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The UN Blacklisting Regime: Targeted Sanctions and Human Rights Protection

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INTRODUCTION

The "war on terror" and the counter-terrorism strategies developed worldwide in the aftermath of the 11th of September 2001 have defined the early years of the 21st Century. One of the least documented aspects, but also one of the most controversial, has been the creation of the UN Blacklist Regime that originated from UN Security Council Resolution 1267 (1999) that has been implemented and adjourned since.

The creation of a List to identify the terrorist individuals and entities that might pose a threat to the security of the states and the public interest seems in theory a reasonable response to prevent another 9/11, as seem reasonable the measures attached to such List. The decision to enforce financial sanctions and visa bans to the proscribed individuals was perceived as a preventive administrative measure to ensure the protection of each citizen. The practice of such strategies has been however far more contentious.

The first backlisting regime was created to exert international pressure on the problematic state of Afghanistan, so as to urge on the extradition of Usama Bin Laden. Since then the list has been extensively expanded in order to target terrorist network and their supporters, providing an international and national framework to preemptively target individuals suspects and entities.

This thesis seeks to document the growing doubts on the legality of this terrorist proscription regime. Whether its development offers a true response to the objective it proposes to achieve or whether it is too often subjected to arbitrariness and injustice. Is it able to protect the rights of the individual listed? How far can the derogation of fundamental rights be justified in the face of major achievements? What are the consequences of in the powers of the United Nation and what are the responses of the Courts?

It will become clear through this analysis how the structural deficiencies of the proscription regime have caused great harm by subverting the principle of rule of law and the presumption of innocence, by bypassing the usual law-making process where the individuals have been subjected to a method that can be solely defined as "*first convicted, then processed*" in sake of preventiveness and how this has opened a conflict between the United Nations and the European Union.

This study is divided in three main parts.

Chapter One is focused on the origin of the measures of terrorist proscription and their historical development and implementation both at the international level, through the creation of such regime by the Security Council of the United Nations, both at the European level through the steps made by the European Council in adopting the strategies of the Security Council.

It will show how a regime solely created for the scope of combating terrorism in relation to the Taliban rule in Afghanistan would be then extensively expanded covering a plethora of different entities and individuals on a global scale. It will also cover how the implementation by the European Council of such measures shifted significantly since the early years, in light of the inability of the Security Council in creating a proscriptive environment respectful of fundamental rights and of rule of law.

Since the First Chapter the disproportionate impact on the rights of the parties will be evident, as they will be evident the different approach taken by the UN and the EU to tackle them, the former only adding minor adjustments which never altered the flawed regime to its core, the latter mostly devolving the decision-making power to the EU courts.

The Second Chapter provides an inquiry of three legal challenges, both successful and not.

All three of them are necessary to better discern the departure of the European Court from the regime created by the Security Council. Through the legal challenges brought by the People's Mojahedin Organization of Iran (PMOI) the European Union was able to develop a mechanism for transparency and accountability that was missing at the UN level, refusing the confidentiality of evidence and demanding primacy for fundamental rights.

The case of the Segi Organization will reveal the implications and stigmatization of being publicly identified as terrorist and will also exhibit some gaps also in the European Union's system of judicial protection of human rights.

Lastly, *Fighters + Lovers v. Demark* represents the perfect illustration of criminalization by association; it will be highlight the influence the political landscape might have in altering the definition of "terrorism".

The third and final chapter of the thesis is the assessment of the major concerns associated with the proscription regime to combat terrorism and its far-reaching impact.
It will firstly assess how the absence of a unitary interpretation of the word "*terrorism*" poses major threat both for the individual associated with it but also for the cooperation among states in conflict-resolution; and it will argue that the use of pre-crime in the terms defined by the Security Council have taken the form of punitive measures rather than preventive ones. The second part of the Third Chapter offers a thorough examination of all the fundamental rights linked with such prescription regime: how far can be these rights derogated? Are present effective remedies for the individuals proscribed? Have they been granted a legal examination? How independent and how autonomous are the de-listing processes?. This Third Chapter will end with a conclusive estimate on the efficacy of targeted sanctions and of the future challenges of other proscription regime such as the one directed to the Russian oligarchs in February 2022.

This comprehensive coverage has been written through the study of primary sources such as official documents of the various institutions involved, several Resolutions of the UN Security Council, the Decisions of the European Council and the assessment of the EU Court of First Instance, the European Court of Justice and the European Court of Human Rights.
Other analysis of the concerns associated with the list have been scrutinized through the use of secondary sources, such as the opinions of academics and professors on the matter.

CHAPTER 1: BIRTH AND DEVELOPMENT OF BLACKLISTING

1.1 – Definition and types of Blacklisting

The roots of blacklisting can be traced historically to the beginning of the 17th Century to define individuals who were to be considered as a menace to the community in which they lived or worked, or had behaved in an unethical or objectionable way.
The etymology per se is extremely significant, the term "*Black*" is symptomatic of disgraceful and blameworthy connotations, as if the person blacklisted is to be avoided, silenced and secluded.
The involvement of these untrustworthy persons in activities considered against specific principles has been ostracized through the applications of blacklists in various contexts.
Historically, the most relevant practices of blacklisting referred to the ostracization of trade unions' activists in the United Kingdom in the 18th Century and to the measures taken towards relevant figures of the entertainment industry during McCarthyism.

1.1.1 The First Use of Blacklisting by Trade Union Activists During Industrialization

This first case dates back to the early days of the Industrial Revolution, when private and public companies sought practices to maintain a compliant labor force and systematically denied individuals employment on the basis of their engagement in trade unions activities, their attendance in strikes and anti-company rallies or their notorious dissent of corporate policies.
These blacklists were periodically disseminated by employers' associations as an admonition to workers that their involvement in activism might result in the termination of their jobs.
With the acceleration of industrialization and the growth of labor movements in the late 19th and early 20th Centuries, the practice of employment blacklisting became very common.

Throughout the following decades workers, activists, and civil rights organizations have lodged a valiant fight against it. Unions have been instrumental in challenging blacklisting practices and advocating for legal protections for workers against discrimination and organized abuses.

Despite these efforts employment blacklisting has persisted, taking more subdued and clandestine forms. The practice of denying job prospects to persons based on their engagement in labor unions, safety concerns, or whistleblowing actions has been documented in various industries, including healthcare and construction.

1.1.2. McCarthyism and Forging of Blacklisting in the Movie Industry

The latter case is still a phenomenon that could be easily inserted in the "*employment blacklisting*". The House Un-American Activities Committee (HUAC) between the 1940s and the 1950s launched a campaign against actors, directors, screenwriters and entertainment professionals suspected of being supporters and sympathizers of the Communist Party in the United States.

As a result, a blacklist of people considered to be a threat to national security was established, effectively banning them from the movie industry. These lists were neither published nor verifiable by the subjects involved, they were mostly the consequences of unilateral decisions made by the studios influenced, notably, by the political environment. The effects of the Hollywood's Blacklist undermined the foundations of democratic expression and free speech in the American society of those years, culminating in the case of the "Hollywood Ten", a plethora of renowned figures of the movie industry who have been severely blacklisted and even imprisoned.

1.1.3. From Comprehensive Sanctions to Targeted Sanctions (1990s)

The origins of the Blacklist regime implemented and developed by the UN Sanctions Committee is the decade-long evolution of the trade embargos and sanctions regime conceived by the United Nations soon after its birth, and enforced from the 1960s to the

1990s in order to address major challenge to international peace and security by exerting pressure on the economy of "troublesome" states.

The initial endorsement of comprehensive financial sanctions was confined only to specific nations and was perceived as an efficient tool, approved with great enthusiasm from the international community.

Disillusionment however, set in pretty quickly.

The embargo imposed on Iraq the 6th of August 1990, four days after its invasion in Kuwait, and extended until 2003 has been described as the worst humanitarian catastrophe ever imposed in the name of global governance. The unintended consequences of the destabilization of President Saddam Hussein's regime were a population on the verge of famine and clear humanitarian costs. [1]

Specifically, the comprehensive sanctions adopted "*have caused persistent deprivation, severe hunger and malnutrition for a vast majority of the Iraqi population, particularly the vulnerable groups—children under five, expectant /nursing women, widows, orphans, the sick, the elderly and disabled*."[2]

Also, the financial costs of the embargo were not framed in denying Saddam Hussain access to funds, but have led to hyperinflation and endemic unemployment for the whole country which is still haunted by an impressive reduction of living standards and a great political and institutional vulnerability.

Similarly, the same prohibitions of imports and exports were applied to Haiti in 1991, soon after the coup d'état by the Armed Forces of Haiti. The already severely impoverished country was massively impacted by the financial sanctions that caused an emigratory crisis and the collapse of the health service structures due to the lack of electricity.

The use of military force was, in the end, necessary in both cases to achieve the goals that the comprehensive financial sanctions were supposed to accomplish. To end the invasion of Kuwait and to finally subvert the Saddam Hussein's regime the United States led a

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[1]Gordon, Joy. "*The Enduring Lessons of the Iraq Sanctions*." MERIP, 15 June 2020, https://merip.org/2020/06/the-enduring-lessons-of-the-iraq-sanctions/

[2] United Nations Food and Agriculture Organization/World Food Program "*Special Alert No.237: FAO/WFF Crop and Food Supply Assessment Mission to Iraq*" July 2003

military operation in 2003, while in the case of Haiti it was the Operation Uphold Democracy approved by the United Nation Security Council that in 1994 effectively restored the democratically elected president Jean-Bertrand Aristide.
The only kind of comprehensive financial sanctions that seemed to have been effective during the 1990s were the ones imposed to the Federal Republic of Yugoslavia, for the restauration of peace in Bosnia and Croatia; even in this case however, humanitarian pain was inflicted to the civilian population in forms of shortage of antibiotics, fuel and food, joined, again, by hyperinflation.

The general conclusion rests on the assumption that, in each of these cases, the humanitarian crisis caused by comprehensive financial sanctions far outweighed the political gains obtained; resulting in increasing disproportional vulnerability for the politically weak groups while benefitting the regime supporters .
As explained by Daniel W. Drezner in *Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice*: " *In authoritarian regimes, leaders had an incentive to create private and excludable goods for supporters, as opposed to public goods for the mass citizenry. Comprehensive sanctions created the opportunity for target governments to allocate rent-seeking opportunities to those supporters. This policy response, would, if anything, increase an authoritarian regime's grip on power"*
Therefore, at the end of the 20th Century, the actual effectiveness and expertise of the United Nations in monitoring the multilateral and comprehensive sanctions against specific countries was questioned, until forceful advocacy by scholars, policy-makers and diplomats led to the broader use of targeted sanctions.
Targeted (or smart) sanctions are specifically designed to hurt key elite figures, supporters or allies of the targeted regime without the same civilian impact and collateral damage that we have witnessed before. The theory states that by pressuring the economic resources of the most powerful leaders these supporters will eventually urge the government for concessions and compromises.
In practice however, in order for the smart sanctions to effectively reach the goal requested some criteria must be ensured.

By 1998 and 1999 the Swiss Government convened in a series of discussions, the so-called Interlaken Process, an arena for experts, government representatives and private actors to ensure the most effective ways for the implementation of this new fundamental tool, the targeted sanctions.

The meetings were mostly focused in defining preconditions for effectiveness such as the ability to control financial flow, the strengthening of the control by the United Nations and the identification of the targets. One of the main concerns was initially the ability, but overall the willingness, of the single states in adopting the measures. It was evident from the beginning, in fact, that many of the Member States clearly lacked the legal authority necessary for the effective implementation of the Security Council decisions.[3]

As disclosed by K.A. Elliot in "*Analyzing the effects of targeted sanctions*" the effectiveness of targeted financial sanctions depends on three conditions.

The first factor is that regime leaders (and in general the targeted individuals) must have assets abroad, an higher share of assets invested and held in foreign counties is particularly common in case of less developed countries that experience low macroeconomic performance.

The second condition is that the assets must be identifiable, while this seems a fairly easy condition, there have been cases of hidden or transferred assets by the targeted individuals to safeguard themselves.

Thirdly, the frozen size of the assets must be large enough, simultaneously, even this particular condition is not a guarantee of the effectiveness of the measures. In many cases regime leaders and high-ranking officials are in possess of valuable resources in their countries and might be able to replenish their assets promptly.

Within the framework of national level implementation there are also some general requirements that must be pursued by national authorities in order to address the targeted sanctions productively.

A first precondition is the domestic legal authority to act when implementing the resolution of the United Nations Security Council. In the course of reform process aimed at the implementation, states usually rely on their constitutional authority or on the

[3] Staibano, Carina, and Peter Wallensteen. *International Sanctions :Between Words and Wars in the Global System*. London ; New York, Cass, 2005. [At pp. 16-17]

amendment of legislation already in force; in case of regional organization (such as the European Union) the necessary legal authority is already provided by the institutions that composed it.

The second aspects is the design and operation of administrative agencies that will play an increasingly active role in informing and reporting the un sanctions bodies. At the same time, also private agencies have a crucial duty for the thorough implementation of smart sanctions. The domestic government agencies should inform banks, financial institutions, airlines, etc. of the requirements and the prohibitive measures they are in charge to enforce, particularly when in presence of a blacklist, complete with the individuals and entities subjected to those measures.

Finally, states are normally required to pursue the enforcement of targeted sanctions by the other private and public state actors, through penalties in case of breaching or circumvention of such measures.[4]

The most prominent examples of smart sanctions include financial sanctions (the freeze of assets of the targeted individuals), travel bans, arms embargoes and in some cases the restriction over luxury goods. For the majority of the Security Council Member States the implementation of smart sanctions seemed like a more precise tool for the deterrence of private actors involved in the worrisome country, without imposing useless suffering on the general population.

Each of the type of the abovementioned smart sanctions has some prerequisites to be fulfilled.

With regard to the case of targeted financial sanction the Interlaken Report has noted the connection between the implementation of the latter and the development of international norms that address the question of money-laundering through institutions such as the Financial Action Task Force (FAFT) or the later Security Council's Counter Terrorism Committee (CTC). It remains imperative, however, the development of procedures by individual states, both on the implementation and on the exemptions and exceptions for

[4] Staibano, Carina, and Peter Wallensteen. *International Sanctions : Between Words and Wars in the Global System*. London ; New York, Cass, 2005. [At pp. 58-60]

each case. For the accurate implementation of travel bans specific databases need to be fulfilled by single states in order to avoid the permission to enter determined countries.
Even more comprehensive obligations arise in the case of arms embargoes, they are required, in fact, detailed strategies for the seizing of arms but also checklists of the goods subjected to the embargo, that are then to be disseminated between the nations involved.
Finally, restrictions over luxury goods (over diamonds for instance), must also by accompanied by the dissemination of checklists between states and by certificate of origin for each good.

As of now, restrictive measures to targeted individuals have been adopted by the United Nations in Afghanistan, Central African Republic, Democratic People's Republic of Korea, Democratic Republic of Congo, Guinea Bissau, Haiti, Iran, Iraq, Lebanon, Libya, Mali, Montenegro, Serbia, Somalia, South Sudan, Syria and Yemen. The measures imposed range from the freeze of assets to restrictions over goods and even vigilance, all of them are accompanied with a list, a blacklist, of all the persons subjected to the sanctions.
A much higher number of sanctioned persons is the one identified by the European Commission. Of fundamental importance are the later sectoral restrictive measures adopted against the Russian Federation, to address its destabilization of the situation in Ukraine.
Initially adopted after the Russian invasion of Crimea in 2014, financial measures and other restrictions on goods and exports have been implemented further after the Russian recognition of the controlled areas of Donetsk and Luhansk as independent entities. As in the case of the United Nations, independent lists of the European Union have been disseminated within the Member States, comprising of persons, entities and items to which the directives are addressed.
While each of these blacklists, both the ones of the United Nations and the ones of the European Commission, are devised to hurt key elite figures of specific countries, there are other cases focused on categories rather than nations. The most influential one in the last two decades is the blacklist referred to ISIL and Al-Qaeda, that designed measures to combat terrorism at the international level; these measures comprise restrictions on arms

exports, the prohibition to make funds available and the freeze of assets, restriction to admission in the Member States and a prohibition to satisfy their claim.

1.2 – The UN Blacklisting Regime for the Suppression of International Terrorism

1.2.1 The Emerging of the Blacklisting Tool: from 1999 to 2001

The birth of the UN Blacklisting regime is marked by the United Nations Security Council Resolution 1267[5] adopted unanimously the 15th of October 1999.
The rationale behind the Resolution of the Security Council was to address the major violations of humanitarian and international law perpetuated in the state of Afghanistan by the Taliban and the suppression of international terrorism.
Specifically, however, UNSCR 1267 (1999) is the aftermath of the creation of a safe-haven for Usama Bin Laden in the Islamic Emirates of Afghanistan, the terrorist acts of the bombings of the United States Embassies in Nairobi and Dar es Salaam, and the failure of the Taliban authorities to surrender the terrorists and (most importantly) Usama Bin Laden for trial.
The Resolution is opened by the request to the Islamic Emirate of Afghanistan to cease the provision of sanctuary and training for international terrorists[6] and by the demand to turn over Usama Bin Laden to the appropriate authorities in order to be arrested and brought to justice[7].

Paragraph 3(b) contains the measures of targeted sanctions to be applied; quoting:

"*Freeze funds and other financial resources, including funds derived or operated from property owned or controlled directly or indirectly by the Taliban, or by undertaking*

[5] From now on UNSCR 1267 (1999)

[6] Paragraph 1 of the UNSCR 1267 (1999)
http://unscr.com/en/resolutions/doc/1267

[7] Paragraph 2 of the UNSCR 1267 (1999)
http://unscr.com/en/resolutions/doc/1267

owned or controlled by the Taliban […] and ensure that they nor any other funds or financial resources so designated are made available, by their national or by any person within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban."

The establishment of such measure was accompanied by the creation of the UN Sanction Committee under Rule 28 of the Provisional Rules of Procedure[8], tasked with the draft and the administration of a Blacklist that was to target organizations and individuals associated with the Taliban, through information brought to its attention by Member States[9].

Finally, the Resolution reiterates the superiority of international law over national law, stressing the legally binding nature of the Resolution and calling the Member States to act strictly in accordance to the mentioned provisions.[10]

A year later UNSCR 1333 (2000) was adopted, a Resolution that underlined the engagement of the United Nations "*to establish and maintain updated lists based on information provided by States, regional, and international organizations, of individuals and entities designated as being associated with Usama Bin Laden*"[11].

While the establishment of a far-reaching, preventive and proscriptive measures to combat international terrorism might seems persuasive, the 1267 regime of Backlist is based on vagueness, uncertainties about its legality and heinous consequences for the individuals involved.

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[8] Provisional Rules of Procedure. Chapter VI: Conduct of Business; Rule 28: *"The Security Council may appoint a commission or committee or a rapporteur for a specified question"*
https://documents-dds-ny.un.org/doc/UNDOC/GEN/N83/400/17/IMG/N8340017.pdf?OpenElement

[9] ECCHR. Blacklisted: Targeted Sanctions, Preemptive Security and Fundamental Rights. Ben Hayes, Gavin Sullivan
(2010). Available at: https://www.ecchr.eu/en/publication/blacklisted-targeted-sanctions-preemptive-security-and-fundamental-rights/

[10] UNSCR 1267 (1999). Paragraph 7.
https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/300/44/PDF/N9930044.pdf?OpenElement

[11] UNSCR 1333 (2000). Paragraph 16(b).
http://unscr.com/en/resolutions/doc/1333

The functioning of the Sanction Committee, on its part, is based on self-administration and internal decision-making of the 15 Member States that compose the Security Council.

1.2.2. The Turning Point: 11th of September 2001

The turning point in the development of the Blacklisting regime is to be found in the terrorist attacks perpetuated by Al-Qaeda in New York, Washington D.C. and Pennsylvania the 11th of September 2001. This date marks, in fact, the enlargement of the targeted sanctions both in measures taken and in the criteria necessary to be listed.

The events of the 11th of September gave birth to UNSCR 1373 (2001), crucial in our analysis since it generalized the standards to be inserted in the Blacklist. A connection with the Taliban and Al-Qaeda was no longer needed, instead "[…] *persons who commit, or attempt to commit, terrorist acts, or participate in or facilitate the commission of terrorist acts[…]*"[12] became the new individuals to be proscribed.

Soon after, UNSCR 1390 (2002), adopted the 28th of January 2002, broadened the sanction measures also to travel bans, heavily restricting the freedom of movement of the individuals blacklisted by virtue of Paragraph 2(b), stating that "*[…] all States shall take the following measures […] Prevent the entry or the transit through their territories of these individuals*".

Paragraph 2(c) also imposes an arms embargo to all the persons who have financed, planned, facilitated and prepared terrorist acts or have been in support of terrorist acts, by stating that Member States should *"Prevent the direct or indirect supply, sale and transfer, to these individuals, groups, undertakings and entities from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related materiel of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned and technical advice, assistance, or training related to military activities*".

[12] UNSCR 1373 (2001); Paragraph 1(c)
http://unscr.com/en/resolutions/doc/1373

Few weeks after the terrorist attacks in the United States' soil, the 1373 regime established, therefore, increasing discretion for the Member States, which are since then lawfully allowed to enlist individuals or entities that they deem a threat for national or international security, with an increasing risk of interpreting the word "*terrorist*" for their own national interests.

Initially, legal safeguards, judicial protection and remedies for individuals or entities whose proceeding were brought in the Consolidated List were almost absent.

In the following development of the procedural reforms to the work of the Sanction Committee, the Security Council submitted itself in a process of revision of these gaps, failing, however, to solve completely the lack of legal guarantees.

UNSCR 1617 (2005)[13] is the first Resolution to install a first line of communication with the individuals and entities subjected to the sanctions. Paragraph 5[14], in fact, requests the Member States to inform the listed person on the restrictions they are subjected to, on the procedures of the Sanction Committee and on the listing and the de-listing procedures.

The wording "*to the extent possible*", however, patently denies any obligatory nature of these rules, as does the necessary consent by the states involved to release what they consider confidential information, but are, actually, in the eyes of the listed individuals, the basis for their judicial proceedings.

This particular Resolution, furthermore, insists on the compliance with Paragraph 17 of the UNSCR 1526 (2004)[15] and decides that "*when proposing names for the Consolidated List […] States shall provide the Committee a Statement of Case describing the basis of the proposal*".

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[13] Adopted the 29th of July 2005

[14] "*Requests relevant States to inform, to the extent possible, and in writing where possible, individuals and entities included in the Consolidated List of the measures imposed on them, the Committee's guidelines, and, in particular, the listing and delisting procedures and the provisions of resolution 1452 (2002)*"

[15] "*Calls upon all States, when submitting new names to the Committee's list, to include identifying information and background information, to the greatest extent possible, that demonstrates the individual(s)' and/or entity(ies)' association with Usama bin Laden or with members of the Al-Qaida organization and/or the Taliban, in line with the Committee's guidelines*"

The so-called "*Statement Of Case*" is also left at the discretion of the designated Member State, that determine to which extent and what information should be shared with the rest of the Sanction Committee.

As already mentioned, at the outset, the legal standards for inclusion or exclusion to the list were lacking; this absence of judicial review or even just appeal for the individuals and entities listed has raised criticism from regional and national courts; which the Security Council tried soon to patch with the creation of the Focal Point[16] by power of UNSCR 1730[17] (2006).

Born due to the unavailability of judicial remedies, the Focal Point represented nothing of the sort. It was entrusted with receiving de-listing requests from petitioners, verify the requests, and make comments and reports. Notably, however, it possessed no authority over the final decision of de-listing which still pertains unilaterally to the Sanction Committee.

Few days later, the adoption of UNSCR 1735 (2006) sought to introduce formal de-listing criteria, by virtue or Paragraph 14 which includes individuals whose identity has been mistaken, individuals who no longer meet the criteria to be kept in the Consolidated List and individuals who are deceased.

These procedural reforms were not enough to cease the human rights concerns by commenters, particularly, in 2007 the same UN High Commissioner for Human Rights disclosed his doubts over the protection of human rights and rule of law in the contest of terrorism and counter-terrorism, highlighting the "*lack of transparency and due process in listing and delisting*" in the system of targeted sanctions that has "*no mechanism for reviewing the accuracy of the information behind a Sanctions Committee listing or the necessity for, and proportionality of, sanctions adopted, nor does the individual affected have a right of access to an independent review body at the international level"*[18]

[16] The mandate of the Focal Point was terminated by UNSCR 1904 (2009), when the Office of the Ombudsperson was set up.

[17] Adopted the 19th of December 2006

[18] U.N. High Commissioner for Human Rights, Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism,

As a consequence of these observations, the Security Council adopted the 17th of December 2009 UNSCR 1904 (2009), which was supposed to alleviate definitively the many concerns coming even within the United Nations.

This Resolution terminates the mandate of the Focal Point, that, as already mentioned, had no decision-making power over the de-listing requests it received. The Focal Point was replaced by the Office of the Ombudsperson an "*eminent individual of high moral character, impartiality and integrity with high qualifications and experience*"[19]; an theoretically independent and impartial office, which was not to seek instructions from the Member States.

As decided by the Annex II of UNSCR 1904 (2009) the communication with the petitioner for a de-listing request is enhanced. The Ombudsperson has to acknowledge, inform and answer specific questions of the petitioner; it also has to draft and circulate comprehensive reports to the Sanction Committee with respect to the de-listing request. The Office of the Ombudsperson can be considered a partial victory in the struggle of respecting legal guarantees, as it increases the benefits of the petitioners, the availability of information and the transparency of the Sanction Committee.

It is partial, however, since it fails to address the absence of an autonomous and independent judicial review; the Office of the Ombudsperson, like the Focal Point, has no jurisdiction over the outcomes of the de-listing requests nor any authority to conduct an impartial review; the final decision rests in the hands of the designated states (which still have the right to keep confidential information to themselves) and the Sanction Committee.

As observed by Cortright and de Wet in *Human Right Standard for Targeted Sanctions* "*the new procedures do not satisfy the international legal standard guaranteeing the*

U.N. Doc. A/HRC/4/88, 9 March 2007, [At pp. 10-11]. Available at http://daccessdds.un.org/doc/UNDOC/GEN/G07/117/52/PDF/G0711752.pdf?OpenElement.

[19] UNSCR 1904 (2009). Paragraph 20.
http://unscr.com/en/resolutions/doc/1904

accused the right to a fair hearing, which includes the right to be heard, the right to impartial and independent judicial review and the right to a remedy[20]"

In the Resolutions, between 2011-2012 the Security Council, expresses many times its intension to lift the sanctions to those who reconcile, the ones that according to the common standards of international law renounce violence and cut all links with terrorist organizations and "*take notes of the need to have appropriate legal authorities and procedures to apply and enforce targeted financial sanctions that are not conditional upon the existence of criminal proceedings, and to apply an evidentiary standard of proof of* "reasonable ground*s" or* "reasonable basis*", as well as the ability to collect or solicit as much information as possible from all relevant sources"*[21]

Particularly, UNSCR 1988 (2011) established a New Sanction Committee (consisting of all the members of the 1267 Sanction Committee) that was to undertake the task of analyzing the enlisting and de-listing requests, but also eventual proposed updates, on the Consolidated List set up by UNSCR 1267.

The set-up of the New Committee did not conceive any new judicial remedy for the listed individuals or entities listed, instead, it had far-reaching impact, covering several new countries.

1.2.3. Modern Times: the Current Implementation since 2015

Nowadays, the UN Consolidated List to combat terrorism can be considered to be the outcome of the spread, both in territory and in security menace, of the Islamic state[22], that between 2013 and 2014 was able to seize territories in Syria and Iraq. The Salafi-jihadist militant organization became notorious for its public beheading of Western captives, for the large contingency of foreign fighters, for a large media presence and propaganda

[20] Cortright, D. and de Wet, E. Sanctions and Security Research Program. *Human Rights Standards for Targeted Sanctions* (January 2010) [at p.10]. Available at: https://www.fourthfreedomforum.org/wp-content/uploads/2020/06/Human-Rights-Standards-for-Targeted-Sanctions.pdf

[21] UNSCR 2083 (2012) Paragraph 44.
http://unscr.com/en/resolutions/doc/2083

[22] Also known as Islamic state in Iraq and Syria (ISIS) or Islamic state in Iraq and the levant (ISIL)

strategies, and for the several terrorist attacks perpetuated in European countries between 2012 and 2016 and the ones in Syria.

From these terrorist attacks is outlined UNSCR 2610 (2021)[23] that establishes the current state of affairs of the Consolidated List for threats to international peace and security caused by terrorist attacks.

The resolution recalls, in fact, the war of Mosul and the siege of Palmyra in order to invite all Member States to participate actively in maintain and update the UNSCR 1988 list.

At present, the measures of the Sanctions Committee remains the following:

- Asset freeze: all states are required to freeze the funds and other financial assets or economic resources of designed individuals and entities.
- Travel ban: all states are required to prevent the entry or transit through their territory by designated individuals.
- Arms embargo: all states are required to prevent the direct or indirect supply, sale and transfer from their territories or by their national outside their territories, or using their flag vessels or aircraft, of arms and related materiel of all types, spare parts, and technical advice, assistance, or training related to military activities to designated individuals and entities.

And the criteria of eligibility for listing of the individuals and entities are still:

- Participating in the financing, planning, facilitating, preparing or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of
- Supplying, selling or transferring arms and related materiel to;
- Recruiting for, or;
- Otherwise supporting acts or activities of, those designated and other individuals, groups, undertaking and entities associated with the Taliban in constituting a threat to peace, stability and security of Afghanistan

The members of the Security Council have to this day the unilateral authority to decide who is eligible to be listed and to submit to the Committee the request, even in case of absence of criminal or penal proceedings against the person considered.

[23] Adopted the 17th of December 2021

The listing request, as already mention, is accompanied with a Statement of Reason that contains the funding evidences of the claim, the organization who is bringing these evidences and various information with regards of the activities of the person that makes him/her eligible, accompanied with a full explanation in details of his/her association with a terrorist organization.

Crucially, however, the designated state is provided with much discretion on the degree of its information-sharing. The wording "*to the extent possible*" allows confidentiality and refrains Member States from the transparency they should be expected to have in such a delicate matter.

Once the request for listing is completed the Sanction Committee has 10 days to consider whether to approve it or nor. Finally, on the same day a request is accepted and therefore added to the 1988 Consolidated List the Committee makes available the narrative summary of reasons for listing in its website.

The de-listing procedure has not changed thoroughly throughout the years.

There are two main ways for an individual or an entity to be removed from the Consolidated List.

The first scenario involves a specific request by a Member State that can, at any time, submit one.

If the de-listing request is made by a Member State different form the one that proposed the petitioner for listing, the final decision will be taken by consensus between all members of the Security Council.

On the other hand, if the de-listing request is made by the same Member State that initially proposed the petitioner for listing, then the petitioner will be automatically removed unless all members of the Security Council are contrary to the de-listing measure.

The second scenario involves a direct petition of the person listed or of a representative to the office of the Ombudsperson (UNSCR 1904).

The Ombudsperson may only give recommendation to the Sanctions Committee, in case it recommends in favor of de-listing the name of the petitioner will be automatically removed unless the all members of the Security Council are contrary to the de-listing measure.

1.3 – Preventing Terrorism in the European Union

1.3.1 Implementing the Blacklist: Harmonization in EU Law

By virtue of Article 301 of the EC Treaty when the EU Council takes in a common position a decision in matters of the Common Foreign and Security Policy (CFSP), those decisions are then implemented by the European Community Regulations and are directly applicable in all EU Member States.

The UN Security Council Resolutions adopted at the beginning of the 2000s, as a response to the terrorist attacks of the 11th of September 2001 (UNSCR 1267, UNSCR1333, UNSCR 1390), were implemented initially by Council Common Position 2002/402/CFSP[24] and Council Regulation 881/2002[25].

"The European Community acting within the limits of the powers conferred on it by the treaty establishing the European Community"[26] adopted all the sanction measures under the directives of the United Nations, such as the freeze of assets.

Differently from the Security Council, the Council of the European Union underlined since the beginning the necessity to "*create maximum legal certainty within the community"* and that *" the names and other relevant data with regard to natural or legal persons groups or entities whose funds should be frozen further to a designation by the UN authorities, should be made publicly known and a procedure should be established within the Community to amend these lists*."[27]

This last point is crucial, the European Union recognized since the harbor of the Consolidated List the possibility of the severe judicial fallouts of the preventive measures imposed to individuals and entities all over the globe, and not only called for the creation

[24] Adopted the 27th of May 2002

[25] Adopted the 27th of May 2002

[26] Council Common Position 2002/402/CFSP; Art 2(2)
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002E0402

[27] Council Regulation 881/2002; Point 5
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0881

of specific procedures within the Union, but also stressed that such preventive measures should be "*effective, proportionate and dissuasive"*[28]

UNSCR 1373 and its Consolidated Lists of individuals and entities was directly implemented by Common Position 2001/931/CFSP[29] and EC Regulation 2580/2001[30].
In the latter one it is given a precise definition of what are to be considered terrorist acts, an element that is totally absent in the United Nations framework due to the inability to clearly state the meaning of terrorism at the international level.
They are described as intentional acts aimed at seriously damaging a country by

i. *Seriously intimidating a population, or*

ii. *Unduly compelling a government or an international organization to perform or abstain from performing any acts, or*

iii. *Seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization:*

a) Attacks upon a person's life which may cause death

b) Attacks upon the physical integrity of a person;

c) Kidnapping or hostage taking;

d) Causing extensive destruction to a government or public facility, 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;

[28] Council Regulation 881/2002; Art 10
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0881

[29] Adopted the 27th of December 2001

[30] Adopted the 27th of December 2001

g) *Release of dangerous substances, or causing fires, explosions or floods 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 under (a) to (h);*
j) *Directing a terrorist group;*
k) *Participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group.*[31]

While efforts in clarifying these definitions are more present at the European level, it is noteworthy that what has been describe above are only the "*terrorist acts*" and not "*terrorism*" per se.

Common Position 2001/931/CFSP, goes even further creating for the first time a definition for "*terrorist group*" which is defined by a structured and organized group that acts with the purpose of committing such terrorist acts mentioned above; a group that has clear roles, an hierarchy between the individuals involved, continuity and a developed structure.

Seen that Common Position 2001/931/CFSP is the European implementation of UNSCR 1373, the individuals subjected to the measures under the Consolidated List are not anymore exclusively individuals or entities strictly connected to the Taliban and Usama Bin Laden.

In the two Annexes in the last pages of the Common Position are enlisted the groups considered terrorist organizations by the European Community. Here are present entities mostly connected with the Irish national struggle such as the Real IRA, the Ulster Defense Association (UDA) and the Red Hand Defenders (RHD); groups that operated for Basque and Spanish nationalism such as the Euskadi ta Askatasuna (ETA)[32] and the *Grupos de Resistencia Antifascista Primero de Octubre* (*GRAPO*); and organizations such as the

[31] Council Regulation (EC) No. 2580/2001
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R2580

[32] Aka Tierra Vasca y Libertad, aka Basque Fatherland and Liberty

Epanastatikos Laikos Agonas[33] (ELA, the largest terrorist organization in Greece) and the Revolutionary Organization 17 November (Dekati Evdomi Noemvri).

Despite the role of the EU Council as a primary institution in designating the groups and individuals to be added in the Consolidated List, an ad hoc "*Clearing House*" was created in order to evaluate the requests from the European Union Member States as who was to be included in the list.

The "*Clearing House*" was part of the EU's Common Foreign and Security Policy branch (CFSP), however, its composition, its mandate and its proceedings were kept completely secret, making the accountability of the House practically absent. The "*Clearing House*" did not appear, in fact, in any of the European Working Groups, nor it had a decision-making process which was open to any form of political scrutiny.

Initially, the European Union faced many dilemmas in trying to find a balance between the implementation of the United Nations' Resolutions and the protection of rule of law. Many procedural reforms however, were introduced over the years, both as a result of internal debates within the Member States, both as the outcomes of legal challenges brought before the European Courts by listed individuals.

The first crucial procedural reform was the replacement of the "*Clearing House*", which had caused significant concerns in matters of human rights protection, with a the EU "Working Party on the Implementation of Common Position 2001/931/CFSP on the Application of Specific measures to Combat Terrorism" (COCOP) in June 2007[34].

The COCOP was invested by the Council of the European Union to work on four main functions:

1. The evaluation of the information provided by the Member States, in view of listing or de-listing measures of individuals, groups or entities to which Common Position 2001/931/CFSP referred to.
2. The control over the implementation of the criteria set out in Common Position 2001/931/CFSP
3. The arrangement of regular reviews of the EU Blacklist (every 6 months)

[33] Aka Revolutionary Popular Struggle

[34]Council of the European Union. Document: 10826/1/07 REV 1.
https://data.consilium.europa.eu/doc/document/ST-10826-2007-REV-1/en/pdf

4. Making recommendations for listing and de-listing

The meetings of the Working Party, however, did not display much more transparency than the ones of the former "*Clearing House*"; they were held in a secure and secretive environment and even in this case the agenda and the organizational details were kept confidential between the parties involved.

According to the COCOP every Member States of the European Union can subject an entity or an individual for listing, designations is, however, open also for third parties, so non-EU states. Moreover, "f*or each person, group and entity listed under Council Regulation (EC) N° 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, the Council will provide a statement of reasons, which will be sufficiently detailed to allow those listed to understand the reasons for their listing"*[35].

The Council Secretariat also has to inform the persons or entities listed with a letter of notification, only after the entry into force of the listing decision. The letter has to provide a detailed description of the restrictive measures, the humanitarian exemptions available, the statement of reasons, and finally a "*reference to the possibility of an appeal to the Court of First Instance in accordance with the condition laid down in Article 230 of the EC Treaty, insofar as the listing has given rise to an asset freeze*"[36]

1.3.2 The Catalyst for reforms: The Kadi Case

The 12th of October 2001, Yassin Abdullah Kadi, a multi-millionaire Saudi Arabian citizen and Al Barakaat International Foundation of Sweden, part of the Hawala banking system used by the Somali diaspora to transfer funds internationally, were placed by the US Treasury Department's Office of Foreign Asset Control (OFAC), on their list, designated as global terrorists.

Five days later, both of them were inserted in the 1267 UN Consolidated List.

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[35] Council of the European Union. Document: 10826/1/07 REV 1. Article 17; Statement of Reasons. https://data.consilium.europa.eu/doc/document/ST-10826-2007-REV-1/en/pdf

[36] Council of the European Union. Document: 10826/1/07 REV 1. Article 20(d). Notification. https://data.consilium.europa.eu/doc/document/ST-10826-2007-REV-1/en/pdf

The 27th of May 2002 the decision of the UN Sanction Committee was transposed in the European framework. The European Council adopted the Common Position 2002/402 CFSP, and on the basis of articles 60[37], 301[38] and 308[39] of the EC Treaty, the Taliban Sanctions Committee measures and provisions were extended to Mr Kadi and International Foundation also at the European level.

What this meant for Mr Kadi and Al-Barakaat was that all their funds and any other financial resources of their belonging were frozen and of course that also the travel ban was applied to them.

Blamed to be associated with Usama Bin Laden and the Taliban regime, the 18th of December 2001 Mr Kadi and Al Barakaat lodged an application for annulment with the European Court of First Instance (CFI). The ground for annulment was that by the implementation of the EC regulation[40], and therefore the fulfillment of the measures dictated by the UNSCR 1267 into European Law, the European Union was violating some

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

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

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

[38] "*Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.*"

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

[40] The action for annulment was initially directed against regulation 2062/2001 and regulation 467/2001 and against their lack of competence to be adopted on the basis of article 60 and 301 of the ECT.

of the petitioner's fundamental rights, namely, the rights to respect for property, the right to be heard, and especially the right to have a fair and effective judicial review.
The 21st of September 2005, the CFI dismissed all the pleas, arguing that they lack the legal basis to review the lawfulness of the decision and that the EC Regulations that were challenged by the petitioners only served the purpose of implementing UNSCR 1267.
According to the CFI, in fact, the European Commission and the European Council had no discretion whatsoever in this matter, and they only had followed article 103 of the UN Charter, for which in case of a conflict between the obligations under the UN Charter and the obligations under any other agreement, the first ones shall prevail.
While admitting that neither the Commission nor the Council had a real autonomy on the matter, the CFI also concluded that the EU courts were empowered to review whether the UNSCR violated any norms of jus cogens, but that in this specific case there was not any violation.

The applicants had challenged the contested regulations on three grounds.
The first alleges that the Council was incompetent in adopting them, the second one alleges the infringement of Article 249 of the EC Treaty and the third, as already mentioned alleged the infringements of their fundamental rights.
In the first case the applicants have argued that the contested regulation (No. 467/2001) is in contrast with Article 60 ECT and article 301 ECT for which the European Council only could have taken those kind of measures (therefore, of targeted sanctions) against third countries, and not against nationals of a Member State. In their view, the targeted sanctions measures were not part of the competences of the European Community, that had no authority in imposing them, neither directly or indirectly to citizens of the European Union.
The CFI found that Regulation No. 467/2001 fell within the scope of Article 60 ECT and Article 301 ECT, since the petitioners had an obvious link with a third-state, namely Afghanistan. Moreover, the European Council had emphasized that the fact that some of

the targeted individuals were nationals of a member state was irrelevant and that targeted financial sanctions cannot be referred only to citizens of the considered third country[41].
Finally, the provisions and the measures taken (namely, the freeze of assets) "*pursue an objective of economic and financial coercion which is […] an objective of the EC Treaty*"[42], which means that "*economic and financial coercion for reasons of policy, especially in the implementing of a binding decision of the Security Council, constitutes an express and legitimate objective of the EC Treaty*[43]".
The second ground, so the infringement of Article 249 EC[44] is also rejected, since a Regulation, as in this case has direct applicability in all Member States, differently from a Decision where the measures are binding only for whom it is addressed.
With regard to the third ground of annulment the applicants claimed that they had not the opportunity to see any justifications for the measures taken against them.

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[41] Case T-306/01 Yusuf & Al Barakaat v Council and Commission. Para. 115 https://curia.europa.eu/juris/document/document.jsf;jsessionid=D8CE631B3A1C65D260A1DDA9BD449356?text=&docid=59905&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=840369

[42]Case T-306/01 Yusuf & Al Barakaat v Council and Commission. Para. 89 https://curia.europa.eu/juris/document/document.jsf;jsessionid=D8CE631B3A1C65D260A1DDA9BD449356?text=&docid=59905&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=840369

[43] Case T-306/01 Yusuf & Al Barakaat v Council and Commission. Para. 92 https://curia.europa.eu/juris/document/document.jsf;jsessionid=D8CE631B3A1C65D260A1DDA9BD449356?text=&docid=59905&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=840369

[44] In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.
A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
A decision shall be binding in its entirety upon those to whom it is addressed.
Recommendations and opinions shall have no binding force.

The CFI found that there is "*no mandatory rule of Public International Law that requires a prior hearing for the persons concerned in circumstances as those of this case*[45]", and that having heard the applicants before the measures were in force would have jeopardize the objectives pursued.

Moreover, "*the Community institutions had no power of investigation, no opportunity to check the matters taken to be facts by the Security Council and the Sanction Committee, no discretion with regards to those matter and no discretion either as to whether it was appropriate to adopt sanctions vis-à-vis the applicants. The principle of Community Law relating to the right to be heard cannot apply in such circumstances, where to hear the person concerned could not in any case lead the institution to review its position*[46]" and therefore, the right to fair hearing of the applicants was not breached, given that the community institutions were not obliged to hear the defendants before the entering into force of the Regulation.

Finally, concerning the right of effective remedy, the CFI asserted that even if no judicial remedy was available in that case, since the Security Council did not established an independent international court for this kind of claims, it was also correct to remark that this lacuna in judicial protection was not contrary to jus cogens[47].

Since the Court of First Instance rejected all the challenges brought before it by Mr. Kadi and Al-Barakaat, both of them soon filed an appeal before the European Court of Justice (ECJ), the 17th of November 2005, insisting that the CFI was incorrect in stating that the

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[45] Case T-306/01 Yusuf & Al Barakaat v Council and Commission. Para 307 https://curia.europa.eu/juris/document/document.jsf;jsessionid=D8CE631B3A1C65D260A1DDA9BD449356?text=&docid=59905&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=840369

[46] Case T-306/01 Yusuf & Al Barakaat v Council and Commission. Para. 328 https://curia.europa.eu/juris/document/document.jsf;jsessionid=D8CE631B3A1C65D260A1DDA9BD449356?text=&docid=59905&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=840369

[47] Case T-306/01 Yusuf & Al Barakaat v Council and Commission. Para. 340-341 https://curia.europa.eu/juris/document/document.jsf;jsessionid=D8CE631B3A1C65D260A1DDA9BD449356?text=&docid=59905&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=840369

European institutions had no authority and no discretion when implementing the Security Council Resolutions and that it was present an effective breaching of their fundamental rights.

The 18th of January, the Advocate General of The European Court of Justice presented its opinion on the issues at stakes, specifically he claimed that the Court of First Instance wrongfully stated that the Community Courts had no jurisdiction to review the internal lawfulness of the contested Regulation. Instead, he claimed that are the Community Courts that determine the obligations within the community legal order, which must be in line with the community law. In principle, this signify that no international agreement (even coming from the Security Council, as in this case), can prejudice the constitutional principles of the EC Treaty.

The Advocate General, Miguel Poiares Maduro, also stressed that the rejection from the Community institutions on the creation of an independent tribunal creates a "*real possibility that the sanctions taken against the appellants within the Community may be disproportionate or even misdirected*" and that "*the mere existence of that possibility is anathema in a society that respect the rule of law"*[48].

Moreover, he added that "*had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control. However, no such measures exist"*[49], the de-listing procedure is only possible through the hands of the very same listing actors, the Sanction Committee. The absence of such mechanism implies the opportunity for the Community Court to review the implementation of the UNSCR within the European framework.

The Advocate General Maduro therefore claimed that the Court should annul the contested regulation, in so far as the appellants are concerned.

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[48] Court of Justice, Luxemburg. Press release No CJE/08/02. "Advocate General's Opinion in Case C-402/05". Paragraph 53. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62005CC0402

[49]Court of Justice, Luxemburg. Press release No CJE/08/02. "Advocate General's Opinion in Case C-402/05". Paragraph 54. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62005CC0402

The final judgment of "Kadi and Al Barakaat International Foundation v. Council and Commission" was issued the 3rd of September 2008 by the Grand Chamber of the ECJ.
The ECJ final ruling concluded that "*the rights of the defense, in particular the rights to be heard, and the right to effective judicial review of those rights, were patently not respected*[50]"
This judgement, set aside the rulings and the conclusions of the Court of First Instance in 2005, and annulled the Council Regulation No 881/2002 that was adopted in the absence of any legal guarantees for the applicants.
This ruling is of paramount importance since it finally opens for the opportunity to challenge the validity of the blacklisting regime asserting that *"the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the court to review in the framework of the complete system of legal remedies established by the treaty"*[51]
As a consequence of this case in fact, the European Community must ensure the listed individuals and entities with information on the reasons for listing and their right to challenge such measures before an independent judicial body.
The ECJ judgment did not solve completely the dispute on the inclusion of Mr. Kadi in the Sanction Committee List. The European Commission, the 28th of November 2008 amended the former Commission Regulation (EC) 881/2002, adopting the Commission Regulation (EC) 1190/2008.
Here the Commission after having "*communicated the narrative summaries of reason provided by the UN Al-Qaeda and Taliban Sanctions Committee to Mr. Kadi and to Al Barakaat International Foundation and after giving them the opportunity to comment on*

[50]Joined Cases C-402/05 P and C-415/05 P. Kadi and Al Barakaat International Foundation v. Council and Commission. Paragraph 334. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62005CJ0402

[51]Joined Cases C-402/05 P and C-415/05 P. Kadi and Al Barakaat International Foundation v. Council and Commission. Paragraph 285. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62005CJ0402

these grounds in order to make their point of view known"[52] considered that the listing of the appellants was justified for reasons of associations with Al-Qaeda and considered also, that these two measures (namely, the statement of reasons and the review of their comments) were procedures that sufficed in avoiding any breaching of their fundamental rights under international law.

The third legal challenge was filed in January 2009 before the General Court (the former CFI), on the same grounds of the first case and on the re-insertion in the Consolidated List. This case gave finally the possibility to the Al-Barakaat International Foundation to be removed from the Consolidated List by the UN Sanction Committee.

The judgment of the General Court was delivered for Mr. Kadi a year later the, the 30th of September 2010, when stating that the measures undertaken under the Commission Regulation (EC) 1190/2008, and the arguments and explanations advanced by the European Commission and the European Council "*quite clearly reveal that the applicant's rights of defense have been observed only in the most formal and superficial sense"*[53]. Significantly, the General Court held that the Commission Regulation (EC) 1190/2008 was to be annulled, as was to be considered unlawful also the measure of asset freeze to which Mr. Kadi was subjected.

This conclusion was grounded on the fact that even if some guarantees were present, namely the personal comment of the applicant and the statement of reasons, the European Commission failed both in taking into account the defendant's comment[54] and in in granting even the most minimal access to the evidence against him, with "*no balance between his interests […] and the need to protect the confidential nature of the*

[52] Commission Regulation (EC) 1190/2008. Paragraph 3.
https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008R1190

[53] Case T-85/09. Kadi v. Council and Commission. Paragraph 171.
https://curia.europa.eu/juris/document/document.jsf?docid=83733&doclang=EN

[54] Case T-85/09. Kadi v. Council and Commission. Paragraph 172
https://curia.europa.eu/juris/document/document.jsf?docid=83733&doclang=EN

information in question[55]" consequently violating Mr. Kadi's right to have an effective and independent judicial review.

Mr. Kadi was finally delisted in 2013 after the European Commission, the European Council and the United Kingdom failed in overturning the judgment of the General Court of 2010.

The remarkable impact of the Kadi Cases rests on its legacy.

Firstly, the final ruling of the General Court claimed the primacy for the respect of human rights, by asserting that when implemented the resolutions of the UN Security Council, the European Commission cannot be in flagrant contrast with the fundamental rights protected by the EC Treaty.

Secondly, it gave prominence to the structural gaps in judicial review and the far-reaching flaws of the UN Sanction Committee Blacklist, opening fertile grounds for it to be legally challenged.

The Mr. Kadi and Al Barakaat International Foundation Case led to introduction of multiple procedural reforms, both within the UN Framework (through the implementation of UNSCR 1904 and the introduction of the Office of the Ombudsperson) and the European Union framework.

1.3.3 A Space for Contention: No More Direct Implementation

In April 2009, as a response to the challenges posed by the ECJ's decision of the Kadi Case, Regulation No.1286/2009 entered into force.

The direct implementation of UNSCR 1267 became no longer possible, instead by virtue of Article 7(a) when the Sanction Committee of the United Nations decides to enlist an entity or an individual for the first time, it is the European Commission in charge of take a decision to include such group in the autonomous EU blacklist, and only following a scrutiny of the statement of reasons.

[55] Case T-85/09. Kadi v. Council and Commission. Paragraph 173
https://curia.europa.eu/juris/document/document.jsf?docid=83733&doclang=EN

Once the decision has positively being taken, the Commission has to send the individual or entity the Statement of Reasons and give them the opportunity to be heard on the matter addressed.
In case and after the observation is submitted, the European Commission will review its decision and give the definitive outcome. The Commission is finally therefore obliged to take into account the observation of the listed group or entity, but also the opinions of the advisory committee of experts from the Member States, before the designating someone as a threat to international security.

The COCOP was renamed in 2016 as the Council Working Party on restrictive measures to combat terrorism (COMET WP).
The functions and the procedures of the COMET WP do not differ much from the ones of the COCOP. Its terms of reference are still the ones to evaluate the information in case of proceedings for enlisting and delisting, to make recommendations, to prepare the regular review of the lists and to assess the impact of Common Position 2110/931/CFSP and Council Decision 2016/1693/CFSP.
The meetings of the COMET WP are to be held every six months, however, despite the calling for profound reforms an high level of secrecy in the composition, the agenda and the locations of the meeting persists.

As of now, the EU terrorist list includes persons and entities active both in the territory of the European Union and outside of it and it is reviews at least every six months.
Since September 2016 the sanctions are applied autonomously by the European Union and not just by individual countries as it was in the past. Currently 13 individuals and 21 groups (or entities) have been subjected to the freezing funds measure and are identified as terrorist threats.
The criteria for listing are established in the Common Position after precise information have been given through a decision taken by a judicial or a competent authority. This decision might be related to the initiation of an investigation, a prosecution or a conviction.

The proposals for listing are submitted by both some Member States of the European Union or third countries, while the de-listing requests are to be submitted again by Member States and third countries, but also by the persons or entities listed.

The European Council then adopts the change to the list and only then the persons or entities subjected to the restrictions are informed by a notification letter.

After having received the notification letter, the individual or entity listed may request the European Council to reconsider the case, may challenge the decision of the competent authority or challenge the council decision under Council Regulation 2580/2001(CFSP).

CHAPTER 2: KEY LEGAL CASES FOR THE ANALYSIS

2.1 – Rationale behind the Selection of the Legal Cases

This chapter seeks to provide a review of significant legal challenges brought by listed individuals and entities over the infringement of some of their fundamental rights. Throughout the examination of the challenges it will be clearly possible to see the role of the courts in developing more stringent judicial guarantees, more availability and more transparency of judicial remedies.

The case of *People's Mojahedin Organization of Iran v. Council* represented, as it did the Kadi Case, a catalyst for change; a call for reforms on judicial remedies available to the applicants of the de-listing requests. It brought to light the total absence of effective judicial guarantees due to the unavailability of information from the designating states and the Sanction Committee of the United Nations. Here, clear demands for the primacy of fundamental rights at the EU level have emerged.
Segi and others and Gestoras Pro-Amnistía and Others v. 15 States of the European Union is significantly able to demonstrate both the direct and the deeper consequences of being labelled as "*terrorist*" and it opens the question on whether the measures to which are subjected the individuals and entities listed are truly administrative or rather punitive and criminal.
Finally, *Fighters + Lovers v. Supreme Court of Denmark* opens a significant topic which will be discussed further in the Third Chapter of the thesis, the absence of a unitary meaning at the international level of the world terrorism and the risks associated with it, such as the obstacles to peace-building and the ostracization of such groups.

2.2 – People's Mojahedin Organization of Iran (PMOI) v. The Council of the European Union

2.2.1. From Armed Group to Opposition Movement

People's Mojahedin Organization of Iran (PMOI)[56], is the biggest Iranian opposition movement, that has fought for the creation of deep changes in the country and the overthrown of the government in place since the 1960s.

PMOI was founded in 1965 by leftist students in opposition to the Pahlavi dynasty and the former monarchical government present in Iran. While being contributors for the conclusion of the Imperial State of Iran, their main objective has been for the decades to come the overthrown of its replacement, the Islamic Republic of Iran, led by the Ayatollah Ruhollah Khomeini.

During the 1970s but mostly during the 1980s PMOI was in charge of many of the offensives directed both to the newly created Islamic government and also to its military apparatus, orchestrating hundreds of terrorist attacks in the country of Iran. These attacks reached their height in the Hafte Tir bombing, when PMOI was able to strike the Islamic Republican Party headquarters killing 74 party members.

The year 1981 was their most active in terms of opposition but also in terms of attacks to the Islamic government, a year in which they have been in charge of more that 65% of the killings in the whole countries. Even the 1990s have been fundamental in shaping the organization's structure and ideology. PMOI has in fact been the director of attacks against many Iranian embassies.

The ideological positions and the attacks by the People's Mojahedin Organization of Iran toward the Islamic state have led to the full-fetched persecution of their members and eventually their exile.

The years in exile already begun in the early 1980s when PMOI relocated in France where they continued their opposition activities; however, in 1986 France ended up expelling the organization from their territory at the insisting requests of Iran under a re-rapprochement policy between the two states. PMOI was then able to set their

[56] Also known as Mujahedin-e Khalq (MEK)

headquarters in the Ashraf Camp in Iraq. After the Iran-Iraq War (1980-1988) and the support of PMOI's paramilitary branch (the National Liberation Army of Iran) to the Iraqi government, in 2003 PMOI successfully signed a ceasefire agreement with the United States for their complete disarmament.
Currently, since 2016 the People's Mojahedin Organization of Iran is located in Tirana, Albania, counting up to 3.000 members.

Their ideology has been since the beginning "*Islam with revolutionary Marxism*", still, the organization has experienced many significant changes since its birth, shifting from a strictly Marxist-Islamic revolutionary establishment toward a more opposition-focused group, based on the creation of a secularized and democratic state with a strict division between politics and religion to which is to be added also great resistance towards Iran's nuclear program.
The current transformation has been dictated by the various changes of the regional and international landscape at the beginning of the 21st Century and by their experience as an exile opposition organization.
The deep changes in the thought behind PMOI's program are clearly described in "*Maryam Rajavi's Ten Points Plan for the Future of Iran*", a plan of action by the National Council of Resistance of Iran (NCRI)[57].
The proposals of the document are focused on a new Iran where democratic pluralism and universal suffrage are the basis for the construction of a new democratic country. They advocate for the development of political rights and social freedoms, for the complete distinction between state and faith, for the prohibition of torture and the abolishment of the death penalty, the creation of an independent judiciary harmonized with international legal standards and an Iran devoid of weapons of mass destruction where regional and international cooperation are main subject of foreign policy.

The complex history of the organization and its controversial alliances (such as part of its finances covered by Saddam Hussain) have created opposite and diverging opinions in

[57]NCRI. (n.d.). Maryam Rajavi's Ten Points Plan for Future Iran
Available at: https://www.ncr-iran.org/en/maryam-rajavis-ten-point-plan-for-future-iran/.

the international arena. However, the liberal and democratic turn of the last two decades has granted PMOI much support by western countries.

Specifically, it has been considered extremely arguable the alliance with Saddam Hussein during the Iran-Iraq War (1980-1988), when the newly founded National Liberation Army of Iran (NLA)[58] decided to fight along the Iraqi forces for the overthrown of the Islamic Republic of Iran and the establishment of a new Iranian government, in exchange of heavy military equipment, military training and economic funds. The turning point the involvement of the PMOI in the war was Operation Eternal Light (July 1988), when the military forces of the NLA, composed of more than 7.000 militants crossed the border with Iran invading Iranian Kurdistan. The operation was a complete failure on a military level leading to the total annihilation of PMOI's military forces, and eventually to the mass execution of thousands of its members by the Islamic State of Iran.

The strategic and ideological alliance of Saddam Hussain's Iran, guilty of the indiscriminate bombing of Iranian cities and the protracted use of chemical weapons, has caused long lasting consequences on PMOI's international reputation particularly in their commitment toward the respect of human rights

There have been two major turning points however in the evolution of PMOI's international respectability:

The first one is the office of Maryam Rajavi, that since 1985 was able to successfully define PMOI as the one and only democratic alternative to the Islamic government in Iran. Since then the group has in fact been the most prominent voice for pluralism and human rights in Iran and was slowly but steadily able to develop their lobbying effort receiving endorsement and political support by many prominent political figures and western countries.

Secondly, the United States' invasion of Iraq in 2003 has been crucial, both since it marked the end of the Saddam Hussein's regime, both because it created an opportunity for direct contact between PMOI and the US military. While the group was still considered a terrorist organization by the United States (since 1997) the Pentagon

[58] The National Liberation Army of Iran (NLA) is the former paramilitary branch of People's Mojahedin Organization of Iran. It is currently inactive and it has been since (circa) 2003.

unilaterally decided to grant the 5.000 militants located in the Ashraf Camp the status of protected persons under the Geneva Convention.

The declaration of Bush entailed, in fact, the reconstruction of the future opposition group of Iran. In 2003 the United States gave an important message by refusing Khamenei's offer to hand over PMOI's leaders to the Islamic State of Iran in exchange of members of the Military Council of Al-Queda and of relatives of Osama Bin Laden[59] who fled to Iran after the 11th of September 2001.

In the last decade the image of PMOI has been completely reconstructed especially in the western eyes. Their work in donation for political campaigns and their continuously voiceful presence at the international level has worked in favor of the organization which is now supported for instance by the United States, the United Kingdom and France.

The relations between People's Mojahedin Organization of Iran and other countries (western and not) remains to this day multifaced and complex again due to its past. One of the major endorsement of the group since the beginning of the 2000s has been lobbying for their removal from the blacklist of designated terrorist organizations.

PMOI was inserted in the European Union terrorist list the 17th of June 2002 following the guidelines of UNSCR 1373 (2001). In the four years to come the organization would legally challenge such decision four times, a decision that was eventually considered void the 4th of December 2008.

The importance of the four PMOI's cases is rooted in their primacy. It is the first successful challenge against terrorist backlisting in the European Union Courts[60], well before the case of Yassin Abdullah Kadi and Al Barakaat International Foundation of Sweden, which has led to crucial modifications in the lists at the procedural level, namely

[59]Merat, A. (2018). *Terrorist, cultists – or champions of Iranian democracy? The wild wild story of the MEK* The Guardian.
Available at: https://www.theguardian.com/news/2018/nov/09/mek-iran-revolution-regime-trump-rajavi.

[60] ECCHR. *Blacklisted: Targeted Sanctions, Preemptive Security and Fundamental Rights*. Ben Hayes, Gavin Sullivan
(2010). Available at: https://www.ecchr.eu/en/publication/blacklisted-targeted-sanctions-preemptive-security-and-fundamental-rights/

the obligation to grant the blacklisted individuals or entities the so-called "Statement of Reasons".

2.2.2. The Absence of the "Statement of Reasons" and the issue of Confidentiality

As already mentioned, the first inclusion of People's Mojahedin Organization of Iran (PMOI) in a blacklist of terrorist organizations dates back to the 17th of June 2002.
The next month (the 26th of July 2002) the organization filed its first action for annulment before the EU Court of First Instance (CFI).
The background of the challenge are clearly defined and analyzed by the CFI in *People's Mojahedin Organization of Iran v. Council*[61] as such: the organization describes itself as the "Parliament in exile of the Iranian resistance" through the creation of the National Council of Resistance in Iran (NCRI). In 2002 they were composed of five separate organizations plus an independent section which was their military operating branch, however, the applicants clearly stated from the beginning that they had renounced violence and military activity since the previous year, in June 2001, when they dismantled their armed structure[62].
The organization was enlisted by the European Council under the provisions of Common Position 2001/930/CFSP and Common Position 2001/931/CFSP, which set up the European Union's autonomous list under the UN Security Council Resolution 1373 (2001).
The measures taken against PMOI were the usual, their funds frozen by all the Member States and the prohibition to move across the territories of the Member States.
The claims of People's Mojahedin Organization of Iran were the following:

- The annulment of Common Position 2002/340, Common Position 2002/462 and Council Decision 2002/460. This action for annulment was later on extended also against Common Position 2005/936 and Council Decision 2005/930.

[61]Case T-228/02, Court of First Instance (Second Chamber), *People's Mojahedin Organization of Iran v. Council*.
Available at*:* https://www.refworld.org/cases,ECJ,4794b6d52.html
[62] Ibid. Paragraph 1.

- The payment to the organization of the damage suffered and the cost of the legal challenge
- The dismissal of the listing action as inadmissible and unfounded

"In support of its claim for annulment of the contested decision, the applicant puts forward three pleas in law. The first plea comprises five parts, alleging infringement of the right to a fair hearing, infringement of essential procedural requirements, infringement of the right to effective judicial protection, infringement of the presumption of innocence and a manifest error of assessment. The second plea is based on infringement of the right to revolt against tyranny and oppression. The third is based on infringement of the principle of non-discrimination".[63]

With regard to the first plea, the applicants while not contesting the lawfulness of the measures imposed by the Council Regulation as such, maintained that the actions taken against them (such as the freezing of their funds) infringed their right of fair hearing as guaranteed by Article 6(2) EU and by Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms ECHR*. The harmful nature of the contested decisions was imposed, in fact, without the opportunity for PMOI to express their views on it, neither before the implementation of the list nor afterwards.

The leaders of the organization not only claimed to be fully unaware of the pending measures against them, they were also unaware of the authorities who enlisted them and, most importantly of the reasons for listing, stating that they were effectively listed "*apparently solely on the basis of documents produced by the Tehran regime*"[64].

Moreover, according to the applicants, any kind of instances of judicial protection was missing, since the European authorities failed in providing even the slightest indication of the legal grounds on which the decisions were based[65], which would necessarily bring to the infringement of Article 253 EC, the right of judicial protection, and ultimately of the presumption of innocence as guaranteed by Article 48(1) of the Charter of Fundamental Rights[66].

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[63] Ibid. Paragraph 61.

[64] Ibid. Paragraph 64.

[65] Ibid. Paragraph 65.

[66] Ibid. Paragraph 66.

Ultimately, the People's Mojahedin Organization of Iran maintained not to be a terrorist organization at the time of their inclusion in the list, a statement that undermines any justification of inclusion in the European autonomous list.

The response of the European Council against the accusation of infringement of the right to be heard and violation of the presumption of innocence are centered on the observance that *"the right to a fair hearing does not entail an unconditional right to be heard before the adoption of a civil or administrative sanction measure, such as that challenged in the present case*"[67]; it is also noted that "*exceptions to the right to be heard during administrative procedure appear to be possible, at least in some Member States*[68]*, on grounds of public interest, public policy or the maintenance of international relations.*[69]*[…] likewise, community law does not confer on the applicant any right to be heard before being included in the disputed list".*[70]

On a more specific note, the Council even stated that the present contested decisions are not in infringement of Article 6 of the ECHR, since nothing in case law indicates that the measures should have been declared during the administrative procedures and before the entry into force of the decisions [71] since that would have meant ensuring the right to be heard before the adoption of the rule in itself, which is clearly not envisaged by any article of the ECHR. The Council highlighted that no violation of the right of fair hearing is present, and that the case *People's Mojahedin Organization of Iran v. Council* is the demonstration of such.

Moreover, it is pointed out the emergency and exceptional nature of the measures (namely the freeze of assets and the travel ban) taken against the organization, whose preventiveness is the guarantee for effectiveness. In non-disclosing the concerned party

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[67] Ibid. Paragraph 71.

[68] The present statement is referred to Germany, France, Italy, the United Kingdom, Denmark, Sweden, Ireland and Belgium.

[69] Case T-228/02, Court of First Instance (Second Chamber), *People's Mojahedin Organization of Iran v. Council*.

Available at*:* https://www.refworld.org/cases,ECJ,4794b6d52.html. Paragraph 72

[70] Ibid. Paragraph 74

[71] Ibid. Paragraph 77.

its enlisting the European Council was only trying not to jeopardize the important public and security objectives pursued precisely by Council Regulation 2580/2001[72] .

The Council also adds that the Common Position, the Council Decision (all of which are strongly condemned by PMOI) and the "*context well known to the applicant*" can be considered a valid statement of reasons, that has been therefore granted already in the Summer of 2002 to the applicants.[73]

Finally, as to whether People's Mojahedin Organization of Iran could effectively be considered a terrorist organization both the European Council and the Home Secretary of the United Kingdom[74] gave aligned answers. Both contended the fact that a decision taken by a competent authority of one of the Member States generally sufficed; the Home Secretary of the United Kingdom[75]goes even further stating that "*whilst noting the applicant's assertions that it has been involved in a legitimate struggle against an oppressive regime and that its acts of resistance have been focused on military targets in Iran, he cannot accept any right to resort to acts of terrorism, whatever the motivation*[76]".

Even the claim of not being a terrorist organization was therefore rejected.

The findings of the Court of First Instance on the challenges brought before it by the People's Mojahedin Organization of Iran are numerous.

The first conclusion in based on the possible infringement of the right to fair hearing**.**

The Court from the beginning stated that the safeguards on the observance of the right of fair hearing "*cannot be denied solely on the ground that neither the ECHR nor the general principles of Community law confer on individuals any right whatsoever to be heard before the adoption of an act of legislative nature*"[77]

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[72] Ibid. Paragraph 81.

[73] Ibid. Paragraph 83

[74] The United Kingdom already listed PMOI as a terrorist organization under the "*Terrorism Act*" (2000)

[75] The United Kingdom already rejected the appeal of PMOI of being removed from the list of proscription under the "*Terrorism Act*" (2000)

[76] Case T-228/02, Court of First Instance (Second Chamber), *People's Mojahedin Organization of Iran v. Council*.

Available at*:* https://www.refworld.org/cases,ECJ,4794b6d52.html. Paragraph 88.

[77] Ibid. Paragraph 95.

Crucially, the Court drew comparisons from the case in question and the findings of the Kadi Case, the one however of the 21st of September 2005, when the CFI dismissed the pleas of Mr. Kadi and Al Barakaat. While the latter has in fact been of paramount importance there is a clear distinction that is made between the two. The case of 2005 required a mere transposition by the Community Institution (and therefore in European Community Law) of a Resolution of the Security Council of the United Nations, and it was in the hands of the Sanction Committee the creation of a mechanism for the examination of each individual situation for enlisting[78].

In the present case, on the other hand, it was not the Sanction Committee who provided the list of the individual persons or groups subjected to the freeze of assets and the travel ban, nor did it provide the procedural rule of those measures.

In this specific case therefore it is "*the Community, through which its member states has decided to act, to identify specifically the persons, groups and entities whose funds are to be frozen […], in accordance with the rules in their own legal order*"[79]

The same European Council asserts that the contested provision (namely Council Regulation No. 2580/2001) falls in the ambit exercised in the area of the Common Foreign and Security Policy (CFSP).

The Court of First Instance concluded that since the identification of the individuals and entities and the adoption of the measures to be applied to them "*involve the exercise of the community's own powers, entailing a discretionary appreciation by the Community, the Community institutions concerned, and in this case the Council, are in principle bound to observe the right to a fair hearing when the act with a view to giving effect to a resolution (UNSCR 1373)*"[80]

As a consequence, safeguarding the right to a fair hearing was a matter of principle and it was positively applicable even in the adoption of measures that fell under Council Regulation No. 2580/2001[81], as it was positively applicable the obligation to state reasons[82].

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[78] Ibid. Paragraph 100.

[79] Ibid. Paragraph 102.

[80] Ibid. Paragraph 107.

[81] Ibid. Paragraph 108.

[82] Ibid. Paragraph 109.

Throughout the case other findings of the Court of First Instance in relation to the right to fair hearing are added.

Specifically, the CFI admitted that depending on the case in question it is possible to insert some restrictions to the right of fair hearing, restrictions that are envisaged when the major objectives of the contested decision are for the sake of avoiding terrorist acts[83]. In line with the statement of the United Kingdome and the European Council it is found that the notification of the measure to freeze founds would have effectively led to jeopardize the aims pursued by the European Community and also by UNSCR 1373 which could only have been fulfilled through a "surprise effect" and that the measures in question "*cannot be the subject-matter of notification before it is implemented*[84]"

"*However, in order for the parties concerned to be able to defend their rights effectively […] it is necessary that the evidence adduced against them be notified to them, in so far as reasonably possible, either concomitantly with or as soon as possible after the adoption of the initial decision to freeze funds*."[85]

The CFI therefore came to the conclusion that while it was possible to have overriding considerations by the Member States that precluded the thorough communication between the parties involved for matter of international security; it was also imperative that the listed individuals and entities were provided with a notification of the measures they were subjected to; but it added that "*the observance of the right to a fair hearing does not require either that the evidence adduced against a party concerned be notified to it before the adoption of an initial measure to freeze funds, or that that party automatically be heard after the event in such a context*"[86].

The second finding of the Court of First Instance were centered on whether the right to judicial protection was or was not infringed.

In this case the Council stated reservations over the jurisdiction of the Court of First Instance since the contested Council Regulation was set up under a Security Council Resolution.

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[83] Ibid. Paragraph 127.

[84] Ibid. Paragraph 128.

[85] Ibid. Paragraph 129.

[86] Ibid. Paragraph 137.

Clearly, however the dispute in place could have only be solved under a legal challenge that fell under a matter of judicial review, which came with within the Court's competences.

Following all of these considerations the Court of First Instance arrived to its conclusive findings with regards to *People's Mojahedin Organization of Iran v. Council*.

According to the CFI while the contested regulation, Council Regulation 2580/2001, provided for the periodic review of the legislation every six months and provided also that it was in the hands of the European Council to review and amend the list present in its Annex, any procedure of notification to the listed individuals or entities is missing, as it was missing the possibility for the applicants to be heard either before and concomitantly to the entry into force of the financial measures with a view to having them removed from the disputed list[87].

As PMOI made clear in fact from the initial hearings they did not receive any type of specific information or material in the file which could have been defined as a justification for their inclusion in the list even though that decision was taken by a so-called competent authority[88]; the same competent authority that was in charge of such decision of inclusion remained to the day of the final conclusions unknown to the applicants.

As stated by the applicants, their view was never heard at the time of the decision nor they were ever in a position to do so, as a consequence, PMOI was not placed in a position to avail themselves of their right of action before the Court.

Moreover, even the opportunity of judicial review was completely absent, the CFI admitted that "*neither the written pleadings, of the different parties to the case nor the file material produced before the Court, enable it to conduct its judicial review, since it is not even in a position to determine with certainty, after the close of the oral procedure, exactly which is the national decision referred to in Article 1(4) of Common Position 2001/931, on which the contested decision is based.*[89]"

Finally, as abovementioned, the PMOI claimed that the information under which the decision for enlisting was taken were documents produced by the Teheran's regime and

[87] Ibid. Paragraph 160.

[88] Ibid. Paragraph 161.

[89] Ibid. Paragraph 166.

that the only explanation for their enlisting was most likely diplomatic. The European Council refrained to take any position on the matter.

The conclusions of the Court are therefore that "*the contested decision does not contain a sufficient statement of reasons and that it was adopted in the course of a procedure during which the applicant's right to a fair hearing was not observed. Furthermore, the Court is not, even at this stage of the procedure, in a position to review the lawfulness of that decision*."[90]

The Court of First Instance added that the European Council must annul the contested decision in so far as it concerns the applicants: People's Mojahedin Organization of Iran. The Council was also order to pay its own cost with regard of the legal challenge in place and a fifth of the cost of the applicants.

2.2.3 The Obligation to State Reason at the EU level

The importance of *People's Mojahedin Organization of Iran v. Council* resides in the attention to the procedural rules. From the findings of the Court of First Instance the 12th of December 2006 arises for the first time the obligation to include in the notification of the decision the "statement of reasons" to all those individuals and entities included in the autonomous blacklist of the European Union.

The victory of PMOI was however more of a procedural victory rather than a substantive ones.

As it will happen two years later to Yassin Abdullah Kadi and Al Barakaat International Foundation of Sweden, PMOI was reintroduced in the European autonomous backlist by the Council of the European Union. This time the re-introduction of the organization was accompanied with a statement of reasons.

Meanwhile, in the second legal case of the four brought by PMOI before a court, the organization was able to successfully be removed from the list of terrorist organization of the United Kingdom under the "*Terrorism Act*" of 2000.

[90] Ibid. Paragraph 173.

It this case the reasons for appeal were more ideological than procedural. As had happen in *People's Mojahedin Organization of Iran v. Council* (in 2006) the organization maintained to have renounced to violence back in the Summer of 2001.

The Proscribed Organizations Appeal Commission (POAC) decided that the PMOI longer satisfied the criteria for the maintenance for proscription the 30th of November 2007, on the basis that the organization had effectively dismantled its own military branch at the latest in the end of 2002 and that it was at that point in time completely disarmed.

Moreover, there have not been found any materials which might have led to the suspect re-creation of their military branch, nor to the re-armament, nor to the training of an organization capable to carry out terrorist attacks. On the contrary, "*the material showed that the entire military apparatus no longer existed, whether in Iraq, Iran or elsewhere and there had been no attempt by the PMOI to re-establish it*[91]".

Obviously, the decision of the re-inclusion of PMOI again by the European Council was challenged by the organization and the 23rd of October 2008 the Court of First Instance delivered its judgement.

Here the decision of the POAC (which was even challenged by the Home Secretary of the United Kingdom) was taken into consideration as one of the main reasons for de-listing.

The Court in fact held that while the European Council effectively complied to the obligation to give the organization the statement of reasons, the same reasons were dismissed by the POAC, a dismissal that was completely disregarded by the European Council and admitted that the statement of reasons provided is "*obviously insufficient to provide legal justification for continuing to freeze the applicants' funds*[92]"

[91] CASE T-256/07, Judgment of the Court of First Instance (Seventh Chamber), 23 October 2008, *People's Mojahedin Organization of Iran v. Council*. Paragraph 348.6
Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62007TJ0256&from=EN

[92] Ibid. Paragraph 177

The European Council was then obliged to de-list PMOI by the Court of First Instance for the second time in just two years, since "*PMOI is not and, at September 2006, was not concerned in terrorism*[93]"

The fourth and last appeal brought by the People's Mojahedin Organization of Iran was the outcome of its third enlisting by the European Council, this time by the request of France, despite having already challenged such decision two times at the European level and one time at the national level in the case of the United Kingdom.

The new listing decision was taken in 15th of July 2008, on the basis of new (an secret) information brought by the French authorities.

The CFI annulled again the decision for listing through the final and decisive findings of the 4th of December of 2008. The Court specified that the statement of reasons was not the sole obligation of the Member States, it must be also ensured that the entities and the individuals proscribed have an effective judicial remedy.

According to the Court, the poor credibility of the evidence brought by France was per se a breach of the right to effective judicial remedy, the fact that the European Council was bound by confidentiality from the French authority did not explain, in the eyes of the CFI, why the production and the delivery of such evidences to the Court was a breach of confidentiality, while the transmission to the same evidence to other 26 States of the European Union was not.

Consequently, the Court of First Instance held that "*the Council is not entitled to base its fund-freezing decision on information or material in the file communicated by a Member State, if the said Member State is not willing to authorize its communication to the Community judicature whose task is to review the lawfulness if that decision"*[94]

The 26th of January 2009 the People's Mojahedin Organization of Iran was finally and ultimately removed from the European Union's autonomous blacklist. The group is now considered by the majority of the countries belonging both to the United Nations, both to the European Union as an opposition group in exile or even as a parliament in exile.

[93] Ibid. Paragraph 349.

[94] Ibid. Paragraph 73.

Notwithstanding the numerous legal challenges and injustices under which the organization went through, the first of them, *People's Mojahedin Organization of Iran v. Council* (2006) was able to remedy much of the legal lacunae left by the European Union in the implementation of the lists.

From 2006 all the Member States of the European Union have to provide a clear statement of reasons to the individuals and entities listed in order to assure the parties the conformity with the right to be heard.

The second procedural victory is the outcome of the decision made by the Court of First Instance in December 2008, by which the decision for enlisting (and therefore the statement of reasons in itself) cannot be based on confidential and secretive information which cannot be brought before a court for judicial scrutiny, effectively establishing the compliance with the right of judicial remedy.

2.3 – Segi and Others v. All 15 Member States

2.3.1 The Alleged Link Between Segi and Euskadi Ta Askatasuna (ETA)

The Segi organization (whose meaning is "*continue*") is a revolutionary pro-independent youth movement set up the 16th of June 2001, that is part of the national liberation struggle for the Basque self-determination. The same organization describe itself as aiming to campaign on youth issues and on the protection of the Basque identity, Basque culture and the Basque language. "*It asserts that it works through democratic channels to ensure respect for fundamental rights, both collective and individual. It campaigns for the right to self-determination and a negotiated political solution to the Basque conflict. It fights for a fairer, more mutually supportive society by combating inequality and discrimination, racism, sexism and homophobia. It combats the oppression of youth, drug trafficking, social insecurity, poverty and violence against young people. It promotes the social, cultural and political expression of young people by organizing events, rallies, festivals and concerts."*[95] It is in line with the political position of both Langile

[95] *Segi and Others and Gestoras Pro-Amnistía and Others v. 15 States of The European Union*. Circumnstances of the Case. ECtHR. (2002)

Abertzaleen Batzordeak (a separatist trade union for the Basque country), Batasuna, and allegedly also Euskadi Ta Askatasuna.

The Basque national struggle exploded during the last half of the 20th Century is the result of decades and even centuries of effort for self-determination. The Basque country, or Euskàl Herrìa, is located in the Western Pyrenees between two nations, France and Spain. The strong desire for independence of the Basque population is the outcome of decades of their self-government and autonomy, their isolation and even the creation of a language (Euskara) which is unrelated to all other languages.

It can be however defined as the beginning of Basque national struggle the end of the 19th Century when Sabino Arana, a Basque politician and writer, finally formalized the nationalist question granting voice to the requests of the Basque population through the creation of the Basque National Party and the Ikurriga, the symbol in the Basque's flag.

For the Basque population, the Spanish Civil War (1936-1939) and the Francoist regime that followed were especially difficult times. The Basque's identity (like many other regional identity present in Spain) was suppressed under Francisco Franco's Dictatorship (1939-1975), resulting in the language and the cultural heritage of the Basque nationalism declared as unlawful. When then the national Basque movement became a focal point for resistance against the regime they were indefinitely forced to clandestinely and expatriation.

A salient feature of the Basque national struggle has been the actions of the military organization Euskadi Ta Askatasuna (ETA), which was established in 1959.

In reaction to the harsh measures taken by the Franco government, ETA was formed with the goal of creating an autonomous Basque nation. To achieve its objectives, the organization committed violent crimes such as bombings and assassinations during the second half of the 20th Century taking many lives over the course of several decades, both of its members and of civilians. Even supporters of the Basque autonomy cause, however, strongly denounced the group's violent methods. As time went on, people's perceptions changed and the need for a diplomatic solution to the Basque conflict increased.

Available at: https://hudoc.echr.coe.int/eng#{"itemid":["001-67141"]}

While Segi always claimed to only use diplomatic and democratic channels for their cause, their suspected ties with the separatist organization ETA let to its inclusion in the autonomous blacklist of the European Union the 27thof December 2001.

In a decision of the 5th of February 2002, Central Investigating Judge No. 5 at the *Audiencia Nacional* in Madrid ordered the suspension of the association's activities as a preventive measure on the ground that it was "*an integral part of the Basque terrorist organization ETA-EKIN*" and referred to Common Position 2001/931/CFSP of the Council of the European Union[96].

The non-violent nature was not in fact believed by the Members States of the EU.

Many times in the past 40 years Spain had accused Segi of being a recruiting groups for other major terrorist organizations in the country.

The case of the inclusion of Segi in the autonomous blacklist of the European Union is of particular interests for a fundamental detail. The organization, as already mention has been blacklisted under Common Position 2001/931/CFSP, however, none of the usual measures for proscription were applied in this case. Segi was not subjected to the freeze of their assets nor it was even banned to travel or to move across the Member States of the European Union. While this might look as a victory or at least as something positive it made even more difficult for the organization to invoke their right to be heard and of an effective and fair process of judicial review.

It is not clear when the Segi organization was effectively dissolved, is plausible to assume that they renounced to their nationalist aims in concomitance with the dissolution of ETA that brought its path to an end in May of 2018.

2.3.2 Complications in invoking the right to be heard and the right to fair trial

Through the implementation of UNSCR 1373 (2001) the European Council set up the blacklist of Segi at the European level the 27th of December 2001 again according to the

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[96] *Segi and Others and Gestoras Pro-Amnistía and Others v. 15 States of The European Union*. Circumstances of the Case. ECtHR. (2002)
Available at: https://hudoc.echr.coe.int/eng#{"itemid":["001-67141"]}

considerations that they were effectively part of the armed struggle and terrorist attacks perpetuated by ETA in the course of the last decades.
In February 2002 Segi filed an application for delisting before the European Court of Human Rights (ECtHR), maintaining that some of their fundamental rights were being infringed.
The rights in question were (as in many of the cases related to the terrorist list of proscription) the right to a fair trial[97], which involves that the applicants are entitled to a fair and public hearing in reasonable time and through adequate facilities, to be informed promptly of the decisions and the measures taken against them and that the applicants have the possibility to defend themselves in person and through the legal assistance of their own choosing; the right to freedom of expression[98]which entails the expression of opinion without the interference of the public authority (some restrictions to the freedom of expression might be present in case such expressions are considered a menace to the public order and democracy); the right to freedom of assembly and association[99], a right that is subject to the same restrictions of the freedom of expression, restrictions that are present to avoid disorders, crime and the protection of the freedom of others; finally the right to an effective judicial remedy[100], which has to be guaranteed notwithstanding the crime in question.

The 23rd of May 2002 the application was considered as inadmissible by the ECtHR.
The applicants when complaining of the infringement of their right refereed to Common Position 2001/930/CFSP and Common Position 2001/931/CFSP; asserted that they were unable to challenge the decision taken by the 15 Member States under these Positions.
Segi complained specifically that by having been described by the European Council as a "*terrorist organization*" their right to presumption of innocence was being violated having put the organization under discriminative circumstances.
Segi therefore claimed to be both direct and potential victim of the text concerned.

[97] Article 6. European Convention of Human Rights (ECHR)

[98] Article 10. European Convention of Human Rights (ECHR)

[99] Article 11. European Convention of Human Rights (ECHR)

[100] Article 13. European Convention of Human Rights (ECHR)

This "potentiality" is the central issue for the ECtHR, that relying on the specificities of Article 34[101] reiterates that the Convention "*requires that an individual applicant should claim to have been actually affected by the violation he alleges"* and *"does not institute for individuals a kind of* actio popularis *for the interpretation of the Convention; it does not permit individuals to complain against a law* in abstracto *simply because they feel that it contravenes the Convention."*

It was impossible therefore for the applicants to bring a proceeding before the ECtHR on the basis that a law may hypothetically infringe their right, since clear and reasonable evidence must be brought before the Court demonstrating the convincing violation of their personal rights.

As abovementioned, *Segi and Others and Gestoras Pro-Amnistía and Others v. 15 States of The European Union* represents a distinct case due to the fact that the usual measures to which are subjected the listed entities (namely the freeze of assets and the travel ban) were not implemented against Segi.

The organization in question was not subjected to Article 2 of (by which the European Community orders the freeze of assets of the listed individuals and entities) and Article 3 (by which the European Community ensures the unavailability of funds, financial assets and economic resources to the listed individuals and entities) of Common Position 2001/931/CFSP. Segi, according to the list in the Annex of Common Position 2001/931/CFSP, was only subject to Article 4 by which "*Member States shall, through police and judicial cooperation in criminal matters within the framework of Title VI of the Treaty on European Union, afford each other the widest possible assistance in preventing and combating terrorist acts*."

The Court insisted on the fact that while it is true that the inclusion in the list might be used as the initial proceeding for legal measures (that then would be possibly be brought before a Community Court) the same Article is mostly aimed at "*improving police and judicial cooperation between the member states of the European Union in the fight*

[101] Article 34. "*Individual applications: The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right*." European Convention of Human Rights (ECHR)

against terrorism[102]", a kind of cooperation that is per se not directed to individuals or entities nor it does affect them.

In dismissing the claims of Segi in *Segi and Others and Gestoras Pro-Amnistía and Others v. 15 States of The European Union* (2002) the ECtHR asserted that "*the mere fact that the names of the applicants appear in the list referred to in that provision as groups or entities involved in terrorist ace may be embarrassing, but the link is much tenuous to justify application of the Convention*" and that "*the situation complained of does not give the applicant associations the status of victims of a violation of the Convention within the meaning of Article 34 of the Convention*".

The Court clearly failed to analyze the broader implications of the inclusion in the list of the various organizations, considering only that the applicants might find themselves in a "embarrassing" position and not in a position of full-fetched discrimination both on a societal and on a criminal level (the applicants are in fact considered constantly as "terrorist suspect" or involved at least in the commission of a crime and always on a fine line to be subjected indefinitely to the measure of asset freeze).

The second legal challenge was brought by Segi before the Court of First Instance (CFI) the 13th of November 2002, the same appeal was again dismissed the 7th of June 2004[103] . The grounds for appeal were the same as the case of 2002, namely the breach of their fundamental rights, this time however, Segi also claimed that they were entitled to compensation for damages and that by maintaining them in the list the European Council was infringing the general principles of Community Law.

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[102] Segi and Others and Gestoras Pro-Amnistía and Others v. 15 States of The European Union. ECtHR. (2002).
Available at: https://hudoc.echr.coe.int/eng#{"itemid":["001-67141"]} Paragraph 8.

[103] Case T-338/02, Segi and Others v. Council, Court of First Instance (Second Chamber), (2004)
Available at:
https://curia.europa.eu/juris/showPdf.jsf?text=&docid=85811&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4806699

The European Council, on its part maintained that the objection of the applicants was inadmissible under Article 114[104] of the *Rule of Procedure of the Court of First Instance* under which Segi submitted their observations and asked the CFI to dismiss the action and to oblige the applicants to pay the costs[105]. The Council also claimed that the Court did not have jurisdiction to assess the legality of an act that came within the scope of the Common Foreign and Security Policy (CFSP) or the Justice and Home Affair Council (JHA).

Under the European Union' Three-Pillar System, Justice and Home Affairs measures (such as the policies of cooperation between states) are part of the Third Pillar while economic matter (like the measure of freeze of assets) are part of the First Pillar. The First Pillar's decisions are issue on which the CFI has jurisdiction, whilst it possess very limited legal capabilities on disputes that arise from Third Pillar's measures.

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[104] Article 114: "*1. A party applying to the General Court for a decision on admissibility, on lack of competence or other preliminary plea not going to the substance of the case shall make the application by a separate document. The application must contain the pleas of fact and law relied on and the form of order sought by the applicant; any supporting documents must be annexed to it*" Rule of Procedure of the Court of First Instance.

Available at:

https://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt7_2008-09-25_14-08-6_431.pdf

[105] Case T-338/02, Segi and Others v. Council, Court of First Instance (Second Chamber), (2004). Paragraphs 13-16

Available at:

https://curia.europa.eu/juris/showPdf.jsf?text=&docid=85811&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4806699

Following these considerations, The Court of First Instance took the view that, by virtue of article 111[106], and being in possess of enough information on the issue at stake the necessity of opening an oral procedure was not present[107].

The present case was in fact dismissed due to the lack of jurisdiction of the CFI over the contested action for damages caused by the inclusion of Segi in the list annexed to Common Position 2001/931[108].

In this case crucially, the CFI was able to identify an enormous lacuna as the consequence of their reasoning when stating that "*probably no effective judicial remedy is available to them* (the Segi organization), *whether before the Community Courts, with regard to the inclusion of Segi on the list of persons, groups or entities involved in terrorist acts*"; moreover, "*with regard to seeking to establish the individual liability of each member state before the national courts on account of their involvement in the adoption of the Common Positions in question, such an action is likely to be of little effect*[109]".

The pleas were conclusively dismissed as unfounded, as it was dismissed the claim of Segi that the Council had infringed the general principles of Community Law; finally, each party must bear their own cost.

After the dismissal by both the ECtHR and the CFI, Segi promptly began a further legal challenge asking for reparations over their blacklisting under Council Common Position 2001/931/CFSP, this time before the European Court of Justice (ECJ).

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[106] Article 111: "*Where it is clear that the General Court has no jurisdiction to take cognizance of an action or where the action is manifestly inadmissible or manifestly lacking any foundation in law, the General Court may, by reasoned order, after hearing the Advocate General and without taking further steps in the proceeding, give a decision on the action*" Rule of Procedure of the Court of First Instance. Available at:
https://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt7_2008-09-25_14-08-6_431.pdf

[107] Case T-338/02, Segi and Others v. Council, Court of First Instance (Second Chamber), (2004). Paragraphs 29-30
Available at:
https://curia.europa.eu/juris/showPdf.jsf?text=&docid=85811&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4806699

[108] Ibid. Paragraph 40

[109] Ibid. Paragraph 38

For the third time the appeal of Segi was dismissed, on the same ground of the CFI in fact also the ECJ asserted that they had no jurisdiction in matters concerning Third Pillar's measures and noted that the CFI correctly considered that no claim for damages is provided.

The ECJ is in fact trusted in giving judicial review in three specific cases: it has jurisdiction to give preliminary rulings on the validity and interpretation of decisions on conventions established under Title VI of the EU Treaty; on infringement of essential procedure requirements and infringement of the EU Treaty if the plea is brought before it by Member States and on dispute between Member States whenever such disputes cannot be settled by the European Council.

It has however no power of judicial review in cases that directly affect the rights of the individuals under the Third Pillar.

The ECJ acknowledged that it is for the Member States of the European Union and their courts and tribunal to apply the right of action in this case[110], consequently the argument of the party that they were left without an effective judicial remedy by the implementation of Common Position 2001/931/CFSP was to be rejected[111] .

2.3.3 The gaps in EU's system of judicial protection of human rights.

The relevance of the cases in question is not settled in the outcome and the results obtained by Segi, which are clearly negative, rather in how they were able to highlight the judicial gaps present at the European level. As it can be noted by this analysis Segi was never able to be de-listed by the various courts to which it brought appeal.

However, some finings can be reached.

The first case of *Segi and others and Gestoras Pro-Amnistía and Others v. 15 States of the European Union* (2002), showed the Court inability to protect the fundamental freedoms of the organization under a principle of non-discrimination.

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[110] Case C-355/04 Segi and Others v. Council (2007). European Court of Justice (Grand Chamber). Paragraph 56.

Available at: https://curia.europa.eu/juris/document/document.jsf?docid=61241&doclang=en

[111] Ibid. Paragraph 57.

The decision of the European Union on the autonomous lists are attached to Common Positions entitled "*on the application of specific measures to combat terrorism*". While a terrorist act is necessarily a criminal offence under national law, the organization in question was not guilty of such, but has been considered in any case as involved in the commission of a crime.

As pointed out by Eckes C. in *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* "*the terms terrorist and terrorism entail an additional negative stigma that goes beyond the common criminal conviction […] furthermore, the consequences of a listing are akin to a criminal conviction, which is publicly known but not immediately followed by a punishment*"[112]. It can be concluded that the ECtHR was misguided when defining the circumstance in which Segi found itself as "*embarrassing*" since the identification of an individual on a European Union list has criminal implication. Eckes C. on the circumstances under which one might be listed also adds that *"the listing criteria do not require a subjective element. Those listed do not have to be aware that their actions might contribute to financing terrorism. However, the fact that sanctions are categorized as preventive administrative measures and do not require the kind of evidence necessary to bring a criminal charge cannot, in itself, lead to the conclusion that they are not criminal. On the contrary, the low evidentiary burden necessary to publicly stigmatize someone as a terrorist suspect is an additional argument why the need for judicial review is so pressing*."[113]

The other two cases, so the ones brought before the CFI and the one brought before the ECJ, exhibited major gap in EU's system of judicial protection of human rights and of rule of law.

The applicants in question, both Segi both the individuals concerned never receive the kind of judicial remedy they asked for.

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[112] Eckes, C. (2009) EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions OUP: Oxford [at p.165]

[113] Eckes, C. (2009) EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions OUP: Oxford [at p.166]

It is crucial to underline that these two cases were not based majorly on the issue of enlisting, but that they were mostly an action for damage. Both Courts only respected the Three Pillars' structure of the European Union.

Segi and Others v. Council (2007), before the ECJ was also scrutinize by Eckes C. In *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* when she stated that "*by relying on the preliminary ruling procedure the ECJ sought to ensure some form of judicial review without assuming the competence to interfere directly with the Member States' cooperation under the Union pillars. Segi alone might not justify the conclusion that the Court would apply the principle of wider jurisdiction to allow direct actions brought by private parties against Union lists, but it does not exclude either*."

The only effective remedy for Segi could have been the one coming from national courts, it remains unclear however whether they could offer adequate protection to the organization. Moreover, to bring closure to this case and to finally be delisted by the autonomous European list Segi could only have brought an action in all of the 27 Member States of the European Union.

Also this instrument, therefore, does not amount to a complete fulfillment of protection to the right to judicial remedy, to which to this day they remained deprived of.

2.4 – Fighters and Lovers v. Danish Supreme Court

2.4.1 The alleged link with PLFP and FARC

Fighters + Lovers is a small Danish activist group and company who was accused by the Danish authorities of complicity in terrorism and financial support of terrorism under the Danish legislation.

At the center of the dispute is the printing and the distribution of t-shirts displaying the symbols of two major organizations that are on the European Union autonomous list and are therefore considered as terrorist organizations and menace to the international security; namely the Popular Front for the Liberation of Palestine (PFLP) and the Fuerzas Armadas Revolucionarias de Colombia (FARC). The revenues from the t-shirts (around

20% of them) were then to be sent to the same organizations printed in the t-shirts in order to support their struggles; in the eyes of Fighters + Lovers both groups were fighting against illegitimate and illegal states.

As already mentioned however, both the PFLP and the FARC were included in the autonomous EU Blacklist implementing UN Security Council Resolution 1373 (2001).
The Popular Front for the Liberation of Palestine is a national Palestinian organization that combines Arab nationalism with Marxist and Leninist ideology, it was founded by George Habash in 1967. It is designated as a terrorist organization by the European Union, the United States, Canada, Israel and Japan.
The organization gained notoriety between the 1960s and the 1970s for the numerous hijackings of planes, and armed attacks to civilian and military targets (even non-Israeli ones).
The group has always been contrary to the development of a two-states solution and the recognition of the state of Israel refusing any instance of security coordination with other states. Their military wing which also calls for the re-establishment of historical Palestine through armed struggle is known as Abu Ali Mustafa Brigades and has fought alongside Hamas and Palestinian Islamic Jihad (PIJ).

The second organization concerned is the Fuerzas Armadas Revolucionarias de Colombia which was included in the EU terrorist list in June 2002 under Common Position 2001/932/CFSP. FARC is a guerrilla organization established in Colombia in 1964 as the military branch of the Partido Comunista de Colombia (PCC) that had wage warfare against the Colombian government for nearly 50 years.
According to the Secretariat of the Central General Command of the FARC-EP, FARC is against oligarchy and imperialism, it stands for the people, for sovereignty and for the conquest of peace and justice; in this same document FARC "*reaffirms its unwavering revolutionary and Bolivarian commitment to continue to battle to win political power*

using a combination of all forms of struggle for as long as the State and its government do not change their outdated and perverse political custom"[114]

Despite the numerous bombings, assassinations, hijackings and other kinds of armed attacks FARC was delisted by the European Union in 2016. The decision was taken by the European Council the 27th of September 2016 in light of the peace agreement signed between the Fuerzas Armadas Revolucionarias de Colombia and the Colombian government after more that 50 years of armed conflict[115].

2.4.2 Financing of terrorism or Philanthropy?

At the national level the implementation of the measures against Fighters + Lovers and the consequent prosecution of its members fell under article 114 of the Danish Penal Code.

Under Article 114 a person is liable to imprisonment if guilty of offences such as intimidating the population, compelling the Danish Government or the Danish Authorities or trying to destroy or destabilize the fundamental structure of a country; it is crucial to highlight that these offences display the direct behaviors and involvement of the suspected individuals.

Under section 114(b), however, "*a person is liable to imprisonment for any term not exceeding 10 years if he: (1) directly or indirectly grants financial support to; (2) directly or indirectly provides or collects funds for; or (3) directly or indirectly makes money, other financial assets or financial or other similar services available to a person, a group*

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[114] "Document #20: "*Press Release from the Revolutionary Armed Forces of Colombia*," Secretariat of the Central General Command of the FARC-EP (2002) | Modern Latin America."
Available at:https://library.brown.edu/create/modernlatinamerica/chapters/chapter-7-colombia/primary-documents-with-accompanying-discussion-questions/press-release-from-the-revolutionary-armed-forces-of-colombia-secretariat-of-the-central-general-command-of-the-farc-ep-mountains-of-colombia-2002/

[115] Council of the EU; "Colombia: EU suspends sanctions against the FARC"; Press release; 27 September 2016
Available at: https://www.consilium.europa.eu/en/press/press-releases/2016/09/27/colombia-eu-suspends-farc/

of persons or association that commits or intends to commit acts falling within the scope of section 114 or 114 (a)"

According to this provisions Denmark's Intelligence Police Unit arrested the seven individuals involved in the distribution of the t-shirts, confiscated the sale proceeds and the remaining products, shut down the group's website and froze all the assets belonging to the groups

The case of Fighters + Lovers opened a major controversy at the national and the European level on the interpretation itself of the word "terrorism".

According to *Fighters and Lovers, T1 and ors v A, Appeal judgment, U 2009 1453, ILDC 2250 (DK 2009), 25th March 2009, Denmark; Supreme Court*[116] "*Articles 114 and 114b of the penal code had to be interpreted in the light of the EU framework decision, according to which whether the conduct of the financed organization had been committed against a state that was considered democratic and respected the rule of law, or whether it was aimed at an occupying power, had to be taken into account.*"

The defendants claimed that, while they were aware that the revenues of the sales would have been sent to PFLP and FARC, they did not believe that the opposing states and governments (respectively Israel and Colombia) could have been actually considered as respectful of democratic principle and of rule of law. They argued in fact that "*Israel was considered an occupying power[…] whilst FARC should have been considered a non-state party to a non-international armed conflict, as it had control of over 40% of the territory of Colombia, and had negotiated with Colombia*[117]"

Finally, Fighters + Lovers contented that in cases as such, when the opposite faction is a state that cannot be considered respectful of human dignity and pluralism the possible breaches of international law ordered by FARC and PFLP should be considered as the

[116] From now on Fighters + Lovers v. Supreme Court of Denmark

Available at: https://opil.ouplaw.com/display/10.1093/law:ildc/2250dk09.case.1/law-ildc-2250dk09?prd=OPIL

[117] Committee of Experts on Terrorism. Provision in the Danish Criminal Code Concerning Terrorism. Section 114. 2006 https://rm.coe.int/ct-legislation-denmark/16806415f2

consequences of the state of terror against the civilian population and that anti-terror law should not prevent the right to resistance against an illegitimate state power[118]

The trial set up for the sentence of the 7 individuals involved in the production and distribution of the t-shirts took place before the District Court of Copenhagen in December 2007.
Rather than focusing on the actions of the organization however, much of the trial involved a substantive consideration on whether FARC and PFLP were to be valued as terrorist groups or forces of armed resistance within the scope Danish law[119] and therefore whether the revenues sent to the different organizations might be considered as finance of terrorism or philanthropy.
The money collected were in fact not intended to the purchase of weapons or ammunitions rather for the purchase of a microphone for the FARC radio station and the PLFP poster printing shop.
The whole trial, in short was focused on the alleged criminal offences that depended on the assessment of the democratic and legal situation in Palestine and Colombia
All the individuals belonging to the organization were acquitted in December 2007, on the ground that both FARC and PFLP were not effectively considered as terrorist organization under Danish law and that being enlisted by the European Council did not amount necessarily to a demonstration of such[120].

Soon after an appeal by the Danish authority was filed before the Eastern High Court that overturned the decision of the District Court of Copenhagen on the ground that the aims pursued both by FARC and PLFP could actually be seen as terrorist even under Danish law.

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[118] Wolff, R. 'Mit T-Shirts in die Terrorfalle' *Die Tageszeitung* (20 November 2007) Available at: https://taz.de/Daenen-wegen-Farc-Symbolen-vor-Gericht/!5191395/

[119] ECCHR. Blacklisted: Targeted Sanctions, Preemptive Security and Fundamental Rights. Ben Hayes, Gavin Sullivan (2010). Pag. 54. Available at: https://www.ecchr.eu/en/publication/blacklisted-targeted-sanctions-preemptive-security-and-fundamental-rights/

[120] Ibid.

Six employers of Fighters + Lovers were sentenced under Section 114(b) of the Danish Penal Code whilst three others remained free on parole.

The decision of the Eastern High Court was challenged by Fighters + Lovers before the Danish Supreme Court that the 25th of March 2009 released its verdict. The Supreme Court of Denmark confirmed the position of the Eastern High Court.
Specifically they claimed that both "*FARC and the PLFP had committed violations against the civilian population, with the aim of seriously intimidating the population, or seriously destabilizing the fundamental political, constitutional, economic, and social structure in Colombia and Israel, respectively, in such a way that the conduct could have inflicted serious harm on the countries, as per Article 114 of the Penal Code*."[121]
The written material and evidence brought before the Supreme Court consisted for the majority of open sources and reports by independent international organizations and NGOs that work for the regular investigation of human rights issues such as Human Rights Watch and Amnesty International but also the Danish Intelligence Services and the Economic and Social Council of the United Nations.

Specifically with regard to the FARC, in a report of 2004 delivered to the Court as evidence by the UN Economic and Social Council it is stated that the illegal armed group continuously commit serious violations and attacks to the civilian population of Colombia, homicides, massacres, hostage-taking, acts of terrorism, forced displacement, use of mines, recruitment of minors, slavery and attacks on the personal integrity of women and girls in the context of sexual abuse and attacks against medical personnel and medical units.[122]
The same kind of violations were witnessed and reported by Amnesty International in 2002 adding also the threat "resign or die" to many of the judges, mayors and local

[121] *Fighters and Lovers, T1 and ors v A, Appeal judgment, U 2009 1453, ILDC 2250 (DK 2009), 25th March 2009, Denmark; Supreme Court*. Paragraph H1.
Available at: https://opil.ouplaw.com/display/10.1093/law:ildc/2250dk09.case.1/law-ildc-2250dk09?prd=OPIL

[122] Ibid Paragraph 652.

officials of the country wgich were accused of collaborating with their opponents, the government of Alvaro Uribe. [123]

The Supreme Court of Denmark was also able to describe in detail the weaponry arsenal owned by the organization made of small arms, grenade launchers, machine guns and mines but also air missiles and rockets[124]. This arsenal was financed throughout the years by drug-trafficking, extortion, and ransoms of hostages.[125]

With regard, therefore as to whether the FARC should be considered as a terrorist organization under Danish law, the response of the court was positive on the ground that: "*The war in Colombia is characterized by gross violations of civilians, human rights violations and violations of the rules of warfare. These abuses are carried out by both sides in the conflict. FARC-EP has clearly stated that their aim is to overthrow the Colombian government by armed force and that a political rapprochement is out of the question. In this regard, FARC-EP has admitted to premeditated attacks and killings against the civilian population and politicians, including attacks that have led to the destruction of homes in cities and the displacement of residents, and FARC-EP has carried out summary executions of civilians without prior trial. It is noted that in certain attacks, the FARC-EP has used weapons that are highly inaccurate and have therefore hit indiscriminate targets. These weapons have been used in urban areas, so innocent people have also been victimized. Finally, FARC-EP has used child soldiers. This contributes to the already large number of displaced people and refugees in Colombia*.[126]"

The reports and analysis of the same organizations are chosen to discuss on the PLFP. The material in question not only analyzed the numerous attacks to the civilian population but focused mostly on the refusal of the group to any kind of negotiation for a two-states solution and on the comparison between PLFP and other major organizations within Palestine such as Hamas and PIJ.

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[123] Ibid Paragraph 668.

[124] Ibid Paragraph 707.

[125] In 2003, a Colombian government report estimated that the FARC-EP has an annual income of US$ 1.3 billion, of which US$ 630 million from drug trafficking and US$ 91 million from ransom. Extortion is estimated to account for around 41% of FARC-EP's earnings.

[126] Ibid Paragraphs 723-724.

The documents showed that at the time of the research the PLFP counted around 800 members but that the support among the population was higher precisely due to the intransigent stance on peace negotiation with Israel. The reports also demonstrated that the organization was responsible for some of the most spectacular hijackings and hostage taking between the 1960s and 1970s always with the purpose to draw international attention to the Palestinian national struggle.

In recent years however the strategies of the organization have changed focusing mostly on activities at the regional level with attacks largely directed to Israeli settlers. [127]

The Supreme Court of Denmark concluded therefore that the PFLP is to be considered as a terrorist organization on the ground that it is "*a militant organization that for the past forty years has used terror to achieve its goals: The establishment of a Palestinian state and the destruction of Israel. Although the organization has the capacity to carry out terrorist acts, it does not pose as great a threat as Palestinian Islamic Jihad and Hamas, nor does it have nearly the same level of popular support. The PFLP is listed on both the EU and US terrorist lists. The PFLP has often publicly claimed responsibility for its attacks on Israeli settlers and considers them fully legitimate in the fight against Israel*." [128]

With regard to the positions taken by the defendants the Court noted they were all aware (or at least considered highly probable) that the two organizations fell under the scope of Article 114 of the Danish Penal Code[129] and that the fact that the revenues that were to be sent to the two organizations were intended for humanitarian purpose was irrelevant to the question of guilt[130], as it was also the fact that the defendants did not considered neither FARC nor PLFP to be terrorist organizations.

The members of Fighters + Lovers were finally sentenced under Article 114b of the Danish Penal Code by the Supreme Court that also agreed with the provisions of confiscation of the materials and the website of the organization.

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[127] Ibid Paragraph 742.

[128] Ibid Paragraphs 745-746-747.

[129] Ibid Paragraph 618.

[130] Ibid Paragraph 619.

2.4.3 Terrorist Organization or Non-State Actors?

The value of *Fighters + Lovers v. Supreme Court of Denmark* is embodied in the controversies it was able to open up.

The first controversy is whether different organizations could be unequivocally be defined as terrorist groups or whether the struggle they are pursuing is legitimate.

The second controversy is whether those same organizations are fighting against countries that are democratic and respectful of human dignity or whether they are actually resisting abusive and aggressive states.

While the assessment of the definition of terrorist group with regard to FARC and the PFLP was analyzed extensively during the legal dispute of 2009 the Court by no means decided to analyze also whether the democratic conditions of both Israel and Colombia could be valued as respectful of human dignity and pluralism.

The court took a biased position towards the organizations under scrutiny.

The same NGOs and human rights reports that were used against both the FARC and the PLFP could have been crucial also in evaluating the numerous violations to the citizens of the sovereign states of Israel and Colombia.

It was the same Amnesty International, in fact, to report in 2002 the numerous violation of the IDF in both Jenin and Nablus. Here the IDF was responsible of the unlawful killings of Palestinians, of compelling Palestinian to participate in military operations so to acts as *human shields*, it was allegedly guilty of torture and cruel, inhuman or degrading treatment of detainees, of blocking medical and humanitarian reliefs, and of the destruction of property and infrastructures[131].

It reported the struggle of more than 800.000 Palestinian in the occupied villages in the West Bank in the Summer of 2002, that were suffering for the prolonged curfews and

[131] Amnesty International. "*Israel and the Occupied Territories: Shielded from Scrutiny: IDF Violations in Jenin and Nablus*." Amnesty International, 4 Nov. 2002, www.amnesty.org/en/documents/MDE15/143/2002/en/.

closures that limited their freedom of movement and also disclosed the administrative detention without charge or trial of hundreds of them.[132]

In 2003 Amnesty International also stated that "*The establishment of settlements (in the Gaza Strip and in the West Bank) violates international humanitarian law and constitutes a serious violation of the prohibition on discrimination. The presence of settlements has led to mass violations of human rights of the local Palestinian population."*[133]

In 2005 it denounced not only the deliberate killings of Palestinians by Israeli settlers in the occupied territories but also that the Israeli authorities had never taken concrete measures to prevent the daily harassment and violence towards Palestinians and their property; this behavior had ultimately created an atmosphere of impunity with will necessarily encourage other attacks[134]

Finally, it had reported in September 2007 the declarations of Israeli government ministers which were considering cutting off water and electricity supplies to the Gaza Strip.

At the same time, with reference to the assessment of the situation in Colombia, it was again the same Amnesty International that criticized and expressed concerns over the events and the policies of the government of President Alvaro Uribe in Colombia.

The "*Democratic Security*" policy of 2002 of the newly elected president granted judicial powers to the security forces, powers that were "*quite simply, contrary to the most fundamental principle pf law, regardless of any safeguard that may be included*", with the same apprehension was welcomed the arms law proposed by the government, a law that could have create a networks of informants and peasants soldiers resulting in paramilitarism being disguised as a new legal clock. The office of Arube was also accused

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[132] Amnesty International. *"Israel / Occupied Territories: End Collective Punishment of Palestinians in Occupied Territories."* Amnesty International, 21 July 2002, www.amnesty.org/en/documents/mde15/121/2002/en/.

[133]Amnesty International, *"Israel and the Occupied Territories: The Issue of Settlements Must Be Addressed according to International Law."* Amnesty International, 7 Sept. 2003, www.amnesty.org/en/documents/mde15/085/2003/en/.

[134] Amnesty International *"Israel/Occupied Territories: Amnesty International Condemns Killing of Palestinians by Israeli Settler, Calls for Urgent Measures to End Settlers' Impunity*." Amnesty International, 17 Aug. 2005, www.amnesty.org/en/documents/mde15/046/2005/en/.

of a tendency for impunity of those under its control responsible for human rights violations.[135]

According to numerous Amnesty International's reports in fact these policies "*menace accountability, threaten to weaken the ability of the state institutions to monitor and investigate alleged human rights violations, and may usher in a resurgence of outlawed paramilitary groups*"[136]

Uneasiness was again expressed in 2006 when Colombia was criticized for having granted a "*green light*" to attack human rights defenders in the country aimed at silencing the groups and preventing the spread of opposition moments[137]

As shown the assessment of the Danish Supreme Court only focused in analyzing the first controversy completely disregarding the second one despite the long legacy of Denmark in the protection of legitimate resistance against oppressive states. The biased positions taken by the court were allegedly the result of political pressures coming from the Colombian government of Uribe to stop *Fighters + Lovers* that ultimately led to their imprisonment.

Fighters + Lovers v. Supreme Court of Denmark ultimately represents another case of arbitrariness and influence of the political landscape over the enlisting of individuals and entities and reaffirms once again the problematic absence of a defined meaning of "*terrorism*" at the international level.

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[135] Amnesty International "Colombia: The "*Democratic Security" Policy Is Not a Human Rights Policy*." Amnesty International , 13 Dec. 2002, www.amnesty.org/en/documents/amr23/142/2002/en/.

[136] Amnesty International "*Colombia: Human Rights and USA Military Aid to Colombia, IV: A Document Published Jointly by Amnesty International, Human Rights Watch and the Washington Office on Latin America."* Amnesty International, 30 Sept. 2002, www.amnesty.org/en/documents/amr23/122/2002/en/.

[137] Amnesty International. "*Colombia: Government Gives "Green Light" to Attacks against Human Rights Activists."* Amnesty International, 6 Sept. 2006, www.amnesty.org/en/documents/amr23/038/2006/en/.

2.5 – A Comparison Between the Three Legal Challenges and their Outcomes

Regardless of the rate of success of these three legal challenges the significance of them all resides in their ability to change the outlook of the strategies of blacklist chosen by the United Nations and in the space of conflict they opened up between the former and the European Union.

In this matter the case of PMOI is the most significant, the group was the first organization to successfully challenge the terrorist blacklist before a court of the European Union, which was able to understand the deeper deficiencies of a system set up without considering accountability or transparency. The obligatory nature of the "statement of reasons" decided by the Court ended the continuous breaches in the right to fair trial against the individuals listed. The same was true for the inadmissibility of poor or ambiguous evidences presented within the "statement of reasons", which ceased the confidential nature of the reasons themselves and the use of the blacklist as an instrument of diplomacy and accords between states.

Others judicial gaps were noted by the court in the challenges brought by the Segi organization, where the "punitive" nature of the measures of listing crucially undermined their validity. Considering the measures of the freeze of assets and the travel ban as administrative measures would have been valid with the presence of an administrative body capable of lifting the sanctions, which is something that was and is still completely amiss. The indefinite length on the measures and the absence of an autonomous and independent tribunal to examine the de-listing requests determined their punitive nature. The court could not offer adequate protection to the Segi organization.

The question of diplomacy and arbitrariness of the evidences seen during *People's Mojahedin Organization of Iran v. Council* is present also on the unsuccessful challenge of the company Fighters + Lovers. The concept of the deliberations of the court was not based much on the company itself rather on the organizations supported, the FARC and PFLP.

The case is focused completely on the interpretation of "terrorist organization" and the evidences of the offences of both FARC and PFLP throughout the years, failing however to mention the slightest oppressive measures taken respectively by the Columbian government of Uribe and the government of Israel against the civilian population.

It is crucial to highlight that differently from PMOI, nor the FARC nor the PFLP had renounced violence or ended the terrorist offences at that point in time. The court in its assessment should have at least evaluated the nature and the root causes of the offence of the organizations, in order to better define them as terrorist organization or non-state actors.

The question of confidentiality in the preventive instruments of the blacklist, the diplomatic and the discretionary nature of the decisions for listing and the judicial guarantees deployed by the European Union thanks to these cases will be thoroughly analyzed in the following chapter.

CHAPTER 3: THE PROBLEMATIC NATURE OF THE BLACKLISTS

3. 1 – Concerns associated with the Lists

3.1.1. The Absence of a Unitary Interpretation of "Terrorism" and its Implication

A far-reaching impact of blacklisting has been associated with the discrimination at the criminal and at the societal level of many diaspora communities that engage in the struggle for self-determination.

Despite more than two decades of counter-terrorism policies and an extensive legislative framework at any level (international, regional and national) a normative blackhole persists: the complete absence of a unified and consolidated definition of the term *terrorism*.

In none of the Security Council Resolutions to combat terrorism it is present the minimum suggestion that a solution to this omission was tried to be searched.

This is mainly for three reasons.

The first motivation is that seen the different countries that compose the Security Council (whether at the time of the UNSCR 1267 in 1999 or nowadays) it is very unlikely that they would have been able to take a unified decision over the term terrorism, as it was remote the possibility that all the other Member States of the United Nations would have consent in such important matter decided only by 15 countries.

Secondly, the apprehension and the urgency to create a real framework for counter-terrorism policy, especially after the 11th of September, meant that no such philosophical question could be answered in such short notice.

Finally, the legal definition for the effective development of counter-terrorism laws was devolved to national states, to which it was (and it is still) granted much discretion in the identification of the "*terrorist groups*" and the meaning of "*terrorism*".

The failure to define terrorism not only impedes the effectiveness itself of counter-terrorism policies but it often impairs with the human rights of the listed individuals especially in light of the self-determination of a country or a population[138].

The International Covenant on Economic, Social and Cultural Right defines in Article 1 the right to self-determination in this way: "*All people have the right to self-determination. By virtue of that right they freely determined their political status and freely pursue their economic, social and cultural developmen*t"[139].
As shown in the analysis of the legal challenges in Chapter Two of this thesis, the absence of a definition of terrorism criminalizes and targets as "*terrorist organization*" groups that defined themselves as "*national liberation movements*".
The Muslim population has faced drastic consequences in the aftermath of 9/11, when the implementation of the measures to combat terrorism in a discriminatory fashion by the national intelligence services and the law enforcement authorities have led to the exclusion and alienation of certain parts of the population[140]. The same process of criminalization has happened for groups such as the Tamil Tigers, the PKK and Hamas which despite the violent strategies used by the groups have never operated outside the regional sphere of their struggle. This process of criminalization poses a threat not only in hindering the cooperation and a possible solution to the conflict they are fighting, but also in criminalizing the supporters of their cause which are constantly perceived as suspects.

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[138] Saul, Ben. "*The Legal Black Hole in United Nations Counterterrorism*." IPI Global Observatory, 2 June 2021, theglobalobservatory.org/2021/06/the-legal-black-hole-in-united-nations-counterterrorism/.

[139] International Covenant on Economic, Social and Cultural Right.
Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights

[140] ENAR; "*Impact of the Counter-Terrorism and Counter-Radicalization Measures on Groups at Risk of Discrimination and Racism Emerging from ENAR Research in 5 EU States for Submission to UN Special Rapporteur on Religion and Belief Background and Scope of the Report*."
Available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Religion/Islamophobia-AntiMuslim/Civil%20Society%20or%20Individuals/ENAR.pdf

In this sense proscription regimes have been the main pre-text for banning demonstrations and to restrict activities of solidarity for nationalist causes.

The case of PMOI is the most telling, the opposition movement that was already being subjected to gross violations of human rights by the Teheran regime was inserted for the first time in a blacklist by the US State Department in 1997 as a "*goodwill gesture for Tehran and its newly elected moderate president, Mohammad Khatami*[141]", a policy that effectively led to an open dialogue between the two countries (even if short-lived) that had stopped since the 1980s.

On the same note, the European Union enlisted the organization due to pressures from Tehran and as a precondition over EU's access to Iranian nuclear facilities[142].

In light of those information, the claim of PMOI before the CFI in *People's Mojahedin Organization of Iran v. Council* (2002), that they were being enlisted at the insisting requests of the Tehran regime and only through evidences and materials produced and distributed by the same authorities that were persecuting them (a claim that was never denied by the European Council) appears rather plausible.

The same has been true for the Kurdistan Workers' Party (PKK), on which controversial and opposite opinions have circulated since it was enlisted by the European Council in 2004, without much explanation and through a decision that was more political than not.[143]

Despite the support by many democratic countries throughout the years such as Finland, Sweden and even the United States, and the despite the ruling of the Belgian Supreme Court that recognized the evidences produced by the Turkish government as unfunded defining the PKK as a non-state party in a non-international conflict and not as a terrorist

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[141] Kempster, Norman. "*U.S. Designates 30 Groups as Terrorists*." Los Angeles Times, 9 Oct. 1997, www.latimes.com/archives/la-xpm-1997-oct-09-mn-40874-story.html

[142] ECCHR. Blacklisted: Targeted Sanctions, Preemptive Security and Fundamental Rights. Ben Hayes, Gavin Sullivan
(2010). Available at: https://www.ecchr.eu/en/publication/blacklisted-targeted-sanctions-preemptive-security-and-fundamental-rights/ [At p.87]

[143] Ibid.

group[144], the organization is currently still present in the autonomous list of the European Union.

The consequences of this unconcluded normative blackhole are even broader when considering the framework of cooperation between states.

From a purely practical standpoint, the absence of an agreed definition of terrorism and the consequent arbitrary delineation given at the national level may preclude cooperation between states simply on the ground of differed interpretations[145] which might result in impunity of the offenders or just pure refusal of cooperation.

The same concerns arise in case of global conflict resolution, in light of the fact that the majority of the "*terrorist organizations*" enlisted have nationalistic aims. Indeed, the proscription of those organization through the "terrorist list" has had mostly the consequence of marginalizing those groups and adversely affecting international and regional dialogue, preventing the states to pertain negotiations with non-state actors to reach the resolution of such conflicts.

For instance, in 2006 due to the difficulties to act as a neutral facilitator at the negotiating table for the peace process between the government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE) Norway felt the necessity to withdraw its support for the European implementation of UNSCR 1373 (2001).

According to the UNIDIR report on Non-State Armed Groups "*the European Union's decision to include the LTTE on its list in May 2006 was widely reported to have negatively impacted the Sri Lanka Peace process*" since not only "*the LTTE demanded the departure of the international monitors of the Ski Lanka Monitoring Mission*" but such decision also gave "*charte blanche for the Sri Lanka government to seek a military solution to the conflict*[146]".

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[144] Times, The Brussels. "Belgian Government Defies Ruling of Its Supreme Court on PKK." www.brusselstimes.com, 30 Jan. 2020, www.brusselstimes.com/92787/belgian-government-defies-ruling-of-its-supreme-court-on-pkk.

[145] Saul, Ben. "*The Legal Black Hole in United Nations Counterterrorism*." IPI Global Observatory, 2 June 2021, theglobalobservatory.org/2021/06/the-legal-black-hole-in-united-nations-counterterrorism/

[146] UNIDIR. "*Engaging Non-State Armed Groups"*. Printed at United Nations, Geneva, Apr. 2008. https://unidir.org/files/publication/pdfs/engaging-non-state-armed-groups-en-326.pdf [At p. 20]

It is to conclude that the arbitrariness in the interpretation of the word terrorism has been and could be in the future used as an ideological tool in the fight for self-determination and that as long as this lacuna is not corrected it might be easily manipulated by the political landscape.

3.1.2. The question of Preventiveness in Terrorism.

The preventive and pre-emptive nature of the measures taken against the individuals and entities enlisted for the purpose of combating terrorism is the central property of the measures.

As mentioned in the First Chapter, the main rationale behind the entry into force of the smart sanctions, which are usually directed to decision-makers and governmental elite of a country, is to put pressure of specific key figures that will then compel and urge the head of state to stop the illegitimate action or at least to sit at a negotiating table.

The case of terrorist blacklist differ extensively in this matter, the terrorist group have no one to compel (except maybe for their leaders) and the preventive and proscriptive measures to which are subjected take more a form of "punitive measures" in which the freeze of assets of the individuals resemble a de facto requisition. [147]

The disastrous terrorist attacks of the early 2000s and the expansion of terrorism at the international level rather than the regional one, have generated great fears among the population which necessarily called for the development of preventive strategies[148]. Punishing the perpetrators after the fact was no longer sufficient, the state had the duty to protect its citizens, "*yet just because the evidentiarily standard for the adoption of individuals sanctions is set lower than for criminal measures this does not prevent them from having punitive effects comparable to criminal charges*"[149]. The circumvention of

[147] Onderčo, M. (2011). Managing the Terrorists: Terrorist Group Blacklisting in Beck's World. Perspectives, [online] 19(1), [At p. 31]. Available at: https://www.jstor.org/stable/23616170

[148] Eckes, C. (2009) EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions OUP: Oxford [At p. 59]

[149] Ibid.

the normal procedure of criminal action is not an unwanted consequence of preventiveness but the rationale behind it, and according to this logic the role of politics is not to avert the existing threats but to prevent the emerging risk from materializing[150].

The question of preventiveness and the idea of pre-crime started to gain notoriety after the attacks of the 11th of September 2001 and it is the introduction and the slow shift from individual offending towards pre-emptive strategies, whose objective is to identify the menaces and to intervene before the crime takes place[151].

"*Pre-crime measures are those measures that link substantial coercive police or state action to suspicion without the need for charge, prosecution or conviction. Pre-crime also includes laws and the police power attached to them than expand the remit of the criminal law beyond the extant offences of conspiracy and attempts to include activities or associations that are deemed to precede the substantive offence targeted for prevention[152]*".

Prevention in case of counter-terrorism however, is not understood as pre-crime at a criminology level, it is not understood as non-punitive measures or as the creation of strategies to address the context and the roots that might lead to crime, these measures of counter-terrorism already criminalize the future acts of these entities, seriously harming their daily life while not searching for the root causes[153].

As argue by Mcculloch and Pickering in *Pre-Crime and Counter-Terrorism: Imagining Future Crime in the 'War on Terror'* the framework of counter-terrorism is the most suitable project for the expansion of the scope of pre-crime, the label terrorist is in fact inherently pre-emptive. While a criminal is considered as such only after a Court has

[150] Onderčo, M. (2011). Managing the Terrorists: Terrorist Group Blacklisting in Beck's World. Perspectives, [online] 19(1), [At p. 30]. Available at: https://www.jstor.org/stable/23616170

[151] McCulloch, J. and Pickering, S. (2009). PRE-CRIME AND COUNTER-TERRORISM: Imagining Future Crime in the 'War on Terror'. The British Journal of Criminology, [online] 49(5), [At p. 628] Available at:
https://www.jstor.org/stable/23639183

[152] Ibid. [At p. 630]

[153] Ibid. [At p. 629]

expressed its verdict according to the principle of the presumption of innocence, the label of terrorist or terrorist organization appears not to defer from this principle.

Under the legal framework analyzed, sanctions and its consequent harms are applied in advance without the need for a trial, and even in case the trial has been of positive outcome for the individuals in question the risk to be re-inserted in the list and under the label of "*terrorists*" is always present; deeming and proscribing terrorist organization as such is mostly a political and diplomatic process than a judicial one, where the confidentiality of evidences (if there are any) and the unavailability of a ultimate definition for terrorism have created an environment where the label "*terrorist*" extends beyond reasonable suspicion, presumption of innocence and evidence-based justice process[154].

This approach to pre-crime represents a new focus of the states on national security, in which the difference between domestic and foreign policy are increasingly blurred.

In the study conducted by Michael Onderčo in *Terrorist Group, Blacklisting In Beck's World* the professor analyzes how the framework of blacklisting at the European level is perfectly in line with the concept of *Risk Society* advanced by Professor Ulrich Beck in *Risk Society: Towards a New Modernity,* the article explains how the human rights derogation that will be described further in the thesis, are the result of management risk.

According to Onderčo M. in fact the targeted measures over the individuals proscribed as terrorists have created three shifts in the governance of national security.

The first shift is the one from the state agents to the individuals, which in a broader analysis in simply the shift at the international level from the use to comprehensive sanctions to targeted ones, and it is explained in the different threats posed at the global level on the territorial expansion of terrorism since the 11th of September 2001 and consequently the pressure put over the domestic elite by the rightly frightened public opinion.

The second transformation is the enlargement of the subjects involved in the measures[155], which are enforced not only to the terrorists themselves but also to the supporters and helpers of the "*terrorist cause*". This enables again the political elite to create wider and

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[154] Ibid. [At p. 630]

[155] See for instance *Segi and Others and Gestoras Pro-Amnistía and Others v. 15 States of The European Union*. ECtHR. (2002)

far-reaching strategies to tackle down the organization's network from its roots. These decisions are administrative but their effects are undoubtedly judicial.
Finally, the third shift is precisely the temporal one, so the focus of the policy-makers not on the past actions of the terrorists, that would require them to trace all evidences (which might be confidential or non-available by some states) plausible enough to stand in court, but on the future actions so as to preclude the commission of future terrorist acts.

The decision to define the measures of enlisting and the measure of the freeze of asset as administrative rather than judicial grants the possibility to policy-makers and institutions to avoid the long procedural safeguards that would be needed before a court, all in the sake of public protection and prevention.
It is to be argue, however, that these measures, despite their crucial goal in combating terrorism, cannot be defined as administrative, since their severity, the harmful impact over the individuals, the various barriers over a just and fair process and the open-ended nature of the designations have transformed them in quasi-punitive judgement.
As noted by the report of the ECCHR *Blacklisted: Targeted Sanctions, Preemptive Security and Fundamental Rights*: "*that this quasi-criminal sanction could be reached on the basis of nothing more than an assessment of preliminary police investigations or intelligence material by a civil servants is arguably an affront to the principle of natural justice*[156].

3.1.3. Substantial Rights Associated with Listing

The following section seeks to document the several fundamental rights that have been oftentimes derogated for the higher objective of fighting the expansion of international terrorism and of preventing terrorist offences to become reality.

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[156] ECCHR. Blacklisted: Targeted Sanctions, Preemptive Security and Fundamental Rights. Ben Hayes, Gavin Sullivan
(2010). Available at: https://www.ecchr.eu/en/publication/blacklisted-targeted-sanctions-preemptive-security-and-fundamental-rights/ [At p.84]

The measures of proscription, such as the freeze of financial assets and the inability to move freely, directly interfere with the Right to Private and Family Life, the Freedom of Assembly and of Association, Freedom of Movement, Right to Property and the Right to Liberty and Security. The proportionality of such derogation is the focus of our assessment.

3.1.3 (a) Right to private and family life

Many of the appeals brought before a court by the individuals and entities sanctioned contested the infringement of their Right to Private and Family Life, imposed by the institutions who listed them (whether that was the Sanction Committee of the Security Council, the European Council or one of the Designating States).

The Right to Private and Family Life is protected by the European Convention of Human Rights (ECHR) and it is defined as follow:

1. "*Everyone has a 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 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 the disorder or crime, for the protection of health or morals, or for the protection of the rights and the freedoms of others.*[157]"

A broad meaning of the term "private life" includes the possibility for every individual to self-determine oneself, its sexual orientation, its relationships, its lifestyle, its dresses and the development of a personal identity. It also means that one's personal information and one's records are not to be shared in public platforms and are to be kept secured.

This right is subject to derogations for the achievement of greatest objectives such as the protection of public safety and the freedom of others, objectives that clearly cannot be maintained in case of terrorist attacks.

[157] European Convention on Human Rights. Section I. Article 8.

Available at: https://www.echr.coe.int/documents/d/echr/convention_ENG

The counter-terrorism measures under the framework of blacklisting directly impact and abrogate from the Right to Private and Family Life for the purpose of major objectives. It has been shown in many case how the measures of the freeze of assets and the visa ban have created interference also from the rights of close family members of the blacklisted, despite not being involved in any criminal activity. Those family members were also subjected to the measures as "*persons acting on their behalf or at their direction*[158]" so as to avoid any availability of funds to the listed individual[159].

3.1.3 (b) Freedom of Assembly and of Association

This right is crucial in the evaluation of the blacklisting framework under Resolution 1373 (2001). All the affiliations of the individuals listed with illegitimate entities and organization are the justification for the abrogation of such right.

The Freedom of Assembly and of Association is covered in the ECHR by Article 11 which states that:

1. *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
2. *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.*

The limitations of the Freedom of Assembly described in Paragraph 2 of the Article can be enforced by the public authority if deemed necessary and proportionate. As the terrorist

[158] UNSCR 1390 (2002).

http://unscr.com/en/resolutions/doc/1390

[159] See: C-340/08 – *M. and Others v. Her Majesty's Treasury* (2010)

Available at: https://curia.europa.eu/juris/liste.jsf?language=en&num=C-340/08

groups and entities can be effectively considered as an association, the violation of such rights has been appealed and contested many times.

The most pertinent cases have been already analyzed in the Second Chapter of the thesis and are the one that have involved the Segi Organization and the Danish Company Fighters + Lovers.

In *Segi and Others and Gestoras Pro-Amnistía and Others V. 15 States of The European Union* (2002) the applicants complained that their right of to Freedom of Expression was being infringed (under the measures of listing) and that their freedom of action as an association was being directly challenged; the concerns of Fighters + Lovers were based on the same ground.

As the label of such groups shift from a mere "*association*" to the identification as a "*terrorist organization*" the derogation from the Freedom of Assembly and of Association is an obvious consequences, since the objectives of the counter-terrorist measures are clearly linked with the protection of public interest, national security and crucially the prevention of crimes on the state's territory.

3.1.3 (c) Freedom of Movement

The legal base of the Freedom of Movement is expressed by Article 2 of Protocol IV of the ECHR, according to which:

1. *Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
2. *Everyone shall be free to leave any country, including his own.*
3. *No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*
4. *The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.*

This rights is comprised therefore of an internal dimension, under which a person can move freely within its own state and choose its own residence, and an external dimension under which each citizen has a right to leave its state.

The inclusion of the travel ban or visa ban as one of the measures to which enlisted individuals are subjected is a clear derogation from this right.

One of the most telling cases concerning this particular rights has been described as a "prison without walls" and it is the case of the Sudanese citizen Abousfian Abdelrazik.

After being imprisoned for his political views against the military coup of Omar Al-Bashir (1989), Mr. Abdelrazik was able to flee to Canada, where he was granted the refugee status and the Canadian citizenship.

Despite never being charged with a criminal offence he was suspected to be linked with the terrorist group of Al-Qaeda soon after the attacks of the 11th of September and in 2003 fled back to Sudan. According to Mr. Abdelrazik he fled back to visit his mothers, while according to the Canadian government he was escaping the investigation on his person.

During the visit he was detained and tortured by the Sudanese authorities and questioned by the Canadian Security Intelligence Services (CSIS) for a period of eleven months the first time and a period of nine months the second time. He was finally released by the Sudanese forces in July 2006.

Upon returning to Canada he found out that he was placed on the un 1267 terrorist list at the request of the US Government, hence he was prevented from leaving.

Since it was cleared from all charges by both the Canadian and the Sudanese authorities he petitioned the Canadian government to intervene in his behalf with the un Sanction Committee asking to be de.listed. This request was however refused by the Committee without any reasons being offered.

In April 2008 he was granted temporary refuge at the Canadian embassy in Khartoum. The singularity in the case of Mr. Abdelrazik is represented by the time he spent in the embassy. He slept in a mattress and then in a bed in the embassy's lobby for a period of fourteen months, a period in which the Canadian authority were still resistant in allowing the man to go back home, adducing to many excuses related to travel documents and money allowances.

This extensive derogation from the right to move freely of the Canadian citizen cannot be considered in line with any principle of proportionality.

The 27th of June 2009 Abousfian Abdelrazik was allowed to fly back to Canada. He will remained enlisted under the UN Security Council Resolution until the 30th of November 2011.

3.1.3 (d) The Right to Property

The measures of freezing of assets irrespectively on whether they can be defined as administrative measures as in the case of the UNSCR strategies directly interfere with the rights of the individuals. This is one of the most draconian impact of to the blacklisted.
Those who fall within the measures of asset freeze are indefinitely subject to the unavailability and impossibility to access any forms of property or economic resources with the only exception of those coming from the state itself.
The first Security Council Resolution on the strategies to combat terrorism that decided on the measure of freeze of assets and in general of all the financial resources under the list never mentioned any guarantees over the minimum income to sustain the personal necessities of the individuals enlisted.
The guarantees on such necessities have been introduced by UNSCR 1452 (2002)[160]. Under Article 1(a) the Security Council provides that the freeze of financial funds of the enlisted persons does not cover "*necessary for basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges for routine holding or maintenance of frozen funds or other financial assets or economic resources*"; all of which need to be approved by the Committee.

The Right to Property under the European Convention on Human Rights is protected by Article 1 Protocol I. The same article contains the possible derogations from this right, while contracting parties are allowed to "*control the use of property*" in case of general

[160] UNSCR 1452 (2002)
http://unscr.com/en/resolutions/doc/1452

interest, the case of "*deprivation of property*" is generally prohibited unless exception are provided by law always in light to the protection of public interests.

While the derogation of this rights is completely legitimate in achieving a major aim like combating terrorism, if paired with absence of a fair and effective process of judicial review and with the unlimited duration of the financial measures the consequences for the listed individuals are critical and might effectively bring to the infringement of their rights.

As reported by Eckles in *EU Counter-Terrorist Policies and Fundamental Rights* (2009) the economic consequences of the freeze of assets are even more severe than the measure of listing[161] (and therefore of by defined as a terrorist) itself. The combination of the two takes more a criminal and punitive characters rather than just administrative one which consequently means that "*even if the individual sanction do not fit in the traditional pattern of criminal law and even if they do not satisfy all criteria in a straightforward application, they do possess clear characteristics of criminal law, which must be taken into account in the application of article 6 ECHR*[162]" the same Article that has oftentimes not been respected by the contracting parties when blacklisting entities or individuals.

While the effectiveness overall of the individuals financial sanction in combating terrorism will be analyzed and discussed in the Third Chapter of the thesis (paragraph 3.3.1), it can be currently concluded that the inseparable nature of the Right to Fair Trial (Art 6 ECHR) and article the Right to Property (Art 13 ECHR) poses great threat to the effective protection of the latter.

3.1.3 (e) Right to Liberty and Security

Article 5 of the ECHR is focused on the protection of one's Right to Liberty And Security, described as follow:

[161] Eckes, C. (2009) EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions OUP: Oxford. [At p.165]

[162] Eckes, C. (2009) EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions OUP: Oxford. [At p.167] S

1. *Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
    a) *The lawful detention of a person after conviction by a competent court;*
    b) *The lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;*
    c) *The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*
    d) *The detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;*
    e) *The lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;*
    f) *The lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*
2. *Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.*
3. *Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*
4. *Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

5. *Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.*

According to Right to Liberty And Security no one can be imprisoned or detained without good reasons and only after the being promptly brought before a court.
There are several cases of derogation or infringement of this specific right, one of the most (in)famous one is the case of the Saudi Arabian citizen Mr. Abd Al Rahim Hussayn Muhammad Al Nashiri.
Mr. Al-Nashiri was captured in Dubai through a US-Polish joint operation an transferred in "Salt Pit" a secret CIA prison in Afghanistan, then into another secret facility in Bangkok and finally in Poland where he was subject to ill-treatments, abuses and torture. In 2006 he was then moved under US custody in Guantanamo Bay where he was continuously tortured and abused.
In April 2011 the US military commission's prosecutors brought charges against Mr. Al-Nashiri with the intent to seek the death penalty. He soon filed an application before the ECtHR which three yeast later issued the final judgment in favor of Mr. Al-Nashiri.
The court in 2014 held that Poland had violated the ECHR notably by Article 5, the Right to Liberty and Security, on the account on the applicant's undisclosed detention in Poland's territory and in light of the permission given by Poland to the United States authorities to transfer the applicant to another undisclosed detention facilitiy despite being fully aware of the risk of torture present for Mr. Al-Nashiri.
The case of Mr. Al-Nashiri falls in the scope of criminal offences as he was effectively accused of having committed a terrorist act. Differently from the case of blacklist therefore the measures taken were penal and not just purely administrative.

While oftentimes this rights has been derogated by the UN Sanction Committee, the measures imposed to the listed individuals are not described as criminal but as administrative, the pre-emptive nature of these measures link intrinsically this right to the right of fair trial and the right to be informed, that will be analyzed thoroughly in the next section.

3.2 – The Legal Challenges Associated with Blacklisting

3.2.1 The Procedural Rights Associated with Listing

Under the Guidelines of Committee for the Conduct of its Work, which has been amended the last time the 10th of ,arch 2023, are described the procedure for listing.

The measure for listing is based on a submission received by the Member States of the Security Council[163]. Before proposing such name for inclusion it is requested to the state to investigate on the various information necessary, such as the state of residence or nationality "*to the extent possible*"[164] and to investigate on the evidence that have brought to the inclusion of such person or entity.

Crucially "*a criminal conviction is not a prerequisite for listing as the sanctions are intended to be preventive in nature*[165]"

The designating member are supposed to provide a detailed statement of case filled with evidences and justifications for listing with "*as much details as possible*", this same statement of case is the basis for the development of the "Narrative Summary of Reasons" and shall be releasable upon request in "*exception for the parts the designating states identifies as being confidential to the Committee*"[166].

The Committee is then entrusted in considering the listing request for a period of 10 working days.[167]

Finally "*on the same day that a name is added to the ISIL (Da'esh) and Al-Qaida Sanctions List, the Committee shall, with the assistance of the Monitoring Team and in coordination with the relevant designating State(s), make accessible on the Committee's*

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[163] Guidelines of the Committee for the Conduct of its Work.

Security Council Committee Pursuant To Resolutions 1267 (1999). Paragraph 6(a). Available at: https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/1267_1989_2253_committee_10_march_2023.pdf

[164] Ibid. Paragraph 6(c)

[165] Ibid. Paragraph 6(d)

[166] Ibid. Paragraph 6(h)(V)

[167] Ibid. Paragraph 6(i)

website a Narrative Summary of Reasons for listing for the corresponding entry or entries. In addition to the narrative summary, the Secretariat shall, promptly after a name is added to the ISIL (Da'esh) and Al-Qaida Sanctions List, publish on the Committee's website all relevant publicly releasable information, where available"[168].

The guidelines of the Sanction Committee directly affect and interfere with two procedural rights, the Right to be Informed and the Principle of the Presumption of Innocence.

3.2.1 (a) Right to be informed

The right to be informed is lay down under Article 6 Paragraph 3(a) of the Right to a Fair Trial under which everyone is entitled "*to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him*."

However, of the fundamental deficiencies in the implementation of the blacklist at the international level has been the inability of the individuals to access the information which would be then be essential for their defense, namely the competent authority who is making the allegation and the evidence to support them.

The obligation to state reasons at the European level in *People's Mojahedin Organization Of Iran V. Council* was the greatest result in tackling this deficiency, according to the CFI ruling in fact the Statement of Reason must "*be notified to the person concerned at the same time as the act adversely affecting him, a failure to state reasons cannot be remedied by the fact that the person concerned learns the reasons for the act during the proceedings before the community court*" since " *the possibility of regularizing the total absence of Statement of Reason after an action has been started might prejudice the right to a fair hearing […] and the principle of equality of the parties before the community courts would accordingly be affected*[169]"

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[168] Ibid. Paragraph 6(q)

[169] Case T-228/02, Court of First Instance (Second Chamber), *People's Mojahedin Organization of Iran v. Council*.

Available at*:* https://www.refworld.org/cases,ECJ,4794b6d52.html. Paragraph 139.

Within the United Nations framework the possibility to access the evidence for blacklisting was the outcome of UNSCR 1822 (2008) which asked the Sanction Committee to "*make accessible on the committee's website a Narrative Summary of Reasons for Listing corresponding entry or entries on the Consolidated List*[170]".

The central deficiency however is still present, as noted by Professor Fassbender,[171] the targeted individuals are never informed prior of being listed, which entails that they do not have the opportunity to give any statement nor comment to prevent their inclusion within the list.

Such possibility is only granted after the decision to be inserted in the list has already entered into force and entails a long procedure for de-listing that more often than not ends before a court.

The impracticability of distributing the information to the listed individual resides on the pre-emptive nature of the measures which as seen in *PMOI v. Council* (2002) must have a "surprise effect"[172] , otherwise the objective of the measures themselves (namely to combat terrorism and to protect national security) would be jeopardize.

The main issue of contention remains the quality of the information under the un framework of the Narrative Summary of Reasons. The UNSCR 2255 (2015) defined the last updates over the characteristic of the Narrative Summary, in which the designating states should enter the justification for enlisting in a way "*as detailed and as specific as possible*[173]"of all the "*relevant public releasable information*". The imprecise wording of such notion pair with the fact that the inculpatory evidences are usually the based on confidential material and secret intelligence material creates another discretionary

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[170] UNSCR 1822 (2008). Paragraph 13.
http://unscr.com/en/resolutions/doc/1822

[171] Fassbender, Bardo. "*Targeted Sanctions and Due Process*". Study commissioned by the United Nations Office of Legal Affairs, 20 Mar. 2006. Available at:
https://www.un.org/law/counsel/Fassbender_study.pdf [At p. 4]

[172] Case T-228/02, Court of First Instance (Second Chamber), *People's Mojahedin Organization of Iran v. Council*.
Available at*:* https://www.refworld.org/cases,ECJ,4794b6d52.html. Paragraph 128

[173] UNSCR 2255 (2015). Paragraph 26.
http://unscr.com/en/resolutions/doc/2255

environment for the designating state that are able to release information as they deem sufficient.

Even in this case, the implementation under the European Union has been more specific and more resolute in tackling such obstacle. Even on the quality of the information *PMOI v. Council* (2008) was the trigger for change. It ended the confidential and secretive nature of the evidence within the "Statement of Reasons" creating a more transparent environment which is the minimum guarantee to ensure a fair process of judicial review and decision of de-listing.

3.2.1 (b) Principle of the Presumption of Innocence

Another principle that is effectively derogated is the Principle of the Presumption Of Innocence. Protected by Article 6(2) of the ECHR the preventive nature of the measures of listing necessarily lead to its derogation.

The current frameworks creates however the proper overturning of this principle. The individuals enlisted are first "convicted" in a certain way and then "processed" only in so far they are able to fight to be de-listed. While in light of the major objectives of the Sanction Committee such derogation is legitimate, the inability to offer a proper mechanism for judicial remedy (that will be thoroughly analyzed in the next section) is the major cause of concerns.

3.2.2 Procedural Rights Associated with De-Listing

The actions for de-listing and their effectiveness are strictly connected with the Right to Fair Trial and the availability of judicial remedies for the individuals and the entities blacklisted.

The first Resolutions for the adoption of the Consolidated List by the Sanction Committee did not provide any possibility whatsoever for the removal of someone from the lists. For almost 4 years the United Nation Security Council has favor of an aura of infallibility.

The first guidelines over some procedures for de-listing were introduced in 2002 but they were purely diplomatically. In order to be removed in fact the applicants should have petitioned the government of their country of citizenship, which would act as an agent for them. The state was then entrusted in producing eventual additional information at the requests of the petitioner (to the limits that they deemed fair) and in approving the de-listing request. The guidelines of the Committee for the Conduction of its Work[174] clearly demonstrated the diplomatic and discretionary nature of such process since they stated that " *if the petitioner's government wishes it may submit a de-listing request*" to the Committee.

The possibility for the petitioners to directly confer with the Sanction Committee (not even if they respected particular conditions) was never mentioned, it was mostly a negotiation (if the request was not denied by the petitioner's government) between the designating state and the petitioner's state.[175]

At the same time, the legally binding nature of the Security Council Resolution meant than even the possibility for a national court to find domestic remedies for de-listing was absent. In accordance with Article 103 of the UN Charter all Member States of the UN were obliged to apply the Resolutions. This meant that "*If, exceptionally, a domestic legal order allows an individual directly to take legal action against a Security Council Resolution, the United Nations enjoys absolute immunity from every form of legal proceedings before national courts and authorities, as provided for in Article 105, paragraph 1, of the UN Charter, the General Convention on the Privileges and Immunities of the United Nations and other agreements*[176]."

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[174] Guidelines of the Committee for the Conduct of its Work. Adopted on 7 November 2002 Security Council Committee Pursuant To Resolutions 1267 (1999). Available at: https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/1267_1989_2253_committee_10_march_2023.pdf

[175] Fassbender, Bardo. "*Targeted Sanctions and Due Process*". Study commissioned by the United Nations Office of Legal Affairs, 20 Mar. 2006. Available at: https://www.un.org/law/counsel/Fassbender_study.pdf [At p. 4]

[176] Ibid. [At p. 5]

This aura of immunity and infallibility was extensively contested by the Swiss Supreme Court in *Nada v. Switzerland (2007)*.

Mr. Nada had applied to the Switzerland government (to whom he was a citizen) to have its name de-listed from the national implementation of UNSCR 1267 under which he was enlisted the 9th of November 2001.

During the proceedings the government of Switzerland stated that it had no discretion over the decisions taken by the Security Council which according to Article 25 and Article 103 of the UN Charter prevailed over any other agreement. "*The government argued that, in those circumstances, Switzerland could not be held responsible for the implementation of the measures in issue*[177]".

The Court observed in this case that since the applicant was not able to apply to the national authority (which in case of de-listing would have been in breaching of Article 103), the Court itself could not lift the sanctions[178] and was obliged in the end to reject the appeal of Mr. Nada.

During the proceedings however the Supreme Court of Switzerland took the opportunity to criticize the lack of protection of fundamental rights of the UN framework.

It noted for example that the "*deprivation of liberty*"[179] should be accompanied with criteria such as the type of measure, it duration and the effect of the measures in question, criteria that were completely absent, as they were absent specific characteristics for the financial measures to which the applicant was subjected, that at the time of the decision had been already in force for five years.

The Court concluded that the minimum due process requirements were not present at the time, representing a clear violation of the fundamental rights of the applicants.

The Nada Case was a call for political reforms. The government of Switzerland soon after introduced some modification that allowed the authorities not to impose targeted sanctions to individuals who have been listed for more than three years without trial, for

[177] Case of Nada v. Switzerland. Application no.10593/08. Party Submission, Paragraph 1a https://hudoc.echr.coe.int/fre#{%22fulltext%22:[%22Nada%22],%22itemid%22:[%22001-113118%22]}

[178] Ibid. The Court's Assessment, Paragraph 201

[179] Ibid. The Court's Assessment, Paragraph 224

those who did not had the possibility to appeal before an impartial authority and those who were not subjected to any criminal charges.

Meanwhile UNSCR 1730 (2006) had introduced the administrative body of the Focal Point, aimed at improving the participation of the individuals, that for the first time could actually address a body of the United Nations for a de-listing request. The work of the Focal Point (which is the ancestor of the current Office of the Ombudsperson) was however purely administrative, it was not involved in the final decision of de-listing and could not even place the request on the Sanction Committee's Agenda for discussion. The criteria on how to deal with a de-listing requests were even in this case amiss of accountability and of transparency.

The criticism of the Swiss Supreme Court were also directed at the newly created Focal Point.
Mr. Nada had in fact appealed to the Focal Point in 2007. The administrative body however not only rejected his request to be removed, it also rejected Mr. Nada's request for information on the country that had designated him for listing and the reasons for designation over principles of confidentiality. "*The Focal Point reaffirmed the confidentiality of the process, but nevertheless informed the applicant that a state whose identity could not be disclosed had opposed its delisting*[180]". Despite the presence of the Focal Point and despite also the later creation of the Office of the Ombudsperson under USCR 1904 the substantive and procedural standard applied by the Security Council were considered in violation of fundamental principles of human rights and of rule of law, the system in place in the United Nations at the material time was thus far from offering a mechanism of protection. [181]

[180] Ibid. Paragraph 40

[181] Eckes, C. (2009) EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions OUP: Oxford [At. p 32]

3.2.2 (a) The De-listing mechanism now

The Guidelines for the conduct of the Committee also depict the current criteria for de-listing, there are three main methods to be removed from the Al-Qaeda Sanction Committee List: a request for de-listing may be asked by any of the Member States, from the Designating State and by the petitioner itself through the Office of the Ombudsperson.

According to the first method "*Member States may at any time submit to the Committee requests for delisting of individuals, groups, undertakings, and/or entities inscribed on the ISIL (Da'esh) and Al-Qaida sanctions list*.[182]"
The request should explain why the persons or entities listed are no longer in possess of the requirement to be included in the list and official documentation shall be brought as evidences[183], the Committee will then evaluate the request for 10 working days during which objections may be advanced by the Member State of the Committee.
If no objections are made by any of the Member States then de-listing request will have a positive outcome, if not those entities will remain in the list.
Under the request coming from the designating state the process is almost identical.

With regard to the third method, so by a direct request from the petitioner: "*a petitioner (an individual, group, undertaking, and/or entity on the ISIL (Da'esh) and al-Qaida Sanctions List or their legal representative or estate seeking to submit a request for delisting can do so either directly to the office of the or through his/her state of residence or nationality or an entity's state of incorporation*.[184]"
The question of confidentiality is present also in this case, the Member State are urged to provide the necessary information even if confidential to the Office but only "*to the extent possible*[185]" .

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[182] Guidelines of the Committee for the Conduct of its Work. Paragraph 7(a)
Security Council Committee Pursuant To Resolutions 1267 (1999). Available at:
https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/1267_1989_2253_committee_10_march_2023.pdf

[183] Ibid. Paragraph 7(d)

[184] Ibid. Paragraph 7(y)

[185] Ibid. Paragraph 7(aa)

The Office will then elaborate a Comprehensive Report on the de-listing request that will be evaluated by the Committee in 15 calendar days.
"*In cases where the Ombudsperson recommends in his/her Comprehensive Report retaining the listing, the Committee will complete its consideration of the Comprehensive Report and notify the Ombudsperson that the listing will be retained*[186]*."*
*"In cases where the Ombudsperson recommends delisting in his/her Comprehensive Report, and after the Comprehensive Report has been presented by the Ombudsperson, the Chair will circulate the delisting request with a no-objection period of 10 working day*s.[187]"

All these currently applied methods for de-listing have presented some deficiencies linked in particular with the right to fair trial and the availability of effective judicial remedies.

3.2.2 (b) The Right to a Fair Hearing

The individual sanctions giving effect both to the implementation of the Security Council Resolution both to the implementation of the same measures at the European Union level have oftentimes been annulled due to a clear breach in the Right to be Heard and in the compliance to the right to a proper and effective remedy.
As seen by the cases analyzed in the Second Chapter however this have not necessarily meant that the individuals and entities listed were conclusively removed from the terrorist list nor that the measure of asset freeze which was imposed to them was lifted. The right to a judicial review and the right to effective remedy remain the most routinely violated principles when applying counter-terrorism measures.

At the international level the right to an effective judicial remedy is guaranteed by Article 8 of the Universal Declaration of Human Rights (UDHR) that expressed that "*everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law*"

[186] Ibid. Paragraph 7(ff)

[187] Ibid. Paragraph 7(gg)

The same right are protected at the European level by the European Convention on Human Right (ECHR). However, a clear distinction is made between the Right to Fair Trial under Article 6 and the Right to Effective Remedy under Article 13.

Article 6 enshrines that "*everyone is entitle to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law";* that the judgment have to be public and that each individual is to be presumed innocent until proven guilty by law.

Article 13 on its part express that each time the rights and freedom of an individual are violated under the ECHR he/she shall have an effective remedy before a national authority, notwithstanding the offence that has been committed.

While there's apparent similarity between the two rights the rationale for their partition is related to the bodies legitimated to conduct the legal review; in the Right of Judicial Review only the "tribunals" have the legal standing to adjudicate eventual pleadings, meanwhile in the second case the eventual legal challenges might be also be decided before a non-judicial administrative body, which should have been, in the case of the Security Council Resolutions, the Office of the Ombudsperson.

At the UN level it is clear that the minimum degree of independence and impartiality are missing. As reported by Professor Fassbender in 2006 at the United Nations Office of Legal Affairs "*no effective opportunity is provided for a listed individual or entity to challenge a listing before a national court or tribunal, as UN Member States are obliged, in accordance with Article 103 of the UN Charter, to comply with resolutions made by the Security Council under Chapter VII of the UN Charter*.[188]"

While the report of professor Fassbender was written years before he introduction of the office of the Ombudsperson, the introduction of this new instrument by UNSCR 1094 (2009) for the implementation of the right to an effective remedy did not amount to such. A strict interpretation to the "remedies" in fact should have required for the Office of the Ombudsperson not only to be impartial and uninfluenced, but also to be able to take binding decisions.

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[188] Fassbender, Bardo. "*Targeted Sanctions and Due Process*". Study commissioned by the United Nations Office of Legal Affairs, 20 Mar. 2006. Available at: https://www.un.org/law/counsel/Fassbender_study.pdf

As reported by David Cortright and Erika de Wet in *Human Rights Standards for Targeted Sanctions* in fact "*The Ombudsperson has no direct decision-making authority on delisting requests, as his/her formal role is limited to the gathering and presenting of information. The delisting decisions are still taken confidentially and by consensus by the Sanctions Committee.*

The new procedures are an improvement and show some willingness by the Security Council to make incremental adjustments that allow petitioners to engage in dialogue with the Ombudsman and possibly receive more detailed information concerning their designation. However, the new procedures do not satisfy the international legal standard guaranteeing the accused the right to a fair hearing, which includes the right to be heard, the right to impartial and independent judicial review and the right to a remedy." [189]

The same concerns are present even to this day since there has never been a comprehensive and extensive correction.

The current Ombudspersons mandate to the ISIL and Al-Qaeda Sanction Committee is contained in Security Council Resolution 2610 (2021)[190] and its tasks are exactly the same as UNSCR 1904 (2009).

It is entrusted in dealing with the de-listing requests by the individuals and entities listed. However the only actions that pertain to it are gathering the information by the petitioners and directly interact with them, present comprehensive reports based on the available information and give recommendations to the Sanction Committee on the possibility of de-listing.

The decision on de-listing is still in the hands of the Sanction Committee. Clearly it is impossible to believe that the same organism that has taken the decision of enlisting might be considered independent and an impartial in offering a review to a de-listing request. None of these measures therefore amount to an "*independent and impartial tribunal*"

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[189] Cortright, David, and Erika De Wet. *Human Rights Standards for Targeted Sanctions*. 2010.
Fassbender, Bardo. Targeted Sanctions and Due Process. Study commissioned by the United Nations Office of Legal Affairs, 20 Mar. 2006. [At p.10]
Available at: https://www.fourthfreedomforum.org/wp-content/uploads/2020/06/Human-Rights-Standards-for-Targeted-Sanctions.pdf

[190] https://www.un.org/securitycouncil/ombudsperson

under Article 6 of the ECHR. At the same time, it is clearly present a possible violation of Article 13 of the ECHR for the same reasons, namely that it is only the Security Committee who has the capacity and legitimacy to list and de-list. [191]

This mechanism of judicial remedy is therefore a façade, and "*has been deemed inadequate by (among others) the European court of justice (ECJ), the European court of human rights (ECtHR), UK Supreme Court, and UN Special Rapporteur on Human Rights and Counter Terrorism*[192]" which are all concerned that the Office of the Ombudsperson is "*not a court*"[193].

At the European level where the possibility to actually refer to a court is present, challenges have risen mostly in relation to confidential and secretive nature of the measures of blacklist.

In *People's Mojahedin Organization of Iran v. Council* (2008) for the first time the obligation to state reasons and the obligation that proper and sufficient reasons have to be delivered to the individuals concerned are present. Clearly, European Courts have tried to strike the appropriate balance between the measures of backlisting and the deference to the right to judicial review.

A proper call for changes have in this case mostly derived from the Courts that "*have been quite robust in asserting that he court themselves must be properly placed in a position to assess the lawfulness of blacklisting decision and have unequivocally*

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[191] ECCHR. Blacklisted: Targeted Sanctions, Preemptive Security and Fundamental Rights. Ben Hayes, Gavin Sullivan
(2010). Available at: https://www.ecchr.eu/en/publication/blacklisted-targeted-sanctions-preemptive-security-and-fundamental-rights/ [At p.33]

[192] Hovell, Devika . "Due Process in the United Nations." The American Journal of International Law, vol. 110, no. 1, Jan. 2016, [At p.9]. https://doi.org/10.5305/amerjintelaw.110.1.0001.

[193] See Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, Comm'n v. Kadi (Eur. Ct. Justice July 18, 2013) (Grand Chamber) [hereinafter Kadi II]; Al-Dulimi v. Switzerland, App. No. 5809/08, para. 119 (Eur. Ct. H.R. Nov. 26, 2013); Nada v. Switzerland, 2012 Eur. Ct. H.R. 1691, paras. 209–14; HM Treasury v. Ahmed, [2010] UKSC 2, paras. 78 (Lord Hope), 149 (Lord Phillips), 181, 185 (Lord Rodger), 239, 248 (Lord Mance); Ben Emmerson (Special Rapporteur), Second Report on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, paras. 14, 20–21, UN Doc. A/67/396 (Sept. 26, 2012).

confirmed that states cannot base backlisting and asset-freezing decisions on confidential material that they are willing to share with the court in the name of national security[194]" Finally, the Parliamentary Assembly of the Council of Europe in Resolution 1597 therefore to the conclusion that the procedural and substantive standards applied by the Security Council of the United Nations and by the Council of the European Union do not fulfill the minimum standards that protect he rule of law and the right to judicial review[195].

As of now the vast majority of the successful request for de-listing are the ones brought before a court. The lifting of these administrative has usually involved a judicial action, rather than the action of an administrative body such as the Ombudsperson.
Clearly therefore, the de-listing procedure under the Sanction Committee directives is still amiss of procedural standards or clear requirements for examination and remains to this day based on the reversal of the principle of presumption of innocence, it cannot be considered nor efficient nor respectful of various human rights of the applicants.

3.3 – The Future of the Blacklists

3.3.1 The Effectiveness of Targeted Sanctions

The shift during the early years of the 21st Century from comprehensive to targeted or smart sanctions is considered a great step in the creation of a mechanism that would not disproportionally hurt the weakest part of a population while targeting the elite of a specific regime. Developed extensively in the 2000s, by 2010 smart sanction were internalized by both the United Nations and the European Union.

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[194] ECCHR. Blacklisted: Targeted Sanctions, Preemptive Security and Fundamental Rights. Ben Hayes, Gavin Sullivan
(2010). Available at: https://www.ecchr.eu/en/publication/blacklisted-targeted-sanctions-preemptive-security-and-fundamental-rights/ [At p.34]

[195] Parliamentary Assembly of the Council of Europe in Resolution 1597. Paragraph 6. https://pace.coe.int/pdf/7df8927af735debce58d63ff0dfa0c434c4068bf234013e28fa5976d4789cc89/res.%201597.pdf

In order to assess the effectiveness of smart sanctions two questions are central.
The first one is whether they are actually capable to avoid much of the humanitarian cost seen at the end of the 20th Century with the use of comprehensive sanction.
The second assessment to be made is whether they have worked properly, whether they were able to reach the initial objectives.

As noted by Doctor Daniel W. Drezner in *Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice* "*the evidence provides moderate support for smart sanctions being more human but less effective than more comprehensive measures*"[196].
With regard to the first question, on the assessment of the humanitarian costs, Drezner showed that while comprehensive sanctions were more likely to trigger an authoritarian response by the leader of the sanctioned country, who would then oppress even more the population causing a decrease in the level of democracy and of human rights respect, the imposition of targeted sanction has been demonstrated to be more in line with the protection of the fundamental rights of the general population. At the same time, a risk of oppression is present also in case of smart sanctions, targeting the key elite figures of a country will generate a sense of threat in the leader which again will be likely to intensify the abuses.
Noteworthily, however, the first response is true mostly in case the targeted elite belongs to a country where the respect for pluralism, rule of law and fundamental rights is already pretty low. On the other hands, studies have shown that when facing an already democratic country comprehensive sanctions will generate a quicker response and quicker concessions due to the value given to the public opinion. It is to note that seen that the majority of the targeted countries do not show an high and consolidated level of democracy, the use of targeted sanctions is the right strategy at least in avoiding large humanitarian catastrophes.

[196]Cortright, David, and Erika De Wet. Human Rights Standards for Targeted Sanctions. 2010.
Drezner, Daniel W. "*Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice*." International Studies Review, vol. 13, no. 1, 2011, pp. 96–108, www.jstor.org/stable/23016144. [At p.102]

The question of effectiveness is less promising, smart sanctions have been proved less likely to be able to coerce the targeted government. As shown by Cortright and Lopez in *The Sanctions Decade: Assessing UN Strategies in the 1990s* the effectiveness in achieving the prime goal of the measure is much higher in case of comprehensive sanctions, that while having certainly a greater social impacts are also able to create the most significant political effect[197].

Overall the effectiveness of targeted sanctions remains ambiguous with mixed successes. The measures of arms embargo, a ban which only covers military equipment is definitely more morally acceptable that the total embargos seen during the 90s. While it has been seen oftentimes as a success has shown disproportionate effects.
In particular "*they reward the actions possessing the ex-ante cache of weapons – which is often the actor responsible for the most egregious war crime*"[198]. While these have worked only the 8%[199] of the time they are more often than not depicted as a great success, highlighting the political and symbolic character of smart sanctions. According to Tostnsen and Bull in *Are smart sanctions feasible?*[200] this failure is due to five main reasons: thy are imposed too late, the exempt the permanent members of the Security Council, they reinforce the disproportional power relations already present in the country, they are easily circumventable and are difficult to enforced since they need an accurate and constant monitoring by the institutions.[201]

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[197] A. Lopez, George , and Cortright David. "Lynne Rienner Publishers | *The Sanctions Decade Assessing UN Strategies in the 1990*s. www.rienner.com,ww.rienner.com/title/The_Sanctions_Decade_Assessing_UN_Strategies_in_the_1990s . [At p.171]

[198] Cortright, David, and Erika De Wet. Human Rights Standards for Targeted Sanctions. 2010.
Drezner, Daniel W. "*Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice*." International Studies Review, vol. 13, no. 1, 2011, pp. 96–108, www.jstor.org/stable/23016144. [At p.103]

[199] Brzoska, Michael. (2008) Measuring the Effectiveness of Arms Embargoes. Peace Economics, Peace Science and Public Policy 14 (2): article 2.

[200] Tostensen, Arne, and Beate Bull. "Are Smart Sanctions Feasible?" World Politics, vol. 54, no. 3, 2002, pp. 373–403, www.jstor.org/stable/25054192.

[201] Ibid. [At p.383]

Tostnsen and Bull have also analyzed the efficacy of the targeted financial measures to set pressure from the economic sphere of the state.
The stakes of success of the financial sanctions (namely, the freeze of assets) has been founded to be higher that the trade sanctions (which comprises ban on exports and imports but also tariffs and quotas on some specific goods and resources). They are accompanied with some inefficiencies: they also are easy to circumvent and difficult to monitor. Assets may be in fact hidden in financial safe heavens, and some of the assets owned by the targeted elite may be linked with the natural resources of the country. The confidentiality policies of some banks and the difficulties in national implementation might decrease their efficiency[202].

Finally, the third most common targeted measures, the travel ban (or visa ban), is more a symbolic and ideological measure than a sanctioning one, they involve the denial of access to a country by the suspension of travelling documents such as visa or resident permits and the general refusal to enter or even transit in specific countries. "*it contributes to the isolation of the target from normal international interaction and to the delegitimization of the target's behaviors*"[203].
In order to be implemented effectively the sanctioning institutions has own all the information related to the targeted individual, which in some countries where the general bureaucracy of the states is not functioning as it should might result complicate. Moreover, cases of circumvention of this third strategies are also present and might take place through the creation of new documents or false identity by the targeted individuals.

Notwithstanding the difficulties that the measures of targeted sanctions might face and despite its lower efficiency in achieving the major goal imposed, the lower humanitarian costs seen in the last two decades make them the most favorable choices between the two. Finally, the ideological impact of smart sanctions is significant, it represents the public condemnation of the illegitimate behaviors of a government and might offer some acknowledgment and consolation to the victims and recognition of the violations.

[202] Ibid. [At p.389]

[203] Ibid. [At p.390]

3.3.2. The European Union Level: Economic Sanctions to the Russian Oligarchs in 2022

The latest example of the adoption of financial targeted sanctions by the European Union (which are not however related to the fight against terrorism) are the measures taken against the Russian Oligarchs in 2022, as a response to the Russian invasion of Ukraine the 24th of February and the consequent illegal annexation of Ukrainian territories of Donetsk, Luhansk, Zaporizhia And Kherson. The European Union had already imposed a variety of restrictive measures to the Russian Federation in 2014 over the Russian annexation of Crimea, which were considered at that time ineffective in combating Russian aggressive posture over the confining state.

The current targeted sanctions include restrictive measures for individual, targeted financial sanctions and visa measures and target "*people responsible for supporting, financing or implementing actions which undermine the territorial integrity, sovereignty and independence of Ukraine or those who benefit from such action*."[204] The individuals listed have been accused, or at least associated, with targeting civilians and critical infrastructure in Ukrainian territories, such as the atrocities committed in Bucha and Mariupol, the deportation and forced adoption of Ukrainian children, the manufacture and supply of drones, the recruitment of Syrian mercenaries to fight in Ukraine and the military re-education of Ukrainian children[205].

The individuals sanctioned are identified in the annex of Council Regulation No. 269/2014 which has been implemented and adjourned from 2014 to 2022.

It comprises a total of 1950 individuals and entities in which more than notorious names can be identified such as the Russian President Vladimir Putin, the Minister for Foreign Affairs Lavrov, high rankings officials, commanders of the Wagner paramilitary group and of course prominent oligarchs.

Between the entities enlisted are also present various armed forces and paramilitary groups such as the "*Donbass People's Militia*" or "*the Luhansk Guard*" but also private

[204] European Council (2023). *EU Sanctions against Russia Explained*. [online] Council of the European Union. Available at: https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/.

[205] Ibid.

military entities like the *Wagner Group*, major companies of the defense sector, banks and financial institutions and media enterprises guilty of having shared disinformation and propaganda.

The measure of freeze of assets is enforced by Article 1 of Council Decision 2014/512/CFSP under which "*it shall be prohibited to directly or indirectly purchase, sell or provide investment for or assistance in the issuance of, or any other dealing with bonds, equity or similar financial instrument*[206]" to any legal person listed in the Annex.
Article 2 of the Council Decision enforced a ban on the sale, supply or exports of arms and military or paramilitary equipment to the Russian Federation from nationals of the Member States of the European Union or from territories of the Members States. Under the same rationale are also banned any technologies that might enhance the military capabilities of the Russian Federation[207].
Finally, also the measure of travel ban or visa ban is present for the persons listed in the Annex, which are not allowed to enter or transit in the territories of the European Union Member States.

The most impactful consequences have been the ones directed to Russian political elites and the oligarchs. The effects the package of financial sanctions imposed by the European Union have been analyzed by Bremus F. And Hüttl P. In *Sanctions against Russian oligarchs also affect their companies*[208] which explains how the stock returns and therefore the firm value of companies with sanctioned board members and CEOs have been affected.
Whilst it is unclear to which extent financial sanctions have been effective at the personal level, it has been reported that "*companies closely associated with, or even run by,*

[206] Council Decision 2014/512/CFSP
Available at: Https://Eur-Lex.Europa.Eu/Legal-Content/EN/TXT/HTML/?Uri=CELEX:02014D0512-20231001#Tocid2

[207] Council Decision 2014/512/CFSP. Article 3.

[208] Bremus, Franziska, and Pia Hüttl. "Sanctions against Russian Oligarchs Also Affect Their Companies." DIW Weekly Report, vol. 12, no. 21, 2022, pp. 142–147, www.econstor.eu/handle/10419/260552, https://doi.org/10.18723/diw_dwr:2022-21-1.

sanctioned oligarchs have seen their business processes affected since the sanctions were announced[209]".

The study has demonstrated that firms with sanctioned oligarchs in their boards have suffered a price losses of 31% after the entering into force of the sanctions, while companies without them have experienced a loss of 19%. Clearly the firms led by unsanctioned oligarchs have been subjected to negative returns, nonetheless the data for the first category is much higher.

With regard to the restrictions imposed to the Russian banking systems, the ban prohibits 10 Russian Banks to use SWIFT, which means they are not allowed to obtain foreign currency and to transfer financial assets abroad. Finally, all transactions with the National Central Bank of Russia are prohibited so that the Central Bank cannot access to its stored assets in banks and
European private institutions[210]

3.3.2 (a) The impact of the Russian Sanctions in the European Union

Currently, the assets frozen by the European Union amount to €21.5 Billion to which is to add an impressive €300 Billion from the Central Bank of Russia in the EU and the G7 countries, it is estimated that more than half of Russian foreign reserves are frozen.
The impact of the targeted sanctions imposed across Russia and Belarus from the beginning of 2022 and implemented in the last two years have had repercussions not only in the targeted countries but also in the same European Union that is experiencing some economic losses[211].

[209] Ibid.

[210] European Council. "EU Sanctions against Russia Explained." www.consilium.europa.eu, 2023, www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/#sanctions.

[211] https://valdaiclub.com/a/highlights/losses-due-to-sanctions-grow-in-the-west/

The economic impact of the Russian sanctions in Europe has been analyzes by an report of the German Bundestag in July 2023[212], the purpose of the report was to develop a public available source of the effects this strategy has had on the country that impose it, seen that the great majority of the estimates are focused only on the sanctioned country.

The economic consequences are already far-reaching.

The first major aftermath of the package of sanctions has been a general higher inflation, "*the impact on higher energy and food prices on national income and its distribution is potentially considerable*"[213]. The heavy burden of imposing sanctions has caused a technical recession.

The reports shows in fact that "*inflation rates are all higher than Brazil, China, India and Saudi Arabia and […]GDP is stagnating. In numerical terms, the European Union GDP is worth less than in 2021. The unemployment rate is worse than the US. In some countries it is almost twice than the USA. At 13% at the end of the first quarter (of 2023), the unemployment rate is worse than in Latin America countries[214]"*. This represent a rising cost of living crisis throughout the European Union. The data show a 10% increase in food prices and a 4% decline in real wages where the most impacted countries have been the Baltic states, Greece and Czech Republic.

According to EU experts, as of July 2022 the greatest aftermaths are the result of the import ban on Russian steel products, since they made 21% of the of imports in the European Union.

Another negative consequences has been shown on the crop prices, where the price for wheat rose by 35%, the one of maize by 15-25% and the price of sunflower seed around 33%. Further price increases are due to EU import ban on Russian wood and export ban on noble gas imposed by Russia itself[215].

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[212] German Bundestag (2023). *Auswirkugen von Sanktionen auf die europäische und russische Wirtschaft / Effects of sanctions on the European and Russian economy*

[online] Available at: https://www.bundestag.de/resource/blob/963236/f100c84d362abc7d0bc6580078911dc8/WD-5-063-23-pdf-data.pdf.

[213] Ibid. [At p.8]

[214] Ibid. [At p.43]

[215] Ibid. [At p.44]

Finally, the government spending and therefore government debt are increasing, due to the necessity of mitigating the effects through the use of subsidies and safety nets, particularly for companies affected within the energy sector.

These ramifications are going to be further enlarged by the 12th sanctions package approved in December 2023 and by its new "*No Russia Clause*". The new clause which has already been criticized and contested by some European countries prohibits EU exports the re-exportation to Russia of sensitive goods and technology when selling, transferring and exporting to third countries. The ban comprises "*dual-use goods, advance technology items used in Russian military systems, production or use of those Russian military systems and aviation goods and weapons*[216]"
The new sanction package is divisive and some diplomats have expressed concerns stating that involving third countries might be counterproductive for EU's global trade.
It is to be seen whether this new measures will further damage the European economy or if the consequences will be mitigated.

3.3.2 (b) Sanctions Against Oligarchs: the case of Roman Abramovich

The sanctions against the oligarchs have caused outrage in the Russian Federation.
The possibility to appeal against the decision of the European Council over the targeted measures such as the freeze of assets and the ban over entering the European Union Members has been already taken by some of them.
Roman Abramovich is a Russian born oligarch with a net worth of $9 Billion[217]. He is the owner of the steel-giant Evraz, which is one of Russia's larger taxpayer and the company productor of Nickel Norilsk Nickel. Previous owner also of the English Chelsea football

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[216] European Council of the European Union. Press Release: "*Russia's war of aggression against Ukraine: EU adopts 12th package of economic and individual sanctions*". 18th December 2023. Available at: https://www.consilium.europa.eu/en/press/press-releases/2023/12/18/russia-s-war-of-aggression-against-ukraine-eu-adopts-12th-package-of-economic-and-individual-sanctions/

[217] Forbes. (n.d.). Roman Abramovich & Family. [online] Available at: https://www.forbes.com/profile/roman-abramovich/?sh=4d045f80134a

club, he sold 73% of the oil firm Sibneft to the notorious state-own Gazprom for $1 Billion in 2005 and from 2000 to 2008 was Governor of the Russian Chukotka Autonomous Area.

The Russian oligarch was listed the 14th of February 2022. He is considered to have close ties with the Russian President Vladimir Putin (mostly due to its role of governor during the first office of the President). According to Council Regulation (EU) No. 269/2014 "*He has therefore been benefitting from Russian decision-makers responsible for the annexation of Crimea or the destabilization of Ukraine. He is also one of the leading Russian businesspersons involved in economic sectors providing a substantial source of revenue to the Government of the Russian Federation, which is responsible for the annexation of Crimea and the destabilization of Ukraine.*"[218]

The action against the decision of the European Council was taken by the defendant the 25th of May 2022 and it brought on four grounds:

1. The alleged infringement of the right of judicial protection and the obligation to state reason.
2. A manifest error of assessment by the Council on the person of Abramovich.
3. The infringement of the principle of proportionality and the principle of equal treatment in so far it concerns the restrictions adopted against the applicants
4. The breaching and unjustified interference with the applicant's fundamental rights as guaranteed by the Charter of Fundamental Rights of the European Union. [219]

During the assessment of the first plea the applicants stated that the lack of judicial remedies is given by the unreliable and insufficient evidences reasoned for listing, in particular it was never specified by the European Council the nature of the relations and favors between the applicants and President Vladimir Putin. According to Abramovich,

[218]Council Regulation (EU) No 269/2014. Annex I. 17/03/2014
https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02014R0269-20221114

[219] Case T-313/22. *Abramovich v. Council*. EU General Court.
https://curia.europa.eu/juris/document/document.jsf?text=&docid=262757&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2436355

these same evidences were derived mostly from newspaper reports and internet sources from which one cannot value the real relation between the two[220].

All the allegations were rejected by the European Council which noted that notwithstanding the nature of the affinities between Mr. Abramovich and Vladimir Putin, they have clearly granted the status of billionaire and oligarch to the defendant.

Under the second plea, Mr. Abramovich contested that the measures of freeze of assets and travel ban were communicated to him only after the entry into force of the decision, not granting him the possibility to be heard on the administrative measures.

To this allegation to Council responded that being heard before the adoption of such measures is possible only over new considerations and new evidence presented to the Council, so elements that were not present in the initial decision for listing[221]. Moreover, in light of the adjournment of listing in March 2023 the Council informed the defendant and gave him the possibility to write its statement to the Council, an opportunity that he took with a letter the 19th of January 2023[222].

The third plea was also rejected by the EU General Court. According to Mr. Abramovich the restrictive measures were discriminatory since they allowed the European Council to sanction all entrepreneurs, regardless of their origin, that have exercised any economic activity within the Russian Federation and that are respectful taxpayers[223].

The Court rejected such considerations on the ground that the decision of the Council was based on the evidence that he is the biggest shareholder of Evraz, one the biggest contributors to the Russian Federation, evidence investigated by the Council at the individual level and founded on personal information over the applicant[224]. On the question of proportionality the Court asserted that the fact that Mr. Abramovich was not part of the decision-makers of the invasion of Ukraine was irrelevant, since the measures were imposed on the reason that his enterprise represents a major source of income for the Russian Federation guilty of the destabilization in Ukraine. The conclusion of the

[220] Ibid. Paragraphs 30-31.

[221] Ibid. Paragraph 59.

[222] Ibid. Paragraph 65.

[223] Ibid. Paragraph 125.

[224] Ibid. Paragraph 128.

Court was that, seen the severity of such destabilization, the measures imposed by the European Union were more than proportionate[225] .

Finally, under the fourth plea the applicant denounced that the inclusion of his name in the list represented a breach of several fundamental rights, such as the right to property, the right to private life, his freedom of movement and the principle of presumption of innocence.[226]

The General Court concluded that while it is true that some restrictions were imposed over the rights mentioned by the defendant, those limitations are for a broader objective, which were to put pressure over the Russian decision-making elite responsible for the invasion of Ukraine so as to limit their scope of action and to preserve the European and international security[227].

The conclusive finding of the Court were that the case in its entirety needed to be rejects.

It is not the first time that the targeted measures of the European Union against the Russian oligarchs are brought before a court and it is unlikely that this would be the last. The same day that *Abramovich v. Council* (2023) was issued with clear negative outcomes for the defendant, the challenge before the EU General Court of the former Ukranian President Viktor Yanukovych and his son granted the de-listing and consequently the lift of the sanction to the applicants, after more than 10 years of inclusion in the list, setting new path to take for the oligarchs and the entities included in the list under Council Regulation (EU) No. 269/2014.

[225] Ibid. Paragraph 144

[226] Ibid. Paragraph 151.

[227] Ibid. Paragraph 160.

3.3.3 The United Nations Level: The Limited use of the Blacklist to Combat Terrorism

The development of blacklisting measures to combat terrorism at the UN level has been accused of bypassing the usual and traditional process of covenant and lawmaking process.

The development of such mechanism was not first in its kind. The 9th of December 1999 the International Convention for the Suppression of Financing of Terrorism was finalized. Its main objective was to enhance cooperation among states when adopting measures for the "*prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators*"[228] it required each signatory states to take appropriate measures for the "*detection and freezing, seizure or forfeiture of any funds used or allocated for the purposes of committing act intended to cause death or seriously bodily injury to any person not actively involved in armed conflict in order to intimidate a population, or compel a government or an international organization to do or abstain from doing an act*"[229].
As the convention was a multilateral treaty it fell in the realm of the Vienna Convention on the Law of Treaties, under which such provisions are binding only for the signatory states.

When UNSCR 1373 entered into force at the end of 2001 the Convention only had four ratifications and 46 signatory states. Under the new sanction regime implemented by the Security Council two shift are identifiable:
The first shift is characterize by the expansion of the legislative power of the Security Council. Measures of counter-terrorism that before the date of 9/11 were mostly implemented at the national level now reached world-wide implications and strategies.

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[228] International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999). Objectives. https://www.unodc.org/documents/treaties/Special/1999%20International%20Convention%20for%20the%20Suppression%20of%20the%20Financing%20of%20Terrorism.pdf

[229] Ibid. Key Provisions

At the same time also the use of targeted sanction by the Security Council shifted, the use of smart sanction was not related to a single state anymore but to an open-handed plethora of entities and individuals present in many of the United Nations' states.

The expansion of the power of the Security Council, the open ended nature of the measures and the legal challenges described during this thesis have opened a space of conflict between the United Nations and the European Union.
Many of the cases analyzed have created such space.
The *Kadi Case* is certainly the catalyst of this conflict. The declarations of the EU General Court when assessing the possible infringement the right to judicial review for Mr. Kadi speak very clearly. The appellant's rights of defense "*have been observe only in the most formal and superficial sense*"[230], the applicant's comment on the decision of the listing measures was never taken into account, completely disregarding his position on the matter[231], no minimal access to evidence was given to the appellant on the basis of the confidential nature of such and the Narrative Summary of Reasons was insufficient for granting the applicant a real possibility of judicial review[232].
The *Kadi Case* brought to light all the deficiencies within the UN framework to create effective judicial guarantees of the listed person which for years have been secluded and impeded to be considered innocent for the absence of a trial.
EU courts have fought for years in attempt to rectify these deficiency. The European Court of Justice, the EU Court of First Instance and the European Court of Human Rights have all repeatedly been able to create the space of judicial review that was missing at the UN level.
As seen throughout this thesis the case of Mr. Kadi is far from being unique.
The findings of the Court in *PMOI v. Council* in 2006 and in 2008 have finally given to the backlisted individuals the opportunity to evaluate the allegations against them so as to satisfy some of the criteria to a fair trial, at the same time the confidentiality of the

[230] Case T-85/09. Kadi v. Council and Commission. Paragraph 171.
https://curia.europa.eu/juris/document/document.jsf?text=&docid=83733&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=10728503

[231] Ibid. Paragraph 172

[232] Ibid. Paragraph 173-174

evidence granted at the UN level has also been refused, adding transparency to a sanctions mechanism that never had any.
On the same note Nada v. Switzerland has open a space for national implementation that was missing before, permitting derogation to Article 103 of the UN Charter.

The same measures of targeted sanctions and the same strategies to combat terrorism have developed in a quasi-autonomous way in the European Union and are far more respectful of the fundamental rights of the listed individuals.
Despite the objectives pursued, that are the same, the framework of the UN has clearly circumvented and bypassed fundamental rights protection, and has revealed itself not to be in consonance with rule of law.
On the other hand, the European Union was able tackle many of the issue reported during the thesis, the autonomy taken by the European court in this matter has created such a conflict between the two that is improbable that an extensive use of terrorist proscription regimes by the Security Council will continue to be adopted.

CONCLUSION

This thesis proposed itself to offer a comprehensive and extensive coverage of the terrorist proscription regime developed by the United Nation since 1999 and the consequent implementation by the European Council and singular nation states.
By examining the regime primarily through the lenses of fundamental rights the extent of the crisis we have seen becomes apparent.
Despite the well-intended rationale behind the measures of proscription, which is to prevent the emerging threat of a terrorist attack to materialize, the punitive effects that have resulted for the individuals, cannot in any ways be considerate proportionate or necessary in combating counter-terrorism and have caused concerns that extent further than the protection of public interest.

As noted several times during this analysis, and directly quoting *Kadi v. Council and Commission* (2009), we can argue that the rights of the listed individuals have been always observed in the most formal and superficial sense possible.
Since the First Chapter it is patently clear the failure of the Security Council or the Sanction Committee to give any kind of effective legal guarantee to the applicants for de-listing. A lacuna that to this day has never been solved but has mostly been buffered with the creation of administrative bodies (first the Focal Point and then the Office of the Ombudspersons) that possess no autonomy, no independency and most importantly no decision-making power.
It is to conclude that the right to a fair trial that should be guaranteed to all, despite the offences committed, is not merely circumvented or derogated but is effectively violated.
On the same note, the power of listing and de-listing residing exclusively in the hands of the same body, namely the Sanction Committee, represents an unacceptable absence of checks and balance within the United Nations.
It is also to be argued that the measures to which are subjected the individuals and entities listed cannot be considered administrative but rather punitive in nature, since they altered fundamentally their life for an indefinite period of time are extremely complicated lift.
The influence demonstrated by the various case study of the political landscape, altering the decision of the Sanction Committee for purely diplomatic reasons and the arbitrary

interpretation of the term terrorisms, coupled with the secretive and confidential nature of the justifications for listing have caused a reputational crisis in the ability of the United Nation to respect the principle of rule of law.
The same reputational crisis that risked to be mirrored in the European Union has been avoided thanks to the assessments and the findings of the Court during the 2010s.
Crucially, the European implementation of the UN regime through the decision of the European Council was not characterized by much discrepancies, with the only exception being the extensive definition of "terrorist acts".
It was only thanks to the work of the European Courts that a an appropriate balance between the measures of backlisting and the obeisance to fundamental principles of rule of law and human rights was possible.
Throughout the cases deliberated mostly in the 2010s European judges were able to tackle the question of confidentiality at least to the extent in offering the de-listing applicants the possibility to defend themselves in court, obliging Member States to deliver the evidences for listing and the information on the designating state or the authority responsible. The courts were able to assess whether the rights of the applicants were being infringed and whether they could be deemed not guilty of being "terrorist organizations".
The role of the court is however inherently problematic. The decision-making power and the procedures for the implementation of the proscriptive regime should not fall on the judiciary rather on the executive bodies of the European Union.
Indeed, it is to argue that while the European Union framework of blacklisting is able to offer a more effective mechanism of judicial protection and a greater quantity of legal guarantees for the applicants, those are merely the consequences of the appeals and the proceedings brought before the European courts by the listed entities and individuals, and not a thoughtful process of the European Council.

The future of the proscription regime for terrorist individuals and organizations does not appear promising.
The conflict between the United Nations and the European Union over a mechanism for the effective protection of human rights have signified the refusal of the EU to apply mechanically the Resolutions of the Security Council in its territory, and consequently a loss of support of major western democratic states.

The framework of the UN has been considered as *ultra vires* and unlawful by European Center for Constitutional and Human Rights (ECCHR) which in 2010 asked for its abolition.

Rather than be abolished, we can ultimately conclude that such framework should be extensively modified and adjourned in line to the development of the European Union.
Firstly by inserting a real independent body that might take binding decisions on de-listing requests; secondly removing the discretionary power of the Member States to retain confidential information to the public and to the listed individual and thirdly by attempting to offer a unitary interpretation to the mean of terrorism.
Such adjustment might originate a framework for the prevention of terrorist attacks at the international level in line with the major fundamental rights pursued by the United Nations since its birth.

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