THE EUROPEAN UNION'S GLOBAL HUMAN RIGHTS SANCTIONS REGIME AND THE 'ROLE RESPONSIBILITY' OF INTERNATIONAL ORGANISATIONS

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ABSTRACT

In 2020 the European Union (EU, the Union) adopted the Global Human Rights Sanctions Regime which, similarly to some national efforts, allows the EU to intervene against serious human rights abuses occurring beyond the Union's borders by adopting targeted sanctions. This contribution aims to critically assess the new regime's essential elements, also drawing on existing EU sanctions regimes' relevant practice. It explores the potential pitfalls that may prevent the new regime to achieve the desired results, as well as the innovative features that may contribute to the development of international law in this field. In this respect, attention is brought onto the theoretical concept of 'role responsibility' and on the examination of possible (international and/or internal) legal grounds for EU action in this field. The contribution closes by looking at the first implementation of the Global Human Rights Sanctions Regime in light of the critical aspects raised in the overall analysis.

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1. INTRODUCTION

According to the consolidated version of the Treaty on European Union (TEU),[1] the European Union (EU, the Union) shall contribute to the protection of human rights as well as to the strict observance and the development of international law in its relations with the wider world. In doing so, the Union shall seek to advance values such as democracy, the rule of law, respect for human dignity and respect for the principles of the United Nations (UN) Charter and international law across the world. Whether this post-Lisbon framework implies a positive duty for the EU – where this is reasonably possible within the exercise of its powers – to set the conditions for a fairer and more effective enjoyment of human rights worldwide is debatable.[2] Despite its rather unclear content, such a general duty has nonetheless facilitated more resolute action against (some) violations of human rights taking place worldwide.

In 2020, taking stock of the Union's autonomous role in adopting restrictive measures[3] based, *inter alia*, on human rights considerations against third countries and non-state actors or on thematic grounds,[4] the EU adopted its 'Global Human Rights Sanctions Regime' (GHRSR).[5] This move on the part of the EU reflects the general evolution of sanctions,[6] which favours individualised

1 See consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, Articles 3(5) and 21.

2 On how human rights are embedded horizontally in the EU post-Lisbon external policy, see M. Balboni and C. Danisi (eds.), *Human Rights as a Horizontal Issue in EU External Policy*, Editoriale Scientifica, Napoli 2021.

3 Although the common term for these measures in EU law is 'restrictive measures', in this contribution we will interchangeably use the terms 'sanctions' and 'restrictive measures'. In this respect, it is worth noting that there is no single, clear international definition of 'sanction'. It could nonetheless be read as a measure (not only of economic nature) adopted against a subject (not only a state) in order to induce it to comply with international law or to punish it in the event of such a violation. See T. Ruys, 'Sanctions, Retortions and Countermeasures: Concepts and International Legal Framework', in L. van den Herik (ed.), *Research Handbook on UN Sanctions and International Law*, Elgar, Cheltenham 2017, pp. 19–51.

4 *Ex multis*, C. Eckes, 'EU Restrictive Measures against Natural and Legal Persons: From Counterterrorist to Third Country Sanctions', (2014) 51(3), *Common Market Law Review*, pp. 869–906; M. Brzoska, 'International Sanctions before and beyond UN Sanctions', (2015) 9(6), *International Affairs*, pp. 1339–1349. The GHRSR joins the already existing thematic regimes, set up respectively against chemical weapons, cyber-attacks and terrorism, along 29 autonomous sanctions regimes with a geographical scope (as of 31 March 2021): see the useful map summarising all regimes at https://sanctionsmap.eu.

5 Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJ L 410 I (hereinafter Council Decision 2020/1999); Council Regulation (EU) 2020/1998 of 7 December 2020, OJ L 410 I (hereinafter Council Regulation).

6 As a key document for this evolution, see UN Security Council, Non-paper on the humanitarian impact of sanctions, attached to the Letter from the Permanent Representatives of China, France, the Russian Federation, the United States and the United Kingdom to the United Nations addressed to the President of the Security Council, S/1995/300, 13.04.1995.

measures in place of generalised restrictions against third countries to avoid, as far as possible, collateral effects on entire populations.[7] Indeed, through the new legal framework, the EU aims to prevent relevant – or to avoid further – violations by imposing a range of specific restrictive measures against actual or potential perpetrators.[8] Similarly to some national efforts, such as the famous 'Magnitsky Act' of the United States of America,[9] this regime establishes the key elements that enable the relevant EU institutions to target individuals and entities as well as identify the human rights abuses that justify the adoption of restrictive measures. The first implementation of the GHRSR has already been controversial within and beyond the Union, although mostly in international political terms rather than legal ones. The Council's adoption of restrictive measures against specific Chinese nationals for the treatment of the Uyghur minority and China's 'sanctions' in response clearly demonstrate the difficulties associated with implementing the new regime without the EU being accused of unjustified interference in the internal affairs of a sovereign state in contrast to international law key principles.[10] Although the GHRSR emphasises individual responsibility by de-linking human rights from a specific country and targeting non-state actors as well, sanctions are perceived as directed against a country.

See also Council of the European Union, Basic Principles on the Use of Restrictive Measures (Sanctions), 10198/1/04 REV 1, 07.06.2004.

7 For a general analysis on EU, C. Portela, *European Union Sanctions and Foreign Policy: When and Why Do They Work?*, Routledge, London 2010; C. Portela, *Targeted Sanctions against Individuals on Grounds of Grave Human Rights Violations – Impact, Trends and Prospects at EU Level*, Study requested by the European Parliament, Brussels 2018; M. Gestri, 'Sanctions Imposed by the European Union: Legal and Institutional Aspects', in N. Ronzitti (ed.), *Coercive Diplomacy, Sanctions and International Law*, Brill, Leiden 2016, pp. 70–102.

8 The preventive role of such restrictive measures in general is underlined in Council of the European Union, Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU CFSP, 11205/12, 15.06.2012. Yet, from the initial implementation of the new regime, one may wonder whether the EU aims also 'to punish', at least indirectly, perpetrators of human rights abuses (see section 4, below).

9 The 'Global Magnitsky Human Rights Accountability Act' was adopted on 18 April 2016 and followed the 2012 Magnitsky Act focused on sanctions against the death of the Russian whistle-blower S. Magnitsky. The Act is available on the United States Congress website at www.congress.gov/bill/114th-congress/senate-bill/284/text. Unlike the EU GHRSR, it covers also acts of significant corruption. For a comment, M. Smoler, 'The Global Magnitsky Act Represents New Era of Smart Sanctions', *Human Rights First*, 20.09.2017, available at www.humanrightsfirst.org/blog/global-magnitsky-act-represents-new-era-smart-sanctions, last accessed 15.02.2021.

10 See Annex of the Council Implementing Regulation (EU) 2021/478 of 22 March 2021 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses, OJ L 99 I (hereinafter Council Implementing Regulation 2021/478). The human rights violations suffered by this minority is also reflected in the European Court of Human Rights' (ECtHR) case law: see ECtHR, *M.A. and others v Bulgaria*, no 5115/18, 20.02.2020, and the wide documentation mentioned therein. See also China's reaction at www.euronews.com/2021/03/22/eu-foreign-ministers-to-discuss-sanctions-on-china-and-myanmar, last accessed 23.03.2021.

As we explore here, the focus on 'key political figures' signals a denunciation of violations led or sponsored by third states against their own population or minority groups, something that echoes at least implicitly the rationale beyond the so-called 'responsibility to protect' (RtP).[11] The resulting impact on EU international affairs risks having a negative influence on the development of the GHRSR.

This contribution aims to provide one of the first comprehensive analyses of the Union's new global regime in order to verify whether such an EU move actually is the key international human rights achievement that some initial commentators have claimed.[12] To this end, its essential elements will be critically assessed to identify any potential legal and/or practical difficulties that may prevent the new regime from achieving the desired results. Given that targeted sanctions have been a cornerstone of the European Common Foreign and Security Policy (CFSP), the analysis will also draw on other existing EU sanctions regimes. In particular, the principles that have emerged in connection with such regimes in the case law of the Court of Justice of the EU (CJEU)[13] will help us to determine if the GHRSR is, or could be implemented in such a way that is, in compliance with the rights of targeted individuals and entities under EU and international law. Pending implementation issues around the potentially wide scope of the new regime are not our sole concern. Indeed, a more substantive point should be addressed here: all things being equal, when will the EU resort to restrictive measures for serious human rights abuses? It is unrealistic to expect that every perpetrator of human rights abuses will be subject to EU sanctions. Whereas discretion in foreign affairs will certainly play

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11 UN General Assembly, 2005 World Summit Outcome, A/RES/60/1 24.10.2005, p. 30. On the RtP, *ex multis* J. Hoffmann and A. Nolikaemper, *Responsibility to Protect: From Principle to Practice*, Amsterdam University Press, Amsterdam 2012; R. Thakur and W. Maley, *Theorising the Responsibility to Protect*, Cambridge University Press, Cambridge 2015. At least formally, the EU endorsed the RtP (see Council of the EU, Conclusions – UN World Summit, 07.11.2005), although it has been reticent to implement it as analysed by C. De Franco, C. O'Meyer and K.E. Smith, '"Living by Example?" The European Union and the Implementation of the Responsibility to Protect (R2P)', (2015) *Journal of Common Market Studies*, p. 996 et seqq.

12 To the author's knowledge, at the time of writing there is still a lack of literature on the new regime, apart from some short comments: F. Finelli, 'A New EU Sanctions Regime against Human Rights Violations', (2020) *European Papers*, pp. 1569–1571; Y. Miadzvetskaya, 'Habemus a European Magnitsky Act', *European Law Blog*, 13.01.2021, available at https://europeanlawblog.eu/2021/01/13/habemus-a-european-magnitsky-act; R. Youngs, 'The New EU Global Human Rights Sanctions Regime: Breakthrough or Distraction', *Carnegie Europe*, 14.12.2020, available at https://carnegieeurope.eu/2020/12/14/new-eu-global-human-rights-sanctions-regime-breakthrough-or-distraction-pub-83415; T. Ruys, 'Introductory Note to the European Union Global Human Rights Sanctions Regime (EUGHRSR)', *The American Society of International Law*, 7.12.2020, all last accessed 20.03.2021.

13 C. Cellerino, 'Human Rights, Court of Justice and External Action', in M. Balboni and C. Danisi (eds.), *supra* note 2, pp. 73–96.

a role, an examination of possible (international and/or internal) legal grounds for EU action in this field is essential to clarify if and, in the positive, when such measures should necessarily be adopted. An investigation into international organisations' responsibility regime under international law as well as of the theoretical concept of 'role responsibility' could provide some answers in this respect.

For these reasons, this contribution is structured as follows. The next section analyses the framework of the GHRSR by focusing on the nature of abuses and the categories of individuals and entities covered by the regime, as well as the expected protection against restrictive measures (section 2). After a discussion on the legality/legitimacy of the EU's role in imposing restrictive measures (section 3), the GHRSR will be tested in light of its first implementation and the subsequent reactions within the international community, the significance of which cannot be overlooked (section 4). The contribution ends with some final remarks (section 5). In summary, whereas the GHRSR certainly provides an additional tool for implementing existing EU policies designed to protect human rights globally, the idea of 'acting by sanctions' in itself is called into question given, *inter alia*, the legal pitfalls that will be identified in this contribution.

2. THE NEW EU GLOBAL SANCTIONS REGIME

Acting upon a proposal by the Commission and the High Representative for Foreign Affairs (HRVP) and supported by the European Parliament,[14] in 2020 the Council established the first EU-wide horizontal mechanism for freezing funds and economic resources as well as imposing travel bans in the case of serious human rights abuses occurring outside the EU.[15] Among the Council's intentions, as reported in the relevant Decision (see whereas four and five),[16] the new regime 'enhance[s] the Union's capacity to promote respect for human rights'

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14 European Parliament, Resolution on a European Human Rights Violations Sanctions Regime, 2019/2580(RSP) 14.03.2019. On the need for individualised restrictive measures, already European Parliament, Recommendation to the Council on a consistent policy towards regimes against which the EU applies restrictive measures, when their leaders exercise their personal and commercial interests within EU borders, 2011/2187(INI) 02.02.2012. An account of the first phase of the elaboration process can be found in N. van der Have, 'The Proposed EU Human Rights Sanctions Regime', (2019) *Security and Human Rights*, pp. 56–71.

15 The relevant Decision is based on Article 29 TEU, whereas the Council Regulation is based on Article 215 of the Treaty on the Functioning of the European Union. On the need for a 'two-steps procedure' given the EU current framework, see C. Portela, *Targeted Sanctions against Individuals*, *supra* note 7, p. 11.

16 Across the contribution reference is made to the relevant 'Decision' (agreed in the framework of the CFSP), although its content is overall equal to the parallel Council Regulation (EU). Where needed, direct reference to the relevant 'Regulation' will be made.

worldwide and contributes to the common foreign and security objectives set out in Article 21 TEU. It also complements existing third-country sanctions[17] that cannot horizontally address human rights violations in light of their specific and limited geographical scope. Other than its global dimension,[18] three elements of the GHRSR would appear to be essential in order to pursue these aims and need to be briefly explored here: the nature of abuses; the individuals and the entities targeted; and the (expected) protection against such restrictive measures.

2.1. THE SERIOUSNESS AND NATURE OF ABUSES

The GHRSR covers a range of human rights abuses. In fact, according to Article 1 of the relevant Decision, the new regime applies in relation to: genocide; crimes against humanity; torture and other cruel, inhuman or degrading treatment or punishment; slavery; extrajudicial, summary or arbitrary executions and killings; enforced disappearance of persons; and arbitrary arrests or detentions. The gravity that such violations need to reach in order to justify the adoption of restrictive measures – and whether, for example, a single case of torture or arbitrary execution would suffice – remains unclear. For example, a broad reading of these abuses would allow the EU to impose sanctions against the individuals who are accused of having arbitrarily detained and killed the Saudi dissent journalist Khashoggi, even though this may be considered an isolated case, in order to prevent similar human rights violations.[19] Yet, the nature of the 'other human rights violations' that, according to the GHRSR founding acts, could trigger restrictive measures supports the view that it is mostly 'widespread' and 'systematic' abuses or those that entail a 'serious concern as regards the objectives of the common foreign and security policy' that would be likely to reach the required threshold of seriousness to fall within the new sanctions regime. For the GHRSR, such 'other' human rights violations consist of trafficking in human beings, abuses of human rights by migrant smugglers, sexual and gender-based violence and abuses of the freedoms of peaceful assembly and of association,

17 Among others, see Council Regulation (EU) 2016/44 concerning restrictive measures in view of the situation in Libya, OJ L 12, Article 6(2).

18 The Commission's Guidance Note on the connected Council Regulation specifies that 'EU sanctions are expected to produce effects in third countries through pressure on the listed persons. However, they do not apply *extra-territorially*' (emphasis added). In fact, non-EU operators do not have the same obligations as EU operators, 'unless the business is conducted at least partly within the EU' (something that may still be problematic, however). See Council Regulation 2020/1998, *supra* note 5, Article 19 and European Commission, Guidance Note on the Implementation of certain Provisions of Council Regulation (EU) 2020/1998, C(2020) 9432 final 17.12.2020 (hereinafter, Commission Guidance).

19 For the international and human rights law implications of this case, see M. Milanovic, 'The Murder of Jamal Khashoggi: Immunities, Inviolability and the Human Right to Life', (2020) *Human Rights Law Review*, pp. 1–49.

of opinion and expression and of freedom of religion or belief. Importantly, no specific limitations are set out in relation to the victims of any of the violations covered by the GHRSR for it to be activated.

In order to define such a broad range of human rights, the relevant Decision emphasises the importance of international human rights law as well as its interaction with international humanitarian law (whereas 4 and Article 1(2)). Reference is made to customary international law and 'widely' accepted international treaties, such as the two international covenants, the Rome Statute of the International Criminal Court and the UN Protocol to Prevent, Supress and Punish Trafficking in Persons. Whereas the reference to the International Criminal Court (ICC) may prove essential as the EU could use its activity for raising the necessary grounds for listing when relevant human rights abuses are involved,[20] it is curious that no consideration is afforded to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. Interestingly, the European Convention on Human Rights (ECHR) is instead expressly mentioned among relevant key international treaties despite its 'narrow' regional scope. In terms of 'European' material focus, the lack of reference to the EU Charter of Fundamental Rights (CFR) is, arguably, more understandable, even though the Charter, by virtue of its scope, would nonetheless apply to sanctions imposed via the GHRSR (see Article 51 CFR) thus enhancing the protection which targeted subjects could enjoy under EU law (see section 2.3, below).[21]

As a result, and especially in comparison with other previous national frameworks, the GHRSR has a potentially wide scope of application in spite of the possible interpretative restraints in the relevant Decision. First, as anticipated, the new sanctions mechanism marks a fundamental difference from other relevant international law frameworks that primarily aim to deal with gross human rights violations.[22] Second, and as a consequence, it could lead the EU to act in situations that would usually evade sanctioning powers. Third, owing to this broad range of violations, EU partners in key external policy areas could also be directly or indirectly subject to sanctions, which is something that could test the credibility and impartiality of the new regime.

To name an example, there are currently two situations that could be covered by what is perhaps the most innovative aspect of the new GHRSR: widespread and systematic sexual and gender-based violence that is not associated with

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20 See discussion in N. VAN DER HAVE, 'The Proposed EU Human Rights Sanctions Regime', *supra* note 14, p. 65.

21 See also Council Regulation 2020/1998, *supra* note 5, whereas 2, that, in affirming the application of the Charter, refers in particular to the right to an effective remedy, the right to defence, and the right to the protection of personal data.

22 An example can be the RtP, as explained in section 3 below.

specific situations such as conflicts or wars. First, according to institutional and non-governmental sources,[23] gender-based violence in Turkey has reached the very high threshold required to be defined as systematic and widespread human rights abuse. The latest decision of Turkey to withdraw from the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) appears to confirm that these are structural issues, rather than signalling, as the Turkish government has claimed, that the Convention offers unnecessary added value for Turkey's legal order.[24] It remains to be seen if, despite the cooperation with Turkey in fields such as migration control, the EU is prepared to target Turkish individuals and entities under the GHRSR to facilitate a significant policy change in the contrast to gender and sexual-based violation. Second, a similar argument can apply to Russia, which is already subject to restrictive measures in view of its actions destabilising the situation in Ukraine.[25] If the interpretation of sexual and gender-based violence is really based on the International Covenant on Civil and Political Rights and the ECHR,[26] the widespread and systematic character of abuses against sexual and gender minorities in Russia should trigger sanctions under the GHRSR.[27] This would apply especially if such abuses are considered in combination with the connected violations of freedoms of peaceful assembly, association, opinion and expression, which are remarkably also covered by the new regime. The fact that – according to Russia – the legislation giving rise to such abuses aims to protect internal 'traditional values' would be irrelevant in the face of international human rights law.[28] Yet, other than the EU's willingness to push the boundaries of the new thematic regime, it remains to be seen which individuals and entities can actually be targeted with restrictive measures in light of the tension between sanctions and internal state sovereignty.

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23 See the sources considered in one of the latest cases on domestic violence at the ECtHR, *M.G. v Turkey*, no 646/10, 22.03.2016.

24 B. Çali, 'Withdrawal from the Istanbul Convention by Turkey: A Testing Problem for the Council of Europe', *EJILTalk!*, 22.03.2021, available at www.ejiltalk.org/withdrawal-from-the-istanbul-convention-by-turkey-a-testing-problem-for-the-council-of-europe, last accessed 25.03.2021.

25 Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 229.

26 For example, ECtHR, *Bayev and Others v Russia*, nos 67667/09, 44092/12 and 56717/12, 20.06.2017. For more, C. Danisi, *Tutela dei diritti umani, non discriminazione e orientamento sessuale*, Editoriale Scientifica, Napoli 2015.

27 Human Rights Council, Discrimination and Violence against Individuals Based on Their Sexual Orientation and Gender Identity, A/HRC/29/23 4.05.2015, para. 48.

28 See M. Balboni and C. Danisi, 'Reframing Human Rights in Russia and China', in S. Bianchini and A. Fiori (eds.), *Rekindling the Strong State in Russia and China*, Brill, Leiden 2020, pp. 61–78.

2.2. TARGETS OF SANCTIONS

The new GHRSR provides for restrictive measures to apply to three broad categories of natural or legal persons, entities or bodies. According to Article 1(3) of the relevant Decision, these consist of state actors, other actors exercising effective control or authority over a territory and other non-state actors. Perhaps most importantly, Articles 2 and 3 specify that the GHRSR targets not only the perpetrators of the above violations, but also persons 'who provide financial, technical, or material support for, or are otherwise involved in' those abuses and persons associated with them. As such, the new regime has the potential for a very wide global reach. This can be seen in Article 2(1)(b), which includes 'planning, directing, ordering, assisting, preparing, facilitating, or encouraging' relevant abuses among the actions that could qualify a person as a potential target of sanctions.[29] While such an approach is certainly welcome when compared to some international regimes,[30] it affords the EU considerable discretion in selecting potential targets of sanctions despite the principles developed by the CJEU to protect concerned people, as analysed below.

The possibility of granting exemptions is nonetheless available. For instance, in relation to travel and transit bans, Member States hosting an international governmental organisation or an international conference convened under the auspices of the UN or that are bound by multilateral agreements conferring privileges and immunities can avoid the application of restrictive measures (see Article 2 of the relevant Decision). As for the freezing of funds and the availability of economic resources, a derogation allows Member States as they deem appropriate to, for example, release the funds and economic resources if they are needed to satisfy the basic needs of the targeted natural or legal persons, entities or bodies or for humanitarian reasons (Articles 3 and 4 of the relevant Decision).

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29 It may follow that the implementation of the GHRSR is based on criteria that seem far more flexible and broader than the usual rules on the attribution of an act or omission to a state or an international organisation under the law of international responsibility: see International Law Commission (ILC), 'Draft Articles on Responsibility of States for Internationally Wrongful Acts', (2001) 2, *Yearbook of the International Law Commission*, and ILC, 'Draft Articles on Responsibility of International Organisations for Internationally Wrongful Acts', (2011) 2, *Yearbook of the International Law Commission*. This is true especially in light of the International Court of Justice (ICJ)'s test for attribution: e.g. ICJ, *Case concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, 27.06.1986, section VII.

30 See the well documented difficulties associated with satisfying the key elements of attribution in the law of international responsibility of States for wrongful acts in cases involving serious human rights violations: ICJ, *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*), 26.02.2007, section VII.

As the Commission's guide clarifies, the result is that EU operators cannot put any funds or economic resources at the disposal of listed persons, either directly or indirectly. For example, once a person is listed, no services or products can be provided by an EU business, and no donations can be received, even from a third country national, from the territory of a Member State.[31] Of course, restrictive measures apply equally to entities owned or controlled by the listed persons, giving rise to the same obligations on the part of EU operators.[32] Member States should grant the enforcement of these sanctions laying down appropriate penalties in the event of non-compliance.

The importance of focusing on specific perpetrators, rather than adopting measures of general scope, is certainly commendable. It is in line with a wider international trend toward smart sanctions that avoid any unnecessary negative impact on an entire population or group of people, as is often the case with economic embargoes.[33] All of these sanctions share the same preventive character, being primarily aimed at producing a change in the policy of a country or in the actions of natural or legal persons, entities or bodies responsible for, involved in or supporting serious human rights abuses – rather than primarily seeking to punish. Yet, the lack of well defined criteria for identifying the possible targets of EU sanctions, as pointed out above, gives rise to the risk of erroneous listings and could hamper appropriate de-listings. Considering the impact on the addressees' right to property at least, the new regime overall needs strong procedural guarantees which, as we show now, can avoid giving rise itself to new human rights violations.

2.3. THE REQUIRED PROTECTION AGAINST RESTRICTIVE MEASURES

The Decision establishing the GHRSR provides for some guarantees to the benefit of the target of the sanction (Articles 5 and 6),[34] as supported initially by its proponents and requested by the European Parliament.[35] First, it requires that the Council's relevant decision is communicated to the concerned natural or legal person, entity or body. Second, it ensures that the addressee is given an opportunity to present observations. Third, in the event that such observations or relevant evidence are submitted, the Council is required to review its decision

31 See Commission Guidance, *supra* note 18, p. 4.

32 To understand when it is possible to say that a listed person owns or controls an entity, see ibid., pp. 6–7.

33 For such an evolution, see L. van den Herik (ed.), *Research Handbook on UN Sanctions and International Law*, *supra* note 3.

34 See also Council Regulation 2020/1998, *supra* note 5, Articles 14 and 15.

35 European Parliament, Resolution on a European Human Rights Violations Sanctions Regime, *supra* note 14, para. 11.

accordingly and to provide information about the outcome. Fourth, and perhaps most importantly, not only shall the Council provide the person or entity concerned with the grounds for listing, but these grounds shall also be included in the relevant amended Annex, where all identification details are provided. Finally, the Council should carry out a periodic review of the list of designated targets.

These guarantees can be briefly assessed, and integrated, in light of the principles already developed by the CJEU in connection with other restrictive measures frameworks.[36] Indeed, in that the new measures are based on the competences provided for in Article 215 of the Treaty on the Functioning of the European Union (TFEU), the targets of sanctions may thus see the legality of the relevant restrictive measures undergo review by the EU courts.[37] Although the principles established by the CJEU in this field relate to other scenarios,[38] including also the relationship between the Security Council's anti-terrorism sanctions and their implementation within the EU legal order, they define minimum standards of protection, the applicability of which is not called into question by the nature of the human rights abuses or other elements featuring in the GHRSR.[39] The outcomes of the well-known *Kadi* saga are certainly relevant here.[40] According to the CJEU, the listing of individuals for the imposition of restrictive measures must comply with their right to effective judicial review as protected by the EU legal order.[41] This implies that the concerned person should, as a minimum, be able to receive the reasons for and be granted (limited, if need be) access to the evidence supporting the listing, to have the case properly reviewed and to obtain the reasons for any delisting refusal.[42]

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36 For reasons of space, we cannot refer to all issues at play. Nor can we explore the relevant principles established by the ECtHR in its case law (as for Article 13 – right to an effective remedy) that might reasonably apply as well to restrictive measures imposed under the GHRSR: see ECtHR, *Nada v Switzerland*, no 10593/08, 12.09.2012; ECtHR, *Al-Dulimi and Montana Management Inc v Switzerland*, no 5809/08 [GC], 21.06.2016.

37 Having regard to Article 275(2) TFEU, it is the individual nature of restrictive measures that permits access to EU courts, as the CJEU confirmed in CJEU, *Laurent Gbagbo et al. v Council*, Joined cases C-478-482/11 P, 23.04.2013, ECLI:EU:C:2013:258, para. 57. Where this review is not possible, relevant measures remain nonetheless challengeable before national courts: see, in relation to travel bans implemented by Member States, CJEU, *Council v Manufacturing Support & Procurement Kala Naft*, Case C-348/12 P, 28.11.2013, ECLI:EU:C:2013:776.

38 M. Sossai, 'UN Sanctions and Regional Organizations: An Analytical Framework', in L. van den Herik (ed.), *supra* note 3, pp. 395–417.

39 Even the fact that terrorist listings is adopted under Article 75 TFEU and is part of the area of Justice, Freedom and Security rather than the CFSP, like the other sanctions regimes, does not justify a different view.

40 CJEU (GC), *European Commission and Others v Yassin Abdullah Kadi (Kadi II)*, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, 18.07.2013, ECLI:EU:C:2013:518; CJEU (GC), *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission (Kadi I)*, Joined cases C-402/05 P and C-415/05 P, 03.09.2008, ECLI:EU:C:2008:461.

41 E.g. CJEU, *Kadi II*, *supra* note 40, para. 97.

42 CJEU, *Kadi I*, *supra* note 40, para. 324 et seqq.

The standard of proof has been a central aspect of the cases brought before the EU courts, especially in relation to limited access to the reasons for listings. As the *OMPI/PMOI* cases showed and *Kadi II* confirmed, the absence of information or evidence supporting the imposition of restrictive measures under the new regime could easily lead to their annulment.[43] In relation to the new regime, however, this aspect may be less problematic than in previous cases.[44] First, as anticipated, the wording of the GHRSR provides for the communication of the grounds for listing. Second, most human rights violations covered by the GHRSR are generally known, as often they are well documented by international organisations and NGOs. As a result, the EU courts will be able to access relevant information, which, given that listing under the GHRSR is autonomous and will not depend on external bodies like the UN Security Council, could make de-listing easier.

One factor could nonetheless hamper this: under the new regime, some doubts remain as to how a sufficient link can be established between (the different kinds of) targets and the relevant human rights violations. If restrictive measures are to be truly preventive in nature,[45] the ability of the targets to contribute to preventing, or to ending, the relevant abuses should be central and would need to always be verified. There would be no justification for a lower standard of review in light of previous case law. In this respect, it would also be useful to clarify whether a de-listing is dependent either on a change in behaviour on the part of the perpetrator or on an improvement in the human rights of (actual or potential) victims, or both. In the absence of clear criteria for determining and assessing the aforementioned link as well as the desired change, including the possibility of requiring a different standard of proof if restrictive sanctions are to be maintained for extended periods, there is a risk of sanctions continuing indefinitely with limited practical effect on the ground. Without further guidance, for example, the Council's periodic review could not lead to adjust sanctions in response to target behaviour. Furthermore, given the discretion to be enjoyed by the Council in this field,[46] the Court's assessment may result in a formal review exercise (potentially) in conflict with applicable human rights (e.g. Article 47 CFR). As has been argued elsewhere in relation to the CJEU's 'new take on country sanctions',[47] there is a risk that the minimum standards of legality established so far in connection with anti-terrorist sanctions may be 'renegotiated' in order to meet the Council's discretion in expanding

43 CJEU (GC), *Organisation des Modjahedines du people d'Iran v Council and UK (PMOI I)*, Case T-228/02, 12.12.2006, ECLI:EU:T:2006:384, para. 160 et seqq.

44 E.g. CJEU (GC), *Fulmen*, Joined Cases T-439-440/10, 21.03.2012, ECLI:EU:T:2012:142, para. 100.

45 For instance, see CJEU, *Kadi II*, *supra* note 40, para. 130.

46 E.g. CJEU, *PMOI I*, *supra* note 43, para. 159.

47 C. Beaucillon, 'Opening up the Horizon: The ECJ's New Take on Country Sanctions', (2018) *Common Market Law Review*, pp. 387–416.

listing criteria, including under the GHRSR. This evolution may not be excluded in the future implementation of the new regime if, for example, in relation to the category of 'state actors' the CJEU will not be able to distinguish the legal personality of the real targets of the sanctions from the legal personality of the state to which they belong even in order to assess the need to maintain restrictive measures.

In short, the guarantees provided for targeted individuals and entities in the GHRSR Decision and associated Regulation seem to reflect overall the principles established in EU courts' case law. Whereas an administrative challenge before the Council is granted to all targets, they will also be able to challenge their listing before the EU courts, which are likely to apply the standards established so far. Inasmuch as targeted entities can avoid restrictive measures by relying solely on formal legal arguments, there may be some truth to the argument that there is a sort of 'procedural fetishism' in the EU courts' approach.[48] Nevertheless, the enjoyment of such procedural guarantees hardly ensures an immediate delisting or award of damages, even in the event of a successful judicial outcome. The risk of being relisted is also very real. Yet, the possibility of having one's case fully reviewed in terms of compatibility with EU fundamental rights has – at a minimum – the effect of providing (more) legitimacy to the GHRSR. Such a legitimacy, as well as the legality, of the EU's role in imposing sanctions on human rights grounds could be investigated further from an international law perspective, before turning to an assessment of the very first implementation of the GHRSR.

3. A 'RIGHT' OR A 'DUTY' TO PREVENT ABUSES? THE 'ROLE RESPONSIBILITY' OF INTERNATIONAL ORGANISATIONS

Even if the new EU sanctions regime is implemented in compliance with the principles analysed above to ensure that procedural guarantees are respected, the setting up of the GHRSR as an autonomous sanctions framework – that is, not dependant on a previous UN decision – entails a more fundamental question: is the EU acting based on a 'right' to adopt restrictive measures against human rights abusers worldwide? Or, conversely, is the EU under an obligation to prevent or punish such violations? If so, does such a right or obligation exist, either under international law or EU 'internal' law? Clarifying this aspect is more than a theoretical necessity; it could also have practical consequences, as

[48] This expression is used by P. Nevill, 'Interpretation and Review of UN Sanctions by European Court: Comity and Conflict', in L. van den Herik (ed.), *supra* note 3, p. 438, where she provides an example of such a scenario by referring to the *Al-Dulimi* case of the ECtHR.

we will see in relation to (the (il)legality of) possible reactions from countries whose citizens are targeted. More broadly, it also throws into question the international role of the EU as a global human rights actor in comparison with other international organisations.

To start with, it is difficult to say that international organisations have either a right or an obligation to prevent human rights abuses under international law. For example, neither the United Nations nor the EU are parties to international treaties containing such rules and, apart from an exception on the part of the EU,[49] they have yet to ratify any human rights treaties. In short, any obligations under such treaties to prevent or punish bind only their Member States if they have ratified or accessed such treaties. Moreover, unless these treaty obligations apply extraterritorially, the current prevailing understanding of human rights law does not call on parties to prevent or punish human rights abuses anywhere in the world.

A more limited rule, which does not even entail these extraterritorial issues, can be derived from a situation where an obligation arising under a peremptory norm of general international law is breached, according to the responsibility of states and international organisations alike under international law.[50] As such, in case a peremptory norm has a human rights content, Article 42 of the Draft Articles on the Responsibility of International Organisations (DARIO) calls upon international organisations to cooperate to bring to an end any serious breach of such a human rights obligation. Moreover, the international organisation at stake must also not recognise as lawful the situation created by such a serious human rights breach and must avoid providing any aid or assistance in maintaining that situation. For our purposes, two observations are useful. First, Article 42 of DARIO specifies that the duty to cooperate should be carried out 'through lawful means'. In terms of 'sanctions', this means that restrictive measures are allowed only to the extent that they do not entail a breach of international law. Second, any attempt to identify peremptory norms having a human rights content would not do much to address the absence of clear obligations for international organisations concerning a general right or duty to prevent (or punish) human rights violations.

If we consider the EU's move in light of these rules, a range of problems arises. A preliminary issue concerns the reasons for the GHRSR. Other than a commitment to protect the values on which it is founded (see the initial part of the new regime's relevant Decision), it is unclear whether the EU sees itself as an 'injured'[51] subject to respond to breaches of the international Community's

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49 The EU ratified the Convention on the Rights of Persons with Disabilities. See Council Decision of 26 November 2009 concerning the Conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, OJ 2010 L 23/35.

50 For international organisations, see ILC, DARIO, *supra* note 29.

51 Yet, in the DARIO commentary, the ILC included the example of the EU's reaction against serious human rights violations in Burma/Myanmar in the section related to 'non-injured' international organisations: see ibid., p. 89.

collective interests, as underlined by Article 42 DARIO, or for other – unrelated – reasons.[52] Second, the aforementioned rules on the responsibility of international organisations for breaches of peremptory norms would nonetheless be relevant only for some human rights abuses covered by the GHRSR – for example, the prohibition of genocide. However, the DARIO rules would certainly not cover many of the violations falling within the scope of the new sanctions regime (see section 2.1, above). For example, a serious breach of the 'other' human rights specified in the GHRSR would not justify an EU (re)action as a member of the international Community under those rules. Yet, clarifying these issues would shed light on the nature of EU sanctions as part of the general framework of international responsibility. Indeed, it is disputable if EU restrictive measures can be considered 'retortions' (i.e. unfriendly actions) or 'countermeasures' (i.e. proportional self-help measures that would otherwise constitute wrongful acts themselves if not seeking to react against relevant prior breaches of international law).[53] But even if we accept that EU sanctions in relation to human rights abuses could be generally conceived of as retortions, especially in light of the punitive character of some measures adopted under the GHRSR, states that are directly or indirectly targeted could nonetheless perceive those measures as violations of the principle of non-interference in internal affairs.[54] Concerned states would therefore see their reaction as being justified under international law. In short, the right or obligation of the EU to act against human rights abuses, as it is framed in the GHRSR, cannot be easily found in international treaties or derived from the rules on the responsibility of international organisations.

Yet, for the sake of completeness, it is worth remembering the potential role that the RtP framework could play in providing an international legal ground for the EU's action in this field. As it is known, in affirming a primary responsibility of states to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity, the RtP calls the entire international community – of which regional organisations like the EU are a part – to 'encourage, as

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52 According the DARIO commentary, the lack of practice in this field does not even allow confirmation of the existence of a general entitlement of international organisations to invoke responsibility and, if so, whether they would invoke such a responsibility on their own or by implementing rights that are owed to Member States: see ibid. and bibliography mentioned in fn. 317.

53 Interestingly, the ILC does not refer often to 'sanctions' in its Drafts Articles on Responsibility, while legal doctrine resorts to this term mainly when acts of international organisations are at stake. Yet, sanctions are not a separate group of measures but may fall within one of the categories mentioned in the text.

54 Although the scope of this principle is still debatable: see ICJ, *Military and Paramilitary Activities in and against Nicaragua*, *supra* note, 29, para. 205 et seqq. For an in-depth discussion of these aspects, T. Ruys, 'Sanctions, Retortions and Countermeasures', *supra* note 3, p. 24 et seqq. See also the discussions in the General Assembly on the legality and legitimacy of sanctions analysed in M. Brzoska, *supra* note 4, p. 1345 et seqq.

appropriate' and to 'help States to exercise this responsibility'.[55] The responsibility to prevent and react against such human rights abuses through 'peaceful means' are key pillars of the RtP. It can be therefore argued that, to the extent that the measures adopted through the GHRSR pursue these aims and could qualify as 'peaceful' means following the reasoning explained above, the new EU regime is – at least implicitly – implementing such a responsibility as far as their respective material scope coincides (section 2.1). Even in this case, however, the RtP would nonetheless provide legal grounds for *some* EU 'sanctions' only.

In the face of such ambiguity, perhaps a more comprehensive explanation for the right or duty to adopt restrictive measures against human rights abuses committed abroad could lie in the concept of 'role responsibility',[56] which delves into omissions of international organisations. To use J. Klabbers' words, the answer cannot be found 'by the simple deontological exercise of pointing to a positive obligation'.[57] As such, he argues that 'some obligation flows directly from the function that has been delegated to the international organisation (its mandate), without the need to identify a separate legal obligation contained in some primary obligation or other'.[58] If this is true, then the organisation at issue can be held responsible for not carrying out its mandate, in terms of its general function within the international community and not simply of attributed powers. Some conditions will nonetheless apply: the concerned international organisation should have knowledge of the situation that requires action and it should be in a position to act.[59]

If its mandate is key, then the EU's right or duty to act against human rights violations worldwide can be found in its founding treaties. Although the Council Regulation on the GHRSR refers to Article 215 TFEU, this part of the founding

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55 The role of international organisations, which should act in compliance with the UN taking into account Chapter VIII of the UN Charter, was given attention more recently: e.g. UN Secretary-General, The Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect, A/65/877 28.06.2011. On the potential role and limits of the EU vis-à-vis the RtP, J. Wouters and P. De Man, 'The Responsibility to Protect and Regional Organisations: The Example of the European Union', (2013) *Leuven Centre for Global Governance Studies Working Paper*; Report of the 2005 World Summit Outcome, *supra* note 11, para. 138. See also UN Secretary-General, Implementing the Responsibility to Protect, A/63/677 12.01.2009. For a specific application of the RtP to EU foreign policy taking Myanmar as a case-study, see E. Staunton and J. Ralph, 'The Responsibility to Protect Norm Cluster and the Challenge of Atrocity Prevention: An Analysis of the European Union's Strategy in Myanmar', (2020) *European Journal of International Relations*, pp. 660–686.

56 J. Klabbers, 'Reflections on Role Responsibility: The Responsibility of International Organizations for Failing to Act', (2018) *European Journal of International Law*, pp. 1133–1161.

57 Ibid., p. 1134.

58 Ibid., p. 1135. In developing his argument, most analysis is based on responsibility for state omissions. In this respect, for example, it is worth noting that Albania's responsibility in *Corfu Channel* was not based on clear legal rules alone but, in part, on the basis of 'elementary considerations of humanity' (ibid., p. 1149).

59 Ibid., p. 1150 et seqq.

treaties cannot offer guidance to the Council, the HRVP and the Commission in this field. It provides only, in paragraph 2, for the power of the Council to adopt restrictive measures against natural or legal persons and groups or non-state entities. Hence, we need to look elsewhere and, especially, at Articles 3(5) and 21 TEU, which appear central in relation to the grounds for adoption and guidance for the implementation of the new regime. They respectively call upon the EU to 'contribute […] to the protection of human rights' and to '[seek] to advance globally values like […] respect for human dignity', while respecting and contributing to the development of international law. Although one could be argued that this general guidance does not actually add much in comparison to the past, it has clarified the EU global 'role' towards human rights. Similarly, whereas the respect of international law reminds the EU to abide by principles such as the non-interference in others' affairs, the founding treaties themselves requires the EU to contribute to the evolution of international law. This means, for example, that the EU is accomplishing this part of its mandate in deciding to go well beyond what customary international law allows in connection with breaches of international peremptory norms *when* these entail human rights violations as explained above. Moreover, the same provisions offer some guidance as to when this 'role' should be played. Indeed, the protection of human rights *is not defined in* geographical terms or political alliances. It follows that such a framework seems to call upon EU Member States to activate – through the Council – the GHRSR whenever sanctions may prevent, in the context of a given documented situation, additional human rights violations irrespective of political considerations and in spite of immediate consequences. It may even call into question, in terms of responsibility, their option to block EU institutions from carrying out the Union's mandate or, alternatively, may support the call for a reform of the regime's institutional framework in order to overcome the unanimity rule.

The importance of this potential role of the EU can be fully appreciated if compared with what the UN and, specifically, the Security Council are able to achieve in this field. The object and the purpose of UN sanctions is – and will probably only ever be – based on the Security Council's essential task: the maintenance or restoration of international peace. As such, unless human rights violations fall within the broad situations in which the Security Council is called upon to act (Article 39 of the UN Charter), no action will follow.[60] Thanks to the GHRSR, the EU finds itself in a unique position to react against a broader range of human rights abuses worldwide because it does not need to connect sanctions to specific situations or the specific aim of maintaining international peace. It follows that the EU could potentially even fill the gap left by the inaction of the

[60] M. Happold, 'UN Sanctions as Human Rights and Humanitarian Law Devices', in L. van den Herik (ed.), *supra* note 3, pp. 125–145.

UN or other international organisations in the event of serious human rights abuses, when it has *the knowledge* and *the capacity* to act.

In brief, more than acting in compliance with a right or an obligation under international law, the EU appears to be carrying out its 'role responsibility' worldwide which, despite some discretion in relation to the means to be used, is firmly required by its mandate. In doing so, the EU is contributing to the development of international law. Indeed, the GHRSR strengthens the growing practice of some states to react against human rights violations worldwide, even beyond those human rights that have acquired the status of peremptory norms of international law or those covered by specific frameworks like the RtP. It also enables the EU to reaffirm its role as a responsible international actor with a capacity even beyond that of the UN this field. Yet, to be genuinely significant in respect to both these aspects, the way in which the new sanctions regime is implemented will be key, as the unilateral character of EU restrictive measures risks raising questions of legitimacy (e.g. Western powers v. the rest of the world) and accusations of double standards (e.g. sanctions against specific states only). For this reason, we now turn to the first implementation of the GHRSR and the reactions that this generated across the world.

4. TESTING THE IMPLEMENTATION OF THE GHRSR: MATTERS OF DISCRETION, TARGETED INDIVIDUALS AND 'COUNTERSANCTIONS'

In light of the key elements of the GHRSR as analysed above and the (potential) duty to act grounded in the EU's own mandate, this section assesses the first implementation of the new regime.

Our analysis has already shown that there are no objective criteria that would necessarily trigger the activation of the new regime. The adoption of new restrictive measures is left to the Council's discretion. In this respect, in accordance with Article 5 of Council Decision (CFSP) 2020/1999, the 'Council, acting by unanimity upon a proposal from a Member State or from the [HRVP], shall establish and amend the list' of targeted natural or legal persons, entities or bodies. The unanimity requirement constitutes a very high threshold for the adoption of the restrictive measures at stake. The risk is that, even if serious human rights abuses occur beyond the EU's borders, the EU will not be able to prevent further violations by sanctioning the categories of perpetrators covered by the GHRSR. Conversely, if the unanimity among EU Member States is motivated by other political goals, this could lead to the adoption of restrictive measures against human rights abuses that may not otherwise be serious enough to warrant international sanctions, which could have implications in terms of the overall effectiveness and neutrality of the new EU mechanism.

There is, then, a further risk that if the exercise of such discretion gives rise to inconsistent practice, this could limit the relevance of the EU's contribution to the development of international law in this field.

The Council exercised this discretion for the first time in March 2021, on two different occasions, to target human rights violations occurring in Russia, China, North Korea, Libya, South Sudan and Eritrea.[61] In total, 15 individuals and four entities were included in the list set out in Annex I to Regulation (EU) 2020/1998. According to the Council, those listed were involved in a wide range of abuses. These include arbitrary arrests and detentions; torture; extrajudicial killings; enforced disappearances; systematic use of forced labour; widespread and systematic repression of freedom of peaceful assembly and of association, of freedom of opinion and expression as well as freedom of religion. While this move already shows a determination to use the GHRSR to sanction a variety of violations, the official status of the individuals who are now subject to EU restrictive measures demonstrates a willingness to target key state actors in third countries, such as the Minister of State Security and the Minister of Social Security of the Democratic People's Republic of Korea, who have both been in charge of implementing the repressive security policies against political dissidents. In relation to human rights abuses in China, the EU listed individuals belonging to the governing elite of the Xinjiang Uyghur Autonomous Region. According to the Council, Zhu Hailun, for example, is subject to restrictive measures because he was in 'charge of overseeing and implementing a large-scale surveillance, detention and indoctrination programme targeting Uyghurs and people from other Muslim ethnic minorities'.[62] Interestingly, although Mr Hailun has not held this position since 2019, the grounds for listing take into account the fact that, until February 2021, he 'continued to exercise a decisive influence'[63] in the implementation of such a programme. As such, the link between targeted individuals and violations appears to be quite loose, if a 'key political position' connected with the planning of systematic human rights violations is enough to be subject to EU restrictive measures. Although no specific evidence is provided

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61 In addition to the aforementioned Council Implementing Regulation (EU) 2021/478, *supra* note 10, see: Council Decision (CFSP) 2021/372 of 2 March 2021 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses, OJ L 71 I; Council Implementing Regulation (EU) 2021/371 of 2 March 2021 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses, OJ L 71 I, 2 March 2021; Council Decision (CFSP) 2021/481 of 22 March 2021 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses, OJ L 99 I, 22 March 2021. On 22 March 2021, giving the existence of a third country sanction regime addressing Myanmar, the Council also adopted further restrictive measures against key political figures for the serious human rights violations taking place after the 2021 military coup (see the same OJ), thus showing the strong interaction between the different sanctions frameworks.

62 Council Regulation (EU) 2020/1998, *supra* note 5, Annex, A(5).

63 Ibid.

in the Council's relevant acts, it is worth also noting the gender and sexual dimension of the human rights abuses involved. In connection with human rights abuses occurring in Chechnya, the EU targeted individuals that have been involved, since 2017, in widespread and systematic persecution of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons or of those presumed to belong to LGBTI groups. As anticipated – and although restrictive measures do not cover the more general situation of these minorities in Russia – the willingness of the EU to take action in this field cannot be overlooked because it signals a firm position on the protection against discrimination based on these grounds in line with the *internal* clash with Poland and Hungary. Finally, the EU appears to be willing to punish (rather than simply to prevent) non-state actors for *past* human rights abuses. This can be seen in the case of the Kaniyat Militia, a Libyan armed militia now subject to restrictive measures in EU. It exercised control in the Libyan town of Tarhuna between 2015 and June 2020, where mass graves were found.

The first implementation of the GHRSR also allows a brief analysis of the reactions of concerned states. In particular, China denied the existence of the human rights abuses to which EU restrictive measures refer and responded by imposing its own 'countersanctions' on ten European individuals and four entities.[64] These individuals seem now prevented from travelling to China, whereas the companies are not permitted to operate in China or with Chinese operators. According to the only available sources, China acted in protest against the EU for interfering in its internal affairs and thus violating basic rules of international law. In China's view, the imposition of 'countersanctions' was therefore a legitimate action under international law in response to what it viewed as a wrongful act. China is therefore refuting – at least indirectly – that the EU is acting to protect collective interests, and adopted restrictive measures against EU targets in terms of countermeasures under international law. Given China's position within the international Community, this reaction could ultimately hamper the rise of new international law rules in this field, and it signals a dissatisfaction with the EU's view of its role as a global human rights actor. Whether or not the EU will be intimidated by China's moves remains to be seen, but it certainly gives the EU cause to reflect on whether sanctions are indeed an effective tool for achieving a change in the actions of concerned countries, or whether they simply fuel international tensions, with other, more innovative strategies required instead.

64 According to media reports, these mainly include EU and national politicians, the Political and Security Committee of the Council of the EU and the Subcommittee on Human Rights of the European Parliament: see Euronews, 'EU agrees first sanctions on China in more than 30 years', *Euronews*, 22.03.2021, available at www.euronews.com/2021/03/22/eu-foreign-ministers-to-discuss-sanctions-on-china-and-myanmar, last accessed 25.03.2021.

5. CONCLUDING OBSERVATIONS

Regarding its content and initial implementation, the EU GHRSR is a step forward in the EU's efforts to prevent and react (if not punish?) against serious human rights violations abroad. It indicates an increasing willingness on the part of the EU to act as a responsible global power in promoting its founding values, if not also in ensuring the protection of the international Community's collective interests. It adds a fundamental tool to respond quickly to extra-territorial human rights violations without the need to establish a country-based regime and, for this reason, avoids a situation in which human rights protection is conflated with other sanctions-related goals. On paper, it sends a strong message both to state and non-state human rights abusers and their supporters worldwide, who risk falling foul of new restrictive measures within the EU. It avoids collateral effects by targeting specific individuals rather than entire countries, in line with the general evolution of international sanctions. Furthermore, targeting individuals could also avoid pointing the finger at a state for violating widely accepted international human rights norms, although it may be difficult not to stigmatise a state if the GHRSR targets the governmental elite and its supporters or associated entities of that country. China is a case in point in this respect.

From an international law perspective, the EU's adoption of the GHRSR pushes the boundaries of the human rights violations to be prevented and/or punished by non(directly)-injured international actors and models a relevant practice for the scope of international organisations to take action towards violations committed in their own non-Member States. Despite the lack of clarity on whether the EU restrictive measures and, more generally, unilateral/non-UN sanctions could be qualified as retortions or (third-party) countermeasures, the EU's move confirms an increasing trend in states' practice toward strong reactions against a broad range of human rights violations outside their boundaries. In this respect, in order to contribute to the development of international law in this field, the future GHRSR-related acts could clarify or make more explicit the – either international or internal – grounds on which the EU effectively bases its action, thus providing in turn appropriate evidence to further develop the 'role responsibility' framework here applied.

That having been said, this analysis has shown that its implementation could prove to be more difficult than expected owing to a broad range aspects which remain unclear. First, there is no certainty that the EU will be able to activate the targeted sanctions given the procedural requirement for the adoption of necessary decisions by the Council. Unanimity is a high threshold that may not be reached when close allies of EU Member States are at risk of being identified as human rights abusers. The example of Morocco's violations in Western Sahara could be a good tester for the EU's willingness to ensure a consistent application

of the new sanctions regime.[65] A non-arbitrary and consistent listing practice would also be key to granting international legitimacy and significance to the EU's role in the development of international rules in this field. Second, from a substantive perspective, given the extent of human rights violations demanding sanctions, it could be difficulty to verify a direct causal relationship between future restrictive measures and the change that the EU will pursue worldwide. As a result, the listing could easily remain unaltered for a long time. This aspect calls into question who should be targeted, what the EU will be really willing to achieve and even the nature of the new restrictive measures, in that they are also punitive rather than simply preventive, as we have seen so far even in the CJEU's case law.[66] Third, there are issues with the effectiveness of individual sanctions more generally. Despite the stigmatisation and deterrent effect (if any) that may be generated, there is no clear indication that these restrictive measures work. For instance, it is unclear whether and how the restrictive measures adopted in the past, via the third-country sanction regime, in relation to serious human rights violations in Iran, have brought about an improvement in the human rights enjoyment in that country.[67] What is more, the unintended negative effects in terms of such an enjoyment on the individuals that depend on the subjects that are targeted, as well as the impacts on the victims, have not been given the attention they deserve. Fourth, given the financial dimension of most sanctions and despite the EU's economic power, doubts can be raised on the effect of Brexit which could hamper the achievement of the desired effects. An agreement with the UK on a common strategy in this field seems needed in the near future to achieve common positions on the identification of the relevant targets. Finally, protests by third countries against the EU for the imposition of restrictive measures on human rights grounds could prevent relevant EU institutions and Member States from implementing the GHRSR. The risk of generating unwanted international tensions is already evident from the restrictive measures targeting China.

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65 M. Balboni and G. Laschi (eds.), *The EU Approach Towards Western Sahara*, Peter Lang, Brussels 2017; C. Danisi, 'Self-Determination as a Peremptory Norm of International Law and Human Rights in Non-Self-Governing Western Sahara: A Test for the European Union', in M. Balboni and C. Danisi (eds.), *supra* note 2, pp. 231–275.

66 CJEU, *Kadi II*, *supra* note 40, para. 130.

67 According to the EU sanctions map, these were introduced in 2011 in the form of travel restrictions and asset freezes against 'persons complicit in or responsible for directing or implementing grave human rights violations in the repression of peaceful demonstrators, journalists, human rights defenders, students or other persons who speak up in defence of their legitimate rights': see Council Decision 2011/235/CFSP of 12 April 2011 concerning restrictive measures directed against certain persons and entities in view of the situation in Iran, OJ L 100. A similar study was carried out in relation to other sanctions regimes, for example as far as sanctions against Russia are concerned: see V. Veebel, 'Lessons from the EU-Russia Sanctions 2014–2015', (2015) 8(1), *Baltic Journal of Law and Politics*, pp. 165–194.

To conclude, the fact that sanctions are imposed by the EU, rather than individual Member States, appears to grant them greater legitimacy. Yet, given the existing doubts on the effectiveness of sanctions as a game changer, for the GHRSR to truly be successful, the EU needs to learn from past restrictive measures and be willing to implement the new regime objectively, irrespective of political or other unrelated factors. If the EU's mandate is the key in line with the Union's 'role responsibility', it is also fundamental that the new sanctions regime operates hand-in-hand with a more proactive approach to human rights protection when the EU exercises its powers in relations with third countries in order to support real change in the situations covered by the GHRSR.