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International Human Rights Law in the EU Global Human Rights Sanctions Regime

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1. Introduction

On 7 December 2020 the EU adopted a Global Human Rights Sanctions Regime (hereinafter, also "EU global regime").[1] It is defined as «a framework for targeted restrictive measures to address serious human rights violations and abuses worldwide».[2] Violations and abuses justifying the taking of said measures are expressly, yet non-

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[1] Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses [2020] OJ L 410I/1 (hereinafter, "the regulation"); Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses [2020] OJ L 410I/13 (hereinafter, "the decision").

[2] Art. 1 of the decision, above n. 1.

exhaustively listed: besides (*i*) crimes against humanity, the decision and the regulation establishing the regime refer to (*ii*) five other «serious human violations and abuses» (e.g., slavery, torture, and arbitrary arrests or detentions), as well as (*iii*) «other human rights violations or abuses, … in so far as [they] 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», «including but not limited to» trafficking in human beings, sexual and gender-based violence, etc.[3]

In the light of the general debate on whether, in the absence of a special regime, so-called unilateral or autonomous sanctions – i.e., restrictive measures adopted independently of the UN collective security system[4] – are only lawful under international law insofar as they qualify as either retorsions or lawful countermeasures,[5] both the

[3] Art. 1 para. 1 of the decision, above n. 1; Art. 2 para. 1 of the regulation, above n. 1.

[4] A similar definition of unilateral or autonomous sanctions is used by, *ex multis*, M. BOTHE, *Compatibility and Legitimacy of Sanctions Regimes*, in N. RONZITTI (Ed.), *Coercive Diplomacy, Sanctions and International Law*, Leiden-Boston, 2016, p. 34 ff., p. 34. See also D. ALLAND, *Les mesures de réaction à l'illicite prises par l'Union européenne motif pris d'un certain intérêt général*, in *Rivista di diritto internazionale*, 2022, p. 369 ff., p. 373, who explains the reasons for their definition as 'unilateral' as follows: «*le caractère "collectif" des mesures de réaction à l'illicite n'atténue en rien leur nature auto-appréciée et ne saurait modifier leur caractère intrinsèquement unilatéral: pour l'Etat tiers il ne s'agit pas en effet de sanction institutionnelle et les positions juridiques adoptées par l'Union Européenne, soumise ici au droit international comme un de ses sujets, voient leur opposabilité aux tiers soumises aux mêmes contraintes que les réactions unilatérales des Etats. Elles sont, en d'autres termes, pleinement assimilées au régime des actes unilatéraux des Etats*».

[5] The question of whether these sanctions are lawful under international law has been extensively debated in the past years. Whilst acknowledging that scholarship is not unanimous and that some States have clearly expressed their views as to their unlawfulness, this article will not specifically address this debate. Indeed, as the following pages will show, the research questions that it aims to address are certainly narrower and, in a way, preliminary to any comprehensive investigation into the lawfulness of the EU global regime under international law. For present purposes, the assumption is that unilateral sanctions may be lawful if the conditions for lawful countermeasures are met (see below at Section 3.1).

For the views taken by certain States, see, e.g., XV BRICS Summit Johannesburg II Declaration BRICS and Africa: Partnership for Mutually Accelerated Growth, Sustainable Development and Inclusive Multilateralism of 23 August 2023 <www.gov.za> accessed 13 May 2024, para. 9; the Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law of 25 June 2016 <https://archive.mid.ru/> accessed 13 May 2024, para. 6.

For recent scholarly contributions, see, *ex multis*, I. BOGDANOVA, *Unilateral Sanctions in International Law and the Enforcement of Human Rights. The Impact of the Principle of Common Concern of Humankind*, Leiden-Boston, 2022; A. SPAGNOLO, *Entering the Buffer Zone between Legality and Illegality: EU Autonomous Sanctions under International Law*, in S. MONTALDO, F. COSTAMAGNA, A. MIGLIO (eds), *EU Law Enforcement. The Evolution of Sanctioning Powers*, Abingdon-New York, 2021, p. 215 ff.; S. SILINGARDI, *Le sanzioni unilaterali e le sanzioni con applicazione extraterritoriale nel diritto internazionale*, Milano, 2020; C. MORVIDUCCI, *Le misure restrittive dell'Unione europea e il diritto internazionale: alcuni aspetti problematici*, in *Eurojus*, 2019, p. 77 ff.; A. HOFER, *The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?*, in *Chinese Journal of International Law*, 2017, p. 175 ff.; N. RONZITTI (Ed.), above n. 4; T. RUYS, *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in L. VAN DEN HERIK (Ed.), *Research Handbook on UN Sactions and International Law*, Cheltenham-Northampton, 2016, p. 19 ff.; A. PELLET, *Unilateral Sanctions and International Law. A Proposal for a New Commission on Unilateral Sanctions and International Law*, in *Yearbook of Institute of International Law*, 2015, p. 730 ff.; A. TZANAKOPOULOS, *The Right to Be Free from Economic Coercion*, in *Cambridge International Law Journal*, 2015, p. 616 ff.

premises and the case-by-case application of the EU global regime appear to warrant further investigation.

In particular, besides the preliminary question of whether restrictive measures foreseen by this sanctions regime and taken so far in its context represent breaches of any international legal obligation binding on either the EU or its member States (or both), this article will address the following fundamental question: is the EU global regime meant and has it been used in practice as an instrument to enforce international human rights rules by reacting to their alleged violation or rather as a foreign policy tool aiming at influencing other States' or, generally, actors' conducts?

Clearly, before attempting to carry out any assessment of the lawfulness of the EU global regime under international law, this question must be answered. Indeed, as the subsequent Sections will highlight, the regulation and decision establishing the EU global regime do refer to relevant international human rights rules; however, in doing so, they state that «regard *should* be had to customary international law and widely accepted instruments of international law».[6] Leaving aside the contentious issue of whether customary international rules in the field of human rights even exist,[7] it is worth noting that, whilst these «widely accepted instruments of international law» are expressly listed, the measures taken so far appear to have been targeting, among others, individuals, entities and bodies somehow linked to either States that are not parties to most of these human rights treaties or non-State actors.[8]

Thus, by a thorough examination of the acts establishing the EU global regime, as well as the restrictive measures taken so far, this article aims to address the aforementioned question of whether said measures can be considered as reactions to *violations* of international human rights rules – hence, provided that all other relevant conditions are met, lawful countermeasures – and ultimately assess the place of international human rights law within this global regime.

2. The EU Global Human Right Sanctions Regime in a nutshell

The EU Global Human Rights Sanctions Regime was adopted on 7 December 2020 after an intense debate which was spurred, inter alia, by the adoption of a similar regime in the United States of America – the so-called "Global Magnitsky Human Rights and

[6] Art. 1 para. 2 of the decision, above n. 1; Art. 2 para. 2 of the regulation, above n. 1 (emphasis added).
[7] The author has addressed this issue in: F. FAVUZZA, *Security detention in times of armed conflict: The relevance of international human rights law*, Milano-Padova, 2018, p. 146 ff.
[8] See below at Section 3.2.

Accountability Act" of 2016[9] – and the assassination of a journalist, Jamal Kashoggi, in the premises of the Saudi Arabian Embassy in Turkey in 2018.[10]

This regime is one of four thematic sanctions regimes that the EU has adopted so far alongside several other country-specific regimes.[11] It consists of two legal instruments, i.e., a Council decision adopted pursuant to Art. 29 TEU and a Council regulation, whose annex is amended by subsequent Council decisions and implementing regulations whenever the Council determines that someone is to be added to the list of targets.[12]

Targets may include «individuals, entities and bodies – including state and non-state actors – responsible for, involved in or associated with serious human rights violations and abuses *worldwide, no matter where they occurred*».[13] Hence the name "Global human rights sanctions regime".

The restrictive measures that this regime foresees are not different from those normally adopted within other sanctions regimes: (*i*) travel bans on individuals; (*ii*) the freezing of funds of individuals, entities or bodies; and (*iii*) the connected prohibition on EU persons and entities of directly or indirectly making funds available to those targeted.[14]

Regarding the types of targets affected, it is certainly interesting to note that, in defining non-state actors for the purposes of this regime, Art. 1 para. 3 of the decision clarifies that these include both «actors exercising effective control or authority over a territory» and «other non-State actors». With regard to the latter, which include, e.g., private individuals and business entities,[15] the subsequent paragraph of the same

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[9] Global Magnitsky Act, Title XII, Subtitle F of Public Law 114-328; 22 U.S.C. 2656 note. This regime «authorizes the [US] President to impose economic sanctions and deny entry into the United States to any foreign person identified as engaging in human rights abuse or corruption». See <https://crsreports.congress.gov/product/pdf/IF/IF10576> accessed 13 May 2024.

[10] See S. POLI, *Le misure restrittive autonome dell'Unione europea*, Napoli, 2019, p. 56 ff. See also: European Parliament, *An EU human rights sanctions regime?*, 2019 <www.europarl.europa.eu> accessed 13 May 2024. On the adoption of this regime, see, *inter alia*, V. SZÉP, *Transnational Parliamentary Activities in EU Foreign Policy: The Role of Parliamentarians in the Establishment of the EU's Global Human Rights Sanctions Regime*, in *Journal of Common Market Studies*, 2022, p. 1741 ff.; N. TILAHUN, *What Is the Added Value of the EU Global Human Rights Sanctions Regime?*, in *European Foreign Affairs Review*, 2021, p. 471 ff.; T. RUYS, *The European Union Global Human Rights Regime (EUGHRSR)*, in *International Legal Materials*, 2021, p. 298 ff.; N. VAN DER HAVE, *The Proposed EU Human Rights Sanctions Regime: A First Appreciation*, in *Security and Human Rights*, 2020, p. 1 ff. For an early analysis of several legal issues potentially raised by this regime, including that of compliance with international human rights law, see also C. ECKES, *Transnational Parliamentary Activities in EU Foreign Policy: The Role of Parliamentarians in the Establishment of the EU's Global Human Rights Sanctions Regime*, in *European Foreign Affairs Review*, 2021, p. 219 ff.

[11] At the time of writing, there are more than 40 EU sanctions regimes. The other three thematic regimes concern, respectively, chemical weapons, cyber attacks, and terrorism. See EU Sanctions Map <www.sanctionsmap.eu> accessed 13 May 2024. For an overview of the EU sanctions regimes, see, among others, S. MONTALDO, F. COSTAMAGNA, A. MIGLIO (eds), above n. 5.

[12] Under Art. 5 para 1 of the decision, above n. 1, «[t]he Council, acting by unanimity upon a proposal from a Member State or from the High Representative, shall establish and amend the list set out in the Annex». See similarly Art. 14 paras 1 and 4 of the regulation, above n. 1.

[13] EU Sanctions Map, above n. 11 (emphasis added).

[14] On travel bans, see Art. 2 of the decision, above n. 1; on financial measures, see Art. 3 of the decision and Art. 2 of the regulation, above n. 1.

[15] Commission Notice, Commission guidance note on the implementation of certain provisions of Council Regulation (EU) 2020/1998, C(2020) 9432 final, 17.12.2020, p. 4.

provision adds that, when considering them as potential targets, «the Council shall take into account in particular the following specific elements: (*a*) the objectives of the common foreign and security policy as set out in Article 21 TEU; and (*b*) the gravity and/or impact of the abuses».[16]

As far as the reasons underlying target designation are concerned, the legal acts establishing this regime refer not only to responsibility for serious human rights violations or abuses, but also to involvement in and association with these acts. The notion of involvement is defined as the provision of «financial, technical, or material support for» these acts or any other involvement in these acts, «including by planning, directing, ordering, assisting, preparing, facilitating, or encouraging» them.[17] By contrast, the notion of association is left undefined. It seems to be a rather vague and arguably controversial category of targets, mostly including relatives of those responsible for or involved in serious human rights violations or abuses, as well as persons otherwise benefitting from the activities affected by the sanctions.[18]

As for the meaning of the expression «serious human rights violations and abuses», the question of its definition will be thoroughly addressed in the subsequent Sections, as it is at the very core of our quest to define the place of international human rights law in the EU global regime.

3. The place of IHRL in the EU Global Human Rights Sanctions Regime

The restrictive measures foreseen by the regime at hand – and described above – clearly fall within the category of unilateral or autonomous sanctions, i.e., restrictive measures that are adopted independently of the UN collective security system.[19] While a thorough examination into the lawfulness of this kind of sanctions under international law is outside the scope of this research work, some elements of this general debate are still worth recalling with a view to clarifying the exact scope of and the reasons underlying the present article's investigation into the EU global regime.

The subsequent Sections will, first, briefly consider the general question of autonomous sanctions' lawfulness under international law by referring particularly to the possibility of qualifying them as either retorsions or countermeasures; second, they will investigate whether the sanctions (meant to be) taken in the context of the EU global regime meet one of the main requirements for lawful countermeasures, i.e., that of being taken as a reaction to a breach of an international rule.[20]

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[16] See also Art. 2 para. 3 of the regulation, above n. 1.

[17] Art. 3 para. 3 lit. *b*) of the regulation, above n. 1; Arts 2 para. 1 lit. *b*) and 3 para. 1 lit. *b*) of the decision, above n. 1.

[18] See M. SOSSAI, *Sanzioni delle Nazioni Unite e organizzazioni regionali*, Roma, 2020, p. 146, citing the opinion delivered by Advocate General Mengozzi on 29 November 2011 in the Case C-376/10P, *Pye Phyo Tay Za v Council of the European Union*, ECLI:EU:C:2011:786, para. 40.

[19] See above n. 4 and n. 5.

[20] As is well known, this is not the only requirement of *lawful* countermeasures. See Arts 49 ff of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), *Yearbook of the International*

3.1. The question of autonomous sanctions as retorsions or countermeasures

It has often been argued that, in the absence of a "special" legal basis (e.g., the WTO regime), autonomous sanctions are only lawful under international law insofar as they qualify as either retorsions or lawful countermeasures.[21] In this perspective, when the restrictive measures taken against a State (or another target) are merely unfriendly, without breaching any international legal obligation, they may qualify as retorsions, that States or, more generally, subjects of international law are free to adopt as they please.[22] While retorsions may be taken in response to the prior violation of an international rule on the part of the target, this does not appear to be a requirement of their definition. Thus, retorsions may also be taken, for instance, in response to another unfriendly measure.[23] By contrast, when autonomous sanctions do violate an international legal obligation binding on the subject adopting them, they could in principle qualify as countermeasures. However, for them to not be regarded as wrongful acts certain requirements would have to be met, as it is only in the case of *lawful* countermeasures that wrongfulness is precluded. Suffice it to mention that, unlike retorsions, lawful countermeasures must indeed be adopted in response to another subject's prior breach of international law.[24]

It is against the background of this general debate that the present article considers both the premises and the case-by-case application of the EU global regime. If any conclusion at all can be drawn concerning its lawfulness under international law, two questions must be answered. The first one concerns the restrictive measures themselves: Are the measures foreseen by the EU global regime – and taken so far in its context – breaches of any international legal obligation binding on either the EU or its member States (or both)?

This question has already been addressed extensively in legal literature in general terms, considering both embargoes and targeted sanctions.[25] For the purposes of the present investigation into the EU global regime, suffice it to assume that at least some of these measures could breach certain international rules. Scholars have referred to, e.g., those on the treatment of aliens or on diplomatic and consular immunities, as well as the prohibition of intervention in the internal or external affairs of a sovereign State and the principle of self-determination of peoples.[26] It follows from this assumption that at least

Law Commission, 2001, vol. II (Part Two); Arts 51 ff. of the Articles on the Responsibility of International Organizations (ARIO), *Yearbook of the International Law Commission*, 2011, vol. II, Part Two.

[21] A brief overview of recent literature on the lawfulness of autonomous sanctions is provided above at n. 5. Amongst those taking the view that they may indeed be lawful when they meet the requirements for lawful countermeasures, see N. RONZITTI, *Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective*, in N. RONZITTI (Ed.), above n. 4, p. 1 ff., esp. p. 9 ff.; T. RUYS, above n. 5; A. SPAGNOLO, above n. 5; C. MORVIDUCCI, above at n. 5.

[22] T. RUYS, above n. 5, p. 23.

[23] Ibid.

[24] On lawful countermeasures, see, among others, N. RONZITTI, above n. 21, p. 11 ff.; C. FOCARELLI, *Trattato di diritto internazionale*, Assago, 2015, p. 1956 ff.; F. PADDEU, *Countermeasures*, in *Max Planck Encyclopedia of Public International Law*, 2015 <https://opil-ouplaw-com> accessed 13 May 2024.

[25] See above n. 5.

[26] See, *ex multis*, T. RUYS, above n. 5, p. 23 ff.

some of the measures taken in the context of the EU global regime would not fall within the category of retorsions, as they would be violations of international law.

This is the main reason why the answer to the second question that this article means to raise is particular important: Is the sanctions regime at issue designed and used in practice as a means for the enforcement of international human rights law? Once one assumes that some of the measures foreseen by this regime (and taken in its context) violate international obligations binding on either the EU or its member States (or both) – and also assuming the absence of any special legal basis –, then the lawfulness of these measures under international law ends up depending on whether «they meet the requirements for the permissible recourse to countermeasures».[27] As previously mentioned, one of these requirements is that countermeasures be taken in response to the prior violation of international law by the target of the measures in question. The following Section aims to address this question.

3.2. The question of whether the restrictive measures foreseen by the EU global human rights sanctions regime are (meant to be) taken as a reaction to alleged breaches of international human rights rules

The question of whether a conduct triggering the adoption of sanctions constitutes a breach of an international rule can only be answered with reference to the general regime of international responsibility. Under Article 2 of the Articles on the Responsibility of States for Internationally Wrongful Acts, «[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (*a*) is attributable to the State under international law and (*b*) constitutes a breach of an international obligation of the State».[28] In other words, for international responsibility to arise, both a subjective and an objective element must be present.[29]

Thus, to answer the question raised in this Section, two sub-questions should be addressed. The first one relates to the objective element of an internationally wrongful act: What are the legal obligations that are deemed to have been breached by the targets of the EU sanctions at issue? The second sub-question relates to the subjective element of an internationally wrongful act: Are the conducts referred to in the implementing regulations and decisions adding certain names to the list of targets attributable to a State or another subject of international law that is bound by international human rights obligations?[30] While both sub-questions are equally important, the present article will mostly focus on the first one, although some of the considerations which follow may also

[27] Ibid., p. 11.
[28] ARSIWA, above n. 20. See, *mutatis mutandis*, Article 4 ARIO, above n. 20.
[29] See, *ex multis*, C. FOCARELLI, *International Law*, Cheltenham-Northampton, 2019, p. 595 ff.
[30] As mentioned, the legal instruments establishing this global regime expressly identify as possible targets of restrictive measures «individuals, entities and bodies – including state and non-state actors – responsible for, involved in or associated with serious human rights violations and abuses worldwide».

be relevant from the perspective of the subjective element of an internationally wrongful act.

It is first of all interesting to note that the two legal instruments establishing the EU global regime refer to both «violations» and «abuses» of human rights.[31] What do these terms mean exactly? Why did the drafters deem it necessary to refer to both? Are abuses something other than violations of international human rights law?

The ordinary meaning of these terms suggests that a difference may indeed exist. Whereas the term «violation» normally refers to «the act of doing something that is not allowed by a law or rule»,[32] the term «abuse» is generally defined as «a corrupt practice or custom»[33] or as a «cruel, violent, or unfair treatment of someone».[34]

Unfortunately, yet unsurprisingly, these terms are not defined in the relevant legal instruments. In both the Council decision and the Council regulation establishing the global regime, «abuse» and «violation» appear to be used interchangeably, with no explanation whatsoever of the reasons why both terms are needed.

A number of specific conducts are listed as cases of «human rights violations and/or abuses». First, crimes against humanity. Second, five specific conducts which are expressly defined as «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 disappearances of persons; and (*v*) arbitrary arrests or detentions. Third, «other human rights violations or abuses … in so far as they are widespread, systematic or otherwise of serious concern as regards the objectives of the common foreign and security policy set out in Article 21 TEU». These are also listed, but the list is not exhaustive. It includes, for instance, (*i*) trafficking in human beings, (*ii*) sexual and gender-based violence, and (*iii*) violations or abuses of freedom of peaceful assembly and association.[35]

Thus, in relevant legal instruments, «violation» and «abuse» appear to be used interchangeably, with no explanation of the reason for this choice. As previously mentioned, this approach is probably unsurprising, especially considering how the EU global regime is inspired by the US Global Magnitsky Act.[36] The 2016 version of this Act authorised the US President to impose sanctions in response to certain acts of significant corruption and «gross violations of internationally recognized human rights».[37] One year later, the then US President issued an executive order which included some significant «differences in language that expand[ed] the scope beyond that stated in the law».[38]

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[31] Indeed, as previously mentioned, the EU global regime is officially meant «to address serious human rights violations and abuses worldwide». See above at Section 2.
[32] <www.britannica.com/dictionary> accessed 13 May 2024.
[33] <www.merriam-webster.com/dictionary> accessed 13 May 2024.
[34] <https://dictionary.cambridge.org/> accessed 13 May 2024.
[35] Art. 1 para. 1 of the decision, above n. 1; Art. 2 para. 1 of the regulation, above n. 1.
[36] See above at Section 2.
[37] Above n. 9.
[38] See: Congressional Research Service, The Global Magnitsky Human Rights Accountability Act, In Focus, 28 October 2020. The Act was permanently reauthorized on 8 April 2022 <www.congress.gov/bill/117th-congress/house-bill/7108/text> accessed 13 May 2024.

Interestingly, this is where the phrase «human rights abuses» first appeared and, similarly to the EU global regime, not a word was spent on the definition of «human rights abuses» nor on their difference from «violations» of human rights.[39]

The same pattern can be identified in a Resolution of 2019 in which the European Parliament had strongly supported the adoption of a «European human rights violations regime».[40] The text of the resolution includes references to both «violations» and «abuses», as well as other terms like «crimes», which adds to the confusion surrounding the exact meaning of these terms.[41]

Still, a possible answer to this dilemma may come from the examination of the measures taken so far in the context of the EU global regime. Indeed, the allegation of human rights abuses seems to be normally made in respect of non-State actors.
Consider, first, the restrictive measures taken in respect of Libya on 22 March 2021.[42] These measures targeted two individuals and an entity to which these individuals were connected. The entity in question is the Kaniyat Militia, i.e., a Libyan militia which had exercised control over a Libyan town for around five years (until 2020). According to the Council, the militia itself was «responsible for serious human rights abuses, in particular extrajudicial killings, and enforced disappearances of persons», whereas the two individuals that these measures targeted specifically were allegedly responsible for the same human rights abuses in their capacity as respectively head of the militia and member, as well as brother of the head, of the militia.[43] Consider also the restrictive measures taken in respect of the Wagner Group on 13 December 2021.[44] As is well-known, the Wagner group is «a privately-owned Russian paramilitary organization» whose members are often referred to as mercenaries, although their classification as such under international humanitarian law is dubious.[45] According to the Council, the group itself was «responsible for serious human rights abuses in several countries – i.e., Ukraine, Syria, Libya, the Central African Republic (CAR), Sudan, and Mozambique –, including

[39] Ibid.
[40] European Parliament resolution of 14 March 2019 on a European human rights violations sanctions regime (2019/2580(RSP)) [2021] OJ C 23/108.
[41] Ibid.
[42] Council Implementing Regulation (EU) 2021/478 of 22 March 2021 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses [2021] OJ L 99I/1; Council Decision (CFSP) 2021/481 of 22 March 2021 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses [2021] OJ L 99I/25.
[43] Ibid.
[44] 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 [2021] OJ L 445I/10; Council Decision (CFSP) 2021/2197 of 13 December 2021 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses [2021] OJ L 445I/17.
[45] Under Art. 47 of Additional Protocol I to the four Geneva Conventions of 1949, mercenaries are defined as those individuals who meet six cumulative conditions, including, e.g., that of not being a national of a party to the conflict and that of being specially recruited locally or abroad in order to fight in an armed conflict. As things stands today, it seems reasonable to assume that most members of the Wagner Group do not meet all of the conditions set out by this provision. See, inter alia, R. LAWLESS, *Are Mercenaries in Ukraine?*, in *Articles of War*, 21 March 2022 <https://lieber.westpoint.edu/are-mercenaries-in-ukraine/> accessed 13 May 2024.

torture and extrajudicial, summary or arbitrary executions and killings», whereas the three Russians individuals that the measures at hand specifically targeted were also allegedly responsible for the same serious human rights abuses due to their leading roles within the group or their direct participation in relevant conducts.[46] Human rights abuses are also identified as the basis for target designation for the recent measures taken against a private individual and a private entity allegedly involved in Russia's «censorship practices».[47]

In the present writer's view, considering the ongoing debate on the applicability of international human rights law to non-state actors, especially non-state armed groups, the drafters of the EU regime – and the member States unanimously voting to insert certain names in the list of targets – may have found it difficult to agree on qualifying the conducts of these non-State actors as «violations» of international human rights law: this would have equated to implicitly endorsing the view that this body of law does apply to non-State armed groups or, generally, subjects other than States.[48]

In this respect, it may be interesting to briefly consider the UK Global Human Rights Sanctions Regulations of 2020.[49] These Regulations are meant to apply to certain specific activities, namely those «which, if carried out by or on behalf of a State within the territory of that State, would amount to a serious violation by that State of an individual's [human rights]», «whether or not the activity is carried out by or on behalf of a State».[50] An explanatory note attached to the Regulations further clarifies that the activities (or

[46] Above n. 44.

[47] Council Implementing Regulation (EU) 2024/417 of 29 January 2024 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses [2024] OJ L of 29 January 2024; Council Decision (CFSP) 2024/418 of 29 January 2024 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses [2024] OJ L OJ L of 29 January 2024. Note, however, that in July 2023 the Council adopted some restrictive measures against various Russian officials or entities allegedly involved in internal repression and, in doing so, it relied on their alleged responsibility not only for «serious human rights violations» – of, inter alia, personal liberty and freedom from torture – but also for «violations or abuses of freedom of peaceful assembly and of association» as well as «violations or abuses of freedom of opinion and expression». Council Implementing Regulation (EU) 2023/1495 of 20 July 2023 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses [2023] OJ L 183I/1; Council Decision (CFSP) 2023/1504 of 20 July 2023 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses [2023] OJ L OJ L 183I/60. Since the target of these measures were clearly linked to Russia (e.g., a Minister in the Government of Moscow), the reason for this choice of words may lie in the rights that have allegedly been breached. This issue will be addressed below.

[48] On this general debate, see, among others, A. CLAPHAM, *Human Rights Obligations of Non-State Actors*, Oxford, 2006; D. MURRAY, *Human Rights Obligations of Non-State Armed Groups*, West Sussex, 2016; K. FORTIN, *The Accountability of Armed Groups under Human Rights Law*, Oxford, 2017. It is also worth noting that, while some may make an exception for insurgents, widely recognized as subjects of international law insofar as they control part of a State's territory in the context of a non-international armed conflict (see, *ex multis*, FOCARELLI, above n. 29, p. 58 ff.), the scope of application of the EU global regime is not limited to non-State actors controlling a territory, as it expressly applies also to «other non-State actors». See Art. 1 para. 3 of the decision and Art. 2 of the regulation.

[49] Global Human Rights Sanctions Regulations 2020 (S.I. 2020/680) (hereinafter "the Regulations").

[50] Art. 4 of the Regulations (ibid.), however, clarifies that relevant violations for the purposes of the Regulations are only those related to the following human rights: «(*a*) right to life, (*b*) right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, or (*c*) right to be free from slavery, not to be held in servitude or required to perform forced or compulsory labour».

conducts) which may justify the adoption of sanctions are the same irrespective of whether they are attributable to a State or to another subject; however, they may only qualify as «human rights violations» when they are attributable to a State.[51] Clearly, this approach seems to confirm the theory advanced above on the reasons underlying the use of both «violation» and «abuse» in legal documents establishing sanctions regimes in the field of human rights, i.e., that the expression «human rights abuses» is meant to cover the same (expressly identified) conducts when they are carried out by non-State actors.

Assuming that this reading is correct and that the UK's Regulations reasoning also underlies the EU global regime, this would preclude the possibility of qualifying the restrictive measures taken vis-à-vis non-State actors as lawful countermeasures. If the EU and/or its member States do not believe international human rights law to be binding on these non-State actors, then the measures taken do not meet the necessary requirements of lawful countermeasures, as they are not taken with a view to reacting to a prior breach of an international obligation binding on the subject in question.

That being said on the possible meaning of the expression «human rights abuses», the investigation should now turn to the expression «human rights violations». Interestingly, the implementing acts of the EU global regime qualify as «human rights violations» certain conducts on the part of individuals, entities or bodies which appear to be somehow connected to third States.

Consider, for instance, the first set of restrictive measures that was adopted on 2 March 2021 in response to the detention of the Russian opposition politician Alexei Navalny upon his return to Moscow in early 2021.[52] These measures targeted four Russian individuals who, according to the Council, were «responsible for serious human rights violations in Russia»: the director of the Russian Federal Penitentiary Service; the chairman of the Investigative Committee of the Russian Federation, i.e., a Committee that is presided over by the Russian President himself; the Prosecutor General of the Russian Federation; the Director and Commander-in-Chief of the Federal Service of National Guard Troops of the Russian Federation.[53]

Several other restrictive measures appear to have been adopted in response to alleged «human rights violations»: those of 22 March 2021 against (*i*) four Chinese individuals and an entity in relation to the treatment of Uyghurs and people from other Muslim ethnic minorities in China,[54] (*ii*) two North Korean individuals and an entity linked to the

[51] Above n. 48.

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

[53] Ibid. Further restrictive measures were adopted in relation to Navalny's detention in July 2023 and, more recently, in March 2024, after his death. See above n. 47; Council Implementing Regulation (EU) 2024/952 of 22 March 2024 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses [2024] OJ L of 22.03.2024; Council Decision (CFSP) 2024/1504 of 22 March 2024 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses [2024] OJ L of 22.03.2024.

[54] Above n. 42.

regime,[55] (*iii*) two Russian individuals in relation to the treatment of LGBTI persons and political opponents in Chechnya,[56] (*iv*) a South Sudanese individual,[57] and (*v*) an Eritrean entity;[58] those of 7 March 2023 which targeted a number of individuals and an entity from different countries, including two acting Taliban ministers for the violation of certain women's rights (e.g., the right to education and to freedom of expression).[59]

In respect of all of these measures, one question arises: If the conducts allegedly carried out by the abovementioned individuals, bodies or entities are «human rights violations», what are the sources of the obligations that these subjects have allegedly breached? Assuming that the individual conducts in question can indeed be attributable to each State, are the human rights obligations referred to in the official motivations underlying target designation really binding on all of the States concerned?

The legal instruments establishing the EU global regime do refer to relevant international human rights rules. However, they merely state that, when applying the regime, «regard *should* be had to customary international law and widely accepted instruments of international law».[60] In the present writer's view, this may be interesting in some respects and problematic in others.

On the one hand, these restrictive measures against third States may be considered as relevant instances of either practice or *opinio juris* (or both) when attempting to identify customary international human rights rules. As is well known, the identification of customary international rules in the field of human rights is extremely difficult, mainly due to the fact that relevant practice is generally considered to be that of States vis-à-vis other States or other relevant actors (e.g., international organisations);[61] however, international human rights law «mostly concerns the relationship between States and individuals and is therefore one of those branches of international law that are mostly "characterised by strong *opinio juris*, but inconsistent inter-State practice or even a lack of actual inter-State practice"».[62] It is in the light of these considerations that the

[55] Ibid.
[56] Ibid.
[57] Ibid.
[58] Ibid.
[59] Council Implementing Regulation (EU) 2023/500 of 7 March 2023 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses [2023] OJ L 69I/1; Council Decision (CFSP) 2023/501 of 7 March 2023 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses [2023] OJ L 69I/11. The same implementing acts also provide for sanctions against four Russian individuals, two South-Sudanese individuals, an individual and an entity from Myanmar, an individual from Iran, and an entity from Syria. Several other restrictive measures were adopted in 2023 and 2024 in response to alleged «human rights violations» supposedly committed by individuals, entities or bodies that are connected to third States. See, among others, the most recent measures of 22 March 2024, which were meant to address «the continuing deterioration of the human rights situation in Russia»: see above n 54, preambular clause No 3 of both the Council implementing regulation and the Council decision.
[60] Art. 1 para. 2 of the decision, above n. 1; Art. 2 para. 2 of the regulation, above n. 1 (emphasis added).
[61] See, among others, H. THIRLWAY, *The Sources of International Law*, in M. D. Evans (Ed.), *International Law*, Oxford, 2014, p. 91 ff., p. 100.
[62] H. BOURGEOIS, J. WOUTERS, *Methods of Identification of International Custom: A New Role for Opinio Juris?*, in R. PISILLO MAZZESCHI, P. DE SENA (eds), *Global Justice, Human Rights and the Modernization*

abovementioned phrase in the founding acts of the EU global regime appears to be particularly interesting, as it leaves the door open to the interpreter to consider the measures taken in this context as relevant practice or *opinio juris* in the field of human rights.

Nevertheless, the same phrase may, on the other hand, raise some concerns. First, not all of the alleged violations referred to in the official motivations underlying target designation can indisputably be considered as violations of customary international rules. True, for some of these violations (e.g., freedom of religion or belief), the founding instruments clarify that they will be considered «insofar as they are widespread [and] systematic». However, these instruments further state that these violations may come under scrutiny under the EU global regime also when they are «otherwise of serious concern as regards the objectives of the common foreign and security policy».[63] In these instances, the customary nature of the underlying rule would arguably be dubious. Furthermore, the abovementioned difficulties concerning the identification of customary international human rights rules have led some to deny the same existence of customary rules in this particular field. This leads to the second concern that, in the present writer's view, should be considered.

As mentioned, the legal instruments establishing the EU global regime state that, when applying the regime, «regard should be had to customary international law and widely accepted *instruments of international law*».[64] A list of such instruments is provided: most of them are international human rights treaties, with the exception of the Statute of the International Criminal Court and the trafficking Protocol to the UN Convention on organized crime.[65] Thus, even if the existence of customary international human rights rules were to be denied, a legal basis could still be found in relevant treaty rules. While

of International Law, Cham, 2018, p. 69 ff., p. 70. The authors also refer to international humanitarian law, international criminal law and international law on the use of force.

[63] Art. 1 para. 1 of the decision, above n. 1; Art. 2 para. 1 of the regulation, above n. 1. Among the measures taken on this basis, consider those targeting certain individuals allegedly involved in the events which led to Navalny's death in March 2024. See, e.g., the motivations underlying the designation of Judge Nikiforov, which clearly differentiate between arbitrary arrest and torture or other cruel, inhuman or degrading treatment, on the one hand, and freedom and expression, on the other hand: «[…] he is responsible for serious human rights violations in Russia, including arbitrary detentions as well as torture and other cruel, inhuman or degrading treatment or punishment, as well as the violation of freedom of opinion and expression, which is of serious concern as regards the objectives of the common foreign and security policy set out in Article 21 TEU» (above n. 53, target 84).

[64] Ibid. (emphasis added).

[65] The following human rights treaties are expressly referred to: (*a*) the International Covenant on Civil and Political Rights; (*b*) the International Covenant on Economic, Social and Cultural Rights; (*c*) the Convention on the Prevention and Punishment of the Crime of Genocide; (*d*) the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; (*e*) the International Convention on the Elimination of All Forms of Racial Discrimination; (*f*) the Convention on the Elimination of All Forms of Discrimination against Women; (*g*) the Convention on the Rights of the Child; (*h*) the International Convention for the Protection of All Persons from Enforced Disappearances; (*i*) the Convention on the Rights of Persons with Disabilities; (*j*) the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; (*k*) the Rome Statute of the International Criminal Court; (*l*) the European Convention for the Protection of Human Rights and Fundamental Freedoms.

this is probably true in respect of most of the measures taken so far, some of them appear to have been targeting individuals, entities and bodies somehow linked to States that are not parties to most of these human rights treaties. Consider the case of sanctions concerning China: the official motivations of target designation refer to «arbitrary detentions», «degrading treatment», and «systematic violations of … freedom of religion or belief».[66] However, China is not a party to the International Covenant on Civil and Political Rights[67] nor to the Statute of the International Criminal Court nor, as far as the present writer's knows, to any other relevant treaty. Thus, in this case, even though the Council justified the adoption of sanctions against these Chinese individuals and entity by referring to «human rights violations», it is at the very least debatable that any international treaty-obligation binding on China had indeed been breached by the latter.

In the final analysis, the answer to the question of whether the restrictive measures foreseen by the EU global regime are meant to be taken – and have been taken in practice – as a reaction to alleged breaches of international human rights law varies depending on the target of each measure. When it comes to non-State actors, it seems reasonable to answer in the negative, as the expression «human rights abuses» appearing in the motivations underlying target designation does not seem to imply that any international rule binding on the target(s) of the measure(s) concerned has been breached. As for measures targeting individuals, entities or bodies connected to third States, while in most cases target designation may find a legal basis in customary and/or treaty law, in some other cases this does not appear to be the case and the measure(s) in question cannot be considered as reaction(s) to the prior breach of an international human rights rule binding on the target.

4. Conclusion

The research question that this article has intended to address is whether international human rights law really and always informs the decision-making process within the EU Global Human Rights Sanctions Regime. An answer in the affirmative would lead to conclude that this regime is indeed designed and implemented as a means for the enforcement of international human rights law.

As things stand today, it is the present writer's view that the most reasonable answer is «not always». Considering both the sanctions adopted against non-State actors for human rights «abuses» and those adopted against certain third States (even if allegedly taken in response to human rights «violations»), this whole regime rather seems to have a dual nature: on the one hand, the official aspiration to use it as a means to enforce international human rights law is evident from some textual elements and some of the measures taken; on the other hand, the regime appears to have been deliberately designed

[66] Above n. 42.
[67] China has merely signed it (05.10.1998). See United Nations Treaty Collection <https://treaties.un.org/> accessed 13 May 2024.

to allow the Council to also use it as a foreign policy tool aimed at influencing other actors' behaviour. After all, this is precisely what the High Representative said on behalf of the EU when presenting the regime: «Sanctions […] are intended to change an actor's behavior and serve as a deterrent to serious human rights violations and abuses».[68] Clearly, in the perspective of international law, this would preclude the qualification of some of the measures taken within this regime as lawful countermeasures.

Ultimately, even taking the view that unilateral sanctions like the ones envisaged by the EU Global Human Rights Sanctions Regime do comply with international law when they qualify as lawful countermeasures,[69] the answer to the question of the lawfulness of this regime is not straightforward. Indeed, the research has shown how, for each and every measure adopted in its context, a case-by-case assessment of the nature of the targets thereof and the legal sources of the obligations allegedly breached is certainly required.

[68] Council of the EU, EU Global Human Rights Sanctions Regime: Declaration by the High Representative on behalf of the European Union, Press release of 8 December 2020.
[69] As mentioned above at n. 5, this view is not universally shared.