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a cura di Rosa Palavera, Nicola Pascucci, Cecilia Valbonesi

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REFLECTIONS ON THE LEGITIMACY AND LIMITS OF EU SANCTIONS IN THE CONTEXT OF INTERNATIONAL CRIMINAL LAW

Magdi Nicoletta Vecchiet

1. THE LEGITIMACY CRISIS OF INTERNATIONAL CRIMINAL JUSTICE

The International Criminal Court (ICC) today faces a complex challenge in applying its mandate on a global scale. The context in which it operates is uneven and marked by double standards, as evidenced by the Security Council (UNSC)'s selective practice of referring situations to the Court. With a few important exceptions, the exercise of jurisdiction by the ICC requires the consent of the state where the crimes were committed or the state of nationality of the accused[1]. Representatives of the most powerful states thus remain outside its reach, reinforcing the sense of politicisation of the system. Thanks to their position as non-party states and their veto power within the UNSC, China, Russia, and the United States manage to escape the Court's jurisdiction, despite having repeatedly authorised the opening of investigations into alleged crimes committed on the territory of other non-party states[2]. These dynamics only fuel the perception of selective justice or "victor's justice", the worrying disparity between

1 R. Cryer, *The philosophy of international criminal law*, in A. Orakhelashvili (ed.), *Research handbook on the theory and history of international law*, Cheltenham-Northampton 2011, 560 ss.

2 Moreover, all institutions of international criminal justice, while claiming universal and autonomous authority, structurally depend on the states that establish them, either directly or through international organisations, and guarantee their functioning through political, operational and financial resources. See J.-M. Iyi, *Is international criminal justice the handmaiden of the contemporary imperial project? A TWAIL perspective on some arenas of contestations*, in F. Jeßberger, L. Steinl, K. Mehta (eds.), *International criminal law. A counter-hegemonic project?*, The Hague 2020, 13 ff. The expression of liberal legal cosmopolitanism, indeed, cannot be detached from the context in which it operates: however, much power may be camouflaged through technical-legal operations based on expertise and compliance with rules, courts act as political actors, collecting, processing and redistributing power. See S. Vasiliev, *The crises and critiques of international criminal justice*, in K.J. Heller, F. Mégret, S.M.H. Nouwen, J.D. Ohlin, D. Robinson (eds.), *The Oxford handbook of international criminal law*, Oxford 2020, chap. 27; R. Dicker, *The International Criminal Court (ICC) and double standards of international justice*, in C. Stahn (ed.), *The law and practice of the International Criminal Court*, Oxford 2015, 3 ff.

the victorious and defeated powers, despite the awareness that the effectiveness of the system cannot be separated from the cooperation of all members[3].

The central question addressed in this article is therefore whether, given the structural limitations of international criminal justice, EU restrictive measures can be regarded as a legitimate complementary response to international crimes, or whether their increasing use risks giving rise to new forms of selectivity, politicisation and regulatory fragmentation. The article argues that such measures can, in any case, be considered necessary in the face of a legal and political silence that international criminal law has left partly unresolved. Nevertheless, whilst they may function as a means of complementary accountability, their legitimacy depends on clear limits, effective safeguards and a careful distinction from criminal punishment.

As is well known, the international criminal justice system was established with the fundamental aim of ending impunity for the most serious crimes and has derived significant moral legitimacy from this inspirational purpose[4]. However, this original legitimacy cannot be considered to extend to all the system's modes of operation automatically, nor has it, *per se,* guaranteed the overall legitimacy of its activities in the long term[5]. The question of legitimacy is therefore a recurring theme in the numerous criticisms levelled at institutions, practices, rhetoric and the practical effects of international criminal law (ICL)[6]. It seems unlikely that the current system is successful in deterring potential perpetrators of international crimes, rehabilitating or reintegrating convicted offenders, or fostering reconciliation among post-conflict communities[7]. Put differently, while the international criminal justice system continues to embody an essential normative and enduring aspiration to accountability, its ability to realise that commitment in practice remains necessarily conditioned by jurisdictional limits, dependence on state cooperation and wider geopolitical constraints. As

3 I. Marchuk, *The fundamental concept of crime in international criminal law. A comparative law analysis*, Berlin-Heidelberg 2014.

4 Given the breadth of the concept of 'legitimacy', it should be clarified that, for the purposes of this paper, the term is used in its substantive and functional sense. It refers not only to the formal legality of a measure, but also to the source that permits the exercise of public authority and which is subject to the criteria of regulatory consistency, procedural fairness, proportionality, respect for fundamental rights, democratic accountability and effectiveness. From this perspective, the legitimacy of the restrictions applied by the EU must be assessed using as a benchmark any serious violations of international law and the related consequences provided for by the legal system, without, however, circumventing the safeguards traditionally associated with criminal liability and international criminal justice.

5 L. Arroyo Zapatero, *The criminology of war and the criminal policy of the European Union*, in Contemporary Criminal Law: Quarterly Review 4 (2023) 1-14.

6 S. Vasiliev, *The crises and critiques* cit.

7 *Ibidem*.

a result, responses to some of the most pressing international crises may, in certain circumstances, prove delayed, partial or uneven, and may even give rise to forms of institutional silence.

And it is precisely in this realm between aspirations and institutional constraints that decentralised accountability mechanisms have taken on increasing importance. Their emergence should not be interpreted as a rejection of international criminal justice, but rather as an attempt to support its fundamental objectives through alternative or complementary institutional channels.

Crimes committed in Syria, Iraq and Ukraine have stimulated national and local justice initiatives, with communities independently documenting atrocities and promoting "grassroots" justice and strenuous "lawfare"[8]. Organisations such as the Commission for International Justice and Accountability (CIJA) and the Justice for Peace in Donbas coalition play a crucial role in supporting these efforts, contributing to the development of the ICL[9].

The increasing shift of focus towards criminal responsibility at the local level could be interpreted as a new "Nuremberg moment"[10]. The idea that, in exercising universal jurisdiction, national courts act as proxies of the international community has also been widely supported in legal doctrine. According to this theoretical approach, when a state exercises universal jurisdiction, it does so by virtue of an implicit mandate conferred by the international community[11]. Major regional initiatives include, for instance, the recent proposal to establish a Special Court for the Crime of Aggression, which is a measure of significant political and legal significance. The ICC, as mentioned, while constituting the core of international criminal justice, cannot fully exercise its jurisdiction over the crime of aggression in the absence of an explicit authorisation by the UNSC. This condition is difficult to achieve today. Hence, the need to create an *ad hoc* jurisdiction, formally supported by the CoE through the Resolution of

8 R. Mulgrew, *Towards the development of the international criminal system*, Cambridge 2013.

9 However, the role of civil society organisations in promoting accountability for international crimes remains controversial. On the one hand, national proceedings provide victims with a forum in which to assert their narratives, which is particularly relevant in the so-called «war of narratives»; on the other hand, they operate within an international community of *superiorem non recognoscens*, where some actors justify their conduct by invoking historical prerogatives and territorial claims. See K. Aksamitowska, *The counter-hegemonic turn to «entrepreneurial justice» in international criminal investigations and prosecutions relating to the crimes committed in Syria and Eastern Ukraine*, in F. Jeßberger, L. Steinl, K. Mehta (eds.), *International criminal law* cit., 135 ff.

10 T. Einarsen, *The concept of universal crimes in international law*, Oslo 2012.

11 A. Annoni, *International practice on universal jurisdiction: An overview*, in S. Manacorda, C. Meloni (a cura di), *Le questioni aperte della giustizia penale internazionale nella prospettiva interna.* Atti del Convegno di Studi, Università degli Studi di Milano (29 settembre 2023), Milano 2023.

27 September 2022[12]. These initiatives thus appear to continue moving in the direction of a universal jurisdiction, based on the idea that certain crimes harm the entire human community[13].

The Council of Europe's (CoE) decision is driven by the need to provide concrete answers alongside EU institutions by outlining an action that not only punishes those responsible but also contributes to post-conflict reconstruction and the reform of public institutions in the affected territories[14].

However, even before considering the actual opportunity to put an end to such crimes, it is necessary to recall that the very question of recognising which acts qualify as international crimes remains unsettled. Although the question seems to imply a statement ("which ones are"), rather than an assessment ("which ones should be"), in practice this distinction turns out to be less clear-cut. It is generally agreed that doctrine and practice converge in identifying four core crimes: genocide, war crimes, crimes against humanity, and the crime of aggression[15]. Nevertheless, the absence of a broader consensus on the inclusion of other serious crimes – despite what might by now be expected as established and uncontested – highlights both a normative gap and a political reluctance. In this sense, keeping the debate open is not only inevitable but also necessary,

12 K. Gavrysh, *Special international court on the crime of aggression against Ukraine: Perspectives and critical issues*, in Journal of International Law 1 (2024) 209 ff. The project took concrete form in May 2024, with the signing of an agreement between Ukraine and the Council of Europe aimed at establishing the legal prerequisites for the Tribunal, whose seat is planned to be on Ukrainian territory and whose structure is intended to be multilateral, with funding shared among the member states. On 26 June 2025, Ukrainian President Volodymyr Zelensky and Council of Europe Secretary General Alain Berset formally agreed on the establishment of the Tribunal, with the support of the forty-six member states. The Tribunal will operate in accordance with the standards of international law, while drawing on the constitutional principles of the participating states. It will not be merely an advisory or parliamentary body, but a fully fledged jurisdiction with investigative and prosecutorial powers. See F. Cowell, A. Magini, *Collapsing legitimacy: How the crime of aggression could affect the ICC's legitimacy*, in International Criminal Law Review 17.3 (2017) 517 ff. One of the main critical issues will concern the effective execution of arrest warrants, as illustrated by the precedent concerning Russian President Vladimir Putin. The Tribunal may nevertheless act as an instrument of diplomatic pressure, especially in light of the possibility for non-member states to participate in the proceedings. A further sensitive issue concerns the possibility of trials *in absentia*, which would depart from the model of the Rome Statute. Such a measure, although open to criticism, may be justified by the exceptional nature of the situation, provided that the rights of the defence are fully safeguarded. See M. Chahrōur, *Council of Europe and Ukraine agree to establish special tribunal for the crime of aggression*, in JURIST (26 June 2025) in jurist.org.

13 M. Gur-Arye, A. Harel, *Taking internationalism seriously: Why international criminal law matters*, in K.J. Heller, F. Mégret, S.M.H. Nouwen, J.D. Ohlin, D. Robinson (eds.), *The Oxford handbook of international criminal law*, Oxford 2020, cap. 9.

14 K. Gavrysh, *Special international court* cit., 209-216.

15 A.K. Greenawalt, *What is an international crime?*, in K.J. Heller, F. Mégret, S.M.H. Nouwen, J. D. Ohlin, D. Robinson (eds.), *The Oxford handbook of international criminal law* cit., cap. 12.

as it offers at least the opportunity to continue and encourage the work of those committed to fostering respect for international law[16].

In this context, it seems appropriate to recall the adoption by the International Law Commission (ILC) of the Draft Articles on the Prevention and Punishment of Crimes against Humanity and the recommendation to the United Nations General Assembly (UNGA) to start the process for the elaboration of an international convention on the subject[17]. Equally recently, in July 2025, the Assembly of States Parties to the International Criminal Court concluded a three-day Special Session at United Nations Headquarters in New York, convened seven years after the activation of the Court's jurisdiction over the crime of aggression. During the session, delegations discussed the ratification, implementation, and application of the Kampala Amendments, underscoring the need for continued dialogue and greater legal clarity[18]. The Assembly adopted by consensus resolution ICC-ASP/S-1/Res.1. *The review of the crime of aggression*, which reaffirmed its commitment to strengthening the Court's jurisdiction and decided to convene another Special Session in 2029 in New York to consider the amendment proposal deposited with the UN Secretary-General in April 2025. Proponents of the reform clarified that the proposal does not intend to alter the definition of the crime of aggression contained in Article 8

16 Antonio Cassese, for example, proposed extending the category to terrorism and torture, while M. Cherif Bassiouni identified as many as twenty-eight international crimes, ten of which – including the four core crimes – would give rise to *jus cogens* obligations. An early version of the Code of Crimes against the Peace and Security of Mankind, drafted by the International Law Commission in 1991, included eleven categories, later reduced to five in the 1996 Draft Code, namely the four core crimes and crimes against United Nations and associated personnel. See A.K. Greenawalt, *What is an international crime?* cit.

17 As noted by Enrico Milano in his presentation at the conference *Harmonisation and Cooperation in International Criminal Law*, in implementation of this recommendation the General Assembly initially entrusted the Sixth Committee with the examination of the Draft Articles, by Resolution 77/249, and subsequently, by Resolution 79/122 of 4 December 2024, convened a United Nations conference of plenipotentiaries, currently scheduled for 2028. The initiative seeks to fill the absence of a specific treaty on crimes against humanity, unlike genocide and war crimes, which are respectively covered by the 1948 Genocide Convention and the 1949 Geneva Conventions, together with the 1977 Additional Protocols. It also aims to strengthen the architecture of international criminal justice by promoting interstate cooperation. More specifically, the initiative pursues two main objectives: on the one hand, to contribute to the implementation of the principle of complementarity enshrined in the Rome Statute; on the other hand, to establish binding legal obligations also for states that are not parties to the Rome Statute, thereby extending the effectiveness of international standards in the prevention and repression of crimes against humanity. See M. Iannuzziello, F. Zazzaro, *Harmonisation and cooperation in international criminal law*, report of the Conference *Harmonisation and Cooperation in International Criminal Law*, University of Milan (13 December 2024), in Sistema penale (9 April 2025).

18 INTERNATIONAL CRIMINAL COURT, *The Assembly of States Parties held a three-day special session on the review of the amendments on the crime of aggression* (July 2025), in icc-cpi.int.

bis, but instead focuses exclusively on the jurisdictional procedures set out in Article 15 bis, particularly paragraphs 4 and 5[19].

The reaction of states to violations of such obligations, such as the suspension of international treaty rights, is generally not based on a right to take countermeasures. On the contrary, it is usually justified by invoking the principle of fundamental change of circumstances (*rebus sic stantibus*), enshrined in Article 62 of the 1969 Vienna Convention on the Law of Treaties and also referred to in the Advisory Opinion of the International Court of Justice on the *Wall in the Occupied Palestinian Territories* (2004)[20].

More recent international practice, however, deviates from the cautious view expressed by the ILC in its commentary on Article 54, showing a growing acceptance of collective countermeasures. The sanctions adopted by the EU against Iran, Syria and Russia – in particular for the annexation of Crimea and the conflict in Ukraine – as well as the measures of other states (USA, Canada, Australia, Japan), indicate a consolidated tendency to consider such countermeasures legitimate in response to serious violations of imperative norms and of *erga omnes* obligations. Furthermore, it is according to this latter profile that the measures implemented by the EU against Russia can be assessed[21].

2. EUROPEAN UNION RESTRICTIVE MEASURES: LEGAL BASIS, FUNCTION AND TYPOLOGIES

Restrictive EU measures represent a distinct yet related form of legal and political response within this analysis. Their significance lies not in their ability to establish individual criminal liability, but in their capacity to exert pressure,

19 See A. Amadio, *The 23rd session of the Assembly of States Parties to the Rome Statute: What future for the International Criminal Court?*, in Observatory on the activities of international and supranational organisations, s.d., in osorin.it. Concretely, the proposal aims to enable the Court to exercise jurisdiction where at least one of the states involved – whether the aggressor state or the victim state – is a party to the amendments, thereby overcoming the current requirement of double ratification. It is therefore unsurprising that the harmonisation proposal has attracted criticism, being regarded by some as an instrumental initiative directed, in particular, against Russia. See C. Mcdougall, *Expanding the ICC's jurisdiction over the crime of aggression*, in Journal of International Criminal Justice 22.3-4 (2024) 543 ff. Such a reading, however, overlooks the fact that the review process had already been envisaged both when the Kampala Amendments were adopted, by RC/Res.6, para. 4, and when jurisdiction over the crime of aggression was activated in 2017 by the Assembly of States Parties, by ICC-ASP/16/Res.5. The review is therefore not a reaction to contingent events, but a planned step in the institutional evolution of the international criminal justice system. See P. Grzebyk, *Myths around the review process of the Kampala amendments on the crime of aggression*, in EJIL: Talk! (6 June 2025), in ejiltalk.org.

20 E. Cannizzaro, *On the special consequences of a serious breach of obligations arising out of peremptory rules of international law*, in Id. (ed.), *The present and future of jus cogens*, Roma 2015, 133-144.

21 K. Meissner, C. Graziani, *The transformation and design of EU restrictive measures against Russia*, in Journal of European Integration (2023) 377-394.

express condemnation and discourage specified conduct in situations where the attribution of criminal liability may be delayed, incomplete or stalled at the institutional level.

The EU employs sanctions and restrictive measures as a key instrument of foreign policy, aimed at achieving the objectives outlined in the Treaty on European Union (TEU), particularly Articles 3(5) and 21. These measures contribute to the maintenance or restoration of international peace and security, while also promoting respect for human rights, democracy, and the rule of law, and protecting the EU's fundamental values and interests[22]. Economic sanctions can, therefore, be defined as a tool generally imposed by a state or international organisation against a state, or against specific individuals, companies or organisations in response to violations of international law or, more generally, to behaviour considered harmful to the global order, carried out or facilitated by the recipients themselves to change their policies[23]. However, as will be further examined below, sanctions can take a wide variety of forms.

The EU sanctions regime develops along a dual track: on the one hand, sanctions can be adopted in implementation of binding resolutions of the UNSC (under Chapter VII of the UN Charter); on the other hand, they can be introduced autonomously by the EU, unilaterally, within the framework of its Common Foreign and Security Policy (CFSP)[24]. Although the provisions of the UN Charter do not directly address the Union, two distinct profiles need to be considered.

At the international level, EU Member States, as members of the UN, are obliged to respect the decisions of the UNSC, as set out in Articles 25, 48(2), and 103 of the UN Charter, which take precedence over other international obligations. At the EU level, the Lisbon Treaty aligns the Union's external ac-

22 Over time, the European Union has established guiding principles for the adoption, implementation, monitoring and evaluation of restrictive measures. Particularly relevant in this regard is the document approved by the Political and Security Committee in June 2004, entitled *Basic Principles on the Use of Restrictive Measures*, later incorporated into the *Guidelines on the Implementation and Evaluation of Restrictive Measures*, most recently updated in May 2018. Reference should also be made to the Council document on *Best Practices for the Effective Implementation of Restrictive Measures*, adopted in May 2018. See A. Zanobetti, *Sanctions, more sanctions: Minimal notes on EU restrictive measures*, in Freedom, Security & Justice: European Legal Studies 3 (2023).

23 L. Bernardini, *La funzione «servente» della giustizia penale nell'enforcement delle sanzioni economiche dell'UE*, in A. Oriolo, A.R. Castaldo, A. Di Stasi, M. Nino (a cura di), *Criminalità transnazionale e Unione europea*, Napoli 2024, 79-105.

24 Y. Miadzvetskaya, C. Challet, *Are EU restrictive measures really targeted, temporary and preventive? The case of Belarus*, in Europe and the World: A Law Review 6.1 (2022).

tion with the principles of the UN Charter, recognising the central role of the Security Council in protecting peace[25].

In terms of content, the EU can opt for a straightforward transposition of the sanctions provided for by the UNSC or reinforce them by adopting additional measures, resulting in a mixed sanctions regime[26]. The autonomous adoption of sanctions by the EU, on the other hand, represents a more recent development in the evolution of its foreign policy, emerging not only as a tool to enhance the Union's strategic autonomy but also as a response to the pressing need for timely action in line with the expectations of the international community[27]. At the same time, this evolution reflects the EU's attempt to fill a normative gap, given the silence of international law on the competence of regional organisations to autonomously adopt restrictive measures. This circumstance has sparked both legal and political debate. Indeed, the growing importance of autonomous sanctions is also linked to the progressive paralysis of the UNSC, brought about by the abuse of the veto power by permanent members (Art. 27(3) UN Statute), which often prevents an effective multilateral response to crises[28].

Quantitatively, autonomous sanctions today exceed those adopted in the implementation of UN resolutions[29]. They are characterised by a predetermined and limited temporal scope, after which their continuation, amendment, or termination is subject to formal review[30].

25 See M. Payandeh, H. Sauer, *European Union: UN sanctions and EU fundamental rights*, in International Journal of Constitutional Law 7.2 (2009) 306 ff. This commitment is also reiterated in the 2018 Guidelines, which set a thirty-day deadline for the implementation of measures adopted under Article 41 of the Charter. See F. Marrella, *Economic sanctions against Russia and the fulfilment of international contracts*, in Italia Oggi (2014) 4 ff.

26 See COUNCIL OF THE EUROPEAN UNION, *Types of sanctions the EU adopts* (12 April 2024), in consilium.europa.eu. Practice confirms the broad use of this approach, for instance in response to serious human rights violations, as in the cases of the Central African Republic, the Democratic Republic of the Congo, Guinea-Bissau, Liberia, Libya, Sudan and South Sudan; threats to the territorial integrity of states, as in the cases of Eritrea, Mali, Yemen and Somalia; nuclear proliferation, as in the cases of Iran and North Korea; and terrorism, including the regimes established by Security Council Resolutions 1267/1999 and 1988/2011. See C. Eckes, *EU restrictive measures against natural and legal persons: From counterterrorist to third country sanctions*, in Common Market Law Review 51.3 (2014) 869 ff.

27 Initially, the European Economic Community limited itself to implementing decisions adopted by the United Nations Security Council. From the 1980s onwards, the first unilateral sanctions, including those against Argentina, Libya and the USSR, emerged in connection with European Political Cooperation. Following the Maastricht Treaty, the European Union progressively developed an autonomous sanctions capacity, which was further consolidated in 2004 with the adoption of the *Basic Principles on the Use of Restrictive Measures*, thereby formalising the legal and operational framework for their use. See F. Giumelli, F. Hoffmann, A. Książczaková, *The when, what, where and why of European Union sanctions*, in European Security 30.1 (2021) 1 ff.

28 K. Meissner, C. Graziani, *The transformation and design* cit., 377-394.

29 C. Morviducci, *EU restrictive measures and international law: Some problematic aspects*, in Eurojus 2 (2019), in rivista.eurojus.it.

30 Y. Miadzvetskaya, C. Challet, *Are EU restrictive measures* cit.

The restrictive measures adopted by the EU apply to a wide range of subjects and primarily fall into two categories: on the one hand, sanctions directed against third states; on the other hand, those directed against natural and legal persons, as well as non-state actors[31]. Sanctions directed against third states, adopted within the framework of the CFSP, are, with some exceptions, generally subject to the rule of unanimity in the Council of the European Union, in accordance with Article 29 TEU[32].

The ban on the export of armaments and military equipment, commonly referred to as an arms embargo, is imposed by the EU Council under Article 29 TEU[33]. As this matter falls within the sovereign competence of the Member States, its implementation is carried out at the national level[34]. In contrast to measures related to military equipment, economic, trade, and financial sanctions fall within the EU's competence and are therefore adopted and implemented at the EU level[35].

Regarding economic, trade, and financial measures, it is necessary to clarify the applicable legal and procedural framework. The dual legal basis – the CFSP Decision (a political act) and the Regulation (a binding regulatory act) – guarantees the effectiveness of the measures adopted, which are immediately binding on all Member States and all economic operators carrying out activities within the EU's territory, regardless of their nationality, as well as on EU-based companies operating globally[36].

31 The latter category includes, for example, public officials, members of the armed forces, former government representatives, businessmen linked to the regimes concerned, as well as non-state groups and organisations, including terrorist formations. See F. Marrella, *Economic sanctions* cit.

32 C. Morviducci, *EU restrictive measures* cit.

33 V.V. Voynikov, *EU anti-Russian sanctions (restrictive measures): Compliance with international law*, in Herald of the Russian Academy of Sciences 92 suppl. 7 (2022) 636-642.

34 The embargo entails a prohibition on the sale, supply, transfer, and transport of arms and military equipment, as well as a ban on technical or financial assistance in the military sphere. Such measures may also include "dual-use" items, i.e. goods and technologies that can be used for both civil and military purposes. See Y. Miadzvetskaya, C. Challet, *Are EU restrictive measures* cit.

35 See V.V. Voynikov, *EU anti-Russian sanctions* cit. The procedure involves a first phase in which the Council, acting unanimously within the framework of the CFSP pursuant to Article 29 TEU, adopts the political decision to impose sanctions. This is followed, on the joint proposal of the High Representative and the Commission, by the adoption of an implementing regulation by the Council, acting by qualified majority under Article 215(1) TFEU, with the European Parliament being informed. See G. Gaeta, *EU foreign policy economic sanctions and the duty to state reasons: The Court of Justice's indications on the right to control in the field of fundamental freedoms*, in Criminal Archives 1 (2022).

36 Economic and trade restrictions are among the most frequent and effective sanctioning instruments, given the European Union's economic weight in international markets. They may include prohibitions on the import or export of certain goods and services, the imposition of duties, restrictions in the areas of transport, investment and capital movements, the withdrawal of tariff preferences, and prohibitions on access to ports and airports by entities linked to the state targeted by the restrictive measures. See C.M. Ceolotto, *The complex*

In view of the procedural difficulties associated with the CFSP's requirement of unanimity, the EU has instead adopted alternative mechanisms to impose restrictive economic measures. A relevant reference is Article 218(9) of the Treaty on the Functioning of the European Union (TFEU), which allows the Council to suspend the application of an international agreement in the event of serious violations by a third contracting state[37]. If the agreement has been approved by a qualified majority (as is usually the case), the suspension decision can also be adopted by a qualified majority[38]. This instrument is highly political, as it is based on considerations of respect for fundamental rights and consistency with the EU's objectives for cooperation[39].

Similarly, the EU may resort to retaliatory measures, which, although not formally qualified as "sanctions", produce equivalent effects. Such measures may include restrictions on diplomatic contacts, suspension of official visits, interruption of bilateral negotiations, suspension of development aid programmes, and withdrawal of trade preferences (e.g., under the Generalised System of Preferences), as well as bans on the import of certain products from the third state concerned[40].

The EU resorts to "targeted" restrictive measures (targeted sanctions) against non-state actors to reduce the adverse humanitarian effects that could result from generalised sanctions aimed at a state, while at the same time increasing the effectiveness of the sanctioning intervention by directly targeting those responsible for the conduct that justified the adoption of the measure[41]. The complementary role of restrictive measures, however, becomes all the more sensitive when sanctions are directed not only against states. At this level, the distinction between preventive governance and punitive effects indeed becomes

balance between general principles on customs penalties, between regulatory evolution and the jurisprudence of the Court of Justice, in Eurojus 4 (2022), in rivista.eurojus.it.

37 V.V. Voynikov, *EU anti-Russian sanctions* cit., 636-642.

38 COUNCIL OF THE EUROPEAN UNION, *Types of sanctions* cit.

39 A relevant example is the partial suspension of the 1977 cooperation agreement with Syria, decided by the EU Council in response to serious human rights violations. The decision, based on Articles 2(5) and 21 TEU, introduced restrictive measures on trade and financial transactions involving oil, gold, diamonds and precious metals. See K. Meissner, C. Graziani, *The transformation and design* cit., 377-394.

40 L. Lonardo, *Challenging EU sanctions against Russia: The role of the Court, judicial protection, and Common Foreign and Security Policy*, in Cambridge Yearbook of European Legal Studies 25 (2023) 40-63.

41 See Y. Miadzvetskaya, C. Challet, *Are EU restrictive measures* cit. This approach is reflected in the *Basic Principles on the Use of Restrictive Measures* of 2004, which emphasise the need to focus sanctions on individuals and entities responsible for, supporting, or benefiting from the policies or actions condemned by the European Union. Similarly, the *Guidelines on the Implementation and Evaluation of Restrictive Measures* of 2018 specify that restrictive measures should target those directly involved in, or benefiting from, the sanctioned conduct. See C. Morviducci, *EU restrictive measures* cit.

even less clear-cut, requiring closer attention to procedural safeguards and fundamental rights.

The adoption of restrictive measures against non-state actors is based on two distinct articles of the TFEU: Article 215(2) and Article 75. The former constitutes the general legal basis for sanctions related to serious threats or violations of international law and the fundamental values of the EU (e.g. terrorism, weapons proliferation, human rights violations). The second is narrower in scope and applies exclusively to counter-terrorism measures within the area of freedom, security and justice[42]. The two provisions differ in scope, types of measures, and adoption procedures[43].

As reiterated by the Council of the European Union in its *Guidelines on the Implementation and Evaluation of Restrictive Measures* (2018), the adoption and implementation of restrictive measures must be carried out in full compliance with international law, particularly with fundamental principles relating to human rights. This implies, *inter alia*, respect for the right to a fair trial and the right to an effective remedy by the individuals concerned. Such measures must also be proportionate to the objectives pursued and provide for derogation mechanisms in the presence of humanitarian need[44]. They must also be subject to periodic review to assess their effectiveness and consistency with their original purpose[45].

42 G. Gaeta, *EU foreign policy economic sanctions* cit.

43 See C. Eckes, *EU restrictive measures against natural and legal persons: From counterterrorist to third country sanctions*, in Common Market Law Review 51.3 (2014) 869 ff. Under Article 215(2) TFEU, the European Union may adopt a wide range of restrictive measures, including the freezing of funds and assets of listed natural or legal persons, travel bans and entry bans into the territory of the Union, whose implementation falls within the responsibility of the Member States, restrictions on the export of specific goods or equipment, and financial measures aimed at limiting access to capital markets. See COUNCIL OF THE EUROPEAN UNION, *Types of sanctions* cit. Article 75 TFEU, by contrast, covers only administrative measures concerning capital movements and payments, such as the freezing of funds, financial assets or economic gains. See C. Morviducci, *EU restrictive measures* cit. Measures based on Article 215 follow the procedure applicable to sanctions against states: first, a political decision is adopted unanimously by the Council within the CFSP framework, pursuant to Article 29 TEU; subsequently, an implementing regulation is adopted by qualified majority, on a joint proposal of the Commission and the High Representative, with the European Parliament being informed. See C. Morviducci, *EU restrictive measures* cit. By contrast, Article 75 TFEU provides for the ordinary legislative procedure, based on a Commission proposal and joint approval by the European Parliament and the Council. See P. Van Elsuwege, *The adoption of «targeted sanctions» and the potential for inter-institutional litigation after Lisbon*, in Journal of Contemporary European Research 7.4 (2011) 488 ff.

44 K. Meissner, C. Graziani, *The transformation and design* cit., 377-394.

45 The obligation to respect fundamental rights applies to all restrictive measures adopted by the European Union, both when they implement binding United Nations Security Council resolutions and when they are autonomously adopted within the framework of the Common Foreign and Security Policy. This requirement has been emphasised by the Court of Justice of the European Union, particularly in the well-known *Kadi* case law, which affirmed the autonomy of the Union legal order in ensuring respect for fundamental rights, including in relation to measures adopted for the implementation of international obligations. See S. Poli, F. Finelli, *Context specific and structural changes in EU restrictive measures adopted in reaction to Russia's aggression on Ukraine*, in Eurojus (2023).

The balance between the effectiveness of restrictive measures and the requirements of legality has, notably, been progressively defined by the case law of the European Court of Justice, which has thus made judicial review, procedural safeguards and the autonomy of the EU legal order central elements of the constitutional framework governing restrictive measures. From the *Kadi* judgments to those relating to the *Rosneft* and *Bank Mellat* cases, the Court has, in fact, specified that such measures, even when adopted in highly sensitive areas such as international security or the common foreign and security policy, cannot be exempted from its review[46].

In recent years, in addition to its traditional geographically based sanctioning regimes, the EU has introduced global sanctioning regimes that allow for targeted restrictive measures against individuals, entities, or bodies, whether state or non-state, regardless of where the violations or abuses have been committed[47]. Particularly prominent among these is the global human rights regime, inspired by the US *Global Magnitsky Act* and similar legislation adopted by some Member States. This regime was formalised through the CFSP Decision 2020/1999 and Regulation (EU) 2020/1998[48].

46 Against this background, the *Kadi* case law remains the constitutional cornerstone of judicial review of EU sanctions and the autonomy of the EU legal order. In *Kadi I*, the Court held that the implementation within the EU legal order of restrictive measures adopted pursuant to UNSC resolutions could not be exempted from review in the light of EU fundamental rights, thereby affirming the autonomy of the Union legal order and the central importance of the right to be heard, the right to effective judicial protection and the right to property. See Court of Justice, 3 September 2008, Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation vs Council and Commission*. In *Kadi II*, the Court further clarified that EU courts must be able to verify whether the grounds relied upon for listing are sufficiently detailed, specific and substantiated, thereby strengthening the requirements of effective judicial protection, proportionality and evidentiary review. See Court of Justice, 18 July 2013, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission and Others vs Kadi*. The same constitutional logic is also relevant beyond the context of United Nations sanctions. In *Rosneft*, the Court confirmed its jurisdiction, through the preliminary ruling procedure, to examine the legality of certain CFSP restrictive measures, thereby limiting the view that sanctions adopted in the field of foreign policy are entirely exempt from judicial review. See Court of Justice, 28 March 2017, Case C-72/15, *Rosneft*. Finally, in *Bank Mellat*, the Court emphasised the importance of the obligation to state reasons and of a sufficiently sound factual basis, confirming the annulment of the restrictive measures where the Council had failed to establish, without manifest error of assessment, the factual basis justifying the applicant's inclusion on the list. See Court of Justice, 18 February 2016, Case C-176/13 P, *Council vs Bank Mellat*. On the constitutional significance of the *Kadi* saga, see, among others, G. De Búrca, *The European Court of Justice and the international legal order after Kadi*, in Harvard International Law Journal 51.1 (2010) 1 ff.; A. Gattini, *Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi, Al Barakaat International Foundation vs Council and Commission, Judgment of the Grand Chamber of 3 September 2008*, in Common Market Law Review 46.1 (2009) 213 ff.; J. Kokott, C. Sobotta, *The Kadi case. Constitutional core values and international law. Finding the balance?*, in European Journal of International Law 23.4 (2012) 1015 ff.

47 K. Meissner, C. Graziani, *The transformation and design* cit., 377-394.

48 L. Arroyo Zapatero, *The criminology of war* cit., 1-14.

The restrictive measures envisaged affect individuals deemed responsible for, supporting or benefiting from serious violations of human and other fundamental rights[49].

The list of sanctioned entities is approved unanimously by the EU Council, upon the proposal of a Member State or the High Representative and is continuously updated. In practice, this regime has been applied to Russian, Chinese, Chechen and Wagner Group members, among others[50].

3. SANCTIONS AGAINST RUSSIA BETWEEN LEGALITY, EFFECTIVENESS AND POLITICAL NECESSITY

Compared to the restrictive measures adopted in 2014, the Council significantly broadened the designation criteria after the conflict began in 2022[51]. The seriousness of Russia's violations of international law motivated a progressive expansion of the criteria for designating restrictive measures initially adopted against those who had undermined or threatened the territorial integrity, sovereignty, and independence of Ukraine, reaching almost 1,800 individuals and groups[52]. The recipients of such measures currently include not only the highest offices of the Federation and officials at all levels, but also non-state actors and natural or legal persons not directly responsible for the Russian government's illicit activities, such as banking and financial institutions, influential businesspeople, pro-government propagandists, and press organs[53]. These measures aim to inflict severe consequences on Russia for its aggression against Ukraine and to reduce its ability to continue the armed conflict.

The sixth and eighth sanctions packages introduced further sectoral restrictions on the provision of services, which had never been subject to sanctions be-

49 See L. Lonardo, *Challenging EU sanctions against Russia* cit. The measures include bans on entry into, or transit through, the territories of the Member States, the freezing of funds and economic resources, and the prohibition for EU operators to make funds or economic resources available to sanctioned individuals. Exemptions are provided, inter alia, on humanitarian or judicial grounds. See S. Poli, F. Finelli, *Context specific and structural changes* cit.

50 L. Arroyo Zapatero, *The criminology of war* cit., 1-14.

51 S. Poli, F. Finelli, *Context specific and structural changes* cit.

52 L. Lonardo, *Challenging EU sanctions against Russia* cit., 40-63.

53 See K. Meissner, C. Graziani, *The transformation and design* cit. In addition to individual restrictive measures, the European Union introduced several sectoral measures, including import and export bans and restrictions concerning road and maritime transport, aviation, energy, defence, and the financial and banking systems. See L. Lonardo, *Challenging EU sanctions against Russia* cit. For instance, in February 2022, the European Union closed its seaports, airports and airspace to the Russian Federation. See S. Poli, F. Finelli, *Context specific and structural changes* cit.

fore[54]. On 1 March 2022, the Council of the European Union introduced a new form of sectoral restrictive measure concerning media broadcasting activities. Although similar measures had already been adopted in the past, this was, for the first time, an explicit ban on EU operators broadcasting news content from certain media outlets, specifically *Russia Today* and *Sputnik*, which the Russian Federation directly funds. The measure was subsequently extended to other media outlets and renewed over time. In parallel, some propagandists identified as instruments of disinformation were included on the EU's sanctions list[55].

Of all the sectoral measures, the financial sanctions represent the most incisive economic intervention. The Union has essentially excluded Russia from its capital markets and financial services by banning transactions with Russian state-owned entities, including the Central Bank of the Russian Federation, the Regional Development Bank, and numerous state-owned enterprises operating in strategic sectors (such as Rosneft, Transneft, Gazprom Neft, Almaz-Antey, and Rostec)[56]. Additionally, financial messaging services, particularly the SWIFT system, have been banned at several Russian banking institutions. Other bans concern public financing, direct investments in Russia, and participation in projects co-financed by the Russian Direct Investment Fund[57].

A significant innovation introduced by this sanctions regime is the application of nationality-based prohibitions. This feature marks a departure from the traditional sanctions approach, which has typically targeted specific states, governments, or individuals and entities identified by name, applying regardless of personal conduct. This raises sensitive issues relating to proportionality, non-discrimination, and the protection of fundamental rights.

Unlike individual restrictive measures, which affect natural or legal persons named and specifically listed in the Annexes to Decision 2014/145/CFSP and Regulation (EU) 269/2014, financial sanctions based on nationality criteria, provided for in Decision 2014/512/CFSP and Regulation (EU) 833/2014, ap-

54 It is now prohibited to provide the Russian government and legal persons, entities or bodies established in Russia with a wide range of professional services essential to business activity, including accounting, statutory auditing, tax and management consultancy, public relations services, IT consultancy, legal advisory services, architecture and engineering services. With regard to the prohibition on the provision of legal advisory services, several bar associations have brought actions before the General Court of the European Union challenging its legality under EU law. See S. Poli, F. Finelli, *Context specific and structural changes* cit.

55 *Ivi*.

56 L. Lonardo, *Challenging EU sanctions against Russia* cit.

57 S. Poli, F. Finelli, *Context specific and structural changes* cit.

ply to all natural persons of Russian nationality, residents of Russia and legal persons, entities or bodies established in that state[58].

Although the underlying rationale often rests on the need for efficiency and rapid implementation, this approach, intended to ensure that citizens of the state concerned cannot circumvent the restrictions, blurs the line between individual responsibility and collective attribution. This innovation has therefore been criticised for its potential conflict with fundamental principles of EU law, such as equality before the law and respect for individual legal protection, while also reflecting the Union's attempt to respond quickly to international crises in the absence of more nuanced enforcement tools[59]. In other words, although EU restrictive measures do not formally entail the attribution of criminal liability, their effects may in some cases approximate a punitive logic, especially where listing decisions are connected to allegations of involvement in serious violations of international law and are adopted in the absence of the procedural guarantees normally associated with criminal proceedings[60].

Moreover, EU restrictive measures, by their very nature, are preventive and temporary instruments, subject to six-monthly or annual review, and are not designed as criminal sanctioning mechanisms capable of ensuring justice for crimes committed[61]. In other cases, the Council has adopted a more cautious approach, either merely designating subjects for serious human rights violations rather than for international crimes, or linking certain illegal conduct, such as

58 *Ivi*.

59 V. Trstenjak, *EU sanctions against third countries. Legal bases for EU sanctions against Russia and its citizens*, in *European Studies: The Review of European Law, Economics and Politics* 10 (2023) 15 ss.

60 In this context, the distinction between administrative or preventive restrictive measures, criminal sanctions and hybrid forms of punitive governance should not be understood as rigid or clear-cut. Formally, EU restrictive measures are preventive and administrative instruments, designed to influence behaviour, prevent the continuation of unlawful situations and safeguard the objectives of the Common Foreign and Security Policy. Criminal sanctions, by contrast, presuppose a judicial determination of individual criminal liability and are accompanied by the safeguards traditionally associated with criminal proceedings. Between these two poles, however, there are increasingly hybrid mechanisms which, although not formally criminal, can produce punitive, stigmatising or incapacitating effects comparable to those of criminal law. The distinction is therefore useful primarily for analytical purposes. The categorisation helps to identify the applicable legal regime and the required safeguards, whilst recognising that, in practice, restrictive measures may overlap with punitive governance when they target individuals or entities on the basis of conduct linked to serious violations of international law. On this functional approach to the punitive nature of formally non-criminal measures, see, by analogy, European Court of Human Rights, *Engel and Others vs the Netherlands*, 8 June 1976; European Court of Human Rights, *Welch vs the United Kingdom*, 9 February 1995. With specific regard to EU restrictive measures, see L. Bernardini, *The 'auxiliary' function of criminal justice in the enforcement of EU economic sanctions*, in A. Oriolo, A.R. Castaldo, A. Di Stasi, M. Nino (eds.), *Transnational Crime and the European Union*, Naples 2024, 79 et seq.; R. Virzo, *EU Freezing and Confiscation Measures: Balancing Human Rights and the Risks of Sanctionary Excesses*, in Human Rights and International Law 1 (2024).

61 Y. Miadzvetskaya, C. Challet, *Are EU restrictive measures* cit.

the deportation of minors, to violations of Ukraine's territorial integrity and independence[62].

The European sanctions regime, therefore, qualifies as a provisional, non-criminal measure. Precisely because of this characteristic, EU institutions often use it as a flexible tool to effectively pursue the objectives of general interest defined in restrictive packages. However, this flexibility is a double-edged sword: sanctions are often imposed without rigorous safeguards, which can lead to potential friction with fundamental principles of law. Among the most obvious concerns is the presumption of innocence, the exceptional nature of which has been recognised by the Court of Justice of the European Union[63]. The adoption of measures that penalise natural or legal persons without the guarantees of a proper judicial process raises difficult questions about the boundary between legitimate preventive action and the erosion of fundamental legal safeguards.

Furthermore, the increasing normalisation of such practices risks transforming an emergency tool into a routine governance tool, thereby diluting its extraordinary character. At the same time, these sanctions, imposed in response to war, cannot be assessed solely on legal grounds; they also require an evaluation of their actual effectiveness in reducing violence or ending conflict[64]. This dual tension – between legality and efficiency, rights and security – highlights both the political usefulness and the regulatory fragility and apparent silence of the European sanctions regime.

4. CONCLUDING REMARKS

In conclusion, despite the unprecedented scope of the sanction measures applied to Russia, it is evident that these instruments suffer from critical structural limitations. The international legal framework, and in particular the International Criminal Court system, has often struggled to provide timely and effective responses. In many respects, international and EU rules fail to clearly define the scope, limits, and coordination of restrictive measures, leaving ample room for political discretion. The result is a variable geometry that reflects not only the divergences and difficulties in cooperation among states, but also the enduring "silences" of the law. The tension between legal gaps and political necessity has thus become a defining feature of the current regime, exemplifying

62 K. Meissner, C. Graziani, *The transformation and design* cit.

63 R. Virzo, *EU freezing and confiscation measures between respect for human rights and risks of sanctioning drifts*, in *Human Rights and International Law* 1 (2024).

64 L. Arroyo Zapatero, *The criminology of war* cit., 1-14.

how crises accelerate both the use and the contestation of poorly defined legal instruments and of new frontiers of law.

Against this background, the European Union's restrictive measures cannot be regarded as a substitute for international criminal justice, but rather as a complementary and necessarily provisional response in contexts where the determination of criminal liability is delayed, incomplete or constrained by institutional limitations; in other words, a terrain left silent by law. Their legitimacy, therefore, depends on compliance with strict procedural safeguards, including the provision of clearly stated and individualised reasons, access to effective judicial review, the periodic re-examination of the measures adopted, respect for the principle of proportionality, and the full protection of fundamental rights. From this perspective, a greater judicialisation of sanctions appears necessary not to equate them with penalties in the strict sense, but to ensure that their preventive and political-institutional function can coexist consistently with the safeguards traditionally associated with the attribution of criminal liability.

Since the beginning of the Russian aggression, the European Commission has reiterated the Union's commitment to justice for Ukraine and its people, strengthening its cooperation with the ICC and supporting the Prosecutor's work with over EUR 10 million[65]. In parallel, the Commission, the Council and the Member States have launched unprecedented coordination to investigate international crimes committed on Ukrainian territory, while intensifying efforts to ensure the uniform application of restrictive measures and to reinforce enforcement mechanisms.

Yet, even the EU's approach is far from free of contradictions. The implementation of restrictive measures falls within the competence of the Member States and, in the absence of harmonisation at the EU level, national authorities have adopted divergent definitions of violations and heterogeneous administrative or criminal sanctions[66]. This fragmentation fosters forum shopping, undermines the credibility of EU action, and weakens the pursuit of the CFSP's objectives[67]. Moreover, the need to overcome potential vetoes in the Council has often required compromises in the form of temporary and targeted derogations, later expanded and adapted, thereby consolidating a variable geometry that reflects the constant tension between solidarity with Ukraine and the pro-

65 S. Poli, F. Finelli, *Context specific and structural changes* cit.

66 L. Arroyo Zapatero, *The criminology of war* cit., 1-14.

67 C. M. Ceolotto, *The complex balance* cit.

tection of national interests[68]. These same features, however, reopen the question of legitimacy, given the risk of indiscriminate application of sanctions, and raise doubts about their democratic appropriateness. Finally, their sustainability is also uncertain: taken unilaterally and applied to entire sectors and populations, sanctions risk producing consequences that extend well beyond their immediate political objectives.

68 Y. Miadzvetskaya, C. Challet, *Are EU restrictive measures* cit.