

# THE EU GLOBAL HUMAN RIGHTS SANCTIONS REGIME: BETWEEN SELF HELP AND GLOBAL GOVERNANCE

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## **Abstract**

By adopting a Global Human Rights Sanctions regime, the European Union took a new step in leveraging its power to respond to human rights violations globally. The regime has a general scope, and targets both state and non-state actors. This paper shows that this regime occupies a tension zone between two competing approaches to sanctions: a self-help approach that perceives sanctions as deriving authority from states' sovereignty and subservient to their foreign policy, and a global governance approach that views sanctions as deriving authority from and bound by the objectives of specific international legal regimes they enforce. The tension between these approaches comes into stark view when constructing the listing criteria and policy objectives of the sanctions, which determine the scope of targets and duration of measures. Whether and how subsequent practice resolves this tension will be determined by certain legislative and interpretive moves by the EU Council and Court.

**Keywords:** Sanctions, EU Foreign Policy, Human Rights, Self-Interest, Global governance, Obligation Erga Omnes

## 1. Introduction

On December 7, 2020 the Council of the European Union (EU) established an autonomous sanctions regime targeting grave violators and abusers of human rights around the world.<sup>1</sup> The preparatory work for the so-called EU Global Human Rights Sanctions (GHRS) regime was initiated by the Netherlands and has received strong support from the EU Parliament and civil society organizations.<sup>2</sup> The sanctions regime takes inspiration from the widely known United States' Global Magnitsky Act,<sup>3</sup> the UK Global Human Rights Sanctions regime,<sup>4</sup> and Magnitsky-style legislations in some other countries such as Canada, Latvia, Lithuania, and Estonia.<sup>5</sup> Unlike the US and other Magnitsky-style regimes that address both human rights violations and corruption abroad, the EU regime focuses exclusively on human rights, similar to the UK regime.

The utilization of sanctions for advancing human rights is not a novel concept in the EU. It is an extension of political conditionality in the areas of aid, development and trade.<sup>6</sup> Existing EU sanctions regimes are also mostly rooted in liberal democratic normative justifications, in keeping with the idea of a 'liberal power Europe'.<sup>7</sup> About two-thirds of all autonomous sanctions that the EU adopted partially or fully concerned human rights and democracy objectives.<sup>8</sup> Unlike existing EU sanctions regimes, however, the GHRS regime has a thematic focus, instead of geographic. Existing EU sanctions regimes, except for security-related regimes addressing terrorism,<sup>9</sup> chemical weapons,<sup>10</sup> and cyber-crimes,<sup>11</sup> target governmental regimes in specific third countries. The GHRS regime, on the other hand, targets individuals and entities globally, regardless of their function within governments or their nationality.

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<sup>1</sup> Council Decision (CFSP) 2020/1999 and Council Regulation (EU) 2020/1998.

<sup>2</sup> Andrew Rettman, 'Dutch Flesh Out Proposal for EU Human Rights Sanctions', *EU Observer*, 19 November 2018.

<sup>3</sup> Global Magnitsky Human Rights Accountability Act, Public Law 114–328.

<sup>4</sup> Global Human Rights Sanctions Regulations 2020.

<sup>5</sup> Nienke van der Have, 'The Proposed EU Human Rights Sanctions Regime', 30 *Security and Human Rights* (2019) pp. 1-16, 4.

<sup>6</sup> Gordon Crawford and Simonida Kacarska, 'Aid Sanctions and Political Conditionality: Continuity and Change' 22 *Journal of International Relations and Development* (2019) pp. 184-214.

<sup>7</sup> Wolfgang Wagner, 'Liberal Power Europe' 55(6) *Journal of Common Market Studies* (2017) pp. 1398-1414. The idea is similar to the older notions of 'civilian power Europe' and 'normative power Europe', see Francois Duchene, 'Europe's Role in World Peace' in R. Mayne (ed.) *Europe Tomorrow: Sixteen Europeans Look Ahead* (1972); Jan Orbie, 'Civilian Power Europe: Review of the Original and Current Debates', 41(1) *Cooperation and Conflict: Journal of the Nordic International Studies Association* (2006) pp. 123-128; Ian Manners, 'Normative Power Europe: A Contradiction in Terms?', 40(2) *Journal of Common Market Studies* (2002) pp. 235-258; Ryan Tilley, 'Normative Power Europe and Human Rights: A Critical Analysis', 7 *POLIS Journal* (2012) pp. 451-494.

<sup>8</sup> EU Parliament, 'Targeted sanctions against individuals on grounds of grave human rights violations – impact, trends and prospects at EU level' (April 2018), p. 13.

<sup>9</sup> Council Decision 2001/931/CFSP.

<sup>10</sup> Council Decision (CFSP) 2018/1544

<sup>11</sup> Council Decision (CFSP) 2019/797.

This paper shows that the GHRS regime is underpinned by an important conceptual dilemma that is not necessarily encountered in existing geographic or security-related sanctions. The dilemma emanates from the simultaneous application of two competing approaches or mindsets to sanctions – referred to as *self-help* and *global governance* approaches. The self-help approach perceives sanctions as flexible instruments of pursuing any foreign policy objectives of states. This approach regards the legitimacy of sanctions as emanating from the inherent prerogative of statehood. The global governance approach, on the other hand, views sanctions as enforcement tools attached to international legal regimes. In this approach, the legitimacy of sanctions is derived not from the inherent right of states, but from their delegated role as executors of international legal norms.

This paper traces past EU sanctions practice in relation to human rights and examines the legal texts and preparatory background of the GHRS regime to reveal how these two approaches differ and what consequences they entail for our understanding of human rights sanctions. The central argument is that these two approaches have diverging implications for how sanctions are defined in targeting scope and operationalized within broader political realities. The scope of targets is defined, and the retail listing and de-listing is determined by the formal *listing criteria* and the *policy objectives* of the sanctions regime. The paper shows that the two approaches entail diverging interpretations of the listing criteria and policy objectives of the GHRS regime. The interpretive divergence emanates from the relative primacy the two approaches assign to either the form and purpose of international human rights (and humanitarian) law or EU's broader foreign policy interests and strategies. This poses a fundamental dissonance between what the EU has been accustomed to in its past practice and what it is promising in the GHRS regime, and in this light the discussion furnishes analytical framework to assess how the Union will navigate that dissonance in future practice.

This paper is structured as follows. Section 2 lays out the meaning of, and distinction between, the self-help and global governance approaches to sanctions. It will be shown that the global governance approach is more suited to human rights sanctions than self-help. This section also briefly presents the historical and theoretical backgrounds of these two approaches and assesses their legality under international law. Section 3 then shows how the two approaches lead to diverging interpretations of the listing criteria in the GHRS regimes. It will be shown that the GHRS regime contains elements from both approaches, reflecting a careful selection of only universally accepted norms as listing criteria but still leaving openings for the EU to straddle its interests onto occurrences of human rights violation. Section 4 continues analysis of the two competing approaches with regard to the construction of the policy objectives of the sanctions. This section reveals that in interpreting what the policy objectives of the GHRS regime are, the EU's country-specific strategic foreign policy priorities and human rights accountability goals contend for primacy, with conflicting implications for listing and de-listing decisions. This is shown by drawing on illustrations from existing EU sanctions practice and jurisprudence, and by looking into the preparatory work and final texts of legislation establishing the GHRS regime. Section 5 concludes the discussion by recalling the central arguments and pointing to specific interpretive issues to keep an eye on in subsequent EU practice and jurisprudence.

## 2. Competing Approaches to Sanctions: Self-help and Global Governance

States have historic right to self-help, including through the use of force, under customary international law.<sup>12</sup> It is an integral part of an international legal order that lacks compulsory dispute settlement system or central law enforcement.<sup>13</sup> The right has become significantly reduced in the post-UN Charter world as the use of force in self-help is prohibited except in cases of armed attack. Self-help not involving the use of force has also become more institutionalized and constrained by being subject to prior dispute settlement processes and subsequent review under certain regimes such as the WTO regime and law of the sea.<sup>14</sup> Outside of such constraints, the reduced right of self-help continues to exist. This is evidenced in the rejection of proposals to condition self-help to the prior exhaustion of peaceful dispute settlement mechanisms during the drafting of articles on state responsibility by the International Law Commission's (ILC).<sup>15</sup> This proposal would have further constrained the role of the traditional self-help right. The ILC's final provision instead recognizes the existing right of self-help without preconditioning it to exhaustion of dispute settlement mechanisms.<sup>16</sup>

While self-help empowers states to deal with their transnational problems, global governance is the reverse, top-down phenomenon of addressing collective problems at the international level in a manner that directly impacts global society, beyond facilitating inter-state interaction. Global governance consists of a constellation of norms, policies and institutions that 'define, constitute, and mediate relations among...the wielders and objects of international public power'.<sup>17</sup> This constellation has increasingly evolved from merely providing functional solutions at the global level towards constitutionalizing the global order, particularly in the sense of forming 'world public law'.<sup>18</sup> It denotes international law's transformation from transactional towards public law paradigm.<sup>19</sup> Liberal internationalism, with human rights and the broader 'humanity's law' at the centre,<sup>20</sup> has 'served as the animating vision' for this constitutionalizing world order.<sup>21</sup> But in terms of enforcing this vision on the ground, collective and hierarchal institutional frameworks exist only in pockets of issue-areas, such as the UN Charter system on peace and security – and human rights is not one of them.

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<sup>12</sup> Thomas Frank, *Recourse to Force: State Action Against Threats and Armed Attacks* (2009), p. 131.

<sup>13</sup> Bruno Simma, 'Counter-measures and Dispute Settlement: A Plea for a Different Balance' 5 *European Journal of International Law* (1994) 102-115, p. 102.

<sup>14</sup> Mary Ellen O'Connell, *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement* (2008), p. 231.

<sup>15</sup> *Idem*, p. 258.

<sup>16</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2 Y.B. INT'L L. COMM'N 129, arts 49 & 50.

<sup>17</sup> Thomas G. Weiss and Ramesh Thakur, *Global Governance and the UN: An Unfinished Journey* (2010), p. 6.

<sup>18</sup> David Kennedy, 'The Mystery of Global Governance', in J. Dunoff and J. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2012), pp. 37-68.

<sup>19</sup> Armin von Bogdandy, Philipp Dann, and Matthias Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' in A. Bogdandy et al (eds.), *The Exercise of Public Authority by International Institutions* (2010), pp. 3-32.

<sup>20</sup> Ruti Teitel, *Humanity's Law* (2011).

<sup>21</sup> Weiss and Thakur (2010), above n 17.

Sir Gerald Fitzmaurice lamented in 1956 that the post-UN Charter international law ‘frowns on self-help, without, however, as yet having put anything in its place’.<sup>22</sup> Global governance that developed with the rise of international organizations and transnational networks<sup>23</sup> in subsequent decades could be seen as a response to fill this void of norm-setting and enforcement in certain issue-areas of shared concern worldwide. Still, the realms of self-help and global governance exist in parallel, with gaps in areas where self-help does not reach and global governance has not yet covered.

Some have sought to bridge this gap by conceiving the two realms as welded together through top-down delegation. Kelsen famously wrote ‘the principle of self-help is eliminated if the legal order reserves the execution of the sanction to a special organ, that is, if the force monopoly of the community is centralized.’<sup>24</sup> Kelsen did not see a contradiction between a system of individual states’ self-help and global collective enforcement. When the collective enforcement is executed by way of requiring states to exercise self-help measures, he posited, the two systems integrate. Kelsen’s claim, however, envisages global government with force monopoly. What has emerged in reality is not global government but governance,<sup>25</sup> with rudimentary enforcement mechanisms unevenly distributed across issue areas. In similar vein to Kelsen, some have construed the International Court of Justice’s (ICJ) conclusion in the Namibia Advisory Opinion<sup>26</sup> obliging states to not enter into economic engagement with South Africa, which was unlawfully occupying Namibia, as an instance of globally authorized self-help sanction by all states in service of international norms.<sup>27</sup> However, this interpretation is unwarranted as the prohibition of economic engagement does not constitute sanction, but is instead an obligation to not recognize the fruit of unlawful conduct under international law. While sanctions, understood as countermeasures, involve violation of international law to respond to a prior violation by another state, in this case the ICJ did not require states to take positive action that violates international law but is otherwise justified – instead it required states to not enter into conduct that violates international law in the first place.

Another approach to bridge the gap between self-help and the patchwork of global governance is a ‘bottom-up’ reconceptualization of states as self-appointed custodians of the global order. This approach conceives states as ‘trustees of humanity’ that should be empowered and obliged to act in the global public interest ‘even absent specific treaty obligations.’<sup>28</sup> The adoption of unilateral sanctions for the global enforcement of international communitarian norms,<sup>29</sup> such as human rights, falls under this category.<sup>30</sup> The international legal framework concerning such unilateral sanctions is

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<sup>22</sup> Gerald Fitzmaurice, ‘The Foundations of the Authority of International Law and the Problem of Enforcement’ 19(1) *The Modern Law Review* (1956), pp. 1-13, 8.

<sup>23</sup> Eyal Benvenisti, *The Law of Global Governance* (2014), p. 25.

<sup>24</sup> Hans Kelsen, *Principles of International Law* (1952), p. 16.

<sup>25</sup> Martti Koskenniemi, ‘Global Governance and Public International Law’ 37(3) *Kritische Justiz* (2004), pp. 241-254.

<sup>26</sup> South West Africa Advisory Opinion, I.C.J. Reports 1971, p. 16, para 124.

<sup>27</sup> Thomas Frank, *Recourse to Force: State Action Against Threats and Armed Attacks* (2009), chapter 8, p. 112 ff.

<sup>28</sup> Eyal Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ 107(2) *AJIL* (2013), pp. 295-333, 300.

<sup>29</sup> Santiago Villalpando, ‘The Legal Dimension of the International Community: How Community Interests Are Protected in International Law’, 21(2) *European Journal of International Law* (2010) pp. 387-419; Bruno Simma and Andreas L. Paulus, ‘The ‘International Community’: Facing the Challenge of Globalization’, 9(2) *European Journal of International Law* (1998) pp. 266-277.

<sup>30</sup> Alexandra Hofer, ‘The Efficacy of Targeted Sanctions in Enforcing Compliance with International Law’ 113 *AJIL Unbound* (2019) pp. 163-113, 167.

relatively undeveloped. There is more legal clarity and practice when sanctions are utilized either at states' level as a self-help foreign policy tool or by international organizations for the enforcement of global norms. Unilateral sanctions that enforce global norms, such as the EU's GHRS regime, fall in between these two systems.

### 2.1. *Comparison of Characteristics*

The more traditional role of sanctions has been as self-help mechanism by states in the pursuit of their national interests abroad. This practice has generally been accepted as a corollary to states' sovereignty and a right recognized under customary international law. The self-help approach perceives sanctions as just another item in the toolbox of foreign policy instruments at the disposal of states in pursuing their (legal) interests internationally. This approach does not anchor its legal legitimacy on the authority of substantive norms – although specific normative concerns such as human rights violations could in fact constitute part of foreign policy priorities of the government of the day – but rather on states' fundamental prerogative of self-help established under international law.<sup>31</sup> From this approach, sanctions are viewed purely as a matter left to the political prerogative of states. This arises from the fact that international law only permits, and does not oblige, states to use their right for self-help. Accordingly, it is held, states can rightfully subject the exercise of the self-help measures to their broader foreign policy calculations – i.e. when the use of sanctions is ultimately harmful to the realization of their interests, states would rightfully not exercise it, and vice versa.

At the level of global governance, the framework for the imposition of sanctions has a clearer legal framework under the United Nations (UN) Charter. Based on article 41 of the Charter, the UN Security Council can impose sanctions on states and non-state actors for the maintenance of international peace and security. The Security Council's practice has also evolved to include the adoption of sanctions for the enforcement of human rights (and humanitarian) norms, as long as the nexus with international peace and security is established.<sup>32</sup>

Sanctions adopted with a global governance approach are envisioned as enforcement mechanisms established for the realization of a substantive international legal regime – e.g. in the case of the UN Security Council, the collective security regime. In this framework, the sanctions regime forms part and parcel of the specific international legal regime that established it. As such, the operation of that sanctions regime would have to be broadly aligned with the substantive regime it purports to enforce. This means, the sanctions need to respond to a norm violation recognized by that treaty or customary law regime, and listing and de-listing has to be in keeping with the speed of progress towards the objectives of that regime. Furthermore, when states implement sanctions adopted by a global governance body, they are acting not in pursuance of their interests but in the service of the international community. Such implementation is not a matter of sovereign prerogative, as the

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<sup>31</sup> Oscar Schachter, 'Self-Help in International Law: US Action in the Iranian Hostage Crisis' 37(2) *Journal of International Affairs* (1984) pp. 231-246.

<sup>32</sup> Inger Österdahl, 'The Exception as the Rule: Lawmaking on Force and Human Rights by the UN Security Council', 10 *Journal of Conflict & Security Law* (2005) pp. 1-20; Vera Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia* (1990); Robert Cryer, 'Sudan, Resolution 1593, and International Criminal Justice', 19(1) *Leiden Journal of International Law* (2006) pp. 195-222.

sanctioning state is merely an agent to a principal, which is the international community embodied in the global governance body.

When states or group of states by their own initiative position themselves as enforcers of global norms, as in the case of the EU's GHRS regime, they are not engaged in the act of helping themselves. Instead, they step into the global public realm and install themselves as global enforcers of a shared norm. Therefore, the use of sanctions in that context has supposedly escaped the domain of provincial interests. Consequently, how such actors utilize sanctions cannot be justified by reference to their foreign policy prerogative because the authority to use sanctions does not emanate from their sovereignty, but instead from the agreement of the international community over a substantive norm, in this case human rights. In this sense, the GHRS regime is fundamentally an embodiment of the global governance approach to sanctions.

There is a relatively straightforward international legal framework applicable with respect to the practice of self-help sanctions at state level and global governance sanctions adopted by international organizations. However, when states individually or regionally (as in the case of the EU) adopt unilateral sanctions for the enforcement of globally recognized norms (i.e. human rights), the two categories of sanctions collapse into one murky territory. Or more precisely, such actors claim legitimacy by invoking the global governance approach, but elements of the self-help approach also manifest. As such, contradictory elements from both the self-help and the global governance approaches are weaved into this new category of sanctions.

## ***2.2. Assessment of Legality***

Although both the self-help and global governance approaches to sanctions are (potentially) lawful under international law within defined conditions, human rights sanctions essentially belong under the later approach. Self-help is grounded on the classic understanding of countermeasures in international law. This has been extensively expounded in literature.<sup>33</sup> It suffices here to note that states that are injured by the internationally wrongful acts of another state can take countermeasures that might violate their own international legal obligations. The injury element means that a state could adopt sanctions as a countermeasure only when its rights under international law are violated. The other side of this coin is that such sanctions could only target a party to which the wrongful act is attributable. This means that there must exist a right-and-obligation relationship between the sanctions sending and target parties. This relationship could arise from a specific treaty regime, such as a bilateral investment treaty between states, or customary international rule, such as rules on the protection of foreign diplomatic premises.

States also retain freedom to exercise self-help through acts of retorsion, i.e. unfriendly acts that do not violate their international legal obligations. A typical example of this is the denial of entry visas to individuals. As entry into a state is a matter under the full prerogative of that state, denial of entry would not constitute a violation of the state's international obligations, except when international obligations are established, such as for diplomats or officials of international organizations.

To the extent that injury is a prerequisite for countermeasures, the self-help approach cannot be relied upon to justify human right sanctions. This is because human rights violations may not

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<sup>33</sup> Nigel White & Ademola Abass, 'Countermeasures and Sanctions', in Malcolm D. Evans (Ed.), *International Law* (5<sup>th</sup> ed, 2018) pp. 521-547.

involve a specific offending state (when rights abuse is committed by private actors) or an injured state at all (when rights violations are committed on the target state's own population). To the extent that human rights sanctions encompass measures that potentially violate international obligations, such as assets freeze, they also cannot be justified as retorsions. The self-help approach, therefore, offers a very limited basis of legality for human rights sanctions.

The justification of human rights sanctions as enforcement of global governance is more viable than the self-help approach and it is potentially justified under international law based on the doctrine of third-party countermeasures.<sup>34</sup> 'Potentially' because the doctrine is still contested but it is the only ground such sanctions could stand on currently. The doctrine espouses that non-injured states are entitled to take countermeasures in response to another states' violation of non-reciprocal or transactional obligations, such as human rights. The internationally wrongful conduct that such sanctions measure often constitutes, such as violations of trade agreements (e.g. when trade is restricted) or property rights (e.g. when assets are frozen) could be justified on the ground that they were taken as a reaction to the target state's violation of collective or global obligations. Collective obligations are those that are binding among a defined group of states arising from a multilateral treaty. Global obligations are those that are 'owed to the international community as a whole', also known as obligations *erga omnes*, under which human rights obligations fall – the implication of obligations *erga omnes* on the targeting scope of human rights sanctions will be elaborated further in section 3 below.

The doctrine of third-party countermeasure is a contested norm, not a settled rule under international law. The ILC concluded in its 2001 report on state responsibility that there is no definitive evidence that third-party countermeasure is an accepted right under international law as it stands now.<sup>35</sup> The doctrine is mainly propounded by the established sanctions sending Western states, while sanctions-receiving (mostly developing) states oppose it.<sup>36</sup> However, recent scholarship has uncovered that developing states have also historically endorsed the doctrine in limited circumstances, particularly in anti-colonial self-determination cases.<sup>37</sup> Moreover, several legal scholars argue that there was more to be said regarding the normative weight of the doctrine than what the ILC settled on.<sup>38</sup> These scholars argue that state practice and opinion juris has developed

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<sup>34</sup> Martin Dawidowicz, *Third-Party Countermeasures in International Law* (2017).

<sup>35</sup> Commentary to the ILC report, 'Responsibility of States for Internationally Wrongful Acts', UN General Assembly resolution 56/83 of 12 December 2001; Tom Ruys, 'Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework', in L. van den Herik (ed.), *Research Handbook on UN Sanctions and International Law* (2016).

<sup>36</sup> Alexandra Hofer, 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?' 16(2) *Chinese Journal of International Law* (2017) pp. 175-214.

<sup>37</sup> Rebecca Barber, 'An Exploration of the General Assembly's Troubled Relationship with Unilateral Sanctions' 70(2) *International and Comparative Law Quarterly* (2021) pp. 343-378.

<sup>38</sup> Dawidowicz, above n 34; Tams C, Asteriti A, 'Erga omnes, jus cogens and their impact on the law of responsibility' in M. Evans and P. Koutrakos (eds), *The international responsibility of the European Union* (2013), p. 163; Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (2005); Linos-Alexander Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility', 13(5) *European Journal of International Law* (2002), pp. 1127-1145; Jochen Abr Frowein, 'Reactions by not directly affected states to breaches of public international law', *The Hague Academy Collected Courses* (1994); Evan Criddle, 'Standing for Human Rights Abroad', 100 *Cornell Law Review* (2015), pp. 269-334 (defending a slightly different concept of fiduciary theory for humanitarian countermeasures);

over the past twenty years since the ILC's report in the direction of stronger approval for the doctrine.

It has been observed that the key weakness of the argument for third-party countermeasures is the lack of strong evidence of *opinio juris* to corroborate the existing state practice.<sup>39</sup> States often do not explicitly articulate this doctrine as their legal basis for adopting sanctions in defence of global norms. A key legal explanation for this could be the fact that such sanctions often serve a mix of various legal and non-legal foreign policy objectives, such as democracy, good governance, and the maintenance of international peace and security.<sup>40</sup> Asserting third-party countermeasures in such cases would be either untenable, because there is no international legal violation at stake corresponding to all the foreign policy objectives mentioned, or unnecessary, when the sanction concerns the collective security regime that is governed by the UN Charter without the need for separate legal justification.<sup>41</sup> In this regard, human rights sanctions are well suited for the invocation of the doctrine. This is because human rights violation constitutes international legal wrongfulness (unlike, e.g., democracy) and it would not be *prima facie* covered by the UN Charter justification (unlike, e.g., international peace and security).

A global human rights sanctions regime adopted by states is a measure that seeks to enforce an international norm (i.e. human rights) by converting it as a foreign policy goal of a state. As such, it is a form of global governance done at level of states. The EU's GHRS regime has a similar character: it aims to enforce globally recognized norms, but the EU is not an organization with global mandate, hence it stands on whatever legal right its member states have. The mission of enforcing global norms elevates the EU sanctions regime from the realm of self-help. But the fact that it is not adopted by a body with global mandate makes it susceptible to being instrumentalized for the regional collective's provincial foreign policy goals. Consequently, the GHRS regime is torn between the *self-help* and *global governance* frameworks on sanctions.

This tension between the self-help and global governance approaches to sanctions is what we see at play in the GHRS regime. The tension emanates from a conceptual dissonance in viewing sanctions as both carrying the weight and legitimacy of global community interests, and also as tools states can expediently wield for their foreign policy goals. The former view gives states a license to use sanctions in a context where their sovereignty would not have been a sufficient justification, while the latter view implicitly uses sovereign prerogative as a justified basis to decide on whether and how to exercise that license. In other words, the tension or dilemma that the EU finds itself in is between being a faithful executioner of a specific global regime (i.e. international human rights) and deploying the power that emanates from that global regime to further its interests and strategies.

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Denis Alland, 'Countermeasures of General Interest', 13(5) *European Journal of International Law* (2002) pp. 1221-1239.

<sup>39</sup> Martin Dawidowicz, 'Third-Party Countermeasures: A Progressive Development of International Law?', 29 *Questions of International Law* (2016) pp. 3-15.

<sup>40</sup> EU Basic Principles, para 1 & 3; Francesco Giumelli, 'The EU as Regional Sanctioner', European Union Institute for Security Studies (2013).

<sup>41</sup> Pierre-Emmanuel Dupont, 'Countermeasures and Collective Security: The Case of the EU Sanctions Against Iran', 17(3) *Journal of Conflict and Security Law* (2012) pp. 301-336.

The subsequent sections demonstrate these two competing approaches in defining the *listing criteria* and the *policy objectives* of the GHRS regime. In these aspects, we see the historical practice and current debate of the EU on human rights sanctions threading a mixed and at times contradictory path.

### 3. Listing Criteria: Erga Omnes Obligations and Self-Interest

A purely self-help approach pushes for an expansive usage of sanctions for as much foreign policy objectives as possible. This view construes sanctions as all-purpose foreign policy tools subject only to the sanctioning states' prerogative, and feasibility and effectiveness considerations. As such, sanctions are utilized to advance any type of foreign policy objective, and, ergo, any type of human rights – whether to uphold established norms or to promote new ones. This is not an uncommon view in Western policy circles, where there is a fairly broadly-shared feeling that powerful 'global good citizens' should be using their sanctions capability to advance global good citizenship more widely.<sup>42</sup>

A global governance approach to sanctions, which is suitable for human rights sanctions, contradicts this open-ended usage of sanctions. As this approach bases the justification of sanctions for global norms on those norms themselves, states' discretion on the application of that power would be circumscribed. As discussed above, the use of unilateral sanctions for upholding global norms is rooted in the (contested) doctrine of third-party countermeasures. This doctrine bestows upon states a circumscribed, delegated norm-enforcement power that is limited to cases of violations of obligations *erga omnes*.

The following discussion elaborates the legal limitation on the scope of the GHRS regime (i.e. the *erga omnes* test) and demonstrates how the tension between the self-help and global governance approaches is manifested in the listing criteria of that regime.

#### 3.2. *The Lawful Scope of Human Rights Sanctions*

The doctrine of third-party countermeasures entails that states can adopt sanctions to enforce global norms, including human rights, if only those norms entail obligations that are owed to the international community as a whole. The scope of *erga omnes* obligations, and which human rights would fall under it, is a contested matter in international law. The more established view on this issue has previously been that only some, not all, human rights obligations possess *erga omnes* character. Although no definitive system of making this distinction has been established, proponents of this view largely agree that some, albeit crude, criteria of distinction could be discerned from the International Court of Justice (ICJ)'s obiter dictum in the *Barcelona Traction* case which launched the *erga omnes* doctrine. The ICJ's influential statement in that case contained the phrase '...in view of

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<sup>42</sup> Emil Dall, Isabella Chase and Tom Keatinge, 'Coordinating Sanctions After Brexit Considerations for the Future of UK Sanctions Policy', RUSI Occasional Paper (May 2020), available at <https://rusi.org/publication/occasional-papers/coordinating-sanctions-after-brexite-considerations-future-uk-sanctions>; US House Committee on Foreign Affairs hearing on 'Impact of Sanctions in Africa' (25 May 2021), available at <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=112715>.

the importance of the rights involved...<sup>43</sup> Consequently, the criteria for erga omnes status most scholars invoke include whether the human rights in question is ‘basic/fundamental’,<sup>44</sup> ‘important’,<sup>45</sup> ‘non-derogable’,<sup>46</sup> or other equivalent descriptors.<sup>47</sup> With such criteria, human rights that have attained the status of *jus cogens* norms (or relate to a *jus cogens* prohibition) automatically qualify as erga omnes obligations, but so do some other non-*jus cogens* human rights that are otherwise deemed exceptionally important. Some of the later types of rights have been recognized by the ICJ itself in its subsequent jurisprudence,<sup>48</sup> others are identified by jurists from state practice.<sup>49</sup> In either case, the key point in this view is that ‘the character erga omnes does not apply indiscriminately’ to all human rights norms.<sup>50</sup>

There is an opposing view which asserts that all human rights entail erga omnes obligations on states.<sup>51</sup> This view holds that all human rights categorically possess the ‘essential distinction’ that the ICJ in its *Barcelona Traction* case stated as characterizing erga omnes obligations, which is the existence of a legal interest by all states to see that obligation fulfilled, or what is also referred to as the non-reciprocal nature of the obligation. Furthermore, the principle of indivisibility of human rights, which opposes hierarchy between rights, corroborates this view in rejecting any such distinction between rights that do and do not entail erga omnes obligation.<sup>52</sup> Proponents of this view assert that such dichotomy between regular and superior human rights ‘...can no longer be regarded as settled law.’<sup>53</sup>

What is important for this discussion is that the debate on this issue is not settled either way. Those that hold the categorical inclusion of all human rights into erga omnes status do not deny that that view is only a newly ascending challenger to the previously established view of hierarchy between human rights norms. In his important work on the topic, judge Meron discredited the hierarchy view by only stating that such view ‘can *no longer* be regarded as settled law’<sup>54</sup> (emphasis added), suggesting

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<sup>43</sup> *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)*, Preliminary Objections, Judgment, ICJ Reports 1964, p 6, para 33.

<sup>44</sup> Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (1997).

<sup>45</sup> Tams (2005), above n 38.

<sup>46</sup> James Crawford, Special Rapporteur on State Responsibility, Third Report on State Responsibility, Int'l Law Comm'n, U.N. Doc. A/CN.4/507, para 373-374.

<sup>47</sup> Tams (2005), above n 38, pp. 117-157; Evan Criddle, ‘Standing for Human Rights Abroad’, 100 *Cornell Law Review* (2015) pp. 269-334, 290.

<sup>48</sup> E.g. the right to self-determination, see Tams (2005), above n 38.

<sup>49</sup> E.g. Ragazzi shows us that the US Third Restatement on foreign relations law lists murder or disappearance of individuals, torture, prolonged arbitrary detention, or a consistent pattern of gross violation of any human rights. Ragazzi, above n 44, pp. 140-41.

<sup>50</sup> *Idem*, p.140.

<sup>51</sup> Yoram Dinstein, ‘The Erga Omnes Applicability of Human Rights’, 30(1) *Archiv Des Völkerrechts* (1992) pp. 16–21; ‘Obligations and Rights Erga Omnes in International Law’, 63(2) *Yearbook of the Institute of International Law* (1989) p. 339; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1991), chapter III.

<sup>52</sup> On hierarchy in human rights, Ian D. Seiderman, *Hierarchy in International Law: The Human Rights Dimension*, (2001); Tereya Koji, ‘Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights’, 12(5) *European Journal of International Law* (2001) pp. 917-941.

<sup>53</sup> Meron (1991), above n 51, p. 199.

<sup>54</sup> *Ibid.*

the relative novelty of the idea that all human rights entail obligation erga omnes. Furthermore, given the progressive expansion of human rights corpus juris, it is questionable whether the status of erga omnes obligations could be conferred to newly emerging rights, such as those related to electoral democracy,<sup>55</sup> human rights defenders and whistleblowers,<sup>56</sup> or the age of digital technology.<sup>57</sup>

This is for two reasons. First, such emerging rights do not yet possess strong basis in customary international law. As Christian Tams expounded in detail, erga omnes obligation arises from customary international law, not merely from treaty law.<sup>58</sup> The relatively limited state practice, opinio juris, and in most cases also the absence of any treaty law basis renders these emerging rights unsubstantiated to command erga omnes obligation. Secondly, identifying erga omnes obligations requires restrictively interpreting the notion of norms that have a strong basis in customary international law. This is because, as Special Rapporteur Crawford put it, the category of erga omnes ‘...includes only a small number of *universally* accepted norms’<sup>59</sup> (emphasis added). It would be contradictory to adopt a restrictive interpretation of the notion of ‘universal acceptance’ when discussing about erga omnes obligations generally, but then to abandon that and adopt a liberal interpretation of that notion once the discussion turns to which human rights candidates fall under the category of erga omnes.

In sum, it could be reasonably argued that all human rights do not automatically give rise to obligation erga omnes. Or in reverse, the proposition that all human rights give rise to erga omnes obligation is not a settled law under international law. This limits the range of human rights violations to which states could respond using sanctions. At the very least, the violation of emerging human rights, such as the examples mentioned above, would not constitute sufficient ground for adopting sanctions that violate the adopting states’ international legal obligations. *A fortiori*, violation of anti-corruption obligation, which has historically been part of Magnitsky-style legislations and has also been proposed for inclusion in the GHRS regime,<sup>60</sup> cannot be included in the listing criteria as it is far from enjoying a customary norm or erga omnes status. This restricts the utility of human rights sanctions as a foreign policy instrument – states can only deploy coercive sanctions in response to violations of human rights norms that have settled universal acceptance as erga omnes obligations.

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<sup>55</sup> Thomas Franck, ‘The Emerging Right to Democratic Governance,’ 86 *American Journal of International Law* (1992) pp. 46-91.

<sup>56</sup> Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UN General Assembly Resolution 53/444 of 1998.

<sup>57</sup> Report of Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, A/HRC/17/27 of 16 May 2011 (concerning the human rights dimension of access to Internet).

<sup>58</sup> Tams (2005), above n 38, chapter 7.

<sup>59</sup> Crawford, above n 46, para 374.

<sup>60</sup> van der Have (2019), above n 5.

### ***3.3. The Listing Criteria of the GHRS Regime***

It has been reported that one of the issues of lengthy negotiation in the preparation of the draft GHRS regime is the selection of human rights for inclusion in the listing criteria of the regime.<sup>61</sup> The EU Council has finally selected about twelve types of human rights violations as listing criteria.<sup>62</sup> These criteria are enumerated in article 1(1) of Decision 2020/1999<sup>63</sup> as follows:

- (a) genocide
- (b) crimes against humanity;
- (c) the following serious human rights violations or abuses:
  - (i) torture and other cruel, inhuman or degrading treatment or punishment,
  - (ii) slavery,
  - (iii) extrajudicial, summary or arbitrary executions and killings,
  - (iv) enforced disappearance of persons,
  - (v) arbitrary arrests or detentions;
- (d) other human rights violations or abuses, including but not limited to the following, in so far as those violations or abuses 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:
  - (i) trafficking in human beings, as well as abuses of human rights by migrant smugglers as referred to in this Article,
  - (ii) sexual and gender-based violence,
  - (iii) violations or abuses of freedom of peaceful assembly and of association,
  - (iv) violations or abuses of freedom of opinion and expression,
  - (v) violations or abuses of freedom of religion or belief:

The list is broadly consistent with the idea that third-party countermeasures should be used in the service of erga omnes or universally accepted norms. It is much wider than the comparable UK legislation that only lists a few most serious (peremptory) norms, namely violations of the right to life, freedom from torture or cruel, inhumane or degrading treatment, and freedom from slavery, servitude or forced labour.<sup>64</sup> But it still shows selectiveness based on normative weight when

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<sup>61</sup> Ibid; Joseph Borell, 'The long and complex road towards an EU Global Human Rights Sanctions Regime', (31 October 2020), available at [https://eeas.europa.eu/headquarters/headquarters-homepage/87884/long-and-complex-road-towards-eu-global-human-rights-sanctions-regime\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/87884/long-and-complex-road-towards-eu-global-human-rights-sanctions-regime_en).

<sup>62</sup> Council Decision (CFSP) 2020/1999.

<sup>63</sup> Also, Council Regulation 2000/1998, article 2.

<sup>64</sup> Global Human Rights Sanctions Regulations 2020, art 4(2).

compared to the US Global Magnitsky Act, which does not have specific listing of human rights but only applies the loose criterion of “serious human rights abuse” for targeting.<sup>65</sup>

Almost all of the items on the list are universally accepted as customary international law norms, hence entailing erga omnes obligations. Some of them, namely genocide, slavery, and torture, are firmly established as not just customary international norms but also peremptory norms of international law. This attests to a conscious choice to stick to human rights norms that have universal acceptance as entailing erga omnes status. This is particularly so in light of the existence of a political push in some parts of the EU for the inclusion of wider set of human rights during the preparation of the sanctions regime. The EU parliament urged that acts of corruption be included in the listing criteria.<sup>66</sup> In line with its track record of liberal internationalism, the Parliament also advocated for the inclusion of attacks on democracy promotion actors such as journalists and human rights defenders in the listing criteria.<sup>67</sup> This is a broader framing of the purpose of the GHRS regime than those proposed by the initiator of the legislation (the Netherlands), which focused on criminal aspect of human rights violations, particularly in conflict situations.<sup>68</sup> At the EU Commission as well one could detect a sense of frustration that the Union has not made good of its enormous economic power in terms of harnessing political compliance worldwide.<sup>69</sup>

The list, however, also contains items that do not have a settled universal acceptance as commanding erga omnes obligations and are more reflections of the EU’s self-interest or priorities in its foreign policy. The chief example here is human trafficking and “abuse of human rights by migrant smugglers” under article 1(1)(d)(i). Although human trafficking has been established as unlawful under international treaties, its customary international law status is still debatable. There are arguments defending the erga omnes status of the prohibition against human trafficking by interpreting it within a broader definition of the prohibition of slavery, which is a jus cogens norm under customary international law. This argument, however, is equally rejected by other international law authorities on the topic.<sup>70</sup> The category of “abuse of human rights by migrant smugglers” is an even weaker candidate as erga omnes obligation as it does not refer to specific norm but potentially covers the abuse of all types of human rights. In that sense it is an odd entry in this list of specific serious human rights norms. Its inclusion is, however, explainable in terms of its weight in EU foreign policy, not in human rights law. In light of the heightened importance the topic of migration

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<sup>65</sup> Executive Order 13818, section 1(a)(ii)(A).

<sup>66</sup> EU Parliament Resolution, of 14 March 2019, 2019/2580(RSP), para 4.

<sup>67</sup> *Idem*; EU Parliamentary Research Service, ‘EU Sanctions: A Key Foreign and Security Policy Instrument’, May 2018.

<sup>68</sup> Letter from the Minister of Foreign Affairs to the Dutch Parliament, file 32735 No 229, 26 November 2018, available at <https://zoek.officielebekendmakingen.nl/kst-32735-229.html>.

<sup>69</sup> Josep Borrell, EU High Representative for Foreign Affairs and Security Policy, interview with *EJIL:Talk!*, 29 October 2020, available at <https://www.ejiltalk.org/europe-must-learn-quickly-to-speak-the-language-of-power-part-i/>.

<sup>70</sup> Carsten Stahn, *International Criminal Law* (2016) pp. 59-61; Anne Gallagher, ‘Using International Human Rights Law to Better Protect Victims of Human Trafficking’, in L.N. Sadat and M.P. Scarf (eds.), *The Theory and Practice of International Criminal Law: Essays in Honor of M. Chieff Bassiouni* (2008) pp. 397-430; Generally, Anne Gallagher, *The International Law of Human Trafficking* (2010).

and the role of smugglers has received in the aftermath of the humanitarian refugee crisis in 2015,<sup>71</sup> the inclusion of this subject in the GHRS regime reflects a move to instrumentalize the later in service of a peculiar EU foreign (and domestic) policy priority. Previous research has shown that EU's priorities in this area are guided by its self-interest, intertwined with securitization, and resulting in harsher and unethical effect on international migrants and migration patterns.<sup>72</sup>

Another ambiguous opening in the listing criteria that could smuggle EU's self-interest is the reference, in article 1(1)(d) of Decision 2020/1999, to EU's broader Common Foreign and Security Policy (CFSP) objectives listed under article 21 of the Treaty on European Union (TEU). Article 21 TEU lists a variety of objectives, but of particular note here is paragraph 2(a), which states the objective to "safeguard its values, fundamental interests, security, independence and integrity". The plain interpretation of this clause enables the EU to utilize the GHRS regime for the safeguarding of its own interests. This provision is ambiguous because the Preamble of the Decision, under recital 5, appears to single out article paragraph 2(b) of article 21 TEU as the sole applicable objective for this sanctions regime. However, this view is complicated by the fact that when reference is made to article 21 TEU in the operative part of the Decision,<sup>73</sup> paragraph 2(b) is not specified. This suggests the general reference to article 21 is purposeful. This is because it is unusual for a preambular text, which is generally an imprecise policy and legal statement, to be worded very precisely while the legally operational text to be loosely worded. Furthermore, the Preamble itself states, under recital 2, that human rights violations, which the sanctions address, threaten CFSP objectives stipulated under article 21(1) and (2) as a whole. This could mean all elements of EU's external action stipulated under article 21(2) TEU, i.e. items (a) to (h), that are relevant to CFSP purposes are potential candidates. There is no consensus among scholars regarding which set of external actions correspond to CFSP, but item (a) mentioned above is recognized by all schools of thought as such.<sup>74</sup> Therefore, depending on how broadly the EU Council interprets article 1(1)(d) of the Decision, the sanctions could be utilized in service of EU's self-interest stipulated under article 21(2)(a) TEU – i.e. its values, fundamental interests, security, independence and integrity.

The term "fundamental interests" has not been mentioned or elaborated anywhere else in the TEU. The word "interests" is commonly used throughout the treaty, but the qualifier "fundamental" is only added under article 21 – and there is not much helpful exploration of the reason why in the literature. A plain textual reading would suggest that what is referred to is not all interests of the EU, but only a select sub-set that are considered fundamental. But this reasoning would be absurd given that article 21 TEU is a general provision stipulating the Union's mandate for external action. It would not be plausible to interpret that the Union's mandate to act on external affairs is restricted only to matters that are most essential ("fundamental"), and not ordinary. Alternative explanations could be that either the term "fundamental" does not have a defined legal consequence, or it

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<sup>71</sup> EU Commission, 'A European Agenda on Migration' (13 May 2015); Sergio Carrera et al, *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society* (2019).

<sup>72</sup> Laure Delcour, 'The EU: shaping migration patterns in its neighbourhood and beyond', in D. Kochenov and F. Amtenbrink (eds.), *The European Union's Shaping of the International Legal Order* (2013) pp. 261-282.

<sup>73</sup> Article 1(1)(d) and 4.

<sup>74</sup> Emanuel Castellarin, 'Article 21 TEU on Principles Governing the Union's Action on the International Scene; Objectives of International Cooperation' in P. Herzog, C. Campbell, and G. Zagel (eds.), *Smit & Herzog on The Law of the European Union* (Vol. 1, c2005-).

signifies some form of division of mandate between the Union and its member states, i.e. to signify that the Union's role is not to supplant member states in all aspects of their interests in external relations. In either case, and whether article 21 TEU refers to all EU interests or a limited set of those, it is clear that the reference is to peculiar interests of the Union as a self-interested actor interacting with the outside world. Such interests are distinct from "values", which is stipulated separately and flexibly defined over time 'to conform to varying political scenarios and the vagaries of public opinion.'<sup>75</sup>

The concept "security" under article 21 TEU is more self-explanatory, but "independence" and "integrity" seem ambiguous. Given the two terms appear together, it is possible that they are derived from the comparable phrase in the UN Charter regarding the "political *independence* and territorial *integrity*" of states.<sup>76</sup> The exclusion of the qualifiers "political" and "territorial" could be construed as a deliberate aim to not confine independence and integrity to only political and territorial dimensions. This understanding is buttressed by the fact that the UN Charter invoked those qualified phrases in association with a specific theme (principles on the use of force), and not in a general treatment of those concepts. The broad and indeterminate phrase "independence and integrity", therefore, empower the EU to engage in external action to safeguard any dimensions of those aspects – e.g. not only political but also economic independence, or not only territorial but also cyber integrity of the Union.

Remarkably, article 1(1)(d) of Decision 2020/1999 does not only cross-refer to the above discussed self-interest considerations, but it also lifts all restrictions in determining which human rights violations could constitute a threat to those interests. The phrase "including but not limited to" in the article allows for any other human rights other than those listed to be grounds for sanctions. Read in combination, this means that the EU Council can seize upon the violation or abuse of any type of human rights around the world that it deems to be "of serious concern" with respect to its own self-interest (for example security, geopolitical interests, or economic independence), and respond with sanctions under the current regime. The only possible restriction is the requirement to consider the gravity and/or impact of the human rights violation or abuse in question. But even then, that requirement is applicable only with respect to one of the three categories of sanctions targets, i.e. non-state actors that do not exercise effective control or authority over a territory. There is no similar requirement with respect to the other two categories, i.e. state actors and non-state actors with *de facto* state power. Article 1(1)(d), therefore, effectively provides a vehicle for a mission creep whereby the Council could use the GHRS regime to address any policy objective by making a link with some human rights concerns.

#### **4. Policy Objectives: Human Rights and Broader Country Strategies**

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<sup>75</sup> Luigi Lonardo, 'Common Foreign and Security Policy and the EU's external action objectives: an analysis of Article 21 of the Treaty on the European Union', 14 *European Constitutional Law Review* (2018) pp. 584-608, p590.

<sup>76</sup> Article 2(4) UN Charter.

Sanction is part and parcel of comprehensive EU foreign policy.<sup>77</sup> As such, it is not deployed in isolation but within a broader context of multifaceted external actions of the Union, especially its CFSP. The EU Basic Principles and Guidelines on sanctions stipulate that sanctions are used ‘as part of an integrated, comprehensive policy approach which should include political dialogue, incentives, [and] conditionality....’<sup>78</sup> The EU Guidelines on sanctions also require that sanctions be consistent with the Union’s overall strategy applicable to the target geography or topic.<sup>79</sup> Accordingly, EU listing and de-listing decision-making, undertaken by the Council, is informed not only by the specific listing criteria, but also by the CFSP policy objectives behind them. Such policy objectives are stipulated in decisions establishing sanctions themselves and also various legislative and policy instruments setting out EU’s strategy relating to the target country, region, or subject matter.

The GHRS regime is not an exception in its subsidiarity to the EU’s broader CFSP objectives. The extent to which EU foreign policy dictates the operation of the sanctions regime is, however, dependent on the conceptual approach or mindset the EU Council would lean towards in future practice. A self-help approach renders decisions on when or under what conditions GHRS sanctions should be adopted, modified, or lifted subject to broader foreign policy strategies. That is, the Council would utilize human rights sanctions in so far as, and for as long as, the effective attainment of the Union’s strategic objectives with respect to the third country in question requires it.<sup>80</sup> This approach collides with a global governance orientation wherein sanctions are devoted to the attainment of the objectives of the international legal regime they enforce (in this case, human rights and humanitarian law), and are not subservient to EU’s other foreign policy objectives. The following discussion shows that existing EU sanctions practice is steeped in the self-help approach, and the GHRS regime promises a departure from that approach but does not fully deliver, therefore is caught in a fault-line. The analysis will identify what aspects of the subsequent EU practice will determine the future trajectory of the GHRS regime.

#### **4.2. Existing Practice and Jurisprudence**

Existing EU sanctions relating to human rights is situated in geographic sanctions and is steeped in the pursuit of liberal democratic reforms and conflict transformation objectives. EU parliamentary research on sanctions practice between 1980 and 2017 shows that in all but a small minority of cases, EU sanctions responding to human rights violations were tied to defending or consolidating other objectives such as democracy, the rule of law, and peace.<sup>81</sup> The implication of the embeddedness of human rights sanctions regimes in these broader CFSP objectives is that human rights violators or abusers are listed and de-listed not strictly based on the speed of progress towards the objectives of human rights, which is protecting rights and ensuring accountability. Instead, the listing and de-listing dynamics hinges upon the EU’s overall country strategy with respect to the

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<sup>77</sup> EU Commission and High Representative, ‘EU Action Plan on Human Rights and Democracy 2020-2024’, joint communication to EU Parliament and the Council, 25 March 2020; EU Council, ‘EU Annual Report on Human Rights and Democracy in the World 2018’, 13 May 2019.

<sup>78</sup> EU Basic Principles on the Use of Restrictive Measures (2004), para 5; EU Guidelines on Implementation and Evaluation of Restrictive Measures (2018), Annex I.

<sup>79</sup> *Idem* (Guidelines), para 5.

<sup>80</sup> On effectiveness in EU external action, see Anne Thies, ‘The Search for Effectiveness and the Need for Loyalty in EU External Action’, in M. Cremona, *Structural Principles in EU External Relations Law* (2018).

<sup>81</sup> EU Parliament (2018), above note 5, p 13-14.

state where the human rights violations take place. This would render human rights sanctions prisoner of the Union's other (non-human rights related) foreign policy priorities and its assessment of political developments in the third country in question. How this affects listing and de-listing decisions is illustrated below using examples from two EU geographic sanctions regimes that have human rights focus but opposite country strategies, one focusing on political stabilization and the other on radical political change.

#### 4.2.1. Democratic Republic of Congo: Regime Stabilization

In the Democratic Republic of Congo (DRC), EU sanctions came on the heels of older UN Security Council sanctions that started in 2003.<sup>82</sup> While the UN sanctions focused on peace and security, the EU's additional sanction, imposed in 2016, was more pivoted towards concerns of electoral democracy, rule of law, and human rights.<sup>83</sup> The EU sanction was triggered as a response to the violence that took place in September 2016 in the capital Kinshasa, but it was utilized to address the evolving peace and democracy crisis that followed.

EU's strategy towards DRC at the time was focused on ensuring political stabilization, which is criticized by some as leaving predatory systems intact.<sup>84</sup> For this purpose, the EU determined it was crucial to hold national dialogue and presidential election.<sup>85</sup> Consequently, EU sanctions targeted DRC officials whose conduct was said to be hindering efforts towards the said dialogue and election. The actual conduct the officials were accused of were human rights violations and the use of violence in connection with the Kinshasa event. However, the targeted officials were not able to ensure their removal from the list by simply refuting the human rights violations accusations only. Their listing was tied to the overall progress towards the stabilization goals.

In the case of *Mutondo v Council*, the EU General Court accepted the EU Council's justification for the continued listing of Mr Mutondo, who was a director of DRC's National Intelligence Agency. The Council's justification was centred on the claim that the individual has committed acts that were '... liable to hinder a consensual and peaceful end to the crisis with a view to holding elections ... and constituting serious violations of human rights in that State.'<sup>86</sup> The breaches to the peace and human rights remained tied together in subsequent reviews of the listing, keeping the individual on the list until such time that the Council deemed the 'political and security situation' in DRC warranted delisting.<sup>87</sup> Another official, Ilunga Luyoyo, who was commander of the riot unit in the Congolese national police, was initially listed under the DRC sanctions due to his alleged responsibility for 'the disproportionate use of force and violent repression' during the Kinshasa incident amounting to serious violation of human rights.<sup>88</sup> However, in renewing the listing of

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<sup>82</sup> Security Council Resolution 1493(2003).

<sup>83</sup> Council Decision (CFSP) 2016/2231 of 12 December 2016 (OJ L1 336/7).

<sup>84</sup> Koen Vlassenroot and Valerie Arnould, 'EU Policies in the Democratic Republic of Congo: Try and Fail?', Security in Transition working paper, SiT/WP06/16 (February 2016), available at [https://brussels.fes.de/fileadmin/public/editorfiles/events/Maerz\\_2016/FES\\_LSE\\_EU\\_Policies\\_in\\_the\\_Democratic\\_Republic\\_of\\_Congo\\_Vlassenroot\\_Arnould\\_2016\\_02\\_23.pdf](https://brussels.fes.de/fileadmin/public/editorfiles/events/Maerz_2016/FES_LSE_EU_Policies_in_the_Democratic_Republic_of_Congo_Vlassenroot_Arnould_2016_02_23.pdf).

<sup>85</sup> Council Decision (CFSP) 2016/2231, para 3.

<sup>86</sup> Case T-174/18 *Mutondo v Council*, para 42.

<sup>87</sup> *Idem*, para 71.

<sup>88</sup> Annex II to Decision 2010/788, as amended by the decision 2016/2231, and in Annex Ia to Regulation no 1183/2005, as amended by the 2016/2230 Regulation.

Luyoyo – and several other individuals<sup>89</sup> – the Council invoked both human rights and extra-human rights considerations. The Council reasoned that there was continued repression of freedoms of assembly, opinion and expression, but also that two additional considerations necessitated the continued listing of the individual.<sup>90</sup> The first is the DRC government’s subsequent failure to publish an electoral calendar and the announcement by the country’s electoral commission that a further 504 days were needed to organize elections. The second was the deterioration of the security situation and the regional instability due to civilian displacement, as reported by the UN Stabilization Mission in the DRC (MONUSCO). These considerations are a step too far when looked at from the objective of human rights accountability but fall within scope when the point of reference is EU’s bigger political objective towards DRC.

In several cases, the Court endorsed these extra-human rights considerations of the Council in prolonging sanctions listing. The Court accepted that the continuity of sanctions is subject to not only the continuation of the specific factual and legal circumstances that gave rise to the adoption of the measures in question (e.g. in the case of Luyoyo, human rights violations in September 2016), but also ‘the need to persist with them in order to achieve the objective associated with them’.<sup>91</sup> In another set of cases, the Court adopted an even broader yardstick, namely ‘in the light of all the relevant circumstances’, to determine whether continued listing on sanctions is justified.<sup>92</sup> This means, in deciding on the continuity of listing, in addition to assessing whether the targeted individuals continue to fulfil the criteria for listing, it is also taken into account whether the evolving EU foreign policy priorities with respect to that country are achieved.

The Council further reflected this in its most recent Conclusions regarding the situation in DRC. After recognizing the election in 2018 as ‘the first peaceful transfer of power’ and ‘opening a window of opportunity for stability...’ in the country,<sup>93</sup> it nevertheless decided to keep several individuals in the sanctions list by invoking a plethora of demands, ranging from reform of national institutions such as the Constitutional Court and the National Electoral Commission, to reform of the security sector.<sup>94</sup> The Council’s press statement following the adoption of the Conclusions inadvertently captures the irony clearly: while applauding the conclusion of a first peaceful transfer of power in DRC, it confirms the continuation of the sanctions, which, the same statement reiterates, is adopted ‘in response to obstruction of the electoral process and human rights violations’<sup>95</sup>

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<sup>89</sup> Cases T-163/18 *Kumba v Council*; T-164/18 *Kampete v Council*; T-165/18 *Kasagwe v Council*; T-167/18 *Kanyama v Council*; T-168/18 *Numbi v Council*; and T-169/18 *Ngambasai v Council*.

<sup>90</sup> *Idem*, para 62 in all of the cases; Case T-166/18 *Luyoyo v Council*, para 62.

<sup>91</sup> Case T-166/18 *Luyoyo v Council*, para 58; Case T-174/18 *Mutondo v Council*, para 59, relying on Case T-306/10 *Yusef v Commission*, para 62-3.

<sup>92</sup> Cases T-170/18 *Mupompa v Council*, T-171/18 *Boshab v Council*, T-172/18 *Mundos v Council*, T-173/18 *Shadary v Council*, T-174/18 *Mutondo v Council*, T-175/18 *Ruborimbere v Council*, T-176/18 *Omalaga v Council*, and T-177/18 *Musonda v Council*, all para 85.

<sup>93</sup> EU Council, ‘Democratic Republic of Congo- Council Conclusions’ (9 December 2019).

<sup>94</sup> Council Conclusions, 14462/19 (9 December 2019).

<sup>95</sup> Council press release, 9 December 2019, available at <https://www.consilium.europa.eu/en/press/press-releases/2019/12/09/democratic-republic-of-the-congo-council-expresses-its-readiness-for-a-gradual-engagement-in-support-of-the-government-s-reform-agenda/>.

#### 4.2.2. Zimbabwe: Regime Change Lite

In Zimbabwe, the EU first introduced sanctions in 2002 in connection with, among others, infringements on the rights to freedom of speech, assembly, and association.<sup>96</sup> The Council imposed arms and equipment embargo, and travel restrictions and assets freeze against individuals. The Council later strengthened the sanctions citing violence committed by the Zimbabwean government during the presidential election in 2008.<sup>97</sup> The EU did not recognize that election as credible. To resolve the political crisis that followed the election, a global political agreement (GPA) was signed forming a national unity government consisting of the ruling ZANU-PF party and opposition forces. The EU sanctions targeting specific individuals associated with the ZANU-PF leadership, however, were renewed even after the formation of the new unity government, and were only partially suspended in 2013.

The objective of the Zimbabwe sanctions is responding to what the EU considers to be a repressive political climate in Zimbabwe, and the end goal appears to be not just accountability for the repression but a fundamental governmental reform. In that sense, distinction is made between the commission of specific rights violations and their broader impact, in EU's perspective, of eroding the rule of law and democracy in the country. The EU General Court has clarified that the individuals were targeted not strictly speaking for the commission of specific 'crime or offence' of violating human rights, but rather because those acts form, in the Council's assessment, 'part of a strategy of intimidation and systemic violation of fundamental rights of Zimbabwean people' adopted by the government.<sup>98</sup> The former Zimbabwean officials listed under the EU sanctions sought to leverage precisely this conceptual distinction in challenging the validity of the sanctions regime before the General Court. In *Tomana et al. v Council & Commission*, a group of 121 applicants argued that their listing no longer actually serves the CFSP objectives of the sanctions regime in question.<sup>99</sup> In light of the fact that the individuals were no longer associated with the government of Zimbabwe, the applicants claimed, 'there is no explanation of how the imposition of a freezing of funds or a travel ban on those individuals... can achieve any legitimate objective.'<sup>100</sup> The applicants argued that their conduct could at most only constitute ordinary crime and as far as the EU is concerned, they could only be dealt with under legal provisions relating to judicial cooperation in criminal matters, not under the CFSP. The Court rejected this plea in fact but endorsed the legal reasoning behind it. It rejected the applicant's claims precisely by invoking the background political objectives those criminal activities (i.e. the human rights violation) affected. It reasoned that the applicant's conduct seriously undermines 'democracy, respect for human rights and the rule of law in Zimbabwe' and in that sense they fall under the EU's CFSP scope.<sup>101</sup>

The subjugation of human rights sanctions to EU's foreign policy strategy with respect to the target country is reflected in the continued listing of Zimbabwean officials even after the political crisis in the country was resolved and a new national unity government was installed after the signing of the GPA. The individuals who were initially targeted by that sanction for their role in the violence and

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<sup>96</sup> Council Common Position 2002/145/CFSP.

<sup>97</sup> Council Common Position 2009/68/CFSP.

<sup>98</sup> Case T-190/12 *Tomana and others v Council and Commission*, para 105.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Idem*, para 91

<sup>101</sup> *Idem*, para 94.

repression prior to the formation of the new government stayed on the sanctions list. Their continued listing was justified based on electoral irregularities, and ‘blocking of’ or ‘lack of progress’ in implementation of the GPA.<sup>102</sup> This means the objective of the sanctions regime evolved in the aftermath of the political transition, and in as long as the new objective still required exertion of political pressure, the originally targeted individuals remained on the list as instruments of such pressure. The General Court described the shift in a more straightforward manner – it stated that a ‘radical and comprehensive’ change in government was now demanded to satisfy EU’s objectives with respect to Zimbabwe.<sup>103</sup> Later on, the Council suspended sanctions with respect to most of the Zimbabwe targets in recognition of the adoption of a new constitution in 2013<sup>104</sup> and subsequent peaceful conclusion of election.<sup>105</sup> It did not annul the sanctions entirely due to its reservations regarding “significant weaknesses” in the process. In subsequent years, the Council kept the few remaining targets and the suspended measures in place based on determinations of varying characters – mostly generic or vague, such as ‘the political situation’<sup>106</sup> Zimbabwe and ‘until the situation becomes clearer’<sup>107</sup> following the change of government in 2017.

In both the DRC and Zimbabwe cases shown above, what determines the length of individuals’ listing on sanctions is not necessarily progress in ensuring the accountability of individuals for the human rights violations in question, but the need to achieve the EU’s strategic goals with respect to that country. In DRC, the strategy was ensuring political *stabilization*, whereas in Zimbabwe it was ushering radical *change* in government, if not a full-blown regime change. These EU goals were not formed once and for all, but evolved over time depending on developments on the ground. This understanding is also consistent with EU guidelines on sanctions which states that sanctions’ ‘efficiency’ should be assessed regularly and be made adaptive to the ‘developments with regard to the objectives of the CFSP Council Decision’.<sup>108</sup>

#### **4.3. Competing Policy Objectives of the GHRS Regime**

The GHRS regime does not have as its explicit objective specific demands derived from country strategies as it is a thematic regime with generic nature. As such, it is structurally unsuited for country-specific foreign policy instrumentalization. Indeed, it appears to promise a departure from the practice of tethering human rights sanctions to evolving foreign policy objectives, and has the markings of an autonomous enforcement mechanism of international human rights (and humanitarian law) rules. At the same time, a closer look at its design also reveals some pathways for the EU to bring back its strategic foreign policy considerations into the equation. Therefore, future practice could potentially pull the regime into either of the two directions, with differing ramifications.

The GHRS regime has a general (global) scope, and a fixed set of objectives and listing criteria, as opposed to geographic sanctions that are adopted per country or event and contain correspondingly contextualized objectives. The main objective of the GHRS regime is upholding a legal notion of

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<sup>102</sup> Preambles of Council Common Position 2009/68/CFSP and Council Decision 2010/92.

<sup>103</sup> *Tomana and others*, above n 98, para 109-10.

<sup>104</sup> Declaration by the High Representative, 7864/1/13 REV 1 (25 March 2013).

<sup>105</sup> Declaration by the High Representative, 6673/14 (19 February 2014).

<sup>106</sup> Council Decision 2019/284.

<sup>107</sup> Council Decision 2018/224.

<sup>108</sup> EU Guidelines, above n 78, para 4 & 6.

justice, namely fighting impunity or ensuring accountability for human rights violations.<sup>109</sup> We can glean this from the preparatory background. The Dutch initiators of the preparatory work for the GHRS regime remarked that the purpose of the sanctions regime is to bring ‘accountability for perpetrators and justice for victims’.<sup>110</sup> In the same vein, the EU 2020-2024 Action Plan on Human Rights and Democracy categorized the proposal as part of the goals aimed at ‘closing the accountability gap, fighting impunity and supporting transitional justice’.<sup>111</sup> In terms of the operation of the sanctions, there were proposals to have an independent committee of experts (composed of former judges and human rights practitioners) draw up lists of targets, instead of governments of Member States through the Council, so as to make it less politicised, more legalized and autonomous process.<sup>112</sup> There were also strong calls for changing the decision-making process at the Council from unanimity to qualified majority voting specifically for the purpose of human right sanctions.<sup>113</sup>

The Preamble of Decision 2020/1999 establishing the GHRS regime frames human rights as not just a political value, but as an international legal obligation of states. Article 1(2) of the Decision also requires that when interpreting the listing criteria for the sanctions, customary international law and a specific set of international human rights, humanitarian, and criminal law treaties must be used as a frame of reference.<sup>114</sup> No other EU sanctions regime so clearly frames its scope within international legal rules, except the regime concerning chemical weapons proliferation,<sup>115</sup> which also refers to an international treaty only to define the term “chemical weapons” and not to define the prohibited acts themselves or in any other way interpret the regime. Moreover, article 2(6) of the Decision refers to the policy objectives of the sanctions as “the ending of serious human rights violations and abuses and the furthering of human rights.” Regulation 2020/1998 implementing the

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<sup>109</sup> Parliamentary Assembly of the Council of Europe, ‘Sergei Magnitsky and beyond: Fighting Impunity by Targeted Sanctions’, Resolution 2252 (2019).

<sup>110</sup> Rettman (2018), above n **Error! Bookmark not defined.**

<sup>111</sup> EU Action Plan 2020-2024, JOIN(2020), 25 March 2020, p. 5.

<sup>112</sup> *The Power of Focus: Proposal for a European Human Rights Entry Ban Commission*, Norwegian Helsinki Committee, European Stability Initiative, and Dutch members of parliament (14 November 2018), available at <https://www.esiweb.org/pdf/Appeal%20-%20For%20a%20European%20Human%20Rights%20Entry%20Ban%20Commission%20-%202014%20Nov%202018.pdf>.

<sup>113</sup> Ursula von der Leyen, President of the EU Commission, ‘State of the Union’ address to the EU Parliament (16 September 2020); Jean-Claude Juncker, President of the Commission, ‘State of the Union’ address to the EU Parliament (12 September 2018); EU Commission and High Representative, ‘EU Action Plan on Human Rights and Democracy 2020-2024’, joint communication to EU Parliament and the Council (25 March 2020); EU Parliament Resolution 2019/2580(RSP) of 14 March 2019, para 6.

<sup>114</sup> Article 1(2). The treaties are: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Prevention and Punishment of the Crime of Genocide; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of the Child; the International Convention for the Protection of All Persons from Enforced Disappearances; the Convention on the Rights of Persons with Disabilities; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; the Rome Statute of the International Criminal Court; and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>115</sup> Council Decision (CFSP) 2018/1544, article 1.

Decision further underscores the importance of international human rights and humanitarian law, and the interaction between these two fields of law, in operationalizing the sanctions.<sup>116</sup>

The above elements suggest a design of sanctions focused on a criminal justice sense of accountability for human rights violations, and positioned within a global governance approach. The sanctions are meant to spur investigation and/or prosecution at national, regional or international levels. For those that face neither of these forms of justice, the price inflicted by the sanctions itself is meant to “change the calculus” of perpetrators as a deterrent.<sup>117</sup> It follows from this that the criteria for listing targets must be centered around the actual perpetration of human rights violations, and not the broader universe of factors bearing on human rights development. As such, the targets would have to be limited to actors that perpetrate rights violations in some legally recognized form, and those whose act contributes either to the perpetration of the rights violation or the blocking of processes of accountability. Consequently, listed individuals could seek delisting by showing that they have been subject to investigation or prosecution with respect to the specific violations in question, or, in the case of those targeted for contributing to the violation or blocking accountability, that they have made change of behavior.

Decision 2020/1999 closely threads this line. Its listing criteria only targets actors that (i) perpetrate human rights violations or abuse, (ii) financially, materially or technically support, or are otherwise involved in “planning, directing, ordering, assisting, preparing, facilitating, or encouraging”<sup>118</sup> the perpetration, or (iii) are associated with any of the above two categories. It does not contain, as in the case of Zimbabwe sanctions, an undefined mode of responsibility for human rights violations (e.g. actors “whose activities seriously undermine”<sup>119</sup> human rights). Nor does it include, as in the case of DRC sanctions, a compounded criteria that connects human rights violations with the ultimate end result they produce (e.g. “obstructing a consensual and peaceful solution towards elections...by acts of repression”).<sup>120</sup> Such a narrowly defined, legalist listing criteria limits the EU’s ability to utilize the sanctions regime for its foreign policy objectives other than those related to accountability for human rights violations. Indeed, some EU policy commentators have already decried that such design that treats human rights violations in a more circumscribed, self-standing manner will lead to sanctions being imposed “without any focus on a country’s wider political problems.”<sup>121</sup>

There are, however, some elements of the GHRS regime that paint the opposite picture as well. Recital 1 of the Preamble of Decision 2020/1999 curiously frames respect for human rights (and the remaining EU founding values) in terms of instrumentality for “ensuring peace and sustainable security.” This reference is curious as both “peace” and “sustainable security” do not constitute part of the Union’s stated values,<sup>122</sup> and “sustainable security” in particular is found nowhere in any of

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<sup>116</sup> Council Regulation 2020/1998, recital 1 of Preamble.

<sup>117</sup> Borell (2020), above n 61.

<sup>118</sup> Article 2(1)(b), 3(1)(b).

<sup>119</sup> Council Decision 2011/101/CFSP, article 4(1).

<sup>120</sup> Council Decision 2010/788/CFSP, article 3(2)(a).

<sup>121</sup> Richard Youngs, “The New EU Global Human Rights Sanctions Regime: Breakthrough or Distraction?”, Carnegie Europe (14 December 2020).

<sup>122</sup> ‘Peace’ is not included in article 2 TEU. Instead, it is mentioned as a separate item next to ‘the Union’s values’ under article 3(1) TEU.

the Union's constituting instruments (TEU or TFEU) or human rights policy documents (Strategic Framework, Action Plan on HR and Democracy). The peculiar reference to these notions in the Decision could be an opening to wield the sanctions regime as an instrument of pursuing EU's strategic peace and security objectives in third countries. Incidentally, it could also be an early sign of the Council's intention to pivot the sanctions towards conflict zones in the Global South, and away from policy areas that are closer to home or might prove detrimental to its interests, such as the rise of authoritarianism within established democracies or the link between human rights violations and transnational business interests.

Recital 5 of the Preamble of Decision 2020/1999, in its reference to the Union's CFSP objectives, provides another route for EU strategic interests to slip into the regime. It indicates that the GHRS regime serves the CFSP action to "consolidate and support democracy, the rule of law, human rights and the principles of international law" as per article 21(1)(b) of TEU. Although the reference to this TEU article is only natural given it contains the most pertinent provision on human rights, it is also logical to interpret the mentioning of all four action items, instead of only human rights, as a purposive interlinking of those four objectives. Consequently, GHRS sanctions could be justified on the grounds of consolidating or supporting democracy, the rule of law, or other principles of international law. This interpretation makes sense when read in conjunction with the subsequent sentence in that paragraph, which requires that application of such sanctions be consistent with the Union's overall strategy in the area. The EU strategy on human rights is intricately bound up with those of democracy and the rule of law, and requires a holistic approach to these issues.<sup>123</sup>

These preambular provisions are legally relevant as the EU Courts rely on them, together with other texts, to construct the policy objectives of the sanctions regime. The other texts include the constitutive instruments of the EU and subsequent Decisions and Regulations of the Council on the listing, continued listing, or de-listing of specific targets. The Courts use policy objectives so construed to assess legality of specific listing and de-listing decisions of the Council under that regime.

The Council's practice in these subsequent Decisions and Regulations will be indicative of whether the GHRS regime will be devoted as a norm-enforcement mechanism (reflecting global governance approach) or will be instrumentalized for EU's foreign policy strategies (reflecting self-help approach). If future practice of the Council follows a global governance approach, its listing and de-listing decisions will remain circumscribed within the human rights accountability objectives reflected in the establishing legislation. That is, such decisions will simply replicate content from Decision 2020/1999 (or Regulation 2020/1998) and adapt it to the specific factual circumstances of the case at hand. This will mean listing and de-listing decisions will be solely based on considerations of protecting rights and ensuring accountability, i.e. whether targets strictly fit into the categories of liability established by the Decision (perpetrators, supporters, and associates), whether ongoing rights violations are stopped and the responsible actors have been investigated or prosecuted

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<sup>123</sup> EU Strategic Framework on Human Rights and Democracy, 2020-2024; Joint Communication of the European Commission and EU High Representative for Foreign Affairs and Security Policy 'Human Rights and democracy at the heart of EU external action – Towards a more effective approach' 12 December 2011.

elsewhere for their human rights violation or abuse, or whether adequate step in that direction that has been taken.

Whereas if a self-help approach prevails, the Council may infiltrate its country or regional strategic objectives into Decisions and Resolutions implementing the sanctions regime. Such added objectives may not necessarily expand the range of targets at the listing stage given the specificity of the listing criteria, but can impact decisions of de-listing or continued listing. As mentioned earlier, at the listing stage, the Council is confined to considering only actors that commit human rights violations, contribute to the commission, or are associated to either of these two categories of targets.<sup>124</sup> In adopting listing decisions, however, the Council could stipulate objectives different from ensuring human rights accountability, such as effecting political reform or peace process, as the reasons for the targeting of human rights, their contributors and associates. Such policy objectives could then be invoked at the periodic expiration of the sanctions measures to ensure the continued listing of the targets, even when progress in terms of human rights accountability is achieved. Furthermore, as has happened in the Zimbabwe and DRC sanctions discussed earlier, the Council could keep incorporating additional non-accountability related policy objectives in subsequent decisions to renew listings. Or in reverse, the Council can also invoke the fulfilment of these additional policy objectives as sufficient grounds to de-list targets even in the absence of progress with respect to the core objective of human rights accountability.

## 5. Conclusion

The EU global human rights sanctions regime established by Council Decision 2020/1999 sits right at the tension zone between two competing approaches to sanctions: the self-help and global governance approaches. The self-help approach perceives human rights sanctions as extension of the inherent prerogative of states to use coercive means to pursue their foreign policy agendas. The global governance approach, on the other hand, frames the power to adopt human rights sanctions as a borrowed mandate, flowing from the authority of international communitarian norms and not subservient to foreign policy objectives of the state or group of states that enforce those norms. In reality, of course, sanctions are always operationalized within a broader foreign policy calculus. As such, the design and implementation of human rights sanctions is an endeavour of negotiating a path between fidelity to the international legal regime in question and deference to the foreign policy priorities of the sanctioning states (in this case the EU).

The diverging ramifications of these two approaches is visible in the way the listing criteria and the policy objectives of the GHRS regime are constructed. The self-help approach espouses a liberal usage of sanctions by states, hence allows broad listing criteria for targets, encompassing any human rights violations. The global governance approach, on the other hand, circumscribes listing criteria to only those norms that have universal acceptance as *erga omnes* obligations. In formulating the policy objectives of the sanctions regime, the self-help approach draws on EU's broader strategic objectives with respect to the countries where human rights violations take place. The global governance approach, on the other hand, insulates the GHRS regime from country strategies and confine it to the objectives of human rights (and humanitarian) law only, i.e. protecting rights and

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<sup>124</sup> Council Decision 2020/1999, art 2(1)(b), 3(1)(b).

ensuring accountability. This means, targets will be listed and de-listed in keeping with the progress towards these human rights objectives on the ground, and not, unlike in the case of self-help approach, in keeping with the fulfilment of other (non-human rights related) CFSP objectives of the EU.

Which approach the EU Council will adopt in using the GHRS regime, or whether it will continue to thread a mixed path, is yet to be seen in future practice. The possible trajectory will be particularly affected by the interpretive preference of the Council and the Court with respect to certain aspects of the sanctions regime: namely, the usage and interpretation of article 1(1)(d) of Decision 2020/1999 linking the sanctions with broader CFSP objectives under article 21 TEU, the reconciliation of references to policy objectives found in the preambular provisions and operative articles of the Decision, and possible changes or additions to the listing criteria and policy objectives in subsequent Decisions (or Resolutions) implementing Decision 2020/1999 (or Resolution 2020/1998).