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Executive Summary

The present study examines a number of issues concerning the EU's own (autonomous) sanctions (also called restrictive measures) and EU sanctions implementing UN Security Council sanctions. The interplay between the international, EU and national constitutional legal systems causes problems and creates complexity in this field but the scope for simplifying this is limited. UN and EU sanctions have very different legal bases at international law. Under EC Law, the legal basis and procedures to be followed for introducing trade/aid suspension measures is quite different from the legal basis and procedure to be followed for introducing CFSP sanctions. This distinction between the two legal bases is retained in the Lisbon treaty, although there is some increased scope for integrating these two bases.

UN and EU targeted sanctions work by means of blacklisting. The procedures for blacklisting are different depending on whether the targets are governments or terrorist organisations. Identification of terrorist suspects as compared to governmental members is a much more uncertain process.

Special conditions have to exist for targeted sanctions successfully to accomplish behavioral modification. CFSP targeted sanctions have seldom achieved their primary objectives. Nonetheless there has been no officially-sponsored objective evaluation of the efficacy of CFSP sanctions. It is, however, clear that UN and EU sanctions have not been applied consistently in the sense of the most serious human rights offenders being targeted. However, the desire for sanctions to be meaningful and not simply symbolic means that sanctions should only be introduced where there is some chance of them having some impact on the target. The target must accordingly be vulnerable to the pressure that a sanction can exert, at least to some degree. Moreover, the civilian population should not be harmed by sanctions. These aims mean that a degree of inconsistency in targeting is inevitable. The existing different institutional frameworks for deciding "positive" and "negative" measures in pursuance of the EU's foreign policy goals as a whole also make a degree of inconsistency inevitable between these positive and negative measures. There is, however, scope for better overall coordination between the various "carrot and stick" policies initiated and implemented at the level of the Commission, Council and Member states. Various concrete steps can be taken at the EU level which may improve effectiveness of implementation, but these steps will not deal with the underlying limited utility of targeted sanctions.

At national law, the creation of anti-terrorist sanctions has greatly increased the people affected by the criminalization sanctions entail. However, the effectiveness of these has never been evaluated and their usefulness is highly doubtful. The present UN blacklisting sanctions violate EU human rights standards, and this has been made clear by the European Court of Justice. Thus the EU/EC implementation of these systems is very problematic. The EU's own sanctions systems also give rise to human rights problems.

The Parliament should use its growing competence over anti-terrorist sanctions to work for a complete overhaul of these sanctions. It is possible to use both governmental and terrorist sanctions such as asset freezes against people in a way which is compatible with human rights standards, but the question is whether it is sensible to retain anti-terrorist sanctions at all. The best solution is to recognise that anti-terrorist sanctions have significant criminal law effects, to integrate them into the present cooperation in justice and home affairs at to place the bulk of the criminal law safeguards at the national level.

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1. Introduction

The following report examines the legal framework for sanctions, an overview of EU sanctions or restrictive measures implemented, sanctions in practice: their effectiveness, sanctions and human rights under international law and EU law and recommendations to the European Parliament and national Parliaments.[1]

2. The Scope of the Present Study: Defining "sanctions"

There is no authoritative definition of what is a "sanction" under either international law or EU/EC law. The terminology used in the Treaty on European Union (TEU) and the European Community treaty (EC) is "measures". However, these are also generally referred to in doctrine and by the Commission and Council themselves as "restrictive measures" or "sanctions". The UN Charter (UNC), Article 41 uses the term "measures not involving recourse to armed force". However, these are again referred to in doctrine and by the Security Council itself, as "sanctions".

In doctrine, the term "embargo" or "trade sanction" is often used to refer to a general or specific export/import measure directed against a state, or a particular economic sector of it. Trade sanctions can be directed against an industry, such as the arms or internal security industry, or an activity (e.g. research in the production of nuclear power) the trade in high value commodities (e.g. diamonds, oil or timber) or air travel. The term "targeted sanctions" is nowadays commonly used for coercive measures directed against an individual or a corporate entity (such as a firm or political party).[2] The boundary line between a targeted sanction and a selective trade embargo is however not hard and fast, because an individual or group can be, and often is, targeted because of his or its involvement in a particular activity, industry or sector of an economy which the party taking the sanctions (hereinafter, the sanctioner) regards as central to the entity it wishes to punish, influence or stop. Moreover, trade sanctions, which can also be taken against only a region of a country which is controlled by a non-state entity, can be combined with the naming of individuals or corporate entities regarded as particularly important for the industry/activity in question.

Although identifying what is a UN sanction is a simple matter, identifying what is a sanction at the EU/EC level is more difficult. The EU/EC has, and uses, a large variety of different "carrot" and "stick" measures to promote its economic and political goals. In doctrine, the phrases "positive" and "negative conditionality" are often used, as are the partially overlapping terms "passive" and "active" measures. If a benefit is granted and then later withheld or withdrawn, should this be regarded as a "sanction"? The choice

[1] See the specifications for the study (EXPO/B/ DROI/2007/34).

[2] See, e.g. Cortright and Lopez, 2002, at p.2. "In our definition, a smart sanctions policy is one that imposes coercive pressures on specific individuals and entities and that restricts selective products or activities, while minimizing unintended economic and social consequences for vulnerable populations and innocent bystanders."

which is made as to the scope of the word "sanction" at EU/EC level is particularly important as regards the conclusions to be drawn on the effectiveness of sanctions. Taking a wide view of what is a sanction may initially seem logical. However, if a demarche or the cancellation of a meeting or a visit by Commission staff to a target country is treated in the same way as a full scale trade embargo it risks watering down the concept of "sanctions" to uselessness. Moreover, the legal bases for restrictive measures and the human rights implications of these are very different from other EU/EC positive and negative measures. It can be misleading to force the operation of "conditionality" clauses in the Cotonou Agreement into a "pressurizing-punishing" sanctions paradigm.[3] It can inter alia, be difficult to say at what point a dialogue, and measures in furtherance of this, slips into becoming a "sanction". The conditionality clauses have anyway already been the subject of a recent report commissioned by the European Parliament.[4] For all these reasons, in the present report I will concentrate upon what the EU/EC itself regards as "sanctions/restrictive measures". However, as regards the legal framework and effectiveness issues, it is useful by way of comparison/contrast to look at two particularly significant types of withdrawal of benefits which are used by the EC, namely suspensions of the General System of Preferences (GSP) and suspensions of trade/aid on the basis of the "essential elements" in the Cotonou Agreement. I will therefore deal briefly with these.

3. Legal framework

- **For sanctions it is the interplay between the international, EU and national constitutional legal systems which causes problems and creates complexity**
- **UN and EU restrictive measures have very different legal bases at international law**
- **The legal basis for trade/aid suspension measures under EC Law is different from the legal basis for sanctions under EU/EC law**
- **This distinction between the two legal bases is retained in the Lisbon treaty, however, there is increased scope for integrating these two bases**

3.1 Introduction

EU sanctions involve three different legal systems namely public international law (including three subsystems in this, the law of the UNC, international trade law and universal/regional treaties on human rights), EU and EC law (which both also include human rights) and national law (constitutional law, again including human rights, administrative law, criminal law, criminal procedure law). The already difficult subject is further complicated greatly by the pillar structure of the EU.

The following explanation may be technical and difficult to follow for a non-lawyer. For those who find it too impenetrable and feel tempted to skip this part of the report, there are four major points to be grasped. The first is that it is the interplay between these three legal systems which causes the complexity of the subject. In particular, interplay between

[3] Cf. Conciliation Resources, 2008.

[4] Bartels 2005a.

UN sanctions and the principle of supremacy of EC law over national law adds greatly to the problems to be solved for the EU states. To put it another way, this principle, one of the corner-stones of EC law, causes considerable problems in this area.

The second major point is that, while UN and EU restrictive measures can both be described as "sanctions", the former rest on much firmer international legal ground than the latter.

The third major point is that it is important to keep separate the EU/EC legal *basis* for three different types of measure: EU implementation of UN sanctions, EU's own restrictive measures and EU's trade/aid measures. Fourthly and finally, all of these measures, to be meaningful, must be effectively implemented at the national level. The full text of the legal provisions referred to is included in an annex, for ease of reference.

3.2 Legal Basis for sanctions under International law

When the EU acts globally, towards third states, it is acting within the international legal system and its actions must be justified by reference to this system. As far as international law is concerned, one should distinguish between the terms "sanction", "counter-measure" and "act of retorsion". The problem is that none of these terms is defined authoritatively in international law.[5] Certain types of coercive measure by the UN Security Council under chapter VII (UNC) directed against either a state as a whole or a government or quasi-governmental entity, or a group of individuals, are nowadays generally referred to (including by the Security Council itself) as "sanctions". As already mentioned, where the measure is not directed against the state itself the term "targeted sanctions" tends to be used. The basis for imposing sanctions under Chapter VII UNC is a Security Council determination under Article 39 that someone, or something, constitutes a "threat against international peace and security". UN targeted sanctions have so far been used to include the following measures: the freezing of financial assets; trade restrictions on arms, security equipment, energy and luxury goods, restrictions on the provision of military or police/internal security services; flight bans and the denial of international travel. All UN members have undertaken to carry out Security Council resolutions (Article 25 UNC). Moreover, they have accepted that these resolutions have priority over other obligations at international law (Article 103 UNC) should these obligations conflict. There is also an express exception in the 1994 General Agreement on Trade and Tariffs (GATT) agreement for Security Council sanctions.[6] From an international legal perspective then, Security Council resolutions rest on very firm ground, although they can obviously be criticized from political or moral perspective as inappropriate, ineffective etc. The legal ground which still exists for challenging Security

[5] See e.g. Abi Saab 2001, p. 39 who gives the term a very general definition "coercive measure by to an internationally wrongful act by a competent social organ". But this definition does not accurately describe the most important type of sanction, namely those taken by the Security Council which are not always taken in response to an internationally wrongful act (Crawford, 2001, p. 57).

[6] Article XXI (c) of the GATT provides, inter alia, that: Nothing in this Agreement shall be construed c) to prevent any contracting party from taking any action in pursuance of its obligations under that United Nations Charter for the maintenance of international peace and security. See also Article XIV bis of the General Agreement on Trade in Services.

Council resolutions is when they intersect with a states's constitutional laws (including, for the EU, constitutional EU law).[7]

In contrast to a Security Council sanction, a "counter-measure" is something which can be used by any state. This is where a state has committed a wrongful act vis a vis another state, and the victim breaches its own obligations vis a vis the former in order to put pressure on the perpetrator to resume law-abiding behaviour. A counter-measure can be imposed unilaterally by one state, or multilaterally by a group of states. The question whether an international organization as such can take counter-measures is disputed. In any event the EU seen as a group of states is entitled to do so even if, as a community defined by law, it will be most reluctant to do so. There are nonetheless various requirements which are to be satisfied before the counter-measure is justified, inter alia a prior breach of international law and a proportional response. A counter-measure is a justification at the level of state-state responsibility: it does not affect whatever human rights obligations the acting state may have undertaken vis a vis individuals in its territory or subject to its jurisdiction.

By contrast to a counter-measure, an act of "retorsion" is an act not in breach of international law which, however, is coercive in that it is also designed to bring pressure on another state to do or refrain from doing something which is not necessarily in breach of international law. As retorsion is not illegal, it is not, in principle subject to any restrictions. Due to the vagueness of some international law rules, however, doubts can arise in practice as to whether a act should be categorized as a counter-measure or as a act of retorsion.

EU/EC restrictive measures often, but not always, involve implementing UN targeted sanctions. However, where the EU acts outside the framework of a UN Security Council sanction, and imposes its own ("autonomous") restrictive measures on a third state, entity or individual, then *as far as international law is concerned*, these restrictive measures fall to be judged either under the legal regime appropriate to counter-measures, or the regime appropriate to retorsion.[8] The same applies to unilateral "sanctions" introduced by EU member states (to the extent that these are still within member states' competence) and by third states. The United States, in particular, has extensive sanction programmes.

For example, where the EU grants a third state access to its markets or provides aid or credits, then it may, for foreign policy reasons, choose to suspend that access or aid in whole or in part. Whether the suspension of credits and aid or the denial and limitation of access to financial markets should be seen as a counter-measure or a retorsion depends upon whether or not the EU has undertaken a legal obligation to grant aid, credits, access

[7] See below, section 6.

[8] Here it should be noted that under Article 7 TEU, the EU can also take "sanctions" against EU member states for violation of the human rights/democracy requirements Article 6 TEU. These are sanctions "within" the treaty regime of the EU. A measure introduced at national level to implement such a sanction is likely to be seen as a unreviewable sovereign act by a national court. Cf. Dr. Karl S v. Kingdom of Belgium, Innsbruck Oberlandesgericht 31 January 2001, ILDC 2 (AT 2001).

to markets etc. [9] Thus, the suspension of a unilateral undertaking extending a benefit will usually be an act of retorsion. The suspension of a reciprocal undertaking will usually be a counter-measure – unless the treaty itself provides for suspension in such circumstances. Where this is the case, the suspension is not in breach of the treaty. Instead the measure is regarded as a lawful response to a "material breach" by the other party, and serves as a means of putting pressure on the other party to go back to complying with the treaty.[10] An additional level of complexity is added by international trade law, in particular World Trade Organisation (WTO) rules applying the GATT. For the contracting parties, the rules on the general system of preferences (GSP) and most favoured nation (MFN) designed to prevent discrimination in trade restrict the type of coercive trade measures which can be used and when these can be employed. Sanctions can be (and have been) partially motivated by protectionist considerations and the WTO is well aware of this. Unlike the situation for Security Council sanctions, for EU autonomous sanctions applicable WTO/GATT rules will still have to be taken into account before such measures are taken.

3.3 Legal Basis for restrictive measures under EU/EC Law

The legal basis under EU/EC law (i.e. the articles of the treaties which are relevant) for restrictive measures is as follows. Article 11 (1) TEU sets out the objectives of the CFSP, inter alia to promote democracy and human rights and "to preserve peace and strengthen international security, in accordance with the principles of the UNC…" Under Article 15 TEU member states shall adopt Common Positions to define the approach of the Union to a matter of geographical or thematic nature. The role of the European Parliament is limited under the CFSP to being kept "regularly informed" and to holding an annual debate (Article 21 TEU).

Article 29 TEU, part of the provisions on Police and Judicial Cooperation in Criminal Matters (PJCC, third pillar) states that "preventing and combating crime, organised or otherwise, in particular terrorism," is one of the tasks of the Union in order to achieve the union's objective "to provide citizens with a high level of safety within an area of freedom, security and justice." International terrorism occurring outside of the "area of freedom, justice and security" can nonetheless be linked in various ways to the area, for example, by being financed by people within the area, and thus, although not specifically mentioned in CFSP, the EU has taken the approach that combating terrorism *outside* the EU is an important policy goal of the EU. Under Article 39 TEU, the European Parliament is consulted regarding framework decisions and decisions, is to be kept regularly informed of developments in PJCC and may ask questions of, and make recommendations to, the Council.

The fact that the internal market is now within EC competence means that a regulation must be adopted to implement either trade measures or financial measures. Article 301 enables the Council when "it is provided, in a Common Position … for an action by the Community to interrupt or reduce … economic relations with one or more third countries" to "take the necessary urgent measures". This is used for trade measures.

[9] See Rosas and Paasivirta 2002.

[10] See Vienna Convention on the Law of Treaties, 1960, Article 60.

Under Article 60, "in cases envisaged in Article 301 ... the Council may in accordance with the procedure provided for in Article 301, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned". This is used for financial measures. Measures under Articles 60 and 301 shall be decided by the Council by a qualified majority on proposals from the Commission. There is no requirement to consult Parliament before adopting the regulation. Article 308 provides that the Council "shall take appropriate measures to attain one of the objectives of the Community, in situations where such an attainment should prove necessary in the course of the operation of the common market and where the Treaty has not provided the necessary powers." The Council shall act unanimously on a proposal from the Commission and after consulting the European Parliament.

The fact that a matter is within shared competence does not mean that a specific regulation is always required. For example, it may be possible to implement certain restrictive measures through a pre-existing regulation.[11]

A two stage procedure is thus applied for restrictive measures within exclusive, or shared, EC competence. A common position is first adopted under the CFSP and thereafter, a regulation is adopted under the EC treaty. This process has been criticized as time-consuming and cumbersome. Some commentators have discerned a trend of increased specificity in the common positions, designed to cut down the negotiations at the EC level.[12] Constitutionally speaking, however, the two decisions are quite separate.[13]

Some matters fall still within national competence. As regards the most frequent type of sanction used by the EU, an arms embargo, Article 296 of the EC treaty provides for this to be implemented by Member States using national measures. Having said that, the scope of the prohibited goods and services is laid down in the Common Military List of the EU.[14] Thus, arms embargoes are imposed by a Common Position and enforced on the basis of export control legislation of Member States. Prohibitions on providing related financial or technical assistance tend to be implemented through a Regulation.

Similarly, restrictions on admission (visa or travel bans) provided for in Common Positions are enforced on the basis of Member States' legislation on admission of non-nationals.

Lastly, as regards the legal framework, it should be noted that targeted sanctions can, and do, involve restrictions on the human rights of the targets. This can also affect the legal authority of the EU to take such measures, and the procedures to be followed (dealt with further below).

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[11] E.g. the diamond embargo on Côte d'Ivoire through EC Regulation 2368/2002 of 20 December 2002 OJ L 358 31.12.2002 p.28 which controls EC trade in rough diamonds in line with the Kimberley Process rules.

[12] Portela, 2008, p. 57.

[13] See below, section 6.

[14] Council CFSP decision 10 March 2008, OJ C 98 18.04.2008 p. 1.

3.4 Legal Basis for Trade/Aid Suspension Measures under EC Law

The usual practice of the Council and the Commission has been to treat sanctions (restrictive measures) as being something distinct from the withdrawal of positive (trade/aid) measures. However, this practice has not been wholly consistent.

The legal *basis* for measures involving suspensions/restrictions in trade and aid is definitely different. The adoption of commercial, development and association agreements, and so the suspension of these, or parts of them, fall under the EC treaty. EC Article 133 provides for agreements to be made concerning commercial policy with third states by the Council on proposals by the Commission. Article 300(3) subparagraph 2 of the EC Treaty provides that the Parliament must give its assent to association agreements, as well as other significant agreements. In addition, the Parliament has the right to be consulted on all other agreements, except for trade agreements concluded on the basis of Article 133(3). The purpose of the "essential elements" clause routinely now included in EC association and trade agreements (in particular, treaties made in furtherance of the framework Cotonou agreement) is to establish a reciprocal undertaking to respect human rights. This gives either party the lawful basis for suspending the treaty in whole or in part if either party considers that human rights/democracy are being breached. The Council can vote by qualified majority to partially suspend such a treaty, but unanimity is required for full suspension. Articles 300(2) subparagraphs 2 and 3 of the EC Treaty expressly restrict the Parliament's role in cases of suspension. Parliament's present, and possible future, role in supervising the application of the human rights and democracy clauses has been dealt with in a previous expert report to the Parliament, as well as other studies, and will only be examined here to the extent that it has implications for sanctions.[15]

The scope for unilateral suspension of aid is typically even wider than for trade. Aid agreements usually include other grounds for suspension, such as diversion of funds intended for one sector (e.g. education) to another sector. Particularly in times of armed conflict, precautionary suspensions are intended to avoid the risk of diversion of aid funds.

The GSP scheme is also "conditional" in that it connects compliance with inter alia certain International Labour Organisation (ILO) treaties with continued preferential access.[16] The original GSP scheme (1995-2004) provided that preferential access would be withdrawn states using forced labour, whereas additional trade preferences would be granted to states ratifying and complying with core basic principles found in six ILO conventions (freedom of association, the right to organise, collective bargaining and the prohibition of child labour). The new "GSP+" arrangement (2006-2014) extends the list of ILO conventions to be complied with. The conditionality in GSP+ is still not as broad as for Cotonou arrangements. And the desire to build in more human rights grounds for withdrawal of trade preferences can raise difficulties as regards WTO rules.[17]

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[15] Bartels, 2005a and 2005b.

[16] This "social clause" is not the only basis for withdrawal of preferential access. Inadequate customs controls, fraud and unfair trading practices are also grounds.

[17] Bartels, 2007.

While the legal bases for trade measures and sanctions are separate, there can be overlaps, necessitating action under both legal bases. Where a commercial agreement includes an undertaking of free movement of capital between the EU and another state, it is necessary to suspend this first if financial sanctions are taken against targets in that state.[18]

By way of concluding remark, the legal basis for a suspension of EU trade/aid with states party to Cotonou agreement treaties is, since 1995, very clear. One commentator considers that it is this, rather than a rise in human rights violations, which explains the more frequent recourse to the Cotonou dialogue arrangements in the period 1999-2004 as compared to the period 1995-1999.[19] The clear structure of the dialogue arrangements set out in the legal framework is also one factor in the claimed effectiveness of these in achieving their objectives (dealt with further below).

3. 5 A brief overview of the development of EU sanctions, and EU policies regarding sanctions

The sanctions instrument has developed rapidly, particularly since the end of the Cold War, both Security Council and the EU autonomous sanctions. The growth, and innovation, in the sanctions being employed is an important part of the "teething problems" the subject has experienced. Originally unilateral sanctions, as economic warfare, and the implementation of UN sanctions, were regarding as being within the competence of the EC member states. However, the expansion of EU/EC competence meant that such measures gradually were seen as falling, wholly or partially, within EC competence. The first EC sanction properly so called was the cereal embargo introduced in 1980 against the USSR as a consequence of the invasion of Afghanistan. EC restrictions on imports were introduced in 1982 against the USSR following the introduction of martial law in Poland. An import ban was introduced against Argentina because of the Falklands-Malvinas war. These were traditional trade sanctions. A turning point in sanctions policy came with the catastrophic humanitarian effects of the general UN trade embargo against Iraq following the end of the second Gulf War. The Iraq case shifted attention to targeted sanctions. As the UN Security Council use of targeted sanctions developed during the 1990's, so too did the EU's use of targeted sanctions. In both cases, however, these began by being used against governments or governmental entities (UNITA in Angola being the first of these). The first EU targeted sanction were the restrictive measures taken against Yugoslavia during its break-up.

Most UN and EU autonomous sanctions are still taken against governmental officials. However, the Security Council sanctions against Liberia expanded the category of people to include some businessmen connected to the targeted government. A further change in sanctions came in 2000 and 2001, with the UN sanctions against a non-governmental entity not acting in control of territory, al-Qaeda.[20]

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[18] This was the case for the initial sanctions against Robert Mugabe, CP 2002/145/CFSP, 21 February 2002 [2002] OJ L 50 21.2.2002 p.1.

[19] Hazelet, 2001. For more general analyses, see Eeckhout, 2004 and Koutrakos, 2006. .

[20] Security Council Resolution 1267, 15 October 1999 directed against the Taliban was supplemented by Resolution 1333 of 19 December 2000, which mentions Osama bin Laden and his associates and resolution

On the level of autonomous EU sanctions, the expansion of targets to include non-governmental entities came in 2001 with the adoption of Common Positions on combating terrorism and on the application of specific measures to combat terrorism. These were designed to implement Security Council Resolution 1373 which requires states to criminalize financing of terrorism.[21] They involve duties on member states to freeze funds and not make available funds to entities listed by the Council as terrorist groups. At the time of the latest consolidation (28 July 2008) 48 groups and 46 people are listed.

The EU has one other resolution directed against a non-state entity, namely, the Transnistrian (Moldavian) leadership.[22]

In 2003, the Council adopted the European Security strategy.[23] This mentions sanctions as a policy tool, but provides no indication as to when and how these are to be used. In the same year it drafted guidelines for sanctions.[24] These deal mainly with the standardization and strengthening of the implementation of sanctions. A second, shorter, document, the Basic Principles, was adopted in 2004.[25] The Council states that it is "committed to using sanctions as part of an integrated, comprehensive policy approach which should include political dialogue, incentives, conditionality and could even involve, as a last resort, the use of coercive measures in accordance with the UN Charter". The Council will seek cooperation from other states to increase the impact of sanctions and work to that effect in the UN Security Council. Convergence between autonomous EU sanctions and UN sanctions is a goal (and will often be realizable bearing in mind the fact that France and the UK are permanent members). Sanctions are to be targeted so as to have "maximum impact on those whose behaviour we want to influence". At the same time, "targeting should reduce to the maximum extent possible any adverse humanitarian effects or unintended consequences for persons not targeted or neighbouring countries". The Basic Principles also set out briefly the general objectives of autonomous EU sanctions. These are to be used "in support of efforts to fight terrorism and the proliferation of weapons of mass destruction and as a restrictive measure to uphold respect for human rights, democracy, the rule of law and good governance". Sanctions are explicitly stated to be decided on a case by case basis.

This last point is particularly important: the Council clearly does not want its hands tied as regards sanctions.

1390 of 16 January 2002, directed against al-Qaeda generally.

[21] CP 2001/930/CFSP and 2001/931/CFSP 27 December 2001 [2001] OJ L 344**,** 28.12.2001 p. 90.

[22] CP 2008/160/CFSP 25 February 2008 [2008] OJ L 51, 26.2.2008 p. 23.

[23] Council of the European Union, A Secure Europe In A Better World - The European Security Strategy http://www.consilium.europa.eu/showPage.asp?id=266&lang=en&mode=g

[24] 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, 3 December 2003 Doc 15579/03.

[25] Council of the European Union, Basic Principles on the use of restrictive measures (sanctions), 7 June 2004, Doc 10198/1/04.

When speaking of "EU policies", it is important to note that different member states in the EU have different views on the efficacy and desirability of sanctions in general.[26] France, Spain and Italy are said to be, in general, more skeptical towards sanctions. Even those states claimed to be positive to the idea of sanctions, such as the UK, the Netherlands, Denmark and Sweden, can have doubts in a particular case based on either an assessment of unfeasibility or counterveiling economic/political interests in the target or the region. For example, the UK and the Netherlands were said to be negative towards tougher sanctions against Nigeria during the late 1990s, because of commercial interests in oil extraction. Without wanting to abandon the objectives of the sanctions introduced against Uzbekistan in 2005 the FRG was said to be a strong advocate of a compromise because of its dependence on a military base in Uzbekistan the state for its peace-keeping forces in Afghanistan.

In general a preference for positive measures and conditionality is undoubtedly a strong feature of EU sanctions policy. Here too, there can on occasion be differences of opinion, but this time between the Commission, and certain member states' governments advocating sanctions. The Commission has a leading role in trade issues, and it broadly promotes a long-term policy of enmeshing third states, especially in the EU neighbourhood, in bilateral and multilateral trade arrangements. Disturbing these for the sake of short-term political goals can be seen as both unnecessary and counterproductive. A definite policy of the Commission, which this time is seems to be fully supported by EU states' governments is ensuring that the wider civilian population do not suffer from any targeted sanctions which are introduced.[27]

A more recent Council concern, manifested in the adoption of new policy documents containing best practices and guidelines, has been the desires for increased effectiveness in implementation of sanctions and in identifying targets and their assets. [28] Improved legal security in listing and delisting has also been a factor here (partly the result of recent case-law of the CFI and ECJ, below section 6). Further documents adopted more recently deal for and for listing and delisting targets.

The EU is bound to implement UN sanctions, but has full control over its own autonomous sanctions (even if the pressure of allied states, such as the United States obviously influences the EU). A table listing EU autonomous sanctions against governments/governmental entities is given below.[29] The effectiveness of these sanctions is examined in section 5.3 and the common features of the sanctions in section 5.4.

[26] These points come from Portela, 2008, p. 146, 267. See also Soetendorp, 1999.
[27] Ibid., pp. 65-70.
[28] Best Practices for the effective implementation of restrictive measures 11679/07 Recommendations for dealing with country-specific EU autonomous sanctions or EU additions to UN sanctions lists 7697/07
[29] The table is an updated and adapted version of a table given in Portela, 2008, p. 102. Portela's table, made for other purposes, excluded the China sanctions. The Iran and Comoros sanctions were introduced after her period of study. The anti-terrorist sanctions are not listed. The present list can be accessed at http://ec.europa.eu/external_relations/cfsp/sanctions/index.htm.

Targeted state	Measure	Time Period	Main Goal
Belarus	**freezing of assets**	**2000-ongoing**	Reverse illegal constitutional change, Free elections
Burma	**Development aid suspension, diplomatic sanctions, arms embargo, visa ban, freezing of assets, commodity sanctions**	**1991-ongoing**	**Recognition of 1989 elections results, democratization process, national reconciliation, respect for human rights**
China	Arms embargo	1989-ongoing	**respect for human rights**
DR Congo	Arms embargo, asset freeze (UN)	2005-ongoing	**Cease armed conflict**
FYR	Arms embargo, investment ban, oil embargo, flight ban	1998-2000	**Terminate military operations in Kosovo**
Iran	Nuclear technology and goods embargo, investment ban, asset freeze	2007-ongoing	**Prevention of acquisition of nuclear weapons**
Indonesia	Arms embargo	1999	**Cease state-sponsored violence, Allow UN force into East Timor**
Moldova (Transnistria)	Visa ban	2003-ongoing	**Cooperation in peace process**
Nigeria	Arms embargo, aid suspension	1993-1999	**Free elections**
Sudan	Aid suspension, arms embargo	1996-ongoing	**Cooperation in peace process, cease state-sponsored violence**
Union of Comoros (Anjouan)	Assets freeze, visa ban, arms embargo	3 March 2008-28 March 2008	**Reverse unlawful rebellion, national reconciliation**
Uzbekistan	Arms embargo, visa ban	2005 –ongoing (arms embargo)	**Allow international inquiry into Andijan events**
Zimbabwe	**Arms embargo, visa ban, assets freeze**	**2002-ongoing**	**Free elections, reverse expropriations**

3.6 The Proposed legal framework after the Lisbon treaty

The Lisbon treaty largely retains the distinction between competence to take sanctions and competence to take measures under association/trade agreements. Competence to take sanctions is provided for in Article 215. This is now stated explicitly to cover natural or legal persons and groups or non-State entities. Moreover, it covers both financial and trade sanctions. The Council votes by qualified majority (although unanimity is retained for adoption of the common position under the EU treaty). The rights of the Parliament are limited to being informed.

Two additional changes regarding sanctions should be mentioned. Article 215 provides that there must be legal safeguards. The Lisbon treaty makes the Charter of Human Rights and fundamental freedoms legally binding. Having said this, the content of the rights affected by targeted sanctions is not so different from the situation before (dealt with in section 6). A procedural right to appeal to the ECJ against the common position is also given under Article 275. Again, this codifies the present legal position, as clarified by ECJ case law.[30]

Two further points must be made. The Parliament is given more power in relation to commercial agreements. Parliament now has the competence, together with the Council, to adopt the measures defining the framework for implementing the common commercial policy (Article 207(2)). Moreover, Parliament's power to agree to treaties is expanded (Article 218). Only those treaties which deal exclusively with CFSP matters are outside of this power of assent. This gives the Parliament the possibility, in new treaties or renewal of older treaties, of first building in an essential elements clause and establishing an association council to monitor the application of this (including taking suspension measures), and second securing representation in that association council. Some limits on parliamentary power still exist in Article 218.

The second change concerns the Parliament's expanded power over the issue of regulation of terrorism. The amended treaty provides for a clear division between sanctions directed against "EU internal" (which fall under Article 75) and "EU external" suspected terrorists and terrorist groups (which fall under Article 215, above). Article 75 refers to Parliament's competence to "define a framework for 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". This would not give the Parliament power over specific operational measures, however, it is in line with the increased overarching competence the Parliament is to have over justice and home affairs. The original reason for the distinction between EU internal and EU external groups was that the (present) wording of Article 301 ("third states") was not regarded as sufficient to cover the freezing of the property of individuals who are EU nationals. This must now be modified in the light of

[30] Judgment of 27 February 2007 in Joined Cases C-354/04 P and C-355/04 P Gestoras Pro Amnistía and others and Segi and others v. Council of the European Union.

the recent judgment of the ECJ (below section 6) and in any event, the new legal basis in Article 215 would definitely remove this difficulty. The only basis for maintaining this distinction is to allow the Council freer hands in dealing with EU external suspected terrorists, on the ground that this is a matter of foreign policy. However, it is difficult to uphold in practice. The sanctions taken so far against EU external groups (explained further below) have the purpose and effect of limiting these groups' fund-raising activities and access to finances within the EU. As such, these sanctions also impinge on the Charter rights of EU citizens and residents, and the Parliament should also be involved in determining this legal framework.

3.7 Comment on the distinction between the legal bases for suspension of trade/aid measures and the legal bases for sanctions

As shown above, the legal frameworks for the suspension of trade/aid measures and sanctions are quite different, with the consequence that the competence of the actors involved, and the procedures to be followed, are different too. The underlying reason for this is the member states' reluctance to make decisions over sanctions an EC matter on the basis that decisions over this area of "high politics" should remain with the governments of EU states. The member states have different constitutional frameworks, and traditions, for parliamentary involvement in foreign policy. Whatever room individual member states have left for parliamentary influence it is safe to say that EU states' governments have not wanted to allow the European Parliament a significant role in the area of sanctions, and wish to keep the role of the Commission limited (largely) to the EC legislative process. Pragmatism is presumably also a factor: 27 member states find it difficult enough to agree on imposing autonomous sanctions at all, and perhaps it is feared that allowing other actors, the Commission, the European Parliament, the national parliaments, a significant role in this decision-making process will make reaching agreement even more difficult. Much can be said in reply, but I can content myself with noting that while it is true that increasing the competent actors would complicate the decision-making process, it is not at all certain that it will make sanctions less likely. The high profile the European Parliament has in relation to human rights means that on several occasions it has taken the initiative in calling for sanctions.

Even though the legal bases remain separate under the Lisbon treaty, there are several arguments in favour of taking a more integrated approach to EU positive and negative measures. To begin with, in terms of goals and means, the withdrawal of trade/aid benefits involve the deliberate punishing of one party (A) by another party (B) for A's actions or omissions, and the deliberate attempt to change A's behaviour. It makes sense to approach the area as a spectrum, or "toolbox" of different responses allowing a flexible "carrot and stick" in all situations. Secondly, there are no sharp dividing lines in terms of coercive *effect* between the suspension or withdrawing of trade/aid benefits on the one hand, and a trade embargo and/or targeted sanctions on the other. The former can be as (in)effective as the latter in terms of securing compliance, depending on the circumstances. Thirdly, as mentioned, in the specific area of anti-terrorism sanctions, the distinction between "external" and "internal" threats is difficult to justify in practice.

4. The process of blacklisting

- **Targeted sanctions work by means of blacklisting**
- **The procedures for blacklisting are different depending on whether the targets are governments or terrorist organisations.**
- **Identification of terrorist suspects as compared to governmental members is a much more uncertain process**
- **The effect of a blacklisting on a terrorist organisation in practice is similar to the prohibition of the organisation**

All targeted sanctions operate by means of blacklists. A small number of "primary" targets are listed and subjected to restrictive measures (assets freezes, travel bans etc). A large group – indeed everyone within the targeter's jurisdiction – is then made subject to obligations not to transfer, hold etc. funds or facilitate travel for etc. the primary targets. These obligations are backed by the criminal law. In other words, it becomes a criminal offence to assist the targets in any way to circumvent the sanctions.

Obviously, the procedure for determining the primary targets is of vital importance. As far as concerns the Security Council, it establishes a subordinate organ, a sanctions body, for each set of targeted sanctions adopted. This body draws up a list of people. In relation to sanctions against governments or quasi-governmental bodies which are engaged in activities threatening to international peace and security, the list is drawn up largely on the basis of diplomatic information. In relation to the anti-terrorism sanctions, that is, the Al Qaeda sanctions under Resolution 1267, intelligence material is the basis for many listings.

The EU applies different procedures for blacklisting. As far as implementation of UN sanctions are concerned, it repeats these verbatim in first a common position, and then a regulation, making an EU, an EC, obligation of what was previously an obligation under international law. The regulation has direct effect in member states. The automatic acceptance of the UN sanctions lists has recently been disproved of by the ECJ (below section 6).

As far as concerns EU's autonomous sanctions directed against governments, as mentioned in section 3.7, guidelines have been adopted, albeit after several years delay, making recommendations for the information (motivation) necessary for listing, and delisting. The basis for the information on which blacklisting occurs tends to be information submitted by member states' diplomats in the target countries, the lead tending to be taken (naturally enough) by those states with the greatest interests in and knowledge of the region and the largest diplomatic capacity there. To my knowledge, the EU delegations in the target state or region have seldom if ever participated in the operational task of supplying target information, even though this is a possibility according to the guidelines. The members of a government are relatively easy to identify, although whatever bank accounts they may have in EU states may not be. It is more

difficult to identify people who are strongly linked to a government, or to a particular activity (such as trade in commodities). Naturally, government officials themselves can have considerable business interests, but private individuals can also exercise considerable influence over the government, e.g. as businessmen who support the government in exchange for being the beneficiaries of lucrative licensing agreements. There can also be difficult decisions to be made whether family members should be listed. The guidelines provide that family members not themselves involved in the sanctioned activity should be listed only where there is a risk of circumvention of the sanctions on the primary target.

Some recommendations are made in the next section regarding improving the effectiveness of the listing/delisting procedures for government members.

As far as concerns terrorist sanctions, a state, or group of states, takes the initiative to propose a particular person or group for inclusion. Blacklisting proposals are primarily made by states the competent authorities of which are actively investigating a given terrorist organisation. The proposal is then circulated to the other members of the working group, usually at least two weeks before the relevant meeting of the group in Brussels. The representatives of the working group then consult other governmental officials in accordance with applicable national procedures. Whether or not there is any consultation with national parliaments depends upon constitutional mechanisms for control over EU/EC decision-making. Once agreement has been reached (and, as with all common positions, unanimity is required) the formal decision is taken in the Council, or in COREPER, by written procedure, meaning that a name is added if there are no objections to it. It is not made public which organisations have been the subject of discussions, nor which states have objected to inclusion.

Under Article 2 of the Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, the EC, within the limits of the powers conferred on it by the EC Treaty, implements the freezing of funds etc of persons etc listed in the Annex to the Common Position by means of a regulation.

Under Article 3 of the applicable regulation,[31] the participation, knowingly and intentionally, in activities, the object or effect of which is, directly or indirectly, to circumvent the freezing obligation shall be prohibited. Under Article 9 of the regulation, each Member State shall determine the sanctions to be imposed where the provisions of this regulation are infringed. However, in line with the standard EC formula, such sanctions "shall be effective, proportionate and dissuasive"[32].

The effect of this must be stressed. In practice, an EU external organization is made subject to an organizational ban: it cannot receive money or any other assets and it is a criminal offence for anyone to hold money or assets for the organization, or assist it economically in any way. No organization can operate in such circumstances.

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[31] EC Regulation 2580/2001 27 December 2001, OJ L 340, 28.12.2001 p. 70.

[32] See Judgment of 21 September 1989 in C-68/88 Commission of the European Communities v Hellenic Republic [1989] ECR 2965.

Where EU internal groups are listed, these are subject only to Article 4 of the Common Position which provides that Member States through police and judicial cooperation within the framework of the PJCC are to afford each other "the widest possible assistance in preventing and combating terrorist acts".[33]

I can conclude, as regards the procedures for blacklisting, by pointing out the differences between this and the normal procedure followed by the police and prosecutor in freezing assets in investigating crime. In national systems, the freezing of assets is an interim measure taken pending a judicial determination of a person's involvement in criminality. It is a temporary measure that can be challenged in court before an independent and impartial judge, at the latest, when the criminal trial takes place – a trial which, according to Article 6 ECHR, must occur within a reasonable time. At the UN and EU level, these sanctions are not interim measures pending a judicial determination, they are alternatives to judicial determinations. The implications of this are examined in section 6.

5. Effectiveness

- **Special conditions have to exist for targeted sanctions to successfully accomplish behavioural modification**
- **CFSP targeted sanctions have almost invariably not achieved their objectives**
- **There has been no officially-sponsored objective evaluation of the efficacy of EU autonomous sanctions**
- **UN and EU sanctions have not been applied consistently in the sense of the most serious human rights offenders being targeted**
- **Better overall coordination seems necessary between the various "carrot and stick" policies initiated and implemented at the level of the Commission, Council and Member states**
- **Various concrete steps can be taken at the EU level which may improve effectiveness of implementation, but these steps will not deal with the underlying limited utility of targeted sanctions**
- **At national law, the creation of anti-terrorist sanctions has greatly increased the people affected by the criminalization sanctions entail**. **However, the effectiveness of these has never been evaluated**

5.1 Theory of sanctions

Galtung, writing in the 1960's, formulated the "naïve" theory of sanctions. At the time, these consisted only of the "economic warfare" of trade sanctions. This theory proceeds on the assumption that the economic disruption caused by trade sanctions translates into political pressure that will either overthrow the leadership of the targeted state, or cause it to change its policies. The greater the disruption, the greater will be the pressure. The

[33] The Council adopted a decision implementing this PJCC duty by providing for an obligation on states to cooperate with each other and Europol and Eurojust in relation to intelligence exchange of the persons and groups listed, 2003/48/JHA on implementation of specific measures for police and judicial cooperation to combat terrorism, [2003] OJ L 68 19.12.2002 p.16.

damage/losses in economic terms of trade or financial sanctions can be classified under three headings: those relating to commercial relations (including export and import losses), those resulting from restrictions on financial flows, and other losses and costs caused by the suspension of diverse sectoral or specific relationships with the target country. Financial difficulties arising from the suspension of capital support are connected to non-repatriation of profits and other receipts; confiscation, freezing, and conversion of savings and assets; the suspension of loans and credits at subsidized rates, and losses and difficulties due to the interruption of debt servicing.[34]

The two objectives of sanctions – overthrow or change – presuppose two different factors. For overthrow, there has to be a sufficient link between those suffering the effects of the trade measures and the leadership, and the leadership must be (ultimately) vulnerable to overthrow by the sufferers, if they are desperate enough. For change, the leaders have to be able, and willing, to reassess the costs and benefits of their policies and to change these in the lines desired by the sanctioner. The leaders must perceive the sanction as avoidable, if they do what the sanctioner wants.

The analyses made in the 1970's and early 1980's of sanctions programmes were that these were ineffective.[35] There is no *necessary* link between the effectiveness in the infliction of economic pain and overthrowing the target or compelling it to make policy changes. Galtung noted first that people get used to hardship and second that there can even be a "rally around the flag" effect of sanctions. Sanctions can, quite simply, be circumvented and undermined in a number of ways.

In 1985, an economic study by Hufbauer et al. was published of a large dataset of 116 cases of trade sanctions.[36] This came to the conclusion, in contrast to Galtung and others' hypotheses, that sanctions had in 34% of cases contributed at least to some extent to the success of the overall policies sought by the sanctioner. The conclusion thus was that there *can be* a link between the effectiveness in the infliction of economic pain and securing policy change, at least as part of a wider long-term foreign policy approach. The doctrinal analyses since then have broadly followed in two different tracks, the first attempting to justify, elaborate upon and improve the methodology of the Hufbauer et al. study, the second track questioning the validity of this.[37] The first track has inter alia brought in as a variable the political make up of the targeted society, in particular, the existence of a political opposition which the sanctions can, if applied correctly, strengthen. Another approach taken is to employ game theory, basing this on the fact that sanctions are a two-way relationship between the sanctioner and the target.[38] From a rational choice perpective, where the target has an expectation of continuing conflict in the future, it makes less sense to give way to the pressure exerted by the sanctioner now.

[34] Boisson de Chazournes, 2007, p.59 .
[35] See e.g. Wallensteen, 1968, Doxey 1996.
[36] Hufbauer, Schott and Elliot, 1985. Revised edition 2008.
[37] Portela 2008, pp. 16-29.
[38] Tsebelis 1990.

Drezner has referred to this as the "sanctions paradox" in that it is more likely that sanctions work between allies than between adversaries.[39]

Theory has tried to keep pace with the rapid development of targeted sanctions. These can be fitted in to the second objective – change of policy – in that this is not dependent on damage inflicted on the target economy, but change can occur through a desire to avoid (further) personal financial damage, a loss of prestige etc.[40] A targeted sanction can operate on the personal level, by causing suffering to the target or his/her associates or family. The assumptions here are inter alia that a person has something of value to lose. If this is personal wealth then the sanction must actually reach this in some way. If it is prestige, then the sanction must negatively affect this in some way. The second (alternative or additional) way a targeted sanction can work is to reduce the means available to the target to pursue a particular policy, e.g. by restricting the target's access to weapons in an internal conflict, or by reducing the income it receives from a commodity (gems, timber).[41] As noted in section 2, the line between a trade sanction and a targeted sanction is not hard and fast, and this second form of operation is a composite type of sanction. As regards ways of working, it assumes that the target has actual influence over the policy the sanctioner wishes the target to change.

In one sense, the imposition of individual responsibility is in line with a development we are seeing in international criminal law, with the creation of the International Criminal Court (ICC).[42] While this development is to be welcomed, it risks missing important structural causes of mass violence and violations of human rights, and the same can be said here.

The assumptions underlying the very idea of, and the actual implementation of, targeted sanctions have not often been subjected to proper questioning. To take a simple example, it is fair to say that a predatory government, oppressing the population and living off easily transportable natural resources such as gemstones, behaves in a fashion analogous to that of organised crime. It may then seem tempting to "go after the money". This assumes that it is only, or largely, money the government ministers are interested in, which may or may not be the same. Even assuming that it is money, and the money is abroad – and it may well be, bearing in mind the instability of the regime in question – it assumes first that the sanctioner can identify it, and speedily freeze it. Even if it is frozen, it assumes that the target is actually capable of changing his policy, and stop being a bandit. But if all the bandit knows about is banditry, and he is not offered any alternative sources of income, he will not stop his banditry. He will simply move his money elsewhere.

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[39] Drezner, 1999.

[40] Portela, 2008, p. 18.

[41] Brozoska, 2003.

[42] In the future, one can see an explicit link in that sanctions may be used to compel compliance with warrants issued by the ICC prosecutor. The EU has used economic measures on both Serbia and Croatia inter alia to pressurize for better cooperation with the International Criminal Tribunal for the Former Yugoslavia.

5.2 Difficulties in measuring "effectiveness"

In doctrine, Barber has introduced the idea of sanctions having primary goals and secondary and tertiary functions.[43] The primary goal is the ostensible objective of the sanction, e.g. to attempt to encourage democracy, to stop human rights violations or the suppression of domestic dissent, to enforce the terms of peace agreements and/or to assist in the pursuit of individuals for prosecution before international courts, to try to ensure compliance with treaty obligations (e.g. the Nuclear non-proliferation treaty). This objective can be measured (though there are problems, as shown below).

The secondary function relates to promoting the sanctioner's reputation domestically and internationally. The tertiary function is maintaining international structures and norms (such as respect for international law). The secondary and tertiary functions are in one sense secured simply by the imposition of the sanction. Going beyond this, and trying to assess their "success" was according to Barber unfeasible.

Other authors have simply listed all the different objectives of sanctions as "goals". At least eight different goals can be identified:

1) Deterrence. Sanctions are threatened in order to deter conduct, usually a norm violation.
2) Compliance. The sanctioning party's intention is that the receiver ought to change some aspect of its foreign or domestic policy.
3) Punishment. When it is too late or too difficult to bring about change, the goal is punishment.
4) Destabilization of a regime or disruption of the activities of a non-state entity
5) Limitation/stabilization of armed conflict.
6) Solidarity: showing support to the activities of friendly states
7) Symbolism. Here the sanctions provide the domestic audience of the sender, international constituencies (such as NGOs) and the receiver itself with evidence of disapproval but without inflicting serious material damage.
8) Signalling. A version of (7) but where the intent is to signal strong resolve to actually inflict material damage.[44]

As regards goal (4), unlike traditional trade sanctions, the EU does not purport to destabilize a regime. However, the ostensible aim of the anti-terrorist sanctions is disruption/prevention of terrorist activities. As regards goal (5), this would not encompass an arms ban, such as the EU introduced against China, which while a result of the killings and the suppression of the democracy movement in 1989, is nowadays motivated mainly to maintain a margin of (Western) technological superiority. As this goal is not geared at behavioural modification, it is not really a targeted sanction. Having said this, the dividing line an export control for national security reasons and a sanction is not hard and fast.

[43] Barber, 1979.
[44] See, in particular Jacobsson 2004, Griffiths and Barnes 2008, Strandow, 2005

The above list of goals can obviously overlap. Measuring the "effectiveness" of sanctions depends upon which goal, or goals, is applicable. Of course, when different states act together to institute sanctions, as EU states do, the group can internally have several overlapping or even contradictory goals. The ostensible goal as set out in the common position may not be the "real" goal for all the states. One state may take a purely diplomatic perspective, seeing it as important to be seen as doing *something* about major international problems, that something being more than "words" and less than "war". Here the actual (behavioural modificatory) effect can be seen as secondary, or even not as desirable at all. Little effort may accordingly be devoted to actually trying to bring about this effect. Another state may on the contrary regard this effect as the only significant goal of the sanctions. And obviously within each of these states there can be different constituencies, NGOs, business interests etc. perceiving the goals of sanctions differently
There are undoubtedly various methodological difficulties involved in analysing if, and if so to what extent, sanctions have been successful in the sense of influencing the behaviour of the target. For example, over how long a period of time should one measure impact? To take a concrete case, US sanctions against Cuba have been in place for over 40 years, with the public goal of bringing about regime change. However, the present Cuban regime is still in place.

The behavioural modificatory effects will reasonably differ according to the type of sanction involved, trade, arms travel, financial. As targeted sanctions are aimed at modifying peoples' behaviour, their impact can theoretically be determined by collecting empirical data on how sanctions actually affect targets (interviewing targets and others, correlating these interviews to try to identify the truth etc). However, it is fair to say that relatively little such work has been done.[45] One can also attempt to (re)construct the effect of the sanction by examining the target's behaviour, and attempting to analyse if this diverges from the behaviour which would otherwise have been expected if sanctions had not been in place, but this is not easy, if it is possible at all.

As mentioned, one explanation for the conflicting opinions of writers is a difference of views as to whether sanctions can or should be assessed separately, or as part of overall (diplomatic, economic etc.) measures designed to achieve the goals in question. There are a number of problems here, inter alia that of cause and effect. If sanctions should be looked at separately, how can the effects of sanctions be isolated from the effects of the other measures? How can these measures be isolated from the target regime's own activities, e.g. in measuring the damage economic sanctions cause to a target sector, how can these be separated from the damage caused by the regime's own economic mismanagement? Another difficulty is whether threats to take sanctions can, or should, be taken into account. Some authors have argued that it is the threat of sanctions which are likely to work, and that if sanctions are actually imposed, there is good reason to believe that these will fail.[46]

[45] See however Cosgrove, 2002, Cosgrove, 2005, Fruchart et al, 2007, Eriksson, 2007 and Wallensteen et al, 2006.
[46] Hovi et. al. 2005.

Is it enough to examine whether the major goal(s) are achieved, or does "effectiveness" also entail an examination of counterveiling "costs". First, there is the damage sanctions can do to the human rights of the targets (below section 6) and as regards targeted commodity (and particularly, investment) sanctions, the "collateral damage" to the population as a whole. Second, there are costs in terms of the administration costs at national and international (EU) level in trying to ensure proper implementation, in adaption of sanctions, in follow-up and evaluation. Third, there are costs in terms of the damage sanctions can do in practice to EU reputational and other interests in the country where the target regime is situated. This can be because the sanctions are, or become, ineffective, and so the EU is perceived as weak by civil society and the political opposition in the state. Or the sanctions can have unintended but serious side-effects on the population as a whole, or, almost as bad, the sanctions are depicted by the ruling regime as having such side-effects, and this explanation is accepted by the population or a significant section of it. This negative reputational damage could occur even where the sanctions are, in fact, having an effect on (and only on) the targets. In an authoritarian state with more or less total control over the sources of information, it is clearly difficult to get the message out that the sanctions are not directed against the state as a whole.[47]

Aside from reputational effects, sanctions can add to the problems of the domestic political opposition, by giving the regime something external to blame for the economic predicament of the country, allowing them a patriotic rallying point. Sanctions can also harden the political polarisation in the country, and make political compromises between the groupings, or peaceful transition of power, more difficult to achieve. Sanctions are obviously intended to affect the ordinary communication channels between the EU and the targeted regime, but they make dialogue much more difficult.[48]

The upshot is that even – or especially - where targeted sanctions are having an effect, the "net" damage to the EU's goals in the state in question – regime transition to democracy, greater respect for human rights etc. – can be greater than the "gain".

A final point as regards costs links back to the different legal frameworks for EU and UN sanctions and to the nature of targeted sanctions. The latter bind all states, even very many states do not take them very seriously. The EU by contrast must work at persuading the neighbouring states of targeted regimes to join them in bringing sanctions, or at least not actively or passively undermine the EU sanctions. The nature of targeted sanctions – that they are a discerning, sophisticated instrument – requires a correspondingly discerning, sophisticated administrative apparatus to implement them. Even if the will is there with neighbouring states, the administrative capacity (customs, border controls etc) to ensure that sanctions are not being circumvented may be lacking. The EU must thus be

[47] Eriksson's conclusion is that – so far – the EU has been losing the media war in Zimbabwe. Eriksson, 2007.

[48] The Zimbabwe sanctions also show that it is extremely difficult to maintain any sort of dialogue while sanctions are imposed, and to adjust these sanctions adequately to a fluid situation "The sanctions strategy by the EU has become a 'hostage' of its own. First of all, targeted sanctions were introduced for a given situation. It is impossible to get back to a status ex-ante. Thus, the early EU sanctions position was motivated for a situation that sanctions cannot undo". Ibid, p. 33.

prepared to spend money and resources both in persuading neighbouring states to go along with the sanctions, and in helping them to do so.

5.3 Assessing the impact of CFSP sanctions

There are articles and studies dealing partially with the efficiency of individual instances of CFSP sanctions, however, hardly any studies have been made of the efficiency of CSFP sanctions as a whole. The lack of an official evaluation might seem surprising. However, this might – cynically – be explained by a reluctance on the part of states to reveal how limited a foreign policy tool targeted sanctions actually are. The recent study of EU and UN targeted sanctions made by the British House of Lords[49] is highly sceptical to the utility of targeted sanctions. The most recent examination of EU sanctions, and the only large study focused on efficacy, has been made by Portela.[50] She studied 10 CFSP anti-governmental sanctions and compared these to economic measures taken within the Cotonou and GSP arrangements.[51] She concluded that only in three cases of CFSP sanctions, those against Indonesia, Nigeria and the Uzbekistan, could the measures be described as having a significant impact. All the others she classified as failures. She also qualifies the three "successes".

As regards Indonesia, the objective of the sanctions was reached speedily, but the sanctions themselves can hardly have had more than a marginal impact. The same point should be made about the sanctions against Comoros which were introduced and ended in record short time. The objective of these sanctions – restoration of control of the Union authorities – was achieved, but the contribution that sanctions made to this was probably zero.

As regards Nigeria, the goal of which was to hold free elections, she concludes that the principal factor behind the achievement of the goal was extraneous, namely the death of the autocratic leader Abacha. The arms embargo and aid suspension had little or no effect. The visa restrictions were an irritant. She considers that the sanctions nonetheless had some effect on the level of diminishing the prestige of the military élite in a state which has the ambition of being a regional and subregional leader. As such, the sanctions, and the similar steps taken by other states, contributed to the speedy holding of elections when Abacha died. While this seems plausible, the extent of the contribution of sanctions to this is obviously difficult to measure. As indicated in section 5.2, there are grave difficulties of cause and effect: here, were the sanctions simply evidence of political risk or the creation of that risk?

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[49] House of Lords, 2007.

[50] Two other studies involving datasets of EU sanctions should be mentioned, namely Hazelet 2001 and Jones 2007. Hazelet's focus is a comparison of US and EU sanctions. Jones' main focus is on sanctions through the EU framework as compared to other methods of imposing sanctions.

[51] She omitted the arms sanctions against China, as not based on behavioural modification and the (non-state) anti-terrorist sanctions. The Iran and Comoros sanctions had only recently been introduced and fell outwith the time period of her study. Her methodology was to evaluate impact on the basis of five different variables, giving a final cumulative result. The results I think are of interest, even there are doubtless differences of opinion amongst experts regarding the methodology used.

The Uzbekistan sanctions had a very limited objective, namely that the Uzbek authorities allow an international investigation into the events in Andijan in May 2005, when an armed uprising was quashed, with the loss of hundreds of lives. When an initial call on the Uzbek authorities to allow an international inquiry made in June 2005, sanctions were introduced in November 2005. These were an arms ban, a visa ban and the suspension of technical meetings within the framework of the Partnership and Cooperation Agreement. The Council stated that the sanctions would be reviewed within a year depending on progress on a number of factors. The result was a compromise. While an international enquiry was not allowed, a "study group" was, the Uzbek government allowed ICRC access to prisoners and human rights dialogue was established. The visa ban was suspended in November 2007 and again in April 2008, the Council stating that it would continue to monitor closely the human rights situation in Uzbekistan and lift, amend, or reapply the visa ban as appropriate.

Portela identifies two main factors behind this partial success. First, Uzbekistan was relatively speaking politically vulnerable. The arms ban had no effect. There were no arms EU sales to Uzbekistan before or after the sanctions. On the other hand, the country has no strong international patron, there are very powerful states (Russia and China) in its neighbourhood and it needs friends. Moreover, it has certain ambitions to be a subregional leader. These factors increase both its isolation and the damage which it perceives comes from a loss of prestige sanctions entail. Second, the Council was very active in seeking a solution, with frequent visits by delegations from the Presidencies concerned, and an apparent willingess to suggest different compromise formulas. The Common Strategy for Central Asia being prepared at the time also added to the pressure, on both sides, to reach a solution.

Portela's general conclusions for the high degree of failure of the CFSP sanctions lies not so much in any EU institutional deficiencies in devising and implementing targeted sanctions (though this is a factor, examined further below) but in the non-economic nature of these sanctions: they do not really hurt the targets.[52]

There are three cases, Belarus, Zimbabwe and Burma, where CFSP sanctions have also been combined with economic sanctions (withdrawal of GSP status, aid withdrawal and a gemstone embargo respectively). In each case an "incremental" strategy was followed: failure to comply with the goals led to tougher sanctions being threatened, and then successively put in place. Despite the structured nature of this, with clear "signaling" to the target, the sanctions have not proved to be successful. The main explanation for this is that in contrast to the Uzbekistan sanctions, the objectives are very ambitious. They amount, in each case, to requiring the leadership of the states in question to stand down – or at least they are certainly perceived in that way. This, and to a lesser extent, the time-frame (the Burma gemstone embargo is new) explains the limited impact of these CFSP sanctions even when combined with economic measures.

[52] Portela, 2008, p. 255 "Sanctions which inflict disutility only symbolically tend to be ineffective in securing their political goals."

Portela's conclusions on CFSP sanctions are in contrast to her conclusions on GSP and aid/trade withdrawals, which she considers are generally effective. The states against which aid/trade withdrawals are threatened or implemented, as part of Cotonou dialogues, tend to be states which are highly dependent upon the EU for trade/aid. The key, then, would appear to be vulnerability. Where there is no such vulnerability, the great likelihood is that sanctions will fail. If sanctions are to work, they must really hurt the target. Non-trade sanctions will seldom be able to do this. Where, on the other hand, there is substantial trade between the target and the EU, there is definitely potential for hurting the target. But such damage can only be inflicted at the cost of inflicting damage on one's own interests. Where the target depends heavily on aid, again, there is substantial scope for hurting it by withholding the aid, but there is a very real risk of hurting the civilian population, something the EU wishes to avoid. Portela's conclusion is that the sparing use of economic sanctions by the EU is a deliberate choice.[53] This choice can be seen as a cynical calculation, putting trade goals above that of human rights. It may well be this in specific cases. However, there can also be valid arguments for this restraint, namely that the approach of enmeshing trade partners in a network of reciprocal rights and duties is much more constructive than imposing sanctions on them. It is, quite simply, difficult simultaneously to pursue both this long term approach and the "megaphone diplomacy" of sanctions.

5.4 Overall Goals: Coherence and Consistency

Consistency can be understood in a number of different ways. The first of these is consistency with the sanctions policies of other major powers, in particular the United States. Hazelet, writing in 2001, considered that there was a relatively high level of consistency between the targets of US sanctions and those of the EU. The differences in the number of targets between US and EU sanctions can be explained mainly by institutional factors: the compromises to be made in the Council mean that it is more difficult to get sanctions instituted. [54]

Consistency can also be understood in terms of which states are targeted. Hazelet considered that there was evidence for a degree of protectionism of former French colonies.[55] However, she considered that the EU was even-handed in how it treated strong and weak states.[56] Portela disagrees with this latter point. She considers that the record shows that the EU threatens aid sanctions against ACP states and CFSP sanctions against middle-ranking states the EU can afford to annoy.[57] The EU's main trading partners are not threatened with sanctions (the China sanctions being, as mentioned before, not really for the purpose of punishing but for maintaining Western technological superiority). It must be remembered that EU sanctions are to a large extent the implementation of UN sanctions, and it is quite clear that sanctions at the level of the Security Council are not always being directed against the regimes in the world which

[53] Portela, 2008, p. 267.
[54] Hazelet, 2001, p. 221
[55] Ibid., p. 194.
[56] Ibid., p. 228.
[57] Portela, 2008, p. 266.

have the worst human rights records. Where a state has a strong patron on the Security Council it is extremely difficult to get sanctions introduced against it, however bad its record. The EU is naturally not responsible for the lack of consistency in UN sanctions (although EU member states in the Security Council, are obviously able to influence these, and the permanent members France and the UK can veto them). But the EU has full control over its own autonomous sanctions. The evidence is, in my view, clearly in Portela's favour.

This is not to say that the states against which the EU has introduced autonomous sanctions do not "deserve" these. In fact, Kreutz, writing in 2005, considered that the only common denominator could be identified for sanctions adopted under the EU's autonomous sanctions programme was the fact that all the regimes targeted had been responsible for massive violence against their own populations. However, even this characteristic is lacking now, as the Iranian sanctions are directed against the present regime's alleged nuclear weapons programme, not its suppression of domestic dissent. Moreover, even if the condition of massive violence is (usually) a necessary condition, it is obviously not a *sufficient* condition, as there are clearly countries where extensive violence has occurred recently (e.g. China, as regards the crushing of demonstrations in Tibet), but there has been no attempts in the Council to initiate (further) sanctions against China.

Massive violence is one factor, but EU autonomous sanctions have also been introduced explicitly to punish certain regimes which have maintained themselves in power by means of rigged elections (Belarus, Zimbabwe, Union of Comoros – the last of these at the request of the AU). However, even here this is not a sufficient condition. For example, no sanctions were introduced against Thailand in 2006, when the military seized power and ejected the democratically elected government.

These cases may admittedly not be "like" cases, which should be treated "alike". But the present insistence in the Council that all sanctions are imposed on a case by case basis means that – deliberately – no scope has been left for developing any approach resembling consistency, or even any overarching coherent principles.

The EU wishes to have a principled foreign policy, one in which human rights concerns cannot be simply "traded off" against other interests. Applied to sanctions, this should theoretically result in sanctions being proposed against any and all states which violate human rights to a certain level or a certain extent. There already exist reasonably objective mechanisms for determining rough "levels" of human rights abuses.[58]

However, clearly other factors have to be built into any such decision, in particular the likelihood of sanctions achieving the desired result, whether effective sanctions can in practice be put in place (meaning a proper vulnerability assessment), whether the likely costs sanctions cause for the EU-target dialogue (or the target's dialogue with opposition

[58] As the Parliament has noted in relation to human rights dialogues, through the FRA has access to independent experts and the capacity to make its own assessments on the basis of UN and NGO material.

political forces) outweigh the benefits of sanctions, whether WTO/GATT obligations rule out, or make more difficult sanctions etc.

As indicated in the preceding section, the greater the dependence of the country on trade and aid with the EU means prima facie the greater likelihood sanctions will have more than a symbolic effect on the regime in charge of the country. This will obviously mean that sanctions are more likely to be effective against states which are more enmeshed in trade relationships with the EU (the very states which WTO/GATT rules make it more difficult to bring sanctions against). Sanctions are very unlikely to have any effect against states with little or no trade with the EU. One could envisage a threshold criterion of the target regime having a minimum level of trade (10% of GNP) with the EU, but is hard to see this being politically possible. On the other hand, it is reasonable, and correct in my view, to take seriously the existing requirement in the guidelines that sanctions should be effective before instituting them. All the actors, including the European Parliament, must then accept that in many cases, sanctions against states have only symbolic value. The different costs may thus well outweigh this value. For its part, the European Parliament, as the democratically chosen representatives of the European voters, should be prepared to take on at least part of the role of explaining to the public why sanctions are being brought against authoritarian state A (because there is some prospect of success) but not against dictatorial state B (because there is no prospect of success).

I think that full "consistency" in the sense of an "automatic threshold" of human rights abuses which would trigger the adoption of sanctions is not practicable or even desirable. However, I also think that where a state is responsible for grave human rights abuses, it is certainly not impracticable to have some form of mechanism of cooperation between the European Parliament and the national parliaments for initiating debates and requiring a relatively open presentation of arguments from those member states' governments which consider that sanctions are nonetheless not advisable. The reasons given may be good, e.g. that a proper assessment has been made and the conclusion reached that the target is insufficiently vulnerable to sanctions. Where the reasons given are not convincing, then it is surely a good thing that the government(s) in question pay the price of political embarrassment.

Consistency can also be understood in the sense of coherence between the EU's own "hard" and "soft" policies (stick and carrot). Some authors have taken the view that there is a good level of consistency.[59] The EU undoubtedly does both, and even can do both as regards the same target (e.g. Zimbabwe sanctions are combined with considerable humanitarian aid directed to civil society). The Parliament has repeatedly stated its view that there is a lack of coherence even *between* the different positive measures (dialogues), poor systematization and transparency of information input and output and poor or non-existent benchmarking.[60] A degree of inconsistency here is inevitable, given the different institutional "ownership" of positive and negative measures (the Commission for most of the former) the member states for CFSP sanctions (something taken up further in the next section). The sanctions discussion here fits into the wider context of the search for

[59] Kreutz, 2005, Hazelet 2001.

[60] See, e.g. European Parliament, 2007 p. 27.

coherence in EU foreign policy: the Commission and the European Parliament have good reasons for wanting a greater degree of coherence between security and development strategies generally. This is logical. At the same time, the consequence of this is that these institutions will have more to say about security. The Council will usually want to keep security issues on a crisis management level – meaning that security issues are kept firmly within its control.[61]

Finally, consistency can be understood in the sense of consistent application of sanctions. Where a sanction is subject in practice to considerable variations in national application among EU states, this obviously undermines the integrity of the sanction. Portela's conclusion is that there is a reasonable degree of consistency among member states in the implementation of CFSP sanctions. Others have expressed criticism as regards implementation of specific sanctions, e.g. the Zimbabwe sanctions. The numerous exceptions granted to targeted ZANU-PF leaders to attend international conferences in, or involving transit through, Europe has allowed them several propaganda victories, at least as regards their own population.

5.5 Effectiveness of implementation procedures at EU level

As indicated above, a vulnerability assessment is an essential part of any sensible sanctions policy. The starting point for the work of assessing effectiveness of implementation is the three "processes" on sanctions.[62] The Stockholm Process report, sets out the following very basic questions which should be posed *before* a decision is reached to initiate sanctions. Although this is directed at UN sanctions, the points are applicable mutatis mutandis to EU sanctions; What behaviour is the Security Council seeking to change? What means are at the disposal of the target actor to carry out its objectionable policies? In which ways is the target likely to try to evade the sanctions? Is the target likely to take retaliatory measures against those implementing the sanctions, and what might these be? What resources are available to the Security Council to assist in determining what types of targeted sanctions will be most effective? What resources are available to the Security Council, the Secretariat, and Member States for implementing targeted sanctions?[63] Basically meaningful sanctions involve careful design, and considerable administrative resources both at the implementing level and, usually, in the countries which are neighbours to the target, for implementation and follow-up.

Council procedures now in place, on paper, require careful preparation and design of sanctions, clear signals to the target of what is required of it and achievable goals. [64] A "Sanctions" formation of the Foreign Relations Counsellors Working party (RELEX/Sanctions) was established in 2004 with this, and other sanctions related issues as part of its mandate.[65] However, it seems clear that even those sanctions introduced

[61] Aggestam et al, 2008.

[62] Biersteker et al 2001, Brzoska 2003, Wallesteen et al, 2003. A fourth such process is being planned by the Greek government.

[63] Wallensteen et al, 2003, para. 271.

[64] Council of the European Union Restrictive Measures: - EU Best Practices for the effective implementation of restrictive measures Council Doc.11679/07 9 July 2007.

[65] Council Doc. 5603/04, 22 January 2004.

after 2004 have not fully fulfilled these requirements.[66] It is, admittedly, difficult to ensure that these requirements are fully complied with. The quick response time (30 days) set out in the guidelines for implementation of UN sanctions means that the EU is not able to do its own impact assessment of these sanctions. Even for EU autonomous sanctions, there is often political pressure to put sanctions in place quickly. Although the Commission may be able to produce a proposal relatively quickly, time pressures will inevitably make it difficult to comply with the requirements of careful design. And admittedly, for some sanctions, whatever effectiveness they have depends wholly on an element of surprise. One cannot threaten financial sanctions without running the very real risk that the money you plan to seize has disappeared from your jurisdiction long before you get around to seizing it.

One possibility is to engage in some degree of forward planning. Resources could be made available for the RELEX/sanctions group to make a number of confidential feasibility studies of sanctions against those EU trading partners which could be said to be in the "risk zone". The main purpose would be to determine the "vulnerability" to different types of sanctions, the major actors etc. The early-warning work of the UN as regards genocide and mass violence also involves making preliminary studies of certain states in risk zones. However, regrettably the extreme political sensitivity of this work presumably rules out cooperation with the UN, or like-minded states such as the US, so a degree of duplication of work is inevitable.

As regards monitoring, follow-up and adaption routines and mechanisms, these too are regarded as essential by the various sanctions processes. However, major doubts remain as to whether these routines and mechanisms really are operating as intended. For example, geographical working groups apparently input information to RELEX/sanctions. But it is difficult to know how much such information comes in, and if any attention is devoted to these reports at the political level. Here one should remember that even within states, there can be a lack of consensus and a lack of consultation regarding sanctions policies. Ministries for foreign affairs in general take the decisions, but the "costs" at national law are borne by other ministries (finance and justice etc.) and enforcement bodies (police, customs, financial inspectorates etc.) Parliament should demand information on how RELEX/sanctions is working in practice, for example, does it really have the resources it needs, is the "ownership" of sanctions issues still, largely, or exclusively, in the capitals of certain member states, do all the people concerned by particular sanctions ever really meet, how often does RELEX/sanctions really meet etc.

Another problem relating to implementation lies in the fact that it is essential to have informed and up to date sources of information *sur place* in order to identify targets, monitor the effects of sanctions on targets, and unintended spill-over effects, monitor methods and incentives for circumvention of sanctions etc. This requires a combination of skills. In particular, determining who should be subjected to sanctions can involve a

[66] For example, Eriksson argues that "the measures did not include the level of clarity that one could have hoped for, i.e. a step-by-step proposal on how the government of Zimbabwe could move ahead amidst the emerging political crisis. The Common Position could have provided for more exit strategies" 2007 at p. 33-34.

form of "prosecutorial" decision, weighing "evidence" and balancing policy (enforcement) considerations with legal (proportionality) considerations. The staff of EU member states embassies, and whatever Commission representation which may be in the state in question, rarely have this sort of "legal-type" competence. As regards the other skills necessary, it is important to remember that the main function of an embassy is to cultivate good relations between the sending and receiving state. The staff of an embassy can be assumed to be uncomfortable in the role of a prosecutor.

It is unreasonable to expect that ordinary diplomats have the type of specialist knowledge necessary. It is not practicable to expect that the existing recommendations and best practices are applied without some institutional watchdog. The necessary expertise already exists, but it is obviously spread out through the member-states. This would suggest that a standing team should be put together of sanctions experts pooled from the member states, but also one or more experts from the Commission. This group could both be entrusted with the final responsibility of putting together different inputs from foreign ministries to make a proper vulnerability assessment. When and if the sanctions policy is agreed, it can visit and advise the EU member states delegations, and whatever Commission representation there is, in the region and country in question on issues of identification, implementation etc.[67] It is unclear to me whether RELEX/sanctions fulfils these objectives in practice.

Experience also shows that it is necessary to react quickly. The situation on the ground can change rapidly. New individuals should be targeted, and people on the list should be delisted. It should be recognised that the cumbersome decision-making procedure of the EU makes the type of decision-making which is necessary much more difficult. Design and follow-up ought, logically, to be easier where it is a single state imposing sanctions, but having said this, even the US sanctions display severe weaknesses in these respects.
An alternative to having a standing group of experts is to have dedicated sanctions officers who can be posted to states subject to sanctions, or neighbouring countries with clear mandates to follow developments closely. The political sensitivity of the subject means that it is unlikely that the Council will be prepared to entrust such officers with the delegated authority to decide additions or deletions to the lists. However, it is important that whatever recommendations such officers make are properly channelled into the Council decision-making process, and quickly endorsed, or if not, reasons are given for not following the recommendations.

While the main role for such dedicated sanctions officers would be for autonomous EU sanctions, major criticisms have also been directed against UN sanctions for lack of logic and motivation in choosing targets, follow-up of targeting, avoidance of circumvention etc. Thus, whatever information such officers gather, and whatever recommendations they make, should also automatically be channelled into the relevant Security Council

[67] The Watson Institute runs training programmes for Security Council officials. A similar training programme oriented both for EU autonomous sanctions and EU implementation of UN sanctions could be organised for Commission officials and diplomats from member states.

sanctions committees decision-making processes, through member states represented in the Security Council.[68]

Finally, the whole subject of EU sanctions, their purposes, limitations, efficiency and implementation at national and EU level, is ripe for an open discussion between national and Commission experts, parliamentarians and academics. The different actors need a forum to meet. The European Parliament could take the initiative to hold a conference on the subject.

5.5 Effectiveness at national law in particular of anti-terrorist sanctions

For those EU states which try to take sanctions seriously, sanctions have real, not symbolic, effects at the level of national law. People's property is frozen. Their possibility of entering into a state is limited or denied. The transfer, holding etc. of funds for the targets is made a criminal offence. Where the primary targets were a very small group of foreign politicians, who did not have property in the country in question, and were unlikely to enter it, then most lawyers could live with these sanctions. But the number of sanctions regimes is increasing, as is their *practical* impact at national law. In particular, the creation of the UN and EU anti-terrorist sanctions – affecting or potentially affecting a large group of EU nationals both as primary targets and secondary addressees – has been the catalyst for a critical discussion at national level on the purposes of sanctions. To put it simply, it is when the sanctions have become "real law" that all their deficiencies have become apparent.

The terrorist financing sanctions were introduced in a great rush – understandable in a sense because of the wave of sympathy for the US after the attacks of 11 September 2001. However, using what is essentially anti-money laundering methods (which is what the sanctions are based on) against terrorist financing is highly controversial for the simple reasons that the motive behind most terrorism is not profit, and the money used is not, or not necessarily, illegal money. As the US "9/11 Commission" found, the effectiveness of these sanctions in the sense of stopping terrorist groups from obtaining financing is highly limited.[69] I would go further. It is most likely zero. The onus of proof should thus be firmly on those who wish to argue that these sanctions should be retained. Moreover, whatever justification might have existed at the time for having preventive measures, instead of proceeding by means of the criminal law, has disappeared by now. All EU states have now ratified and implemented in national law the UN Convention on the Prevention of Terrorist Financing. The improved cooperation arrangements, and the principle of mutual recognition of decisions by member states courts, is the way forward in effective criminal law cooperation in this field. The increased powers the European Parliament has over this field (when and if the Lisbon treaty enters into force) should be used to encourage this, not to attempt to build a supra-national blacklisting mechanism

[68] There is now considerable critical discussion at the UN level on establishing better criteria for initiating and following up on sanctions. See UN General Assembly press release 27 February 2008 regarding the Committee on the Charter and UN role. The opposition of the US and other states to any expansion in UN secretariat resources has so far ruled out any meaningful improvements in evaluation/follow-up capacity. It remains to be seen if the recent ECJ judgment (section 6) will lead to meaningful improvements.

[69] National Commission on Terrorist Attacks on the US, p. 382.

which is ineffective, impracticable and in violation of basic human rights (below section 6).
At least in some EU states, a difference in perspective can be observed between those practicing national lawyers involved in actually implementing and enforcing sanctions (civil servants in Justice and Finance Ministries, prosecutors and judges) and those civil servants in the Foreign Ministries responsible for agreeing to, or at least, explaining the need for, sanctions. Anti-terrorist sanctions are the creation of diplomats, not criminal lawyers. Insufficient independent evaluation has been made of the utility of these sanctions. It is striking that the European Commission evaluation which has been made of EU efforts against terrorist financing hardly mentions these sanctions.[70] They do not seem to be taken seriously by the experts, but, as shown in the next section, they raise serious concerns as regards human rights.

6. Sanctions or restrictive measures and human rights under international law and EU law

- **It is possible to initiate both governmental and terrorist sanctions such as asset freezes against people in a way which is compatible with human rights standards**
- **The present UN sanctions systems, however, violate human rights standards. Thus the EU/EC implementation of these systems is very problematic.**
- **EU sanctions systems also give rise to human rights problems**
- **The Parliament should use its growing competence over anti-terrorist sanctions to initiate a complete overhaul of these sanctions**
- **The best solution is to recognise that anti-terrorist sanctions have significant criminal law effects, to integrate them into the present cooperation in justice and home affairs at to place the bulk of the criminal law safeguards at the national level**

To begin with, the scope of a state's human rights obligations should be explained briefly. These tend to operate within states' "jurisdiction".[71] This usually means a state's territory, but according to the case law of the applicable supervisory bodies (in particular, for EU states, the European Court of Human Rights, ECtHR) there can on occasion be extraterritorial obligations. This territorial dimension explains, paradoxical though it might seem, why general or specific trade embargoes directed against a state, or stopping aid, will rarely violate the human rights obligations of an acting state, even if the measure causes the suffering of the population of the target state. While there are arguably situations where acting states have some form of residual legal obligations to assist people outside of their jurisdiction, these are exceptional. Having said this, a trade sanction which is targeted on a particular economic sector can obviously have secondary

[70] John Howell and Co, 2007.
[71] See Article 1, ECHR. Article 51 of the EU Charter of Fundamental Rights and Freedoms provides that the Charter "is addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. "

effects on targeted populations. The broader the sector is defined – in order to avoid circumvention – the greater the risk for such a spill-over effect. For example, a ban on providing services to a state-owned bank will obviously affect all the customers of the bank. Another example is the present sanctions against Iran designed to restrict Iran's capability to enrich uranium involve an export ban of a long list of equipment which has several uses (e.g. X-ray equipment in hospitals). A third example is an investment ban or the refusal of export credit guarantees, directed against a sector of the economy on which the country as a whole is heavily dependent.

Even if an entity introducing sanctions has only residual *legal* obligations vis a vis the target population, it obviously should, *morally and politically* speaking, carefully design sanctions to avoid the suffering of the population as a whole. As already mentioned in section 3.5, the EU definitely tries to do this, and where aid channeled through state organs is withheld, it attempts to increase aid through other channels.

While a person must usually be within a state's jurisdiction before one can speak about that state's measures violating his or her human rights, human rights treaties (as opposed to constitutions) tend not to differentiate between resident citizens and non-citizens. This means that where property is located within a state which is subject to an obligation to respect property, then even if the owner lives abroad, the property is protected.

As far as concerns which constitutional and human rights are potentially in conflict with sanctions, it depends upon the type of sanctions involved (financial, travel, arms embargo). In all cases, it tends to be "civil and political rights" which are affected. The rights issues are particularly prominent in relation to financial (asset freezing) sanctions, and the individual's, or group's, access to effective judicial or other remedies (included under Justice rights in the Charter of Fundamental Rights of the Union). Air travel bans interfere primarily with freedom of movement (although there can be secondary effects on private and family life, and even on the right to life, e.g. where a targeted person needs foreign medical care). Financial sanctions interfere with a person's private and family life, and his or her property rights. Arms embargoes limit the seller's rights to dispose of his or her property as well as the buyer's property rights, when weapons paid for already are not permitted to be transferred.

However, in practice, arms embargoes will hardly ever, and travel bans will rarely, involve human rights violations. Arms sales are typically subject to stringent licencing requirements. The "right" to sell weapons is severely circumscribed in national law. Thus, adding conditions to a licence regarding future sales, to the effect that arms merchants may not sell to named governments or named individuals may not even be regarded as an interference at all with a property right. Even if this is an interference, it will be justified as a legitimate "control on use". As regards travel bans, the right of freedom of movement, naturally, is not formulated so as to oblige states to admit aliens into their territory. Thus, as far as aliens are concerned, states are generally free to restrict their entry by means of visas, or to remove this right from a category of people altogether (assuming that there is no discrimination). Travel bans, operating as they do at both the point of entry and the point of exit, will only raise an issue for state parties under ECHR

Article 2, Protocol 4 if a person subject to a ban is attempting to enter his or her state of nationality, and is refused entry. Even here, a travel ban will almost certainly not violate the ECHR, as proportional restrictions can be imposed for reasons of public order, national security etc. Exceptional cases, where refusing a person entry to territory can result in them being or being denied essential medical care or being subject to torture, or the death penalty in the state they are attempting to leave, can be dealt with by making humanitarian exceptions on a case by case basis.

Of the usual targeted sanctions, it is assets freezes which in practice are problematic. The human rights problems here can be described simply as defects in fair procedures for blacklisting, and lack of access to court, or other effective remedies to challenge blacklisting. These problems apply to all targeted sanctions regimes, EU implementation of UN Security Council sanctions directed against members of governments and individuals and EU's own sanctions regimes directed against member of governments and terrorist suspects/groups. However, the exact problems differ somewhat depending upon both the sanction-taker and the nature of the target.

It must be stressed that human rights do not make sanctions regimes impossible. All human beings, even members of "predatory" governments and terrorists (and, obviously, terrorist suspects) have human rights. But it is still possible to initiate both governmental and terrorist sanctions such as asset freezes against people in a way which is compatible with human rights standards. It is simply that proper safeguards have to be provided.

The human rights problems are at their most pronounced, and most intractable, in relation to Security Council sanctions. Even though improvements have been made at the UN level as regards the criteria for blacklisting, and a "focal point" has been created to which blacklisted people can complain, this focal point is only a "clearing house" for complaints. There is still no international legal mechanism for checking or reviewing the accuracy of the information forming the basis of a UN sanctions committee blacklisting or the necessity for, and proportionality of, measures adopted. The individual still has no right of access to a court or a quasi-judicial body at the UN level.

The adaption of targeted sanctions, originally directed at regimes, to apply to suspected terrorists, terrorist supporters, and terrorist groups has given rise to a further dimension of accountability problems, in that the basis for terrorist blacklisting is often intelligence material. This will consist to a large extent, as far as terrorist networks are concerned, of risk analyses. Such analyses, experience shows, can often be wrong. It is possible, and indeed, required by human rights standards, to provide for effective remedies even in such cases. However, there are legitimate national security concerns in maintaining the secrecy of this material. States are extremely reluctant to give this sort of material to each other, and, naturally, an international body. Where, however, there is publicly available material (newspaper reports etc.) linking identified people or groups to definite terrorist activity, then this material can be more easily used.

By contrast, as already mentioned, for governmental sanctions, identification is rarely a problem. This indicates that the main type of complaint is likely to be about being targeted in the first place, and/or the proportionality of the response. It is much easier to

provide a remedy in this type of case, as the reviewing body simply needs to test whether the person has been correctly identified, and that the decision-maker's decision that he or she should be subjected to a – temporary – sanction is not disproportionate.

The Security Council is only bound by the UNC and customary international law. It is not bound by any human rights treaty. EU states however, are bound by their respective constitutional protections of rights as well as the European Convention on Human Rights (ECHR) both by virtue of their ratifications of the ECHR and because the ECHR is regarded as part of the general principles of EC law. The ECJ has now confirmed that, as a matter of EC constitutional law, states cannot justify violating EC law on the basis that a Security Council resolution supposedly obliges them to do so (a matter considered further below).

What specific rights are concerned under the ECHR?[72] As far as assets freezing is concerned, blacklisting raises issues primarily under ECHR Article 6 (access to court/fair trial), Protocol 1, Article 1 (protection of property) and Article 13 (effective remedies).

The effects of blacklisting may be sufficiently serious to be the "determination of a criminal charge", triggering the application of Article 6 in its entirety. If this is not the case, then blacklisting fits into the Convention framework of disputes over "civil rights" under Article 6 (1), i.e. the rights to property and to reputation. The ECtHR has refused to accept that access to a court can be totally blocked for national security reasons or that the court is, for national security reasons, not capable of determining the dispute on the merits. On the other hand, in both criminal and civil cases the ECtHR has accepted that the requirements of a fair trial may be modified in anti-terrorism matters. It has allowed courts with a special composition, and the application of special procedures to maintain secrecy. It is however crucial that the court in question be independent, impartial and competent and that the procedure before it follows the principle of equality of arms. The court must be capable of judging the merits of the measure, and of ordering its cessation.

As regards property rights, an assets freeze will usually be adjudged as a "control on use". The margin of appreciation is wide and national security is a pressing need. Thus, the possibility exists under the ECHR to take fairly drastic measures against property for anti-terrorism purposes. However, the room for error exists in this field as in any other. Indeed, it probably is even more likely in a field where enforcement agencies are required to act on limited intelligence material, under political pressure to show results. The ECtHR has tended to take into account the availability of safeguards, particularly judicial safeguards, against wrongful or arbitrary controls on use.

Article 13 (effective remedies) is a subsidiary article, and only comes into play when an application falls within the scope of another material right. Even where an allegation of a threat to national security is made, the ECtHR case law makes it clear that the guarantee of an effective remedy requires as a minimum that a competent, independent appeals authority must exist which is to be informed of the reasons behind the decision, even if such reasons are not publicly available. The authority must be competent to reject the

[72] These issues, and the relevant case law of the ECHR is set out in Cameron 2003a and Cameron 2006.

executive's assertion that there is a threat to national security where it finds it arbitrary or unreasonable. There must also be some form of adversarial proceedings, if need be through a special representative after a security clearance.

Both the autonomous EU anti-terrorist sanctions, and the EU implementation of Security Council anti-terrorist sanctions, have been the subject of several cases before the CFI/ECJ, with more cases pending. I will deal with the two most important cases, namely the *Kadi/Al-Barakaat* case, concerning EU implementation of Security Council anti-terrorist sanction Resolution 1267, and the *Modjahedines* case, dealing with the EU's autonomous anti-terrorist sanctions.

As regards the first issue, EU implementation of Security Council sanctions, the legal position under the ECHR can be summarized in the following way: there is no doubt that, should a state, or the EU, have unilaterally introduced the type of sanctions system required by Security Council resolution 1267 (or for that matter, any of the other targeted sanctions resolutions involving blacklisting as present formulated), then this would be in breach of the ECHR. The only question is whether European states and the EU could or should *avoid* responsibility for breaching the ECHR because the Security Council has, in effect, ordered them to do so.

The position taken by the ECJ Court of First Instance (CFI) in the *Kadi/Al-Barakaat* case[73] was, simply put, yes. The CFI placed the EU, as an international actor, within the framework of international law. According to international law, it has supremacy over national law, and the UNC (by virtue of Article 103) has supremacy over other international law.

This position is, however, untenable from constitutional perspective, and the decision was rightly criticized in doctrine and by the Council of Europe.[74] By incorporating Security Council resolutions in EC regulations, the EC has given these a supra-constitutional status. These cannot be challenged at national law, without emperiling the fundamental principle of the supremacy of EC law over national law. This principle removes the constitutional "gate" which exists in EU member states' constitutional laws. According to constitutional law, the binding force international law receives is by virtue of the constitution. Thus, while states should try to respect international law, if international law goes against the constitution and the conflict cannot be reconciled, the constitution must be preferred. The *Kadi/Al-Barakaat* went on appeal to the ECJ.[75] The ECJ confirmed that the sanctions were within EC competence, but overruled the CFI on the issue of their validity. It took – undoubtedly correctly in my view - the constitutional perspective.

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[73] Judgments of 21 September 2005 in Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission, [2005] ECR II-3533, Case T-315/01, Yassin Abdullah Kadi v. Council and Commission, [2005] ECR II-3649.

[74] See, e.g. Cameron, 2006, Nettesheim, 2007, Parliamentary Assembly of the Council of Europe 2008.

[75] Judgment of 3 September 2008 in Joined cases C-402/05 and C-415/05 Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities.

The judgment does not, and cannot, annul the underlying Security Council obligation. The ECJ does not deny that EU states are under an international legal obligation to carry out the al-Qaeda sanctions contained in resolution 1267 but states that the EC was not able to do this constitutionally speaking because the resolution, as it was implemented, involves violating of fundamental EC rights. The rights in question are primarily the right to be informed properly of the reasons for a decision and the right to effective (judicial) protection against an executive decision.

The ECJ has thus sent a clear signal to the EU members who sit in the Security Council that, in the future, targeted sanctions must be devised and implemented with proper respect for basic human rights. This is hardly a disaster for international law, as some will presumably claim. The United Kingdom in particular has been vocal in asserting that EU states must lead with good example, if it wants to be seen as a responsible actor on the global level. But what this means, to be quite frank, is that EU states must do *in their own territories* what the UK, and the other permanent members in the Security Council, tell it to do. It must be remembered that it is only democratic states which have good systems of protection for human rights which experience problems with the Security Council sanctions regimes. The leading power in the world, the United States, would not accept for a moment that its constitutional protections of rights could be overruled by an international body. There is explicit case law from the US Supreme Court to this effect.[76] The Security Council is not a democratic body. Its "laws" are not legitimized by the people. This judgment from the ECJ simply reminds the Security Council that it must take account of basic human rights when it acts in furtherance of its - undoubtedly – vital mandate to preserve international peace and security.

The judgment was absolutely necessary. The diplomats representing states in the Security Council operate on quite different parameters and with quite different perspectives than national lawyers. For them, the problem is that states do not listen sufficiently to the Security Council. They have been ignoring criticism of the system now for seven years. They would not have voluntarily stopped using sanctions powers, or voluntarily subjected these to limitations. The United States and the United Kingdom in particular see the discussion almost purely in effectiveness terms. The judgment from the ECJ has broken this legal deadlock and forced the diplomats to think again.

However, this does not mean that the problem has been solved. The ECJ has given the Council of Ministers three months to redraft the regulation in a way which conforms with basic EC rights. The discussion has now shifted to what can be done at UN level. If adequate safeguards can be provided there, then it is not necessary for there to be safeguards at the level of EC law. The risk, however, is that some formula is devised which conforms to the letter of the ECJ's judgment, but does not conform to its spirit.[77] The resistance to any form of quasi-judicial mechanism is great among the permanent members of the Security Council. The European Parliament, and the national parliaments of most of the member states, do not have decisive influence over this process of reform at the UN level. Both the European parliament and the national parliaments should keep

[76] Reid v. Covert, 354 US 1, 77 (1957). See also Diggs v. Schultz, 470 F. 2d 461, 466-67, (DC Cir. 1976).
[77] I discuss possible solutions in Cameron, 2003a.

this matter under close scrutiny. If no effective judicial, or, at least, quasi-judicial remedy is created at the UN level, then the judgment means that the Security Council resolution cannot be implemented at EC level, unless such a remedy is also created at EC level. But the Security Council cannot simply give the EC Council of Ministers (and, later the ECJ) the material on which blacklisting is based without simultaneously conceding a right for all other states (including states suspected of supporting terrorism) to demand the same information. The likely result, thus, if a real remedy is not created at UN level, is that the duty at international law to implement the resolution "falls back" to the member states. However, for those member states with constitutional protections analogous to those in EC law, and to Articles 6 and 13 ECHR, which should be most, if not all of the EU states, the implementation of the resolution is not constitutionally possible. These states will be in breach of an obligation under the UN Charter – but an obligation which should never have come into being in the first place.

It might be argued that some kind of system analogous to that of the EU's own autonomous anti-terrorist sanctions could be instituted at the UN level. The judgment of the CFI in the *Modjahedines* case should thus be considered, to determine whether this sets appropriate standards.[78] The CFI found in this case, simply put, that the present blacklisting procedure was deficient from the perspective of legal security and legal remedies. The Council must give adequate reasons to listed entities for listing them. And a new procedure had to be devised which gave blacklisted organizations an effective remedy before community institutions for blacklisting. This is in accordance with settled ECJ case law. When any executive decision is taken which infringes EC (in this case, human) rights, reasons must be given "to provide the person concerned with sufficient information to make it possible to ascertain whether the decision is well founded or whether it is vitiated by a defect which may permit its legality to be contested."[79]

Incidentally, this judgment clearly has implications for the other – governmental – autonomous sanctions regimes, both as regards notification (which the Council has attempted to deal with by new guidelines) and as regards effective remedies (which so far has not been dealt with). However, for evidential reasons sketched out above, it is much easier to provide an "effective" remedy for governmental sanctions. From human rights perspective, then, these sanctions can be maintained, both at the UN and EU autonomous level. The problem lies with the anti-terrorist sanctions.

After the *Modjahedines* judgment, the Council provided the persons and groups listed with – very brief – reasons why they have been listed.[80] The next step for several of these entities has thus been to institute actions before the CFI to question whether the decision to list them was correct. This litigation is ongoing. For most of these entities, several years have elapsed before they are able to even begin to get an effective remedy.

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[78] Judgment of 12 January 2006 in case T-228/02 in Organisation des Modjahedines du peuple d'Iran, v. Council of the European Union. [2006] ECR II-4665

[79] Judgments of 28 June 2005 in Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, Dansk Rørindustri and others v. Commission [2005] ECR I-5425, para. 462.

[80] Council of the European Union, Follow-up to the Judgment of the Court of First Instance in Case T-228/02 - OMPI v. Council, Council Doc. 5418/3/07 May 11, 2005.

At national law, or in this case, at the EC level, an effective remedy means that an independent court should have jurisdiction to review such an executive decision. The court is to check that the decision is in accordance with the law and is proportional. The court holds the executive to the law and the law defines the scope of the court's power of review. But what is the "law" the Council is applying when it adopts a common position listing a given organization as "terrorist"? What norm has the entity being blacklisted breached? At the root of the problem is the technique of blacklisting itself.[81] The decision to blacklist is not an accusation that the organization has committed a criminal offence. Whether a person has committed a crime is an issue which courts – although not the CFI or ECJ – obviously have long experience of testing. An accusation is made, the evidence is submitted and the court gives judgment.

But how is a court able to review a decision that an entity should be categorized as engaging in terrorist activity? Closer analysis of the *Modjahedines* judgment indicates, sure enough, that the CFI would accept a largely formal remedy. The CFI states that, in any future proceedings, it should defer to the Council's own assessment of the evidence.[82]

It is unclear whether the ECJ would place higher demands on the EU's own autonomous system in this respect (and, ipso facto, the UN system). Its case law in other areas certainly sets tough demands on judicial review. The *Modjahedines* case shows that the extent of the review exerted by the court – whether this be the CFI or the ECJ - is all important. I would say that the creation of a formal remedy is in some senses worse than nothing, because it gives the impression of fairness without its reality. The question is still open: in *Kadi/Al-Barakaat* the ECJ simply indicated that some form of anti-terrorist sanctions was within the competence of the EC to order, and that some form of – improved – system would be compatible with EC law.

This, of course, is not the same thing as saying this is a good idea. I therefore would strongly urge the European Parliament to use its new power under Article 75 TEU (when and if the Lisbon treaty enters into force) to do one of two things.

It can choose to retain EU blacklisting but work towards creating a proper supranational remedy, which can also scrutinize the policy issue of blacklisting, proportionality etc. Only if there is a review of the policy issues will this remedy be meaningful. This

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[81] Andersson et. al, 2003 and Cameron, 2003b.

[82] "Lastly, it is true that the Council enjoys broad discretion in its assessment of the matters to be taken into consideration for the purpose of adopting economic and financial sanctions on the basis of Articles 60 EC, 301 EC and 308 EC, consistent with a common position adopted on the basis of the CFSP. Because the Community Courts may not, in particular, substitute their assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council, the review carried out by the Court of the lawfulness of decisions to freeze funds must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power. That limited review applies, especially, to the Council's assessment of the factors as to appropriateness on which such decisions are based" at para. 159.

involves looking inter alia at the following issues: that the terrorist acts for which the organization in question is accused are really attributable to the organization, that these are not isolated incidents, but go to the policy of the organization itself, that the "benefits" of making fund-collecting for this organization outweigh the "costs" in terms of the inevitable "overspill" restrictions in freedom of association and expression of people resident in EU states pursuing the same political goal as the organization, but not advocating terrorist means. This is the sort of review performed by courts in states where it is possible to criminalize organizations for anti-constitutional activities. However, I think it will be very difficult to have such a type of judicial review at the EU level. Certainly, the CFI or the ECJ are not the correct type of body, applying the correct type of criminal procedure, to engage in such a review. And there are huge evidential difficulties. The sort of intelligence material which states have will quite simply not be submitted to a supranational body. The time is not yet ripe for such a body at the EU level.

The alternative, making a reality of the principle of subsidiarity, is that the European Parliament should work for this issue to be "handed back" to the member states. This is not admitting defeat to or being "soft" on terrorism. The way forward here an acceleration of cooperation within the framework of justice and home affairs, building upon the principle of mutual recognition. If individual states choose to "blacklist", instead of pursuing terrorist organisations by criminal means - which is what they really should be doing - then they should be obliged, under the supervision of the European Parliament and national parliaments, to provide adequate remedies at the national level for such blacklisting. I think the second solution is greatly to be preferred.

It is long due for the discussion of anti-terrorist sanctions to be moved from the level of symbolic, diplomatic initiatives and fitted into the wider discussion of how best to ensure effective anti-terrorist cooperation measures in the EU, while maintaining respect for human rights. It is necessary to scrutinize carefully the advantages and – very large - disadvantages of blacklisting as a method of law enforcement, in particular the price this entails in the form of encroachments on basic principles of the *Rechtsstaat*. My conclusion is that the CFI judgment in the *Modjahedines* case is not a good solution to the problem of UN or EU autonomous anti-terrorist sanctions either from the perspective of democratic control over criminal policy or effective protection of human rights.

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Appendix 1

Legal Basis for Sanctions and Trade/aid measures under UNC, TEU, EC Treaty and Cotonou agreement

Charter of the UN
Article 1
The Purposes of the United Nations are:
To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
To be a centre for harmonizing the actions of nations in the attainment of these common ends

Article 25
The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

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

Article 41
The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

TEU
Article 6
1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

Article 11
To safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the UN Charter;
To strengthen the security of the Union in all ways;
To preserve peace and strengthen international security, in accordance with the principles of the UN Charter and the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders;
To promote international cooperation;
To develop and consolidate democracy and the rule of law and respect for human rights and fundamental freedoms.

Article 21
The Presidency shall consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and shall ensure that the views of the European Parliament are duly taken into consideration. The European Parliament shall be kept regularly informed by the Presidency and the Commission of the development of the Union's foreign and security policy.
The European Parliament may ask questions of the Council or make recommendations to it. It shall hold an annual debate on progress in implementing the common foreign and security policy.

Article 29
Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.
That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism […]
— approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e).

Article 39
1. The Council shall consult the European Parliament before adopting any measure referred to in Article 34(2)(b), (c) and (d). The European Parliament shall deliver its opinion within a time limit which the Council may lay down, which shall not be less than three months. In the absence of an opinion within that time limit, the Council may act.
2. The Presidency and the Commission shall regularly inform the European Parliament of discussions in the areas covered by this title.
3. The European Parliament may ask questions of the Council or make recommendations to it.
Each year, it shall hold a debate on the progress made in the areas referred to in this title.

EC Treaty
Article 60
1. If, in the cases envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned.
2. Without prejudice to Article 297 and as long as the Council has not taken measures pursuant to paragraph 1, a Member State may, for serious political reasons and on grounds of urgency, take unilateral measures against a third country with regard to capital movements and payments. The Commission and the other Member States shall be informed of such measures by the date of their entry into force at the latest. The Council may, acting by a qualified majority on a proposal from the Commission, decide that the Member State concerned shall amend or abolish such measures. The President of the Council shall inform the European Parliament of any such decision taken by the Council.

Article 133
1. The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.
2. The Commission shall submit proposals to the Council for implementing the common commercial policy.
3. Where agreements with one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Community policies and rules. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee on the progress of negotiations. The relevant provisions of Article 300 shall apply.

4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority […]

Article 297
Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

Article 301
Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.

Article 308
If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

Cotonou Agreement

Article 33 Institutional development and capacity building
1. Cooperation shall pay systematic attention to institutional aspects and in this context, shall support the efforts of the ACP States to develop and strengthen structures, institutions and procedures that help to:
a) promote and sustain democracy, human dignity, social justice and pluralism, with full respect for diversity within and among societies;
b) promote and sustain universal and full respect for and observance and protection of all human rights and fundamental freedoms;
c) develop and strengthen the rule of law; and improve access to justice, while guaranteeing the professionalism and independence of the judicial systems; and
d) ensure transparent and accountable governance and administration in all public institutions.
2. The Parties shall work together in the fight against bribery and corruption in all their societies.
3. Cooperation shall support ACP States' efforts to develop their public institutions into a positive force for growth and development and to achieve major improvements in the efficiency of government services as they affect the lives of ordinary people. In this context, cooperation shall assist the reform, rationalization and the modernisation of the public sector. Specifically, cooperation support shall focus on:
a) the reform and modernisation of the civil service;
b) legal and judicial reforms and modernisation of justice systems;
c) improvement and strengthening of public finance management;
d) accelerating reforms of the banking and financial sector;
e) improvement of the management of public assets and reform of public procurement procedures; and
f) political, administrative, economic and financial decentralisation.
4. Cooperation shall also assist to restore and/or enhance critical public sector capacity and to support institutions needed to underpin a market economy, especially support for:
a) developing legal and regulatory capabilities needed to cope with the operation of a market economy, including competition policy and consumer policy;
b) improving capacity to analyse, plan, formulate and implement policies, in particular in the economic, social, environmental, research, science and technology and innovation fields;
c) modernising, strengthening and reforming financial and monetary institutions and improving procedures;
d) building the capacity at the local and municipal levels which is required to implement decentralisation policy and to increase the participation of the population in the development process; and
e) developing capacity in other critical areas such as:

i.international negotiations; and
ii.management and coordination of external aid.
5. Cooperation shall span all areas and sectors of cooperation to foster the emergence of non-State actors and the development of their capacities; and to strengthen structures for information, dialogue and consultation between them and the national authorities, including at regional level.

Article 96 Essential elements: consultation procedure and appropriate measures as regards human rights, democratic principles and the rule of law
1. Within the meaning of this Article, the term "Party" refers to the Community and the Member States of the European Union, of the one part, and each ACP State, of the other part.
2. a) If, despite the political dialogue conducted regularly between the Parties, a Party considers that the other Party has failed to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law referred to in paragraph 2 of Article 9, it shall, except in cases of special urgency, supply the other Party and the Council of Ministers with the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties. To this end, it shall invite the other Party to hold consultations that focus on the measures taken or to be taken by the party concerned to remedy the situation.
The consultations shall be conducted at the level and in the form considered most appropriate for finding a solution. The consultations shall begin no later than 15 days after the invitation and shall continue for a period established by mutual agreement, depending on the nature and gravity of the violation. In any case, the consultations shall last no longer than 60 days. If the consultations do not lead to a solution acceptable to both Parties, if consultation is refused, or in cases of special urgency, appropriate measures may be taken. These measures shall be revoked as soon as the reasons for taking them have disappeared.
b) The term "cases of special urgency" shall refer to exceptional cases of particularly serious and flagrant violation of one of the essential elements referred to in paragraph 2 of Article 9, that require an immediate reaction.
The Party resorting to the special urgency procedure shall inform the other Party and the Council of Ministers separately of the fact unless it does not have time to do so.
c) The "appropriate measures" referred to in this Article are measures taken in accordance with international law, and proportional to the violation. In the selection of these measures, priority must be given to those which least disrupt the application of this agreement. It is understood that suspension would be a measure of last resort.
If measures are taken in cases of special urgency, they shall be immediately notified to the other Party and the Council of Ministers. At the request of the Party concerned, consultations may then be called in order to examine the situation thoroughly and, if possible, find solutions.
These consultations shall be conducted according to the arrangements set out in the second and third subparagraphs of paragraph (a).

Article 98 Dispute settlement
1. Any dispute arising from the interpretation or application of this Agreement between one or more Member States or the Community, on the one hand, and one or more ACP States on the other, shall be submitted to the Council of Ministers.
Between meetings of the Council of Ministers, such disputes shall be submitted to the Committee of Ambassadors.
2. a) If the Council of Ministers does not succeed in settling the dispute, either Party may request settlement of the dispute by arbitration. […]

Appendix 2: Legal Framework under the TEU after Lisbon treaty changes

Article 3(5).
In its relations with the wider world, the Union shall uphold and promote its values and contribute to the protection if its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

Article 24
The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded. The common foreign and security policy shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties. The specific role of the European Parliament and of the Commission in this area is defined by the Treaties.
The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.

Article 36
The High Representative of the Union for Foreign Affairs and Security Policy shall regularly consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and inform it of how those policies evolve. He shall ensure that the views of the European Parliament are duly taken into consideration. Special representatives may be involved in briefing the European Parliament. The European Parliament may ask questions of the Council or make recommendations to it and to the High Representative. Twice a year it shall hold a debate on progress in implementing the common foreign and security policy, including the common security and defence policy.

Treaty on the Functioning of the European Union

Article 75
Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for 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.
The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph. The acts referred to in this Article shall include necessary provisions on legal safeguards.

Article 207(2)
The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.

Article 209
1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures necessary for the implementation of development cooperation policy, which may relate to multiannual cooperation programmes with developing countries or programmes with a thematic approach.

Article 215
1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.
2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.
3. The acts referred to in this Article shall include necessary provisions on legal safeguards.

Article 215(6)
The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement. Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:
(a) after obtaining the consent of the European Parliament in the following cases:
(i) association agreements;
(ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;
(iii) agreements establishing a specific institutional framework by organizing cooperation procedures;
(iv) agreements with important budgetary implications for the Union;
(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.
The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.

Article 275
The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions. However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.