ARTICLES

ARE THE EU MEMBER STATES STILL SOVEREIGN STATES UNDER INTERNATIONAL LAW?

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LONG-ARM COLLECTIVE SOVEREIGNTY THROUGH THE EU: THE EU GLOBAL HUMAN RIGHTS SANCTIONS REGIME TRANSCENDING THE LIMITS OF THE FIGHT AGAINST IMPUNITY

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ABSTRACT: The EU Global Human Rights Sanctions Regime was adopted by the European Union in December 2020, following in the footsteps of its allies and some of its own Member States. Initiated across the Atlantic in response to the murder of Russian lawyer Sergei Magnitsky, these thematic international sanctions can now target anyone associated with the most serious human rights violations. Presented as key levers in the international fight against impunity, these instruments lie at the confluence of foreign policy and criminal justice. The EU Global Human Rights Sanctions Regime is therefore a privileged observation point for studying the evolution of practice in areas that are traditionally closely associated with State sovereignty. More specifically, the analysis, carried out within the framework of both EU external action law and public international law, shows how the EU Global Human Rights Sanctions Regime enables the Union and its Member States to grasp some

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The present *Article* partly updates and further develops some of the research results published in two French-language contributions on the restrictive measures regime in question: C Beaucillon, 'Lutte conte l'impunité ou alternative à la justice? A propos des mesures restrictives de l'Union européenne en réaction aux violations graves des droits de l'homme' (2021) RTDH 551; C Beaucillon, 'Projection normative et optimisation du droit international: la fin et les moyens des mesures restrictives de l'Union européenne en réaction aux violations graves des droits de l'homme' (2021) Revue des Affaires européennes 611.

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international situations which would fall outside their single competences and jurisdictions. This in turn illustrates a form of enhanced, collective and long-armed sovereignty, exercised on the international stage by the EU and its members in the service of their values and strategic interests.

KEYWORDS: EU external action – Common Foreign and Security Policy – EU values – human rights – international criminal law – competence.

I. INTRODUCTION

On 7 December 2020, the European Union adopted a new regime of restrictive measures to respond to serious human rights violations and abuses,[1] also referred to in practice as the EU global human rights sanctions regime. These instruments are part of the now well-known practice of the European Union to adopt non-military coercive measures designed to compel their target – third States and/or their nationals – to change conduct that the Union alleges is contrary to international law.2 From this perspective, the European Union's restrictive measures are one of the most effective and widely used contemporary instruments for projecting its normative power on the international scene.3 In doing so, the European Union intends to contribute to the respect, enforcement and even progressive development of international law,4 by promoting a specific normative vision of international law through its own interpretations and qualifications.

The EU global human rights sanctions regime adds up to the 37 other regimes of restrictive measures in force in January 2024.[5] Of these, 34 are aimed at third countries and three are formulated in a thematic or horizontal manner. The measures adopted in response to international terrorism,[6] adopted at the turn of the millennium under the impulsion of the UN Security Council,[7] were for a long time the only thematic or horizontal measures of the European Union. This targeting technique, until then mainly used by

[1] Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures in response to serious violations and serious harm to human rights; Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures in response to serious violations and serious harm to human rights.

[2] C Beaucillon, *Les mesures restrictives de l'Union européenne* (Bruylant 2014) 712; C Beaucillon, 'The European Union Position and Practice with regard to Unilateral and Extraterritorial Sanctions' in C Beaucillon (ed), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar Publishing 2021) 110-129.

[3] I Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) JComMarSt 235-258, 235.

[4] As commended by arts 3(5), 21(1) and 2 TEU.

[5] For an overview: EU Sanctions Map, www.sanctionsmap.eu.

[6] Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism. On the loss of the territorial character of restrictive measures against international terrorism and the emergence of the first horizontal regime of restrictive measures, see C Beaucillon, *Les mesures restrictives de l'Union européenne* cit. 448 and the bibliographical references cited.

[7] See Security Council, Resolution 1267 of 15 October 1999, UN Doc S/RES/1267(1999) and Resolution 1373 of 28 September 2001, UN Doc S/RES/1373(2001).

the United States in a unilateral context,[8] was adopted by the European Union on the occasion of measures taken in 2018 in response to the proliferation of chemical weapons[9] and in 2019 in response to cyber-attacks targeting the Union and its members.[10] These restrictive measures belong to the category of so-called targeted measures, since they are based on the identification of persons or entities on whom various types of restrictions are imposed, such as travel or transit bans, or freezes of funds and assets. The specificity of so-called thematic or horizontal restrictive measures regimes, however, is that they do not formally target a State, but focus on the activities to which the measures respond. In this respect, the European Union's restrictive measures regime on serious human rights violations stands out as an example/a very special instrument. Indeed, the political objective is thus shifted from the stigmatisation of the third state formally targeted by international sanctions, to the highlighting of values and interests these instruments are intended to promote on the international scene.

The procedure for adopting such targeted restrictive measures is the same, whether they are formally taken against a state or are instead designed horizontally through a thematic scope. First, a Council decision is unanimously[11] adopted under the Common Foreign and Security Policy (CFSP), on the basis of art. 29 of the Treaty on European Union (TEU). Second, this decision is followed by a European regulation based on art. 215 of the Treaty on the Functioning of the European Union (TFEU), which is adopted by the Council at a qualified majority on the High Representative for Foreign Affairs and Security Policy and the Commission. The restrictive measures adopted on 7 December 2020 follow the same procedural pattern.[12]

The political context of the adoption by the European Union of measures to respond to serious human rights violations or abuses deserves to be recalled here.

First of all, the European Union joined an international dynamic initiated several years earlier. The United States was the first to take such measures, based on the *Russia*

[8] C Portela, 'Horizontal Sanctions Regimes: Targeted Sanctions Reconfigured?' in C Beaucillon (ed), *Research Handbook on Unilateral and Extraterritorial Sanctions* cit. 441-457.

[9] Council Decision 2018/1544 of 15 October 2018 on restrictive measures to combat the proliferation and use of chemical weapons.

[10] Council Decision 2019/797 of 17 May 2019 on restrictive measures against cyber attacks that threaten the Union or its Member States.

[11] Art. 31 TEU introduces the conditions for "constructive abstention" through which an EU Member State can refrain from voting the measures at the CFSP level without hindering their collective implementation through art. 215 TFEU. In such a case, the Member State is however not bound to implement the restrictive measures where their national competences are at stake, as in the field of arms trade for instance. Recourse to constructive abstention remains exceptional. On the recent practice in the context of the restrictive measures against Russia, see: E Bartoloni, 'Simple Abstention and Constructive Abstention in the Context of International Economic Sanctions: Two Too Similar Sides of the Same Coin?' (2022) European Papers www.europeanpapers.eu 1121-1131.

[12] Council Decision (CFSP) 2020/1999 and Regulation (EU) 2020/1998 cit.

and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act[13] of 2012, which responded to the torture and murder of Moscow lawyer Sergei Magnitsky. The scope of the US measures was then expanded in the *Global Magnitsky Human Rights Accountability Act*[14] of 2016. Subsequently, several states joined this US initiative by adopting similar national legislation: Estonia in 2016,[15] Canada[16] and Lithuania[17] in 2017, Latvia in 2018,[18] and the UK in 2018[19] and 2020.[20] The presence of some EU Member States in this list calls for comment. The position of the three Baltic States is undoubtedly explained by the trigger for the adoption of the EU global human rights sanctions regime. The position of the United Kingdom is particular, insofar as London, which adopted its own legislation in the context of the Brexit, had largely supported the adoption by the European Union of new regimes of horizontal restrictive measures based on the American model.[21]

Secondly, the adoption by the European Union of its own global human rights sanctions regime seems to be a response to some of the criticisms it has received, mainly from across the Atlantic, regarding its lack of commitment to the defence of human rights and, more particularly, democracy, both within the European Union and in the implementation of its development policy.[22] The political importance of these various criticisms is commensurate with the place of these principles in the construction of Europe: the promotion of human rights and democracy are among the founding values of the Union.[23]

It follows from these considerations that the EU's restrictive measures in response to serious human rights violations are part of the contemporary dynamics of the EU's external action in favour of the effective implementation of international law. More specifically, and as this *Article* is a contribution to the exploration of the issue of EU Member States' sovereignty under international law,[24] the specificities of the design and implementation of the regime of human rights restrictive measures lead to wonder whether, through the Council of the European Union, the Member States are exercising a form of "collective

13 United States, Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act [14 December 2012].

14 *Ibid*. 114-328.

15 Estonia, Amendment to Obligation to Leave and Prohibition on Entry Act [8 December 2016].

16 Canada, Justice for victims of corpus foreign officials act (Sergei Magnitsky Law) SOR/2017-233 [3 November 2017].

17 Lithuania, Amendment art. 133 to Law No IX-2206 on the Legal Status of Aliens [16 November 2017].

18 Latvia, Attachment to the Law of Sanctions [8 February 2018].

19 United Kingdom, Sanctions and Anti Money-Laundering Act (SAMLA) [23 May 2018].

20 United Kingdom, Global Human Rights Sanctions Regulations (Reg 680/2020) [6 July 2020].

21 C Portela, 'Horizontal Sanctions Regimes' cit.

22 C Beaucillon, 'Lutte contre l'impunité ou alternative à la justice? A propos des mesures restrictives de l'Union européenne en réaction aux violations graves des droits de l'homme' (2021) RTDH 551-571.

23 Art. 2 TEU.

24 The author wishes to thank the organizers of the European Papers – Jean Monnet Network Conference in the context of which this contribution has been conceived: "Are the EU Member States still Sovereign States under International Law?" (15-16 December 2022) Sapienza University of Rome.

sovereignty".[25] Since these measures are adopted in response to the violation of certain rules and principles of international law as defined in customary and conventional international law (*e.g.* international crimes), it is possible to question the consequences of this new Council practice for the interpretation and implementation of such essential norms of public international law.

Indeed, this sheds a new light on EU Member States' sovereignty: are we in practice witnessing a collective exercise of their sovereignty by the Member States of the European Union within the Council? What consequences can be drawn from this for the collective implementation of public international law? This question will be dealt with in terms of normative considerations, through the detailed analysis of the specific international rules (and the interpretation thereof), that the EU and its Member States intend to promote on the international scene in order to fight against the impunity for serious human rights violations (section II). Conversely, the serious human rights violations covered by the restrictive measures regime at issue correspond, for the vast majority of them, to (international) criminal offenses. This raises the question of the territorial and/or personal jurisdiction (or lack thereof) of the EU and its Member States to punish such acts, and places in a singular perspective the recurrent question of the punitive nature and purpose restrictive measures. Returning to the question of collective sovereignty, would this mean that EU restrictive measures are used, in a way, so as to go beyond the traditional European vision of (criminal) sovereignty of the Member States, allowing for an alignment with US practice, including extraterritoriality? This question will be dealt with in terms of powers and competences considerations, and will be anchored in an in-depth analysis of the nature, purpose and effective reach of the restrictive measures designed to fight against impunity of serious human rights violations (section III).

II. The normative positioning of the Union: a new space for the collective exercise of sovereignty

II.1. Human rights and criminal law, a source of inspiration and legitimacy

Art. 1 of the CFSP Decision and art. 2 of the EU Regulation adopting the EU global human rights restrictive measures at issue are formulated in almost identical terms as regards the violations and breaches to which these measures are intended to respond. It should

[25] This term was used by the sole arbitrator Max Huber in the Island of Palmas case (Netherlands, USA), 4 April 1928, Reports of international arbitral awards, vol. II, p. 838: "Sovereignty in the relations between States signifies independence. [...] The special cases of the composite State, of collective sovereignty, etc., do not fall to be considered here and do not, for that matter, throw any doubt upon the principle which has just been enunciated" (emphasis added).

be noted here that these instruments do not qualify these violations and breaches, an exercise to which this analysis will refer.

First, the Decision and the Regulation refer to international crimes – genocide and crimes against humanity – and then to material elements of international crimes – torture, slavery, extrajudicial executions, enforced disappearances and arbitrary arrest or detention.[26] Torture and slavery also involve the violation of peremptory norms of public international law, as does genocide. The offenses on this first list are not specified in any way and appear to be capable of triggering inclusion on the target list by a single finding of the Council.

Next comes a non-exhaustive list of human rights violations or abuses considered to be "widespread, systematic or otherwise serious in relation to the objectives of the Common Foreign and Security Policy".[27] It includes trafficking in human beings, sexual violence, but also violations of freedom of assembly and association, freedom of opinion and expression, and freedom of religion or conscience. In this rather heterogeneous list, a distinction should however be made between criminal activities and violations of civil and political rights, some of which – freedom of assembly, freedom of opinion – are the cornerstone of the political conditionality of the partnership agreements concluded by the European Union with third countries. This mixing of genres seems justified by the introduction, in the criteria for assessing the seriousness of the violation of the rights in question, of subjective elements that are external to the norms governing the protection of these rights, but that are instead linked to the European Union's objectives in the conduct of its external relations.

From the point of view of EU law, on the one hand, the initiative may seem logical in view of the objective of coherence in external action, which is binding on the institutions of the European Union.[28] From an international law perspective, on the other hand, it would be difficult to accept that the seriousness of violations likely to trigger the adoption of restrictive measures could depend solely on a subjective interpretation of the EU, in the light of the objectives of its external action policy.

The following paragraph provides a welcome clarification at this point: in applying (the decision and the regulation), account should be taken of “customary international law and widely recognized instruments of international law".[29] This is followed by another illustrative list of twelve international conventions, combining the 1948 International Convention on the Prevention and Punishment of the Crime of Genocide, the 1989 United Nations General Assembly Convention on the Rights of the Child, and the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms adopted by

[26] Art. 1(1)(a)-(c) of Council Decision (CFSP) 2020/1999 cit.; art. 2(1)(a)-(c) of Regulation (EU) 2020/1998 cit.
[27] Art. 1(1)(d) of Council Decision (CFSP) 2020/1999 cit.; art. 2(1)(d) of Regulation (EU) 2020/1998 cit.
[28] Art. 21(3) TEU.
[29] Art. 1(2) of Concil Decision (CFSP) 2020/1999 cit.; art. 2(2) of Regulation (EU) 2020/1998 cit.

the Council of Europe. A comparison of these three texts suffices to raise several questions concerning the scope of the instruments in question.

First, while the chapeau of the paragraph begins with a reference to customary international law, the juxtaposition of "widely recognized instruments" hardly seems capable of producing the same effect. This can be dealt with in terms of both material and formal considerations.

In terms of substance, these legal catalogues and their interpretation are far from identical. For instance, it is true that the European Convention for the Protection of Human Rights and Fundamental Freedoms enshrines rights that are sometimes similar to those of the 1966 International Covenant on Civil and Political Rights. Despite convergence in the purpose of the instruments, differences persist not only in the interpretation of the rights enshrined, but also in the formulation of the legal issues at stake. This is blatantly illustrated by the international and European human rights litigation concerning the first type of horizontal sanctions imposed by the European Union at the instigation of the UN Security Council, targeting international terrorism and particularly Al-Qaeda and associated persons. In particular, the *Sayadi and Vinck v Belgium* cases before the UN Human Rights Committee,[30] and the *Nada v Switzerland* case before the ECtHR[31] illustrate the impossibility of equating the Covenant and the Convention in situations where different individuals are listed as targets of the same regime of measures. It is possible to close this part of the discussion by recalling the strong criticism directed at the General Court of the European Union following the judgment delivered in 2005 in the *Kadi I* case, because of an interpretation of the concept of *jus cogens* that was considered too "European" – and therefore not reflecting the state of positive international law.[32]

In terms of formal considerations, it is impossible for the European Union to claim to contribute to the observance of treaty-based norms by a State which is not a party to it, by virtue of the principle of the relative effect of treaties.[33] However, it is possible to wonder about the implications of this indistinct reference to a set of "widely recognized instruments", a methodology which seems to suggest that the European Union could use them as a source of inspiration regardless of their scope – *ratione materiae*, but also *personae*, *loci* or *temporis*. Let us trust that the European Union will refrain from experiments, which

[30] United Nations Human Rights Committee Findings No. 1472/2006 of 28 October 2008 submitted by Nabil Sayadi and Patricia Vinck.

[31] ECtHR *Nada v Switzerland* App n. 10593/08 [12 September 2012]. See in particular F Finck, 'L'application des sanctions individuelles du Conseil de sécurité des Nations unies devant la Cour européenne des droits de l'homme' (2013) RTDH 457-476.

[32] Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* ECLI:EU:T:2005:332. See in particular: C Eckes, 'Judicial Review of European Anti-Terrorism Measures: The Yusuf and Kadi Judgments of the Court of First Instance' (2008) ELJ 84-86; R Schütze, 'On "Middle Ground": The European Community and Public International Law' (EUI Working Papers 13-2007) 19-23.

[33] Art. 34 of the Vienna Convention on the Law of Treaties between States (1969); and between States and International Organisations (1986).

would take the form of restrictive measures seeking to make international norms enforceable beyond their scope. Such a practice could go far beyond the main accepted models of extraterritorial application of human rights, which rely alternatively on control over specific territories or specific persons.[34] Moreover, this would not be in keeping with the letter of the European Union's 2018 Guidelines on restrictive measures, which, while not binding, clearly express the objectives of not resorting to extraterritorial measures and more generally of respecting international law.[35] This, in turn, will help raise the question of whether or not EU restrictive measures practice is at a tipping point (see below, section III).

Secondly, within the sole category of international instruments that actually reflect rules of customary international law, a further distinction must be made as to the scope of the norms in question. It concerns the difference between *erga omnes* norms, which are in principle binding on all subjects of the international community, and *jus cogens* norms, which not only have an *erga omnes* scope, but also belong to the category of peremptory norms that are not subject to derogation under international law. This belonging to what is now considered to be the emerging expression of a substantive international public order is justified by the extreme gravity of the acts in question, such as the commission of the crime of genocide. Yet, in the logic of restrictive measures just outlined, not all violations whose mere finding is sufficient to trigger listing – unlike those requiring verification of the gravity criterion – correspond to violations of peremptory norms of international law. Moreover, while any norm of *jus cogens* certainly has an *erga omnes* scope, the converse is not true. This inevitably raises the question of the legitimacy and, above all, the standing of the European Union in public international law, which I shall address below.

Thirdly, it is probably important to recall that, as sources of public international law, international custom and treaties – within the limits of their relative effect – are primarily binding on States and international organisations. The immediate submission of private persons to public international law – through the direct creation of rights and obligations originating in the international order[36] – has been recognized in more or less perennial contexts, and unquestionably participates in the emergence of the private person among the subjects of the international order. However, the opposability of the instruments listed above to private persons undoubtedly varies according to the instrument and the norm considered.

Finally, the question remains as to who, as the perpetrator of the violations exposed, is likely to be included in the Union's lists. The CFSP Decision and the EU Regulation offer a most ambiguous answer. They apply to "legal persons, entities or bodies", which include "state actors", "actors exercising effective control or authority over a territory", or "other

[34] M Milanovic, *Extraterritorial application of Human Rights Treaties* (Oxford University Press 2011) 304.

[35] General Secretariat of the Council of the European Union, Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy, Document 5664/18 of 4 May 2018 (spec. paras 9, 51 and 52).

[36] Esp. in the fields of international criminal law and international human rights.

non-state actors", but subject, the Regulation adds, to taking into account the objectives of the EU's external action or the gravity of the acts in question. The first of the terms used seems sufficiently vague to include states, which seems to be confirmed by the textual reference to the notion of territorial control. Alternatively, the notion of state actor could refer to the official functions performed by potential individual targets, similar to the irrelevance of the official capacity of persons prosecuted under the Statute of the International Criminal Court. It would be difficult, however, in the state of public international law, to extend the scope of this provision beyond the settings in which it operates. The vagueness of the personal scope of restrictive measures continues with the mention of other non-State actors, whose designation seems to be subject to stricter conditions regarding the verification of the seriousness of the human rights violation in question. Yet the political objective of combating impunity and deterritorializing a thematic regime seemed to imply precisely the designation of private persons, natural or legal, as targets of the measures.

It is clear from the above that the instruments underpinning the EU global human rights sanctions regime offer an extremely broad framework for action and considerable discretion to the Council in designating the targets of the measures. The many questions raised above will have to be examined *in concreto* by the Council, which will gradually build up its administrative practice, before the latter is submitted to the control of the Court of Justice of the Union. It is therefore to be hoped that this new system of restrictive measures will provide an opportunity for the EU judiciary to continue to build up its case law on the interpretation of Union law and its scope in the light of the relevant rules of conventional and customary international law to which the European Union's action is subject.[37]

II.2. NORMATIVE INTERPRETATION AND HYBRIDIZATION WITHIN THE COUNCIL PRACTICE

While listings under the EU global human rights sanctions regime initiated at a rather slow pace, they have recently accelerated. On 2 March 2021, four Russian nationals, all in official positions, were placed on the EU lists in response to the detention of Alexei Navalny.[38] On 22 March 2021, several natural and legal persons of Russian, Chinese, North Korean, Libyan and South Sudanese nationality were in turn placed on the European lists.[39] On 13 December 2021, four other natural and legal persons were included in this list. These are the Wagner group, its founding member, and two natural persons involved

[37] For now, the only action for annulment relating to this restrictive measures regime has been declared inadmissible: case T-75/22 *Prigozhin v Council*, Order of the General Court of 7 September 2022.

[38] Council Decision (CFSP) 2021/372 of 2 March 2021 amending Decision (CFSP) 2020/1999 concerning restrictive measures in response to serious violations and serious breaches of human rights.

[39] Council Decision (CFSP) 2021/481 of 22 March 2021 amending Decision (CFSP) 2020/1999 concerning restrictive measures in response to serious violations and serious breaches of human rights.

in the command and control of the group's actions.[40] While no listings were decided in 2022, they have accelerated in 2023 with five waves in February,[41] March,[42] June,[43] July[44] and September,[45] with a total of 62 new natural and legal persons added on the list, in relation to the situations in Afghanistan, the Central African Republic, Iran, Myanmar, Russia, Sudan, Syria and Ukraine. This regime of restrictive measures thus appears a "catch-all" instrument, allowing the targeting of persons with varied profiles. In particular, it should be noted that the European Union targets Chinese nationals exclusively through cross-cutting regimes, and that recent Afghan designations are linked to gender-based violence imposed by the Taliban regime when back in power. In parallel to the designations made under the EU global human rights sanctions regime, Central Africa, Iran, Libya, Myanmar, North Korea, Russia, South Sudan, Sudan and Syria, are also subject to EU restrictive measures regimes with a state focus.

With the exception of the Libyan militia, the persons listed perform or have performed official functions for their State of nationality or have an organic link with it. The reference instruments which alleged violation justifies inclusion in the European lists are not specified. Instead, the various offences in which the persons concerned are allegedly involved are listed, without reference to the distinctions analysed above. A textual analysis of the reasons for listing the 88 persons and entities currently targeted reveals the following elements. The Council is responding to the commission of various criminal acts: arbitrary detentions, large-scale surveillance programmes, torture and degrading treatment, forced labour, indoctrination of populations, violation of religious freedom, extrajudicial, summary or arbitrary executions, killings and murders, massive use of sexual violence or specific wiring of LGBTIQ+ or related populations, extrajudicial, summary or arbitrary executions and killings. These elements of crimes, to use the specific terminology of contemporary international criminal law, have the particularity of being specifically directed against opposition gatherings or the population more generally. It is thus possible to conclude, in the absence of further public information, that the Council and its Member States are responding to violations of human rights that could also, under

[40] 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.

[41] Council Decision (CFSP) 2023/433 of 25 February 2023 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses.

[42] Council Decision (CFSP) 2023/501 of 7 March 2023 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses.

[43] Council Decision (CFSP) 2023/1099 of 5 June 2023 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses.

[44] Council Decision (CFSP) 2023/1500 of 20 July 2023 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses6; Council Decision (CFSP) 2023/1504 of 20 July 2023 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses.

[45] Council Decision (CFSP) 2023/1716 of 8 September 2023 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses.

specific instruments of international and/or domestic law, fall within the scope of criminal law. Importantly, some of these acts require, by virtue of the scale of their perpetration and the number of their victims, recourse to organisational means of a State nature or scope. This explains the presence of State entities or bodies in the list of targets of the measures, despite the cross-cutting or deterritorialized nature of the sanctions regime in question. The classification of the acts targeted among behaviours that could come under the heading of atrocities or mass crimes only reinforces the questions about the consequences to be drawn from these new sanctions practice of the European Union.

Be it as it may, it is certainly impossible, in the absence of express references to customary international law or treaty law in the public practice of the designations under the EU global human rights sanctions regime, to conclude that the restrictive measures illustrate the interpretation by the Council or the Member States of these sources of international law. However, the implicit qualifications made by the Council when it considers that a specific situation falls within the regime of restrictive measures relating to serious human rights violations, reflect the position of the 27 EU Member States, deciding unanimously within the Council, on behaviours that do not meet the requirements of international standards governing human rights and criminal offenses.

III. "Supplementing" criminal repression? A new space to overcome the limits of jurisdiction

III.1. Foreign policy v. criminal repression: the nature and purpose of the measures involved

EU restrictive measures in response to serious human rights violations or abuses are administrative measures with the dual aim of compelling their targets to change their behaviour and deterring others from engaging in similar behaviour. They are therefore similar, albeit from a different angle, with the restrictive measures against terrorism, which share this dual objective of combating and preventing.

Their adoption with the specific aim of combating impunity can only raise questions about the nature of restrictive measures and, more generally, of international sanctions. Indeed, even if the function of these measures is meant to be preventive,[46] their effects may be broadly punitive.[47] More specifically on the repressive dimension of such measures, it will suffice here to recall the criteria generally used to distinguish criminal from administrative sanctions: the authority of the decision, the purpose of the measure

[46] *E.g.* General Secretariat of the Council of the European Union, Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy cit.

[47] A Hofer, 'Creating and Contesting Hierarchy: The Punitive Effect of Sanctions in a Horizontal System' (September 2020) Revista CIDOB d'Afers Internacionals 15-37.

and its effects. In this respect, while it is certain that restrictive measures are not the result of a sentence pronounced by a judge, their purpose and effects can, like the measures adopted by the United Nations Security Council, be compared in some cases to criminal sanctions.[48]

Far from being a theoretical question, the nature of the measures has significant implications for their legal regime.

The present analysis of EU restrictive measures in response to serious human rights violations or abuses has revealed that they have been aimed at responding to violations of both civil and political rights and international criminal law.[49] While, unlike the US Magnitsky laws, the issue of corruption does not formally appear, it may well be captured in broader criminal patterns, or in the context of what are considered particularly serious violations of civil and political rights.[50] Thus, the criminal tinge of conduct that might justify listing is certain.

As for the consequences of such a listing, they essentially take the form of funds freezing and prohibitions from entry into or transit through the territory of the Member States of the Union. Although they do not in themselves have consequences equivalent to those of a criminal sanction, judicial review of the enforcement of these bans has already highlighted the seriousness of the infringements, *inter alia*, of the right to property, the right to come and go and in rare cases the right to liberty, as well as the reputation of the persons listed.[51]

Such reputational damage is likely to be heightened in the context of the present restrictive measures, since the reason for their adoption is linked to specific, often criminal, conduct. From the perspective of reputational damage to listed persons, the Council's rigor in assessing the violations in question and their threshold of seriousness, sensitive issues developed above, is likely to play a key role in practice.

It is also important to recall that the European Union's restrictive measures in response to serious human rights violations and abuses were conceived, in the political

[48] In this sense, see A Miron, 'Les "sanctions ciblées" du Conseil de sécurité de Nations unies, réflexions sur la qualification juridique des listes du Conseil de sécurité' (2009) Revue du marché commun de l'Union européenne 357; L Nava, *Les sanctions internationales unilatérales dites "horizontales" à l'épreuve des garanties individuelles - pratique de l'Union européenne et des Etats-Unis* (Masters thesis, dir. Pr. Charlotte Beaucillon, defended in sept. 2020, University of Paris 1 Panthéon-Sorbonne) 11-13; A Hofer, 'Creating and Contesting Hierarchy' cit..

[49] See section II of this *Article*.

[50] On the possible application to certain acts of corruption, see C Portela, 'Horizontal Sanctions Regimes' cit. 441-457.

[51] See ECtHR *Nada v Switzerland* App n. 10593/08 [12 September 2012]; joined cases C-402/05 and C-415/05 *Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union, Commission of the European Communities* ECLI:EU:C:2008:461 (known as Kadi I); joined cases C-584/10 C-593/10 and C-595/10 *European Commission, Council of the European Union and United Kingdom of Great Britain and Northern Ireland v Yassin Abdullah Kadi* ECLI:EU:C:2013:518 (known as Kadi II); case C-45/15 *Safa Nicu Sepahan Co. v Council of the European Union* ECLI:EU:C:2017:402.

discourses accompanying the drafting of the EU global human rights sanctions regime, as an *additional and supplementary* instrument to criminal law, with the same objective of combating impunity:

> "[...] Rules are rules', as the (Dutch) saying goes. But only if breaking the rules has consequences. That's true in the school playground, and it's true in the arena of international law. That's why the Netherlands, as a champion of international law, always works to stress the importance of accountability. After all, a norm can only stand if violators of that norm are punished. Of course, this is why we have international criminal law. And why international criminal courts and tribunals are so important. But around the world, people are still falling victim to human rights violations on a daily basis. Human rights, which lie at the core of Europe, require a multifaceted approach. And we see human rights sanctions as a necessary additional instrument. To supplement the criminal law [...]".[52]

From the point of view of the regime applicable to these "additional and supplementary" restrictive measures, significant differences from the regime for criminal proceedings must be highlighted. The burden of proof is reversed, since it is up to the targets of the measures to demonstrate to the Council or the Court that they should not be included in the European lists. As a result, the presumption of innocence does not apply in this case, which explains the increased potential for infringement of the fundamental rights of the persons targeted.

Indeed, the American practice of placing on the Magnitsky lists persons who had already been convicted of criminal offenses raises the question of respect for the principle of *non bis in idem*, which requires that the same act should not be punished twice.

On its side, the European Union develops a practice of doubling the listing of certain individuals on the basis of two separate restrictive measures regimes. This was highlighted, for example, in the case of a person targeted both under the restrictive measures regime against Syria and under the thematic regime to combat the proliferation of chemical weapons.[53]

This raises the question of whether the targets of the measures can hope to obtain their removal from the European lists without any legal recourse. Yet, the very mechanism of international sanctions lies in the promise that the sanctions will be lifted if the targets change their behaviour.[54] The same is true for EU restrictive measures responding to human rights violations, which are supposed to share this incentive function.

[52] 'Closing Remarks by the Minister of Foreign Affairs at a Meeting on the EU Global Human Rights Sanctions Regime' (20 November 2018) and currently withdrawn from the website of the Dutch Ministry for Foreign Affairs. This speech is however mentioned in the Ministry's 'Human Rights Report 2018' (August 2019). Only selected fractions of the speech are now published on the website of the Universal Rights think tank www.universal-rights.org.

[53] C Portela, 'Horizontal Sanctions Regimes' cit.

[54] *Ibid*.

However, the CFSP Decision and the EU Regulation at stake do not specify what behaviour is expected from the targets of the EU restrictive measures in question.[55]

Finally, the American measures adopted on the basis of the Magnitsky legislation emphasize a conservatory function – which the European measures ignore as the law stands – illustrated by the objective of lifting the measures in the event of new criminal proceedings against the targets. This silence of the European acts on the articulation with criminal proceedings seems to contradict the often stated objective of giving priority to legal proceedings.[56]

Some political scientists have seen in this evolution the emergence of a European form of "soft international criminal law".[57] Some other law academics have more recently demonstrated that the EU global human rights sanctions regime is no longer to be considered a mere foreign policy tool but should be aligned on principles governing criminal justice measures.[58] It stems for the above that the EU global human rights sanctions are instruments of a new kind, designed to draw new consequences from serious human rights violations, and intended to complement the legal remedies already available through human rights litigation and criminal prosecution. This raises the question of the added value, in the eyes of the Council and the EU Member States, of these restrictive measures aimed at combatting impunity for serious human rights violations.

III.2. Overcoming the limits of jurisdiction and extending the reach of the measures

The theory of jurisdiction governs, in public international law, the conditions under which a State is competent to deal with a specific situation. In this respect, the two generally accepted connecting factors are the territorial link and the personal link of a State with a specific situation. Thus, a State (or a group of States, meeting within an international organisation, for example) may have jurisdiction over a situation which takes place in its territory or which concerns one of its nationals. This is the mechanism on which the system of freezing funds and financial assets in the context of the implementation of the European Union's restrictive measures is based: only funds located on the territory of the Union and its Member States will be subject to the execution of EU freezing measures.[59]

In addition to these considerations, the European Union's restrictive measures in response to serious human rights violations are based on references to certain criminal offenses, such as the crime of genocide or trafficking in migrants. This incursion of

[55] *Ibid*.

[56] See *e.g*. European Parliament Resolution 2019/2610(RSP) of 14 March 2019 on the human rights situation in Kazakhstan.

[57] C Portela, 'A Blacklist is (almost) Born, Building a Resilient EU Human Rights Sanctions Regime' (17 March 2020) European Union Institute for Security Studies 6.

[58] A Moiseienko, 'Crime and Sanctions: Beyond Sanctions as a Foreign Policy Tool' (21 June 2023) ANU College of Law Research Paper n. 23.4, forthcoming in the German Law Journal.

[59] See *e.g*. Council Decision (CFSP) 2020/1999 cit. and Regulation (EU) 2020/1998 cit.

international criminal law into the logic of restrictive measures seems to be a source of confusion. In what capacity is the European Union dealing with these serious human rights violations? Is it acting within the framework of international responsibility of States and international organisations, or within that of international criminal law? In short, what legal interests does it defend here?

From the point of view of the international law of responsibility of States and international organizations, the question of the defence of universal interests is one of the thorniest. It will suffice to recall here that the distinction between crimes and torts, initially favoured in the work of the International Law Commission responsible for the codification of the law of responsibility, has been abandoned in favour of taking into account violations of peremptory norms of international law.[60] In this regard, the international law of responsibility as codified by the International Law Commission recognizes a right of action for responsibility of States and international organizations not (subjectively) injured by the breach in question, on the basis of the interest of the international community in seeing the peremptory norms respected.[61] Nothing is less certain, however, with regard to the countermeasures adopted by these non-injured States or organizations, whose contested practice is limited to American and European measures[62] and which codification has in the end been reserved by the International Law Commission.

In addition to the law of international State or IO responsibility, the European Union's restrictive measures in response to serious human rights violations need to be analysed from the perspective of individual responsibility. Indeed, they cover a wide range of human rights violations, from international crimes that meet *jus cogens* standards – *e.g.* genocide, torture – to violations that do not necessarily carry a criminal label – *e.g.* the violation of freedom of association. At least some of these restrictive measures are therefore part of a rationale for combating impunity for crimes that should be criminally punished. If one reserves the above-discussed question of the articulation of these administrative measures with the criminal proceedings that would be necessary in this matter, in particular from the point of view of the procedural and substantive guarantees provided by criminal proceedings, the fact remains that the question of the legal basis for the competence to adopt measures of individual scope in reaction to alleged criminal offenses has not been clarified.

Does the violation of *jus cogens* necessarily entail a form of universal repressive jurisdiction? And do all the human rights violations to which the European Union wishes to respond consist of violations of peremptory norms of international law? The answer to both questions is no.

[60] Arts 40 and 41 of International Law Commission, Articles on the International Responsibility of States, UN Doc A/56/10: Report of the International Law Commission to the General Assembly on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001).

[61] *Ibid*. art. 48.

[62] See, in general, *ibid*. art. 54 and, in particular, para. 6 of its commentaries.

Beyond the crime of genocide and crimes against humanity, for which some authors claim that international custom requires States to exercise universal jurisdiction for law enforcement purposes,[63] it is important to recall that universal jurisdiction for law enforcement purposes is only mobilized in cases defined restrictively by certain specific national legislations, whose often limited scope has been criticized.[64] In particular, it is significant that in the *Arrest Warrant* case, Belgium argued that there was a territorial link – a very small one – between the acts of the Minister of Foreign Affairs of the Democratic Republic of Congo and the exercise of universal jurisdiction, which was allegedly based on the fact that "the complaints at the origin of the arrest warrant came from twelve persons, all of whom were resident in Belgium, five of whom were of Belgian nationality".[65]

Under the regime of EU restrictive measures for serious human rights violations, the majority of cases would fall outside the reach of universal jurisdiction. Likewise, the vast majority of human rights violations to which the European Union would have to react on the basis of its EU global human rights sanctions regime would not fall within the jurisdiction of the courts of the Member States of the Union.

It stems from the above, that the effect of these restrictive measures, like the American Magnitsky legislation, is to allow the Union and its Member States to extend their normative influence to situations that do not fall within their competence, *i.e*. their jurisdiction, or even their sovereignty. The descriptions sometimes used to show the power of normative projection of these instruments – "deterritorialized" restrictive measures applying to "transnational" situations – combined with the undoubtedly noble and politically irreproachable objectives of combating impunity, should not obscure their ambiguous legal scope. Indeed, it is clear from the foregoing that these restrictive measures make it possible to short-circuit altogether both the logics of the international theory of titles of jurisdiction and that of international criminal jurisdiction. Firstly, they set aside the limits that the titles of jurisdiction impose on States (and, consequently, of the international organisations through which they act), by targeting situations that present neither a personal, nor a territorial connection with the Union or its members. Secondly, they render obsolete the limits imposed by the rules on the jurisdiction of national and supranational criminal and civil courts.

Returning to our general discussion of the sovereignty under international law of EU Member States, the present case study on restrictive measures adopted by the EU in response to serious human rights violations, calls for several conclusions.

First, this case shows that the European Union serves as a privileged space for its Member States to exercise a form of collective normative sovereignty. Indeed, the EU

[63] In this sense: E David, *Eléments de droit pénal international et européen* (2nd edn, Bruylant 2018) 720.

[64] A Lagerwall, 'Que reste-t-il de la compétence universelle au regard de certaines évolutions législatives récentes' (2009) AFDI 743-773.

[65] ICJ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [14 February 2002] para. 15.

restrictive measures in response to serious human rights violations refer to a highly heterogeneous catalogue of international instruments, from which the Council of the EU has formally selected those standards that are particularly relevant to EU action in the international fight against impunity. This use of international human rights law and international criminal law as a simple source of inspiration gives the Council the necessary margin for manoeuvre it needs to put forward its normative priorities. These depend neither on a substantive hierarchy between the norms in question (which could derive from the reference to *jus cogens* norms), nor on a disciplinary approach to international law (which could not only derive from the distinction between human rights law and criminal law, but also from the distinction between rights which must be guaranteed in all situations, and rights that can suffer derogations under certain conditions). Rather, the normative priorities of the Council and EU Member States reflect the political objectives that guide EU's external action in general, and the fight against impunity in particular. They are based on a kind of hybridization of reference standards, irrespective of their international legal source or nature; an exercise whose legal method raises questions, but which probably has derived its political legitimacy from the noble cause pursued by the measures.

Second, the adoption at the EU level of restrictive measures to fight against the impunity for serious human rights violations provides the Member States with the means to transcend the limits of their national sovereignties and jurisdiction. As some political declarations reveal, these restrictive measures have been designed so as to complement the legal remedies available to challenge serious human rights violation, mainly human rights litigation and criminal prosecution. This very particular positioning of restrictive measures in response to serious human rights violations opens up a new interstitial space for developing the collective exercise of Member States' sovereignty within the EU. Going beyond the limits (geographical, personal, material and temporal) of the positive legal regimes governing the international protection of human rights and the repression of international crimes, the restrictive measures in question make it possible to target situations which hitherto fell outside the competence of the Member States and the Union. They thus reveal the exercise of a new form of long-arm collective sovereignty by Member States united within the EU.

The Member States of the European Union are therefore not only still individually sovereign under international law, but they have also found within the Union the conditions for exercising an enhanced form of collective sovereignty, designed to further extend the reach of both their influence and power of deterrence, to counter impunity for serious human rights violations on the international stage.