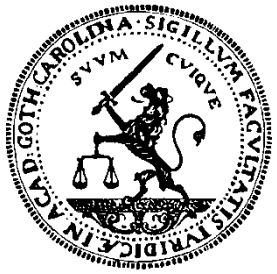

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‘Sins of the Past’

Protection of Fundamental Rights in Individual Sanctions in the Historical, Institutional, and Judicial CFSP Context

JURM02 Graduate thesis

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Table of contents

Summary

Since 24 February 2022, the European Union has faced a conventional war on its doorstep and an increase in geopolitical tension with the East. This has required the Council to act quickly and forcefully within its competence in the area of Common Foreign and Security Policy. To counteract the adverse geopolitical actions the Council has issued sanctions packages which have never been utilized before so extensively. The most common type of measure is individual sanctions which are intended to increase the cost of the target to maintain their activity. Effectively, sanctions are intended to weaponize fundamental rights by withdrawing the benefits from certain individuals. Considering the significant impact these measures have on fundamental rights for targets and citizens of target countries it is relevant to study whether the Union effectively protects the fundamental rights even in its response to wrongful international actions.

The purpose of this thesis is to study three layers within the area of CFSP: 1) Historical, 2) institutional, and 3) judicial. By using a holistic method based on these three areas the development of fundamental rights within the CFSP and especially individual sanctions can be observed both from a legal and contextual perspective. The historical aspect serves the purpose to study if Member States have displayed interest in developing a common foreign policy within the Union and how Member States' relationship to CFSP has impacted the development both institutionally and judicially. The institutional aspect will try to assess the inner workings of the CFSP, which institutions therein are responsible for drafting individual sanctions, and which are ensuring the protection of fundamental rights. Lastly, the judicial perspective serves to study the role of the Court and its current ability to ensure the protection of fundamental rights in the area of CFSP and individual sanctions.

Conclusively, by looking at these three aspects it becomes apparent that the area of CFSP still struggles with the historical skepticism from Member States which will not allow the area to develop at the pace it is currently acting in. These historical burdens threaten the future development of fundamental rights in individual sanctions. The past hesitance to empower the Union in this specific area has undermined its institutional and legal efforts, leading to a disadvantageous situation where the protection of fundamental rights is compromised. This discrepancy in the development of CFSP is affecting the courts' ability to effectively protect fundamental rights. Unfortunately, the Court has also taken a cautious stance in its assessments of individual sanctions due to its political sensitivity. The role of the Court is to maintain the power balance within the Union and to ensure that the signed treaties are being enforced effectively. Under the current standing of the judicial framework, the Court is not able to fulfill this role, placing greater demands on the institutions.

Sammanfattning

Sedan den 24 februari 2022 har Europeiska unionen stått inför ett konventionellt krig på sin tröskel och en ökad geopolitisk spänning från öst. Detta har krävt av Rådet att agera snabbt och kraftfullt inom ramen för sin kompetens för den gemensamma utrikes- och säkerhetspolitiken. För att motverka Rysslands aggression har rådet utfärdat omfattande sanktionspaket som aldrig tidigare har använts i så stor omfattning. Den vanligaste typen av åtgärd är individuella sanktioner, som syftar till att öka individens och staten eller ickestatens kostnader för att upprätthålla sin verksamhet. Sanktioner beväpnar i praktiken grundläggande rättigheter genom att dra in förmånerna för vissa individer. Med tanke på den stora inverkan som dessa åtgärder har på grundläggande rättigheter för sanktionerade individer och medborgare i utsatta länder är det relevant att undersöka om Unionen effektivt skyddar de grundläggande rättigheterna även i sina kontraåtgärder i det internationella spelrummet.

Syftet med den här avhandlingen är att studera tre skikt av GUSP: 1) den historiska, 2) den institutionella och 3) den rättsliga. Genom att använda en holistisk metod kan utvecklingen av de grundläggande rättigheterna inom GUSP och särskilt enskilda restriktiva åtgärder observeras både ur ett juridiskt och kontextuellt perspektiv. Den historiska aspekten tjänar syftet att studera om medlemsstaterna har visat intresse för att utveckla en gemensam utrikespolitik inom Unionen och hur medlemsstaternas förhållande till GUSP har påverkat utvecklingen både institutionellt och rättsligt. Den institutionella aspekten kommer att försöka bedöma hur GUSP fungerar och vilka institutioner som ansvarar för att utarbeta enskilda restriktiva åtgärder och vilka som garanterar skyddet av de grundläggande rättigheterna. Slutligen ska det rättsliga skiktet studera domstolens roll och dess nuvarande förmåga att garantera skyddet av de grundläggande rättigheterna inom området GUSP och särskilt individuella restriktiva åtgärder.

Genom att titta på dessa tre aspekter blir det uppenbart att GUSP-området fortfarande kämpar med den historiska skepticismen från medlemsstaterna som inte tillåter att området utvecklas i den takt som de för närvarande agerar i. De historiska bördorna hotar den framtida utvecklingen av grundläggande rättigheter i individuella sanktioner. Den historiska tveksamheten att låta Unionen öka sin makt på detta område har påverkat det institutionella och rättsliga arbetet, vilket har missgynnat skyddet av de grundläggande rättigheterna. Diskrepansen i utvecklingen inom GUSP påverkar domstolarnas förmåga att effektivt skydda de grundläggande rättigheterna. Tyvärr har domstolen också intagit en försiktig hållning i sina bedömningar av enskilda restriktiva åtgärder på grund av dess politiska känslighet. Domstolens roll är att behålla maktbalansen inom Unionen och se till att de undertecknade fördragen verkställs effektivt. Med den nuvarande rättsliga ramen kan domstolen inte uppfylla denna roll vilket ställer högre krav på institutionerna.

Abbreviations

AG	Advocate General
CFSP	Common Foreign and Security Policy
ECHR	European Convention for the protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EEAS	European External Action Service
EEC	Treaty establishing the European Community
EPC	European Political Cooperation
EUSR	Special Representative for Human rights
EU or the 'Union'	European Union
HR	High Representative of the Union for Foreign Affairs and Security Policy
HR/VP	High Representative of the Union for Foreign Affairs and Security Policy /Vice-President of the European Commission
SEA	Single European Act
TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union
The Charter or 'CFR'	Charter of Fundamental Rights of the European Union

1 Introduction

1.1 Background

The European Union (hereinafter 'EU' or 'the Union') is facing a considerable threat from the ongoing war on the European continent which involves a candidate country, Ukraine, and a nuclear power, Russia. A centerpiece to combat this threat has been the use of Individual Restrictive Measures (hereinafter 'individual sanctions'). This thesis will focus on the individual sanctions which are targeted towards individuals or entities that have been deemed to exercise decisive influence or in other ways benefit from, support, or finance the policy of which the Union has declared a threat. Some examples of individual sanctions that the Union has adopted consist of asset freezes, making economic resources or funds unavailable, travel bans, and export and import controls.

Individual sanctions fall within the area of Common Foreign and Security Policy [CFSP]. The development of the area of CFSP since the 1970s has continuously exposed the complex nature of external policy. Firstly, external politics are intrinsically connected to economic policy and there is great difficulty in implementing one without affecting the other. Advocate General [AG] Jacobs illustrated this particularity as:

> '[m]any measures of commercial policy may have a more general foreign policy or security dimension. When for example the Community concludes a trade agreement with Russia, it is obvious that the agreement cannot be dissociated from the broader political context of the relations between the European Union, and its Member States and Russia.'[1]

In the Maastricht Treaty, the Union was built on a pillar structure consisting of three 'pillars' regulating three different sets of areas: (i) the European Community, (ii) the Common Foreign and Security Policy, (iii) the Co-operation in Justice and Home Affairs. The Lisbon Treaty effectively abolished the pillar structure and put the Treaty on European Union [TEU] and Treaty on the functioning on the European Union [TFEU] on equal footing meaning that the legal value of the treaties is, since the Lisbon Treaty, equal.[2] The CFSP area was further developed to incorporate the institutions of the Union and to invite influence by the European Parliament (hereinafter the 'Parliament') to increase democratic legitimacy and transparency.[3] Regardless of the abolishment of the pillar structure and the formalization of CFSP it still serves as a remnant from the pillar structure. The area is still clearly severed from the

[1] Case C-124/95 *The Queen, ex parte Centro-Com Srl vv HM Treasury and Bank of England* [1997] ECLI:EU:C:1996:345, Opinion by AG Jacobs, para. 41

[2] Consolidated version of the Treaty on European Union [2016] OJ C 202, Article 1(3)

[3] Wanda Troszczynska-Van Genderen, 'The Lisbon Treaty's provisions on CFSP/CSDP State of implementation', (Belgium, 2015), 17

rest of the competence and procedures of the treaty. When the Lisbon Treaty came into effect another major development happened, the Charter of Fundamental Rights of the European Union (hereinafter 'the Charter')[4] came into effect.

The Charter is a codification of constitutional traditions which has been developed in the Member States and through international obligations including the European Convention for the protection of Human Rights and Fundamental Freedoms [ECHR]. The jurisprudence from the Court of Justice of the European Union [hereinafter the 'Courts' or CJEU] and the European Court of Human Rights [ECtHR] was codified and given authority to the interpretation of the Charter's provisions.[5] The Charter is applicable whenever EU institutions, bodies, offices, and agencies act and/or member states implement EU law.[6] Considering that research shows that economic coercion, such as sanctions, causes detrimental effects on public health, economic conditions, the development of civil society, and education in target countries,[7] the fundamental rights aspect is an important consideration.

The Court's jurisdiction in CFSP matters is a delicate matter considering the fluid borders between political and judicial aspects of the Union's external actions. The Court's jurisdiction has developed parallel to the increasing relevance of fundamental rights in the Union, and considering the impact external actions have in this area, the Court's review serves an important purpose to ensure the adherence to and development of the Charter in CFSP.

1.2 Purpose and Research Question

The purpose of this thesis is to approach the fundamental rights perspective in the CFSP context, focusing on fundamental rights in individual sanctions. The thesis will study three aspects of CFSP and fundamental rights, namely 1) the historical aspect, 2) the institutional aspect, and 3) the judicial aspect. The historical aspect will focus on the historical development of CFSP and the actions taken by the Union to incorporate foreign policy into the EU judicial framework and the Member States' attitude towards increased diplomatic powers of the Union. In addition to these observations, the historical political advancements of fundamental rights will also be outlined. The historical aspect will serve as a model of explanation for the current CFSP institutional and judicial set-up. Secondly, the institutional aspect will focus on the central institutions that are acting within the legislative procedure, policy-making, and fundamental rights field within CFSP. The purpose of this description is

[4] Charter of Fundamental Rights of the European Union [2016] OJ C 2020

[5] 'Charter of Fundamental Rights of the European Union' (*Eurlex*) <https://eur-lex.europa.eu/EN/legal-content/summary/charter-of-fundamental-rights-of-the-european-Union.html> Accessed 14 May 2023

[6] Art. 51 CFR

[7] Dursun Peksen, 'Better or Worse? The Effect of Economic Sanctions on Human Rights' [2009] 46(1) Journal of Peace Research 59, 60

to study whether the current institutional framework allows for fundamental rights deliberations and if CFSP has increased its transparency and legitimacy through the development of the institutions. Lastly, the judicial aspect will focus on the role of the European Courts and their jurisdiction on individual sanctions. The purpose is to study how the court has contributed to developing and strengthening fundamental rights within the area of CFSP. The purpose of this thesis is to combine these three aspects to obtain a holistic perspective on the development of CFSP regarding fundamental rights in individual sanctions and what conclusion can be drawn on the future inter-play between these aspects.

This thesis will attempt to answer the following question:

'Has the Historical, institutional, and judicial development in the area of CFSP contributed to the strengthening of fundamental rights in individual sanctions?'

1.3 Delimitations

Due to the complexity of the Union's foreign policy and actions framework, this thesis will only focus on the historical, institutional, and judicial development within CFSP. Firstly, sanctions have a significant impact on a multitude of factors in a targeted country or entity. This thesis will only study adverse effects on human rights in relation to sanctions. Furthermore, this thesis will only focus on the application of the framework for individual sanctions within the area of CFSP. Further delimitations concern the development of fundamental rights which will only concern fundamental rights as developed within the Union's legal framework and not in international law. This also applies to the legislative framework applicable to sanctions which have been limited to EU law. Concerning the institutional framework, attention has been given to the central acting bodies within CFSP that have a connection to fundamental rights and the drafting of individual sanctions. For the sake of clarity, only parts concerning state sovereignty and fundamental rights have been described in the historical portion of this thesis. There is a significant amount of case law concerning the area of CFSP however this thesis has specifically focused on the *Rosneft* case because it concerns fundamental rights deliberations concerning individual sanctions and the specifics of CFSP decisions and regulations. Lastly, acknowledging that there are numerous theories on the role of courts, this thesis will focus on their role from a Dworkinian perspective. The Dworkinian theory allows for a usage of the inherent moral of a given legal system and regard for overarching principles and deliberations that goes beyond the blackletter of the law. Because of the holistic approach of the Dworkinian perspective, this theory is well suited to attempt to define the role of the court in legal questions which have a political and judicial perspective.

1.4 Methodology and Material

The area of CFSP does not allow itself to be studied in a dogmatic approach as the rationale of EU foreign policy law lays within the intricate area constituting the wider concept of foreign policy. Foreign policy is a heavily politicized area shrouded in secrecy which makes the task of studying the underlying objectives of the legislation difficult or even impossible.[8] Therefore, it is necessary to study the research using an 'EU law contextual approach'. A contextual approach also enables a review of legal orders at a given time in history,[9] which is important considering the geopolitical landscape since 2022. Lastly, the importance of looking at human rights in the CFSP context can contribute to the understanding of human well-being and the promotion of 'the psychic unity of mankind'.[10]

This notion is derived from the fact that humans from all cultures are similar in how they perceive 'suffering, joy, attachment, pride, aesthetic appreciation, and symbolic expression' which are factors contributing to a healthy, satisfactory, and self-respecting life.[11] For humans to gain fulfillment in this regard there are theoretically corresponding human rights that facilitate these achievements.[12] Historically external action tends to revolve around facing aggression with aggression and primal reactions of inducing harm or death upon adversaries. Democracies that are founded by the people should protect *their* people, but also the citizens captive in adverse states that act totalitarian. A violation of a fundamental right does not righteous response in the same demeanor. CFSP does not only have an obligation to protect the Union's interest but also develop external politics to be consistent with the underlying objective of keeping peace and protecting fundamental rights even when facing a difficult and serious threat. The impact of EUs politics in the global arena has been described by Anu Bradford as the 'Brussels Effect'.[13] The Union wields an unprecedented power to influence and restrict markets around the world, a notion this thesis will transfer into foreign security policy. The Union derives its legitimacy from its capability to convey values that foreign governments and citizens adhere to,[14] which arguably are values that cater to the 'psychic unity of mankind'. The fundamental rights context in CFSP can give an understanding of whether external action is choosing a constructive anthropologic approach to foreign threats and challenges.

[8] See Chapter 2; see also Council of the European Union, 'Request for access of document 10360/22' (Brussels 1 August 2022) COMM ref. 22/1327-mj/vk

[9] Philip Selznick, ''Law in Context' Revisited' [2003] 30(2) Journal of law and society 177, 180

[10] Ibid [185]

[11] Ibid

[12] Ibid

[13] For further discussion see Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford university Press 2020)

[14] Anu Bradford, 'The European Union in a globalised world: the 'Brussels effect'' [2021] 2 Revue européenne du droit 75, 76

This holistic approach contributes to comprehensively understanding developments and laws in this area.[15] Furthermore, it is crucial to account for the *sui generis* character of EU law since it is neither international law nor national law.[16] The uniqueness of EU law requires that the body of the EU is studied with a contextual approach.

This approach explains and interprets the law by studying other relevant fields which impact the orientation of the body of law being observed. The different areas that have been chosen fulfill a unique task within the system of CFSP. The history of CFSP serves as a model of explanation for the actions taken by the Member States to develop or restrict the Union's institutions dealing with CFSP. By observing history, it is possible to understand the different positions taken by the actors within the system. The history of the CFSP area will reveal the founding ideas and how these have developed through time and parallel to other advancements within the Union, such as fundamental rights.[17] The history aspect has been chosen based on the observation that the Union has through time built a political identity integrating more and more on core areas of states, such as foreign policy, which arguably is beyond the initial idea of the peace project through a trade Union after the Second World War.[18]

By studying the development of the institutions, observations can be made about the legitimacy of the political and legal authority which they claim. It is within the institutions that the values and politics of the Union come to life through the Member State and Union representatives. The institutions are composed of different types of representatives, such as the Parliament being composed of representatives elected by the Union's citizens, whilst the Council of the European Union (hereinafter 'the Council') is of state officials and ministers. The EU institutions allow limited participation by the citizens but have the power to draft policies that will stand as the 'Politics of the Union'.[19] Considering that the era of CFSP, *inter alia*, exports these crafted values by the Union it is relevant to observe whether the institutions take account of the democratic values which inherit the 27 member states. The institutions acting in CFSP can be held to be disconnected from citizens' democratic participation. However, the ministers and officials that compose these institutions come from parties that have been democratically elected in their respective countries. By observing the institutional framework and the actual output from these institutions the question regarding their legitimacy and authority can be assessed.

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[15] Ester Herlin-Karnell and Gerard Conway and Aravind Ganesh, *European Union Law in Context* (Hart Publishing 2021), 2

[16] Herlin-Karnell and Conway and Ganesh (n 15) [4]

[17] Ibid [3]

[18] 'History of the European Union 1945-59' (*European Union)* <https://european-union.europa.eu/principles-countries-history/history-eu/1945-59_en> Accessed 17 May 2023

[19] Herlin-Karnell and Conway and Ganesh (n 15) [8]-[9]

Lastly, the observation of the role of the Court and its case law in the area of CFSP serves as the knot for the analysis. The European Court is the motor for integration and the institution which ensures constitutional balance amongst the institutions and upholds the rule of law in *all* Union activities.[20] The role of the Court thus serves as a centerpiece amongst the Union's institutions and has been described by Horsley as 'both a court *and an institution of the Union'*.[21] This is derived from the court's actions as a political power and a self-proclaimed policymaker.[22] The Court has ruled on the primacy of EU law and attributed the direct effect to EU provisions. These actions by the Court have on occasion led the legislature within the Union to transpose the Court's statements into secondary law.[23] The Court is thus able to both set constitutional limits where the policies are created *and* create policy by its adjudication.[24] Considering that the Union today has set out objectives in its foreign policy it is relevant to study if these objectives have strengthened the Court's ability as a judicator.[25] Lastly, it is relevant to study whether the Court can protect and enforce the fundamental rights standards that are developed within the institutions. The role of the court as a constitutional guardian requires it to engage with the content of foreign policy objectives to ensure the constitutional limitations and set the constitutional boundaries in the substance of the policies.

The material used in this thesis consists of primary sources such as treaty texts, regulations, decisions, and case law. A review of these sources allows for an illustration of whether the content of EU law contains adequate legislation on the sanction procedure and if there are legal obligations to protect fundamental rights. Unfortunately, EU acts emanating from the foreign policy field can be confidential which makes it difficult to obtain a comprehensive understanding of the 'true' objectives, rationale, or deliberations made in this area. Because of the confidential nature of foreign policy, it is important to acknowledge that potentially relevant material might not be accessible. Primary sources will be interpreted and understood in the light of secondary sources such as books, journal articles, and 'soft law' instruments such as guidelines, basic principles, and reports made by EU institutions. It is important to combine the text of the primary law sources and the secondary sources to study whether the policy (or politics) is translated into the actual legal framework. Furthermore, will these sources aid in understanding the gaps whereas relevant information is confidential. Lastly, to set the context of the historical, institutional, and judicial aspects of CFSP news articles, blog

[20] Thomas Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and its Limits* (Cambridge University Press, 2018), 5-6

[21] Ibid [24]

[22] Marise Cremona, 'A Reticent Court? Policy Objectives and the Court of Justice.' In Marise Cremona and Anne Thies (edn.) *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing 2014), 31

[23] Thomas Horsley (n 20) [18]

[24] Marise Cremona (n 22) [32]

[25] Ibid [20]

posts, and other general sources will be used. These sources are not used to understand the legal framework or contribute to any legal conclusions, but rather to illustrate the context in which the legal framework is developed.

1.5 Disposition

In Chapter two, 'the History of CFSP', the reader will first be introduced to historical and current deliberations that are relevant to understanding sovereign nations' relationship to state identity and their external relations. The development of state identity and the self-interest-driven actions by states in the foreign arena sets the background on which base the CFSP is created and serves as a mode of explanation for the future challenges and developments in the future development of CFSP. Chapter two proceeds with an overview of how CFSP grew from the informal gatherings amongst the Member States up until the current state of CFSP in a post-Lisbon context. Focus has been on aspects that illustrate the growth of fundamental rights deliberations in CFSP sanctions and the emergence of the institutional framework. This chapter will finish with a description of the empirical consequences of sanctions, focusing on the fundamental rights impact.

In Chapter three, 'Institutional Protection of Fundamental Rights in CFSP', the focus has been on the development of integrating fundamental rights deliberations in the CFSP framework by the current institutions which are responsible for the drafting and implementation of sanctions. This chapter will focus on the inter-play amongst the institutions and which of these carries the responsibility to ensure that sanctions are directed and drafted so that fundamental rights are respected.

Chapter four, 'Legislative Procedure – Individual Sanctions', will describe the legislative procedure and legislation when sanctions are adopted. This will provide the appropriate context in which the work of the institutions described in the third chapter is realized. Furthermore, will a description of the legislative procedure illustrates the interplay between the TEU and TFEU which sparks challenges when adopting sanctions. Lastly, the implementation in Member States will be described to illustrate the fragmented national measures used to enforce the EU-level sanctions.

Chapter five, 'The Impact of Constitutionalizing and Opinion 2/13', will focus on the constitutionalizing of EU law in the context of a fundamental right and how this has impacted the legitimacy and authority of EU law. The first segment of chapter five will describe the Court's role in strengthening EU law in national courts and how the Court plats a role in developing EU law through its legal procedures and remedies. Special attention is given to 'Opinion 2/13' because of the opinion's considerate impact on the accession to the ECHR. The opinion illustrates the Member States, the Commission, and the Court's position on the development of fundamental rights by accession to the ECHR. The goal of acceding to the ECHR provokes several legal questions

regarding the sovereignty of EU law, the CJEU, and other courts' jurisdiction on CFSP matters and limits to the EU's competence to adhere to international treaties. This chapter becomes a crucial step in understanding the status of the relationship the Union has with international obligations and the will to adhere to human rights standards set outside the EU law context.

Chapter six, 'Jurisdiction of the CJEU in Individual Sanctions' will focus on the ability the Court has to enforce the CFSP objectives and strengthen fundamental rights. Chapter five describes the CJEU as a 'motor for integration' and the Court's ability to deal with fundamental rights matters which combined becomes a key component in understanding the actual authority of fundamental rights in Individual Sanctions. This Chapter will focus on the impact of the institution's work in the judicial context and how the challenges discussed in the previous chapters, such as the relationship between the TEU and TFEU, impacts the Court's ability to effectively enforce fundamental rights in Individual Sanctions. Lastly, the Dworkinian perspective will be described and applied to the judicial limitations currently put on the CJEU. This theoretical point of view will contribute to further understanding of the Dworkinian 'toolbox' and how the full utilization of the Dworkinian toolbox can contribute to strengthening fundamental rights and overcoming the challenges and potential shortcomings of the historical development and institutional framework.

1.6 State of the Art

From the research conducted for this paper, it can be concluded that the area of CFSP is usually researched in a concentrated form focusing on specific research questions isolated from the broader context of EU foreign relations. Regarding foreign relations in general the title '*The Intergovernmental Pillars of the European Union'* by Eileen Denza has been used. This book was released in 2002. This title illustrates the relationship between the member states and the Union's development in creating a Common foreign and security policy. Another notable example is also the title *'The struggle for Recognition: State Identity and the Problem of Social Uncertainty in International Politics'* by Michelle Murray. This book was released in 2019 and provides more recent research on this topic.

A notable contributor to the historical CFSP research is Wolfgang Wessels who has co-authored the titles '*Foreign Policy of the European Union: From EPC to CFSP and beyond',* published in 1997, and *'European Political Cooperation: Towards a Foreign Policy for Western Europe',* published in 2013. Wessels's work provides an overview as well as an in-depth analysis of the development of the Union's foreign relations from a political perspective as well as historical institutional development. More notable contributors to the CFSP research are Christina Eckes and Piet Eeckhout who have contributed significantly to both the historical and judicial research in this area. Notable titles from Eckes are '*The Legal Basis of Community Sanctions: Moving*

Competences from One Pillar to Another?' and from Eeckhout is '*EU External Relations Law'*. These works have been combined with the recent title by Graham Butler '*Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations'* who contributed to the research on the constitutionalization of EU law and an in-depth understanding of 'Opinion 2/13'.

Besides the key literature mentioned above, the research on CFSP is fragmented and consists of journal articles and papers focusing on specific areas. Notable examples of key journal pieces on the jurisdiction of the court are Panos Koutrakos's *'Judicial Review in the EU's Common Foreign and Security Policy'*. This article presents an overview combined with an in-depth analysis of the central aspects and challenges of the Court's review of CFSP. The Court jurisdiction remains the most researched topic regarding the judicial aspect of CFSP. A central paper in understanding the development of the constitutionalizing of the Court and the standing of the Court's jurisprudence in member states legal framework is Jörgen Hettne and Xavier Groussot and Gunnar T. Pétursson's *General Principles and the Many Faces of Coherence: Between Law and Ideology'*. This paper presents the notion of 'trust' between the European courts and the importance of developing fundamental rights in EU law to retain legitimacy and authority as a legal order.

This paper aims to provide a comprehensive analysis of the field of CFSP by contextualizing the question of fundamental rights in Individual sanctions within broader political and legal developments. The thesis acknowledges that legal evolution is dependent on and influenced by broader political changes within a judicial system. Therefore, it seeks to integrate the political and judicial dimensions of CFSP to assess the enhancement of fundamental rights within this framework. To shed light on the role of the Courts in this context, a Dworkinian perspective has been adopted, facilitating a nuanced discussion that considers not only written law but also political and ethical developments within the EU legal order. The intention is to contribute to a deeper understanding and rationale for adopting a holistic approach to fundamental rights issues in the context of external relations.

2 The History of CFSP

To study the development of fundamental rights and the sanction regime in CFSP a historical background is appropriate starting from the European Political Cooperation [EPC] to the Lisbon Treaty. The historical overview will describe how this area has strengthened the Union on the international scene and played a key role in building the Union's international legal persona. Both areas have a common denominator, namely, that they touch upon aspects of state sovereignty and have been subject to controversy.

2.1 State Sovereignty and External Relations

> *'When people ask me… for what is called a policy, the only answer is that we mean to do what may seem to be best, upon each occasion as it arises, making the Interest of Our Country one's guiding principle'.*[26]

The Montevideo Convention lays down the most widely accepted criteria for statehood, namely, (a) a permanent population; (b) a defined territory; (c) government; and (d) the capacity to enter into relations with other states.[27] The EU adhered to the Montevideo Convention's definition, with some amendments, in the principal statement of the Badinter Committee, defining a state as having a territory, a population, and a political authority.[28] The Committee further stated that the recognition of statehood is a matter of fact and is not contingent upon recognition from other states.[29] It is clear from these criteria that state sovereignty derives from autonomy in its internal and external affairs. A state's international status is the product of a series of independent actions taken by states, such as concluding treaties, acceding to international declarations, sending, and receiving diplomatic and consular missions, and, conventionally, defending its integrity with armies and weapons.[30] These actions then give power to the 'policy' of the state and allow it to exert pressure and influence other sovereign nations to preserve the state's self-interest.

Denza argues that states are driven by enlightened self-interest, which involves a twofold mission for the state. Firstly, it involves the defense of the state's physical, political, and religious imperatives. Secondly, it involves the distribution of the state's political, religious, and cultural values throughout

[26] Henry Kissinger, *Diplomacy* (Touchstone, 1994), 95; Lord Palmerston in a written statement in 1856 to describe British policy to Lord Clarendon

[27] Montevideo Convention on the Rights and Duties of States [1933], Article 1.

[28] Alain Pellet, 'The Opinions of the Badinter Arbitration Committee - A Second Breath for the Self-Determination of Peoples' [1992] 3(1) European Journal of International Law, 178, 182

[29] Ibid

[30] Eileen Denza, *The Intergovernmental Pillars of the European Union* (Oxford Academic, 2002), 86

the world. According to Denza, it is only recently that states have regarded the achievement of a stable world order, including collective security, as a priority in their foreign policy.[31]

The idea of collective security raises two points that will be briefly addressed: 1) the security dilemma and 2) state identity. The security dilemma stems from uncertainty regarding the motives behind other states' actions. Simply put, when there is uncertainty regarding one's state's actions, such as increasing military expenditures, other states are provoked to increase theirs to maintain the balance of power. This spiral causes states to constantly believe that the intentions of other states are 'more malign, [...] greedier than previously believed'[32] thus creating a self-fulfilling prophecy of an arms race.[33] This connects to the formation of state identity through an interplay between internal and external behaviors. States create a domestic identity that they project externally and this needs to be shared by the states they choose to cooperate with. This requires the state to interact with other states that perceive the 'security dilemma' from their perspective based on mutual historical experience and perception. Sweden serves as a good example of how collective security may raise issues with the external image. Sweden has historically been a neutral country and would with its entry into the EU in the 90s arguably give up that neutrality.[34] The notion of the security dilemma argues that for states to continue their pursuit of self-interest by cooperating with other states, they must choose allies that perceive the security dilemma from a similar perspective to retain their historical external 'image'.

To summarize, states' external actions and identities are driven by self-interest, but their power and authority are established through their external relations and actions. The creation of a collective security organization would have to accommodate and respect the sovereignty of states, including those within the Union. It is important to bear this in mind when examining the history of CFSP.

2.2 European Political Cooperation

The embryo of what is today titled CFSP started with the submission of the Davignon report in the 1970s as a response to the political and economic changes happening in Europe in the 1960s.[35] During this period political cooperation was formed by the nine countries in the Community called the European Political cooperation. The EPC allowed the foreign ministers of the

[31] Denza (n 30) [85]

[32] Michelle Murray, *The Struggle for Recognition: State Identity and the Problem of Social Uncertainty in International Politics* (Oxford Academic 2019), 29

[33] Ibid [31]

[34] Christopher Hill, 'The Actors Involved: national Perspective' in Elfriede Regelsberger and Philippe de Schoutheete de Tervarent and Wolfgang Wessels (eds), *Foreign Policy of the European Union: From EPC to CFSP and beyond* (Lynne Rienner Publishers 1997), 88.

[35] 'Common Foreign and Security Policy' (*Eur-Lex*) <https://eur-lex.europa.eu/EN/legal-content/summary/common-foreign-and-security-policy.html> Accessed 10 April 2023

nine Member States to work together 'intergovernmental' based on non-binding agreements.[36] The goal of the EPC was to increase understanding of pressing issues in international politics and to allow for harmonization and coordination of how to approach mutually identified international political objectives.[37] The EPC was intended to allow the nine Member States to confront the outside world with a single voice and more efficiently execute their common objectives with more insight and power. The work within the EPC consisted of exchanging communications through the telex system COREU and arranging meetings between the political directors of foreign ministers and their diplomats continuously throughout the year. The EPC became an organization that foreign states consulted due to its status as an accepted and important actor on the international scene.[38]

The EPC was a separate organization from the Community institutions and had an informal working relationship. The EPC was shrouded by an unusual amount of secrecy,[39] and the organization was reluctant to combine the political and economic aspects (which was a concern for the Community) of foreign relations. However, the EPC was under a heavy workload, and it was not until the founding of the European Council that would organize and formalize the procedures within the EPC. The EPC's informal and secret context was not appropriate in the community context. The formalization was met with skepticism from the EPC members, and between the European Council of Stuttgart in 1983 and the Council in Dublin in December 1984, the heads of government failed to reach any common declaration because President Mitterrand refused to prepare a written declaration in advance.[40] The heads of government preferred to discuss their stance orally rather than in official declarations.

In 1987, the Single European Act [SEA] formalized the coordination between Member States' foreign policies and incorporated the Commission into the EPC. However, the Community Foreign Policy was still formulated by Foreign Ministers and governed by Public International Law,[41] and the Parliament was merely informed on EPC matters.[42] The obligation of the EPC was to 'endeavor jointly to formulate and implement a European foreign policy'.[43] During this era, the EPC did not have any legislative powers to adopt sanctions and was only limited to political coordination. Even though the EPC was being formalized, the jurisdiction of the Court of Justice was expressly

[36] David Allen and Reinhardt Rummel and Wolfgang Wessels, *European Political Cooperation: Towards a Foreign Policy for Western Europe* (Elsevier, 2013), 1

[37] Ibid [3]

[38] Ibid [20]

[39] Ibid [52]

[40] Alfred Pipers and Elfriede Regelsberger and Wolfgang Wessels *European Political Cooperation in the 1980s: A Common Foreign Policy for Western Europe?* (Brill, 1988), 54

[41] Denza (n 30) [44]

[42] Ricardo Gosalbo Bono, 'Some reflections on the CFSP legal order' [2006] 43(2) CML Rev 337, 339

[43] Denza (n 30) [44]

excluded in Article 31 of the SEA, which excluded any rights and duties in the EPC context. The organization of the EPC in the SEA era was shrouded in soft law, but the EPC managed to coordinate sanctions under this framework.

The European Community Ministers decided to prohibit the import and export of goods and to ban construction and service contracts between nationals and companies of the Member States and nationals and companies of Iran.[44] These sanctions were implemented on a national level and based on Article 224 of the Treaty establishing the European Community [EEC] which stirred controversy as there was no United Nations [UN] Security Council decision nor any 'serious international tension constituting a threat of war'.[45] The absence of binding legal instruments jeopardized the application of the sanctions and the UK Parliament decided not to interfere with contracts that had been concluded between the incident and the decision by European Foreign Ministers.[46]

Another example of sanctions during this era is the economic sanctions towards the Soviet Union in 1980 due to their repression in Poland. The Council based the sanctions on Article 130 EEC. This legal basis was intended to be used for political action rather than commercial purposes, however, it was best suited for the allocation of the Community budget to humanitarian purposes in Poland instead of low-price sales of Community farm produce which would be controlled by Polish State buying agencies. Article 130 EEC was also used to impose economic sanctions on Argentina following the Falklands war.[47]

2.3 The Maastricht Treaty

The Maastricht Treaty was signed in 1992 and came into effect in 1993. The Maastricht Treaty established CFSP as the second pillar in the three-pillar system, making it a formal policy area within the Union, replacing the EPC. The Maastricht Treaty developed the foundation laid down by the EPC, further integrating CFSP into the Union, and laid down provisions that would enable Union action on the international scene in the Title V Article J Treaty of Maastricht.

The Treaty of Amsterdam, signed in 1997, brought institutional changes such as the installation of the High Representative of the Union for Foreign Affairs

[44] Denza (n 30) [44]

[45] Article 224 EEC reads: Member States shall consult each other with view to taking together the steps needed to prevent the functioning of the common market being affected by measures which Member State may be called up onto take in the event of serious internal disturbances affecting the maintenance of law and order in the event of war serious international tension constituting threat of war or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

[46] Denza (n 30) [44]

[47] Ibid

and Security Policy [HR].[48] The intention was to create a representative that was responsible for the implementation of the CFSP policy and would represent the EU in foreign policy matters. Furthermore, the treaty abolished the distinction between the Council and the Member States acting in political cooperation and conferred power to the Council to adopt two new types of instruments – 'Common positions' and 'Joint actions'.[49] A common position would be adopted which the Member State was obliged to conform their national positions with and to uphold in international organizations and conferences. A Joint Action committed the Member State 'in the positions they adopt and in the conduct of their activity'.[50] The Council laid down the scope, objectives and means, procedures, and conditions for its implementation. It was clear from the Treaty that CFSP was not a part of the supra-national decision-making structure and decisions could not be altered without prior ratification by Member States. Furthermore, acts under the Title V Treaty of Maastricht do not create any rights for individuals and would not have any direct effect.[51] The area of CFSP was not intended to preclude the Member States' sovereignty in foreign affairs and was to be regarded as a *common* policy governed by international law.[52] Jurisdiction by the European Court of Justice was stated in Article L Treaty of Maastricht as limited to protecting the line between the EU and the CFSP, i.e. that CFSP measures may not affect other areas of the Union.

These institutional changes were important to give legitimacy to the Union's self-declaration as a beholder of legal identity and to provide a face to the Union's foreign policy, which would be able to create and maintain external relationships founded under the new legal persona.[53]

The Maastricht Treaty outlined a set of objectives for CFSP in Article J.1. These objectives have three dimensions: first, to safeguard the common values, fundamental interests, and independence of the Union and to strengthen the security of the Union. Secondly, to preserve peace and security in accordance with the UN Charter, the Helsinki Final Act, and the Paris Charter. Lastly, the objectives correspond with actions that facilitate a stable world order, promote international cooperation, develop, and consolidate democracy, the rule of law, and respect for human rights.

The 1990s marked the beginning of the 'Sanctions Decade' when more than 50 episodes of sanctions were launched, with only twelve being from the UN

[48] 'High Representative of the Union for Foreign Affairs and Security Policy' (*EUR-Lex*) <https://eur-lex.europa.eu/EN/legal-content/glossary/high-representative-of-the-Union-for-foreign-affairs-and-security-policy.html> Accessed 10 May 2023

[49] Denza (n 30) [55]

[50] Treaty on European Union, signed in Maastricht on February 7 [1992] OJ C 191, Article J.4

[51] Denza (n 30) [60]

[52] ibid [44]

[53] Article B TEU (n 50)

Security Council and the remainder from the United States and the EU.[54] The Maastricht Treaty equipped the Union with the legislative power to adopt autonomous sanctions through the Council which could adopt binding Joint Actions by unanimity. However, if economic measures were not intended, they could be adopted by a qualified majority.[55] Regarding sanctions, the Maastricht Treaty lacked provisions. The legal basis for sanctions was rather found in the EEC, as these had been used previously under the EPC framework. This ambiguity caused economic actions to conflict with the EU and Member States, as CFSP is an intergovernmental procedure and sanctions of economic nature would fall under the control of the EU internal structure.[56] This discrepancy was the spark of the sanctions landmark case *KADI I* and *KADI II*, which concerned, *inter alia*, the choice of a legal basis for the EU measures against associated individuals and entities associated with al-Qaeda, Usama Bin Laden, and the Taliban.[57]

In 2004, the Council adopted the 'Basic Principles on the Use of Restrictive Measures ('Sanctions'),' which laid down guidance for the enforcement of both UN sanctions and EU autonomous sanctions. Sanctions, that had historically been targeted towards states, should, according to the new 'Basic Principles', be targeted 'in a way that has maximum impact on those whose behavior we [the Union] want to influence'.[58] This would switch the priority from state-targeted sanctions to individual sanctions. Furthermore, it is emphasized that sanctions should not be adopted in such a way that they have any adverse humanitarian effects or unintended consequences.[59] The Union had identified that the trade embargo adopted against Iraq in the 1990s was circumvented and had great adverse humanitarian effects due to its indiscriminate application, and targeted measures were deemed more effective. [60] Sanctions must be carried out with full respect for Human Rights and the Rule of Law.[61]

Subsequently, in 2005, the Council released the 'Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of

[54] David Cortright and George Lopez, 'Sanctions Decade: Assessing UN Strategies in 1990s' (Speech at Managing Global Issues Seminar Series, Washington, 18 April 2000), *Carnegie Endowment for International Peace* <https://carnegieendowment.org/2000/04/18/sanctions-decade-assessing-un-strategies-in-1990s-event-50> Accessed 5 April 2023

[55] John J. Kavanagh, 'Attempting to Run before Learning to Walk: Problems of the EU's Common Foreign and Security Policy' (1997) 20 B C Int'l & Comp L Rev 353, 361

[56] Ibid [364]

[57] Case C- 402/05 P and C415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECLI:EU:C:2008:461. See also Case C-584/10 P *Commission and Others v Kadi* [2013] ECLI:EU:C:2013:518

[58] Council of the European Union Basic Principles, 'Basic Principles on the Use of Restrictive Measures (Sanctions)' [2004], 10198/1/04, REV 1, para. 6

[59] Ibid

[60] Christina Eckes, *The Legal Basis of Community Sanctions: Moving Competences from One Pillar to Another?* (Oxford Academic 2010), 90

[61] Council of the European Union (n 58) [para. 7]

the EU Common Foreign and Security Policy', which laid down the objectives, procedures, and substance of the individual sanctions the Union envisaged. The guidelines emphasize the importance of the measures' conformity with human rights and fundamental freedoms and the right to an effective remedy.[62] For the Union to ensure its conformity with these principles, the targeting of certain individuals and entities needs to follow 'due process' rights for the persons to be listed. The CFSP common position lays down the criteria for determining which persons and entities may be listed, and the measures should not extend to that person's family or individuals or entities that do not constitute a legitimate target on their own.[63] The guidelines are a big step towards a uniform and formalistic approach to the EU autonomous sanctions regime. However, the actions and procedures in CFSP are still shrouded in soft law instruments.

2.4 The Lisbon Treaty

The Lisbon Treaty was signed on 13 December 2007 and came into effect on 1 December 2009.[64] The Treaty amended the Maastricht Treaty in Article 2 and renamed it the Treaty on the Functioning of the European Union. The old TEU is still in effect but was revised to include provisions concerning the area of CFSP. The Treaty established in Article 1(3) of the TEU that both the TEU and the TFEU have the same legal value. One of the most significant amendments was the abolition of the old pillar structure that dominated the Maastricht Treaty. However, a remnant of the pillar structure still existed: the area of CFSP remained effectively a 'separate pillar' because it was still clearly separated from the rules and procedures of the TFEU. The executive authority remained with the European Council and the Council, and the jurisdiction of the Union courts remained limited.[65]

Starting with the institutional changes to the CFSP and the augmentation of the HR which now became the double-hatted post of the High Representative/Vice-President of the European Commission [HR/VP]. This amendment was to ensure leadership on matters relating to the area of CFSP and to promote coherence on external actions.[66] The role of the HR/VP is to ensure that the area of CFSP becomes more integrated with the remainder of the Union's institutions.[67] Under the HR/VP is the European External Action Service [EEAS] which serves as the Union's diplomatic service and as a support function for the HR/VP's foreign obligations. These institutions will help bring the EU's legal personality to life and negotiate international agreements and

[62] Council of the European Union (n 58) [para. 9]

[63] Council of the European Union Guidelines, 'Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy' [2005] 15114/05, para. 17-20

[64] Paul Craig and Gráinne de Búrca, *EU law* (7th edn, Oxford University Press 2020), 20

[65] Ibid [21]-[22]

[66] Article 18 TEU

[67] Troszczynska-Van Genderen (n 3) [5]

ensure the Union's membership in international organizations. Furthermore, the Parliament was given an increased role through Article 36 TEU by obligating the HR/VP to consult the Parliament on the principal aspects and choices of the CFSP and to be informed on the development of CFSP, requiring that the Parliament's views be 'duly taken into consideration'. The participation of the Parliament was strengthened by HR/VP Catherine Ashton's declaration on political accountability which was delivered in 2010.[68] This new structure and involvement by the Parliament are a substantial change to the historical secrecy and shadowy activities of the CFSP as the Parliament is the representative of the people in the Union and is now more integrated into the workings of the CFSP.[69]

The CFSP also underwent procedural changes to increase efficiency in decision-making and increase flexibility. These amendments have been declared controversial by some Member States because they tilt the power balance between the EU and the Member States and create what has been dubbed a 'two-speed Europe'.[70] The concept of a two-speed Europe stems from the fact that the majority of decisions within the CFSP require unanimity, and if unanimity cannot be reached, consenting Member States can proceed with the decision by obtaining a qualified majority vote. This would mean that certain countries are further ahead in their policies than those who do not adhere to the suggested decision, thus creating a 'two-speed Europe'.[71] One such exemption from the unanimity rule is the 'Passerelle clause' in Article 31 TEU, which allows for a qualified majority under four exceptions, *inter alia*, when adopting any decision implementing a decision defining a Union action, such as individual sanctions.[72]

In 2015, the Council updated the sanctions guidelines that were initially adopted in 2005.[73] Additionally, in 2022, the Council adopted the 'Update of the EU Best Practices for the Effective Implementation of Restrictive Measures.'[74] The guidelines highlight the importance of respect for Article 6(3) TEU, which references the Charter and constitutional traditions common to the Member States, especially the due process and the right to an effective remedy. This language is recognized by the original guidelines and has not been amended, even though the Charter now shares the same legal value as the treaties post-Lisbon. Targeted measures are limited to individuals who are

[68] Declaration by the High Representative on Political Accountability (Brussels 2010) 12401/10 ADD 1

[69] Troszczynska-Van Genderen (n 3) [8]

[70] Ibid [17]

[71] Ron Synovitz and Rikard Jozwiak, 'Two-Speed' Europe: A Plan For EU Unity Or Disintegration?' *RadioFreeEurope/RadioLiberty* (Washington, 28 March 2017) <https://www.rferl.org/a/eu-explainer-two-speed-multispeed-europe/28396591.html> Accessed 15 April 2023

[72] Troszczynska-Van Genderen (n 3) [8]

[73] Council of the European Union, 'Sanctions Guidelines – update '[2018] 5664/18

[74] Council of the European Union, 'Restrictive measures (Sanctions) - Update of the EU Best Practices for the effective implementation of restrictive measures' [2022] 10572/22

benefiting from and supporting the policies and actions which the Union is trying to combat.[75] The listing procedure is conducted via the Council through clear and tailored criteria to determine individuals or entities. Member States are encouraged to propose listings and are not allowed to unilaterally target individuals or entities as this would discourage the uniform application of sanctions and risk the functioning of the internal market.[76] Regardless of these 'clear instructions,' the listings of individuals remain the most litigated subject in the area of CFSP.

2.5 Human Rights consequences of Sanctions

The subject of the social and human rights impact of sanctions is not given a lot of attention in the political and medial discourse. Usually, it is the underlying purposes of Sanctions, namely the policy change, that is given attention. A less highlighted issue is whether sanctions work and how detrimental is the effect to human rights. Peksen has named the modern perception of sanctions as 'the naïve theory of economic sanctions'.[77] This theory is built on the assumption that sanctions will deplete the political elites' resources, such as military and police capacity and their coercive power will diminish since they can no longer retain the loyalty of these groups. Consequently, their political influence decreases which will enable political opponents to rally support from citizens and induce a power shift which will eradicate the expressiveness and improve human rights conditions.[78] Nevertheless, as described below, sanctions are prone to produce the opposite outcome, as the repressive capabilities of the targeted elite tend to strengthen in response.

Peksen outlines four contributing factors to this growth. Firstly, the elites which are targeted control scarce resources in society and have the connections and ties within the political leadership to divert the cost of sanction to the citizens whilst also creating alternative revenue streams by bypassing the sanction regime through, *inter alia*, illegal smuggling schemes or trading networks.[79] Prominent businessmen and influential elite tend to grow more loyal to the political regime because they depend on the current political landscape to retain their businesses or influence. For example, oligarchs have reached their status through dealings with the political regime and are unlikely to leave

[75] Council of the European Union (n 73) [para. 13]
[76] KADI I (n 57) [para. 230]
[77] Peksen (n 7) [61]
[78] Ibid [61]
[79] Ibid [62]; Daniel W. Drezner, 'Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice' [2011] 13(1) International Studies Review 96, 98. See also Ana Swanson and Matina Stevis-Gridneff, 'Russia Is Importing Western Weapons Technology, Bypassing Sanctions' *The New York Times* (Washington/Brussels 18 April 2023) <https://www.nytimes.com/2023/04/18/business/economy/us-russia-chips-sanctions.html> Accessed 20 May 2023

their trusted business partner.[80] Citizens tend to suffer lower costs when individual sanctions are imposed.[81] Secondly, sanctions tend to create an increase in poverty, unemployment, and poor health conditions for ordinary citizens.[82] A notable example is the effects the Syria sanctions had on the import of child cancer medicine and other life-supporting health products.[83] The socio-economic distress causes political violence which the regimes counter with more oppression to retain the *status quo*. Another example is the mass arrests in Moscow following a demonstration against the Ukraine war.[84] Another factor contributing to these consequences is that the decrease in resources in the target state leads to less expenditure on health care, natural disaster prevention, and social expenditures.[85] These consequences can be mitigated by access to natural resources such as oil.[86]

Thirdly, economic sanctions can be used by the regimes to increase their legitimacy by framing the sanctions as a threat to national security. This will enable the regime to oppress opponents further and as justification to continue undermining the sender of the sanctions. In this regard, the Russian regime has deployed a twist by framing the sanctions against Russia to strengthen the identity and unity of the people. In Putin's speech at the Valdai Discussion Club, a Moscow-based think tank, he told a joke about a German boy which implied that the sanctions are hurting the Union whilst the Russian economy is growing.[87] By projecting that the EU depends on Russia but not the other way around, the regime justifies its action by portraying itself as a self-sustaining superpower, a so-called 'rallying-around-the-flag' approach.[88] Fourth and lastly, sanctions will isolate the target country from international trade and investments from foreign economies. Economic integration, which has

[80] Fedor Krasheninnikov, 'Are Sanctions on Russia Oligarchs Effective?' (*The Russia File*, 21 April 2023) <https://www.wilsoncenter.org/blog-post/are-sanctions-russian-oligarchs-effective> Accessed 20 May 2023

[81] Drezner (n 79) [100]

[82] Peksen (n 7) [62]

[83] Özgur Özdamar and Evgeniia Shahin, 'Consequences of Economic Sanctions: The State of the Art and Paths Forward' [2021] 23(4) International Studies Review 1646, 1646. See also Dahlia Nehme, 'RPT-Syria sanctions indirectly hit children's cancer treatment' Reuters (Damascus, 15 March 2017) <https://www.reuters.com/article/mideast-crisis-syria-sanctions-idUSL5N1GS5CX> Accessed 20 May 2023

[84] Guardian staff and agencies, 'Russia protests: more than 1,300 arrested at anti-war demonstrations' (London, 22 September 2022) <https://www.theguardian.com/world/2022/sep/22/russia-protests-more-than-1300-arrested-at-anti-war-demonstrations-ukraine> Accessed 20 May 2023

[85] Özdamar and Shahin (n 83) [1656]- [1657]

[86] Ibid [1653]

[87] Guardian News, 'Russian president Vladimir Putin takes part in Valdai discussion club meeting – watch live' at Minute 2:41:10 <https://www.youtube.com/live/p5UUN6Y-KbY?feature=share&t=9670> Accessed 20 May 2023. See also Sudeshna Singh, 'Putin Downplays EU Sanctions On Russia With Dark Humour As He Takes Sly Dig At Germany' *Republic World* (Mumbai, 30 october 2022) <https://www.republicworld.com/world-news/europe/vladimir-putin-cracks-dark-joke-as-european-countries-sanction-on-russia-backfires-watch-articleshow.html> Accessed 20 May 2023

[88] Özdamar and Shahin (n 83) [1653]

been a cornerstone of the EU's success, promotes and strengthens human rights by creating economic prosperity. The consequences of isolation will cause further consolidation of resources in the target country and decreased accountability.[89]

What Peksen describes can be categorized as the 'Unintended consequences' of sanctions. The origin of such unintended consequences has been conceptualized by Robert Merton as systematic causes of knowledge gaps, ignorance, and interest in the analysis an actor partakes in before action.[90] Some unintended consequences could be anticipated beforehand whilst others would be impossible due to the unique characteristics of the target country or their response and resources.[91] Statistically, there are variations in unintended consequences amongst the different sanction regimes, and notably, the UN sanctions against Iran have displayed fewer unintended consequences due to them being mainly targeted sanctions.[92]

The consequences of sanctions can be generally described as above; however, the true effect of sanctions differs depending on a multitude of aspects such as mutual dependence between the countries, social stability in the target country, and whether the sanctions are targeted or general.[93] When it comes to smart sanction it has been shown that it is inefficient in changing policy in the target country but mitigates adverse human rights effects. The lack of understanding of the long-term effects of individual sanctions and the causality of the aggregate effect of political and economic unrest in target countries calls for further research. However, individual sanctions are a display of force when responding to the regime's coercive actions.[94]

However, the focal point of this thesis, which is unintended consequences, can arguably be traced back to an 'incomplete policy process,[95] hence the institutional and judicial framework in the sending entity plays a critical role in mitigating the adverse human rights effects.[96] Whilst the threat to human rights constitutes an unintended consequence of sanctions they are important to address because a systematic failure to mitigate these adverse effects could affect the legitimacy of the Union and the normative order within.[97]

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[89] Peksen (n 7) [63]

[90] Mikael Eriksson, 'The unintended consequences of Uninted Nation targeted sanctions' in Thomas J. Biersteker and Sue E. Eckert and Marcos Tourinho (Eds.) *Targeted Sanctions – The Impacts and Effectiveness of United Nations Actions* (Cambridge University Press 2016), 194; see also Robert K. Merton, 'The Unanticipated Consequences of Purposive Social Action' [1936] 1(6) American Sociological Review 894.

[91] Eriksson (n 90) [194]

[92] Ibid [207]-[208]

[93] Özdamar and Shahin (n 83), [1648]- [1657]

[94] Drezner (n 79) [104]

[95] Eriksson (n 90) [193] and [217]

[96] Ibid [209]-[210]

[97] Eriksson (n 90) [201]

3 Institutional Protection of Fundamental Rights in CFSP

3.1 Pre Lisbon

The European Union was founded as an economic initiative to stimulate trade among the Member States to facilitate peace. It was not until the late 1960s that the idea of integrating human rights into the Community was introduced through the European Court of Justice's jurisprudence.[98] This notion was formally declared in 1973 in the *Declaration on the European Identity* as a fundamental element of the European Identity.[99] During the 1980s and the EPC area, the promotion of human rights was based on non-binding documents. The first codification of human rights promotion and compliance is found in the Single European Act in 1987 which stated in its preamble explicitly that the Union's responsibility was to ensure compliance with human rights.[100] It was not until the adoption of the EEC that the promotion and protection of human rights were introduced in the substantive articles of the treaties concerning Development Cooperation. Article 130u(2) EEC states that one of the objectives is to:

> '(...)develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.'

It was not until the Maastricht era that fundamental freedoms and human rights became a general objective. The nature of the human rights referenced in external objectives is stated in Article F.2 TEU of the Common provisions:

> 'The Union shall respect all 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.'

The legal status of the provision was during the Maastricht era unclear. Firstly, the Court was excluded from jurisdiction on both the common provisions and the provisions concerning the CFSP. Furthermore, the Union had not acquired a legal personality and was unable to ratify any of the human rights instruments present at the time, namely the ECHR and UN instruments for the protection of human rights. Since there was no internal or external judicial review of the content and effects of the foreign policy instruments at the time there was no judicial supervision of how human rights were 'respected'. The Union's political institutions were the sole body that would

[98] Martine Fouwels, The European Union's Common Foreign and Security Policy and Human Rights [1997] 5(3) Netherlands Quarterly of Human Rights 291, 292

[99] Declaration on the European Identity by the Nine Foreign Ministers on 14 December 1973 in Copenhagen, Bull. EC 12-1973, 118

[100] Fouwels (n 98) [293]

enforce and observe that human rights were being taken into ‘respect’ when the Union exercised its competence under the CFSP.

With the introduction of ‘joint actions’ and ‘common positions’ under CFSP, the Union could now theoretically resort to declarations, démarches, common positions, and joint actions to promote human rights. The new possibilities of economic sanctions would also prove to be an instrument in which the Union would respond to foreign violations of human rights. During the 90s the Union would issue several demarches mostly condemning the human rights violations whilst a number raised positive human rights developments in specific countries, such as Kirghizstan.[101] A demarche is a written document in which legal status is determined by the address's action to it. The addressee can choose to accept the content of the démarche thus creating a binding agreement. However, most human rights demarches contain observations by a third country to the addressee disapproving of human rights violations and may or may not contain a request for action.

The Union adapted its choice of instruments depending on which country was the subject. The Union usually resorted to confidential démarches regarding human rights violations to countries that were more economically and politically significant to the Union. For example, a démarche adopted to raise concern about the death penalty in the United States was held confidential.[102] Such was not always the case as the Union has adopted confidential demarches towards, *inter alia*, Mozambique which was motivated by a concern that it would raise too much public unrest if it would be public.[103] During this period the Union also adopted *Economic sanctions* as a response to Human Rights violations.[104]

3.2 Post-Lisbon

The treaty of Lisbon was significant for the development of fundamental and human rights in the Union's legal framework. Article 6 TEU put the Charter of fundamental rights on equal footing with primary law and committed the EU to accede to the ECHR. The old Article J.1 was now substituted by Article 21 TEU and was amended to include ‘guiding principles for the Union's actions on the international scene. These amendments state that ‘Union’s action on the international scene’ shall be ‘guided by’ several principles that it seeks to advance in the wider world, in particular democracy, the rule of law, and the universality and indivisibility of human rights.[105] The language changed significantly from the Maastricht Treaty and was more definite, yet vague.

[101] Fouwels (n 98) [298]

[102] Ibid [299]

[103] Ibid

[104] Common position of 15 March 1994 (Decision *94/165/CFSP),29* and the reinforcement of the sanctions against Nigeria, decided upon by a common position on 20 November 1995

[105] Fouwels (n 98) [245]-[246]

Furthermore, was the Union now equipped with the Charter whose legal status is more clear-cut than the old references to the ECHR and 'constitutional traditions common to the Member States'.[106] Under the treaty of Lisbon, two changes would impact the development of fundamental rights within the area of CFSP: 1) the introduction of the Charter and 2) the institutional amendments in CFSP.

3.3 The legal status of the Charter of Fundamental Rights

The Charter is a codification of the constitutional traditions and international obligations common to the Member States. When the Treaty of Lisbon came into effect this became a significant landmark for the relevance of human rights through the Union's actions. This newly enforced position of human rights in the Union accelerated the work within the institutions responsible for external relations and in June 2012 an initiative was announced, namely the 'Strategic Framework and Action Plan on Human Rights and Democracy'.[107] The press release emphasizes the importance of promoting human rights unconditionally through the Union's external action to promote democracy and export the Union's values. The EEAS and the Commission would have to ensure the success of the goals set out in the strategic framework.[108] The Lisbon Treaty was determined to strengthen the Union as an advocate for fundamental rights and these fundamental rights should be interpreted and protected in the light of 'changes in society, Social progress, scientific and technological developments'.[109]

The field of application of the Charter is according to Article 51(1) of the Charter addressed to the institutions of the Union and the Member States so far, they implement EU law. Both the EU institutions and Member States are under an obligation to promote its application when acting in the Unions arena. The field of application has been extended in the Court's case law beyond the verbatim boundaries of the Charter. The Court has held that the charter applies to the EU institutions even if they are acting outside of the EU legal framework.[110] Furthermore, is the notion of 'implementing EU law'. The Court has established that to determine whether a national measure involves the implementation of EU law, it is necessary to determine, inter alia, whether the national legislation at issue is intended to implement a provision

[106] Annabel Egan and Laurent Pech, 'Respect for human rights as a general objective of the EU's external action' in Douglas-Scott, Sionaidh; Hatzis, Nicholas (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar Publishing 2017), 243

[107] Council of the EU, EU Strategic Framework and Action Plan on Human Rights and Democracy 11855/12, Luxembourg, 25 June 2012

[108] Ibid

[109] Tanel Kerikmäe, 'Introduction: EU Charter as a dynamic Instrument' in Tanel Kerikmäe (eds.) *Protecting Human Rights in the EU: Controversies and Challenges of the Charter of Fundamental Rights* (Springer Berlin / Heidelberg, 2013), 1

[110] Case C-8/15 P to C-10/15 P, *Ledra Advertising v Commission and ECB* [2016] ECLI:EU:C:2016:701, para. 67

of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of directly affecting EU law; and whether there are specific rules of EU law on the matter or rules which are capable of affecting it.[111] The Charter has also been held to be applicable when Member States implement international obligations of which is considered EU law, such as the WTO agreements.[112]

An important factor of the Charter is the relationship to the ECHR. The rights catalog in ECHR is according to Article 52(3) of the Charter translated into the Charter so far there is a corresponding provision in both instruments. This relationship allows the Courts of the Union to take ECHR case law into account when interpreting the scope and level of protection granted by the Charter. The charter may never afford lesser protection than the ECHR. However, the relationship between the Charter and the ECHR is not easily defined due to the dual system of courts. The Union courts must ensure conformity between the Charter and the ECHR; however, they are not bound by the ECHRs case law.[113]

Notwithstanding that the Charter is of equal legal value as the treaties, the Union must promote human rights, including its charter rights in its external affairs.[114] In 2015 the Council introduced guidelines to ensure 'methodological steps' to ensure compliance with fundamental rights at the Council's preparatory bodies.[115]

The guidelines state that during both the legislative and non-legislative procedures the Commission, the Council, and the Parliament are responsible for ensuring that proposals and amendments are in line with fundamental rights instruments of the Union. In a CFSP context, this responsibility would ultimately lie with the Council as this body is the one that lays down the underlying CFSP decision which contains the provisions and reasons for the action taken by the Union. As will be explained in Chapter 3.4, the Council is assisted by numerous bodies and representatives to obtain a human rights aspect to their proposed actions.

The importance of a thorough human rights assessment in the decision-making and legislative steps is crucial. The Court has held in the *Schmidberger* case that 'measures which are incompatible with observance of the human rights thus recognized are not acceptable in the Community'.[116] This

[111] Case C-198/13 *Julian Hernández and Others* [2014] ECLI:EU:C:2014:2055, para. 33, 35, and 37; See also Case C-206/13 *siragusa* [2014] ECLI:EU:C:2014:126, para. 24-25

[112] Case C-66/18 *Commission v Hungary* [2020] ECLI:EU:C:2020:792, para. 212 to 216

[113] Article 52 of the Charter

[114] Article 3(5) and Article 21 TEU

[115] Council of the European Union, 'Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council preparatory bodies' (5377/15)

[116] Tanel Kerikmäe (n 109) [7]; Case C-112/*00 Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECLI:EU:C:2003:333, para. 73

conclusion has the legal effect of making EU acts that violate human rights will be grounds for annulment and in the case of restrictive measures, an annulment could potentially ruin the effectiveness of the measure.

3.4 Institutional changes in CFSP

The Lisbon Treaty abolished the pillar structure but the area of CFSP would still be conducted using an intergovernmental procedure. The Lisbon Treaty implemented institutional changes to CFSP that would increase the coherence and strength of the Union's external actions. The Lisbon Treaty established two new institutions which would act as a bridge between CFSP, and other external actions taken by the Union namely the HR/VP and EEAS.[117] Regarding human rights integration, the new institutional design of CFSP did not allow more room for the biggest human rights advocate within the Union – The Parliament. The Parliament did receive increased power in the legislative, budgetary, and supervisory roles in other areas of the Treaties but retained its limited role in CFSP procedures.[118] Considering the pursuit of coherence within the Union, this discrepancy will prove the development of human rights policy in CFSP difficult.[119] To provide a comprehensive description of human rights policy within CFSP each institution's contribution on this matter will be detailed beginning with the European Council.

3.4.1 The European Council

The European Council has experienced increased relevance since the Maastricht treaty from being an informal gathering to being acknowledged as an EU institution in the Lisbon Treaty.[120] The European Council is tasked to provide the Union with the necessary ground for its developments and to define the general political directions and priorities. The European Council is not equipped with any legislative power but has been given increased power within the CFSP.[121] According to Article 22(1) TEU, the European Council shall define the Union's strategic interests and objectives. This decision can encompass both CFSP and other areas of external action. The Council's CFSP decisions regularly refer to the European Council's common strategies instruments.

3.4.2 The Council of the European Union

External relations issues are discussed within the Council by the foreign ministers of the EU Member States and consist of two configurations: 1) the general affairs council and 2) the foreign affairs council [FAC].[122] FAC is responsible for the EU's external action, which includes foreign policy, defense

[117] Eeckhout P, *EU External Relations Law* (2nd edn Oxford Academic 2011), 165-166
[118] Ibid
[119] Egan and Pech (n 106) [10]
[120] Article 13(1) TEU
[121] 'Setting the EU's political agenda' (*European Council*) <https://www.consilium.europa.eu/en/european-council/role-setting-eu-political-agenda/> Accessed 12 May 2023
[122] Egan and Pech (n 106) [6]

and security, trade, development cooperation, and humanitarian aid. FAC discusses the Union's external action based on the guidelines adopted by the European Council.[123] The FAC is composed of the foreign ministers from all Member States and which minister is attending is dictated by the agenda. Other Ministers that may be present are the defense minister, development minister, and trade minister. Their main objective is to ensure the coherence of the Union's External actions through binding decisions.[124]

The Council has since the Treaty of Maastricht gained an increased role which can be described as a new intergovernmentalism. The Council has gained more power in areas in CFSP which has been described as 'core state powers'. The working methods within the Council are tailored to allow for 'integration without supranationalization'.[125] This ambivalent relationship has stirred criticism towards the Council being secretive and lack transparency in its work. A notable example of this can be found in the context of adopting individual sanctions as the conventional meeting grounds for Council and Parliament representatives are excluded. Under the ordinary legislative procedure, the Council and parliament engage in trilogues which allows the Parliament to engage in the work of the Council. However, under the legislative procedure in individual sanctions, no trilogues occur which excludes the Parliament's ability to question the Council representatives.[126] Due to the lack of transparency, the public and members of Parliament and national parliaments are not able to scrutinize the work of the Council.[127] However, the Council is intended to preserve the balance of interest in the Union by promoting the interests of the Member States in other EU institutions.[128]

3.4.3 The High Representative of the Common Foreign and Security Policy

The HR/VP presides over the Council in foreign affairs and is supported by the EEAS. The HR/VP also serves as the vice president of the Commission and holds the position of Commissioner for External Relations. The HR/VP's capacity as Commissioner for external relations is subject to the same workings as the Commissioner as 'gatekeeper of the treaties' and to ensure the consistency of the Union's external action.[129] Furthermore, the HR/VP also takes part in the work of the European Council[130] and thus the role of the

[123] Article 15 (2) and Article 18 (3) in fine TEU

[124] 'Foreign Affairs Council configuration (FAC)' (*Council of the European Union*, Last reviewed: 22 December 2022) <https://www.consilium.europa.eu/en/council-eu/configurations/fac/> Accessed 25 April 2023

[125] Saurugger S and Terpan F, 'The Court of Justice of the European Union: a quite leader' *in* Dermot Hudson and other (eds), *Institutions of the Union* (5th edn, Oxford University press 2022), 97

[126] Ibid [99]-[100]

[127] Ibid [101]

[128] Saurugger and Terpan (n 125) [103]

[129] Article 18 (4) TEU

[130] Article 15 (2) TEU

HR/VP extends between the intergovernmental procedures of CFSP and the rest of the community order. This 'double-hatted' position has consequently involved the Parliament through the HR/VPs membership in the Commission. This brings an important human rights aspect to the working of the HR/VP as the Parliament is one of the biggest human rights advocates among the Union's institutions. This adds to the democratic legitimization of the HR/VP and an incentive for the HR/VP to raise human rights concerns. The HR/VP is obliged to raise human rights aspects in its work as this is a part of the Unions obligations according to Article 3(5) TEU and Article 21(2) TEU.[131]

The HR/VP coordinates the positions of the Member States and informs the Parliament on CFSP issues. With third countries and international organizations, the HR/VP represents the Union in dialogue with third countries and international organizations such as the UN Security Council.[132] The HR/VP has been equipped with the possibility to make initiatives to several actions in external relation matters, *inter alia*, the proposal of individual sanctions under Article 215(2) TFEU. Such a proposal shall be joint with the Commission and forwarded to the Parliament.[133] The HR/VP is furthermore responsible for the implementation of the Union's external relations policies and decisions of the European Council and the Council.[134]

3.4.4 European External Action Service

The EEAS assists the HR/VP in maintaining diplomatic relations and strategic partnerships with non-EU countries. It also cooperates with the European Council, Parliament, and the European Commission. The EEAS focuses on, *inter alia*, peace building and tackling human rights issues as this constitutes the core of its activities.[135] The EEAS is responsible to report to the HR/VP in its annual report on how the HR/VP should manage and prioritize the Union's external action resources, including internal control systems. Working closely with the EEAS is the Sanction Division which is responsible for the 'development and maintenance' of the Union's close to 40 EU sanctions regimes currently in place. The Sanction Division acts as a control function for how the sanctions are implemented and assist in negotiations with sanctioned

[131] Stichting The London Story and others et al., 'Open letter on human rights to High Representative/Vice-President of the European Union Josep Borrell on his visit to India' (*The London Story*, 2 March 2023) <https://thelondonstory.org/2023/03/01/open-letter-on-human-rights-to-high-representative-vice-president-of-the-european-Union-josep-borrell-on-his-visit-to-india/> Accessed 25 April 2023

[132] 'High Representative / Vice President' (*EEAS*, 24 August 2021) <https://www.eeas.europa.eu/eeas/high-representative-vice-president_en#8861> Accessed 25 April 2025

[133] Article 215(1) TFEU

[134] Maciej Pleszka, 'High Representative of the Union for Foreign Affairs and Security Policy – Analysis of the Lisbon Treaty Provisions' [2010] 13 Yearbook of Polish European Studies 81, 93

[135] European External Action Service, '2021 Annueal Activity Report' (2022) (ref. Ares (2022)5064306)

countries.[136] They set out to ensure that the restrictive measures are well-targeted and regard the risk of unintended negative consequences.[137]

3.4.5 The Special Representative for Human Rights

The Council has adopted a decision appointing a Special Representative for Human rights [EUSR].[138] The EUSR is responsible for facilitating the policy objectives of the Union regarding human rights as set out in the treaties and in accordance with both the EU strategic Framework and EU action plan on 'Human Rights and Democracy'.[139] The EUSR is responsible to draft recommendations on the implementation of the above-mentioned acts relating to the Union's Human Rights work and to represent the Unions and its principles with third countries.[140] The EUSR work extends to all of the Union's external action, including the CFSP, and works closely with the EEAS to ensure coherence and consistency in their respective work in the area of human rights.[141] The EUSR shall report to the Council working groups and the FAC if necessary and may be involved in briefing the Parliament.[142] The work of the EUSR extends to all Union instruments and the EUSR also work with the Commission in its activities.[143]

[136] 'EEAS Vacancy Notice Contract Agent FGIV – Job title: Policy Officer Sanctions Division'(*EEAS*, 3 February 2023) <https://www.eeas.europa.eu/eeas/eeas-vacancy-notice-contract-agent-fgiv-%E2%80%93-job-title-policy-officer-sanctions-division_en> Accessed 25 April 2023

[137] Ibid

[138] Council Decision 2012/440/CFSP appointing the European Union Special Representative for Human Rights [2012] OJ L200/21

[139] Council Decision (CFSP) 2019/346 of 28 February 2019 appointing the European Union Special Representative for Human Rights [2019] OJ L 62/12, Article 2

[140] Ibid [Article 2 and 3]

[141] Ibid [Article 4]

[142] Ibid [Article 10]

[143] Ibid [Article 11]

4 Legislative Procedure – Individual Sanctions

This section will study how the subject of human rights and fundamental rights has been dealt with when the Union adopts individual sanctions. It is important to get an overview of the legislative procedure of individual sanctions and the responsibility of the legislative body to introduce human rights into the procedure. In the next chapter, the judicial review of the restrictive measures in the Union Courts and the ECHR will be examined to establish whether individuals who are targeted by sanctions have legal recourse in the event they claim their fundamental rights have been violated.

4.1 Competence of the Union

Article 23 TEU, which is the first provision in Chapter 2 Title V TEU concerning CFSP, references Article 21 TEU on the general provision on the Union's external actions. Article 21(2) TEU sets out objectives and principles for the Union's external actions. These objectives are broadly formulated with operative terms such as '*safeguard* its [the Union's] values, fundamental interests, security, independence, and integrity; *consolidate and support* democracy, the rule of law, human rights, and the principles of international law'. It could be argued that the area of CFSP is primarily concerned with Article 21(2)(c) TEU, as this objective explicitly mentions security and the preservation of peace.[144] However, the Union is bound to pursue all the objectives following Article 21(3) TEU, which states that these objectives and principles guide all areas of the Union's external actions. The structure of Article 21 TEU gives that all Union's external actions are bound by the same principles and objectives. This raises a constitutional issue regarding when the specific CFSP procedure can be adopted to pursue the objectives in Article 21 TEU, as the nature of CFSP competence is not clear-cut and can inherently touch upon other areas of the Treaties.

To achieve the objectives, the Union must act within the limits of the competences conferred upon it by the Member States in the Treaties,[145] and this also applies to the CFSP.[146]

The conferred competence to the Union within the CFSP has been a wildly debated area since the introduction of the Maastricht Treaty. Article 2(4) TEU states that the Union shall have competence, under the provisions of the TEU, to define and implement a Common Foreign and Security Policy. The nature of that competence is not clear-cut as it does not fit within the definitions of shared or exclusive competence. Article 4(1) TFEU states that the Union

[144] Eeckhout (n 117) [169]
[145] Article 5(2) TEU
[146] Opinion 2/94, 'Accession to the ECHR' [1996] ECR I-1759, para. 24

shares competence with Member States when the treaties confer a competence to the Union which does not relate to any of the areas in Articles 3 and 6 TFEU.[147] The exercise of the CFSP competence lays outside TFEU as Article 2(4) TFEU references the provisions of the TEU and more specifically, Chapter 2 Title V TEU. The concept of shared and concurrent competence has been used to describe the nature of competence.[148] In Article 24(1) TEU, it is stated that the Union's competence *shall* cover *all* areas of foreign policy and matters relating *to security*. It further states that the area is subject to specific rules and procedures and excludes legislative acts. This means that the area of CFSP is not a legislative area of the Union and does not put EU acts adopted in this field above national law. However, Member States are indeed bound by the decisions which are taken within the area of CFSP.[149]

Member States are furthermore subject to a 'solidarity clause' through Article 24(3) TEU, which instructs the Member States to support the policy actively and unreservedly in a spirit of loyalty and mutual solidarity and to comply with the Union's action in this area. Several articles in Chapter 2 Title V TEU instruct the Member States on how to adhere to the 'solidarity clause'.[150] Most importantly for individual sanctions, Article 29 TEU binds the Member States to ensure that their national policies conform to the Union's positions.

Another key provision to clarify the Union's competence is Article 40 TEU, which was transferred from Article 47 EU[151] with an addition of a second indent in the Lisbon Treaty. Article 40 TEU protects, in its first indent, the supranational procedures and powers and is intended to prevent the Council from using the CFSP competence and its unique procedures if the measure could have been adopted under the supranational competences.[152] Similarly, it works the other way around and protects actions that should rightfully be adopted under the CFSP competence.[153] This clear limitation of Article 40 TEU and the vagueness of the Union's competence and objectives within the area of CFSP raise issues on the cross-pillar structure of restrictive measures that are adopted under Article 215 TFEU. The confusion stems from the broad objective of CFSP and how it risks contaminating other areas of EU Foreign policy, *inter alia*, Common Commercial Policy [CCP]. Article 40 TEU is constructed to protect from such contamination, however, there is limited guidance post-Lisbon as to if the old delimitation principles drawn in the

[147] Mahnič P, 'The Process of Integration of the CFSP into the Evolving Constitutional Legal Order of the EU: Article 218 TFEU' [2019] 79 Zbornik Znanstvenih Razprav, suppl. Special Issue; Ljubljana 107, 109

[148] Eeckhout (n 117) [171]

[149] Ibid

[150] See Article 32 and 34 TEU

[151] TEU (n 48)

[152] Robert Schütze, *European constitutional law* (Cambridge University Press, 2012), 197

[153] Eechhout (n 117) [181]

SALW case still apply.[154] The contamination issue is at its most prominence when dealing with acts adopted under Article 215 TFEU. The sole purpose of Restrictive measures under this article is to reduce or halt financial and economic relations. This entails implications for commercial aspects which can be adopted under the CCP. It was held in *SALW* that CFSP is a type of *lex generalis* whilst other areas of the TFEU which touch upon other foreign policy areas are *lex specialis*.[155] To determine whether an act should be adopted under CFSP or not was to be determined by the 'main purpose or component of the measures in issue'. This means that the EU can adopt acts that incidentally or do not affect other policy areas. Lastly, the court held that the use of two different sets of legal bases is incompatible with the old article 40 TEU (Article 47 EU).[156]

Eeckhout argues that the first principle of *SALW* still stands in the post-Lisbon era. However, not without hesitation. Since CFSP objectives are as 'ill-defined' as before it is difficult to safely sever CFSP objectives from other EU foreign policy areas. Furthermore, since all foreign policies are bound by the same objectives the 'aim' stands out as the decisive factor. CFSP guidance can be found in Article 24(1) TEU as to what the aim of such measures is, namely 'EU security'.[157] In the case of Article 215 TFEU it is evident that such measures will affect at minimum the CCP and such effect is not incidental, it is intentional. One can easily identify a discrepancy when policy areas are combined in such a manner. Whilst the restrictive measures have been argued by the court 'to consolidate and support democracy, the rule of law, human rights and the principles of international law' following Article 21(2)(b) TEU[158], it inherently will provoke fundamental rights issues, contrary to the objective of Article 21(2)(a) TEU. It can be questioned whether it is a democratic institutional allocation of power or a careful conferral of competence to allow intergovernmental procedures to adopt measures that have such fundamental implications.

4.2 Legal basis and procedure to adopt Individual Sanctions

The procedure prescribed in Article 215 TFEU states the following:

> '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

[154] Piet Eeckhout, 'The EU's Common Foreign and Security Policy after Lisbon: From pillar talk to Constitutionalism' in Andrea Biondi and Piet Eeckhout and Stefanie Ripley (eds.) *EU law After Lisbon* (Oxford university Press, 2012), 272

[155] Case C-91/05 *SALW* [2008] ECLI:EU:C:2008:288, paras. 71-72

[156] Eeckhout (n 154) [274]

[157] Ibid [275]-[276]

[158] Case T-536/21 *Belaeronavigatsia v Council* [2023] ECLI:EU:T:2023:66, para. 34. See also Case T-426/21 *Assaad v Council* [2023] ECLI:EU:T:2023:114, para. 215

> 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.'

In the second paragraph of Article 215 TFEU, it states the following regarding individual sanctions:

> '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.'

A common financial or economic restrictive measure is an asset freeze which blocks the target from accessing bank accounts and investments held in the EU.[159] Definitions are usually found in the regulation laying down the freezing measures.[160] The Court has held that the concept of 'freezing' is preventive and shall not deprive the persons affected by the measure of their property and be temporary and reversible.[161] Furthermore, there are types of non-economic sanctions, such as travel bans.

The procedure to adopt individual sanctions begins with a CFSP decision under Article 29 TEU. A decision taken under Article 29 TEU 'defines the approach of the Union to a particular matter of geographical or thematic nature'.[162] Decisions outline the agreed stance on a certain foreign issue and the actions that need to be taken by the Union.[163] Decisions are intended to lay out the basic principles and consensus leading up to the decision, whilst the procedure in the TFEU lays down the legislative aspects of the action.[164] This decision does not constitute a legislative act as these are exempted from the decision-making of CFSP according to Article 24(1) TEU. However, there are examples that the CFSP decisions have the nature of a legislative act since they may contain provisions that are intended to create rights and obligations for third persons. A notable example of this is the sanction regime against Bosnia and Herzegovina which consist of travel bans and asset freeze. These sanctions are based on a decision based on Article 29 TEU and a joint

[159] Martin Russell, 'EU sanctions: A key foreign and security policy instrument' [2018] PE 621.870, 4

[160] See for example Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2014] OJ L 78/6, Article 1(e)(f)

[161] Case C-753/21 *Instrubel* [2022] ECLI:EU:C:2022:987, para. 50

[162] Case T-256/11 *Ezz and others* [2014] ECLI:EU:T:2014:93, para. 41

[163] See for example Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2014] OJ L 78/16

[164] Eechhout (n 154) [475]

proposal but with no reference to Article 215 TFEU.[165] Because of the discrepancy between the intergovernmental procedure and the values on which the Union is founded such as democracy and the rule of law,[166] a decision should arguably not have normative action.[167] Arguably the appropriate instrument for the Bosnian sanction regime would be to adopt a regulation under 215(2) TFEU, although the Council has not yet taken such actions. Instead, the Council extended the sanctions regime until 2024 in 2022.[168]

The second step of the process is to adopt a regulation under Article 215 TFEU. This article serves as the bridge between the political decision and the concrete actions of the Union,[169] making the measures agreed on in the decision directly applicable in the Member States.[170] A regulation under Article 215 TFEU is adopted by a qualified majority based on a joint proposal by the HR/VP and the Commission.[171] To implement the sanctions, Member States need to adopt their own national rules as far as the measures fall outside the EU's competence. Such is the case with, inter alia, visa bans.[172] The interaction between the CFSP decision and the regulations adopted under Article 215 TFEU was reviewed in both the KADI line of cases and the Bank Melli Iran case. The court acknowledged that Article 301 EC (now Article 215 TFEU) acts as a bridge between the two pillars, but the underlying EU acts do not serve as the legal basis for the regulation. Rather, they serve as a condition for the adoption of the regulation.[173] Despite the intention of the treaties to distinguish between the decision and the regulation, these differences are not clear. The court has described the relationship between CFSP decisions and regulations on individual sanctions as '*carbon copies'*.[174]

Article 215 TFEU is *prima facie,* the appropriate legal basis on which financial restrictive measures with predominantly external objectives are adopted. The Court clarified this position in the case of *Parliament v Council*[175] where the European Community implemented the UN Security Council Resolution 1390 targeting Usama bin Laden, members of the Al-Qaeda organization and the Taliban, and other individuals, groups, undertakings, and entities

[165] Council Decision 2011/173/CFSP of 21 March 2011 concerning restrictive measures in view of the situation in Bosnia and Herzegovina

[166] Article 2 TEU

[167] Eechhout (n 117) [479]

[168] Council Decision (CFSP) 2022/450 of 18 March 2022 amending Decision 2011/173/CFSP concerning restrictive measures in view of the situation in Bosnia and Herzegovina

[169] M. Eugenia Bartoloni, 'Restrictive Measures Under Art. 215 TFEU: Towards a Unitary Legal Regime? Brief Reflections on the Bank Refah Judgment' [2020] 5 European papers 1359, 1365

[170] Case C-72/15 *Rosneft* [2017] ECLI:EU:C:2017:236, para. 89

[171] Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202, Article 215

[172] Russell (n 159) [6]

[173] Eechhout (n 117) [510]; see also text to n 154

[174] Rosneft (n 170) [para. 81]

[175] Case C-130/10 *Parliament v Council* [2012], ECLI:EU:C:2012:472

associated with them. The Council adopted a regulation under Article 215(2) TFEU whilst the Parliament argued that the regulation should have rightfully been adopted under Article 75 TFEU as this article stipulates individual sanctions for the prevention of terrorism and related activities.[176] The Court held that the regulation must be adopted based on a single legal basis that corresponds to the predominant aim of the regulation.[177] Furthermore, in the event a regulation is based on multiple legal basis the procedure prescribed cannot be incompatible.[178] By the Court's case law individual sanctions may also be adopted under Article 291(2) TFEU as ruled in the *NIOC* case. Notably from this case, the Court held that a Joint proposal is not considered a procedural guarantee because it is not afforded by Article 291(1) TFEU and is thus not required in all cases where restrictive measures are adopted.[179] Here the Court effectively excludes the participation of the HR/VP and Commission from the procedure. Such recourse could potentially undermine the coherence of the Unions external actions as the HR/VP is the designated body to ensure consistency.

4.3 Implementation in Member States

To implement the sanctions, Member States need to adopt their own national rules as far as the measures fall outside the EU's competence. Such is the case with, inter alia, visa bans.[180] Restrictive measures are enforced by Member States through CFSP decisions, regulations, and national law. A decision is legally binding on Member States[181] and according to Article 29 TEU, Member States national policies must conform with the Council decision. The Union currently employs a combination of EU acts and guidelines to ensure the uniform application of individual sanctions, these are 1) Regulation under Article 215 TFEU, 2) Guidelines, and 3) best practice acts.[182] A regulation is legally binding and requires no implementing measures in the Member States[183] however, for restrictive measures the regulation usually sets out instructions for the Member States to set up a competent national authority that supervises the implementation of sanctions and also lay down penalties for individuals who are not complying with the sanctions.[184] Member States are also required to have a legislative framework that enables them to take the measures provided for by the Union regulation, such as asset freeze, making economic resources unavailable, etc. The Member States are in these regards free to decide which structure suits their legal system, however, this

[176] Parliament v Council (n 175) [para. 12]

[177] Ibid [para. 43]

[178] Ibid [para. 49]

[179] Case C-440/14 P *National Iranian Oil Company v Council* [2016] ECLI:EU:C:2016:128, para. 45

[180] Russell (n 159) [6]

[181] Article 288 TFEU

[182] Giumelli F and others, 'United in Diversity? A Study on the Implementation of Sanctions in the European Union' [2022] 10(1) Politics and Governance 36, 36

[183] Article 288 TFEU

[184] Council of the European Union (n 73) [para. 25]

discretionary power has also led to uneven implementation of the sanction regimes.[185]

Looking at the different institutional frameworks two types can be identified: 1) 'top-bottom approach' and 2) 'bottom-top approach'. The former is an effort to keep the decision-making power within the Member State to a centralized agency. This will benefit uniform application but comes with the cost of losing local insights and adaptation which can decrease efficiency and bring uncertainty to appropriately implement policies. The reverse order will have the reverse issues. If the implementing power is conferred to a local agency, it will cause great local variations in the implementation but will be better adapted for the local circumstances. Member States have empirically adopted a combination of these approaches. Research published by *Giumelli et.al* concluded that the Member States' structure of the institutional framework was fragmented and complex with several agencies sharing the decision-making, authorization, and freezing responsibility. This caused a great variance in communication and respond times leading to direct factual inaccuracies and sometimes even no further support upon requesting the agencies.[186]

Variations can also be found in the different penalties the Member States are enforcing for violation of sanctions. The penalties usually vary depending on which provision has been violated and the severity of that violation. A notable example is Germany which has a maximum prison sentence of 15 years under aggravating circumstances and Denmark which only enforces a three-year prison sentence under similar circumstances.[187] Romania only imposes jail time for violations of sanctions related to dual-use goods. There are notable examples of Member States, namely Poland, and Spain, who do not impose criminal penalties but only administrative fines. Currently, Romania enforces the most lenient penalties through the Union with imprisonment only for limited violations and a maximum fine of 6,000 Euros. This can be put in comparison to the highest fine in the Union currently issued by the Netherlands which has a standard fine of 87,000 EUR to 870,000 EUR for legal and natural persons and a fine calculated on 10 % of the annual turnover for legal persons.[188]

The importance of uniform application of sanctions was highlighted by the court in *KADI I* due to the implication sanctions had on the internal market. The Court identified that unilateral adoption of sanctions could threaten the operation of the common market and distort competition as well as affect free movement rights.[189] The Member States are only bound by the instructions provided for by the regulation and the remaining supporting acts, guidelines

[185] Giumelli (n 182) [37]
[186] Ibid [40]
[187] 'Violations of Sanctions' (*Danish business Authority*) <https://danishbusinessauthority.dk/violations-sanctions> Accessed 10 may 2023
[188] Giumelli (n 182) [41]
[189] KADI I (n 57) [para. 230]

and best practice is not formally legally binding. However, guidelines in this area are adopted by the Council and hold political significance. They do not specify to such a degree that uniform implementation can be ensured. There is a natural reason why uniform criminal sanctions cannot be instructed or adopted by the Union, and it is simply because the Union does not have the competence to act within the area of Criminal law. However, for administrative sanctions, the Union can set out more precise instructions, which has been done in environmental law.[190]

[190] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC [2003] OJ L 275, Art. 16(3) and (4). See also case C-203/12 *Billerud Karlsborg and Billerud Skärblacka* [2013] ECLI:EU:C:2013:664

5 The impact of Constitutionalizing and Opinion 2/13

This segment will discuss the role of courts in constitutionalizing EU law and how fundamental rights have played a role in the legitimacy of EU law. Furthermore, attention will be on 'Opinion 2/13' which contains the last statement by the Member States, Commission, and the Court on the accession to the ECHR. 'Opinion 2/13' also contains several guiding statements by the Court which illustrate the position it has taken in the future development of fundamental rights.

5.1 Constitutionalizing and the role of the Court

As acknowledged in Chapter 2, foreign and security policy is an area that is closely tied to the sovereignty of a state and its ability to assert itself internationally. Whilst the historical development of CFSP has been cautious and mostly driven by informal procedures which later been stamped in law, the role of the judiciary has gone from non-existent to limited. Historically the Union's foreign and security policy has been shrouded in secrecy, using informal gatherings and virtually no accountability mechanisms.[191] The attitude the Member States have historically shared, and to some extent still are, is that the foreign policy area is contesting the sovereignty of the states which makes further integration and constitutionalizing of CFSP an unpopular development.[192] At the center of integration and constitutionalizing is the CJEU which obtains the monopoly of interpreting EU law. The CJEU exercises its power through various procedures such as annulment procedures,[193] Preliminary rulings[194] , and ensuring accountability through action for damages.[195] In the context of fundamental rights, the CJEU has taken a lead role in strengthening the status and protection of individuals and entities when it can do so. However, in the context of CFSP, the CJEU's role remains limited.

The role of the CJEU was not recognized until the 1970s when legal scholars started viewing the CJEU as a centerpiece in the development of the Union, and more specifically European integration. Political scientists have described the CJEU as a 'power', an 'activist' for integration, or a conventional supreme court that is limited by the 'political boundaries of judicial discretion'.[196] Landmark cases such as *Costa v Enel* which lays down the primacy of EU law and the ability to directly invoke EU law in national courts. [197] It

[191] Carolyn Moser and Berthold Rittberger, 'The CJEU and EU (de-)constitutionalization: Unpacking jurisprudential responses' [2022] 20(3) International Journal of Constitutional Law 1038, 1049

[192] Ibid

[193] Art. 263 TFEU

[194] Art. 267 TFEU

[195] Art. 340 TFEU

[196] Saurugger and Terpan (n 125)

[197] Case 6-64 *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66, 596

could be held that the CJEU is a self-empowering institution that enables itself to act within the system. Furthermore, the CJEU has managed to strengthen the position of fundamental rights and the four freedoms through its case law, which can be seen as an indirect political initiative taken by the CJEU.[198] However, the impact of the Court is contingent upon that their judicial decisions be requested by other entities, such as national courts or individuals. In this context, the principal-agent notion explains the relationship between Member State courts and the CJEU as CJEU acts as the agent and the Member States as the principals. The idea is that the CJEU was to guarantee the commitments the Member States made in the Treaties.

The ability of the Court to exercise and develop its case law is dependent on the Member States' willingness to collaborate with the CJEU which historically has varied throughout the Union. Some Member States resist the 'Europeanization of law' and are more reluctant to turn to the CJEU for, *inter alia*, preliminary rulings. Whilst the institutions of the Union were until the 90s acting on the trust of the citizens to govern the EU without much participation or accountable decision-making, this permissive consensus is now shifting. The shift is characterized by Member States challenging and bypassing CJEU case jurisprudence in various ways. The principle of primacy has limitations in relation to Member States' constitutions as these will prevail in the event of a conflict of laws.[199] The Constitutional court in Germany (BVerfG) challenged the supremacy of EU law stating that the CJEU case *Heinrich Weiss and Others* was *ultra vires* (beyond its power) and thus withdrawing the legal effect of the judgment in Germany.[200] The CJEU is balancing a fine line between being the agent and power to be reconciled with. The role of the CJEU is crucial to ensure judicial coherence between Member States and the protection of the fundamental rights developed within the Union.

The CJEU has historically been working towards gaining more relevance in the Union and has been doing this through a strategy of dialogue and persuasion.[201] This requires the Court to adhere to Member States' interests and public opinion.[202] Maintaining this balance is an important task for the CJEU but also stands in direct contrast to the constitutional role of the Court. The Union cannot be regarded as the 'owner' of a constitution, as the definition in classic constitutional theory states that 'international organizations cannot be endowed with a constitution because the latter results from the sovereignty of the people and is associated with statehood'.[203] However, EU law does not share the same traits as other international organizations and could arguably

[198] Saurugger and Terpan (n 125) [152]

[199] Ibid

[200] 'June infringements package: key decisions' (*European commission*, 9 June 2021) <https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743> Accessed 25 April 2023

[201] Saurugger and Terpan (n 125) [161]

[202] Ibid [160]

[203] Ibid

be regarded as a legal order separate from domestic law and international law. The main reason is that the Treaties are centered around the principle of supranationalism, which means that the EU is a legal and political entity that is above the Member States. Through the treaties, which all Member States signed, they have conferred power upon the institutions, including the CJEU, and the content of the treaties resembles that of a conventional constitution. Regardless, the Treaties won't let itself be easily defined as it does not constitute a proper federal constitution and the CJEU does not have the power to overturn national supreme or constitutional court's rulings.[204] One major task the CJEU has continuously endowed with clear constitutional character is the development of fundamental rights.

The CJEU has developed the general principles of EU law since the 1970s. These principles have been developed using multiple layers of law such as the principles of the Treaties and common traditions within the Union and the CJEU's case law. With the treaty of Lisbon, these were consolidated and clarified in the Charter and obtained primary law status. Focusing on human rights, these are derived from historical international law instruments. Since they have been incorporated into the Union's legislation the CJEU has been adamant about reassuring the primacy of EU law even in contexts that involve the ECHR. The CJEU issued 'Opinion 2/13' in December 2014 and addressed the question of whether the draft agreement on the accession of the European Union to ECHR was compatible with EU law.[205]

5.2 Opinion 2/13

Currently, the ECHR and its case law are incorporated into the CJEUs body of law through its general principles of EU law. The CJEU 'draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories'.[206] The Charter is also intended to be a legal instrument that ensures the protection of fundamental rights common to the Member States derived from the ECHR. In 2013 the Commission referred the Draft Accession Agreement [DAA] to an opinion procedure under Article 218(11) TFEU which would allow the Court to ensure its compatibility with the treaties.[207]

The Commission began with its opinion on the DAA, and in the area of CFSP, the focus was on attribution and effective judicial protection.

[204] Saurugger and Terpan (n 125) [161]

[205] Opinion 2/13, 'Accession of the European Union to the European Convention for the Protection of Human Rights' [2014] ECLI:EU:C:2014:2454), para. 1

[206] Ibid [para. 37]

[207] Butler Graham, *'Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations'* (Modern Studies in European Law) (Oxford: Hart Publishing 2021), 165

First, the Commission dealt with the issue of attribution, as the ECHR requires the act to be attributed to a Member State or the EU. According to the Commission, a measure shall be attributed to a Member State even if that Member State implements EU Law, including decisions under the FEU. That would entail decisions under Article 29 TEU leading up to individual sanctions. This would mean that Member States that are acting within the *common* foreign and security policy would be held accountable for the action they take based on such an EU act. The Commission goes further to state that this requirement will have the effect of precluding the ECHR's case law where international organizations have been held accountable for the actions of contracting parties when implementing resolutions of that organization.[208] The Commission concludes that it falls within Article 19(1) TEU for that Member State's court to guarantee legal protection regarding the actions on the part of that state.[209] The issue of effective judicial protection was further elaborated by addressing the issue of the limited jurisdiction of the CJEU.

The exact extent of the CJEUs jurisdiction will be set out in Chapter six but the Commission concludes that the internal remedy within the Union offers an effective remedy when combining the Union courts and the courts of the Member States.[210] The CJEU also gave its opinion on the ability of the Union to accede to the ECHR and the limitations within the area of CFSP.

Regarding the Member State's ability to accede to the ECHR, the CJEU submits the observations by the Member States, which are inconclusive. Whilst most agree that, according to the protocols that have already been signed by the Member States, accession would be possible, issues arise in the discrepancy between the Member States as to which protocols they have signed. The decision to conclude an agreement would require unanimity, and is, according to the CJEU, unlikely to be reached. Germany also submitted that the agreement must not affect the situation of Member States' relation to ECHR. Accession in the absence of unanimity, which would alter the Member States' relation to the ECHR, could breach the duty of sincere cooperation.[211]

Concerning the area of CFSP, the discussion amongst the Member States starts with the observation made by the UK that the Commission relied on case law that predates the Lisbon treaty and cannot be held permissible for the Commission's conclusions. The UK held that the jurisdiction of the court does not extend to Article 267 TFEU and that the rule in Article 275 TFEU should be interpreted narrowly. This position is shared by France who expressed concern over a broad interpretation of the rules governing the court's jurisdiction in CFSP. The French government held that broad interpretations of terms like 'restrictive measures' might lead to uncertainties in interpreting

[208] Opinion 2/13 (n 205) [para. 95]
[209] Ibid [para. 93]
[210] Ibid [para. 100]
[211] Ibid [para. 127]

the wording of Article 215(2) TFEU to expand beyond the intentions of that article.[212] The French government and the Netherlands held that restrictive measures should be understood as 'decisions imposing sanctions', which are limited to travel bans to the Union and freezing measures. The limitations of acts that are up for the CJEUs scrutiny present issues with Articles 6 and 13 ECHR as this would contravene the provisions on effective judicial remedy. The Council pointed out that these issues would only be relevant regarding the EU acts that are attributable to the EU since the Member States' courts would ensure the right to effective judicial protection in national courts for actions attributable to the Member State.[213]

The CJEU's statement on potential accession to the ECHR clarifies that such accession cannot affect the competences of the Union or the specific characteristics of EU law. The nature of EU law as a new legal order, where Member States have limited sovereignty and individuals within the Union are also subject to its laws, makes accession to the ECHR complicated. CJEU explains that the characteristics of EU law are such that it stems from the treaties, being an independent source of law, which holds primacy over Member States' laws. The application, development, and enforcement of EU law are derived from the institutions and the Member States, and this 'special structure' is a cornerstone in the 'process of creating an ever-closer Union among the peoples of Europe'.[214]

The CJEU argues in essence that the EU constitutional framework is based on a full set of legal rules to ensure its function. A potential accession to the ECHR could potentially disrupt this notion and would require a specific procedure and conditions adapted to the Union's current legislation.[215] One could argue that the CJEU requires authority over the ECHR rules and case law for it to be satisfied that the constitutional workings of the Union not be disrupted by an accession. The EUs fundamental rights are a critical component in the legal framework of the Union, and these are laid down and developed by EU law. However, as Article 52(2) of the Charter suggests, most of these fundamental rights in the Charter are reproduced in the ECHR and the CJEU observes the case law of the ECtHR without being bound by it. The CJEU still retains its sovereignty over the development and application of the ECHRs body of law. *Groussot et al.* argue that a potential accession to the ECHR could impact the mutual trust between Member States. This concept means in essence that Member States are required 'to consider all the other Member States to be complying with EU law and particularly with the fundamental

[212] Opinion 2/13 (n 205) [para. 131]

[213] Ibid [para. 135]

[214] Ibid [para. 167]; See also Article 1 TEU

[215] Jörgen Hettne and Xavier Groussot and Gunnar T. Pétursson, 'General Principles and the Many Faces of Coherence: Between Law and Ideology' in S. Vogenauer and S. Weatherill (Eds.), *General Principles of Law: European and Comparative Perspective* (Vol. 23, Hart Publishing Ltd 2017), 95

rights recognized by EU law'.[216] Mutual trust in heavily connected to the efficiency of EU law and without it, cooperation between Member States would be swarmed in litigation. *Groussot et al.* argues that since 'Opinion 2/13' there has been a 'European spleen' as the CJEU in its rhetoric distrusts the ECHR case law as it can have effects on the effectiveness of EU law. For the Union to accede to the ECHR it would have to be exempted from the founding principle of the ECHR which is equality of the contracting parties. Considering that the contracting parties are states, and the Union cannot be regarded as one, it would have to retain its 'special characteristics' by receiving special treatment in the ECHR context. Based on the reasoning of the CJEU such treatment would probably entail the *status quo:* autonomy and primacy of EU law.

It is through the preliminary ruling procedure the Member States 'sets up a dialogue' with the Courts to ensure that EU law is applied consistent throughout the Union and its full effect.[217] The CJEU stresses the autonomy of EU law as a crucial aspect of the future development of EU law and argues that introducing an institutional framework such as the ECHR could undermine this structure.[218] A potential accession to the ECHR would empower the institutions of that organization to lay down binding laws on the institutions and Member States of the Union which would have constitutional implications as this constitutes a conferral of power made by the Union and not its Member States. This issue is compounded by the fact that Member States would be allowed to seek advisory opinions from the ECtHR on questions related to the interpretation or application of ECHR law, creating a conflict with Article 267 TFEU's obligation to submit questions to the CJEU. This would further undermine the concept of mutual trust, not only between Member States but also between Member States and the CJEU. Overall, the CJEU expresses hesitation regarding accession to the ECHR, as it may disrupt the constitutional balance within the Union and create discrepancies between the independent courts of the Union and the ECHR.

In terms of the area of CFSP, the CJEU begins by acknowledging that there are limitations as to which acts fall within their jurisdiction. The CJEU does not specify the exact limitations of its jurisdiction and such a statement would not serve the CJEU as it would tie them down. However, if the draft agreement ought to be drafted so that it would respect the 'special characteristics of CFSP' the jurisdiction of the ECtHR would have to be equal to that of the CJEU. The limitations that would limit the CJEUs jurisdiction would not limit the ECtHR's which would entail that an outside body would have the ability to conduct further judicial review of certain CFSP acts that the CJEU.[219] Allowing the ECtHR to have jurisdiction would potentially open for further

[216] Hettne and Groussot and Pétursson (n 215) [96]
[217] Opinion 2/13 (n 205) [para. 176]
[218] Ibid [para. 181]
[219] Opinion 2/13 (n 205) [para. 255 – 256]

review by other external judicial bodies such as the International Court of Justice. Article 344 TFEU stipulates that disputes concerning the treaties must be dealt with by the Union Courts and the CJEU has confirmed in its case law that the reading of this article ought to be 'strict and narrow'.

Conclusively, because the DAA fails to have regard for the specific characteristics of EU law and that of the CFSP, the CJEU holds that the draft agreement does not allow for accession to the ECHR.[220] The CJEUs hesitancy towards opening for an additional legal review of EU acts is argued to be derived from its lack of trust in the Member States.[221] The CJEU is concerned that the possibility of review from a different court would undermine the CJEUs influence in the EU legal order. However, if the Court would allow for equalizing CFSP with other areas of Union action, the EUs external actions would become more integrated and allow for a more transparent foreign policy.[222]

[220] Opinion 2/13 (n 205) [para. 258]
[221] Butler (n 185) [262]
[222] Ibid

6 Jurisdiction of the CJEU in Individual Sanctions

The CJEUs jurisdiction on CFSP matters was virtually non-existent up until the Maastricht treaty. Pre-Maastricht CFSP was dealt with informally and Member States had not yet entrusted the Union with integrating CFSP into its institutional and judicial framework, including the CJEU. The case law that was developed under the Maastricht treaty extended the Court's jurisdiction arguably beyond the wording of the treaties. This segment will explore the CJEUs jurisdiction as it stands after the Lisbon Treaty, focusing on the protection of fundamental rights.

6.1 Legal basis for CJEUs jurisdiction

The Courts of the European Union are under the obligation to 'ensure that in the interpretation and application of the Treaties, the law is observed' and that the Member States provide effective legal protection in the fields covered by Union law.[223] The structure of Article 263 TFEU, Article 267 TFEU, and Article 277 TFEU ensures a complete system of legal remedies and procedures that acts to ensure judicial review of the legality of European Union acts.[224] The legality of an EU act essentially refers to whether the act at issue conforms to the legal framework established by the Treaties including the Charter. [225] For a claimant to have standing before the CJEU the conditions in Article 263(4) TFEU needs to be met.[226] In short, the act needs to be of direct or individual concern to them or, if no implementation measures are needed, of direct concern. For the national court to raise a question on preliminary ruling in CFSP matters the conditions in Article 263(4) TFEU needs to be met by the applicant.[227]

The CJEUs jurisdiction in CFSP is dictated by what is referred to as the 'Carve-out' and the 'Claw-Back' rules. These rules ought to be considered exceptions to the general rule in Article 19(1) TEU and should therefore, according to the Courts, be interpreted narrowly.[228]

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[223] Article 19(1) TEU

[224] Case C-72/15 *Rosneft* [2017] ECLI:EU:C:2017:236, Opinion by AG Tanchev, para. 38

[225] Article 263 TFEU; see also 'Annulment of legal acts by the Court of Justice' (*EUR-Lex)* <https://eur-lex.europa.eu/EN/legal-content/summary/annulment-of-legal-acts-by-the-court-of-justice.html> Accessed 11 May 2023

[226] Christina Eckes, 'Constitutionalising the EU Foreign and Security Policy: The ECJ accepts jurisdiction over claims for damages under the Common Foreign and Security Policy (CFSP)' *(VerfBlog*, 18 September 2020) <https://verfassungsblog.de/constitutionalising-the-eu-foreign-and-security-policy/> Accessed 15 April 2023

[227] Article 275(2) TFEU

[228] Rosneft (n 170) [para. 74]

Beginning with the carve-out rule it has been expressed by AG Wathelet as 'the unreviewable nature of certain acts adopted in the context of the CFSP'.[229] The rule is derived from the second subparagraph of Article 24(1) TEU and Article 275(1) TFEU. Even though the CJEU has been granted the opportunity to clarify which acts they intended to limit themselves from, it remains an open-ended question.[230] According to AG Wathelet, the CJEU has established that acts adopted under Articles 23 to 46 TEU and emanating acts fall outside the ambit of the CJEU review as far as its content relates to the sphere of CFSP implementation.[231] A provision is a 'CFSP' provision, according to AG Bobek, if it formally and substantively relates to CFSP.[232] In the case of *Elitaliana,* the CJEU concluded that measures adopted based on a Council Joint action were subject to the rules of EU public procurement law. Considering that the contract at issue fell under the rules of financial regulation the CJEU held that Article 24(1) TEU and Article 275 TFEU cannot be interpreted so extensively as to exclude the CJEU from interpreting and applying a provision of financial regulation in the context of public procurement.[233] AG Jääskinen argued based on Article 40 TEU that the CJEU is the guardian to ensure the delimitation of CFSP from the other competence areas of the treaties. Whilst the provisions in the Joint actions laid down provisions on the allocation of the EU budget, these provisions should fall under the review of the CJEUs. This logic is enforced because the CJEUs jurisdiction is undisputed if similar provisions would be found in an EU act not relating to CFSP. [234]

The CJEU has in its earlier case law reasoned on whether a CFSP measure touches upon other areas of the Treaties. The Court held in *KADI I* that a community measure that 'relates specifically to international trade and essentially intends to promote, facilitate or govern trade with direct or immediate effect on trade on a product' falls within the ambit of the CCP.[235] Furthermore, in the *Werner* case, the court held that a does not fall outside of the scope of CCP just because it has grounds in a CFSP objective.[236] The importance of clear criteria for the determination of whether a measure falls

[229] *Rosneft,* Opinion by AG Tanchev (n 224) para. 39

[230] See *Rosneft,* Opinion by AG Tanchev (n 202), para. 40. See also Case C-130/10 *Parliament v Council* [2011], EU:C:2012:472, Case C-348/12 P *Council v Manufacturing Support & Procurement Kala Naft* [2013] EU:C:2013:776, Case C-658/11 *Parliament v Council* [2012] EU:C:2014:2025 and Case C-478/11 P to Case C-482/11 P *Gbagbo and Others v Council* [2012] EU:C:2013:258, and Opinion 2/13 (n 183) para. 251

[231] *Rosneft,* Opinion by AG Tanchev (n 223); Case C-348/12 P *Council v Manufacturing Support & Procurement Kala Naft* [2013] EU:C:2013:776, para. 99

[232] Case C-14/19 P *CSUE v KF* [2020] ECLI:EU:C:2020:220, Opinion by AG Bobek, para. 61

[233] *Rosneft,* Opinion by AG Tanchev (n 223), para. 50; Case C-439/13 P *Eulex Kosovo v Elitaliana* [2015] ECLI:EU:C:2015:753, para. 48 and 49

[234] C-439/13 P *Eulex Kosovo v Elitaliana* [2015] ECLI:EU:C:2015:753, Opinion by AG Jääskinen, para. 60

[235] KADI I (n 57) [para. 183]

[236] Case C-70/94 *Fritz Werner Industrie-Ausrustungen GmbH v Germany* [1995] ECR I-3189, para. 10

within the ambit of other areas of the Treaties is crucial to determine whether the act at issue falls within the jurisdiction of the CJEU. In 'Opinion 2/13' the CJEU itself stated that certain acts were to be excluded whilst not specifying the limits. Regardless the Court proceeded to interpret the DAA which had clear CFSP and political aspects without hesitation. The exact extent of the Carve-out rule remains to be determined.

Moving to the 'Claw-back' rule which is stated in the second paragraph of Article 24(1) TEU and Article 275(2) TFEU. CFSP acts that fall under the 'Claw-back' are those not based in Articles 23 to 46 TEU and/or content relates to CFSP implementation. Eckes argues that the exception to the exception concerning individual sanctions should be interpreted broadly.[237] The acts in question are those that encroach on areas outside of CFSP and decisions laying down individual sanctions towards natural or legal persons. Acts which are intended to affect a third-persons legal standing and rights must be susceptible to the Court's review, regardless of the EU acts nature or form.[238] From the wording of Article 24(1) TEU and 275 TFEU, it gives the impression that it is only an action of annulment that might come into question. However, in the *SEGI* case, the CJEU opened the door for preliminary rulings.[239] For the Court to fulfill its obligations under Article 19(1) TEU it has to offer its full judicial capacity.[240] However, whether the current standing of the jurisdiction allows for interpretation is not clear-cut.

The Court has accepted jurisdiction on interpretation when the question has concerned staff management[241] and as previously mentioned, CFSP actions that relate to public procurement contracts. No preliminary ruling has yet been granted on interpretation when the decision has its origin in CFSP provision and concerns CFSP implementation. However, the Court received a request for a preliminary ruling from the Regional Court of Bucharest concerning CFSP implementation. The question submitted relates to national measures implemented to enforce CFSP Decision 2014/512/CFSP. In this context, the Romanian tax agency confiscated equipment and proceeds from Neves 77 due to their sale of radio equipment, which was manufactured in Russia, to an Indian company.[242] The company was also imposed a civil fine. As was held by AG Wathelet in *Rosneft* it should be no issue for the CJEU to exercise the more restricted review of preliminary ruling on interpretation than that of validity, which is much broader.[243] This would also increase the CJEU's options to interpret an act differently rather than annulling it or declaring it invalid.[244] However, the Court did not opt for a preliminary ruling on

[237] Eckes (n 226)
[238] Case C-355/04 P *Segi and Others v Council* [2007] ECLI:EU:C:2007:116
[239] *Rosneft*, Opinion by AG Tanchev (n 202), para. 62
[240] See Case C-192/18 *commission v Poland* [2019] ECLI:EU:C:2019:924
[241] Case C-283/20 *EULEX-KOSOVO* [2022] ECLI:EU:C:2022:126
[242] Case C-351/22 *Neves 77 Solutions* [2022] Request for Preliminary Ruling
[243] Ibid [para. 1–4]
[244] *Rosneft*, Opinion by AG Tanchev (n 202) [para. 75]

interpretation in *Rosneft* and instead ruled on validity.[245] Therefore, the case of *Neves 77* will have importance for the future development of the Court's jurisdiction in CFSP matters.

Considering that the national courts of the Member States are not allowed to rule on the validity of EU law in light of the *foto -frost* case[246], a denial from the CJEU from jurisdiction on interpretation would create a void. Moreover, the purpose of the judicial review under Article 267 TFEU is to ensure uniform application of EU acts in Member States, and as the CJEU expressed itself in 'Opinion 2/13' - 'open a dialogue between them (the CJEU) and the Member States.' As emphasized under the development of the CFSP uniform application and coherence stands at the heart of CFSP. The Court's ability to be able to fully deploy Article 267 TFEU also connects to the objectives of the Union and the founding principles of the Union which is the 'rule of law and the universality and indivisibility of human rights and fundamental freedoms.' As individual sanctions based on Article 215(2) TFEU are raising manifest issues with fundamental rights the preliminary ruling procedure becomes crucial to ensure conformity with the right to effective judicial protection and the Court's obligation under Article 19(1) TEU. Considering the Court's statements in 'Opinion 2/13' regarding the discrepancy between the Union court's jurisdiction and the jurisdiction of the ECtHR in the event of an accession, a potential extension of the court's jurisdiction would possibly contribute to enabling an accession to the ECHR.[247]

There are two main exceptions to the limitations of the CJEUs jurisdiction on CFSP. Firstly, the CJEUs jurisdiction according to Article 40 TEU is delimiting the area of CFSP from other foreign policy areas of TFEU. This article serves the purpose of ensuring that CFSP procedures are not used to adopt non-CFSP measures. This article has constitutional elements and bestows upon the CJEU to ensure that the institutions of the Union are working within their conferred power and competence.[248] Article 40 TEU serves to protect the institutional balance within the Union and opens a door to questioning the aims and objectives of the act at issue. However, as discussed previously, the ambivalence in the exact limits of the Union's different foreign policies makes review under Article 40 TEU a superstitious exercise. The Second exception relates to protecting fundamental rights and especially the principle of effective judicial protection. This exception has been added post-Lisbon with the development of individual sanctions.[249] It has been held that it is the

[245] Rosneft (n 170) [para. 81]

[246] Case C-314/85 *Foto-frost* [1987] ECLI:EU:C:1987:452, para. 19

[247] Christian Breitler 'Jurisdiction in CFSP Matters – Conquering the Gallic Village One Case at a Time?' [*European law blog*, 2022] <https://europeanlawblog.eu/2022/10/13/jurisdiction-in-cfsp-matters-conquering-the-gallic-village-one-case-at-a-time/> Accessed 4 May 2023

[248] Panos Koutrakos, 'Judicial Review In the EU's Common Foreign and Security Policy' [2018] 67 (1) ICQL 1, 7

[249] Ibid [7] – [8]

individual nature of these measures that enable access to the Union courts.[250] Furthermore, individual sanctions are adopted under Article 215 TFEU which is not a provision that is covered by the claw back rule, therefore the court is not limited regarding such regulation.[251] However, the exact extent the CJEU may go to ensure the protection of fundamental rights continues to develop cautiously.

In the *Rosneft* case, the applicant pleaded that the actions taken towards Rosneft were not necessary or proportionate to the aims being pursued by the Union. This enables the court to review the fundamental rights of the applicant and particularly their right to property and right to conduct business. The court stated that the 'European Union legislature must be allowed a broad discretion in areas which involve political, economic, and social choices on its part, and in which it is called upon to undertake complex assessments'.[252] Such an act's legality can only be affected if the measure is 'manifestly' inappropriate. The threshold for 'manifestly' was not given much attention in that case and has not been revisited extensively in later case law. Lastly, the rights relied on by Rosneft are not absolute, as is the case with most rights in the Charter. The Court reasoned that the essence of the rights was not being affected and that any harm caused to fundamental rights in the proximity of Rosneft or if Rosneft themselves was to be deemed a wrongful target, restrictive measures, 'by definition', will cause harm to persons and entities who are in no way responsible for the situation which caused the sanctions.[253] These statements by the CJEU could illustrate the tough position and the political complexity surrounding the Union's sanction regime.

6.2 A Dworkinian perspective on the Court's Jurisdiction

Ronald Dworkin is a legal philosopher that argued that law and morality are two systems that contain their own 'collection of norms'. Dworkin studied how these two-systems interacted and whether the content of each system affected the other. The overarching question presented by Dworkin was 'how far is morality relevant in fixing law content on any particular issue?'.[254] In Dworkins' latest work, '*Justice for Hedgehogs'*, he introduces a one-system where the two separate systems become symbiotic. He argues that law is a branch of political morality.[255] Dworkin does not believe that Courts create law by their discretion if there is no applicable statue or decision, but rather

[250] Rosneft (n 170), para. 103; Case C-478/11 P *Gbagbo and Others v Council* [2013], ECLI:EU:C:2013:258, para. 57

[251] Rosneft (n 170) para. 106; KADI I (n 57) para. 362

[252] Ibid [para. 146]

[253] Ibid [para. 149]; Case C-84/95 *Bosphorus* [1996] ECLI:EU:C:1996:312, para. 22

[254] Hugh Baxter, 'Dworkin's 'one-system' conception of law and morality' [2010] 90 Boston University Law Review 857, 858

[255] Lawrence G. Sager, 'Putting Law in Its Place', in Wil Waluchow, and Stefan Sciaraffa (eds), *The Legacy of Ronald Dworkin* (Oxford Academic, 2016), 117

that the judge *interprets* what is already a part of the legal material. By this interpretation, the judge gives a 'voice' to the values to which the legal system is committed.[256] In every legal system, there are 'Hard Cases' in which there is no applicable statue. For the judge to solve these cases he/she needs to engage in interpretation of the law based on moral deliberations. This aspect was cherished by AG Mancini in the case of *Les Verts* as he stated:

> '[…] The obligation to observe the law takes precedence over the strict terms of the written law. Whenever required in the interest of judicial protection, the Court is prepared to correct or complete rules which limit its powers in the name of the principle which defines its mission'.[257]

According to Dworkin law does not only consists of rules but also 'non-rule' standards. These standards can have their roots in moral or political standards. These standards are derived from the judge as he or she tries to connect his decision to the best moral theory that fits the whole legal and political system. [258] Dworkin's theory takes a holistic grasp of the legal system and does not let itself confine itself to isolated 'pillars'.

Dworkin suggests there are three tools accessible to his judge: 1) rules, 2) principles, and 3) policies. Rules are binary, whether they are applicable or not. So far it is a valid rule that the case needs to be decided following the rule. The second tool, a 'principle', describes rights and provides the judge with a standard to decide his case. The principle needs to be weighed with other principles in the legal system to reach a conclusion that fits into the 'morality' of the system. The last tool, a policy is a standard that sets out an objective or a goal to be reached.[259] A combination of these tools will give the judge the ability to solve the cases before him and he or she must always be anchored in the moral values of his community and regard the judicial system.

This Dworkinian approach should be set with the constitutionalizing in the EU law context, and especially CFSP. The act of constitutionalizing refers to developing and applying common EU norms and principles which are developed through the institutions and Member States of the Union. Constitutionalizing is arguably a prerequisite for democratic legitimacy. As Hebermas' argued comes democratic legitimacy from constitutionalism and the rule of law.[260] Especially important is the content and ultimately, protecting of fundamental rights as this supports democratic legitimacy. The two aspects of

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[256] Raymond Wacks, '*Philosophy of Law: A Very Short Introduction'* (2nd edn, Oxford Academic, 2014), 51

[257] Case 294/83 *Les Verts* [1986] ECLI:EU:C:1985:483, Opinion of AG Mancini, para. 7

[258] Wacks (n 256) [53]

[259] Ibid [55]

[260] Christina Eckes, 'Common Foreign and Security Policy: The Consequences of the Court's Extended Jurisdiction' [2016] 22(4) European Law Journal 492, 495

fundamental rights, namely their substance and their protection, can be said to be handled by two separate institutions. It is the political institutions of the Union that fill its content and it is the Court that enables its judicial review and strikes down on the content or its handling. This relationship can be viewed as either augmenting or interference with the democratic process.[261] Both the notion of Dworkin and Habermas is based on the ability of the court to continuously decide on 'Hard Cases' and with this in mind the area of CFSP creates a difficult arena for Dworkinian courts to further develop the law beyond the letter but within the moral of EU law.

The area of CFSP is peculiar, so far that the Member States have transferred part of their sovereignty to the Union, which itself adopts an intergovernmental procedure and limits judicial review without incorporating the voice of the people in the Union, namely the Parliament. Arguably the CJEU would be able to counterbalance this omission by protecting fundamental rights throughout the whole chain of CFSP procedures and implementation. The CJEU seems not to adhere to such an opinion considering that they have expressed a reluctancy to conduct judicial review of Member States actions in a CFSP context. Both the Commission and CJEU were adamant about the fact that the Union was not to be held accountable for actions that would breach fundamental rights and that such breaches should be dealt with in national courts,[262] even if these breaches emanated from CFSP acts. Introducing national courts as a rule rather than the exception would deprive the CJEU of increasing its ability to ensure that public power is exercised in accordance with the law and especially with due regard to fundamental rights.

Considering that the area of CFSP can be described as the highest point of politics, it is no surprise the line between the political decisions and the legal framework regulating such decisions becomes blurry. This creates a context in which the distinction between the judicial branch and the political branch becomes problematic. Martin Shapiro views the courts as an extension of the political system and Landfried argues the court's judicial review could interfere with the public realm in the event the Courts adjudicated on political decisions.[263] However, the Court has managed to keep its foot in both camps. The CJEU is in a peculiar situation when it comes to interpreting EU law, especially the content of fundamental rights and how these should be applied. Fundamental rights are derived from two main legal orders outside EU Law, Member States constitutions and international law.[264] Considering the different roots of fundamental rights and the CJEUs statements in 'Opinion 2/13' it would suggest that there is a hierarchy amongst the legal sources where fundamental rights should derive their substance from.[265] In light of the

[261] Eckes (n 260) [495]
[262] See text to n 178
[263] Eckes (n 260) [495]
[264] Hettne and Groussot and Pétursson (n 215) [80]
[265] Ibid [81]

discussion about the mistrust expressed by the CJEU towards the ECtHR, the CJEU seem to wish to remain the sole interpreter and potentially, substance maker for fundamental rights. Whilst it is worth acknowledging that the CJEU based its argument on the threat to the effectiveness of EU law,[266] the consequences of limiting the court jurisdiction and commitments, reach far into the Court's ability to develop its cherished fundamental rights and arguably, could have political dimensions.

[266] Hettne and Groussot and Pétursson (n 215) [95]

7 Analysis

This thesis has examined three aspects of the CFSP and the protection of fundamental rights, namely 1) the historical aspect, 2) the institutional aspect, and 3) the judicial aspect. By combining these three aspects it has become evident that each one presents its own set of challenges. Considering that fundamental rights are heavily affected by target country citizens and individuals who are sanctioned, it is crucial that the policy-making body can draft well-considered actions which minimize adverse effects. To understand the protection of fundamental rights in individual sanctions it is important to look at CFSP from a holistic perspective to identify where in the decision-making chain and legislative-chain fundamental rights are brought to attention and where it is enforced. When we examine the historical aspect as a starting point, it becomes evident that the Member States were obstructing CFSP integration.

The first chapter of this thesis begins with a brief explanation of what constitutes a sovereign state and what factors contribute to a state's sovereignty. According to the literature studied in this thesis, states are very protective of their image and status in the international community. This image is built by exporting national values and being able to choose which states they cooperate with. Who the state chooses to cooperate with depends on whether they believe they share the same geopolitical perspective and who/what they perceive as threats. Cooperation is done through diplomatic channels and by concluding agreements and being a part of international organizations. A state's ability to choose who to cooperate with allows them to build an external image and stands as a cornerstone in asserting its independence. A state who gives up the ability to make decisions for itself externally will be heavily impaired in its ability to export the values they have created within its territory and risks challenging its international image. However, an EU membership obliges loyalty to the decision of the Union and eventually when it comes to foreign policy, adhering to the Union's position.

Interestingly there seems to be a connection between the CJEU's protection of fundamental rights and the willingness of Member States to adhere to the primacy of EU law. This would suggest that for the Union to be successful in its foreign policy it needs to ensure that the policy exported does not infringe on fundamental rights as this would undermine the Member State's core values. Ultimately, it is the Member State who drives the developments within the Union by amending the treaties and with this background in mind, it might serve as an explanation as to why the Member States have been reluctant to develop the area of CFSP too rapidly and especially to confer extensive power to the Union.

Under the EPC era, the Union's foreign works were informal and secretive. It comes as no surprise that the Member States during this era would be hesitant

towards allowing their foreign relations to be dictated by the opinions of other Member States who do not share the historical relationships, context, or perspective as themselves. The Union was never intended to become a state and it seems so that the Member States tried to hold on to the last frontier of their exclusivity being their foreign politics. The development of CFSP can be viewed as a limitation on Member States' ability to conduct their sovereign foreign policy which could explain why the intergovernmental governance structure was chosen. A strong indication of this is the reluctance to even draft written declarations by the heads of government. However, it seems that the perspective changed during the late 80s and 90s as the CFSP was granted more power and was given a higher amount of 'trust' by the Member States. Similarly, fundamental rights became codified in the SEA act in the late 80s which set the foundation for the later development of the export values of the Union. During this pivotal stage, the EPC/CFSP was formalized, and the Union started to act on the international stage with more official EU acts. It is clear from the content of the demarches that the Union wished to export its human rights value by condemning states that were in breach of such rights. The Member States were likely observing the growth of the Union as a concept and were expecting results before allowing more power to be conferred to the Union. As the results grew and the Union managed to cooperate with the UN and US on the international stage, Member States probably saw the advantages of adhering to a *Common* foreign and security policy.

The development was cautious however, up until the Lisbon treaty the acts emanating from this area were still governed by international law and the Member States would not allow a major shift from the *status quo*. The same was true for the status of fundamental rights as these were only vaguely referenced in the treaties and were governed by international law. The development of sanctions during this era was not without controversy as the Union used articles that were intended to be used in 'threats of war' was now used to exert political pressure, something that not all Member States agreed with. It was a stark contrast from the historical usage of soft-law instruments such as demarches and declarations.

With the introduction of the Maastricht treaty, the Union received a full makeover with the 'pillar structure', and the CFSP even got its own pillar. This was a clear indication that CFSP matters would be governed separately from the rest of the Union's matters. The institutional changes such as the installation of the HR and the newly introduced ability by the Council to adopt common positions and Joint Actions were developments that strengthened the Union as a geopolitical actor and a coherent force. This would inevitably enforce the Union's ability to exercise an effective foreign policy as the Member States would be bound by the EU acts through the treaties and not only under international law obligations. During the Maastricht era, the Member States saw a lot of geopolitical unrest and the Union wanted to position itself as a power to reconcile with. During the sanction decade, the Union gained a lot of

traction and used the ability to sanction even though it became apparent that the sanctions had an uncertain legal basis. However, after the KADI saga, the Union adopted frameworks to formalize the procedure of sanctions, which was a welcome feature to strengthen the fundamental rights aspect of sanctions. The Maastricht era also reflects the pivot from general sanctions to smart sanctions. A potential explanation for this shift is the increasing awareness of the adverse human rights effects of sanctions.

The Lisbon treaty stands as the biggest institutional change to CFSP and an embodiment of the lessons learned throughout history. The drafters wished to beef up the institutional framework of the CFSP and to connect it to the other areas of the Union by including the Parliament and making the high representative vice-president of the Commissioner's office. The Union was now exercising its external power in regional conflicts and lifted its historically secret work to the spotlight by issuing public reports on the policies that were being exported by the Union. This increase in public awareness would also put increased pressure on the Union to be an international actor who adheres to fundamental rights. Historically foreign policy could be decided and implemented from the scrutiny of the public, but under the Lisbon Treaty, the Union's foreign policy entered the public eye. This can only be seen as a positive development as transparency and accountability increase and this seems to have been noticed by the CFSP representatives as they now issue public reports on their human rights work. The Lisbon treaty enabled more forceful actions and with the introduction of the Passerelle Clause, Member States had to find themselves in a position where their external powers were hollowed. Inevitably this sparked discussion regarding the 'two-speed' Europe, which serves as another example of how Member State sovereignty was chipped away.

One of the biggest milestones for fundamental rights took place during Lisbon Treaty, namely the Charters' entry into primary law and the commitment to accede to the ECHR. Since the equalization of the charter the Union has released a strategic framework and reminded that human rights must be a cornerstone in the Union's legislative procedures and decision-making. Looking historically at the status of human rights these have usually been anchored in soft law instruments and been difficult to enforce. The equalized status of the Charter serves as one of the greatest developments for CFSP because a primary law source of fundamental rights would positively influence democratic and legitimate actions even in the foreign policy field.

Conclusively, the historical development of the Union's external relations and the usage of sanctions has been cautious. From the findings of this thesis, it is evident that the Member States have slowly adhered to the idea of collective foreign politics and action. Member States have had to make concessions to their sovereignty but have been rewarded by increased strength in numbers. A part of the concession to the Union can be explained by the fact that the

Union has become more value-driven in its external relations and that values are derived from the Member States and collective development. With the enactment of a set of foreign objectives and the Charter, which acts as a working project of common values, the Union has gained the trust of Member States. This has also led to an increase in the status of fundamental rights as democratic principles and protection of fundamental rights are core values that the Member States demand from the Union to recognize its primacy.

Studying the institutional development of CFSP there were little to no developments until the Lisbon Treaty. During the EPC era, there was no official organization but rather informal meetings between state representatives, usually diplomats. The individuals who developed the Union's external affairs during this era had little connection to the people of the Union and they did not anchor their discussions with the rest of the community's institutions. This slowly changed during the EPC and Maastricht era as the Commission, parliament, and the European Council were integrated into CFSP procedures. The installation of the HR was a necessary tool to create a glue between the different representatives and to have access to one individual who had a holistic view of the work of CFSP.

In the spirit of the Lisbon treaty, to abolish the pillar structure, it was no surprise the drafters integrated the HR as vice president of the Commission's office as this would integrate CFSP further into the rest of the Union's decision-making. Seeing the new HR/VP and the Commission work closely and supervise the area of individual sanctions allows for the treaties to be respected at an early stage of the political and legislative procedure. Furthermore, the capacity of the HR/VP strengthened with the increase in working groups within CFSP such as the EEAS and EUSR. As these working groups are specifically adopted to strengthen fundamental rights in CFSP the awareness and implementation of fundamental rights aspects becomes more streamlined.

The legal status of the Charter has positively affected the number of guidelines and working documents that the institutions have access to and even if these documents are not legally binding, they have political significance and form a part of the Unions value creating effort. Considering the complexity of adopting economic coercive measures and the potentially devastating effects they may have a combination of interdisciplinary human rights-focused institutions is key in developing this area. The HR/VP also acted as a guiding shepherd in the Union’s work as the role requires that all the different institutions within the workings of CFSP are represented in the decision-making which is crucial to protect the objectives laid down by the treaties. Furthermore, the HR/VP ensures that the Parliament's opinion on the CFSP policies is being considered, thus ensuring a voice of the people in the Union's foreign policy. From a critical viewpoint, it is difficult to comprehend exactly who-does-what within the area of CFSP. As all these institutions are covered under

the objectives in Article 21 TEU, there is no clear division of task that would indicate which one of the numerous institutions ensure fundamental rights in individual sanctions or sanction in general. The implementation of sanctions today is fragmented amongst the Member States, and it is difficult to obtain an overview of how the sanction regime is enforced through the Union. This may provoke issues regarding differences in criminal penalties being imposed due to sanction violation and uniform implementation. Whilst there are obvious difficulties with having a centralized agency within the Union it would be beneficial for the coherent applications of the sanction and ensuring fundamental rights protection in the implementation phase of the sanctions. It seems so from the structure today that the HR/VP will be the one ultimately responsible for the protection of fundamental rights in the decision-making and legislative procedure of individual sanctions.

The Courts maintained for a long time a limited role in developing the area of CFSP. It was not until the Lisbon Treaty they received the ability to review certain acts and aspects of CFSP actions. Historically the reluctancy to allow the Courts to review CFSP acts most likely lies in the sensitive political nature of CFSP decision-making. Allowing a Court review of the CFSP decision would threaten to expose the Member States' foreign politics in ways that would not happen in the national legal framework. However, the role of the Court became increasingly important as the CFSP decision would have a heavier impact on the global community. There are clear signs that with the emerging sanctioning and development of fundamental rights, the Court was allowed a more active role in monitoring at least CFSP acts that would affect a third-persons legal standing. Regardless, the review remains limited.

Based on the current text of the treaties individual sanctions have the strongest protection by the Court. However, from the findings of this thesis, there are gaps in terms of which acts may be subject to review and how extensive this review is. However, the Court reviewed the decision to accede to the ECHR without limitations. The DAA has heavy political implications considering that accession is provided for by the treaties, an amendment of the treaties decided on by the Member States. Yet, the Court obstructs the accession by commenting on how such action would affect the Union and Member States politically and judicially. Why this assessment was accepted in this context but has not been exploited in CFSP is an open-ended question. Furthermore, the court has described CFSP decisions and regulations stipulating individual sanctions as ‘Carbon Copies’ which would call for judicial review of both since potential issues in the regulation would emanate from the decision. Considering that the restrictive measure against Bosnia is only confined to a decision, this logic could prove a huge gap in the access to justice for individuals subject to decision-based sanctions.

The case law has developed the scope of the jurisdiction into areas that arguably go beyond the text of the treaties. These extensions, however, are based

on the argument that the CFSP regulation touches upon other areas of the Union and therefore needs to fall under the court's jurisdiction. The Court surely acts as a guardian of the procedures laid down by the treaties. However, just because procedural breaches are easy to identify and can be based on objective criteria, the Court should not shy away from entering the domain of fundamental rights in CFSP for the benefit of advancing the values of the Union.

When it comes to individual sanctions and the judicial review of the substance, the Court is cautious about developing the exact rationale for infringement on fundamental rights. This can be explained by the court's explanation that CFSP decisions are preceded by 'complex political assessments' that the court is restricted from interpreting or reviewing. This presents a huge gap in the protection of fundamental rights since the proportionality and necessity review is based on an analysis of the underlying objective *and* consequences of an EU act.

I contest the notion that a judicial review of the impact of sanctions on fundamental rights would have to enter the political realm. As all limitations to fundamental rights must be proportionate, it would be able for the Court to rely on statistical analysis and empirical observations to conclude whether an action *is* or is likely to result in disproportionate or unnecessary consequences. Through a data-driven analysis the Court would be able to develop the design of sanction to be compliant with its case law, and even better, develop the sanction design and deliberations to limit adverse effects on human rights. Whilst I acknowledge the awkward request that the Court conduct a data-driven analysis in its legal deliberations, I believe it is necessary for individual sanctions, considering the proximity effect of sanctions and shed light on 'unintended consequences'. It is not until the sanctions have been drafted and implemented that we can observe potential unforeseen consequences, hence the institutions have played out their role at that time. A likely scenario is that a legal or natural person initiates a proceeding in a national court or European Court bringing the question for the Courts to handle. Therefore, the Court must be equipped with the capacity to rule on the questions put to them or at least refer the matter to a competent institution after an initial assessment. Whilst the case law has come a long way when it comes to listing criteria, it will continue to be impossible for the Court to lay down guidance on which infringements are deemed necessary and proportionate if it continues to limit itself from applying data-driven and empirical review of disputed sanction regimes. By continuing with a limited review, the true cost and thresholds for the limitation of fundamental rights are kept secret. This is not a request to the Court to interfere with political deliberations but a petition to add a layer of Dworkinian reason to the political 'truth' by applying all available layers of principles, rules, morals, and data to achieve justice.

Should the Court engage in CFSP deliberations to promote fundamental rights? The Dworkinian approach to the role of the Court would say yes. It has been shown in this thesis that the primacy of EU law rests on the Court's ability to ensure that fundamental rights are protected and complied with the constitutional traditions of Member States. The Court's ability to bring legitimacy and trust in the EU is crucial for its longevity. The development of a constitutionalizing court must regard all areas of EU law and action. The principles developed in the case law have a tremendous political impact as this sets the standard for the Union's politics. Whilst the area of CFSP wishes to hold policy and law separate, it can be said that policy pulls, and law pulls back. This thug of war is what retains the balance in the separation of power and allowing a policy to pull without review is a forfeit to the old ways of unhinged foreign politics. The Union and the CJEU have developed a moral persona through the judicial and political work of strengthening fundamental rights in virtually all areas of the Union's actions. However, there is a discrepancy in how far the Court is willing to go for future development. Whilst the Court argues in ‘Opinion 2/13’ that they will lose the monopoly on EU law and how that would be damaging to the judicial framework of the Union, they remain ambiguous and cautious on individual sanctions which account for tremendous fundamental rights deliberation. Surprisingly, the Court is unwilling to take this opportunity of strengthening fundamental rights, not only within the Union but also the values that the Union exports.

8 Concluding remarks

From observing the three aspects of the CFSP it becomes clear that the historical hesitancy has limited the institutional and judicial development of fundamental rights in the area of CFSP. It is not so that the Member States have chosen this path, but it is rather a consequence of the Member States' actions to maintain their bit of sovereignty in this area that has led to this unfortunate result. The Union has found itself in a deadlock regarding the development of CFSP since Member States wish to gain the advantage of strength in numbers but not cost them their autonomy in external relations. Therefore, to answer the question presented in this thesis: No, the historical, institutional, and judicial development in CFSP has not contributed to the strengthening of fundamental rights. This answer requires an explanation.

Fundamental rights have been strengthened within the Union since the EPC era. By adopting the Charter into primary law, the national and Union courts can enforce fundamental rights much more effectively than before the adoption of the Charter. However, in the area of CFSP, effective enforcement is blocked by the limited jurisdiction of the Court. Considering that the Court is not able to develop the handling of fundamental rights in this context, the institutions are left with soft-law instruments such as guidelines and best practices. The issue of strengthening fundamental rights in this context thus lies in the fact that the court cannot review, and it is not possible to enforce a potential breach of soft-law instruments through any other institution within the Union. Although CFSP is ostensibly concerned with human rights considerations, there is a notable absence of a robust accountability mechanism to ensure or scrutinize whether it aligns with the evolving social development of fundamental rights. To ensure such a conclusion, the area of CFSP must become more transparent, susceptible to review, and able to rely on case law, which today is scarce.

Whilst Russia’s aggressions against Ukraine serve as a clear scenario whereas fundamental rights for individuals that promote, benefit, or aid these atrocities in any way must be limited, CFSP measures are being enforced globally in numerous situations. The Union has effectively weaponized fundamental rights by being able to withdraw them in undefined circumstances. It goes for all adverse actions; it should not be deployed indiscriminately and should not affect the civilian population who find themselves imprisoned in a totalitarian regime. Returning to the title of this thesis, namely "Sins of the past," which refers to the inherent conflict between the self-centered motives of Member States and their aspiration to establish collective protection, a contentious political landscape has emerged, thereby limiting the ability of EU institutions to undertake essential actions. These institutions find themselves constrained, unable to legislate and operate in a manner that effectively serves the Union's overarching objective of promoting fundamental rights in its external action and the goal of exporting consistent values that are universally applicable.

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