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**Unpacking the Elusive Nature of Magnitsky
Sanctions: Human Rights and Security
Considerations**

Victoria Kerr and James Patrick Sexton

European University Institute

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Research Forum, Glasgow, March 2022

Unpacking the Elusive Nature of Magnitsky Sanctions: Human Rights and Security Considerations

Victoria Kerr and James Patrick Sexton

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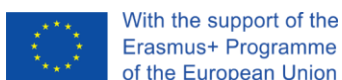
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Abstract

International sanctions play an increasingly prevalent role in responses to global challenges. In particular, several states and the European Union have in recent years created 'Magnitsky sanctions' regimes that utilise travel bans and asset freezes to target persons located abroad presumed responsible for the violation of human rights. This paper seeks to explore Magnitsky sanctions, through the lenses of human rights and security, with a view to seeking clarity and stimulating further discussion on their future place, role, and regulation. Through unpacking Magnitsky sanctions' potential aims – human rights and security – the paper exposes Magnitsky sanctions as elusive and malleable tools, that potentially reflect more overarching trends, namely the proliferation of securitisation within international relations and dissatisfaction with existing international criminal justice avenues.

Keywords

Unilateral Sanctions, Human Rights, Security, International Criminal Law, European Union

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1. Introduction

International sanctions play an increasingly prevalent role in responses to global challenges. In particular, several states and the European Union (‘EU’) have in recent years created ‘Magnitsky sanctions’ regimes that utilise travel bans and asset freezes to target persons located abroad presumed responsible for the violation of human rights. While sanctions have historically encompassed a security dimension, the predominant aim of Magnitsky sanctions

is the protection and promotion of human rights.¹ This paper seeks to explore Magnitsky sanctions, through the lenses of human rights and security, with a view to seeking clarity and stimulating further discussion on their future place, role, and regulation. Given their relative novelty and ambiguity, the paper first situates Magnitsky sanctions within the international sanctions environment, before mapping the most comprehensive and active Magnitsky regimes and identifying trends in their designations. Thereafter, through unpacking Magnitsky sanctions' potential aims – human rights and security – the paper exposes Magnitsky sanctions as elusive and malleable tools. With more states creating Magnitsky-style regimes and designations continuing, the paper critically assesses whether Magnitsky sanctions reflect more overarching trends, namely the proliferation of securitisation within international relations and dissatisfaction with existing international criminal justice avenues.

2. Magnitsky Sanctions

2.1 *Situating Magnitsky Sanctions*

Sanctions have long been used by states in their relations with other states.² The aims of sanctioning states have historically varied, including 'signalling' dissatisfaction with certain conduct or a state of affairs, coercing an actor into behavioural changes, 'constraining' an actor's behaviour, other goals, or a combination thereof.³ While the term 'sanction' is often used to refer to *economic* sanctions, defined by Hufbauer *et al* as the 'deliberate, government inspired withdrawal, or threat of withdrawal, of customary trade or financial relations',⁴ other forms of international sanctions have also long been used. These include, among others, diplomatic sanctions, which involve the recalling of ambassadors or interruption of diplomatic relations between states,⁵ and sports sanctions, whereby states restrict the inflow or outflow of athletes to sporting events, such as those used in relation to South Africa during Apartheid.⁶ Today, the international sanctions environment consists of a vast overlapping array of different regimes in operation across the globe. Nevertheless, three broad trends can be observed which are of particular importance to Magnitsky sanctions.

¹ While several Magnitsky sanction regimes also focus on corruption, the present paper focuses on their human rights dimensions. For the former, see A. Moiseienko, *Corruption and Targeted Sanctions: Law and Policy of Anti-Corruption Entry Bans* (Brill | Nijhoff 2019).

² Generally, see N. Mulder, *The Economic Weapon: The Rise of Sanctions as a Tool of Modern War* (Yale University Press 2022).

³ F. Giumelli, *Coercing, Constraining and Signalling: Explaining UN and EU Sanctions after the Cold War* (ECPR Press 2011) 32-35, cited in Ö. Özdamar and E. Shahin, 'Consequences of Economic Sanctions: The State of the Art and Paths Forward', (2021) 23 *International Studies Review* 1646, 1648.

⁴ G. Hufbauer *et al.*, *Economic Sanctions Reconsidered: History and Current Policy* (Peterson Institute Press 2007), 3.

⁵ E.g., K. Willsher, 'France recalls ambassadors to US and Australia after Aukus pact', *The Guardian (online)*, 17 September 2021, <www.theguardian.com/world/2021/sep/17/france-recalls-ambassadors-to-us-and-australia-after-aukus-pact>.

⁶ See J.A.R. Nafziger, 'Nonaggressive Sanctions in the International Sports Arena', (1983) 15(2) *Case Western Reserve Journal of International Law* 329.

Firstly, unilateral sanctions – those created without authorisation from the United Nations Security Council – are increasingly employed by states and the EU.⁷ Sanctions were originally deployed by states unilaterally to pursue their own interests,⁸ and while the use of multilateral sanctions vastly increased in the 20th century with the creation of the League of Nations and later the United Nations, states appear to be re-embracing unilateral sanctions.⁹ Secondly, sanctions have become increasingly targeted. So-called ‘smart sanctions’ have proliferated since the mid-1990s largely as a reaction to the serious human rights effects that comprehensive state-wide measures can have, such as witnessed in Iraq during the 1990s.¹⁰ For instance, individual states and the UNSC regularly take a thematic approach to sanctions by targeting individuals (allegedly) involved in particular conduct regardless of the state in which they are located.¹¹ However, the increase of thematic sanctions has not led to the elimination of state-focused sanctions; in fact, state-wide or geographically-orientated sanctions (i.e. regimes focused on a particular state, but under which individuals and entities can be targeted) continue to occur.¹² Furthermore, it has been argued that the cumulation of overlapping ‘targeted’ sanctions by numerous states has in certain cases created effects similar to comprehensive sanctions.¹³ Thirdly, while sanctions have historically been imposed either in connection with or to prevent war or to resolve international disputes, they have become increasingly justified by referencing the internal affairs of the state in which the sanctioned conduct occurs or by invoking internationally or transnationally shared interests, notably human rights.¹⁴ Magnitsky sanctions, hailed as a new ‘generation’ of sanctions,

⁷ D.S. Cohen and Z.K. Goldman, ‘Like it or Not, Unilateral Sanctions are Here to Stay’, (2019) 113 *AJIL Unbound* 146; E. Moret, ‘Unilateral and extraterritorial sanctions in crisis: implications of their rising use and misuse in contemporary world politics’ in C. Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Elgar 2021).

⁸ See F. Crouzet, ‘Wars, Blockade, and Economic Change in Europe, 1792-1815’, (1964) 24(4) *The Journal of Economic History* 567, 568-569 and L. Davis and S. Engerman, ‘Sanctions: Neither War nor Peace’, (2003) 17(2) *Journal of Economic Perspectives* 187, 188-190.

⁹ *Supra* n 7.

¹⁰ K. Annan, ‘In address to International Rescue Committee, Reflects on Humanitarian Impact of Economic Sanctions’, UN Press Release SG/SM/7625, 15 November 2000, <www.un.org/press/en/2000/20001115.sgsm7625.doc.html>.

¹¹ UNSC Res 1373 (2001) of 28 September 2001, S/RES/1373(2001); Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP); Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.

¹² E.g., see Security Council Committee established pursuant to resolution 2206 (2015) concerning South Sudan, <<https://www.un.org/securitycouncil/sanctions/2206#current%20measures>>.

¹³ I. Prezas, ‘From Targeted States to Affected Populations: Exploring Accountability for the Negative Impact of Comprehensive Unilateral Sanctions on Human Rights’ in C. Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Elgar 2021).

¹⁴ Examples include: the US and USSR’s country-wide sanctions on ‘human rights’ issues during the Cold War period, see G.A. Lopez, ‘Enforcing Human Rights Through Economic Sanctions’ in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (OUP 2013), 773-774; current geographically-orientated sanctions by the US against Burundi, Central African Republic, and Syria and the sanctions imposed under the Countering America’s Adversaries Act, against Russia, North Korea and Iran, see T. Firestone and K. Contini, ‘The Global Magnitsky Act’, (2018) 29 *Crim Law Forum* 617; current geographically-orientated sanctions by the EU ‘particularly in the context of

represent a combination of these three trends: they are unilateral, target individuals and entities and not only *refer* to human rights, but purport to use human rights abuses or violations as their justification.¹⁵

Magnitsky sanctions were created in honour of Sergei Magnitsky, a Russian tax lawyer, auditor and whistleblower who exposed the large-scale fraud and corruption of numerous Russian tax officials, resulting in his arrest in 2008 and ultimate death under suspicious circumstances in Moscow's Butyrka Prison in 2009 at the age of 37.¹⁶ The European Court of Human Rights later ruled that Russian authorities' treatment of Magnitsky violated his rights to life and amounted to inhuman and degrading treatment.¹⁷ Following the campaigning of Magnitsky's former employer, Bill Browder, the circumstances surrounding his death drew international criticism.¹⁸ In response, the Sergei Magnitsky Rule of Law Accountability Act 2012 ('the 2012 Act') was passed by the US Congress and signed by then-President Barack Obama in December 2012.¹⁹ In December 2016, the Global Magnitsky Human Rights Accountability Act 2016 ('the 2016 Act') was also passed by Congress,²⁰ which broadened the application of the sanctions globally to any foreign person involved in human rights abuse.²¹ Canada followed suit and in 2017 adopted its own Magnitsky legislation.²² Since then, several other states and regions have also adopted Magnitsky-style legislation, including Gibraltar, Jersey, Kosovo, Estonia, Latvia, and Lithuania. The UK (2020) and EU (2021) also adopted comprehensive Magnitsky-style regimes and have since designated numerous individuals and entities from across the globe allegedly involved in human rights violations or abuses. Most recently, the Australian Parliament passed the Autonomous Sanctions Amendment (Magnitsky-style and

democratic backsliding', see C. Portela, 'The EU's new human rights sanctions regime: one year on', *The Loop*, <<https://theloop.ecpr.eu/the-eus-new-human-rights-sanctions-regime-one-year-on/>>; and thematic measures such as the EU's ISIL/Da'esh and Al-Qaeda regime which lists individuals 'being involved in serious abuses of human rights outside the EU, including abduction, rape, sexual violence, forced marriage and enslavement of persons' among other criteria, see Council Decision (CFSP) 2016/1693 of 20 September 2016 concerning restrictive measures against ISIL (Da'esh) and Al-Qaeda and persons, groups, undertakings and entities associated with them and repealing Common Position 2002/402/CFSP, Art 2(2)(f)).

¹⁵ M. Russell, 'Global human rights sanctions: Mapping Magnitsky laws: The US, Canadian, UK and EU approach', European Parliament Briefing (2021), 1, <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698791/EPRS_BRI\(2021\)698791_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698791/EPRS_BRI(2021)698791_EN.pdf)>.

¹⁶ BBC NEWS, 'Russia "is now a criminal state", says Bill Browder', 23 November 2009, <<http://news.bbc.co.uk/2/hi/business/8372894.stm>>.

¹⁷ ECtHR, *Magnitsky and Others v. Russia*, Nos. 32631/09 and 53799/12, 27 August 2019, paras. 241 and 265.

¹⁸ Radio Free Europe / Radio Liberty, 'Interview: Browder sees "Tipping Point" in Western Attitudes to Russia', 30 January 2011, <https://www.rferl.org/a/interview_browder_west_russia/2291847.html>.

¹⁹ H. R. 6156 (112th): Russia and Moldova Jackson–Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, <<https://www.govtrack.us/congress/bills/112/hr6156/text>>.

²⁰ S.284 (114th): Global Human Rights Accountability Act of 2016, <<https://www.congress.gov/bill/114th-congress/senate-bill/284/text>>.

²¹ C. Portela, 'The EU's human rights sanctions regime: Unfinished business?', (2021) 54 *Revista General de Derecho Europeo*.

²² Bill S-226: Justice for Victims of Corrupt Foreign Officials Act 2017, <<https://laws.justice.gc.ca/eng/acts/J-2.3/>>.

Other Thematic Sanctions) Act 2021, which creates the basis for a Magnitsky sanctions programme to be adopted.²³

Magnitsky sanctions, as a new generation of thematic sanctions purporting to focus on human rights, have received considerable support. Much of the drive towards the adoption of Magnitsky sanctions has come from national parliaments thus far.²⁴ In 2013, parliamentarians from a variety of states, including Canada and the UK, came together in the European Parliament and founded an inter-parliamentary 'Justice for Sergei Magnitsky' group.²⁵ In the US, Congress pushed forward the original Magnitsky legislation, despite reluctance from the Obama administration.²⁶ Furthermore, it was the UK parliament that amended the proposed Sanctions and Anti-Money Laundering Act in 2018 ('SAML 2018') (see Section 2.2.1) in the UK so as to include the promotion of human rights and compliance with international human rights law ('IHRL') as a justification for the use of the sanctions,²⁷ and an All-Party Parliamentary Group on Magnitsky Sanctions was launched in October 2021.²⁸ At the EU level, most of the drive for Magnitsky sanctions came from national parliaments, such as the Netherlands', and the EU parliament itself.²⁹ Civil society organisations also regularly advocate for and petition governments regarding the imposition of Magnitsky sanctions,³⁰ and generally welcome their creation.³¹ In addition, various NGOs have met directly with the US departments of State and the Treasury in relation to sanctions recommendations.³²

²³ Human Rights First, 'Human Rights First Welcomes Australia's Adoption of Magnitsky-Style Sanctions', 2 December 2021, <<https://www.humanrightsfirst.org/press-release/human-rights-first-welcomes-australia-s-adoption-magnitsky-style-sanctions>>.

²⁴ M. Russell, *supra* n 15.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ REDRESS, 'New Cross-Party Parliamentary Group Pushes for Further Sanctions to Tackle Human Rights Abusers and Kleptocrats in the UK', 19 October 2021, <<https://redress.org/news/new-cross-party-parliamentary-group-pushes-for-further-sanctions-to-tackle-human-rights-abusers-and-kleptocrats-in-the-uk/>>.

²⁹ M. Russell, *supra* n 15.

³⁰ Commission on Security and Cooperation in Europe, 'Helsinki Commission Workshop to Explain Global Magnitsky Sanctions Process', 7 March 2018, <<https://www.csce.gov/international-impact/press-and-media/press-releases/helsinki-commission-workshop-explain-global-https://www.ecdhr.org/?p=1108>>.

³¹ See Norwegian Helsinki Committee, 'First use of EU "Magnitsky" human rights sanctions' law targets Russian officials', 4 March 2021, <<https://www.nhc.no/en/first-use-of-eu-magnitsky-human-rights-sanctions-law-targets-russian-officials/>>; M. Normington, 'It's the end of the year, the Global Magnitsky sanctions are here', *Global Witness*, 31 December 2019, <<https://www.globalwitness.org/en/blog/its-the-end-of-the-year-the-global-magnitsky-sanctions-are-here/>>.

³² Human Rights First, 'Human Rights First Meets with State and Treasury Departments on Human Rights and Corruption Sanctions', 1 August 2018, <<https://www.humanrightsfirst.org/press-release/human-rights-first-meets-state-and-treasury-departments-human-rights-and-corruption>>. Human Rights First has been involved in the submitting recommendations of roughly one third of those who are designated in the US, see I. Steinhäuser, 'How human rights sanctions need to evolve for everyone's benefit', *Reuters*, 1 November 2022, <<https://www.reuters.com/legal/government/how-human-rights-sanctions-need-evolve-everyones-benefit-2021-11-01/>>.

2.2 Mapping Magnitsky Sanctions

Given the novelty of Magnitsky sanctions regimes and the various differences between them, it is necessary to map and analyse the most comprehensive and active regimes: the US, UK and EU's.

2.2.1 Legal Frameworks

United States

The 2012 Act permitted the imposition of sanctions in the forms of freezing assets under US jurisdiction, the prohibition of US transactions,³³ and the denial of entry into the US of persons involved in the abuse, death and ensuing cover up of Magnitsky, and/or also considered responsible for extrajudicial killings, torture, or other gross violations of internationally recognised human rights committed against human rights defenders and individuals seeking to expose illegal activity carried out by officials of the Russian Government.³⁴ When the 2016 Act was passed,³⁵ the application of Magnitsky sanctions was broadened globally.³⁶ It allows for sanctions to be imposed on any 'foreign person'³⁷ the President determines responsible for extrajudicial killings, torture, or other 'gross violations of internationally recognized human rights' committed against human rights defenders and individuals seeking to expose illegal activity carried out by government officials in a foreign country.³⁸ 'Gross violations of internationally recognized human rights' is defined as including 'torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of person'.³⁹ The victims are expressly specified as whistleblowers or human rights defenders.⁴⁰

³³ Under H. R. 6156 (112th): Russia and Moldova Jackson–Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, U.S. Persons are prohibited from dealing (directly or indirectly) with those designated and any entities 50% or more owned by those designated. Transactions in US Dollars usually fall within US jurisdiction (extra-territorially) as they are cleared through the US financial system: see T. Firestone and K. Contini, 'The Global Magnitsky Act', (2018) 29 *Crim Law Forum* 617.

³⁴ H. R. 6156 (112th): Russia and Moldova Jackson–Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, s. 404 (a).

³⁵ See <https://home.treasury.gov/system/files/126/glomag_pl_114-328.pdf>.

³⁶ C. Portela, *supra* n 21.

³⁷ S.284 (114th): Global Human Rights Accountability Act of 2016, s. 1262 (1) states: 'FOREIGN PERSON.—The term "foreign person" has the meaning given that term in section 595.304 of title 31, Code of Federal Regulations (as in effect on the day before the date of the enactment of this Act).' Interestingly, US nationals would be subject to criminal prosecution for the same conduct. See M. Russell, *supra* n 15.

³⁸ S.284 (114th): Global Human Rights Accountability Act of 2016, s. 1263(a)(1).

³⁹ S.284 (114th): Global Human Rights Accountability Act of 2016, s. 1262(2), referring to section 502B(d)(1) of the Foreign Assistance Act of 1961 (22 U.S.C. 2304(d)(1)).

⁴⁰ M. Russell, *supra* n 15.

In 2017, then-President Trump issued Executive Order 13818 ('E.O. 13818')⁴¹ which widens the scope of application of the sanctions to those 'responsible for or complicit in, or to have directly or indirectly engaged in, serious human rights abuse',⁴² however 'serious human rights abuse' is not defined. It is suggested that this is a lower threshold than 'gross violations of internationally recognized human rights', and thus that E.O. 13818 allows for a wider reach.⁴³ Unlike in the 2016 Act, E.O. 13818 does not specify particular victim categories.⁴⁴ Sanctioned targets may be either state or non-state actors ('NSAs').⁴⁵

United Kingdom

In light of their (at the time) impending withdrawal from the EU, the UK adopted the SAMLA 2018⁴⁶ in order to create a domestic legal framework which empowered an 'appropriate Minister'⁴⁷ to impose sanctions on individuals and entities through sanctions regulations, for the discretionary purpose of 'provid[ing] accountability for or be[ing] a deterrent to gross violations of human rights, or otherwise promot[ing]- i. compliance with international human rights law, or ii. respect for human rights'.⁴⁸ Unlike in the US, where 'serious human rights abuse' is undefined, 'gross violations of human rights' under the SAMLA 2018 in the UK is defined as torture, or other cruel, inhuman or degrading treatment or punishment.⁴⁹

In July 2020, the UK Government used its powers under the SAMLA 2018 to adopt the Global Human Rights Sanctions Regulations 2020 ('the 2020 Regulations').⁵⁰ Sanctions may therefore be imposed on persons responsible for, involved in, or facilitating violations or associated with or belonging to an involved organisation,⁵¹ and may include both financial sanctions,⁵² and immigration sanctions.⁵³ The 2020 Regulations further specify which human rights violations are covered, in that not only torture, other cruel, inhuman or degrading treatment or punishment are covered, but also violations of the right to life and slavery, forced or compulsory labour.⁵⁴ No categories of victims are expressly provided for, however particular

⁴¹ Executive Order 13818, <<https://www.federalregister.gov/documents/2017/12/26/2017-27925/blocking-the-property-of-persons-involved-in-serious-human-rights-abuse-or-corruption>>.

⁴² Executive Order 13818 of December 20, 2017, s. 1(a)(A).

⁴³ M. Russell, *supra* n 15.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ SAMLA 2018, <<https://www.legislation.gov.uk/ukpga/2018/13/contents/enacted>>.

⁴⁷ Defined in SAMLA 2018, s. 1(9) as the Secretary of State or Treasury Secretary.

⁴⁸ SAMLA 2018, s. 1(2)(f).

⁴⁹ SAMLA 2018, s. 1(7).

⁵⁰ The Global Human Rights Sanctions Regulations 2020, <<https://www.legislation.gov.uk/uksi/2020/680/contents>>.

⁵¹ The Global Human Rights Sanctions Regulations 2020, Regulation 6.

⁵² Explanatory Memorandum to the Global Human Rights Sanctions Regulations 2020, 2020 No. 680, <https://www.legislation.gov.uk/uksi/2020/680/pdfs/uksiem_20200680_en.pdf>, para 7.4 referring to Part 3 of the Global Human Rights Sanctions Regulations 2020.

⁵³ Explanatory Memorandum to the Global Human Rights Sanctions Regulations 2020, 2020 No. 680, para 7.5 referring to Part 4 of the Global Human Rights Sanctions Regulations 2020.

⁵⁴ Global Human Rights Sanctions Regulations 2020, Regulation 4(2).

attention will be given to human rights defenders, journalists, civil society activists and whistleblowers, or if the victim has ‘any particular links to the UK’.⁵⁵ Sanctions can be applied to both state and NSAs.⁵⁶ The seriousness of the conduct and the status and connections of the involved person may also be considered under the legislation.⁵⁷

European Union

On 7 December 2020, the EU adopted the EU Global Human Rights Sanctions Regime,⁵⁸ under which sanctions (‘restrictive measures’ in EU language) may be imposed in relation to genocide, crimes against humanity and two categories of human rights violations or abuses.⁵⁹ The first category is ‘serious human rights violations or abuses’ which are defined in an exhaustive list as torture, and other cruel, inhuman or degrading treatment, slavery, extrajudicial, summary or arbitrary executions and killings, enforced disappearance of persons and arbitrary arrests or detentions.⁶⁰ This mirrors the Magnitsky legislation by the US and UK. However, the second category is non-exhaustive: ‘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 of the Treaty on the European Union:

- (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.⁶¹

Sanctions may be imposed against persons, entities or bodies who are state actors, and NSAs, which means both actors exercising effective control or authority over a territory and other NSAs,⁶² and may take the form of financial sanctions,⁶³ and also denial of entry or transit through Member States.⁶⁴ As an international organisation, the EU’s sanctioning process differs from individual states’ (such as the US and the UK’s) in that new unilateral sanctions

⁵⁵ Foreign and Commonwealth Office, ‘Global Human Rights Sanctions: consideration of designations’, 6 July 2020, <<https://www.gov.uk/government/publications/global-human-rights-sanctions-factors-in-designating-people-involved-in-human-rights-violations/global-human-rights-sanctions-consideration-of-targets>>.

⁵⁶ M. Russell, *supra* n 15. It has been stated that ‘HMG is likely to give particular attention to non-state actors who have acquired a significant degree of control, authority and organisation over people or an area’ – see Foreign, Commonwealth and Development Office, *ibid*.

⁵⁷ Foreign, Commonwealth and Development Office, *ibid*.

⁵⁸ Council Decision (CFSP) 2020/1999, 13; and Council Regulation (EU) 2020/1998, 1.

⁵⁹ Council Regulation (EU) 2020/1998, Article 2(1).

⁶⁰ Council Decision (CFSP) 2020/1999, Article 1(1)(a), (b) and (c); Council Regulation (EU) 2020/1998, OJ L 410I, 7.12.2020, Article 2(1)(a), (b) and (c).

⁶¹ Council Decision (CFSP) 2020/1999, Article 1(1)(d); Council Regulation (EU) 2020/1998, Article 2(1)(d).

⁶² Council Decision (CFSP) 2020/1999, Article 1(3)); Council Regulation (EU) 2020/1998, Article 2(3).

⁶³ Council Decision (CFSP) 2020/1999, Article 3; Council Regulation (EU) 2020/1998, Article 3.

⁶⁴ Council Decision (CFSP) 2020/1999, Article 2.

are created by a Decision of the Council of the EU,⁶⁵ usually following a proposal from the European Commission and/or the High Representative of the Union for Foreign Affairs and Security Policy.⁶⁶ If new EU sanctions involve asset freezes (such as those taken under the Global Human Rights Sanctions Regime) an Implementing Regulation will also be required.⁶⁷ Once in force, every EU Member State is obliged to enforce the respective sanction within their jurisdiction. In the case of the Global Human Rights Sanctions Regime, this entails the freezing of assets and the denial of entry/transit to those sanctioned. In an effort to ensure consistency in the criminalisation of sanctions violations in the Member States, the EU Commission in May 2022 proposed to make the violation of restrictive measures an EU crime, in essence creating mandatory minimum criminalisation requirements in every Member State.⁶⁸

2.2.2 Identifiable Trends

The US Global Magnitsky sanctions regime is by far the most extensive and has a global reach. High-level state officials, such as the President of The Gambia, Yahya Jammeh,⁶⁹ and the First Vice President of South Sudan, Taban Deng Gai,⁷⁰ as well as other mid to lower-level state officials or entities,⁷¹ key state military figures,⁷² military entities⁷³ leaders of police units⁷⁴ and

⁶⁵ Consolidated Version of the Treaty on European Union [2008] OJ C115/13, Article 29.

⁶⁶ See European Council / Council of the European Union, 'Adoption and review procedure for EU sanctions', <<https://www.consilium.europa.eu/en/policies/sanctions/adoption-review-procedure/>>.

⁶⁷ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ L. 326/47-326/390, Article 215.

⁶⁸ European Commission, 'Proposal for a COUNCIL DECISION on adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union', 25 May 2022, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2022:0247:FIN>>. This is pending at the time of writing.

⁶⁹ U.S. Department of the Treasury, 'United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe', 21 December 2017, <<https://home.treasury.gov/news/press-releases/sm0243>>.

⁷⁰ U.S. Department of the Treasury, 'Treasury Sanctions South Sudanese First Vice President for Role in Serious Human Rights Abuse', 8 January 2020, <<https://home.treasury.gov/news/press-releases/sm869>>.

⁷¹ E.g., Saud al-Qahtani, former Royal Court Advisor in Saudi Arabia, members of the South Sudanese Government, Chinese government entities and officials, state officials from the Xinjiang Uyghur Autonomous Region of China ('XUAR'), Fednel Monchery, Director General of the Haitian Ministry of the Interior and Local Authorities, Kadyrov, Head of the Chechen Republic, state officials from Cuba. Individuals sanctioned by the US can be found in the OFAC database under the program 'GLOMAG', see here: <<https://sanctionssearch.ofac.treas.gov/>>.

⁷² E.g., Myanmar military commanders, the commander of Cambodia's Prime Minister Bodyguard Unit, a leader of the Allied Democratic Forces in the DRC, and the Chief of Staff of the Eritrean Defense Forces.

⁷³ E.g., the Myanmar (referred to in the US SDNs as Burmese) 33rd Light Infantry Division.

⁷⁴ E.g., a Commissioner of Nicaragua's National Police, the former Inspector General of Police of the Ugandan Police Force, former Senior Superintendent of Police in District Malir, Pakistan, and Rapid Action Battalion in Bangladesh.

intelligence bodies⁷⁵, and also NSAs including militias⁷⁶ have been targeted for alleged human rights violations. Given the lack of definition of ‘serious human rights abuses’ in the legislation, the human rights violations targeted through the sanctions are wide-ranging, including the right to freedom of expression, to be free from inhuman, cruel or degrading treatment or torture, to be free from arbitrary arrest or unlawful detention or confinement, the right to life, sexual and gender-based rights, and property rights among others. Situations of ethnic cleansing (for example against the Rohingya and Uyghur populations), enforced disappearances, kidnapping, forced displacement, and mass violations or ‘scorched earth’ policies are also targeted.

The UK’s Magnitsky sanctions also have a global reach. The UK, like the US, has targeted high-level state officials, such as the former President of The Gambia⁷⁷ and the President of Belarus.⁷⁸ The sanctions also mainly target individuals who are state officials,⁷⁹ military commanders,⁸⁰ and or leaders of intelligence bodies⁸¹ or police units.⁸² Notably, the UK sanctioned a family member of a state official – the Former First Lady of The Gambia, merely for her association with the Former President (also sanctioned).⁸³ At the time of writing, only one individual connected to an NSA has been targeted: Furqan Bangalzai, former commander of Lashkar-e-Jhangvi, a terror organisation, who allegedly facilitated the bombing of Lal Shahbaz Qalandar shrine in Sehwan, Pakistan, in which at least 70 people were killed.⁸⁴ The main human rights violations targeted reflect the UK Magnitsky legislation: torture, other cruel, inhuman or degrading treatment or punishment, are covered, but also violations of the right to life and slavery, forced or compulsory labour.⁸⁵

The EU’s Magnitsky sanctions have targeted individuals operating in Europe, Asia and Africa, but no individuals or entities from the Americas have as of yet been sanctioned. The human rights violations targeted appear to reflect ‘serious human rights violations or abuses’ as

⁷⁵ E.g., Abdul Rahab Jarfan, a Houthi member and the former Head of the National Security Bureau, Ahmad Hassan Mohammed al Asiri, Saudi Arabia’s former Deputy Head of General Intelligence Presidency, and Saudi Arabia’s Rapid Intervention Force.

⁷⁶ E.g., Rayan al-Kildani, the leader of the 50th Brigade militia in Iraq, leaders of Iran-backed militias in Iraq, and Mohamed al-Kani and the Kaniyat militia in Libya.

⁷⁷ UK Sanctions List, Date Designated: 10/12/2020, Unique Id: GHR0059, OFSI Group ID: 14010. Individuals sanctioned by the UK can be found on the UK Sanctions List, see here: <<https://www.gov.uk/government/publications/the-uk-sanctions-list>>.

⁷⁸ UK Sanctions List, Date Designated: 29/09/2020, Unique Id: GHR0050, OFSI Group ID: 13918.

⁷⁹ E.g., state officials connected to the deaths of Sergei Magnitsky and Jamal Khashoggi; state officials connected to the President of Belarus; the Former General Prosecutor of Ukraine, state officials from XUAR, and the Ministry of People’s Security Correctional Bureau, DPRK.

⁸⁰ E.g., Commander-in-chief of the Myanmar forces and high-ranking officials in the Venezuelan Armed Forces.

⁸¹ E.g., former Director General of the Gambian National Intelligence Agency and the Ministry of State Security Bureau, DPRK.

⁸² E.g., former Senior Superintendent of Police in Karachi, Pakistan, the Terek Special Rapid Response Unit in Chechnya and the Special Action Force of the Venezuelan National Police.

⁸³ UK Sanctions List, Date Designated: 10/12/2020, Unique Id: GHR0060, OFSI Group ID: 14012.

⁸⁴ UK Sanctions List, Date Designated: 10/12/202, Unique Id: GHR0082, OFSI Group ID: 14167.

⁸⁵ Global Human Rights Sanctions Regulations 2020, Regulation 4(2).

defined in the EU's regime as torture, and other cruel, inhuman or degrading treatment, slavery, extrajudicial, summary or arbitrary executions and killings, enforced disappearance of persons and arbitrary arrests or detentions.⁸⁶ The majority of the sanctions have been imposed on mid to high-level state officials,⁸⁷ military commanders,⁸⁸ and leaders of intelligence bodies;⁸⁹ however, sanctions have also been imposed on NSAs.⁹⁰ Interestingly, no one alleged to have been involved in the deaths of Sergei Magnitsky or Jamal Khashoggi has been sanctioned by the EU to date. The majority of the US, UK and EU's Magnitsky sanctions have at their core the aim of targeting those at the helm of or involved in the enforcement of *ongoing* repressive regimes suppressing peaceful protesters, political dissidents, human rights activists and journalists. The US and UK also target those involved in *ongoing* armed conflicts, including in Myanmar, Syria, Yemen, and Ethiopia. However, individuals involved in specific and well-documented isolated incidents have also been targeted *ex post facto* by the US and UK, such as particular individuals involved in the killing of Jamal Khashoggi and indeed Sergei Magnitsky.⁹¹

3. Magnitsky Sanctions and Human Rights

Despite the prevalence of human rights language in Magnitsky sanction regimes, inconsistencies between how the different regimes operate in practice means that the extent to which human rights *law* influences the determination of those sanctioned is unclear.⁹² This Section explores what the legal nature of human rights violations are and, furthermore, whether Magnitsky sanctions promote (or instead violate) human rights under human rights law.

3.1 The Legal Nature of Human Rights Violations

As Magnitsky sanctions ostensibly aim to target, among others, (alleged) violators or abusers of human rights, what does it mean for individuals and/or entities to 'violate' or 'abuse' human rights under human rights law? As demonstrated in Section 2.2, there are inconsistencies between the definition of 'human rights' used within different Magnitsky regimes and thus it is unclear whether references to 'human rights' relate to IHRL underpinning the regimes, to a

⁸⁶ Council Decision (CFSP) 2020/1999, of 7 December 2020, Article 1(1)(a), (b) and (c); Council Regulation (EU) 2020/1998, OJ L 410I, 7.12.2020, Article 2(1)(a), (b) and (c).

⁸⁷ E.g., Russians involved in the detention of Alexei Navalny, the Minister of State Security and the Office of the Prosecutor of the DPRK, and the Deputy Prime Minister of the Chechen Republic.

⁸⁸ E.g., the Major General of the South Sudan People's Defense Forces and the National Security Office of the Government of Eritrea.

⁸⁹ E.g., Commander of the Terek Special Rapid Response Unit.

⁹⁰ E.g., high-level members of the Kaniyat Militia and the Militia itself, and commanders and mercenaries of the Wagner Group and the Group itself.

⁹¹ U.S. Department of the Treasury, 'Treasury Sanctions 17 Individuals for Their Roles in the Killing of Jamal Khashoggi', 15 November 2018, <<https://home.treasury.gov/news/press-releases/sm547>>. Another SDN involved in an isolated incident was a Pakistani surgeon who was alleged to have been involved in kidnapping, wrongful confinement, and the removal of and trafficking in human organs.

⁹² 'Human rights law' in this Section refers to IHRL. On the relationship between unilateral sanctions more broadly and human rights law, see I. Jazairy, 'Unilateral Economic Sanctions, International Law, and Human Rights', (2021) 33 *Ethics & International Affairs* 291.

less legalistic conception of human rights relating to the values which the legal framework attempts to protect, or to other areas of international law.⁹³

IHRL is traditionally understood as a relationship between the state and those within its jurisdiction, placing limits on the former's interference with the freedoms of the latter.⁹⁴ The International Covenant on Civil and Political Rights ('ICCPR') requires each contracting state to undertake 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant...'.⁹⁵ Therefore, stemming from universal and/or regional treaties, or customary international law, states owe human rights obligations to everyone within their jurisdiction. Jurisdiction is considered to be primarily territorial, only extending extraterritorially in limited circumstances,⁹⁶ for instance when a state operates effective control over another state's territory or has custody of an individual.⁹⁷ While some argue that extra-territorial jurisdiction applies to instances when an individual's rights are affected by a state regardless of a territorial or other nexus, this has not received widespread acceptance in the jurisprudence of human rights courts.⁹⁸

As the human rights law relationship exists between the individual and the state (the latter as an abstract entity), conduct that results in the violation of rights must be attributable to a state which mostly occurs when the said conduct is carried out by a state agent, such as a member of the state's armed forces.⁹⁹ Conduct of private persons and groups can also be attributed to the state when they are 'acting on the instructions of, or under the direction or control of, that State' during the conduct.¹⁰⁰ However, under this interpretation, private actors *not* acting on behalf of a state cannot be considered to have *violated* IHRL. Indeed, while under IHRL states have positive obligations to those within their jurisdiction to protect them from the actions of third parties,¹⁰¹ the IHRL system:

focuses on human rights within each state and mainly recognizes (a) private individuals and groups only as actual or potential victims, (b) each state as the violator and the

⁹³ S. Wheatley, *The Idea of International Human Rights Law* (OUP 2019), Chapter 1.

⁹⁴ Here, and in line with the targets of Magnitsky sanctions, references to 'human rights' should be understood as civil and political rights and not economic and social rights.

⁹⁵ ICCPR, Article 2(1), (signed 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

⁹⁶ See M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011).

⁹⁷ ECtHR, *Al Skeini and Others v. The United Kingdom*, No. 55721/07, 7 July 2011, paras. 133-140.

⁹⁸ As suggested in UNHRC, 'General comment No.36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life', 30 October 2018, para. 63, <https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_878_5_E.pdf>.

⁹⁹ See ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts ('ARSIWA'), UN Doc. A/56/10, Article 2.

¹⁰⁰ ARSIWA, Article 8.

¹⁰¹ See United Nations Human Rights Committee, 'General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life', CCPR/C/GC/36(2018), paras. 18-31.

protector of the rights of its population, and (c) each state and the UN as the promoter of human rights that would monitor all states' behavior.¹⁰²

As such, it is debatable whether human rights violations can be attributed to individuals or NSAs as a matter of *human rights law*.¹⁰³ In the context of Magnitsky sanctions, this is only an issue where those sanctioned are individuals/NSAs *not* under the direction or control of a state, which, as we have seen from Section 1.2.2, is not often the case.

Nevertheless, even when an individual's conduct *is* attributable to a state and that state's human rights obligations are violated, only the state itself is in violation of IHRL. The individual(s) whose conduct caused the violation will only face legal repercussions for a (state's) violation of human rights law where specific prosecutable criminal laws (be that domestic or international) criminalising the same conduct exist. Therefore, although the majority of conduct sanctioned thus far under Magnitsky sanctions regimes has targeted individuals whose conduct would likely be attributable to a state, characterising such sanctions as targeting 'human rights violators' is not entirely accurate. Granted, the vast majority of conduct ostensibly giving rise to Magnitsky sanctions will (in the abstract) likely violate domestic and/or international criminal law ('ICL'), considering that hitherto targeted individuals are accused of particularly serious offences.¹⁰⁴ However, the fact that the EU's regime also indicates the perpetration of international crimes as a *separate* justification for the imposition of sanctions highlights that these are seen as distinct rationales underlying the creation of Magnitsky sanctions.¹⁰⁵

Therefore, although Magnitsky sanctions regimes target 'human rights violators', the relationship between IHRL and the individuals sanctioned is more complex.¹⁰⁶ Magnitsky sanctions appear to target individuals/entities for allegedly transgressing against the principles that human rights law protects rather than the law itself: individuals cannot be held responsible under IHRL for 'violating human rights' but only for parallel crimes under domestic or ICL. Pursuing respect for human rights without interacting with the international law developed to protect them, therefore, appears contradictory and suggests that human rights law is not transparently used in the context of Magnitsky sanctions.¹⁰⁷

3.2 Magnitsky Sanctions and the Promotion of Human Rights

If Magnitsky sanctions do not target human rights violations within the meaning envisaged under human rights law, it must be questioned whether they can positively impact upon the *enjoyment* of human rights.

¹⁰² Z.F. Kabasakal Arat, 'Looking beyond the State But Not Ignoring It: A Framework of Analysis for Non-State Actors' in G.J. Andreopoulos, Z.F. Kabasakal Arat and P. Juviler (eds.), *Non-state Actors in the Human Rights Universe* (Kumarian Press 2006), 4.

¹⁰³ See K. Fortin, *The Accountability of Armed Groups under Human Rights Law* (OUP 2017).

¹⁰⁴ There is a strong relationship between serious human rights violations and crimes against humanity. See *ibid.*

¹⁰⁵ See Section 2.2.

¹⁰⁶ E.g., J. Borell Fontelles, *European Foreign Policy in Times of COVID-19* (EEAS 2021), 143-146.

¹⁰⁷ For an overview of the different conceptions of human rights, see S. Wheatley, *supra* n 93.

Firstly, while not doing so in a manner legally recognised under human rights law, sanctioning individuals may stop the commission of ongoing IHRL violations and deter future violations from a pragmatic point of view. Indeed, the EU's High Representative described the Global Human Rights Sanctions Regime's rationale as 'to change an actor's behaviour and serve as a deterrent to serious human rights violations and abuses'.¹⁰⁸ While Magnitsky sanctions could be, in principle, a method through which human rights are strengthened on the international stage, sanctions' effects are inherently hard to measure. Literature examining the effectiveness of sanctions in altering behaviour has shown inconclusive results, especially regarding 'targeted' sanctions.¹⁰⁹ Indeed, the effectiveness of Magnitsky sanctions is still a very under-researched area; however, it is apparent that the sanctions will likely only negatively affect the targeted individual/entity if they hold property or assets in the targeting state, such as in the case of Russian oligarchs in the UK and EU member states.¹¹⁰

Secondly, states, in creating Magnitsky sanctions, could arguably contribute to human rights protection by complying with their obligation to criminalise, investigate, prosecute, and punish those responsible for conduct that violates IHRL. Such obligations stem from specific treaty requirements, such as the Convention against Torture, and as part of the securing of substantive human rights, such as the right to life.¹¹¹ For instance, although an individual is not responsible for the 'violation' of the prohibition of torture as a means of human rights law, the state with jurisdiction over that person is under an obligation to criminalise, investigate and, if necessary, prosecute them for that conduct.¹¹² As individuals sanctioned under Magnitsky regimes regularly do *not* face criminal sanctions domestically as their conduct is, as alleged, usually carried out under the orders of or with the acquiescence of governments, such sanctions could arguably pursue this aim. This view is strengthened by the fact that several Magnitsky regimes specifically identify prosecution for the conduct underlying the alleged human rights violation as a justification for de-listing an individual ending the sanctions upon them.¹¹³ Nevertheless, while prosecuting individuals for conduct that also violates IHRL may prevent future violations, the obligation to criminalise and prosecute, etc., only arises regarding

¹⁰⁸ J. Borrell Fontelles, 'EU Global Human Rights Sanctions Regime: Declaration by the High Representative on behalf of the European Union', 8 December 2020, <<https://www.consilium.europa.eu/en/press/press-releases/2020/12/08/eu-global-human-rights-sanctions-regime-declaration-by-the-high-representative-on-behalf-of-the-european-union/>>.

¹⁰⁹ E.g., D. Peksen, 'When do imposed economic sanctions work? A critical review of the sanctions effectiveness literature', (2019) 30 *Defence and Peace Economics* 635, 643.

¹¹⁰ Policy Department for External Relations (European Parliament), 'Targeted sanctions against individuals on grounds of grave human rights violations – impact, trends and prospects at EU level' (2018), 26, <[https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603869/EXPO_STU\(2018\)603869_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603869/EXPO_STU(2018)603869_EN.pdf)>.

¹¹¹ M. Pinto, 'Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law', (2018) 34(2) *Utrecht Journal of International and European Law* 161, 165-166.

¹¹² Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

¹¹³ E.g., The Sergei Magnitsky Rule of Law Accountability Act 2012, Sec. 404 (d).

those within a state's jurisdiction. Therefore, all Magnitsky sanctions, as being inherently *external*, are not legally required under positive human rights law obligations.

3.3 Magnitsky Sanctions: Detrimental to Human Rights

Although Magnitsky sanctions profess to protect human rights, it is contradictory that, through imposing Magnitsky sanctions, sending states/the EU either violate or undermine IHRL. As earlier identified, international sanctions more generally have drastically infringed and violated the human rights of those immediately targeted and wider populations,¹¹⁴ and in 2014, a UN Special Rapporteur office was specifically created on 'the negative impact of the unilateral coercive measures on the enjoyment of human rights'.¹¹⁵

As highlighted, Magnitsky sanctions appear to mirror the positive obligations to investigate and prosecute those allegedly responsible for acts constituting serious human rights violations. However, it is also argued that human rights-based sanctions can undermine ongoing investigations into alleged IHRL violations. In the context of the US' 2021 sanctions against those allegedly involved in serious IHRL and IHL violations in the Tigrayan conflict (Ethiopia), these sanctions may have instead undermined ongoing multilateral investigations into the conflict.¹¹⁶ Citing the fact that the US sanctioned individuals prior to the release of the joint investigation of the UN Office of High Commissioner for Human Rights and the Ethiopian Human Rights Commission, Tilahun argues that '[t]his move undercut the multilateral human rights protection system, and even incentivized the targets of sanctions to not take the human rights investigation seriously...'.¹¹⁷ While these sanctions were not strictly taken under the US' Magnitsky regime, through basing these individual sanctions on similar grounds it is foreseeable that Magnitsky sanctions provoke similar concerns.

In addition to potentially undermining the system of investigations into IHRL violations, Magnitsky sanctions may more importantly violate several substantive human rights, for instance relating to due process guarantees. Stemming from the lack of clarity between the 'violation' language examined above, the true function of IHRL, and Magnitsky Sanctions' aura of (international) criminal law, such sanctions may violate an individual's right to a fair trial.¹¹⁸

¹¹⁴ For instance, see A. F. Douhan, 'Fundamental Human Rights and Coercive Measures: Impact and Interdependence', (2017) 1 *J. Belarus. State Univ. Int. Relat.* 67.

¹¹⁵ UNHRC, RES 27/21 (2014), para. 22.

¹¹⁶ N. Tilahun, 'The Problem with Using Sanctions as Human Rights Accountability: The Case of US Sanctions in Response to Conflict in Ethiopia', *Volkerrechtsblog*, 4 January 2022, <<https://voelkerrechtsblog.org/the-problem-with-using-sanctions-as-human-rights-accountability/>>. Note that, while not authorised under the US' Magnitsky Regime, Executive Order 14046 of 17 September 2021 shares many qualities with Magnitsky regimes. See here: <<https://www.federalregister.gov/documents/2021/09/21/2021-20508/imposing-sanctions-on-certain-persons-with-respect-to-the-humanitarian-and-human-rights-crisis-in->>.

¹¹⁷ N. Tilahun, *ibid.*

¹¹⁸ H. Al-Nassar *et al*, 'Guilty Until Proven Innocent? The EU Global Human Rights Sanctions Regime's Potential Reversal of the Burden of Proof', (2021) *Security and Human Rights*; J.P. Sexton, 'The European Union's Sanctioning of Russian Military Officers: An Urge for Caution', *EJIL:Talk!*, 5 August

While the right to a fair trial is usually only triggered once an individual is ‘charged’ with a crime, the right also extends beyond a state’s criminal code.¹¹⁹ The UN Human Rights Committee (‘UNHRC’) stated that the right to a fair trial may extend beyond criminal charges where the measures taken against the individual ‘must be regarded as penal because of their purpose, character or severity.’¹²⁰ In a recent study of Magnitsky sanctions, Al-Nassar *et al* conclude that sanctions are much more likely to trigger the right to a fair trial where the sanctions target conduct *ex post facto* as, instead of pursuing prevention/interdiction, such sanctions appear to punish the targeted individual/entity, similar to criminal law.¹²¹ Indeed, creating Magnitsky sanctions ‘allows circumventing cumbersome criminal procedures’ while still, in effect, punishing individuals for conduct that they have allegedly engaged in.¹²² Where the alleged violations have already occurred and the sanctions are therefore imposed *ex post facto* (for instance, upon those implicated in Khashoggi’s killing), it is especially unclear how human rights are protected. Indeed, the current and former Special Rapporteurs on the negative impact of unilateral coercive measures on the enjoyment of human rights have specifically highlighted fair trial and due process issues with Magnitsky-style regimes.¹²³

3.4 Magnitsky Sanctions as a Form of (Quasi-) Criminal Accountability

Despite Magnitsky sanctions not stemming from a judicial pronouncement of the targeted person/entity’s criminal responsibility and instead (professedly) aiming to prevent/interdict human rights violations, punitive language and the search for accountability permeates the rationale for and operation of these regimes in practice. For the former UK Foreign Secretary, intended targets of the UK’s regime are, for example, ‘perpetrators’ of ‘human rights violations’ within a ‘long struggle against impunity’.¹²⁴ Josep Borrell, the driving force behind the EU’s Magnitsky legislation, similarly stated (in the context of the EU’s Magnitsky regime) that ‘[t]oo many human rights offenses perpetrators believe they can get away with their *crimes*’.¹²⁵ Furthermore, the fact that many Magnitsky sanctions are imposed *ex post facto* on alleged perpetrators adds further weight to the argument that such measures are not focused on human rights per se, but instead aim at securing some form of accountability against those

2022, <<https://www.ejiltalk.org/the-european-unions-sanctioning-of-russian-military-officers-an-urge-for-caution/>>.

¹¹⁹ A. Clooney and P. Webb, *The Right to a Fair Trial in International Law* (OUP 2021), 26-27; see also P. Mahoney, ‘Right to a Fair Trial in Criminal Matters Under Article 6 E.C.H.R.’, (2004) 4(2) *Judicial Studies Institute Journal* 107, 109-110.

¹²⁰ UNHRC, ‘General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial’, CCPR/C/GC/32(2007), para. 15.

¹²¹ H. Al-Nassar *et al*, *supra* n 118, 16-17.

¹²² H. Al-Nassar *et al*, *ibid*.

¹²³ Letter dated 26 August 2020 <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25507>> ; Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights on his mission to the European Union, (2018) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/215/80/PDF/G1821580.pdf?OpenElement>>.

¹²⁴ HC Deb. 6 July 2020 vol. 678, cols 663-664 (emphasis added).

¹²⁵ J. Borell Fontelles, *supra* n 106, 145 (emphasis added).

assumed responsible for the underlying conduct.¹²⁶ Granted, the violation of human rights, especially when regarding torture and the deprivation of life, will also violate domestic law,¹²⁷ and in many circumstances also constitute international crimes.¹²⁸ However, by describing quasi-punitive measures in the language of human rights, Magnitsky sanctions appear to not only undermine human rights law, but also implicate international criminal justice more broadly. Circumventing the rights of those affected by Magnitsky sanctions in pursuit of a perceived inherently just end – tackling impunity – sets a dangerous precedent towards arbitrariness.

4. Magnitsky Sanctions as Security Measures

This Section dissects the presumption that Magnitsky sanctions also further security – as with other sanctions regimes – by considering to what extent they address a threat or emergency or can contribute to traditionally recognised subfields of security.

4.1 A Purpose of Security

While the concept of security itself has always been, and continues to be, particularly ‘elusive’,¹²⁹ a security measure, at its core, aims to prevent a threat faced by someone or something.¹³⁰ If the measure does not address the threat ‘urgently and with exceptional means’, it will develop or manifest, and if the threat persists, then security has not been achieved.¹³¹ It can be deduced that multiple forms of sanctions contribute to security. Multilateral sanctions are tools of the UNSC and are explicitly referred to as a possible option it can resort to for the maintenance or restoration of international peace and security. In the US, the Treasury’s 2021 Sanctions Review states that sanctions ‘are a tool in [the US] national security arsenal’.¹³² Furthermore, US sanctions’ connection to a state of emergency also illustrates a link with security. The UK Government’s Integrated Review¹³³ also refers to

¹²⁶ Compare with the argument presented in L. van den Herik, ‘The Individualization of Enforcement in International Law: Exploring the Interplay between United Nations Targeted Sanctions and International Criminal Proceedings’ in T. Maluwa, M. du Plessis, and D. Tladi (eds.), *The Pursuit of a Brave New World in International Law: Essays in Honour of John Dugard* (Brill | Nijhoff 2017).

¹²⁷ G. Dancy and V. Michel, ‘Human Rights Enforcement From Below: Private Actors and Prosecutorial Momentum in Latin America and Europe’, (2016) 60 *International Studies Quarterly* 173.

¹²⁸ See J.P.P.L. Acevedo, ‘The Close Relationship Between Serious Human Rights Violations and Crimes Against Humanity: International Criminalization of Serious Abuses’, (2017) 17 *Anuario Mexicano de Derecho Internacional* 145.

¹²⁹ S. Osisanya, ‘National security versus global security’, (2015) *UN Chronicle*, <<https://www.un.org/en/chronicle/article/national-security-versus-global-security>>.

¹³⁰ R. Paris, ‘Human Security: Paradigm Shift or Hot Air?’, (2001) 26(2) *International Security* 87.

¹³¹ A. Hyde-Price, ‘“Beware the Jabberwock!” Security Studies in the Twenty-First Century’ in H. Gärtner, A. Hyde-Price, and E. Reiter (eds.), *Europe’s New Security Challenges* (Lynne Rienner Pub 2000).

¹³² U.S. Department of the Treasury, ‘The Treasury 2021 Sanctions Review’, October 2021, 4, <<https://home.treasury.gov/system/files/136/Treasury-2021-sanctions-review.pdf>>.

¹³³ UK Government Cabinet Office, ‘Global Britain in a Competitive Age: the Integrated Review of Security, Defence, Development and Foreign Policy’, 16 March 2021, <<https://www.gov.uk/government/publications/global-britain-in-a-competitive-age-the-integrated-review-of-security-defence-development-and-foreign-policy/global-britain-in-a-competitive-age-the-integrated-review-of-security-defence-development-and-foreign-policy>>.

sanctions as being part of the UK's 'national security diplomacy'.¹³⁴ At EU level, sanctions are considered 'an essential tool in the EU's common foreign and security policy'.¹³⁵

A discourse of 'security' also permeates Magnitsky sanctions. When former-US President Donald Trump issued E.O. 13818, he stated 'that the prevalence and severity of human rights abuse [...] [has] reached such scope and gravity that they threaten the stability of international political and economic systems' and that '[h]uman rights abuse and corruption undermine the values that form an essential foundation of stable, secure, and functioning societies'. He thereby determined 'that serious human rights abuse [...] around the world constitute[s] an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States', and declared a national emergency to address that threat.¹³⁶ The UK's Global Human Rights Sanctions Explanatory Memorandum notes that human rights violations have a 'devastating impact on individuals and places the safety of individuals and societies at risk. Successfully deterring such conduct would help [...] support the long-term global conditions most conducive to security, economic growth and the safety of all'.¹³⁷ The UK's Magnitsky regime is also referred to as indicative of the UK government's national security objectives and strategies for simultaneously maintaining international peace and security and promoting human rights.¹³⁸ At EU level, the Human Rights Sanctions Regime directly refers to 'the objectives of the common foreign and security policy set out in Article 21 TEU',¹³⁹ and has been described as 'an example of transnational-threats-driven prioritization of security in EU politics'.¹⁴⁰ Therefore, as can be seen in other sanctions regimes, Magnitsky sanctions employ security-related terminology fluidly.

4.2 Do the Targeted Human Rights Violations Constitute a Threat or Emergency?

Since sanctions more broadly are employed to prevent war and tackle internationally or transnationally shared threats such as terrorism, it appears reasonable to assume that direct threats or emergencies exist in these cases. Similarly, when Magnitsky sanctions target individuals or entities involved in situations of *ongoing* conflict or in repressive regimes, they may be a tool for stopping the violator's actions, preventing further development of the threat of conflict or continuation of the operation of a repressive regime. In this sense, the

¹³⁴ *Ibid.*

¹³⁵ European Commission, 'Restrictive measures (sanctions)' (undated), <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions_en>. The CFSP is governed by Chapter 2 of Title V of the Treaty on European Union.

¹³⁶ Executive Order 13818 of December 20, 2017.

¹³⁷ UK Government, 'Explanatory Memorandum to the Global Human Rights Sanctions Regulations 2020', 2020 No. 680, para 7.1.

¹³⁸ M. Zemtsov *et al.*, *The Legitimacy and Effectiveness of the UK Sanctions Regime as a Human Rights Tool* (UCL undated), <https://www.ucl.ac.uk/americas/sites/americas/files/the_legitimacy_and_effectiveness_of_the_uk_sanctions_regime_as_a_human_rights_tool.pdf>.

¹³⁹ Council Decision (CFSP) 2020/1999, of 7 December 2020, Article 1(4).

¹⁴⁰ C. Eckes, 'EU global human rights sanctions regime: is the genie out of the bottle?', (2021) 30(2) *Journal of Contemporary European Studies* 255.

employment of security-related terminology in the context of Magnitsky sanctions is not immediately problematic.

However, many Magnitsky sanctions are imposed *ex post facto*¹⁴¹ and attempt to hold those sanctioned accountable *after* violations have occurred.¹⁴² In these situations, Magnitsky sanctions are *corrective* rather than *coercive* measures, and thus it is challenging to ascertain how those particular sanctions would urgently *prevent* the manifestation of a threat or emergency. Violators acting with impunity may proceed to violate others' human rights or incite further violations. However, it cannot be assumed that isolated incidents which are targeted *ex post facto* automatically give rise to a threat or emergency.

4.3 Evaluating Magnitsky Sanctions as Security Measures

4.3.1 National Security of the Sanctioning State

If national security measures are understood to reflect 'the ability of a state to cater for the protection and defence of its citizenry' against a threat or in an emergency, there must be a nexus between the underlying issue and the sanctioning state.¹⁴³ Thus, if Magnitsky sanctions are measures which can be imposed in the interests of the national security of the sanctioning state(s), a connection must be made to the security of the sanctioning state(s) even though the human rights violations or abuses occur abroad.

Traditionally, unilateral state-wide sanctions were often imposed in response to a declaration of war with the sanctioning state, and therefore a nexus to the sanctioning state was evident. Indeed, unilateral sanctions have often been argued to constitute countermeasures: measures taken in response to an internationally wrongful act which has 'injured' the sanctioning state.¹⁴⁴ As sanctions evolved, the injury (or nexus) to the sanctioning state required for sanctions to be countermeasures has become more difficult to establish. While multilateral sanctions, e.g., imposed by the UNSC, may target internationally wrongful acts (if 'threats to international peace and security' constitute such acts), a collective injury to UN Member States is particularly challenging to establish. Furthermore, thematic sanctions regimes sometimes target internationally wrongful acts in the sense that they address 'violations of an obligation that protects the collective interest of the group (e.g., a multilateral disarmament regime, as in the case of Iran) or of an *erga omnes* obligation owed to the international community as a whole (e.g., grave human rights violations, as in the case of Syria or Myanmar)' but the injury to the sanctioning state(s) is less evident.¹⁴⁵ Parallels can be drawn between the challenges of categorising sanctions as countermeasures and Magnitsky sanctions as 'national security' measures. While, occasionally, human rights violations or abuses have directly affected

¹⁴¹ See Section 2.2.

¹⁴² See Section 3.4.

¹⁴³ S. Osisanya *supra* n 129.

¹⁴⁴ ARSIWA, Arts. 49-54.

¹⁴⁵ D. Hovell, 'Unfinished Business of International Law: The Questionable Legality of Autonomous Sanctions', (2019) 113 *AJIL Unbound* 140.

citizens of sanctioning states, the majority of Magnitsky sanctions imposed thus far have targeted human rights abuses occurring abroad that affect the sanctioning state (or EU) tenuously, if at all.¹⁴⁶

Similar arguments have also been raised in the context of the World Trade Organization ('WTO')-legality of unilateral human rights sanctions. Under the WTO framework, unilateral human rights-related sanctions can be justified on national security grounds if they are 'taken in time of war or other emergency in international relations'.¹⁴⁷ However, as argued, human rights violations against civil society and journalists in Russia may not constitute an 'emergency in international relations' to allow the invocation of the national security exception; such an 'emergency' would only arise if the human rights violations occurred in geographical proximity to the sanctioning state and 'could potentially trigger other negative externalities such as refugee flows'.¹⁴⁸ While this paper's purpose is not to assess the WTO-legality of sanctions, the arguments raised hold some weight when we consider whether Magnitsky sanctions can contribute to national security. Although Venezuela and Cuba are in geographical proximity to the US, it is not fully clear that violations of human rights by individual actors in these states could cause 'negative externalities' giving rise to a threat or emergency affecting US citizens' security.

If the sanctioning state's citizens are not threatened by the human rights violations and thus a nexus to the sanctioning state(s) does not exist, then Magnitsky sanctions cannot contribute to the national security of the sanctioning state(s).

4.3.2 International or Global Security

Historically, international or global security 'involved the territorial integrity of nations and the greatest threat to such territorial integrity was posed by wars between states, and particularly between great powers'.¹⁴⁹ Now, there appears to be two mutually reinforcing components of international or global security. Firstly, it can only be achieved through the cooperation of states, because 'insecurity is a transnational phenomenon' that requires a 'global approach'.¹⁵⁰ Secondly, international or global security concerns issues which extend beyond one state's internal affairs: they are not issues which reflect the values of one state, but are rather a common or shared threat or emergency.

¹⁴⁶ U.S. Department of the Treasury, 'Treasury Sanctions Two Individuals and Five Entities Under Global Magnitsky', 12 June 2018, <<https://home.treasury.gov/news/press-releases/sm0411>>; U.S. Department of the Treasury, 'Treasury Sanctions Turkish Officials with Leading Roles in Unjust Detention of U.S. Pastor Andrew Brunson', 1 August 2018, <<https://home.treasury.gov/news/press-releases/sm453>>.

¹⁴⁷ I. Bogdanova, 'Targeted Economic Sanctions and WTO Law: Examining the Adequacy of the National Security Exception', (2021) 48(2) *Legal Issues of Economic Integration* 171, 193.

¹⁴⁸ I. Bogdanova, *ibid.*, 195

¹⁴⁹ J.S. Nye and S.M. Lynn-Jones, 'International Security Studies: A Report of a Conference on the State of the Field', (1988) 12 *International Security* 5.

¹⁵⁰ W.C. Wallace, 'Global Security', in S. Romaniuk *et al.* (eds.), *The Palgrave Encyclopedia of Global Security Studies* (Springer 2019), 3, citing A. Burke, K. Lee-Koo, and M. McDonald, 'An ethics of global security', (2016) 1(1) *Journal of Global Security Studies* 64.

How *all* Magnitsky sanctions contribute to international security, in light of these components, is not fully clear. While the US, UK and EU have all recognised the importance of aligning their Magnitsky sanctions, they are still imposed unilaterally with many divergences. Magnitsky sanctions imposed by the EU *do* involve cooperation but they may not represent a global approach. Furthermore, Magnitsky sanctions' targeting of individuals involved in armed conflict could contribute to international or global security in principle given that these situations often affect multiple states, either as a result of direct participation in the conflict, or by issues such as displacement.¹⁵¹ However, while the deaths of individuals such as Jamal Khashoggi and Sergei Magnitsky may (rightfully) spark widespread outrage, how these individual incidents constitute threats which extend beyond the internal affairs of the state is unclear. Magnitsky sanctions' targeting of repressive regimes could contribute to international or global security pursuant to the 'human rights peace theory' which dictates that security between states increasingly depends on security within non-democratic or non-human rights compliant states.¹⁵² However, such an assumption may again be arbitrary without concrete evidence.

Conversely, Magnitsky sanctions may paradoxically be a 'source of instability in the international order' and/or a 'recipe for international tension'.¹⁵³ Magnitsky sanctions have been met with fierce reactions, for example by Russia against the US,¹⁵⁴ and by China against the EU and US.¹⁵⁵ Overall, it appears that the majority of Magnitsky sanctions, at present, may not have the necessary components to contribute to international security: not only do they not involve global coordination, they also do not clearly target shared threats or emergencies and may, in fact, create them.

4.3.3 The Security of those Affected by Targeted Conduct

Although the alleged IHRL violations underlying Magnitsky sanctions may not constitute a threat or emergency to the sanctioning state or to international security, this does not preclude the violations constituting a threat or emergency (and, therefore, a security risk) for those within the state where the violations are allegedly taking place. A normative question, however, arises as to whether states should, through Magnitsky sanctions, interfere in another state's internal affairs.

Magnitsky sanctions' hypothetical focus on the security of the states where the human rights violators are operating seems to be justified by claiming that the 'security' of the citizens of another state may generally, or indirectly, affect national or international security interests. For example, in sanctioning the Commander of the Ugandan Chieftaincy of Military Intelligence

¹⁵¹ S. Osisanya, *supra* n 129; P. Wexler *et al.*, 'Global security – Introductory essay', (2016) 1(1) *Global Security: Health, Science and Policy* 1.

¹⁵² P. van Kempen, 'Four Concepts of Security: A Human Rights Perspective', (2013) 13(1) *Human Rights Review* 1, 5.

¹⁵³ T. Ruys, 'Introductory note to the European Union Global Human Rights Sanctions Regime (EUGHRSR)', (2021) 60(2) *International Legal Materials* 298, 300.

¹⁵⁴ M. Russell, *supra* n 15.

¹⁵⁵ C. Portela, *supra* n 21.

(CMI), it was stated:

Human rights defenders, members of civil society groups, journalists, and ordinary people seeking to exercise their right to freedom of expression and right of peaceful assembly face threats of violent repression from authoritarian leaders. Allowing this activity to continue unchallenged not only abandons and threatens victims of human rights abuses, but also poses a direct threat to the national security of the United States. Countries with repressive political regimes are often unstable over the long run, and they export instability regionally and worldwide. These regimes are often a threat to the peace and security of other nations.¹⁵⁶

The UK's Magnitsky regime has also been hailed as 'a powerful new tool to protect democratic governance by tackling human rights abuses'.¹⁵⁷ However, despite increased statistical evidence to support the 'democratic peace hypothesis' – that '[a] policy that actively advances human rights around the world can enhance both national and global security by decreasing the number of states likely to engage in international aggression and the destabilizing consequences associated therewith'¹⁵⁸ – it appears arbitrary to impose Magnitsky sanctions on those operating repressive regimes, unless there was concrete evidence of a direct threat to national security or international security, or if that threat materialised. Even if such evidence did exist, and thus the security of the territory where the human rights violations were occurring was a legitimate goal, it seems that Magnitsky sanctions would only *de facto* contribute to the latter form of security if they were effective, which, given that there have been very few delistings, is not definitive.

4.4 Subjective Security

Ultimately, analysing Magnitsky sanctions' contribution to these three subfields of security produces more questions than answers. By placing Magnitsky sanctions within the security realm, sanctioning states may be 'generalising' and 'abusing' the concept of security.¹⁵⁹ Some have argued that security is a subjective concept in the sense that 'any problem can become a security issue once it has been securitized by policymakers', thus making 'the security field entirely reactive to what policy makers deem a security threat, removing any independent analytical value'.¹⁶⁰ Sanctions now reflect a 'permanent exceptional' which ultimately

¹⁵⁶ U.S. Department of the Treasury, 'Treasury Targets Repression and the Undermining of Democracy', 7 December 2021, <<https://home.treasury.gov/news/press-releases/jy0517>>.

¹⁵⁷ F. De Vrieze, 'The Magnitsky Sanctions and the Politics of Individual Accountability', *Global Policy Opinion*, 11 September 2020, <<https://www.globalpolicyjournal.com/blog/11/09/2020/magnitsky-sanctions-and-politics-individual-accountability>>.

¹⁵⁸ W. Burke-White, 'Human Rights and National Security: The Strategic Correlation', (2004) *Faculty Scholarship at Penn Law* 960; see also I. Kant, 'Perpetual Peace' in H.S. Reiss. (ed.), *Kant's Political Writings* (2d ed., CUP 1991).

¹⁵⁹ Keynote Speech by H.E. Mr. Xie Feng Commissioner of the Ministry of Foreign Affairs of China in the Hong Kong Special Administrative Region at the Opening Ceremony of 2020 Colloquium on International Law, 'Say No to Unilateral Sanctions and Jointly Uphold the International Rule of Law,' 3 December 2020, <<https://www.mfa.gov.cn/ce/cohk/eng/zydt/t1838003.htm>>.

¹⁶⁰ Hyde-Price, *supra* n 131; P. D. Williams (ed.), *Security Studies: An Introduction* (Routledge 2008).

undermines their legitimacy, as threats or emergencies, by nature, cannot last forever.¹⁶¹

It is widely accepted that Magnitsky sanctions are 'destined to be selective' and 'will no doubt be informed by political considerations'.¹⁶² As the sanctions are 'not meant to exclusively focus on the gravity of the violation or the responsibility of those sanctioned', they will not 'be applied neutrally or impartially', but rather they will 'conform to the foreign policy objectives and interests of those applying [them]' and are thus 'a foreign policy tool'.¹⁶³ The limited role of parliaments in designation processes points to their 'political nature'.¹⁶⁴ At EU level, Magnitsky sanctions have been described as the 'newest tool in the EU's extending foreign policy toolbox'.¹⁶⁵ Furthermore, if we consider the US, the IEEPA is 'used today as a routine foreign policy tool',¹⁶⁶ as the 'vague' grounds for invoking and seeming unfettered discretion of the President to declare a national emergency means that Magnitsky sanctions can be imposed regardless of whether a 'real' emergency actually exists.¹⁶⁷ The downgrading of the human rights violations covered to 'serious human rights abuses' in the 2016 Act from 'internationally recognised human rights abuses' in the 2012 Act also suggests an element of subjectivity.¹⁶⁸ Furthermore, references to the 'ideals' or 'interests' of the sanctioning state,¹⁶⁹ and the fact that sanctioning states appear to wish to cooperate their impositions of Magnitsky sanctions with allies¹⁷⁰ also points to the idea of powerful states imposing their interests upon others.¹⁷¹ In the UK, it has been explicitly recognised that Magnitsky sanctions in their first year were imposed when it was 'diplomatically convenient' to do so.¹⁷²

¹⁶¹ M. Tourinho, 'Towards a world police? The implications of individual UN targeted sanctions', (2015) 91(6) *International Affairs* 1399, 1410.

¹⁶² F. De Vrieze, *supra* n 157.

¹⁶³ C. Eckes, *supra* n 140.

¹⁶⁴ See <https://www.europarl.europa.eu/doceo/document/A-9-2021-0354_EN.html>.

¹⁶⁵ C. Eckes, *supra* n 140.

¹⁶⁶ A. Boyle, 'Checking the President's Sanctions Powers: A Proposal to Reform the International Emergency Economic Powers Act', *Brennan Center For Justice*, 10 June 2021, <<https://www.brennancenter.org/sites/default/files/2021-06/BCJ-128%20IEEPA%20report.pdf>>.

¹⁶⁷ *Ibid.*

¹⁶⁸ See <<https://chrissmith.house.gov/news/documentsingle.aspx?DocumentID=409221>>.

¹⁶⁹ U.S. Department of the Treasury, 'United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe', 21 December 2017, <<https://home.treasury.gov/news/press-releases/sm0243>>; UK Government Cabinet Office, 'Global Britain in a Competitive Age: the Integrated Review of Security, Defence, Development and Foreign Policy', 16 March 2021, <<https://www.gov.uk/government/publications/global-britain-in-a-competitive-age-the-integrated-review-of-security-defence-development-and-foreign-policy/global-britain-in-a-competitive-age-the-integrated-review-of-security-defence-development-and-foreign-policy>>.

¹⁷⁰ H. Hurd, 'What Britain's New Sanctions Reveal About U.S.-U.K. Relations,' *Lawfare Blog*, 17 July 2020, <<https://www.lawfareblog.com/what-britains-new-sanctions-reveal-about-us-uk-relations>>.

¹⁷¹ See <<https://www.federalregister.gov/documents/2021/01/04/2020-29015/global-magnitsky-human-rights-accountability-act-annual-report>>; and REDRESS, 'New Cross-Party Parliamentary Group Pushes for Further Sanctions to Tackle Human Rights Abusers and Kleptocrats in the UK', 19 October 2021, <<https://redress.org/news/new-cross-party-parliamentary-group-pushes-for-further-sanctions-to-tackle-human-rights-abusers-and-kleptocrats-in-the-uk/>>.

¹⁷² REDRESS, *ibid.*

In addition, Magnitsky sanctions' imposition often appears to exemplify the targeting of individuals so that the trade goals of the sanctioning state,¹⁷³ or strategic alliances, are not infringed.¹⁷⁴ For example, with states such as Saudi Arabia, an ally of the US and UK, it is notable that Saudi Crown Prince Mohamed bin Salman has never been sanctioned, despite his alleged close connections to and oversight of those suspected of being involved in Jamal Khashoggi's death.¹⁷⁵ In contrast, however, although there are Magnitsky sanctions on individuals involved in the repression of the Rohingya, geographical sanctions regimes are still favoured by the UK and US for the situation in Myanmar, possibly due to the fact that 'preserving bilateral relations may be a less pressing priority'.¹⁷⁶

5. Seeking Clarity

Having concluded that it is not fully clear how Magnitsky sanctions contribute to human rights or security, two potential reasons explaining their creation and use, which reflect other overarching trends, are tentatively presented here.

5.1 Proliferation of Securitisation

Firstly, Magnitsky sanctions may exemplify the proliferation of securitisation, in line with the constant evolution of security, rather than solely masking political motives of sending states/the EU.¹⁷⁷ It has been argued that '[a]lthough, in theory, a boundary exists between [the conceptual frameworks of national security and international security], such a boundary is not sufficient to maintain a clear-cut delimitation between them. Rather, they have a symbiotic relationship.'¹⁷⁸ The UN General Assembly 'has [also] stated that national and international security has become increasingly interrelated.'¹⁷⁹ In addition, state-centric approaches to security are now outdated. Security threats can still be military-related, as the concept of 'security' has traditionally and continues to be associated with the use of force between states;¹⁸⁰ however, non-military-related threats, which affect 'the preservation of the norms, rules, institutions and values of society', are also now closely associated with security.¹⁸¹ Furthermore, the fact that Magnitsky sanctions follow a number of thematic sanctions regimes is reflective of

¹⁷³ C. Loudon and C. Kmiotek, 'UK Global Human Rights Sanctions: Year One in Numbers', *RUSI Commentary*, 20 July 2021, <<https://rusi.org/explore-our-research/publications/commentary/uk-global-human-rights-sanctions-year-one-numbers>>.

¹⁷⁴ M. Normington, *supra* n 31; I. Steinhäuser, 'How human rights sanctions need to evolve for everyone's benefit', *Reuters*, 1 November 2021, <<https://www.reuters.com/legal/government/how-human-rights-sanctions-need-evolve-everyones-benefit-2021-11-01/>>.

¹⁷⁵ M. Russell, *supra* n 15.

¹⁷⁶ *Ibid.*

¹⁷⁷ G.A. MacLean, 'Human Security and the Globalization of International Security', (2006) 7 *The Whitehead Journal of Diplomacy and International Relations* 89.

¹⁷⁸ S. Osisanya, *supra* n 129.

¹⁷⁹ B. Simma *et al* (eds.), *The Charter of the United Nations: A Commentary vol. I.* (3rd edn., OUP 2012), 111.

¹⁸⁰ J.S. Nye and S.M. Lynn-Jones, *supra* n 149.

¹⁸¹ S.M. Makinda, *Sovereignty and Global Security, Security Dialogue*, (Sage Publications 1998), 281-292.

'personalisation' and 'individualisation' trends in the peace and security field.¹⁸² In this sense, the subfields of security analysed above are restrictive due to their focus on the security of a state or states collectively. This analysis may change if we consider Magnitsky sanctions as a measure for 'human security, acknowledging that threats cannot only come from States and non-State actors, but can also exist to the security of both States and the people',¹⁸³ or if we re-evaluate the concept of security as a need for human protection.¹⁸⁴

The fluid employment of security-related terminology and the use of Magnitsky sanctions as security measures could, as such, be a reflection of the evolution of security itself. In this way, Magnitsky sanctions *could* contribute in some way to all three notions of security addressed above as the concept of security has evolved in such a way that these subfields are circular or interdependent.

5.2 Dissatisfaction with International Criminal Justice

Given that Magnitsky sanctions appear to infringe on international criminal justice, it is possible that, rather than centring on the respect for human rights, the creation of Magnitsky sanctions represents an expression of dissatisfaction with international criminal justice.¹⁸⁵

Despite the supposed 'justice cascade' surrounding the creation of the ICC, it is not controversial to assert that international criminal justice, at present, leaves much to be desired.¹⁸⁶ In addition to a low number of prosecutions at international tribunals for international crimes, domestic prosecutions, including those taken under universal jurisdiction, are limited in their effects. Recent prosecutions of individuals under universal jurisdiction, while a positive contribution to the tackling of impunity, have only been possible due to the presence of the alleged perpetrator in that territory. For instance, the prosecution of Anwar Raslan in Germany, recently found guilty of numerous crimes against humanity committed within his capacity as a Colonel in the Syrian Security Service, brought into sharp relief the fact that the vast majority of individuals responsible for such crimes have not and probably will never face a criminal trial.¹⁸⁷ Furthermore, the time elapsed between the commission of international crimes and the conclusion of a trial is usually considerable; sanctions, on the other hand, can be created and

¹⁸² Eurojust Genocide Network, 'Prosecution of Sanctions (Restrictive Measures) Violations in National Jurisdictions: A Comparative Analysis', December 2021, <https://www.eurojust.europa.eu/sites/default/files/assets/genocide_network_report_on_prosecution_of_sanctions_restrictive_measures_violations_23_11_2021.pdf>, 8, citing C. Portela, 'National Implementation of United Nations Sanctions, Towards Fragmentation', 65 *International Journal* 13, 17.

¹⁸³ B. Simma *et al.*, *supra* n 179, 111. See also S. Daft, 'Human security and international law: why? how?' in G. Oberleitner (ed.), *Research Handbook on International Law and Human Security* (Elgar 2022).

¹⁸⁴ S. Osisanya, *supra* n 129.

¹⁸⁵ See Section 3.4.

¹⁸⁶ D. Guilfoyle, 'This is not fine: the International Criminal Court in Trouble', *EJIL: Talk!*, 21 March 2019, <<https://www.ejiltalk.org/part-i-this-is-not-fine-the-international-criminal-court-in-trouble/>>.

¹⁸⁷ C. Schaer, 'As a Syrian torturer is jailed, a debate on justice begins', *Al Jazeera*, 17 January 2022, <<https://www.aljazeera.com/news/2022/1/17/as-a-syrian-torturer-is-jailed-a-debate-on-justice-begins>>.

implemented rapidly. As illustrated by the statements of the politicians behind the respective regimes, Magnitsky sanctions could therefore be seen as a representation of the frustration with this lack of accountability, and can be used to express states' desire to punish those assumed responsible for international crimes that reside in areas where either prosecution under universal jurisdiction or extradition is impossible. This point is further illustrated by the comprehensive – and, in light of the human rights issues raised, surprising – support that these sanctions regimes enjoy from civil society and a non-partisan spectrum of political parties.¹⁸⁸ If sanctioning individuals assumed responsible for international crimes because they reside outside of the reach of international justice becomes the new norm, this both removes the impetus for states to prosecute such individuals and strips procedural guarantees which are the bedrock of (inter)national criminal law.¹⁸⁹

6. Conclusion

Through using human rights and security as analytical lenses, this paper identifies Magnitsky sanctions in their current form as somewhat of an elusive phenomenon.

Although human rights language permeates both the legislation underlying Magnitsky sanction regimes and the rhetoric surrounding their imposition, it is unclear what role human rights law itself plays. Indeed, the state-centric nature of human rights law and the punitive effects of Magnitsky sanctions in practice highlights contradictory aims. While this paper has shown that such sanctions may contribute to the protection of human rights through interdicting or preventing future violations in the abstract, Magnitsky sanctions may also, however, undermine ongoing human rights accountability measures and profoundly violate the rights of those targeted. Furthermore, while at first glance Magnitsky sanctions could constitute security measures, which threats or emergencies they target, and indeed whose security is at stake in their imposition, is unclear. Inconsistencies appear when we consider that many Magnitsky sanctions are imposed *ex post facto*, and also when they are evaluated via traditional subfields of security.

Ultimately, however, Magnitsky sanctions could instead represent broader international trends, namely a dissatisfaction with international criminal justice and/or the evolution of security itself. With support for Magnitsky sanctions continuing to increase, now is the time to consider their future place, role, and regulation.

¹⁸⁸ Freedom House, 'Freedom House Urges Congress to Reauthorize and Fund Global Magnitsky Sanctions Before End of Year', 6 December 2021, <<https://freedomhouse.org/article/freedom-house-urges-congress-reauthorize-and-fund-global-magnitsky-sanctions-end-year>>. T. Ruys, 'Reflections on the "Global Magnitsky Act" and the Use of Targeted Sanctions in the Fight against Grand Corruption', (2017) *Revue Belge de Droit International / Belgian Review of International Law* 492, 508-509.

¹⁸⁹ The prosecution of sanctions violations has also been presented as an alternative to investigations/prosecutions of core international crimes. See Eurojust Genocide Network, *supra* n 182, 26.