ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

Global Human Rights Sanctions and State Sovereignty: Does the New Tool Challenge the Old Order?

YIFAN JIA

PhD Candidate and Visiting Lecturer, King's College London (UK)
Visiting Fellow, Graduate Institute of International and Development Studies (Switzerland)

✉ **y.jia@kcl.ac.uk**
https://orcid.org/0009-0007-1282-6589

ABSTRACT

Global human rights sanctions (also known as Magnitsky sanctions) regimes target individuals and entities involved in gross human rights abuses. The sanctions measures, including visa bans, transaction restrictions, and asset freezes, are implemented through executive decision-making processes. This article critically analyses the legality of Magnitsky sanctions in relation to the principle of state sovereignty, exploring whether these new transnational legal regimes disrupt the existing international legal order. Given that global human rights sanctions can be employed to address both individual responsibility and state responsibility for human rights violations, this paper scrutinizes the legitimacy of the jurisdiction of these sanctions and evaluates whether they can be justified as countermeasures, respectively. This paper argues that the jurisdiction of sanctions is not in violation of international law. As unilateral measures against states for violating human rights law, Magnitsky sanctions can significantly contribute to the formation of customary international law on third-party countermeasures.

Keywords: global human rights sanctions, state sovereignty, extraterritorial jurisdiction, countermeasures, asset freezing

ATHENA
Volume 3.2/2023, pp. 1-36
Articles
ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

1. Introduction of GHRSRs

Global Human Rights Sanctions Regimes (GHRSRs), commonly referred to as Magnitsky sanctions, are sanctions frameworks designed to address perpetrators of severe human rights violations committed abroad. The US was the first country to establish such a legal regime in 2016, known as the Global Magnitsky Human Rights Accountability Act. Since then, this sanctions regime has been adopted by 35 countries worldwide, including the EU through decision (CFSP) 2020/1999 and regulation (EU) 2020/1998, and the UK through the Global Human Rights Sanctions Regulations 2020.

GHRSRs encompass a range of restrictive measures that can be utilized to target individuals (natural persons) and/or entities (legal persons and other bodies).[1] These measures may include visa bans, asset freezes, and transaction restrictions. While the potential sanctions measures are similar across all countries, the specific types of grave human rights violations that serve as grounds for designating individuals and entities under these sanctions regimes may vary from jurisdiction to jurisdiction. Commonly recognized serious human rights violations that form the basis for designation under GHRSRs include torture and extrajudicial killings (right to life). Apart from the US and Canada, other jurisdictions' GHRSRs also encompass slavery (forced labour).[2] Moreover, the EU GHRSR includes enforced disappearances and arbitrary arrests or detentions, as well as international crimes such as genocide and crimes against humanity. GHRSRs in the US

[1] The individuals and entities who are on the sanctions lists are referred to as sanctioned persons.

[2] Global Magnitsky Human Rights Accountability Act, Pub. L. No.114–328, div. A, title XII, subtitle F, §1263(a)(1), 130. Stat. 2534. (2016) (codified at 22 U.S.C. § 2656 note) (US); Justice for Victims of Corrupt Foreign Officials Act, S.C. 2017, c. 21, § 4(2)(a) (Can.); Global Human Rights Sanctions Regulations 2020, SI 2020/680, reg. 4(2) (UK); 2020 O.J. (L410 I/1) Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations, art. 2(1)(c); *Autonomous Sanctions Regulations 2011* (Cth) reg 6A(4)(a) (Austl.).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

and the EU also provide for the possibility of sanctioning perpetrators of "other human rights violations".[3]

The designation process within GHRSRs typically involves a "blacklisting" decision, bypassing a judicial process. The authority to designate individuals and entities under GHRSRs rests with government representatives, such as the President of the US, the Secretary of State in the UK, and the Council of the EU.[4] It has to be mentioned that Canada recently introduced a court review for forfeit orders claimed by the Minister, adding a judicial element to the process.[5] However, this paper will only focus on assets freeze instead of assets forfeiture and thus will exclude the forfeiture order from the scope of discussion.

The innovative aspect of GHRSRs lies in their status as the first and only thematic sanctions regime on human rights, transcending geographical boundaries. Prior to their establishment, individual sanctions based on human rights violations existed in various jurisdictions. For instance, the EU passed a regulation[6] and a decision[7] in 2011 addressing serious human rights violations in Iran, while the US enacted Sergei Magnitsky Rule of Law Accountability Act (Magnitsky Act) in 2012 following the death of Magnitsky.[8] However, these measures were all country-specific. The introduction of a thematic sanctions regime on human rights institutionalized

[3] Global Magnitsky Human Rights Accountability Act, Pub. L. No.114–328, div. A, title XII, subtitle F, §1263(a)(1), 130. Stat. 2534. (2016) (codified at 22 U.S.C. § 2656 note) (US); 2020 O.J. (L410 I/1) Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations, art. 2.1(d).
[4] Global Magnitsky Human Rights Accountability Act, Pub. L. No.114–328, div. A, title XII, subtitle F, §1263(a), 130. Stat. 2534. (2016) (codified at 22 U.S.C. § 2656 note) (US); Global Human Rights Sanctions Regulations 2020, SI 2020/680, reg. 5(1) (UK); 2020 O.J. (L410 I/1) Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations, art.14.
[5] Budget Implementation Act, 2022, No. 1 (S.C. 2022, c. 10) (Can).
[6] 2011 O.J. (L100/1) Council Regulation (EU) No 359/2011 of 12 April 2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Iran.
[7] 2011 O.J. (L100/51) Council Decision 2011/235/CFSP of 12 April 2011 concerning restrictive measures directed against certain persons and entities in view of the situation in Iran.
[8] Sergei Magnitsky Rule of Law Accountability Act, Pub. L. No. 112-208, 126 Stat 1496 (2012) (US).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

sanctions against perpetrators of human rights violations and shifted the focus of sanctions from states to specific cases and victims.

A significant development brought about by GHRSRs is the "disconnection of breach from geography" (Portela, 2022). This means that "malicious individuals and networks can be sanctioned despite broader foreign policy priorities which could otherwise prevent effective actions." (Normington, 2019). The decision-making procedures within GHRSRs are also simpler compared to previous approaches to addressing human rights violations. Previously, states had to establish specific legal frameworks for each individual case. GHRSRs offer more flexibility as they can be applied to any new human rights abuses falling within their scope, allowing for a quicker response to human rights violations (Eckes, 2022).

GHRSRs have emerged in response to a backdrop of weakened international mechanisms for human rights protection and a global backlash against human rights. In this context, human rights NGOs have warmly welcomed GHRS as a new and powerful tool for confronting human rights violations (OMCT, 2018). According to Browder (2015, 303), GHRS represent "new method[s] for fighting human rights abuses in authoritarian regimes in the twenty-first century". This approach emphasizes individual accountability and aims to create tangible consequences that instil fear in human rights violators.

2. Challenge of GHRSRs Under International Law

Although GHRS holds significant potential, it has faced continuous opposition since its establishment. These oppositions encompass concerns regarding the tangible efficacy of the sanctions regimes, the genuine intentions behind their implementation, the adherence to due process in the sanctioning procedures, and more. This highlights the tension between this new legal framework and the existing international legal order. This paper

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

will zoom in on one of those objections, which is the potential violation of the principle of state sovereignty.

The primary objections to GHRS come from sanctioned states, which have implemented various countersanctions in response to their citizens and/or entities being targeted under GHRS. For example, as a response to the US "Magnitsky list", Russia also created a "Guantanamo list" with an equal number of names on it.[9] Turkey issued the same sanction measures against the counterparts, two Ministers, of the US in response to the US sanctions.[10] This objection has been extensively deliberated within the framework of the UN Special Rapporteur on unilateral coercive measures (UCM), with GHRSRs repeatedly featuring in recent reports. The majority of countries worldwide consider UCM to be illegal. The current Special Rapporteur Douhan highlights that "the illegal nature of unilateral coercive measures has been consistently affirmed by the Human Rights Council and the General Assembly."[11] This stance is exemplified by a UN Human Rights Council (UNHRC) resolution from 2017, which declares that "unilateral coercive measures and legislation are contrary to international law, international humanitarian law, the Charter and the norms and principles governing peaceful relations among States".[12] The reasons listed in the resolutions include violation of the state sovereignty and impeding free trade.

[9] "МИД РФ опубликовал список граждан США, которым закрыт въезд в Россию [The Russian Foreign Ministry has published a list of US citizens who are denied entry to Russia]." RIA Novosti, published July 19, 2014, https://ria.ru/20140719/1016693619.html.
[10] Republic of Turkey Ministry of Foreign Affairs. "QA-70, 2 November 2018, Statement of the Spokesperson of the Ministry of Foreign Affairs, Mr. Hami Aksoy, in Response to a Question Regarding the Decision on Lifting Sanctions Against U.S. Attorney General and the Secretary of Homeland Security." Accessed 21 May 2023. https://www.mfa.gov.tr/sc_-70_-disisleri-bakanligi-sozcusunun-abd-li-bakanlara-uygulanan-yaptirimlarin-kaldirilmasina-iliskin-sc_en.en.mfa.
[11] See Human Rights Council resolutions 15/24, 19/32, 24/14, 30/2 and 34/13 and General Assembly
resolutions A/RES/75/181, 69/180, 70/151 and 71/193. Alena Douhan. *Unilateral Coercive Measures: Notion, Types and Qualification*, Rep. of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights. U.N. Doc. A/HRC/48/59 (July 8, 2021).
[12] Human Rights Council Res. A/HRC/RES/34/13 (April 07, 2017).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

The debate at the UN goes beyond the UNHRC. The UN Special Rapporteurs points out that the issue of UCM remains an ongoing topic in debates at the UN General Assembly (GA) (Jazairy, 2019), with substantial disparities between the positions held by sanctioning and sanctioned states (Douhan, 2021). Despite the prevailing viewpoint of the international community regarding the illegality of UCM, approximately thirty states, primarily advanced Western nations, challenge this consensus and advocate for the legitimacy of unilateral sanctions as tools to pursue specific foreign policy objectives (Jazairy, 2019). Other than condemning UCM, Resolutions adopted during UN meetings, including those of the UNGA and UNHRC since the 1990s explicitly call for states to refrain from UCM.[13] even after the Russian invasion of Ukraine, where unilateral sanctions have been widely adopted, the latest resolution from the UNHRC still remains the same status.[14]

However, it is essential to acknowledge that the concept of UCM differs from that of unilateral sanctions or autonomous restrictive measures. The former primarily finds application within UN discussions, while the latter is implemented on a broader scale. Unilateral sanctions represent a category of unilateral measures that are used in various contexts, and GHRS and UCM are both subtypes of unilateral measures. That means, even if we set aside the controversy surrounding the conclusion that UCM are deemed unlawful (See Fellmeth, 2023) and accept it as the prevailing view within the international community, it is inappropriate to extend this conclusion directly to GHRS. Instead, it is necessary to examine whether GHRS can be classified as a form of UCM.

However, this approach is challenging because there is no definition of UCM in the resolutions of the UNHRC or the UNGA. The recent attempt can be found in the UNSR's report, where Douhan (2021) defines the UCM as

[13] Human Rights Council Res. A/HRC/RES/34/13 (April 07, 2017).
[14] Human Rights Council Res. A/HRC/RES/49/6 (April 13, 2022).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

> any type of measures or activity applied by States, groups of States or regional organizations without or beyond the authorization of the Security Council, not in conformity with international obligations of the sanctioning actor or the illegality of which is not excluded on grounds of the law of international responsibility, regardless of the announced purpose or objective.

Yet, this approach to defining it seems minimally beneficial and steers the discussion into an impasse: UCM is considered illegal; within unilateral measures, those whose illegality cannot be ruled out are categorized as UCM. From the current debate regarding UCM, it can be learnt that the international community has not achieved a consensus regarding what unilateral sanctions are lawful. That means the legality of GHRS under international law is also worth debating. This paper delves into the examination of the legality of GHRSRs within the realm of international law, particularly focusing on whether GHRS contradict the principle of state sovereignty. By doing so, this paper also contributes to the discussion of the tension that emerges between unilateral sanctions and the fundamental principles that form the bedrock of the current international legal framework.

3. GHRS and State Sovereignty

To answer the state sovereignty question, the target of GHRSRs is the first issue that needs to be investigated. This needs to be discussed because the acts of gross human rights violations that GHRSRs aim to target may give rise to both individual responsibility and state responsibility. On the surface, the question of whom GHRSRs target seems clear, as all GHRSRs state that the sanctions targets are individuals and entities. It is true that individuals are the targets of sanctions when they are imposed on non-state actors for human rights violations like human trafficking. However, in the reality of public discussion of how such sanctions are used, sanctions on individuals can be perceived differently. As Argent (2020) points out, in the view of some

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

countries, "the imposition of individual sanctions [is] being seen as a targeted attack on the country as a whole". This issue is particularly relevant in the context of GHRS, which primarily targets state officials. As Wu (2022) notes, when GHRS are applied to state officials who exercise state power, the sanctions indirectly target the state.

While it is true that the statements from sanctioning states emphasize that GHRSRs only target individuals, the practice of implementing these sanctions paints a different picture. Upon closer examination, it becomes clear that the major jurisdictions, including the EU, the UK, the US and Australia, all have explicitly designated government organs, as opposed to individual officials, as targets of their sanctions. For instance, the EU has sanctioned the Office of the Prosecutor of the Democratic People's Republic of Korea,[15] the UK has sanctioned the Russian Terek Special Rapid Response Unit,[16] the US has sanctioned the 33rd Light Infantry Division of the Burmese Army,[17] and Australia has sanctioned the Iran Morality Police.[18] Although not all wrongful acts committed by state organs may be attributed to the state, it is undeniable that when a department or ministry of a state is sanctioned, the state as a whole bears the consequences. As such, sanctions imposed on entities that are state organs are essentially directed at the state itself.

The analysis above shows that GHRSRs include both state-to-state acts and state-to-individual acts. Since this article primarily focuses on state sovereignty, I will not delve into a detailed discussion of whether GHRS targets individuals and states separately when applied to different actors or if one sanction can be understood to target both. The only significance of identifying the targets of sanctions is to determine the rules that apply to

[15] "EU Sanctions Map." accessed March 02, 2023 , https://www.sanctionsmap.eu/#/main/details/-50/?search=%7B%22value%22:%22%22,%22searchType%22:%7B%7D%7D.
[16] "Financial sanctions, Global Human Rights." accessed March 02, 2023. https://www.gov.uk/government/publications/financial-sanctions-global-human-rights.
[17] "Sanctions List Search." OFAC, accessed September 06, 2022 , https://sanctionssearch.ofac.treas.gov/.
[18] "Consolidated List". Accessed March 03, 2023, https://www.dfat.gov.au/international-relations/security/sanctions/consolidated-list.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

different natures of acts. The question of whether GHRS violates state sovereignty can be further divided into two sub-questions: in the case of state-to-individual acts, the question arises as to whether the jurisdiction established by GHRS is permissible under international law, and in the case of state-to-state acts, the question is whether third states can legitimately impose restrictive measures, as outlined in GHRS, in response to the state's violations of international human rights obligations. The following sections will discuss respectively.

3.1 Individual Responsibility

In order to examine the legality of GHRS in relation to jurisdiction, it is crucial to identify the type of jurisdiction involved and the basis upon which it operates. There are diverse views regarding the bases of jurisdiction under GHRSRs. Abdelhady (2018) argues that GHRSRs exemplify universal jurisdiction since it does not require a jurisdictional nexus. Xiao (2021) contends that GHRSRs' jurisdiction is based on the concept of "long arm jurisdiction", which applies to individuals outside the jurisdiction of the implementing state. However, the EU asserts that its sanctions "do not apply extraterritorially" and "do not create obligations for non-EU persons or entities unless the business is conducted at least partly within the EU".[19] When examining the literature on unilateral sanctions, there is a similar criticism that those acts "extend the sanctioning State's domestic jurisdiction extraterritorially, in violation of well-established principles of jurisdiction (Barber, 2021)."

Before delving into the jurisdictional issue of GHRSRs, it is imperative to initially acknowledge the dual-tiered structure inherent to the sanctions framework, which consists of primary sanctions and the enforcement of the sanctions. Primary sanctions encompass measures such as visa bans, trade

[19] European Commission. "Frequently asked questions: Restrictive measures (sanctions)." posted February 26, 2022, https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_1401.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

restrictions, and asset freezes that target individuals and entities allegedly responsible for human rights violations, while the enforcement of sanctions is designed to target the violation of the primary sanctions. When enforcement measures focus on third parties, they are commonly referred to as secondary sanctions.

This term is often associated with another sanctions regime addressing violations of primary sanctions, but as noted by Ruys and Ryngaert (2020), the broader concept of it encompasses "all measures which, in essence, aim to regulate economic transactions between a third state and a target state." Discussions surrounding the jurisdiction of sanctions frequently conflate primary sanctions and secondary sanctions, with arguments against the legality of sanctions often stemming from the latter (See Ruys and Ryngaert, 2020), which leads to a limited discussion on the legality of the primary sanctions.

In the context of GHRSRs, every jurisdiction sets out penalty provisions to punish the violation of GHRS imposed on the sanctioned persons: the US refers to the civil and criminal punishments under the International Emergency Economic Powers Act (IEEPA);[20] the UK sets up a Part in its Global Human Rights Sanctions Regulations to stipulate the enforcement of these sanctions;[21] the EU has the provision that "Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented."[22] The EU and the UK have made it clear that GHRSRs are only enforced within their own territories or against their own nationals,[23] but the enforcement regulation in the US does not incorporate restrictions on the

[20] Global Magnitsky Human Rights Accountability Act, Pub. L. No.114–328, div. A, title XII, subtitle F, §1263(f), 130. Stat. 2534. (2016) (codified at 22 U.S.C. § 2656 note) (US).
[21] Global Human Rights Sanctions Regulations 2020, SI 2020/680, pt. 7 (UK).
[22] 2020, O.J. (L I 410/13) Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, art. 16(1).
[23] 2020 O.J. (L410 I/1) Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations, art. 19; Global Human Rights Sanctions Regulations 2020, SI 2020/680, reg. 3 (UK).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

scope of sanction enforcement, potentially allowing for the imposition of secondary sanctions.. However, among the 35 countries that could enforce the sanctions, only the US appears susceptible to secondary sanctions scenarios (to the best of my knowledge, this has not manifested in practice). This paper aims to dedicate space to discussions on prevalent issues in most sanctioning states and, therefore, will not delve into secondary sanctions.

Following the differentiation between primary and secondary sanctions and the clarification that this paper exclusively centres on primary sanctions, when delving into jurisdictional issues, it becomes essential to distinguish between primary sanctions themselves and the enforcement of the primary sanctions. If to say that objectors of unilateral sanctions often utilize the illegality of secondary sanctions to dispute the legitimacy of any unilateral sanctions regime, supporters of unilateral sanctions, in turn, rely on the legality of the jurisdiction in the enforcement of sanctions to claim that all types of jurisdictions related to unilateral sanctions are lawful. EU is an example of the latter. EU states that "EU sanctions inherently apply in non-EU countries – however, only within an EU jurisdiction", since "the obligations imposed are binding on EU nationals or people located in the EU or doing business here".[24]

It is necessary to examine how this is illustrated in the EU GHRSR. It states in the regulation that

> This Regulation shall apply: (a) within the territory of the Union, including its airspace; (b) on board any aircraft or vessel under the jurisdiction of a Member State; (c) to any natural person inside or outside the territory of the Union who is a national of a Member State; (d) to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the

[24] EU Commission, "Overview of sanctions and related resources", accessed November 11, 2023, https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/overview-sanctions-and-related-resources_en.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

> law of a Member State; (e) to any legal person, entity or body in respect of any business done in whole or in part within the Union.[25]

It is clear that these jurisdictions are based on widely accepted principles, namely, territorial principle and nationality principle. However, this is only a partial narrative, as this Article solely addresses the jurisdiction of the enforcement of primary sanctions. Deliberately or otherwise, the EU moulds regulations to channel jurisdictional discussions primarily towards the enforcement of sanctions, diverting attention from the jurisdiction related to the imposition of primary sanctions in order to avoid the controversy of the potential exterritorial jurisdiction.

There are three forms of jurisdiction in international law, which are legislative/prescriptive, adjudicative and enforcement. Since adjudicative jurisdiction means "a State's authority to decide competing claims" (Colangelo, 2012) and often refers to "the authority of courts to entertain suits" (Kamminga, 2020), in the context of primary sanctions, where judicial involvement is absent, adjudicative jurisdiction is non-existent. Enforcement jurisdiction refers to "enforce or compel compliance or to punish noncompliance with its laws or regulations, whether through the courts or by use of executive, administrative, police, or other nonjudicial action."[26] There are three sanctions measures in the primary sanctions in GHRSRs. Visa bans fall under the jurisdiction of immigration authorities, and asset freezes entail the freezing of assets within the sanctioning country, thus aligning with the territorial principle. Regarding the sanctions measure of transaction restriction, two parties are involved: the sanctioned individuals or entities and the companies of the sanctioning country. While the intended impact of these measures is to restrict the transactions of the sanctioned individuals and entities, the actual targets of these sanction measures are companies of the sanctioned country. This can be learned from the wording in the legislation:

[25] 2020 O.J. (L410 I/1) Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations, art. 19.
[26] Restatement (Third) of US Foreign Relations Law, s. 401(b)(c).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

instead of stating that the sanctioned persons are restricted from access to funds or economic resources, the EU states "No funds or economic resources shall be made available directly or indirectly to or for the benefit of the natural or legal persons, entities or bodies listed in the Annex."[27] Consequently, this measure adheres to either the territorial or nationality principle.

Thus, there is only one type of jurisdiction that needs to be discussed -- legislative (prescriptive) jurisdiction. Legislative jurisdiction, also referred to as prescriptive jurisdiction, determines "whether and under what circumstances a State has the right to regulate (Mann, 1964)". In GHRSRs, legislative jurisdiction refers to the authority to establish rules prohibiting foreign individuals and entities from committing certain human rights violations.

3.1.1 Territorial Jurisdiction

Since the legislative authority pertains to the imposition of sanctions on a foreign person who violated human rights abroad, the jurisdiction appears to be extraterritorial. However, there is a way to argue that GHRS is actually based on territorial jurisdiction. This is learnt from the discussion on the Alien Tort Statute (ATS) in the US. Colangelo (2013) suggests that jurisdiction based on international law is not extraterritorial jurisdiction, because the scope of the application of international law is global, and thus "accurate implementation and application of international law can transform exercises of extraterritorial jurisdiction into exercises of territorial jurisdiction." (Colangelo, 2014).

This rationale can easily be used to justify GHRSRs, given the foundation of GHRS is international human rights law. While this perspective appears cogent, it rests upon two key premises (Colangelo,2013): the assumption that the individual's home country is bound by the obligations outlined in that particular international law and the stringent adherence to international law.

[27] 2020 O.J. (L410 I/1) Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations, art. 3.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

However, this rationale is not applicable to all situations in GHRSRs. Firstly, not every state is burdened with the same international legal obligations regarding human rights; this prerogative is limited to those dictated by *jus cogens* and human rights violations acknowledged in treaties ratified by the states in which the perpetrators reside. Thus, in instances where the involved party lacks pertinent obligations, the sanctioning country cannot assert jurisdiction over the individual on the grounds of violating international law. This holds especially true, given that GHRS in the EU and the US can be applied against "other serious human rights violations".

More importantly, while sanctioning states include international human rights law in their legislation, the responsibilities they delineate often transcend the parameters set by international human rights treaties. For instance, GHRSRs expand the scope of the potential sanctioned persons by expanding the definition of the link of the target acts to human rights violations. Under GHRSRs, the UK could sanction an "involved person", and the EU could sanction a person who is "associated with" the persons who are "involved in" the human rights violations.[28] That is beyond the scope of individual responsibility for certain human rights violations. Thus, while the "implementing international law" argument potentially offers justification for certain (or even a significant amount of) facets of GHRS, it should be admitted that there are aspects of GHRSRs that extend beyond its scope.

Beyond the argument grounded in "implementing international law", universal jurisdiction is also justified for use when a state lacks a direct link to criminal acts. The basis for universal jurisdiction is that the criminal acts are "so heinous that every state has a legitimate interest in their repression" (Staker, 2018). However, the argument of "implementing international law" holds greater explanatory power, as criminal acts falling under the scope of universal jurisdiction are delineated in international treaties or considered *jus*

[28] Global Human Rights Sanctions Regulations 2020, SI 2020/680, reg. 6 (UK); 2020 O.J. (L410 I/1) Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations, art. 3.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

cogens, thus squarely within such argument. Hence, if the overarching theory of "implementing international law" fails to justify all scenarios under GHSR, it becomes necessary to scrutinize the legality of the extraterritorial legislative jurisdiction of GHRS.

3.1.2 Exterritorial Jurisdiction

In International Law, extraterritorial legislative jurisdiction resides in a middle ground where no rule explicitly permits its use, yet no rule expressly prohibits it. Two prevailing views on such grey areas: "no prohibition means allowed" and "no permission means forbidden". The *Lotus* case established the principle of extraterritorial jurisdiction, which permits it unless limited by prohibitive rules in specific cases.[29] However, the emerging perspective suggests that a state asserting legislative jurisdiction should provide justification with a specific connection to the acts in question. These two understandings are still debatable. While some believe that the latter represents the current prevailing view on jurisdiction (Bradley, 2001; Meessen 1996, 74), others argue that the requirement for the substantial link between the acts or persons and the state has not yet evolved into new customary international law (Ryngaert, 2015; Kuyper, 1984). The justification associated with the aforementioned perspectives can be temporarily set aside and instead scrutinize its applicability to the context of the sanctions under consideration.

In contrast to the typical scenario of legislative jurisdiction, the imposition of sanctions entails a separation of enforcement jurisdiction from legislative jurisdiction with no adjudicative jurisdiction involved. This detachment implies that the two types of jurisdictions have different scopes: the legislative jurisdiction is applied to acts carried out by foreigners in foreign states, while the enforcement jurisdiction operates based on territorial and nationally principles. This type of jurisdiction is commonly observed in

[29] S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), para 46.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

immigration law, where specific requirements are established for foreigners to meet in order to obtain a visa. There appears to be a prevailing consensus asserting that border control unequivocally symbolizes a state's sovereignty (Tilahun, 2021), as "each State is free to regulate the entry into its territory of foreign nationals (Gestri, 2023)". That means, a state can decide on visa issuance regardless of grounds and without preceding juridical proceedings. Okosa (2019) contends that irrespective of the reason for visa denial, the state does not breach any international obligations.

There may be other restrictions posed on the legislative jurisdiction on visa regulations, but there seems to be no limitation based on the principle of state sovereignty. This also renders the visa ban one of the least controversial measures within sanctions regimes. Other sanction measures can similarly be explained. In essence, as long as the enforcement jurisdiction is within the territorial boundaries and there is no adjudicative jurisdiction involved, legislative jurisdiction should have no limitation. It appears contradictory to the perspective that it is not allowed for extraterritorial legislative jurisdiction. However, upon closer examination of the conditions, one would realize that the jurisdictional aspect of sanctions differs from that in the traditional situation of extraterritorial jurisdictions, and thus, the objections to the latter are not applicable to the former.

For example, there is an argument that extraterritorial jurisdiction may result in conflicts of jurisdictions when multiple states claim jurisdiction over the same issue. However, different legislative jurisdictions under GHRSRs can coexist without conflicting with one another. An example of this is the sanctions imposed in the Magnitsky case, which have been issued by multiple jurisdictions and effectively function together.[30] Importantly, these sanctions do not hinder Russia from exercising its own jurisdiction over the case. On

[30] Foreign and Commonwealth Office and The Rt Hon Dominic Raab MP, "UK announces first sanctions under new global human rights regime", Published July 6, 2020, https://www.gov.uk/government/news/uk-announces-first-sanctions-under-new-global-human-rights-regime; 2020 O.J. (L410 I/1) Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

the contrary, sanctioning states encourage Russia to exercise its territorial jurisdiction. The US GHRSR clearly states that the sanctioned individual being prosecuted is one of the conditions for terminating the sanctions.[31]

In summary, regardless of whether one interprets the legislative jurisdiction of GHRS as territorial or extraterritorial, it does not infringe upon the sovereignty of other states. Consequently, with the absence of adjudicative jurisdiction and the legality of legislative and enforcement jurisdiction, it can be concluded that the jurisdiction of GHRS does not violate the principle of state sovereignty. However, it should be noted that the above conclusion holds true only when there is no adjudicative jurisdiction present. In other words, the extraterritorial legislative jurisdiction is deemed acceptable because sanctions are decisions of the executive body rather than the judiciary. However, it should be acknowledged that this underlying assumption is not immune to challenges. For instance, some question the legitimacy of the sanctions measures based on executive orders, suggesting a violation of due process. The analysis in this article does not delve into this viewpoint, nor does it seek to justify the legitimacy of the sanctions regime in terms of due process. Therefore, it is crucial to note that the viewpoint asserting the compatibility of the GHRSRs with the principle of state sovereignty is valid only when the sanctions decision does not require court involvement. Thus, this analysis cannot be applied to justify the forfeiture orders in the recent amendment in Canada GHRS.

3.2 State Responsibility

From the literature on sanctions, there are two internationally recognized lawful unilateral measures under international law which could be used to justify sanctions: retorsions and countermeasures. Although there is literature on the legality of sanctions in general, the determination of such is a nuanced consideration intricately linked to factors such as the nature of the targeted

[31] Global Magnitsky Human Rights Accountability Act, Pub. L. No.114–328, div. A, title XII, subtitle F, §1263(g), 130. Stat. 2534. (2016) (codified at 22 U.S.C. § 2656 note) (US).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

acts, the specific measures employed, and so forth. Consequently, it is necessary to examine GHRS in this regard. The primary legal document drawn for assessing that is the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). Although not a convention, ARSIWA is widely recognized as reflecting customary international law concerning state responsibility.

3.2.1 Retorsion

In the commentaries of ARSIWA, retorsion is defined as an "'unfriendly' conduct which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act".[32] It is "widely regarded as a freedom" in International Law (Crawford 2013, 677), and therefore considered lawful (Sands, 2000). Some scholars, such as Damrosch (2019) and Sands (2000), explore to justify unilateral sanctions with this concept. For example, Sands (2000) states that retorsion is not an entitlement as a countermeasure for a sanctioning state, but it is still lawful in international law. Retorsion may include "the prohibition of or limitations upon normal diplomatic relations or other contacts, embargoes of various kinds or withdrawal of voluntary aid programmes".[33] Even Douhan (2021), the Special Rapporteur arguing against UCM, admits that "customary international law provides for the possibility of 'unfriendly acts' that are consistent with the international obligations of the State engaging in it (retorsion)".

Other than this swift conclusion, Ruys (2017) correctly points out that the main issue of applying the concept of retorsion is to determine "whether or not certain measures do or do not amount to a breach of an international obligation of the State (or organization) engaging in them in the first place". In the context of GHRSRs, the fact that Russia called the UK GHRS against

[32] International Law Commission (hereinafter, ILC). *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, [2001] 2 Yearbook of ILC 31, U.N. Doc. A/56/10.
[33] *Ibid.*

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

the government official "unfriendly" instead of "illegal" may suggest retorsion can be a possible way to justify GHRS.[34] However, it is crucial to analyse three sanctions measures separately. Tilahun (2021) correctly points out that the visa ban serves as a typical example of retorsion, whereas the assets freeze does not. Members of the Advisory Committee on Issues of Public International Law (CAVV) in the Netherlands also agree that the imposition of the entry requirement is retorsion.[35]

Regarding transaction restrictions, it is not against the rule under the principle of state sovereignty or sovereignty equality. GHRS only prohibits providing funds or services to foreign individuals and entities rather than to states or entire industries, and thus it is unlikely for GHRS to violate the free trade principles outlined in WTO rules. While providing funds or services may be an obligation under other trade or investment agreements, this paper exclusively concentrates on the principle of state sovereignty, so legal obligations in other bilateral or multilateral treaties are not the primary focus. As the commentaries of ARSIWA provide examples of retorsions such as "embargoes of various kinds",[36] it is reasonable to argue that the restrictive measure in GHRSRs, which involves forbidding the provision of funds, can also be considered an act of retorsion and thus lawful under international law.

3.2.2 Countermeasures

Countermeasures are defined as lawful measures in response to an internationally wrongful act according to ARSIWA. In order to be entitled to take countermeasures, one must have the right to invoke responsibility for the

[34] "Russia: Kremlin Promises Retaliation to UK's Magnitsky Act Sanctions." DW, published July 07, 2020, https://www.dw.com/en/russia-kremlin-promises-retaliation-to-uks-magnitsky-act-sanctions/a-54080668.
[35] Members of the Advisory Committee on Issues of Public International Law, Legal consequences of a serious breach of a peremptory norm: the international rights and duties of states in relation to a breach of the prohibition of aggression (Advisory report no. 41, 2022), published Nov 17, 2022, https://www.advisorycommitteeinternationallaw.nl/publications/advisory-reports/2022/11/17/legal-consequences-of-a-serious-breach-of-a-peremptory-norm.
[36] ILC, *Draft articles on State responsibility*, cited, p.128.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

wrongful act committed by another state. Article 48 of ARSIWA states that "any State other than an injured State is entitled to invoke the responsibility of another State... if the obligation breached is owed to the international community as a whole."[37] Article 48 of ARSIWS further states that when there is a breach of obligation owed to the international community as a whole, any State entitled to invoke responsibility by "cessation of the internationally wrongful act", "assurances and guarantees of non-repetition", and "performance of the obligation of reparation".[38]

Regarding the specific obligations Article 48 refers to, the commentary further explains that "such obligations have sometimes been referred to as 'obligations *erga omnes partes*'".[39] While there is an ongoing debate regarding whether the obligations of *erga omnes* and *jus cogens* share the same scope and regulate identical acts (Picone, 2011), *jus cogens* at the very least is a component of *erga omnes* obligations. According to Conclusion 17 of the Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) [draft conclusions of *jus cogens*], "Peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*)."[40] Given the greater availability of international legal documents on *jus cogens* compared to *erga omnes* obligations, this paper has chosen to employ the narrower concept of *jus cogens* to streamline the discussion.

The draft conclusion of *jus cogens* presents a non-exhaustive list of widely accepted *jus cogens*, which includes the prohibition of genocide, crimes against humanity, slavery, and torture.[41] In addition to the four crimes

[37] ILC, *Draft articles on State responsibility*, cited, art.48.
[38] *Ibid*.
[39] ILC, *Draft articles on State responsibility*, cited, p. 126.
[40] ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries*, [2022] 2 Yearbook of ILC 2, U.N. Doc. A/77/10, p.64.
[41] ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries*, [2022] 2 Yearbook of ILC 2, U.N. Doc. A/77/10.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

mentioned in the list, the Special Rapporteur Tladi also recognizes "other norms that have been cited as norms of *jus cogens*" include the prohibition of enforced disappearance, the right to life, the prohibition of human trafficking, and other norms that have some level of support, such as the prohibition against arbitrary arrest.[42]

Since this paper does not focus on identifying *jus cogens*, it does not aim to delve into or repeat the discussion. The draft conclusions and the observations in the relevant reports are directly utilized in this paper to examine the targeted acts in GHRSRs. Based on these conclusions, it can be argued that many of the serious human rights violations listed in GHRSRs constitute breaches of *jus cogens*, including genocide, crimes against humanity, torture and other cruel, inhuman or degrading treatment or punishment, slavery, extrajudicial, summary or arbitrary executions and killings, and so on. However, "other human rights violations or abuses" stipulated in the US and the EU GHRSR are too wide to be included in the scope of the breach of *jus cogens* or obligations *erga omnes* and thus may be outside of the scope of Article 48 of ARSIWA. Having said that, it is not to indicate that sanctions measures against a state committing "other human rights violations" cannot be justified under international law, but simply serve as an acknowledgement that the examination in this paper regarding countermeasures is confined to the breaches of *jus cogens*.

Article 48 empowers any state to take action without specifying whether individual states can do so unilaterally. Article 54 attempts to regulate the "Measures taken by States other than an injured State", but there is no clear consensus in this regard. The commentaries of ARSIWA state that "There appears to be no clearly recognized entitlement of States to take countermeasures in the collective interest," and "leaves the resolution of the matter to the further development of international law."[43] It is a pity that in the recent draft conclusion of *jus cogens*, the International Law Commission

[42] *Ibid*.
[43] ILC, *Draft articles on State responsibility*, cited, p.139.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

(ILC) had the chance to sort out the development of international law in this regard but failed to do so. The Special Rapporteur Tladi, states in his 2022 report that the application of autonomous measures against breaches of *jus cogens* is still "controversial", and "their status in law is not settled".[44]

Thus, based on the legal document from the International Law Commission, there is no clear answer as to whether third-party countermeasures are lawful or not. Some argue that, based on the development of international law after the establishment of ARSIWA, there is enough state practice to support the use of third-party countermeasures. An example of this is the CAVV, which lists some state practices in its recent report, with an emphasis on the most recent sanctions on Russia, to justify such an argument.[45] Certain scholars, like Barber (2021) put forth the argument of "breadth of State practice in adopting unilateral sanctions in response to human rights violations and other matters regulated by international law" to justify unilateral sanctions, and Cleveland (2006) even argues that "the relatively frequent use of economic sanctions by the US and other developed nations since WWII makes it difficult to conclude that a customary international norm exists against the practice".

However, using the example of the current sanctions against Russia alone may not be sufficient to establish customary international law on third-party countermeasures against the breach of *jus cogens*, because the ground for those sanctions is much narrower than the breach of *jus cogens*. For instance, the sanctions on Russia could be explained as the use of unilateral sanctions as a countermeasure against the illegal use of force or acts of aggression, which cannot be used to explain GHRS. As Ruys (2017) correctly points out,

[44] *Fifth report on peremptory norms of general international law (jus cogens)* [2022] U.N. Doc A/CN.4/747, p.57.
[45] Members of the Advisory Committee on Issues of Public International Law, Legal consequences of a serious breach of a peremptory norm: the international rights and duties of states in relation to a breach of the prohibition of aggression (Advisory report no. 41, 2022), published Nov 17,2022 https://www.advisorycommitteeinternationallaw.nl/publications/advisory-reports/2022/11/17/legal-consequences-of-a-serious-breach-of-a-peremptory-norm.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

the examination of the state practice in relation to sanctions is "a complex endeavour", it is not feasible to arrive at an easy conclusion. I do not intend to delve into the state practice of unilateral sanctions over the past 20 years, as it is too vast a project for this paper. I believe a more reasonable approach is to analyse the contribution of GHRS to the formation of customary international law in this regard.

Before the examination, it is necessary to clarify what the substance and object of the review are. Based on the discussion above, if there is customary international law to support the use of GHRS, it could be phrased like any state other than an injured state is entitled to take measures against another state that breaches *jus cogens*. Some also use "collective countermeasures" to refer to third-party countermeasures (Hofer, 2020). However, Alland (2002) correctly points out that, in this context, "collective" mainly means that the countermeasures are based on collective interests, and "in reality, such collective countermeasures are really individual initiatives". GHRS are unilateral sanctions, and different sanctioning states have different targeted acts, resulting in different sanctioned persons. To avoid confusion, this paper will use the term "third-party countermeasures" instead of "collective countermeasures".

Based on the discussion above, since the visa bans and transaction restrictions can arguably be explained as retorsion, the only issue that needs to be justified is the assets freeze. As a result, the subsequent analysis should focus on determining whether state practice under GHRSRs, especially the freezing of the assets of an individual or entities from another state, can be considered as forming the particular rule of customary international law. The rule permits a non-directly injured state to impose countermeasures on a state for the breach of *jus cogens*.

In the draft conclusion of the Identification of Customary International Law by the ILC, Conclusion 8 lists the requirements of the generality of customary international law: "sufficiently widespread and representative, as

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

well as consistent."[46] It is necessary to examine GHRS based on these criteria. Regarding widespread, since there is no specific number of states required to meet this criterion, it is debatable whether the establishment of similar sanctions regimes by 35 countries can be deemed as sufficiently widespread. Regarding the representative, it necessitates that state practice is not confined to states with specific characteristics. However, the countries that have adopted GHRS are mainly developed countries located in Europe and America. Thus, Xiao (2021) points out, that even if 34 countries have passed similar laws, GHRS cannot be considered an international agreement due to its limited geographical representation." However, as the Draft Conclusion on Identification of Customary International Law suggests, "the participating states should include those that had an opportunity or possibility of applying the alleged rule."[47] There are two main considerations for establishing a sanctions regime: one is political will, and the other is the capability of utilizing sanctions power. Establishing and implementing a sanction regime requires resources and a certain level of economic sacrifice, and that is one of the reasons only developed countries are the main sanctioning states. If only developed countries had the opportunity and capability to implement sanctions, the current state practice may not necessarily lack representation.

Rather than solely focusing on the geographic distribution of sanctioned countries, it may be more important to examine the sanctioned states. In the determination of a rule of customary international law, it is required to examine whether "States affected by the claim then react by affirming the legality of the action, objecting to it, or acquiescing (Roberts and Sivakumaran, 2018)". The ILC draft emphasises the practice from "specially affected states", which are those that have a higher degree of interest or are more directly affected than other states in specific practices (Worster, 2013). However, in the case of breaches of *jus cogens*, no state possesses special

[46] ILC, *Draft conclusions on identification of customary international law, with commentaries*, [2018] 2 Y.B. INT"L L. COMM"N 2, U.N. Doc. A/73/10, p. 120.
[47] ILC, *Draft conclusions on identification of customary international law*, cited, p.136.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

interests that set them apart from others. Therefore, every state is equally affected by the rule (if it were to exist). The objections raised by sanctioned states will have an impact but will not solely determine the formation of customary international law in this context.

For a similar reason, a state can hardly claim to be the persistent objector, especially in the circumstance of the violation of *jus cogens*. According to international law, if "a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection".[48] The concept of persistent objection "without prejudice to any question concerning peremptory norms of general international law (*jus cogens*)".[49] The recognition and enforcement of *jus cogens* supersede any claims of persistent objection.

Thus, there is no exemption or special treatment for any country under this potential rule of customary international law. However, within the context of GHRS, it is clear that certain countries face more sanctions. Since it is impossible to study all other countries, I choose to study the most important one, the state that gave rise to the Magnitsky case—Russia. In response to the Magnitsky Act, Russia has responded by adopting the Dima Yakovlev Bill, which prohibits US citizens from adopting children from Russia (Kramer and Puddington, 2013). This can be considered a form of retorsion, demonstrating Russia's opposition to the sanctions imposed by the US.

Another significant measure taken by Russia is the establishment of a "Guantanamo list", which imposes sanctions on US citizens responsible for torture or those who legitimize torture in Guantanamo Bay and Abu Ghraib,[50] which is called "retaliation with symmetrical measures" by Russia (Novosti, 2013). This act seems to be an objection to the sanctions from the US.

[48] ILC, *Fifth report on identification of customary international law,* U.N. GAOR. A/CN.4/717, (March 14, 2018), p.60.
[49] *Ibid.*
[50] "МИД РФ опубликовал список граждан США, которым закрыт въезд в Россию [The Russian Foreign Ministry has published a list of US citizens who are denied entry to Russia]." RIA Novosti, published July 19, 2014, https://ria.ru/20140719/1016693619.html.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

However, ICJ correctly points out in the Nicaragua case that "If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself then whether or not the State's conduct is in fact justifiable on that basis, the Significance of that attitude is to confirm rather than to weaken the rule."[51] The rationale behind Russia's "Guantanamo list" is exactly the same as GHRS, where Russia as a state other than the injured state unilaterally issued sanctions measures against the US for torture, which is a breach of *jus cogens*. Thus, although the "Guantanamo list" serves the purpose of expressing Russia's objection to the US unilateral sanctions against Russians, it also supports third-party countermeasures by practising them itself, which in fact confirms the rule.

In terms of consistency, the institutionalization of human rights sanctions, progressing from state-focused sanctions regimes to the global human rights sanctions regime, demonstrates the commitment of the sanctioning states to maintain a certain degree of consistency in their practice of imposing sanctions on human rights violations. However, it is crucial to note that the implementation of GHRS is not consistent. The Colombian-Peruvian asylum case highlights that a state practice cannot form a rule if it exhibits "so much inconsistency... and has been so much influenced by considerations of political expediency in the various cases".[52] As Gaston (2022) correctly points out, "the sheer number of individuals who would have to be sanctioned in order for the Magnitsky laws to be applied equally means that selective application is inevitable". A notable example is Canada, which passed the GHRSR in 2017 but has not issued any sanctions based on GHRSRs since 2018.[53] The shift is not due to the decrease in the severity of human rights

[51] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J.14, (June 27).
[52] Asylum Case (Colombia/Peru), Judgement, 1950 I.C.J, No. 7, Rep. 227 (Nov. 20).
[53] Government of Canada. "Consolidated Canadian Autonomous Sanctions List." Accessed June 03, 2023. https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/consolidated-consolide.aspx?lang=eng#dataset-filter.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

violations post-2018 but may instead be linked to a change in the prioritized focus of their foreign policy.

However, the rule under examination concerns whether the state possesses a right rather than an obligation to issue countermeasures. Consequently, there is no requirement for consistent and equal application to any state that is in violation of *jus cogens*. A right or entitlement implies that a state can opt to employ sanctions or refrain from doing so, and it can choose to use one sanction measure or the alternative. In this context, the establishment of the GHRSR against gross human rights violations can already be seen as a consistent practice, since the thematic sanctions regimes mean that the sanctioning state is willing to use sanctions against the breach of *jus cogens*. Having said that, as Portela (2018) correctly warns "Arbitrary and inconsistent listing practices would quickly endanger the credibility of a regime". Thus, while the inconsistent application may not jeopardize the formation of customary international law, it risks compromising the legitimacy of GHRS by undermining credibility.

Based on the above analysis, a definitive conclusion cannot be drawn asserting that the GHRS can establish customary international law regarding countermeasures. Simultaneously, it cannot be conclusively stated otherwise, as no state, including the sanctioned ones, explicitly indicates objection to the use of countermeasures against breaches of *jus cogens*. This suggests that there is room for arguing that GHRSRs can significantly contribute to the development of a new customary international law rule regarding the entitlement of third-party countermeasures, serving as an example for discussion alongside other state practices over the past 20 years to support such an argument.

For GHRS to be deemed as countermeasures, the sanctions measures should also meet specific criteria established by ARSIWA, namely proportionality, temporariness, and reversibility. Proportionality, as stated in Article 51 of ARSIWA, "Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

act and the rights in question".[54] Ruys (2017) argues that "the proportionality of third-party countermeasures may be particularly hard to assess".

The degree of proportionality hinges on the extent of assets held by an individual or entity in a foreign jurisdiction. Given that GHRS primarily targets state officials and state organs, the question arises as to whether these individuals and entities actually possess any assets in foreign countries, let alone a large amount of them. Consequently, considering the gravity of the human rights violations outlined in GHRS, imposing the restrictive measure of asset freeze may be viewed as proportionate to the alleged wrongful acts in the majority of cases. However, a nuanced consideration emerges in instances where a sanctioned individual resides predominantly in the sanctioned state. In such cases, there is a pertinent concern regarding the proportionality of the imposed measures, especially considering more and more GHRS are issued by several jurisdictions. Special Rapporteur Crawford correctly points out that the collective impact of measures by all countries should be considered together when evaluating the proportionality of countermeasures,[55] as shown in Article 54 in the second reading version of ARSIWA: "Where more than one State takes countermeasures, the States concerned shall cooperate to ensure that the conditions laid down by this Chapter for the taking of countermeasures are fulfilled."[56] Thus, it is crucial to uphold this principle as a safeguard against the potential misuse of sanctioning powers.

The other two requirements are also not a big issue for the assets freeze measures. The requirement of reversibility is addressed in Article 49(3) of ARSIWA, which states that "countermeasures, shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question."[57] Asset freezes inherently possess the potential for

[54] ILC, *Draft articles on State responsibility*, cited, art.51.
[55] Third report on State responsibility, by Mr. James Crawford, Special Rapporteur (2000) UN Doc A/CN.4/507 and Add. 1–4.
[56] State Responsibility, Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading (UN Doc. A/CN.4/L.600) 21 August 2000, Draft Article 54(3) [2000].
[57] ILC, *Draft articles on State responsibility*, cited, art.49.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

reversibility, making them compliant with this requirement. The freezing of assets can be lifted once the violating state demonstrates a willingness to rectify the human rights violations and fulfil its obligations. For example, under the US GHRSR, one of the conditions for lifting sanctions is for the sanctioning state to prosecute the individual subject to sanctions,[58] which is aimed at fulfilling the state's human rights obligation to ensure accountability for human rights violations. Temporarily stipulated in the same article, that "Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State".[59] Most GHRSRs include regular review provisions. For example, Article 14(4) of Regulation (EU) 2020/1998 states that "the list in Annex I shall be reviewed at regular intervals and at least every 12 months."[60] This provision helps address the requirement of temporariness by ensuring that the sanctions remain in place only for as long as necessary.

Furthermore, asset freezes are capable of achieving the aims outlined in Article 48, including cessation and reparation.[61] Sanctions can be viewed as a means to pressure the sanctioned state to cease the wrongful acts and comply with their international obligations. By imposing asset freezes, the goal is to create a deterrent effect and encourage the responsible state to halt human rights violations. Furthermore, the frozen assets can potentially serve as a source for future reparations to the victims of human rights abuses, and Canada already amended its GHRSR to make confiscating the frozen assets feasible.[62] This demonstrates that asset freezes are an appropriate measure within the context of GHRS, aligning with the requirements of cessation of the wrongful act and preparation for reparation.

[58] Global Magnitsky Human Rights Accountability Act, Pub. L. No.114–328, div. A, title XII, subtitle F, §1263(g), 130. Stat. 2534. (2016) (codified at 22 U.S.C. § 2656 note) (US).
[59] ILC, *Draft articles on State responsibility*, cited, art.49.
[60] 2020 O.J. (L410 I/1) Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations, art. 14 (4).
[61] ILC, *Draft articles on State responsibility*, cited, art.48.
[62] Budget Implementation Act, 2022, No. 1 (S.C. 2022, c. 10) (Can).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

In summary, freezing assets can be generally considered to meet the criteria as a countermeasure, but in practice, sanctioning states should adhere to the standards - proportionality, temporariness, and reversibility – to ensure their legitimacy. Combining the analysis of state practices above, although a definitive conclusion cannot be drawn that the practice of GHRS has already formed an international customary law, it has at the very least provided a significant practical foundation for the development of third-party countermeasures on the breach of *jus cogens*. Particularly, Russia, as a major sanctioned state, has played a crucial role in shaping this potential customary rule through its response to the Magnitsky Act. It can be said that, in terms of state responsibility, the GHRSRs, as a novel form of unilateral measures, not only have not disrupted the existing order but have also provided essential analytical material for areas that were previously unclear in the established order.

4. Conclusions

To conclude, GHRS can be utilized to address both individual responsibility and state responsibility for the acts of human rights violations. When the GHRS concern individual responsibility, there is a need to discuss the legality of GHRS in relation to jurisdiction, and the main debatable issue is the legality of its legislative jurisdiction under international law. In the case of GHRS, since there is no adjudicative jurisdiction and the enforcement jurisdiction is based on either territoriality or nationality, the extraterritorial legislative jurisdiction should not be deemed a violation of state sovereignty.

When the GHRS concern state responsibility, there is a need to explore what kind of unilateral measures in international law could be used to justify GHRS. Within the spectrum of GHRS measures, the imposition of a visa ban and transaction restrictions could reasonably be construed as retorsion—a legally permissible yet unfriendly act in international law. Due to the lack of clarity in customary international law pertaining to third-party

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/17357

countermeasures, it is hard to complete the inquiry that revolves around whether freezing assets qualify as countermeasures under international law.

Thus, this paper seeks to examine the extent to which the establishment and enforcement of GHRS can contribute to the evolution of such a customary norm. By analysing state practices against the criteria of being "widespread, representative, and consistent", the paper suggests that GHRS has substantial potential in shaping international customs on third-party countermeasures against the breach of *jus cogens*.

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