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EU Human Rights Sanctions Regime: Striving for Utopia Backed by Sovereign Power?

Christina ECKES*

On 7 December 2020, the EU Foreign Affairs Council adopted an ‘EU Global Human Rights Sanctions Regime’ (EU HRSR). The objective of the EU HRSR is to give the EU to a flexible tool to address serious human rights violations and abuses worldwide. This article starts from the position that setting up an EU HRSR serves a noble objective. The EU HRSR could be desirable tool to flexibly confront those with consequences that commit serious human rights violations. Yet, it would crucially need to comply with human rights itself. This is not a small feat to accomplish. Much hinges on the listing and delisting criteria, the required evidentiary standard, and the information on which the listing decisions are based. Based on a detailed analysis of the Court of Justice’s sanctions case law, the article sets out the requirements with which the EU HRSR would have to comply. Finally, the horizontal EU HRSR is an attempt to decouple the protection of human rights from specific (political) conflicts. This decoupling directly charges the protection of human rights, which is traditionally portrayed as ‘neutral’, with sovereign politics.

Keywords: Human rights, sanctions, restrictive measures, listing criteria, evidentiary standard, delisting

1 INTRODUCTION

On 7 December 2020, the EU Foreign Affairs Council adopted an ‘EU Global Human Rights Sanctions Regime’ (EU HRSR). The objective of the EU HRSR is to give the EU to a flexible tool to address serious human rights violations and abuses worldwide.¹ The EU HRSR, as all EU sanction regimes, is based on Article 215 Treaty on the Functioning of the European Union (TFEU) and consists of a Common Foreign and Security Policy (CFSP) decision containing an annex with the names of those targeted and an EU regulation making the sanctions directly applicable within the national legal orders. The EU HRSR, as most EU sanctions regimes, comprises two types of measures: financial sanctions (asset freezes) and

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¹ Council Decision (CFSP) 2020/1999 of 7 Dec. 2020 Concerning Restrictive Measures Against Serious Human Rights Violations and Abuses and Council Regulation (EU) 2020/1998 of 7 Dec. 2020 Concerning Restrictive Measures Against Serious Human Rights Violations and Abuses, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2020:410I:FULL&from=EN> (accessed 23 Mar. 2021).

restrictions on movement (travel ban). Banks within the EU freeze financial assets of those targeted and Member States impose travel bans.

The EU HRSR is modelled on the US ‘Global Magnitsky Act’, which was signed into law by the Obama Administration in December 2016 and became operative under an Executive Order by President Trump in late 2017.² The Global Magnitsky Act carries the name of Sergei Magnitsky, a Russian lawyer who investigated an enormous tax fraud connected to the Kremlin. Magnitsky was kept in detention without trial for over a year, was beaten by riot troopers, and denied medical care. In 2009, Magnitsky was killed in custody. Those involved in his detention and death did not face any legal consequences in Russia.

The Global Magnitsky Act has already inspired similar legislation in Canada.³ The UK has had for some time Magnitsky-inspired provisions in its general sanction legislation, targeting people connected with or benefited from the torture of political opponents.⁴ In July 2020, the UK imposed the first sanctions under a national Global Human regime operating under the UK’s Sanctions and Anti-Money Laundering Act 2018.⁵

The EU initiative, originally tabled by the Netherlands, received backing from a vast number of civil society organizations that promote human rights and the fight against corruption.⁶ The assumption is that the EU HRSR would be more flexibility than the existing EU sanction regimes that are geographically limited. It would provide the legal framework for a Council Decision to freeze the assets and impose travel bans on an individual of any nationality, with and without official function and link to a given state, including militia leaders. The EU HRSR is hence a further step to break the historical link between sanctions, which started as trade embargoes against states, and foreign regimes. In this sense it is also an acknowledgement of the growing relevance and power of non-state actors.

This article starts from the position that setting up an EU HRSR serves a noble objective. The EU HRSR could be desirable tool to confront those with consequences that commit serious human rights violations worldwide. Yet, it

² *Global Magnitsky Human Rights Accountability Act* (‘Global Magnitsky Act’), <https://www.govinfo.gov/content/pkg/PLAW-114publ328/pdf/PLAW-114publ328.pdf>; *Executive Order* (‘Order’) 13818 Titled ‘Blocking the Property of Persons Involved in Serious Human Rights Abuses or Corruption’, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/glomag_eo.pdf (accessed 23 Mar. 2021).

³ *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* S.C. 2017, c. 21, full text <https://laws.justice.gc.ca/eng/acts/J-2.3/FullText.html> (accessed 23 Mar. 2021).

⁴ *Proceeds of Crime Act 2002 (POCA) and the Sanctions and Anti-Money Laundering Act 2018 (SAMLA)*.

⁵ *The Global Human Rights Sanctions Regulations 2020*, <https://www.legislation.gov.uk/ukxi/2020/680/introduction/made?view=plain>; see also <https://www.gov.uk/government/publications/financial-sanctions-global-human-rights> (accessed 23 Mar. 2021).

⁶ Ninety-two civil society organizations, *Open Letter from Non-Governmental Organizations in Support of a Targeted, Global EU Human Rights Sanctions Regime* (Nov. 2018), <https://www.nhc.nl/global-eu-human-rights-sanctions-regime/> (accessed 23 Mar. 2021).

would need to comply with human rights itself. This assumes that the EU institutions have learned their lessons from the many annulments of individual sanctions under the existing sanction regimes. Much hinges on the listing and delisting criteria, the required evidentiary standard, and the information on which the listing decisions are based. A tension lies in the fact that broad listing criteria reduce the likelihood of successful judicial challenges but that ‘clear and distinct’ criteria are required in order to comply with EU law and in particular with the rule of law in the EU.⁷ Finally, the *horizontal* EU HRSR decouples the protection of human rights from specific (political) conflicts. This is different from how such protection is currently taking place under geographically limited regimes. This decoupling directly charges the protection of human rights, which is traditionally portrayed as ‘neutral’, with sovereign politics.

The article is structured as follows. Section 2 discusses the distinctive features of the EU HRSR in light of and by contrast with existing EU sanction regimes. It focusses on the horizontal thematic nature of the EU HRSR; the question of whether a change in behaviour should result in delisting; and the preventative or punitive nature of human rights sanctions. Section 3 focusses on the legal requirements emerging from the large body of case law of the Court of Justice of the European Union (CJEU) addressing the legality of individual sanctions in the context of counterterrorist and geographically limited sanction regimes. Section 4 discusses why adopting sanctions under the EU HRSR by qualified majority vote is one bridge too far. It engages with the move towards centralization under EU sanctions regimes and addresses the legality of national alternatives to the EU HRSR. Finally, it offers conceptual reflections how the EU HRSR may change the discourse on human rights to openly acknowledge sovereign power. The last section presents conclusions.

2 NATURE AND OBJECTIVES OF THE EU’S HUMAN RIGHTS SANCTIONS REGIME

Sanctioning individuals for severe human rights violations is not new in the prolific sanctions practice of the EU. Protecting human rights is also an objective of EU external relations in Article 21 Treaty on European Union (TEU). The EU HRSR however is a new way of framing sanctions. It has managed to step out of the discourse of securitization. It no longer directly addresses political conflict and is in principle unrelated to political entities (states). Instead, it places the rights of the victim front and centre. By doing so, it pursues objectives that are dear to those who are traditional critics of sanctions: exposing HRs violations, sending a

⁷ Declaration 25 on Arts 75 and 215 of the Treaty on the Functioning of the European Union.

signal of disapproval of such acts, and, ideally, exercising pressure on human rights violators by disrupting their business in and travel to the EU.

2.1 HORIZONTAL THEMATIC NATURE

The creation of the EU HRSR is part of an emerging trend towards horizontal sanctions regimes. The majority of the forty plus EU sanction regimes were imposed as geographically limited regimes targeting a specific country or region.⁸ Many also contain sub-regimes specifically addressing human rights violations as part of the overall sanction regime that pursues other more openly political objectives. However, those sanctioned under the geographically limited sub-regimes addressing human rights violations did not necessarily have to be directly linked to government authorities. In addition to the geographically limited sanction regimes, the EU has had for many years ‘horizontal’ sanctions regimes targeting terrorist suspects and since 2018 and 2019, respectively, it has also had horizontal regimes against the use of chemical weapons and cyberattacks.⁹

Of the existing EU sanction regimes, the EU’s more recent horizontal sanctions regimes, namely the 2016 autonomous Islamic State in Iraq and the Levant (ISIL)/Da’esh and Al-Qaida regime,¹⁰ complementing the EU measures giving effect to UN Security Council lists concerning ISIL/Da’esh and Al-Qaida,¹¹ as well as the regimes against chemical weapons (2018) and cyberattacks (2019), come the closest to the shifts the full (political) responsibility to the collective bodies/institutions of the EU.

EU HRSR. The ISIL/Da’esh and Al-Qaida regime in particular also possesses a human rights component, by listing individuals ‘also’ for ‘being involved in serious abuses of human rights outside the EU, including abduction, rape, sexual

⁸ See EEAS website for all restrictive measures in force, http://eeas.europa.eu/cfsp/sanctions/index_en.htm (accessed 23 Mar. 2021).

⁹ Council Decision (CFSP) 2018/1544, *EU Restrictive Measures Against the Proliferation and Use of Chemical Weapons*; Council Regulation (EU) 2018/1542, *EU Restrictive Measures Against the Proliferation and Use of Chemical Weapons*, and Council Decision (CFSP) 2019/797, *EU Restrictive Measures Against Cyberattacks Threatening the Union or Its Member States*, of 17 May 2019; Council Regulation (EU) 2019/796, *EU Restrictive Measures Against Cyberattacks Threatening the Union or Its Member States* (17 May 2019).

¹⁰ Council Decision (CFSP) 2016/1693 of 20 Sept. 2016 *Concerning Restrictive Measures Against ISIL (Da’esh) and Al-Qaeda and Persons, Groups, Undertakings and Entities Associated with them and Repealing Common Position 2002/402/CFSP*; Council Regulation (EU) 2016/1686 of 20 Sept. 2016 *Imposing Additional Restrictive Measures Directed Against ISIL (Da’esh) and Al-Qaeda and Natural and Legal Persons, Entities or Bodies Associated with Them*.

¹¹ UN Security Council Resolution 2253 (2015) (‘UNSCR 2253 (2015)’) *Expanding the Scope of the Measures Imposed by UNSCR 1390 (2002) to Individuals, Groups, Undertakings or Entities Associated with the Islamic State in Iraq and the Levant (‘ISIL (Da’esh)’)*.

violence, forced marriage and enslavement of persons'.¹² While the criterion itself is phrased in terms of general serious abuses of human rights and does not specifically refer to ISIL/Da'esh or Al-Qaida, a systematic reading would require such a link.

The 2016 autonomous ISIL/Da'esh and Al-Qaida regime fundamentally revised the existing counterterrorist regime. A renamed Council Working Party, Council Working Party on restrictive measures to combat terrorism (COMET WP), was established, with an enlarged mandate as compared to the previous Common Position 931 Working Party that had been fifteen years in charge of counterterrorist listings.¹³ COMET WP examines and evaluates the information with a view to (de-)listing a person and makes recommendations for (de-)listings to prepare proposals of the High Representative for Foreign Affairs and Security Policy.

Designations under the autonomous ISIL (Da'esh) and Al-Qaida regime may be 'based on proposals from the Member States or from the HR/VP'.¹⁴ In practice, the Council lists individuals based on proposals of the High Representative in an EU procedure,¹⁵ without involvement of national authorities. Both the chemical weapons and the cyberattacks sanctions regimes are based on an identical designation procedure.¹⁶ Adopting sanctions under these horizontal regimes is, different from the traditional way sanctions have been imposed based on a decision of the competent national authority, no longer a composite but an EU only procedure. In other words, in the past, designations under the horizontal counterterrorist regime have been based on a relevant decision of a competent *national* authority, with the CP 931 Working Party/Council confirming (rubberstamping?) national decisions. Under the new EU only procedures by contrast, designations have been fully centralized: a working party (e.g., COMET WP) prepares, the High Representative proposes and the Council lists. This may help to diminish potential

¹² Article 2(2)(f) of Council Decision 2016/1693, *supra* n. 10.

¹³ *Council of the European Union* (2016), 14612/1/16 REV 1 (Brussels 23 Nov. 2016), <https://www.statewatch.org/news/2016/dec/eu-council-comet-terrorist-lists-wp-14612-16-rev1.pdf> (accessed 23 Mar. 2021).

¹⁴ Article 5(1) of Council Decision 2016/1693, *supra* n. 10.

¹⁵ For example, *Council Decision (CFSP) 2019/271 of 18 Feb. 2019 Amending Decision (CFSP) 2016/1693 Concerning Restrictive Measures Against ISIL (Da'esh) and Al-Qaeda and Persons, Groups, Undertakings and Entities Associated with Them*, and *Council Implementing Regulation (EU) 2019/270 of 18 Feb. 2019 Implementing Regulation (EU) 2016/1686 Imposing Additional Restrictive Measures Directed Against ISIL (Da'esh) and Al-Qaeda and Natural and Legal Persons, Entities or Bodies Associated with them*. E.g., *Council Decision (CFSP) 2018/1000 of 16 July 2018 Amending Decision (CFSP) 2016/1693 Concerning Restrictive Measures Against ISIL (Da'esh) and Al-Qaeda and Persons, Groups, Undertakings and Entities Associated with them*, and *Council Implementing Regulation (EU) 2019/270 of 18 Feb. 2019 Implementing Regulation (EU) 2016/1686 Imposing Additional Restrictive Measures Directed Against ISIL (Da'esh) and Al-Qaeda and Natural and Legal Persons, Entities or Bodies Associated with them*.

¹⁶ Article 4(1) of Council Decision 2018/1544 and Art. 6 of Council Decision 2019/797, *supra* n. 9.

national bias. It also shifts the full (political) responsibility to the collective bodies/institutions of the EU.

Formally, the EU HRSR has a global reach. This avoids antagonizing any particular state or region and ‘meant to end exemption even for the servants of powerful and strategically important states’.¹⁷ The lack of a geographical focus avoids any critic on this point at the level of adopting the legal instruments and postpones potential disagreement to the more limited scale of an individual listings. The EU HRSR offers a legal framework to adopt sanctions against any particular person or group of persons, for example following any incident of grave human rights violation. This is expected to offer more flexibility and allow for a quicker EU reaction to such incidents than if the EU first needs to adopt an entirely new geographically limited sanctions regime.

2.2 CHANGING BEHAVIOUR OF GRAVE HUMAN RIGHTS VIOLATORS?

An open question remains the precise objective of imposing sanctions on any particular individual. Objectives in EU sanctions regimes are always formulated in a very general manner, usually stating that such measures are necessary in view of the situation in a particular country. The EU HRSR sets out that the targeted restrictive measures ‘will pursue common foreign and security policy objectives as set out in Article 21 TEU’ and ‘contribute to Union action to consolidate and support democracy, the rule of law, human rights and the principles of international law’.¹⁸

However, does the EU HRSR have the objective to lead the targeted person to change his behaviour as it is principally the case for all EU sanctions?¹⁹ The question of whether a change in behaviour should allow human rights violators to be delisted at all has been openly raised in the debate surrounding the EU HRSR.

The Global Magnitsky Act adopted under the Obama Administration in 2016 foresaw the termination of sanctions when those sanctioned ‘demonstrated [a] change in behavior’ (section 1263, subsection (g)). The Executive Order by President Trump of 20 December 2016 stepped up the urgency, declaring ‘a national emergency to deal with’ ‘serious human rights abuse and corruption around the world’ (Executive Order 13818). It permits generally that the Secretary of the Treasury is ‘authorised to determine that circumstances no longer warrant the blocking of the property and interests in property of a person listed in the Annex to this order’ (Executive Order

¹⁷ A. Rettman, *First Glimpse of New EU Human Rights Sanctions*, EUobserver of 14 Sept. 2020, <https://euobserver.com/foreign/149419> (accessed 23 Mar. 2021).

¹⁸ Council Decision (CFSP) 2020/1999, *supra* n. 1, recital 5.

¹⁹ See 2018 EU Sanctions Guidelines, Council of the European Union, Brussels, 5664/18.

13818, section 10) but does not relate this to a change in behaviour of the targeted person. So far at least two delistings have occurred under the Global Magnitsky Act; yet, it is not clear for what reasons.²⁰

The EU sanctions guidelines of 2018 set out that ‘restrictive measures are imposed by the EU to bring about a change in policy or activity by the target country, part of country, government, entities or individuals’.²¹ Changing policy or activity may seem in many ways a relic from the times that sanctions were necessarily connected to the political regime of a third country. A change in state policy can be demonstrated. As a matter of principle, even a regime change may occur. Demonstrating a change in behaviour is much more difficult for an individual perpetrator of human rights violations. Often the sanctions will relate to a specific (series of) occurrences of human rights violations that may lie in the past. This raises questions such as: Should someone who has been demonstrated to have committed grave human rights violations be delisted at all? How long after the violation has taken place? Should the period of listing be related to him (the absolute majority of grave human violators are men²²) constituting a threat for the future? Should the period of listing be proportionate to the gravity of the violation? These are questions that the EU HRSR does not answer.

2.3 PREVENTIVE OR PUNITIVE MEASURES?

Sanctions must be preventive in order to classify as administrative rather than criminal measures, which has consequences for the evidentiary standard, as well as the defense rights of those targeted. The EU HRSR regime is meant to target human rights violators who have been identified, at the evidentiary standard of the sanction regime, to have committed serious human rights violations. The imposition of sanctions would hence usually be triggered by *past* human rights violations. The EU HRSR would logically have to include the objective of preventing *future* violations to substantiate the claim that sanctions are ‘preventive’ rather than ‘repressive’, as has been consistently argued by the Council and the Commission and accepted by the Court of Justice with regard to the counterterrorist sanction regimes. However, the actual dissuasive effect of sanctions requires a counterfactual argument and is impossible to measure.

²⁰ GUL, Abdulhamit and SOYLU, Suleyman. Delistings are, <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20181102.aspx> (accessed 23 Mar. 2021).

²¹ *Ibid.*

²² For example, six of the forty-seven persons listed on 6 July 2020 under the UK Global Human Rights regime are female. None of the fourteen persons listed on 30 July 2020 (Council Decision 2020/1132) under the EU counterterrorist regime (Common Position 2001/931/CFSP) is female.

Nienke van der Have explained the intricate relation of preventive and punitive measures and called for recognition of the punitive aspect of individual sanctions.²³ This would be a very transparent way forward. The EU HRSR did not choose this route. Yet, it remains also difficult to imagine how the recognition of a punitive element would be understood by the Court of Justice and the European Court of Human Rights when reviewing these sanctions. It is likely to raise objections of *non bis in idem* against double listings or a prosecution by the International Criminal Court (ICC) (see below), as well as a claim to stricter due process requirements of those listed. *Non bis in idem*, also known as the prohibition of double jeopardy, protects persons from being criminally charged twice for the same action. If being listed under the EU HRSR were to be accepted as punitive, this general principle of criminal law could be raised against criminal prosecution of the human rights violations that have led to the listing.

As a means of comparison, the language in the chemical weapons regime addresses in the present tense the use or building up capacity to use chemical weapons.²⁴ This appears to target a current or future threat. The cyberattacks regime by contrast seems to identify people, who ‘are responsible for [past] cyberattacks or attempted cyberattacks’.²⁵ The focus is on the act itself. From the wording alone, it is much less apparent under the cyberattacks regime whether the person must constitute an ongoing threat.

The EU HRSR seems comparable to the cyberattacks regime. It focusses on (past) violations. The relevance of whether the targeted person constitutes a potential future threat is directly connected to the question of whether a change in behaviour should result in delisting.

3 THE DEVIL IS IN THE DETAIL: TARGETING HUMAN RIGHTS VIOLATORS WITHOUT VIOLATING THEIR HUMAN RIGHTS

3.1 JUDICIAL REVIEW

The EU HRSR may be inspired by the US regime but the US model of *Global Magnitsky* cannot and should not be followed too closely as it does not offer judicial protection to those sanctioned in a way that would meet due process guarantees under the Charter of Fundamental Rights. For the EU HRSR, it will be a challenge to ensure compliance with the human rights guaranteed under EU and national law, including the rights to the defence of those sanctioned. The high

²³ N. van der Have, *The Proposed EU Human Rights Sanctions Regime – A First Appreciation*, 30 *Sec. & Hum. Rts.* 1–16, at 7 (2019).

²⁴ Article 2(1)(a) of Council Decision 2018/1544, *supra* n. 10.

²⁵ Article 5(1) (a) of Council Decision 2019/797, *supra* n. 10.

numbers of annulments in the past, both of counterterrorist and country sanctions, have seriously damaged the legitimacy of these sanction regimes.²⁶ The EU HRSR has to make a credible claim of contributing to the protection of human rights without itself infringing them.

The EU and its Member States make a universal commitment to judicial review of the exercise of public power under Article 47 EU Charter and Article 6 ECHR. For sanctions against individuals, judicial protection before the EU Courts is further specifically guaranteed in Article 275(2) TFEU. Numerous actions for annulment,²⁷ preliminary references,²⁸ and actions for damages (*Safa Nicu Sepahan*; *Abdulrahim*)²⁹ before the EU Courts have demonstrated that the Courts will not as a matter of executive privilege shy away from reviewing sanctions. Access to the EU courts is structurally available to all listed persons. Yet, just on a side note: the EU HRSR did not set up an additional independent channel of administrative review comparable to the UN Ombudsperson, who receives complaints about listings under certain UN sanctions regimes. Any judicial review takes place in light of the objectives of the legal instrument and the specific designation criteria. Both are hence essential to enabling the Court to carry out meaningful judicial review.

3.2 DESIGNATION CRITERIA

The link between designation criteria and judicial review was explicated by the Member States in a Declaration to the Lisbon Treaty dedicated to the adoption of sanctions, which emphasizes that ‘the due process rights’ of those sanctioned must be observed and that this hinges on ‘thorough judicial review’ of listing decisions ‘based on clear and distinct criteria’.³⁰ The identification of the Council should be based on ‘personal conduct’ ‘corresponding to the designation criterion’.³¹ The Member States’ formal commitment to clear and distinct criteria is particularly

²⁶ C. Eckes, *EU Restrictive Measures against Natural and Legal Persons: From Counter-Terrorist to Third Country Sanctions*, 51(3) Com. Mkt. L. Rev. 869–906 (2014).

²⁷ For example, General Court (2010), Case T-85/09, *Kadi v. Commission (Kadi II)*; General Court (2005), Case T-315/01, *Kadi v. Council and Commission (Kadi I)*; ECJ 18 July 2013, Joined Cases C-584, C-593 & C-595/10 P, *Commission and Others v. Kadi (Kadi II appeal)*; General Court 2008, Case T-284/08, *People’s Mojahedin Organization of Iran v. Council (PMOI III)*; General Court 2008, Case T-256/07, *People’s Mojahedin Organization of Iran v. Council (PMOI II)*; General Court (2006), Case T-228/02, *Organisation des Modjahedines du peuple d’Iran v. Council and UK (PMOI I)*.

²⁸ ECJ 2017 Case C-72/15, *Rosneft*.

²⁹ ECJ 2013, C-239/12 P, *Abdulrahim v. Council and Commission*; ECJ 2017, Case C-45/15 P, *Safa Nicu Sepahan Co.*

³⁰ Declaration 25, *supra* n. 7.

³¹ *Ibid.*

relevant in the context of horizontal regimes, which are not *a priori* subject to limitations imposed by geographical location or political affiliation.

The Court of Justice has granted the Council considerable leeway, repeatedly confirming its broad discretion for defining ‘the general criteria’ adopted ‘for the purpose of applying restrictive measures’.³² The General Court further specifically ruled out that the legal safeguards applicable to the adoption of specific restrictive measures (individual listing) could be applied to the assessment of the legality of a general regime (listing criteria).³³

In some of the human rights sub-regimes, the designation criteria remain very general. They refer for example to ‘[...] persons responsible for human rights violations [...]’.³⁴ However, in a systematic reading they are limited by the objective to achieve a change in policy of the rulers in the particular geographical area on which they focus. This contextual systematic limitation does not apply to horizontal regimes, such as the EU HRSR. The EU HRSR lists thirteen specific serious human rights violations, introduced at three levels. Genocide and crimes against humanity are considered the gravest category. Sanctions are applied without further requirements. Trafficking in human beings, sexual and gender-based violence; violations or abuses of freedom of peaceful assembly and of association; violations or abuses of freedom of opinion and expression; and violations or abuses of freedom of religion or belief are examples of the least grave violations.³⁵ They require for a sanction to be imposed that the violation(s) are ‘*widespread, systematic* or are otherwise of *serious concern* as regards the objectives of the common foreign and security policy set out in Article 21 TEU’. Overall an attempt to specification is made, which may also be the reason for the introduction of this questionable hierarchy. Generally, ‘the gravity and/or impact of the abuses’ should be taken into account for listing decisions.³⁶

Those, who can be targeted by sanctions under the EU HRSR, are also distinguished in three categories: first, ‘natural or legal persons, entities or bodies, who are *responsible* for’ violations or abuses; second, those, ‘who provide financial, technical, or material support for or are otherwise involved in’ violations and abuses, ‘including by planning, directing, ordering, assisting, preparing, facilitating, or encouraging such acts’; and third, those, who are *associated* with those in the first two categories.³⁷ This allows, at least potentially, targeting a very broad range of persons. Yet, much lies in

³² ECJ 2015, Case C-630/13 P, *Anbouba*, para. 43.

³³ General Court 2016, T-160/13, *Bank Mellat v. Council*, para. 100.

³⁴ Recitals 2 and Art. 1(1) of *Council Decision 2014/119/CFSP of 5 Mar. 2014 Concerning Restrictive Measures Directed Against Certain Persons, Entities and Bodies in View of the Situation in Ukraine*.

³⁵ Council Regulation (EU) 2020/1998, *supra* n. 1, Art. 2(1)(d); Council Decision (CFSP) 2020/1999, *supra* n. 1, Art. 1(1).

³⁶ Council Decision (CFSP) 2020/1999, *supra* n. 1, Art. 1(4)(b).

³⁷ Council Regulation (EU) 2020/1998, *supra* n. 1, Art. 3(3).

the actual listing practice of who is sanctioned for being ‘associated with’ someone, who committed a serious human rights violation.

3.3 DELISTING

As a matter of principle, delisting as a result of a change in activity is required by the general objective of EU sanctions. If this was not foreseen, the EU HRSR would have to explicate that it departs from the general policy. However, the EU HRSR does not set out delisting criteria, responding to the questions raised above.

Generally speaking, it is fair to conclude from the case law of the CJEU that the broader the (de-)listing criteria the more discretion falls to the Council. This means that it is more difficult to successfully challenge an individual listing. This reduces the likelihood of successful legal challenges that may in turn undermine the legitimacy of the EU HRSR in the eyes of the public. Challenges against existing EU sanctions have become less successful. Less individual listings are annulled. The question is only whether this is the case because the listing process has become more robust or whether this is the case because the listing criteria have become much broader, including being ‘associated with’ someone with power in the political regime of a third country.³⁸

3.4 SCOPE

In the adoption process of the EU HRSR, the definition of the scope of regime was one of the most vividly discussed issues. Should the regime only target human rights violators or also persons implicated in the crime of corruption? Should specific human rights be identified that are particularly protected by the threat of sanctions?

The EU HRSR does not include corruption. It lists specific serious human rights violations. On the one hand, this demonstrates an attempt to limit the scope of the instrument, which is core to ensuring its legality and political credibility. On the other hand, the exclusion of corruption could also be read by the opponents of the EU HRSR as confirming that the EU is ready to sanction human rights violations abroad but avoids addressing something that is arguably also a problem at home.³⁹ Furthermore, corruption and human rights violations are often intimately entangled.⁴⁰

³⁸ *Ibid.*

³⁹ https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption_en (accessed 23 Mar. 2021).

⁴⁰ Raoul Wallenberg Institute, *The Nexus Between Anti-corruption and Human Rights* (Lund: Raoul Wallenberg Institute 2018).

Singling out specific human rights as particularly fundamental, as the EU HRSR does by introducing a hierarchy of violations, entails the danger of undermining the results of sustained efforts by the human rights community to emphasize that all human rights are fundamental, including social economic rights.

Another remaining issue is whether it is desirable to allow for a person to be listed under more than one sanction regime. One could here think of a listing under one of the human rights sub-regimes, as well as under the EU HRSR. Legally, this would be possible, as sanctions are considered to be preventive rather than punitive. However, would a delisting or a successful action for annulment against one of these regimes result in an embarrassment of the listing under the other regime? If the two regimes pursue different objectives, e.g., a change of policy of a political regime and a change of activity of the individual human rights perpetrator, this would not necessarily have to be the case. Yet, if a listing is annulled because the Council did not meet the evidentiary standard this would have direct consequences for the legitimacy of the listing under the other regime. One could argue that this should be a reason for delisting.

How does the EU HRSR relate to the ICC? The EU position is that both complement each other in serving the same purpose: bringing people to justice who commit international crimes, which all entail grave human rights violations.⁴¹ Sanctions under the EU HRSR (different from sanctions imposed by the ICC) are not regarded as punitive and could be imposed much more swiftly on the basis of less evidence, because they do not have to meet the more stringent evidentiary requirements under criminal law. It is hence likely that human rights violators are already targeted by sanctions under the EU HRSR at the time of prosecution by the ICC. Any failure to establish sufficient evidence in the ICC, which must adhere to the higher criminal evidentiary threshold, should then be considered for their listing under the EU HRSR. This does not mean however that a failure to meet the evidentiary standard for criminal prosecution would result in a delisting under the EU HRSR, as the latter will be subject to a lower evidentiary standard.

3.5 EVIDENTIARY BASIS

In the US, sanctions under the Global Magnitsky Act must formally meet an evidentiary threshold akin to requiring a ‘reason to believe’ or ‘based on credible information’. As a matter of practice, the US government tries to exceed this level of proof in most cases. Formally, ‘reason to believe’ is a higher threshold than for

⁴¹ S. Blok, *Closing remarks by the Minister of Foreign Affairs at a meeting on the EU Global Human Rights Sanction Regime* (The Hague 20 Nov. 2018), <https://www.government.nl/documents/speeches/2018/11/20/blok-on-eu-global-human-rights-sanction-regime> (accessed 23 Mar. 2021).

example the ‘reasonable grounds to suspect’, as necessary in the UK to impose human rights sanctions.⁴² However, in practice, the US courts are very reluctant to interfere with what they consider political decisions; hence, the formal formulation should not lead to the conclusion that judicial review in the US is more robust.

In the EU, at least the level of detail *publicly* supplied to substantiate a listing under some of the human rights sub-regimes is very low. An example reads: ‘In this capacity, Gabriel Amisi Kumba was therefore involved in planning, directing, or committing acts that constitute serious human rights violations in Democratic Republic of Congo (DRC)’.⁴³ In addition, for a listing to be upheld by the CJEU, it is sufficient that one of several reasons put forward by the Council can be substantiated.⁴⁴ The CJEU has not indicated a minimum evidentiary standard in abstract but carries out a case by case review. Listings under the EU HRSR should from the beginning meet a high evidentiary threshold to avoid repeated annulments. The Court’s case law on presumptions is relevant in this context.

3.5[a] *Reversing the Burden of Proof Without Presumptions*

Rebuttable presumptions are the point from which factual inquiries start. In a sanctions case before the CJEU, they shift the burden of proof to the applicant seeking an annulment of his listing. They set out what facts will be taken to be true if the applicant is unable to overcome the presumption.

The possibility to rely on presumptions for a listing decision depends on the context. In principle, the Council has to discharge its burden of prove by demonstrating ‘sufficiently specific, precise and consistent’ evidence showing ‘a sufficient link between the person ... and the regime’.⁴⁵ However, the Court of Justice also held that ‘the use of presumptions is not precluded if the *contested acts have made provision for them* and they *serve the purpose of the legislation at issue*’.⁴⁶ The presumption must be rebuttable and not disproportionate to the legitimate aim pursued.

In *Tay Za*, the General Court accepted that the son of a business figure was sanctioned for the sole reason that he belonged to the family of a person who could be regarded as being associated with the leaders of the sanctioned regime. On appeal, the Court of Justice found that the General Court erred in law when it pronounced this general assumption that certain categories of persons, i.e., family

⁴² Section 6 ‘Designation criteria’ of the Global Human Rights Sanctions Regulations 2020, <https://www.legislation.gov.uk/ukxi/2020/680/regulation/6/made?view=plain> (accessed 23 Mar. 2021).

⁴³ Council Decision 2019/2109/CFSP of 9 Dec. 2019 Amending Decision 2010/788/CFSP Concerning Restrictive Measures Against the Democratic Republic of the Congo.

⁴⁴ ECJ 2015, Case C-630/13 P *Anbouba*, para. 46.

⁴⁵ *Ibid.*, para. 53; see also ECJ 2013, Case C-348/12 P, *Council v. Manufacturing Support & Procurement Kala Naft*.

⁴⁶ ECJ 2012 C-376/10 P, *Tay Za v. Council*, para. 69.

members of businessmen associated with the regime, fell within the scope of the listing criteria.⁴⁷ The Court of Justice further considered how the presumption related to the objective of the sanctions regime and held that ‘it is not easy to establish a link, even an indirect link, between the absence of progress towards democratization and the continuing violation of human rights in Myanmar and the conduct of the family members of those in charge of businesses’.⁴⁸

In *Abouba*, the leading case on presumptions, the CJEU held that it was not sufficient to justify designation that the applicant was a successful businessman in Syria to conclude that he supported the Assad regime (the relevant criterion for inclusion in the EU’s Syria sanctions). However, the Court explained that ‘inclusion on the lists of persons subject to restrictive measures was well founded on the basis of a set of indicia relating to his situation, functions and relations in the context of the Syrian regime that were not rebutted by him’.⁴⁹ Similarly, in *Tomana*, the CJEU confirmed that the conclusion was legally possible that:

those who hold senior posts, such as the individuals involved in military, police or security operations, must be regarded as being fully associated with the [sanctioned political regime], unless they have taken specific action demonstrating their rejection of the government’s practices. In those circumstances, referring to the capacity of those individuals or to the posts they occupy is sufficient, as the contested measures themselves expressly provide.⁵⁰

In other words, while it is not possible to rely on a general presumption the Council may in a contextual appreciation of the facts conclude that the role, position and activities of the person were only possible if the person supported the targeted regime.⁵¹ Such a conclusion must not have been rebutted by evidence of dissociation with the regime in question.

The EU HRSR does not include an express presumption of who is involved in grave human rights violations. Any such presumption would also be impossible without referring to broad categories, but this has been held by the Court as being unlawful. As discussed above, the EU HRSR indicates broad categories of potential targets. The absence of an express presumption however does not mean that the Council cannot and will not rely in its listing practice on a similar contextual appreciation of the facts as accepted by the Court in *Abouba*, which amounts to a form of implicit presumption. A rebuttable implicit presumption that contextual evidence justifies designation reverses the burden of proof. The Court seems to be willing to accept this.⁵²

⁴⁷ *Ibid.*, para. 84.

⁴⁸ *Ibid.*, para. 89.

⁴⁹ ECJ 2015, Case C-630/13 P, *Anbouba*, para. 55.

⁵⁰ ECJ 2016 Case C- 330/15 P, *Tomana and Others v. Council and Commission*, 84.

⁵¹ ECJ 2015, Case C-630/13 P, *Anbouba*, paras 18 and 51.

⁵² ECJ 2017, Case C-599/16 P, *Yanukovych v. Council*, para. 70.

3.5[b] *Open Source*

The commitment of national and EU actors to use exclusively open source materials is crucial in the context of due process rights. In the past, a large number of sanctions, both counterterrorist and country sanctions, have been annulled by the EU Courts because the Council did not share the relevant information to put the Courts in the position to rule on the merits.⁵³ The Courts have been very clear. The Council cannot rely on a claim that the evidence concerned comes from confidential sources in order to justify that it cannot be disclosed to the EU Courts.⁵⁴ It is not entitled to hide behind the state secrecy laws of a Member State.⁵⁵

The exclusive reliance on open source materials will solve this important problem. Open source materials cannot legally qualify as confidential materials. They must be shared with the applicant in case of a legal challenge.⁵⁶ State secrets privilege cannot apply in cases where the information is already in the public domain.⁵⁷ The EU HRSR does not codify a commitment to rely exclusively on open source material for listings. Yet, if the Council relied in practice on publicly available materials only this would allow it to avoid some of the troubles of the counterterrorist and country sanctions.

However, any information, including open source information should only be accepted as credible as its source. Only because an allegation is publicly made, this does not mean that a fair possibility to provide counter evidence was given. Much publicly available information is based on hearsay and notoriously difficult to verify or successfully contradict from the perspective of the suspected.

3.5[c] *Information Provided by Third States*

The CJEU held that ‘competent authority’ within the meaning of the autonomous EU counterterrorist sanctions regime is not ‘limited to the authorities of Member States but as being capable, in principle, of also including the authorities of third States’.⁵⁸ In other words, decisions of competent authorities of non-EU states can satisfy as a reason for designation.

⁵³ Eckes, *EU Restrictive Measures*, *supra* n. 26; C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford University Press 2009).

⁵⁴ GC, *PMOI I*, *supra* n. 27, para. 155.

⁵⁵ GC, *PMOI III*, *supra* n. 27, para. 73.

⁵⁶ ECtHR 23 Feb. 2016, Appl. No. 44883/09, *Nasr and Ghali v. Italy*.

⁵⁷ *Ibid.*, para. 268; V. Abazi & C. Eckes, *Closed Evidence in EU Courts: Security, Secrets and Access to Justice*, 55(3) *Com. Mkt. L. Rev.* 753–782 (2018).

⁵⁸ ECJ, Case C-599/14 P, *Council v. Liberation Tigers of Tamil Eelam (LTTE)*, paras 22 and 27.

The Council does not have to verify whether the actions of the third state, e.g., investigations, were well founded, but it has to ‘verify whether the decision to freeze funds was well founded in the light of those investigations’.⁵⁹ Moreover, it is not necessary that the Council has access to the evidentiary basis of the third state’s actions. This can be highly problematic, depending on the situation in the third state. The credibility of the third state’s actions, such as the instigation of investigations, generally depends on its compliance with the rule of law, but can also depend on other factors, such as a recent regime change. In *Yanukovych*, for example, letters of the Ukrainian Prosecutor General’s Office were considered sufficient proof of the existence of criminal proceedings brought against Mr Yanukovych on account of alleged misappropriations of public funds.⁶⁰ Mr Yanukovych is the former President, who was removed from office in the 2014 Ukrainian revolution. The circumstances indicate the political dimension that criminal proceedings may have in such a case.

However, the Council must, ‘before acting on the basis of a decision of an authority of a third State, verify whether that decision was adopted in accordance with the rights of the defence and the right to effective judicial protection’.⁶¹ It is sufficient, for that purpose, that the Council briefly mentions in the statement of reasons why it considers the decision of the third State to meet a sufficient level of protection of procedural rights. The Council cannot delay making these observations only in the event of a legal challenge before the CJEU.⁶² These observations are politically highly sensitive and cannot amount to interference in the internal affairs of the third State concerned.⁶³

In the context of the EU HRSR, the High Representative or the Member States may likely rely on reports of societal actors, such as human rights organizations, for their proposals. This raises additional questions of how to verify credibility of information, relating to issues such as for example whether different autonomous sources corroborate the same allegations without relying on each other.

⁵⁹ ECJ *Yanukovych*, *supra* n. 52, para. 158.

⁶⁰ The appellant maintained that the General Court failed to take into account concerns about human rights compliance and compliance with the rule of law in Ukraine and, in particular, about the lack of prosecutorial and judicial independence, even though those elements led to violations of the presumption of his innocence and his right to due process.

⁶¹ ECJ, *LTTE*, *supra* n. 58, para. 24.

⁶² *Ibid.*, para. 35.

⁶³ *Ibid.*, para. 34.

4 ADOPTING THE HUMAN RIGHTS SANCTIONS REGIME

4.1 QUALIFIED MAJORITY VOTE AND FURTHER CENTRALIZATION

All EU sanctions regimes so far have been adopted on the basis of Article 215 TFEU. This requires a unanimous CFSP Council Decision under Article 29 TEU, which is then followed by a directly applicable EU Regulation giving effect to the CFSP decision. The CFSP Council Decisions contain an annex with the names of the targeted individuals. In other words, every name on the list is agreed unanimously by all the Member States.

Former President Jean-Claude Juncker proposed in his 2018 State of the Union speech that Member States make use of existing EU rules to move from unanimity to qualified majority voting in certain areas of the EU's CFSP, referring specifically to 'human rights issues' and 'sanctions'.⁶⁴ The European Parliament (EP) welcomed this proposal in its resolution of 14 March 2018 and urged 'the Council to adopt this new sanction instrument in such a way that the imposition of human rights sanctions might be adopted by qualified majority in the Council'.⁶⁵ However, after some discussion, Commissioner Johannes Hahn insisted in March 2019 that all sanctions decisions would continue to require unanimity. This is also the case under the EU HRSR.

Unanimity had been feared to potentially prove to be an obstacle to listing individuals closely linked to the regime of wealthy powerful non-EU states, with whom some Member States entertain economic relations, such as China. At the point of writing, only limited practice of adopting sanctions under the EU HRSR has emerged. In the first round, the EU sanctioned four Russian individuals identified as involved in the detention of Alexei Navalny. In the second round of listing on 22 March 2021, the EU, together with the US, the UK and Canada imposed sanctions on 11 individuals and four entities for abuses of the Uyghur in Xinjiang, China, as well as violations in North Korea, Libya, South Sudan, Russia, and Eritrea.⁶⁶ In particular the decision to list Chinese nationals for human rights violations seems to confirm that together with non-disclosure of the internal discussions and the formal proposal by the High Representative, this procedure will in principle also ensure that the political and economic implications of listing an individual are evenly affecting all Member States. The EU Council acts as such, without external parties being able to distinguish between friends and foes amongst

⁶⁴ J.-C. Juncker, *State of the Union Address 2018*, https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-speech_en_0.pdf. (accessed on 23 Mar. 2021)

⁶⁵ *European Parliament Resolution of 14 Mar. 2019 on a European Human Rights Violations Sanctions Regime (2019/2580(RSP))*, (Strasbourg, 14 Mar. 2019).

⁶⁶ See the consolidated list at: https://eeas.europa.eu/headquarters/headquarters-homepage_en/8442/Consolidated%20list%20of%20sanctions (accessed 23 Mar. 2021).

the EU Member States. Centralization appears to have enabled the EU for the first time since 1989 to impose significant sanctions against Chinese nationals, including high officials.⁶⁷

As explained above, the EU HRSR gives, besides the Member States, the High Representative for Foreign Affairs and Security Policy the right to propose designations and, in practice, most designations are likely to be made following a proposal by the High Representative. This is one step towards centralizing the adoption of sanctions. However, the joint proposal of the Commission and the High Representative of 19 October 2020 for an EU HRSR foresaw an additional step towards centralization.⁶⁸ It proposes that the Commission should for the first time have the power to oversee on the implementation of the travel bans. This later point is not realized in the EU HRSR. It seems to have been abolished after resistance by some of the Member States.

4.2 NATIONAL ALTERNATIVES

In October 2019, eight members of the Nordic Council, including Denmark, Finland, Iceland, Sweden, Norway, the Faroe Islands, Greenland, and Åland, expressed the intention to adopt national human rights sanctions modelled on the US Global Magnitsky Act if the EU does not succeed in adopting the EU HRSR.⁶⁹ The EU HRSR has now been adopted. However, the pressure by the Nordic Council states still raises the question of whether such unilateral national measures would be compatible with EU law.

In *Kadi I* (2008), the CJEU pointed to the link between freezing assets and the operation of the internal market and concluded that Member States could not unilaterally impose individual sanctions.⁷⁰ At the time however, many Member States (16 of the 27) had national legislative measures running in parallel with the directly applicable European counter terrorist sanctions regime.⁷¹

⁶⁷ <https://www.reuters.com/article/us-eu-china-sanctions-idUSKBN2BE1AI> (accessed 23 Mar. 2021).

⁶⁸ Commission Press Release of 19 Oct. 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1939 (accessed 23 Mar. 2021).

⁶⁹ A. Rettman, *Widow's Plea as EU Diplomats Debate Magnitsky Act*, EUobserver of 14 Nov. 2019, <https://euobserver.com/justice/146606> (accessed 23 Mar. 2021).

⁷⁰ ECJ 3 Sept. 2008, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities (Kadi I appeal)*, para. 230; C. Eckes, *International Sanctions Against Individuals: Test case for the Resilience of the EU's Constitutional Foundations International Sanctions Against Individuals*, 15(3) Eur. Pub. L. 351–378 (2009).

⁷¹ UK Supreme Court 27 Jan. 2010, *Her Majesty's Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Appellants); Her Majesty's Treasury (Respondent) v. Mohammed al-Ghabra (FC) (Appellant); R (on the application of Hani El Sayed Sabaei Youssef) (Respondent) v. Her Majesty's Treasury (Appellant) [2010] UKSC 2*, para. 22.

In November 2019, the Commission responded to a question by a competent national authority, presumably posed because of the plans of several Member States to adopt national human rights sanctions:

that the unilateral adoption of national asset freeze measures for reasons related to the achievement of the CFSP objectives as set out in Article 215 TFEU would have a clear impact on the functioning of the internal market and would undermine the purpose and effectiveness of the above-mentioned provision of the TFEU.⁷²

The opinion of the Commission is not uncontroversial. Since the entry into force the Treaties do no longer identify specific CFSP objectives but contain an integrated list of EU external relations objectives. These objectives are very wide-ranging and comprehensive, including the protection of human rights, but also for example international security (Article 21(1), (2)(b) and (c) TEU). It seems difficult to limit the material scope of CFSP in any meaningful way based on its objectives.⁷³

In addition, CFSP is not an exclusive or shared but parallel competence. The adoption of a CFSP decision does not pre-empt Member States from taking national measures on the same issue, unless the national measure affects the effectiveness of the CFSP decision.⁷⁴ This is different when an EU Regulation is adopted under Article 215 TFEU. Regulations are directly applicable. National measures may not alter, obstruct or obscure this direct applicability.⁷⁵ In the specific context of individual sanctions, the CJEU ruled that national sanctions against a person who was also targeted by an EU Regulation ‘affect the scope of that regulation’.⁷⁶ However, the mentioned Member States planned to adopt national human rights sanctions if the EU had not succeeded in adopting an EU HRSR, hence in absence of any EU Regulation (or CFSP Decision).

It seems convincing that asset freezes imposed in some Member States but not in others necessarily create disparities and divide the internal market, in the sense that economic activity by the targeted individuals remains possible in part of the internal market while it is prohibited in others. Yet, the gravity of the impact on the operation

⁷² European Commission, *Opinion of 8 December 2019 on the Compatibility of National Asset Freezes Imposed by Member States with Union Law* (2019), https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/191108-opinion-national-asset-freezes_en.pdf (accessed 23 Mar. 2021).

⁷³ C. Eckes, *Common Foreign and Security Policy: The Consequences of the Court’s Extended Jurisdiction*, 22(4) *Eur. L. J.* 492–518 (2016); see on the normalization of CFSP more broadly: *EU External Relations Law: Text, Cases and Materials*, Ch. 9 (2d ed., R. A. Wessel & J. Larik eds, Hart Publishing 2020).

⁷⁴ Declarations 13 and 14 to the Lisbon Treaty. See C. Eckes, *EU Powers Under External Pressure: How the EU’s External Actions Alter Its Internal Structures* (Oxford University Press 2019); C. Hillion & R. A. Wessel, *Restraining External Competences of EU Member States Under CFSP*, in *EU Foreign Relations Law: Constitutional Fundamentals* 79–121 (M. Cremona & B. De Witte eds, Hart Publishing 2008).

⁷⁵ ECJ 1977, C-50/76 *Amsterdam Bulb*.

⁷⁶ ECJ 2012, C-539 & 550/10 *Stichting Al Aqsa*.

of the internal market as such appears limited, even if sanctions target very wealthy individuals.⁷⁷ It is not obvious that this justifies considering unilateral national sanctions against human rights perpetrators adopted for political reasons and irrespective of the economic power of those targeted as incompatible with EU law.

In addition, the Commission's opinion of 2019 seems to raise problems for all other national sanction regimes imposing asset freezes, which all relate more or less directly to the comprehensive integrated list of EU external relations objectives. In this context, it is interesting that the Commission has not so far brought an infringement action under Article 258 TFEU against a Member State for running parallel national sanctions regimes. If the Commission could make legally hard that parallel national sanctions regimes undermine the functioning of the internal market and the effectiveness of EU sanctions under Article 215 TFEU, as stated in its 2019 opinion, infringement proceedings should be the legally (perhaps not politically) logical consequence.⁷⁸

4.3 CONCEPTUAL CONSEQUENCES: ARE HUMAN RIGHTS LOSING THEIR INNOCENCE?

Human rights as a concept and as a statal commitment, both in national constitutions and under international law, have been widespread at least since the formulation of the Universal Declaration of Human Rights in 1948. The human rights discourse in civil society and courts however only gained significant traction in the 1970s, largely because they served as a competing ideological framework that benefitted from neutrality and impartiality as compared to capitalism and communism.⁷⁹ Human rights seemed to offer an alternative 'utopia' that allowed striving for a better world without becoming entangled in the confrontational Cold War rivalries of the time.⁸⁰

This reading of human rights as neutral however is not uncontroversial. It has been argued that human rights were never neutral or politically impartial but intertwined with state sovereignty and as such connected to the exercise of power and violence.⁸¹ Karl Marx for example read liberal rights as ideological instruments for solidifying economic relations in law and justifying exploitation of

⁷⁷ Eckes (2009), *EU Counter-Terrorist Policies*, Ch. 2, *supra* n. 53.

⁷⁸ See e.g., the Bilateral Investment Treaty cases (ECJ 2009, C-205/06, *Commission v. Austria*; ECJ 2009, C-249/06, *Commission v. Sweden*; ECJ 2009, C-118/07, *Commission v. Finland*), in which the CJEU found BIT agreements by Member States to violate the EU Treaties because they may potentially undermine the effectiveness of sanctions.

⁷⁹ N. Klein, *The Shock Doctrine* 118–128 (Penguin 2007); S. Moyn, *The Last Utopia – Human Rights in History* 212–228 (Harvard University Press 2010).

⁸⁰ Moyn, *supra* n. 77.

⁸¹ D. Loick, *Kritik der Souveränität* (Campus Verlag 2012).

the working class.⁸² Indeed, the widespread strong protection of property as compared to the protection of the physical integrity of the person, for example in context of marital rape or abortion, appear to form part of part of a masculine capitalist conception of the world. While human rights form the core of the conception of individual autonomy in democratic constitutional states it also seems in order to keep in mind that their specific codification, interpretation, and application in legal practice may have never met the self-declared standard of neutrality, to which human rights supporters regularly connect them. Indeed, while human rights are often seen as expressions of universal moral claims and as such as capable of transcending and restricting political power, human rights as codified under law are always partial and based on a political choice.⁸³ They result from an expression of sovereignty. They are a formal recognition of certain political values (and not others), codified in a particular way, and backed by the threat of enforcement. At the same time, human rights continue to be *presented* with an air (and objective) of neutrality and impartiality, as part of an argument divorced of selfish sovereign interest, and ultimately as a (utopian) promise to work for a fairer world.

The EU HRSR is the conscious exercise of sovereign power over individuals for the purpose of attaching a personal price tag to violating human rights, usually outside of any jurisdiction that could or would convincingly threaten consequences. As desirable and laudable as this sounds, one should not forget that the EU HRSR is (also) a political tool. This fully accepted and acknowledged in the context of country sanctions. In fact, the potential political, economic, and diplomatic consequences play a central role in the debate preceding the adoption of sanctions. The EU HRSR confirms this by explicitly acknowledging the political dimension by stating that designations ‘shall take into account’ the ‘objectives of [the EU’s] common foreign and security policy’.⁸⁴

In the context of the EU HRSR, the issue of selection of targets on the basis of foreign policy considerations needs to be openly discussed. Who will be sanctioned and who will not cannot (at least not only) be a question of who has committed the most appalling human rights violations. It will necessarily also be the result of political and above all economic considerations. Yet, a certain level of discomfort remains at the thought that political considerations may result in a situation that only smaller fish are fried, while the most powerful may be spared because of political considerations.

⁸² G. Cohen, *Karl Marx's Theory of History: A Defence* (Oxford: Oxford University Press 1978); C. Menke, *Kritik der Rechte* (Suhrkamp 2015).

⁸³ M. Ignatieff, *Human Rights as Politics and Idolatry*, 2–52 (Princeton University Press 2001).

⁸⁴ Council Decision (CFSP) 2020/1999, *supra* n. 1, Art. 1(4)(a).

Political motives also co-determine the listing practice under the Global Magnitsky Act, as confirmed by current and former officials of the US Treasury.⁸⁵ In addition, we should keep in mind that the EU and the US take very different approaches for example to the relationship between human rights sanctions and the ICC. While, as explained above, in Europe the expectation is that the EU HRSR is intended to dovetail with the work of the ICC, the US is targeting ICC staff with travel bans because the work of the ICC allegedly interferes with US foreign policy.⁸⁶ The US reaction to the EU potentially listing US citizens under the EU HRSR remains an open issue.

The EU HRSR is a novel way of expressly linking human rights protection beyond the jurisdiction of the EU directly to foreign policy objectives. This is the case for all EU sanctions.⁸⁷ It is reflected in the EU's past practice, as well as the EU sanctions guidelines of 2018.⁸⁸ The EU HRSR is no exception in this regard. As all foreign policy tools, the application of the EU HRSR is subject to the wider considerations of EU external relations, including geopolitical power politics, economic interests, and diplomacy.

The air of neutrality and impartiality and the promise of a fairer world is what attracts so many human rights organizations to have supported the adoption of the EU HRSR. Yet, whether they will also agree with the inevitably selective use of the instrument remains to be seen. In addition, the openly political use of human rights under the EU HRSR is another step towards the politicization of the human rights discourse that may also undermine its success as a seemingly neutral tool urging international actors to commit at least formally and rhetorically to the value of protecting human rights.

5 CONCLUSIONS

Individual sanctions are a comparatively cheap tool of foreign policy. There are more frequently used than ever. The three recently adopted EU sanctions regimes fighting cyberattacks, chemical weapons, and human rights violations might be the beginning of a new trend, namely, a broader move to horizontal thematic sanctions regimes targeting individuals unrelated to any political regime, which allow

⁸⁵ The author has had the opportunity to discuss US sanctions policy with current and former officials of the US Treasury at (academic) workshops and meetings.

⁸⁶ US Secretary of State Michael Pompeo, *Remarks of 15 March 2019*, <https://www.state.gov/secretary/remarks/2019/03/290394.htm>; reflected <https://www.hrw.org/news/2019/03/15/us-threatens-international-criminal-court> (accessed 23 Mar. 2021).

⁸⁷ C. Portela, *EU Sanctions as a Foreign Policy Tool*, in *Europe as a Global Actor* 429–439 (S. B. Gareis, G. Hauser & F. Kernic eds, Opladen/Farmington Hills 2012).

⁸⁸ Council of the European Union, *EU Sanctions Guidelines*, *supra* n. 19.

imposing sanctions in a supranational procedure without involvement of national authorities.⁸⁹

In the academic community, sanctions are largely seen as ineffective in compelling policy changes in third countries.⁹⁰ Many of the country sanctions are in place for decades and no (direct) response of those sanctioned can be identified. This raises the question: Does it make sense to use individual sanctions against perpetrators of human rights violations? Is it a sensible way of bringing these perpetrators to some form of justice? Is sanctioning justified for other reasons? Is there an added value to the horizontal EU HRSR compared to the existing model of human rights sub-systems forming part of an overall sanctions regime targeting a particular country or geographical region?

Despite the critical reflections offered in this article, I answer these questions about the added value of the EU HRSR in the affirmative. Depending on its use, it could offer a flexible instrument that reaches beyond the existing forms of addressing international human rights violations. This article examined the question of how such a regime and the sanctioning practice under it should look like. The very objective of protecting human rights requires that such a regime must be endowed with particularly robust legal safeguards to ensure that those committed to fighting human rights violations do not become perpetrators themselves.

The EU HRSR would have done well in stipulating the need for a clear and distinct link based on personal conduct between the targeted person and a grave human rights violation; an express and sufficient evidentiary threshold; and the commitment to meet this threshold on the basis of publicly available and reliable information. It did not do so. These stipulations could have contributed to ensuring a practice of self-restraint needed in view to the broad scope of a sanction regime addressing grave human rights violations across the globe. They could have ensured that all designations rest on a robust factual basis that can be made available to those sanctioned and, in the event of a legal challenge, to the CJEU. The EU HRSR leaves these points open and it is now for the Council to develop a credible practice that respects the rights of those sanctioned.

Rules on the burden of proof, the commitment to formality by establishing clear and precise listing criteria, as well as the use of presumptions are in their core about accepting that inevitably mistakes will be made. All three mechanisms could have been used to ensure strategically and in the long-term that when mistakes are made they are made because the EU is not able to list someone who committed a

⁸⁹ One could also count the 2016 renewal of the 2001 counter-terrorist sanctions regime into the current ISIL/Da'esh and Al-Qaida regime as part of this trend.

⁹⁰ Russia is a case in point. For an academic study of country sanctions: R. Pape, *Why Economic Sanctions Do Not Work*, 22(2) Int'l. Sec. 90–136 (1997); and R. Pape, *Why Economic Sanctions Still Do Not Work*, 23(1) Int'l. Sec. 66–77 (1998).

serious human rights violation rather than that it targets an innocent person. Only time and potentially a series of legal challenges might tell us more about the EU's use of the EU HRSR in practice.

The EU HRSR may become a successful attempt to reach beyond the existing means of holding perpetrators of serious human rights violations responsible. Yet, we cannot expect it to be applied neutrally and impartially, exclusively focussed on the gravity of the violation. As all sanction instruments, the EU HRSR cannot but conform to the foreign policy objectives and interests of those applying it. It is best to acknowledge the link between human rights sanctions and sovereign power than to pretend neutrality.