STUDY

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Targeted sanctions against individuals on grounds of grave human rights violations – impact, trends and prospects at EU level

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Targeted sanctions against individuals on grounds of grave human rights violations – impact, trends and prospects at EU level

ABSTRACT

Sanctions are one of the tools utilised to address human rights violations. They are also an increasingly prominent tool in the European Union's foreign policy. International sanctions policy is part of a global trend towards individualisation: rather than affecting the state as a whole, bans nowadays are targeted at individuals identified as responsible for the abuses. The present study analyses the evolution of targeted sanctions regimes imposed by the EU, as well as by the UN, against individuals on grounds of gross human rights violations. It focuses on the most recent developments in international sanctions practice. It provides recommendations on how this tool could be further developed at EU level, making reference to the option of adopting a Global Magnitsky-type legislation allowing for the designation of human rights abusers worldwide.

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List of abbreviations

CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EEAS	European External Action Service
EP	European Parliament
EU	European Union
ICC	International Criminal Court
NATO	North Atlantic Treaty Organisation
QMV	Qualified Majority Voting
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TSC	Targeted Sanctions Consortium
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
WMD	Weapons of Mass Destruction
WTO	World Trade Organisation

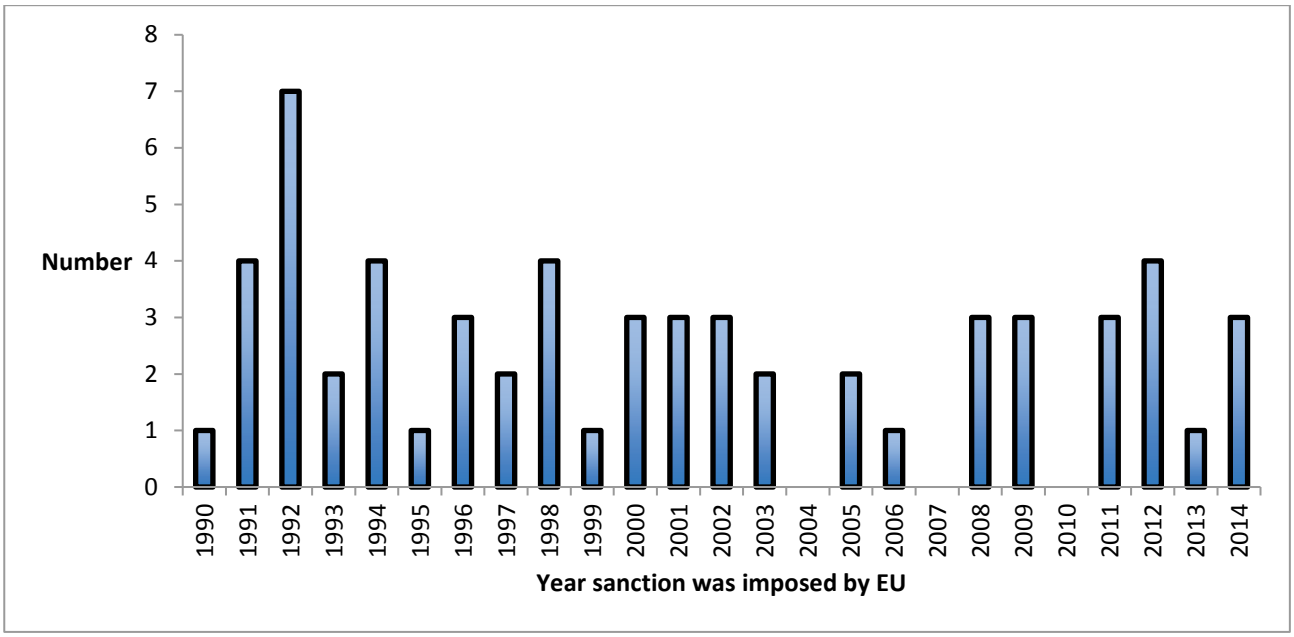
Executive summary

- Originally developed within the context of the United Nations (UN), the practice of applying sanctions against individuals has become commonplace in EU foreign policy.
- Sanctions against individuals represent the narrowest expression of a targeted sanction, discriminating clearly between targets and non-targets, while other types tend to display effects on non-targeted populations to different degrees.
- Although traditionally highly targeted, EU sanctions (including those applied against individuals) are gradually becoming less discriminating, largely as a result of frequent litigation.
- Despite the increasing trend towards individualisation of sanctions, few instances are known as yet in which the behaviour of targets has been affected, at least in a way that incites compliance with the sender's aims.
- Still, a comprehensive inquiry into UN individually targeted sanctions found a compliance ratio of about 20 %, which does not deviate from common estimates for comprehensive embargoes.
- Nevertheless, even the most optimistic assessments concede that the performance of individual sanctions could be improved beyond present compliance ratios with the help of better informed targeting policies.
- Since the early days of targeting, the European Union (EU) has considerably improved its listing practices, primarily as a result of litigation before the EU Courts, with the Kadi (*Yassin Abdullah Kadi and Al Barakaat International Foundation. v. Council of the European Union. and. Commission of the European Communities*) and Kadi II (*Yassin Abdullah Kadi v European Commission*) cases playing a fundamental role in this evolution.
- The jurisprudence by the EU Courts has been the most fundamental factor driving the refinement of EU listings. For several years, EU courts ruled more often in favour of claimants rather than the Council of the EU (Council), a trend that has been reversed over the past two years. In the course of successive litigation episodes, the Council has improved the robustness of its listings.
- Despite major improvements, both in justification of the listings and the due process guarantees enjoyed by the designees, problems with the legality of EU sanctions persist.
- The current debate surrounding the appropriateness of adopting Magnitsky-type legislation should consider the unresolved problems still suffered by EU blacklisting practices.

1 Introduction

The European Union (EU) has often made use of sanctions, also called 'restrictive measures' in EU jargon, within the framework of the Common Foreign and Security Policy (CFSP). Since 1980, it has become one of the most active senders, accounting for 36 % of the sanctions imposed worldwide[1] (Borzyskowski and Portela, 2018). The following graph displays the chronological evolution of autonomous EU targeted sanctions regimes, showing that frequency has remained relatively stable[2].

Graph 1: Evolution of EU autonomous sanctions regimes



***Source*: own elaboration**

The EU has an established track-record in supporting human rights with the imposition of sanctions (Nivet, 2015). Among EU institutions, the European Parliament (EP) is widely recognised as the main advocate of human rights in EU foreign policy (Smith, 2014), to the point that it has been called a 'norm entrepreneur' (Feliu and Serra, 2015). The EP has traditionally been the most vocal EU actor in calling for the imposition of sanctions in reaction to human rights violations. This role even predates the EP's acquisition of competences in foreign policy: as early as the late 1980s, the EP expressed its condemnation of human rights abuses by refusing its assent to financial protocols to the agreements with Turkey and Israel (Zanon, 2005; Greilshammer, 1991). In recent years, the EP has been calling for the imposition of sanctions against natural persons on human rights grounds, participating in an international trend towards the individualisation of sanctions. A resolution of February 2012, which constitutes the most comprehensive thematic review of EU sanctions policy to date, takes issue with the individualisation of sanctions, positing that targeted leaders 'will be affected if they are personally subject to pressure in the form of restrictions on their ability to move money, invest and access their financial assets, restrictions on prospects for travel, and restrictions on access to particular goods and services or diplomatic representation' (EP, 2012, point N). Yet, the text focuses on authoritarian leaders, thus displaying a pro-democracy orientation.

[1] This calculation is made on the basis of a universe of sanctions composed by the following senders: United Nations, regional organisations worldwide and US.

[2] The graph displays new sanctions imposed under CFSP and cases of suspension of the ACP - EU Partnership Agreement in response to a breach of human rights or democratic principles in the period from 1990 to 2014. Only new regimes, i.e. sanctions against a country not previously under sanctions for the same reason, are included. The graph is based on (provisional) data collected by the author.

Subsequent resolutions on related issue areas and countries with particularly poor human rights records have voiced similar proposals. A resolution of March 2014 on the worldwide eradication of torture proposed the establishment of a mechanism for imposing sanctions against officials of third countries involved in grave human rights violations. In 2017, the EP called for the use of targeted sanctions against any key figures responsible for human rights abuses in South Sudan and the Democratic Republic of Congo (DRC).

As part of this trend, the introduction of a so-called Magnitsky act applying sanctions against individuals who have committed grave human rights violations is currently under discussion. This type of law was first introduced by the US to target individuals involved in the beating and killing in prison of Sergej Magnitsky, a Russian lawyer employed with an investment company, after he had exposed corruption among Russian elites. Magnitsky-type legislation making possible the targeting of individuals with visa bans or asset freezes for their involvement in grave human rights violations has already been adopted in some EU Member States and Canada.

However, the imposition of sanctions in response to human rights violations has been marred by at least two types of criticism. The classic argument is that sanctions penalise the population rather than the decision-makers whose actions triggered their imposition in the first place and that they aggravate the human rights violations they intend to correct (Jazairy, 2017). Despite the apparent obsolescence of this criticism, it has not disappeared from the discourse of international fora due to the persistence of a few comprehensive embargoes, mostly imposed by the US. A more recent line of critique contends that the blacklisting of individuals is accompanied by the violation of fundamental rights as designated individuals are deprived of their rights to due process. Both lines of argument have in common that the imposition of measures meant to address human rights violations amounts to a breach of human rights.

The present study analyses the trend towards individualisation of sanctions, identifies the main criticisms to which they have been subject, reviews the EU's role in targeting individuals for human rights violations and discusses the pertinence of the EU's response to them. In conclusion several recommendations for the refinement of this tool as well as the optimisation of its use are made.

2 Introducing targeted sanctions

2.1 Defining sanctions and targeted sanctions

In the absence of a commonly agreed definition for the term 'sanctions' under international law, International Relations scholars refer to economic sanctions as the 'deliberate, government inspired withdrawal, or threat of withdrawal, of customary trade or financial relations' (Hufbauer et al., 2007, p.3). However, sanctions are not limited to the interruption of economic relations, but also encompass non-economic measures. The present study conceives of sanctions as measures imposed by an individual or collective sender that interrupt normal relations or benefits that would otherwise be granted in response to perceived misconduct by the target (Portela, 2010). This broad understanding includes economic and financial restrictions as well as diplomatic sanctions (Biersteker et al., 2016; Doxey, 2009). In the EU context, sanctions have traditionally been referred to as 'restrictive measures' or *mésures negatives* in French, even though in recent times the term 'sanctions' is gaining currency also in EU parlance.

Despite targeted sanctions having first appeared in the context of the United Nations (UN), their origin is European, which explains their subsequent adoption in the EU context. The idea of targeted measures emerged in response to negative experiences with comprehensive trade embargoes in the mid-nineties, which led to hardship for whole populations due to the blanket interruption of all trade and finance. Following the international outcry over the Iraqi humanitarian catastrophe which was provoked by the UN embargo, in particular the high mortality rate among children, it became clear to the United Nations Security Council (UNSC) that the employment of similar measures would be politically untenable. Then

Secretary-General Boutros Boutros-Ghali questioned 'whether suffering inflicted on vulnerable groups in the target country is a legitimate means of exerting pressure on political leaders whose behaviour is unlikely to be affected by the plight of their subjects' (Boutros-Ghali, 1995). In response to the legitimacy crisis of sanctions, permanent members of the UNSC issued a 'non-paper' announcing that 'any future sanctions regime should be directed to minimise unintended adverse side-effects of sanctions on the most vulnerable segments of targeted countries' (UNSC, 1995). Thus, the key definitional element of targeted sanctions is their discriminatory nature, i.e. their ability to affect specifically those responsible for objectionable actions. The aim is to apply coercive pressure on transgressing parties, government officials and elites who support them, while avoiding any impact on others. While some advocates expect targeted sanctions to be more effective than comprehensive measures, assessments have so far concluded that their efficacy is similar, but not superior (see below). Thanks to the introduction of targeting in 1994, sanctions have not only survived, but have become the instrument of choice for the UNSC. Current EU documents on sanctions policy explicitly subscribe to the notion of targeting.

The definition of a 'targeted sanction' is associated with a certain degree of indeterminacy in that it entails a potentially open-ended list of measures. A negative definition is more appropriate: under 'targeted sanctions' we understand measures that fall short of a blanket economic embargo. A key difference between comprehensive and targeted sanctions is that the latter can be directed towards a non-state actor or an individual, a major innovation vis-à-vis the traditional view. Reviewing the practice of the UNSC since the inception of targeting, Biersteker, Eckert and Tourinho (2016, p. 26) distinguish five main types:

- financial sanctions, such as investment bans or freeze of Central Bank assets
- sectoral sanctions, such as aviation bans or arms embargoes
- commodity sanctions covering oil, diamonds, charcoal or luxury goods
- diplomatic sanctions, such as limitation of diplomatic staff
- individual sanctions, consisting mostly of travel bans and assets freezes.

Beyond these basic classification, the authors undertake a categorisation of targeted sanctions according to their degree of discrimination, which can be visualised in the following table:

Table 1: Discrimination scale of sanctions

Most targeted measures	Sanctions targeting specific individuals and entities, with asset freezes and/or travel bans.
Relatively discriminating measures	Sanctions targeting specific sectors of government (or non-governmental targets), such as arms embargoes, diplomatic sanctions, nuclear dual-use items, and luxury goods.
Moderately discriminating measures	Sanctions targeting key export commodities of the targeted economy (excepting oil), such as diamonds, timber and charcoal; or individual sanctions targeting several very large companies that affect entire sectors of an economy.
Relatively non-discriminating measures	Sanctions affecting core economic sectors, such as the financial, oil and transportation (e.g. aviation and shipping) sectors.
Comprehensive sanctions	Comprehensive trade ban/trade embargo. May include either export and/or import ban (some exemptions possible, such as humanitarian aid, food, and medicines).

Source: **Biersteker et al. 2016 (minimally adapted)**

The table above shows that individual sanctions represent the most targeted type of sanctions. Targets are clearly identified by their name in a list, which ensures that no innocent person or entity will suffer as a result of the ban. By contrast, other measures further down the discrimination scale lack the capacity to identify a target with precision. Illustratively, commodity bans affect the trade conducted by those actors they intend to disadvantage, but they also affect trade conducted by actors uninvolved in the wrongdoing. The remainder of this briefing paper will focus on individual sanctions, as the type geared to affect specific individuals, while other types of targeted measures will be considered for the purpose of comparison.

2.2 Benefits of 'targeted sanctions'

The introduction of targeted sanctions has considerably enlarged the options available to policy-makers in the design of restrictions by making new courses of action possible (Giumelli, 2015). The key benefits of targeted sanctions can be summarised as follows:

- Firstly, they admit various types of actors as targets, including rebel groups, economic sectors, banks, state and private companies, harbours, foundations and natural persons. Such level of precision is unavailable with traditional embargoes, which are unable to discriminate. Importantly, targeted sanctions can affect either private or public actors, depending on whether or not the sender aims at a government, or both. Sanctions can be targeted at specific territories within a state, e.g. a province, or territory under the control of a rebel faction.
- Secondly, targeted sanctions improve the flexibility enjoyed by senders to upgrade or ease the sanctions to reward progress by the target, respond to the continuation or worsening of the breach, or simply to adjust to changing circumstances in the situation being addressed. While comprehensive sanctions are an 'all or nothing' policy instrument, targeted sanctions are a more 'agile' tool as they can be adjusted in response to target behaviour (Biersteker et al., 2016). This allows for the incremental application of sanctions, which can be ratcheted upwards or downwards as appropriate. The European Council highlighted the importance of this feature, captured in the notion of 'scalability', in the context of the third round of sanctions on Russia in 2014 (European Council, 2014).
- Thirdly, by establishing a clear link between a specific violation and the response adopted by the sender, a targeted sanction communicates unequivocally which sort of breach has triggered the measures and who is held responsible for its commission. This obviates possible ambiguities in the political interpretation of EU action. Moreover, by restricting the target group to a circle of persons and entities with specified contours, such sanctions can frustrate the population's identification with designated individuals, thereby correcting the 'rally around the flag' effect (Happold, 2016). Originally identified by Norwegian peace researcher Johann Galtung in the early days of sanctions scholarship, 'rally around the flag' refers to a phenomenon whereby the population perceives the sanctions effort as directed against the country as a whole, rather than against its leadership (Galtung, 1967).

Individual sanctions are applied via the preparation of a list, popularly called a 'blacklist'. It is common practice firstly to formulate listing criteria in the original sanctions legislation, adding the list of names of persons and entities as an annex to the legislative act. The recent case of sanctions on Venezuelan leaders follows this approach (Council of the EU, 2017; 2018). Designations can be released simultaneously with the legal act, or left for a later stage. At the UN, the task of deciding on listings is often delegated to the Sanctions Committee, a body entrusted with managing the sanctions regime whose composition replicates that of the UNSC, albeit at a lower level of seniority. Because designated persons feature as entries on blacklists, sanctions are easy to modify: designations can be added to or removed from the list without fundamentally altering the sanctions regime.

What are individual sanctions meant to accomplish? Targeted sanctions are cherished for their versatility, reflected in their multiple applications. They pursue both a practical aim – that of limiting the actions of

the target – and symbolic/ psychological effects. When imposed against non-governmental actors, visa bans targeted at individuals can interfere with efforts to raise funds or procure arms if international travel is required. With governmental actors, visa bans can interfere with attempts to enlist international support for specific policies. Alexis Lamek, deputy Ambassador of France to the United Nations, referred to sanctions as a 'means of accompanying states in their return to stability', via the blacklisting of persons who threaten the return to peace, limiting the flow of armaments and the trafficking in natural resources, as illustrated in recent UN measures against the Central African Republic (Lamek, 2014, author's translation). The rationale for financial sanctions is to deprive certain actors of their funding sources by denying targets access to the international financial system (Eckert, 2008). Beyond their employment in response to undesirable developments, targeted sanctions can be used preventively to address potential threats at an early stage. In particular, the use of blacklists against persons and entities engaging in the funding of terrorist organisations enable security interventions before any dangerous act has occurred (de Goede and Sullivan, 2016). Deputy Ambassador Lamek also referred to blacklisting of the terrorist organisation Answar al-Charia as sending an 'unambiguous message to terrorists confirming the determination of the international community and encouraging moderate Islamists to relinquish their solidarity (*désolidariser*) with terrorists and to re-join political dialogue' (Lamek, 2014, author's translation). In addition, individual sanctions may also bring about psychological effects on their targets. Certain types of sanctions such as the interruption of cultural, scientific and sports co-operation are seen as having symbolic/psychological impacts (Elliott, 2005; 2016).

Yet, this basic distinction does not cover the entire range of effects for which individual sanctions are employed and appreciated. Scholars and activists alike have highlighted other significant impacts. Firstly, the significance of purportedly 'symbolic' effects should be unpacked. As recognised by Elliott (2005), sanctions can stigmatise leaders and bring about a decline in the backing they enjoy among key domestic or external actors, in the form of defections among the ranks of supporters or even within the leadership. Thus, the imposition of sanctions can have tangible effects even in the absence of immediate material damage.

Another important role of sanctions concerns the deterrent effect they exert on third countries which might be tempted to imitate the wrong. Sanctions scholar James Barber catalogued a number of roles played by sanctions vis-à-vis third parties as well as the international system, including deterring third parties from engaging in similar behaviour, showing solidarity with allies, contributing to the cementing of an international norm, or empowering certain international organisations and structures (Barber, 1979).

Thirdly, the imposition of sanctions, which often responds to demands by the democratic opposition in the target country, can help to protect activists from prolonged imprisonment or mistreatment by the authorities. A case in point is Belarus, where the easing or lifting of sanctions by the EU has sometimes been effected in exchange for the release of political prisoners (Portela, 2011). Andrei Sannikov, a former presidential candidate in Belarus who was imprisoned on charges of organising mass disturbances, illustrates this argument, stating: 'I am the living proof of the effectiveness of […] sanctions, because I was released only due to the fact that […] the European Union introduced economic sanctions against the businessmen that were close to Lukashenko and supportive of the regime. Only this made them release me' (House of Commons of Canada, 2016a).

3 Targeted individual sanctions: the legal dimension

3.1 Legal basis and adoption procedure for EU sanctions

A glance at the legal bases for the adoption of sanctions demonstrates how the EU is fully participating in the trend towards individualisation of sanctions.

EU sanctions are agreed in the Common Foreign and Security Policy (CFSP), an intergovernmental framework where decisions are taken by unanimity and where each Member State has a formal veto. Under the Lisbon Treaty, the CFSP act – a 'CFSP Common Position' before the Lisbon Treaty or 'Council Decision' thereafter – must be adopted under chapter 2 of Title V of the Treaty on European Union (TEU) on a joint proposal from the High Representative and the European Commission. However, once agreed, those measures that have a bearing on the single market, i.e. economic and financial measures, must be implemented through the Community. Accordingly, they require the adoption of a regulation under the first pillar, which gives effect to the bans reflected in the CFSP act. This cross-pillar mechanism, known as the 'two-steps procedure', emerges as a legal necessity: the imposition of sanctions is a foreign policy matter that cannot be decided in the Community framework, but must be subject to an intergovernmental decision. Because decisions affecting the common market must be adopted by the Community, an EC regulation under qualified majority voting (QMV) follows the CFSP measure. The current legal basis is Article 215 of the Treaty on the Functioning of the European Union (TFEU), which explicitly provides for the adoption of both sanctions against third countries as well as individuals, groups and non-state entities. It reads:

> '1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.
>
> 2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.'

The two-steps procedure entailing the obligatory adoption of two separate – albeit connected – legal acts for the enactment of economic sanctions regimes took shape during the 1970s. It thus constitutes a cross-pillar mechanism predating the creation of the EU, formalised for the first time by the Maastricht Treaty.

However, not all sanctions affect the common market. When the measures agreed fall within the competence of the Member States rather than that of the Community, Member States are responsible for implementation. In these instances, no action by the Community is required. This pertains to arms embargoes – since trade in arms is excluded from the common market –, but also visa bans, two of the most frequently used measures.

Under the Lisbon Treaty, a separate article disciplines the adoption of sanctions against individuals, specifically in the field of terrorism: Article 75 TFEU provides for the adoption of 'administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-state entities'. Such measures are to be adopted by the Council and the European Parliament through the ordinary legislative procedure. Implementation is by a Council act on a Commission proposal, without the European Parliament's participation. The adoption of terrorist listings under art. 75 TFEU contrasts with the adoption of other sanctions in that it is dissociated from foreign policy: it is part of the Area of Justice, Freedom and Security rather than the CFSP.

When the EU applies sanctions in implementation of UNSC Resolutions, the same procedure applies. In this case, the only difference is that the CFSP act includes a reference to the UNSC Resolution it gives effect to.

3.2 Court challenges and the overturning of listings

A most serious challenge to the individualisation of sanctions emanates from the incompatibility between opaque blacklisting and due process guarantees. Following the September 11th attacks, UN assets freezes and travel bans were extended to numerous individuals identified as financial supporters of Al Qaeda.

Designations were overwhelmingly proposed by the US, often on the basis of classified intelligence. The case came about through a ruling of the European Court of Justice (ECJ) of September 2008 concerning a complaint by Yassin Abdullah Kadi, the Al Barakaat International Foundation and Ahmed Ali Yusuf, blacklisted under UNSC sanctions regime 1267 (Al Qaeda). In a landmark decision, the ECJ found a violation of the right to be heard and the right to effective judicial review and annulled the listing. It also confirmed previous jurisprudence affirming that the principle of effective judicial protection requires the grounds for the listing to be communicated (Griller, 2008; Portela, 2009).

The Kadi ruling inaugurated a new era in terms of sanctions implementation. From a UN perspective, it was seen as having triggered a major legitimacy crisis comparable to that provoked by the Iraqi embargo in the 1990s (United Nations General Assembly, 2015). Yet, it was precisely the difficulties created by the EU's implementation of UN listings that compelled the UN system to institute a mechanism of redress. Even though the UNSC did not accept the judicial review of its decisions, they agreed to the creation of a 'Focal Point'. The Focal Point evolved into the figure of an Ombudsperson, charged with receiving and examining applications by individuals who claim to be wrongfully listed. The Ombudsperson may recommend the de-listing of designations after reviewing the supporting evidence. While this represents a major improvement at UN level, it is applicable only to designees in anti-terrorism listings, in line with the original Kadi case. For designations in all other sanctions regimes, the Focal Point system still applies, which neither entails any judicial review, nor allows for designees to learn the reasons for their listing (Happold, 2016). Since 2014, a group of eleven UN members dubbed the 'Like-minded states', including EU members Austria, Belgium, Denmark, Finland, Germany, the Netherlands and Sweden, has been lobbying in favour of the extension of the Ombudsperson system to country-specific sanctions regimes (Eden, 2016).

Within the EU, the Kadi ruling initiated an era of extensive litigation, with individual challenges in EU Courts running into the hundreds (Pursiainen, 2016; Lidington, 2014). In the period from 2010 to 2014, cases concerning sanctions became the third most recurrent issue area among the cases heard by EU Courts, placing it only after intellectual property rights and competition quarrels (Court of Justice of the European Union, 2014). By 2017, cases regarding restrictive measures had displaced competition cases, becoming the second most frequent issue heard by the Court (Court of Justice of the European Union, 2017). Worryingly, in the years that followed the Kadi case, the Council lost around two-thirds of the cases, for which the Courts ruled in favour of claimants. According to Council sources, this trend changed only recently: 'In 2012, 2013 and 2014 the Council was still losing twice as many cases as it won, while in 2015 that trend was reversed; the Council then won more than twice as many cases as it lost. The same applies for 2016.' (Bishop quoted in House of Lords, 2017a). Two rationales for this development have been identified. One of them relates to improvements in the Council's presentation of reasons for the listings, as well as the gathering of evidence to support individual designations. As explained by Michael Bishop, an official from the Council legal service, '[i]n the early days of EU targeted sanctions individuals and companies were regularly listed on the basis of no reasons. The Council now gave reasons for sanctions listings. The General Court sometimes found those reasons to be insufficiently precise, detailed and specific' (House of Lords, 2017a). The second rationale relates to a broadening in the definition of the listing criteria, which accommodates a larger population of targets on the basis of their status and makes it easier to justify their designation in the event of a court challenge.

Jurisprudence by European Courts has led to major improvements in EU listing practices. Thanks to frequent litigation, EU Courts have established in their case-law the requirements that need to be satisfied for individual listings, regarding the specification of designation criteria, statements of reasons and supporting evidence (Pursiainen, 2016), all of which had been absent in the early days of blacklisting.

Nevertheless, a number of problems persist, two of which are of particular relevance. The first concerns the lack of a standard of proof: the Court of Justice of the European Union has not yet specified clearly what standard of proof it will employ in assessing whether or not a statement of reasons is sufficiently

substantiated, a state of affairs that has been widely criticised (Pursiainen, 2016; House of Lords, 2017a). Secondly, there is a difficulty with the closed material procedure adopted in 2015. The EU General Court incorporated a new article in its Rules of Procedure, inspired by the English 'closed material proceedings', to allow confidential information to be considered by the Court without it being disclosed to the other party (Happold, 2016). This seeks to address sanctions cases where designations have been overturned because the Council has been unable to disclose the confidential evidence supporting them. According to art. 105, an EU institution or Member State may request confidential treatment, after which the Court shall determine if the information should remain confidential vis-à-vis the other party. If so, it will take it into consideration without disclosing it to the other party, which may obtain only a non-confidential summary.

On the one hand, the 2015 arrangements are considered by some legal scholars as insufficient to guarantee due process rights. On the other, Member States have refrained from its activation due to persisting concerns about insufficient standards for the confidentiality of classified information. Anxieties centre around the impossibility of withdrawing the confidential information after two weeks have elapsed following the determination of its confidential character by the court (House of Lords, 2017a), as well as the likelihood of leaks (Pursiainen, 2016). This state of affairs remains, in sum, unsatisfactory for both sides. Thus, it has failed to solve the problem it intended to address and requires further reform.

4 Targeted individual sanctions: the political dimension

4.1 The use of 'targeted sanctions' in EU foreign policy

Before proceeding to examine and discuss the use of targeted sanctions by the EU, it is worthwhile defining what is meant by an EU sanction. Equally, it is important to specify the international legal context in which autonomous EU sanctions are applied. Countermeasures may be taken by a state damaged by an international wrongful act and even by all other states of the international community in case of violation of an *erga omnes* obligation. A gross violation of human rights would qualify as such. Thus, countermeasures consist in the non-performance of an obligation, e.g. the suspension of a treaty with a wrongdoer, as specified in Article 22 of the International Law Commission Draft Articles on State Responsibility. Retorsions, by contrast, are merely non-friendly acts and do not necessarily presuppose the violation of an international obligation[3]. A visa ban constitutes an example for a retorsion. Both types alternate in the practice of the EU.

Three different types of EU sanctions can be distinguished with reference to their embeddedness in universal sanctions regimes (Biersteker and Portela, 2015).

Firstly, there are sanctions applied by the EU in the absence of a previous sanctions resolution by the UNSC, routinely called 'autonomous' EU sanctions. These are enacted by the Council of the EU in instances where the UNSC proves unable to reach agreement. Out of the *ensemble* of autonomous sanctions regimes imposed by the EU over the past 25 years, roughly two-thirds were imposed in support of human rights and democracy objectives, while only one third pursued different aims, mostly the termination of armed conflict. Calculations of how many sanctions pursue this aim are compounded by the frequent conflation of human rights objectives with other goals, such as conflict resolution or the promotion of democracy. As noted by Karen Smith, in the EU the promotion of democracy is often attached to the promotion of human rights (Smith, 2014). EU discourse justifying sanctions routinely refers to the impact on human rights which are related to the democratic process, but which have been incorporated into human rights law, such as the freedom of expression or freedom of association (Smith, 2014). A recent example can be found in the designation criteria of the Venezuela sanctions regime, which apply to 'natural and legal persons responsible for serious human rights violations or abuses or the repression of civil society and democratic

[3] The author thanks Prof Natalino Ronzitti for highlighting this point.

opposition and persons, entities and bodies whose actions, policies or activities undermine democracy or the rule of law in Venezuela, as well as persons, entities and bodies associated with them' (Council of the EU, 2017). As a result, the imposition of sanctions in response to human rights breaches can hardly be dissociated from that addressing democratic backsliding. The same is true for sanctions imposed in pursuance of termination of violent conflict. For cases in which sanctions were imposed in pursuance of peace and security objectives, some mention of human rights objectives in the text is commonplace. To judge by the language of sanctions legislation, practically the totality of EU sanctions pursues the advancement of human rights.

What varies is the relevance given to human rights in the motivation of the sanctions. In sanctions regimes addressing backsliding, human rights tends to appear as a key objective, accompanying the objective of democracy promotion. In regimes addressing armed conflict, it features less prominently, and is often coupled with allusions to international humanitarian law. There are only a handful of EU sanctions regimes where human rights features as the primary aim in the absence of references to democracy, rule of law and international humanitarian law. Only 8.4 % of EU autonomous sanctions regimes imposed from 1980 to 2017 feature human rights as the main objective of the regime, while about 35 % cite human rights among its most prominent aims[4].

Secondly, in a separate role, the EU acts as an implementing agency of UNSC sanctions. Since all members of the UN are obliged to implement measures adopted under Chapter VII of the UN Charter, the EU gives them standing in European law on behalf of all EU Member States. Since these measures simply give effect to UNSC decisions, the EU does not exert any independent agency (Schneider, 2015).

Thirdly, the EU sometimes enacts autonomous sanctions that go beyond the letter of UN sanctions (Taylor, 2010). Hence, both above-mentioned roles come together at times, in a practice that has long escaped the attention of observers. These are additional measures taken to strengthen UN sanctions regimes. Often, these are based upon the wording of UNSC resolutions. For example, when the UN Security Council urges Member States to 'exercise vigilance' with regard to the implementation of sanctions taken under Chapter VII, the EU may decide to add supplementary sanctions. The EU sanctions on Iran since 2010, DPRK or Libya in 2011 exemplify this type, sometimes labelled as 'supplementary' sanctions. However, the distinction between these types is often fluid as an autonomous EU sanctions regime can be subsequently legitimated by an UN 'seal' that extends its application globally (Biersteker and Portela, 2015).

Following piloting at UN level, the EU has fully embraced the application of targeted sanctions and in particular the blacklisting of individuals and entities. Indeed, the EU blacklisted 15 Libyan entities in February 2011, in addition to those designated by the UN, because they constituted a source of funding for the Libyan regime. The list included banks, a broadcasting corporation, oil companies, foundations, an investment company as well as the Revolutionary Guard Corps. Four months later, six port authorities were added to the list, making maritime trade impossible with the main cities on the Libyan coast. Similarly, in 2015 the EU froze the assets and restricted the admission of 'persons undermining democracy or obstructing the search for a political solution in Burundi, including by acts of violence, repression or inciting violence, and persons involved in planning, directing, or committing acts that violate international human rights law or international humanitarian law' (Council of the EU, 2015), listing four individuals. The examples of Libya and Burundi show how the EU has been exploiting the versatility of targeted sanctions to hit a wide range of actors that are part of the state, linked to the state, or unconnected with it. These examples also show how the EU has deployed its autonomous measures both in the absence of UN sanctions in Burundi and against the backdrop of UN sanctions during the Libyan crisis.

Despite the EU's long tradition of applying the notion of targeted sanctions, Brussels had not explicitly endorsed it until a relatively late stage in its development. Even though the EU has been applying targeted

[4] Calculation based on provisional data collected by the author.

sanctions since the 1980s, it committed programmatically to targeting its measures only after the first European Security Strategy was released in December 2003 (High Representative of the CFSP, 2003); thereafter, the EU became discursively more open about its security role. The official 'Principles for the use of restrictive measures' (2004), a document comprising merely two pages, followed the release of a more extensive document dealing with the implementation of sanctions, the 'Guidelines for the implementation of sanctions', in 2003 (Council of the EU, 2003) and updated in 2012 (Council of the EU, 2012).

The 2004 'Basic Principles', which provide some guidance on the political aspect of sanctions imposition, announces the EU's readiness to impose autonomous sanctions at a time when it was already established practice. Its contents still clarify a number of EU sanctions policy features that had not previously been made public:

- Firstly, it subscribes to targeted sanctions, stating that: 'Sanctions should be targeted in a way that has maximum impact on those whose behaviour we want to influence. Targeting should reduce to the maximum extent possible any adverse humanitarian effects or unintended consequences for persons not targeted or neighbouring countries' (Council of the EU, 2004).
- Secondly, it specifies the objectives pursued by EU autonomous sanctions: to fight terrorism and the proliferation of weapons of mass destruction and to uphold respect for human rights, democracy, the rule of law and good governance.
- Thirdly, it commits to ensuring full implementation of measures agreed by the UNSC and to enlist the support of other actors when imposing autonomous sanctions.
- Lastly, it pledges deployment of its autonomous sanctions in full conformity with its obligations under international law.

The European Parliament has also endorsed a targeted approach in its 2012 resolution, which recommends:

> 'to deploy sanctions or restrictive measures which are targeted at and proportionate to the objective pursued, aimed at influencing only the accountable elites of repressive or criminal regimes and the responsible non-state actors of failed states minimising, as far as possible, the adverse impact on civil populations, especially the most vulnerable' (EP, 2012, point j).

As widely recognised in sanctions research, senders can aim measures narrowly on individual leaders or supporters, or they can broaden their aim to encompass whole sectors or commodities. Depending on this choice, 'the types of and severity of the impacts will differ widely' (Elliott, 2016).

The sanctions practice of the EU, which has traditionally featured sanctions against individuals coupled with arms embargos, has evolved away from narrowly targeted measures towards broader bans (Portela, 2016). Listing criteria now encompass considerably larger groups of individuals than previously. This evolution has been denounced as a departure from what used to be an 'exemplarily targeted practice' (Portela, 2016) and contrasts sharply with the UNSC's trend towards increasingly targeted measures (Biersteker et al., 2016).

In the course of the 2000s, the standard formulation of listing criteria for sanctions pursuing human rights objectives referred to 'persons whose activities seriously undermine democracy, human rights and the rule of law'. This has now evolved to the broader and less incriminatory phrase of 'those identified as responsible for the policies or actions that have prompted the EU decisions to impose restrictive measures and those benefiting from and supporting such policies and actions', to be found in the 2012 revision of the *Guidelines* (Council of the EU, 2012, p. 8).

Following adoption of the revised guidelines, this phrase routinely features in EU sanctions legislation. Current sanctions against Syria, for instance, define its target group as 'persons responsible for the violent

repression against the civilian population in Syria, persons benefiting from or supporting the regime, and persons associated with them' (Council of the EU, 2013, p. 18). The inclusion of 'persons associated with' those 'responsible for the violent repression' and those 'benefiting from or supporting the regime' broadens the targeted circle considerably. While the universe of persons identified as responsible for condemned policies can be defined narrowly as it entails individuals in leadership positions, the group 'benefiting from and supporting such policies and actions' is potentially open-ended. The reference to individuals or groups held to 'benefit from' and 'support' the regime could, in principle, extend to all the leadership's sympathisers.

Worryingly, modifications in targeting criteria have not been motivated by the intention to target more precisely. Rather, innovation has been driven by the annulment of listings by European courts, as explained in the previous section. Knowing that listings may come under the scrutiny of the Court, the Council has started to formulate listing criteria in a way which is less susceptible to litigation.

This policy was confirmed by Michael Bishop, a Senior Legal Adviser with the Legal Service of the Council of the European Union:

> 'The court is more comfortable with a broader-based listing criterion, such as providing support to the Government of Iran, than with a criterion such as involvement in nuclear proliferation, which is more difficult to prove. That means that…part of the reason for the Council winning more cases now is that more use has been made of those other status-based, broader-based criteria. However, I must insist that at least half of the reason for the improved success rate is definitely an improvement in the quality of the listing proposal and the information that accompanies it. I have seen that. It is clear.' (House of Lords, 2016).

Nevertheless, the broadening of listing criteria may not have forcibly led to a proliferation of designees. The reformulation of criteria may have merely served the purpose of justifying existing designations, rather than leading to the adoption of new ones.

4.2 Sanctions co-operation with EU partners

Applying sanctions alongside other countries is a routine practice for the EU. Already the 2004 'Basic Principles' stipulate that 'the Council will work to enlist the support of the widest possible range of partners in support of EU autonomous sanctions which will be more effective when they are reinforced by broad international support' (Council of the EU, 2004, point 4).

Far from being a mere 'desideratum', it finds practical application in the design of sanctions regimes. One of the six criteria that guided the imposition of sanctions against targets in the Russian Federation and Ukraine in September 2014 was listed as 'international coordination' (European Council, 2014). The preference for applying sanctions alongside other actors reflects a global trend: overlap between sanctions senders is extensive. In 66 % of all sanctions regimes occurring between 1980 and 2014, multiple senders imposed sanctions against identical targets for the same reason. While sanctions in the 1980s used to involve only one or two senders, this increased to four senders in the 1990s and six senders by 2011 (Borzyskowski and Portela, 2018).

Among those countries that co-operate with the EU, the US stands out, not only as the principal sender of sanctions worldwide, but also the closest partner of the EU. The privileged nature of the transatlantic relationship finds reflection in the European Security Strategy, which mentions the US first when listing its partners, and describes the link between both as 'irreplaceable' (High Representative of the CFSP, 2003). Co-ordination between the EU and Washington on sanctions matters is regular and intense, taking place both formally and informally (House of Lords, 2017).

A comparison of EU and US reactions to human rights violations found no significant differences between EU and US sanctions, whereas, by contrast, UN sanctions tended to be harsher than EU or US sanctions (Hazelzet, 2004). The level of sanctions alignment between Brussels and Washington is high: In Asia, sub-

Saharan Africa, Europe, and the Middle East, about half of all sanctions are jointly imposed by the transatlantic partners. In sub-Saharan Africa, half of all sanctions have been imposed by the transatlantic partners. In non-EU Europe, six out of 13 sanctions were joint activities by the EU and US. Similarly, in the Middle East, US-EU sanctions co-operation affects less than half of all cases. Yet, each sender has also imposed an additional four sanctions of its own independently of the other. Finally, in Asia, more than half the sanctions have been applied by the US and the EU acting in tandem. Latin America is a conspicuous exception to the rule of alignment: only a minority of Washington's sanctions regimes in that region are matched by Brussels (Borzyskowski and Portela, 2018). The alignment of sanctions with Canada is even closer: Ottawa imposes sanctions with Brussels more often than Washington (Charron and Aseltine, 2016).

In addition to key like-minded countries such as the US or Canada, a number of European countries outside the EU as diverse as Georgia and Norway routinely align with the measures enacted by the EU (Hellquist, 2016). Once the EU has decided on a sanctions regime, it invites other countries to align with the measures. Alignment remains optional for these countries. Categories of countries eligible for official alignment includes members of the European Economic Area (Iceland, Norway, and Liechtenstein), European Neighbourhood Policy countries (Armenia, Azerbaijan, Georgia, the Republic of Moldova and Ukraine), signatories to the Stability and Association Agreement (Albania, Bosnia and Herzegovina and Kosovo), as well as candidate countries and aspirants (Albania, the Former Yugoslav Republic of Macedonia, Montenegro, Serbia, Turkey, Bosnia and Herzegovina and Kosovo). The European External Action Service (EEAS) routinely announces their alignment with EU measures in a press release.

A different regime governs the alignment between Switzerland and the EU. Absent any provisions on alignment with CFSP sanctions, Swiss alignment does not feature in European External Action Service (EEAS) press releases. Yet, alignment is common and Switzerland decides on a case-by-case basis whether to take over measures by the EU in its entirety, in part or not at all.

Whilst sanctions co-operation is widespread, the measures adopted do not always coincide. The contents often diverge, with US sanctions entailing more far-reaching restrictions, or the timing of imposition differs.

4.3 EU individual sanctions against human rights abusers

EU practice in the imposition of targeted sanctions has evolved over time. The following selection of cases offers an overview of the main features of this evolution from the origins of the practice in the mid-1990s to our days.

One of the early examples of EU sanctions imposed in response to gross human rights violations took place in 1995. The EU reacted to the execution of Nigerian activist Ken Saro-Wiwa and eight co-defendants imposing a visa ban on 'members of the Provisional Ruling Council and the Federal Executive Council and their families'. It also condemned the 'human rights abuses perpetrated by the military regime, including capital punishment and harsh prison sentences, implemented after flawed judicial process and without granting the possibility of recourse to a higher court' (Council of the EU, 1995). At this stage, the targets of the sanctions regime belonged to the Nigerian leadership, which was held responsible for the execution of the famous activists.

In 2004, the EU reacted to the intimidation campaign and closure of Latin-script Romanian schools in Transnistrian region in Moldova blacklisting 'persons responsible for the intimidation campaign and the closure of Latin-script Moldovan schools' (Council of the EU, 2004). The ten blacklisted individuals featured senior officials from the Ministry of Education as well as local council officials.

The EU also blacklisted in 2004 four officials from the Ministry of Interior in Belarus who are considered responsible for the disappearance of three opposition leaders and a journalist. This time, the visa bans were accompanied by asset freezes. In 2005, with regard to Uzbekistan, the EU enacted restrictions on admission aimed at those individuals 'directly responsible for the indiscriminate and disproportionate use of force in

Andijan and for the obstruction of an independent inquiry', blacklisting several high-ranking military officers as well as senior officials from the Ministry of Interior in Tashkent (Council of the EU, 2005).

One of the most recent sanctions regimes imposed on human rights abusers was enacted on Iran in 2011. The most remarkable novelty of this sanctions regime is that its 29-member blacklist does not only feature designees from the security forces, but also from the judiciary (Council of the EU, 2011). In 2016 a visa ban and assets freeze was imposed on 'persons […] undermining democracy or obstructing the search for a political solution in Burundi, including by acts of violence, repression or inciting violence', as well as 'persons […] involved in planning, directing, or committing acts that violate international human rights law or international humanitarian law, as applicable, or that constitute serious human rights abuses, in Burundi' (Council of the EU, 2015). The most recent EU sanctions regime adopted in November 2017 addressing the leadership of Venezuela features top officials from all three branches: executive, legislative and judicative (Council of the EU, 2018).

Overall, it is observable that there is a decreasing trend in terms of the location of targets in the hierarchy; while the initial blacklists targeted the country's top leadership, subsequent blacklists identified human rights abusers below the cabinet level, and sometimes outside the executive branch. The focus on officials from state authorities shows that individual designations are employed to denounce state-led or state-sponsored abuses perpetrated against the civilian population.

How does the EU fare in term of the consistency of its measures, the efficiency of implementation and the communication and outreach of its individual sanctions?

The answers to these questions reveal that the EU performs very well in some areas and much less so in others. To start with, the process leading to the adoption of sanctions is opaque. Because the sanctions imposition process originates usually with the Council working groups, and its framing remains exclusively in the hands of the Council and Commission, it is difficult to trace the genesis of individual sanctions regimes. Due to the exclusion of the European Parliament, civil society has a less direct access to the policy process than in other domains. Instead, external partners such as the US have an easier access to the articulation of sanctions regimes, and to the proposal of designations, than civil society. Designees are often chosen on the basis of information provided by representations of the Member States – and also of the EEAS - in the target country. While it is difficult to think of consistency as a criterion for listing human rights abusers, given the political nature of the exercise, the quality of evidence on which designations are made has improved considerably. This is largely due to the proliferating jurisprudence of the Court of Justice of the European Union (CJEU), which has set certain standards against which designations are scrutinised. From this point of view, the judicial challenges of EU designations have had a positive effect in promoting consistently solid designations. This is visible even to the external observer, as blacklists nowadays feature publicly the reasons for designation of blacklisted individuals. Also, the yearly renewal of sanctions provides a regular opportunity for reviewing the continued validity of designations.

Despite extensive consultation with other senders, most notably the EU's transatlantic partners, the length and nature of blacklists on both sides of the Atlantic Ocean diverge on account of different listing practices. In international comparison, the EU is cautious when it comes to the release of blacklists. The existence of a far-reaching judicial check, which is unusually intrusive in the case of the EU by virtue of the jurisdiction of the CJEU in fundamental rights coupled with the high standards for human rights protection instituted by the ECHR, largely accounts for this situation. While the frequent overturning of designations by the CJEU is a regrettable development in several respects, CJEU has had the effect of improving consistency of blacklisting practices, thereby increasing supranational influence on a domain that has deliberately kept Member States driven throughout numerous treaty revisions.

Implementation of the measures is mostly satisfactory, certainly by comparison with UN standards. While in the early days some Member States acted in contravention of the visa bans, notably by inviting

blacklisted leaders such as Mugabe to events in Europe, such cases have become extremely rare. Exemptions have become commonplace in sanctions legislation, and they are widely observed. By contrast, the lack of effective communication has been one of the key problems marring the sanctions regimes. Awareness of the sanctions regimes, their scope and rationale is consistently dismal in all countries where designees operate, and regrettably, even among the European public.

4.4 Are individual sanctions effective?

The evolution of targeted sanctions represents a trend towards the personalisation and individualisation of measures in the field of human rights as well as peace and security, a development visible in the rise of ad-hoc international tribunals to deal with war crimes, and the International Criminal Court (ICC). Yet, little is known about the relative efficacy of targeted sanctions in comparison to comprehensive economic embargoes. Research remains scarce, partly because the tools are still under development: sanctions in force are often fine-tuned in order to improve their selectivity and efficacy. The international actors which have embraced targeted sanctions are highly unlikely to resort to comprehensive embargoes on account of their unpopularity (UNGAC, 2015), irrespective of their comparative efficacy in bringing about the desired policy changes. Criticisms of targeted sanctions have taken different forms.

One strand questions the feasibility of targeting sanctions, contending that they cannot totally avoid harming the population (Tostensen and Bull, 2002), a claim confirmed by recent experiences with Iran and Syria (Moret, 2015; Walker, 2016) as well as with some UN sanctions targets (UNGA, 2015). The charge about the instrument's inability to spare the civilian population despite the effort at targeting (Gordon, 2015) resonates with those criticisms floated in the heyday of comprehensive embargoes. An examination of UN practice suggests that the level of human rights protection in the target country is more likely to worsen under an episode of targeted sanctions when compared with a situation where sanctions are not imposed, similar to previous findings of studies on comprehensive sanctions (Carneiro and Apolinario, 2016). While this argument may still apply when targeted measures accumulate, approximating full embargoes, and especially when financial sanctions affect key economic sectors (Drezner, 2011; Wallensteen, 2016), highly targeted measures against individuals obviate such problems.

A second group of critics focuses on the purported inefficacy of targeted sanctions. Early studies of sanctions' efficacy suggest that targeted measures are somewhat less efficacious than comprehensive embargoes (Hufbauer et al., 2007). The most optimistic assessment of targeted sanctions so far contends that their efficacy is comparable to that of comprehensive embargoes (Biersteker et al., 2016). Yet, this positive outcome is largely attributable to the fact that evaluation combines a measurement of coercion alongside other aspects, such as the communicative value of the measures. Even if certain studies have disaggregated country cases in episodes (Biersteker et al., 2016), most research still displays a focus on country cases as an ordering logic. Studies do not systematically evaluate the effects of sanctions on individuals, but the impacts of the sanctions package as a whole. A major research gap exists in the field, as sanctions assessment is routinely conducted with reference to states, despite the existence of an established practice of aiming at individuals often not connected with the states.

Finally, a more fundamental criticism has been directed at the practice of blacklisting. This perspective views the regular adoption and operation of blacklists as a 'modern practice of banishment' whereby 'life in modern society is rendered effectively impossible' by a ban based on largely secret evidence that 'paralyses societal participation' of designees (De Goede, 2011, pp. 501-502). As posited by Marieke de Goede, while the Kadi case contested the logic and legitimacy of the UN sanctions regime, it 'simultaneously contributed to a normalisation of the principle of targeted sanctions and inscribed their pre-emptive nature' (De Goede, 2011, p. 501).

What knowledge has been gained specifically from the impacts of targeted sanctions on designees? The political trend towards individualisation observable in sanctions practice has not been matched by an

effort to ascertain the efficacy of these measures on the side of the senders. To compound the scarcity of research available on this issue, there is hardly any study that looks specifically at the impact of individual sanctions imposed by the EU, as scholarship focuses mostly on the UN.

A large body of sanctions research based its scepticism about the potential efficacy of targeted sanctions on the diminished impact of individual sanctions. As already posited by US sanctions scholar Kimberly Elliott at a time when no systematic evaluation was available, more targeted impact translates into more limited impact, even for those targeted (Elliott, 2005). Similarly, leading sanctions scholar George Lopez acknowledges that sanctions 'have by themselves rarely forced rights violators to desist their actions. They've never toppled a government run by a dictator who violates human rights' (House of Commons, 2016c).

The study conducted by the Targeted Sanctions Consortium (TSC), which was the first investigation of UN targeted sanctions in the post-Cold War era assessing impacts along various evaluative criteria, produced fresh data on which the effects of individual sanctions can be measured.

Based on the TSC dataset, Elliott tested the hypothesis that travel and assets sanctions should display primarily psychological impacts on those targeted or their supporters. She finds that in the few episodes consisting of individually targeted sanctions, political impacts are observable, but economic and psychological impacts are not. By contrast, where broader sectoral sanctions are used, evidence of economic as well as political impacts is detected in more than half the episodes (Elliott, 2016). Contrary to expectations, she found psychological impacts to be uncommon, even when sanctions publicly and prominently target individuals. Moreover, the more narrowly targeted sanctions typically have fewer impacts than other types and psychological impacts are never associated with any degree of sanctions effectiveness (Elliott, 2016). Elliott's findings confirm assumptions about these measures' ability to stigmatise targets. Stigmatisation was more evident in cases involving armed conflict, where it often eroded the political support for targets, than in cases of actors involved in terrorism, violence against civilians or coups d'état (Elliott, 2016).

Outside the TSC inquiry, scholars have adduced different reasons for the relative inconsequence of individual sanctions on the basis of separate inquiries.

US scholar Erica Cosgrove investigated the effects on two individuals who had been listed under the UN bans on Sierra Leone (1997-2010) and Liberia (2003-2016), two closely related regimes. One of the former designees surveyed, Mr Golley, a practicing lawyer holding citizenship of the UK and Sierra Leone, confirmed the presence of psychological impacts in terms of stigma, shame and fear, as well as significant financial damages resulting from the loss of prestige caused by his public inclusion in a UN blacklist. At the same time, he does not attribute any changes in his political views and allegiances resulting from the pressure he came under due to the listing (Cosgrove, 2005).

A former member of the Liberian cabinet, Mr Carbah, explained that he would have been regarded with suspicion if his name had not featured on a UN blacklist where fellow ministers were included (Cosgrove, 2005). From this viewpoint, the immediate effect of the listing was to confirm his loyalty to the Liberian leadership and dissipate any suspicion of proximity with hostile foreign powers. The stigmatising effect took a secondary role in a situation in which a suspicion of disloyalty would have endangered his personal safety. He stated: 'it brought a lot of blessings to me to have been included, otherwise I might have been taken for somebody who is in the government and is not part of the government and probably accused of providing information that probably led to this kind of situation' (cited in Cosgrove, 2005, p. 223). It follows that there was no stigmatisation associated with the inclusion in the ban. The designee reported that he did not feel singled out because he viewed the blacklist 'as a punishment on the government' he belonged to (cited in Cosgrove, 2005, p. 220). He claims that his decision to resign and seek asylum overseas was

motivated by revelations about President Taylor which came to light as a result of a UN investigation, rather than from his own designation.

Peace researchers Peter Wallensteen and Helena Grusell conduct a more comprehensive investigation, analysing data on 450 individuals who have featured on eight different UN lists adopted to address violent conflicts or post-conflict situations. Their enquiry sheds light on a number of interesting aspects regarding the design of listings.

Firstly, they discover that, while designation criteria have gained in specificity, there is a downward trend in listing of individuals. Over time, the number of listed individuals decreased, as did the level of seniority of the designees. The rationale behind limiting the number of designations, recommended by the panel of experts monitoring the sanctions on Côte d'Ivoire, was to prevent the targeting of an entire group in order to prevent their all uniting in opposition against the sender, the UN in this case. Thus, there was a preference for an initially modest listing that could subsequently be escalated. However, field research in Côte d'Ivoire revealed that the blacklist was mocked for the inclusion of only three designees, who albeit violators of the UN resolution, were viewed as peripheral in terms of political power. Here, designation tactics reflecting a weak understanding of how individual sanctions would be perceived and ultimately undermined the credibility of the sanctions (Wallensteen and Grusell, 2012).

Secondly, the trend of designating persons other than the leaders in charge is counterintuitive given that the lower an individual is placed in the hierarchy of the decision-making of the target country, the fewer opportunities there are for him or her to influence the course of action that sanctions aim at changing. Yet, senders had a stronger focus on the top levels of decision-makers in the early episodes, while later they turned towards the lower levels. While the Liberia sanctions regime targeted a large number of leaders, later measures have refrained from targeting leaders, focusing instead on senior administrators, supporters and 'traders'.

In measuring the ability of the measures to bring about targets' compliance with UNSC demands, Wallensteen and Grusell conclude that the compliance ratio for individually targeted sanctions is not higher than is the case for other types of sanctions, which has regularly been estimated to be between 20 % and 34 %. All in all, this result is satisfactory given that the central argument in favour of targeted sanctions is not that they may outperform embargoes in terms of effectiveness, but that they bring about the same results as more comprehensive measures at a lower human cost. The success ratio found by Wallensteen and Grusell corroborates this claim. Nevertheless, the authors contend that their performance could be improved beyond present compliance ratios with the help of better targeting policies.

What the findings of Cosgrove and Wallensteen and Grusell have in common is that they ascribe the inefficacy of the measures to suboptimal targeting. In other words, targeted individual sanctions are not working better because the selection of designees is unsound. Scholars find that the ineffectiveness of visa bans can be ascribed to the wrong employment of the tool, rather than to any inherently flawed nature. Cosgrove posits that the travel ban did not inspire concerted political opposition to President Taylor within Liberia because the civil war was already underway when the measures were imposed (Cosgrove, 2005).

The experience of the EU in the use of individual targeted sanctions has been systematically documented, but little knowledge of its impacts is available. Still, some evidence of the impact individual sanctions was collected. The travel bans inconvenienced some targets in their personal as well as professional capacity, as documented in some interviews with some targets (Eriksson, 2007). Belarusian opposition leader Sannikov, who used to be a member of cabinet under President Lukaschenko, reports that officials fear that 'international condemnation by democratic countries will prevent them from enjoying the life that ordinary people, who did not commit any crimes, can enjoy all over the world' (House of Commons of Canada, 2016a).

4.5 The impacts on individuals: from Nada to Sannikov

While the EU has a vast record of imposing sanctions in response to human rights violations, it has shifted from general measures – such as arms embargoes – to blacklisting members of the target country leadership as well as senior officials and their inner circle. However, it has only recently started blacklisting deposed leaders (Boogaerts et al. 2016) and individuals unconnected to government authorities, thus mirroring the UN's practice of targeting 'spoilers'.

One of the designations that attracted most attention in the early days of individually targeted sanctions was that of Mr Youssef Nada, a businessman and former banker who was blacklisted by the UNSC in late 2001 and subjected to an asset freeze and a travel ban on the grounds of his directorship of Bank al Taqwa and his affiliation with the Muslim Brotherhood. His case gained popularity after it was reported to the Council of Europe by a Swiss parliamentarian. By then, Mr Nada was an aging Italian-Egyptian citizen residing in an Italian enclave surrounded by Swiss territory. Because the Campione d'Italia is a tiny area, the imposition of a travel ban complicated his life situation considerably, depriving him of access to a hospital. Due to this travel ban, he was denied medical care. As he explained: 'I was prohibited to go even to the hospital. And when I asked Susan Lamb [of the UN Sanctions Committee] to allow me to go to Europe for my broken hand – they refused.' (Nada quoted in De Goede, 2011, p.504).

He acknowledged his political alignment, which he presumed to be the cause for his designation: 'I am a member of the Muslim Brotherhood for more than 60 years. That is true. But Muslim Brotherhood is not blacklisted; it is not known as a terrorist organisation. We are completely against violence. And, Bin Laden and his group, for example Al Zawahiri, made a book against us and consider us infidels' (Nada quoted in De Goede, 2011, p.504). Mr Nada, poetically a name meaning 'nothing' in Spanish, found himself in a 'limbo' from which no exit was obvious. As De Goede explains, until Mr Nada was finally delisted in 2010, he found himself in a 'juridical zone of indistinction, in which he was neither indicted, and thus given a chance to defend himself, nor cleared and given a chance to resume his life' (De Goede, 2011, p.504).

Examples along the lines of Mr Nada's case are unobservable in the European sanctions landscape, due to the enactment of exemptions in sanctions legislation, which has become routine for the EU (Happold, 2016), as well as on account of the evolving jurisprudence of the ECJ described in the previous chapter. Due to the difficulty of ascertaining the effects of individual sanctions on the designees, and particularly of obtaining credible information from the designees, research on this question is hardly available.

In order to ascertain the impact of individual sanctions on the target, a more viable approach consists in listening to the experiences and insights of the activists. The experience of Andrei Sannikov, a former presidential candidate in Belarus who was imprisoned on charges of organising mass disturbances, is illustrative: he claims to be 'the living proof' of the effectiveness sanctions 'because I was released only due to the fact that […] the European Union introduced economic sanctions against the businessmen that were close to Lukashenko' (House of Commons of Canada, 2016a). His account provides evidence of the fact that sanctions do protect activists and opposition politicians.

Mr Sannikov refers to the sanctions that were in place prior to 2010 as 'visa ban tourist sanctions', which he describes as 'a very mild instrument'. He reports:

> 'After the crackdown in 2010, when many of us were in jail, me included, the attitude in jail was very difficult [...] There was a horrendous attitude on the part of the authorities. (A)fter the condemnation statements from different states […] they started to contemplate targeted economic sanctions on businessmen. Even when they had just started to do this in Brussels, already I felt the attitude changing inside the prison where I was. They were becoming not so aggressive and not so arrogant, because they were afraid of being included. Even some of the wardens who I saw told me openly – confidentially, of course – that they were afraid that they or their families would be included in the blacklist. Then the targeted sanctions followed, and two businessmen close to the dictator were targeted by the sanctions.

> Immediately, they started the procedure for my release and the release of my friend, the manager of my presidential campaign.'

The witness explains the impact of sanctions on decision-makers as follows: 'when people who are on the side of the regime, or are members of the regime, or are those who have actually implemented whatever policies the regime has implemented in Belarus, they know that there is a principled assessment of their activities, their wrong activities, and they know the possible consequences. They are being more careful.'

The security forces also feel threatened by the sanctions: 'some of the wardens in the prison […] asked me not to release their names to the press because they were afraid of being targeted by sanctions. They were afraid, also, that they would be known as criminals, even among their neighbours. (C)ondemnation by the west of the crimes they committed exposes them inside the country because their names become known, which they try to keep secret. It puts them in an awkward position'.

Mr Sannikov sees a direct relationship between the blacklisting of individuals close to Lukaschenko and the protection of imprisoned opposition members: 'There was a leak of information that there were probably three more businessmen who would be targeted by the sanctions. But then nothing happened and the rest of the political prisoners stayed in prison. If it happened, they would have been released, I'm sure about that'.

He also claims to have detected a change of attitude among the business community: 'When those businessmen were targeted in Belarus they panicked. […] The consolidated position on targeting businesses that supported the regime […] created a different attitude inside the business community because they started to think about whether they were right to continue to finance this kind of repressive regime, and maybe they could do something to help the changes'.

The juxtaposition of these two cases provides us with important insights regarding individual listings and their impacts. Mr Nada's case has become a rarity in the sanctions landscape due to the introduction of due process guarantees. These allow individuals to challenge their listing. The very fact that they challenge their listing in court indicates that the listing represents an inconvenience for the target. Even in the presence of a clear link between the designee and the leadership at fault, a listing may be cancelled by the Court if it considers that insufficient evidence supports the designation.

On the other hand, information on the impact of listings abounds in the account of Mr Sannikov. According to him, once senior officials and businesspeople feel that they are at risk of being blacklisted, they moderate their actions vis-à-vis the opposition, in the knowledge that external powers are watching. This moderating effect is also visible among the prison officials, who worry about the social stigma. Sannikov's insights fits the accounts about the easing of EU measures on Belarus, which often coincided with – or occurred in exchange to – the release of political prisoners (Portela, 2011). Sannikov's account also allows for a new interpretation of the effectiveness of the sanctions regime against Belarus. Even if sanctions proved unable to bring down authoritarian rule in Minsk, they were nevertheless able to protect opposition activist from the action by the authorities.

The juxtaposition of the cases of Mr Nada and of Mr Sannikov evidences the splendour and misery of targeted individual sanctions: the same tool that can severely obstruct the life of designees – unfairly if the target has been wrongly identified – can also mitigate the suffering of activists.

5 The adoption of Magnitsky-type legislation

The 'Magnitsky Rule of Law Accountability Act' was enacted in the US in 2012 following revelations about the torture and subsequent death in prison of Mr Sergej Magnitsky, a lawyer who had publicly exposed grand corruption cases among Russian elites. Individuals listed are blocked from entering the US and accessing US financial markets, while property and any other assets would be seized if they come under US jurisdiction (Poblete, 2013).

The Act allows for the blacklisting of those involved in the murder of Magnitsky as well as similar cases of gross human rights violations worldwide, vowing to list 'persons that were responsible for or benefited financially from the detention, abuse or death of Sergej Magnitsky, were involved in the criminal conspiracy uncovered by [him], or were responsible for extrajudicial killings, torture or other gross violations of internationally recognised human rights committed against individuals seeking to expose illegal activity carried out by officials of the […] Russian Federation or to obtain, exercise, defend or promote internationally recognised human rights and freedoms anywhere in the world'. In December 2016, a new version of the law was passed, the 'Global Magnitsky Act', which was signed into law in December 2017. This legislation, which increases the focus on corruption and has worldwide coverage, does not supersede, but co-exists with, the original Magnitsky list. In its first iteration, the list features 13 individuals, each of a different nationality, to which Treasury added 39 affiliated companies and individuals (U.S. Department of State, 2017). Designees included a former Gambian president, a Pakistani surgeon and a Congolese businessman, respectively accused of creating a unit within the armed forces to terrorise and kill activists, participating in illicit organ-trafficking, and using government connections to obtain lucrative mining and oil deals.

Following the adoption of the US act, other countries followed suit: Canada, the UK, Estonia and most recently Lithuania (Rettman, 2017). This legislation follows the standard practice established by the UNSC: first, the listing criteria are defined, and designations should follow later. The Canadian list combines designees from three different countries – Russians implicated in the torture of Mr Magnitsky, a number of high-ranking Venezuelan officials around Mr Nicolás Maduro, and three officials from South Sudan – while the UK and Estonia have yet to include designations in their blacklists.

Table 2: Overview of Magnitsky legislation acts (as of January 2018)

Country	US	US	Estonia	UK	Canada	Lithuania
Name	Magnitsky Act	Global Magnitsky Act	Amendment to Obligation to Leave and Prohibition on Entry Act	Amendment to Criminal Finances Bill	Justice for Victims of Corrupt Foreign Officials Bill	Amendment to Law on the Legal Status of Aliens
Status	November 2016 (passed) December 2012 (signed into law)	December 2016 (passed) December 2017 (signed into law)	December 2016	Passed by Commons February 2017; pending approval by House of Lords	October 2017	November 2017
Designation criteria	individuals: involved in the conspiracy uncovered by Magnitsky; responsible for Magnitsky's detention, abuse, and death; responsible for extrajudicial killings, torture, or other gross human rights violations against individuals seeking to expose illegal activity by Russian officials or to promote their	persons who have committed serious human rights abuse and engaged in corruption around the world	foreigners: having participated in activities resulting in 'death or serious damage to health of a person' or their 'unfounded conviction […] for criminal offence on political motives'	n. a.	foreign nationals responsible for extrajudicial killings, torture or other gross violations of human rights committed against individuals in any foreign state who seek to expose illegal activity carried out by foreign public officials, or to defend human rights	individuals suspected of involvement in human rights violations

	human rights in Russia					
Measures foreseen	Vis ban, assets freeze restrictions on their ability to access the US financial markets	Visa ban, assets freeze restrictions on their ability to access the US financial markets	Visa ban	asset freezing	asset freezing	Visa ban
Listed groups	Russia *49 in the original listing*	Various nationalities *13 in the original listing*	empty	n. a.	Russia Venezuela South Sudan *52 in the original listing*	empty

Source: **own elaboration**

The adoption of Magnitsky-type legislation is currently under discussion in the European Parliament. A most recent initiative is the EP resolution of 13 September 2017, which reiterated its call for an EU Magnitsky sanctions list against the 32 Russian state officials responsible for the death of Sergei Magnitsky imposing an EU-wide visa ban and a freezing of the financial assets (European Parliament, 2017).

At its point 36, the resolution 'encourages EU Member States to consider adopting legislation with a view to establishing clear criteria allowing for blacklisting and the imposition of similar sanctions against third country individuals and their family members who have committed serious human rights violations or have been responsible for, or complicit in, ordering, controlling or otherwise directing acts of significant corruption, including the expropriation of private or public assets for personal gain, corruption related to government contracts or the extraction of natural resources, bribery, or the facilitation or transfer of ill-gotten assets to foreign jurisdictions' (European Parliament, 2017).

The European Parliament had already issued similar calls in previous years (European Parliament, 2014), echoing calls from civil society (Kinzelbach and Spannagel, 2018; Servettaz, 2014). In a November 2017 resolution, the Lithuanian Parliament (Seimas) invited other Member States of the EU, as well as of the North Atlantic Treaty Organisation (NATO) to enact Magnitsky-type lists, and supported its adoption at EU level (Seimas of Lithuania, 2017).

5.1 The case in favour

The case in favour of the enactment of a Magnitsky-type list can be based on two main arguments, many of which were brought to the fore in the context of the debate on the recent adoption of Magnitsky acts elsewhere.

The establishment of such list would mark the ultimate de-coupling of designees from country-based classifications, a development that would accurately reflect the nature of the instrument. As posited by Canadian scholar Kim Nossal, 'there can be no better example of the move to targeted sanctions than the Magnistky Act of 2012', a piece of legislation imposing sanctions 'on just 18 of Russia's 143 million people' (House of Commons of Canada, 2016c). So far, with the only exception of the terrorism lists, all EU sanctions regimes are formally linked to a state. The possibility of listing individuals responsible for grave human rights violations without recourse to a country-based list would obviate the need for the establishment of a new sanctions regime to blacklist individual perpetrators. This would reduce the complexity of the current system and allow for the blacklisting of human rights abusers in the absence of a major event – a serious international crisis involving violent conflict or democratic backsliding – in the country where the target operates. As seen above, most sanctions regimes focusing on human rights have been enacted against abusers in countries which were simultaneously being targeted for violent conflict or democratic backsliding, or which were already under sanctions on account of a major international crisis.

Another key argument is that a practice of blacklisting individuals engaging in gross human rights violations draws international attention to the situation of political or civil society activists under threat of, or subject to, imprisonment and mistreatment in third countries, and can thereby help protecting them. This is closely linked to the argument supporting the adoption of the law on account of its (purported) role in deterring similar behaviour. Canadian MP Irwin Cotler highlights that the objective of the Magnitsky Act is to deter would-be or prospective violators (House of Commons of Canada, 2016b). Opposition leader Andrei Sannikov, a former Belarusian cabinet member who defected to the opposition, substantiates both rationales by compellingly claiming that sanctions on Belarus 'probably saved [his] life' (House of Commons of Canada, 2016a; see also case study above). The same Belarusian activist highlights the deterrent effect of blacklists: 'those who abuse human rights grossly and regularly, for a long time, enjoy immunity because they're high officials and no international law makes it possible to bring charges against high officials of the state, no matter how bad it is. Impunity is a driving force of further repression, so the global Magnitsky law of course will be a very powerful instrument' (House of Commons of Canada, 2016a).

In addition, the anti-corruption orientation of the Magnitsky legislation would provide a legal basis for the blacklisting of persons involved in corruption cases. Combatting corruption and money-laundering are goals that feature as prominently as responding to human rights violations in the legal acts of those countries that have already adopted them (Poblete, 2013; Seimas of Lithuania, 2017). In the EU context, sanctions are rarely imposed to combat corruption abroad. This rationale has only been applied to the asset freezes on purportedly misappropriated funds in Egypt, Tunisia and Ukraine, often at the request of the countries post-revolutionary authorities (Boogaerts et al., 2016). It has occasionally been addressed in the context of the suspension of the ACP-EU Partnership Agreement, albeit in the form of demands for reform, not in the form of blacklist of perpetrators. The enactment of an EU 'Global Magnitsky' act could firmly anchor the fight against corruption as a foreign policy objective. This would be a welcome addition, given that human rights violations are often connected to corruption. As posited by US sanctions expert George Lopez, 'the greatest perpetrators, both in conditions of war and of regular human rights abuses without war, tend to be kleptocracies and organised criminal networks that are benefiting substantially from the perpetration of these violent areas' (House of Commons, 2016c)

A European Magnitisky list would help to reinforce the visibility of the European Union as an advocate of human rights worldwide. The adoption of visa bans at EU level has been the norm rather than the exception, despite the absence of any legal impediment to their adoption at national level under EU law. In view of the adoption of Magnitsky-type listings by EU Member States, the extension of the list to all members would present a more unified external image of the organisation as a political entity with a uniform stance on who are *personae non-gratae*. The most obvious step would consist of a visa ban, the measure adopted by Estonia and Lithuania. This contrasts with the British adoption of assets freezes. However, the impending withdrawal from the EU means that British actions will soon decline in importance in the CFSP. Furthermore, the existence of an all-European Magnistky list would put the EU on a par with its transatlantic partners where similar legislation is already in force, namely the US and Canada.

5.2 The case against

Perhaps the principal argument against the adoption of a Magnitsky list is the most classical argument in the sanctions debate: its expected lack of impact on targets. It was put forward in the context of the Canadian debate: Ottawa's blacklist has been criticised for its inability to affect the designees, who do not view Canada as a tax haven (Charron, 2017). Canada's robust anti-money laundering legislation makes it an unlikely destination for the money of designees (Charron, 2017). This argument is less valid for countries like the UK, which is believed to be home to properties of Russian elites. According to Mr William Browder, leader of the global Magnitsky Justice Campaign, 'kleptocrats in Russia and other authoritarian regimes […] all have expensive properties in London and think they are untouchable' (quoted in EU reporter 2017). It also differs dramatically from the expected impact of US measures. As acknowledged by a senior US

official, 'sanctions not only block all assets under U.S. jurisdiction […], but also prevent U.S. persons from dealing with persons designated today, to include individuals or companies. […] given the dominance of the US financial system, it effectively shuts out many folks from the international system' (US Department of State, 2017). In the specific case of the EU, the expected impact of the measures differs depending on the identity of the target(s).

With the notable exception of those countries which have already adopted a Magnistky list, the idea of creating an EU-wide equivalent has not yet garnered much support outside the European Parliament[5]. Enacting a new, general blacklist unconnected to any specific country is likely to expand opportunities for litigation in European courts. Despite visible improvements in the outcome of litigation, the Council does not yet have the problem of legal challenges under control. This might lessen Member States' appetite for placing individuals under sanctions in general. As this author posited in the framework of a hearing with the Parliament of Canada, 'it is difficult to imagine that the EU will contemplate the adoption of an act of this nature due to the recurrent court challenges that it has been facing with regard to its designations' (House of Commons of Canada, 2016c).

In this connection, it is worthwhile recalling that the adoption of Magnitsky-type legislation with an asset freeze variant has different implications from a mere visa ban. While the visa-ban is a mere retorsion and it is usually at the discretion of the banning state, asset freezes may entail a violation of international law, whose unlawfulness is excluded only if serious violations of human rights have been perpetrated. Contrary to visa bans, an asset freeze may be challenged before a court, and court challenges to sanctions are, as discussed above, a specifically European vulnerability. Hence the necessity to distinguish between travel bans and asset freezes and to identify sound criteria for determining whether an individual has been responsible for a grave human right violation[6].

Finally, the adoption of a Magnitsky list might elicit countersanctions by the country whose nationals are affected. The passing of the original Magnitisky list in the US prompted the Duma to enact a prohibition of any political activities by NGOs receiving funding from the US, as well as a series of sanctions levied against US officials and a ban on US adoptions of Russian orphans. This risk might be mitigated by the listing of individuals of a mix of nationalities along the lines of the 'Global Magnitsky Act', whose universal scope contrasts with the Russian focus of the original Magnitsky list, but it cannot be entirely discarded.

5.3 Conclusion

It is difficult to predict the extent to which the campaign in favour of Magnitsky legislation will gain momentum. Even though the Lithuanian parliament is actively lobbying for adoption, the impending withdrawal of the UK from the Union inevitably weakens adoption prospects, since the EU will lose one of its 'heavy weights' in terms of support for sanctions, particularly for human rights goals (House of Lords, 2017b).

The adoption of a Magnitsky act would undoubtedly have the effect of consolidating the EU's reputation as a human rights advocate, and of anchoring its commitment to fight corruption. The main benefit of the adoption of a Magnitsky act at EU level consists in allowing for the blacklisting of severe human rights abusers even in the absence of a major political event of democratic backsliding or large-scale violence. It would facilitate the blacklisting of individual perpetrators of human rights violations where no standing sanctions regime exists, and where they are unlikely to come about as country sanctions regimes. Conversely, there is a risk that this option would lower the threshold for blacklisting of individuals, opening a 'Pandora box' characterised by inconsistent listing practices that could quickly endanger its credibility. Thus, in the event of adoption, the EU would be well advised to clearly define the nature and magnitude

[5] Assessment based on author's exploratory inquiries with selected EU Member States.
[6] The author thanks Prof Natalino Ronzitti for highlighting this point.

of the abuses warranting the blacklisting of individuals. In the lucid reflection of Canadian sanctions expert Meredith Lilly, the adoption of Magnitsky-type legislation creates 'a new test' for determining when to intervene in the actions of other states (House of Commons, 2016d).

Finally, EU actors should be aware that blacklisting rarely brings about the sort of change in the behaviour of the target that can be publicly show-cased as a success story. There are indications that it can help protect activists and opposition politicians. This is an important effect that makes the legislation worth pursuing. However, it operates in a subtle way that renders their fruits less visible than those of high profile sanctions cases. In the event that the EU gives a green light to the proposed legislation, it should ensure that no inflated expectations are created about sanctions' ability to change things on the ground.

6 Recommendations

- Over the past decade, the problem of inadequate due process has taken centre stage in the discussion over individual sanctions: numerous designations have been challenged successfully in EU Courts. While figures show that the Council is now winning more cases than it is losing, reversing the negative trend witnessed in the first years of litigation, Court challenges are far from over. These challenges impinge upon the international prestige of the EU and cast doubts on its commitment to support UN action. In future, the Council should continue to focus its efforts in better substantiating the evidentiary basis for its listings.
- The frequent success with which designated individuals have challenged the listings constitutes a serious disincentive for the expansion of the listing practices in the EU. In the event of an adoption of Magnitsky-type legislation at EU level, an effort should be made to include designations that satisfy the highest evidentiary standards in order to minimise their vulnerability to court challenges. Ideally, listings attached to a – still hypothetical – European Global Magnitsky list should be thoroughly supported by open access evidence.
- Efforts undertaken by the Council to prevent court challenges to its designations have led to the broadening of listing criteria, a development that has caused concern as it dilutes the targeted nature of the bans. For the defence of its listings, the Council should ensure that it relies on the robustness of its evidentiary basis, rather than on a broadening of its listings criteria.
- In conjunction with the group of 'Like-minded countries' at the UN, the EU should endeavour to improve the efficiency of its system for de-listing requests, and work towards the expansion of the competence of the UN Ombudsperson beyond her current responsibility to hear requests concerning the sanctions regime against Da'esh and Al-Qaida (former UNSC Resolution 1267 listing) to cover also country-specific sanctions regimes. This is of particular consequence given that UN listings may also be challenged at EU Courts, as famously exemplified by the *Kadi* case.
- In an effort to strike a balance between the urgency to include persons in a blacklist and collecting sufficient evidence supporting their listing, reviews should take place every six months. The reviews should not only assess the pertinence of the listing, but the existence of sufficient material to support the designation in the face of a hypothetical challenge. To this end, the Council working group can act as a 'peer group'. Where evidence is judged insufficient, the countries having proposed the original designation should be given an additional six months to strengthen the evidentiary material. Absent any improvements past six months, the Council should assess the likelihood of a challenge and, where relevant, give serious consideration to delisting.
- The European Parliament, as an institution with a particular interest in protecting human rights and fundamental freedoms, should exercise close scrutiny of the actions of the Council in this field, monitoring new developments in the definition of listing criteria and the modifications of blacklists, openly enquiring about the rationales for changes where relevant. This is particularly

expedient in view of the prospective disappearance of the British Parliament as a venue for scrutiny of EU sanctions policies which has, thanks to successive inquiries into this subject matter, made useful information available to researchers by inviting key decision-makers and officials and subsequently publishing the transcripts.

- The Council should, as a matter of priority, strengthen the closed material procedure with a view to enhancing the confidence of Member States and promote the activation of the mechanism. The lack of employment of the current arrangement testifies to its unsatisfactory character and calls for urgent remedy.
- The EU should enhance the analytical capacity of the EEAS and Commission structures responsible for the preparation of sanctions legislation to ensure that issues surrounding the design of individual sanctions are given proper consideration. This is particularly important in view of the scarcity of specialised staff supporting Member States representative in the formulation of sanctions policy in the context of the relevant Council working groups. The impending withdrawal of the UK, one of the Member States with the highest level of expertise in sanctions design, will aggravate the scarcity of specialised knowledge available to support policy formulation.
- The EU should either investigate or commission research assessing the effects of its targeted sanctions on individuals. On account of the judicialisation of sanctions' disputes and abundance of court cases, the cases made by designees constitute virtually the only material available on the effects of targeted sanctions on individuals. The production of scientific research would provide valuable insights for the refinement of the tool.
- In the event of adopting Magnitsky-type legislation, it should be modelled on the Global Magnitsky Act rather than on the original Magnitsky Act, in order to highlight its universal coverage as a tool for human rights protection, rather than as a political signal against specific countries. This is in keeping with the individualisation of sanctions and will minimise the risk of political backlash in third countries.
- In its first rendition, a Magnitsky act should be limited to visa bans, following Lithuania's and Estonia's practice, in order to mitigate possible legal difficulties, while the adoption of an assets freeze could be contemplated subsequently.
- Particular attention should be paid to the number of individuals included in the initial sanctions round, as well as to the mix between responsible officials and mere implementers in the public administration and the security forces blacklisted. As we have seen, a very low number of designations, and an excessive focus on lower-rank civil servants as opposed to senior official has undermined the credibility of the blacklists in the target countries.
- Given that the adoption of a Magnitsky act would lower the threshold for blacklisting of individuals as this would become de-linked from country sanctions regimes, it would create a new test for EU intervention. To mitigate the risk of inconsistent listing practices, the EU should define the nature and magnitude of the abuses warranting inclusion of individuals in the list.

Bibliography

Ashton, C., Speech by European Union High Representative on the EU's policy on restrictive measures, European Parliament, 1 February 2012.

Barber, J., *Economic sanctions as a policy instrument*, International Affairs Vol.55 No.3, 1979, pp. 367-384.

Biersteker, T. and Portela, C., *EU Sanctions: Three types*, EUISS Brief, EUISS, Paris, 2015.

Biersteker, T., Eckert, S. and Tourinho, M. (eds), *Targeted Sanctions. The impacts and effectiveness of UN action*, Cambridge University Press, Cambridge, 2016.

Biersteker, T., Tourinho, M. and Eckert, S., 'The effectiveness of United Nations targeted sanctions' in T. Biersteker, S. Eckert and M. Tourinho (eds), *Targeted Sanctions: The impacts and effectiveness of United Nations action*, Cambridge University Press, Cambridge, 2016, pp. 220-247.

Boogaerts, A., Portela, C. and Drieskens, E., *One swallow does not make spring: A critical juncture perspective on the EU sanctions in response to the Arab Spring*, Mediterranean Politics, Vol. 21 No 2, 2016, pp. 205-225.

Borzyskowski, I. v. and Portela, C., 'Sanctions Co-operation and regional organisations', in S. Aris, A. Snetkov and A. Wenger (eds), *Inter-oganisational Relations and International Security*, Routledge, Abingdon, 2018, pp. 280-294.

Boutros-Ghali, B., Supplement to 'An Agenda for Peace': Position paper of the Secretary-General on the occasion of the fiftieth anniversary of the United Nations. A/50/60, S/1995/1, New York, January 25, 1995.

Brzoska, M., *From Dumb to Smart? Recent reforms of UN sanctions*, Global Governance 9:4, 2003, pp. 519-535.

Cardwell, P., *The legalisation of EU foreign policy and the use of sanctions*, Cambridge Yearbook of European Legal Studies, 17:1, 2015, pp. 287-310.

Carneiro, C. and Apolinário, L., *Targeted versus Conventional Economic Sanctions: What is at stake for human rights?*, International Interactions, 42:4, 2016, pp. 565-589.

Charron, A. and Lilly, M., *More sanctions is the wrong tool for human rights protection*, Policy Options, Institute for Research on Public Policy, Montreal, 2017.

Charron, A. and Portela, C., *The UN, regional sanctions and Africa*, International Affairs 91(6), 2015, pp. 1369–1385.

Charron, A., Written evidence to the House of Commons' Standing Committee on Foreign Affairs and International Development, Legislative Review of the Special Economic Measures Act and the Freezing of Assets of Corrupt Foreign Officials, Parliament of Canada, 19 October, 2016.

Charron, A. and Aseltine, P. *Calling a Spade a Spade: Canada´s use of sanctions*. Winnipeg: Canadian Global Affairs Institute, 2016.

Cosgrove, E., 'Examining targeted sanctions. Are travel bans effective?' in P. Wallensteen and C. Staibano (eds), *International Sanctions: Between words and wars in the global system*, Frank Cass, Abingdon, 2005, pp. 207-228.

Council of the European Union, Council Decision (CFSP) 2018/90 of 22 January 2018 amending Decision (CFSP) 2017/2074 concerning restrictive measures in view of the situation in Venezuela, Brussels, 22 January 2018.

Council of the European Union, Council Decision (CFSP) 2017/2074 of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela, Brussels, 13 November 2017.

Council of the European Union, Council Regulation (EU) 2015/1755 of 1 October 2015 concerning restrictive measures in view of the situation in Burundi, Official Journal of the European Union L 257/1, Brussels, 2 October 2015.

Council of the European Union, Council Decision 2013/255/CFSP of 31 May 2013 concerning restrictive measures against Syria, OJ L 147, Brussels, 1 June 2013.

Council of the European Union, Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, Doc. 11205/12, Brussels, 15 June 2012.

Council of the European Union, Council Decision 2011/235/CFSP of 12 April 2011 concerning restrictive measures directed against certain persons and entities in view of the situation in Iran, Brussels, 12 April 2011.

Council of the European Union, Council Common Position 2005/792/CFSP of 14 November 2005 concerning restrictive measures against Uzbekistan, Brussels, 14 November 2005.

Council of the European Union, Basic Principles on the use of restrictive measures (Sanctions), Brussels, 7 June 2004.

Council of the European Union, Council Common Position 2004/622/CFSP of 26 August 2004 amending Common Position 2004/179/CFSP concerning restrictive measures against the leadership of the Transnistrian region of the Moldovan Republic

Council of the European Union, Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, Doc. 15579/03, Brussels, 3 December 2003.

Council of the European Union, EU Common Position 95/515/CFSP: Common position of 20 November 1995 defined by the Council on the basis of Article J.2 of the Treaty on European Union, on Nigeria, Brussels, 20 November 1995.

Court of Justice of the European Union, Annual Report, Publications Office of the European Union, Luxembourg, 2014.

Court of Justice of the European Union, Annual Report, Publications Office of the European Union, Luxembourg, 2017.

De Goede, M. and Sullivan, G., *The politics of security lists*, Society and Space, 34:1, 2016, pp. 67-88.

De Goede, M., *Blacklisting and the ban: Contesting targeted sanctions in Europe*, Security Dialogue, 42:6, 2011, pp. 499-515.

Doxey, M., *Reflections on the sanctions decade and beyond*, International Journal, 64:2, 2009, pp. 539-549.

Drezner, D., *Sanctions sometimes smart: Targeted sanctions in theory and practice*, International Studies Review, 13, 2011.

Eckert, S., *The use of financial measures to promote security*, Journal of International Affairs, 62:1, 2008, pp. 103-111.

Eden, P., 'United Nations targeted sanctions, human rights and the Office of the Ombudsperson', in M. Happold and P. Eden (ed) *Economic Sanctions and International Law*, 2016, Hart, Oxford, pp. 135-169.

Elliott, KA., 'The impacts of United Nations targeted sanctions' in T. Biersteker, S. Eckert and M. Tourinho (eds), *Targeted Sanctions: The impacts and effectiveness of United Nations action*, Cambridge University Press, Cambridge, 2016, pp. 172-189.

Elliott, KA., 'Trends in economic sanctions policy' in P. Wallensteen and C. Staibano (eds), *International Sanctions: Between words and wars in the global system*, Frank Cass, Abingdon, 2005, pp. 3-14.

Eriksson, M., 'EU sanctions: Three cases' in P. Wallensteen and C. Staibano (eds), *International Sanctions: Between words and wars in the global system*, Frank Cass, Abingdon, 2005, pp. 108-125.

Eriksson, M., *Targeting the leadership of Zimbabwe: A path to democracy and normalisation*?, Uppsala University, Department of Peace and Conflict Research, Uppsala 2007.

EU Reporter, 'UK parliament passes historic Magnitsky asset-freezing sanctions', 22 February, 2017.

European Council, 2014, Joint letter to the EU Heads of State or Government by the President of the European Council, Herman Van Rompuy, and the President of the European Commission, José Manuel Barroso, on restrictive measures against Russia, Press Release EUCO 174/14, Brussels, 5 September 2014.

European Parliament, European Parliament recommendation to the Council of 2 February 2012 on a consistent policy towards regimes against which the EU applies restrictive measures, when their leaders exercise their personal and commercial interests within EU borders (2011/2187(INI)), P7_TA(2012)0018, Brussels, 2 February 2012.

European Parliament, European Parliament recommendation to the Council of 2 April 2014 on establishing common visa restrictions for Russian officials involved in the Sergei Magnitsky case (2014/2016(INI)), Brussels, 2 April 2014.

European Parliament, European Parliament resolution of 13 September 2017 on corruption and human rights in third countries (2017/2028(INI)), Strasbourg, 13 September 2017.

Feliu, L. and Serra, F., 'The European Union as a "normative power" and the normative voice of the European Parliament', in S. Stavridis and D. Irrera (ed) *The European Parliament and its international relations*, 2015, Routledge, Abingdon, pp. 17-33.

Galtung, J., *On the Effects of International Economic Sanctions, with examples from the case of Rhodesia*, World Politics 19:3, 1967, pp. 378-416.

Gattini. A., *Case law: Joint cases C-402/05 P and 415/05 P, Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission*, Common Market Law Review, 46, No 1, 2009.

Gestri, M., 'Sanctions imposed by the European Union: Legal and institutional aspects', in N. Ronzitti (ed) *Coercive Diplomacy, Sanctions and International Law*, 2016, pp. 70-102.

Giumelli, F., *Coercing, Constraining, Signalling*, ECPR Press, Colchester, 2011.

Giumelli, F., *Understanding United Nations targeted sanctions: An empirical analysis*, International Affairs 91, No 6, 2015, pp. 1351–1368.

Gordon, J., *The invisibility of human harm: how smart sanctions consumed all the oxygen in the room*, Social Research, 82:4, 2015, 863–874.

Greilsammer, I., *The non-ratification of the EEC-Israel Protocols by the European Parliament (1988)*, Middle Eastern Studies Vol. 27 No.2, 1991, pp. 303-321.

Griller, S., *International law, human rights, and the union's autonomous legal order: Notes on the European court of justice's decision on Kadi*, European Constitutional Law Review, 4, No 3 (2008), pp. 528-53.

Happold, M., 'Targeted sanctions and human rights', in M. Happold and P. Eden (ed) *Economic Sanctions and International Law*, 2016, Hart, Oxford, pp. 87-111.

Hazelzet, H., *Carrots or sticks? EU and US reactions to human rights violations in the nineties and beyond*, paper presented at the conference 'Enhancing the European Profile in Democracy Assistance', The Hague, Netherlands, July 4-6, 2004.

Heinz, W. and Litschke, P., *Der UN-Sicherheitsrat und der Schutz der Menschenrechte*, Deutsches Institut für Menschenrechte, Berlin, 2012.

Hellquist, E., *Either with us or against us? Third-country alignment with EU sanctions against Russia/Ukraine*, Cambridge Review of International Affairs 29, No 3, 2016, pp. 997-1021.

High Representative of the CFSP, *European Security Strategy*, Brussels, 12 December 2003.

House of Commons (a), Standing Committee on Foreign Affairs and International Development, Parliament of Canada, evidence session 15:30, 14 November, 2016, available under http://www.ourcommons.ca/DocumentViewer/en/42-1/FAAE/meeting-32/evidence, accessed 30 March 2017.

House of Commons (b), Standing Committee on Foreign Affairs and International Development, Parliament of Canada, evidence session 16:35, 7 December, 2016, available under http://www.ourcommons.ca/DocumentViewer/en/42-1/FAAE/meeting-40/evidence, accessed 30 March 2017.

House of Commons (c), Standing Committee on Foreign Affairs and International Development, Parliament of Canada, evidence session 15:30, 31 October, 2016, available under http://www.ourcommons.ca/DocumentViewer/en/42-1/FAAE/meeting-30/evidence, accessed 30 November 2016.

House of Commons (d), Standing Committee on Foreign Affairs and International Development, Parliament of Canada, evidence session 15:30, 26 October, 2016, available under http://www.ourcommons.ca/DocumentViewer/en/42-1/FAAE/meeting-26/evidence, accessed 30 November 2016.

House of Lords, Select Committee on the European Union, EU Justice Sub-Committee, Corrected oral evidence: The Legality of EU Sanctions, 11 October 2016.

House of Lords (a), *The legality of EU sanctions*, European Union Committee, 11th Report of Session 2016-17, 2 February 2017.

House of Lords (b), *Brexit: Sanctions policy*, European Union Committee, 8th Report of Session 2017-19, 17 December 2017.

Hufbauer, G., Schott, J., Elliot, K. and Oegg, B., *Economic Sanctions Reconsidered: History and Current Policy*, Institute for International Economics, Washington, D.C., 2007.

Jazairy, I., Statement at the 72nd session of the General Assembly, Third Committee, Item 73 (b & c), New York, 18 October 2017.

Kinzelbach, K. and Spannagel, J., 'New ways to address an old problem : Political repression', in C. Rodríguez-Garavito and K. Gómez (ed) *Raising to the Populist Challenge*, Dejusticia, Bogotá, 2018, pp. 185-195.

Lamek, A., Intervention auprès du Conseil de sécurité du représentant permanent adjoint de la France auprès des Nations unies, New York, 25 novembre 2014.

Lerch, M., *Menschenrechte und Europäische Aussenpolitik*, Verlag für Sozialwissenschaften, Wiesbaden, 2004.

Lidington, D., Letter addressed to Lord Tugendhat, Chairman of EU Subcommittee C, House of Lords, London, 14 February 2014

Moret, E., *Humanitarian impacts of economic sanctions on Iran and Syria,* European Security, 24:1, 2015, pp. 1-21.

Neier, A., *Sanctions and human rights*, Social Research 82:4, 2015, pp. 875-886.

Nivet, B., *Les sanctions internationales de l'Union Européenne : soft power, hard power ou puissance symbolique?,* Revue internationale et stratégique, Vol. 97, printemps 2015, pp. 129-38.

Poblete, J., *The Magnitsky List: a trend-setter process in global human rights and compliance law?*, WorldECR, Vol.21, 2013, pp. 15-1.

Portela, C. and Orbie, J., *Sanctions under the EU's Generalised System of Preferences (GSP): Coherence by accident?*, Contemporary Politics, Vol. 20, No 1, 2014, pp. 63-76.

Portela, C., 'How the EU learned to love sanctions', in M. Leonard (ed), *Connectivity Wars*, ECFR: London, pp. 36-42.

Portela, C., *Are EU sanctions 'targeted'?*, Cambridge Review of International Affairs 29, No 3, 2016, pp. 912-929.

Portela, C., *European Union Sanctions and Foreign Policy*, Routledge, Abingdon, 2010.

Portela, C., *Member states' resistance to EU foreign policy sanctions*, European Foreign Affairs Review 20(3), 2015, pp. 39–61.

Portela, C., *Belarus and the European Union: Sanctions and partnership?*, Comparative European Politics Vol 9 No 4, 2011, pp. 486-505.

Portela, C., *National implementation of United Nations Security Council sanctions: Towards fragmentation*, International Journal (Canada) 65 No 1, 2009, pp. 13-30.

Portela, C., *Where and why does the EU impose sanctions?*, Politique Européenne 17 No 3, 2005, pp. 83 – 111.

Pursiainen, A., *Targeted Sanctions and fundamental rights*, Solidplan Consulting, Helsinki, 2017.

Rettman, A., *Lithuania adds to EU momentum on Russia sanctions*, EUObserver, 16 November 2017.

Ronzitti, N., 'Sanctions as instruments of coercive diplomacy. An international law perspective', in N. Ronzitti (ed) *Coercive Diplomacy, Sanctions and International Law*, 2016, pp. 1-32.

Schneider, C., *Les sanctions économiques de l'Union Européenne*, Annuaire de Droit de l'Union Européenne, 2015.

Seimas of the Republic of Lithuania, Resolution on the Anniversary of the death of Sergei Magnitsky, No XIII-83, Vilnius, 23 November 2017.

Servettaz, E., *A Sanctions Primer. What happens to the targeted?*, World Affairs, 177 No2 , 2014, pp. 82-89.

Smith, K., *European Union foreign policy in a changing world*, Third edition. Polity: London, 2014.

Taylor, B., *Sanctions as grand strategy*, IISS: London, 2010.

Tostensen, A. and Bull, B., *Are smart sanctions feasible?*, World Politics, 54:3, 2000, pp. 373-403.

United Nations General Assembly, Compendium of the High-level Review of UN Sanction, Doc. A/69/941–S/2015/432, New York, 12 June 2015.

United Nations Security Council, Letter from the Permanent Representatives of China, France, the Russian Federation, the United States and the United Kingdom to the United Nations addressed to the President of the Security Council, S/1995/300, New York, 13 April 1995.

U.S. Department of State, Background Briefing by Senior Administration Officials on the Rollout of the Global Magnitsky Sanctions, Special Briefing, Senior Administration Officials via teleconference, 21 December, 2017, available under https://www.state.gov/r/pa/prs/ps/2017/12/276734.htm, accessed 4 January 2018.

Vries, A. de and Hazelzet, H., 'The EU as a new actor on the sanctions scene' in P. Wallensteen and C. Staibano (eds), *International Sanctions: Between words and wars in the global system*, Frank Cass, Abingdon, 2005, pp. 95-106.

Walker, J., *Study on Humanitarian Impact of Syria-related unilateral coercive measures*, UNESCWA, Beirut, 2016.

Wallensteen, P. and Grusell, H., *Targeting the right targets? The UN use of individual sanctions*, Global Governance, 18:2, 2012, pp. 207-230.

Wallensteen, P., 'Institutional learning in targeted sanctions', in T. Biersteker, S. Eckert, and M. Tourinho, (eds), *Targeted Sanctions. The impacts and effectiveness of UN action*, Cambridge University Press, Cambridge, 2016, pp. 248-264.

Weschler, J., *The evolution of Security Council innovations in sanctions*, International Journal 65 No 1, 2009, pp. 31-43.

Zanon, F. 'The European Parliament: an autonomous foreign policy identity?', in E. Barbé and A. Herranz (eds), *The role of parliaments in European foreign policy,* Office of the European Union, Barcelona, 2005, pp. 107-119.

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