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Brief

The EU's Magnitsky Act
Obsolete in the Face of Russia's Crimes in Ukraine?

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Despite the mounting evidence of the most serious of human rights violations being conducted by Russian forces on Ukrainian soil, the EU has so far chosen not to use its new Magnitsky Act to blacklist the perpetrators and their commanders. Instead, the EU has preferred to respond to Russia's 'dumb' bombs with increasingly 'dumb' sanctions. This Brief explains why, after decades of work to smarten up its restrictive measures, the politicisation of human rights sanctions and the high threshold of evidentiary standards make it very hard for the Council to rely on evidence gathered from transition countries.

While the Russian invasion of Ukraine may not have started with clear genocidal intent, the Kremlin's narrative and legislation have gradually caught up with the mounting evidence of its troops' genocidal practices.[1] The flattening of Mariupol, the indiscriminate attacks on civilian areas, the targeted strikes on critical energy and water infrastructures ahead of winter, the deportation of Ukrainian children for assimilation in Russian families and institutions, the massacre in Bucha, and atrocities committed in other places under effective Russian control, and thus subject to the international law of occupation, have fuelled a debate on how to prosecute the perpetrators of war crimes and crimes against humanity.[2]

But faced with jurisdictional obstacles to try President Putin and his henchmen and -women in absentia before the International Criminal Court, and problems of legitimacy of setting up a special tribunal for the crime aggression, the EU and G7 countries have made further strides in adopting sanctions aimed at crippling the Russian economy.[3]

In the face of Russia's crimes in Ukraine, the GHRSR has not been employed, which raises the question of whether it is fit for purpose

In December 2020, the EU adopted a new thematic sanctions tool – the Global Human Rights Sanctions Regime (GHRSR) – that targets the most serious of human rights violations and abuses worldwide, including genocide and crimes against humanity (Category 1), extrajudicial, summary or arbitrary executions and killings, enforced disappearance of persons, and arbitrary arrests or detentions (Category 2).[4] Yet, in the face of Russia's crimes in Ukraine, the new instrument has not been employed by the Council, which is surprising and raises the question whether the GHRSR is fit for purpose.

1. The Politicisation of Human Rights Sanctions

Better known as the EU's Magnitsky Act, the GHRSR became operational in 2021, when 17 individuals and five legal entities from six countries were blacklisted, yet lay dormant in 2022. Instead, those Russians deemed politically, operationally, or directly responsible for war crimes and other grave human rights violations in Ukraine were added to the country-specific sanctions lists. This illustrates the inherently political character of EU sanctions policy. Whereas the EU is fond of presenting itself as a virtuous global citizen altruistically defending a higher order of human dignity, the definition and adoption of restrictive measures is as much a formal acknowledgement of EU values as it is a reflection of the political choices made in deciding which persons (not) to target, under which sanctions regime, and what level of pain to inflict. By stating in Article 1(4) that designations "shall take into account […] the objectives of the common foreign and security policy," the GHRSR takes a further step "towards the politicisation of the human rights discourse that may also undermine its success as a seemingly neutral tool urging international actors to commit at least formally and rhetorically to the value of protecting human rights."[5]

Country-based sanctions inevitably put in question the whole relationship of the EU to that country. While that may be exactly the point, as the adoption of a long series of sanctions packages against Russia shows, the GHRSR was an attempt to bolster the role of 'normative power Europe' by decoupling the protection of human rights from country-specific situations.

The EU's Magnitsky Act was supposed to fill a gap by providing a legal basis for targeted individual sanctions without the need for a country-based regime, thereby supplementing existing restrictive measures and reinforcing collective action to ensure – rather bombastically – that "perpetrators of human rights violations and abuses have nowhere to hide."[6] The presumption was that horizontal regimes would make it easier to dissociate restrictive measures from the EU's diplomatic relations with the third country concerned. Yet, this presumption of depoliticising the EU's overall relations with a third country is flawed, for two main reasons.[7]

- First, the GHRSR does not insulate the EU from third countries adopting countersanctions, thereby severely impacting bilateral relations, as spectacularly shown in the case of China. On 22 March 2021, the same day when the EU blacklisted four persons and one entity for the reported mass detention and persecution of the Uyghur minority in Xinjiang Province, China adopted countersanctions against 10 individuals and four entities in the EU, including Members of the European Parliament, the EP's Sub-committee on Human Rights and the Council's Political and Security Committee, think tankers, and academics that Beijing claimed "severely harm China's sovereignty and interests and maliciously spread lies and disinformation."[8] These sweeping measures led the EP to effectively freeze the ratification procedure of the draft EU-China Comprehensive Agreement on Investment.

- Second, the GHRSR impels the EU institutions to bring the state into the centre of analysis, thereby blurring the boundaries between the new thematic regime and country-specific sanctions and raising questions about consistency and complementarity. Indeed, if the subjects were primarily intended to be non-state actors, then early practice with the instrument shows that, in a power vertical, it is hard to get away from the state and its governance structures, thus robbing the GHRSR of one of its supposedly innovative traits.

2. Evidentiary Standards

Following on from the previous point about proper implementation, it is worth recalling that the Court of Justice of the EU (CJEU) linked it to respect for the rule of law ex Article 47 of the Charter of Fundamental Rights of the EU (CFR) and the right to an effective remedy.[9] In terms of evidentiary standards, a tension lies in the broad listing criteria for sanctions under the EU's Magnitsky Act and the distinct conditions required under EU law.[10] For the GHRSR to comply with the Union's own rule of law standards, much depends on the listing criteria, the information on which Council decisions are based, and appropriate legal procedures through which a listing can be challenged in order to guarantee a thorough judicial review and rights of redress.[11]

A tension lies in the broad listing criteria for sanctions under the EU's Magnitsky Act and the distinct conditions required under EU law

The GHRSR primarily targets natural or legal persons, entities, or bodies, who are directly responsible for grave violations of human rights. Around that group are the ringleaders who provide financial, technical, or material support, including by planning, directing, ordering, assisting, preparing, facilitating, or encouraging such acts. In a third concentric circle feature those who are associated with those in the first two categories. By extending sanctions to the latter category, the GHRSR casts a wider net so as to catch the bigger fish (i.e., those political, spiritual, and economic enablers). Yet, as under conventional criminal law, the more tenuous the link to the actual crimes, the heavier the burden of proof.

More than a decade of litigation has led the CJEU to refine its judicial scrutiny to uphold the fundamental rights of targeted persons and entities in the process of blacklisting. Recent research has shown that, in contrast to post-Lisbon jurisprudence on counterterrorism, the abundant caseload of sanctions for the alleged misappropriation of state funds of Ukraine reveals an unprecedented level of judicial scrutiny over and an exceptionally high standard: by the end of 2022, 46 out of 50 cases brought before the CJEU had been annulled.[12]

The GHRSR contains neither criteria nor references to benchmarks. It only prescribes that, when listing non-state actors for other human rights violations than those mentioned in categories 1 and 2, the Council "shall take into account in particular […] the objectives of the [CFSP]; and the gravity and/or impact of the abuses" (Article 1(4)). That is not to say that no causality is established at all: the annexes to the decisions do provide details of the conduct of the blacklisted individuals and the types of violations they committed.[13] However, even at this level of implementing acts, no reference is made to breaches of specific human rights instruments.

Contrary to conventional criminal law, but in line with pre-existing EU sanction procedures, no trial or any process of adjudication is foreseen under the GHRSR. In cases of counterterrorism sanctions, their aim is primarily preventive (i.e., blocking access to funds) rather than punitive.[14] Since

targeted sanctions are not criminal measures, the presumption of innocence protected by Article 48(1) CFR is not infringed, and Article 49 CFR does not apply.[15] In the case of the GHRSR, it will be harder to argue that the nature of the measures, while temporary and subject to regular review, is purely preventive. After all, they "imply an accusation of a criminal nature," though not in the context of criminal proceedings. Under the counter-terrorism sanctions regime, there is a requirement of a finding by a competent authority.[16] Where persons are "identified as responsible" for misappropriation of state funds in the context of country-based sanctions, it requires at least the commencement of criminal proceedings or a pre-trial investigation in the country in question.[17] In relying on such decisions taken by the authorities of a third country, the Council must verify whether that decision was adopted in accordance with the rights of the defence and the right to effective judicial protection.[18] In view of the high level of evidentiary standards upheld by the CJEU, this makes it difficult for the Council to rely on evidence gathered from transition countries like Ukraine where the justice sector is still vulnerable to widespread corruption and political cronyism.[19] It is hardly surprising, given the aims and scope of the instrument, that the GHRSR does not require any prior decision of a judicial or otherwise competent authority. Since it does not explicitly require any specific evidence that listed persons or entities are responsible, it is difficult to see how the solid factual basis for the decision can be tested.[20] This is, no doubt, one reason why most of the listings so far have targeted persons and entities with clear links to the state, where official lines of responsibility can be more easily identified.[21]

Conclusion

Even if the novelty of the GHRSR lies in the grave nature of the human rights abuses it covers, the targets of such violations might as well be blacklisted under (existing) vertical sanction regimes, especially if a case-centric approach is necessary to meet the evidentiary standards set in the CJEU's case law. The blacklisting of those held responsible for the arbitrary arrest, trial, and detention of Russia's main political opposition figure, Alexei Navalny, is a case in point.

In the absence of a threat of veto by the Member States, the adoption of restrictive measures under the country-specific sanctions regime would have been preferable to signal the EU's dismay at the evolution of Russian politics. Conversely, in taking aim at Beijing's – independently verified – genocidal practices in Xinjiang, the EU refrained from branding the malign behaviour of the targets as GHRSR Category 1 abuses.[22]

This raises the question of whether targets guilty of genocide and crimes against humanity will ever be hit under the GHRSR. The answer: if so, then probably only long after the occurrence of the events, when sufficient evidence has been gathered to hold up in court. Hence, the absence – for now – of Mr Putin and his henchmen from the GHRSR list, whereas they do appear on the blacklist under the EU's sanctions against Russia. This amplifies the question about the value added of the horizontal human rights sanctions regime. The answer supposedly lies in the reduction of reasons to veto the adoption of restrictive measures against (former) incumbents deemed responsible. Absent reform of CFSP decision-making procedures in the Council that might not be such a bad thing. Indeed, the Council deserves encouragement to make better use of the instrument the next time a Member State throws a spanner in the works by insisting that some evident candidates, like those preaching genocide, be kept off or removed from existing blacklists.[23]

This war has become Putin's version of the Holodomor, and warrants the re-activation of the EU's Magnitsky Act

In light of Russia's weaponisation of last winter and the prospect of a new season of major offensives, with the threat of tens of thousands more Ukrainian citizens being killed, deported, or displaced, this war has become Putin's version of the *Holodomor*, and warrants the re-activation of the EU's Magnitsky Act.

Endnotes

[1] "Transcript: Vladimir Putin's Televised Address on Ukraine," Bloomberg, 24 February 2022; Centre for Civil Liberties, 4 April 2022; "Helsinki Commission Briefing on Russia's Genocide in Russia," Commission on security and cooperation in Europe, 14 November 2022.

[2] Ilze Brands Kehris, Assistant Secretary-General for Human Rights, "Human rights concerns related to forced displacement in Ukraine," Office Of The High Commissioner For Human Rights, 7 September 2022; and Humanitarian Research Lab, Yale School of Public Health, *Russia's Systematic Program for the Re-education and Adoption of Ukraine's Children. Conflict Observatory Report* (New Heaven: Conflict Observatory Report, Humanitarian Research Lab, Yale School of Public Health, 14 February 2023).

[3] "Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova," International Criminal Court, 17 March 2023; "EU solidarity with Ukraine," European Commission, accessed in May 2023.

[4] Council of the European Union, *Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses*, OJ L410I/13 (Brussels: Official Journal of the European Union, 7 December 2020).

[5] Christina Eckes, "EU Human Rights Sanctions Regime: Striving for Utopia Backed by Sovereign Power," *European Foreign Affairs Review* Vol. 26, Issue 2 (May 2021): 219, 240.

[6] Eamon Gilmore, "Keynote address by the EU Special Representative for Human Rights, Eamon Gilmore at the launch of the EU Action Plan on Human Rights and Democracy 2020–2024," Eamon Gilmore, 23 November 2020.
[7] There exist several other arguments that militate against the rationale that underpins the GHRSR. See: Steven Blockmans, "The EU's Mangnitsky Act: An innovative tool for the enforcement of human rights and rule of law worldwide?" in *The Rule of Law's Anatomy in the EU: Foundations and Protections*, eds. A Rosas, J Raitio, and P Pohjankoski (Hart Publishing, 2023), 207-221.
[8] Council of the European Union, *Council Decision (CFSP) 2021/2160 of 6 December 2021 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses*, L 436/40 (Brussels: Official Journal of the European Union, 6 December 2021); Matthew Parry, *China's Counter Sanctions on EU Targets* (Brussels: European Parliamentary Research Service, May 2021).
[9] European Court of Justice, *PJSC Rosneft Oil Company, Regina (on The Application of) v Her Majesty's Treasury and Others*, ECLI:EU:C:2017:236 (Luxemburg: European Court of Justice, 28 March 2017), para 73.
[10] European Union, *Consolidated version of the Treaty on the Functioning of the European Union A.DECLARATIONS CONCERNING PROVISIONS OF THE TREATIES 25.Declaration on Articles 75 and 215 of the Treaty on the Functioning of the European Union*, C 202/346 (Brussels: Official Journal of the European Union, 2016).
[11] Based on a detailed analysis of CJEU sanctions case law, Eckes has set out the requirements with which the GHRSR has to comply. See: Christina Eckes, "EU Human Rights Sanctions Regime."
[12] Celia Challet and D C Grumaz, "EU Restrictive Measures and Third Countries' Evidence," *European Foreign Affairs Review*, Vol. 28, No. 1 (2023): 9–29.
[13] Council of the European Union, *Council Decision (CFSP) 2021/2197 of 13 December 2021 amending Decision (CFSP) 2020/1999 concerning restrictive measures against serious human rights violations and abuses*, LI 445/17 (Brussels: Official Journal of the European Union, 13 December 2021).
[14] Of course, the consequences for the listed individual may be severe. See: European Court of Justice, *Joined cases C-584/10 P, C593/10 P and C-595/10 P European Commission and others v. Yassin Abdullah Kadi*, ECLI:EU:C:2013:518 (Luxemburg: European Court of Justice, 18 July 2013), para 132.
[15] General Court (Second Chamber), *Case T-49/07 Sofiane Fahas v Council of the European Union*, ECLI:EU:T:2010:499 (General Court, 7 December 2010), para 67; General Court (Third Chamber), *Case T-256/11 Ahmed Abdelaziz Ezz and Others v Council of the European Union*, ECLI:EU:T:2014:93 (General Court, 27 February 2014), paras 77–80; Court (Fifth Chamber), *Case C-220/14 P Ahmed Abdelaziz Ezz and Others v Council of the European Union*, ECLI:EU:C:2015:147 (Fifth Chamber, 5 March 2015).
[16] General Court, *Case T-49/07,* para 67; Council of the European Union, *Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism*, OJ L344/93 (Brussels: Official Journal of the European Union, 28 December 2001), art 1(4).
[17] General Court, *Case T-256/11,* para 67.
[18] On counter-terrorism sanctions, see: Court (Grand Chamber), *Case C-599/14 P, Council of the European Union v Liberation Tigers of Tamil Eelam (LTTE)*, ECLI:EU:C:2017:583 (Grand Chamber, 26 July 2017), paras 22–27; On misappropriation of state funds the Court has recently strengthened its position, see: Court (Eighth Chamber), *Case C-598/16 P Viktor Fedorovych Yanukovych v Council of the European Union*, ECLI:EU:C:2017:786 (Eighth Chamber, 19 October 2017), paras 71–75; Court (Seventh Chamber), *Joined Cases C-72 & 145/19 P Suzanne Saleh Thabet and Others v Council of the European Union*, ECLI:EU:C:2020:992 (Seventh Chamber, 3 December 2020), paras 34–40 and 46.
[19] In the specific case of Ukraine, the challenge might be overcome thanks to the work of the EU Advisory Mission (EUAM), whose mandate was amended precisely to provide support to the authorities to facilitate the investigation and prosecution of international crimes committed in the context of the Russian invasion. See: Council of the European Union, *Council Decision (CFSP) 2022/638 of 13 April 2022 amending Decision 2014/486/CFSP on the European Union Advisory Mission for Civilian Security Sector Reform Ukraine (EUAM Ukraine)*, L 117/38 (Brussels: Official Journal of the European Union, 13 April 2022); Celia Challet and D C Grumaz, "EU Restrictive Measures."
[20] European Court of Justice, *Joined cases C-584/10 P, C593/10 P and C-595/10,* para 119.
[21] Council, *Common Military List of the European Union Review 58(3)* (Brussels: Official Journal of the European Union, 2021), 621-34.
[22] For evidence materials and further references on the Uyghur Tribunal led by Sir Geoffrey Nice QC (lead prosecutor of Slobodan Milosevic in front of the International Criminal Tribunal for the former Yugoslavia), see: Church House Westminster, *Uyghur Tribunal Judgment* (Church House Westminster, 9 December 2021); United Nations Human Rights Office of the High Commissioner, *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China* (Geneva: United Nations Human Rights Office of the High Commissioner, 31 August 2022); Church House Westminster, *Uyghur Tribunal Judgment* (Church House Westminster, 9 December 2021).
[23] Following a successful attempt in 2022 in removing Patriarch Kirill from the EU's sanctions list against Russia, Hungary threatened to block the adoption of the 10th sanctions package if nine names were not taken off the existing blacklist. During a COREPER meeting on 18 January 2023, Poland protested against Hungary's request for the de-listings, submitting a formal protest with the support of the Baltic states. See: Jakob Hanke Vela and Zoya Sheftalovich, "Spanish-French love-in — Lindner's debt problem — Putin's blood diamonds," *Politico*, 19 January 2023.

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