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MAGDALENA M. MARTÍN MARTÍNEZ*

THE EU GLOBAL HUMAN RIGHTS SANCTIONS REGIME, A YEAR ON: SOME CERTAINTIES AND MANY A DOUBT

1. *Introduction*

On 7 December 2020, the OJEU published a set of regulatory measures made up of two instruments, Council Decision (CFSP) 2020/1999, and Council Regulation (EU) 2020/1998, through which the new restrictive measures against serious human rights violations and abuses are managed[1]. The EU solemnly announced that by means of the aforesaid instruments, it was finally establishing a global human rights sanctions regime (EU Global Human Rights Sanctions Regime)[2], as the media, human rights organisations and the jus-internationalist doctrine hailed its approval as an extraordinary achievement[3].

* Full Professor of Public International Law at the University of Málaga.

[1] Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, Official Journal of the European Union, L 410 I/1; Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, L 410 I/13.

[2] Announcement of the High Representative on behalf of the EU on 8 December 2020. Available at: https://www.consilium.europa.eu/es/press/press-releases/2020/12/08/eu-global-human-rights-sanctions-regime-declaration-by-the-high-representative-on-behalf-of-the-european-union/. The Republic of North Macedonia, Montenegro, Serbia and Albania also joined this Declaration, as candidates for membership of the European Union; Bosnia and Herzegovina, a Stabilisation and Association Process country and potential candidate; Norway, an EFTA country, member of the European Economic Area; and Ukraine.

[3] Regarding the media, headlines like "The European Magnitsky Law. A milestone with a lot of potential" stand out. https://www.atlanticcouncil.org/blogs/new-atlanticist/the-european-magnitsky-law-a-milestone-with-a-lot-of-potential/. And in relation to NGOs, worthy of note are Amnesty International's campaigns https://www.amnistia.org/ve/blog/2020/01/13283/derechos-humanos-r2p-y-leyes-magnitsky and the one promoted by William Browder, North American tycoon and until 2005 one of the biggest investors in Russia, whose defence lawyer before the authorities of this country was precisely Sergei Magnitsky: https://www.magnitskyawards.com/about/the-global-magnitsky-justice-campaign/. In relation to the doctrine, see for instance *Editorial Comments*, in *Common Market Law Review*, 2021, pp. 621-634, T. RUYS, *Introductory Note to the European Union Global Human Rights Sanctions Regime (EUHRSR)*, in *International Legal Materials*, 2021, pp. 298-300.

Thus ended a "long and complex road", in the words of the High Representative of the Union for Foreign Affairs and Security Policy[4], to materialise an aspiration pursued by himself and by other political leaders[5]. After undergoing vicissitudes, appearing and disappearing from the Union's political agenda for almost a decade[6], its rapid handling and immediate entry into force has aroused many a great expectation.

The present contribution aims to discern to what extent it constitutes an *ex novo* category whereby the EU has provided itself with a real sanctioning power, both for reasons of its own security and for the achievement of its external objectives. This will allow us to confirm or refute the potential and scope which *a priori* it has been attributed with. We understand that this is a feasible objective because although its application is still limited, the EU possesses an *acquis* in terms of sanctions for human rights violations, which, with the appropriate exceptions, can serve as a parameter to explore the future trajectory and the obstacles that the new regime will have to confront. To this end, and after this brief introduction, we will examine the origin, procedure and particularities of the aforementioned regulations (II), to then analyse the legal nature, means, objectives and scope of the measures approved (III). Then, we will address some reflections on the certainties, doubts and expectations that their application is raising (IV), to subsequently end the present work with some conclusions and final thoughts.

2. *Origins, procedure and specificity of the EU global human rights sanctions regime*

As is known, the EU has been adopting sanctions (or restrictive measures, according to community terminology) within the framework of the Common Foreign and Security Policy (CFSP) since the Maastricht TEU of 1992 made it clear that one of the main objectives of said CFSP was, as it has continued to be ever since, the development and consolidation of democracy and the rule of law, as well as respect for human rights and the fundamental principles of international law[7]. It should be succinctly recalled that the ways then articulated to promote compliance with the aforementioned objective by third States were, on the one

[4] "The long and complex road towards an EU Global Human Rights Sanctions Regime". Available at: https://eeas.europa.eu/headquarters/headquarters-homepage/87884/long-and-complex-road-towards-eu-global-human-rights-sanctions-regime_en.

[5] This is expressed by the High Representative in his blog posting of 31 October 2020, https://eeas.europa.eu/headquarters/headquarters-homepage/88970/node/88970_es. Along these lines, Stef Blok, Minister of Foreign Affairs of the Netherlands, in a speech at Leyden University on 10 December 2019 pointed out what the new regulation meant to him and to his country: *"For over a year now, the Netherlands has been calling for the establishment of an EU human rights sanctions regime (…) This means we can now get to work on an EU decision that allows us to impose sanctions on human rights violators anywhere in the world. We can then deny them access not only to the EU's territory, but also to financial assets in the EU. So they won't be able to do business here anymore. Or shop in the glitzy stores of Paris or Budapest. Above all, they will be outed, before the eyes of the world, as violators of human rights. This is not a label anyone wants. In short, with this new EU sanctions regime, we can show that the EU has teeth. And human rights abusers will feel their bite. Now that's what I call effective".* Available at: https://www.government.nl/documents/speeches/2019/12/10/human-rights-lecture-by-minister-of-foreign-affairs-stef-blok.

[6] In fact, in the Resolution of the European Parliament of 16 December 2010, this Institution already referred presciently to the need for a common sanctioning response from the EU to deal with the Magnitsky case. Available at https://www.europarl.europa.eu/doceo/document/TA-7-2010-0489_ES.pdf

[7] Articles J.1 of the Treaty on European Union (TEU, Maastricht) and 21 of the Treaty of Lisbon in force.

hand, the conditionality of development aid, and, on the other hand, a set of actions of a dual nature, complementary to the previous ones. Thus, along with positive measures, which included political incentives and financial assistance for non-Member States committed to the development of democracy and the Rule of Law in its broadest sense[8], restrictive deterrent measures were also stipulated for the first time, in the form of sanctions against countries, entities and/or individuals in the event of serious or systematic human rights violations[9].

In the two decades that have elapsed since the first CFSP sanctions, more than 40 restrictive measures have been adopted against 34 countries, of which two-thirds of the sanctions, affecting aproximately a total of 200 individuals and entities, have been imposed in support of human rights and democracy objectives[10]. This growing amount of entities and individuals have been the recipients of a package of restrictive measures, both general and selective (targeted), ranging from arms embargoes and restrictions on specific imports or exports, to the freezing or restriction of funds and economic resources, to visa and travel restrictions, to the prohibition of satisfying claims on contracts or transactions.

Despite the various nomenclatures, its typology has remained invariable until the establishment of the measures that concern us here. For this reason, depending on the source, these own or autonomous CFSP sanctions of the EU have traditionally been distinguished from that implementing the UN's ones, although they are not entirely hermetic categories[11]. In fact, the EU originally linked its sanctioning power with the maintenance of international peace and security within the framework of the UN, in order to execute and/or complement the sanctions previously agreed by the Security Council under Chapter VII of the San Francisco Charter in situations classified as a threat to international peace and security or acts of aggression. Thus, initially, each EU Member State was individually responsible for adopting the domestic law necessary to comply with the international obligations arising from its UN membership, but a joint enforcement regime was subsequently instituted (Articles 301 and 60 of the TCE)[12]. Starting from a CFSP Common Position or Action, which required unanimity, the necessary sanctioning Regulations in execution of said Common Position would then be approved by qualified majority.

For their part, the autonomous sanctions of the EU, which *stricto sensu* would not be such, would come from two sources: either in application of the model clause on democracy

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[8] Adopted from the Resolution of November 28, 1991 of the Council and of the Member States meeting in the Council on human rights, democracy and development, Bol. CE 11/1991, point 1.3.1, p. 124

[9] V. BOU, *La Unión Europea y los derechos fundamentales: desafíos actuales,* in *Revista Europea de Derechos Fundamentales*, 2014, pp. 15-50.

[10] Data from the EP, section C of its Resolution of March 14, 2019, on a European human rights violations sanctions regime (2019/2580(RSP). Available at: https://www.europarl.europa.eu/doceo/document/TA-8-2019-0215_ES.pdf. F. GIUMELLI et al., *United in Diversity? A Study on the Implementation of Sanctions in the European Union*, in *Politics and Governance*, 2022, pp. 36-46.

[11] In fact, an autonomous restrictive measure of the EU can be legitimized a posteriori by the UN, when it decrees its application on a global scale, in the same way that the opposite is not ruled out, that is, that certain sanctions adopted by the EU in execution of a Resolution of the Security Council that comes to an end, continue to be applied as measures of the Union. On this matter, see also: T.J BIERSTEKER.; C. PORTELA, *EU sanctions in context: three types*, París, 2015.

[12] Article 301: "Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission".

and human rights inserted in the international agreements concluded with other Organisations and with third states under the Common Commercial Policy[13], or as a result of the aforementioned will to prevent and punish serious human rights violations within the framework of the CFSP. Nonetheless, although the sanctioning power of the EU is usually protected under the aegis of the UN, this does not prevent the Union from sometimes abandoning the canon of international legality for the sake of legitimacy, agreeing upon sanctions before the Council of Security, as happened in 1991 after the implosion of the Socialist Federal Republic of Yugoslavia, or even in the absence of an express mandate from the Security Council. Such is what the EU has been doing in Syria for more than ten years, arguing that these sanctions respond to the paralysis of the UN derived from the right of veto, in addition to being forced by its duty to comply with the increasingly questioned responsibility to protect (R2P)[14]. Also without any prior Resolution of the Security Council, the EU has been implementing restrictive measures in Venezuela since the end of 2017, their consisting of both arms embargo and repression equipment, as well as travel ban and the freezing of assets of a growing number of high officials held responsible for human rights violations. It does not seem a coincidence that these two examples of autonomous EU sanctions, like the new restrictive measures under study, present as a backdrop critical episodes in the turbulent relationship between the EU and Russia, or more specifically with its president V. Putin, who has capitalised them in order to strengthen his strategic partnership with the two governments affected[15].

Be that as it may, the basic principles relating to the application and evaluation of the EU's sanctioning power in the face of serious human rights violations were developed in 2003 in the form of Guidelines, in which their objectives and legal aspects were set out in detail, in addition to the categories of recipients, and even a standard model for drafting regulatory legal instruments[16]. Since then, the aforementioned Guidelines have been reviewed and updated without interruption in 2005, 2009, 2017 and 2018, although the substantial aspects have remained unchanged. In this way, in relation to the objectives

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[13] Its origins date back to the mid-1990s, with the adoption of a Decision of 29 May 1995 on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries. (COM(95)0216 - C4-0197/95), from which it is reproduced in more than 50 agreements that affect around 130 third states. Regarding the phases of said clause, from the beginning to its full consolidation, the different types (foundation and element clauses, explicit suspension or non-execution, positive or negative conditionality), as well as the problems generated by its application: Mª. C MUÑOZ RODRÍGUEZ, *Democracia y Derechos Humanos en la Acción Exterior de la Unión Europea,* 2010; A. MANERO SALVADOR, A. et al.: *La acción exterior de la UE en materia de derechos humanos*. Madrid, 2014. Accessed 10 January 2018, https://e-archivo.uc3m.es/bitstream/handle/10016/21126/monografias_4_IFV_2014.pdf?sequence=1&isAllowed=y; F. JÍMENEZ GARCIA, *Medidas restrictivas en la Unión Europea: entre las "sanciones" y el unilateralismo europeo*, en *Retos para la acción exterior de la Unión Europea*, directed by C. MARTÍNEZ CAPDEVILA Y E. MARTÍNEZ PÉREZ, Valencia, 2017; M.J. BARCELÓ, *La proyección exterior de la identidad europea: Política Comercial Común y condicionalidad en materia de Derechos Humanos*, en *Cuadernos Europeos de Deusto* 2019, pp. 287-308.

[14] J. FERRER LLORET, *La Unión Europea ante la crisis siria: limitaciones e incoherencias de la acción exterior europea en el Mediterráneo*, en *Revista General de Derecho Europeo,* 2014, pp. 1-60; S. AKBARZADEH.; A. SABA, *UN paralysis over Syria: the esponsibility to protect or regime change?*, in *International Politics,* 2018, pp. 536–550.

[15] F. GIUMELLI, *The Redistributive Impact of Restrictive Measures on EU Members: Winners and Losers from Imposing Sanctions on Russia*, in *Journal of Common Market Studies*, 2017, pp. 1062–1080.

[16] On 8 December 2003, the Council asked the High Representative to develop, in partnership with the Commission, the political framework for a more effective use of sanctions. Following this mandate, the Political and Security Committee (PSC) approved on 1 June 2004 Basic Principles on the Use of Restrictive Measures (Sanctions), which COREPER endorsed on 7 June 2004. Available at: https://data.consilium.europa.eu/doc/document/ST-10198-2004-REV-1/es/pdf .

pursued, it became clear that by means of said Guidelines, the EU intended to induce a change in the policy or activity of the country, the government, the entities or the individuals targeted by such measures, for which reason these would be reviewed periodically. In the section on legal principles, the obligation for the sanctions to observe International Law whilst, in particular, not entailing an extraterritorial application was emphasised, for this is a practice denounced by the Union itself. The need to determine its legal framework and selective nature was also made explicit, in such a way as to minimise the human costs and other undesired collateral effects that might derive from its application. With regard to the preparation of the lists of recipients, it was agreed to respect the right to a fair trial of the persons and entities affected, a practice to be adopted through legal instruments that, as is the case with Decisions and Regulations, both permit the judicial review, and contain clear criteria for the establishment of their application and withdrawal. And finally, the obligation to specify the identification data of those sanctioned was underlined, in order not to harm the innocent, allowing exemptions for humanitarian needs, and clearly specifying the conditions for their maintenance, lifting and expiration, as well as the procedure in case of non-observance. In fact, in order to ensure compliance with and evaluation of the restrictive measures, the "sanctions" formation was created in 2004 within the Working Party of Foreign Relations Counsellors, which has played a notable role in the adoption of the global sanctions regime in terms of the human rights in question[17].

Consequently, from its origins, the sanctioning power of the EU has become the ultima ratio over a comprehensive strategy, including political dialogue, incentives and conditionality. For this reason, the sanctions should conform to the obligations of International Law assumed by the Union, seeking the support of the rest of the international community with the objective of achieving maximum selectivity and effectiveness on the recipients whose behaviour it was intended to change, whilst minimising the possible adverse effects through continuous scrutiny, which would permit to discern over time the need or not to maintain them[18]. Under these starting premises, their legal basis was consecrated and expanded in the current TFEU (Article 215.2), which maintained the initial regulatory procedure, with the exception that the old Common Positions were replaced by CFSP Decisions (Article 29 TEU). As we have advanced, the application and evaluation of CFSP sanctions has been renewed and concretised in successive versions of the original Guidelines of 2004. The latest Guidelines, dated 4 February 2018, were accompanied by an Update of the EU Best Practices for the effective implementation of restrictive measures[19].

Thus, the increasingly extensive EU sanctions map has generated a comprehensive database[20], along with a vast literature. The analysis of this complex sanctioning framework aside, purely instrumental with regard to our purpose, we are interested in the consideration

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17 Council Document of a 'Sanctions' Formation of the Foreign Relations Counsellors Working party (RELEX/Sanctions), of 22 January 2004 (5603/2004).

18 Basic Principles on the Use of Restrictive Measures (Sanctions), of 7 June 2004. https://data.consilium.europa.eu/doc/document/ST-10198-2004-REV-1/es/pdf

19 On 20 December 2016, the Committee of Permanent Representatives (COREPER) took note of an update of the EU Best Practices Paper (doc. 15530/16), which is kept under constant review, and on 4 May 2018, the Foreign Relations Counsellors "Sanctions" formation Working Party agreed on a new element to be included in the EU Best Practices Paper under paragraph 86a. Available at: https://data.consilium.europa.eu/doc/document/ST-8519-2018-INIT/es/pdf

20 https://www.sanctionsmap.eu/#/main. G. FELBERMAYR et al., *The Global Sanctions Data Base*, in *European Economic Review*, 2020; G. FORWOOD et al., *EU restrictive measures*, in *The Guide of Sanctions*, Global Investigations Review, 2021.

of two questions, namely: the factors that have concurred for the adoption of the two new instruments on restrictive measures against serious human rights violations, and the process followed until its entry into force.

2. *Catalysts of the new global sanctions regime*

In relation to the first question, in our view, these measures are the result of unblocking the cooperation between the Institutions involved in their approval, to which previous comparative law legislation has been added, and which has served as a model to follow.

The essential inter-institutional coordination was realised with the election, on 1 December 2019, of J. Borrell as High Representative of the European Union for Foreign Affairs and Security Policy. His figure has been decisive to unite the will of the Commission, the European Parliament (EP) and, above all, the Council, in reconciling the opposing stances of its Member States. Whereas, historically, the EU's own sanctions compelled each Member state to reconcile all sorts of their private interests, in particular, economic ones, with the promotion of common values, in this specific case the harmonisation of two opposing positions was also required.

On the one hand, that of a minority but active group of Member States ("like minded states"), mostly Nordic and Baltic[21], staunch supporters of a single regime to punish, harshly and without delay, human rights violations in third countries, especially those perpetrated near the Union's borders. Most of them[22], following in the footsteps of the United States of America, had adopted replicas of the law that in their opinion was the legal reference that the EU should imitate: the "Russia and Moldova Jackson-Vanick Repeal and Sergei Magnitski Rule of Law Accountability Act of 2012", better known as the Magnitsky law. Said differences being overcome with the new EU sanctions regime, this law was enacted after the incarceration in 2008 and subsequent death in prison a year later of the lawyer who gave it its name, Sergei Magnistki, accused of participating in a tax fraud on a large scale, which, according to his complaint, high Russian officials and authorities would have committed. The purpose of this law was precisely to impose travel bans and freezing of assets on those responsible for his detention and death. In spite of this, in 2013, a Russian court found Magnitsky guilty posthumously of the charges for which he was imprisoned. In 2016, President Obama enacted a second law, complementary to the first one, the "Global Magnitski Human Rights Accountability Act", expanding the scope of sanctions in two ways.

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[21] The group "like-minded states" was made up of Latvia, Lithuania, Estonia, the Netherlands, Denmark and Sweden. In fact, the members of the Nordic Council even stated that they would proceed jointly in this regional sub-framework if the EU was unable to reach an agreement. Also the United Kingdom, then still a member, in line with the historic Anglo-American alliance, approved on 23 May 2018 the "Sanctions and Anti-Money Laundering Act 2018 ("SAMLA"), in development of which on 5 July 2020, "The Global Human Rights Sanctions Regulations of 5 July 2020" was approved (available at www.legislation.gov.uk), whose first recipients have been a group of 49 individuals and/or organisations. About the differences and similarities of the sanctions regime of the United Kingdom with that of the EU and its application post-Brexit: S. POLI, "The UK as a third country: The Current Model of Cooperation with the European Union in the Adoption of Restrictive Measures", *European Papers*, 2021.

[22] Estonia, Latvia and Lithuania, in addition to the United Kingdom, then still a member of the EU. Also third states, as is the case of Canada, Australia, Kosovo, Georgia and Moldova, in addition obviously to the US.

On the one hand, by incorporating the fight against corruption into the concept of human rights violations under investigation, and on the other hand, by stipulating its global applicability at a universal level, and not only in relation to a specific country[23].

Facing those in favour of the EU mimetically reproducing this global sanctions regime, another group of Members, including Spain, Portugal, Greece and Italy, and to a lesser extent France and Germany, even unequivocally acknowledging the need to extend the CFSP sanctions in case of flagrant violations of human rights, doubted the haste, and, above all, the suitability of the model to follow. In general terms, they insisted that the EU should develop its own sanctions policy, not necessarily identical to that of its North American ally, and that these restrictive measures should be the last resort of a more complex and broader strategy, an expression of the so-called "carrot and stick" diplomacy. In particular, with regard to relations between the EU and Russia[24], the EP has been maintaining an ambivalent position, halfway between the two aforementioned position. This circumstance could explain why in 2019 the EP, while insisted that the confrontation was detrimental to both, whereby communication channels should always be kept open despite the disappointing results, suported a rapid approval of a European Magnitski Law with which to impose sanctions upon Russian officials and authorities responsible for serious human rights violations was urged[25]. Such ambiguity is recurrent, since, although the EU did react to the Magnistksy case and the murder of other political opponents[26], including the failed poisoning attempt on A. Navalny and his posterior imprisonment, with which the new sanctions regime has been launched, the truth of the matter is that at the same time, the EU has uninterruptedly held talks with Russia. It is hence not surprising that the disagreement experienced on the occasion of the High Representative's trip to Moscow in February 2020 did not prevent Germany and France, only four months later, from breaking the theoretical unity of action based on the slogan *"push back, contain and engage"*[27], and from proposing to resume the EU-Russia bilateral summits interrupted back in 2014. Due to the veto from the Baltic countries and Poland, the conclusions with which the June 2021 European Council closed are a perfect example of this fine-tuned ambiguity, whereby it will "*explore formats and conditionalities of dialogue with Russia*".[28]

In this context, the debate opened in November 2018 by the Dutch Government within the Council on the political opportunity of a system of specific sanctions in the field of human rights at a Union level takes on its full meaning. Along these lines, the High Representative recounted on his institutional blog in December 2019, just four days after his appointment, that he held a meeting with the European Parliament's Committee on Foreign

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[23] F.J. ZAMORA CABOT, M.C MARULLO, *La Global Magnitsky Act de los Estados Unidos: sanciones internacionales contra corrupción y violaciones graves de los derechos humanos*, in *Ordine Internazionale e diritti Umani*, 2019, pp. 536-549.

[24] T. FORSBERG., *The power of the European Union. What explains the EU's (lack of) influence on Russia?*, in *Politique Européenne,* 2013, pp. 22-42.

[25] European Parliament resolution of 12 March 2019 on the state of EU-Russia political relations (2018/2158(INI)), section M, and Recommendation 45, respectively. Available at: https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX:52019IP0157

[26] We are referring to the murders of journalist Anna Politkovskaya, and political opponent Boris Nentsov, the execution being administered by a bullet in the back of the neck, on 27 February 2015.

[27] M. MIROSEVICH-JUARISTI, M. *La nueva estrategia de la UE para Rusia: un equilibrio de debilidad*, in *ARI*, 2021; C. BILDT; G. GRESSE; K. LIIK; N. POPESCU, *Push back, contain and engage: how the EU should approach relations with Russi*a, in *ECFR Policy Brief*, 202; N. MIKHEDLIZE, *From the Ukraine–Russia War to the Navalny Case: How to Deal with the Kremlin?*, in *EU-LISTCO Policy Papers,* 2021.

[28] Conclusions of the European Council of 24 June 2020, para. 31. Available at: https://www.consilium.europa.eu/media/50844/2425-06-21-euco-conclusions-es.pdf.

Affairs and with national parliamentarians, including the Latvian MP Rihards Kols. During the meeting, Kols, who had been the promoter of the introduction of the Magnitsky law in his country, asked him point-blank if he was in favour of an identical European regulation, to which the interpellated replied verbatim: *"I said that in general, I was all in favour of strong EU action on human rights but I also had to confess that I was not fully aware what exactly his question meant"*.

In such a personal way, the High Representative made the adoption of a global system to sanction human rights violations one of the primary objectives of his mandate. The archetype of said regime would be the "Global Magnitski", at least in terms of the ultimate purpose. Still, as has already become clear, its assumption was far from unanimous from a strategic point of view. The success of the High Representative lay precisely in bridging the differing views in record time; not surprisingly, the process was completed in less than a year, despite the substance of the matter, the delicate nature of the process in political terms, and the technical requirement of two different instruments that were to be adopted simultaneously. On 9 December 2019, after the first Foreign Affairs Council under his presidency, J. Borrell announced that an agreement had been reached authorising him to start the preparatory work for the new sanctions regime. The starting point would be a non-paper prepared by the EEAS technical unit dedicated to sanctions. The next step was to include the EU's horizontal human rights sanctions regime on a global scale among the most relevant measures of the ambitious EU Action Plan on Human Rights and Democracy 2020-2024[29]. Three months later, in June 2020, two of the Council preparatory bodies directly involved in its handling process, together with COREPER, the Working Party on Human Rights (COHOM) and the "Sanctions" Working Party of Foreign Relations Counsellors (RELEX), agreed to move on to the next phase. In this way, on 19 October 2020, the High Representative presented the proposal for a Decision to the Council and, together with the Commission, also for a Regulation, as President Von der Lyden had already advanced her strong support for "a European Magnitsky law"[30]. After an intense debate in said RELEX Working Party, on 7 December 2020, the Council approved both instruments, as an early tribute to the annual commemoration of the Universal Declaration of Human Rights.

In our opinion, the judgment of the European Court of Human Rights (ECHR) of 27 August 2019 was decisive in achieving consensus. It established that Magnitsky's detention was not arbitrary, considering that the Russian authorities had reasonable grounds to prosecute him for tax evasion, and that in fact they had started investigating him before he reported the €174 million fraud allegedly committed by high-ranking Russian officials. Still, the ECHR found that that there was no reason to keep him in prison for almost a year without trial, let alone subject him to continuing ill-treatment or deprive him of the medical care that he needed until his death. Consequently, the ECHR declared that Russia had

[29] Joint communication to the European Parliament and the Council. EU Action Plan on Human Rights and Democracy 2020-2024, 25 March 2020. In the annex to the text, it appears as the first measure for "closing the accountability gap, fighting impunity and supporting transitional justice". Available at https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX%3A52020JC0005

[30] State of the Union Address by President von der Leyen, of 16 September 2020: "So we must always call out human rights abuses whenever and wherever they occur – be it on Hong Kong or with the Uyghurs. But what holds us back? Why are even simple statements on EU values delayed, watered down or held hostage for other motives? When Member States say Europe is too slow, I say to them be courageous and finally move to qualified majority voting – at least on human rights and sanctions implementation. This House has called many times for a European Magnitsky Act – and I can announce that we will now come forward with a proposal. We need to complete our toolbox". Available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655

violated Articles 2 (right to life), 3 (prohibition of torture), 5 (right to liberty and security), and 6 (right to a fair trial) of the European Convention on Human Rights (ECHR, also known as the "Convention for the Protection of Human Rights and Fundamental Freedoms"), condemning said State to pay the lawyer's widow and mother 34,000 euros[31], a high compensation for ECHR standards, which evidenced the seriousness of the human rights violations in this case.

2.1. *The adoption process and the regulatory instruments of the new global sanctions regime*

With respect to the second question that concerns us, both the process of adoption of the new sanctions and the chosen regulatory instruments reflect the will of the Member States to act collectively from the initial proposal of sanctions until their implementation[32]. Thus, Decision (CFSP) 2020/1999, presented at the request of the High Representative, establishes the political and legal basis for sanctions, binding the Member States. Said Decision is complemented by EU Regulation 2020/1998, a joint proposal from the High Representative and the Commission, which, safeguarding the functioning of the internal market, guarantees the uniform imposition of sanctions on all persons, entities and bodies subject to the jurisdiction of the Union.

Through the conjunction of both instruments, the three objectives that the High Representative set out in his confirmation hearing for office before the European Parliament's Committee on Foreign Affairs would be achieved. Firstly, a coherent foreign action that connects the community dimension with the intergovernmental one of the CFSP. Secondly, to unify the position of the Member States through a global mandatory regime. And thirdly, to convey the joint commitment along with an integrated vision of human rights as a hallmark of the EU in world governance[33]. One of the main shortcomings that the CFSP had historically dragged was thus corrected, namely its lack of real effectiveness due to to the complexity of the decision-making procedure and the strategic discrepancies between Member states.

Throughout the regulatory procedure, the Commission and the EEAS would assist both the Council and the Member States. To such an end, the Commission published a guidance note to *"provide guidance on certain provisions in the Regulation, for the purpose of ensuring uniform implementation by EU operators and national competent authorities"*.[34] Notwithstanding the above, as the Commission itself specified, this document did not encompass all the precepts, or create additional legislative provisions, or establish a legally binding interpretation, a task for which the CJEU is responsible. In this regard, it should be remembered that the CJEU does not have jurisdiction in the field of the CFSP (Article 24 TEU), except when reviewing

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31 Magnitskiy and others v. Russia, (Applications nos. 32631/09 and 53799/12), ECLI:CE:ECHR:2019:0827JUD003263109.

32 M. DUMAS, *The protection of human rights in the EU sanction mechanism: A new hope with the Magnitsky act.*, Global Campus of Human Rights Europe, Nottingham, 2019.

33 "Los desafíos del nuevo Alto Representante de la Unión Europea para Asuntos Exteriores y Política de Seguridad", *Cuadernos de Santa Cruz* nº 3, 2019. Available at: http://www.exteriores.gob.es/Portal/es/SalaDePrensa/Multimedia/Publicaciones/Documents/2019_11_CUADERNOS%20SANTA%20CRUZ_N3%20web.pdf

34 Commission Guidance Note on the Implementation of Certain Provisions of Council Regulation (EU) 2020/1998, of 17 December 2020. Available at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/201217-human-rights-guidance-note_en.pdf.

the legality of restrictive measures against natural or legal persons, or supervising the application of the CFSP by EU institutions, a control for which, as is known, the Kadi I and II[35] cases were a turning point.

From the foregoing, it can be established that although all the EU Institutions have participated in the process of adoption of both instruments, the leading role in their application has been played by the Council and, to a lesser extent, by the CJEU. The limited role of the EP is in turn noticeable, which, despite its active involvement in the adoption of the new regime, was only informed *ex post facto*, as is the case with CFSP sanctions (Article 215.1 of the TFEU). Indeed, the EP had already shown its support in three Resolutions of 2012, 2014 and 2017, and, above all, in a report of April 2018 that the Subcommittee on Human Rights had commissioned from Clara Portela, one of the academics who, beyond a doubt, have influenced the configuration of the new sanctions the most. In said Report, it was concluded that the absence of participation of the EP eclipsed the autonomous sanctioning power of the EU, which, in addition to a certain lack of popular legitimacy, had historically been subjected to inconsistency and inefficiency. For this reason, after examining the pros and cons of a European Magnitsky law, it recommended a system of sanctions universal in scope demonstrating its aim to serve as a protective tool for human rights and not as a political battering ram against third countries. With an extremely selective character, it would be adopted only in cases of human rights violations whose importance and magnitude were found to justify beyond a doubt its imposition upon those responsible for said violations[36]. This position was endorsed in the Resolution of 4 March 2019 on a European sanctions regime for human rights violations, where the EP develops what, in its opinion, should be the distinctive notes of the new sanctions regime. Firstly, its insertion in the CFSP, whereby an essential part to selectively deter potential persons and entities from violating human rights would be established, hence reinforcing the role of the Union in the fight against impunity. Secondly, the need for complementarity and coherence with the EU's own autonomous sanctioning power, as well as with the international legal framework on sanctions provided by the UN Security Council. And, thirdly, the importance of respecting the rights of the affected persons or entities, as well as ensuring a uniform interpretation and application of the restrictive measures by all EU Member states[37].

3. Legal nature, recipients, means, objectives and scope of the restrictive measures

As has already been shown, the restrictive measures have been articulated through two typical regulatory instruments. Regulation (EU) 2020/1998 is addressed to natural and legal persons under EU jurisdiction, whereas CFSP Decision 2020/1999 is addressed to all

[35] S. POLI, *The Common Foreign Security Policy after Rosneft: Still imperfect but gradually subject to the rule of law*, in *Common Market Law Review*, 2017, pp. 1799-1834; L. LONARDO, *May Member States' courts act as catalysts of normalization of the European Union's Common Foreign and Security Policy?*, in *Maastricht Journal of European and Comparative Law*, 2021, pp. 287-303.

[36] European Parliament. "Targeted sanctions against individuals on grounds of grave human rights violations. Impact, trends and prospects at EU level". Study requested by the DROI Committee. Available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603869/EXPO_STU%282018%29603869_EN.pdf.

[37] Resolution of the EP of 12 March 2019, already mentioned. Available at: https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX:52019IP0157.

Member States. In consequence, they are two complementary rules intended for the same purpose, but whose precepts are not entirely coincident.

Regulation (EU) 2020/1998 opens its recitals by referring to Decision CFSP 2020/1999, and insisting on the need to prosecute serious human rights violations and abuses wherever they are committed, in such a way that the restrictive measures are applied taking into consideration the *"interaction between International Human Rights Law and International Humanitarian Law"*. Worthy of note is the lack of reference to a third branch or normative sector, International Criminal Law[38], whose cross-fertilisation with the first two has facilitated the regulation of criminal responsibility at the international level. Its absence is not trivial, insofar as it could reveal that the new sanctions do not imply the exercise of a true *ius puniendi* by the EU, but rather of a power of a "civil" nature, prior to or concurrent with the individual criminal responsibility determined in international criminal courts. This nature contrasts with the fact that the new measures are reactive rather than preventive, as are most of the CFSP sanctions, despite the opposite having theoretically been concluded.

After offering a definition of its key concepts (Article 1), Regulation (EU) 2020/1998 identifies the serious human rights violations or abuses[39] that justify the application of restrictive measures (Article 2), stating in the first place genocide and crimes against humanity (Articles 2a and 2b). In both, although the EUHRSR is independent of those legal actions, the sanctions are expected to be adopted before the commission of said crimes is confirmed by the International Criminal Court or relevant courts, especially considering that their purpose is to serve as a warning with which to modify the recipients' conduct. Be that as it may, these restrictive measures would complement, by way of civil liability, the individual criminal responsibility at an international level to which the authors are liable. Thus, in our view, the exclusion of war crimes, together with genocide and crimes against humanity, is open to criticism, considering that they are of the most serious importance for the international community as a whole, especially in the light of both the previous reference to International Humanitarian Law that the Regulation itself makes, and the objectives of the EU's foreign action, which include peacekeeping, conflict prevention and the strengthening of international security (Article 21 TEU).

In a second category, Regulation (EU) 2020/1998 breaks down other sanctionable human rights violations (Article 2.c), drawing up a list that includes torture and other cruel treatment; slavery; extrajudicial executions; enforced disappearances and arbitrary arrests. Given that these acts constitute the criminal category of crimes against humanity in accordance with Article 7 of the Rome Statute, their separate enumeration would reflect the need to clarify that all of them will be punishable, even in instances where they do not exceed the threshold of sufficient seriousness needed for their classification as international crimes.

Finally, Regulation (EU) 2020/1998 provides for an opening clause that, similar to the Rome Statute, empowers the EU to sanction any other human rights violation as long as it is either generalised or systematic or especially serious in relation to the guiding principles of foreign and security policy, as is the case with human trafficking, sexual and gender-based violence, and violations of freedom of assembly, opinion and religion (Article 2.d). With regard to this last category, it is specified that it will be necessary to abide by what is

[38] Considering it settled, we put aside the recurrent debate on the approach to International Criminal Law, on which we have expressed our view in previous works, and regarding which we refer again to the definition that A. Cassese previously formulated in the first edition of his *International Criminal Law*, Oxford, 2003.

[39] N. VAN DER HAVE, *The Proposed EU Human Rights Sanctions Regime. A Firts Appreciation*, in *Security and Human Rights*, 2019, pp. 56-71.

established by customary international law, which would confirm the incorporation of this formal source of International Law in the EU, as well as by the provisions of a list of widely-accepted international multilateral treaties of a universal scope. The conventional catalogue includes all those that form the backbone of International Human Rights Law, in addition to the Rome Statute, to which a European regional treaty, the ECHR, would be added. As we understand, if we take into account that widespread and/or systematic sexual violence is expressly mentioned as one of the serious violations contrary to the principles of the EU's foreign action, the 2011 Convention of the Council of Europe on preventing and combating violence against women and domestic violence (Istanbul Convention), which the EU itself signed in 2017, could as well have been included in the list of said treaties, unless such an instrument is assumed not to enjoy the necessary acceptance[40]. The other great exclusion is corruption, which is part of the punishable offences both in the Magnitsky law and in its British counterpart. Therefore, it can be concluded that the human rights violations punishable in the EU correspond, mainly but not only, to the obligations arising from the peremptory norms of general international law, unlike what is provided for in the North American and British sanctions regimes, which focus on "ordinary" violations of international law, including, of course, corruption.

As for the recipients of the sanctions set forth in Regulation (EU) 2020/1998, they will be natural or legal persons, as well as entities and organisations responsible for serious human rights violations or abuses, or which support such acts or which are involved in them in any other way. The authors of said crimes in any degree will be sanctioned, as well as their accessories and the necessary participants who provide financial, technical or material support (Article 3.3 b), that is, the different forms of participation in crimes, with the exception of induction. This typically criminal nomenclature contrasts with the exercise of a sanctioning power, which, as we have already advanced, is of a civil nature. When those sanctioned are natural persons, it does not matter whether they are state agents or *de facto* agents who exercise control or effective authority over a territory (Article 2.3). The restrictive measures that will be applied to them will consist in the freezing of funds and economic resources (Article 3.1), with the exceptions authorised by the competent national authorities for the satisfaction of their basic needs in a broad sense or for humanitarian purposes (Article 5). Said competent national authorities are identified in an Annex, and in the case of Spain, they belong to the central administration of the State, under the coordination of the Ministry of Foreign Affairs. The same applies in most of the rest of the Member States, with the exception of Belgium, where, due to its well-known peculiarity, the infra-state entities play a major role.

For their part, all those under the jurisdiction of the EU are obliged to apply the rule and adopt the corresponding sanctions. Still, the directors and employees of European companies are exempt from liability when they act in good faith in compliance with the Regulation (Article 11). Thus, two considerations are imposed: on the one hand, a prohibition on hindering the observance of the restrictive measures by all the authorities of the Member States; and, on the other hand, the consequent responsibility of those who knowingly and deliberately carry out or participate in actions aimed at circumventing the

[40] Compared to the 44 States Parties to the Rome Convention, the Istanbul Convention has been ratified by 34 States, after the complaint lodged by Turkey on 20 March 2021 in accordance with Article 80. The difference is that of the 27 EU Members, there are 6 of them (Bulgaria, Czech Republic, Hungary, Latvia, Lithuania and Slovakia) that have not yet ratified it. Although its ratification is still pending, the EU signed the Istanbul Convention on 3 June 2017, despite the technical approval of the CJEU in Opinion 1/19, of 6 October 2021.

effectiveness of the measures provided for in the Regulation. As has been indicated, the entry into force of the global sanctions regime took place the day after its publication (8 December 2020), its scope of application encompassing the land, sea and air space of the 27 Member States. It will also be mandatory for European citizens, even if they are outside the EU, and for all companies that are established under the law of one of the 27 Member states, or that operate within the EU (Article 27).

Although the Regulations are rules that do not require legislative development, the particularity of these restrictive measures requires the publication of lists of those sanctioned, whereby the Commission and the Member States are called upon to inform each other of the measures issued in their application, as well as of enforcement and infringement problems (Article 13). For the sake of safeguarding the right to due process, the affected party included in said list is to be informed directly or by announcement, as well as to be allowed to submit observations, without prejudice to any possible appeals before the CJEU. In the case of natural persons, their identification on the list must be exact, with all the necessary descriptions, data and even possible aliases, in order to avoid possible errors. The handling of personal data is reflected on the EU's updated, interactive sanctions map[41] (Article 17).

Simultaneously with the Regulation, Decision CFSP 2020/2019 was adopted, which is addressed to all Member states. With the same purpose, it seeks to establish a general objective regime of restrictive measures for serious human rights violations within the framework of the values and principles of the EU and, in particular, those of the CFSP. It is thus added to the pre-existing sanctions regime, so that the geographical criterion inherent to the CFSP sanctions against third countries is joined by the thematic one, whilst maintaining the temporary nature of the restrictive measures and their periodic review. We find the interaction of the new regime with the CFSP sanctions to be one of the most complex issues for the future, since it must not only be consistent with the EU's foreign action, but also with its internal policies, adding and not subtracting, strengthening and not weakening the hallmarks of the Union[42].

In particular, worthy of note is its selective nature, derived from the impossibility or lack of will to punish authoritarian regimes or countries as a whole, yet of course without prejudice to the fact that, within the framework of the CFSP, due action be taken against the State of which the natural or legal persons recipients of the new measures are nationals. That is why the EU tends in practice to apply restrictive measures that are individual, proportional, and justified in detail, in terms of both the reasons whereby they are advised, and the personal data of the recipients, except in those cases in which they complement or implement sanctions previously agreed by the UN. For instance, the EU may sanction a third State for the use of chemical agents, as well as adopt restrictive measures against the military or political leaders who have authorised it. As a matter of fact, the poisoning of the opponent A. Navalny initially ended with the adoption of CFSP sanctions against Russia, to be later ensued, in application of the regime that concerns us here, by the imposition of the first restrictive measures of travel bans and freezing of assets against four senior Russian officials responsible for the inhumane treatment to which he is being subject during his imprisonment in this country. Although the recitals of the Decision insist on linking the new sanctions regime with the CFSP, the truth is that its scope is by definition much more limited, for it

41 https://www.sanctionsmap.eu/-/main/details/50/acts?checked=50&search=%7B"value":"","searchType":%7B%7D%7D.

42 E. HELLQUIST, *Ostracism and the EU's contradictory approach to sanctions at home and abroad*, in *Contemporary Politics*, 2019, pp. 393-418.

aims to defend democracy, the rule of law and human rights by means of acting not against authoritarian regimes and corrupt governments as a whole, but against some of their members, on the understanding that in instances of human rights abuses, it is usually easier to demonstrate the involvement of state officials than the participation of company officials. Consequently, we share the thesis that under this global regime, although the EU attacks the symptoms or visible manifestations of serious human rights violations, it does not get to their root.

Said serious human rights violations or abuses are the same ones contemplated in the Regulation, yet with the nuance that upon approval or modification of the list of non-state agents that are recipients of the restrictive measures, Decision CFSP 2020/2019 will take into consideration the CFSP and the seriousness of the abuses (Article 1.4). As for the type of measures, it encompasses both restrictions on the mobility of natural persons, and economic sanctions (Articles 2-4). In relation to the former ones, the recipients will be prohibited or restricted from entering or transiting the territory of the entire Union, with a first exception that a Member State will not be forced to deny entry to its own nationals, in addition to the general exceptions derived from said State being the seat or host of an International Organisation. This hence creates an unprecedented category of refusal of entry at the border and/or refusal of visas, which overrides national legislation on the matter, such that those sanctioned will only be able to access the territory of the Union in the exceptional cases provided for in the Decision (CFSP) 2020/2019 itself. These exceptions derive from the usual humanitarian purposes, or from the fact that the restrictive measures could hinder an ongoing political dialogue or negotiation to promote respect for human rights, in relation to which it should not be forgotten that sanctions ought to be the last resort. Whilst exemption of restrictive measures may also be implemented in instances where said entry or transit is necessary to handle a legal proceeding, the rest of the Member States may object to it.

The second type of restrictive measures are the economic ones, consisting of freezing of funds and resources of the natural and legal persons, entities or bodies that are the perpetrators of the violations, or that render aid to or that assist in the commission of said human rights violations, with the same exceptions as stipulated in the Regulation. The recipients of the restrictive measures will be included in a list specifying all relevant data, as well as reasons for inclusion. The Council of the EU will approve and modify said list unanimously, this being the same criterion required for its approval, with the aim to speak with a single voice at all costs (Article 8). In order for the Decision CFSP 2020/2019 to have the greatest effect possible, the EU will "encourage" third countries to adopt similar measures. It is foreseeable that those required to do so be neighboring countries and, in particular, the candidates to join the Union, in an attempt to guarantee the effectiveness of the measures and to minimise the so-called "substitution effects" (Article 9). In such a way, the EU succeeded in having the Declaration of the High Representative, where the reason for an imminent adoption of a new general sanctions regime was established, adhered to by a number of countries, including the Republic of North Macedonia, Montenegro, Serbia and Albania, as candidate countries; Bosnia and Herzegovina, a country of the Stabilisation and

Association Process, and potential candidate; Norway, an EFTA country, member of the European Economic Area; and even Ukraine.[43]

Unlike the Regulation, the Decision will have a limited validity, until 8 December 2023, which is the same date of the initial application of the restrictive measures to be agreed upon (Article 10).

4. A first assessment of the EU new global sanctions regime in the light of practice: some certainties, and many a doubt

The analysis carried out in the preceding pages leads us to assess very positively the fact that the EU has finally equipped itself with a global sanctions regime in the area of human rights, in keeping with the previous practice of countries and partners in its environment[44]. Said regime is added to the three existing horizontal ones in terms of terrorism, chemical weapons and cybercrime, which it resembles, insofar as it separates the responsibility of the recipients of the restrictive measures from that of the States of which they are nationals. In fact, the existence of two parallel lists of Russian nationals sanctioned for the Navalny case, the first one made up of six people and one entity involved in the use of chemical weapons, after his poisoning in August 2020[45], and the second one resulting from the application of the new regime, evidences that this complements and adds value to the previous ones[46]. Its particularity lies in the fact that it responds to a transnational logic by virtue of which the Union has decided to centrally address those serious human rights violations that endanger its collective security[47].

As we have advanced, in its first year in force, said new regime has so far been applied on four occasions, which, naturally, does not respond to a logic of impartiality or neutrality.

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[43] EU Global Human Rights Sanctions Regime: Declaration by the High Representative on behalf of the European Union. Press release, 8 December 2020. Available at: https://www.consilium.europa.eu/es/press/press-releases/2020/12/08/eu-global-human-rights-sanctions-regime-declaration-by-the-high-representative-on-behalf-of-the-european-union/ E. SZÉP; V. VAN ELSUWEGE, "EU sanctions policy and the alignment of third countries. Relevant experiences for the UK?", in SANTOS VARAS, J., and WESSEL, R.A., *The Routledge Handbook on the International Dimension of Brexit*, London and New York, 2020, pp. 226-240.

[44] C. PORTELA, *The EU Human Rights sanctions regime: Unfinished Business?*, in *Revista General de Derecho Europeo,* 2021, pp. 20-44.

[45] Council Implementing Regulation (EU) 2020/1480, of 14 October 2020 implementing Regulation (EU) 2018/1542 concerning restrictive measures against the proliferation and use of chemical weapons; Council Decision (CFSP) 2020/1482 of 14 October 2020 amending Decision (CFSP) 2018/1544 concerning restrictive measures against the proliferation and use of chemical weapons (OJEU L7341, 15 october 2020. The six natural persons sancioned with EU travel ban and asset freeze are the Chief of the Presidential Domestic Policy Directorate; the First Deputy Chief of Staff of the Presidential Executive Office of the Russian Federation; the Plenipotentiary Representative of the President of the Russian Federation in the Siberian Federal District ; the Director of the Federal Security Service of the Russian Federation, and two deputy ministers in the Ministry of Defence. The entity is the State Scientific Research Institute for Organic Chemistry and Technology. On this matter, C. PORTELA, *The EU's Chemical Weapons Sanctions Regime: Upholding a Taboo Under Attack*, European Union Institute for Security Studies, 2020.

[46] A. HERNÁNDEZ SIERRA, *El nuevo régimen global de sanciones de la Unión Europea en materia de derechos humanos: una aproximación normativa*, en *Revista General de Derecho Europeo*, 2021, p. 273.

[47] C. ECKES, *EU global human rights sanctions regime: is the genie out of the bottle?*, in *Journal of Contemporary European Studies,* 2021.

As previously indicated, its first implementation took place on 2 March 2021, in response to the arrest and imprisonment of the Russian opponent A. Navalny, whose release was unsuccessfully demanded by the ECHR on 17 February 2021, on the grounds that his health and life were compromised[48]. The first recipients of restrictive measures, consisting of travel and EU entry bans, as well as freezing of funds and economic resources, were four high-ranking Russian officials involved in the matter (namely, the Director of the Federal Penitentiary Service, the President of the Investigative Committee, the Attorney General and the Director of the National Guard)[49].

The second round was on 22 March 2021, when it was agreed to include eleven persons and four entities, nationals of six countries, in the list of recipients of the aforesaid restrictive measures of Decision 2020/1999[50]. In numerical terms, the most affected country was China, since identical restrictive measures were issued against four high-ranking officials responsible for serious human rights violations against the Uyghur Muslim ethnic minority, as well as against one entity, the Xinjiang Public Security Bureau. For its part, Russia remained at the geographical epicenter of the new global sanctions regime, and two senior officials of the Russian administration in Chechnya responsible for torture and extrajudicial executions were included in the list. The same measures were also issued against two senior officials of the North Korean military administration, while the funds of a North Korean entity, the Central Public Prosecutor's Office of the Democratic People's Republic of Korea, were frozen on account of an extensive catalogue of human rights violations, from torture, to enforced disappearances, to sexual violence against women. The list was completed with two Libyan military officers, their commanding the Kaniyat Militia and the Tarhuna Brigade, found responsible for summary executions and enforced disappearances between 2015 and 2020, and with a South Sudanese general commanding an armed group responsible for extrajudicial executions and killings. Finally, although no natural person of this nationality was included, an entity was added to the list, namely the Eritrean National Security Office, responsible for arbitrary detentions, extrajudicial executions, enforced disappearances and torture committed by their agents.

On 6 December 2021, the sanctions list was partially modified[51]. Specifically, one of the two Libyan citizens was removed from the list after dying in July 2021, while some data was corrected in the entries corresponding to seven of the natural persons who had been

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[48] European Court of Human Rights asks Russia to release Aleksey Navalnyy, Press Release ECHR 063 (2021); Judgments of the European Court of Human Rights (ECHR) on Navalni v. Russia, of 17 October 2017; Navalni v. Russia, of 15 November 2018, and Navalni v. Russia (no. 2), of 9 April 2019.; SIDORENKO, A. MAXIM et al. *On the Urgency of the Application of Interim Measures by the European Court of Human Rights*, in *Cooperation and Sustainable Development*. Springer, 2022. pp. 683-689.

[49]Council Decision (CFSP) 2021/372 of 2 March 2021 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses (OJ L 71I, 2.3.2021, p. 6–9); Council Implementing Regulation (EU) 2021/371 of 2 March 2021 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses (OJ L 71I, 2.3.2021, p. 1–5).

[50] Council Decision (CFSP) 2021/481 of 22 March 2021 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses (OJ L 99I, 22.3.2021, p. 25–36); Council Implementing Regulation (EU) 2021/478 of 22 March 2021 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses (OJ L 99I, 22.3.2021, p. 1–12).

[51] Council Implementing Regulation (EU) 2021/2151 of 6 December 2021 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses (OJ L 436, 7.12.2021, p. 1–6).

included months before (three Russian, two North Korean, one Chinese and one Libyan citizens, the latter being precisely the brother of the deceased militia chief).

The latest extension of the list of restrictive measures by the EU occurred on 13 December 2021, with the aim to add a new entity and three natural persons in relation to it[52]. This is the so-called Warner Group, an unincorporated private military company that, whilst headquartered in Russia, has perpetrated serious human rights violations and abuses throughout the world, from Ukraine, to Syria, to Libya, to Central African Republic, to Sudan, to Mozambique. The three natural persons related to said Group, all of them being Russian nationals, are one of its founders, a mercenary, and another leader, who worked as security adviser of the President of the Central African Republic.

In our opinion, there are three noteworthy aspects on the application of the global sanctions regime for human rights violations during its first year in force. The first one is that all the natural persons sanctioned have only been men, which seems to reinforce the idea that the majority of women tend to be the victims and not the perpetrators of international crimes or serious human rights violations. The second aspect is that said restrictive measures are not triggered by the international crimes of genocide and crimes against humanity, but by the alleged serious human rights abuses listed in a second category (tortures, extrajudicial executions and killings, and arbitrary arrests), or in the generic clousure clause (systematic and widespread violations of freedom of assembly or freedom of speech, etc.). This shows that although the new regime is expected to complement the actions of the ad hoc international criminal tribunals system and the International Criminal Court in the framework of the fight against impunity, the formulas for cooperation, exchange of information and sequence of actions necessary to safeguard the principle of *non bis in idem* have not yet been concretised. The third aspect is that the nationality of those sanctioned corresponds either to weak states engulfed in armed conflicts or post-conflict contexts (Libya, South Sudan, Eritrea), or to leading countries where the Rule of Law does not however apply (Russia, China, North Korea).

From a legal point of view, the new regime presents specificities in accordance with the sui generis nature of the Union, which, in the framework of the CFSP, has developed a civil regulatory power, characterised by the imposition of non-punitive measures with a dual objective. On the one hand, to preserve its strategic interests and foreign security, which it frequently identifies with international peace and security. And, on the other hand, to protect and promote democracy, the rule of law and human rights as constitutional principles of the ad intra and ad extra European integration[53]. In consequence, restrictive measures are in theory preventive and/or reactive, and represent an alternative to the use of force in international relations, defined by its flexibility, temporality and diversity of recipients and purposes (coercion, limitation or restriction and signalling/stigmatisation of individuals, legal persons or entities). Notwithstanding the above, and despite its enormous potential, its practical application raises a number of political and technical uncertainties.

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[52] Council Decision (CFSP) 2021/2197 of 13 December 2021, OJ L 445I, 13.12.2021, p. 17–20, and Council Implementing Regulation (EU) 2021/2195 of 13 December 2021 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses, OJ L 445I, 13.12.2021, p. 10–13.

[53] F. GIUMELLI; F. HOFFMANN; A. KSIAZCZAKOVA, *The when, what, where and why of European Union sanctions,* in *European Security*, 2021, pp. 1-23.

TABLE 1: EU HUMAN RIGHTS SANCTIONS REGIME (in force until 8 December 2022)
(Source: own elaboration)

Targets EU HRSR	HR Violations	Legal basis	Restrictive measures	Nationality/Charge
NATURAL PERSONS **1st ROUND** (02/03/2021) ***4 persons***	-Arbitrary arrests and detentions **+** Widespread and systematic repression of freedom of assembly, opinion and expression	Council Decision (CFSP) 2021/372 **+** Council Implementing Regulation (EU) 2021/371	Travel ban and ban on entry into the territory of the EU **+** freezing of economic resources	**-RUSSIAN (4) Officer position**
2nd ROUND (22/03/2021) ***11 persons***	Serious human rights violations, including torture, extrajudicial killings, enforced disappearances or systematic use of forced labour	Council Decision (CFSP) 2021/37	**Idem**	**-CHINESE (4) O.p** **-RUSSIAN (2) O.p** **-NORTH KOREAN (2) O.p** **-LIBYAN (2)** Head and member of the Kaniyat Militia
3rd ROUND (07/12/22021) Correction of data on the list of 7 of the persons previously included, and removal of one Libyan person due to his death		Council Decision (CFSP) (2021/481 + Implementing Regulation (EU) 2021/47	**Idem**	**-SOUTH SUDAN (1)** Major General of the South Sudan People's Defence Forces
4th ROUND (13/12/2021) ***15 persons*** ***-one deceased-***	Serious human rights abuses, which include torture and extrajudicial, summary or arbitrary executions and killings.	Council Implementing Regulation (EU) 2021/2195	**Idem**	**-RUSSIAN (3)** **-NORTH KOREAN (2)** **-CHINESE (1)** **-LIBYAN (1)** **-RUSSIAN (4)** All of them members of the Wagner Group
ENTITIES **2nd ROUND** (22/03/2021) ***3 Entities + Armed group*** **4th ROUND** (13/12/2021) ***1 Entitty*** **(Warner Group)**	Serious human rights abuses, including torture and extrajudicial, summary or arbitrary executions, and enforced disappearances of persons and killings.	Council Decision (CFSP) (2021/481 + Implementing Regulation (EU) 2021/47 Council Implementing Regulation (EU) 2021/2195	Freezing of economic resources and funds	**-CHINESE (1)** Xinjiang Production **-NORTH KOREAN (1)** The Central Public Prosecutor's Office **-ERITREAN (1)** The National Security Office (also known as National Security Agency) of the Government of Eritrea **-RUSSIA (1)** Russia-based unincorporated private military entity acting in Ukraine, Syria, Libya, the Central African Republic (CAR), Sudan and Mozambique
ARMED GROUP **2nd ROUND** (22/03/2021)	Serious human rights abuses, in particular extrajudicial killings, and enforced disappearances of persons	Council Implementing Regulation (EU) 2021/2195	Freezing of economic resources and funds	**-LIBYAN (**1) The Kaniyat Militia

TOTAL: PERSONS= 14 (Males: 14/Females: 0); ENTITIES=4 + 1 ARMED GROUP

4.1. Political uncertainties

First, precisely due to its generality, the EU Global Human Rights Sanctions Regime risks becoming a jumble of codes or totum revolutum, whereby the number and hierarchical rank of the potential recipients of the measures may get blurred. Thus, the ad hoc criminal tribunals and the International Criminal Court seem to have opted for a selective and exemplary strategy in the prosecution of those presumed to be responsible for international crimes, prioritising those cases based on the importance or public position of the victimiser[54]. Unlike said international tribunals, we may well consider that when imposing the new sanctions, the EU ought to follow exactly the opposite philosophy, widening as much as possible the range of natural persons to whom the aforesaid sanctions apply, regardless of the public position they hold or their institutional relevance.

However, it is impossible to determine in advance how often or against whom they will be adopted, considering that everything is likely to depend on the drift of European integration and the ability of the Member States to achieve the unanimity that its implementation requires. As antithetical precedents, the cases of Belarus and Venezuela stand out. Regarding Belarus, the consensus among the Member states in relation to the serious human rights violations, including the instrumentalisation of migrants on the border with Poland, has translated into a growing number of restrictive measures of different kinds, which nowadays already affect one hundred and eighty-three persons and twenty-six entities[55]. Conversely, in Venezuela, there is a division about the advisability of extending the restrictive measures against high officials of the Maduro regime responsible for human rights violations, which the EU has been applying since 2017[56], and even about their binding nature for Member States. In this regard, it should be remembered that the ban on entry into EU territory issued against Venezuelan Vice President Delcy Rodríguez was breached by the Spanish authorities, who held a meeting with her in February 2020 at the Madrid airport facilities[57]. Said non-compliance has been settled judicially in Spain with a controversial Supreme Court's Decision, where it is asserted, in our opinion erroneously, that *"the obligations*

[54] B. KOTECHA, *The International Criminal Court's Selectivity and Procedural Justice*, in *Journal of International Criminal Justice*, 2020, pp. 107-139.

[55] Conclusions of the European Council of 20 and 21 October 2021. On 15 November 2021, the Council modified the inclusion criteria of the list to permit the application of selective restrictive measures against persons and entities that organise activities carried out by the Lukashenko's regime to facilitate the illegal crossing of the EU's external borders or to contribute to such activities. The list of sanctioned persons and entities, with express mention of their names, informative data for identification purposes, reasons and date of inclusion, appears annexed to Council Implementing Regulation (EU) 2021/2124 of 2 December 2021 and Council Implementing Decision (CFSP) 2021/2125 of 2 December 2021, OJ L 430I.

[56] Restrictive measures against entities and natural persons in Venezuela date back to Council Regulation (EU) 2017/2063 of 13 November 2017, and Council Decision (CFSP) 2017/2074 of 13 November 2017. The Council of the EU agreed on 11 November 2021 to extend them by one more year, yet without a public announcement via press release as usual. Nowadays, they affect over 55 high-ranking officials, and their suitability has been questioned by Spain, perhaps the Member State that has most vehemently call for dailogue against sanctions; A. AYUSO, S. GRATIUS, "Las respuestas de la Unión Europea a las transiciones inversas en Cuba y Venezuela", *Anuario Latinoamericano Ciencias Políticas y Relaciones Internacionales*, 2020, pp. 89-112.

[57] Council Decision (CFSP) 2018/90 of 22 January 2018 amending Decision (CFSP) 2017/2074 concerning restrictive measures in view of the situation in Venezuela, OJ L 16I , 22.1.2018, p. 14–16.

derived from the CFSP decisions have an essentially political nature", whereby the State responsibility that their violation entails is therefore also exclusively political[58].

The second uncertainty that the application of the new regime raises has to do with both the academic debate on the measurement of the effectiveness of sanctions in general[59], and the limited success that the restrictive measures imposed by the EU have historically shown[60]. Its effectiveness must be pondered in relation to the objectives pursued. Thus, in the case of the regime that concerns us here, it would be necessary to check whether they have modified the behaviour of the recipients (coercion), or restricted their ability to act (containment) and/or stigmatised their behaviour (deterrence). The praxis shows that, at least in terms of those sanctioned, the majority being of Russian nationality, their effects have certainly been scarce, bearing in mind that there is no record of significant changes in their behaviour, not to mention in the state institutions that they serve or represent[61]. In consequence, only in the case of the small group of individuals and national entities from weak states, the disapproval, intended *urbi et orbi*, that their blacklisting and the application of restrictive measures entail will contribute to their international isolation and to a slowdown in their activities[62]. To this is added that while the Commission is competent to control the compliance of the Member States with the restrictive economic measures, this is not the case with the visa bans, whose effectiveness remains at the discretion of said Member states.

Last but not least, the third weak point refers to the lack of coherence and even contradiction of the restrictive measures with respect to other initiatives or strategies within the CFSP framework. In fact, as with other sanctions, they can present counterproductive effects, including the adoption of countermeasures by those third states whose nationals, natural or legal persons, have been sanctioned. Thus, returning to the aforementioned example of Venezuela, the EU, while extending restrictive measures for human rights violations consisting of travel bans and freezing of assets against fifty-five high-ranking officials, has redoubled political dialogue and mediation attempts with the Maduro regime. The inconsistent position of the Union is reflected in the ups and downs with regard to both the recognition of the Guaidó government[63], and its vision of human security[64]. In relation to the specific restrictive measures for human rights violations imposed against senior Russian officials, practically all European Institutions, from the Parliament to the High

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[58] *Author's translation. Auto del Tribunal Supremo, Sala de lo Penal 10453/2020, de 26 de noviembre de 2020. Causa especial núm. 20084/2020 (Spain's Supreme Court decisión, Criminal Division, 10453/2020, of 26 November 2020). Ponente (Reporting Judge) D. Manuel Marchena Gómez; ECLI: ES:TS:2020:10453ª*; For a critical comment, see A. MANGAS MARTIN, "Sobre la vinculatoriedad de la PESC y el espacio aéreo como territorio de un Estado: comentario al Auto del TS español de 26 de noviembre de 2020, Sala de lo Penal". *Revista General de Derecho Europeo,* 2021.

[59] M. D. JAEGER, *Coercive sanctions and international conflicts: A sociological theory*. Routledge, 2018; D. PEKSEN, *When Do Imposed Economic Sanctions Work? A Critical Review of the Sanctions Effectiveness Literature*, in *Defence and Peace Economics*, 2019, pp. 635-647.

[60] N. ZELYOVA, *Restrictive measures-sanctions compliance, implementation and judicial review challenges in the common foreign and security policy of the European Union*, in *ERA Forum*, 2021, pp. 159-181.

[61] I. TIMOFEEV, *Policy of sanctions in Russia-EU relations*, in *The Routledge Handbook of EU-Russia Relations*. Routledge, pp. 252-262.

[62] N. HELWIG; J. JOKELA, AND C. PORTELA. *Sharpening EU sanctions policy: Challenges and responses in a geopolitical era*, in *Finnish Institute of International Affairs Report,* 2020.

[63] C. DÍAZ BARRADO; S. MORÁN BLANCO, *Reconocimiento de gobiernos en el orden internacional. La práctica al hilo de dos asuntos en el espacio latinoamericano: Honduras y Venezuela*, in *UNISCI Discussion Papers*, 2019.

[64] S. GRATIUS; E, RODRÍGUEZ PINZÓN, *Entre seguridad humana y estatal: ¿ofrece la Unión Europea una respuesta coherente a los desafíos de seguridad en Centroamérica, Colombia y Venezuela?*, in *Colombia Internacional*, 2021, pp. 117-145.

Representative, have simultaneously been supporting the tightening of said measures and calling upon the parties to strengthen mutual understanding. After the illegal annexation of Crimea in 2014, the EU agreed on three packages of restrictive measures consisting of visa bans and freezing of funds against a total of one hundred and fifty Russian and Ukrainian officials, and thirty-seven entities, as well as sanctions in certain economic sectors, such as such agriculture, energy, finance and defence[65]. Said sanctions evidenced the Union's commitment to the international principle that enshrines the non-recognition of territorial changes resulting from the use of force; yet, they did not change the Russian position at all[66]. In fact, in May 2015, Russia responded by publishing a blacklist still in force, whereby eighty-nine European Union officials and politicians are barred from entering its territory.

From then on, bilateral relations became tense, until in October 2020, the well-known Navalny case led to the worst crisis in bilateral relations since the implosion of the former USSR, including the application of the sanctions regime for human rights violations for the first time. Still, the adoption of new restrictive measures against Russian nationals has not prevented a good number of Member States from continuing to grant investor residence schemes, also known as "golden visas", to Russian oligarchs, many of them being close to Putin, which represents a flagrant contradiction denounced by the European Parliament. For its part, Russia responded by taking countermeasures. Thus, on 30 April 2021, the government of V. Putin prohibited the entry of another eight European officials, including the recently deceased President of the EP, D. Sassoli, and the Vice President of the European Commission, V. Jourova. The Russian government then imposed a ban on imports of a number of agricultural products from the EU, a circumstance that eroded the consensus that had prevailed in the European Council until then[67]. Given the crucial impact that Russia has on all areas of the EU, the former being for instance the main supplier of natural gas, the collateral effects of the sanctions are perceived both internally and internationally[68]. At an internal level, the high costs of the restrictive measures for some Member states have prompted them to raise the question as to whether it makes sense to continue sacrificing their particular interests in exchange for such meagre returns, a circumstance that has subsequently resulted in the polarisation of the Member States in two opposing groups, those in favour and those against sanctions[69], respectively, which undermines the design and execution of a solid CFSP[70]. At the international level, the spiral of retaliation between the EU and Russia hinders the common fight against jihadist terrorism and the resolution of entrenched conflicts, such as the one in Syria[71].

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65 E. MORET; T. BIERSTEKER et al., *The New Deterrent? International Sanctions against Russia over the Ukraine Crisis. Impacts, Costs and Further Action*, *The Graduate Institute Geneva, Program for the Study of International Governance*, 2016.

66 E. MILANO, *The non-recognition of Russia's annexation of Crimea: three different legal approaches and one unanswered question*, in *Question of International Law,* 2014, pp. 35-55.

67 V. SZÉP, *New intergovernmentalism meets EU sanctions policy: The European Council orchestrates the restrictive measures imposed against Russia*, in *Journal of European Integration*, 2020, pp. 855-871

68 P. POSPIESZNA; J. SKRZYPCZYŃSKA; B. STĘPIEŃ, *Hitting two birds with one stone: How Russian countersanctions intertwined political and economic goals*, in *Political Science and Politics*, 2020, pp. 243-247.

69 A. KARLOVIĆ; D. ČEPO; K. BIEDENKOPF, *Politicisation of the European Foreign, Security, and Defence Cooperation: the case of the EU's Russian sanctions*, in *European Security*, 2021, pp. 344-366.

70 A. DANDASHLY et al., *Multipolarity and EU Foreign and Security Policy: Divergent Approaches to Conflict and Crisis Response*, *JOINT Research Papers*, 2021.

71 R. FERRERO TURIÓN, *Las sanciones de la UE hacia Rusia en el contexto del conflicto ucraniano*, en *Revista CIDOB d'Afers Internacionals,* 2020, pp. 187-207.

In the light of the foregoing, it can be deduced that the EU insisting on maintaining restrictive measures for human rights violations can be explained by two reasons. On the one hand, due to their strong symbolic or indicative value, whereby an unequivocal message that there are certain red lines not to be crossed is sent not only to their recipients, but also to the countries of which they are nationals. And on the other hand, from an internal point of view, because their maintenance has been possible in many of the Member States, such as Spain, constituting an issue of little or no relevance to the public and the political parties, by means of which their continuity has been guaranteed under different governments and leaderships[72].

4.2. Technical-legal uncertainties

With regard to the technical-legal uncertainties, which are added to those previously addressed, we highlight the following ones. Firstly, we are to take into account the fact that the execution of the new regime is incumbent upon the Council instead of the Commission, an exception that stems from its peculiarity. Thus, the restrictive measures are developed through the corresponding implementing or application regulations, under which the competent national authorities for the exchange and update of information are determined. It is for the Working Party of Foreign Relations Counsellors (RELEX) to monitor the degree of compliance by the Member States with the economic sanctions, visa bans being however de facto icumbent upon Member states.

Secondly, the unforeseen gaps in certain relevant issues, and which are to be resolved through practice. This explains the publication for the first time of a Commission guidance note, of 17 December 2020, which clarifies some doubts and leaves open the possibility of future updates. Among the most delicate issues, worthy of note is the review of the blacklists and the procedure for the recipients of the measures to request their exclusion from them. A priori, the restrictive measures are temporary, such that after a period of time, they will be subject to review, whereby their extension or termination are subsequently agreed upon. Notwithstanding the above, this period is not predetermined, given that it is only indicated that the review is to be implemented periodically and at least every twelve months, in accordance with the provisions of the corresponding legal act. Proposals for the inclusion or removal of a person or entity from the lists must specify the particular justifying reasons, a contribution that is incumbent upon the High Representative or the Member State that has endorsed it. Previous studies on sanctions agreed by the UN indicate that the higher their duration, the more ineffective they become[73]. The termination of the restrictive measures for human rights violations through said commitment to periodic review, instead of through a sunset clause, is due to the fact that indefinite sanctions are typical of particular material regimes, such as those related to terrorism or non-proliferation. We believe that in human rights violations, it is essential to periodically review said sanctions with a view to their cessation, because if they are not truly punitive, but preventive and persuasive, then the recipients ought to rest assured that when they demonstrate a modification in their behaviour, the sanctions will automatically decline. Thus, the incentive to comply will be stronger the more limited their validity is, as opposed to those restrictive measures that are perpetuated over time without causing any change in their recipients' behaviour.

[72] C. PORTELA, P. POSPIESZNA, J. SKRZYPCZYŃSKA, D. WALENTEK, *Consensus against all odds: explaining the persistence of EU sanctions on Russia*, in *Journal of European Integration,* 2021, pp. 683-699.
[73] K.E. BOON, *Terminating Security Council Sanctions*, in *International Peace Institute*, 2014.

Nonetheless, some doubts remain. On the one hand, the burden of proof of behavioural change is more difficult than in other forms of sanctions, especially considering that restrictive measures can be imposed on those who participate "in some way" in the human rights violations perpetrated by a principal offender. On the other hand, it is not clear whether regarding human rights violations classified as international crimes of genocide or crimes against humanity, a minimum period of time greater than the aforementioned twelve months ought to elapse before admitting a request for removal from the list, given their special seriousness. And finally, there is the possibility that a person may simultaneously be included in several lists or subject to a process before the International Criminal Court. In such a case, if the request for removal from the list is successful in a framework of human rights violations, said removal would not have an automatic effect on other lists, except in instances of lack of evidence or acquittal by the International Criminal Court. As in other sanctions regimes, the recipients of restrictive measures for human rights violations may also request a temporary exemption to meet their basic needs, such as food, medical treatment or for the payment of professional fees related to the provision of legal services[74]. On this matter, the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights warned, in the 2017 Report, that humanitarian exemptions were not being respected[75]. In particular, his gave an account of the case of a sanctioned Russian businessman, whose wife was hospitalised in a European clinic. When trying to pay the medical bill, he found that his funds had been frozen, and his request to be allowed to use said funds for that purpose, dismissed, despite it being an exemption expressly provided for in the Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy[76].

The third legal uncertainty, and the most far-reaching one, is related to the obligation to respect the fundamental rights of the recipients of the restrictive measures and, in particular, the right to a fair trial and the presumption of innocence, irrespective of their not being punitive measures or having been imposed by a judicial authority. If we also bear in mind the high number of appeals registered by the remaining sanctions regimes, the judicial control of the restrictive measures acquires even greater relevance in this case[77]. It would constitute a *contradictio in terminis* for the EU to fight against human rights violations without scrupulously respecting said rights, for which reason it is necessary to resort to the previous case law of the CJEU on the matter in order to identify the problems and their possible solutions[78].

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[74] Art. 4.1 of the Council Regulation (EU) 2020/1998 and Article 3.3 of the Council Decision (CFSP) 2020/1999. (entiendo que artículo 3.3).

[75]Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, on his mission to the Russian Federation, A/HRC/36/44/Add.1, 27 july 2017, p. 12.

[76] Guidelines on the implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, 4 may 2018.

[77] C.E. ECKES, *EU Human Rights Sanctions Regime: Striving for Utopia backed by Sovereign power?*, in *European Foreign Affairs Review*, 2021, pp. 219-242.

[78] N. ZELYOVA, "Restrictive Measures –sanctions compliance, implementation and judicial review challenges in the Common Foreign and Security Policy of the European Union", *Era Forum*, 2021, pp. 159-181; J. FERRER LLORET, *Las medidas restrictivas de la Unión Europea contra las violaciones graves de los derechos humanos en el Mediterráneo: ¿una potencia normativa*, in *Revista Electrónica de Estudios Internacionales*, 2021.

In this connection, the sources of information that support the inclusion of a person or entity in the EU sanctions lists may come from internal informants or *whistleblowers*[79], from civil society or from third countries. Still, said sources are not always public, which makes it difficult for those affected to refute the veracity of the behaviours attributed to them. Further to this, given that it is not a judicial process, it is not necessary to present evidence of guilt *strictu sensu*. When elucidating this issue in relation to other sanctions regimes, the CJEU has not established a minimum evidentiary standard, whilst admitting the validity of circumstantial evidence and endorsing the inclusion in the blacklists of persons who, due to their position, position and activities, were in intimate collusion with the government of the sanctioned country, unless the interested parties prove otherwise. As has already been shown, the categories of recipients of the restrictive measures under this new regime are considerably broad, including those who collaborate in different ways with the main perpetrator of the human rights violations. Consequently, their inclusion in said lists may, in turn, presumably be based on contextualised assessments, which de facto implies a reversal of both the burden of proof and the presumption of innocence. In short, the recipients of the restrictive measures are "guilty" of the human rights violations imputed to them, except where they are able to prove otherwise.

Without prejudice to the foregoing, there are the duties incumbent upon the High Representative or the Member States as *whistleblowers*, which must provide reasonable evidence on the human rights violations and abuses perpetrated by the recipients of the measures. The Council, in turn, has the duty to notify those affected of the reasons for their inclusion in the list, either by notification to their address, or, if this is unknown, through the publication of a notice in the OJEU[80]. Considering that nothing is said about the stage of proceedings in which said communication must take place, everything points to the fact that it will be carried out once the restrictive measures have been imposed and the blacklist is published and in force, which goes against the preventive nature of said measures, and which is typical of punitive sanctions. In this vein, the reason is straightforward: if the sanctioned persons are warned beforehand, they could pre-empt the sanctions and frustrate the freezing of assets or travel bans, whereby the latter might become ineffective before being applied. Once the *ex post facto* decision has been communicated, the affected party may present observations or new exculpatory evidence. The Council will study them, once again informing those affected of its final decision. Were the allegations or exculpatory evidence rejected, the recipients of the measures may only file an appeal for annulment. In the light of

[79] Concerning the protection of *whistleblowers* in relation to serious human rights violations, we are to remember the Joint Statment of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, and the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, of 21 December 2010*: "3. Public authorities and their staff bear sole responsibility for protecting the confidentiality of legitimately classified information under their control. Other individuals, including journalists, media workers and civil society representatives, who receive and disseminate classified information because they believe it is in the public interest, should not be subject to liability unless they committed fraud or another crime to obtain the information. In addition, government "whistleblowers" releasing information on violations of the law, on wrongdoing by public bodies, on a serious threat to health, safety or the environment, or on a breach of human rights or humanitarian law should be protected against legal, administrative or employment-related sanctions if they act in good faith. Any attempt to impose subsequent liability on those who disseminate classified information should be grounded in previously established laws enforced by impartial and independent legal systems with full respect for due process guarantees, including the right to appeal".* Available at: https://www.oas.org/en/iachr/expression/showarticle.asp?artID=829&lID=1

[80] Articles 14-15 of the Council Regulation (EU) 2020/1998 and Article 5 of the Council Decision (CFSP) 2020/1999.

the previous trajectory of the CJEU, three *ad futurum* observations can be made in relation to the appeals that the EU Global Human Rights Sanctions Regime will certainly engender.

The first one is that, recently, the CJEU has broadly interpreted the concept of legal person in Article 264.4 of the TFEU in order to accommodate third non-EU countries, whose active legitimacy to question the restrictive measures imposed upon their nationals it recognises. Specifically, in 2021, it overruled a previous ruling by the General Court admitting that the sanctions against high-ranking officials of the Venezuelan government directly affected said country, which, therefore, had a direct interest in their annulment[81].

As for the second observation, the CJEU has been very scrupulous both in the factual verification of the human rights violations that are the reason for the restrictive measures, and in respect of the participation of the appellants. In fact, the information contained on the blacklists, in addition to being a sufficient basis for the measures, must be detailed and specific.[82] Particularly, this has been the reason why the sanctioning procedures against Ukrainian leaders close to the Putin regime adopted after the 2015 Crimean crisis have been annulled.[83] However, the response has been just the opposite in relation to the nationals of Russia and Venezuela.

Regarding the former ones, the CJEU confirmed all the restrictive measures against high-ranking Russian officials, except for the case of billionaire A. Romanovich Rotenberg[84], in which it admitted a partial annulment on the grounds that the existence of a link, direct or indirect, between his activities or actions and the situation in Ukraine that gave rise to the adoption of the restrictive measures against him was not proved, the Council having only provided indirect evidence based on inaccurate press articles. In similar terms, it has pronounced itself regarding those sanctioned of Venezuelan nationality. Thus, in the ruling of 14 July 2021, the General Court of the EU, after undertaking a detailed examination of the specific situation of the appellants, dismissed the appeals of nine senior officials, including that of Vice President Delcy Rodríguez, who were sanctioned in 2018, for undermining democracy and the rule of law in their country. It has only upheld the one filed by the Secretary-General of the Venezuelan National Electoral Council (CNE), XA Moreno Reyes, considering that, as happened with Rotenberg, the Council has not been able to prove that it was he who had approved the laws that undermined democracy in said country, or his contribution to the illegitimate 2017 Constituent National Assembly of Venezuela. Considering that his signature was a simple administrative requirement, and that he neither

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[81] Judgment of the Court (Grand Chamber) of 22 June 2021, Bolivarian Republic of Venezuela v. Council of the European Union, Case C-872/19 P, EU:C:2021:507. It resolves the appeal for cassation filed against the General Tribunal's Decision of 20 September 2019, which in turn dismissed the appeal for annulment filed by the Bolivarian Republic of Venezuela against Regulation 2017/2063, under which it had erroneously been interpreted that Venezuela had no interest in exercising the right of action, that the challenged provisions did not directly affect Venezuela, and that said State was neither a natural nor a legal person under Article 263.4 of the TFEU; B. VAZQUEZ RODRÍGUEZ, "El locus standi de terceros Estados para interponer recurso de anulación contra medidas restrictivas de la UE: el asunto C-872/19 P, Venezuela/Consejo", *Revista de Derecho Comunitario Europeo,* 2021, pp. 1037-1060.

[82] Council of the European Union v. Liberation Tigers of Tamil Eelam (ltte), 2017, ECLI:EU:c:2017:583.; C-530/17 P Azarov v. Council, 2018, ECLI:EU:C:2018:1031; C-599/ Joined Cases C-72/19 P and C-145/19 P Saleh Thabet and Others v. Council, 2020, ECLI:EU:C:2020:992.

[83] C. CHALLET, *Reflections on Judicial Review of EU Sanctions Following the Crisis in Ukraine by the Court of Justice of the European Union*, in *Research Papers in Law* 4/2020.

[84] P. KALINICHENKO, *Post-Crimean Twister: Russia, the EU and the Law of Sanctions*, in *Russian Law Journal*, 2017, pp. 9-28; K. ENTIN, *The EU-Russia Sanctions Regime before the Court of Justice of the EU*, in *Principled Pragmatism in Practice*, Brill Nijhoff, 2021. pp. 104-124.

participated in the elaboration of the CNE's positions nor had any influence on the content of the decisions of this body, he was not responsible for the violations that motivated the imposition of the restrictive measures[85].

Third, the aforementioned annulments of the restrictive measures by the CJEU raise two burning issues. On the one hand, the possibility that the recipients of said measures, together with the appeal for annulment that they must file within the tight two-month period, also request a national judge to raise a preliminary ruling on the validity of the regulations on which the measures are based, in a sort of forum shopping fashion, an event that can also occur between the ECHR and the CJEU with regard to the EU sanctions that implement those agreed by the UN. And, on the other hand, the annulment opens the door to an issue that the CJEU initially eluded in the Rosneft case[86], and that it has later resolved, but not in a totally satisfactory way, in the Bank Refah Kargaran case[87], namely the compensation for damages suffered by those sanctioned who, after achieving their exclusion from the list, wish to clear their name[88]. Thus, in the Bank Refah case, the CJEU unequivocally affirms for the first time its jurisdiction to hear claims for compensation filed by individuals or legal entities affected by the CFSP restrictive measures. From a theoretical point of view, it does so by resorting to the necessary coherence of the EU judicial system, an abstract argument that some authors have even described as unconvincing[89]. As for the practical level, the

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[85] Case T-552/18, Xavier Antonio Moreno Reyes v. Council of the European Union, 14 July 2021. *"74. In the light of all the foregoing, it must be held that, in response to the applicant's objections, the Council has not established that the ground relied on against the applicant is well founded, since it has not been able to show that the applicant approved the CNE's decisions. The Council has not been in a position to convincingly dispute the applicant's arguments, first, that the signature of the Secretary General affixed, without any discretion, to the CNE's decisions, seeks only to check that they accurately reflect the conclusions reached by the members of that institution and to ensure compliance with the formal legal requirements for the adoption of those decisions and, second, that the Secretary General does not play a part in drawing up the CNE's positions and has no influence over the content of the CNE's decisions; 75 Accordingly, the Council made an error of assessment in concluding in the contested acts that the applicant, as Secretary General of the CNE, approved the decisions of that institution.; 76 It follows that the applicant cannot be held responsible for the CNE's decisions which, according to the Council, undermined democracy in Venezuela".*

[86] Case C-72/15, Judgment of 28 March 2017; P. ANDRÉS SÁENZ DE SANTAMARÍA, *Mejorando la "lex imperfecta": tutela judicial efectiva y cuestión prejudicial en la PESC (a propósito del asunto "Rosneft)*, en *Revista de Derecho Comunitario Europeo*, 2017, pp. 871-903; L. BORLINI; S. SILINGARDI, *Defining elements and emerging legal issues of EU "sanctions"*, in *The Italian Yearbook of International Law Online*, 2018, pp. 33-52; H.O. DE LINDEN, *The Court of Justice's Difficulty with Reviewing Smart Sanctions as Illustrated by Rosneft*, in *European Foreign Affairs Review*, 2019,

[87] Case C-134/19 P *Bank Refah Kargaran/Council*, Judgment of 6 october 2020 (Grand Chamber); P. VAN ELSUWEGE; J. DE CONINCK, "Action for damages in relation to CFSP decisions pertaining to restrictive measures: a revolutionary move by the Court of Justice in Bank Refah Kargaran?", *EU Law Analysis*, 2020; T. VERELLEN, *In the Name of the Rule of Law? CJEU Further Extends Jurisdiction in CFSP (Bank Refah Kargaran"*, in *European Papers*, 2021, pp. 17-24; M.E. BARTOLONI, *'Restrictive Measures' Under Art. 215 TFEU: Towards a Unitary Legal Regime?. Brief Reflections on the Bank Refah Judgment*, in *European Papers*, 2021, pp. 1359-1369; N. BERGAMASCHI, *La sentenza Bank Refah Kargaran: l'evoluzione del controllo giurisdizionale sulla PESC"*, *European Papers*, 2021, pp. 1371-1383.

[88] "*Negative impact of unilateral coercive measures: priorities and road map"*. Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights. A/HRC/45/7, 21 July 2020. "*52. The Special Rapporteur underscores that the contemporary system does not provide for a comprehensive mechanism for the protection of human rights and for accountability and redress for those whose rights have been violated by unilateral sanctions. Existing mechanisms provide only for the possibility of diplomatic protection by States (…) and through individual appeals to regional courts (in particular, the European Court of Justice in accordance with article 275 of the Treaty on the Functioning of the European Union), all of which have rather limited competence".*

[89] J. SANTOS VARA, *El control judicial de la política exterior: hacia la normalización de la PESC en el ordenamiento jurídico de la Unión Europea (a propósito del asunto" Bank Refah Kargaran")*, en *Revista de Derecho Comunitario Europeo*, 2021, pp. 159-184.

admissibility of said proceedings for damages does not imply facilitation for the appellants to obtain them. It will not suffice to have won the appeal for annulment, but it must also be proved that there has been a serious infringement of a legal norm that conferred rights on said appellants, a requirement that *a priori* CFSP Decisions relating to the imposition of restrictive measures do not meet[90].

5. *Conclusions and final thoughts*

The analysis of the HRSR shows that this new thematic horizontal regime is a flexible instrument, and with great potential to implement the CFSP in accordance with one of its basic guiding principles, namely the *"consolidation of democracy and the rule of law, as well as respect for human rights and fundamental freedoms"*[91]. After its first year of validity, its main contributions and challenges can already be seen emerging.

At the normative political level, the new regime is an example of imperfect transnationalism, for although the adoption of the measures and their inclusion in the blacklists require unanimity, the Member States seem to have assumed the supranationality and the centrality that their application entails. In fact, in the period between December 2020 and December 2021, three rounds of restrictive measures have been agreed against a variety of recipients from all continents, mostly natural persons who are nationals of powers with which the EU maintains important relations of all kinds, as is the case of Russia and China. These measures have been adopted and extended beyond the particular interests of Member states, conveying a message of commitment and of European unity through the values that inspire them. Still, said commitment is manifestly improvable in terms of coherence and effectiveness. Regarding coherence, it is hardly justifiable to impose sanctions for human rights violations upon persons or entities in official positions of countries which the EU Member States sell weapons to, or do business with, and where human rights are sidelined. In consequence, the new regime does not seem to contribute to ending double standards in the EU's fight against human rights violations and international crimes. On the contrary, it contemplates preventive measures that precede or complement individual criminal responsibility at an international level, whilst completely circumventing state responsibility for the planning and commission of said violations. And as far as effectiveness is concerned, there is no evidence of the usefulness of the measures adopted or that they have succeeded in changing the behaviour of the recipients. In additon, the selection of the recipients of the restrictive measures is not neutral or objective, but rather responds to strategies that are similar to those used by the international courts of the international criminal justice system, and regardless of the seriousness of the violations perpetrated.

At a normative philosophical level, it is also unclear what type of power the HRSR obeys. Insofar as certain values and principles are present in its adoption and application, its sanctions have been labelled as selective and preventive measures typical of the civil,

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[90] C. BEAUCILLON, *Opening up the horizon: The ECJ's new take on country sanctions*, in *Common Market Law Review*, 2018; Also "The European Unions position and practice with regard to unilateral and extraterritorial sanctions, *Research Handbook on Unilateral and Extraterritorial Sanctions*. Edward Elgar Publishing, 2021.

[91] C. PÉREZ BERNÁRDEZ, *Las sanciones de la UE como instrumento de la acción exterior: una apuesta renovada por sus valores fundamentales*, en F. ALDECOA (Ed.), *El papel internacional de la Unión Europea. Propuestas para la Conferencia sobre el Futuro de Europa*, Catarata, 2021, pp. 205-236.

normative or ethical power that characterises the EU against the military power deployed by other actors[92]. Nonetheless, this definition does not take into consideration the subjective motivations also present in the new regime, the loopholes in the procedures for inclusion and exclusion from the lists, or the limited procedural legal guarantees that assist those sanctioned. After a year since its approval, the praxis generated so far continues to cast reasonable doubts on the true nature and purpose of the measures, as well as on the scope of their control by the CJEU. It would hence be advisable to clear them without delay in order to prevent the HRSR from collapsing and becoming an unrealised instrument detached from the CFSP, which, if it is to deserve such a name, must reconcile rhetoric with reality, whilst maintaining a firm commitment *ad intra* and *ad extra* to International Human Rights Law[93].

[92] R. NOUREDDINE, *Normative Power Europe and in Field of Human Rights: is the EU a Force for Good in the World?*, in *Australian and New Zealand Journal of European Studies*, 2021, pp. 111-118.
[93] J. LETNAR ČERNIČ, *The Reformed EU Human Rights Sanctions Regime: A Step Forward or an Empty Threat?*, in *Business and Human Rights Journal*, 2021, pp. 559-566.