/2010[305]. After a new decision of the UN sanction committee, which excluded the above-mentioned names from the list, the Council adopted a further regulation, through which the subjects have been cancelled. Nevertheless, on 3 March 2011, Al-Faqih, Abdrabbah, Nasuf and the Sanabel Relief Agency presented an appeal for the annulment of the previous regulations[306]. If the appeal presented by Sanabel Relief Agency was considered not admissible due to the fact that the subject did not have legal existence anymore, the appeal presented by the three individuals was declared admissible before being rejected due to the flimsy arguments. For these reasons, the appellant asked to the Court[307]:

1) To annul the contested sentence;
2) To annul the contested regulations;
3) To condemn the Council and the Commission to the costs.

In support of the appeal, the claimants presented four main reasons[308]:

1) Wrong interpretation made by the Tribunal in the previous sentence regarding the breach of the right of property and private life;
2) Wrong evaluation made by the Commission of the motives that brought to the reintegration of the subjects in the list;
3) Wrong motivation given by the Commission for the implementation of the contested regulations, plus, a lack of real protection of the right to defense and legal protection;
4) Regarding the Sanabel Relief Agency, the claimants sustain that after the addition of the name into the list, even without legal existence, it must have the right to appeal against the inclusion, despite the following elimination of the name from the list.

The Court starts its analysis from the last reason, meaning the refuse of the Tribunal to accept the appeal made by the agency due to lack of legal existence. The CJEU declares that the foreign minister of UK sent a letter by stating that the Sanabel Relief Agency was not on the list of the English companies since 2007 and that since 2012 it was not even on the list of charity organizations. Even if the elimination of the name of the agency from the list is not a sufficient motivation to reject the appeal, because everyone can ask reparations due also to moral damages, at the same time, the physical presence of the appellant before the Court during the proceeding is necessary. It was a

[305] Regulation of the Commission of 7 December 2010, (EC) No. 1139/2010, *amending for the 141st time Council 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.*
[306] Judgment of the Court of Justice of the European Union of 15 June 2017, case C-19/16 P, *Al- Faqih and others* v *Commission of the European Union.*
[307] *Al- Faqih and others* v *Commission of the European Union*, par. 15-16.
[308] *Al- Faqih and others* v *Commission of the European Union,* par. 19-20.

matter of fact that this circumstance cannot occur, owing to the closure of the company. Hence, having stated that the organization did not exist anymore, the Tribunal did not run into an error of law, so that the fourth reason cannot be accepted. Regarding the first motive provided, the appellants appeals against the decision of the Tribunal of rejecting their allegations about a violation of the right to property and private life due to targeted sanctions. Also in this case, the Court rejects these motivation due to their abstract character and due to lack of detailed and sufficient evidence regarding the allegations[309]. Regarding the lack of motivations for the re-implementation of targeted sanctions at the damage of the subjects, the appellants sustain that the General Court did not carry out the judicial review that was needed in that case, also recalling the Kadi sentence of 2013 (Kadi IV[310]). Regarding this, the Court declares that:

> "The General Court stated that Regulation No 1139/2010 referred to the communication to the appellants of the statements of reasons and to the observations which the appellants were able to submit in that regard, and, moreover, assessed the reasons given in those statements, finding in this instance that they conformed to the requirements stemming from the judgment of 18 July 2013, Commission and Others v Kadi […] since they contained the individual, specific and concrete reasons for placing the appellants' names on the list at issue"[311].

Hence, it is not possible to claim that the Commission did not explain the reasons behind the implementation of the contested acts, and, moreover, there is not any evident failure by the GC of carry out the judicial review. In conclusion, the Court rules regarding the third reason presented, meaning the wrong motivations given by the Commission to justify the re-inclusion in the list of the subjects, plus the lack of protection of the appellants' right of defense and legal protection; the CJEU declares that:
In accordance to what has been previously ruled by the GC, recalling the Kadi sentence of 2013, the Commission followed the fundamental procedural guarantees, by operating a good and detailed judicial review; the appellants did not provide any evidence of the fact that the judgment of the tribunal was based on wrong elements given by the Commission, so that the institution did not misbehave in its process of blacklisting[312].
Due to the analysis of both the acts of the Commission and the previous judgment of the General Court, the CJEU rules that the appeal is rejected.

[309] *Al- Faqih and others* v *Commission of the European Union,* par. 48-61.
[310] *European Commission and others* v *Yassin Abdullah Kadi.*
[311] *Al- Faqih and others* v *Commission of the European Union,* par. 68.
[312] *Al- Faqih and others* v *Commission of the European Union,* par. 71-85.

3.3.3. *Al-Ghabra* v *Commission*

The dispute starts on 12 December 2006 when Mohammed Al-Ghabra (a UK citizen) was added to the list issued by the UN sanction committee including all the individuals and entities having connection with terrorist activities. To implement the list at the Union level, the Commission issued a regulation (EC) No. 14/2007 of January 2007, in which the name of the subject was officially added to the list. On June 2007, the United Kingdom Foreign and Commonwealth Office ("FCO"), informed Mr. Al-Ghabra of its listing, by also providing to him a copy of the disclosable statement of the case, considering that the other part of the statement was closed due to security reasons. In light of the evolutions had with the Kadi sentence of 2008, on 2009 the applicant asked to the Commission a review of its listing to challenge its lawfulness; the Commission responded by giving him the reasons that led both the sanction committee and the Commission to add his name to the blacklist:

1) He was in regular contact with senior individuals of Al-Qaida and there was a meeting in 2002 in which Mr. Al-Ghabra met with the Al-Qaida director of operations;
2) Mr. Al-Ghabra always played a central role in the recruiting phase with Al-Qaida: he radicalized young Muslims in the United Kingdom and once they had the right training, he sent those individuals to the organization also by facilitating their travel and he was the connection between them and the organization;
3) Mr. Al-Ghabra was also fundamental for the provision of material and logistic support to Al-Qaida and other terrorist organizations;
4) He also financied those organizations and he planned trips to Pakistan for recruiting seeking;
5) Mr. Al-Ghabra himself went to terrorist training camps.

After having received those motivations, the appellant contested the allegations and asking for the disclosure of the evidences against him. At this point the Commission started the review of his case and it asked to the sanction committee more detailed information and evidences regarding his listing. On 2011, after having received the material from the committee, the Commission informed the applicant and it sent him a letter with all the additional facts. According to the material given by the UN sanctions committee, Mr. Al-Ghabra was a UK extremist associated with few other extremist individuals that has always been in contact with the senior Al-Qaida individuals in Pakistan. Moreover, he was a close friend of Faraj Al-Libi who is a senior commander of the Pakistan unit of Al-Qaida. In addition, the applicant was linked also with a Kashmiri militant group and he did the *jihadi* training himself on 2002. In conclusion, the committee stated that the applicant was planning a terrorist attack on UK territory in 2009, but it failed

due to lack of resources[313]. On 2012, the Commission sent another letter to the applicant to inform him about new detailed information that were sent from the sanction committee, in which, among all, he was accused, of having contacts with a group of extremist individuals in Pakistan who were planning several attacks on civilian UK aircrafts. The Commission also declared to have sent that information in order to permit to the subject to respond with his own declarations and observations during the process of review[314]. Mr. Al-Ghabra responded by stating that that information was vitiated by a lack of evidence. Nevertheless, the Commission declared that, after the review, the name of the applicant should be maintained into the list due to all the reasons listed before that are considered sufficient, valid and detailed to justify the listing procedure. Mr. Al-Ghabra challenged the decision of the Commission before the General Court by asking for the annulment of the contested regulation for what concerns him. He presented four main reasons for the appeal[315]:

1) Breach of the 'reasonable time' principle;
2) Violation of the Commission of evaluating by itself whether or not the applicant should be maintained into the list;
3) Infringement of the rules regarding the standard of the evidences;
4) The presence of errors which vitiated the motivations;

The Commission responded by dismissing the contestation as inadmissible and unfounded.
With regard to the first reason presented, the applicant states that he was not informed about the motivations of his listing right after the implementation of the contested regulation, but that they have been sent after a reasonable time, and this made impossible to bring the contestation before the General Court in time. The General Court responds to this accuse by recognizing that the Commission took excessively time to decide over the review requested by the applicant, so, it recognizes that there was a breach of the 'reasonable time' principle in such terms. Either way, to use the violation of this principle as a justification for the annulment of a regulation of this importance, there should have been also a violation of the right to defense or the impossibility of having legal protection as a consequence for the applicant. Considering that Mr. Al-Ghabra did not have any of these matters, the first reason could not be considered by the GC as a sufficient reason to rule for the annulment of the contested act[316]. Regarding the second motive, the applicant sustains that the Commission did not try to obtain from the sanction committee the evidences in relation to the allegation made against him, but the GC responds by quoting the considerations made in the Kadi case and it states that the Commission,

[313] Judgment of the General Court of the European Union of 13 December 2016, case T-248/13, *Al-Gabra* v Co*mmission of the European Union*, par. 1-24.
[314] *Ibidem.*
[315] *Al-Gabra* v Co*mmission of the European Union*, par. 46.
[316] *Al-Gabra* v Co*mmission of the European Union*, par. 47-67.

after having received the information from the sanction committee, should examine and investigate in detail in order to understand if they are valid. Even if the Commission did not disclose all the materials because it was forbidden by the committee for security reasons, there are not any evidences that the institution did not make a good analysis or examination of the facts and the applicant's rights to legal protection and defense are always been respected. Despite this, the applicant declares that the Commission did not consider if the information of the sanction committee has been taken due to torture or other inhuman treatments, but it must be said the subject in his observations sent to the Commission after the inclusion, did not provide any official allegation or any evidence that these events occurred[317]. Because of this, the GC rejected also the second reason. Regarding the third reason, the applicant sustains that the grounds of allegations were mere suspicion and were not 'sufficient solid and factual basis' as it was required by the standards delineated by the Kadi proceeding. The GC responds by stating that it is matter of the Court deciding whether or not the proofs provided are respecting the standards required. Moreover, at this point can also be recalled what has been said in the previous analysis of the case *Abdulrahim* v *Council and Commission*, in which the jurisprudence delineated in the Kadi saga was reaffirmed and it was said that, in relation to the grounds of inclusion:

> "Having regard to the preventive nature of the restrictive measures at issue […]if, in the course of its review of the lawfulness of the contested measure,[…] the Courts of the European Union consider that, at the very least, one of the reasons mentioned in the summary provided by the Sanctions Committee is sufficiently detailed and specific, that it is substantiated and that it constitutes in itself sufficient basis to support that decision, the fact that the same cannot be said of other such reasons cannot justify the annulment of that measure"[318]

which means that, in this case, if the GC sustains that the information given by the sanction committee are sufficiently detailed and precise to justify the inclusion of the applicant, the act cannot be annulled. Hence, considering that for the General Court the information given by the Commission in support of its decision are 'sufficient solid and factual basis', also the third motive has to be rejected. In conclusion, regarding the fourth reason, Mr. Al-Ghabra sustains that the allegations made against him contains lack of truthfulness, are not detailed or precise and some of them were vague and not based on rational criteria. The GC responds by analyzing in detail all the information provided by the Commission, especially focusing on the witness of an anonymous individual that was protected by the UK after having given to the government important information at the damage of the appellant. The General Court states that

[317] *Al-Gabra* v C*ommission of the European Union*, par.68-100.
[318] *Abdulbasit Abdulrahim* v *Council of the European Union and European Commission,* par. 68.

> "In particular, the grounds and, above all, the first and second further sets of reasons communicated to the applicant are not confined only to making general assertions but contain numerous details and precise particulars relating both to the identity of the persons concerned and to the time, place, context and other circumstances of the relevant conduct"[319].

Moreover, according to the information given by both the sanction committee and the UK, the applicant has a very important role in Al-Qaida and he provided to radicalize and recruit young men in order to prepare attacks on the United Kingdom territory; in addition, the facts are described in detail andthey derived from the security services database. Furthermore, the GC, after having deeper analyze all the allegations made against the applicant, sustains that he has never given real evidences to demonstrate that he is not a threat to the international security. In conclusion, the General Court dismisses the appeal made by the applicant and condemns Mr. Al-Ghabra to the costs[320].
At this point, the aftermath of the Kadi case for what concerns the jurisprudence of the Court of Justice of the European Union has been delineated. It has been analyzed both the accepted and rejected proceedings similar to the Kadi one, and, moreover, also the relationship between the European Court of Human Rights and the CJEU has been deeply examined. These are all information that can brought to important conclusions regarding the approach now took by the Court in relation to the imposition of targeted sanction against the suspected terrorist or terrorist organizations. Due to this, the conclusion will be analyzed in the next, conclusive paragraph.

3.4. Critics made against the new jurisprudence of the Court, final remarks and conclusions.

This third chapter was focused on the consequences that the Kadi case had within the jurisprudence of the Court of Justice of the European Union. As it has been possible to see, it is undeniable that the impact of this case on the jurisprudence of the Court was really strong, and it is also evident how there is a common thread between all the facts and circumstances analyzed in this chapter, that can all be reconnected to what is derived from the Kadi case. One of the most interesting aspect that came out from this study, is the fact that it did not influenced only the judgment of the Court regarding matters of counter-terrorism or targeted sanctions: it had an impact over its approach also for what concerns the relationship with the other institutional bodies and, moreover, with the full international scenario. This was particularly manifest in the analysis of the Opinion 2/13[321], in which the Court of Justice of the European Union gave a negative opinion regarding the official accession of the EU to the European Convention on Human Rights. This episode left many

[319] *Al-Gabra* v C*ommission of the European Union*, par. 137.
[320] *Al-Gabra* v C*ommission of the European Union*, par. 138-195.
[321] *Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties*.

scholars in doubt, especially because, according to many, the values delineated in the Kadi case were not respected, due to the fact that human rights did not have the central role that was expected. On the contrary, from the study made in the first paragraph, it is apparent how the precepts and the principles derived from the approach used in that case are evident and existent. This occurs because the positions that came out from the Kadi case, were not only focused on the protection of human rights within the implementation of restrictive measures, but they were connected to a more general and bigger precept: the nature and the core values and principles of the European Union must be protected above all. This regards not only the preservation of fundamental rights (as it happened in the Kadi case), but also all the other provisions expressed by the treaties and the law of the EU (as we have seen in the Opinion 2/13). In the circumstance of the project of agreement to entry in the convention, the nature and the independence of the Union would not be guaranteed, and also many of the provisions expressed in the treaties were at risk of losing importance. This is the reason why the Court issued a negative opinion regarding it: it was not against the entrance in general, it was against the conditions expressed in that project of agreement. In relation to the consideration that many have done, about the lack of total protection of human rights due to this refusal, it cannot be considered as a good argument. This is because the safeguard of the individual rights is always been well-provided by the Union; in fact, both the ECHR and the Charter of Fundamental Rights of the European Union are already part of the inviolable principles of the Union, even without the official entrance in the convention, and, in addition, the CJEU is already able to judge and to rule in proceeding and appeals regarding this matter. Besides, there are evidences, apart from the Kadi case, in which the Court has protected and preserved those provisions. Consequently, it is evident how the legacy of the Kadi case is visible even in this event: the only difference with the above-mentioned proceeding was the type of provision to protect, but not the substance. The Court decided to give the priority to the safeguard of the nature, the independence and the authority of the EU, because they were the dispositions at risk; at the same time, the non-entrance in the ECHR would not affect the condition of human rights because they were already well-protected within the EU itself.

To go more in the specific regarding the terrorism and targeted sanctions field, it is evident how the legacy of the Kadi case is really strong and present. First of all, it is important to underline that after the judgment of the Court in Kadi II, many scholars have started thinking that this solid new approach of the ECJ would have bring significant issues to the fight against terrorism. In fact, the fear was that the Court would have rule in an irrational way, by considering only the human rights of every individual, without well investigate case-by-case and without giving a fair and impartial judgment, with regard to the imposition of targeted sanctions. Due to this, this chapter has analyzed three accepted more recent proceedings similar to the Kadi one, and three rejected proceedings. Although that case had a strong impact over the subsequent Court's judgments, it does not mean that all the appeals have been accepted

and that all the proceeding ended with a recognized violation of human rights by the institutions of the Union. With the study of the first three cases, it is possible to delineate some common characteristics that have been specific also of the Kadi case:

a) Violation of articles 6, 8, 13 of the ECHR and of article 1 of the additional protocol;
b) Violation of the articles 41 and 47 of the Charter of Fundamental Rights of the European Union;
c) Violation of the duty to motivation;
d) Superficial investigation over the motivation for the inclusion and superficial judicial review;
e) Violation of the principle of proportionality.

If the Court, after a long and precise investigation, realizes that one of the previous circumstances occurred, it cannot rule in favor of the institutions and at the damage of the individual. Despite this, it does not mean that in every single proceeding regarding this matter, the Court has actually found a violation or a misbehave made by the institutions. As we have study in the cases of Hamas, Mr. Al-Faqih or Mr. Al-Ghabra, when there are not any evidences of the occurrence of a breach of fundamental rights, the Court is able to reject the appeal. Moreover, in order to have an investigation as detailed and precise as possible, the cases can last for a really long time. Maybe, this is the only criticism that can be made to the Court, because it happens very often that the litigation lasts for a reasonable time; in fact, we have mostly analyzed the latest sentences of each case, but the whole facts have lasted for years and maybe they are not even concluded. The main problem is that if the appellant is innocent, that could be a significant damage not only to himself but also to the people that surround him, as his family. It is also to be said, that without a precise and deep investigation, the Court could not be able to adjudicate in a rational and in a fair way regarding the matter presented. So that, there should be found a compromise to balance the duration of the proceedings and the times of investigation of the Court.

In any case, it is undeniable that the impact of the Kadi case over the jurisprudence of the Court of Justice of the European Union has been real and powerful and that its consequences will last for a long time. This will occur without prejudicing the fight against terrorism, which is an enemy common to everyone, but, on the contrary, the purpose is to try to balance the imposition of the targeted sanctions in order to stop the financing and the proliferation of terrorism, without excluding the protection of the fundamental rights. It could be a good way to balance on one side, the main purpose of the foreign and security policy of the Union, which is the fight against terrorism, and on the other, the protection of the nature and the core principle of the EU, among which human rights.

To conclude this thesis, the next chapter will focus on the consequences that the Kadi case had on the counter-terrorism policy of the European Union, also to better analyze its strategy in the light of the most recent events.

4. THE AFTERMATH OF THE KADI CASE: THE IMPACT THAT THIS CIRCUMSTANCE HAD ON EU COUNTER-TERRORISM STRATEGY

In the previous chapter, it was possible to analyze the impact that the Kadi case had on the jurisprudence of the Court of Justice of the European Union, and it was possible to see that the approach used by the Court in that circumstance has been used as guideline for many other cases. To conclude this research, it is important also to understand whether the Kadi case has affected also the policy line of the Union in matter of counter-terrorism, and due to this, several documents issued by the European Union and the Council of Europe will be analyzed: the Stockholm programme; the regulation (EU) 2016/794; the directive (EU) 2016/681; the directive (EU) 2017/541; the European Union counter-terrorism strategy and, to conclude, the Council of Europe's counter-terrorism strategy.

4.1. The Stockholm programme

The Stockholm Programme is the third five-year program of the European Union in matters of freedom, security and justice after the ones of Tampere of 1999[322] and of Hague of 2004[323]. The project of the program was presented on October 2009, while on December of the same year, it was approved by the European Council in accordance with article 68 of the TFEU and published on the official journal of the EU. The program is highly detailed, but it is not binding for the States: in fact, it mostly represents the schedule that all the European institutions (with particular regard to the Commission) have to respect to develop their works in this field, within the years 2010-2014. In general, the main purpose of the program is to develop an area of freedom, security and justice ("JLS") which can face the most important fears of the States of the Union[324]. Due to this, the European Council believed that one of the most important priorities that the Union had to confront with in those years, was the study of the necessities and interests of the citizens. The major challenge would be to guarantee, at the same time, both the respect of the fundamental rights and freedoms for every individual and the security of the European territory. In the light of what has been previously told, starting from the jurisprudence delineated in the Kadi case, similar values have been highlighted also in the Stockholm programme; in fact, its common thread is to balance the countermeasures to combat the most serious European threats with the preservation of human rights, thanks to the issuing of provision

[322] Conclusions of the Presidency of the European Council of 15 and 16 October 1999, *Tampere European Council.*
[323] Communication of the Council of the European Union of 3 March 2005, (2005/C 53/01), *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*.
[324] Information and Notes of the European Council of 2 December 2009, (2010/C 115/01), *The Stockholm Programme - an open and secure Europe serving and protecting the citizens*.

ensuring the protection of individuals. To sum up, the safeguard of both human rights and the security of the European Union have to grow in parallel. Considering that the focal point of this program were the citizens, the main goals that have been delineated are the following:

i. To promote citizenship and human rights;
ii. To promote a European Union based on the rule of law and on justice;
iii. To develop the security strategy of the Union;
iv. Making the EU more globalized to stimulate investments;
v. To develop a migratory policy comprehensive and forward-looking, based on solidarity and responsibility;
vi. To reaffirm the EU external dimension.

Moreover, the program provides the use of several tools that are necessary in order to make it effective[325]:

i. Mutual trust: the relationship that bounds the institutions of the Union and the member States is the corollary of an efficient cooperation especially in the matters regarding the JLS. Due to this, it is necessary to consolidate the trust already achieved and to find new solutions that can also develop the presents systems within the member States in order to have a major consideration of them;
ii. Implementation: it refers to the necessity of giving more attention to the full application and effectiveness of the institutional instruments already existent, so that the citizens' requests could always be received, and, furthermore, exhaustive answers may be provided;
iii. Legislation: as a general principle, the new legislative initiatives should be presented only after having verified the respect of the principles of subsidiarity and proportionality, after having verified and investigated over the necessities of the citizens and after having took into account the considerations made by the member States. Moreover, it is necessary to assess the consequences of the possible new legislation in matters of freedom, security and justice and to verify that nothing can affect the EU treaties (such as it was settled by the CJEU in its jurisprudence, considering the major importance of the treaties as inviolable principles of the European Union that have to be protected above all);
iv. Increased coherence: there should be a better internal coordination in matters of JLS;

[325] *The Stockholm Programme - an open and secure Europe serving and protecting the citizens, Brussels*, pag. 5-11.

v. Evaluation: since the Lisbon Treaty, member States in collaboration with the Commission, are appointed to issue an objective evaluation regarding: the implementation of policies in matters of JLS; the use of specific institutional instrument in order to reach the goals set out; the correct functioning of European judicial area, which should also have a prior position in the valuation process. This action has also the purpose of developing the principle of mutual recognition between states and EU institutions;
vi. Training: in order to promote the emergence of a real common European culture in judicial matters, a training regarding all the EU issues is necessary. This is indicated especially to all the professionals that works in the field of justice, freedom and security;
vii. Communication: there should be a better communication between the citizens and the institutions in order to have a clear information regarding the develops in matters of justice, freedom and security;
viii. Dialogue with civil society: an open and transparent dialogue between the EU institutions and the civil society should be always maintained;
ix. Financing: this program should be financed under the current financial framework, also considering that numerous of the measures and actions provided by the program can also be reached with a better use of the instrument and funds already existent. In addition, there should be also a better evaluation on the instrument to use to finance the most important measures of the program, which regard also territories outside Europe, and whose purpose is to combat organized crime and international terrorism;
x. Action plan: suddenly after the adoption of the Stockholm program in 2009, a plan of action should be presented by the Commission within the first semester of 2010. This plan should transform the purposes and the priorities of the program in concrete measures;
xi. Review of the Stockholm program: the Commission should present before 2012 a partial review of the implementation of the program, in order to inform the national parliaments[326].

Despite the program is focused on more general matters, to the purpose of the thesis, it is important to analyze the prerogatives regarding the preservation of human rights and of the security of the European territory.
Concerning the former, the program reaffirms how the European Union is founded on common values and on the respect of fundamental rights. Due to this, the institutions of the Union are invited to respect and protect the rights provided by the ECHR and by the Charter of Fundamental Rights of the European Union, always in accordance with international law and by

[326] *Ibidem.*

following all of its evolution[327]. According to the program, it is not sufficient to preserve those rights, but, the European Union has the duty to spread fundamental rights and values even within third countries. Due to this, it is necessary the creation of a plan of action regarding human rights with the purpose of promoting them in the external relationship of the Union in matters of JLS. This plan should be examined by the European Council and should contain very specific measures and priorities. Regarding the project of transmission of human rights, the program particularly states that the process for the full abolition of the death penalty, torture and other inhuman treatments shall be implemented. Moreover, the EU should continue its fight against genocide crimes and to promote the cooperation between member States and third countries regarding this matter. The program also highlights the necessity to protect the minorities, considering that the differences have to be respected and the most vulnerable individuals need to be defended. In this respect, the EU condemns all the forms of discrimination and supports all the projects that have been created in order to develop the integration of the vulnerable groups within the European community and culture[328]. It is also stated that a major protection is needed for all the people who are part of these groups and that are in dangerous situations, such as women victims of violence or any kind of mutilation. Victims of any crimes are considered the most vulnerable persons; about this, it is important to show respect and support to all the victims, and to establish a coordinate approach with them, in order to improve their assistance. For this reason, the Council asks to the Commission and to the member States to develop new practical measures to support those individuals and to enhance the already existent instruments. Furthermore, the Council also starts verifying the possibility of elaborating a whole legal instrument whose purpose is focused on the victims' protection.

One of the most important objectives of the EU within this program is to improve and facilitate the access to justice for every individual, with the purpose of permitting to everyone on the European territory to assert their rights. With this regard, the program proposes of taking into consideration a better development of the e-justice, which was already implemented on November 2008, with the creation of the European e-justice portal. This instrument permits to the citizens to have a better and deeper information especially regarding the services that the Union offers and to have clarifications about their rights and about the whole European legal order[329].

On the other side, regarding the security of the European Union, the European Council reaffirms the need of finding a common strategy that can be adopted by all the EU member States: a better coordination of actions both at European and national level is necessary in order to protect the citizens from transnational threats. Terrorism, organized crime, drug and arms trafficking, are only few of the numerous threats that have to be combated at the Union

[327] *The Stockholm Programme - an open and secure Europe serving and protecting the citizens, pag.*11-13.
[328] *Ibidem.*
[329] *Ibidem.*

level. In order to do this, the Union aims at increasing the work of the EU institutions and of the competent authorities of each member State, in order to improve the results. Moreover, the article 71[330] of the TFEU establish the Standing Committee on Internal Security ("COSI"), whose purpose is to coordinate and control all the operations and the actions of the European Union in matters of internal security and it works within the Council. In the contest delineated in this program, the COSI would be appointed in charge of controlling and implementing the whole new security strategy of the Union[331]. With this purpose, the program sets and requires, to the Council and the Commission, to draft the EU common strategy, always taking into account the following principles[332]:

a) Clear division of powers between the member States and the EU institutions;
b) Protection of fundamental rights of every citizen and respect of the rule of law;
c) Solidarity and mutual trust among member States;
d) Adoption of an approach based on the intelligence system;
e) Cooperation among all the agency of the EU, which also include a better exchange of information;
f) To enhance the preventive measures;
g) To consider also the strategy of the EU international policy and, in addition, it is necessary to also reflect on how these policies could affects the neighboring countries, because the internal security is strongly linked to the external dimension of the threats.

To analyze in a more specific way the approach that the program adopts with regard to terrorism, the Council reaffirms that its policy in the fight against this phenomenon is based on four main plans of action: prevention, protection, prosecution and response. Among them, the field that needs to be implemented is the one of prevention. More in general, it can be said that it is still considered as one of the most dangerous threats that the European Union has to face with, due also to its constant changes and evolutions: in particular, the terrorists are able to easily respond to the counter-terrorism measures implemented by the international community and, more important, are always

[330] Treaty on the Functioning of the European Union, article 71: "A standing committee shall be set up within the Council in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union. Without prejudice to Article 240, it shall facilitate coordination of the action of Member States' competent authorities. Representatives of the Union bodies, offices and agencies concerned may be involved in the proceedings of this committee. The European Parliament and national Parliaments shall be kept informed of the proceedings".
[331] *The Stockholm Programme - an open and secure Europe serving and protecting the citizens, pag.*35-38.
[332] *Ibidem.*

able to exploit any situation[333]. Due to this, the Council reaffirms the importance to establish a strong cooperation between EU and third countries and asks to the member States to strengthen all the mechanism and measures of prevention, especially in order to promptly individualize all the signals of radicalization and any threat of violent militant groups within their territories to try to eradicate the problem from the origin. Of course, the individualization of the process of radicalization before the implementation of any terrorist activities can happen only with a strong engagement between all the member States and their institutions; thanks to the information sharing, the identification of the main characteristics of the radicalization and recruiting process, and so of the terrorist activities, it can be possible[334]. In fact, the purpose of the counter-terrorism strategy that should be implemented according to this program, would comprehend also the study and the analysis of the roots of this phenomenon in order to combat it from a deeper perspective, especially by understanding the methods used by the terrorist groups to develop their propaganda, in particular thanks to the use of internet. With this purpose, it is important to elaborate new techniques and to invest in new resources than can help to individualize all the platforms that are used to spread the terrorist propaganda and that lead to the radicalization process of millions of individuals all around the world, which then lead to the recruiting phase, in which those individuals are called to combat within the militia of the terrorist groups by organizing and implementing the attacks[335]. Nonetheless, the fight against terrorism has to consider also the financing of the phenomenon, which has a fundamental role, so it is necessary to control all the money transfers and to investigate regarding the new methods of payment used by terrorists, especially by tracing all the European investors. In this context, the program reaffirms the total participation of the Union also in the strategies adopted and implemented by the United Nations, also with the implementation of the UNSC sanctions, with the objective of remaining active and participant in the fight against this phenomenon at global level[336]. At the European level, the program also confirms the importance of the role of the Europol, whose functions should be enforced, and it will be better analyzed in the next paragraph. To conclude the analysis of the Stockholm program, it is necessary to mention what has been stated concerning the balancing between the counter-terrorism strategy and the protection of fundamental human rights. In coherence with what has been affirmed before, also in this case, the respect of human rights plays a major role; in fact, the program emphasize that the protection of fundamental rights and freedoms are corollary principles of the European Union in the fight against terrorism, so that, all the measures implemented with the issuing of this new strategy, must not provide any breach of those essential provisions, so that they could not be challenged. Due

[333] *The Stockholm Programme - an open and secure Europe serving and protecting the citizens, pag.*50-52.
[334] *Ibidem*.
[335] *Ibidem*.
[336] *Ibidem.*

to this, it is a responsibility of the EU to verify that all the tools, instruments and measures used in the fight against this phenomenon can fully respect human rights by also providing the intercultural dialogue.

4.2. Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016: new functions for the Europol

The Europol is an entity of the European Union whose creation was provided by the Maastricht Treaty of 7 February 1992[337], even if it became operative only on July 1999. The office was officially set up with the decision of the Council 2009/371/JHA[338], in which it has been stated that the work of the office is financed by the Union and that the European Parliament would have a major control over the activities of the entity. The Europol's objective is to implement the efficiency of the competent authorities of every member State, in combating every form of criminality, including terrorism. This entity has several and important functions, among which: analyzing and investigating over data and information provided by the intelligence; to give analytic support to every member States and helping them with their investigations over it is necessary; to prepare valuations and strategic analysis over the new threats; to promptly inform every member States about facts regarding them; and finally, to facilitate the sharing of information, with regard to criminal matters, between member States[339]. As it was mentioned in the previous paragraph, with the Stockholm Programme[340], it was decided to give more importance and more responsibilities to the Europol, in order to have a better coordination within the strategies implemented by the member States in the fight against the criminality. More in detail, the objective of the programme was to transform this entity in the focal point of the sharing of information between all the competent authorities in matters of criminal law of the EU member States, and to implement the efficiency of the office at the operational level. The latest modification regarding the role and the duties of this entity, is the Council and Parliament Regulation of 2016[341], in which the new functionalities of the Europol are explained in detail.
First of all, it is decided that the Europol must sustain and reinforce the actions of the member States and to promote the cooperation among them to fight every form of criminality which involve one or more EU States. Due to this, among the new functionalities of the Europol it is important to mention:

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[337] Maastricht Treaty (or Treaty on European Union), Maastricht, 7 February 1992.
[338] Decision of the Council of 6 April 2009, 2009/371/JHA, *establishing the European Police Office (Europol).*
[339] *Ibidem.*
[340] *The Stockholm Programme - an open and secure Europe serving and protecting the citizens*.
[341] Regulation of the European Parliament and of the Council of 11 May 2016, (EU) 2016/794, *on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA.*

a) Analysis of the information and analysis of the risks which also includes the elaboration of new technologies for data processing. In fact, it is necessary that the office is able to individuate the correlations between the investigations and the common *modus operandi* of the most important criminal organizations. Moreover, the Europol should be in possession of the most advanced IT structure in order to be constantly updated regarding the sharing and the use of the data;
b) Europol should be appointed of using and sharing data with member States, other EU institutions, private entities and third countries, in order to better reach the objectives set. With this regard, the regulation explains that the data processing should be limited and should be controlled by the 'purpose limitation' which is a corollary principle of the entity's activities. This principle is particularly important because it emphasizes the relevance of transparency, legal certainty and predictability;
c) Europol, as it was also mentioned before, should become the focal point of sharing information among member States, with regard to criminal matters. Moreover, it should be the guide in promoting a real cooperation between the EU institutions, competent authorities and member States, with the common purpose of delineating a single strategy;
d) The dialogue between the member States and the entity should be reinforced by the institution of the 'national unit' which embrace the connection between the Europol and the competent national authorities, in order to have an efficient response of every member States to the request made by the Europol. Furthermore, the office should be able to directly work with the EU States to develop a common strategy in the fight against the criminal threats;
e) To permit to the member States to be more participant to the decision taken within the Europol, each State should be represented on the management board of the entity[342].

The Europol is a body whose purpose is to help fighting the most dangerous threats in the European territory, due to this, it is evident that the fight against terrorism has a major role in its schedule. All the functions that have been listed before are functional, on one side, to collect as much information as possible regarding terrorists and terrorist activities and, on the other, to develop the new common strategy that can be able to eradicate this threat. Considering that terrorism is an extra-territorial phenomenon, in this specific case, it is necessary to collaborate with third countries and to share information with them; this is the main reason why, this entity should be able

[342] Regulation of the European Parliament and of the Council of 11 May 2016, (EU) 2016/794, *on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA,* par. 3-35.

to process data not only with member states but also with any other private entity, country or institution that could be useful within the investigations. With this regard, an important role is given to the Interpol, which is the international organization of the criminal police. All the member States are also affiliated with the Interpol whose mission is to collect and spread data to all the competent authorities for the contrast of criminal threats all around the world. Due to the great importance of this organization, it is necessary to assure a full and regular sharing of information and data between Europol and Interpol, to also better guarantee a total protection of the individuals' human rights. In fact, regarding the data processing, the work of Europol should be licit and correct with respect to the interest subjects[343]. For this reason, the principle of fair processing is strictly linked to the principle of transparency, in order to permit to the interests to be aware of all the information regarding them to have the possibility to exercise their rights. Nevertheless, it should be possible to limit the access to those data if the disclosure could damage the successful outcome of the work of the Europol, such as the defense of security and the prevention of criminality. With the aim of protecting both individual rights and the transparency in the data processing, the regulation also states the necessity of the publication of a document inclusive of all the dispositions and means applicable by the individuals for the exercising of their rights. Moreover, the Europol should issue on its website a list of all the decisions and agreements taken in relation to the data processing[344].

4.3. Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016: the use of PNR data for the prevention, investigation and prosecution of terrorist offences

With the Stockholm Programme, which was analyzed in detail before, the Commission was asked to present a proposal regarding the use of Passenger Name Record ("PNR") data, with the purpose to investigate and prevent all the terrorism activities and other serious crimes. The PNR are data generated by the travel agencies, tour operators and air carriers and they are considered among the most sensitive categories of personal data; this is due to the fact that they contain several and really detailed information related to the passengers, among which:

a) Personal details: name, surname, date of birth, nationality, date of the reservation of the flight and all the other names related to that reservation;

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[343] *Ibidem.*

[344] Regulation of the European Parliament and of the Council of 11 May 2016, (EU) 2016/794, *on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA,* par. 41.

b) Information regarding the passport: number, issuing country, expiry date;
c) All forms of payment information, telephone number, email address, frequent flyer information, home and work address;
d) All the medical conditions of the specific passenger including any disability.

Thanks to the analysis of PNR data, it is possible to identify people that were never suspected of terrorist activities or of other serious crimes and to combat this phenomenon from another point of view, with respect to the analysis of the other data available or with respect to the other counter-crime strategy that have been used before. The main reason why the use of this data for investigation and law enforcement purposes was never allowed before 2016, is due to the fact that they would refer to all the passengers and not only to the suspected ones; for this reason, several proposals of EU directives have been denied to avoid an excessive surveillance over the citizens. The directive 2016/681[345] was approved only after the serious Islamic terrorist attacks of 2015 within the European territories, which brought again, after ten years[346], the sense of fear and terror among the EU citizens[347]. The directive aims at specific goals, among which: to guarantee security within the EU territory; to protect the EU citizens and to establish a legislative framework to rule and to control the treatment of PNR data. Hence, this directive provides the possibility of PNR data transfer both for the EU and extra-EU flights, and it assigns to the member States the duty to collect and to process all the data. In fact, every EU State has the obligation to establish a competent authority for the counter-terrorism program that can act as 'passenger information unit' ("PIU"), whose purpose is to collect and share data with the other member States and with the Europol[348]. Considering the possible negative consequences due to these activities, the PNR data processing have limits, and their treatment should be finalized only to[349]:

a) To contrast the serious crimes and the terrorist attacks, as well as terrorist organizations, as they have been delineated in the definition given by the Council in the framework decision 2002/475/JHA[350];

[345] Directive of the European Parliament and of the Council of 27 April 2016, (EU) 2016/681, *on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime*.
[346] Before the terrorist attacks of ISIL of January and November 2015 in France, the European territory had not been victim of any Islamic attack since the Al-Qaida bombing in the London underground of July 2005.
[347] VASILOPOULOS (2017).
[348] Directive (EU) 2016/681, par. 13.
[349] Directive (EU) 2016/681, par.14-41.
[350] Framework Decision of the Council of 13 June 2002, (2002/475/JHA), *on combatting terrorism*, at article 2: "offences relating to a terrorist group: 1. For the purposes of this Framework Decision, "terrorist group" shall mean: a structured group of more than two persons,

b) Value the passenger before and after the departure/arrival in or from any of the member States, in order to individualize the ones who are in need of a more detailed investigation;
c) Respond, case by case, to a motivate request by the competent national authorities of transmitting and processing PNR in cases of counter-terrorism investigations and to promptly communicate the results to the Europol;
d) Collect and analyze the data and to confront them with the other relevant databases.

After having collected those data and after having ascertained the need of further investigations regarding specific individuals, the period of conservation of PNR should be proportionated to the purpose of the counter-terrorism program, to promote a legal and penal action against the terrorist activities and any other serious crime. Due to this, the competent authorities are allowed to maintain the data also for a long period in order to do a better analysis and investigation. Nonetheless, the period of maintaining of the data should not be longer of five years and the interested individuals should receive, by the member States, accurate information regarding the data processing and concerning their rights. All the activities related to the PNR processing shall be registered and documented in detail to verify the integrity and the lawful of the treatment. Due to this, it should be granted an external

established over a period of time and acting in concert to commit terrorist offences. "Structured group" shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure. 2. Each Member State shall take the necessary measures to ensure that the following intentional acts are punishable: a) directing a terrorist group, b) participating in the activities of a terrorist group , including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group"; at article 1: " Terrorist offences and fundamental rights and principles: 1. Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of: seriously intimidating a population, or unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation, shall be deemed to be terrorist offences: (a) attacks upon a person's life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage taking; (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons; (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life; (i) threatening to commit any of the acts listed in (a) to (h).

and independent national authority whose purpose would be to verify the lawfulness of all the proceedings and investigations with the support of the data sharing and processing. Among this, an important role is given to the responsible of the data protection, who has the obligation of surveillance and consulting regarding the modality of data processing and he must have the access to all the data analyzed by the PIU and who has, in case of illicit data processing, the power to refer the issue to the competent authority.
With the purpose of protecting the citizens and to avoid an abuse of power, in accordance with articles 8[351] and 21[352] of the Charter of Fundamental Rights of the European Union (which issue respectively, the right to protection of personal details and the right to non-discrimination), the PNR data processing should not permit the implementation of decision that can damage in a significant way the life of the subject, based only on the analysis of those data. In addition, all the investigations made by using PNR data shall not be determined on the base of any form of discrimination (gender, religion, language, country of origin, personal convictions, policy opinion etc.), and these activities should not be used in any case as an excuse by the member States to avoid their international law duties. In fact, the directive, by recalling the CJEU jurisprudence that we have well examined in the previous chapter, states:

> "Taking fully into consideration the principles outlined in recent relevant case law of the Court of Justice of the European Union, the application of this Directive should ensure full respect for fundamental rights, for the right to privacy and for the principle of proportionality. It should also genuinely meet the objectives of necessity and proportionality in order to achieve the general interests recognised by the Union and the need to protect the rights and freedoms of others in the fight against terrorist offences and serious crime. The application of this Directive should be duly justified and the necessary safeguards put in place to ensure the lawfulness of any storage, analysis, transfer or use of PNR data"[353].

This is another evidence that the line of thought adopted by the Court in the Kadi case and in the following cases of law, has affected also the policy of the EU in matters of counter-terrorism. Human rights protection and the fight

[351] Charter of Fundamental Rights of the European Union, article 8: "1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority".
[352] Charter of Fundamental Rights of the European Union, article 21: "1.Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibit".
[353] Directive (EU) 2016/681, par. 22.

against this phenomenon must go hand in hand, and all the strategy adopted have to follow strictly rules in order to take into account the life of the people who are affected by them. Furthermore, the directive states also that the PIU should be helped by the Europol in the data processing and that the sharing of information should not damage the high rate of preservation of private life and personal details provided by both the charter and the ECHR at article 8[354]. To conclude, the directive affirms that these objectives could be better reached at the Union level, due to this the EU can intervene in accordance with the principle of subsidiarity as it is provided by article 5[355] of the TEU.

4.4. Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017

The directive (EU) 2017/541/JHA[356] comprehends another step made by the European institutions in order to develop the unitary character of the counter-terrorism strategy and to combat the latest terrorist threats on the European territory. This directive has the function to replace the framework decision (EU) 2002/475/JHA[357] and to modify the Council decision (EU) 2005/671/JHA[358]. The purpose of this directive is to develop a unitary legal framework for all the EU countries in order to promote a juridical cooperation both concrete and real. This objective can be helped also by the sharing of

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[354] European Convention on Human Rights, article 8: "1. Everyone has the right to respect for his private and family life, his home and his correspondence.2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

[355] Treaty on European Union, article 5: "1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. 3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality".

[356] Directive of the European Parliament and of the Council of 15 March 2017, (EU) 2017/541/JHA, *on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.*

[357] Framework Decision (EU) 2002/475/JHA.

[358] Decision of the Council of 20 September 2005, (EU) 2005/671/JHA, *on the exchange of information and cooperation concerning terrorist offences.*

information and data between both member States and EU institutions. The character of this new directive is derived by the one of the framework decision 2002/475/JHA[359]: it tries to update the strategy by issuing new obligations for the member States and to fill the gaps of the previous ones. The two pillars of this directive are both article 82 and 83[360] of the TFEU; the latter gives to the Council and to the Parliament the possibility on one side to define serious crimes, and on the other to choose the sanctions related to very extreme spheres of criminality which includes terrorism; for what regards the article 82, at paragraph 2 (c)[361], it gives the possibility to the European Parliament and to the Council to issue minimum rules regarding the rights of the victims of serious crimes, among which terrorism. Having stated this, it is important to say that the directive combines both the old statements of the previous directive and also new regulations and obligations, especially with regard to the duties related to the member States. At the beginning, the directive reaffirms that the Union is based on universal values of freedom, equality and solidarity and on democracy and the rule of law; it states that, in accordance with the framework decision 2002/475/JHA[362], the terrorist attacks represent one of the worse damages to these values, especially for what concerns democracy and the rule of law. Considering the latest attacks and threats on the European territory, it is evident how the terrorist threat has evolved, especially with the ever-increasing growth of the phenomenon of the 'foreign fighters', which are individuals that travel abroad with the only purpose of carrying out attacks. Their presence and their involvement on the latest attacks is accompanied with the increasingly frequent radicalization of EU citizens

[359]Framework Decision (EU) 2002/475/JHA.

[360] Treaty on the Functioning of the European Union, article 83: "1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.2. If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76 […]".

[361] Treaty on the Functioning of the European Union, article 82, par. 2 (c): ""2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern: […] (c) the rights of victims of crime".

[362] Framework Decision (EU) 2002/475/JHA.

who are inspired and trained by the terrorist organizations (in particular thanks to the online platforms) and who decided to stay in Europe and to organize reprisal on the European soil[363]. Having regard of these new aspects of the phenomenon, it is important to implement a common and single strategy among all the member States including also the EU agencies such as the Europol. The directive also sustains the need of finding a common and more detailed definition of terrorist offences: they are characterized by both an objective and a subjective element. The former is also the intentional and the material one, which is related to the nature and the contest in which the attacks are carried out, especially because they usually lead to a serious damage to a country or to the country's citizens; the second element is the subjective one, which represents the purpose of the attacks that it is usually linked to the will of strongly intimidate the population in order to coerce the institution to do or not to do a specific act. This definition is not really different to the one stated in the previous framework decision (2002/475/JHA[364]), such as the list of the acts that can be reconnected to a terrorist attack. The real innovation of this directive is linked to the increase of the above-mentioned phenomenon of the foreign fighters, which represents the real new threat of the European territory. Due to this, the articles 9, 10 and 11 of the directive especially concern the travels with purpose of carrying out terrorist acts, the financing of these travels and the financing of terrorism. The article 9 explains how every member State has the duty to punish as crime the act of an individual who decides to move to another country (different from the one of residence or citizenship) with the only purpose of committing terrorist acts or to participate at the activities organized by a terrorist group, that in particular includes the operations of terrorist training[365]. At article 10, the directive states that the member States shall punish as crime the promotion and the financing of travels with the only purpose of carrying out terrorist activities. To conclude, at article 11, it is ruled that the States have to adopt all the necessary measures in order to prevent and to punish all the activities of financing of terrorist activities among which the provision and raising of capitals.

For what concerns the sanctions applicable to those crimes and to the perpetrators, article 15 is related to the convicted individuals, and it states that criminal prosecutions have to be effective, proportionate and dissuasive and that they could lead also to the extradition. The sanctions provided for terrorist acts or intention of committing terrorist acts should be more severe with respect to the other crimes; the direction of terrorist groups should be punished with not less than 15 years of imprisonment; the participation to these terrorist groups provides a sanctions of no lower than 8 years of prison such as the threat of committing a terrorist act; in all these cases, in the event in which minors are involved, the penalty may be aggravated[366]. Of course, extenuating circumstances are considered if the interest individual decides to renounce at

[363] Directive (EU) 2017/541/JHA.
[364] Framework Decision (EU) 2002/475/JHA.
[365] Directive (EU) 2017/541/JHA, article 9.
[366] Directive (EU) 2017/541/JHA.

the terrorist activities and decides to collaborate with the competent authorities by giving important information to combat the phenomenon. In relation to the legal personality involved in terrorist activities, article 18 of the directive provides specific sanctions; in this case, the nature of the penalty is financial and they could also provide: the exclusion from public subsidies; the closure of commercial activities; legal surveillance; permanent or temporary closure of the places used to commit the crime.
Another important part of the directive is related to the fundamental rights and freedoms. According to article 23, the directive does not prejudge the obligation of the member States and of the institutions to respect the fundamental right and freedoms considered as principal values of the European Union as it was stated by article 6 of the TEU[367].
To conclude, the directive also rules regarding the rights of the victim of terrorism. With this regard, article 24 states that are considered as 'victim' both the individuals who have been damaged physically, mentally or economically by a terrorist act, and also the family of the individuals who have been killed by one of the attacks. The aids provided by the directive have to be issued right after the attacks, *pro bono* and in a way that could be easily accessible to the family of the victims or to the victims themselves. The benefits include also psychological and emotive sustain, necessary medical treatments, judicial, financial or practical consulting, and help also for what regard their rights[368].

4.5. The European Union counter-terrorism strategy

At this point of the research, it is important to analyze the comprehensive EU counter-terrorism strategy, in order to understand the approach used by the European Union to combat this phenomenon more in detail. The first strategy was adopted in 2005, after the attacks of Madrid and London[369], but it was modified and developed several times in the years. On 30 November 2005[370], the Council and the European Council adopted the first document regarding the policies to use to contrast the terrorist threat and to protect the citizens in order to permit their lives in an area of freedom, security and justice in accordance with the EU values. The roots of this scheme comprehend the fight against this phenomenon, while always respecting the human rights of every individual as fundamental principles of the Union. The procedure was based on four main pillars which are: prevent, protect, pursue and respond. The first pillar means to prevent the radicalization of individuals in order to avoid their recruiting and then their intentionally completely turning to terrorism. The process of radicalization is an international phenomenon that can be defeated only with the cooperation among all the member States, third countries and

[367] Directive (EU) 2017/541/JHA, article 23.
[368] Directive (EU) 2017/541/JHA, article 24.
[369] VIDINO, BRANDON (2012: 169 ss.).
[370] Programme of the Council and European Council of 30 November 2005, 14469/4/05 REV 4, *The European Union counter-terrorism strategy*.

other international organizations. This process includes an important role played by the most important terrorist organizations (such as Al-Qaida) whose purpose was to inspire the individuals and to convince them to join their battle[371]. In accordance with what has been stated in the strategy, there are several basic steps that people can make in order to get closer to this world, and the globalization did not help in stopping this process: easy traveling all around the world, money transfer, the use of the internet (and in the more recent years especially of the social networks) are all weapons that can be used by terrorist organizations to recruit people from other countries. The cornerstone of the terrorist propaganda is the attempt to make individuals considering and justifying violence, and the character of this propaganda has a strong impact over many young people so that also the European Union need to prepare its own strategy in order to stop the spread of this way of thinking. The first step regards the opposite propaganda that EU has to develop, in order to present a different point of view and to publicly condemn violence and all the activities promoted by the terrorist groups. There are parts of the global society who are more prone to embrace the extremist values of terrorism, due to their social and economic conditions, which also includes lack of education and lack of well-implemented political values and institutions. It is obvious that, with respect to other parts of the world, in the European Union this phenomenon is less likely to happen, but still, there are individual segments of the population that could suffer due to one of these circumstances. With this respect, the EU counter-terrorism propaganda should also promote human rights, rule of law, democracy, education and good governance all around the world, by also embracing the inter-cultural dialogue to promote the pacific and cultural confrontation, and to avoid discrimination which is one of the most important cause of radicalization.

On the more practical field, the strategy asks to prevent the radicalization process by limiting the activities of those who are appointed of recruiting people, by avoiding the developing of training camps, by creating a legal framework in order to prevent the recruitment and, finally, by analyzing ways to prevent the recruiting through the internet[372].

Analyzing the second pillar of this strategy, the protection of the citizens has a key role in the whole policy. At the basis of this, there is the need of protecting all the cardinal targets in order to make then less vulnerable to the attacks. Due to this, it is fundamental to increase the protection of EU external boarders to make at least more difficult for the suspects to enter our areas. In this filed, the European Boarders Agency will have a central role by implementing all the technologies to collect and to share the passenger data and to implement the boarders' control. Thanks to the Visa Information System and to the second-generation Schengen Information System[373] the

[371] VIDINO, BRANDON (2012: 169 ss.).

[372]Programme of the Council and European Council of 30 November 2005, 14469/4/05 REV 4, *The European Union counter-terrorism strategy*, pag.7-8.

[373]Programme of the Council and European Council of 30 November 2005, 14469/4/05 REV 4, *The European Union counter-terrorism strategy*, pag.10.

authorities have the power to share the access information with the agencies and with the member States and, in case of necessity, they have the possibility to deny the entrance to EU territories. In addition, it is necessary to improve the protection of airports, seaports and aircraft security arrangements[374], plus all the other infrastructures (railroads, metro stations) among the EU soil, considering that they are among the major objectives of the terrorist attacks. The vulnerability should be reduced not only at a 'physical' level (bombing or shooting) but also at the 'electronic' one, with regard to the possibility of an increase of the cyber-attacks that should not be undervalued[375].
The third pillar is focused on to pursue terrorists across borders with the purpose of bring down the terrorist activities. The investigations should be conduct at the Union level to develop a single and joined scheme in order to impede the planning and the carrying out of terrorist attacks. This can happen only with the destruction of the terrorists' networks, which are fundamental for the recruiting process, with the freezing of the funds of the terrorist organization to avoid the buying and selling of weapons, explosives and other materials which can be helpful for the commitment of attacks on EU soil. In this case, it is fundamental a strong and effective cooperation among the member States which have to share their information within each other and also with the EU institutions and agencies, such as the Europol, which is necessary to the establishment of a common strategy. As we have stated throughout the research, one of the most important tools in the EU fight against terrorism is the freezing of the assets of terrorist organizations or of people involved in terrorist activities. So that, this document affirms the importance of developing a financial investigation over money transfer, also helped by the work of the Financial Action Task Force whose role is central[376].
In this light, the priorities of this pillar reside on the capacity of the member States to improve their investigations and their national capabilities to combat terrorism, but also on the capacity to cooperate among each other and with the EU bodies with the sharing of data and information, especially considering the global dimension of this phenomenon and the power and organizing which is needed to combat it. Due to its international dimension, most of the attacks that have been committed on European soil have been originated outside. Hence, it is important to develop also a stronger international cooperation with EU key partners, such as UN and its bodies.
Finally, the last pillar is focused on the response that need to be given once the attack occurs. In fact, the strategy recognizes that it is almost impossible, at that time but even now, to reduce the risk of terrorist attacks to zero[377]. Due to this, it is important to develop a program in order to be always ready to

[374] *Ibidem.*
[375]Programme of the Council and European Council of 30 November 2005, 14469/4/05 REV 4, *The European Union counter-terrorism strategy*, pag.11.
[376]Programme of the Council and European Council of 30 November 2005, 14469/4/05 REV 4, *The European Union counter-terrorism strategy*, pag.14.
[377]Programme of the Council and European Council of 30 November 2005, 14469/4/05 REV 4, *The European Union counter-terrorism strategy*, pag.15.

react if the attack actually occurs. The key of this approach is to manage and to minimize the consequences of the terrorist attacks and this can be done by taking into consideration the citizens in the first place. Of course, it is important to implement effective responses to these acts, and for this, member States need to agree on EU Crisis Co-ordination Arrangements and to develop supporting procedures to them: after having realized what kind of terrorist attacks occurred (physical or cyber), it is necessary to have a rapid sharing of information, a media coordination and a mutual operational control. In this position, the EU has to prove its ability of taking common and effective measures[378]. With regard to the population damaged by the attacks, the strategy lists some indications, among which: to guarantee protection to all the involved citizens and their families; to activate the Civil Protection Mechanism; to ensure assistance and compensation to all the victims and their families[379].

After having analyzed the key aspects of this strategy, it is important to analyze the key actors; of course, the member States have the major responsibility in combatting terrorism, and they have to implement at the best they can their national means. Nonetheless, the support given by the Union should not be undervalued. The EU's role is necessary for four main reasons[380]:

1) To strengthen national capabilities: by sharing information, practice, support to national means, especially by collecting all the intelligence analysis;
2) To facilitate European cooperation: as we have said, one of the most important factors for the realization of a common and effective strategy is the major cooperation among member States, and EU can help with the establishment of mechanism to facilitate this process especially between the police and the judicial bodies;
3) To develop collective capability: another important support for combatting this phenomenon at the Union level, is given by the many agencies that have been created within the EU, such as the Europol;
4) To promote international partnership: as it has been delineated in the previous lines, terrorism is a threat that works at global level. Due to this, the cooperation should not be limited to European States, institutions or bodies. The role of the European Union is also linked to the promotion of collaboration also with international partners, among which third countries and UN.

[378]Programme of the Council and European Council of 30 November 2005, 14469/4/05 REV 4, *The European Union counter-terrorism strategy*, pag.16.
[379] *Ibidem.*
[380] Programme of the Council and European Council of 30 November 2005, 14469/4/05 REV 4, *The European Union counter-terrorism strategy*, pag.4.

To sum up, the counter-terrorism strategy of the European Union is based on high-level political dialogue and on the promotion of the cooperation among all the actors that are affected by this threat, also at the international level. Equal importance has been given also to the respect and protection of human rights, since it has been stated that all the measures that have to be taken to combat this phenomenon, are not allowed to commit a breach of fundamental rights of any individual.
The strategy has been updated several times, especially in the last years, due to the develop and the change of some aspects of the terrorist threat. As it has been mentioned in the analysis of the 'prevent' pillar, the radicalization and the recruiting are key aspects of the terrorist scheme. Due to the continuous spread of these two phenomena, the Council agreed on May 2014 on the issuing of the EU Strategy for Combatting Radicalization and Recruitment to Terrorism[381], which is particularly focused on all the means and indications to eliminate these two processes. The main objective of this strategy is to prevent people to radicalize and to be recruited by terrorist organizations, also considering that the means for the radicalization process are in a constant evolution, especially due to the emergence of the 'lone actors' and 'foreign fighters' who are not formally linked to any group but they act alone on the base of the support given to the extremist terrorist ideology. The cardinal points of this program are[382]:

1) To promote security, justice and equal opportunities: according to this point, individuals are more inclined to radicalize if they have been damaged by strong violations of human rights or if they have been affected by serious forms of discrimination. The process of radicalization is more likely to happen in situations in which there are evident social gaps, such as the lack of education, marginalization, social exclusion which lead the individuals to embrace the terrorist extremist view because it is seen as a form of salvation. These are the main reasons why, EU should keep promoting its values, should combat inequalities and should implement the bad social scenario of that little slice of the population who suffered from it[383];
2) To ensure that moderation prevails over terrorism and violence: as we have stated before, the terrorists bring some people who are almost radicalized, to think that in certain cases violence can be justified. In this view, the role of the European Union is to combat this rhetoric by straightening the moderate voices and to promote inter-cultural dialogue[384];

[381] Programme of the Council of the European Union of 19 May 2014, 9956/14, *Revised EU Strategy for Combating Radicalisation and Recruitment to Terrorism*.
[382] Programme of the Council of the European Union of 19 May 2014, 9956/14, *Revised EU Strategy for Combating Radicalisation and Recruitment to Terrorism,* pag.6-15.
[383] *Ibidem.*
[384] *Ibidem.*

3) To enhance government communications: another way to stop the spreading of radicalization in the European territory, is to modify the languages in which the policies are implemented and described to the population. In other words, it is important to ensure a good communication between the institutions and the citizens in order to spread the values of the EU and to stop the proliferation of other more violent ideas. This is useful especially for those people who felt marginalized or excluded by the society, and it is important that all the policies and the strategies adopted by the Union are understood by everyone. Another important aspect is the control of the social media, which are one of the most important platforms within the radicalization and the recruiting phases; if terrorists are using the internet to spread their values, at the same time, the institution should use the same means to promote messages against that propaganda and to highly spread the European values[385];
4) To support counter-terrorism messages: counter-terrorism messages have a dual purpose. In fact, on one side they can help people already radicalized to abandon that view, and on the other, they can prevent people who are attracted to the terrorist view from being total involved in it. Among the most effective messages there are the ones of the victims or of the family of the victims, who sharing their stories and who are the most indicate persons to de-legitimise and condemn terrorism[386];
5) To counter online radicalization and recruitment: as it has been stated before, there have been a strong increase of radicalization and recruiting throughout the internet and the social media. Moreover, thanks to these platforms, terrorists have the possibility to easily share and spread their propaganda and they have also been able to build virtual training camps for the recruited individuals. The internet is strongly used also because it is a transnational entity that make easy the transgression of several jurisdictional norms. Due to the gravity of the situation, this problem should be resolved both at public and private level; meaning that with the EU institutions and the member States, also the private entities and society should play an important role, especially if they are part of the internet industry[387];
6) To train and to engage first line practitioners: during the various stages of the process of radicalization, the individuals' mind starts to be influenced and slowly modify, until it becomes totally plagiarized by the terrorist view. In this final stage, also the behavior, opinions and general habits of those people suddenly change. In this case, the persons that are closer to those individuals

[385] *Ibidem.*
[386] *Ibidem.*
[387] *Ibidem.*

should be the first ones to recognize this change. Due to this, the European Union is encouraging the improving of training modules in order to help the interested individuals to have more knowledge with regard to the process of radicalization and the recruitment in order to also help the competent authorities to individualize those people before that the process has finished. The individuals to which these training modules are organized are teachers, religious leaders, social and health care workers, community police officers and many others[388];

7) To support both the individuals and the civil society to build resilience: it is clear that governments needs help to the counter-terrorism strategy, and, as it was stated before, also the private sector can help. The most important thing in this case is to improve the resilience of the civil society which have to promote the EU values and to resist to the terrorists' appeals. Moreover, a big part of this work should start from the educational field; schools and university should promote the study of issues related to nationality, differences, religions and the aftermath of the most violent historical wars to better understand what can be caused when the violence is justified and instigated[389];
8) To support further research into the trends and challenges of radicalization and recruiting: considering that these phenomena are in constant evolution, it is important to keep developing the research and the study regarding these matters. In this field, a special role is played by all the scholars and specialists who have helped the competent authorities thanks to the discover of some peculiar characteristics of these processes that now are easier to identify[390];
9) To align internal and external counter-radicalization strategy: as it has been mentioned before, the terrorism is an international phenomenon, hence, many of the attacks that have been committed on European soil have been previously organized abroad. Moreover, always thanks to the use of internet, also the radicalization and the recruiting phase shall take place within third countries. With this regard, it is necessary a more effective cooperation at the international level, with other countries, other international organizations and other institutional bodies[391];
10) To deliver the strategy: this strategy is implemented in the first place by the member States who have to cooperate with the EU institutions and with all the other partners mentioned above[392].

[388] *Ibidem.*
[389] *Ibidem*.
[390] *Ibidem.*
[391] *Ibidem.*
[392] *Ibidem.*

As it is possible to see, this new strategy is focused more in detail on the process of radicalization and recruitment. Also in this case, the Council states how the adoption of particular measures or policies does not permit to the actors to violate human rights as corollary principles of the European Union. At this point, it is important to conclude this chapter related to the counter-terrorism policies of the European Union, with the analysis of the project adopted by the Council of Europe for the prevention of terrorism, that has also been adopted by the European Union in 2018.

4.6. The Council of Europe counter-terrorism strategy

After the latest attacks on European soil, the Council of Europe decided to adopt a new counter-terrorism program for the years 2018/2022. The strategy was approved on 4 July 2018, and it was presented by the secretary general Jagland as it follows: "We must improve the ability of our member states to prevent and combat terrorism, in full compliance with human rights and the rule of law. This strategy takes account of the growing terrorist threat and should provide European governments with additional, effective means of response"[393]. This quote embraces the core of the strategy: in fact, if on one side it is necessary to find new solutions and new means to combat this phenomenon, on the other the implementation of those new measures shall not breach any of fundamental human rights. This also means that the strategy is also based on the already existent legal framework issued by the Council of Europe, which in the latest years has strongly worked to develop new policies and new techniques in order to combat the latest evolution of the terrorist character. In fact, the basis of this strategy relies on the Council of Europe Convention on the Prevention of Terrorism, signed in Warsaw on 16 May 2005[394]. This convention was really important because of its innovative character due to the introduction of new concepts, related to the terrorist phenomenon, that has been fundamental for the issuing of all the following counter-terrorism policies. Due to this, even if it is not the core of the paragraph, it is important to mention these innovations, because they have also influenced the stipulation of the latest Council of Europe strategy that will be soon analyzed. First of all, the purpose of the convention was to fill the gap of the international law regarding the fight against terrorism; with this regard, it introduce an important difference between 'terrorism' and 'terrorism prevention'[395], and the latter represent the focus of the document, as it has been stated in article 2: "The purpose of the present Convention is to enhance the efforts of Parties in preventing terrorism and its negative effects on the full enjoyment of human rights, in particular the right to life, both by measures to be taken at national level and through international co-operation, with due

[393] JAGLAND (2018).
[394] Council of Europe Convention on the Prevention of Terrorism, Warsaw, 16 May 2005.
[395] HUNT (2006: 603-628).

regard to the existing applicable multilateral or bilateral treaties or agreements between the Parties"[396]. This article explains in depth the objective of the convention, which is the implementing of the investigation in order to prevent the committing of terrorist attacks, always recalling the importance of considering and protecting the fundamental human rights, and above all, the right to life. Hence, the measures that have to be taken at both national and international level, have to focus not only on responding in the aftermath of the attacks, but they have to be implemented with the purpose of avoiding the perpetration of terrorist activities in the first place. Due to this, the convention introduces the offences for recruiting and training of terrorists at articles 6 and 7. For what concerns the former, it is stated the 'recruitment' is intended as the actions of convincing another individual to commit a terrorist act, to participate in terrorist activities or to join a terrorist organization. In this light, the Council of Europe declares that every State should consider recruiting for terrorism as a criminal offence under its national law[397]. In relation to article 7, it states that 'training for terrorism' is to intend as the preparation of certain individuals for the committing of terrorist activities by giving them instructions on the *modus operandi* which comprehends specific methods or techniques and the using of some weapons such as explosives. As it was declared for the recruiting activities, also the training ones shall be considered as criminal offences under the national law of every member State[398]. Another important point of the convention regards the sanctions, which are set out by article 11: it is stated that every member State shall provide to punish with specific measures all the people who have committed the offences listed in articles 6 and 7. These measures must be effective, proportionate and dissuasive and it could include also the implementation of financial sanctions[399]. At the same time, the convention also mentioned the safeguard that have to be assure to every individual so that, article 12 states that all the measures should take account of the fundamental rights provided by the ECHR, with particular regard to the freedom of expression and religion[400], and none of them should be implemented by following "discriminatory or racist treatments"[401]. After having analyze it, it is possible to comprehend why this convention has become the basic legal framework of all the following counter-terrorism policy adopted in Europe. Also the counter-terrorism strategy of the Council of Europe for the years 2018-2022 was strictly influenced by it. Of course, at the same time, this program also adds some peculiar analysis and tools to help member States and their competent authorities. The Council of Europe, in this strategy, while recognizing that States have to play a central role in this fighting, also believe in the necessity of cooperation among themselves and the other institutions. Hence, the Council's main purpose is to

[396] Convention on the Prevention of Terrorism*,* article 2.
[397] Convention on the Prevention of Terrorism, article 6.
[398] Convention on the Prevention of Terrorism, article 7.
[399] Convention on the Prevention of Terrorism, article 11.
[400] Convention on the Prevention of Terrorism, article 12(1).
[401] Convention on the Prevention of Terrorism, article 12(2).

promote international cooperation and coordination and the implementing of measures that have to be effective but at the same time careful of the respect of human rights and of the rule of law[402]. The main addition in comparison to the previous convention was the articulation of the program, which is divided in three main focal points: prevention, prosecution and protection which also includes assistance to the victims. To study the former, prevention is to intend as a set of indications to avoid not only the material terrorist attacks, but also other factors than can lead to the organization and preparation of them. In fact, the Council's purposes are to facilitate the sharing of information and practices in order to avoid the propaganda, radicalization, recruiting and training of terrorists. As it has been explained before, terrorism is a phenomenon that has to be eradicate from the roots, which means that, first of all, there is the need to avoid the spreading of its extremist ideology among individuals. This can happen by preventing any form of discrimination among people to impede that part of population feels abandoned or alienated from the rest of the society and, due to this, is attracted by terrorist propaganda by starting the process of radicalization. In addition, it is important to develop a program regarding the education field, in order to organize several seminars in the school to teach to both teachers and students how to recognize the first steps of radicalization process, to be able to recognize the affected individuals and to signal them to competent national authorities. As mentioned before, one of the most frequent instrument thanks to which some individuals approach to that world is the internet; for this reason the Council states that a group of IT specialists should work in order to collect all the information and data of member States and analyze them, always considering the protection of human rights. For what concerns the financing of terrorism, the prevention is possible by improving the legal instrument of the Council of Europe and due to this it is necessary to present a report with all the advices and indication that should be included in all the Council of Europe instruments regarding this matter[403].

The second key point is prosecution which means to proceed against terrorists and terrorist organization. In this case, the Council of Europe wants to pursue the best practices to collect all the evidences against those individuals, that have to be found not only on the conflict territories but also on the IT platforms used by them to recruit people and to spread their propaganda. The purpose is to incriminate those people and to process them always following the rule of law and in accordance with human rights. In order to obtain all the evidences that are needed, the Council states that member States should implement their own task forces and they also need to cooperate in order to find a common approach for the investigation and prosecution of those crimes. The approach that need to be adopted comprehends the issuing of guidelines that are fundamental for the research of proofs both on the online platforms and on the

[402] Programme of the Council of Europe of 4 July 2018, CM(2018)86-addfinal, *Council of Europe Counter-Terrorism Strategy (2018-2022)*.
[403] *Ibidem.*

conflict zones. These guidelines need to be provided by a group of specialized national experts appointed by member States. In addition, in order to prepare the judge to process terrorists and, more in particular, foreign fighters, it is important to organize several workshops and seminars to share viewpoints, ideas, experiences and information and to reach a pan-European plan including all the standards that are useful to better conduct a proceeding against those people[404].

The last key point of this strategy is protection. Such as in the EU counter-terrorism strategy, also in this one, the protection of the citizens from any form of terrorist violence is the priority of the program. According to the Council of Europe, a central role is played by the de-radicalization process, which has to be implemented within the Council and thanks to both member States and expertise groups. Thanks to this process, individuals can stray from the terrorist ideology and can be helped for the 'reintegration phase' in the society[405]. In this view, a major role is also played by the protection of European women and children who have been introduced to the terrorist propaganda and who get converted to that ideology. In fact, in the last years many women decided to leave European territories to voluntarily join the terrorist organizations abroad, and, many times, also their children became part of them. There are many evidences of the involvement of young men and women in the terrorist activities due to their early indoctrination. Considering the wide spreading of this phenomenon, the Council of Europe believes that not enough has been done to protect those people, especially for what concerns the children. For this reason, it is necessary to implement at national level some prevention strategies and measures whose purpose is the reintegration of them in their homeland society. Due to this, the Council of Europe provides the organization of a conference in which this issue will be better discussed and analyzed[406].

Another important point is the delineation of the approach to adopt in the aftermath of the attack. When the attack occurs, considering the difficult to deal with that kind of violence, the first thing to do is to delineate its characteristics in order to better support all the victims and their families. Firstly, a number of important authorities, key figure and agencies should meet to develop an emergency plan whose purpose is to ensure the protection of the damaged area and to preserve the safeguard of the citizens. Secondly, it is important that all the emergency services are properly functioning to provide assistance, health care and information to all the people affected by the attack. Specifically regarding the victims of the attack, the Council of Europe affirms that the assistance given to them and to their families (especially in case of death) should be better coordinated and the effort made by member States should be implemented[407].

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[404] *Ibidem.*
[405] *Ibidem.*
[406] *Ibidem.*
[407] *Ibidem.*

After having analyzed both the counter-terrorism strategy, it is possible to notice that the measures, the indications and the purposes are very similar among themselves; they both aims to eradicate the phenomenon from the origins, and the most important threat of this period is the radicalization and recruiting of European citizens who decided to act alone in the light of the terrorist ideology. The de-radicalization process and the control of some internet platforms are the most important objectives of both strategies, such as the tracking of the organizations' finance and the protection of the citizens. Another interesting aspect, which is very important to the purpose of our research, is the constant mention of human rights that have to be protected even with the adoption of certain measures for combatting this phenomenon.

4.7. Final remarks and conclusion

The aim of this chapter was to analyze whether or not the approach used by the CJEU in the Kadi case has also influenced the policies of the European Union in its counter-terrorism program. As it was possible to see, terrorism is considered one of the major threats that EU has to face with. The Stockholm Programme listed several requests to EU States, and the main objective was to issue a common strategy that can be able to combat this phenomenon due to the cooperation among member States, third countries, other international organizations and agencies. The developments made within the Union have been sufficient to satisfy the requests that have been made in 2009 by the program, especially after the latest attacks and the new evolutions of the characteristics of the terrorism phenomenon, which led to the issue of amendments and novelties with regard to the previous strategy adopted. In fact, in the latest period, the worst fear was the spreading of the radicalization process even within individuals living in the EU territories, as 'foreign fighters' and 'lone wolves'. The approach used by the Union to combat this process was really strong, and it aims at combating the diffusion and the evolution of the terrorist propaganda from the roots, with the help of other international organizations, and, in particular of agencies and groups of specialists of the field. Nonetheless, what emerged from this analysis was the conviction that the majority of the individuals that are fascinated by the terrorist ideology are mostly affected by social problems, due to lack of education and economic resources, but also due to discrimination issues. For this reason, in every document that has been analyzed it is possible to notice a reference to the protection and the safeguard of fundamental rights of every individual, with particular regard to the discrimination problem. In fact, the policies of the European Union always promoted the spreading of a different and more liberal ideology, promoting equality among citizens and strongly condemning any form of discrimination. Moreover, several plans for the reintegration of those people in the western society have been issued, in order to try to prevent them to became fully alienated by that propaganda. Also considering the practical measures that have been adopted for the counter-terrorism strategy, such as the use of PNR data for the collecting of

information regarding suspected individuals, there is always the obligation of protection and defense of the human rights of every individual. In addition, especially in the Stockholm programme, great importance was also given to the access to justice, that has to be guaranteed to everyone at the same level. To sum up, in my opinion, it can be stated that also the policies of the European Union in this field have been, in some way, affected by the approach used by the Court in the Kadi case, and in its strategy, the Union always tries to balance the necessity to stop terrorism with the obligation to respect fundamental basic rights as core principles of the organization.

CONCLUSION:

The aim of this research was to understand the relationship between the use of targeted sanctions in the fight against terrorism and the respect of human rights, especially in the light of the Kadi case which has been one of the most important cases of the last decades and which is considered a real turning point in the jurisprudence of the Court of Justice of the European Union. This consideration is related to the stance adopted by the Court both for the balance between the counter-terrorism strategies and the protection of human rights and for the position that the European Union has to take with respect to the decisions of the Security Council, without acting passively but always remembering the corollary principles that are at the base of the European Union. The first chapter was important to obtain a general knowledge regarding the use of targeted sanctions, in order to understand their character and the reason why they have been chosen as the major tool in the fight against this phenomenon. As it was mentioned before, the use of these restrictive measures was due to the necessity to contain the collateral damages of the general sanctions, whose effects were more harmful for the citizens than for the government of the State against which they were imposed. The results of the doctrinal analysis of these tools were the recognition of their doubt effectiveness and the possibility of the violation of fundamental individual rights in their imposition. To support this vision, it has been studied the Kadi proceeding, well known by the international scenario, due to the final considerations appointed by the Court of Justice of the European Union. In fact, the Court, after having well examined the situation, has stated that a severe breach of the appellant's human right occurred and that, for this reason, all the measures adopted against him needed to be annulled. The findings of the Court were based on some important facts:

- Missing of an accurate investigation by the European Union institutions regarding the effective connection of the appellant with terrorist activities;
- Missing of sufficient and exhaustive evidence in support of his inclusion in the blacklist;
- Missing of a sufficient and accurate control by the European Union institutions over their acts and of the conformity of the acts with the human rights obligations;
- Violation of the principle of proportionality;
- Violation of the right to defense and of the right of having legal protection.

The conclusions of the Court have been extremely strong and innovative, by giving an important response to the debate regarding the balance between the respect of human rights and the fight against terrorism. According to the Court, although considering necessary the eradication of the phenomenon of terrorism for the security of the international scenario, the protection and the

preservation of human rights need to be respected and protected above all, to preserve the corollary principles on which the Union is founded. With this respect, the core of the research was to study the aftermath of this proceeding, to comprehend if it had a serious and important impact over the jurisprudence adopted by the Court even in the following cases of law regarding this issue. Due to this, the third chapter analyzed the its judicial consequences by examining the relationship between the European Court of Human Rights and the Court of Justice of the European Union in the light of the Opinion 2/13, and by analyzing six subsequent cases of law similar to Kadi. In all the circumstances studied, it is undeniable the existence of a strong influence derived from the Kadi case, which is resulted to be the common thread between them all. With regard to the opinion 2/13, it is possible to see how that judgment of the Court has not affected only the counter-terrorism field, but also the relationship of the Union with the other institutions. In fact, the key point of the Kadi judgment was the obligation to preserve all the fundamental principles on which the Union is founded, that comprehend human rights, but also all the other provisions expressed by the treaties. As a matter of fact, the independence and the nature of the European Union were at risk of losing importance with the acceptance of the draft agreement proposed by the commission in that circumstance, and this, on a par with the violation of human rights, indicates a breach of roots of the Union that cannot be accepted. Regarding the terrorism issue, as it was mentioned, the proceedings examined in the third chapter were really similar to the Kadi one, and also in these circumstances the legacy of that judgment is visible. The proceedings taken into consideration have been: *Abdualbasit Abdulrahim* v *Council and Commission*, *Liberation Tigers of Tamil Eelam ("LTTE")* v *Council and Kurdistan Workers' Party ("PKK")* v *Council*, *Hamas* v *Council*, *Al- Faqih and others* v *Commission* and *Al-Ghabra* v *Commission.* Nonetheless, not all the trials have been accepted, to proof the objectivity of the assessment of the Court, which was not moved only by the will of proving superiority with regard to the decisions taken by the United Nations. The accepted proceedings, which are *Abdualbasit Abdulrahim* v *Council and Commission*, *Liberation Tigers of Tamil Eelam ("LTTE")* v *Council and Kurdistan Workers' Party ("PKK")* v *Council,* are characterized by the presence of some features that were common also to the Kadi one, such as the superficial investigation of the institutions and the lack of sufficient and accurate evidences to justify the targeted sanctions against the appellants; the violation of the principle of proportionality; the lack of judicial review, and finally, the breach of fundamental rights, and more in particular, of the right of a fair trial. The Court, considering these facts, ruled in the light of what it has been stated before, by annulling all the provisions adopted against the appellants. It is obvious that, without the existence of these violations and defects, it is impossible to accept the cases, and due to this, the three remaining proceedings of the six analyzed have been rejected. From a judicial point of view, the results of this work have showed how it is impossible to deny the strong impact of the Kadi case's conclusions on the following jurisprudence

of the Court of Justice of the European Union. The interest fact was to understand if this impact occurred also in the political field, within the implementation of the European counter-terrorism strategies. Hence, the last chapter of the thesis is focused on the analysis of all the most important European security program from 2005 to 2018, with particular regard to counter-terrorism policies. The outcome of this study showed that there have been important evolutions in matters of security policies, and that especially in relation to terrorism, they have been often updated to assure a major protection of the citizens. The development of these strategies is specifically due to the character of the terrorism *modus operandi,* which is in constant progression and which makes very hard the prediction of the terrorists' future moves. It has been possible to state that, after the latest development especially concerning the radicalization and the recruiting phases and also the naissance of the 'foreign fighters' and 'lone wolves' *phenomena*, the European institutions have issued more severe and specific policies, including major controls and tougher sanctions. Nonetheless, in all the programs analyzed there is always a specific mention to explain that the adoption of certain harsh measures does not allowed the member States nor European institution to violate human rights. As a matter of fact, it appears to be clear that the Kadi case did not have a strong effect only on the judicial plan, but also on the political one. In any event, it is important to underline how this position has not the purpose to overshadow the fight against terrorism to protect human rights: the real objective is to find a balance between the war against the most dangerous threat that the European Union has to face with, and the preservation of its corollary values, by avoiding the risk of destroying the nature of the organization.

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ABSTRACT

INTRODUCTION:

This research project analyzes the relationship between two concepts that have been protagonist of the international relations of the last decades: the fight against international terrorism and the protection of human rights. On one side, there is the phenomenon of terrorism which is considered the most dangerous threat to the international security of years 2000s[408]: in fact, the *modus operandi* of this phenomenon is particularly characteristic and in constant evolution, with the collateral damage of rendering a specific categorization of its strategy very difficult. On the other side, there are the fundamental values of liberal democracies: human rights. They are the corollary principles of every liberal State, and they have to be respected and preserved, even if not always they are protected as they should be. Especially in the field of counter-terrorism programs, it has often been asked if these two concepts could effectively run in parallel: In fact, the question that has mostly influenced this research has been whether in the fight against terrorism, human rights are effectively preserved or not. It is obvious that the responses to such a vague question can be incredibly numerous, so that it is impossible to collect them all in just one work. For this reason, this study will be categorized by focusing on the use of a specific tool for counter-terrorism strategies, to investigate on the relation between this kind of 'weapon' and the respect of human rights. The means in questions are the so-called 'targeted sanctions' which are imposed against specific subjects, by preventing any repercussion over innocent people. Due to this, in the fight against terrorism, these kinds of measures have been regularly used with the objective of imposing restrictive financial measures against individuals, entities or groups connected to terrorist activities. The principal question posed is if the imposition of these kind of measures could actually preserve the total respect of human rights. In relation to this, it is impossible to do not analyze the case of law which is considered to be the turning point within this debate: the Kadi proceeding. This trial is considered one of the most important and evolutionary cases of the latest decades, due to the innovative findings of the Court of Justice of the European Union in this context. In any case, the core of the research is to analyze the aftermath of the Kadi proceeding, to understand if this judgment has been a real beginning to a new jurisprudence of the Court, or if it has been only an exception to the rule. With this purpose, in the research six cases successive and similar to the Kadi one, are analyzed to comprehend whether or not the Court has followed the same line of thought. In order to understand the real impact that this new jurisprudence of the Court had, it is worthwhile also to analyze the aftermath of the Kadi case on the political field. Due to this, the

[408] BIERKSTER (2010: 99-102).

final part of the research is focused on the study of the major European counter-terrorism strategies.

1. TERRORIST BLACKLISTING: A DIFFICULT BALANCE BETWEEN THE COUNTER-TERRORISM PROGRAM AND THE RESPECT OF HUMAN RIGHTS

1.1. From general sanctions to targeted sanctions

The analysis of the blacklisting system as a weapon in the fight against terrorism, can occur only with a prior study of the concept of 'sanctions', whose individualization principally refers to the shift from the 'general' to 'targeted' ones[409]. Firstly, it is possible to say that 'general (or comprehensive) sanctions' refer to the traditional concept of sanctions as it was assumed in the twentieth century within the international arena: a combination of economic measures directed against a targeted government[410]. Generally, the use of sanctions as international relations instruments, was considerably grown after the end of the cold war, when the United Nations Security Council became more became more active in exercising its powers provided by the chapter VII[411] of the UN charter, but suddenly it started to be criticized for it. The criticism started especially after the end of the Gulf war, in 1991, when the Security Council imposed strictly sanctions against Iraq, whose effects affected for the most part the civilians. Due to this, for the first time, the human rights impact of sanctions emerged at the international level. The aftermath of this case was an increasing criticism towards the United Nations activity, which, in turn, gave rise to an important debate on how the sanctions may better be imposed, with a series of projects, workshops and studies in order to find a better solution. The solution was found in the impositions of restrictive measures addressed against specific subjects, which could avoid the collateral humanitarian damages derived from the general sanctions. Following this chapter, it will be possible to analyze all the features of this system in order to understand why, during the last decade, there has been an international litigation over the legality of these measures under the principles of international law. At first, it is fundamental to examine in a deeper way the concept of sanction.

1.1.1. *What is a sanction*

The concept of 'sanction' is a specific feature of the international relations of the last decades, but this term can have a wide variety of meanings which are very often used in a simplistic way and this make impossible to determine a single authoritative definition. First of all, it is important to explore the three

[409] VAN DEN HERIK(2017: 5 ss.).
[410] HERSEY (2013: 1235 ss.).
[411] Charter of The United Nations, San Francisco, 26 June 1945.

approaches that some scholars have tried to highlight in order to define the concept of 'sanction'. The first one is purpose-oriented, and it is focus on the objective of the sanction used in order to punish a breach of any legal norm[412]. On the international field Jonathan Law and Elizabeth Martin have determine their definition of sanctions which are "taken against the State to compel it to obey international law or to punish it for a breach of international law"[413]. Analyzing the second approach, it is author-oriented, meaning based on the identity of the author of the measures concerned. To conclude, the third approach is the most prominent within the international relations field and it defines sanctions in relation to the type of measures taken. They generally have an economic character, such as the embargo, import and export restrictions, and targeted sanctions[414]. Undoubtedly, the first and most known international organization which has used this type of measures has been the United Nations, thanks to the sanctions adopted by the Security Council pursuing article 41 of the UN charter[415] which are mostly monitored by one of the Council's sanction committee[416]. Now-a-days, the majority of the sanctions implemented by the individual States are adopted to comply binding decision of UN Security Council, especially for what concerns the restrictions taken with the targeted sanctions, but this does not preclude the possibility for a State to act independently, and to adopt sanctions against another one. For what concerns their functions, in international relations these measures can be adopted following different purposes[417]: to coerce or change certain behaviors; to limit the availability to access resources which are needed to pursue certain activities; to warn and denounce; to punish.
As it is possible to notice, sanctions can have a wide variety of purposes, but what it is necessary to underline is that neither general nor targeted sanctions have to be necessarily implemented due to a previous breach of a legal norm. Of course, if sanctions can be considered lawful or not has to be analyzed case by case; it is impossible to give an authoritative or general statement on this matter. For this reason, at this point, it is necessary to go through the research by deeper analyzing both general and targeted sanctions.

1.1.2. Comprehensive Sanctions

As it has been mentioned before, general sanctions are referred to the traditional economic measures of the twentieth century taken against a

412 RUYS (2017: 19 Ss.).
413 *Ibidem.*
414 *Ibidem.*
415 Charter of the United Nations, chapter VII, 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".
416 RUYS (2017: 21).
417 RUYS (2017: 22).

targeted State. Usually, general sanctions had a preventive function and not a punitive one. Moreover, they are addressed against the whole targeted State to reach the objective which is the State's government[418]. Usually, general sanctions had a preventive function and not a punitive one. Moreover, they are addressed against the whole targeted State to reach the objective which is the State's government[419]. Nonetheless, general sanctions have two major disadvantages that should be taken into consideration: the first one is related to their dubious effectiveness, while the second one is related to the 'collateral damages' of the sanctions and, more in particular, to the harm that they can cause to innocent people who live in the targeted State. One practical examples of how general sanctions can be both ineffective and harmful for innocent people, is the already mentioned case of Unites States' attack against Iraq in the 1990s, when in the aftermath of the Iraqi invasion of Kuwait and after the Iraq's refusal to comply with the Security Council's resolutions, the United Nations body decided to impose a total ban on trade against this country. The consequences of these measures were both the ineffectiveness of harming the real objective (Saddam Hussain) and the excessive suffering that they have caused to the citizens. For this reason, for the general believing, the advent of targeted sanctions can be explained as the aftermath of this episode, in order to solve the problem of humanitarian collateral damages and general ineffectiveness.

1.1.3. Targeted Sanctions

Targeted sanctions have been imposed for the first time by United Nations from the second half of the 1990s[420]. The first case of a sanction directly targeting individuals was in 1994 with the UN Security Council's resolution 917[421] which imposed travel ban and authorized States to impose the freezing assets of all officers of the Haitian military and police and all the other person connected with the *coup d'état* of the General Raoul Cedras in Haiti[422]. As a general point, in her work Elizabeth Hersey gives a definition of targeted sanctions, which are considered as "measures that are designed and implemented in such a way as to affect only those parties that are held

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[418] HERSEY (2013: 1237).
[419] HERSEY (2013: 1237).
[420] BIERKSTER (2010: 99-102).
[421] Resolution 917 of the United Nations Security Council of 6 May 1999: "The Security Council, […]Acting under Chapter VII of the Charter of the United Nations, […]Decides that all States shall without delay prevent the entry into their territories: (a) Of all officers of the Haitian military, including the police, and their immediate families; (b) Of the major participants in the coup d'état of 1991 and in the illegal governments since the coup d'état, and their immediate families; (c) Of those employed by or acting on behalf of the Haitian military, and their immediate families, […]Strongly urges all States to freeze without delay the funds and financial resources of persons falling within paragraph 3 above, to ensure that neither these nor any other funds and financial resources are made available, by their nationals or by any persons within their territory, directly or indirectly, to or for the benefit of such persons or of the Haitian military, including the police".
[422] HAPPOLD (2016: 3).

responsible for wrongful, unacceptable, illegal or reprehensible behavior"[423]. Those mentioned 'parties' could be individuals, legal entities and also non-state actors, and the measures are implemented by national legislation in a way that permits to the government to freeze the assets of the targeted individuals and prohibits their travel among the country[424]. Within United Nations and the European Union, they have been progressively implemented especially after the events of 11 September 2001 as a counter-terrorism strategy. At this point, it is important to delineate three types of targeted sanctions which have been really important in the international relations of the last decades.

1.1.3.1. Three types of targeted sanctions: UNSC resolution 1267, USA Magnitsky act and Russian Yakdev's law

In order to better understand the character of the targeted sanctions, it is important to analyze them in the practice by exploring the most important measures adopted both by States that by international organization. The first group of sanctions that we take into consideration are the one included in the UNSC resolution 1267[425], which is part of the 'Al-Qaida sanctions regime' adopted by the Security Council in order to weaken and to overcome the above terrorist group. This resolution represents a new and different approach of the United Nations to fight against terrorism and provides, first of all, the creation of the Taliban Sanctions Committee, whose most important purpose was to issue a 'consolidated list' including all the names of individuals suspected to be part of Al-Qaida, and of all the other subjects suspected of having connection with terrorist activities. Generally speaking, the blacklisting procedure is logical and useful, and it avoids the risk of the collateral humanitarian damage by targeting only the real responsible of a wrongful international act. The problems with this tool are due to the fact that initially individuals were not informed of their inclusion in the list and there was not a simple way to remove names from it[426]. At this point, it is also important to mention two other types of 'smart' sanctions: United States' Magnitsky Act[427] and Russia's Yakovlev's Law[428]. Regarding the first mentioned act, it was the attempt to restore the trade and commercial activities with Russia after the end of the cold war. The main problems were the wide spreading corruption,

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[423] HERSEY (2013: 1240).
[424] HERSEY (2013: 1241).
[425] Resolution of the United Nation Security Council of 15 October 1999, S/RES/1267(1999).
[426] HERSEY (2013: 1243).
[427] Act of the United States of America of 14 December 2012, Pub. L. No. 112-208, *to authorize the extension of nondiscriminatory treatment (normal trade relations treatment) to products of the Russian Federation and Moldova and to require reports on the compliance of the Russian Federation with its obligations as a member of the World Trade Organization, and for other purposes* (Russia and Moldova Jackson-Vanik repeal and Sergei Magnitiky Rule of Law Accountability Act).
[428] Federal law of Russian Federation of 22 December 2012, no. 272-FZ, *On Sanctions for Individuals Violating Fundamental Human Rights and Freedoms of the Citizens of the Russian Federation* (Dima Yakovlev Law).

political prosecution and Human Rights violations in Russia. For this reason, the Magnitsky Act also included the duty of the President to submit to the appropriate congressional committee a list of each person who was considered (based on credible information and after an accurate investigation) responsible for gross violations of human rights. The Russian Federation's Government responded by enacting the "Yakovlev's Law"[429], which was really similar to the previous one and it went even further. In any of the three cases analyzed, there is not any assurance of the fact that listed people will immediately be informed about their listing.
After having generally analyzed the concept of targeted sanctions and how they have been firstly used within international policies, it is now the moment to shift the research to the specific item of the work, the analysis of the use of targeted sanctions in combating terrorism.

1.2. Targeted sanctions in the fight against terrorism: the blacklisting system

As mentioned above, targeted sanctions have been used in the last decades as one of the main weapons in fight against terrorism. After the fiasco in Iraq, in which civilians have been the real victims of the sanctions, the Security Council decided to shift from general to targeted sanctions in order to put pressure onto individual and entities and to avoid humanitarian emergencies in its counter-terrorism strategy. The aim is to identify targeted individuals (who are suspected to be connected with terrorist organizations) or legal entities or terrorist organizations and to insert them on a 'blacklist'. In order to better understand the origin of this system, it is important to analyze the group of sanctions which are considered the real starting point of the blacklisting as a weapon against terrorism: the Al-Qaida sanctions regime.

1.2.2. Al-Qaida Sanctions Regime

The Al-Qaida sanctions regime is a group of UN Security Council's resolutions implemented in order to destroy the Taliban regime which was accused of protecting Bin Laden and in order to stop the financing of terrorism. We take into consideration the UNSC resolutions 1267, 1333, 1373 and 1390. The first resolution of this group is the above-analyzed 1267 of 15 October 1999[430] which was explicitly implemented against the Taliban regime. First of all, it created the UN Security Council committee and the 'consolidated list' comprehending all the suspected individuals and entities linked with Al-Qaida or with the Taliban. The following explained sanction is the provided for by UNSC resolution 1333 of 19 December 2000[431]. This sanction was implemented to reaffirm the positions already taken. in fact,

[429] The Dima Yakovlev Law.
[430] UNSC Resolution 1267.
[431] Resolution of the United Nation Security Council of 19 December 2000, S/RES/1333(2000).

always under the chapter VII of the UN charter, there was a formal request to comply with the provision included in the preceding resolution, a request to cease the relationship with the terrorist organizations (which included the close of all the training camps of Al-Qaida on the Taliban territory)[432]. To continue, the resolution 1373 of 28 September 2001[433] was implemented right after the terrorist attacks of 11 September 2001 and was directed for the most part to the member States so that they could engage in combating terrorism. The resolution and all the measures included in it had a biding effect over member States. Finally, the last resolution of the group is the 1390 of 1 January 2002[434], in which the Security Council stressed the positions taken before and reaffirm the necessity of the Talibans to comply with them. In conclusion, it is important to say that initially there was not any possibility of appeal for the listed subjects: it was introduced only on December 2006 with the Security Council's resolution 1730[435], with the de-listing procedure. Considering the important role of the backlisting system in the counter-terrorism strategies, it is time to verify their effectiveness.

1.4.2. The effectiveness of UN targeted sanctions

After having analyzed, theoretically speaking, the characteristics of targeted sanctions and the type of sanctions adopted by the Security Council, it is important to understand if they have actually been effective. With the purpose of thoroughly evaluating the effectiveness of those sanctions, the analytic research made by the scholars Bierkster, Eckert, Tourinho and Hudàkovà on November 2013 will be taken into consideration. Their analysis is based on the study of 62 episodes of UN targeted sanctions over the past twenty-two years. The measure of sanctions effectiveness is considered as a function of two variables: policy outcome and UN targeted sanctions contribution to that outcome[436]. The first variable is evaluated with a scale of five points, from 1 to 5, while the second one is evaluated on a scale of six point, from 0 to 5. A sanction is considered well effective only if the policy outcome is a 4 or a 5 and the UN sanction contribution to that outcome is at least evaluated a 3. The research is more informative and complete by taking into consideration also three different (and most frequent) purposes of the sanction which are coercion, constraint and signaling[437]. The following table explains better the results of the research, expressed in percentage:

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[432] *Ibidem.*
[433] Resolution of the United Nations Security Council of 28 September 2001, S/RES/1373(2001).
[434] Resolution of the United Nations Security Council of 1 January 2002, S/RES/1390(2002).
[435] Resolution of the United Nations Security Council of 19 December 2006, S/RES/1370(2006).
[436] BIERKSTER, ECKERT, TOURINHO, HUDÀKOVÀ (2013:21).
[437] *Ibidem.*

[438]	Effective	Mixed	Ineffective
Coerce	10%	27%	63%
Constrain	28%	22%	50%
Signal	27%	44%	29%

As it can be seen, the total percentage of effective sanction is low. Only the sanctions with signaling purpose register more positive results by having the 44% of mixed effect, but it equally means that they are not perfect and that there is something that should be ameliorated.

1.5. European Sanction Regime: 'internal' and 'external' blacklisting

At this stage, it is important also to have an overall vision on how individual sanctions are implemented in the European Union and if the European policy is different from the one of the United Nations, especially for what concern the protection of human rights. First of all, the main difference is that in the case of European Union there are two types of targeted sanctions: the 'external' ones which refer to the ones implemented following a resolution of the Security Council (which are mandatory) to support the activities of the United Nations; and the 'internal' ones which are the autonomous sanctions and are the ones decided by the European Union itself, but even them can be a reflection of the decision previously made by the United Nations[439]. Nonetheless, both types of blacklisting have been used by the European Union during the last decades, even if, according to many, the relationship between EU acts and Security Council Resolution has always been very strong, and the sanctions regime of the United Nations have been implemented in the Union system with common positions and regulations. It is possible to mention the regulation 467/2001[440] of 6 March 2001, whose purpose was to implement the measures included in resolution 1267; the regulation 2580/2001[441] and the common position 2000/931[442] which were issued to conform the Union with the measures adopted with the Security Council's resolution 1373; the regulation (EC) No 881/2002 which strengthens even more the previous adopted measures, but at the same time, it introduces a system of exemptions to the sanctions previously imposed[443]. The stipulation of blacklists and the adoption of targeted sanctions against the listed subjects has risen numerous

[438] *Ibidem.*
[439] ANDERSSON (2013: 69).
[440] Regulation of the Council of 6 March 2001, (EC) No. 467/2001, *Prohibiting the export of certain goods and services to Afghanistan, straightening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No. 337/2000*.
[441] Regulation of the Council of 27 December 2001, (EC) No. 2580/2001, *on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.*
[442] Common Position of the Council of 27 December 2001, (2001/931/CSFP), *on the application of specific measures to combat terrorism.*
[443] PORRETTO (2008: 244).

critics, due to the importance given to the human rights in the Union treaties which could be damaged with the implementation of those measures.

1.6. The ECHR and the breach of fundamental rights in the blacklisting system

Human rights are considered those rights which are fundamental, inalienable and unalterable for each human being and the violation of which by any State or entity should directly lead to a trial and a sentence. After the Second World War, in order to promote democracy and the respect of human rights, the European Convention on Human Rights was signed in Rome in 1950[444] and its major purposes were: to provide a minimum standard of living, to form collective assurance, to reinstate the name and the reputation of Europe within the rest of the world. As it was mentioned before, the introduction of targeted sanctions and the blacklisting system in the counter-terrorism strategy has been protagonist of numerous critics especially regarding the legal field, therefore, it is important to study the relationship between those measures and human rights. First of all, it is important to distinguish between substantial human rights (which are basic rights possessed by people) and procedural rights (which are the rights to information, access to justice, and rights to public participation)[445], and it is possible to say that the rights that could be most damaged by the implementation of restrictive measures are the procedural ones. In fact, even if before the inclusion of a name in the blacklist a deep investigation should occur, in none of the cases, there was a trial before the addition to a member list. Moreover, the de-listing procedure has been added only in 2006. Hence, the great dilemma is to understand, in particular, whether the external sanctions should be implemented with or without judicial review, to realize if the implementation of certain acts could actually breach any fundamental right. It is possible to say that the turning point in this debate has been the famous 'Kadi case' who totally changed the vision of the European Court of Justice and that set out a new approach in the implementation of targeted sanctions by the EU. For this reason, the next chapter will be focused on the analysis of this case.

2. CASE OF STUDY: THE KADI CASE AND THE DISPUTE BETWEEN UNSC AND ECJ

The second chapter of this thesis is focused on one of the most famous proceedings of the last decade, the Kadi case, which is also considering the 'turning point' in the change of the European Court of Justice's jurisprudence in the field of counter-terrorism strategy and the respect of human rights, in connection with the principle of loyal cooperation which characterizes the relationship between the European Union and the United Nations. This

[444] European Convention on Human Rights.
[445] HAPPOLD (2016: 8).

chapter will analyze the long route of the case and also the considerations made by the European Court of Human Rights (ECtHR) in respect to the episode.

2.1. Kadi I

Mr. Kadi submitted an application to the Court of First Instance on 18 November 2001, whose aim was to quest the annulment of the EU regulation which aimed to implement the Security Council blacklist in which he was included, and that comprehended the freezing of his assets[446]. The arguments that have been presented to support the claim were: breach of the right to a fair hearing, breach of the right of property and the principle of proportionality, breach of the right of an effective judicial review[447]. The principal argument of the European Council and Commission against those motions was the fact that the institutions were bound to the United Nations resolutions following a principle of 'loyal cooperation' under international law. More specifically, this bound was referring to two different articles of the charter of the United Nations, respectively the art. 25 and the art. 103[448]. One of the focal points of the Court of First Instance findings of 2005, was the question about the relationship between the legal order of the UN and the legal system of any other community or regional organization. The judicial body explicitly states that the obligation under the resolution for all the UN member States shall prevail over any other obligation emanating from any other international agreements, which includes also the EC treaties. With regard to the judicial review issue, the Court of First Instance stated that a judicial review over any UN resolution would have been totally inappropriate, adding that the power of the European Union to review was really limited. Moreover, it took an additional step, by saying that none of the breach previously listed by the applicant was actually put in place by the resolution 1267[449] and the consequent blacklist issued. The approach adopted by the Court of First Instance was subjected to numerous criticisms due to its terrible abdication of judicial responsibility[450].

2.2. Kadi II

On 3 September 2008, the European Court of Justice pronounced its decision on appeal in the Kadi case. The findings of the Court have been influenced in the first place by the opinion of the Advocate General Poiares Maduro, who in January 2008 issued an opinion regarding the case, who adopted a strong

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[446] HOVELL (2016: 4).
[447] Judgment of the Court of First Instance of the European Union of 21 September 2005, case T-315/01, *Kadi* v *Council of the European Union and Commission of the European Communities.*
[448] Chater of the United Nations.
[449] Resolution 1267 of the United Nation Security Council.
[450] HOVELL (2016: 8).

position by going against the decision of the Court of First Instance, especially regarding the violation of human rights[451]. The result was that, the European Court of Justice in his judgment of 2008 followed the opinion of AG and it contrasted in total the previous decision of CFI. In fact, the ECJ in the sentence took a particular and strong stand by invalidating the two regulations above-mentioned which implemented the resolutions of the Security Council that included the appellant in the blacklists and that condemned him to targeted sanctions. The reasoning of this decision is to find in the expressed violation of fundamental rights protected by the European legal order[452]. The majority of the critics derived from the approach that the European Court of Justice had with regard to the Security Council and, more generally, with regard to the international arena. In fact, it has been said that the judgment was too imperialistic, as it was a way to prove the magnitude and the power of the European Union to the disadvantage of the general values of international law. Moreover, the Court has been accused of having adopted a too nationalistic approach, unwilling to international dialogue which has always been one of the main virtues of the European Union as a global actor[453]. From another and more practical point of view, the real fear was that the new jurisprudence of the ECJ would have de-stabilized the status quo of the international politics and it could also have been a real turning point for the collapse of the sanctions' regime[454]. In a first phase, the finding of the ECJ was seen more as an act of rebellion against the UNSC, then a real turning point in the European approach to the respect of fundamental rights; in fact, the Kadi II decision was considered, first of all, as an exception to strengthen the role of the ECJ within the international scenario. As a consequence of it, the Security Council's response was the creation of the office of UN Ombudsperson, which is a subsidiary office of the UNSC; it was establish with the UNSC resolution 1904[455], and its purpose was to help the sanctions committee in the delisting procedure. In conclusion, it is important to understand if the judgement of the European Court of Justice had a real impact over the following sentences of the case, or if it was just an 'exception' due to the will of the Court to increase its straight at the global level.

2.3. Kadi III and Kadi IV

[451] Opinion of Advocate General Poiares Maduro of 16 January 2008, cases C-402/05P and C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v *Council of the European Union and Commission of the European Communities*.
[452]Judgment of the European Court of Justice of 3 September 2008, cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v *Council of the European Union and Commission of the European Communities*.
[453] DE BURCA (2009)
[454] HOVELL (2016: 10).
[455] Resolution of the United Nations Security Council of 17 December 2009, S/RES/1904(2009), par. 20-21.

After the judgment of the European Court of Justice, the Commission issued the regulation (EC) No. 1190/2008[456], in which it states that after having showed to Mr. Kadi the summary of the reasons of his enlisting and after having given to him the possibility to present his considerations about it, these consideration has been examined and the final statement was that the restrictive measures against the appellant were more than justified and he has to remain in the blacklist[457]. Due to this, on 26 February 2009, the appellant contested the decision and brought the case before the General Court of European Union ("GC") which exposed its conclusions on 30 September 2010. With this regard the GC affirms that the deficiencies at UN level for what concerns the right to a fair process and the right to a judicial review, previously found by the ECJ, were still in place. Due to this, even if it recognized the step forward made by the UN with regard to this matter, the tribunal also realized the necessity to review the implementing measures in accordance with EU human rights law[458]. The European Commission, The Council and the United Kingdom of Great Britain and Northern Ireland did not well accept the decision taken by the General Court and for this reason, they contested the judgement. Due to this the Court of Justice of the European Union ("CJEU"), on 18 July 2013, was obliged to give the final judgment which is also called Kadi IV. Thus, the CJEU concluded by recalling the previous judgment of the European Court of Justice, by considering the claim of Mr. Kadi as acceptable and by recognizing the necessity of the annulment of the regulations in the part concerning the appellant[459]. The approach taken by the court in Kadi IV has been a lot criticized because it was accused to prefer the European Union law over the international law.

2.4. European Court of Human Rights' position on the balance between the fight against terrorism and the respect of human rights: Nada v *Switzerland.*

Even if the European Court of Human Rights ("ECtHR") has always stated that States have to balance the fight against terrorism with the respect of human rights, It is also important to say, that the European Convention on Human Rights concedes to the States a certain room of manoeuvre to deal with emergency situations. This room of manoeuvre is stated in article 15

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[456] Regulation of the European Commission of 28 November 2008, (EC) 1190/2008*, on imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban.*

[457] *Ibidem.*

[458] Judgment of the General Court of the European Union of 30 September 2010, Case T-85/09, *Yassin Abdullah Kadi* v *European Commission.*

[459] Judgment of the Court of Justice of the European Union of 18 July 2013, joined cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and others* v *Yassin Abdullah Kadi.*

which is a derogation clause, which has some limits that are better underlined in the study of the case *Nada* v *Switzerland*.

2.4.1. Nada v *Switzerland*

On 12 September 2012 the grand chamber of the ECtHR ruled on the appeal presented by Youssef Moustafa Nada against Swiss, regarding the implementation of targeted sanctions issued by the UNSC against subjects which were suspected to be connected with international terrorism. It is important to notice, how the conclusions of this case are really similar to the ones deriving from the Kadi proceedings: the ECtHR exposed the conclusions deriving from Kadi II of the European Court of Justice, by saying that there is not rule of priority that can justify a clear and wrongful breach of the fundamental rights provided by the convention[460].

2.5. A new turn in the practice of the ECtHR: the guidelines to balance security and human rights

The European Court of Human Rights also sets some specific guidelines to try to balance international security and the protection of the suspects' human rights: The margin of appreciation allowed to the authorities in combatting terrorism is not *carte blanche;* More rigid restrictions are allowed by public interest when there is a plausible suspicion of terrorist threat, but, in any case, this not provide the excessive individual suffering; The most important guarantee is the access to a court; The suspected individual need to be in possess of sufficient information regarding the allegations made against him, in order to let him prepare his defense; The restrictions of the rights must be temporary[461]. As we have seen in the practice of the Kadi case, but also in the Nada one, the targeted sanctions imposed against the suspects have been very harsh and based on very limited information; In fact, the main problem within the blacklisting system is the little opportunity for suspects to challenge the decision before an independent review body and it is really difficult also to obtain reparations in case of wrong listing.
The Kadi case was considered as a turning point in the blacklisting system, because for the first time the ECJ recognized the impossibility of dealing with targeted sanctions if the individual fundamental rights are not also considerate. Due to this, in the next chapter will be analyzed the aftermaths of the case and also other, more recent, proceedings dealt by the Court, in order to apprehend whether and how the line of the ECJ has changed regarding this issue.

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[460] Judgment of the European Court of Human Rights of 12 September 2012, application No. 10593/08, *Nada* v *Switzerland.*
[461] DRAGHICI (2009)

3. THE AFTERMATH OF THE KADI CASE: THE DEVELOPMENT OF A RIGHT-BASED JURISPRUDENCE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

The aim of this third chapter is to understand if the approach used by the ECJ in the Kadi case has been only an exception to the general rule or it has been a real start for a new jurisprudence of the Court based on the completely preservation of human rights and of the other fundamental values of the European Union.

3.5. The principle of equivalent protection and the importance of the relationship between the CJEU and the ECtHR.

Suddenly after the end of the Kadi saga, the Court of Justice of the European Union was again in the middle of the spotlight due to the debate regarding whether or not the EU should formally join the European Convention on Human Rights. The opinion 2/13[462] issued by the Court is now considered as 'historical' because it delineated even more, the line of the jurisprudence of this institution. The amendments provided by the Lisbon treaty permits to the European Union to officially join the convention, although avoiding to damage its competences defined in the treaties[463]. With regard to this matter, the Court, after having studies the draft agreement provided by the Commission, stated that it was not compatible neither with article 6 (2) of the TEU nor with the relative protocol (n. 8) regarding the possibility of admission of the European Union in the European Convention on Human Rights[464]. The negative response given by the Court was based on the importance given to the fundamental principles of the European Union, exactly like it happened in the Kadi judgment, with the only difference that in this specific case, the principle in danger were not human rights, but the nature and the

[462] Opinion of the Court of Justice of the European Union of 18 December 2014, case opinion 2/13, *Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties.*

[463] Treaty on European Union, Article 6: "1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

[464] *Ibidem.*

independence of the Union and its institutions. Due to this, it is unfair to state that the jurisprudence of the Kadi case was not considered in this opinion; in fact, there is a common thread between the two, which is the importance to guarantee the protection of every corollary principles at the base of the Union.

3.6. Following Kadi: the other accepted appeals that deserve attention.

The proceedings that will be examined are: *Abdualbasit Abdulrahim* v *Council and Commission*, *Liberation Tigers of Tamil Eelam ("LTTE")* v *Council and Kurdistan Workers' Party ("PKK")* v *Council*.

3.6.1. *Abdualbasit Abdulrahim* v *Council and Commission.*

On 21 October 2008, Mr. Abdulrahim was added to the list issued by the sanction committee within the UNSC resolution 1267 of 1999[465]. The regulation (EC) No. 1330/2008[466] of the Commission implemented the resolution and provided the freezing of the founds of the appellant, with the charges of having been involved in the fund-rising for a terrorist organization and for being connected to people involved in terrorism activities. On 15 April 2009, Mr. Abdulrahim made an appeal against the Council of the European Union and the European Commission, with the requests of obtain the annulment of the regulation 1330/2008, due to a violation of the right to be heard, of the right to have a fair trial, of the right to respect private and family and of the right of property[467]. The GC states that the allegations made against the appellant were not based on solid grounds and that the violations listed by him were well-founded. Due to this, the General Court considers the addition of the appellant's name on the blacklist as unjustified and it rules on the annulment of the regulation (EC) No. 1330/2008 for the part concerning the claimant[468]. The analysis of this case has made evident the similarities with the approach used by the ECJ in Kadi II, whose final judgment gave the standards to reach the final statement of this following case.

3.6.2. *Liberation Tigers of Tamil Eelam ("LTTE")* v *Council.*

[465] Resolution 1267 of the United Nations Security Council.
[466] Regulation of the Commission of 22 December 2008, (EC) No. 1330/2008*, amending for the 103rd time Council 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.*
[467] Judgment of the European Court of Justice of 28 May 2013, case C-239/12 P*, Abdulbasit Abdulrahim* v *Council of the European Union and European Commission.*
[468] *Ibidem.*

With the decision 2006/379/EC[469], the Council officially added the LTTE to the list. According to the motivations provided by the Council, the LTTE was described as a terrorist group and several terrorist acts that the group should have done since 2005, have been mentioned as evidences[470]. Due to the addition to the blacklist, the group decided to appeal against on 11 April 2011, by presenting seven reasons, among which: The wrong classification of the LTTE as a terrorist organization; The violation of the duty of motivation; The violation of the right to defense and to an effective legal protection for the appellant. Also, in this case, the Court, in the exposition of its judgment, recalls parts of the Kadi case in relation to the respect of the fundamental rights. Due to effective violations of the rights above-mentioned, and due to a lack of a deep investigation by the Institutions, the Court decided to accept the motivations given by the LTTE and to condemn the Council.

3.6.3. *Kurdistan Workers' Party ("PKK")* v *Council*

The Kurdistan Workers' Party is a paramilitary organization founded on 1978, and after the implementation of the regulation (EC) No. 2580/2001[471], its name was always maintained in the list of people and entities subjected at restrictive measures due to connection with terrorism or terrorist activities. Always recalling similar motives to the ones used by Mr. Kadi, also this groups appealed against the Council in order to obtain the annulment of the restrictions made against it. Among all the reasons, the two most important were the lack of motivation and the violation of the right to defence. The General Court of the European Union provides its judgment by recalling not only the Kadi case but also the LTTE one; in fact, the Tribunal founds similar circumstances between the three cases, and it recognizes both the lack of motivations for a so long listing, and the violation of the right to defence at the damage of the appellant. Due to these motivations, also this case was accepted and the measures against the group have been annulled.

3.7. Following Kadi: the most important rejected proceedings

This paragraph deals with the analysis of three proceedings rejected by the Courts, which are: *Hamas* v *Council*, *Al- Faqih and others* v *Commission* and *Al-Ghabra* v *Commission.*

3.7.1. *Hamas* v *Council*

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[469] Decision of the Council of 29 May 2006, 2006/379/EC, *implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2005/930/EC.*
[470] Judgment of the Court of Justice of the European Union of 26 July 2017, case C-599/14 P, *Council of the European Union* v *Liberation Tigers of Tamil Eelam (LTTE)*, par. 10.
[471] Regulation (EC) No. 2580/2001.

Hamas is a Palestinian paramilitary organization which was founded on 1987 after the first *intifada,* and that, due to its *modus operandi,* officially recognized as a terrorist organization by many nations of the world. The dispute between Hamas and the European Union started when on 2001, with the United Nations Security Council resolution 1373[472], the sanction committee added its name to the blacklist and the Union issued the regulation (EC) 2580/2001[473], to fulfill with the request of the resolution. The name of this organization was always maintained into the list, also in the following acts of the European Union adopted to replace the previous regulation. Hamas decided to appeal against those acts, by recalling all the motivations already mentioned in the previous cases, including the lack of motivations, the violation of the duty to be heard, of fair trial and of information. The GC, after having analyzed the responses given by the Council, stated that none of the charges made against the institutions were well-founded, and that the Council did not violate any of the mentioned right. Moreover, the motivations given to justify the inclusion were more than sufficient and based on solid grounds, so that the appeal of Hamas could not be accepted.

3.7.2. *Al- Faqih and others* v *Commission*

The dispute started in 2006, when Al-Bashir Mohammed Al-Faqih, Ghunia Abdrabbah, Taher Nasuf and the Sanabel Relief Agency have been included, for the first time, in the blacklist by the Commission with the regulation (EC) No. 246/2006[474]. Despite of the exclusion of these names from the blacklist, on 3 March 2011, Al-Faqih, Abdrabbah, Nasuf and the Sanabel Relief Agency presented an appeal for the annulment of the previous regulations[475], due to wrong motivation and to the violation of the right to defense. The General Court rules by recalling the the Kadi sentence of 2013, the Commission followed the fundamental procedural guarantees, by operating a good and detailed judicial review; the appellants did not provide any evidence of the fact that the judgment of the tribunal was based on wrong elements provided by the Commission, so that the institution did not misbehave in its process of blacklisting[476]. Due to these reasons, the appeal is rejected.

3.7.3. *Al-Ghabra* v *Commission*

The dispute starts on 12 December 2006 when Mohammed Al-Ghabra (a UK citizen) was added to the list issued by the UN sanction committee including

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[472] UNSC resolution 1373.
[473] Regulation (EC) No. 2580/2001.
[474] Regulation of the Commission of 10 February 2006, (EC) No. 246/2010, *amending for the 63rd time Council 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, and repealing Council Regulation (EC) No 467/2001.*
[475] Judgment of the Court of Justice of the European Union of 15 June 2017, case C-19/16 P, *Al- Faqih and others* v *Commission of the European Union.*
[476] *Al- Faqih and others* v *Commission of the European Union,* par. 71-85.

all the individuals and entities having connection with terrorist activities. To implement the list at the Union level, the Commission issued a regulation (EC) No. 14/2007 of January 2007, in which the name of the subject was officially added to the list. In light of the evolutions had with the Kadi sentence of 2008, on 2009 the applicant asked to the Commission a review of its listing to challenge its lawfulness; the Commission responded by giving him the reasons that led both the sanction committee and the Commission to add his name to the blacklist. Mr. Al-Ghabra responded by stating that that information was vitiated by a lack of evidence and due to this, he challenged the decision of the Commission before the General Court by asking for the annulment of the contested regulation for what concerns him. The Commission responded by dismissing the contestation as inadmissible and unfounded. In conclusion, the General Court, after having deeper analyze all the allegations made against the applicant, sustains that he has never given real evidences to demonstrate that he is not a threat to the international security. In conclusion, the General Court dismisses the appeal made by the applicant and condemns Mr. Al-Ghabra to the costs[477].

3.8. Critics made against the new jurisprudence of the Court, final remarks and conclusions.

As it has been possible to see, it is undeniable that the impact of this case on the jurisprudence of the Court was really strong, and it is also evident how there is a common thread between all the facts and circumstances analyzed in this chapter, that can all be reconnected to what is derived from the Kadi case. Moreover, that it did not influenced only the judgment of the Court regarding matters of counter-terrorism or targeted sanctions: it had an impact over its approach also for what concerns the relationship with the other institutional bodies and, moreover, with the full international scenario. This was particularly manifest in the analysis of the Opinion 2/13[478], in which in the circumstance of the project of agreement to entry in the convention, the nature and the independence of the Union would not be guaranteed, and also many of the provisions expressed in the treaties were at risk of losing importance. This is the reason why the Court issued a negative opinion regarding it, because such as in the Kadi proceeding, also in this case the corollary values of the European Union would have not be preserved. To go more in the specific regarding the terrorism and targeted sanctions field, it is evident how the legacy of the Kadi case is really strong and present. With the study of the first three cases, it is possible to delineate some common characteristics that have been specific also of the Kadi case, such as the violation of right to a fair trial, lack of the duty to motivation and violation of the principle of proportionality. If the Court, after a long and precise investigation, realizes

[477] *Al-Gabra* v C*ommission of the European Union*, par. 138-195.
[478] *Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties*.

that one of the previous circumstances occurred, it cannot rule in favor of the institutions and at the damage of the individual. Despite this, it does not mean that in every single proceeding regarding this matter, the Court has actually found a violation or a misbehave made by the institutions. In fact, when there are not any evidences of the occurrence of a breach of fundamental rights, the Court is able to reject the appeal. In any case, it is undeniable that the impact of the Kadi case over the jurisprudence of the Court of Justice of the European Union has been real and powerful and that its consequences will last for a long time, with the purpose to try to balance the imposition of the targeted sanctions in order to stop the financing and the proliferation of terrorism, without excluding the protection of the fundamental rights.

4. THE AFTERMATH OF THE KADI CASE: THE IMPACT THAT THIS CIRCUMSTANCE HAD ON EU COUNTER-TERRORISM STRATEGY

To conclude this research, it is important also to understand whether the Kadi case has affected also the policy line of the Union in matter of counter-terrorism, and due to this, several documents issued by the European Union and the Council of Europe will be analyzed: the Stockholm programme; the regulation (EU) 2016/794; the directive (EU) 2016/681; the directive (EU) 2017/541; the European Union counter-terrorism strategy and, to conclude, the Council of Europe's counter-terrorism strategy.

4.1. The Stockholm programme

The Stockholm programme is the third five-year program of the European Union in matters of freedom, security and justice, and it mostly represents the schedule that all the European institutions (with particular regard to the Commission) have to respect to develop their works in this field, within the years 2010-2014. . In general, the main purpose of the program is to develop an area of freedom, security and justice ("JLS") which can face the most important fears of the States of the Union[479]. Due to this, the European Council believed that one of the most important priorities that the Union had to confront with in those years, was the study of the necessities and interests of the citizens. In the light of what has been previously told, starting from the jurisprudence delineated in the Kadi case, similar values have been highlighted also in the Stockholm programme; in fact, its common thread is to balance the countermeasures to combat the most serious European threats with the preservation of human rights, thanks to the issuing of provision ensuring the protection of individuals. To sum up, the safeguard of both human rights and the security of the European Union have to grow in parallel.

[479] Information and Notes of the European Council of 2 December 2009, (2010/C 115/01), *The Stockholm Programme - an open and secure Europe serving and protecting the citizens*.

4.2. Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016: new functions for the Europol

The Europol is an entity of the European Union whose creation was provided by the Maastricht Treaty of 7 February 1992[480], even if it became operative only on July 1999. The Europol's objective is to implement the efficiency of the competent authorities of every member State, in combating every form of criminality, including terrorism. With the Stockholm Programme[481], it was decided to give more importance and more responsibilities to the Europol, in order to have a better coordination within the strategies implemented by the member States in the fight against the criminality. The latest modification regarding the role and the duties of this entity, is the Council and Parliament Regulation of 2016[482], in which the new functionalities of the Europol are explained in detail. Among the new functionalities of the Europol it is important to mention: analysis of the information and analysis of the risks; Europol should be appointed of using and sharing data with member States, other EU institutions, private entities and third countries, in order to better reach the objectives set. With the aim of protecting both individual rights and the transparency in the data processing, the regulation also states the necessity of the publication of a document inclusive of all the dispositions and means applicable by the individuals for the exercising of their rights.

4.3. Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016: the use of PNR data for the prevention, investigation and prosecution of terrorist offences

With the Stockholm Programme, the Commission was asked to present a proposal regarding the use of Passenger Name Record ("PNR") data, with the purpose to investigate and prevent all the terrorism activities and other serious crimes. The PNR are data generated by the travel agencies, tour operators and air carriers and they are considered among the most sensitive categories of personal data; this is due to the fact that they contain several and really detailed information related to the passengers. Thanks to the analysis of PNR data, it is possible to identify people that were never suspected of terrorist activities or of other serious crimes and to combat this phenomenon from another point of view with respect to the analysis of the other data available or with respect to the other counter-crime strategy that have been used before.

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[480] Maastricht Treaty (or Treaty on European Union), Maastricht, 7 February 1992.
[481] *The Stockholm Programme - an open and secure Europe serving and protecting the citizens*.
[482] Regulation of the European Parliament and of the Council of 11 May 2016, (EU) 2016/794, *on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA.*

With the purpose of protecting the citizens and to avoid an abuse of power, in accordance with articles 8[483] and 21[484] of the Charter of Fundamental Rights of the European Union (which issue respectively, the right to protection of personal details and the right to non-discrimination), the PNR data processing should not permit the implementation of decision that can damage in a significant way the life of the subject, based only on the analysis of those data. In addition, all the investigations made by using PNR data shall not be determined on the base of any form of discrimination, and these activities should not be used in any case as an excuse by the member States to avoid their international law duties. This is another evidence that the line of thought adopted by the Court in the Kadi case and in the following cases of law, has affected also the policy of the EU in matters of counter-terrorism, with human rights protection and the fight against this phenomenon that have to go in parallel.

4.4. Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017

The directive (EU) 2017/541/JHA[485] comprehends another step made by the European institutions in order to develop the unitary character of the counter-terrorism strategy and to combat the latest terrorist threats on the European territory. The purpose of this directive is to develop a unitary legal framework for all the EU countries in order to promote a juridical cooperation both concrete and real. This objective can be helped also by the sharing of information and data between both member States and EU institutions. The directive also sustains the need of finding a common and more detailed definition of terrorist offences: they are characterized by both an objective and a subjective element. The former is also the intentional and the material one, which is related to the nature and the contest in which the attacks are carried out, especially because they usually lead to a serious damage to a country or

[483] Charter of Fundamental Rights of the European Union, article 8: "1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority".

[484] Charter of Fundamental Rights of the European Union, article 21: "1.Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibit".

[485] Directive of the European Parliament and of the Council of 15 March 2017, (EU) 2017/541/JHA, *on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.*

to the country's citizens; the second element is the subjective one, which represents the purpose of the attacks that it is usually linked to the will of strongly intimidate the population in order to coerce the institution to do or not to do a specific act. Another important part of the directive is related to the fundamental rights and freedoms. According to article 23, the directive does not prejudge the obligation of the member States and of the institutions to respect the fundamental right and freedoms considered as principal values of the European Union.

4.5. The European Union counter-terrorism strategy

The first strategy was adopted in 2005, after the attacks of Madrid and London[486], but it was modified and developed several times in the years. The roots of this scheme comprehend the fight against this phenomenon, while always respecting the human rights of every individual as fundamental principles of the Union. The member States are the key actors of this strategy and they have the major responsibility in combatting terrorism; hence they have to implement at the best they can their national means. Nonetheless, the support given by the Union should not be undervalued. The strategy has been updated several times, especially in the last years, due to the develop and the change of some aspects of the terrorist threat. As it has been mentioned in the analysis of the 'prevent' pillar, the radicalization and the recruiting are key aspects of the terrorist scheme. Due to the continuous spread of these two phenomena, the Council agreed on May 2014 on the issuing of the EU Strategy for Combatting Radicalization and Recruitment to Terrorism[487], which is particularly focused on all the means and indications to eliminate these two processes. The main objective of this strategy is to prevent people to radicalize and to be recruited by terrorist organizations, also considering that the means for the radicalization process are in a constant evolution, especially due to the emergence of the 'lone actors' and 'foreign fighters'. To sum up, the counter-terrorism strategy of the European Union is based on high-level political dialogue and on the promotion of the cooperation among all the actors that are affected by this threat, also at the international level. Equal importance has been given also to the respect and protection of human rights, since it has been stated that all the measures that have to be taken to combat this phenomenon, are not allowed to commit a breach of fundamental rights of any individual.

4.6. The Council of Europe counter-terrorism strategy

[486] VIDINO, BRANDON (2012: 169 ss.).
[487] Programme of the Council of the European Union of 19 May 2014, 9956/14, *Revised EU Strategy for Combating Radicalisation and Recruitment to Terrorism*.

After the latest attacks on European soil, the Council of Europe decided to adopt a new counter-terrorism program for the years 2018/2022. The strategy was approved on 4 July 2018, and it was presented by the secretary general Jagland as it follows: "We must improve the ability of our member states to prevent and combat terrorism, in full compliance with human rights and the rule of law. This strategy takes account of the growing terrorist threat and should provide European governments with additional, effective means of response"[488]. This quote embraces the core of the strategy: in fact, if on one side it is necessary to find new solutions and new means to combat this phenomenon, on the other the implementation of those new measures shall not breach any of fundamental human rights. The Council of Europe, in this strategy, while recognizing that States have to play a central role in this fighting, also believe in the necessity of cooperation among themselves and among the other institutions. The key points of this strategy are: prevention, prosecution and protection which also includes assistance to the victims.

4.7. Final remarks and conclusion

The aim of this chapter was to analyze whether or not the approach used by the CJEU in the Kadi case has also influenced the policies of the European Union in its counter-terrorism program. As it was possible to see, terrorism is considered one of the major threats that EU has to face with. The approach used by the Union to combat this phenomenon was really strong, and it aims at combating the diffusion and the evolution of the terrorist propaganda from the roots, with the help of other international organizations, and, in particular of agencies and groups of specialists of the field. Nonetheless, what emerged from this analysis was the conviction that the majority of the individuals that are fascinated by the terrorist ideology are mostly affected by social problems, due to lack of education and economic resources, but also due to discrimination issues. For this reason, in every document that has been analyzed it is possible to notice a reference to the protection and the safeguard of fundamental rights of every individual, with particular regard to the discrimination problem. In fact, the policies of the European Union always promoted the spreading of a different and more liberal ideology, promoting equality among citizens and strongly condemning any form of discrimination. To sum up, in my opinion, it can be stated that also the policies of the European Union in this field have been, in some way, affected by the approach used by the Court in the Kadi case, and in its strategy, the Union always tries to balance the necessity to stop terrorism with the obligation to respect fundamental basic rights as core principles of the organization.

Conclusion:

[488] JAGLAND (2018).

The aim of this research was to understand the relationship between the use of targeted sanctions in the fight against terrorism and the respect of human rights, especially in the light of the Kadi case which has been one of the most important cases of the last decades and which is considered a real turning point in the jurisprudence of the Court of Justice of the European Union. The conclusions of the Court have been extremely strong and innovative, by giving an important response to the debate regarding the balance between the respect of human rights and the fight against terrorism. According to the Court, although considering necessary the eradication of the phenomenon of terrorism for the security of the international scenario, the protection and the preservation of human rights need to be respected and protected above all, to preserve the corollary principles on which the Union is founded. Concerning the aftermath of the Kadi case, from a judicial point of view, the results of this work have showed how it is impossible to deny the strong impact of the Kadi case's conclusions on the following jurisprudence of the Court of Justice of the European Union. The interest fact was to understand if this impact occurred also in the political field, within the implementation of the European counter-terrorism strategies. The outcome of this study showed that there have been important evolutions in matters of security policies, and that especially in relation to terrorism, they have been often updated to assure a major protection of the citizens. Hence, in all the programs analyzed there is always a specific mention to explain that the adoption of certain harsh measures does not allowed the member States nor European institution to violate human rights. In any event, it is important to underline how this position has not the purpose to overshadow the fight against terrorism to protect human rights: the real objective is to find a balance between the war against the most dangerous threat that the European Union has to face with, and the preservation of its corollary values, by avoiding the risk of destroying the nature of the organization.