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Peripheral hegemony in the quest to ensure Security Council accountability for its individualized UN sanctions regimes

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Peripheral hegemony in the quest to ensure Security Council accountability for its individualized UN sanctions regimes

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A demand for strengthened Security Council accountability has been put forward quite vigorously in the context of the individualized UN sanctions regimes.[1] Over the years, a great variety of actors have voiced their concerns or outright condemnation of the accountability deficit that exists for UN sanctions regimes which target individuals.[2] This accountability gap was effectively created when the heavily critiqued Security Council policy to impose comprehensive sanctions transmuted into designs of targeted sanctions regimes in the 1990s.[3] The traditional procedures and accountability mechanisms that controlled the comprehensive sanctions against states were overall political and diplomatic in nature and not considered fit for the new sanctions paradigm which had the individual rather than the state as its core focus. The shift to targeted sanctions thus required fresh thinking about and new approaches to Security Council accountability. External actors, including states, and particularly their courts[4] and parliaments,[5] but also regional courts[6] and parliaments,[7] UN human rights bodies[8] and special rapporteurs,[9] scholars[10] and civil society[11] took the lead in exposing the accountability deficit and through

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[1] The respective Watson reports have been tremendously instructive in guiding the process towards greater accountability, see e.g., *Strengthening Targeted Sanctions Through Fair and Clear Procedures*, 2006, *UN Doc.* A/60/87 – S/2006/331; *Addressing Challenges to Targeted Sanctions: An Update of the Watson Report*, 2009; and *Due Process and Targeted Sanctions: Un Update of the "Watson Report"*, 2012.

[2] Those voices came together in the articulation of concern included in the World Summit Outcome document of the UN General Assembly, "we also call upon the Security Council …to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and removing them, as well as for granting humanitarian exceptions." *UN Doc.* A/RES/60/1, 24 October 2005, para. 109.

[3] The evolution of sanctions was fostered by the Sanctions Reform Initiatives by Switzerland, Germany and Sweden in the so called Interlaken Process on Targeted Financial Sanctions (1998 and 1999), the Bonn-Berlin Process on Arms Embargoes and Travel and Aviation Related Sanctions (1999 and 2000), and the Stockholm Process on the Implementation of Targeted Sanctions (2001).

[4] United Kingdom, High Court of Justice (Administrative Court), *Hay v. HM Treasury,* [2009] EWHC 1677 (Admin), 10 July 2009; United Kingdom, High Court of Justice (Administrative Court, *A, K, M, Q & G v. H.M. Treasury,* [2007] EWHC 869 (Admin), 24 April 2008; and Federal Court of Canada, *Abdelrazik v. Canada,* 2009 FC 580, 4 June 2009.

[5] E.g. the Dutch and Swiss Parliaments (see the 2009 Update of the Watson report, *supra* note 1, at 41-42).

[6] *Nada v. Switzerland,* Appl. No. 10593/08, ECtHR (Judgment), 12 September 2012; *Al-Dulimi and Montana v. Switzerland,* Appl. No. 5809/08, ECtHR (Judgment), 6 November 2013.

[7] Parliamentary Assembly, Council of Europe, Resolution 1597 (2008), 23 January 2008.

[8] HRC, *Nabil Sayadi and Patricia Vinck v. Belgium,* View, Communication No. 1472/2006, 29 December 2008.

[9] Statements by the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, to the Human Rights Council and General Assembly, at http://www2.ohchr.org/english/issues/terrorism/rapporteur/statements.htm, (e.g. UN General Assembly, Report of the Special Rapporteur, A61/27, 16 August 2006 (Scheinin) and Report of the Special Rapporteur, A/67/396, 26 September 2012 (Emmerson)).

[10] Scholarly writings referencing the Kadi case are overwhelming. Prominent scholars, who have analysed the Kadi case in particular from an accountability perspective, include: Erica, de Wet, 'From Kadi to Nada: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions', 12 *Chinese Journal of*

concerted efforts they created the impetus for change. The protagonist in this story is beyond any doubt the European Court of Justice (ECJ) with its legendary Kadi-case.[12] In light of the above panorama, this article examines issues of Security Council accountability in relation to individualized UN sanctions regimes. It particularly assesses and appraises the role of external forces in bringing about change within the UN system, with a focus on the ECJ and its Kadi case.

Overall, the Kadi jurisprudence has had a transformative impact on the interrelationship between the EU and the international legal order and in this context it has also spurred cogitations on whether constitutionalist or pluralist theories offer the best models for accountability processes.[13] Rather than looking at how the reception or disregard of international law in the EU informs the accountability potential within the European legal order, this article examines the flipside, i.e., the ECJ's imprint beyond the EU. It zeroes in on the instrumentality of the ECJ to strengthen accountability in the UN system. In so doing, the article offers a more general appraisal of the potential of decentralized litigation as a strategic means to effectuate systemic change within a different, universal legal order. While acknowledging the multiple positive effects that the Kadi case has had in terms of triggering innovations at UN level, the article also presents the argument that peripheral litigation may not always be sufficiently sensitive to intricacies and limits of a more global and centralized organization and it may not take full account of the systemic implications of its judgement beyond the concrete confines of the case that is being adjudicated. More concretely regarding the external effects of the Kadi II judgement, it is posited that the ECJ's principled, or perhaps hegemonic, approach and its non-negotiable commitment to high standards of judicial review might actually have negative repercussions for broader attempts to foster accountability processes across all UN sanctions regimes. By way of conclusion, some afterthoughts are offered regarding the focus that is needed in ongoing and future sanctions accountability discussions which go beyond Kadi and the 1267/1989 Al Qaeda-counterterrorism sanctions regime.

The article starts from the premise that the ECJ overshadows other regional and national courts and bodies in terms of leverage. While the argument has been made that the ECtHR is equally

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International Law 787-807 (2013); and Ian Cameron, 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights', 72 *Nordic Journal of International Law* 159-214 (2003).

[11] International Commission of Jurists (ICJ), *Addressing Damage, Urging Action. Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights*, February 2009, available at: http://www.refworld.org/docid/499e76822.html.

[12] CFI EU, *Yusuf and Al Barakaat International Foundation v. Council and Commission*, Case T-306/01, Judgment, 21 September 2005; CFI EU, *Yassin Abdullah Kadi v. Council of the European Union and Comission of the European Communities*, Case T-315/01, Judgment, 21 September 2005; CJ EU, *Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P, Grand Chamber, Judgment, 3 September 2008; CJ EU, *Yassin Abdullah Kadi v. Commission*, Case T-85/09, General Court, Judgment, 30 September 2010; CJ EU, *European Commission and Others v. Yassin Abdullah Kadi*, Joined cases C-584/10 P, C-593/10 P and C-595/10 P, Grand Chamber, Judgment, 18 July 2013. See also the opinions of the Advocate General (who presents a public and impartial opinion to the case before the Court), Opinion of Advocate General Poiares Maduro, Case C-415/05 (infra), 23 January 2008; Opinion of Mr Advocate General Bot, Joined cases C-584/10 P, C-593/10 P and C-595/10 P (infra), 19 March 2013.

[13] S. Besson, 'European Legal Pluralism after Kadi', 5 *European Constitutional Law Review* 237-264 (2009); G. De Burca, 'The European Court of Justice and the International Legal Order', 51 *Harvard International Law Journal* 1-49 (2010), and J. d'Aspremont and F. Dopagne, *Kadi:* The ECJ's Reminder of the Elementary Divide between Legal Orders, 5 *International Organizations Law Review* (2008), pp. 371-379.

influential as its jurisdiction stretches over an even greater number of States and its case law enjoys world-wide repute,[14] EU implementation is critical to a successful collective sanctions regime. Therefore the threat of an adverse judgement coming from the ECJ and the concomitant possibility of direct annulment of the implementing measures present a more powerful axe than rebuking judgements from human rights courts and committees which have less immediate effects. Surely, the stream of denunciations of other courts and bodies have multiplied and diversified the menace of non-implementation and non-cooperation, but the main focus in this article will lie with the ECJ as an agent of change.

1. The transmutation from comprehensive to targeted sanctions and its implications for forms and strictures of accountability

The quest for accountability is, logically but also to some extent paradoxically, the result of increased activity on the part of the Security Council.[15] Indeed, the 1990s have been labeled the sanctions decade as they witnessed a significant intensification of the use of collective coercive non-military measures by the Security Council.[16] Coupled with the augmentation of the number of sanctions regimes came a true metamorphosis of this instrument when comprehensive sanctions schemes were replaced by targeted sanctions. While the quantitative increase in Security Council activity *per se* ignited demands for accountability, it was the qualitative mutation that had most direct implications for forms and strictures of accountability. This section briefly traces the transformation of UN sanctions over the past decades and sets out the ramifications thereof for proper accountability schemes.

Originally, and despite the legal connotation of their name, UN sanctions were conceived of as political measures addressing a determined threat to the peace rather than legal responses to identified violations of international law.[17] The traditional procedures and mechanisms that were

[14] Erica de Wet, *supra* note 10, at 790: "Whereas the ECtHR informs the jurisprudence of 47 States that constitute the membership of the Council of Europe, the CJEU impacts the legal developments in 27 States which make up the EU. Moreover, all 27 EU Member States (two of which are permanent members of the UNSC) are also members of the Council of Europe and therefore need to take into consideration the jurisprudence of both the ECtHR and the CJEU. In addition, these two courts have often in the past influenced the jurisprudence of other domestic courts around the world. The importance of their reasoning in the Kadi and Nada decisions for the efficacy of UNSC sanctions regimes therefore is self-evident and justifies closer scrutiny"; see also Report of the Special Rapporteur, A/67/396, *supra* note 9, par. 21: "However, the principle in the Nada case has wider geographical ramifications than the Kadi litigation since it applies to all 47 member States of the Council of Europe, including three permanent members of the Security Council."

[15] Several scholars have indicated that such accountability quests may negatively affect the unleashed and long-awaited activity of the Security Council, which is perhaps not a desired consequence after decades of Cold War paralysis. See e.g., Bardo Fassbender, '*Review Essay Quis judicabit?* The Security Council, Its Powers and Its Legal Control', 11 *European Journal of International Law* 219-232 (2000), comparing the Security Council to a "a deplorably weak Gulliver, lying on the ground not by choice, whom [lawyers with a thirst for accountability] want to tie up with their lawyerly bands and strings" (pp. 220-221); And Simon Chesterman more articulately in, 'Globalisation and public law: A global administrative law?', in Farral and Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* (Cambridge: Cambridge University Press, 2009), arguing that the cost of greater accountability may be a reduced ability to respond to crisis situations, p. 83.

[16] D. Cortright, G.A. Lopez and L. Gerber-Stellingwerf, 'The Sanctions Era: Themes and Trends in UN Security Council Sanctions since 1990', in V. Lowe et al. (eds.), *The United Nations Security Council and War; The Evolution of Thought and Practice since 1945* (Oxford: Oxford University Press, 2008), at 205-225.

[17] Hans Kelsen, 'Collective Security and Collective Self-Defense under the Charter of the United Nations', 42 *American Journal of International Law* 783-796 (1948), p. 788.

in place for the comprehensive sanctions imposed on states were political and diplomatic in nature. For instance, Rule 37 of the Council's operating Rules of Procedure makes sure that a state whose interests are affected by a matter discussed in the Council is invited to present its view.[18] Similarly, Article 50 of the UN Charter grants third states that are confronted with special economic problems arising from economic sanctions a right to consult with the Council.[19] This state-oriented institutional framework was architecturally unprepared to accommodate the individual as a new target of sanctions. Individuals simply had no access whatsoever to the Security Council and it took some time before the understanding came that the shift to targeting individuals directly also presupposes a broader refashioning of procedures and accountability mechanisms. Initially, the development of the concept of targeted sanctions was mainly focused on mitigating the extensive collateral effects of comprehensive sanctions on innocent populations and on rendering sanctions more effective. The protection of the individual who was targeted by the sanctions was not of primary concern, and in fact the insight that individuals whose interests are directly affected should be offered some avenues to protect their own interests emerged only later.[20]

Intertwined with the remodeling of the instrument, the 1990s and beyond also witnessed an expansion of the type of emergencies which sanctions were supposed to address. As the notion of 'threat to peace' became increasingly versatile in character,[21] sanctions regimes were set up for a wide-ranging spectrum of entirely different situations. Broadly conceived of as non-military Chapter VII measures, sanctions gained more specific identities as nuclear non-proliferation instruments in the context of North Korea and Iran,[22] as human rights enforcement mechanisms and pro-democracy and conflict management tools in a myriad of different countries,[23] such as

[18] Rule 37 of the Provisional Rules of Procedure reads, "Any Member of the United Nations which is not a Member of the Security Council may be invited, as the result of a decision of the Security Council, to participate, without vote, in the discussion of any question brought before the Security Council when the Security Council considers that the interests of that Member are specially affected, or when a Member brings a matter to the attention of the Security Council in accordance with Article 35(1) of the Charter." *UN Doc.* S/96/Rev.7, 1983.

[19] See Simma, Khan, Nolte and Paulus (eds.), *The Charter of the United Nations, a commentary* (Oxford: Oxford University Press, 2012), commentary on Article 50.

[20] T.J. Biersteker, Targeted sanctions and individual human rights, 65 *International Journal* 99 (2009-2010), p. 101.

[21] See Simma, Khan, Nolte and Paulus (eds.), *The Charter of the United Nations, a commentary* (Oxford: Oxford University Press, 2012), commentary on Article 39.

[22] In reaction to nuclear tests by North Korea (DPRK), the Security Council imposed sanctions in resolutions 1718 (2006), 1874 (2009), 2087 (2013) and 2094 (2013). The measures included am arms embargo, a weapons of mass destruction programs-related embargo, and a bon on the export of luxury goods, as well as individual targeted sanctions, see http://www.un.org/sc/committees/1718/.
With respect to Iran's nuclear programme, sanctions were imposed on 23 December 2006 by resolution 1737. The mandate of the Sanctions Committee was expanded in resolutions 1747 (2007), 1803 (2008) and 1929 (2010). Measures include a proliferation-sensitive nuclear and ballistic missile programmes-related embargo; an arms embargo, and travel ban and assets freeze on designated persons and entities. See further: http://www.un.org/sc/committees/1737/. See also S. E. Eckert, United Nations and nonproliferation sanctions, 65 *International Journal* 69 (2009-2010).

[23] Sanctions for crisis management and peace, democracy and human rights enforcement purposes were imposed on, *inter alia*: Angola (1993- 2002), *UN Doc.* S/RES/864, 15 September 1993, Somalia (1992-present), *UN Doc.* S/RES/751, 24 April 1992 [its mandate was expanded and the committee renamed such as to include sanctions imposed on Eritrea, S/RES/1907, 23 December 2009], Iraq (2003-present), *UN Doc.* S/RES/1518, 24 November 2003, Liberia (1992-present), succeeding sanctions regimes were establishes in 1997 and 2001.

DRC,[24] Central African Republic,[25] and Yemen[26] and as part of counter-terrorism strategies in particular in the Al Qaeda/Taliban 1267 sanctions regime.[27] In the EU context of autonomous sanctions,[28] a fourth type has emerged in response to the Arab Spring developments which aims to assist new regimes in tackling the misappropriation of state funds by their predecessors.[29] Effectively, these regimes, as they have been imposed on former Egyptian and Tunesian leaders, are utilized to bypass the more burdensome regular processes of mutual legal assistance.[30]

The concrete purposes of sanctions regimes are contingent on the identity of the regime as such and they may variegate and fluctuate per time frame, depending on the evolvement of the emergency they are supposed to address as well as on interlinkages with other responses. Generally, three purposes of UN sanctions are distinguished, namely: (i) to *coerce* or change behavior, (ii) to *constrain* access to resources needed to engage in proscribed activities, or (iii) to *signal* and stigmatize.[31] In practice, allegations have often been made that sanctions also have punitive purposes, or at least that they have an impact that equals punitive measures.[32] The discussion on the potential punitive nature of sanctions was particularly conspicuous in the setting of counter-terrorism sanctions given the connotations of terrorism as a criminal act and it was reinforced by the perceived consequences that such a qualification would have for the nature

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Currently Liberia sanctions are rooted in *UN Doc.* S/RES/1521, 22 December 2003, Cote d'Ivoire (2004-present), *UN Doc.* S/RES/1572, 15 November 2004. See further: http://www.un.org/sc/committees/list_compend.shtml and the Targeted Sanctions Consortium "Sanctions App".

[24] *UN Docs.* S/RES/1493, 28 July 2003 and S/RES/1533, 12 March 2004.

[25] *UN Doc.* S/RES/2127, 5 December 2013.

[26] *UN Doc.* S/RES/2140, 26 February 2014.

[27] *UN Doc.* S/RES/1267, 15 October 1999 and complemented and further developed by subsequent resolutions. Another counterterrorism sanctions regime was established in the context of Lebanon after the Hariri terrorist bombing, *UN Doc.* S/RES/1636, 31 October 2005.

[28] In addition to the implemented UN sanctions regimes, the EU has also created its own regimes as part of its foreign policy and security policy for instance for Zimbabwe, Birma and Belarussia, or it extends the UN sanctions regimes with its own listings as was done in the case of Iran. The EU autonomous sanctions can be subdivided in sanctions aimed directly against individuals suspected of (supporting) terrorism and sanctions aimed against states yet including individuals closely linked to the state. The EU autonomous anti-terrorist sanctions are effectively intended to comply with the obligations of the EU Member States under UN resolution 1373 (2001).

[29] E.g., in Tunesia and Egypt, Council Decision 2011/72/CFSP, 2 February 2011, as last amended and renewed by Council Decision 2014/49/CFSP, 30 January 2014, and Council Decision 2011/172/CFSP, 22 March 2011 as last amended and renewed by Council Decision 2014/153/CFSP, 20 March 2014.

[30] Maya Lester, 'First Arab Spring Sanctions Judgments – 3 Annulments of Tunisian Listings by the European Court', http://europeansanctions.com/2013/05/30/first-arab-spring-sanctions-judgments-3-annulments-of-tunisian-listings-by-the-european-court/, 30 May 2013.

[31] T.J. Biersteker and others (eds.), *Designing United Nations Sanctions, Initial Findings of the Targeted Sanctions Consortium* (New York, 27 April 2012), further developing and adapting the typology of F. Giumelli, *Coercing, constraining and signaling: explaining UN and EU sanctions after the Cold War* (Colchester: ECPR Press, 2011).

[32] See on the impact of sanctions: Euclid A. Rose, 'From a Punitive to a Bargaining Model of Sanctions: Lessons from Iraq', 49 *International Studies Quarterly* 459-470 (2005); and David Cortright and George A. Lopez, 'Learning from the Sanctions Decade', 2 *Grotius Dialogue* (3) (2000), at http://www.worlddialogue.org/print.php?id=90.

of the remedy that ought to be provided.[33] However, on many occasions, it was emphasized – including by the ECJ - that UN sanctions are inherently preventive in nature.[34]

The question how targeted sanctions compare to comprehensive sanctions in terms of effectiveness is subject to debate and cannot be answered in the abstract. Recent studies have developed and amended theories and methodologies to assess the policy outcomes of targeted sanctions regimes specifically.[35] These studies suggest that a number of factors determine and shape the impact of targeted sanctions, including their design, the greater policy strategies in which the sanctions regimes are embedded, interactions between the imposer and recipient of the sanctions, decision-making rules and perceptions.[36] Moreover, it has been emphasized that sanctions regimes should be evaluated per episode which take account of substantive, temporal and contextual changes.[37] Targeted sanctions may play different roles in different contexts or in different time frames within the same situation, and different strategic paradigms may underlie the sanctions policy, ranging from deterrence to containment, coercion, diplomacy and prevention.[38] Since each sanctions regime is unique in many respects and dimensions[39] and since sanctions are never imposed in isolation[40] but rather as part of a greater scheme of policy and legal initiatives, the more recent studies as well as ongoing projects tend to identify factors that correlate with effective outcomes rather than they make direct causal inferences.[41]

Irrespective of their relatively low effectiveness, there has been an increase of the use of collective UN sanctions. This has, in turn, resulted in greater sophistication and diversification of this tool as described above. Hence, the growing resort to the tool of sanctions as such culminated in a transmutation which concerned both the ultimate addressees of the sanctions as well as their functionality and underlying rationale. Jointly, those paradigmatic changes placed accountability demands more squarely on the agenda than they had been before. The lobby for more rules-based sanctions regimes did, however, not take place in an isolated antechamber, but was rather part of a greater movement. In fact, the broader claim that the increasing density of global governance and the concomitant shift in activity from being purely regulatory to encompassing an executive dimension with direct impact on rights and interests of individuals necessitate the rethinking of accountability processes lies at the heart of the Global Administrative Law (GAL)-project. In the context of this project, core elements of accountability

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[33] Andrea Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion', 17 *European Journal of International Law* 881-919 (2006); 2009 Update of the Watson report, *supra* note 1, Section 3 (by Larissa van den Herik and Nico Schrijver).

[34] See e.g., *UN Doc.* S/RES/2083, 17 December 2012, 14th preambular paragraph and ECJ Kadi II Judgement of 18 July 2013, para. 130.

[35] Gary Clyde Hufbauer et al, *Economic Sanctions Reconsidered,* 3rd edition (Washington: Peter G. Peterson Institute for International Economics, 2007), M. Eriksson, *Targeting Peace; Understanding UN and EU targeted sanctions* (Burlington: Ashgate, 2011), F. Giumelli, *Coercing, constraining and signaling: explaining UN and EU sanctions after the Cold War* (Colchester: ECPR Press, 2011). And for EU sanctions: C. Portela, *European Union sanctions and foreign policy: when and why do they work?* (Abingdon: Routledge, 2010) .

[36] M. Eriksson, *Targeting Peace; Understanding UN and EU targeted sanctions* (Burlington: Ashgate, 2011), at 6.

[37] *Idem.*

[38] *Idem,* at 53-54.

[39] T.J. Biersteker and others (eds.), *Designing United Nations Sanctions, Initial Findings of the Targeted Sanctions Consortium* (New York, 27 April 2012), p. 13.

[40] *Idem*, p. 13.

[41] *Idem*, p. 17.

have been identified as including transparency, participation, reasoned decision, legality, and effective remedies.[42] Even if the concept of accountability is manifested in different forms and exists on different levels, and is ever-evolving in these respects,[43] there is overall agreement that accountability goes beyond responsive mechanisms only.[44] This is important to highlight in a reflection on sanctions and accountability, since the Kadi-inspired discussions - in particular in European circles - have tended to focus on delisting only while sometimes neglecting the importance of proper listing, improvements already integrated in the listing processes, and other procedural questions such as those related to the grant of humanitarian exemptions. Of course questions of listing and delisting are intensely interrelated since only decisions that are made on the basis of certain *ex ante* identified criteria and that follow set procedures are amenable to some kind of *ex post facto* independent review. In this respect it may also be noted that the underlying rationale of accountability is not only that it serves to constrain power, but also to make decision-making more reasoned and to improve the quality of decisions. All together these objectives may enhance the ability of those affected to protect their legitimate rights and interests,[45] but ultimately more reasoned decision-making can also be seen as a benefit in its own right.

Specifically in the sanctions domain, calls for procedural reform were premised on the idea that the shift to individuals as ultimate targets of sanctions required a more legal model of accountability. However, a great part of the discussion was linked, by virtue of the Kadi case, to one specific sanctions regime which was the 1267/1989 Al Qaeda counter terrorism regime. This regime has been characterized as the mother of all sanction regimes and as a forerunner,[46] but in many respects it is atypical.[47] Therefore, the question arises to what extent concrete accountability demands that emerge from the 1267/1989 Al Qaeda-setting can be transposed to the more generic sanctions setting. The identity of the sanctions regime, as being either a counter-terrorism regime, a human rights/democracy/conflict regime or a non-proliferation regime may have an impact on the accountability design that is most suitable and appropriate. Moreover, even though all these regimes target individuals, there is still a need to differentiate and to broadly distinguish between two categories of individuals. First, there are individuals who are listed primarily on the basis of their position and affiliation to the State.[48] Those individuals can, in principle, use the

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[42] B. Kingsbury, N. Krisch, and R. Stewart, The emergence of global administrative law, 68 *Law and Contemporary Problems* 15 (2004-2005), at 17.

[43] R. Mulgan, "Accountability": An Ever-Expanding Concept?, 78 *Public Administration* 3: 555-573 (2000).

[44] Simon Chesterman, Beatrice Pouligny, 'Are Sanctions Meant to Work – The Politics of Creating and Implementing Sanctions through the United Nations', 9 *Global Governance* 503-518 (2003); Simon Chesterman, 'Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law', 14 *Global Governance* 39-52 (2008).

[45] See the report of the 5474th meeting of the Security Council, *UN Doc.* S/PV.5474, 22 June 2006, p. 25, 26.

[46] Mr. Mayr-Harting, Chair of the 1267 Committee, quoted in the 2012 Update of the Watson report, *supra* note 1, at 25.

[47] It is atypical since it is the only sanctions regime without a territorial connection and it is based on a very general determination that all acts of terrorism can constitute a threat to peace, S/RES/1390, 28 January 2002.

[48] North Korea: 'Consolidated List of Entities and Individuals', last updated 31 December 2013, http://www.un.org/sc/committees/1718/pdf/List_Entities_and_Individuals_English.pdf; the listing criteria can be found in *UN Doc.* S/RES/1718 (2006), par. 8 (d) and (e), see also 'Guidelines of the committee for the Conduct of its Work', 20 June 2007, http://www.un.org/sc/committees/1718/pdf/guidelines_20_jun_07.pdf. Iran: 'INDIVIDUALS AND ENTITIES DESIGNATED AS SUBJECT TO THE TRAVEL BAN AND ASSETS FREEZE PURSUANT TO RESOLUTIONS 1737 (2006), 1747 (2007), 1803 (2008), AND 1929 (2010) AND TO THE COMMITTEE DECISIONS OF 18 APRIL 2012 AND 20 DECEMBER 2012',

state apparatus to participate in and challenge sanctions decision-making, and therefore the need to remodel accountability processes is less immediate. The second group of individuals who are targeted, are those individuals who oppose the state, either as rebels in a civil conflict or as designated terrorists[49] and obviously those individuals are not in a position to utilize the regular diplomatic channels. Finally, there is an intermediary group of individuals who do formally not immediately belong to the state apparatus, but who are targeted because of their informal affiliation with or their economic or other influence on the regime. In some instance family members have been targeted, either because of their affiliation to the regime, or to make sure they do not act as a financial sanctuary for their targeted relatives.[50] The accountability problem is most acute for the second group of individuals who have no ties to the state apparatus at all, and is also present for the intermediary group. Hence, it is important to appreciate that this accountability problem presents itself in different shades and colours for different categories of individuals. Therefore, the argument can be made that in light of the diversification of sanctions in terms of targets and aims, there may be a need for both cross-fertilization among as well as differentiation between accountability models.

As a final observation in this section on the transmutation of sanctions from comprehensive to targeted sanctions, it can be noted that targeted sanctions have by now become mainstream[51] and that they are utilized by all important actors in the sanctions domain. In addition to the UN, the US and the EU are important players in this regard. Apart from implementing UN sanctions, the EU has also developed an autonomous sanctions policy as part of its Common Foreign and Security Policy which also employs targeted sanctions rather than comprehensive sanctions.[52] Discussions on accountability for UN sanctions may thus be inspired by and contrasted with developments in these other legal orders. However in doing so, the difference in policy and legal environments in which UN, EU and US sanctions are adopted should not be ignored. Bilateral US sanctions are generally more flexible than multilateral sanctions and less subjected to regulation and legal accountability processes. In this sense, it can be observed that in particular the EU autonomous sanctions are subjected to much greater legal scrutiny than the US bilateral sanctions. This has had the effect of reducing the discretion of EU political bodies in their listing

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http://www.un.org/sc/committees/1737/pdf/1737ConsolidatedList.pdf; the listing criteria can be found in *UN Doc.* S/RES/1737 (2006), par. 18 (f); see also 'Guidelines of the Committee for the Conduct of its Work', http://www.un.org/sc/committees/1737/pdf/revisedguidelinesfinal.pdf.

[49] Al-Qaida: 'The List established and maintained by the Al-Qaida Sanctions Committee with respect to individuals, groups, undertakings and other entities associated with Al-Qaida', Last updated on 14 March 2014, http://www.un.org/sc/committees/1267/pdf/AQList.pdf; the listing criteria can be found in *UN Doc.* S/RES/2083, 17 December 2012, par. 10; see also: 'Guidelines of the Committee for the Conduct of its Work', 15 April 2013, http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf.

[50] The EU case law on the propriety of listing family members is equivocal. In Tay Za, the Court (Grand Chamber) held that it may not be presumed that family members of leading business figure benefit from functions exercised by the businessmen and that this creates a sufficient link to the military regime in Birma, Case No. C-376-10, 13 March 2012, para. 71. In contrast, in the case of Bouchra al Assad, the sister of the President and wife of the Deputy Chief of Staff, the General Court held that the Council was entitled to presume that she had benefitted from the regime, Case No. T-202/12, 12 March 2014, paras. 99-106.

[51] With the exception of the second Libya sanctions regime which started with Security Council Resolution 1970 (2011).

[52] Although the EU autonomous Iran sanctions which added to the implemented UN sanctions were at some point so far reaching, targeting a great array of economic actors that they had a wide-reaching impact on the general population which could be similar to comprehensive sanctions.

decisions.[53] In both cases of the US and the EU however, sanctions remain foreign policy instruments guided by state interest or broadly phrased policy goals. For instance, the EU's Common Foreign and Security Policy, including decisions to impose and effectuate sanctions, are guided "by principles which have inspired its own creation", namely "democracy, rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law."[54] UN sanctions, even if broadly inspired by similar principles, have an arguably more restricted scope of application. As they are generally governed by Chapter VII of the UN Charter, their area of application is confined to matters involving threats to international peace and security. Nonetheless and despite attempts in some legal orders to further regulate sanctions regimes and pose certain limits to political discretion, in all these environments of the UN, EU and US, sanctions continue to be predominantly political in nature. For instance, so far, the decision when to impose sanctions as well as the overall sanctions design remain within the political domain and outside the purview of judicial scrutiny. Sanctions designs as well as decisions *not* to list a specific individual have not been reviewed by courts.[55] Accountability demands and wishes may eventually culminate in preferences for more rules-based sanctions designs and they zero in on the articulation of precise listing criteria, as well as moves to encourage procedural reforms including creating possibilities for listed individuals to present a claim against their listing. Yet, these accountability quests do, so far, leave greater policy questions untouched. Overall, it can be concluded that the mission for better accountability schemes is currently in full swing. It started over a decade ago, when, in the immediate aftermath of 9/11 on 18 December 2001, mister Kadi brought his case before the General Court (then CFI) in Luxembourg.

2. The power of Kadi I: reforms at UN level and the creation of the Ombudsperson

In the decade that has passed since Kadi initiated proceedings in Luxembourg, significant procedural amendments have been incorporated in the sanctions regimes at UN level. Even if causality may often be a too straightforward concept to capture complex societal dynamics, in this instance few people will dispute that the proceedings in Kadi I were crucial as a driver of change. Improvements made both for the listing as well as the delisting process brought the 1267/1989 Al Qaeda sanctions regime closer in line with the mentioned accountability-standards

[53] This difference became manifest in US and EU sanctions policies targeting Russia in relation to the Crimea developments, where diverging lists were used and German Chancellor Merkel indicated that the different legal basis explained different listing decisions. The EU could less easily target oligarchs because the EU could only list individuals who were responsible for actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine and because of evidentiary requirements, "EU leaders agree new Russia sanctions", 21 March 2014, www.euobserver.com. Council Decision 2014/145/CFSP, 17 March 2014, as implemented by Council Regulation No. 269/2014, 17 March 2014 and Council Implementing Regulation No. 284/2014, 21 March 2014.

[54] Article 21 (1) TFEU. Article 21(2) lists specific goals that the EU will pursue in its international relations.

[55] For instance, the decision not to list Putin is a clear policy decision, which was defended by the White House by indicating that targeting a Head of State would be an extraordinary step, "EU and US impose sanctions on Russian and Ukrainian officials", the Guardian, 17 March 2014. Subjecting Heads of States to sanctions may also raise questions of immunity. Interestingly, research has suggested that sanctions schemes with partial listing, i.e. focusing on one side of a conflict and which do not list individuals from all parties to a conflict, are generally more effective, T.J. Biersteker and others (eds.), *Designing United Nations Sanctions, Initial Findings of the Targeted Sanctions Consortium* (New York, 27 April 2012), p. 29, fn. 12.

of transparency, participation, reasoned decision, legality, and effective remedies. Concretely, the reforms for listing regarded notification, the articulation of more specific criteria for listing, the preparation of a statement of case and narrative summaries and the release of information about the reasons for listing. However, the process towards greater accountability was also timid at times, as states were often only *encouraged* to comply with certain standards, rather than they were *obliged* to do so.[56]

The first step to facilitate and stimulate *de*listing was the development of a triannual internal review procedure.[57] The rationale for this procedural amendment was to avoid perpetuate listing and thus to address legitimacy concerns as well as to remove listings that had always been or had become improper and thus to maintain an updated and accurate list, which ties in to the need for qualitative decision-making. The more revolutionary reform was the introduction of the Ombudsperson as an external entity with a certain level of scrutiny. Initially, the institute of the Ombudsperson was primarily geared towards offering individuals a certain access and possibility to be heard. The main powers of the Ombudsperson were confined to information gathering and engaging in a dialogue. On the basis of these functions, when approached with a delisting request, the Ombudsperson would "draft a Comprehensive Report that will exclusively: (a) summarize … all information available to the Ombudsperson… (b) describe the Ombudsperson's activities … (c) based on an analysis of all information available to the Ombudsperson and the Ombudsperson's observations, lay out for the Committee the principal arguments concerning the delisting requests."[58] Subsequently, it remained up to the Sanctions Committee to approve or reject the delisting request through its normal decision-making procedures. The powers of the Ombudsperson were significantly expanded in Resolution 1989 when it was vested with the power to make recommendations for delisting which in principal take effect unless overturned unanimously by the Sanctions Committee or, if referred, by a majority in the Security Council.[59] The Ombudsperson has thus contributed to greater accountability for the 1267/1989 Al Qaeda sanctions regimes by increasing the transparency of the listing process through providing better insight into the underlying reasons and, to a more limited extent, evidence for the listings. The Security Council's acceptance of independent external scrutiny over its own decisions and those of the sanctions committees was unprecedented and should therefore not be taken lightly, even if the modalities of review were still modest. In Resolution 2083, the Security Council reaffirmed its support to the Ombudsperson and it called on States to encourage individuals and entities to approach the Ombudsperson with their delisting petitions rather than regional and national courts.[60]

The procedural reforms made in the context of the 1267/1989 Al Qaeda regime have had a certain spill over effect to other sanctions regimes, but this has generally been confined to improvements of the listing procedure and only to a much more limited extent for amendments regarding delisting. Overall, a certain trend towards greater formalization of sanctions regimes in

[56] *UN Doc.* S/RES/1904, 17 December 2009, paras. 12-15.
[57] *UN Doc.* S/RES/1822, 30 June 2008, paras. 24-26.
[58] *Ibid.*, Annex II, para. 7.
[59] This has not happened to date, see seventh report of the Ombudsperson to the Security Council, *UN Doc.* S/2014/73, 31 January 2014, para. 32. However, one occasion a delisted individual was immediately relisted, which might have implications for the fairness of the Ombudsperson procedure, see *ibid.*, para. 33-37.
[60] *UN Doc.* S/RES/2083, 17 December 2012, para. 22.

their design can be discerned. Even if some sanctions regimes, such as the non proliferation regimes, remain deeply political, other regimes, particularly the human rights and civil conflict regimes, are partly designed around listing criteria which are connected to international legal norms.[61] Moreover, all sanctions committees currently operate on the basis of guidelines which prescribe some modest transparency standards in the form of notification requirements and requests to prepare narrative descriptions with reasons for the proposed listing.[62] In contrast, the delisting innovations in the form of the Ombudsperson have been confined to the 1267/1989 Al Qaeda regime and were not extended to other regimes. In fact, when this regime was parted in two separate regimes, the Al Qaeda regime and the Taliban regime, individuals listed under the Taliban sanctions regime were henceforth excluded from the Ombudsperson's mandate.[63]

Apart from the limited scope of her mandate, the institute of the Ombudsperson has also been criticized as being insufficient in other respects. Crucial deficiencies of the Ombudsperson from a legal perspective remained that the institute was not a judicial entity, that the mandate was too short (initially 18 months, currently 30 months), and mostly the possibility of overturn of recommendations by the sanctions committee or the Security Council.[64] For these reasons, the Special Rapporteur for Counter Terrorism deemed the reforms unsatisfactory and criticized the absence of an effective remedy at UN level.[65] The Rapporteur emphasised that national and regional courts had engaged with the matter as a direct consequence of this lacuna.[66] These decentralized courts generally reviewed the Security Council implementation measures.[67] In so doing, they ostensibly respected the Security Council prerogative and refrained from undertaking direct review of the sanctions regime or the listings at UN level. However, given the lack of any real discretion on the part of States in implementing the sanctions, a court decision which annuls the implementing measures creates a direct Article 103-conundrum for the implementing state since the primary Security Council obligation to list and implement remains in existence.[68] Furthermore, the potential of these decentralized courts to engage in any real substantive review is curtailed by the inaccessibility of the information and evidence that underlies the decision to list at UN level. This information, which may be of confidential nature, is generally only at the disposal of the designating state and these states are often not willing to share and disclose information.[69]

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[61] For instance, in the CAR sanctions regime, individuals can be listed because they have been "involved in planning, directing, or committing acts that violate human rights law or international humanitarian law, …, including acts involving sexual violence, targeting of civilians, ethnic- or religious-based attacks, attacks on schools and hospitals, and abduction and forced displacement, *UN Doc.* S/RES/2134, 28 January 2014, para. 37(b).

[62] The guidelines of each Committee can be found from this website: http://www.un.org/sc/committees/list_compend.shtml.

[63] *UN Doc.* S/RES/1988, 17 June 2011; *UN Doc.* S/RES/1989, 17 June 2011.

[64] 2012 Update of the Watson report, *supra* note 1, Section two.

[65] Report of the Special Rapporteur, A/67/396, *supra* note 9, par. 20, 21.

[66] Ibid.

[67] Erica de Wet, *supra* note 10.

[68] *Nada v. Switzerland, supra* note 6, Concurring Opinion of Judge Malinverni.

[69] The Ombudsperson has encountered similar problems, but has also concluded agreements or made arrangements with several states to facilitate access to classified or confidential information. See e.g., Seventh report of the Ombudsperson to the Security Council, *UN Doc.* S/2014/73, 31 January 2014, paras. 11 and 62.

In light of these systemic imperfections of decentralized review, the interest remained geared towards fine-tuning accountability processes at UN level as a more structural component of sanctions regimes. The post-Kadi I discussions on the most appropriate forms and strictures of such processes ranged from proposals to make the Ombudsperson fully human rights proof and to transform this institute into an Independent Adjudicator,[70] to arguments which rather referred to the special Security Council prerogatives and which emphasised the unique and highly political context in which the Security Council operates.[71]

3. The hegemonic approach by the ECJ in Kadi II

The appraisal of the Ombudsperson and the related question of whether national and regional courts should take a critical or rather a deferential stance towards this new institution were not central legal questions in the Kadi II proceedings. Yet, given the ECJ's pivotal role in the discussion on fostering accountability for UN sanctions, its dictum was awaited in suspense. Even though the earlier Kadi-judgements had displayed a certain insouciance for the relevance of Article 103,[72] the Opinion of Advocat-General Bot appeared more reconciliatory towards New York.[73] The Advocat-General confirmed that measures implementing Security Council decisions cannot be immune from judicial scrutiny.[74] However, he also underscored that the special role and primary responsibility of the Security Council had to be taken into account when delineating the scope and intensity of the review.[75] As it would be inappropriate for European Courts to act as *de facto* appeal courts for decisions of UN sanctions committees, Bot proposed to adjust the intensity of review of the implementing measures to the international context which formed an inherent part of those measures.[76] In framing this argument, Bot also referred to the EU legal framework which prescribes respect for the UN Charter in the design and implementation of the EU foreign and defence policy.[77] For these reasons, Bot advocated a differentiation in remedies and review, thereby rejecting the approach of the General Court which had transposed the review-standards that had been developed in the context the 1373-sanctions.[78] The Advocat-General observed that, in the context of the Al Qaeda sanctions, the listing decisions were taken on a universal and central level on the basis of information which was not meant to be shared

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[70] Report of the Special Rapporteur, A/67/396, *supra* note 9, par. 23.

[71] Thirteenth report of the Analytical Support and Sanctions Implementation Monitoring Team submitted pursuant to resolution 1989 (2011) concerning Al-Qaida and associated individuals and entities, *UN Doc.* S/2012/968, 31 December 2012; K. Prost, 'Fair process and the Security Council: a case for the office of the Ombudsperson', in N. White e.a. (eds.), *Counter-Terrorism; International Law and Practice* (Oxford: Oxford University Press, 2012).

[72] N.M. Blokker 'Reviewing the Review: Did the European Court of Justice in Kadi Indirectly Review Security Council Resolutions? On the Downside of a Courageous Judgment' in: M. Bulterman et al. (eds.), *Views of European Law from the Mountain: Liber Amicorum Piet Jan Slot* (Alphen a/d Rijn: Kluwer Law International, 2009), 315-326.

[73] Opinion of Mr Advocate General Bot, *supra* note 12.

[74] *Ibid.*, para. 44-52.

[75] *Ibid.*, para. 69-71.

[76] *Ibid.*, para. 70.

[77] *Ibid.*, para. 73.

[78] The crucial difference between the 1267 and 1373 UN sanctions regimes, is that the latter are based on decentralized listing. There is thus no Chapter VII obligation to list certain individuals, but the decision whom to subject to sanctions and how to identify those individuals and other procedural matters are left to the discretion of states, or in Europe, the EU.

with all implementing states or the EU-institutions.[79] He also referred to the political dimensions of the listing process and the character of sanctions as being preventive in nature. These considerations should not result in a full *carte blanche* for the executive[80] but, taking account of the procedural modifications that had already taken place at UN level, Bot argued that the intensity of review could be grounded on a certain level of trust and a presumption of legality of the UN decisions. More concretely, the Advocat-General proposed to distinguish between external and internal review.[81] The external review would concern the reasons for listing, while the internal review would regard the concrete evidence and underlying information. Bot suggested to presume that a listing would be corroborated by sufficient evidence and consequently EU-courts would only have to review marginally and ensure that no flagrant violation of this presumption had been committed. The Opinion of the Advocat-General was welcomed at UN-level as the 'long-awaited support for the institution of the Ombudsperson'.[82] The *rapprochement* between the UN and the EU was, however, short-lived and abruptly bypassed by the more rigid judgement of the ECJ.

The ECJ rejected the Advocat-General's proposed distinction and held that an effective remedy required review of the underlying evidence as well as the statement of reasons. The Court was well aware of the practical difficulties of this finding in that the underlying evidence of UN listings is mostly not in the possession of the EU institutions and may be of confidential nature. However, according to the ECJ the principle of harmonious cooperation did not imply a presumption of legality of UN decisions to list as proposed by the Advocat-General, but it rather presupposed that the UN sanctions committee and all UN member states would share information with the EU-institutions with a view to maintaining a harmonious relationship. The Court also held that whether there were reasons for non-disclosure of information to the listed individual concerned and how this would affect the probative value of the confidential evidence were matters for the Court to decide.[83] As a more flexible gesture, the Court mitigated its firm position by demanding that only one of the statement of reasons would have to be supported with sufficient evidence, provided that this reason in itself could support the listing as such.[84] It was thus not necessary to provide the underlying information of all reasons mentioned in support of the listing, but at least of one. The ECJ justified its strict attitude by reference to the absence of effective judicial protection at UN level.[85] In its dismissive appraisal of the UN system, the ECJ omitted to mention the Ombudsperson as a new mechanism.[86] In fact, its appraisal built on a finding of the European Court of Human Rights in *Nada*, which in turn referenced an assessment of the Federal Supreme Court of Switzerland. Yet, the Swiss Court's evaluation of the UN delisting procedure was undertaken before the creation of the Ombudsperson.[87] It is unclear why the ECJ did not acknowledge the existence of the Ombudsperson as an innovative element

[79] Opinion of Mr Advocate General Bot, *supra* note 12, para. 75.
[80] *Ibid.,* para. 86.
[81] *Ibid*. para. 92-110.
[82] Thirteenth report of the Monitoring Team, *supra* note 57.
[83] ECJ, Kadi II Judgement, 18 July 2013, paras. 125-129.
[84] *Ibid.*, para. 130.
[85] *Ibid.*, para. 133.
[86] See for an equally dismissive appraisal which does take account of the Ombudsperson, *Al-Dulimi and Montana v. Switzerland,* Appl. No. 5809/08, ECtHR (Judgment), 6 November 2013, para. 119.
[87] As also observed by the Ombudsperson in her address at a lunch seminar at the Dutch Ministry of Foreign Affairs, September 2013.

in the UN delisting procedure and its reinforced powers after Resolution 1989 and why it did not publicly recognize that at the moment of the judgement, Kadi had already effectively been delisted at UN level through the Ombudsperson procedure.[88]

Apart from these omissions, the judgement has also been criticized as not being clear on the standard and nature of the review as it mixed *de novo* with classical retroactive judicial review.[89] Particularly noteworthy is also paragraph 115 of the judgement. In this paragraph, the Court suggests that the UN sanctions committee and even designating states which are not EU member states should, in a spirit of effective cooperation, share information, including confidential information which would allow EU authorities to determine the propriety of a listing. It is of course unclear what the immediate incentive would be for non-EU member states to share or disclose sensitive information with EU actors, even more so since the EU courts do not have proper procedures in place to deal with information of this nature.[90] The combination of an insistence on high standards of review and a demand that confidential information be shared coupled with the lack of own procedures to ensure proper treatment of confidential information is remarkable. Moreover, it begs the question whether other domestic and regional courts will follow suit. As an unintended side effect, the ECJ approach may actually offer an excellent excuse to other States with low levels of enthusiasm for sanctions implementation to disengage. Seen from this perspective, the ECJ Kadi II judgement might not seem to fully align with the EU's overall commitment towards multilateralism as articulated in Article 21(2), second para., TEU.[91]

4. The implications of Kadi II

In Kadi II, the ECJ thus pursued the parochial approach of Kadi I.[92] Arguments related to the special UN Security Council context and the difference between UN implemented sanctions and autonomous EU sanctions, as raised by the EU Council of Ministers and EU member states, and appreciated by Advocat-General Bot, were largely ignored by the Court. In essence, the Kadi II judgement can be read as an attempt to export EU standards and demands of judicial review to New York. While possibly commendable from a strict internal EU fundamental rights perspective, this approach has three negative implications for broader attempts towards greater accountability and rules-based sanctions regimes at UN level. These implications specifically

[88] In contrast, in Kadi I, the ECJ did offer appraisals of the then existing diplomatic re-examination procedure. Finding this procedure insufficient seemingly constituted one of the reasons for its own intervention, therefore it would have been logical if the ECJ in Kadi II would have re-examined the procedural changes made at UN level in some more depth, see e.g. Kadi II, paras. 316-326.

[89] In contrast, the Ombudsperson has articulated clearly that she will engage in *de novo* review on the basis of reasonable and credible-bases standard. This flows from the inherent nature of sanctions as not being criminal in nature and change in behavior may thus be reason for delisting and also from the wording chosen by the Security Council in relevant resolutions, see e.g., Approach to and standard for analysis, observations, principal arguments and recommendation, August 2011.

[90] A point elaborated by Advocat-General Sharpston, Opinion in OMPI case, Case No. C-27/09, 14 July 2011, paras. 171-190 and 222-257. The process for reform of the procedure on this matter is currently ongoing. Draft Rules of Procedure of the General Court have been sent by the President of the General Court to the President of the Council, 7795/14, 14 March 2014.

[91] The Lisbon Treaty articulates the EU's commitment to multilateralism in Article 21 by stating, *inter alia,* that the 'Union shall promote multilateral solutions to common problems, in particular in the framework of the United Nations'.

[92] The qualification of a parochial approach comes from G. De Burca, 'The European Court of Justice and the International Legal Order', 51 *Harvard International Law Journal* 1-49 (2010), p. 4.

concern: (i) the attempt to broaden the mandate of the Ombudsperson to other sanctions regimes, (ii) the possibility to differentiate in the form, scope and intensity of review per sanctions regime, and (iii) trends towards the inclusion and formulation of more precise listing criteria in the design of sanctions regimes.

4.1 The mandate of the Ombudsperson

The mandate of the Ombudsperson is, as indicated, currently limited to the Al Qaeda-regime. Its predecessor, the Focal Point which had first been created to offer listed individuals access to the Security Council system, was linked to all UN sanctions regimes. However, the Focal Point operates merely as a PO box where requests for delisting can be submitted. It remains in existence for all regimes other than Al Qaeda and also to receive and transmit requests for humanitarian exemptions. The Ombudsperson as created for the 1267/1989 Al Qaeda regime in direct response to Kadi I, was considered too intrusive to be part of all UN sanctions regimes. In particular such a mechanism was considered inappropriate and undesirable for the highly politically sensitive nuclear proliferation-regimes of Iran and North Korea.

Over time, proposals have been made for an incremental expansion of the mandate of the Ombudsperson to other sanctions regimes. Such an extension would be particularly appropriate for other sanctions regimes that target individuals with no direct link to or affiliation with the state, such as the civil conflict regimes in Liberia or Somalia/Eritrea. Moreover, such an expansion would pre-empt situations in which an individual that was delisted upon the proposal of the Ombudsperson from the 1267-regime, was subsequently relisted under another regime with no access to the Ombudsperson.[93] With a view to better ensuring the institutional grounding of the Office of the Ombudsperson across UN sanctions regimes, Like-Minded-States proposed an expansion at the occasion of the renewal of the Ombudsperson's mandate in 2013.[94] They argued that this would strengthen accountability mechanisms and remedies in those other regimes. This proposal did not fall in fertile ground. It was premature, and in particular the permanent members of the Security Council were not prepared to consider any further expansion and institutionalisation of the Ombudsperson. The ECJ's judgement in Kadi II and its disregard for the Ombudsperson did not provide any incentive for Security Council members to revisit their position in this respect. The ECJ thus effectively decoupled the accountability discussion as it exists in the EU as regards the autonomous and implemented UN-sanctions from the broader discussions at UN level.

4.2 Differentiation in review and remedies

UN sanctions regimes generally utilize the same means – financial and travel sanctions – but those are applied in fundamentally different situations, with different aims and on the basis of different criteria and procedures. Similarly in the EU context, a wide variety of different sanctions regimes exist. There might thus be reason also to reflect on potential differentiation in review and remedies, in particular at EU level where judicial review exists for all sanctions regimes. Nonetheless, the General Court has transposed the standards for the scope and intensity of the

[93] Watson report 2012, p. 19.

[94] The Like-Minded States on Targeted Sanctions are: Austria, Belgum, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland. Their letter was dated 7 November 2012, *UN Doc.* S/2012/805.

review from the 1373-decentralized terrorism sanctions context directly to the Al Qaeda sanctions regime, thereby favouring a certain harmonization of review for all sanctions regimes alike.[95] In contradistinction, Advocat-General Bot argued in favour of differentiation depending on the source of the obligation to list, even in case of two sanctions regimes that were both concerned with counter-terrorism.[96] According to Bot, the difference in procedure and context of listing justified such a differentiation in review. As indicated, the ECJ did not adopt Bot's proposals and explicitly referred to the 1373-standards.[97] This stance corresponds with a broader EU judicial trend towards harmonization of sanctions review. In one of the cases regarding autonomous sanctions in the context of Iran, the General Court rejected the Council of Ministers' plea for a less intense review compared to the terrorism sanctions in light of the aim of the Iran sanctions to terminate certain governmental policies rather than to combat terrorism.[98] It can be questioned whether this is the best approach or whether a certain openness to differentiate would do better justice to the inherent differences that exist between sanctions regimes, but perhaps this question is premature for discussion on accountability at UN level.

4.3 Sanctions designs and listing criteria

In recent years, a certain formalization of sanctions regimes has taken place. The Security Council increasingly includes reference to legal norms and standards as criteria for listing instead of vaguer benchmarks such as the disruption of the peace process. This formalization of the overall designs of sanctions regimes facilitates retroactive assessments whether a certain listing was justified and what kind of information and evidence should sustain the decision to list. The high standards of judicial review that the ECJ has developed and imposed in Kadi can have unintentional and paradoxal consequences reverting this trend. After all, in sanctions regimes that operate on the basis of more political and abstract criteria, the decision to list is less justiciable *per se*. This would effectively mean a retreat to less targeted and more blunt sanctions.[99] In the autonomous EU sanctions regime against Iran, this trend has already set in. From a legal and accountability perspective, a trend away from rules-based sanctions regimes and less reasoned listing decisions should certainly be seen as regress.

A retreat to less rules–based sanctions designs would itself not be subject to judicial review. Generally, the design of sanctions regimes is considered to be a political matter. In this sense, the Like-Minded States have consistently emphasised that the role of the Ombudsperson should not be extended to assessing the regime as such, or to opiniate on the criteria that are being used to list.[100] The role of the Ombudsperson is confined to reviewing whether certain individuals have been lawfully listed, i.e. whether the listing was done in accordance with the pre-set criteria and on the basis of sufficient evidence. Any scrutiny beyond this would invade the political space and discretion which belongs to the political entities utilizing sanctions as a policy tool in broader governmental and diplomatic strategies. A similar understanding exists at EU level. As indicated,

[95] General Court, Kadi II, 30 September 2010, Case No. T-85/09, para. 138.
[96] Opinion of Mr Advocate General Bot, *supra* note 12, para. 64.
[97] ECJ, Kadi II Judgement, 18 July 2013, paras. 14-15.
[98] General Court, *Iran Transfo v. Council*, Case No. C-392-11, 13 May 2013, paras. 25-26, 36.
[99] A point also made by A. Tzanakopoulos, *Kadi* Showdown: Substantive Review of (UN) Sanctions by the ECJ, EJIL: Talk!, 19 July 2013.
[100] Statement by H.E. Ambassador Weenaweser on behalf of the Group of Like Minded States on Targeted Sanctions, 10 May 2013.

on occasion, the General Court explicitly advised the Council to use broader listing criteria with a view to escaping negative judicial interference.[101] A recent plea by the Central Bank of Iran may test the limits of this political discretion. In its claim to the European Courts, the Bank questioned the legality of the Council's decision to impose sanctions on banks based on the argument that banks support the government, and it particularly argued that the imposition of sanctions on the central bank of a state are disproportional.[102] It remains to be seen whether and how the EU courts will engage with these questions that are more policy-oriented. It is unlikely that these will be subjected to the same intense review given the need for a certain respect of the prerogative of the Council to determine foreign policy.

5. Some afterthoughts

Kadi II imposes a high standard of judicial review to assess the propriety of a given implemented UN-listing. In its judgement, the ECJ has bypassed and ignored the Ombudsperson and generally appreciated the UN review system as insufficient. The arguments of Advocat-General Bot in favour of differentiated sanctions-review, taking account of the UN-context and improvements made were rejected. From a micro-level rule of law perspective, this firm stance can be welcomed as a clear signal towards New York that fundamental standards and proper procedures for sanctions regimes must be in place and respected. However, this article has suggested that the principled approach of the ECJ might interfere with broader strategies towards greater accountability and rules-based sanctions regimes. The ECJ effectively emasculates the position of the Ombudsperson and does not motivate states to embark on or push for further institutionalisation and consolidation of this mechanism in terms of incremental expansion of the mandate and linkage to other regimes. As a result, the institution of the Ombudsperson risks to disappear once the 1267/1989 Al-Qaeda regime is terminated, if ever this will happen,[103] and it will not become a regular component of the institutional framework governing sanctions regimes. From this perspective, the underappreciation of the Ombudsperson is a missed opportunity to prompt further reform and to enhance accountability processes at UN level across sanctions regimes. Indeed, the Kadi II rigid approach may even lead to less rules-based sanctions regimes and the use of vaguer, more politically coloured criteria to evade judicial scrutiny at EU level. After Kadi II, the motivation to engage in further reflection on procedural reform and greater accountability for UN sanctions will not be rooted any longer in and driven by the EU judicial developments since the standards set are simply too high to be met at this point in time. Arguably, the most important advancement to be made today is not to transform the Ombudsperson in a judicial entity, but rather to ensure that the mandate of this institution is further consolidated and gradually extended to other regimes so as to end the arbitrary situation that some listed individuals have access and others not for the simple reason that they were listed as part of the 'wrong' sanctions regime.

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[101] See e.g., General Court, *Islamic Republic of Iran Shipping Lines v. Council*, Case No. T-489/10, 16 September 2013, para. 64.

[102] M. Lester and F. Hobson, Targeted sanctions and sanctions targeted: Iranian banks in the European courts, *Butterworths Journal of International Banking and Financial Law* 2013, pp. 278-280.

[103] Admittedly, it is unlikely that the Security Council will terminate the regime any time soon, as it has become a magical counter-terrorism tool with the potential to be generally and universally applied. Given the fluidity of Al Qaeda as an organization, 1267/1989 sanctions can effectively be imposed on any individual belonging to any group wherever active and located on the world, as evidence by the most recent listing of Boko Haram, *UN Doc.* SC/11410, 22 May 2014.

Ultimately, the lack of proper centralized processes in the form of the Ombudsperson or otherwise will result in even more diffused and scattered accountability attempts which test the solidity of multilateral decision-making. Ironically, these dynamics occur both at the UN as well as at the EU setting. Within the EU context, claimants are also increasingly bypassing the EU courts, just like the ECJ bypassed the Ombudsperson. The suit of Bank Melli in UK domestic courts for damages is an example hereof. Individuals approach domestic courts directly asking for interim relief of EU sanctions. Other demands before domestic courts, and particularly UK courts, concern a review of the legality of the designating State's proposal to list or review of a State's refusal to request de-listing. In addition, delisted individuals have started suing States that had proposed their listing originally for damages.[104] Overall, this picture of piecemeal adjudication on the basis of a wide variety of claims and on different levels inspires fundamental inquiries as to whether constitutionalist or pluralist approaches offer best accountability prospects. However, such inquiries tend to focus on *ex post facto* review as the prime manifestation of accountability. Such one-dimensional attention may disregard other important facets of accountability needs. Very concrete and practical aspects of the sanctions procedure which require improvement concern the need to introduce sunset clauses,[105] the need of disclosure of the designating state,[106] and the need for assistance to individuals who are unintendedly affected, which seems to require an individualization of Article 50 of the UN Charter.[107]

By way of conclusion, it is important to table one last matter that deserves explicit mentioning, since it is severely underresearched and underreported. This is the so called ripple effect of listings. It does not belong to common knowledge that the UN sanctions lists in fact lead multiple lives. Officially, these lists constitute the basis for the imposition of sanctions in the form of the freezing of assets and travel bans. Informally, however, the lists are copied by many societal actors, such as banks, air companies, and also official immigration authorities and others. The lists thus have effective implications that extend far beyond the formal sanctions. More problematically, decisions to delist are not immediately incorporated in the copy-pasted lists that exist outside the sanctions regimes. It has thus been suggested that a decision to list is a life sentence in the sense that its practical effects will long outdate the actual formal listing.[108] And of course no delisting mechanisms exist or will ever exist for those informal lists. Delisted individuals may never be able to obtain a credit card or a mortgage, and are thus impeded from leading a regular life despite being delisted. It is therefore from an intensely pragmatic point of view that an argument can be made in favour of greater attention to the listing process so that undue listings can be avoided. The quality of procedures, criteria for listing and decision-making in the listing process is vital and deserves much more attention. This article has presented the argument that decentralized litigation has limits in terms of inspiring change in a different legal system and that specifically the Kadi II judgement may have negative repercussions. More

[104] For a survey and analysis, see Maya Lester and Brian Kennelly, Judicial Review of Sanctions Decisions: "The Wrong Point in the Wrong Court with the Wrong Defendant"?, *Judicial Review* 2013, pp. 206-210.
[105] See e.g., K. Boon, *Terminating Security Council Sanctions*, IPI Policy Paper, 12 April 2014.
[106] See e.g. Resolution 2083 (2012), para. 12 and the seventh report of the Ombudsperson to the Security Council, *UN Doc.* S/2014/73, 31 January 2014, paras. 53-54.
[107] Pleas also made by the Like Minded States, *UN Doc.* S/2012/805, 7 November 2012.
[108] An observation made by Gavin Sullivan, Solicitor and lawyer at the European Center for Constitutional and Human Rights, Amsterdam, 24 February 2014. Sullivan has represented individuals in the Ombudsperson process.

generally, it is important that in the aftermath of Kadi, discussions on accountability processes in the context of multilateral sanctions regimes shift to greater emphasis on the listing procedures rather than delisting opportunities, even if this does not fully correspond to lawyers' natural inclination to focus on court proceedings and review mechanisms.