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THE "MAGNITSKY" LEGISLATION AND THE IMPOSITION OF INDIVIDUAL SANCTIONS TO FIGHT CORRUPTION AND HUMAN RIGHTS VIOLATIONS

1. Introduction

Corruption is a phenomenon that has always characterized human history over the centuries. The need to adopt instruments to fight it is certainly not new, although in the past it has mainly concerned national corruption of public authorities. This battle has become "international" rather recently, starting in the 1990s, when the international community became aware of the extremely negative effects that corruption has on both the economy and the protection of human rights.

In the general context of the instruments adopted at the international level (frequently within international organizations) in order to stigmatize and criminalize corruption that were widely analyzed by the doctrine[1], this paper will focus its attention on a more specific

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[1] We can remember: the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, adopted by OECD in 1997; the 2003 *United Nations Convention against Corruption*; *the Interamerican Convention against Corruption*, adopted by the OAS in 1996; *Convention on the fight against corruption involving EU officials or officials of EU countries,* adopted by the EU in 1997; the *Criminal Law Convention on Corruption*, adopted by the Council of Europe in 1999; the *African Union Convention on Preventing and Combating Corruption* adopted in 2003. See, *inter alia*, J. D'HOLLANDER, *Ethics in Business: the New OECD Convention on Bribery*, in *Review Juridique Themis*, 1999, p. 147 ss.; I. CARR, O. OUTHWAITE, *The OECD Anti-Bribery Convention Ten Years On*, in *Manchester Journal of International and Economic Law*, 2008, p. 3 ss.; A. TYLER, *Enforcing Enforcement: Is the OECD Convention's Peer Review Effective?*, in *The George Washington Law Review*, 2011, p. 137 ss.; M. PIETH, L.A. LOW, N. BONUCCI, *The OECD Convention on bribery: A commentary*, Cambridge, 2014; M. KUBICIEL, A. C. RINK, *The United Nations Convention against Corruption and its Criminal Law Provision*, in P. HAUCK,

aspect which is becoming more and more widespread: the adoption of legislative regimes that impose sanctions against individuals that violate human rights and/or commit corruptive acts, regimes that bear the name of Sergej Magnitsky.

Starting with the analysis of the "evolution" of the international perception about corruption and the affirmation of a clear awareness about the negative effects that it has also on the enjoyment of human rights (par. 2), this paper will develop an in-depth analysis of the American "Magnitsky" legislation, the first in this field, and will focus on the characteristics of this sanctions regime and its systematic aspects (par. 3). As a matter of fact, it seems to prefigure an equation between serious violations of human rights and serious acts of corruption. This equivalence implies that both acts contravene *erga omnes* international obligations (which are namely the respect for fundamental individual rights, on the one hand, and the prohibition of serious acts of corruption, on the other), which would justify the adoption of sanctions against foreign nationals suspected of such acts as a countermeasure against their States. This approach will be compared with the "case law" of judicial or quasi-judicial bodies dealing with the protection of human rights (par. 4) and the proposed sanctions regime within the EU (par. 5), in order to identify the characteristics of these different regimes and their relationship with international human rights law (par. 6).

2. *Corruption: An Element of Distortion within International Relations and Enjoyment of Individual Rights*

Corruption is not a new phenomenon and the International Community began to react to it, particularly from the end of the 1900s, spurred by two factors: an economic one and an "ethical" one. The first one concerns the awareness of the negative effects that corruption has had relating to the concurrence capacity of enterprises and concerning the respect of concurrence rules of western market. The fact that an enterprise could buy raw material or start a new business in a developing country by means of corruption permitted it to sell products in the occidental market with a more competitive prices and, in general terms, to have an advantage towards enterprises that acted fairly.

The second factor, the "ethical" one, is linked to the increasing consciousness of the (negative) impact that corruption has not only in relation to the market/commercial distortion but also regarding the reduction of the development of a country, the enjoyment of human rights, the democracy and the human security and the respect of the rule of law. Corruption, in fact, undermines the trust of civil society in institutions, endangers the rule of law and facilitates inequalities and the development of organized crime. So, the idea that the battle to corruption is one of the fundamental elements to help the affirmation of society free from the hunger and underdevelopment and to permit a real enjoyment of human rights and of rule of law.

S. PETERKE (eds.) *International Law and Transnational Organized Crime*, Oxford, 2016; B. HOCK, *Transnational Bribery: When Is the Extraterritoriality Appropriate?*, in *Charlestone Law Review*, 2017, p. 305 ss.; C. ROSE, M. KUBICIEL, O. LANDWEHR, *The United Nations Convention against corruption: A commentary*, Oxford, 2019; A. MOISEIENKO, *Corruption and Targeted Sanctions: Law and Policy of Anti-Corruption Entry Bans*, Leiden/Boston, 2019; T. H. WILSON, J. R. SHEPPARD, *In Memory of Sergei Magnitsky: A Lawyer's Role in Promoting and Protecting International Human Rights*, in *Houston Journal of International Law*, 2019, p. 343 ss.

The influence of these two elements is clear in US legislation in this field: in the '70s, the *Foreign Corrupt Practice Act* (FCPA), adopted as consequence of the Watergate, was the first (and, for a long time, the only) example of a national legislation that criminalized those who corrupted foreign public official as these acts were contrary to the "feelings" of American people and, clearly, for the negative effects on the American market. The 2012 *Magnitsky Corrupt Act* (followed by the *Global Magnitsky Act* of 2016[2]) is, again, the first act with which a State has decided to adopt individual sanctions (the ban to enter the USA territory and the freezing of "American" assets) towards foreign citizens[3] who have committed serious violations of human rights on people who had reported serious corruption of national authorities. Both these acts (the FCPA and the Magnitsky legislation) have strongly influenced the international[4] and foreign[5] legislation in these fields since the diffusion of corruption is now universally considered a serious obstacle to the socio-economic development of a country and for the affirmation of national legal orders that effectively protect human rights.

It is not accidental that the World Bank's policy, starting from the '90s, has increasingly focused on the relationship between economic national development and good governance, asking its borrowers to implement policies of transparency, to reform the legal system with the aim to sustain the fight against corruption and establishing the possibility to cancel its loan if the Country does not comply. Moreover, WB has developed a system of sanctions towards individuals or companies responsible of acts of corruption in the framework of financial projects of the World Bank[6], sanctions that can include a temporary or an enduring ban to prevent the subject from obtaining a Bank loan.

These few examples underline that the battle against corruption has become an imperative at the international level non only for economic reasons but also, and above all, for reasons that concern the achievement of fundamental aims of international legal system, i.e. a sufficient level of development for every people and the real implementation of human rights in the world. In fact, without a doubt there is an inversely proportional relationship between the level of corruption within a society and the level of impunity within it, on the one hand, and the enjoyment of individual rights, on the other[7]. The corruption multiplies the effects of violations of human rights because it is a serious element of distortion in the relationship between citizens and authorities and because it is a factor that amplifies the

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[2] See, *Sergei Magnitsky Rule of Law Accountability Act*, 23 July 2012, and *Global Magnitsky Human Rights Accountability Act*, 23 December 2016.

[3] The Magnitsky Act of 2016 establishes that the terms «foreign persons means a person that is not a United States person» and that «United States persons means: (a) a United States citizen or an alien lawfully admitted for permanent residence to the United States; (b) an entity organized under the laws of the United States or of any jurisdiction within the United States, including a foreign branch of such an entity» (definition that derives from 2012 Magnitsky Act).

[4] The most important acts in these fields, namely the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, adopted by OECD in 1997, and the 2003 *United Nations Convention against Corruption*, were strongly influenced by the U.S. *Foreign Corrupt Practice Act.*

[5] As we will see later the American "way" has been followed by Canada, Estonia, Lithuania and United Kingdom that had adopted a national legislation establishing individual sanctions towards persons that have committed serious violations of human rights or serious acts of corruption

[6] See, C. YIFENG, *International Organizations and Strategies of Self-Legitimization: The Example of the World Bank Anti-Corruption Sanctions Regime*, in *Manchester Journal of International and Economic Law*, 2016, p. 314 ss.

[7] See, *UN Anticorruption Tool Kit* (2004), 11-12, www.unodc.org. For a "quantitative" analysis of the negative relationship between corruption and human rights, see, L. A. CARDONA, H. ORTIZ, D. VÁZQUEZ, *Corruption and Human Rights: Possible Relations,* in *Human Rights Quarterly,* 2018, p. 317 ss.

State's incapacity to fulfill its international obligations to protect human rights and to prevent their violation.

In this domain, we can imagine three different scenarios.

The first one concerns corruption that we can define "weak" because it has not a serious negative impact on the enjoyment of individual rights, even if it is illegal and ethically condemnable (for example, corruption that aims to accelerate the examination of a document from the authorities).

The second one is about a situation where the corruption is "strong" or "high" considering the causal link between corruption and the violation of human rights, it can be systematic but it do not have negative effects on the population as a whole. An example could be the situation where some prisoners have to pay some prison officers to have food of good quality or the case where some public officers ask for a bribe to permit the access to the national health service. In these situations, the State will be responsible for the violation of the right to not be subjected to inhuman or degrading treatment and for the violation of the right to health if it has not adopted all the necessary measures (legislative, administrative, ect.) to prevent corruption and to sanction those responsible for it[8]. It is well known that the obligation to fulfill human rights also involves the duty to adopt positive actions to protect people from potential violations of their rights by authorities and by private citizens. As a consequence, the lack of national measures to counteract corruption effectively and/or the non-prosecution of the offender leads to a violation of human rights by the State.

The third scenario comes when the corruption is systematic within the national system, it is so widespread that it involves the highest authorities and seriously reduces the potential for development of a Country ("grand" corruption). The reference is to a situation in which public resources are diverted towards the Head of State or of Government's personal bank accounts and of other high authorities or a situation where the savage exploitation of the State's natural resources by national or foreign companies is permitted upon receiving a big bribe. This type of corruption can be considered an act of violation of the duty of the State to use public resources to implement economic, social and cultural rights[9] and, more generally, a violation of the right to human development of the involved populations[10]. Such widespread corruption is the antithesis of the affirmation of a legal system in which the rule of law, the socio-economic development, the protection of human rights are interconnected and necessary for mutual affirmation and for the continuous and progressive development of populations.

In this context, some countries have adopted a national legislation aiming to sanction persons that commit serious violations of human rights and/or serious act of corruption

[8] It is quite obvious to underline that this is true also when the corruption is realized from private citizens (that are not public officials) because the obligation to prevent corruption and violations of human rights falls on State both for action of public official and for action of private citizens.

[9] It is worth to remind that art. 2, par. 1, of the International Covenant on economic, social and cultural rights establishes, among others, the duty of States parties «to take steps, individually and through international assistance and co-operation, especially economic and technical, *to the maximum of its available resources,* with a view to *achieving progressively the full realization* of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures» (italic added).

[10] We can find a specific violation of the right to development in situations where there is a serious and systematic corruption that makes use of public money to fulfil personal interests and not public welfare and the socio-economic development of the State or in situations where a population's group is systemically excluded from accessing public funds or public services. See, R. CADIN, *Profili ricostruttivi e linee evolutive del diritto internazionale dello sviluppo*, Torino, 2019, p. 187.

(namely, acts that belong to the second and third category previously analyzed): the "Magnitsky" legislation.

3. *The American "Magnitsky Acts": from "Targeted" Sanctions to "Global" Sanctions*

In 2009 Sergei Magnitsky, a Russian tax attorney who had denounced really serious acts of corruption within the Russian Ministry of Interior, died in a Muscovite jail as a consequence of the very hard treatment during its precautionary detention.

In 2012 the US Congress adopted the *Sergei Magnitsky Rule of Law Accountability Act* which establishes the Secretary of State power to adopt, with the participation of the Congress[11], sanctions towards a person that: a) was responsible for the detention, abuse, or death of Sergei Magnitsky or benefitted financially from the detention, abuse, or death of Sergei Magnitsky or was involved in the criminal conspiracy uncovered by Sergei Magnitsky; or b) is responsible for extrajudicial killings, torture, or other gross violations of human rights committed against individuals seeking to expose illegal activity carried out by officials of the Government of the Russian Federation or that act to protect and promote human rights.

The sanctions imply the ban for the foreign persons included in the black list to enter in the USA territory (or the revocation of the permit to enter) and the block of transaction and the freezing of the assets that these persons have in the United States, that are under the US jurisdiction or that are owned or controlled by an American (physical or legal) person. Therefore, also American companies cannot have economic relationships with persons that are included in the blacklist (one of the most important aspects of the Act from the point of view of the "prevention" of human rights violations). The Act does not establish anything on the level of proof necessary to include a foreign person in the blacklist, simply affirming that the Secretary of State "determines" that a person is responsible for one of the acts enlisted in the Magnitsky Act. At the same time, the possibility that the name of a person is removed from the blacklist depends exclusively on the decision of the Secretary of State that that person had not been involved in one of the forbidden activity.

It is worth noting that the 2012 Magnitsky Act does not pay particular attention to the corruption that is named only in connection to the violation of fundamental rights of persons who, like Magnitsky, had denounced serious corruptive acts[12]. In other words, the sanctions are directed towards persons that have seriously violated the human rights of those who had denounced illegal activity of Russian authorities or had acted to protect and promote human rights, but do not target persons "simply" guilty of corruption.

The will to sanction also the corruption is, instead, completely clear in the *Global Magnitsky Human Rights Act* adopted by the Congress in 2016, act that was adopted not in

[11] The Act establishes that the Secretary of State submits to the appropriate congressional committees a list of each person deemed by the Secretary to be responsible of one of the above-mentioned acts. The text does not attribute to the Congress the power to influence the decision of the Secretary; it has only the right to be informed.

[12] The Sec. 4 states that: «Not later than 120 days after the date of the enactment of this Act, the Secretary of State, in consultation with the Secretary of the Treasury, shall submit to the appropriate congressional committees a list of each person the Secretary of State determines— (1)(A) is responsible for the detention, abuse, or death of Sergei Magnitsky […]; (2) is responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights committed against individuals seeking— (A) to expose illegal activity carried out by officials of the Government of the Russian Federation».

substitution but in addition to the previous. The Act establishes the power of the President of the USA to impose sanctions on any foreign person who, based on "credible evidence": a) is responsible for extrajudicial killings, torture, or other gross violations of human rights committed against an individual who exposes illegal activity carried out by authorities or that acts to promote and defend human rights; b) is a government official, or a senior associate of such an official, that is responsible for, or complicit in, ordering, controlling, or otherwise directing, acts of significant corruption; or c) has materially assisted, sponsored, or provided support for a corruptive activity (as described in section 1, let. a), par. 3 of the Act).

The most important differences with respect to the 2012 Act are quite evident.

The first one is the more general range of the Act that, even though named the Magnitsky Act, is not related to the event that occurred to the Russian lawyer and its principal target is not the Russian Federation but the whole world as underlined by the term *global* in the title.

Even if the political reasons of the adoption of these acts (and of the first one in particular) are clear and do not concern mainly the will to protect human rights or to do justice for Sergei Magnitsky[13], it is interesting to note that a (supposed) wrongful act committed in a foreign State and by a foreign national[14] becomes the legal basis to impose national sanctions with respect to individuals alleged to have committed these acts. In other words, it seems to refer to a universal jurisdiction no longer concerning the repression of international crimes but, generally, the serious violation of human rights. In this case, it would be a universal jurisdiction aimed to impose civil and administrative sanctions and not criminal ones (as for international crimes), but equally concerning the imposition of "limitations" to rights of a foreign citizen and because of acts committed in other States, limitations that, in this field, are decided by political organs rather than judicial ones. This last aspect raises some questions concerning the protection of individual rights of persons who have been sanctioned (as we will see below).

The second difference concerns the subject that can adopt individual sanctions, namely the President of the USA and not the Secretary of State, and deals with the (lax) limits to the discretion of the authority in the adoption of sanctions. In fact, the President can exercise this power on the basis of credible evidence (specification that is not in the 2012 Act).

Moreover, Sec. 3, let. c., states that the President, deciding the adoption of sanctions, will consider the information provided by the Congress, by other Countries and by NGOs operating in the field of human rights. The let. g. of the same section establishes some other reasons, as compared to the previous Act, for which the President can decide to withdraw the sanction, namely: there is evidence that the person had not committed the acts for which the sanction was imposed; the person has been prosecuted properly for the acts at the basis of the adoption of sanctions; the person has credibly demonstrated a significant change in its behavior, has paid appropriate consequences for its acts and has credibly committed not to engage in one of the prohibited activity in the future. The necessity of "credible evidence"

[13] In the Sec. 2 of the 2012 Act, section concerning the Findings of the Act, we can read that: «[…] (4) Good governance and anti-corruption measures are instrumental in the protection of human rights and in achieving sustainable economic growth, which benefits both the people of the Russian Federation and the international community *through the creation of open and transparent markets*» (italic added).

[14] The Sec. 3, let. a) of the 2016 Act states that: «The President may impose the sanctions described in subsection (b) with respect to *any foreign person* the President determines…» (italic added). The Sec. 2 of the Act describes the terms "foreign person" as a person that is not a United States person and describes the latter as the 2012 Act did (see, supra note 3).

or the specification of the sources that the President can use to adopt sanctions and of the reasons that can lead to the withdrawal of the latter seem to underline the legislative will to (partially) limit the discretion of the executive power in the adoption of this type of sanctions, limitations that better guarantee the right to defense of the persons involved.

However, there are issues that these amendments cannot resolve and that pose serious problems regarding the protection of human rights of sanctioned persons: the sanction is decided by political (not judicial) authority and the possibility to appeal to courts to question its imposition is limited to the goods freezing being excluded for the ban to entry in the US territory.

First of all, in this context, it is worth noting that the sanctions can be adopted on the basis of classified evidence, if the American praxis concerning sanctions against terrorists is confirmed. The *Al Haramain Islamic Foundation* case of 2011[15] is very interesting because the Ninth Circuit of the Court of Appeal has used the text elaborated by the Supreme Court in the case *Mathews v. Eldridge* (1976)[16] to establish if the procedure taken by the Secretary of Treasure to adopt sanctions was appropriate. This text asks the court to balance the private interest damaged by the authority decision, with the risk of an erroneous deprivation of that interest and with the public interest of the Government (encompassing the fiscal and administrative weight the additional or substitutive procedure can have). Adopting this text in the *Al Haramain* case, the Court has paid particular attention to the concept of the "substantial evidence" that the authority decision must be based on. So, it has stated that the Department of Treasure's decision can be based on classified evidence as long as it communicates the reasons to the sanctioned person (for example, by means of an unclassified summary of the evidence). Let's assume that the judicial authority should be less "deferent" toward the political power and therefore limit (or exclude) the possibility to use classified evidence, considering that the Magnitsky Act does not deal with a "delicate" issue as terrorism. However, the Court of appeal in the *Al Haramain* case also affirmed that in questions where the national security, the foreign policy and the administrative law are interconnected the judicial control tends to be very respectful of the government prerogatives. This affirmation give little hope to a change in the above mentioned tendency of American judicial authorities especially since the executive order 13818, adopted by President Trump to delegate to the Secretary of Treasure its power in this field, states that the acts of violations of human rights and the serious acts of corruption are a threat for national security.

Secondly, as previously mentioned, only sanctions concerning the freezing of assets can be contested before judicial authorities. In fact, the Supreme Court has continuously stated that the power to expel or to impede the entry of foreigners in the US territory is a sovereign attribution of executive organs *essentially* immune from the judicial control[17]. Moreover, the executive order 13818 states that the Secretary of Treasure, consulting the Secretary of State and the General Procurer, is authorized to establish when the circumstances and reasons that have led to the freezing of assets are no longer present. It is necessary to underline two aspects: the General Procurer intervenes when a revision of the sanction is necessary and not when it is adopted; the Procurer is involved when the sanction

[15]Al Haramain Islamic Foundation Inc v. United States Department of the Treasury, Court of Appeal for the Ninth Circuit, 23 September 2011

[16] Mathews v. Eldridge, 424 U.S. 319 (1976).

[17] Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Shaughnessy v. Mezei, 345 U.S. 206 (1953); Kleindienst v. Mandel, 408 U.S. 753 (1972); Fiallo v. Bell, 430 U.S. 787 (1977).

concerns the freezing of assets ant not the entry ban. As a consequence, the person sanctioned can challenge the sanction concerning the freezing of assets before the Secretary of Treasure and, then, before judicial authority, whereas he/she can request a revision of a sanction concerning the prohibition to entry in the US territory only before the Secretary of State.

Another very interesting aspect which differentiates the two Acts, particularly concerns the corruption. In fact, the latter is *per se* a reason to impose a sanction on the basis of the 2016 Act, whereas, as seen above, in the first Magnitsky Act, corruption is mentioned only as an event that leads to the violation of human rights of whistleblowers who had reported corruption of authorities. In this context, the 2016 Act lists non exhaustive examples of what "acts of significant corruption"[18] means, namely: expropriation of private or public assets for personal gain; corruption related to government contracts or the extraction of natural resources; the facilitation or transfer of the proceeds of corruption to foreign jurisdictions. Therefore, the (serious) corruption and the serious violations of human rights represent the two (independent) reasons by which the adoption of sanctions can be justified, according the 2016 Act. Even if it is true that the principal aim of the Act is to fight against human rights violation regardless of where they are committed, it is also true that even in the absence of a clear connection between the violation of human rights and the corruption, the latter can still be persecuted. Indeed, the connection seems to be *a contrario* considering that, between the hypothesis of indictable corruption, there are persons responsible for serious violations of human rights against those who had tried to «expose illegal activities carried out by government officials…». In other words, the serious violations of human rights are persecuted because they are committed towards persons that have reported acts of corruption of national authority.

The executive order 13818 of President Trump is clear in this sense. On the one hand, as a matter of fact, the title of the order concerns the freezing of property of persons involved in serious human rights violations or acts of corruption and, on the other hand, the text states that these violations and corruption constitute an unusual and extraordinary threat to national security, foreign policy and the economy of the United States such as to cause the President to declare a national emergency to deal with this threat. Furthermore, there is no specification, not even in the text, regarding the necessity of a causal link between the violation of human rights and the corruption to adopt sanctions. Consequently, the American legislation puts at the same level the serious violations of human rights and serious acts of corruption. The latter seem to be considered actions in violation of international obligations *erga omnes,* as the serious violations of international norms on Human Rights protection, and this thus explains (and justifies) the executive's power to adopt individual sanctions towards foreigners that have committed the alleged illegal act on the territory of another State. As a matter of fact, the sanctions can be addressed only to a person that is «responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights» or that is «a government official, or a senior associate of such an official, that is responsible for […] acts of significant corruption». In both cases, the acts

[18] The reference to the *acts of significant corruption* seems to evoke the classical distinction between "petty" and "grand" corruption: the grand one is the corruption that involves the highest level of a national Government and provokes the distortion of the governmental function and the erosion of the rule of law, the economic stability and the trust of civil society in good governance; the petty one concerns corruptive acts that are less relevant from a point of view both of the effects and favors exchanged and the persons involved (see, *UN Anticorruption Tool Kit (2001)*, 11-12, available at www.unodc.org).

must, therefore, constitute a serious breach of international law, since any violation of individual rights or any act of corruption is not sufficient (for the imposition of sanctions).

Moreover, if it is true that sanctions are primarily directed towards persons, it is also true that they can involve *every* person, including Head of State or of Government or high officials[19], and consequently they are indirectly addressed to States that seriously violate human rights. It is worth noting that the sanctions in case of corruption can be addressed *only* to persons that are «government official[s], or a senior associate of such an official», statement that underline the will to "condemn" both individuals and States. This aspect explains also the reason of attributing to the Executive the power to adopt sanctions without any participation of a judicial body (this latter would intervene, if necessary, later). On the other hand, this approach is in line with the most recent guidelines of the US courts on immunity [20]and prosecution of human rights violations outside US territory, which has given a predominant role to executive bodies[21].

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[19] Until now, some sanctions have been addressed to former Head of State (for example, Yahya Jammeh, Gambia's Former President) or high official (Yankuba Badjie, Former General Director of the Gambia's National Intelligence Agency, or Gao Yan, Director of the Office for the Beijing's Public Security). Is interesting that, after the murder of Jamal Khashoggi, 17 Saudi citizens have been inserted in the "Magnitsky" lists because of their responsibility or complicity in the journalist's murder and the US Senate's Commission for the International Relations, on the basis of the Magnitsky Act, asked for the first time in October 2018 the President to present a report determining the responsibility concerning the murder of Khashoggi. In particular, the Commission asked to establish if the Prince Mohamed Bin Salman was responsible for it and, in this case, demanded the opportunity to adopt sanctions towards him.

[20] Although the question of the immunity of state bodies in this context goes beyond the aim of this writing, it is recalled that in 2010 the Supreme Court, in its judgment in *Samantar v. Yousuf*, stated that the Foreign Sovereign Immunities Act does not apply to individual state bodies (see, Supreme Court, *Samantar v. Yousuf*, 560 US 305(2010), judgment of 1 June 2010). In 2012, the State Department adopted the "Rosenberg Statement" in which it stated that federal courts should refrain from deciding on immunity claims that have not previously been submitted to the State Department. For this reason, a request for immunity for a foreign public official should be addressed first to the State Department than to the courts. In addition, it is stated that it belongs to the Executive, not the courts, to assess whether or not an individual is eligible for immunity. Finally, the Department added that its decision in this case (which originated the Statement considered here) was not subject to judicial review. For a further reading, see, J. B. BELLINGER III, *The Dog that Caught the Car: Observations of the Past, Present, and Future Approaches of the Office Legal Adviser to Official Acts Immunities*, in *Vanderbilt Journal of Transnational Law*, 2011, p. 819 ss.; J.E. BERGER, C. SUN, *Sovereign Immunity: A Venerable Concept in Transition?*, in *International Litigation Quarterly,* 2011, p. 57 ss.; H.H. KOH, *Foreign Official Immunity After Samantar: A United States Government Perspective*, in *Vanderbilt Journal of Transnational Law*, 2011, p. 1141 ss.; P. B. RUTLEDGE, *Samantar and Executive Power*, in *Vanderbilt Journal of Transnational Law,* 2011, p. 885 ss.; L. RYAN, *The New Tate Letter: Foreign Official Immunity and the Case for a Statutory Fix*, in *Fordham Law Review*, 2016, p. 1773 ss.

[21] As it is known, the Alien Tort Statute was adopted as part of the Judiciary Act of 1789 to allow foreigners that have suffered a violation of their rights in violation of the law of nations or of a treaty concluded by US to present a civil lawsuit before American courts. Until the end of '80s of the last century, the ATS was not so used but from the sentence *Filartiga v. Peña Irala* its importance was renewed because the Court of Appeal of the Second Circuit stated the power of foreigners to appeal to American courts to protect their rights even when they have been violated abroad and by foreigners (see, Court of Appeal for the Second Circuit, Dolly M. E. Filartiga and Joel Filartiga v. Americo Norberto Peña Irala, 630 F.2d 876). The Supreme Court, from the decision on the "writs of certiorari" in the case *Sosa v. Alvarez Machain* (see, Sosa v. Alvarez Machain, 542 U.S (2004), started to limit increasingly the application of the ATS, until the decision *Jesner v. Arab Bank PLC* (see, Jesner v. Arab Bank PLC, 138 S. Ct. 1386 (2018)) which excluded that, on the basis of the ATS, a complaint can be presented before American courts against foreign companies since it is the political power, and not the judicial one, that has the responsibility and the capacity to evaluate questions of foreign policy. As a consequence, the Congress (and not the Courts) is entitled to state if the public interest is better safeguard by imposing the respect of the ATS to foreign companies. On the ATS see, inter alia, D. WALLACH, *The Alien Tort Statute and the Limits of Individual Liability in International Law*, in *Stanford Journal of International Law*, 2010, p. 121

Moreover, also the fact that the 2016 Magnitsky Act, contrary to the 2012 Act, states the possibility to impose sanctions not only for the violations of human rights, but also for serious acts of corruption, shows that for American authorities both acts are equally serious, and an international action is necessary to fight against them. Therefore, the American legislation seems to imply that the devastating effects that the outstanding corruption provoke on societies, economies and on the States' capacity to guarantee (also) political, civil, economic, social, and cultural individual rights make the corruption an act against international *erga omnes* obligations, like as human rights violations. In fact, as is generally known, *erga omnes* obligations are duties whose violation allows the whole International Community and/or third States to react, because they guarantee fundamental interests and values of that Community[22]. So, the sanctions addressed to individuals that are responsible for these violations represent also a way, we could say the "*countermeasures*", to push States to respect these obligations. In other words, it is a means to reaffirm the existence and the necessity to respect this type of international obligations. Moreover, this equalisation between serious violations of human rights and serious acts of corruption and violations of *erga omnes* duties justifies the adoption of sanctions towards foreign nationals who have committed these acts outside the US territory.

Following the US example, some countries adopted (Canada, United Kingdom, Estonia, Lithuania, Gibraltar) a "Magnitsky legislation". It is interesting to notice that two of these (namely, Canada[23] and Lithuania[24]) have created a legal regime where the serious violations of human rights and the serious acts of corruption are equalized and each one of them constitute sufficient and independent reasons to adopt sanctions against individuals that are considered at fault. Therefore, the Canadian Act states that the Governor in Council can restrict or prohibit some activities identified in the text or freeze the property and assets of a foreign national who: a) is responsible or complicit in gross violation of human rights (against individuals who in a foreign State defend and promote the respect of human rights); b) is a foreign public official or an associate of such official and is responsible for or complicit in ordering, controlling, ect. acts of significant corruption (as misappropriation of private or public assets for personal gain, corruption related to the expropriation or extraction of natural resources). The influence of the American Act is also very clear in the equalisation between the gross violation of human rights and the significant corruption as acts that can cause the adoption of sanctions by the Canadian Government to reaffirm the rule of law and respect of human rights in the world.

In the United Kingdom, on the other hand, *"Magnitsky amendments" to the Criminal Financial Act 2017* and *to the Sanction and Anti-Money Laundering Act 2018* sanction those who violate human

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ss.; M. E. DANFORTH, *Corporate civil liability under the Alien Tort Statute: Exploring its Possibility and Jurisdictional Limitations*, in *Cornell Int. Law Journal,* 2011, p. 659 ss.; A. CHANDER, *Unshackling Foreign Corporations: Kiobel's Unexpected Legacy*, in *Am. Jour. Int. Law* 2013, p. 829 ss.; A. J. COLANGELO, *The Alien Tort Statute and the Law of Nations in Kiobel and Beyond*, in *Georgetown Journal of International Law*, 2013, p. 1329 ss.; V. GROSSWALD CURRAN, D. SLOSS, *Reviving Human Rights Litigation after Kiobel*, in *Am. Jour. Int. Law*, 2013, p. 858 ss.; A. LOWE, *Customary International Law and International Human Rights Law: A Proposal for the Expansion of the Alien Tort Statute*, in *Indian International Law Journal*, 2013, p. 523 ss.; D. P. STEWART, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, in *Am. Jour. Int. Law,* 2013, p. 601 ss.; P. WEISS, *ATS Lives: Al Shimari Survives Kiobel*, in *Ucla,* 2015, p. 19 ss.; L. Chiussi, *Jesner et Al. v. Arab Bank, PLC: Closing the Door to Litigation Against Foreign Corporations Under the Alien Tort Statute?*, in Sidiblog.org, 2018; J. B. Whisker, K. R. Spiker, *The Alien Tort Claims Act*, New York, 2019.

[22] As is generally known, this type of obligation was for the first time affirmed in an *obiter dictum* of the International Court of Justice in the case *Barcelona Traction* (Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), 1970 ICJ REP. 3 (February 1970).

[23] See, *Justice for Victims of Corrupt Foreign Officials Act (Sergej Magnitsky Law)*, S.C. 2017, c. 21, 18 October 2017.

[24] See, *Law on the Legal Position of Foreign Affairs*, No IX-2206, 16 November 2017.

rights abroad, and not corruption. In the same way, Estonian legislation bans entry in the State's territory for those who had caused the death or very serious injuries or extrajudicial detention of persons for political reasons[25] and the Gibraltar's legislation allow to adopt freezing of assets of people who violate human rights[26]. In these cases, the focus is on the fight against human rights abusers without any consideration for an act of corruption even when it is "significant".

This raises the question whether this equalisation between serious violations of human rights and serious acts of corruption could be considered corresponding to the current international legal order in the human rights field.

4. *The Relationship between Corruption and Violation of Human Rights in the "Jurisprudence" of International Body of Protection of Human Rights*

The question if the corruption can be considered an act *per se* contrary to human rights and/or to *erga omnes* obligations leads to analyze how the "jurisprudence" of international body of protection of human rights has dealt with the corruption.

Focusing first and foremost on the universal level, the recommendation addressed by the international body of control of human rights instruments (like the Special Rapporteurs) to States to combat corruption given its negative effects on the correct allocation of national economic resources or an effective fight against discrimination or, again, on the existence of a fair, equitable and respectful justice and prison system that respects individual rights, or, finally, on the effective possibility for women and children to access health services. Nevertheless, a direct connection between corruption and violations of human rights, in the sense to consider the first the cause of the second, has never been stated[27]. Least of all, they do not affirm that an endemic corruption within a State represents a violation of international *erga omnes* obligations.

Another important aspect concerns the fact that UN bodies of control of human rights instruments, until now, have never expressed their opinion on the link between corruption and violation of human rights when they have analyzed individual communication. As a matter of fact, they have never stated if the corruption was one of the causes that had led to the violation of the human rights involved. This obviously depends on the fact that the communications have not considered the corruption as a cause of the violation reported by applicants, nonetheless, the bodies would have stated whether the corruption represents a violation of human rights in the explanation of the grounds of their opinions[28].

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[25] See, *Amendments to The Law on Amending the Obligation to Leave and Prohibition on Entry Act* 262 SE, 8 December 2016.

[26] See, *"Magnitsky Amendment" to the Proceeds of Crime Act 2015*, 8 February, 2018

[27] It is worth noting that the 2017 Report of the Special Rapporteur on the Right to Health concerned exactly the relationship between the corruption and the Right to Health itself, highlighting how corruption (both small and large) makes medical care less accessible, available and of worse quality. The rapporteur, therefore, recommends adopting the Right to Health as a standard of reference in legislation and policies to fight against corruption in the health sector (see, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/72/137, 14 July 2017).

[28] It has been underlined that, until 2018, the UN bodies has "decided" 2619 communications and the corruption was mentioned in only 80 of them or because the applicants was accused to be corrupted in proceedings that had not respected the right to a fair trial or because they affirmed to had had to pay a bribe in the situation that lead to the (alleged) violation of one of their rights (see, Raoul Wallenberg Institute for Human Rights and Humanitarian Law, *The Nexus between Anti-Corruption and Human Rights*, Lund, 2018).

Taking into consideration the European level, and, in particular, the Council of Europe, the scenario does not change. As a matter of fact, also the European Court of Human Rights has never been able to deal with the corruption as a cause of human rights violations, since the applicants have never affirmed that the suffered corruption was one of the causes of the violation of their rights. The Court has outlined some aspects concerning corruption but, when doing so, it has never stated whether corruption could be *per se* a direct cause of violation of human rights. For example, in the *Telbis and Viziteu v. Romania*[29] case, in addition to pointing out that States enjoy wide margins of appreciation in determining policies aimed at preventing and eradicating corruption in the public sector, it has been stated that the confiscation measures affecting the applicant were legitimate and not contrary to Article 1 of Protocol 1 to the ECHR, as they were carried out in accordance with the general interest and within the limits of the margin of appreciation granted to the States with regard to the measures to be taken to prevent criminal conduct (in this case, the corruption of a public official). In this context, it is stated that «S.T.'s criminal activity conducted as a public servant consisted of 291 acts of bribe-taking over a period of only five weeks (see paragraphs 12 and 15 above) and *involved damage to the State social security budget*» (italics added). This passage shows that the circumstance that corruption leads to a reduction of the funds allocated to social security by diverting them in favor of an individual, is one of the elements that allow the Court to consider the preventive measures of confiscation of assets as legal, because they was adopted in the general interest[30].

In other cases, dealing with the question of whistle-blowers, the Court has established the criteria for deciding whether the State, sanctioning them, acted lawfully, as: the public interest in the disclosed information; whether the applicant had alternative channels for making the disclosure; the authenticity of the disclosed information; whether the applicant acted in good faith; the severity of the sanction[31].

However, as pointed out above, the Court has never stated whether corruption can be a *direct* cause of violation of human rights.

In spite of the fundamental difference deriving from the fact that in these cases the "accused" or the subject whose documents are addressed is a State and not an individual, as in the case of Magnitsky sanctions, what we have seen above points out that the relationship between corruption and violations of human rights and, in particular, the question whether the corruption can be considered an act violating individual rights is really problematic[32].

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[29] See, Telbis and Viziteu v. Romania, app. no 47911/15, Court, 28 June 2018, par. 80.

[30] Equally, in the previous case *Gogitidze and others v. Georgia*, the Court has observed «that the measure formed an essential part of a larger legislative package aimed at intensifying the fight against corruption in the public service […]. Having regard to the domestic legal framework (see paragraphs 52-54 and 85 above), it is evident that the rationale behind the forfeiture of wrongfully acquired property and unexplained wealth owned by persons accused of serious offences committed while in public office and from their family members and close relatives was twofold, having both a compensatory and a preventive aim» (see, Gogitidze and others v. Georgia, app. no 36862/05, Court, 12 May 2005, par. 101).

[31] See, Guja v. Moldova, app. no 14277/04, Court (Grand Chamber), 12 February 2008, par. 69-96; Heinisch v. Germany, app. no 28274/08, Court, 21 October 2011, par. 37.

[32] Regarding the possibility that corruption is considered *per se* a violation of Human Rights or even an international crime, see, N. KOFELE-KALE, *The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime under International Law*, in *The International Lawyer*, 2000, p. 149 ss.; I. BANTEKAS, *Corruption as an International Crime and a Crime against Humanity*, in *Journal of International Criminal Justice*, 2006, p. 466 ss.; S.B. STARR, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, in *Northwestern University Law Review,* 2007, p. 1257 ss.; M. SEPÚLVEDA CARMONA, J. BACIO-TERRACINO, *Corruption and Human Rights: Making the Connection*, in M. BOERSMA, H. NELEN (eds.), *Corruption and Human Rights: Interdisciplinary Perspectives*, Antwerp, 2010, p. 25 ss.; A.B. SPALDING, *Corruption, Corporations and the New Human*

In this sense, a sentence adopted in 2010 by the ECOWAS Court is really substantial. The Court had to deal with the question of whether serious acts of corruption can be a violation of the right to education by Nigeria[33]. The Court affirmed rightly that the corruption has a very negative effect on the right to education (and other human rights) but, *per se*, cannot be considered a violation of that right by the involved State. Only when a clear link between corruption and violation of a right exists, the corruption can be considered the cause (or one of the causes) of that violation with a consequent responsibility of a State. If this is not the case, any corruptive act could be considered a violation of human rights.[34].

Even if this sentence concerns the State's action and is addressed to a given State, it underlines an essential element, namely the causal link that must exist between the corruptive act and the violation of an individual right. The first must be (at least) one of the causes that had led to the violation of a right. This causal link is even more necessary when the sanction is addressed to an individual rather than a State.

On the other hand, the issue here is not the affirmation of a *human rights based* (or *human rights oriented*) approach and not exclusively "penalistic" approach to the fight against corruption, i.e. an approach which, in assessing whether a State has fulfilled its obligation to prevent and fight corruption, does not only consider the "material" element corresponding to the fact that it has adopted national legislation criminalizing such practices, but also gives importance of having achieved or not of positive effects in terms of the protection of human rights deriving from internal practice in the fight against corruption. Obviously, this approach should be supported and encouraged, but when the issue concerns the imposition of individual sanctions (as in the Magnitsky legislation) it is necessary to demonstrate that the human rights violation has resulted (i.e. was caused) by corruption.

5. *The current EU sanction regime to protect human rights and the rule of law and the initiative for a "European Magnitsky Act"*

As is generally known, the art. 215 TFEU is the legal basis that allows the EU to adopt sanctions both against third States and against individuals/entities that are suspected to have

Right, in *Washington University Law Review*, 2014, p. 1365 ss.; A. PETERS, *Corruption as Violation of International Human Rights*, in *Eur. Jour. Int. Law,* 2018, p. 1251 ss.

[33] In 2007 the *Social and Economic Rights and Accountability Project* (SERAP), a NGO acting in Nigeria, appealed to the ECOWAS Court on the basis of the results of a inquiry developed by an independent public body, the *Independent Corrupt Practices and Other Related Offences Commission*, about the diversion of public money addressed to education and schools. From 2005 to 2006, about 270 million of dollars, that were aimed to the construction or reparation of schools, were addressed to front companies or, in other cases, the authorities paid larger amount of money to crooked companies that did works without respecting the minimum standards or that did not the works at all. So, during the process, the SERAP affirmed that the inquiry demonstrated a systemic corruption in the Nigerian State, corruption that makes Nigeria incapable to guarantee the minimum standards of education to its citizens. Moreover, the applicant underlined that the Nigerian authorities have favored this situation without adopting the necessary measures to pursuit the corruption also when it concerns the high level official. For consequence, the SERAP asked to the Court to affirm that the Nigeria had violated the right to education (see, *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. the Federal Republic of Nigeria and Universal Basic Education Commission*, ECW/CCJ/JUD/07/10, parr. 19-21, 30 November 2010).

breached fundamental EU or international norms[35]. These sanctions sometimes are adopted to "simply" implement UN Security Council resolutions in the EU territory, sometimes they are supplementary measures that go beyond sanctions decided by the Security Councils and sometimes they are decided by the European Union institutions in the absence of a Security Council decision. In this case, the EU sanctions aimed at individuals both to react to violations of human rights and to hinder the misappropriation of public funds by leaders of the ruling class [36]. So, for example, the Council adopted some sanctions against individuals that misappropriated public funds in Egypt, Tunisia and Ukraine with the objective to consolidate rule of law, democracy, respect of human rights and the sustainable development of economy and societies[37]. In fact, as we have seen below, the misappropriation of public funds can impede or strongly reduce the economic development of a society and has a very negative impact on the enjoyment of human rights and on the development of democratic institutions. This is obviously the opposite of the rule of law and of the good governance that require the respect of the law, the absence of arbitrariness in the use of public powers, the use of these powers and of the public resources to meet the needs of the population, just to mention some components. For these reasons, the EU acts by means of sanctions against people that stole these funds to reaffirm some fundamental principles of the EU (and of the international order): democracy and respect of human rights. The "reaction" of the EU against people that violate human rights is even more comprehensible because the protection of human rights is one of the "pillars" of the European Union (and of the Constitutions of Member States) and the implementation of these rights in the world is one of the principal purpose of the EU Foreign and Security Policy.

These restrictions are based on a Council decision concerning a common position or action, decision that is adopted by unanimity and that has to be implemented directly by Member States (artt. 28, 29 TEU). If sanctions concern measures freezing funds and economic resources, they are implemented by means of a Regulation, adopted by the Council, acting by qualified majority, on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission (Article 215 of TFUE). The European Parliament will be informed and the ECJ can review these regulations that are, clearly, binding and directly applicable throughout the EU. The sanctions adopted have to be consistent with the purpose of

[35] The imposition of sanction is part of the EU "common foreign and security policy" where the decisions are adopted by unanimity and States have a veto power. Moreover, on the basis of the TFEU art. 215: «1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof. 2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities». If the adoption of individual sanctions concerns the fight to terrorism, the decision about «administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-state entities» will be adopted by the Council and the European Parliament through the ordinary legislative procedure. Implementation is carried out by a Council act on the basis of a Commission proposal (art. 75 TFUE).

[36] A complete list of EU sanctions is available at https://www.sanctionsmap.eu/#/main

[37] See, Council Decision 2011/172/CFSP, *Concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Egypt,* 21 March 2011 (OJ L 76, 22.3.2011, p. 63); Council Decision 2011/72/CFSP, *Concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia*, 31 January 2011, (OJ L 28, 2.2.2011, p. 62); Council Decision 2014/119/CFSP, *Concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine*, 5 March 2014, (OJ L 066 6.3.2014, p. 26).

the Common Foreign and Security Policy, with human rights (and, in particular, the right to a due process) and with international law and international obligations of the EU. Notwithstanding this and the amelioration that the EU system have tried to introduce, some problems concerning the compatibility with human rights law endure, in particular regarding the decision process and its transparency and the very little participation of the EU Parliament that is only informed of the measures adopted[38].

In March 2019, the European Parliament has adopted a resolution to propose[39] the creation of a EU regime of individual sanction addressed to persons that, all over the world, violate human rights[40]. This resolution was preceded, in 2014, by a recommendation of the Parliament addressed to the Council concerning the implementation of common restrictions about visas of Russian officials involved in the Magnitsky case and, in 2019, by some resolutions about the creation of the above-mentioned regime. On the basis of the parliamentary proposal, the individual sanctions would be imposed by the EU to those who a) are responsible for, involved in or which has assisted, financed or contributed to the planning, directing or committing of gross human rights violations and abuses; and b) perpetrate acts of systemic corruption related to grave human rights violations. In comparison to the American legislation[41] (and to the legislation of some of the above mentioned European States), this proposal states a double limit to the possibility to impose sanctions in reaction to the corruption: this latter must have a "systemic" character and it must be linked to a serious violation of human rights. These requirements are cumulative, so it is necessary that both are respected to lawfully adopt the sanctions.

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[38] Within the European Union, the adoption of the proposed European sanctions regime in the field of corruption should resolve some problems that, still now, concern the imposition of individual sanctions to (suspected) terrorists by the EU. The first concerns the lack of a clear definition by the European Union Court of Justice of a standardisation of proofs necessary to lawfully impose an individual sanction. Even if the EUCJ has affirmed that the decision of the Council in this field must be founded on clear, detailed, and specific reasons, the Court has never defined which are the proof standard used to state whether the decisions of the Council are reasonable and lawfully. Another important aspect is the fact that the power is gathered exclusively in the hands of the Council and of the Commission, whereas the Parliament, the institution that is very attentive to the protection of human rights, is excluded from this process (see, C. PORTELA, *Targeted Sanctions against Individuals on Grounds of Grave Human Rights Violations – Impact, Trends and Prospects at EU Level*, EP/EXPO/B/COMMITTEE/FWC/2013-08/Lot08/17, 2018, p. 18). It would be important, therefore, that the EU Parliament is involved at least in the definition of the standards of *listing* and *de-listing,* in order to guarantee a highest standard of protection of individual rights also for persons hit by the sanctions and avoiding a *Kafkaesque* situation where the protection of human rights is pursued (also) through their violations. About the praxis concerning the adoption of sanctions by the EU, see, *inter alia*, M. ERIKSSON, *EU sanctions: Three cases*, in P. WALLENSTEEN, C. STABAINO (eds), *International Sanctions: Between words and wars in the global system*, New York, 2005, p. 108 ss.; C. PORTELA, *European Union Sanctions and Foreign Policy,* London, 2009; M. DE GOEDE, *Blacklisting and the ban: Contesting targeted sanctions in Europe*, in *Security Dialogue*, 2011, p. 499 ss.; T. BIERSTEKER, C. PORTELA, *EU Sanctions: Three types*, Paris, 2015; P. J. CARDWELL, *The legalisation of EU foreign policy and the use of sanctions*, in *Cam. YB Eur. Leg. St.*, 2015, p. 287 ss.; M. GESTRI, *Sanctions imposed by the European Union: Legal and institutional aspects*, in N. RONZITTI (ed.), *Coercive Diplomacy, Sanctions and International Law*, Leiden, 2016, p. 70 ss.; C. PORTELA, *Targeted Sanctions against Individuals on Grounds of Grave Human Rights Violations – Impact, Trends and Prospects at EU Level*, cit.

[39] This term is not used in a technical sense because the EU Parliament does not have a power to propose a legislative initiative (power that, as it is well known, belongs to the European Commission).

[40] See, European Parliament, Resolution on a European Human Rights violations sanction regime, 13 March 2019, 2019/2580(RSP).

[41] It is worth noting another difference between the American legislation on sanctions on corruption and the EU proposal in this field: in the EU regime the imposition of sanction caused by corruption is not limited to public officials.

This system shows that the European institutions adopt an approach which is more centered on the fight to human rights violations, than the one followed by American authorities who have adopted a most "extremist" position by equalizing the violations of human rights and the corruption. The European proposal seems to refer to the corruption as a means *to sustain* the action concerning the protection of human rights: the EU will be able to sanction both the individual that have violated human rights, and persons that are responsible for systemic corruptive act that have led to a serious violations of human rights. In other words, if the corruption is systemic and has led to a violation of individual rights, it is a lawfully and sufficient basis to impose individual sanction.

However, it could be asked which advantage this approach produces as compared to the existing way to sanction individuals that violates human rights, considering that the serious violation of human rights caused by corruption can be included in the more general category of serious violations of human rights at the aim to impose sanction. One explanation could lie in the desire of the EU institutions to specifically combat even acts that have extremely negative effects on national (and not only) economic systems and, at the same time (or, perhaps, precisely because of this), cause serious violations of individual rights. Another reason could be the will to enhance the global role of the EU at international level as one of the principal actors in the protection of human rights even when they are caused by serious acts of corruption. Moreover, the new regime would establish a clear legal basis to "pursue" also the act of corruption (in the limits see above), possibility that in the existing EU system of sanctions may be inferred only as a violation of the rule of law and of "stability" of a State (as for the misappropriation of public funds).

On December 2019, Josep Borrel, the EU's High Representatives for Foreign Affairs and Security Policy, announced that the foreign ministers of the European Union agreed to start the preparatory work for the adoption of a global sanctions regime, namely of the EU Magnitsky Act. Then the Covid-19 pandemic broke out in the world and the EU efforts (as these of Member States) were aimed to contain and fight against the spread of the disease. We will see whether or not the proposal of the European Parliament will be taken up after the "emergency" and followed[42].

6. *Conclusion*

The two regimes (the American one and the European Union one) are both addressed to strengthen the respect of international *erga omnes* obligations in the field of human rights and to fight against their serious violation. However, in the proposed European Magnitsky Act, the corruption would be "prosecutable" only if this has a causal link with the serious violations of human rights, whereas, on the other hand, the American regime equalizes the corruption to the violations of human rights and the corruption represents *per se* a sufficient reason to impose (lawfully) individual sanctions. The European approach seems to be more corresponding than the American one to the international bodies' praxis concerning the relationship between corruption and human rights where the corruption can be sanctioned (as any other act) if there is a causal link between the latter and the violation of human rights.

[42] The announcements that followed the decision of the EU Foreign Ministers seem to confirm the EU Parliament approach as they focused on the fight for human rights violations and on the impunity of offenders without any particular reference to corruption.

Moreover, the decision of American authorities to impose individual sanction on persons that have committed act of serious corruption, without any connection with the violations of human rights, seems to lead the corruption in the field of the violations of international *erga omnes* obligations. This is a choice that does not correspond to the international legal order position where the fight to corruption is led thorough the adoption of international convention that imposes to the State to prosecute persons suspected of act of corruption but not considers the possibility to impose sanctions on these latter (nor this possibility is established in any document or resolution of international bodies). Also, in the current EU system of sanctions the adoption of restrictive measures against individuals that have misappropriated public funds are justified with the necessity to protect human rights, the right to development and the rule of law. The future possible EU Magnitsky regime, as we have seen above, clearly links the possibility to adopt sanctions against peoples who have committed acts of corruption to the fact that they also provoke serious violations of human rights.

All these tools, in their partiality, appear, however, useful because the adoption of anti-corruption measures (both national and supranational) are fundamental in pursuing the objective of limiting the multiplicative element of human rights violations inherent in corruption and to make anti-corruption a vehicle for the affirmation of individual rights (at least in the long term) and of the rule of law. The provision of such measures (which certainly cannot be reduced to the mere existence of a system of individual sanctions) thus makes it possible to pursue a dual objective, additional to the fight against corruption, namely the removal of obstacles to the enjoyment of individual rights and the prevention of their violation. In this way, a virtuous circular system of protection of human rights and prevention of corruption can be created, provided that such measures are also compatible with the protection of individual rights.