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Guilty Until Proven Innocent? The EU Global Human Rights Sanctions Regime's Potential Reversal of the Burden of Proof

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Abstract

This article explores the extent to which the European Global Human Rights Sanctions Regime (EUGHRSR) should be deemed to contain punitive elements, and if such elements do exist, how the principle of presumption of innocence should be applied to the targeted entity. Taking into account the Engel-criteria, literature research and existing national human rights sanctions regimes, we claim that under specific circumstances the Regime could be considered punitive, and argue that in such situations, certain safeguards with regard to the burden of proof require additional attention.

Keywords

European Global Human Rights Sanctions Regime – EUGHRSR – presumption of innocence – national human rights sanctions regimes – punitive – safeguards – burden of proof

1 Introduction

In the summer of 2020, Alexei Navalny, a prominent opposition leader in Russia was poisoned with a toxic nerve agent of the Novichok group, which

is considered a chemical weapon.[1] In response, the European Union (EU) invoked the chemical weapons sanction regime to target those involved in the poisoning.[2] After Navalny recovered, he returned to Russia, where he is – at the time of writing- unlawfully detained.[3]

When gross human rights violations and abuses occur within third countries, those responsible may not be prosecuted under their respective jurisdictions.[4] For instance, several years ago, Jamal Khashoggi, a Saudi Arabian journalist, was murdered in the consulate of Saudi Arabia in Turkey.[5] Whereas the United States (US) imposed sanctions under the Global Magnitsky Act,[6] the EU did not.[7] The official reason for this remains unclear, however scholars have suggested that the EU did not want to harm its relationship with Saudi Arabia.[8] At the time of the Khashoggi killing, the EU could only impose sanctions on countries (comprehensive sanctions) with respect to human rights violations and abuses, which could become politically sensitive.[9]

More recently however, the EU has acknowledged that 'serious human rights violations and abuses are taking place in many parts of the world without any consequences for the perpetrators.'[10] Against this backdrop, it has expanded its sanction toolbox by adopting a new smart sanction regime known as the European Union Global Human Rights Sanctions Regime (EUGHRSR), which

1 Council Implementing Regulation (EU) 2020/1480 [2020] OJ 2 63/1.

2 *Ibid.*

3 'Russia Navalny: Poisoned opposition leader held after flying home (17 January 2021) <https://www.bbc.com/news/world-europe-55694598> accessed 20 January 2021.

4 Consult for instance the world report of the human rights watch to see which other cases have dealt with the abuse of human rights see: European Union Events of 2019' (*Hrw*, 2020) <https://www.hrw.org/world-report/2020/country-chapters/european-union> accessed 20 January 2021.

5 Deyoung and Fahim, 'US, Saudi steps in Khashoggi case don't go far enough, lawmakers say' *Washington Post*, (16 November2018) <https://www.washingtonpost.com/world/national-security/2018/11/15/43854472-e8e8-11e8-a939-9469f1166f9d_story.html> accessed 28 January 2021.

6 *Ibid.* The global Magnitsky act empowers the US to sanction human rights abuses abroad.

7 The European Parliament did adopt a resolution but no action was taken, see European parliament joint motion for a resolution, "*Resolution on the killing of journalist Jamal Khashoggi in the Saudi consulate in Istanbul*, 2018) <https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2018/2885(RSP)> accessed 20 January 2021.

8 Barnes Dacey, 'The end of the post-Khashoggi era? Europe's collapsing unity on Saudi Arabia' (*Ecfr*, 6 March 2019) <https://ecfr.eu/article/commentary_the_end_of_the_post_khashoggi_era_europes_collapsing_unity_on_sa/> accessed 28 January 2021.

9 Eckes, 'EU Human Rights Sanctions Regime Ambitions, Reality and Risks' [2020] 2020(10) Amsterdam Centre for European Studies Research Paper 7.

10 Press release, 'Questions and Answers: EU Global Human Rights Sanctions Regime' (Europa EU, 7 December 2020) <https://eeas.europa.eu/headquarters/

entered into force in December 2020.[11],[12] This regime enables the targeting of individuals and entities for the gravest of human rights violations and abuses that are said to have extra-territorial effect, including genocide, torture and other cruel, inhuman or degrading treatment or punishment,[13] without causing political upheaval.[14] It enables the EU to freeze assets and impose travel bans on third country individuals.[15] This variety of targeted sanctions is not a novel concept to the EU. Since the Maastricht Treaty of 1993, the 'frequency and intensity' of targeted sanctions has only grown,[16] and for good reason: sanctions are an easy and effective method for the EU to address issues of international concern.[17] Furthermore, targeting individuals does not include the major economic risks that usually accompany trade sanctions that target states.[18]

These restrictive measures do have consequences on various human rights of the targeted individuals, such as that of liberty and the right to private and

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headquarters-homepage/90013/questions-and-answers-eu-global-human-rights-sanctions-regime_en> accessed 20 December 2020.

11 *Ibid.* Smart sanctions, otherwise known as targeted sanctions, take restrictive measures towards individuals as opposed to the entire state (comprehensive sanctions). Under the notion of smart (targeted) sanctions, there are also sectoral smart sanctions, which targets a particular sector or sectors within a country such as the financial, gas and arms sector, thereby attempting to paralyse proper functioning of a country.

12 The EUGHRSR has been implemented already and sanctioned four Russians involved in the unlawful detainment of Navalny, but also those involved in targeting Uyghurs. See: Council Implementing Regulation (EU) 2021/371 of 2 March 2021 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses and Council Implementing Regulation (EU) 2021/478 of 22 March 2021 implementing Regulation (EU) 2020/1998 concerning restrictive measures against serious human rights violations and abuses.

13 See Article 1 Council Decision (CFSP) 2020/1999 of 7 December 2020.

14 Eckes, 'EU Human Rights Sanctions Regime: Ambitions, Reality and Risks' [2020] 2020(10) Amsterdam Centre for European Studies Research Paper 7.

15 Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses [2020] OJ L 410 I/1, preamble para 1; Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses Commission Guidance Note On The Implementation Of Certain Provisions Of Council Regulation [2020] OJ L 410 I/13, Articles 2–3; Rebecca Brubaker and Thomas Dörfler, 'UN Sanctions and the Prevention of Conflict' (2017) <https://i.unu.edu/media/cpr.unu.edu/attachment/2578/UNSanctionsandPreventionConflict-Aug-2017.pdf>.

16 Francesco Giumelli, Fabian Hoffmann and Anna Książczaková, 'The When, What, Where and Why of European Union sanctions' (2020) European Security 1, 9.

17 *Ibid*, 14.

18 *Ibid.*

family life.[19] With regard to procedural human rights, targeted individuals are placed on a sanctions list without prior notification resulting in visa bans or frozen assets, and are only able to contest this listing after the measures are imposed. This may mean that the individual is deemed responsible for the act they are accused of until they can prove they are not responsible, and face penalties without a trial. Of course, in some instances imposing sanctions for preventive purposes may be justifiable, but empirical evidence shows that on other occasions targeted sanctions had to be annulled due to reasons such as lack of a sufficiently solid basis.[20] Against this backdrop, the principle of the presumption of innocence, a procedural right in criminal proceedings, can be seen as vital to protect the interests of the targeted individual.

The presumption of innocence is part of the broader right to a fair trial and follows from Article 48 of the EU Charter of Fundamental Rights (CFR) and Article 6(2) of the European Convention on Human Rights (ECHR). Article 48 CFR states that everyone who has been charged shall be presumed innocent until proven guilty according to the law. Respect for the rights of the defense, or anyone who has been charged, shall be guaranteed.[21] Article 6 (2) ECHR, states that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The latter more implicitly prescribes a presumption of innocence.[22] Additionally, the presumption of innocence stipulates that the burden of proof lies with the accuser.[23] The principle is applicable to measures that are punitive in nature. Restrictive measures (such as freezing of assets) are deemed non-punitive and consequently, the presumption would be considered inapplicable.[24] However, when the restrictive measure in question does become punitive in nature,

19 Authors' interview with Dr. Kushtrim Istrefi, Faculty of Law, Economics and Governance, Utrecht University School of Law (Online, 9 December 2020). See also, for instance, *Nada v. Switzerland* no 10593/08 (ECtHR, 12 September 2012).

20 See for instance Joined Cases C-72/19 P and C-145/19 P *Saleh Thabet and Others v Council* [2020].

21 Charter of Fundamental Rights of the European Union [2012] OJ C 326/02, Article 48.

22 European Convention of Human Rights [1950] ETS 5, Article 6(3).

23 This is without prejudice to any obligation on the judge or the competent court to seek both inculpatory and exculpatory evidence, and to the right of the defence to submit evidence in accordance with the applicable national law. See Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016], Article 6.

24 See for instance C-158/14 *A, B, C, D v Minister van Buitenlandse Zaken* [2017]; T-306/10 *Yusef v Commission* [2014]; C-584/10 P *Commission and Others v Kadi* [2013].

the presumption of innocence becomes significant, and consequently, steps should be taken to grant the relevant aspect(s) of the right.

Because the EUGHRSR is new legislation, existing scholarship tends to focus on the instrument in broad terms, discussing its central features, similarities and differences with regard to the existing sanctions regimes. It also focuses on the concept of judicial review, on the punitive or preventative dimension of targeted sanctions[25] and from a broader angle, the effectiveness of the legislation, as opposed to the presumption of innocence.[26] This deficit may be because the principle of the presumption of innocence is typically associated with punitive procedures (which is deemed not to be the case with the EUGHRSR), and perhaps for this reason, the analogy to targeted sanctions has not been made as yet.[27] For this reason, this paper aims to address gaps in literature by looking at a more specific aspect of the EUGHRSR: its compliance with the burden of proof requirement within the principle of the presumption of innocence. It should be noted that the relevance of the research extends beyond the presumption of innocence in relation to the EUGHRSR, as it might suggest the relevance of other procedural safeguards in relation to said instrument. Thus, the research takes the first step in drawing attention to such considerations.

Against this backdrop, the present research seeks to answer the following interrelated research questions:

> (A) To what extent should the measure of asset freezing from European Global Human Rights Sanctions Regime be deemed to contain punitive elements, and if such elements do exist, (B) how should the presumption of innocence, in particular the burden of proof, be applied to the targeted individual?

25 See for instance Christina Eckes 'EU Restrictive Measures Against Natural and Legal Persons: from Counterterrorist to Third Country Sanctions' (2014) Common Market Law Review 51, 869.

26 See for instance Clara Portela 'The EU's Use of "Targeted" Sanctions: Evaluating Effectiveness' (2014) CEPS Working Documents 391, 1.

27 For instance, Article 6 of the ECHR deals with the presumption of innocence, and Article 6(1) states that in the case of a 'criminal charge,' meaning the safeguards apply in matters deemed criminal in nature, see European Convention of Human Rights [1950] ETS 5 Article 6. Additionally, Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65 also explicitly refers to 'criminal' proceedings.

The research formulates the following sub-questions in order to answer the central research questions:

1. What are punitive measures?
2. Can the measure of asset freezing from EUGHRSR be deemed punitive within the EU and Council of Europe's legal systems?
3. What does the principle of presumption of innocence, in particular the burden of proof, entail within the European context?
4. Which provisions within the EUGHRSR pertain to the presumption of innocence, and in particular the burden of proof?
5. How should the presumption of innocence, in particular the burden of proof, be applied to the targeted individual within the context of the EUGHRSR?

After expounding the methodology of the paper in Section 2, Section 3 briefly describes what punitive sanctions are (sub-question 1). Section 4 answers the first central question, establishing the foundation of the research through examining whether the EUGHRSR can be deemed to contain punitive elements (sub-question 2). The following three sub-questions, taken together, lead to an answer to the second central question. Section 5 describes the scope of the presumption of innocence in the European context (sub-question 3). Section 6 identifies which provisions within the EUGHRSR might relate to the presumption of innocence and reflects on what implications the principle may have on them (sub-question 4). Section 7 concludes the paper by presenting potential concerns and recommendations with regard to the burden of proof within the presumption of innocence in the EUGHRSR context (sub-question 5).

2 Methodology

The aim of this research is twofold. First, it intends to provide an analysis on the potentially punitive nature of the EUGHRSR. This is important because the current (legal) consensus is that sanctions regimes are deemed not-punitive, but preventive, meaning that criminal safeguards do not apply.[28] This is problematic because potential perpetrators will then not be granted, for instance, procedural rights such as the presumption of innocence.[29]

28 Eckes, 'EU Human Rights Sanctions Regime: Ambitions, Reality and Risks' [2020] 2020(10) Amsterdam Centre for European Studies Research Paper, P.13

29 AJC de Moor-van Vugt, and R.J.G.M Widdershoven, *Administrative Enforcement*. Iin Jans and others (eds), Europeanisation of Public Law (Europa Law Publishing 2015) 299.

This analysis will attempt to disprove this legal consensus rendered by the European Court of Human Rights (ECtHR) and Court of Justice of the European Union (CJEU). The research will only examine one specific measure of the EUGHRSR, namely the freezing of assets, since focusing on a single measure enables a more comprehensive and in-depth analysis. There is no case law concerning the EUGHRSR as it has only recently entered into force, however, the CJEU has case law pertaining to other targeted restriction regimes (such as the counter-terrorism sanctioning regime) which predominantly deals with the freezing of assets. These concrete examples may be used analogously to substantiate the present argument. By focusing on the freezing of assets, the research draws parallels between the counter-terrorist regime and the EUGHRSR. This research applies the *Engel-criteria*[30] as established by the ECtHR in order to identify the punitive nature of asset freezing, since these criteria are considered to be the starting point for the assessment of the applicability of Article 6(2) ECHR (the presumption of innocence).[31] We will also focus on the presumption of innocence, particularly the burden of proof, as prescribed in the ECHR and the CFR. Elements of the presumption of innocence, with particular focus on the burden of proof, will be extracted from using case law of the CJEU and ECtHR. These elements will be applied to the EUGHRSR.

To conduct this research, a legal doctrinal approach will be adopted, in which primarily legal sources will be utilised. The nature of the research questions is normative, in that they were designed to critically examine the nature of the EUGHRSR and highlight aspects that authorities *should* take into account to guarantee that fundamental rights protections are given to those sanctioned. The paper also contains descriptive elements in explaining issues (such as the presumption of innocence) that serve as a base for the normative evaluation. In addition, secondary sources and interviews will be used to substantiate the arguments.[32]

30 See section 4.2.1.

31 European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights Right to a Fair Trial (Criminal Limb)' (2020), 10.

32 The research does not involve the results and responses from the interviews as the main substance of the arguments. Rather, they are conducted to fill the gap in the existing academic literature.

3 Punitive Measures

Punitive measures can be found in both administrative law and criminal law. It is important to note that in administrative law, measures are not always deemed punitive but can be reparatory in nature, meaning that the measure is used to restore the lawful situation without punishing the person in question.[33] Punitive measures go beyond reparation of the lawful situation and are designed to inflict supplementary harm to the offender by punishing the individual. If the measure of asset freezing is punitive in nature, the framework of guarantees, similar to the guarantees in criminal law, are applicable.[34]

4 The EU Global Human Rights Sanctions Regime: Punitive in Nature?

Measures that include the objective of preventing future threats of violations are considered to be preventive (not-punitive) rather than punitive.[35] With this in mind, this section examines the case-law of the ECtHR and CJEU to reflect on whether the EUGHRSR can be deemed to contain punitive elements, focusing on asset freezing. This section firstly examines the CJEU's and the ECtHR's reasoning as to why freezing of assets might be deemed preventive. The subsequent subsection considers whether and how asset freezing, in relation to EUGHRSR, might qualify as punitive. More specifically, it (1) applies the *Engel-criteria*; (2) analyses the existing academic debate; and (3) scrutinises similar sanction regimes to the EUGHRSR. It concludes by stating that freezing of assets within the EUGHRSR can be seen as punitive and consequently, safeguards, including crucial elements of the presumption of innocence, should apply.

4.1 *Preventive Aspect of Sanctions*

The CJEU has, through its jurisprudence, consistently denied the punitive nature of the targeted sanctions regime, particularly with regard to asset freezing imposed to combat terrorism.[36] This type of sanctions regime presumes

33 AJC de Moor-van Vugt, and R.J.G.M Widdershoven, *Administrative Enforcement*. in Jans and others (eds), Europeanisation of Public Law (Europa Law Publishing 2015) 278.

34 *Ibid.*

35 Christina Eckes, 'EU Human Rights Sanctions Regime: Ambitions, Reality and Risks' (2020) 64 Amsterdam Law School Legal Studies Research Paper 1, 13.

36 See for instance C-158/14 *A, B, C, D v Minister van Buitenlandse Zaken* [2017]; T-306/10 *Yusef v Commission* [2014]; C-584/10 P *Commission and Others v Kadi* [2013].

that the person in question might be engaging in terrorist activities, and if no preventive measures are taken, he or she would continue to do so, resulting in serious threats to peace and security.[37] On a number of occasions, targeted individuals have claimed that the measures on asset freezing are excessively strict and punitive.[38] In response, the Court has stated that freezing of funds and economic resources are preventive in nature.[39] The CJEU's main argument has been that its aim is to combat terrorism by preventing the financing of terrorist acts,[40] so that the relevant terrorist regimes are prevented from 'obtaining financial support from any source whatsoever.'[41] Freezing funds are deemed to be 'temporary, precautionary and preventive' and do not deprive the person of their property, having no 'definitive legal effects.'[42] In addition, the Court notes, the measures are accompanied by derogations.[43] The competent national authorities are not prohibited from, among other things, granting exceptions to those funds or economic resources which are 'necessary to cover basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges'.[44] In light of these considerations, the CJEU argues that these restrictions are preventive in nature.

There is little case law of the ECtHR that has dealt with whether the freezing of assets can be viewed as punitive.[45] However, there are cases that touch upon the question of whether confiscation may be deemed as such.[46] These cases

37 C-79/15 *P Council v Hamas* [2017] para 24; T-256/07 *People's Mojahedin Organization of Iran v Council* [2008] para 109.

38 See for instance T-49/04 *Hassan v Council and Commission* [2006] para 96 and T-85/09 *Kadi v Commission* [2010] para 83. It is worthy of note that in this case Kadi states that his asset has been frozen for nearly 10 years. The Court responded that it was 'outside of the scope of these proceedings' and did not give a clear answer.

39 See for instance C-584/10 P *Commission and Others v Kadi* [2013] para 36; T-527/09 *Ayadi v Commission* [2015] para 13; C-117/06 Möllendorf & Möllendorf-Niehuus [2007] para 63; T-256/07 *People's Mojahedin Organization of Iran v Council* [2008] para 110.

40 C-158/14 *A, B, C, D v Minister van Buitenlandse Zaken* [2017] para 96.

41 T-306/01 *Yusuf & Al Barakat International Foundation v Council and Commission* [2005] para 120.

42 T-306/10 *Yusef v Commission* [2014] para 62.

43 C-584/10 *P Commission and Others v Kadi* [2013] para 75; T-253/02 Ayadi v Council [2006] para 121.

44 T-49/04 *Hassan v Council and Commission* [2006] para 96.

45 In *Segi* the focus was placed on the judicial vacuum, see in that regards, Sullivan and Hayes, 'Blacklisted: Targeted sanctions, preemptive security and fundamental rights' [2010] 1(1) European Center for Constitutional and Human Rights 20.

46 For instance *De Tommaso v. Italy*, no. 43395/09, 23.2.2017 (ECtHR, 23 February 2017).

are relevant because asset freezing can be considered a provisional measure; a precursor for confiscation as a punitive measure.[47] These cases are mostly related to the Italian anti-mafia preventive confiscation regime. This regime is designed in such a way that it can be applied to persons who are not convicted.[48] Moreover, the Italian model of confiscation does not have the effect of transferring ownership of assets to the public authorities.[49] The ECtHR makes clear that confiscation is an effective and necessary measure in combating the Italian Mafia.[50] Therefore, 'the preventive purpose of confiscation justifies its immediate application notwithstanding any appeal.'[51] For these reasons, the ECtHR has never considered confiscation as punitive.[52]

4.2 *Potential Punitive Aspect of Sanctions*

Having discussed the arguments of the CJEU and ECtHR regarding the preventive nature of asset freezing, the remainder of the section reflects on whether it might be deemed punitive.

4.2.1 The Engel-Criteria

As mentioned in the methodology section, the criteria developed in *Engel* are important to determine whether a measure such as freezing of assets can be classified as punitive in nature.[53] Three criteria play an important role in this assessment.

The first criterion is the classification of the measure as punitive or not in domestic law. It should be noted that this criterion is not decisive for determining whether a measure is punitive or not.[54] This is dependent upon the second and third criterion.[55] In practice, the second and third criterion carry the most weight on the assessment of a measure.[56] This means that the *Engel-criteria*

47 This will be further discussed in paragraph 4.2.1.

48 Simonato, 'Confiscation and fundamental rights across criminal and non-criminal domains' [2017] ERA <DOI 10.1007/s12027-017-0485-0> accessed 28 January 2021 P.8.

49 Raimondo v. Italy, Application no. 12954/87 (ECtHR, 22 february 1994) para 29.

50 Raimondo v. Italy, Application no. 12954/87 (ECtHR, 22 february 1994) para 30.

51 *Ibid.*

52 For more cases see, *Arcuri and others v. Italy* (dec.), no. 52024/99, 5.7.2001; *Licata v. Italy* (dec.), no. 32221/02, 27.5.2004; Riela and others (dec.), no. 52439/99, 4.9.2001.

53 *Engel and Others v. the Netherlands*, Application no. 5100/71 (ECtHR, 8 June 1976).

54 *Oztürk v. Germany*, Application no. 8544/79 (ECtHR, 21 February 1984, with note of Barkhuysen and Van Emmerik.

55 See, *Lutz v Germany,* Application no. 9912/82 (ECtHR, 25 August 1987) para 55.

56 Crijns & Van Emmerink, 'Samenloop tussen strafrecht en punitief bestuursrecht' (2018) 749 NJB.

are not cumulative but rather alternative.[57] However, in a case whereby the criteria separately do not render a clear conclusion, a cumulative approach is not precluded.[58]

The second criterion is the nature of the offence. It examines whether the legal provision is binding to a specific group with a special status or to all citizens. When the measure is addressed to a specific group with a special status and if the measure only applies within that group, it is then not considered to be punitive.[59] For this reason, the measure is regarded as a disciplinary standard for certain professions with a special status, such as lawyers and doctors.[60] In *Öztürk,* the Court ruled that the measure was not directed towards a given group possessing special status in the manner, for example, of disciplinary law, but towards all citizens.[61] Thus, when a measure is addressed to all citizens, this gives an important indication that it is punitive in nature.[62]

The third criterion is the nature and degree of severity of the penalty that the person concerned is liable to incur. This criterion boils down to determining whether the aim of the measure is punitive and deterrent. In addition, it takes into consideration the maximum severity of the measure and not necessarily what is actually imposed.[63] However, this element is seldom decisive.[64] For instance, in *Öztürk,* the measure imposed was considered 'light' in nature, as the fine was not considered high.[65] Nevertheless, the measure was still regarded as punitive in nature.[66] It is important to note is that the ECtHR does not give guidelines on how to assess the aim of a measure. In its case law, the Court seems to assume that the measure in question meets these aims without substantive motivation.[67]

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57 Crijns & Van Emmerink, 'Samenloop tussen strafrecht en punitief bestuursrecht' (2018) 749 NJB.

58 See for instance *Jussila v. Finland* [GC], no. 73053/01, §§ 30–31, ECHR 2006-XIII, and Zaicevs v. Latvia, no. 65022/01, § 31, 31 July 2007.

59 no. 24935/04 (ECtHR 29 October 2013) with note of Barkhuysen and Van Emmerik.

60 *Ibid.*

61 Oztürk v. Germany, Application no. 8544/79 (ECtHR, 21 February 1984) para 53.

62 The CJEU introduced another category as well, namely the economic operators. See C-489/10 Bonda [2012] ECLI:EU:C:2012:319. This category is not within the scope of this paper, and therefore not further discussed.

63 no. 24935/04 (ECtHR 29 October 2013) with note of Barkhuysen and Van Emmer.

64 *Ibid.*

65 The equivalent of this is roughly 13.50 euros.

66 Oztürk v. Germany, Application no. 8544/79 (ECtHR, 21 February 1984) para 54.

67 See for instance: Oztürk v. Germany, Application no. 8544/79 (ECtHR, 21 February 1984) para 53, and Janosevic v. Sweden, Application no. 36985/97 (ECtHR, 23 July 2002) para 68.

If the *Engel-criteria* are applied to the EUGHRSR, in particular to the freezing of assets, the following can be deduced: on the basis of the first criterion, Article 1 (e) and (f) Council regulation (EU) 2020/1998 indicate that freezing of economic resources and funds are preventive measures. However, as mentioned , this does not exclude the measure from being punitive as well.

Regarding the second criterion, asset freezing may be invoked if someone commits serious human rights violations and abuses as stipulated in Article 2 Council regulation (EU) 2020/1998. This means that the EUGHRSR, specifically regarding the freezing of assets, is addressed to anyone who commits grave violations of human rights. Therefore, the measure does not apply to a specific group since any person may theoretically be capable of committing serious human rights violations. The aforementioned reasoning gives an indication that the measure might be punitive. Despite the fact that the *Engel-criteria* are not cumulative, it would not be adequate to conclude that freezing of assets is punitive in nature solely on the basis of the second criterion, especially when taking into consideration the CJEU's reluctance to qualify such a measure as punitive. In the situation whereby the criteria analyzed separately do not render a clear conclusion, a cumulative approach may therefore be considered.[68] Thus, it is important to examine the final criterion.

In *Engel*, the third criterion focuses on whether the aim of the measure is punitive and deterrent. Since guidelines from the Courts are missing in this matter, the general nature of smart sanctions will be further examined to give an indication of its aims. When considering the general nature of smart sanctions, a rather worrying trend is visible. Individuals who are blacklisted and subjected to asset freezing are indefinitely prevented from using, receiving or assessing any form of fund or economic resources, unless an exception, such as Article 4 (1) Council regulation (EU) 2020/1998 applies.[69] This exception makes it possible for a state to authorise the release of economic resources or funds despite the person being blacklisted. Nevertheless, the consequence of being blacklisted for an indefinite period of time 'resembles a *de facto* appropriation of property akin to permanent criminal confiscation.'[70] The most recent blacklisting under the EUGHRSR dates from March 2021,[71] therefore, it cannot be concluded yet that the listing will be indefinite. However, since there is no

68 see for instance: see Jussila v. Finland [GC], no. 73053/01, §§ 30–31, ECHR 2006-XIII, and Zaicevs v. Latvia, no. 65022/01, § 31, 31 July 2007.

69 Sullivan and Hayes, 'Blacklisted: Targeted sanctions, preemptive security and fundamental rights' [2010] European Center for Constitutional and Human Rights, 35.

70 *Ibid*, 108.

71 See footnote 12.

effective procedure in force to legally challenge this decision, an indefinite listing could indeed be possible, perhaps constituting a criminal confiscation.

Although the ECtHR did not classify the Italian confiscation as punitive, the dissenting opinion of Judge Alburquerque can provide a different course of action. Therefore, if a case about asset freezing (which *de facto* would have the characteristics of confiscation when perpetrators are blacklisted for an indefinite time) in the context of EUGHRSR is brought to the Court, the outcome could be different. In *De Tomasso,* Judge Albuquerque's dissent dealt with the question of why the personal preventive measures should not be regarded as preventive, but punitive. Judge Albuquerque illustrated this view by referring to the *Engel-criteria*. Regarding the third criterion he stated the following:

> *'These measures had a general and special preventive purpose, like any ordinary criminal penalties. In practice, they were also based on the socially reprehensible nature of the suspect's conduct, a factor that likewise forms the basis for any criminal penalties. Italian legal scholars have always emphasised the close link between personal preventive measures and criminal law and its purposes'*[72]

This reasoning can also be applied to the freezing of assets in the context of EUGHRSR, which may suggest that the purpose of the measure is to deter potential perpetrators but also to punish perpetrators in such a way that it prevents them from committing any other serious human rights violations again. This would indicate that the measure also has the aim to alter the perpetrator's behaviour. As Judge Albuquerque already pointed out, the aforementioned forms the basis for any criminal penalties. Thus, based on the analysis outlined above, asset freezing might be deemed to contain punitive elements.

4.2.2 Discussions in the Academic Sphere

This section deals with the academic discussion regarding the punitive nature of the freezing of assets in the context of EUGHRSR. Existing academic insights illustrate that there are punitive elements within the smart sanctions regimes imposed by the EU, including the newly-adopted human rights sanctions regime. It should be noted from the outset that, as Van der Have suggests, these sanctions are designed to restrict certain aspects of the life of targeted

72 See dissenting opinion of Judge Albuquerque in De Tommaso v. Italy, Application no. 43395/09, 23.2.2017 (ECtHR, 23 February 2017). For more information regarding the work of Italian scholars, please consult: Maugeri A.M., La tutela della proprietà nella CEDU e la giurisprudenza della Corte Europea in materia di confisca, in Maugeri A.M., Falcinelli D., Cupi A., Sequestro e confisca, Torino, Giappichelli Editore, 2017.

individuals, and have considerable negative impacts on their human rights.[73] These include, among others, the right to property and freedom of movement. Furthermore, within the context of these regimes the notions of procedural and judicial protection are seen to be considerably compromised.[74] While the CJEU acknowledges this and claims it is still preventive in nature,[75] from the perspective of the targeted individual, these aspects of the sanctions could very well be perceived as a form of punishment.[76]

Furthermore, it is salient to take into consideration the temporal aspect of the smart sanctions regime. It was mentioned by the CJEU that restrictive measures combatting terrorism are preventive in nature.[77] These measures can be distinguished from 'criminal penalties, which are imposed, for their part, in respect of punishable past acts which have been objectively established.'[78] In other words, this type of regime is seen as having an *ex-ante* approach. It would be an error, however, to categorise all the smart sanctions within the EU context as having the same approach. The newly-adopted human rights sanctions regime is a case in point. As Eckes argues, these types of regimes are designed to target the individuals' *past* behaviour as opposed to potential *future* threat.[79] Put differently, it involves an *ex-post* approach to handling the issue; that is, a punishment for what one has done, imposing harm in response to violation of certain norms.[80] Therefore, the EUGHRSR could be seen as containing a punitive element. In order to further consider this aspect, the following section examines existing national human rights sanctions regimes.

4.2.3 Analysis of the Existing National Human Rights Sanctions Regimes

The EUGHRSR is inspired by various national human rights sanctions regimes.[81] Accordingly, analysing various counterparts of the newly-adopted

73 Nienke van der Have, 'The Proposed EU Human Rights Sanctions Regime' (2019) 56 Security and Human Rights, 61.

74 *Ibid.*

75 See for instance T-253/02 *Ayadi v Council* [2006] para 121; T-49/04 *Hassan v Council and Commission* [2006] para 97.

76 Alexandra Hofer, 'The Efficacy of Targeted Sanctions in Enforcing Compliance with International Law' (2019) 113 AJIL Unbound 167.

77 C-584/10 *P Commision and Others v Kadi* [2013] para 75; also see T-85/09 *Kadi v Commission* [2010] para 83.

78 *Ibid.*

79 Christina Eckes, 'EU Human Rights Sanctions Regime: Ambitions, Reality and Risks' (2020) 64 Amsterdam Law School Legal Studies Research Paper 1, 13–14.

80 Alexandra Hofer, 'The Efficacy of Targeted Sanctions in Enforcing Compliance with International Law' (2019) 113 AJIL Unbound 163, 167.

81 Christina Eckes, 'EU Human Rights Sanctions Regime: Ambitions, Reality and Risks' (2020) 64 Amsterdam Law School Legal Studies Research Paper 1, 10.

European Act may help to grasp the nature of the instrument. This section investigates American, Canadian and British counterparts in turn. These countries are chosen on the grounds that they have well-established sanctioning instruments. Analysing these Acts underscores the *ex-post* and punitive nature of asset freezing when the measure is imposed and is retained for a significant amount of time (particularly when the individual in question is no longer in a position of power).

The United States was the first country to adopt an instrument sanctioning gross human rights abuses and corruption by foreign individuals and entities.[82] The Act authorizes the president to impose sanctions on foreign individuals the president determines i) is responsible for gross human rights violations against certain individuals, ii) acted as an agent of a person responsible for gross human rights violations, iii) is a government official, or a senior associate of such an official, that is responsible for, or complicit in, ordering, controlling, or otherwise directing, acts of significant corruption or iv) has materially assisted, sponsored, or provided financial, material, or technological support for activities of corruption.[83] Canada offers an equivalent to the EU Global Human Rights Act in the form of the Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law).[84] Similarly to its international counterparts, the Act is used to target foreign nationals who are 'responsible for or complicit in extrajudicial killings, torture or other gross violations of internationally recognized human rights.'[85] Finally, the United Kingdom (UK) has recently adopted the Global Human Rights Sanctions Regulations (2020), subsumed under the Sanctions and Anti-Money Laundering Act (2018).[86] The purposes of the Regulation are to deter and *provide accountability* for activities that would amount to a serious violation by that State of an individual's right to life, right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, among other things.[87]

The American, Canadian and English acts seem to address those who have already committed international crimes, suggesting that the measures can be viewed as punitive in nature. This idea is reinforced when looking at the individuals that have been sanctioned in the past. The US list includes for

82 Global Magnitsky Human Rights Accountability Act.

83 Global Magnitsky Human Rights Accountability Act, section 3.

84 Justice for Victims of Corrupt Foreign Officials Act [2017] Statutes of Canada c. 21 (Sergei Magnitsky Act).

85 *Ibid.*

86 The Global Human Rights Sanctions Regulations 2020 <https://www.legislation.gov.uk/uksi/2020/680/made> accessed 21 January 2020.

87 Article 4 paras 1–2 of The Global Human Rights Sanctions Regulations 2020.

example Lecha Bogatyrov, the alleged executor of the murder on Umar Israilov in 2009.[88] Salah Mohammed Tubaigy and Saud al-Qahtani, responsible for the murder and torture of Jamal Khashoggi, are also on the US, UK and Canadian list.[89] Yahya Jammeh, the former President of The Gambia, was sanctioned by the US and the UK after he stepped down, making him another example of an individual who is targeted with the aim of punishing *ex-post* instead of preventing *ex-ante*.[90] Canada has listed Venezuelan government officials who are no longer in power or serving in an official capacity, further suggesting that the measures also serve a punitive purpose.[91] Additionally, Sudanese officials including Paul Malong Awan, responsible for gross human rights violations in Sudan, are no longer active in an official capacity (positions of power) but are still subject to restrictive measures.[92]

In conclusion, with regard to these national human rights sanctions regimes, the listed individuals committed, among others, torture, illicit transfer of funds and extra-judicial killings, in some cases more than ten years ago. In certain instances, targeted individuals are no longer active in an official capacity. These are individuals who may not easily be prosecuted within their respective jurisdiction. In light of these observations, one could argue that these (national) human rights sanctions regimes might gravitate towards being more punitive in nature than preventive to future threats. Whether it could be seen as more

88 Reuters Staff, 'Factbox – Who's who on the U.S. Magnitsky list' Reuters (Washington 12 April 2013).

89 US Department of the Treasury, 'Treasury Sanctions 17 Individuals for Their Roles in the Killing of Jamal Khashoggi' (U S Press Release, 15 November 2018); Consolidated List of Financial Sanctions Targets in the UK <https://www.gov.uk/government/publications/financial-sanctions-consolidated-list-of-targets/consolidated-list-of-targets> accessed 21 January 2020, 1–3.and Global Affairs Canada, 'Jamal Khashoggi Case' (Government of Canada November 29, 2018). <https://www.canada.ca/en/global-affairs/news/2018/11/jamal-khashoggi-case.html> accessed January 27, 2021.

90 Consolidated List of Financial Sanctions Targets in the UK <https://www.gov.uk/government/publications/financial-sanctions-consolidated-list-of-targets/consolidated-list-of-targets> accessed 21 January 2020, 1–3.and US Department of the Treasury, 'United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe' (U S Press Release, 21 December 2017). Unlike Canada and the UK, the US does not make the reasons for listing public.

91 For instance, Francisco Jose Rangel Gomez and Rafael Ramirez are both on the list even though they are no longer in an official capacity, and have been since 2017. See: 'Consolidated Canadian Autonomous Sanctions List' (Government of Canada November 6, 2020) <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/consolidated-consolide.aspx?lang=eng> accessed January 27, 2021.

92 ST, "Rights Body Backs Canada Sanctions on S. Sudan Officials" (Sudan Tribune November 7, 2017) <https://sudantribune.com/spip.php?iframe&page=imprimable&id_article=63940> accessed January 29, 2021.

punitive is essentially fact-dependent. In any event, imposing these measures allows circumventing cumbersome criminal procedures.

4.3 *Summary*

In short, the CJEU views the existing sanctions regime, in particular with regard to asset freezing, as preventive rather than punitive. It was also observed that the ECtHR deems property confiscation preventive in nature. However, several considerations demonstrated that human rights sanctions regimes might also include punitive elements. First, the application of the *Engel-criteria* showed that asset freezing might be seen as punitive. Second, the arguments put forward by leading scholars in this field showed that the regime as such could be seen as punitive as well. These arguments included: (a) seeing the issue from the perspective of the targeted and (b) its *ex-post* element. The previous section, through scrutinising the existing national human rights sanctions regimes, highlighted the *ex-post* nature (i.e. punitive) of these instruments. It revealed that when the human rights violations and abuses took place some time ago, particularly when the targeted individual is no longer in a position of power, the measure in question might gravitate towards being more punitive in nature than preventive. It follows, therefore, that safeguards pertaining to criminal procedures, including the presumption of innocence, should be guaranteed with regard to asset freezing particularly when these conditions are met.[93]

5 The Presumption of Innocence

If it can be argued that asset freezing can have punitive elements, then crucial elements derived from safeguards (such as the presumption of innocence) should apply. This section will elaborate on the presumption of innocence, with particular focus on the burden of proof. Here, the ECtHR's approach to the presumption of innocence is important to consider alongside the EU, since the EU has expressed its aim to align with the ECHR in terms of the meaning and scope of rights that are included in both human rights instruments.[94] The EU has stated that it can, however, diverge from the ECHR when providing more extensive protection.[95] Additionally, divergence between the case law

93 Christina Eckes, 'The Law and Practice of EU Sanctions' (2018) in S. Blockmans, & P. Koutrakos (eds), Research Handbook on the EU's Common Foreign and Security Policy, 30.

94 Charter of Fundamental Rights of the European Union [2012] OJ C 326/02, Article 52(3).

95 *Ibid.*

of the CJEU and ECtHR exists,[96] however both approach the presumption of innocence in a similar manner. Therefore, the differences are not as important for the purposes of this paper. This section will therefore focus on the case law of the CJEU and the ECtHR and, at EU level directives where the presumption of innocence is extensively dealt with.[97]

The presumption of innocence follows from Article 48 CFR and Article 6(2) ECHR and is a general principle of EU law.[98] The principle applies to all stages of criminal or punitive proceedings, starting at the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence. However, the presumption of innocence is no longer applicable when the decision on the final determination of whether that person has committed the punitive offence, has become definitive.[99] As noted, the presumption of innocence only applies in criminal proceedings.[100] It does not apply to civil proceedings or to administrative proceedings, even when administrative proceedings are regarded as punitive measures.[101] Additionally, the burden of proof falls under the scope of the presumption of innocence. The latter means that everyone who has been charged shall be presumed innocent until proven guilty according to law.[102] This paper will focus solely on the requirements regarding the burden of proof which follow from the presumption of innocence.

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96 See on the divergence between the two courts for example: Amalie Frese and Henrik Palmer Olsen, 'Spelling It Out–Convergence and Divergence in the Judicial Dialogue between CJEU and ECtHR [2019] Nordic Journal of International Law 429.

97 Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65; Directive 2012/29/EU the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceeding [2012] OJ L 142; and Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280.

98 JE van der Brink, W den Ouden, S Prechal, RJGM Widdershoven and JH Jans, *General Principles of Law,* in Jans and others (eds), Europeanisation of Public Law (Europa Law Publishing 2015) 235.

99 Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65, Article 2.

100 *Ibid*, Article 2 and point 11 of the preamble.

101 *Ibid*, point 11 of the preamble.

102 Charter of Fundamental Rights of the European Union [2012] OJ C 326/02, Article 48 and European Convention of Human Rights [1950] ETS 5, Article 6(2).

The burden of proof is an important element of the presumption of innocence for the individual. The burden of proof lies with the prosecution, which means it is the prosecution's responsibility to prove that the accused is guilty.[103] When the burden of proof is shifted from the prosecution to the defense, (meaning the defendant is presumed guilty instead of innocent and has to convince a court otherwise) there may be a violation of the presumption of innocence.[104] However, if a *prima facie* case[105] has been made against the accused, the defense may have to provide an explanation.[106] Furthermore, any doubts benefit the accused (the principle of *dub pro reo*).[107] In other words, the accused has to be guilty beyond a reasonable doubt.[108] Additionally, if unrealistic/unattainable standards are set on the defense, there could also be a violation of presumption of innocence. This happens, for instance, when the Court dismisses evidence that could help the defense prove his or her case,[109] or when certain parties (f.i. the police) make an arrest on unreasonable grounds and do not have to explain these grounds before the courts.[110] An issue can arise if the decisions of domestic courts are not sufficiently reasoned in finding an applicant guilty.[111]

In some cases, it is justified that the burden of proof is effectively reversed due to legal presumptions. For instance, in the case of *Salabiaku v. France,* the ECtHR ruled on the question of whether a French provision, which provided that a person in possession of smuggled goods is deemed to be responsible

103 This is without prejudice to any obligation on the judge or the competent court to seek both inculpatory and exculpatory evidence, and to the right of the defence to submit evidence in accordance with the applicable national law. Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65, Article 6.

104 *Telfner v. Austria* no. 33501/96 (ECtHR, 20 March 2001), Article 15.

105 *Prima facie* translates to "at first appearance" and refers to a case in which the evidence is substantial and overwhelming, enough to prove a case before the trial.

106 *Ibid*, paragraph 18.

107 *Barberà, Messegué and Jabardo v. Spain* App no 10590/83 (ECtHR, 6 December 1988), paragraph 77; 34619/97 *Janosevic v. Sweden* no. 34619/97 (ECtHR 23 July 2002), paragraph 97 and Article 6; Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65, section 2.

108 *Ajdarić v Croatia* no. 20883/09 (ECtHR 13 December 2011), paragraph 51.

109 *Topić v Croatia* no. 51355/10 (ECtHR 10 October 2013), paragraph 45.

110 *Frumkin v Russia* no. 74568/12 (ECtHR 5 January 2016), paragraph 166.

111 *Melich and Beck vs the Czech Republic* no. 35450/04 (ECtHR 24 July 2008) paragraph 49–55; *Ajdarić v Croatia* no. 20883/09 (ECtHR 13 December 2011), paragraph 51.

for the criminal offence of smuggling, was compatible with the presumption of innocence. The ECtHR held that this reversal was indeed compatible. Presumptions of fact or of law are allowed if they remain within 'reasonable limits' and the individual is able to defend themselves.[112] Irrebuttable presumptions of fact or of law, meaning presumptions, which cannot be disproved in any way, are, however, prohibited by the presumption of innocence.[113] As the Regulation and Decision that make up the EUGHRSR do not contain any presumptions of fact or of law, it falls outside the ambit of this research to discuss this in more detail.

This research will focus on the duties of the 'accuser' in particular,[114] as these raise important points that could be applied to the EUGHRSR. Firstly, the accuser must inform the accused of the case that is to be made against him or her.[115] This must be done in a timely manner. Additionally, the accuser must have solid grounds to make a case in the first place, and sufficient evidence to convict the accused.[116] Both these elements ensure that the accused will be able to prepare a sound defense so that they will not be presumed responsible for the act they are accused of on unfair procedural grounds. All of this usually occurs in the intermediary phase of proceedings, where parties must make their initial submissions and indicate the evidence they will use.[117] In the case of listings in the EUGHRSR, the situation is slightly different. This is because there is no formal prosecutor. Instead, an accusatory role is taken up by the Council of the European Union, which selects individuals to place on the restrictive measures list. Additionally, in this procedure there is no formal trial involving a judge. These elements will be discussed in detail in Section 6 below.

6 The Presumption of Innocence and the EUGHRSR

In the previous section, the presumption of innocence and the requirements for the burden of proof that flow from it were discussed. In this section, the particularities of the burden of proof will be applied to the EUGHRSR. The

112 *Salabiaku v. France*, Application no. 10519/83 (ECtHR 7 October 1988).

113 Aistė Mickonytė, *Presumption of Innocence in EU Anti-Cartel Enforcement* (1 edn, Brill Nijhoff 2018) 193.

114 *Barberà, Messegué and Jabardo v. Spain* App no 10590/83 (ECtHR, 6 December 1988), paragraph 77.

115 *Ibid.*

116 *Ibid.*

117 *Ibid.*

question of whether the EUGHRSR respects the requirements of the burden of proof will be explored. As stated, the requirements of the presumption of innocence include informing the individual of their case (or in this case their listing) in a timely manner, as well as giving reasons for penalizing the individual in the first place.

6.1 *Informing the Listed Individual of the Imposition of the Measure*

The Regulation does take into account that the individual should be informed of their case. Article 14 of Council regulation (EU) 2020/1998 iterates that the Council of the European Union should communicate their decision to subject an individual to certain measures.[118] In this communication, the Council has to include the reasons for the listing directly or via the publication of a notice, and provide the natural or legal person, entity or body 'with an opportunity to present observations.'[119] If substantial new evidence is presented, the Council is to review it and inform the targeted person/entity accordingly.[120] Additionally, the Annex (which lists the names of targeted individuals as well as the reasons for their listing) must be reviewed every 12 months, and can be amended on the basis of information that Member States provide.[121] As said, the burden of proof would typically pertain to trials. The sanctioning regime is different, in that an accusatory role is taken on by the Council, the body responsible for sanctioning individuals.[122] From the Regulation, it becomes clear that the Council takes on an accusatory role also in the sense that they have duties with regard to communicating certain information to the targeted person or entity, and monitoring evidence.

However, from the perspective of the presumption of innocence, several issues arise from Article 14 of the Council Regulation (EU) 2020/1998 as well, with regards to informing the individual of their case. As noted above, with regard to the presumption of innocence and burden of proof, the accuser must inform the accused of the case that is *to be made* against him or her in a timely manner.[123] Firstly, it becomes apparent that the communication regarding the decision to the listed individual comes after the imposition of a sanction. The decision has already been made and is already in force when the targeted

118 Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses [2020] OJ L 410 I/1, Article 14(1).

119 *Ibid*, Article 14(2).

120 *Ibid*, Article 14(3).

121 *Ibid*, Articles 14(4) and 14(15).

122 *Ibid*, Article 14.

123 Barberà, Messegué and Jabardo v. Spain App no 10590/83 (ECtHR, 6 December 1988), para 77.

individual first hears of it. Thus, the burden of proof is reversed since the individual is presumed responsible for the violations and human rights abuses. As the examples of sanctioned individuals by other countries based on their Magnitsky Acts showed, sanctioning might be more punitive than preventive especially when certain factual conditions are met.[124] In this regard, it seems like there is a lack of compliance with the notification requirement embedded in the burden of proof. However, it must be emphasized that a measure like asset freezing cannot be announced prior to being executed, as the individual may circumvent the measure by, for instance, relocating their assets. Therefore, it is perhaps justifiable not to inform an individual of the imposition of the sanction until after it is done. It should, however, be possible to challenge the imposition of the measure after it is imposed.

6.2 *Challenging the Measure of Asset Freezing*

The burden of proof entails that the accuser, in this case the Council, must have solid grounds to make a case, and sufficient evidence to convict the accused in a trial, or sufficient evidence to make sure a sanction is imposed.[125] In a trial, this is also meant to ensure that the defendant will be able to prepare a defense. Article 14(2) of the EUGHRSR seems to imply that the defendant has the ability to challenge the listing. In the words of the Regulation, the defendant should be provided 'with an opportunity to present observations.'[126] Providing the defendant with such an opportunity should be welcomed, as the presumption of innocence requires this.

However, it can be questioned how much opportunity an accused will *de facto* have to challenge the listing. The defendant can give observations on his/her listing based on the information given in the Annex.[127] In order to successfully prove to the Council that one has not been in any way linked to a past violation and is no danger for future violations, a defendant would need to have all substantial evidence the Council has based the listing on. Since the Regulation is relatively new, there are no individuals listed as yet nor are there any cases that could be used to see what information will be included in the Annex. Thus, it is fruitful to turn to other Annexes of other (not EU) listing

124 Section 3.2.3.

125 *Ibid.*

126 Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses [2020] OJ L 410 I/1, Article 14(2).

127 Article 15 of the Regulation highlights the information the Annex needs to contain, namely the grounds for the listing, and information to identify the listed individual or entity. See Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses [2020] OJ L 410 I/1, Article 15.

regimes that are similar to the EUGHRSR to determine how much information they provide. Other listing regimes of the EU can be a source for information on how much information a defendant has access to when the Council puts him or her on the newly-adopted list. It should be noted that it is not certain whether the EU will adopt the same approach, as no information on the listing on the EUGHRSR is available yet.

An example of a Sanctions regulation with a similar Annex is the Council Regulation No. 270/2011 which concerns measures against persons and entities in Egypt.[128] While the scope and subject matter is different to the regime discussed in this research, the Annex is constructed similarly. For example, Article 3 of said Regulation, regarding the Annex, is virtually the same as Article 15 which also regards the Annex in the EUGHRSR. With regard to the former, all individuals listed were 'person[s] subject to judicial proceedings by the Egyptian authorities with respect of the misappropriation of State Funds on the basis of the United Nations Convention against Corruption.'[129] Several cases were brought before the CJEU by individuals listed.[130] In the Case C-72/19 P, the Court of Justice held that the Council had to be cautious when imposing restrictive measures, and that 'there must be a sufficiently solid factual basis' on which the concerned persons or entities are listed.[131] The Court continued that the Council has to itself verify that the rights of the defense and right to effective judicial protection were respected when the decision for restrictive measures was adopted, and that the grounds must be 'sufficiently detailed and specific, that it is substantiated and that it constitutes in itself a sufficient basis to support that decision.'[132] Additionally, the Court iterated that 'it is the task of the competent EU authority to establish, in the event of the challenge, that the reasons relied on against the person concerned are well founded, and not the task of the person to adduce evidence of the negative, that those reasons are not well founded.'[133] This case is one of many in which the Court has dismissed or annulled listings for insufficient detail.[134] The latter

128 Council Regulation (EU) No 270/2011 of 21 March 2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Egypt [2011] OJ L 76/4.

129 *Ibid*, Annex.

130 See for instance, Joined Cases C-72/19 P and C-145/19 P *Saleh Thabet and Others v Council* [2020] ECLI:EU:C:2020:992.

131 Joined Cases C-72/19 P and C-145/19 P *Saleh Thabet and Others v Council* [2020] ECLI:EU:C:2020:992, paragraph 39.

132 *Ibid*, paragraph 41.

133 *Ibid*, paragraph 45.

134 C-530/17 *P Azarov v Council* [2018] ECLI:EU:C:2018:1031; C-599/14P *Council of the European Union v Liberation Tigers of Tamil Eelam* (LTTE) [2017] ECLI:EU:C:2017:583.

highlights the relevance of the burden of proof with regard to listing procedures well. Therefore, in the EUGHRSR, authorities should ensure that the listing procedure takes into account this aspect of the burden of proof.

This section has dealt with the burden of proof, and how it relates to the EUGHRSR. Although the Regulation does take into account some elements of the burden of proof, there are several areas that may compromise the rights of the sanctioned individual.

7 Conclusion and Recommendations

This research has been guided by the following questions: (A) To what extent should the European Global Human Rights Sanctions Regime be deemed to contain punitive elements, and if such elements do exist, (B) how should the principle of presumption of innocence be applied to the targeted individual?

The CJEU views the existing sanctions regime, in particular with regard to asset freezing, as preventive. It was also observed that the ECtHR deems property confiscation preventive in nature. However, several considerations demonstrated that asset freezing within the EUGHRSR might well contain punitive elements. First, the application of the *Engel-criteria* showed that asset freezing applies for everyone and not for specific groups. Moreover, the aim of the measure can be deemed punitive once factual circumstances are met. Second, the arguments propounded by leading scholars in this domain showed that the regime as such could be seen as punitive. These arguments included: (a) seeing the issue from the perspective of the targeted and (b) its *ex-post* element. Subsequently, scrutinising the existing national human rights sanctions regimes highlighted the *ex-post* nature of freezing of assets. It revealed that when the human rights violations and abuses took place some time ago, particularly when the targeted individual is no longer in a position of power, the measure might gravitate towards being more punitive in nature than preventive of future threats. In light of these observations, the research concluded that the first central research question can be answered in the affirmative (though its fact-dependence should not be ignored).

The consequence of asset freezing being a punitive measure in certain factual situations is that certain safeguards corresponding with the punitive nature should apply. One of these is the presumption of innocence, which, among other things, stipulates that the burden of proof lies with the accuser. This means that it is the accuser's responsibility to prove that the accused is responsible for the act they are accused of. Part of this requirement is informing the individual of their case in a timely manner and providing grounds on

which the accusation is based. The aim is to ensure that the individual has an opportunity to defend themselves.

The EUGHRSR does take into account the burden of proof. The Regulation stipulates that the listing should be communicated to the individual. There are also mechanisms for monitoring the listing in place, however, there is an element that might benefit from additional attention. As of now, the targeted individual will not know of the proceedings against him or her until after the measures have been imposed. In addition to the – probably – limited information provided to him or her in the Annex, this makes the listing difficult to challenge. However, the cases on the listing against certain persons and entities in Egypt based on Regulation no. 270/2011 do indicate that the CJEU will verify the listings and require they are based on a sufficiently solid basis. Based on these observations, it would be advisable for the Council to ensure as an additional consideration that the listing of an individual and the freezing of their assets are based on enough evidence. This is particularly relevant when the measure might exhibit punitive characteristics. As the presumption of innocence stipulates, it should not be the task of the accused to prove his or her innocence.