# THE EUROPEAN UNION PROTECTION OF HUMAN RIGHTS THROUGH ITS GLOBAL POLICY: THE IMPLEMENTATION OF THE REGIME OF RESTRICTIVE MEASURES AGAINST SERIOUS VIOLATIONS AND ABUSES OF HUMAN RIGHTS

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**Abstract:** The Regime of Restrictive Measures against Serious Violations and Abuses of Human Rights launched at the end of 2020 by the European Union is part of the Commission's objective to reaffirm the Union's firm commitment to promoting universal values and strengthening its leadership in this field. However, the first year of implementation of the regime casts doubt on its effectiveness, given the existence of legal loopholes that tarnish it.

**Keywords:** Restrictive measures, serious violations and abuses, Human Rights, European Union.



## 1. Introduction

In 2012 the European Union (hereinafter EU) adopted a Strategic Framework for Human Rights and Democracy[1], which set out the principles, objectives and priorities aimed at improving the effectiveness and coherence of EU policy in these areas. To implement this Strategic Framework, the EU has to date adopted three Action Plans (2012-2014[2], 2015-2019[3] and 2020-2024[4]).

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[1] Human Rights and Democracy: EU Strategic Framework and EU Action Plan, Council of the European Union, 11855/12, June 25, 2012. Available at https://data.consilium.europa.eu/doc/document/ST-11855-2012-INIT/en/pdf.

[2] Included as Annex III together with the Strategic Framework.

[3] Joint Communication to the European Parliament and the Council, Action Plan on Human Rights and Democracy (2015-2019) "Keeping human rights at the heart of the EU agenda". JOIN(2015) 16 final, April 28, 2015. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015JC0016.

[4] Joint Communication to the European Parliament and the Council, EU Action Plan on Human Rights and Democracy 2020-2024. JOIN/2020/5 final, March 25, 2020. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020JC0005. Adopted by the Council on 17 November 2020.

The European Commission elected in 2019 began its work by promulgating the priorities of the institution and of the EU for the new period that began and that encompasses the years 2019-2024[5], proceeding to develop such document during the year 2020. Among the priorities, two stand out that seek to underline the work of the EU as an international organization and the role that it should come to have in the globalized world in which we live, interrelating the internal welfare of European citizens with the welfare of the rest of the nations and the rest of humanity. These two priorities refer to achieving a stronger Europe in the World and to the promotion of our European way of life.

Within this promotion lays the development of Human Rights and Democracy in which a Europe that protects them must defend Justice and the Fundamental Values of the EU not only within the EU, but also in its foreign policy through various actions such as the modernization of the EU asylum system and cooperation with partner countries, and the development of a new Plan for the advancement of Human Rights and Democracy in the World.

The President of the European Commission, Mrs. *Ursula von der Leyen*, presented on November 18, 2020, the New EU Action Plan on Human Rights and Democracy[6] which contains the program of measures that the European Commission intends to develop in this field during the indicated period.

This New Action Plan builds on previous action plans and continues to focus on long-term priorities by identifying five broad priority areas: 1) protecting and empowering people; 2) building resilient, inclusive and democratic societies; 3) promoting a global system for Human Rights and Democracy; 4) new technologies: harnessing opportunities and addressing challenges; and 5) delivering by working together, the Action Plan also reflects the changing context with attention to new technologies and the link between global environmental issues and Human Rights.

The New Action Plan is therefore intended to reaffirm the EU's firm commitment to the promotion of universal values. Respect for human dignity, freedom, democracy, equality, the rule of law and respect for Human Rights will continue to underpin all aspects of the EU's internal and external policies. As highlighted by the European Commission, the global picture of Human Rights and Democracy is mixed. While there has been progress, the backlash against the universality and indivisibility of Human Rights, the closing of civic space and the rollback of Democracy must be addressed. New opportunities have emerged as well as risks, especially related to technological advances and the global environment.

The New Action Plan on Human Rights and Democracy also sets out the ambitions and priorities for concrete action in the field of relations of the EU and third States and International Organizations. To this end, it is envisaged that the EU and its Member States

[5] European Commission, Directorate-General for Communication, Leyen, U., *Political guidelines for the next European Commission 2019-2024*; Opening statement in the European Parliament plenary session 16 July 2019; Speech in the European Parliament plenary session 27 November 2019, Publications Office, 2020, https://data.europa.eu/doi/10.2775/81903.

[6] See note 4.

will use the full range of their instruments, in all areas of external action, to focus and further strengthen the EU's global leadership on overall priorities.

But the effective implementation of the Action Plan requires not only coordinated action by the EU and its Member States, respecting the different institutional roles and competences, but also the implementation of a whole series of enforcement mechanisms, demonstrating a common EU approach. This is the framework for the new regime of sanctions in cases of serious Human Rights violations, the study of which will be undertaken below.

This new regime took its first steps with the presentation by the President of the European Commission, *Ursula von der Leyen*, and the High Representative of the Union for Foreign Affairs and Security Policy, *Josep Borrell*, of a joint proposal for a Council Regulation concerning the application of restrictive measures (sanctions) against serious violations and abuses of Human Rights on October 19, 2020[7].

Following the joint proposal, on December 7, 2020, the Council adopted a Decision[8] and Regulation[9] establishing this comprehensive regime of restrictive measures (or sanctions) on Human Rights, with the European Commission presenting a Guidance Note[10] to address issues that were likely to arise in the implementation of the new rules. This new regime will not replace existing geographic sanctions regimes (Höbert 2017; Portela 2005; Beaucillon 2021), some of which already address Human Rights violations and abuses in Syria[11], Belarus[12], Venezuela[13], Yemen[14], or the ongoing Ukraine conflict[15],

[7] https://ec.europa.eu/commission/presscorner/detail/es/ip_20_1939.

[8] Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJEU L 410I, 7.12.2020, p.13. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020D1999&from=ES.

[9] Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, OJEU L 410I, 7.12.2020, p. 1. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020R1998&from=EN.

[10] Commission Guidance Note on the Implementation of Certain Provisions of Council Regulation (EU) 2020/1998, Brussels, C(2020) 9432 final, 17 December 2020. Available at https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/201217-human-rights-guidance-note_en.pdf.

[11] Council Implementing Regulation (EU) 2021/848 of 27 May 2021 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria, OJEU L 188/18, 28.5.2021. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32021R0848&from=EN.

[12] Council Regulation (EU) 2021/1030 of 24 June 2021 amending Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus, OJEU L 224I, 24.6.2021. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R1030&from=EN.

[13] Council Implementing Regulation (EU) 2021/275 of 22 February 2021 implementing Regulation (EU) 2017/2063 concerning restrictive measures in view of the situation in Venezuela, OJEU L 60 I/1, 22.2.2021. Available https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R0275&from=EN.

[14] Council Implementing Regulation (EU) 2021/2015 of 18 November 2021 implementing Regulation (EU) No 1352/2014 concerning restrictive measures in view of the situation in Yemen, OJEU L 410 I/1, 18.11.2021. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R2015&from=EN.

[15] Council Regulation (EU) 2022/428 of 15 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJEU L 87I, 15.3.2022. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.LI.2022.087.01.0013.01.ENG&toc=OJ%3AL%3A2022%3A087I%3AFULL.

nor those regimes developed for the specific cases of chemical weapons[16] or cyber-attacks[17].

In any case, this study presents a reflection after the first year of application of the regime, not only on the appropriateness of the legal instrument published for this purpose, but also on its effectiveness with respect to the objectives stated at the time of its publication.

## 2. The Regime of Restrictive Measures Against Serious Human Rights Violations and Abuses

### 2.1. The legal support of the Restrictive Measures Regime

As mentioned above, the legal support for this new regime consists of two joint instruments adopted on December 7, 2020, Council Decision (CFSP) 2020/1999[18] and Regulation (EU) 2020/1998[19]. This normative framework for the adoption of restrictive measures is complemented by three non-regulatory instruments that will serve as guides in its application: two of them prior to this regime and the guidance note[20].

The guidelines applicable by analogy by the Member States to the new regime are the "Guidelines on the implementation and assessment of restrictive measures (sanctions) in the framework of the EU common foreign and security policy"[21] and the "EU best practices for the effective implementation of restrictive measures"[22]. However, none of these texts establishes a common regime for challenging the measures by the parties sanctioned by them, leaving such mechanism to the exercise of the national authorities in conjunction with the control that the Court of Justice of the European Union may carry out, pursuant to Article 275.2 of the Treaty on the Functioning of the European Union[23].

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[16] Council Regulation (EU) 2018/1542 of 15 October 2018 concerning restrictive measures against the proliferation and use of chemical weapons, OJEU L 259, 16.10.2018, p. 12-21, in its consolidated version of 15 October 2020. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32018R1542.

[17] Council Decision (CFSP) 2019/797 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States, OJEU L 129, 17.5.2019, p. 13. as consolidated on 19 May 2021. Available at https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32019D0797.

[18] Op. cit., note 8.

[19] Op. cit., note 9.

[20] Op. cit., note 10.

[21] Guidance on the implementation and assessment of restrictive measures (sanctions) in the framework of the EU's Common Foreign and Security Policy (update), 5664/18, May 4, 2018. Available at https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf.

[22] EU Best Practices for the effective implementation of restrictive measures, 8519/18, May 4, 2018. Available at https://data.consilium.europa.eu/doc/document/ST-8519-2018-INIT/en/pdf.

[23] Consolidated version of the Treaty on the Functioning of the European Union (hereinafter TFEU). OJ C 326/4726.10.2012.Availableathttps://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN.

### 2.2. Scope of the Restrictive Measures Regime

*A) "Sanctionable" subjects*

The regime allows the EU to impose the measures contained in the regime not only on natural persons, but also on entities and bodies - including state and non-state actors - responsible for, involved in or associated with serious Human Rights violations and abuses around the world, regardless of where they occurred.

Specifically, the article 1.3. of the Decision (CFSP) 2020/1999 states that "for the purposes of this Decision, natural or legal persons, entities or bodies may include: a) State agents; b) other agents exercising effective control or authority over a territory; c) Other non-State agents".

For the determination of each of the types set forth herein, the Decision does not include any definition, the Regulation specifying that, with respect to "non-State actors", it will refer to "other non-State actors to which Article 1(4) of Decision (CFSP) 2020/1999 applies"[24], i.e., those listed in the Annex[25].

Such a vague determination is not strange to this type of instrument. However, it is questionable if it is related to the necessary respect for a series of procedural rights contained in Human Rights treaties and other European instruments of judicial cooperation. Thus, the question arises as to what is to be considered as "responsible" for the purpose of determining the sanction. "Responsible" obviously implies a determination of responsibility which, however, is not carried out through a prior adversarial procedure, but through a political reaction of the Union to a series of acts that are defined as punishable. Without disputing the seriousness of these acts, it is true that the requirement to respect these principles - not only derived from International Human Rights law, but also from national procedural laws - raises doubts as to the legality of the adoption of these sanctions at both the domestic and international level, especially when they are far removed from the framework of international responsibility or the application of retaliatory measures (Rosas 2016). Even more so when the acts referred to in the Decision (CFSP) and the Regulation are acts closely linked to a criminal definition.

To limit such discretion, the Guidelines and Best Practices mention the need not only to respect applicable International Law, but also the obligations arising from the Treaty on European Union or the European Charter of Fundamental Rights, but without establishing a clear mechanism for such respect. It is specified that "*Proposals for autonomous listings should include individual and specific reasons for each listing. The purpose of the reasons is to state, as concretely as possible, why the Council considers, in the exercise of its discretion, that the person, group or entity concerned falls under the designation criteria defined by the relevant legal act, taking into consideration the*

[24] Article 2.3 of Council Regulation (EU) 2020/1998.
[25] However, the Annex at the time of publication of the texts was empty of content.

*objectives of the measures*"[26]. But confidential motives and discussions have never sat well with the principles governing criminal prosecutions and sanctioning regimes.

*B) The "gross violations and abuses of Human Rights" covered by the Regime*

As determined by Article 1 of Decision (CFSP) 2020/1999[27], the serious violations and abuses of Human Rights to which the restrictive measures regime is intended to respond are:

> "(a) genocide.
> (b) crimes against humanity.
> (c) the following serious human rights violations or abuses: (i) torture and other cruel, inhuman or degrading treatment or punishment, (ii) slavery, (iii) extrajudicial, summary or arbitrary executions and killings, (iv) enforced disappearance of persons, (v) arbitrary arrests or detentions.
> (d) other human rights violations or abuses, including but not limited to the following, in so far as those violations or abuses are widespread, systematic or are otherwise of serious concern as regards the objectives of the common foreign and security policy set out in Article 21 TEU: (i) trafficking in human beings, as well as abuses of human rights by migrant smugglers as referred to in this Article, (ii) sexual and gender-based violence, (iii) violations or abuses of freedom of peaceful assembly and of association, (iv) violations or abuses of freedom of opinion and expression, (v) violations or abuses of freedom of religion or belief.".

This list, which begins as a closed list of "violations" - although it later includes an exemplary type - is open to criticism from the point of view of International Criminal Law on which it is based, as it introduces some confusion between paragraphs b), c) and d), and eliminates war crimes, which are equally serious abuses of Human Rights that do not fall under this consideration.

As has been understood by specialized doctrine (Bassiouni 1999, 2011; Bou 2009; Capellà i Roig 2005; Torres 2008), crimes against humanity are a series of acts committed in the context of a widespread or systematic attack against the civilian population. For example, Article 2 of the Draft Articles on the Prevention and Punishment of Crimes against Humanity prepared by the International Law Commission[28] defines Crimes against Humanity as "any of the following acts when committed as part of a widespread or systematic attack against a civilian population and with knowledge

[26] Para. 11 of the Working Methods Recommendations Document for EU Autonomous Sanctions, Annex I to the Guidance on the Implementation and Evaluation of Restrictive Measures, op. cit. note 22.
[27] The list of which literally reproduces Article 2 of Council Regulation (EU) 2020/1998.
[28] Draft Articles on the Prevention and Punishment of Crimes against Humanity, adopted by the Commission on second reading, at its seventy-first[er] session, A/74/10, 2019 (hereinafter Draft CLH 2019). Available at https://undocs.org/en/A/74/10.

of such attack", including in the list of prohibited conducts murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity; the persecution of a group or collectivity with its own identity on political, racial, national, ethnic, cultural, religious, gender or other grounds universally recognized as unacceptable under international law, in connection with any of the acts referred to in this paragraph; enforced disappearance of persons; the crime of apartheid; and other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.

Given this definition, which reflects Customary International Law on the subject, we could consider that paragraph c) of Article 1 referred to above is intended to broaden the situations that may be considered abusive when they do not meet the level of generality or systematicity required for crimes against humanity or even to include the definitions of these conducts contained in the instruments for the protection of Human Rights mentioned in the article below, which sometimes do not fully coincide with their classification as crimes against humanity[29]. Although the definition contained in the general type continues to accommodate the more specific types of treaties.

However, the reference in subparagraph (d) to "other violations or abuses of Human Rights, including, inter alia, the following, provided that such violations or abuses are widespread, systematic (...)" cannot be explained, especially since all of them, except for subparagraph (i), are conducts that can be subsumed under the crimes against humanity provision described above. Such reiteration adds nothing to the figure, and it would have been more appropriate to include in said paragraph (d) only the reference to those other violations or abuses of Human Rights that are of a different gravity with respect to the objectives of the common foreign and security policy established in Article 21 of the TEU.

[29] Thus, for example, the CLH 2019 Draft, defines torture as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions", while the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states that it shall be understood as such "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions". Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification, and accession by United Nations General Assembly Resolution 39/46 of December 10, 1984. Available at https://www.ohchr.org/en/professionalinterest/pages/cat.aspx.

*C) Applicable restrictive measures*

According to Decision (CFSP) 2020/1999, two restrictive measures would be applicable: a travel ban to the territory of the Union (for natural persons) and a freezing of funds (for natural and legal persons and entities). In addition, EU persons and entities would be prohibited from making funds available to listed persons, either directly or indirectly.

However, this proposal for measures has not been fully transferred to the Regulation (EU) 2020/1998, which only includes the freezing of funds and the prohibition of making them available, given the complexity of ensuring uniformity in a competence that does not belong to the Union, but to the Member States. This circumstance calls into question whether the objective of these sanctions, which as the European Parliament recalled should be the criminal prosecution of the perpetrators through national or international jurisdictions to combat impunity, is accessible through the freezing of funds, or will simply serve as a measure to prevent the flow of capital and financing to non-state entities or individuals not protected by jurisdictional immunities.

It should be recalled at this point that, despite the wording of the Regulation (EU) 2020/1998, the rule of immunity from jurisdiction and execution of certain State agents and entities for the commission of the crimes mentioned above only lapses when the prosecution is carried out by the agent's own State or by an International Criminal Court. Thus, as the International Court of Justice stated in 2002 in the Arrest Warrant case between Belgium and the Democratic Republic of the Congo, "the Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule granting immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity"[30], with the noted exceptions of national prosecution, prosecution by an International Court and withdrawal or renunciation to the immunity by the State (Torres 2002). Conjugating such a rule with the sanctioning of national agents will be a complex fit for Member States jurisdictions bound to respect not only European Law but also International Law.

### 2.3. The procedure for the adoption and modification of measures

As underlined by the European Parliament prior to the adoption of the regime, "*(...) the credibility and legitimacy of this regime are conditioned by its full compliance with the highest possible standards in terms of the protection and observance of the due process rights of individuals or entities concerned; insists, in this regard, that decisions to list and delist individuals or entities should be based on clear, transparent and distinct*

[30] Para. 58 of the Judgment of 14 February 2002, Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium).

*criteria and directly linked with the crime committed in order to guarantee a thorough judicial review and redress rights; calls for the systematic inclusion of clear and specific benchmarks and a methodology for the lifting of sanctions and for de-listing*"[31]. However, this key concern has not been reflected in the instrument of its adoption.

As can be deduced from the guidance instruments, the listing decision will come from the Council, being a political decision that must consider the elements identified in Article 1.4 in the case of non-State actors; namely, "*the objectives of the common foreign and security policy as set out in Article 21 TEU, and (b) the seriousness or impact of the abuses*". The listing process follows the General Guidance on Other Restrictive Measures reflected in the Interpretative documents[32].

Thus, it is established that the proposal for inclusion must come from any Member State or from the European External Action Service[33] and that, once notified through the COREU[34] system, it will be discussed in the relevant regional group, with the participation of the EEAS and Commission's experts on sanctions, together with the Council's Legal Service, and other actors may be invited to such discussions in order to improve the understanding of the relevance of the measures in question. All aspects will be discussed in the Group of External Relations Counsellors who will examine the sanction proposal, together with the EEAS and the Commission, prior to the adoption of the CFSP Decision by the Council which will have to be taken unanimously, a circumstance deeply regretted by the European Parliament[35] All deliberations will be confidential.

The publicity of the measures is established by means of individual notification (complex to carry out, especially in the case of non-state entities or individuals protected in the States) and publication in the OJEU, informing at that time of the process for making observations, requesting a review of the measures, or challenging them before the CJEU.

For the modification of the measures (beyond possible corrections due to errors in the identification of the subjects), all participants will be consulted again, and a periodic review will be carried out to assess their adjustment or possible evolution. Requests for deletion shall be addressed to the General Secretariat of the Council, which shall forward them to the Council of the European Union, the relevant regional group, the Council's Legal Service, and the Group of Councilors on External Relations for discussion.

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[31] European Parliament resolution of 14 March 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_EN.html.

[32] See, op. cit., notes 20 and 21.

[33] Hereinafter referred to as the EEAS.

[34] COREU is an open communication system between the EU Member States, the Council, the EEAS, and the European Commission that allows for a regular flow of information with the aim of facilitating communications on CFSP matters.

[35] Point 1 of the European Parliament Resolution of 8 July 2021 on the comprehensive EU human rights sanctions regime (EU Magnitski Act) (2021/2563(RSP)). Available at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0349_ES.pdf.

As can be seen, and logically to ensure its effectiveness, the measure is only notified to the directly injured party once it has been adopted. The recipient of the measures has the possibility to apply for the annulment of the Decision on the CJEU, but the appeals will then be subject to the two-month period of such procedure. Given its application in each of the territories of the Member States, its individualized response (if the individual so wishes) would be extremely costly and detrimental to their rights to defense and contradiction[36], as well as potentially conflictual for the principle of generality of application of EU Law in cases of forum-shopping. Moreover, being a person allegedly responsible for the commission of crimes that entail the obligation of prosecution for the Member States, it is doubtful whether the recipient of the measure would want to appear before any national authority to defend their rights.

The problematic regarding the respect of the rights to defense, fair trial and contradiction has been analyzed by the CJEU in the context of other targeted regimes. As an example, we can mention the Judgment in the case T-258/20, Oleksandr Viktorovych Klymenko (applicant) v. Council of the European Union of 3 February 2021[37]. Mr. Klymenko was requesting the annulment of several Decisions that provided for his inclusion in the list of persons subject to a freezing funds' measure under the regime provided by Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities, and bodies in view of the situation in Ukraine[38].

In support of his action for annulment, the applicant put forward five pleas in law alleging, (i) infringement of the duty to state reasons; (ii) a manifest error of assessment and misuse of powers; (iii) third, infringement of the rights of defence and of the right to effective judicial protection; (iv) lack of a legal basis, and (v) infringement of the right to property[39].

Regarding the third plea, the CJEU declared that:

*"According to settled case-law, in a review of restrictive measures the Courts of the European Union must ensure the review, in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the*

[36] The Institute of International Law already in its 2017 session recalled the need to care for such fundamental rights in the adoption of targeted sanctions mentioning how such EU measures have violated human rights on many occasions. See: Institute of International Law, 12th Commission, Final Resolution, *Review of Measures Implementing Decisions of the Security Council in the Field of Targeted Sanctions*, Session of Hyderabad, 9 September 2017.

[37] Judgment in the case T-258/20, Oleksandr Viktorovych Klymenko (applicant) v. Council of the European Union of 3 February 2021 (also, the Judgment). ECLI:EU:T:2021:52. Available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=237287&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5742144.

[38] Council Decision 2014/119/CFSP of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine. OJ L 66, 6.3.2014, p. 26–30. Available at https://eur-lex.europa.eu/eli/dec/2014/119(1)/oj.

[39] Par. 48 of the Judgment.

*EU legal order, which include, inter alia, the right to effective judicial protection and the rights of defence, as enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union ('the Charter') (see judgment of 25 June 2020, Klymenko v Council, T-295/19, EU:T:2020:287, paragraph 59 and the case-law cited).*

*(...)*

*In so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, such as those provided for by Article 6, their meaning and scope are, under Article 52 (3) of the Charter, the same as those laid down by the ECHR"*[40].

Having in mind such scope of interpretation and application of the rights of defence and of the right to effective judicial protection, the CJEU has highlighted the necessity for the Council to not only indicate why it has considered such rights as respected but also assure itself that the national authorities had comply with such rights if the Council relies in any national proceedings before sanctioning the individual.

## 3. Application of the Restrictive Measures Regime During the Year 2021

After the entry into force of the above instruments (Decision and Regulation), the Council has proceeded on four occasions to the inclusion of subjects or modification of the regime (Martín 2022)[41].

The first Decision in this regard was issued on March 2, 2021[42], justifying their adoption in the detention of Russian opposition politician Alexei Navalny and denouncing "the continuing serious nature of Human Rights violations in Russia"[43]. According to the Decision, the first four persons were included in the list of restrictive measures, all of them Russian state agents (the director of the Russian Federal Penitentiary Service; the chairman of the Investigative Committee of the Russian Federation; the Prosecutor General; and the director of the Federal Service of the National Guard Troops of the Russian Federation), accused of the serious abuses and Human Rights violations committed by the arrest and detention of Mr. Navalny, and in those that followed in Russia, "including arbitrary arrests and detentions and systematic and widespread violations of freedom of peaceful assembly and association, including through the violent repression of protests and demonstrations."

[40] Par. 64 and 99 of the Judgment.
[41] Our investigation involving the different amendments of the original Decision and Regulation closed on April 6, 2022.
[42] Council Decision (CFSP) 2021/372 of 2 March 2021 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses, OJEU LI 71/6, 2.3.2021. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021D0372.
[43] Ibid, point 4 of the Whereas of the Decision.

The second decision took place on March 22, 2021[44]. In it, the Council recalled that the main function of this new regime was "the Union's determination to strengthen its role in addressing serious violations and abuses of Human Rights around the world. Realizing the effective enjoyment of Human Rights for all is a strategic objective of the Union. Respect for human dignity, freedom, democracy, equality and the rule of law and respect for Human Rights are fundamental values of the Union and of its common foreign and security policy" and that it was therefore concerned about "serious violations and abuses of Human Rights in various parts of the world, such as torture, extrajudicial executions, enforced disappearances or the systematic use of forced labor committed by individuals and entities in China, the Democratic People's Republic of Korea, Libya, Eritrea, South Sudan and Russia". Thus, it included not only individuals linked to abusive state structures, but also three state agencies and one non-state militia (the Kaniyat Militia in Libya), and even individuals at the head of non-state entities and involved in situations of internal armed conflict, such as the head of the Kaniyat Militia in Libya or the Major General of the army of the South Sudan People's Defense Forces of South Sudan (SPDFSS).

The next modification of the list took place on December 6, 2021[45]. This modification involved the deletion of one of the individuals due to his death and the modification of some of the entries that already referred to the individuals based on the inclusion of more information on the reasons for the measure.

The last modification of the list was decided on December 13, 2021[46]. This modification referred to the inclusion of one entity (Wagner Group) and several individuals involved with it (Dimitriy Utkin, Stanislav Evgenievitch Dychko, and Valery Zakharov). Wagner Group is defined as a Russia-based unincorporated private military entity, led by Dimitriy Utkin and financed by Yevgeny Prigozhin. For the European Union, the Wagner Group is responsible for serious human rights abuses in Ukraine, Syria, Libya, the Central African Republic (CAR), Sudan and Mozambique, which include torture and extrajudicial, summary, or arbitrary executions and killings.

Mr. Prigozhin had been the subject previously of other restrictive measures for his activities in Libya as "financier of the Wagner Group" and has presented two actions against such decisions that have been dismissed by the CJEU[47]. In the case of the Council Decision (CFSP) 2021/2197 of 13 December 2021 amending Decision (CFSP) 2020/1999, Mr. Prigozhin's representatives have raised four pleas in law that are decisive

[44] Council Decision (CFSP) 2021/481 of 22 March 2021 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses, OJEU LI 99/25, 22.3.2021. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021D0481.

[45] 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, OJEU L 436/1, 7.12.2021. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32021R2151.

[46] Council Decision (CFSP) 2021/2197 of 13 December 2021 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses.

[47] The last Judgement has been adopted on 1st July 2022, after this investigation was closed.

to assess the validity of such measures in relation to EU Law and International Law[48]. Firstly, the need to motivate any decision. Secondly and thirdly, a misuse of powers on part of the Council and an error of assessment regarding the relationship between Mr. Prigozhin and the Wagner Group; and lastly the violation of several fundamental rights, namely, articles 10 (Freedom of expression), 6 (Right to a fair trial) and 13 (Right to an effective remedy) of the European Convention for the Protection of Human Rights and Fundamental Freedoms[49]. The new Prigozhin case is still pending on the CJUE but previous case law of the Court on the matter permits to affirm that the protection of the right to fair trial and to an effective remedy is one of the obstacles to be overcome by the EU to ensure the effectivity and legality of the regime.

## 4. Conclusion

Criticism of the regime has not been long in coming. But mainly because of its markedly political character (Youngs 2020) or its demonstrated lack of effectiveness in achieving the primary objective of promoting the end of impunity (Portela 2021). Once again, we return to the initial doubt as to whether this type of measure favors the primary objective of ending impunity or entrenches the alleged perpetrators in the territories they already control and, on whose population, they are committing the abuses they are trying to eliminate by putting pressure on the perpetrator.

Although the objective of having a regime like that regulated by the US Magnitski Act[50] has undoubtedly been achieved, it is also true that the regime is insufficient in view of the magnitude of the proposed objective. There is no doubt that the EU, interested in expanding its influence at the international level, must have an instrument that allows it to react in those cases in which coordinated action from the United Nations Security Council proves insufficient, but the mechanisms put in place are far removed from the purpose of such measures: the repression of conduct. Given the distance of these subjects from the territories of the Union, it is doubtful that the prohibitions will affect them in any way. Different national jurisdictions are implementing different legal solutions to the problems that raise the effectiveness of the sanctions in their own legal regimes but the need for a European approach collides with the principle of conferral as defined by article 5 of the Treaty of the European Union. As an example, Spain had to amend its national legislation regarding the Land Registry due to the impossibility to proceed to the inscription of the sanctions in cases of properties owned by "front-men" of sanction individuals or entities.

Perhaps it would be more effective, if the end of impunity for serious Human Rights violations and abuses is the real objective and no other, to promote a broad

[48] Action brought on 11 February 2022- Prigozhin v Council (Case T-75/22) (2022/C 148/47). OJEU C 148/35, 4.4.2022. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62022TN0075&from=EN.

[49] Convention for the Protection of Human Rights and Fundamental Freedoms, done in Rome, 4.11.1950.

[50] Government information available at https://www.state.gov/global-magnitsky-act/. Infographic on the Magnitski Act available at https://www.state.gov/wp-content/uploads/2020/12/Infographic_v1.8-508.pdf.

application of the principle of universal jurisdiction in the territory of the EU and to encourage cooperation to this end, actively promoting the ratification of the Rome Statute for the ICC and carrying out the work of monitoring compliance with Human Rights in the framework of bilateral or multilateral policies of association or neighborhood that the Union promotes with other areas of the world. In any case, the criminal prosecution of most of the individuals included in the list of sanctioned individuals before international criminal jurisdictions seem not only complex (due to the assumed lack of collaboration of the States of nationality), but also due to the absence of some of the elements that define the international crimes for which they could be indicted.

In any case, the EU is new in the application of sanctions to individuals in the context of Decision (CFSP) 2020/1999 and Regulation (EU) 2020/1998, so only time will allow to be fair with its assessment. The armed conflict in Ukraine has given the EU the opportunity to prove what can be accomplished by the application of such regimes. It is up to the Council alone to ensure that European society sees in its action a real mechanism of involvement with Human Rights and not a political game that is only apply against those States (and their agents) that are not in the interest of the EU and its relations.

## References

BASSIOUNI, M.C. (1999), *Crimes against Humanity in International Criminal Law*, Martinus Nijhoff Publishers, The Hague.

BASSIOUNI, M.C. (2011), *Crimes against Humanity: Historical evolution and Contemporary Application*, Cambridge University Press, New York. https://doi.org/10.1017/CBO9780511976537

BOU FRANCH, V. (2009), 'Crimes against Humanity in Contemporary International Law', in N. Zaikos (coord), *The Diversity of International Law. Essays in Honour of Professor Kalliopi K. Kaoufa*, Martinus Nijhoff Publishers, pp. 547-580. https://doi.org/10.1163/ej.9789004180390.i-676.184

CAPELLÀ I ROIG, M. (2005), *La tipificación internacional de los crímenes contra la Humanidad*, Tirant Lo Blanch, Valencia.

HÖLBERT, C. (2017), 'A comparative study: where and why does the EU impose sanctions?', *UNISCI Magazine*, vol. 43, pp. 53-71.

MARTÍN MARTÍNEZ, M. (2022), 'The EU Global Human Rights Sanctions Regime, a year on: Some Certainties and Many a Doubt', *Ordine Internazionale e diritti umani*, vol. 1/2022, pp. 71-98.

PORTELA, C. (2005), 'Where and why does the EU impose sanctions?', *Politique Européenne*, vol. 17, no. 3, pp. 83-111. https://doi.org/10.3917/poeu.017.0083

PORTELA, C. (2021), 'Horizontal sanctions regimes: targeted sanctions reconfigured?', in C Beaucillon (coord), *Research Handbook on Unilateral and Extraterritorial Sanctions*, Edward Elgar, Cheltenham, pp. 441–457. https://doi.org/10.4337/9781839107856.00035

PORTELA, C. (2021), 'The EU Human Rights sanctions regime: unfinished business?', *Revista General de Derecho Europeo*, 54, pp. 19-44.

ROSAS, A. (2016), 'Restrictive measures against third states: value imperialism, futile gesture politics or extravaganza of judicial control?', *Il diritto dell'Unione europea*, vol. 4, pp. 639-640.

TORRES PÉREZ, M. (2002), 'Inmunidad de Jurisdicción Penal e Impunidad: el fallo de la Corte Internacional de Justicia de 14 de febrero de 2002)', *Tribunales de Justicia*, vol. 11, pp. 97-100.

TORRES PÉREZ, M. (2008), *La responsabilidad internacional del individuo por la comisión de Crímenes de Lesa Humanidad*, Tirant Lo Blanch, Valencia.

YOUNGS, R. (2020), 'The New EU Global Human Rights Sanctions Regime: Breakthrough or Distraction?', *Carnegie Europe*, https://carnegieeurope.eu/2020/12/14/new-eu-global-human-rights-sanctions-regime-breakthrough-or-distraction-pub-83415.

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