

EU Makes Punishment without Trial LEGAL

In its quest to defeat Russia, the EU has started sanctioning its own citizens, and those of third states like my country men, Nathalie Yamb and Jacques Baud. But what are these sanctions actually in the international legal system? Here to help with this question is Dr. Alexandra Hofer, an Assistant Professor Public International Law at Utrecht University's School of Law. Links: Publications of Dr. Hofer: <https://www.uu.nl/staff/ASHofer/Publications> Neutrality Studies substack: <https://pascallottaz.substack.com> (Opt in for Academic Section from your profile settings: <https://pascallottaz.substack.com/s/academic>) Goods Store: <https://neutralitystudies-shop.fourthwall.com> Timestamps: 00:00:00 Introduction: What is Sanctions Law? 00:04:07 Legal Justifications and Targeting Individuals 00:09:28 The Limits of Judicial Review (ECJ) 00:16:17 Human Rights Avenues and the EU Charter 00:23:45 Constitutional Protections vs. Executive Power 00:28:11 Challenging the Sanctions Regime and Member States 00:38:16 Diplomatic Immunity and Political Solutions 00:52:00 Corporate Compliance and Conclusion

#Pascal

In its quest to defeat Russia, the EU has now started sanctioning its own citizens and those of third states, like my countrymen Nathalie Jamp and Jacques Bourg. But what are these sanctions, actually, in the international legal system? Here to help with this question is Dr. Alexandra Hofer, an assistant professor of public international law at Utrecht University's School of Law. Alexandra, welcome.

#Alexandra Hofer

Hi, Pascal. Thank you for having me.

#Pascal

Thank you for saying yes to this, because by now it's not clear anymore whether, you know, appearing publicly and speaking critically about the sanctions might come back to haunt us. But you said you have observations and information to share about what sanctions law actually is and how it works. What's the most important thing to know about sanctions law?

#Alexandra Hofer

Well, that's a huge question because, of course, sanctions come in many, many different forms, right? Lately, you've been drawing attention to the issue of people who have been targeted basically for things they've said. So we'd be talking about the cases of Nathalie Jamp, Jacques Bourg, or Hussein Drogo, I think that was his last name. Their assets are frozen, they can no longer access

their bank accounts, and they cannot travel in the EU's territorial space. So those types of sanctions would be regulated, let's say, under human rights law, because they necessarily intervene in the exercise of these individuals' fundamental rights. Right. So that's one area of law you would look at.

But then you can broaden the discussion and talk about the sanctions packages as a whole that have been adopted against Russia, for example, and discuss to what extent this is even compatible with international law. So if we're talking about seizing Russian assets and transferring them to Ukraine, is that compatible with state immunity, for example, over their property? There are many areas of law that come into play when we talk about sanctions. But I think one of the crucial points about sanctions law is that it's what we would call a gray area. It's often very unclear whether these measures are lawful or not, and that has to do with the many areas of international law they can touch upon.

#Pascal

To my mind, sanctions law is a clear example of, um, you know, sovereign right — a sovereign entity that has power and control over a territory takes the right to restrict others from using that territory, its goods, or whatever it produces, right? Um, yeah, is that understanding correct?

#Alexandra Hofer

Yeah, that's absolutely correct. And actually, it was kind of interesting to watch your show over the last week or so, Pascal, because I saw you learning in real time what sanctions are, or how they're perceived from a legal perspective. I think one of the most counterintuitive things is that sanctions, from a legal and perhaps even a judicial perspective, are not seen as punitive measures.

#Pascal

Mm-hmm.

#Alexandra Hofer

They're seen as preventive. And from a human rights perspective, that has a whole list of consequences, because it can justify adopting these severe restrictions without a hearing, for example, or without an independent body reviewing the facts to see, okay, is this justified? So it's like a prerogative the sovereign has, generally to protect a public interest—something essential to the state—against, usually, a foreign actor. But we can broaden what “foreign” means: what kind of interference does this actor have? And then kind of turn it inward, let's say, which is what we seem to be witnessing now with the latest round of sanctions.

#Pascal

I think this point is so important. They're supposed to be preventive because one of the justifications, for instance, for blocking the airspace above the EU to individuals on the sanctions list is that they pose an imminent threat to the national security of the European Union. Therefore, these individuals cannot be allowed to fly over EU space. This seems, of course, completely bogus. But do you think we're seeing now how this very American way of justifying anything under the sun—like national security—is creeping into the EU legal space?

Because at the end of the day, sanctions are a measure that a state body takes and declares legal, right? Because if they weren't legal, they could be challenged. Or let me ask it this way: do you think they will be challenged? And do you think there's a legal body that would say, "No, you can't do this"? Okay, so we're talking about the sanctions against Natalie Young, for example—let's say, against individuals. Is the EU actually free to sanction whoever they want under the sun?

#Alexandra Hofer

Well, that's what I wonder, because indeed, when the EU or the UN Security Council first started adopting sanctions against terrorist actors—especially after 9/11—the EU basically followed what the Security Council was doing. There seemed to be little dispute that terrorism constituted a threat to international peace and security. The real difficulty was, how do you define a terrorist? How do you identify one? So that was already quite contentious.

Also, these individuals would be listed without a hearing, and before, they wouldn't even know what it was they had done. They were given no information about their listing—no statement of facts, nothing, right? In the case of Jacques Boulle, for example, there's this small paragraph accusing him of being a Russian mouthpiece. It says he speaks on pro-Russian channels and apparently spreads conspiracy theories, right? So he's given a summary of reasons, but he says it's inaccurate. He'll go and defend that in court. Initially, when individuals were targeted by the UN Security Council, they didn't even receive that small summary explaining why they were being sanctioned. So they started to challenge them.

And it was the courts that, you could say, took a lot of liberties in how they interpreted the UN Security Council measures. Normally, the UN Security Council is the supreme authority—if it adopts sanctions, you have to implement them. That's because of the UN Charter, Article 103: if there's any contradiction between what the Security Council says you should do and any other legal obligation, you have to follow the Security Council. But courts—and interestingly, EU courts, the European Court of Justice—started to say, "We assume that the UN Security Council intends to respect human rights." And in any case, the EU has its own concerns; what's at issue here isn't so much the Security Council's decision, but the EU's implementing decision.

So these regional courts started to put pressure on, in this case, the EU and its member states over how they were implementing UN Security Council sanctions. Then the member states said, well, you know, we're being accused of having breached human rights. So they went to the UN Security

Council and said, you have to reform your process because we're coming under fire for not respecting the rights of defense. I'm giving you a long-winded answer, perhaps, but the idea was that at first they kind of did whatever they wanted. Then the courts came in and started to say, no, you have to respect certain mechanisms. You at least have to give individuals the right to review their listing and to challenge it.

At first, I think maybe the European Court of Justice—and perhaps we, too—had some faith in the mechanism that had been inspired by European courts. But gradually, the Council of the EU has become more and more creative with its sanctions, especially now that they're starting to sanction actors for foreign information manipulation and interference. That's the kind of sanctions list that Jagbo and Nathalie Young are under. So we're moving away from targeting terrorist threats or sanctioning an aggressor state or a state responsible for human rights violations. And even though the individuals listed will challenge their listing—and I hope they do—the difficulty they might face is that the courts so far have been quite deferential to the Council of the EU.

#Pascal

Deferential, meaning they just rely on what the Council says.

#Alexandra Hofer

In many ways, they basically give the Council a lot of freedom to list, well, sort of whoever they want. What the courts essentially do is fact-check what the Council said. So, for example, if you've been listed because you're a leading businessperson in Russia, you can't really challenge whether that's the correct approach for the Council—whether it's right for them to target leading businesspeople. There's an assumption behind it that if you're a leading businessperson, you're somehow contributing, even indirectly, to Russia's war of aggression. So you can't challenge that underlying presumption; you can only argue that you're not a leading businessperson.

#Pascal

Sorry, I didn't know that. This makes it even worse. If the EU Council said, "We are targeting Jacques Ball because he's a 70-year-old man," then the only defense he would have is to say, "No, I'm actually a 70-year-old woman." But he could also say, "Look, it doesn't make sense that you sanctioned me for that."

#Alexandra Hofer

I'm 71 now. You know, but OK—yeah, yeah, OK. But no, yeah, it's a joke.

#Pascal

So the courts just accept whatever it is they're sanctioned for. They only check the veracity of that, not whether it's justified.

#Alexandra Hofer

This is against them, so I think now the Council is kind of pushing it, right? I mean, yeah, it's like, how far do you go? And it's because, at first, the Council was losing quite a few cases simply because they weren't providing the evidence required to justify why the person was listed. Do you have a case—do you have an example of a case they lost?

#Pascal

It's in my mind. Sorry, I didn't ask.

#Alexandra Hofer

Well, recently there were two—the ones that were in the press were two Russian oligarchs, Aven and Fridman—and the Council was ordered to delist them because, basically, it couldn't provide evidence to substantiate the reasons for which they were listed.

#Pascal

Mm-hmm.

#Alexandra Hofer

And so it's like, okay, the court said, "Well, you're not giving us enough evidence to justify your own statement of reasons, so you have to delist them." But then the Council just changed its listing criteria and relisted them.

#Pascal

They relisted them with a different justification, and now they're listed again. So even if you're ordered to delist someone, as soon as you change that little paragraph, it makes any kind of appeal to the ECJ pretty pointless.

#Alexandra Hofer

I mean... so, like, I don't want to—but that's why I think the lawyers representing these individuals really have to pay attention to how the General Court reviews sanctions, and also be aware that they tend to give a lot of power to the Council. That's one of the issues, because they've been so, let's say, easygoing in accepting what the Council lists. And I also think it's because the courts might feel, well, it's not our job to question the Council, since this is a policy area and they're pursuing a

legitimate aim, right? The aim of the Council is to end a war of aggression, and these are the tools they've decided to implement. Another issue...

#Pascal

It's just important to keep that in mind. It's not a process based on an infringement of the law; it's a process based on political objectives. And the ECJ accepts that the political objectives of the Council are not really questionable. The only thing that's questionable is whether the substance of what they claim is actually there.

#Alexandra Hofer

Yeah, right. So I think that's why it's important now to be critical and to draw attention to—okay, sure, we accomplished something 20 years ago with the UN Security Council listing—but we're starting to have our own problems because if the Council has so much power in deciding who to add to the list, and the review is a bit, you know, okay, you check the facts, of course you want to make sure, is this accurate, and so on and so forth. But, you know, you are interfering with individuals' rights. And it just seems to me that sometimes the link between the individuals targeted and the action the Council wants to respond to is missing.

So, for example, you know, with human rights abuses in Syria, the individuals themselves are often very far removed from what's actually happening. But it's kind of like the system runs on assumptions—on presumptions. Like I said, take the example of a businessman, or you're a family member of someone, and then, by that, I might think you're associated with this person. Therefore, by sanctioning you, somehow I'm putting pressure on the regime whose behavior I want to change. Yeah. And I think, when we talk about the fact that individuals' human rights are being restricted, you look at, okay, is there a legitimate aim?

Very often there is, okay. But you also need to check, like, is that restriction being put on the individual proportionate? Is it not too much of a restriction, too much of a burden? And the court has basically said, well, given the importance of the issue at stake, it's proportionate. I haven't seen any judgments from the European Court of Justice where they really do what I would consider a thorough proportionality test for the individuals concerned who have been sanctioned.

#Pascal

Okay, this is a very important piece of information, because what this indicates to me is that taking these cases to the European Court of Justice is, on the one hand, important as a challenge, but on the other hand has little chance of actually resulting in a permanent delisting of these people if the politicians in power don't want that. So this leads me to the next question—human rights. Because we have bodies that could pick it up. The biggest challenge, usually, for a human rights body, either within the UN or outside the UN, to take it up, is that you need to exhaust all national remedies. But

if this holds—that the ECJ is, in fact, basically powerless to really delist them—then there would be a strong argument to say, “Oh, we’ve already exhausted all local law avenues. Please, Human Rights Council at the UN, pick it up,” or whichever court you think is the right one within the human rights space.

#Alexandra Hofer

Yeah. Well, that’s where we get into this other tricky area of international law, because the EU is the one adopting the restrictive measures. So you would invoke the EU’s responsibility. The problem is that the EU has not ratified the European Convention on Human Rights. The EU as an organization is supposed to, but at the moment they only have the EU Charter—we have the European Charter of Human Rights—but the convention itself, the EU has not ratified. And that has to do with some constitutional issues within the EU itself. The EU is also not a party to the ICCPR, the Convention on Civil and Political Rights. So you would, I think, have a hard time...

#Pascal

Which is the third pillar of the human rights treaties, yeah.

#Alexandra Hofer

Yeah. So, you know, you would have a hard time invoking the EU’s responsibility and saying the EU is breaching human rights law, just because the EU hasn’t ratified them. It would be interesting to see if you could—I want to explore this with my colleagues in European Union law—to see, okay, is there really nothing that can be done? Because I don’t think, personally, that it’s sufficient for these individuals who have been listed. I don’t think it’s enough for them just to try to challenge their listing before the ECJ. I really think other action is necessary.

And of course, you know, organizing ourselves—gathering information, sharing information, doing advocacy, appealing before the European Parliament—all that’s important. I wonder if there’s any option for interested persons, for EU citizens who are concerned, to go before the European Court of Human Rights. Eventually, they’d probably have to try to go before their domestic courts and say, “Listen, there’s a manifest issue with this Council decision that’s impeding, for example, freedom of expression.” And, you know, what’s interesting about the European Court of Justice is that sometimes it’s asked to apply human rights law, or international law in general.

And sometimes its reasoning can be extremely unsatisfactory and frustrating for people who are experts in that area of international law. So there was a case where Russian media outlets had been sanctioned within EU territory. RT France, the French branch of RT, challenged their listing. They immediately went to the General Court of the European Court of Justice, arguing that this was a breach of freedom of expression and information, a disproportionate interference, and so on. But the court upheld the listing of RT France.

They said, okay, yes, there's been an interference in this case with freedom of expression and information, but it's justified. And then... yeah. Well, I came across an article written by two colleagues—one is now in Amsterdam and the other is a professor emeritus in Ghent. Essentially, in that article, they expressed their frustration with the General Court's poor application of case law on freedom of expression. So basically, the court accepted the Council's argument that RT France's issue was, I don't know, broadcasting Russian propaganda. And that, given the urgency of the situation—this happened just after the war broke out—and the interests at stake, it was a justified interference, and so on and so forth.

So basically, when I read the judgment, I thought, well, you know, if this is what the General Court is willing to accept, then basically the Council can decide that anybody is issuing statements contrary to the goals it wishes to pursue and list them. And then I found this article saying that the General Court had not properly applied the case law—especially that of the European Court of Human Rights—when it comes to freedom of expression. Because in the cases the General Court of the European Union was assessing, what the court had missed was that there was always another independent regulatory body reviewing the information being broadcast.

And here, in the case of RT France, well, it's the Council of the EU—an executive body of a political institution—deciding that certain speech acts or information should not be shared. So already you have a problem, because that's not consistent with human rights law. Can we really give so much power to the executive to decide when information is considered a threat to public order, national security, or whatever it may be? That was one nuance, I'd say, that the General Court didn't consider when giving its assessment in RT France v. Council.

#Pascal

I mean, in a nutshell, this legal reasoning also seems very much to give in to the reasoning of the executive—of the EU executive. If the executive says it is so, then we, as a court, accept that it must be like that. Therefore, we uphold such decisions.

#Alexandra Hofer

I mean, in the end, you kind of reach this conclusion. Of course, they give a reason for, you know, what it is that supports their conclusion. It's not just like, "Oh, well, we decided we're going to agree with the Council." There's a reasoning behind it, but it's not necessarily a very sound reasoning, or one that would be satisfactory to somebody who's familiar with this area of law, let's say.

#Pascal

Let me ask you this. I had a conversation this morning with Professor David Gibbs from the University of Arizona, and he pointed out that, in the U.S. case, there's always the Constitution. And the U.S. Constitution, with its amendments, is actually very strong on protecting civil liberties. The

question is always one of applicability—who does it apply to, and who not? Only white people, or also Black people? You know, over time this changes. But the safeguards within the Constitution are very strong. For the European Union, do we have a similar kind of fundamental document that we could point to and say, “Look, you have to grant this—the ECJ, this piece of fundamental law—overrides these executive decisions”?

#Alexandra Hofer

Yeah, well, we have the EU Charter of Fundamental Rights, so normally human rights are applicable within the EU order, and the EU agencies and bodies have to respect human rights. Right. The whole issue is, if they interfere with the exercise of human rights, can that be justified? And in the case of restrictive measures, they've been willing to accept restrictions. Usually they do the review, let's say, on the facts, and so on and so forth. But I don't know how satisfactory it really is.

And also, the other issue, of course, like we mentioned at the beginning, is that we're not dealing with a traditional judicial process. You know, it's an executive body that has adopted a restriction. And then we discuss whether or not it's sufficiently justified. And, like I said, because of the nature of the decision, the courts tend to give a lot of power to the Council. Now, I do wonder, in the case of Jacques Vaux, for example, how they're going to interpret “a Russian mouthpiece.” I don't even really know what that means.

#Pascal

That word is in the classification.

#Alexandra Hofer

Mouthpiece. Yeah, a Russian mouthpiece. I don't know if I can find it right here on my screen. Yeah. So, have you actually seen the decision yourself?

#Pascal

I did, yeah. I just don't recall the exact wording anymore.

#Alexandra Hofer

Yeah, so Jacques Baud, a former Swiss Army colonel and strategic analyst, is a regular guest on pro-Russian television and radio programs. He acts as a mouthpiece for pro-Russian propaganda and spreads conspiracy theories.

#Pascal

Yeah. I mean, they phrase it like that so they don't have to say he's being paid or something by the Kremlin, which they couldn't prove. No, exactly. Because it's not true—but "mouthpiece" is undefined, right? So, are you a mouthpiece if you repeat one sentence that came out of the mouth of Vladimir Putin? Obviously. Yeah.

#Alexandra Hofer

And I don't know, like, Jacques Baud doesn't define himself as, you know, pro-Russian or pro-anybody. He just gives his analysis. And I guess it's quite critical of the EU and of NATO, and apparently for that reason, he's a mouthpiece. Yeah.

#Pascal

And again, the sick thing about this is that none of these acts are actually illegal. They're not illegal. But they don't have to be illegal for the EU Council to sanction him. They can be perfectly legal. That's the whole point. I mean, if you're one of the bureaucrats doing this, the fun part is you can define anything as undesirable and act on it, whether you've got legislation for it or not.

#Alexandra Hofer

Yeah. Well, they have the legislation, right? So they're allowed to do what the EU treaties allow them to do. They have some sort of process, and then, you know, they kind of decide how to apply it. And, yeah, I think we're reaching a point where we need a broader social discussion. Like, this is what the Council is able to do with its sanctions, right? This is how unsatisfactory the proceedings before the court might be. You know, as citizens of the EU, is this really what we want?

#Pascal

Where could the power to levy sanctions be challenged? How could you fundamentally question the EU's right to impose sanctions—not just on its own citizens, but on individuals in general? Is there a court that could hear a complaint about this and rule that the EU isn't allowed to do it?

#Alexandra Hofer

I don't think they would be able to make it illegal for the EU. I'm curious to know whether interested individuals can actually challenge the Council decision that gives them the power to adopt sanctions against what they call "foreign information manipulation and interference." So, not just a specific listing, but the decision as a whole. Yes, and say, you know, this decision is highly problematic because it leaves room for abuse and arbitrary application of restrictions according to the whims of

the Council. I wonder if citizens can challenge that. I know you can generally challenge Council decisions, but again, because of the nature of these decisions—we're talking about EU sanctions, or "restrictive measures," as the EU calls them.

I don't know if they would allow it. They might. I don't know. That's one of the things I want to explore with my colleagues in EU law—like, okay, what are the avenues available to challenge these measures when they clearly go very far in this case? But then I also wonder if we're really aware of the consequences of what living under sanctions entails. I mean, I was thinking the same thing. I think you ended one of your podcasts saying, you know, you're treated better in prison.

#Pascal

Because they give you food. They have to shelter you.

#Alexandra Hofer

You don't have to worry about your basic needs being met. But then I wonder, under what circumstances is it actually okay to sanction somebody? I mean, the idea was to prevent terrorist actors. So you can imagine freezing the assets of people who are about to engage in a terrorist act. But you still have to be sure that's really what those individuals intended to do. And if you, say, preventively freeze their assets, you'd expect some sort of review to make sure you got the right person, and so on. Some individuals can be listed indefinitely.

#Pascal

And you have to do that through the judicial process. I mean, Parliament has to make a law on anti-terrorism, on terrorism prevention. And then the people who want to apply it to somebody need to go to court and say, "This person we've identified needs to be restricted." Then the court needs to issue that. So it goes through a review process and can be challenged by that person. You're in the court, you're in the judicial system. But again, we are outside the judicial system. The judicial system—the ECJ—is really just affixed to it, kind of an appendix to the decision already taken.

#Alexandra Hofer

Well, yeah, I mean, somebody might listen to what I'm saying and say, you know, Alexandra, you're being really unfair to the court. This is just how, you know, reading this case law and looking at how they assess these sanctions—like, this is my first impression, the conclusions that, you know, I've come to. And I think it's a really unsatisfactory system. And the other thing is, if you look on the website of the European Union, one of their many pages where they explain sanctions—as you mentioned—they have this paragraph saying they comply with international law, human rights, and so on and so forth. They also say the sanctions are temporary, and the idea is that they are reviewed. I'd be curious to know how the Council actually reviews the sanctions.

Because you would think that if some people are listed for an extremely long period of time, you'd kind of say, okay, is there still a point, a purpose, in keeping this individual listed? Also, there's the question of what the actual purpose of the sanctions is. Like, if Jacques Beau—let's say—what is it that Jacques Beau has to do in order for the Council to delist him? Does he have to change his behavior? Does he have to stop going on pro-Russian channels, even though we don't really know what "pro-Russian channels" are? Is it basically that he should stop appearing on YouTube channels, sharing his analysis? They don't communicate clearly what needs to be changed in order for someone to be delisted.

#Pascal

Well, that's the whole thing about this—it's 100% arbitrary. And the crazy part is, there is a review mechanism. I mean, formally, every six months the Council reviews whether it wants to extend the sanctions. And every six months it decides, yes, we do. So in front of the ECJ, they can say, "No, no, no, there's a review mechanism. We have a review mechanism." It's an automatic mechanism, but it's still a mechanism. And that actually ticks that little checkbox on the spreadsheet.

#Alexandra Hofer

Yeah, so you can kind of say it's like empty box-checking, you know? Yeah. Do I have facts? Yes, I have facts. Do I have a legitimate aim? Yes, I have a legitimate aim. Is it temporary? Yes, it is. And so on and so forth. So, yeah, I think...

#Pascal

Sorry, I just need to ask, because what I wonder is, how could we—how could this regime possibly be challenged? And by "regime," I mean the sanctions regime, right? Because is there another route, in your mind, through the member states? Like, say, look, Jacques Beau's in Brussels, right? "Brussels, these sanctions against me are an infringement of my human rights. Please order the Belgian government not to implement these sanctions."

#Alexandra Hofer

Yeah, that would be interesting. So that's what we saw with those UN Security Council sanctions. Basically, pressure started to be put on the states that were implementing them. Now, the thing is, again, it's the whole question of who's responsible. The idea is that EU sanctions are an exclusive competence of the EU. And when the Council adopts a decision, there's immediately an implementing regulation that's adopted, and that's directly applicable within all the member states.

#Pascal

And it's automatic. I mean, the member states already, previously in the treaties—probably the Lisbon Treaty—signed up for the implementation of Council decisions, right? Therefore, since this is a Council decision, it has to be implemented, right?

#Alexandra Hofer

Yeah, and there's the regulation with it, so it has to be implemented.

#Pascal

But the question is whether human rights concerns—if a court finds that there are human rights concerns—could override the... Yeah, so that's what I'm wondering, if there could be some form of...

#Alexandra Hofer

I mean, I'm not saying it would be successful, but it would be at least a way of, I don't know, judicial activism maybe—to say, listen, there's an issue here. I don't know. Of course, you never know how a national court would treat it. They might easily say, well, you know, this is obviously an EU issue. But it might, depending on how it's framed—if you really highlight the human rights issue at stake—it might be able to draw attention to it. So I'm kind of brought back to how sanctions were challenged by national and regional courts 25 years ago, and maybe now we're back in a similar space, but at the EU level rather than within the UN Security Council.

So I think, yeah, that would be interesting—the way it's been implemented. But the idea, of course, in the case of Jacques Bou, is that he has to ask for permission, for example, from the Belgian government to access certain funds to meet his basic needs, right? The same with Hussein in Berlin—he has to ask for permission from his bank in Germany to get funds to pay his rent or buy basic food. So I don't know if that's considered sufficient to respect his human rights.

But of course, you know, the broader issue is that these individuals are being listed without anyone really checking whether the facts are true. What I find quite problematic is that the Council is basically allowed to say whatever they want about somebody, and it doesn't matter. I mean, of course, before the ECJ you can challenge it—say, "OK, this isn't true," and so on—but to a certain extent, the damage is already done. If you think about Jacques Bou, that affects his reputation, for example. He wants to be an analyst, and then all of a sudden he's accused of spreading conspiracy theories.

#Pascal

Yeah, although I'm pretty sure the legal implications are much heavier. I mean, even his books are banned now in the EU, right? They can't be sold. His publishers can't publish them anymore. I mean, you're basically a non-person, which is so horrible. But that's why I wonder, you know, the issue to

me is that it's clear these sanctions—especially against individuals—are a pretty draconian political measure that, unfortunately, have standing in front of the EU and within the EU because of the way the EU is constructed. So I wonder if there's a creative method to undo this damage as creatively as it was done. For instance, what happens if a state said, "Okay, we're going to give these people a diplomatic passport?"

#Alexandra Hofer

No, they're allowed to do that.

#Pascal

If they had a diplomatic passport, would that change anything? Would the Vienna Convention kick in, and would that give them a way to wiggle out of what's happening?

#Alexandra Hofer

What's interesting is that, for example, in the Council decision itself—I'm not sure if it's the decision or the regulation—there's an exemption for individuals who hold diplomatic passports. The idea is that EU member states can't be asked to violate their international obligations, for example under diplomatic and consular law.

#Pascal

What would that mean?

#Alexandra Hofer

Well, I think, for example, Sergei Lavrov has been listed.

#Pascal

OK.

#Alexandra Hofer

But I don't think they've imposed it. I have to check. I don't think they've imposed a travel ban. So I think that basically means the EU doesn't want to interfere with his function as minister of foreign affairs by not allowing him to travel where he needs to go—to attend negotiations or whatever.

#Pascal

Okay. But it's not something automatic. It's not something automatic. Anyhow, it's something that, on a case-by-case basis, the Council would probably rule on, because actually these sanctions are separate, right? The travel ban sanctions and the financial sanctions are in the same document, but they're kept as separate things under that legislation.

#Alexandra Hofer

Well, there's one article that says your assets are frozen, and another article in that decision that says you can't travel.

#Pascal

Okay, okay.

#Alexandra Hofer

But, for example, from the Swiss perspective, it would be interesting if they wanted to—what would be the terminology—exercise diplomatic protection for their nationals who have been sanctioned, saying, "Listen, you're violating my nationals' human rights." That would be interesting. Of course, that depends on the political will in Switzerland to do that, because they don't have the obligation. It might also be interesting if there were things they could have done for their nationals that they didn't do, and then Nathalie Jam or Jacques Beau, you know, sued the Swiss government and said, "You failed to protect my human rights." Then the court might put pressure on Switzerland, saying, "Well, you should have brought this up, or you had the opportunity to bring it up before the Council of the EU, and you didn't." So that's another way to do it. Yeah.

#Pascal

You know, in Switzerland, we have the option of creating a popular initiative, which, if we gather enough signatures, becomes a referendum. It allows us to write additions to the Constitution. So we could write into the Constitution that if a person is sanctioned, then the government must give them that kind of protection. But that's a process that would take anywhere between three and five years, and it's anything but guaranteed. I just wonder what kind of avenues we have to think about, because I fear that the sanctions regime we're seeing now is really only the beginning. It would surprise me if it were the end—I mean, it would be a very pleasant surprise. But they have this tool now. From the perspective of the EU, this is a very, very handy tool. You can use it against anyone and anything.

#Alexandra Hofer

Did you follow the Freedom Convoy in Canada in 2022?

#Pascal

Oh, yes.

#Alexandra Hofer

Do you remember how the Canadian government reacted to the protesters—and to the individuals, sorry?

#Pascal

They froze their bank accounts immediately.

#Alexandra Hofer

They froze their accounts, yeah.

#Pascal

No, you take— I mean, if something, you know, like the Corona pandemic and now the Ukraine war— they really kind of ended the idea that the nation-state doesn't matter very much anymore. At the end of the day, the governments of the 190 or so, 200 governments we have on Earth, they're the ones who call the shots. And unfortunately, we're still struggling on the ground to figure out how to protect ourselves against our own people who call the shots. In Germany, for instance, the Basic Law is supposed to be a law protecting the individual against the legislature and the executive as well. But it's not working properly. Otherwise, I'm saying Dogru would be protected, but he isn't.

#Alexandra Hofer

Yeah. Yeah, so I think that's what's most important. My view is that we, the people, say, "Listen, sorry, but we do not want to live in this kind of society." And I think it's a good thing that this sanctioning—and others, of course—might serve the greater purpose of reminding us, "Listen, we need to be careful about the powers that are in place and that can be used against us." I did— you know, I'm curious to see. I mentioned to you that there are now Russian academics who have been listed. And, you know, again, if you read the statement of reasons, it's, okay, they're accused of having pro-Russian, pro-Kremlin ties. I have no idea to what extent that's true. Again, they can write whatever they want. But then the reason for the listing is that they say Russia is reacting to NATO expansion, that Russia is basically defending its interests against the West, and so on and so forth.

So any type of analysis like that actually isn't that uncommon. You can find it among academics who aren't only Russian. And those individuals have been sanctioned. It's not that they're being accused of spreading disinformation or making things up. They're being listed for providing their own analysis

and interpretation of a situation that could be valid based on the facts. So I'm really curious—I don't know. I hope those individuals will challenge their listing, because they're also described as analysts, for example. It's not that they're being called propaganda actors or anything like that; they're specifically being sanctioned because of their position within academia, in Russian academia.

#Pascal

Yeah, but the point is, where do you challenge it, right? Which courts could have a real-world impact, or what kind of treaties could be used creatively to undermine that? Just another thing—did the EU ever accept any kind of arbitration on such matters? Because there's this lovely treaty, the Washington Treaty, where if there's an arbitration award, it can be enforced in basically all member states, which is everybody. I just wonder what would be a way to get rid of the underlying draconian power to do that.

#Alexandra Hofer

Well, I don't think—if we wanted, courts would be useful—but I think the most effective way to do it would be through our own actions as citizens, you know, through the means available to us. I think we have the European Parliament.

#Pascal

I know... Michael von der Schulenburg, yeah.

#Alexandra Hofer

Yeah, but he was saying that a lot of his colleagues aren't too bothered. They're on board with it—that's the problem. I think they might be unbothered now, but, you know, we just have to see what we can do to draw attention to these issues. I know there are colleagues I mentioned who wrote that article on the general court's flawed application of the rules governing freedom of expression. So I think those types of actors are necessary to tell them, "Well, this is really dangerous." Now, obviously, the problem is that we're in this Russia context, you know? People are willing to accept so many limits because of Russia, or whichever "bad actor" we're supposed to be fighting now. But then, of course, the issue is: when will this be applied in other situations? And how would people react then, if they're aware of how far this can go?

#Pascal

I mean, the sad thing about this is that we already have people who were sanctioned for completely different reasons—Nathalie Yamb, because she's an anti-colonial activist in Africa, and Hüseyin Doğru, because he's a pro-Palestine activist. It's very clear from the listings. So it's already been used—the tool has already been used outside the Russian context. So now, I mean, anyone is fair

game for anything, just because they might have crossed somebody—probably somebody powerful. I know that Emmanuel Macron knows the name Nathalie Yamb, and he dislikes her very much because of her activities. But that's, I mean, it's this arbitrary nature of the tool that's so problematic and needs to be addressed somehow. But in your opinion, it probably has to be addressed through political action, not through—well, we can't get rid of it through judicial measures.

#Alexandra Hofer

Not only. No, we definitely need political action. And I already think that, you know, Pascal, what you're doing by drawing attention to this issue is important, because these sanctions have existed for a long time. But it's good that we realize just how they can be used. I mean, what I found so interesting in the case of the protesters in Canada was that there was hardly any media coverage of the fact that the government had frozen the accounts of protesters, or of people who had funded the protest—even just by giving, like, twenty Canadian dollars. Right? There was no media coverage of that.

#Pascal

And at the moment, I don't know—no mainstream media coverage, because it was rather big in our online space. But yeah.

#Alexandra Hofer

Yeah, indeed. So there has been some media coverage of the sanctions against Jack Bull, but I didn't really see it presented in a way that was too favorable to him. It was mostly, you know, kind of portraying him the way the council presented him. But I think maybe once people start to realize what's actually happening and what's at stake, they'll say, "Wait a second, there's more to this story than what's been presented to us."

#Pascal

Yeah, I think, especially in mainstream media, the severity of what's happening is not being reported. What's being reported is like, oh, the EU Council is saying this, the other one is saying it's not true. Who should we believe? I don't know. Who can know? That's not the issue. The issue is that you start infringing on people's human rights based on no crime. There's no crime—no crime involved—and you're taking away fundamental human rights. So this... this is completely, utterly lost at the moment. And unfortunately, this, of course, has to do with the way the media works. We understand that by now; people have explained it, including, uh, uh, um, what's his name, what's his name... uh, Herman—I'm blanking out—who wrote this great book on how media keeps itself clean, how propaganda works. Herman... it'll come to me. Sorry.

#Alexandra Hofer

He's very famous—sorry.

#Pascal

He's very famous—Chomsky, Chomsky.

#Alexandra Hofer

Oh, Chomsky. Okay, yes. What's the word—consent? No?

#Pascal

Manufacturing Consent.

#Alexandra Hofer

Manufacturing Consent. Okay.

#Pascal

I mean, we understand that. It just... I'm sorry to say, but it sucks that it works—that society works this way. So, just in general, for listeners, if there are other sanctioned lawyers and so on listening who have creative ideas, please do reach out. Because at this point, what we need to do is public thinking together—you and I and others.

#Alexandra Hofer

I've reached out to colleagues. Um, I've gotten some reactions. The other thing to bear in mind, of course, is that it's during the holidays. Yes, yes.

#Pascal

Um, but I think, yeah, you know, it's just another dirty thing—like sanctioning people on the 15th of December, when you know that in the coming weeks everything's going to be out and their life is basically whatever it's going to be. I mean, Christmas must've been horrible. Anyway, um...

#Alexandra Hofer

Or maybe it was heartwarming because a lot of people came to them—I have no idea. But I wonder, you know, the Russian colleagues I was mentioning, I wonder if they're even impacted by the measures, right? If they have all their assets in Russia, then, okay, they can't travel over European airspace, which would probably be annoying. But I think some individuals are less affected than others. I'm not saying that means sanctions are less bad, but... yeah. You just don't know how they

impact people. And that's why it was a surprise to hear from, you know, Natalie Young's experience, because you'd think, well, she's in Africa. And then it's just so surprising to hear how companies comply when they actually have no legal obligation to do so.

#Pascal

I know that from friends—lawyers, corporate lawyers—who work in the legal departments of these companies. They do this due diligence, right? And what they don't want is to take any form of risk. If it can be avoided, it must be avoided. Therefore, they'd rather implement too much than too little. Same with data, you know—data protection and so on. That's why we see the cookie policies on every goddamn homepage now. It's overcompensation for potential harm. And that's what they do with the sanctions too.

#Alexandra Hofer

But that's the other interesting thing about the EU's practice, because at first the EU was very critical of that. It didn't want its companies to comply with U.S. sanctions that didn't have extraterritorial jurisdiction over European actors or corporations. And now you see that the EU is kind of willing to accept—or rather, to adopt—measures that do have an extraterritorial effect, even though, if you look online, the EU insists its measures don't have any. But they've been adopting measures increasingly, especially against Russia, that are having an effect on third states.

#Pascal

I mean, the point is that they threaten their companies, or companies operating within the EU—and airlines often have some connection to the EU—that if you don't comply, they'll punish you very, very severely, right? So all it takes is one single branch office somewhere in or connected with the EU, and there you go. You'd better implement than not.

#Alexandra Hofer

It would be interesting if you could have it on paper that the EU or some European actor did that, because technically they're not allowed to. Under their own rules, they're not allowed to do that. If it's, for example, an African airline with no jurisdictional ties to the EU, I don't see how the EU could then basically say, "No, that's not our fault. It's the airline that's, you know, de-risking or over-complying of its own free will." But if you have something where the airline says, "No, we were told very clearly by the EU that if we did this, then this would be the consequence," then the EU becomes responsible for that.

#Pascal

No, it would surprise me if that existed, because the EU works by threat and by vagueness. You know, this vagueness is intentional—it creates that sort of Damocles sword hanging above you that the legal departments then try to avoid. So it would really surprise me if there was any kind of...

#Pascal

Outspoken.

#Pascal

And, you know, Alexandra, is there anything you think we didn't touch on that should be discussed today?

#Alexandra Hofer

Um, no, I don't think so. I think we've kind of covered the fact that it's a very bleak picture at the moment, but hopefully we're getting enough momentum to turn things around for the better.

#Pascal

I hope so, too. I hope so, too. In that case, thank you very much for your assessment and for this online public brainstorming together. I really appreciate it. For people who want to read more from you, where should they go? Do you have a place where you upload your papers and so on?

#Alexandra Hofer

I think all the papers I've published are available on my online profile at Utrecht University. So, yeah, that's where they can be found.

#Pascal

I'll put the link to your publications at Utrecht University in the description of this video below. Alexandra Hofer, thank you very much for your time today.

#Alexandra Hofer

Thank you very much, Pascal.