COERCIVE DIPLOMACY, SANCTIONS AND INTERNATIONAL LAW
Istituto affari internazionali (IAI)
Rome, 13/II/2015

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(2)

INTERNATIONAL CONFERENCE ON

COERCIVE DIPLOMACY, SANCTIONS AND INTERNATIONAL LAW

ROME, 13 FEBRUARY 2015

Palazzo Rondinini
Via del Corso, 518

Working language: English / Business attire required

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PROGRAMME

A special thanks to Banca Monte dei Paschi di Siena for kindly providing the conference room

9.30-11.00	**SESSION I: SANCTIONS AS INSTRUMENTS OF COERCIVE DIPLOMACY**
Chair:	***Ettore Greco***, Istituto Affari Internazionali (IAI), Rome
Paper givers:	***Natalino Ronzitti***, LUISS University and Istituto Affari Internazionali (IAI), Rome ➢ *Sanctions as instruments of coercive diplomacy: an international law perspective* ***Michael Bothe***, University of Frankfurt ➢ *Compatibility and legitimacy of sanctions regimes*
Discussants:	***Marco Roscini***, University of Westminster ***Marina Mancini***, LUISS University, Rome, and Mediterranean University of Reggio Calabria
11.00-11.30	**Coffee break**
11.30-13.00	**SESSION II: THE ACTORS OF INTERNATIONAL SANCTIONS REGIMES**
Chair:	***Nicoletta Pirozzi***, Istituto Affari Internazionali (IAI), Rome
Paper givers:	***Marco Gestri***, University of Modena and Reggio Emilia and Johns Hopkins University (SAIS Europe) ➢ *Sanctions imposed by the European Union: legal and institutional aspects* ***Charlotte Beaucillon***, Université Paris I ➢ *Individual States, sanctions and the extraterritorial effects of national legislation* ***Nigel White***, University of Nottingham ➢ *Sanctions against non-State actors*
Discussants:	***Eric Myjer***, Utrecht University ***Giuseppe Maresca***, Italian Ministry of Economy, Rome
13.00-14.00	**Buffet lunch**
14.00-15.30	**SESSION III: SANCTIONS AND THE PROTECTION OF HUMAN RIGHTS**
Chair:	***Marco Gestri***, University of Modena and Reggio Emilia and Johns Hopkins University (SAIS Europe)
Paper givers:	***Kyoji Kawasaki*** , Hitotsubashi University, Tokyo ➢ *Sanctions and erga omnes obligations*

Thilo Marauhn/Ignaz Stegmiller, Justus-Liebig-Universität Giessen

- *The role of sanctions committees*

Monica Lugato, LUMSA University, Rome

- *Sanctions and individual rights*

Discussants: ***Marco Roscini***, University of Westminster

Michael Bothe, University of Frankfurt

15.30-16.00 **Coffee break**

16.00-18.00 **SESSION IV: THE IMPLEMENTATION OF SANCTIONS**

Chair: ***Stefano Silvestri***, Istituto Affari Internazionali (IAI), Rome

Paper givers: ***Daniel H. Joyner***, University of Alabama School of Law, Tuscaloosa

- *Sanctions and the principle of proportionality*

Andrea Atteritano, LUISS University, and Hogan Lovells International Law Firm, Rome / ***Maria Beatrice Deli***, LUISS University, and International Chamber of Commerce, Rome

- *Impact of sanctions on treaties of commerce and contracts*

Francesco Giumelli, University of Groningen

- *The effectiveness of sanctions: the case of the European Union*

Joachim Krause, University of Kiel

- *Western Economic and Political Sanctions as instruments of strategic competition with Russia – opportunities and risks*

Discussants: ***Mojtaba Kazazi***, International law practitioner; Former Executive Head, United Nations Compensation Commission, Geneva.

Mark Entin, Russian Association of International Law, Moscow

Nicoletta Pirozzi, Istituto Affari Internazionali (IAI), and "Roma Tre" University

CONCLUSIONS AND FOLLOW-UP

18.00-18.15 ***Natalino Ronzitti***, LUISS University and Istituto Affari Internazionali (IAI), Rome

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Draft paper on

Sanctions as Instruments of Coercive Diplomacy: an International Law Perspective

By Natalino Ronzitti

LUISS University and Istituto Affari Internazionali (IAI), Rome

Contents

1. Coercion: a) military, b) economic, c) political

Coercion may assume various forms, that have in common the will of a State to impose to another State the conduct that the coercing State desire from the coerced State.

Military coercion implemented through the use of force is illegal unless exerted in self-defence or mandated by the UN SC. In both instances coercion has limits for it must be exercised only for repelling an armed attack and restoring the sovereignty of the aggrieved State or within the limit mandated by the SC. Examples of threat to force are more controversial. While there are instances that fall squarely under the prohibition of Article 2 (4) of the UN Charter, others are less certain. An ultimatum is a clear example of the former, while the detention and posture of a notable quantity of weapons and missiles is an example of the latter. The ICJ stated that the detention of a considerable quantity of weapons or the nuclear posture contained within the limits necessary to dissuade the potential adversary to resort to nuclear weapons are not a violation of Article 2 (4)[1]. Other examples of controversial threats include military exercises in disputed waters, showing the flag therein or exercising the right of passage or transit in contested international straits.

[1] ICJ, *Reports*, 1996, 246-247; *Reports*, 1986, 135.

Economic coercion is even more controversial. Tom Farer gives the following definition: "[.....] efforts to project influence across frontiers by denying or conditioning access to a country's resources, raw materials, semi- or finished products, capital, technology, services or consumer" and gives as examples of coercion the threat not to give the most favoured nation clause under the GATT (1947 and 1994), while the non-concession of any aid or assistance would not exceed the threshold of coercion.[2] A modern example of economic coercion might be represented by a cyber attack for disrupting the financial system of a foreign State. There are a number of treaties or UN declarations banning economic coercion, without giving any definition. The constitutive instrument of the OAS contains a provision outlawing the economic coercion. According to Article 20 of the OAS Charter "No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind". Other instruments include the GA Declaration on Friendly Relations (2625-XXV), the GA resolution 42/173 on Economic Measures as a Means of Political and Economic Coercion against Developing Countries of 1987 and the Helsinki Final Act of 1975 (Principle VI) of the CSCE.

The notion of political intervention and the delimitation of its legality are even more evanescent. The danger is to prohibit diplomacy and any form of intercourse between States. The offer of good offices or mediation for dispute-settlement are forms of intervention that are not prohibited under international law. The same is true for representations as to human rights implementation or minorities treatment in a foreign State. It goes different for political pressure accompanied by a threat to force. The conclusion is that political intervention is not prohibited unless dictatorial. In between there are instances the prohibition of which is doubtful, for instance hostile propaganda or financing opposition parties or corruption of State officials in order to obtain a change of government.

[2] Tom Farer "Political and Economic Coercion in Contemporary International Law". AJIL, vol. 79, 1985, 405 ff.

2. The Principle of Non-Intervention

The principle of non- intervention finds its origin in the American continent and was due to the need of the Latin-American State to cope with intrusive actions by the US which could not be defined as war. Offut for instance recalls that between 1813 and 1927 the US intervened more than 60 times in order to protect their citizens[3]. Even the European Powers intervened in the American continent, for instance Germany, Great Britain and Italy blocked the coast of Venezuela in order to recover their credits (1902-1903). At diplomatic level, the first manifestation of the policy of non-intervention may be traced in the Additional Protocol on Non-Intervention of 23 December 1936 dealing with inter-American relations, which states:

"The High Contracting Parties declare inadmissible the intervention of any one of them directly or indirectly, and for whatever reason, in the internal or external affairs of the Parties".

However the Protocol did not define the term "intervention".

After the entry into force of the UN Charter, the threat and use of force have been definitively outlawed with the consequence that it is not strictly necessary to codify the principle of non-intervention vis a vis those actions that encompass the threat or use of armed force. The practical relevance of the principle of non-intervention is thus confined to those actions which do not involve the threat or use of force by which a State tries to influence the conduct of another State. Even though the ICJ, as we shall see, has affirmed that a conduct involving a manifestation of policy of force constitutes a violation of both Article 2 (4) of the UN Charter and the Principle of non-intervention.

It is difficult to individuate the category of actions that do not constitute threat or use of force and are nonetheless a violation of the principle of non-intervention. As already noted simple interferences such as a proposal of devolving a controversy to judicial or arbitral settlement, a protest or a request to abide by international law are not intervention. The same is true for a criticism to the form of government. Otherwise diplomacy and foreign policy would be prohibited. The tendency to dilute

[3]M. Offut, *The Protection of Citizens Abroad by the United States*, Baltimore, 1928, 12 ff.

the principle of non-intervention by Latin American and Afro-Asian States has had the consequence of regarding as illegal conduct and actions which are falling within the normal activity of foreign relations (for instance a criticism raised vis a vis a foreign State) or the establishment of military alliances. In this connection GA RES 36/103 (Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States) sets out the prohibition to strengthen the existing military blocs or to create new ones. The resolution has been adopted with the contrary vote or the abstention of Western countries.

It is not an easy task to enumerate the actions constituting intervention. Article 2 (7) of the UN Charter, defining the domestic jurisdiction, is not of any help since, according to us, it regulates the relations between the UN and member States and not those among the States themselves. One has therefore to take into consideration a number of GA resolutions as well other regional treaties or declarations.

As far as GA resolutions are concerned, reference should be made to the resolutions 2131 (XX), 2625 (XXV), 36/103 which are dedicated to the principle of non-intervention. In addition Article 32 of the resolution 3281 on the Charter of rights and duties of States and paras 7-8 of the resolution 42/22 on the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relation (18 November 1987) should be quoted.

According to the above resolutions and in particular according to the resolution 2625 (XXV) the following actions constitute a violation of the principle of non-intervention:

- "armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements";
- "organize, assist, foment, finance incite or tolerate subversive activities toward the violent overthrow of the regime of another State";
- "interfere in civil strife in another State";
- "The use of force to deprive peoples of their national identity";

- " to use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind".

It is easy to deduct from the above enumeration that coercion is a necessary ingredient of the notion of prohibited intervention and that only this kind of actions may constitute a violation of the principle of non-intervention.

The second category of instrument regulating intervention is constituted by regional treaties and declarations.

The Charter of the Organization of American States contains two provisions:

Article 19, according to which

"No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements".

And Article 20, already quoted, which affirms that

"No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind".

Article 4 (9) of the Constitutive Act of the African Union establishes the "non-interference by any member State in the internal affairs of another State".

For regional instrument not having treaty value the CSCE Helsinki Final Act (1975) should be quoted. The principle of non-intervention is regulated in Chapter VI of the Declaration of principles which states:

"The participating States will refrain from any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State, regardless of their mutual relations.

They will accordingly refrain from any form of armed intervention or threat of such intervention against another participating State.

They will likewise in all circumstances refrain from any other act of military, or of political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind.

Accordingly, they will, inter alia, refrain from direct or indirect assistance to terrorist activities, or to subversive or other activities directed towards the violent overthrow of the regime of another participating State".

Therefore from the documents referred to, one may draw this preliminary conclusion:

(1) Intervention implies coercion;

(2) The coercion, to constitute intervention, should be unlawful.

The former element is mentioned in all documents above quoted. The latter comes from an interpretation of the system of international law. For not all conducts corresponding to coercion are unlawful, but only the ones violating a norm of international law.

3. The Principle of Non-Intervention in the Case-Law of the ICJ

The ICJ has dealt with the principle of non –intervention mainly in three cases: The Corfu Channel Case, Nicaragua *v.* United States and DRC *v.* Uganda. In all three judgments the principle of non-intervention is intermingled with the one on the prohibition of threat and use of force.

In the first case the Court had to adjudicate the claim by U.K. to enter the Albanian territorial waters to sweep mines in order to procure the evidence to submit to the Court. In a well-known passage the Court stated:

"The Court cannot accept such a line of defence. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States,

and might easily lead to perverting the administration of international justice itself."[4]

This passage has been recalled by the Court in its judgment Nicaragua *v.* United States. First of all the Court points out that the principle of non-intervention belongs to customary international law. To prove the customary nature of the principle, the Court quotes the GA Resolution 2625 (XXV) on friendly relations and the principle of non-intervention embodied in Chapter VI od the Helsinki Final Act (1975). The Court, however, does not totally identify the principle of non-intervention with the provisions embodied in the two instruments and is obliged to admit that one of the fundamental problem is to define the precise content of the principle under consideration. To this end the Court specify the nature of the action constituting intervention and its content. As far as the first point the Court affirms that coercion is an essential element of the prohibition of non-intervention. As far as the second the Court, after having affirmed that the principle forbids to intervene directly or indirectly in the internal or external affair of a State, underlines that the action to be forbidden should embody items that the principle of sovereignty leaves to the choice of States, such as the economic, political, social and cultural system and the formation of foreign policy. To note that the Court does not affirm a total autonomy of the principle of non-intervention and the prohibition of the threat or use of force, in the sense that they forbids distinct category of actions, The Court specifies that there are actions which constitute a prohibition on non-intervention as well of the use of force in international relations.

The most quoted passage is the following:

"Notwithstanding the multiplicity of declarations by States accepting the principle of non-intervention, there remain two questions : first, what is the exact content of the principle so accepted, and secondly, is the practice sufficiently in conformity with it for this to be a rule of customary international law ?As regards the first problem - that of the content of the principle of non-intervention - the Court will define only those aspects of the principle which appear to be

[4] JCJ, *Reports*, 1949, 35.

relevant to the resolution of the dispute. In this respect it notes that, in view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty. to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State. As noted above (paragraph 191). General Assembly resolution 2625 (XXV) equates assistance of this kind with the use of force by the assisting State when the acts committed in another State "involve a threat or use of force". These forms of action are therefore wrongful in the light of both the principle of non-use of force, and that of non-intervention".[5]

Even in the case DRC v. Uganda the two principles were jointly considered. The Court finding was that Uganda, having occupied a border regions of the DRC and giving its financial and military support to irregular forces operating in that State, violated the principle of non-use of force and that of non-intervention. It is stated:

"The Court considers that the obligations arising under the principles of non-use of force and non-intervention were violated by Uganda even if the objectives of Uganda were not to overthrow President Kabila, and were directed to securing towns and airports for reason of its perceived security needs, and in support of the parallel activity of those engaged in civil war".[6]

4. Sanctions, Countermeasures and Retorsions

There is not an accepted definition of sanctions and this term is controversial and even labelled as "imprecise" by the ILC, which points out that Article 41 of the UN Charter refers to "measures" and not to "sanctions". However, sanction is the term currently employed to indicate those measures taken by the SC under Article

[5] ICJ, *Reports*, 1986, 106.
[6] ICJ, *Reports*, 2005, 227, paragraph 163.

41against a State to remedy a situation defined under Article 39 and implying a threat to peace, a violation of peace or an act of aggression. Sanctions do not necessarily imply that the target State has committed an international wrong, even though this is usually the case. The SC, when determines that a situation amounts to a threat to peace, gives a political judgment and often does not affirm that a State is responsible of having committed a violation of international law. Sanctions are adopted by the United Nations which, according to some authorities, is the only competent organization to act. The measures which can be taken under Article 41 are contained in a enumeration which is not exhaustive and include: complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations. The enlargement of notion of threat to peace has had as a consequence also the widening of subjects to be targeted that are nowadays not only States, but also non-State actors and even individuals[7]. Sanctions may include also the suspension or the expulsion of a member State from the organization to which it belongs and this extreme measure is envisaged not only by the UN, but also by other regional organizations and has been concretely implemented by the League of Arab States, Africa Union and the Organization of American States. Sanctions are therefore politically motivated and are not adopted for commercial reasons. On the contrary, they may imply economic sacrifices by States adopting sanctions. If sanctions are taken through obligatory measures, they share the strength coming from Article 103 of the UN Charter and prevail over conflicting obligations of the State implementing a sanction. This is of importance for treaties entered into by the implementing State, for instance a treaty of commerce. Sanctions are subjects to the limits of *jus cogens*. The practice shows that other limits derive from human rights/humanitarian law and recently the content of sanctions has been adapted in order to take into considerations such principles. The implementation of sanctions may be frustrated by conflicting principles of constitutional law or by fundamental principles contained in the constitutive

[7] A. Pellet, A. Miron, "Sanctions", PMEPIL

instrument of an international organizations, for instance in the Treaty of the EU. These issues will be the object of other papers.

The EU prefers to employ the term "restrictive measures" leaving sanctions within parenthesis. According to the EU the aim of restrictive measures is ".....to bring about a change in policy or activity by the target country, part of country, government entities or individuals"[8]. Therefore they do not have a punitive character, but are imposed in order to reach a concrete goal, i.e. a change of policy.

Countermeasures differ from sanctions since they are a form of self-help and can resorted to only if the targeted State has committed an international wrongful act. The countermeasure may consist in a violation of the same norm infringed by the targeted State or of another provision of international law. They were in the past labelled as peacetime reprisals to distinguish them from belligerent reprisals. Reprisals have a punitive character and may also include measures of armed force (in peacetime), a feature now prohibited under international law.

Anand gives the following definition of countermeasures:

"countermeasures are pacific unilateral reactions which are intrinsically unlawful, which are adopted by one or more States against another State, when the former considers that the latter has committed an internationally wrongful act which could justify such a reaction"[9].

ILC Draft Articles on State Responsibility defines the object and limits of countermeasures in the following way (Article 49):

"1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question".

[8] Europa, EEAS, Common and Foreign Security Policy, Sanctions Policy.

[9] Anand, "The Definition of Countermeasures", in J. Crawford, A. Pellet, S. Olleson (eds), *The Law of International Responsibility*, Oxford, 2010, 1135.

Even though countermeasures may give origin to opposite countermeasures by the targeted State, they are not inconsistent with Article 2 (3) of the UN Charter and the obligation to settle international disputes by peaceful means and cannot be considered as a means of endangering international peace and security[10]. There is no doubt of the unilateral nature of countermeasures. They are adopted on the assumption that the targeted State has comitted an international wrong and it is for the State adopting the countermeasure to judge whether a wrong has been committed, without the need of having recourse to an international tribunal or other third party mechanism competent to ascertain if a wrong has really been committed[11]. This said it is to point out that countermeasures are submitted to a number of procedural requirements, namely the call upon the responsible State to comply with its obligation and the notification of the decision to take a countermeasure as well as an offer to negotiate. A State is however entitled, in case of urgency, to adopt countermeasures to preserved its rights. In this case it is dispensed from abiding by the procedural elements. As has been rightly pointed out urgent countermeasures may be needed in order to impede that the target State nullify the substance of countermeasures, for instance by withdrawing its assets from the banks of the injured State[12].

As has been pointed out by the ICJ in its judgment on Gabcikovo-Nagymaros Project (Hungary/Slovakia), the purpose of countermeasures "must be to induce the wrongdoer to comply with its obligations under international law, and that the measure must therefore be reversible"[13]. This means that countermeasures should be terminated, once that the wrongdoer has stopped its wrongful conduct and has complied with its obligation to repair[14].

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[10] C. Tomushat, "Article 2 (3)", in B. Simma, D.-E. Khan, G. Nolte, A. Paulus. *The Charter of the United Nations. A Commentary*, 3rd ed., Oxford, 2012, vol. I, 196-197.
[11] Anand, op. cit, 1129.
[12] Y. Iwasawa and N. Iwatsuki, "Procedural Conditions", in Crawford, A. Pellet, S. Olleson (eds), op. cit., 1154.
[13] ICJ, *Reports* 1997, 56-57.
[14] M.Kamto, "The Time Factor in the Application of Countermeasures", in Crawford, A. Pellet, S. Olleson (eds), op. cit., 1174-1176.

Countermeasures differ from retorsions. Unlike the former, the latter consist in "acts which are not incompatible with the international obligations of the States taking them towards the target State". In its Commentary ILC gives the following definition: "[.....]"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. Acts of 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".

5. The Legitimization of Coercion: a) self-defence; b) UNSC Chapter VII Resolutions; c) Regional Organizations; d) Coalition of Willing//Individual State

The present paragraph is dedicated to assess instances of permissible/ non-permissible coercion.

(a)Economic coercion cannot lawfully raise the exercise of self-defence. For two reasons: firstly for economic coercion is not prohibited under Article 2(4) of the Charter and self-defence may be triggered only if a breach of that Article is committed; secondly since self-defence is available if a classical violation of Article 2(4) is committed, i.e. an armed attack. On this point Article 51 of the Charter is unequivocal in allowing self-defence only if an armed attack has occurred. During the Arab oil boycott of 1973 it was speculated an armed intervention against the Arab producers and in particular against Saudi Arabia. The US President Ford and the then Secretary of State H. Kissinger did not rule out an armed response. But this option was lifted. Julius Stone, for his part, while affirming that economic coercion cannot be considered as armed aggression according to the definition given by GA resolution 3314 (XXIX), said that "self-defence against it may be licit even, in appropriate cases, to the point of use of armed force".[15] This opinion was rejected by other scholars, for instance by T. Farer.[16] One could assume that Stone's opinion is linked to the particular fact of history represented by the oil boycott and nowadays the

[15] J. Stone, *Conflict through Consensus. United nations Approaches to Aggression,* 1977, 100. See also the discussion witin the ILC to the Ago Report on international responsibility in P. Malanczuk, "Countermeasures and self-defence as circumstances precluding wrongfulness in the International Law Commission's draft Articles on State responsibility", SImma ,Spinedi (eds), *United Nations Codification of State Responsibility*, 1987, 270-271

[16] T.J. Farer, *Political and Economic Aggression in Contemporary International Law*, Nijhoff, 127-129.

recent doctrines on self-defence speculate on the time of armed attack and the possibility of preventive self-defence, but those opinion have in common that the violation triggering an armed response is an armed attack and not an act of economic coercion however severe it might be. It is thus expedient to conclude that economic coercion, in so far as it is a violation of international law, may trigger only countermeasures and not an armed response.

(b) While the notion of countermeasures is linked to a violation of a norm of international law, the idea of sanction is linked to the idea of a situation which might or may not constitute a violation of international law. Sanctions are taken by the UNSC not only in case of aggression, but also in case of threat to peace or violation thereof . The last two situations do not necessarily presuppose a violation of international law. Sanctions are adopted under Article 41 and have become a common feature after the end of cold war. They are usually included in an obligatory decision, even if the possibility of a recommendation is not ruled out. The competence of the General Assembly, which by definition can pass only hortatory measures, to recommend sanctions is disputed [17].Measures taken by the SC range from the severance or limitation of economic relations to the interruption of diplomatic relations. The measures are indicated in Article 41 with a non-exhaustive list. The characteristic and limitations of sanctions are assessed in other papers and will not commented here. It is only to point out that sanctions cannot contain military measures such as blockades or other measures envisaged by Article 42. This notwithstanding the SC may authorize States to use force for their implementation, for instance visiting and boarding foreign vessels on the high seas in order to check if they transport a prohibit cargo. This happened in a limited number of cases, the latest is the resolution 1973 (2011) on Libya which authorized member States to inspect

[17] For an affirmative stance see Andreas F. Lowenfeld, *International Economic Law*, 2nd ed., Oxford, 869-870, who argues, quoting Article11 of the UN Charter, that GA may adopt sanctions provided that the SC is not acting. For the contrary view see B. Conforti, *Le Nazioni Unite*, 9th ed., Padova, 2012, 332-333. As a matter of fact, the GA enacted several recommendations on sanctions, mainly before the end of the cold war.

foreign vessels on the high seas even without their consent[18]. Sanctions are not implemented directly by the SC, but by member States. This is the most delicate problem, as often countries circumvent sanctions and /or do not have appropriate implementing legislation. For this reason it has become a common feature to establish sanction committees to monitor sanctions implementation.

(c) Regional organizations are often the protagonist of sanctions, not only for implementing measures decided by the SC, but also for taking sanctions on their own. The practice is very reach, for instance for sanctions decided by the OAS against Cuba and other Latin American States. Other regional organizations which have resorted to sanctions are the League of Arab States, the AU and the ECOWAS. As already said the EU prefers to employ the term restrictive measures instead of sanctions.

The main question is whether a regional organization under Chapter VIII of the UN Charter is obliged to seek the authorization by the SC in order to adopt sanctions. The majority of scholars, after a perusal of the Charter drafting history and a systemic interpretation of its relevant provisions, is of the opinion that regional organizations need the SC authorization under Article 53 of the Charter only for those measures that imply the use of force. In other words measures falling under Article 41 of the UN Charter do not need to be authorized by the SC, while measures falling under Article 42 need. For instance the Cuban quarantine of the sixties would have requested the authorization by the SC and the OAS was not entitled to authorize the US to take such forceful measure against the Cuba. Sanctions against the Dominican Republic (1960) and Cuba (1962) were rightly taken without a SC authorization even though the Soviet Union argued differently. Sanctions decided by ECOWAS (1992) in the form of arms embargo were taken without any SC authorization. Sanctions were thereafter endorsed by the SC and imposed to all members of the international community. The citation of precedents might continue and the conclusion according

[18] See also paragraph 10 of the SC Res 917 (1994) on Haiti, calling upon member States "...to halt outward as well as inward maritime shipping in order to inspect and verify their cargo and destinations..". The Haiti case is sometimes wrongly qualified as blockade (see for instance Lowenfeld, op, cit., 862) instead of maritime interdiction.

to which non-military sanctions do not need to be authorized by the SC is based on sound findings.[19]

The SC may utilize a regional arrangement for implementing non- military action and even for rendering obligatory, through an appropriate resolution, measures of this kind decided by a regional organization.[20]

The question arises whether a regional organization has the same power conferred to the SC under Article 41 in imposing sanctions or whether its restrictive measured should be based on a different rationale.

Much depends on the constitutive instrument. If it provides, for instance, the suspension or the expulsion of a member State for the persistent violation of its provisions, the regional organization is authorized to do so. The same is true if the constitutive instrument gives the organs of the organization the power to impose sanctions to member States for a conduct not in keeping with the regional organization. The rationale in these cases is the consent given a priori by States with the conclusion of the constitutive instrument of the organization.

In all other cases, for instance measures to be taken against third States or against member States if they are not contemplated by the constitutive instruments, the organization is allowed to take restrictive measures only if they might qualify as retorsions or countermeasures since the regional organizations do not share a general power of sanctions as the one envisaged by Article 41 of the UN Charter.[21]

(d) The situation of the individual State vis-à-vis of sanctions has been already illustrated. The individual State is lacking of a general power of sanctions and its restrictive measures should qualify as retorsions or countermeasures to be lawful. The same is true for a Coalition of Willing, since the number of participating States

[19] Walter, « Commentary to Article 53 » in Simma et Al, cit. vol. II, 1482-1487. See also Lowenfeld, op. cit., 883 ; Villani, « Les rapports entre l'ONU et les organizations régionales dans le domaine du maintien de la paix », *Recueil des Cours*, 290 (2001), 360-364.

[20] Walter, op. cit., 1497

[21] Cf Villani, op.cit., 364-366.

cannot render lawful a measure that is unlawful if it were imposed by an individual State.

6. Autonomous sanctions adopted in addition to the ones decided by the SC

May a State (or a regional organization) adopt sanctions in addition to the ones decided by the SC? This happened several times. For instance, in 1990 the SC adopted resolution 661-1990 against Iraq which was implemented with additional measures taken by Western countries. The same occurred with the sanctions against the former Yugoslavia and the restrictive measures taken by the EU far more severe than the ones decided by the SC. Same considerations with Iran and the resolutions 1737-2006, 1747-2007, 1803-2008, 1835-2008, 1929-2010 which were supplemented by additional restrictive measures taken by the Western countries, mainly when the SC cannot agree on specific measures that the EU and US are willing to adopt.

The Guidelines established by the EU specify that restrictive measures taken the EU for implementing SC resolutions may be more severe of those established by the UN. In reviewing the legal principles for adopting EU restrictive measures, the Guidelines affirm:

"Certain restrictive measures are imposed by the Council in implementation of Resolutions adopted by the UN Security Council under Chapter VII of the UN Charter. In the case of measures implementing UN SC Resolutions, the EU legal instruments will need to adhere to those Resolutions. However, it is understood that the EU may decide to apply measures that are more restrictive"22

The following situations may be envisaged:

(a) The UN resolution is a mere recommendation (even though nowadays sanctions usually are a matter of an obligatory decision): in this case States are not obliged but are allowed to implement the conduct which has been

[22] Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, 15 December 2009, PESC 1746.

recommended and thus they may take the restrictive measures recommended, which may become obligatory for the members if a regional organization so decides;

(b) The restrictive measures go beyond those measures which have been decided/recommended by the SC. In this case such additional measures may be taken only if they amount to countermeasures, i.e. as a reaction to a conduct contrary to international law by the target State, since States are not allowed to take restrictive measures independently from a violation of a norm of international law, unlike the SC that is entitled to decide sanctions if there is a threat to peace even if no norm of international law has been violated. Being understood that measures of retorsion are always admissible. Another limit comes from the principle of proportionality, for the cumulative effect of SC sanctions and additional restrictive measures may result in a violation of that principle;

(c) In between there are situations which are difficult to classify: for instance the restrictive measure taken by States is a form of implementation of the resolution more severe in respect to the conduct of other member countries;

(d) Lifting sanctions by the SC may also come into consideration. If sanctions are terminated, States cannot continue with their implementation. On this point the EU Guidelines specify:

"It is ….. important to repeal restrictive measures swiftly in response to UN decisions on this point. Where the EU applies restrictive measures in implementation of Security Council Resolutions only, it is not proper for the implementing legal instruments to remain in place when the Security Council has decided the measures should be lifted. Where necessary, the legislative instruments can be repealed with retroactive effect; it is desirable that this period is kept as short as possible".

It has been argued that States (or regional organizations) not only cannot maintain any restrictive measures when the SC has terminated sanctions, but also cannot

impose measures more restrictive and severe of those decided by the SC[23]. The reason is that such measures could be at variance with Article 24 of the UN Charter that entrusts the SC with the principle function of maintaining peace and international security. We agree with this view in connection with the situation of sanctions termination. But imposing the duty to States not to adopt sanctions more severe than the ones decided by the SC will curtail their freedom and the right to take countermeasures if a violation of international law has been committed.

It is obvious that States cannot unilaterally decide to stop sanctions if they are ordered (and not merely recommended) by the Security Council. The conduct of UK and US to lift sanctions against Rhodesia attracted the criticism of the General Assembly and a number of countries including the Soviet Union[24].

7. Sanctions and Sovereign Immunity

International law gives sovereign immunity to a number of assets which are State property. Sanctions and countermeasures often freeze this kind of property. The practice to freeze central banks property is well known and has been applied both by SC resolution and by restrictive measures taken by individual countries (alone or in conjunction with their allies). Are these measures lawful or inconsistent with the principle of sovereign immunity?

The answer is simple for sanctions adopted by the SC, even supposing that the freezing of sovereign assets is contrary to international law. Because of Article 103 of the UN Charter they prevail over any conflicting obligation deriving from customary or conventional law.

Quid for restrictive measures adopted without a SC resolution? International law exempts from foreign jurisdiction State activities that are considered *acta jure imperii*. It is even more restrictive as far measures of pre-judgment attachment and post-adjustment attachment are concerned. Article 21 of the UN Convention on

[23] Villani, op. cit., 167-168.
[24] See Lowenfeld, op.cit,, 864-865.

Jurisdictional Immunities of States and Their Property (2004), which is mostly regarded as declaratory of customary international law, does not allow measures of constraints against property , including any bank account, which is used or intended to use in performance of the function of the diplomatic mission of the foreign State or its consular posts (Article 21, 1 a) and property of the central bank or other monetary authority of the State (Article 21, 1 c), along with other property that usually is not object of a freeze (for instance property forming part of the cultural heritage of the State).

It has been held that freezing measures related to State property, such as those taken by EU against the assets of the Iranian Central Bank, are illegal in so far as they exceeds the sanctions delivered under the SC resolution . The reference has been made to the 2004 Convention to corroborate that opinion[25].

However, the principle of immunity of jurisdiction and freezing of assets are located on different stages. Immunity from jurisdiction is a procedural norm that bars a court from judging a State when sovereign activities or property are concerned. On the contrary, restrictive measures are the product of State legislation or executive order that impede the owner to dispose of its property. For that reason they are not commensurable and the principle of sovereign immunity cannot preclude the freedom of State to freeze foreign assets as a countermeasure for violation of international law.

In its judgment on the Central Bank of Iran v. Council of the EU (Case T-262/12, Judgment of the General Court, First Chamber, 18 September 2014), the EU Court of Justice annulled the Council regulation concerning restrictive measures against the Central Bank of Iran because it was not proved the Bank activity in circumventing sanctions. The Court did not rely on the principle of sovereign immunity.

[25] Pierre-Emmanuel Dupont, " Countermeasures and Collective Security: The case of EU Sanctions Against Iran", (2012) 17 *Journal of Conflict and Security Law*, 314.

8. Economic Sanctions and Multilateral Trade Agreements: the Security Exception

It is open to question whether multilateral trade agreements constitute an impediment to the adoption of economic sanctions by member States. Usually this category of agreements contains a clause, called "security exception", allowing the parties to adopt sanctions for foreign policy reasons, even if they are not specifically authorized by the body administering the agreement. A security exception is contained in the following treaties:

1) Art. XXI Gatt ,Art. XIV-bis Gats, Art. 73 Trips Agreement;

2) NAFTA, Art. 2102 (National Security);

3) Energy Charter Treaty , Art. 24, paragraph. 3

Article XXI of the GATT under the system of WTO repeats verbatim the same provision contained in the GATT 1947. It allows the adoption of unilateral measures and reads as follows:

"Security Exceptions

Nothing in this Agreement shall be construed

(*a*) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(*b*) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(*c*) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security".

The less controversial clause is the one contained sub (c) since it allows the parties to implement measures decided by the SC under Article 41 of the UN Charter. Because of Article 103 of the UN Charter the obligations contained in the resolution prevail

over any other obligation contracted by member States. Resolutions under Article 41 are usually taken under the form of an obligatory act. However, according to the prevailing doctrine, the same conclusion may be reached if sanctions are recommended and not mandated by the SC. A finding difficult to share since Article XXI (c) refers to "obligations" and not to hortatory measures which may be recommended by the SC and even by the GA.

Problems arise for the other category of security exceptions. Article XXI limits the operation of the clause in two ways: the interest invoked should be "essential", otherwise it would be too easy to claim that the situation involves the security of the State; the measure adopted should be related to the items mentioned by the Article (for instance military items or fissionable material) or taken in a situation therein described. Even in this last case the latitude of interpretation is broad, for it relates not only to "war", but also to undefined notions as "other emergency in international relations". Practice shows that States invoking a security exception claim that they are taking a political decision not subject to any control of the bodies entitled to assess its conformity to the GATT rules. It has been observed that "There is no consensus on whether the validity of invoking national security exceptions for taking trade sanctions may be inquired and ruled on"[26], with the consequence that they seem falling outside the DSU system and the mechanism of prohibition of countermeasures unless authorized under the WTO machinery.

The security exception embodied in Article XXI ir repeated verbatim in Article XIV-bis of Gats and Art. 73 of Trips.

According to Reuter (24 April 2014), a Russia memo was circulated within the WTO affirming the illegality of the EU and US trade restrictions for the annexation of Ukraine, namely GATS rules. Russia reserved subsequent action that could be counteracted by recourse to provisions on security exceptions.

[26] Rosine M. Planck Brumback, "Constructing an Effective Dispute Settlement System: Relevant Experiences in the GATT and WTO", Occasional Paper prepared for the Belo Horizonte Meeting, May 1997, 21

The validity of the claim of security exception is not made dependent upon the legitimacy of the situation on which the exception is based. For instance a security exception may be invoked even if the claimant State acted unlawfully and thus created a state of war or a situation of emergency.

Nafta security exception, also, is labelled in general terms. Article 2102, entitled National Security, reads:

"1. Subject to Articles 607 (Energy) and 1018 (Government Procurement), nothing in this Agreement shall be construed:

(a) to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;

(b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests

(i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,

(ii) taken in time of war or other emergency in international relations, or

(iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices;

or

(c) to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security".

According to Laird, is for the government invoking the national security exception to decide what is "an essential security interest" and "there is no, in fact, judicial review of the decision", with the consequence that there is a "complete discretion" by the State party[27]. Lowenfeld, who goes back to the provision drafting history in the GATT 1947, gives a more balanced view. He recognizes that the clause has never been submitted to international scrutiny. However it was never been invoked to gain

[27] Ian Laird, "The Emergency Exception and the State of Necessity", In Ortino, Liberti, Sheppard, Warner, *Investment Treaty Law, Current Issues*, London, 2007, 247.

commercial advantage and has been used only for adopting measures falling under definition of sanctions, i.e. restrictive measures for pursuing foreign policy objectives[28].

The same consideration applies to the Energy Charter Treaty , which in Article 24 (3) sets out its security exception in the following manner:

"(3) The provisions of this Treaty other than those referred to in paragraph (1) shall not be construed to prevent any Contracting Party from taking any measure which it considers necessary:

(a) for the protection of its essential security interests including those

(i) relating to the supply of Energy Materials and Products to a military establishment; or

(ii) taken in time of war, armed conflict or other emergency in international relations;

(b) relating to the implementation of national policies respecting the nonproliferation of nuclear weapons or other nuclear explosive devices or needed to fulfil its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines, and other international nuclear non-proliferation obligations or understandings; or

(c) for the maintenance of public order.

Such measure shall not constitute a disguised restriction on Transit.

9. The Limits of Countermeasures

There are a number of obligations to be respected by the State resorting to countermeasures. Some of them, for instance proportionality, will be dealt with in other papers. Here the focus is on Article 50 on the Draft Articles on State Responsibility which sets out the following conditions. Note that they impose obligations to States and are not applicable to sanctions adopted by the SC.

The obligations are worded in the following terms. Countermeasures should not affect:

1. the prohibition on threat and use of force enshrined in Article 2(4) of the UN Charter
2. the protection of fundamental human rights

[28] Andreas F. Lowenfeld, op.cit., 916-918. Cf. however P. Picone, A. Ligustro, *Diritto dell'Organizzazione Mondiale del Commercio*, Padova, 2002, 337

3. the obligations of a humanitarian character prohibiting reprisals
4. other obligations of peremptory international law.
5. moreover the provision establishes the enduring obligation related to the settlement of disputes as well those deriving from the law on diplomatic and consular immunities.

For the purpose of this paper the obligation to protect fundamental human rights is of particular relevance since it may set limitation on the extreme form of economic coercion. During the work of the international law Commission on the State Responsibility an attempt to insert a provision on the extreme form of economic coercion was done by the Special Rapporteur Arangio Ruiz who proposed such an obligation under Article 14(2) dealing with prohibited countermeasures. The extreme forms of economic coercion against the territorial integrity or political independence of a State stood alone or as a specification of prohibited countermeasures consisting of threat or use of force. But the proposal was not accepted[29]. As an example, the total interruption of trade relations and communications, without being decided by the SC, was quoted. In effect such measures fall under the exemplification contained in Article 41 of the UN Charter. However, the State practice shows that the adoption of measures of this kind has been justified to counteract serious violations of international law committed by the target State. The interruption of trade relations and communications fall under the law of countermeasures in so far as they consist in a violation of treaties linking the State resorting to such measures and the target State. Otherwise they are simple retorsions.

The final text of prohibited countermeasures includes actions which are contrary to the protection of fundamental human rights. May extreme forms of economic coercion carry out a human rights violation? The ILC Commentary brings elements

[29] See C. Leben who argues that Arangio Ruiz proposal is not completely dead but "may be more or less reintegrated" if Article 49 (1) is taken into account together with the principle of proportionality (Leben, "Obligations Relating to the Use of Force and Arising from Peremptory Norms of International Law", in Crawford et Al, op,cit., 1203). According to another and similar view "economic and political countermeasures may be illegal if they are aimed at coercing a State to subordinate the exercise of its sovereign rights or its independence" (L. Boisson de Chazournes, "Other Non-Derogable Obligations", *ibidem.* 1213).

of clarification, recalling the General Comment No. 8 (1997) of the Committee on economic social and cultural rights. It is stated:

"it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country".

Moreover the Commentary quotes the last part of Article 1 (2) of the 1966 Covenant on Civil and Political Rights, where it is stated that "In no case may a people be deprived of its own means of subsistence".

10. Countermeasures by Third States

Often restrictive measures are adopted by States which are not directly injured by the wrongdoer, for instance in case of serious violation of human rights or a violation of the territorial integrity of a foreign States. No problem arises if such measures are taken by the SC under Article 41 of the UN Charter. What if they are taken by States individually or collectively? As we shall see there is no a definite answer. The ILC Draft Articles on State Responsibility contains a provision which is an example of constructive ambiguity (Article 54). For it entitles States, which are not directly injured by the wrongdoer, but that nevertheless have a right to invoke the responsibility of another State, to take "lawful measures" (and not countermeasures) against the wrongdoer. This may happen when a norm establishing obligations toward the community of States as whole is violated (for instance prohibition of genocide) or when a norm setting out a collective interest of a group of States (for instance a violation of the 1966 Covenant on Civil and Political Rights) is infringed. The expression lawful measures was employed since there was no agreement in establishing whether States not directly injured were entitled to take countermeasures or, on the contrary, if the SC was the only competent authority in this matter. The

state of art is well illustrated by the ILC Commentary. It was held that according to the State practice

"[.....] the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of Statesreferred to in article 48 to take countermeasures in thecollective interest. Consequently, it is not appropriate toinclude in the present articles a provision concerning thequestion whether other States, identified in article 48, arepermitted to take countermeasures in order to induce aresponsible State to comply with its obligations. Instead,chapter II includes a saving clause which reserves the positionand leaves the resolution of the matter to the furtherdevelopment of international law. [.....]Article 54 accordingly provides that the chapter on countermeasures does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against the responsible State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached. The article speaks of "lawful measures" rather than "countermeasures" so as not to prejudice any position concerning measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole".

However this finding has been assesses as not in keeping with reality for, as may be drawn by the examples quoted by ILC itself, the instances of measures taken by States not directly affected are numerous.[30]

The *Institut de droit international* has taken a clear stance in its Krakow Resolution on Obligations *Erga Omnes* in International Law. Article 5 affirms the right of States not specifically affected "[.....] to take non-forcible counter-measures under conditions analogous to those applying to a State specifically affected by the breach". Supposing that a State non directly injured may take a countermeasure, the other point is whether such a State may take a countermeasure in case of any violation of an obligation establishing a collective interest or owed toward the international

[30] A. Pellet and A. Miron, op.cit.. See also L.-A. Sicilianos "Countermeasures in Response to the International Community Owed to the International Community", in Crawford et Al., op. cit., 1147-1148.

community as a whole or only if the breach consist in a serious violation. It has been held that while the State directly injured may take a countermeasure in case of any violation whatever, a State not directly injured may resort to countermeasures only if there is a serious violation of such category of obligations[31].

11. Countersanctions by the Target State

Is a State entitled to react to restrictive measures imposed against it? The phenomenon of reacting against sanctions (restrictive measures) with countersanctions is practiced by the target States and has become particularly relevant with the Russian Federation and the restrictive measures imposed by Western countries. Russia reacted with restrictive measures against Western countries affirming that their policy was contrary to international law and thus their conduct was unlawful[32].

The practice of reactions and counter-reactions is not new. For instance if a State is reacting in self-defence the target State does not stay inert and responds with forceful measures. The same happens with reprisals in wartime. The target State resorts to counter-reprisals on the assumption that the reprisals launched against it are unlawful.

As to the admissibility of counter-sanctions one has to distinguish between sanctions imposed by the SC and countermeasures taken by States individually or collectively.

As to sanctions imposed by the SC, the starting point is that they are obligatory for all UN members. Article 48 of the UN Charter says that decisions by the SC should be implemented by all UN members (or some of them as decided by the SC) . Reacting with countersanctions to sanctions imposed by the SC is a kind of non-compliance of the SC obligatory resolutions. Therefore countersanctions shuld be regarded as unlawful.

It goes different for countermeasures taken by States individually or collectively. The problem, here, is whether a countermeasure is lawfully taken since the target State is

[31] G. Gaja, "The Protection of General Interests in the International Community", 364 *Recueil des Cours* (2014), 131

[32] See for instance the Executive Order No. 560 by President Putin "On Applying Certain Special Economic Measures to Ensure the Security of the Russian Federation" (*government.ru/en/docs/14392*).

not abiding by international law. If yes, the target State resorting to countersanctions commit an international wrong. If not, the target State may resort to countersanctions that in this case would amount to countermeasures since they are taken in reaction against an international wrong.

To avoid such a consequence the only possibility is to have recourse to a mechanism entitled to verify whether a violation of international law have been committed and decide the content of countermeasure to be taken. The WTO system is endowed with such a mechanism. However it seems that WTO is the exception and not the rule.

Counter-reactions in the form of retorsions are legitimate since they do not constitute a violation of norms of international law.

12. Conclusions

The aim of this paper was to assess the legal standing of the different form of coercion and to rationalize in legal terms nature and limits of restrictive measures adopted by States and international organizations, which are erroneously assembled under the same category and labelled as sanctions.

The findings are the following:

- While military coercion offers several examples of its illegality stretching from the threat to the use of armed force, illegality of economic coercion is more difficult to define and should encompass a violation of international treaties. Instances of economic coercion integrating a violation of norm of customary international law are harder to find out. Even more so for political coercion, unless it substantiates a form of threat to armed force.

- Economic pressures that do not violate any provisions of international law are mere retorsions which are unfriendly acts, but cannot trigger any international responsibility and do not entitle the target State to react with countermeasures.

- Sanctions are a kind of economic coercion that are within the competence of the UN SC and may be adopted independently from a commission of an international wrongful act. As a rule, they are embodied in an obligatory decision taken under Article 41 of the UN Charter, which member States are bound to implement. Sanctions may also be recommended by the SC. Sanctions are typical of a centralized system as the one envisaged by the UN.

- States, individually or in coalition among themselves, are not entitled to adopt sanctions independently from a resolution of the SC. They may adopt only restrictive measures in the form of countermeasures to react against an international wrong committed by the target State. Additional measures supplementing the ones decided by the SC may be taken only if they qualify as countermeasures.

- Countermeasures have limits established by customary international law. They may be adopted by the State victim of an international wrong and are typical of a system not institutionalized and where the State to State relations are still the paradigm of the international community. It is controversial whether States not directly affected may resort to countermeasures in case of a violation of *erga omnes* obligations. However there is an overwhelming body of practice substantiating the view that also States not directly affected may resort to countermeasures, independently from a SC resolution, if the violation of an *erga omnes* obligation is of particular gravity. This is a step toward getting over of the current legal order essentially based on bilateral relations.

- The target State is lawfully entitled to counteract with restrictive measures if the countermeasures are illegitimate, for instance if it has not committed any wrongful act. Retorsions are always permissible.

- Unlike the UN, regional organizations are not endowed with a general power to adopt sanctions. Therefore either they implement sanctions decided by the SC or adopt restrictive measures in the form of countermeasures.

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COERCIVE DIPLOMACY, SANCTIONS AND INTERNATIONAL LAW

ROME, 13 FEBRUARY 2015

Palazzo Rondinini
Via del Corso, 518

Draft paper on

Compatibility and legitimacy of sanctions regimes

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Sanctions are measures taken by an international actor (the sanctioner, a State or an international organization) in reaction to an undesirable, most often allegedly illegal behaviour of another actor (the sanctionee) for the purpose of making the sanctionee desist from that behaviour. Usually, such measures consist of a value deprivation, i.e. the denial or withdrawal of certain advantages which the sanctionee would otherwise expect or claims to be entitled to.

There are two types of "sanctions" which follow completely different rules: enforcement measures imposed by the Security Council and so-called autonomous sanctions, i.e. measures unilaterally decided by individual States, groups of States or regional organizations. The former category is based on Articles 39, 41, 25 UN Charter. It raises questions of the interpretation of these provisions, of the scope of discretion which the Security Council possesses, and of the limitation of its powers, in particular those based in human rights law. The Security Council may use these powers by authorizing States, groups of States or regional organizations to adopt certain sanctions.

This paper concentrates on the latter category, autonomous sanctions. The first question concerning the compatibility or legitimacy of autonomous sanctions is whether the sanctionee has political or similar reasons to expect such advantages or is even legally entitled to receive them. The ensuing second question is whether there is any rule allowing for exceptions to such entitlement. The question of the lawfulness of sanctions can thus only be answered by looking at legal norms, or as the case may be, particular legal regimes regarding the expected advantages which are denied or withdrawn by the sanctioner. In this respect, it is necessary to address specific types of sanctions separately. Whether the general rules on countermeasures apply is also a question of the regime applicable to each type of measure.

A non-exhaustive list of typical measures employed as sanctions is the following:

a. Trade in commodities

A typical sanction is a ban or restriction on imports or exports, depending on what hurts the sanctionee and is therefore able to induce it to cease the undesirable behaviour. It is often limited to certain commodities, e.g. a ban on oil imports from a certain oil exporting country or a ban on the export of weapons or of luxury goods to the sanctionee country.

There is no rule of general (customary) international law forbidding such restrictions. They present legal problems only if they fall under a relevant treaty. The multilateral regime applicable to such restrictions is the GATT. Such restrictions violate, first, the most favoured

nation rule (MFN, Art. 1 GATT) as the restrictions do not apply to other States and the sanctionee is thus treated less favorably than others. Such restrictions also violate the prohibition of quantitative restrictions (Art XI GATT). A total ban is the most rigorous form of quantitative restrictions. Such deviations from the prohibitions of the GATT are allowed if they fall under the exceptions provided for in Articles XX or XXI. Art. XX is not relevant in the present context. The said restrictions may, however, constitute action which a Contracting Party may consider necessary for the protection of its essential security interests (Art. XXI(2) GATT).[1] It must be noted that certain important sanctionees are not (or have not been at relevant times) Contracting Parties to the GATT, e.g. Libya, Sudan, Somalia, Syria, Iraq, Iran, Belarus.[2] Sanctions against these States are not subject to GATT restraints.

The said restrictions may also violate bilateral treaties. The typical treaty on friendship, commerce and navigation (FCN treaty)[3] of the United States contains a clause to the effect that there will be freedom of commerce between the parties. These restrictions of course violate such a clause. The treaties, however, usually contain a clause allowing a party to take measures to safeguard its essential security interests.

The examples show that it will as a rule not be necessary to rely on countermeasures to justify restrictions on the import or export of goods.

b. Financial transactions, access to the financial market

Another typical kind of sanctions relates to financial transactions. They take different forms. A very simple, but not very effective one is the simple prohibition of transborder financial transfers. Another and very common one is the prohibition of access by persons or enterprises belonging to the sanctionee to assets situated on the territory of the sanctioner. A typical example is the freezing of assets. Yet another possibility is barring enterprises of the sanctionee from access to the capital market. This can be done by preventing persons or enterprises of the sanctioner from buying or selling bonds or equity of enterprises belonging to the sanctionee. Finally, financial business operations by enterprises belonging to the sanctionee may be restricted on the territory of the sanctioner.

The legal questions triggered by each of these measures vary.

Restrictions on money transfers fall under the regulatory regime of the IMF. According to Art. VIII(2)(a), members shall avoid restrictions on current payments. Such restrictions may at least not be discriminatory (Art. VIII(3)) unless approved by the Fund. As the restrictions

[1] For details see the paper by Ronzitti.
[2] Most of these countries are observers, but in that capacity, they are not bound by the treaty.
[3] See the paper by Atteritano.

imposed as sanctions distinguish between the sanctionee and other countries, they are discriminatory and thus, subject to the IMF approval, unlawful. There does not seem to be any practice to that effect. The IMF is always involved in discussion about sanctions and their economic effects. Yet it appears that the IMF tries to address negative economic effects of sanctions through consultations.

Activities restrained by a sanctions regime of the kind described constitute as a rule financial services which fall under the GATS as defined by Art. I GATS and Sec. 5 of the Annex on Financial Services. For the reasons already indicated concerning trade in commodities, they violate the most favoured nation rule enshrined in Art. II GATS. The exceptions for security reasons allowed by Art. XIVbis GATS correspond *grosso modo* to those envisaged by Art. XXI GATT.

Some of the financial sanctions mentioned above raise human rights problems. In particular the freezing of assets poses the problem of protection of private property. As there is no universally recognized human right to the protection of private property, the problem may not often arise. But European States parties to the European Convention on Human Rights must, according to Art. 1 of the Additional Protocol, respect that right also regarding persons or enterprises coming from non-member States. The question then arises whether sanctions may constitute a valid limitation of the right guaranteed under the Protocol additional to the ECHR.

These questions of the protection of property may also arise under bilateral investment treaties or treaties of friendship, commerce and navigation. What has been said concerning trade in commodities applies *mutatis mutandis* to trade in financial services.

c. Freedom of movement of persons

Measures affecting the movement of persons usually relate to the entry of targeted persons, mainly persons belonging to the sanctionee, into the territory of the sanctioner. They include the prohibition of entry, the introduction of visa requirements and visa denial. There is a human right to leave a country (Art. 12(2) ICCPR), but there is no corresponding right to enter a country, except for the case of non-refoulement of refugees which is not relevant in the present context. There is no multilateral regime providing for a right of entry. Denial of entry of certain persons may be an unfriendly act towards their country of origin, but not unlawful under general international law. Reliance on countermeasures is thus not necessary in order to justify a prohibition of entry.

The situation will be different where a bilateral investment or commercial treaty provides for a right of entry under certain conditions. In this case, provisions on safeguarding security interests will become relevant.

d. Interstate contracts

As an exceptional measure, the implementation of interstate contracts, e.g. contracts between governments for the delivery of military material (up to entire weapons systems and battleships), may be suspended or otherwise discontinued. This will as a rule be a violation of the contract, a disregard for the rule "*pacta sunt servanda*". It is in this respect that the rules of international law on State responsibility and countermeasures really become relevant. If the sanctioner is injured by an unlawful act of the sanctionee, the sanctioner may lawfully refrain from performing international legal obligation, subject to the principle of proportionality (Art. 49, 51 ARS).

Where the act or activity triggering the sanctions constitutes the violation of an obligation *erga omnes,* the responsibility of the State in question, i.e. the sanctionee, may be invoked by any other State, but the reaction of the non-injured State is limited to requesting assurances of non-repetition and compensation of damages for the benefit of the injured State (Art. 48(2) ARS). Reactions by a State which is not injured going beyond these limitation are not lawful.

e. Private transborder contracts[4]

Many sanctions regimes affect contracts concluded or to be concluded between private persons or enterprises situated in the sanctioner and in the sanctionee country. The conclusion of new contracts or the implementation of existing contracts may be prohibited or otherwise restrained. As to legal norms restraining the imposition of sanctions of this kind, two distinctions must be made: First, the relationship between the two States, a matter of international law, must be distinguished from the relationship between the State and the private individual or enterprise concerned, a question of national law subject to international guarantees. Secondly, the distinction between contracts already concluded and contracts to be concluded is essential.

In the relationship between the States in question, such prohibition may amount to a restraint on trade in commodities or in services, already discussed.

[4] For details see the paper by Atteritano.

In relation to the affected individuals or enterprises, this is primarily a question of property rights which may be protected by national constitutional law or international human rights law, in some cases also by bilateral investment guarantee treaties.

The guarantee of property rights is enshrined in Art. 1 of the Protocol Additional to the ECHR. States may not deprive any natural or legal person "of his possessions". Such "possessions" may include contractual rights having a pecuniary value. The European Court of Human rights has consistently held bank deposits to constitute "property" in this sense.[5] On the other hand, expectations of future benefits only amount to "possession" of they have a firm basis in law, i.e. constitute legitimate expectations.[6] Thus, a prohibition of implementing a valid contract would violate the guarantee, but the prohibition of concluding contracts in the future only in exceptional circumstances. To the extent that a prohibition constitutes a deprivation of possessions in the sense of Art. 1, it must be asked whether the measure falls under the exception clauses of that provision, namely a measure taken in the public interest inconformity with national and international law (Art. 1(1)) or a control of the use of property (Art. 1(2). Under certain circumstances, the Court holds, the freezing of a bank account can be a lawful limitation of a property right according to Art. 1(1) 2nd sentence.[7]

Conclusion:
It has been shown that legal restraints on sanctions as a means of coercive diplomacy depend on the type of measure taken in a particular case. Each sanctions regime must be analyzed with great caution. But it has also been shown that a wide variety of sanctions is lawful under various relevant legal regimes, even without relying on the general rules regarding countermeasures. Whether the principle of non-intervention imposes additional restraints on this freedom to adopt sanctions is debatable. In its *Nicaragua* judgment, the ICJ has been somewhat reluctant to derive from that principle a prohibition of certain means of economic pressure.[8]

[5] *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Fromer Yugoslav Republic of Macedonia,*App. 60642/08, Grand Chamber, 16 July 2014, para. 80; *Trajkovski v. Macedonia,* App. 43320/99, 7 March 2002; *Appolonov v. Russia*, App. 67578/01, 29 August 2002; *Zolotas v. Greece,* App. 66610/09, Judgment of 29 January 2013, para. 47.
[6] *Kopecky v. Slovakia,* App. 44912/98, Judgment of 28 September 2004, para. 35, 45 *et seq.*
[7] Trajovski v. Macedonia.
[8] For details, see the paper by Ronzitti.

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COERCIVE DIPLOMACY, SANCTIONS AND INTERNATIONAL LAW

ROME, 13 FEBRUARY 2015

Palazzo Rondinini
Via del Corso, 518

Draft paper on

Sanctions imposed by the European Union: legal and institutional aspects

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Contents: 1. General overview of EU practice in the field of sanctions (or "restrictive measures"). 2. The EU decision-making process for the imposition of sanctions; 3. The implementation of EU sanctions: the role of the Member States. 4. Judicial remedies against EU imposed sanctions. 5. Conclusions.

1. General overview of EU practice in the field of sanctions (or "restrictive measures")

The European Union (EU) is making an **increasing use of the instrument of sanctions** or, as they are called in the EU jargon, of "restrictive measures", as a form of coercive diplomacy. In particular, recent practice shows a **growing inclination of the EU to impose autonomous sanctions**, going beyond UN measures, and also a certain readiness to impose "tough" measures, having serious economic impact[1]. This may not come as a surprise, if one considers the willingness of the EU to "assert its interest and values on the international scene"[2]. The EU cannot be regarded in itself a military power, generally lacking the capacity to project military force abroad. On the other hand, the EU certainly is an "economic superpower"[3]. As a consequence, the threat or the imposition of economic and financial sanctions can be a powerful tool in the hands of the EU in order to exert an influence on the conduct of other actors in the international arena. It is also important to stress that, from a political viewpoint, there exists a **general**

[1] Anthonius W. de Vries, Clara Portela and Borja Guijarro-Usobiaga, *Improving the Effectiveness of Sanctions: A Checklist for the EU,* CEPS Special Report No. 95 / November 2014, p. 1.
[2] Art. 32 TEU.
[3] Court E. Golumbic, Robert S. Ruff III, "Who Do I Call For An EU Sanctions Exemption?: Why The EU Economic Sanctions Regime Should Centralize Licensing", *Georgetown Journal of International Law*, vol. 44, 2013, p. 1007 ff., at p. 1052 (An EU sanctions regimes "can be fairly measured against that of the US in terms of its impact"); Christina Eckes," EU Restrictive Measures Against Natural and Legal Persons: From Counterterrorist to Third Country Sanctions", in *Common Market Law Review*, vol.51, 2014, p. 869 ff., at 872 ("The EU possesses unmatched economic power: it is the biggest economy and the greatest trading power in the world"); Leeander Leenders, *EU Sanctions: A Relevant Foreign Policy Tool?*, College of Europe, Bruges, EU Diplomacy Papers, 3/2014, p. 4.

agreement among the member States as to the fact that the EU is much better placed than national governments to impose international sanctions[4].

This paper is devoted exclusively to EU restrictive measures adopted for political, non-commercial purposes, within the framework of the Common Foreign and Security Policy (CFSP). In effect, EU institutions generally keep a distinction between "restrictive measures" properly so called, adopted within the framework of the CFSP, and other types of actions designed for influencing the conduct of other actors. In particular, the restrictive measures discussed in this paper do not include the measures adopted in the context of commercial disputes nor the actions decided under a legal basis outside the CFSP, such as those consisting in the suspension or termination of bilateral agreements, of unilateral trade concessions or of cooperation with third countries[5].

In 2004, the EU Council outlined a general policy framework for the adoption of sanctions, by adopting the "**Basic Principles** on the Use of Restrictive Measures (Sanctions)", which had been elaborated by the Political and Security Committee[6]. That document expressed in the clearest terms the willingness of the EU to use sanctions as a key instrument of its foreign policy and, for the first time, designed a strategy for the use of sanctions[7].

Another important programmatic document is represented by the "**Guidelines** on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy", whose last version was adopted by

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[4] See in particular, the Report of the UK Government "Review of the Balance of Competences between the United Kingdom and the European Union. Foreign Policy" https://www.gov.uk/government/consultations/foreign-policy-report-review-of-the-balance-of-competences. As noted by Eckes, EU Restrictive, cit., p. 872, the report is "throughout very positive about the EU's role in the area of sanctions".

[5] Needless to say, these actions may, and often are, linked to, or combined with, the restrictive measures decided within the CFSP. See Iain Cameron, "Introduction", in ID., *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures*, Cambridge –Antwerp – Portland, Intersentia, 2013, p. 39.

[6] Council document 10198/1/04. Cameron, Introduction, cit., p. 11 "The basic principles are meant as a simple guide to the reasons that the EU might have for resorting to sanctions".

[7] See Clara Portela, *European Union Sanctions and Foreign Policy: When and Why do they Work?*, London – New York, Routledge, 2010. P. 28; Golumbic, Ruff III, op. cit., p. 1024 ff. (the Basic Principles, though perhaps lacking in specificity, are nonetheless a definitive articulation of EU sanctions policy).

the Council on 15 June 2012[8]. This more articulated document outlines a number of principles in order to guide the EU institutions and Member States in the formulation and implementation of sanctions and presents **standard wording and common definitions** that may be used in the legal instruments imposing or implementing restrictive measures. The Guidelines also suggested that a specific Council body be dedicated to the monitoring and follow up of the restrictive measures. As a consequence, on 26 February 2004 COREPER mandated the Foreign Relations Counsellors Working Party to carry out the monitoring and evaluation of EU restrictive measures, while meeting periodically in a specific Sanctions formation (**RELEX/Sanctions**), reinforced as necessary with experts from capitals.

The mandate for RELEX/Sanctions includes the exchange of information and experiences and the development of best practices among Member States in the implementation of restrictive measures. In accordance with that mandate, in November 2005 RELEX/Sanctions adopted a set of "EU **Best Practices** for the Effective Implementation of Restrictive Measures". The Best Practices are "non exhaustive recommendations of a general nature for effective implementation of restrictive measures", particularly directed at national authorities.

At the time of writing, there are **more than 30 regimes of EU sanctions in force**[9]. Many of them implement binding Resolutions adopted by the UN Security Council under Chapter VII of the Charter (ex. Al Qaeda). In effect, the Basic Principles stress the importance of the use of sanctions as an instrument "to maintain and restore international peace and security in accordance with the principles of the UN Charter" and the willingness of the EU Council to support the UN and fulfil the obligations

[8] Council document 11205/12. A first version of the Guidelines was adopted by the Council on 8 December 2003 (doc. 15579/03). Updated versions were agreed on 1 December 2005 (doc. 15114/05) and on 22 December 2009 (doc. 17464/09).

[9] European Commission, Restrictive Measures in force (art. 215 TFEU), updated 5.12.2014.

stemming from the UN Charter[10]. It may also happen that the EU, in implementing UNSC sanctions, decides to add further restrictive measures (Iran)[11].

At the same time, the EU (formerly the EC) has a long experience in adopting sanctions **on an autonomous basis, that is independently from a UN Security Council resolution**[12]. Currently, there are a number of important examples of these autonomous sanctions (Belarus; Moldova; Russian Federation; Syria). According to the 2004 Basic Principles, the Council will impose autonomous sanctions, if necessary, "in support of efforts to fight terrorism and the proliferation of weapons of mass destruction and as a restrictive measure to uphold respect for human rights, democracy, the rule of law and good governance"[13].

Needless to say, in the catalogue of EU sanctions one may find both traditional **"comprehensive" or "blunt" sanctions**, directed at States, and **"targeted" or "smart" sanctions**, aimed at single individuals or entities[14]. As to the targeted sanctions, that is measures directed at individuals who are named on *ad hoc* lists, a distinction has to be made between:

a) The situations in which the lists are established and maintained by the UNSC or a specialized sanctions committee (Resolution 1267, of 1997 concerning Al Qaeda). In this case the crucial decisions concerning listing and delisting are taken at UN level.

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[10] See also EU Sanctions Guidelines, para 3, "in the case of measures implementing UN SC Resolutions, the EU legal instruments will need to adhere to those Resolutions".

[11] Ibid., "it is understood that the EU may decide to apply measures that are more restrictive".

[12] That practice was inaugurated in the 1980s, with the adoption of sanctions against the Soviet Union following the invasion of Afghanistan (1980), against Poland for the imposition of martial law (1981) and vis-à-vis Argentina in the wake of the invasion of the Falkland Islands (1982). See Andrea de Guttry, "Le contromisure adottate nei confronti dell'Argentina da parte delle Comunità europee e dei terzi Stati ed il problema della loro liceità internazionale", in Natalino Ronzitti (ed.), *La questione delle Falkland/Malvinas nel diritto internazionale*, Milan, 1984, p. 343 ff.; LA Sicilianos, "Countermeasures in response to Grave Violations of Obligations Owed to the International Community" in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility*, Oxford, 2010, 1137-48, at 1141.

[13] Para. 3.

[14] On that distinction, see Marco Gestri "Legal Remedies against Security Council Targeted Sanctions," in Italian Yearbook of International Law: *De Lege Lata* and *De Lege Ferenda* Options for Enhancing the Protection of the Individual, in *Italian Yearbook of International Law*, 2008, pp. 25-53, at 25-26

b) The situations in which the SC confines itself to deciding that sanctions are to be imposed upon certain subjects, leaving the concrete identification and listing of those subjects to the EU (Regime established under Resolution 1373 of 2001: in this case it is the EU that has to identify individuals and groups involved in terrorism).

Another distinction that has been made in the literature is between the sanctions that are geographically defined, targeting the political regimes of third States and their supporters, and the counterterrorist sanctions, which do not apply to a specific geographical region[15].

From a general point of view, the EU practice on sanctions may give rise to a number of problems. First of all, in the case of sanctions adopted *motu proprio* by the EU, that is in the absence of a UNSC resolution, a problem as to their **compatibility with international law** may arise. In this regard, the Basic Principles adopted in 2004 by the EU Council seem to move from the overarching principle of full respect for international law, providing that autonomous EU sanctions must be in "full conformity" with international law obligations (para. 3). In effect, under the TEU, "in its relations with the wider world, the Union…shall contribute to..the strict observance and the development of international law, including respect for the principles of the United Nations Charter" (art. 3 para. 5). In practice, from a legal point of view, EU sanctions may fall into different categories. Firstly, the EU may adopt measures that, even if designed to injure the target State or person, do not conflict with any international obligation. This is in particular the case when the EU decides to terminate or suspend benefits that had been unilaterally granted to third countries (development aid, technical assistance, cultural cooperation). These measures, qualified as "**retorsion**" under international law[16], do not raise any problem. Another example is offered by the

[15] Christine Eckes, "EU Restrictive Measures Against Natural and Legal Persons: From Counterterrorist to Third Country Sanctions", in *Common Market Law Review*, vol.51, 2014, pp. 869-906.

[16] According to the ILC, the notion of retorsion covers any ""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". Notably "acts of retorsion may include the prohibition of or limitations upon normal diplomatic relations or other contacts, embargoes of various kinds or withdrawal of voluntary aid programs. Whatever their motivation, so long as such acts are not incompatible with the international obligations of the States taking them towards the target State, they

introduction of visa requirements for the entry into the EU of nationals of a given State or by the adoption of visa bans vis-à-vis certain individuals. In effect, each State is free to regulate the entry into its territory of foreign nationals, at least when there exists no international agreement regulating the movement of persons between the States involved.

A different situation arises when the sanctions adopted by the EU, if considered *per se*, do conflict with obligations deriving from customary or treaty law. In this case, the measure concretely adopted has to find a legal justification under the law of the international responsibility of States and international organizations (notably, pursuant to the rules on "**countermeasures**") or under the law of treaties (notably, according to the **principle *inadimplenti non est adimplendum*).** Indeed, the practice of EU autonomous sanctions, that is of measures adopted without a UNSC authorization gives rise to a number of delicate legal questions, concerning *inter alia* their compatibility with art. 53 of the UN Charter as well as the right of the EU to take countermeasures in the presence of *erga omes* obligations[17].

When EU autonomous sanctions are adopted, EU institutions work in order "to enlist the support of the widest possible range of partners"[18], for, as stated in the EU Sanctions Guidelines, "the effectiveness of restrictive measures is directly related to the adoption of similar measures by third countries"[19]. In effect, the practice shows that the EU is often successful in **aligning the conduct of a significant number of third**

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do not involve countermeasures and they fall outside the scope of the present articles". Commentaries on the Draft Articles on responsibility of States for Internationally Wrongful Acts (2001) ILC Yearbook II (2) 128.

[17] One has to recall the thesis according to which, when the UN Security Council exerts its powers under art. 41 of the Charter and adopts sanctions against a certain State, individual States or international organization lose any right to adopt further sanctions in respect to the said State, even under the doctrine of collective countermeasures vis-à-vis violations of *erga omens* rules: see Sicilianos, op. cit., p. 1142; Ugo Villani, "The Security Council's Authorization of Enforcement Action by Regional Organizations", in *Max Planck Yearbook of United Nations Law*, vol. 6, 2002, p.p. 538-540; Pierre-Emmanuel Dupont, "Countermeasures and Collective Security: The Case of the EU Sanctions Against Iran", in *Journal of Conflict & Security Law*, vol. 17, 2012, pp. 301-336.

[18] EU Basic Principles, para 4.

[19] EU Sanctions Guidelines, Annex 1, para 21: "in principle, therefore it is preferable for sanctions to be adopted in the framework of the UN. Where this is not possible, the aim should be to bring as much as possible of the international community to exert pressure on the targeted country".

States with that of the EU. More particularly, the States belonging to the following categories generally tend to align with EU measures: candidate countries, potential candidates, members of the European Economic Area (EEA). Also some of the partners of the European Neighborhood Policy have shown an important tendency to conform to EU sanctions, notably Moldova, Georgia and Armenia. In this connection, one may refer to the restrictive measures adopted against Syria on 15 October 2012. According to a Declaration issued by the High Representative of the Union for Foreign Affairs and Security Policy, the following third countries had expressly committed themselves to conform to the EU acts imposing the sanctions: Croatia (Acceding Country); the former Yugoslav Republic of Macedonia, Montenegro, Iceland and Serbia (Candidate Countries); Albania (Potential Candidate); Liechtenstein and Norway (members of the EEA); Moldova and Georgia. In light of the above, one can say that the EU sanctions policy exerts, from a factual point of view, a relevant force of attraction in respect of third States.

From the legal point of view, the case of **candidate countries** deserves a particular attention. They are generally expected to conform to sanctions adopted by the EU[20]. Yet it is questionable that candidate countries are under a legal obligation to do so. The problem has arisen in respect of the unwillingness of Serbia to align with the EU sanctions against Russia. The EU Commissioner for Neighborhood Policy and Enlargement Negotiations, Johannes Hahn, has recently issued contradictory declarations on the issue, stating, on the one side, that Serbia is under a legal commitment to gradually align its foreign policy to that of the EU, in particular in respect of difficult issues such as sanctions on Russia; yet, on the other side, declaring that the EU is not asking Serbia to impose sanctions against Russia[21].

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[20] See EU Guidelines, Annex I, para 22, "candidate countries should be systematically invited to align themselves with the measures imposed by the EU" See also European Parliament recommendation to the Council of 2 February 2012 on a consistent policy towards regimes against which the EU applies restrictive measures, when their leaders exercise their personal and commercial interests within EU borders (2011/2187(INI)): (i) "to ensure that countries belonging to the European Economic Area and applicant countries for accession to the European Union also apply the restrictive measures and exchange relevant information with the Union"

[21] http://www.b92.net/eng/news/politics.php?yyyy=2014&mm=11&dd=19&nav_id=92288

Another issue of general interest emerging from the EU practice is that concerning the **jurisdictional scope of application of sanctions**. The EU Sanction Guidelines expressly condemn the extra-territorial application of national legislations imposing sanctions, notably in respect of natural and legal persons under the jurisdiction of EU Member States, and declare that the EU "will refrain from adopting legislative instruments having extra-territorial application in breach of international law"[22]. In any case, the jurisdictional scope of EU sanctions is generally quite broad. According to the standard clause on jurisdiction envisaged by the EU Sanctions Guidelines, restrictive measures apply (a) within the territory of the EU, including its airspace; (b) on board any aircraft and or any vessel under the jurisdiction of a Member State, (c) to nationals of any Member State (wherever located), (d) to any legal person, entity or body incorporated or constituted under the law of a Member State (wherever located) (e) to any legal person, entity or body with respect to business done in whole or in part within the EU[23]. On the other hand, EU sanctions, differently from some US measures, do not envisage more aggressive forms of extra-territorial application, such as provisions covering the conduct of **foreign subsidiaries of EU legal persons** or clauses controlling the **re-export from third countries of EU-origin goods**[24].

2. The EU decision-making process for the imposition of sanctions

The adoption of "restrictive measures" in the EU legal order is governed by a **complex procedure**, which often straddles the TEU and the Treaty on the Functioning of the European Union (TFEU). The legal picture is complicated by the fact that any measure adopted by the EU must under EU law have an appropriate legal basis, in

[22] Para. 52.
[23] Para. 88.
[24] It has to be added that EU sanctions lists tend in any case to influence the conduct of leading non-EU companies based in third States: in the financial sector, for instance, a survey carried out in 2009 showed that 36% of non-EU companies use the EU list explicitly and a further 31% employ some form of aggregate, including EU designations: Deloitte Fin. Advisory Servs. Llp, *Facing The Sanctions Challenge In Financial Services: A Global Sanctions Compliance Study*, 2009, p. 18.

accordance with the principle of attribution of powers, and considering the variety of possible different legal bases that may come into consideration in a given case.

The imposition of restrictive measures for political purposes in principle **falls under the EU Common Foreign and Security Policy (CFSP)**, and requires a **Decision of the Council,** adopted under article 29 TEU and in accordance with the procedure envisaged by artt. 30 and 31 TEU[25]. The measures must be consistent with the objectives of the CFSP, which are outlined in art. 21 TEU.

The **sanction proposal** may come **from any MS or from the HR**, who can act with the support of the EU Commission (in this case, the HR and the Commission will introduce a joint proposal). When the EU implements sanctions decided by the UNSC, it is crucial for the EU to adopt the necessary legal instruments with minimum time delay. In this connection, EU members of the SC may play a central role, notably in ensuring immediate information concerning the discussion and prospective adoption of new UN sanctions (the Guidelines stress the importance of "prompt exchange of information regarding draft Security Council Resolutions).

With respect to EU autonomous sanctions, the Guidelines articulate in a very detailed manner the different phases of the decision making process leading to the introduction of a sanctions proposal before the Council[26]. An important role in the

[25] Obviously, the basic political decisions as to the adoption of restrictive measures are often taken by the European Council. In this respect, the EU General Court (GC) has recalled that "the CFSP decisions adopted by the Council have to comply with the first subparagraph of Article 26(2) TEU, according to which the Council is deemed to act 'on the basis of the general guidelines and strategic lines defined by the European Council'": 25 April 2012, case T-509/10, Manufacturing Support & Procurement Kala Naft v Council, para 38. Before the entry into force of the Maastricht Treaty, a practice developed as to the adoption of "informal sanctions" against certain States or entities (Cuba, Guatemala, Pakistan, the Palestinian Authority, Peru, Russia, Serbia and Turkey). They were simply envisaged by the "conclusions" of the European Council or the Council, without being formalized in any further decision. A remnant of this practice is the embargo on arms against China, imposed by the Declaration of the Madrid European Council of 27 June 1989. See Gisela Grieger, "Sanctions as an EU foreign policy instrument", Library Briefing, Library of the European Parliament, 22.5.2013, p. 3.

[26] Proposals for restrictive measures are submitted by the Member States or the European External Action Service (EEAS). The political aspects and broader parameters of the proposals are first discussed in the relevant **regional working party** of the Council, which is chaired by the EEAS and assisted by EEAS country desk officers and sanctions officers and experts from the Commission and the Council Legal Service. The EEAS Heads of Missions in the countries concerned are generally invited to provide their advice on the proposals. Where appropriate, the Political and Security

preparation and review of autonomous sanctions regime is played by the **European External Action Service (EEAS)**[27].

As an instrument of the CFSP, the adoption of a Decision on sanctions as a general rule requires **unanimity** from EU Member States in the Council. Some derogations to this rule are envisaged by art. 31, para 2, TEU. In particular, the Council may decide by qualified majority with respect to situations in which the ministers act on the basis of a previous decision of the European Council or upon a proposal presented by the HR at the specific request of the European Council (in both cases one may speak of a sort of prior authorization to qualified majority voting by the European Council). One has also to take into account the rules on abstention, and notably the mechanism known as "**constructive abstention**" (art. 31, para. 1 TEU). In particular, if a MS abstains that will not prevent the adoption of the decision (unless one-third of the members representing one-third of the population abstain and qualify their abstention). A member state may also qualify its abstention by making a formal declaration: in that case it "shall not be obliged to apply the decision, but shall accept that the decision commits the Union". Besides, in "a spirit of mutual solidarity, the Member State shall refrain from any action likely to conflict with or impede Union action based on that decision, and the other Member States shall respect its position". This instrument for flexibility allows a member State to opt out of a certain decision without blocking its adoption. In the doctrine, the utilization of such a mechanism has recently been invoked in order to allow the Council to adopt more effective sanctions against the Russian Federation in the wake of the Ukrainian crisis[28]. From a different viewpoint, one could consider that mechanism also in order to solve possible problems deriving from the

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Committee will also discuss the proposal and provide political orientations. When an agreement has been reached in the regional working party on the political aspects of the proposal, a **technical working group** (the Council's Foreign Relations Counsellors working group, **RELEX**) will discuss all the legal, technical and horizontal aspects of the proposed measures. **In this working group both the EEAS and the Commission are represented to provide advice on horizontal and technical aspects of the measures under consideration.** After having been cleared by the regional working party and RELEX, the proposal will be submitted to COREPER and to the Council.

[27] See also Eckes, EU restrictive, cit., p. 884.

[28] Steven Blockmans, "Ukraine, Russia and the need for more flexibility in EU foreign policy-making", CEPS Policy Brief, No. 320, 25 July 2014.

more prudent attitude of the new Greek Government in respect of the imposition of sanctions against Russia.

However, on the one hand, the constructive abstention mechanism has not been very successful in the CFSP practice; on the other hand, its application in the field of sanctions appears as particularly problematic.

Considering that in the field of the CFSP the adoption of legislative acts is excluded (art. 31, para. 1 TEU), the Decision on sanctions, in order to be applicable vis-à-vis natural and legal persons, has to be implemented by further acts. In particular, the measures foreseen in the CFSP Decision of the Council may be implemented along **two different tracks**, depending on the type of sanctions envisaged and on the attribution of competences between the EU and member States.

First, some measures are **implemented directly by the Member States**. This is in particular the case when the EU has no competence to adopt the operative measures envisaged by the CFSP Decision. In any case, since CFSP Decisions are legally binding, Member States are under a legal obligation to act in conformity with the act. Typically, **arms embargoes** and **travel bans**, established by a CFSP Decision, are directly implemented by the member States. For arms embargoes this is a consequence of art. 346 of the TFEU[29]. The embargo is therefore implemented by the national laws or regulations of each member State[30]. Needless to say, uniformity is required as to the application of the arms embargo by the Member States. As rule, that is unless otherwise specified, arms embargoes will cover all goods and technology included in the Common Military List of the Union[31]. One of the favorite EU restrictive measures is the restriction on the admission to its territory of specifically listed third country nationals. The travel ban may imply the denial of a visa, if the State of nationality is included

[29] On the other hand, very often the embargo also covers dual-use items and the provision of services related to military technology. These aspects have to be covered by a EU Regulation.

[30] Cameron, Introduction, cit., p. 9.

[31] Common Military List of the European Union (adopted by the Council on 17 March 2014) (equipment covered by Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment)(updating and replacing the Common Military List of the European Union adopted by the Council on 11 March 2013 (1))(CFSP) (2014/C 107/01)

among those for which EU regulation No. 539/2001 requires a visa, or the non-admission of the person in question at a point of entry into EU territory. Both measures will be implemented by national authorities, for the responsibility of issuing visas and of exerting border control is still in the hands of national Governments[32]. As a recent example of a travel ban, one may refer to the Decision 2010/573/CFSP concerning restrictive measures against the leadership of the Transnistrian region of the Republic of Moldova, which has imposed a travel ban on a list of people "responsible for the campaign of intimidation and closure against Latin-script Moldovan schools in the Transnistrian region of the Republic of Moldova".

In a second range of hypotheses, the imposition of the sanctions foreseen in the CFSP decision requires **further EU legislation under the TFEU**. This is the case of measures restricting trade or financial relations with a State, which generally fall under the EU Commercial policy[33] or affect the movement of capital and the functioning of the internal market. In practice, the Council generally indicates in the CFSP instrument that "Further action by the Union is needed in order to implement certain measures"[34]. This enables the HR and the Commission to propose a Regulation implementing the measures falling within the remit of the Union.

After the Lisbon Treaty, the legal basis for such a legislation is offered by **art. 215 TFEU**[35]. The first paragraph deals with **sanctions directed at States** while the second

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[32] In some cases, there is no need for any additional normative measure, and the travel restriction is implemented simply by denying access to the concerned individual.

[33] Court of Justice (ECJ), 14 January 1997, Centro-Com, Case 124/95 [1997] ECR I-80.

[34] See EU Sanctions Guidelines, para 49. "Where precision is needed to ensure that all measures are implemented in time, the CFSP instrument should indicate expressly how each measure or part of measure will be implemented" (ibid.). See Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine, para. 13.

[35] A second legal basis for the imposition of sanctions aiming at preventing and combating terrorism and related activities is provided by art. 75 TFEU. Under this provision: "Where necessary to achieve the objectives set out in art. 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities". However, this provision is interpreted as referring exclusively to measures adopted in order to combat "internal"

has introduced a new legal basis in respect of **restrictive measures against natural or legal persons and groups or non-States entities.** Before Lisbon, the imposition of targeted sanctions relied on a more precarious legal basis, deriving from the joint application of *ex* Articles 301, 60 and the flexibility clause (Article 308 TEC).

According to the first paragraph of art. 215, where a CFSP decision provides for the "interruption or reduction....of economic and financial relations" with one or more countries, the Council shall adopt the "necessary measures", acting by a qualified majority on a joint proposal from the HR and the Commission[36]. The same procedure is envisaged by the second paragraph for the adoption of targeted sanctions.

It is to be noted that under art. 215 TFEU the **European Parliament** has a very marginal role in respect of the adoption of sanctions. Formally, the Parliament does not take any active part in the procedure for the adoption of the sanctions and has only to be informed once the measures have been adopted. In effect, the Parliament has requested on many occasions to be associated in all the stages of the sanctions process, and in particular in the decision-making process leading to sanctions, in the selection of the sanctions most appropriate to the situation, and also in the definition of benchmarks and the evaluation of their implementation within the framework of the review mechanism and the lifting of the sanction[37]. In a number of cases, the Parliament has also expressed its political views on the merits of the EU sanctions policy, inviting the Council to

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terrorism, that is against terrorist or terrorist groups posing a threat to public security in the Member States (or within the EU). On the other hand, when the threat relates primarily to one or more third States or to the international community in general, the appropriate legal basis would be represented by art. 215 TFEU. On the relationship between art. 75 and art. 215 TFEU, see ECJ, 19 July 2012, European Parliament v. Council, Case C-130/10,. In the doctrine, Cameron, Introduction, cit., p.35 ff.; Eckes, EU Restrictive Measures, cit.

[36] Legally, the Regulation is based upon the CFSP Decision, and should be adopted after it. In practice, the proposals for the CFSP Decision and the Regulation tend to be drafted and discussed together, in order to allow the Council to adopt them simultaneously. See Golumbic, Ruff III, op. cit., p. 1040.

[37] European Parliament resolution of 4 September 2008 on the evaluation of EU sanctions as part of the EU's actions and policies in the area of human rights (2008/2031(INI)

adopt sanctions vis-à-vis certain States[38] or accusing the EU of "double-standards" in the imposition of sanctions[39].

Art. 215 TFEU provides for the adoption of "**the necessary measures**". When that formula is used in the Treaty, the institutions may have recourse to all the types of legal acts envisaged by art. 288 TFEU (regulations, directives, decisions, recommendations and opinions).

By any means, the instrument of EU legislation generally used in this field is the "**regulation**". Only regulations may in effect guarantee the necessary uniformity in the application of the restrictive measures, in view of the fact that they **have general application**, are **binding in their entirety** and are **directly applicable** in all member States (art. 288 TFEU).

As we have seen, it is the Council that has to adopt the basic regulation on the restrictive measures. With respect to autonomous sanctions, the Council generally also exerts the competence to adopt the **acts implementing the basic regulation**, notably when it is necessary to establish at the EU level "uniform conditions" for implementing the measures[40]. As to restrictive measures implementing UNSC resolutions, it is the Commission which is generally entrusted to amend the regulation, or its annexes, in order to give effect to decisions of the UNSC or its Committees on listing or delisting[41].

3. The implementation of EU sanctions: the role of the Member States

[38] European Parliament Resolution of 17 January 2013 on the human rights situation in Bahrain (2013/2513(RSP)

[39] European Parliament, Recommendation to the Council of 2 February 2012 on a consistent policy towards regimes against which the EU applies restrictive measures, when their leaders exercise their personal and commercial interests within EU borders (2011/2187(INI)) http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-0018

[40] Under art. 291 TFEU, where uniform conditions for implementing EU acts are needed, in principle the competence to adopt the implementing acts pertains to the Commission. The Council may be granted such a competence "in duly justified specific cases".

[41] Cameron, Introduction, cit., p. 39.

The actual implementation of the restrictive measures imposed at EU level often requires further action on the part of the Member States. In this respect, one may distinguish between possible **legislative action** and **administrative action** by Member States.

Council Regulations imposing sanctions are directly applicable in the Member States and, being part of EU law, take precedence over conflicting domestic legislation. As a consequence, as a rule and in the abstract, they should not require further legislation on the part of Member States. However, the Regulation may in practice require the adoption of additional legislation or regulations by Member States.

Typically, this happens in respect of the **determination of penalties for violations of the restrictive measures** (so called "**secondary sanctions**")[42]. In this respect, the regulations imposing restrictive measures normally include a standard clause, which is also set out in the Sanctions Guideline[43]. For instance, Regulation 267/2012, the basic act concerning sanction on Iran, provides in its art. 46 that:

> Member States shall lay down the rules on penalties applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.

By virtue of such a provision, Members States are under an articulate set of positive obligations: the duty **to adopt internal measures** imposing penalties for the violation of the restrictive measures; a duty **to concretely take all necessary measures to enforce** those measures; an obligation **to ensure that the penalties are effective, proportionate and dissuasive**. As a consequence, even if the choice of the penalties remains within the discretion of each member State, such a discretion is limited by the requirements concerning effectiveness, proportionality and dissuasion. The notion of "effective, proportionate and dissuasive penalties" has been elaborated by the European

[42] C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*, Oxford, OUP, 2009, pp. 55-56.
[43] Guidelines, cit., pp. 41-42, para. 89-90.

Court of Justice in its case law[44] and it is now regularly used in EU legislation. In any case, the interpretation of these requirements is not an easy task and has to be made in accordance with the EU case law[45]. The penalties envisaged by the Member States range from measures of an administrative or civil nature to criminal law penalties. As to the criminal penalties, they may be provided for in legislative measures adopted *ad hoc*, with specific regard to a single sanctions regime; in many States the penalties can be imposed directly by the Government, via secondary legislation, pursuant to an authorization provided in a general statute[46]. In some legal orders, the penalties derive from general provisions of criminal law concerning breaches of EU regulations[47].

Under the relevant EU legislation, the member States are under a duty to notify the Commission of the rules adopted for imposing sanctions "without delay".

The delegation to each member State of the competence to lay down the rules on penalties applicable to infringements of EU restrictive measures could determine inconsistencies in the repression of violations. In this respect, as observed by Eckes, "it cannot be ruled out that the Community [now the EU] adopts criminal sanctions for the violation of European sanctions regimes at some point in the future"[48].

Apart from the situations in which the Member States have to adopt legislative measures, they also have the responsibility to carry out a number of important tasks in order to ensure that sanctions regimes are complied with. Given that the EU is not a federal State, and does not possess enforcement agencies having general competence,

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[44] ECJ, 21 September 1989, Case 68/88, Commission v Greece, [1989] ECR2965.

[45] See AG Kokott, Joined cases C-387/02; C-391/02 and C-403/02, Berlusconi and Others [2005]ECR I-3565.

[46] This is the case in the Netherlands. Suus Hopman, Michel Uiterwaal, "The Implementation of EU Terrorism Blacklisting Sanctions in the Dutch National Legal System", in Cameron, EU Sanctions, cit., p. 223 ff.

[47] See, for instance, the case of Finland. A general provision of the Finnish Penal Code punishes the violation of any regulatory provision in a "Regulation, adopted on the basis of Article 60, 301 or 308 of the Treaty establishing the European Community, on the interruption or limitation of capital transfers, payments or other economic relations as regards the Common Foreign and Security Policy of the European Union, (365/2002)" or the violation of "a regulatory order issued on the basis of one of the above". See Kimmo Nuotio, "How, if at all, do anti-terrorist blacklisting sanctions fit into (EU) Criminal Law?", in Cameron, EU Sanctions, cit., p. 126.

[48] EU Counter-Terrorist Policies, cit.., pp. 55-56.

the function of **monitoring** the application of the restrictive measures by natural and legal persons and that of ensuring the **effective enforcement** of the sanctions by the same subjects is still in the hands of MS. National authorities are in particular tasked to cooperate with the relevant economic operators (including financial and credit institutions) in the application of sanctions.

In other words, as observed in the legal literature, "while EU legislation sets EU sanctions policy, adopts sanctions programs, and designates targets, **the day-to-day operation of the EU sanctions regime falls to the Member States**"[49].

National authorities also have to report to the Commission on their monitoring and enforcement activities.

Another aspect of the implementation of the EU sanctions which is entrusted to MS is the **granting of exemptions.** In effect, as is typically the case with sanctions programs, the EU instruments on financial restrictions, restrictions on admission and other restrictive measures generally make provision for appropriate exemptions to take account of, in particular, "**basic needs of targeted persons, legal fees, extraordinary expenses** or, where applicable, **humanitarian needs** or **international obligations**"[50]. Another situation in which exemptions may be granted is in order to enable a targeted persons **to fulfil an obligation arising from a prior contract**[51].

The granting of these exemptions has generally to be based on a **case-by-case assessment**[52] of the particular situation of the person involved and is attributed to the national authorities. The latter may also have the competence to impose conditions as to the exemptions granted, in order to ensure that they do not frustrate or circumvent the objectives of the sanctions regime[53]. It is to be noted that the EU acts imposing sanctions **do not provide detailed criteria** as to the granting of exemptions. Some guidance for the consideration of exemptions requests by the competent authorities of the member States is provided by the Sanctions Guidelines, as previously seen, and, in

[49] Golumbic,, Ruff III, op. cit., p. 1042.
[50] EU Sanctions Guidelines, p. 12, para. 25.
[51] EU Sanctions Guidelines, p. 13, para 28, and p. 37, para 86.
[52] GC, 6 September 2013, case T-434/11, Europäisch-Iranische Handelsbank AG v Council.
[53] EU Sanctions Guidelines, p. 12, para 26.

more articulated terms, by the Best Practices. However, as observed, "this guidance lacks specificity...and leaves a vast amount of discretion to member state competent authorities"[54].

In fact, concerns have been expressed in the legal literature as to **possible inconsistencies in the concrete implementation of EU sanctions** deriving from the reliance upon the authorities of 28 separate Member States for the management of exemptions and, more in general, for the day-to-day enforcement of sanctions. Divergences in the actual implementation of EU sanctions programs among the Member States could in effect derive from the unequal availability of financial resources in the various states[55], from different levels of efficiency and professionalism of the authorities involved in the administration of sanctions but also from diverging political attitudes in respect of the targeted entities[56] or from a tendency to favor the economic interests of domestic operators. In light of that, some commentators have in particular advocated **the establishment by the EU of a centralized licensing agency** "responsible for reviewing and issuing decisions on applications for exemptions from sanctions"[57].

While waiting for such possible innovation, under existing EU law the full and consistent implementation by Member States of the EU legislation on restrictive measures should be ensured by the EU Commission (the watch-dog for EU law) and EU Courts. More particularly, if a Member State fails to adopt the necessary implementing rules *in subiecta materia*, an **infringement procedure** can be started by the Commission against that Member State, in accordance with Articles 258 (or by another Member State, under art. 259 TFEU)[58].

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[54] Golumbic,, Ruff III, op. cit., p.1044.

[55] It is to be noted that "the EU currently does not provide financial assistance for sanctions implementation": Golumbic, Ruff III, op. cit, p. 1045.

[56] Ibid., p. 1046: "domestic political agendas can..lead to disparities in sanctions implementation and enforcement.

[57] Golumbic,, Ruff III, op. cit., p. 1042.

[58] The Commission or the other Member States may bring the case to the Court of Justice, whose judgment is binding (art. 260 TFEU). In case of non-compliance with the Court's judgment, the Court may impose a lump sum or penalty payment on the concerned Member State (ibid.).

In the actual practice, a number of problems also derive from the **number of national authorities** generally involved in the application, monitoring and enforcement of sanctions. In Italy, the application of sanctions involve a myriad of institutions: Ministry of Economic Affairs; Ministry of Foreign Affairs; Ministry of the Interior; Ministry of Justice; the Bank of Italy; the National Commission for Business and Stock Exchange (CONSOB); ISVAP; Italian police corps and agencies involved in the fight against crime (Polizia di Stato; Carabinieri; Guardia di Finanza; DIA). In order to ensure better coordination among those entities, a special Committee, Comitato di Sicurezza Finanziaria (Committee for financial security) has been established (Legge 14 dicembre 2001, n. 431; Legisaltive Decree 22 June 2007). The CSF, set up within the Ministry of Economic Affairs and chaired by the Director General of the Treasury, consists of the representatives of the various institutions involved.

In any case, it has to be added that when the Regulations implementing restrictive measures entrust specific tasks to the competent authorities of Member States, these authorities are "either listed in an Annex to the Regulation, or indicated in an indirect way by listing in an Annex to the Regulation the web-pages of each Member State where information about its relevant competent authorities can be found"[59].

[59] EU Sanctions Guidelines, p. 13, para 30.

4. Judicial remedies against EU imposed sanctions

Under general EU law, the EU regulations adopted under art. 215 TFEU are subject to judicial review by the Court of Justice and the General Court of the EU. In particular, EU acts may be challenged in accordance with the **action for annulment** envisaged by art. 263 TFEU. As to the CFSP decisions constituting the basis for the imposition of sanctions, they are also subject to judicial review when they envisage sanctions targeted against natural or legal persons. In effect, art. 275 (2) TFEU introduces a derogation to the general rule, according to which the Court of Justice has no jurisdiction in the field of the CFSP, providing that the Court shall have jurisdiction "to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of article 263 of the Treaty, reviewing the legality of decisions providing for restrictive measures against natural and legal persons adopted by the Council on the basis of Chapter 2 of Title V of the TE"[60].

As is known, the numerous actions brought to the Court by listed individuals and legal persons, challenging the EU measures for alleged incompatibility with fundamental human rights, have given rise to an important and somewhat "revolutionary" case law of the EU Courts[61]. That case law has put the entire EU sanctions system under

[60] On the scope of that exception, see GC, 25 April 2012, case T-509/10, Manufacturing Support & Procurement Kala Naft v Council, para 34-38, nyr.

[61] Natural or legal persons, being unprivileged applicants, may bring an action against acts addressed to them and against acts which are of direct and individual concerns to them. After the entry into force of the Lisbon Treaty, private parties may also challenge a "regulatory act" (that is a non-legislative act) if the act is of direct concern to the applicant. As regards targeted sanctions, even under this restrictive test there is no question that the persons which are targeted by the act adopting the sanctions may challenge it, even if the act is adopted in the form of a Regulation. As a matter of fact, the case law of the EU Courts has consistently admitted the application by natural or legal persons included in the lists. A different legal discourse applies in respect of the Regulations adopting sanctions against States. It has to be observed that in this case undertakings suffering economic losses from the sanctions do have limited standing to challenge the EU measure according to the *Plaumann* formula. They need to prove that the act in question affects them "by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually as in the case of the person addressed".

considerable pressure[62]. This is not the place for re-discussing this jurisprudence, which has been extensively analyzed in the legal literature. It is however important to stress that that case-law is breaking new ground as to the judicial review of sanctions.

The first judgments that focused on the general, formal deficiencies in the listing and delisting procedures, amounting to a violation of the human rights of listed individuals (KADI I)[63], have open the way to the more recent wave of decisions (KADI II; Iranian cases) in which **full judicial scrutiny** of both the lawfulness and of the merits of each measure is carried out[64]. EU courts now routinely exert substantive judicial review of the merits of each measure, even if implementing a UNSC decision, and they annul sanctions not supported by adequate evidence.

More particularly, in the first place the EU courts analyze, from the viewpoint of art. 296 TFEU, the **reasons given by the Council** for listing the interested person. These reasons must comply with the listing requirements envisaged in the relevant acts and must be clear and specific, in order to allow the person to defend its rights and to challenge the measure before a court[65]. If the reasons are too vague, the listing is annulled[66]. In the second place, EU courts evaluate the **information or evidence presented by the Council in order to support the alleged reasons**: if the information

[62] See Eckes, EU Restrictive, cit., p. 891 ("more than a hundred cases have been brought to the EU courts challenging different types of targeted sanctions").

[63] ECJ, 3 September 2008, Joined cases C-402, C-415/05 P, Kadi and Al Barakaat International Foundation v Council and Commission [2008] ECR I-6351 (Kadi I Appeal).

[64] ECJ, 18 July 2013, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P Commission and Others v Kadi, nyr ('Kadi II' Appeal); GC, 21 March 2012, Joined Cases T-439/10 and T-440/10 Fulmen and Mahmoudian v Council; ECJ, case C-280/12 P, Council v Fulmen and Mahmoudian.

[65] See, for instance, ECJ, Fulmen, cit., para 61: "the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining disclosure of those reasons, without prejudice to the power of the court having jurisdiction to require the authority concerned to disclose that information, so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court having jurisdiction, and in order to put the latter fully in a position to review the lawfulness of the decision in question". See also ECJ, Kadi II, cit., para. 100.

[66] See, for instance, GC, 6 September 2013, Case T-24/11, Bank Refah Kargaran v Council, nyr.

or evidence is insufficient or inadequate the listing is also annulled[67]. As stated by the Court of Justice,

> the judicial review of the lawfulness of a measure whereby restrictive measures are imposed on an entity extends to the assessment of the facts and circumstances relied on as justifying it, and to the evidence and information on which that assessment is based. In the event of challenge, it is for the Council to present that evidence for review by courts of the European Union[68].

This case-law impinges upon delicate issues, such as judicial review of political decisions or of classified evidence[69]. In this respect, EU Courts have clarified that the institutions must submit to the court the evidence necessary to substantiate the alleged reasons "without it being possible to raise objections that the evidence and information used by the Council is secret or confidential"[70]. That even if the Court of Justice has acknowledged that overriding considerations pertaining to the security of the EU or of Member States or to the conduct of international relations may justify derogations from the adversarial principle, under which all information and material must be fully communicated between the parties, and preclude the disclosure of some information to

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[67] CJ, Fulmen, para. 64: "The effectiveness of the judicial review guaranteed by Article 47 of the Charter also requires that the Courts of the European Union are to ensure that the decision, which affects the person or entity concerned individually, is taken on a sufficiently solid factual basis. That entails a verification of the allegations factored in the summary of reasons underpinning that decision, with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated (see Kadi II, paragraph 119)". See also M. Lester, "Recent European Court Judgments On Iranian Sanctions", in *European Sanctions*, http://europeansanctions.com/2013/09/19/recent-european-court-judgments-on-iranian-sanctions/

[68] Ibid. See also GC, Case T-390/08, Bank Melli Iran v Council, paragraphs 37 and 107.

[69] CJ, Fulmen, cit., para 70: "In such circumstances, it is none the less the task of the Courts of the European Union, before whom the secrecy or confidentiality of that information or evidence is no valid objection, to apply, in the course of the judicial review to be carried out, techniques which accommodate, on the one hand, legitimate security considerations about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need sufficiently to guarantee to an individual respect for his procedural rights, such as the right to be heard and the requirement for an adversarial process (see Kadi II, paragraph 125, and, by analogy, ZZ, paragraphs 54, 57 and 59)".

[70] See, GC, Fulmen, cit. para. 100.

the person concerned[71]. The draft new rules of procedure of the General Court submitted to the Council by the General Court, in agreement with the Court of Justice, do in effect envisage an *ad hoc* procedure allowing a party to submit that the communication of certain evidence would "harm the security of the EU or its Member States or the conduct of their international relations" and the Court to take the material into account without it being disclosed to the other party[72].

Another issue deserving investigation is to what extent domestic courts are allowed to review national measures adopted to implement EU measures, notably when member States exert a certain measure of discretion (e.g., the granting of exceptions).

5. Conclusions

From the foregoing analysis, a number of provisional conclusions can be drawn:

- The EU is making an increasing use of economic sanctions and has become one of the most important actors in that field. Particularly, in recent times the EU has shown a new inclination to adopt autonomous sanctions, enacted without any UN basis or going beyond relevant resolutions of the UN Security Council.

- Even if EU institutions have declared that autonomous sanctions must always be "in full conformity with international law", the actual lawfulness of each measure has to be carefully evaluated, notably under the law of the treaties (*inadimplenti non est adimplendum*) or under the rules on the international responsibility of States and international organizations (countermeasures).

- As regards autonomous sanctions, the EU is often successful in aligning the conduct of a significant number of third States (candidate countries; potential

[71] See ECJ, Fulne, cit., para. 70

[72] Council of the EU, Draft Rules of Procedure of the GC of the European Union - consolidated version, doc. 16724/14, 9 December 2014, art. 14. See M. Lester, "Draft European Court Rules Propose Secret Hearings, & April 2014", *European Sanctions*, http://europeansanctions.com/2014/04/06/draft-european-court-rules-for-secret-hearings/; Id, "EU To Approve New Court Rules To Permit Secret Hearings", 22 January 2015, *European Sanctions*, ; ID, "New EU Court Rules To Be Adopted Without UK Approval", 23 January 2015, in *European Sanctions*, http://europeansanctions.com/category/court-procedure/

candidates; members of the EEA; partners of the European Neighborhood Policy) with EU decisions. From a legal point of view, the position of EU candidate States, vis-à-vis EU decisions imposing sanctions, deserves particular consideration.

- Under EU law, the imposition of sanctions is governed by a complex procedure. Some legal and institutional aspects of that regime are still in need of clarification, also considering the innovations introduced by the Lisbon Treaty. Generally, the imposition of sanctions requires a CFSP Decision of the Council, adopted under article 29 TEU. The latter is directly implemented by Member States when the EU has no competence to adopt the operative measures (arms embargoes; travel bans). In all the other cases, further EU legislation is necessary under art. 215 TFEU. Such a two-step procedure may be time-consuming and lead to delayed and ineffective implementation of the sanctions[73]. Besides, the adoption of the basic CFSP Decision requires unanimity among Member States, which can determine a paralysis in EU action or the adoption of watered-down measures. In this respect, the possible application of the rules of the TEU on "constructive abstention" has to be explored.

- The concrete implementation of EU sanctions is largely dependent upon the conduct of the Member States. First, they generally have to lay down the rules on the penalties for violations of the restrictive measures . More particularly, the choice of the penalties remains within the discretion of each Member State; on the other hand, that discretion is limited by the obligation to ensure that the penalties are effective, proportionate and dissuasive. In practice, the interpretation of the latter obligation may be problematic. Second, the function of monitoring the application of EU sanctions and that of ensuring the effective enforcement of the sanctions are still in the hands of the Member States. Third, under the current EU system, also the competence to grant exemptions is delegated to the national authorities of Member States. EU legislative or programmatic acts do not provide in that respect detailed criteria but only very general guidelines.

[73] See Leenders, op. cit., p. 7.

- The delegation to the national authorities of 28 Member States of crucial functions concerning the implementation of EU sanctions (penalty determination; enforcement; granting of exemptions) has given rise to concerns about possible inconsistencies in the application of the measures, both among economic and financial operators and in the legal literature. Proposals have been put forward in order to overcome the present legal framework. On the one hand, one could envisage the adoption by EU institutions of common rules on penalties for violations of the restrictive measures (under the new competences introduced by the Lisbon Treaty). On the other hand, the establishment of a EU centralized agency, responsible for issuing decisions on exemptions from sanctions, has been advocated. These proposals deserve further investigation, from a legal but also from a political viewpoint.

- Under EU law, acts adopting sanctions may be challenged before the Court of Justice of the EU (art. 263 TFEU) and an extensive litigation has been triggered by targeted individuals and entities. As a consequence, the EU (and, indirectly, the UN) sanctions system have been subject to considerable pressure. In particular, EU courts now exert substantive judicial review of the merits of each restrictive measure, even if implementing a UNSC decision, annulling sanctions not supported by adequate evidence. This case-law raises thorny issues, such as the limits of the judicial review of political decisions or the possibility for a court of law to use classified evidence. At the time of writing this paper, EU institutions are considering important reforms in the procedure of the General Court addressing these problems. The recent EU case-law on sanctions has also been criticized by US officials, for risking to undermine the effectiveness of international sanctions (with particular respect to Iranian sanctions)[74]. On the other hand, the EU case-law has had a crucial role in favoring important reforms at the UN level as concerns the listing and delisting procedures.

[74] James Kanter, "Iran Ruling In Europe Draws Anger From U.S", *The New York Times*, September 6, 2013, http://www.nytimes.com/2013/09/07/world/europe/european-union-wrongly-imposed-sanctions-on-iranian-companies-court-rules.html?_r=0.

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(4)

INTERNATIONAL CONFERENCE ON

COERCIVE DIPLOMACY, SANCTIONS AND INTERNATIONAL LAW

ROME, 13 FEBRUARY 2015

Palazzo Rondinini
Via del Corso, 518

Draft paper on

Individual States, sanctions and the extraterritorial effects of national legislation

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Amongst the diverse issues that are to be discussed during this conference through the sanctions prism, the question of unilateral action by single sovereign States is perhaps the most ancient while the least circumscribed by an eminent and prolific doctrinal debate[1].

Limits to individual States action. Needless to recall, first, that coercive unilateral action has been significantly limited with the entry into force of the Charter of the United Nations, which article 2§4 formally prohibits the use of force in international relations. Hence, the disappearance of the notion of reprisal, which was until then considered a legitimate, though military, unilateral reaction to the violation of its legal interests by another State[2]. It stemmed from the above that while the use of force in international relations is the monopoly of the United Nations Security Council, which has "*the primary responsibility*" for the maintenance of international peace and security[3], States retained discretion on the use of pacific coercion measures in their relations to other subjects of international law. There is no denying the fact, however, that this freedom of unilateral action must be exercised in the limits imposed by both general and special international law[4].

Material scope of unilateral coercion. The material scope of unilateral pacific sanctions is not intrinsically different from the scope of collective sanctions. Non-military sanctions essentially centre on economic measures[5]. First, commercial measures can include restrictions to the importations from the targeted State, either in the form of contingents or of increasing customs duty. Exportations may also be restricted in different ways. Generally speaking, key products can be targeted, such as high technology goods or even agricultural goods when the targeted State

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[1] Among others, D. Alland, *Justice privée et ordre juridique international*, 1994, Paris, Pedone; L.-A. Sicilianos, For a most recent example, Y. Kerbrat lectures at the IHEI Geneva, on unilateral sanctions.
On Extraterritoriality as such: M. Akehurst, "Jurisdiction in international law", *British yearbook of international law*, 1972-1973, pp. 145-257; G. Burdeau, "Le gel d'avoirs étrangers", *Journal du droit international*, 1997, pp. 5-57; Cahiers du CEDIN, *L'application extraterritoriale du droit économique*, Paris Montchrestien, 1987, 254 p.; F.-A. Mann, "The doctrine of jurisdiction in international law", *RCADI*, 1964 t. I, pp. 9-162; K. Messen (ed.), Extraterritorial jurisdictiona in theory and practice, 1996, The Hague, Kluwer Law International, xvii-262 p; P. J. Slot and E. Grabandt, "Extraterritoriality and jurisdiction", *Common market law review*, 1986, pp. 545-565; B. Stern, "Quelques observations sur les règles internationales relatives à l'application extraterritoriale du droit", *Annuaire français de droit international*, 1986, pp. 7-52;

[2] H. Kelsen, "Théorie générale du droit international public, problèmes choisis", *RCADI*, 1932, t. 42-IV, p. 124; Resolution of the Institute of International Law, Paris session 1934, "Reprisals regime in times of peace"

[3] Article 24 of the UN Charter

[4] Permanent Court of International Justice, *The case of the S.S. "Lotus"*, 7th September 1927.

[5] Non economic measures can for instance include the suspension of negotiations or even sports embargoes, which will not be developed here.

relies on importation to support its domestic needs[6]. In this perspective, embargoes, understood as the interdiction to export towards one or more States, can be one of the most powerful coercive tools when the prohibited product is both rare and difficult to substitute. Commercial measures can also take the form of the suppression of a specific advantage that had been granted by the sender to the target, as for instance the cessation of specific commercial conditions granted either unilaterally or through a bilateral treaty including conditionality clauses. Most of these commercial measures directly raise the question of their conformity to international law rules binding the sender and the target. Second, financial measures have become one of the most widespread coercive tools within the sanctions range, especially for their strong impact on the target's economy. The freeze of funds of a targeted State may be accompanied with the freeze of funds of the individuals representing the State, as well as the entities supporting the regime against which the measures are pointed. On the same scale, States may decide to suspend financial assistance granted unilaterally to the target, and/or to oppose to the granting of new assistance to the target within international financial institutions. This last option certainly supposes that the sender is sufficiently important on the international scene to weigh on the decision of the organisation. Third, other measures may target international transportation and communications, affecting for instance air traffic. Similarly, individual sanctions may include visa bans and travel restrictions to the individuals that are associated with the target of the measures.

Sanctions and unilateralism. It stems from the above that the term of sanction, although generally used to refer to any pacific measure that is adopted either collectively or unilaterally by States to constrain their target to change behaviour, is not, legally speaking, the most accurate term to qualify unilateral measures. Indeed, the term sanction assumes the existence of a prior violation of the law. In a broad sense, a sanction can then refer to any legal or material process aimed at ensuring the efficiency of the law[7]. Some have convincingly argued that the term of sanction should only be used to refer to the sanctions that international organisations impose on their Members for breaches of their constitutive status[8]. In this perspective, it has been argued that the "measures" the UNSC adopts under article 39 of the Charter are sanctions of a breach of the Charter, constituted by an aggression, a threat to or a breach of peace[9]. By contrast, this debate inevitably sheds light on the intrinsically different legal nature of unilateral measures.

[6] This last example clearly raises an issue of the balance to be struck between lawful unilateral coercive action by States and the respect of human rights as well as humanitarian law. This issue will certainly be touched upon in both Monica Lugato and Daniel Fitz' texts.

[7] G. Scelle, « Le rôle des sanctions », *in* A. Mestre, L. Le Fur et G. Scelle (eds.), *Les sanctions internationales, trois opinions de juristes*, 1936, Paris, Pedone, p. 41

[8] W. Friedman, « General course in Public international law », *RCADI*, 1969, t.127-II, p. 116

[9] J. Combacau *Contra* M. Forteau

They are indeed adopted in the context of what remains of a non-institutionalised international society, where sovereign States have the power to pursue by their own means, and in the limit of what international law admits, the respect of their own legal interests – as long as the legal different has not been put before a Court[10]. In other words, unilateral sanctions may be considered an extra-judiciary tool, which is linked to the implementation of law, but not with dispute settlement mechanisms. The unilateral sanction aims to exhaust the disagreement between the sender and the target, by obtaining the rallying of the alleged responsible target to the alleged prejudiced sender[11]. This reminiscence of private justice[12] clearly questions the *legitimacy* of unilateral measures, which purpose and justification are qualified by the sender itself, without any control of whether the measures are *effectively* reacting to a breach of law – and not pursuing different political or economic goals. Unilateral measures therefore essentially belong to the realm of inter-subjectivity.

Extraterritoriality and international law. This legal uncertainty of the unilateral measures that have not (yet) been submitted to judicial control is all the more complex to contain as senders generally seek the multilateralisation of their unilateral sanctions. Indeed, it is well known that economic sanctions efficiency is conditioned by their wide implementation. In this perspective, the sender will seek the voluntary participation of third States or organisations, to implement measures that are similar or support its unilateral sanctions. This is the case for instance when the sender justifies its unilateral measures arguing that the target has violated an *erga omnes* obligation, that is due the international community as a whole[13]. In other circumstances, the sender will seek to exert pressure on third States to constrain them to follow their unilateral sanctions threads. This is for instance the case of secondary boycotts, by which the sender prohibits to its nationals to conduct commercial relations with the nationals of the target. This technique may be further elaborated into a tertiary boycott, by prohibiting commercial relations with operators that are affected by a secondary boycott. Extraterritoriality intervenes at a third stage: the sender seeks to impose an obligation to third States and their nationals to abide by the

[10] When the unilateral measures do not violate international law, they amount to *retorsion*, this is, unfriendly but lawful measures taken by a State towards another subject of international law (A/56/10, Supplement n°10, Report of the International Law Commission, 53th session, p. 350). When the unilateral measures are contrary to international law ruling the relations of the sender and the target, for instance the General Agreement on Tariffs and Trade, the sender will engage its international responsibility. It will nevertheless be excused if it is demonstrated that the unilateral measures qualify as *countermeasures*, as circumstances precluding wrongfulness (A/CN.4/SER.A/2001/Add.1(Part 2), International Law Commission, Article 22 of the Draft articles on State responsibility for internationally wrongful acts. See also International Court of Justice, *Gabcikovo-Nagymaros Project* (Hungary vs. Slovakia), 25th September 1997, §82.)

[11] S. Szurek, « Le recours aux sanctions », *in* H. Gherari and S. Szurek (eds.), *Sanctions unilatérales, mondialisation du commerce et ordre juridique international*, 1998, Paris, Montchrestien, p. 25.

[12] A. Denis, *op.cit.*

[13] International Court of Justice, *Barcelona Traction Light and Power Company Ltd* (Belgium vs. Spain), 5th February 1970.

unilateral sanctions it has decided. In other words, extraterritoriality corresponds to situations where a State seeks to apprehend through its domestic legal order, diverse elements that are situated outside its territory, that is, to exert directly and extraterritorially its normative power[14].

Extraterritoriality has arguably raised different issues and received diverse solutions according to the successive evolutions of State practice and international law, which will be examined in three phases: the solutions proposed under general international law and the theory of jurisdiction (I), the solutions that have stemmed from international economic law and informal settlements (II), and finally more recent evolutions of international law and practice seemingly less controversial on extraterritoriality (III).

I – Extraterritoriality and the theory of jurisdiction: classical solutions of public and private international law

1. The distribution of competences by international law

- *Jurisdiction to prescribe and jurisdiction to enforce*

The jurisdiction to prescribe refers to the power of a State to edict general rules through its legislative, administrative or judicial organs. The jurisdiction to enforce refers to the power of a State to implement a general rule or an individual decision through material acts of execution, eventually including the use of coercion. It is well known that the jurisdiction to enforce cannot be exercised outside the territory of the State without the permission of the third State on the territory of which the implementation is to be executed. As the Permanent Court of International Justice stated in the Lotus case:

"*Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.*"[15]

- *The territorial principle*

Far from the permissive interpretation that can be proposed of the *Lotus* solution, international courts have reaffirmed the precedence of the territorial principle, either by consecrating the "*effectiveness*" of the nationality to be opposed to third States[16], or in refusing to recognise the

[14] B. Stern, « L'extraterritorialité revisitée », *Annuaire français de droit international,* 1992, p. 244
[15] Permanent Court of International Justice, *The case of the S.S. "Lotus"*, 7th September 1927, p. 19
[16] International Court of Justice, *Nottebohm*, 6th April 1955, p. 23

"*control theory*" which would have allowed to diplomatic protection of a company according to the nationality of its shareholders[17].

This being said, it is interesting to note that States adopting extraterritorial legislation[18] are constant in their aim to ground this legislation into recognised competences under international law.

2. Extensive use of competence grounds

- *Generally invoked grounds of competence* (to be developed)
    - Territoriality
    - Nationality/personality
    - Protection
    - Universality

- *Territoriality and the effects theory*

States are competent to exert normative jurisdiction over persons and goods that are present on their territories. The "effects theory" as expressed in the *ALCOA* case is the most significant extension of this normative jurisdiction:

"*It is settled law [...] that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the State reprehends; and these liabilities other States will ordinarily recognise*"[19]

While the effects theory has essentially been developed in the field of competition law, it has early been examined by the European Commission as to whether it could generate its responsibility under U.S. Law, and especially as regarded the restrictions to oil and gas controls imposed to the USSR in 1982[20].

- *The extension of the personality ground through the control theory*

The traditional "incorporation criteria" by which a company has the nationality of the State in which it is incorporated has been further extended by the U.S. through the "control theory", in order to define the notion of "*persons under U.S. jurisdiction*" as intended in the Trade with

[17] International Court of Justice, *Barcelona Traction, Light and Power Company*, 5th February 1970, p. 38

[18] The United-States, but also the United-Kingdom – See. V.A.W. Lowe, « Blocking extraterritorial jurisdiction : the British protection of trading interests Act, 1980, *American Journal of International Law*, 1980, pp. 257-282 ; R. Higgings, « The legal bases of jurisdiction », *in* C.-J. Olmstead (ed.), *op.cit.*, pp. 3-14.

[19] Circuit Court of Appeals, 2nd Cir, *U.S. v. Aluminium C° of America*, 12th March 1945, 148 F. 2d 416.

[20] Department of Commerce, International Trade Administration, 15 CFR Parts 376, 379, 385, Amendment of oil and gas controls to the USSR ; and the Commentaries of the European Community on the Amendments of June 1982 to the US legislation on exportations control (11th August 1982) ; see L.A. Sicilianos, op.cit., p. 89.

Enemy Act[21], which was applicable in times of peace until 1977: any company detained or controlled by a national of the United States, a person effectively on the US territory or to a company constituted under U.S. law was subjected to the legislative dispositions at stake, therefore creating extraterritorial effects.

The case of sanctions against Libya adopted in 1986 can be distinguished here in that it provided for both commercial restrictions and the freeze of assets of the government[22]. While the Executive orders at stake use the notion of "U.S. persons", the subsequent regulations adopted by the Treasury department in July 1986 amounted to the traditional definition of the person "detained or controlled", as presented above.

This attempt to give extraterritorial effect to U.S. legislation through the personality principle and the "control theory" has not succeeded

3. General rejection of the "control theory"

- *Non-recognition of the extraterritorial effects of U.S. law by domestic Courts of third States*

As a reaction to the extraterritorial attempt to regulate their behaviour, the control criteria has generally not been given effect by the domestic Courts of third States. For instance, in the *Société Fruehauf-France c. Massardy* case, the Paris Appelate Court has considered that the French interests of the company should prevail over the "personal interests" of its majority American shareholders, who were prohibited by the US Treasury to execute a contract concluded with the Popular Republic of China[23]. Similarly, in the context of the Euro-Siberian Pipeline case, the Hague district Court applied Dutch law to the contract concluded by a Dutch company that was indirectly controlled by an American company, without imposing the restrictions that were foreseen in U.S. law[24].

- *Political denunciation of wrongfulness*

Besides the non-recognition of the extraterritorial effects of legislation based on the control theory, the Euro-Siberian pipeline case has generated contestations on the lawfulness of U.S. laws according to public international law. For instance, the UK considered that:

"*The embargo in the terms in which it has been imposed is an attempt to interfere with existing contracts and is an unacceptable extension of American extraterritorial jurisdiction in a way which is repugnant in international law*"[25].

[21] Trade with the Ennemy Act, 1917, Publ L. 65-91, 40 Stat. 411, amended in 1941
[22] Executive order 12543, 7th January 1986 ; Executive order 12544, 8th January 1986
[23] Cour d'Appel de Paris, 22 mai 1965, JCP, 1965, II. 14274 bis.
[24] *European Oil Company S.A. v. Sensor Nederland B.V.*, Hague district Court 17th September 1982.
[25] Lord Cockfield, UK Secretary of State for Trade, 2 august 1983, *International Legal Materials*, 1982, p. 851.

Similarly, the memorandum addressed by the European Economic Community to the United States referred to the decision of the International Court of Justice in the *Barcelona Traction* Case, considering that the extraterritorial effects of the U.S. measures were violating both the territoriality and the nationality principles, and were, therefore, wrongful in public international law[26].

- *Resolution through counter-intuitive tendency to conciliation*

Following the diverse reactions described above, the President and Congress of the United States decided an attenuation of the 1986 measures targeting Libya and South Africa. On the same line, the American Law Institute considered in its third Restatement of the Foreign Relations Law of the United States that "*a State may not ordinarily regulate activities of corporations organized under the laws of a foreign State on the basis that they are owned or controlled by nationals of the regulating State*", reducing extraterritorial effects of the law to cases of "major national interest"[27].

II – Extraterritoriality vs. Blocking laws: Informal settlements within international economic law (to be developed)

1. Helms Burton and D'Amato Kennedy Acts – case study

- Context of adoption
- Material scope
- Extraterritorial aspect of the legislation

2. The legislative reactions

- Blocking laws and regulations adopted amongst others by the EC
- Material scope of the provisions

3. The judicial reactions in front of the WTO dispute settlement mechanism

- General Agreement on Tariff and Trade violations
- General Agreement on Services violations
- Suppression of an advantage argument
- Existence of another situation argument

[26] Commentaries of the European Community on the Amendments of June 1982 to the US legislation on exportations control (11th August 1982), *op. cit.*
[27] Third restatement of the law, op.cit., § 414(2), b)i), p. 270.

4. The informal U.S.-E.C. settlement of the dispute

- No decision by the GATT dispute settlement mechanism
- Freeze of OFAC sanctions for the violations of U.S. law with extraterritorial effects

III – Extraterritoriality reloaded: towards *de facto* un-controversy?

1. The growing institutional interest to regulate and limit extraterritorial effects of legislation

- *The project of resolution of the Institute of International law, 2001*

The Institute of International Law examined twice a project of resolution on "The limits set by International Law to the Competence of States Over Persons under their Jurisdiction" in 2001[28]. The project reaffirmed the principle of territoriality, and focuses on extraterritoriality on its third point:

"*III. 1. The principles of sovereignty and of non-intervention protect a State against any interference of other States in the choice of its economic and social system. However, these principles cannot allow a State to violate internationally protected fundamental rights.* [...] *3. States should abstain from pursuing their own policy through means that may infringe upon the jurisdiction of other States in a manner contrary to international law. In the case of concurrent jurisdiction between two or more States, neither of those States shall abuse its power so as to further its interests to the detriment of those of other States.*"

In its revised version, the draft resolution is enhanced with a 4th paragraph to point III: "*4. The notion of duress cannot be limited to material acts of physical coercion performed upon a person or against property. The criterion of localisation which is correctly applicable to such acts, cannot be extended to cover other forms of coercion, such as threats of the use of force, deprivation of property, or* ***economic sanctions. The mere fact of uttering such threats, whose effects can only be felt on the territory of the State whose authorities voiced them, tends to exert a form of coercion on the behaviour of their targets, regardless of location, a pressure which even if indirect, remains nonetheless real.***" [29]

The draft resolution, which could not gather consensus, was in the end not adopted.

- *The Study by the Secretariat of the International Law Commission, 2006*

More recently, the United Nations General Assembly was presented the report of the International Law Commission Secretariat on "Extraterritorial jurisdiction"[30]. It recognises that extraterritoriality is a growing issue in international law, due to the globalisation of world economy, the increasing number of multinational companies and the raise of criminal activities cross-boarders, amongst others. It also recognises that extraterritoriality is now being

[28] *Yearbook of the Institute of International Law*, 2000-2001, pp. 88-117
[29] Emphasis is ours.
[30] A/61/10(2006), Annex E – Extraterritorial jurisdiction, *Report of the ICL to the UNGA*

uncontroversialy used in some fields of the law, such as competition law where the "theory of effects" was created. Nonetheless, extraterritoriality remains both controversial and key in at least two branches of international law: criminal law and economic law. It is in this perspective that the International Law Commission has concluded to the interest of the topic, and to the opportunity of drafting a comprehensive instrument. To date however, the topic has not been put on the agenda of the Commission – probably because of the lack of consensus on the issue.

2. The end of the Office of Foreign Assets Control truce: sanctioning extraterritoriality as regards financial sanctions violations

- *Civil cases (at least 16)*
  - Range: from 12500 $ settlement for Transpacific National Bank, to $152 million for Deutsche Boerse AG's Clearstream Banking SA unit
  - in 2011, JP Morgan $88.3 million to settle allegations of violations of sanctions against Cuba, Iran and Sudan
  - in 2011, Société générale, $111,000 to settle allegations of violations of sanctions against Iran
- *Criminal charges (at least 6)*
  - In 2012 HSBC $1,9 million settlement (counter-narcotic sanctions)
  - 2013 BP $4 million settlement of criminal allegations
  - 2014 BNP $963 million settlement of criminal allegations (moving funds for clients in violation of sanctions against Sudan, Iran and Cuba) : qualified by the Treasury "largest ever settlement"

Concluding remarks

Extraterritoriality, balance of powers and remaining issues of international legality. A series of questions stems from the above considerations on the diverse phases of the way international law rules unilateral sanctions with extraterritorial effects:

- It is important to note that most eminent codification organs have seized the issue of extraterritoriality at the beginning of the years 2000 and that no clear evolution of international law explains the raise of judicial sanctions of violations of unilateral sanctions with extraterritorial effect
- Unilateral sanctions with extraterritorial effect remain contrary to international law amongst which the principle of non intervention in the internal affairs of third States

- The alleged wrongfulness of the extraterritorial effects of unilateral sanctions remain to be raised by the States of which the private operators that are sanctioned are nationals
- Denunciation of wrongful extraterritorial effects may still take diverse forms, most of which have been discussed above:
    - Diplomatic denunciations
    - Non-recognition of foreign legislation with extraterritorial effect
    - Non-recognition of foreign orders or judicial decisions implementing foreign legislation with extraterritorial effects
    - Adoption of blocking statutes
    - Adoption of claw-back statures
    - Adoption of judiciary orders prohibiting nationals from executing foreign legislation with extraterritorial effects
    - Introduction of international litigations
- It stems from the above that although extraterritorial effects of unilateral sanctions remain highly controversial in international law and contrary to some of its fundamental principles, this issue still seems to be left to the balance of power between the leading economies of the world on the one hand, and to the operation of private international law rules to contain their effects on the other hand.

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IAI
Istituto Affari Internazionali

INTERNATIONAL CONFERENCE ON

COERCIVE DIPLOMACY, SANCTIONS AND INTERNATIONAL LAW

ROME, 13 FEBRUARY 2015

Palazzo Rondinini
Via del Corso, 518

Draft paper on

Sanctions against Non-State Actors

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DRAFT - NOT TO BE QUOTED

Sanctions against Non-State Actors

Nigel D. White*

1. Introduction

The aims of this chapter are: first to contextualise the imposition of sanctions against non-state actors (NSAs) – to explain the trend towards them and their goals and purposes. It considers the notion of NSAs (terrorists, rebels ...) drawing a line between them and state actors, which is not as straightforward as might appear (shown, for example, by the case of individual politicians or governmental employees). The next step is to undertake a doctrinal analysis of such measures, first in terms of their legal nature (whether they are imposed to punish illegal acts or to tackle threats to the peace, and the values they are meant to protect – security, human rights, democracy). Secondly, the chapter considers their legal bases (the UN Charter, TEU, collective countermeasures, non-forcible measures, custom ...). Thirdly, the legal obligations imposed by them are analysed (whether they bind members, all states, NSAs themselves), and their legal effects (whether they criminalise, punish directly or indirectly, override existing obligations); finally to identify any legal limitations upon them (from general principles of international law such as non-intervention to specific legal regimes such as international human rights law). The chapter also considers issues of implementation, oversight and enforcement of sanctions; and accountability for misapplied or overly injurious sanctions. The legal analysis is based on relevant constitutional, international and regional laws, as well as the practice of the various organizations (primarily the UN and EU) and chosen states (principally the US). Several case studies conclude the chapter and conclusions are drawn, particularly on how that practice has either developed the legal framework governing sanctions against NSAs or has breached it.

2. The Trend Towards Sanctions against NSAs

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The post-Cold War period has seen a sharp move towards 'smart' sanctions against those individuals or entities within states or outside states 'responsible' for breaches of international law or threats to international peace and security. This comports with a move to supplement, but not replace, state responsibility with individual responsibility for breaches of international law. The main motivation has been to ensure that innocent citizens and civilians are not punished for the wrongdoings of their (often unelected) leaders. This is part of the move towards protecting human security alongside, but not instead of, state security and generally towards the protection of civilians. This trend was identified by the UN's High Level Panel in its 2004 report 'A More Secure World':

> As a result of growing concern over the humanitarian impact of comprehensive sanctions, the Security Council stopped imposing them after the cases of Iraq, former Yugoslavia and Haiti, and turned exclusively to the use of financial, diplomatic, arms, aviation, travel and commodity sanctions, targeting the belligerents and policy makers most directly responsible for reprehensible policies.[1]

While these new-style targeted sanctions have raised their own human rights concerns, in terms of due process, rights to property, privacy and freedom of movement, they are quantitatively less than the human rights impact of punitive sanctions imposed against a state and, therefore, against the population of a state, as shown by the massive suffering caused to the people of Iraq by the collective comprehensive sanctions imposed from 1991-2003;[2] and that caused to the people of Cuba by unilateral sanctions imposed by the US against Cuba from 1960 onwards.[3] To quote again from the High Level Panel Report of 2004:

> Targeted sanctions (financial, travel, aviation or arms embargoes) are useful for putting pressure on leaders and elites with minimal humanitarian consequences, provide a less costly alternative to other options and can be tailored to specific circumstances. By isolating violators of international standards and laws, even modest sanctions measures (including sports embargoes) can serve an important symbolic purpose. The threat of sanctions can be a powerful means of deterrence and prevention.[4]

The High Level Panel made it clear that the move to smart sanctions had to be combined with better monitoring, implementation and enforcement to make them more effective.[5] There can be little doubt that smart sanctions imposed against Saddam Hussein's or Fidel Castro's regime would have been better for the populations of Iraq and Cuba but the question remains as to whether such measures imposed against members of a regime or government are going to affect sufficient change in behaviour as to be an adequate replacements or alternatives to general sanctions.

Thus, the move towards smart or targeted sanctions is, perhaps too readily, explained as a development of more precise, more surgical measures against states, or more accurately state leaders but also against 'elites' within states. In a sense, such measures may be best considered as measures against state actors; given that the leaders of states are paradigmatic state agents;[6] and so they are beyond the scope of this chapter, but this really depends upon the scope of the measures: are they confined to paradigmatic state agents or do they extend more broadly to cover influential

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[1] Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, 'A more secure world: our shared responsibility' (UN, 2004) para 80.
[2] J. Gordon, *Invisible War: The United States and the Iraq Sanctions* (Harvard University Press, 2010).
[3] N.D. White, *The Cuban Embargo Under International Law: El Bloqueo* (Routledge, 2015) 99-124.
[4] High Level Panel (2004) para 179.
[5] High-Level Panel (2004) para 180. See also Report of the Informal Working Group of the Security Council on General Issues of Sanctions (UN Doc S/2006/997).
[6] Articles 4 and 5, Articles on the Responsibility of States for Internationally Wrongful Acts 2001.

and powerful people within a state's elite. In this instance, sanctions are a mixture of measures against state actors and NSA's. This type of 'mixed' regime requires further examination, for example those measures imposed against Libya in 2011, when the resolutions contained non-forcible measures against individuals.[7] The confusion over whether the term NSAs covers regime elites is largely due to the lack of legal definition of NSA which is, in itself, something of an 'empty term', comprising as it does 'actors which apparently only have in common that they are not the state, and not governmental'.[8]

Indeed, with exceptions like Haiti in the 1990s,[9] and Libya in 2011, the UN (as opposed to other state-based actors) has often largely failed to adopt smart sanctions against state leaders (witnessed by the inconclusive debates on Zimbabwe and Syria),[10] although historically it has engaged in limited sanctions against states in the form of arms embargoes, starting with that imposed against South Africa in 1977.[11] The UN has concentrated its targeted sanctions against non-state actors such as members of terrorist and rebel groups. Indeed, it has been argued that for the UN the concept of NSAs is confined to such groups.[12] Thus, the story of the development of smart sanctions isn't simply one of a response to humanitarian concerns caused by general sanctions against states, since the UN had established practice of imposing such sanctions against non-state actors, for example, with such measures, for example against UNITA in 1993, before full evidence of the damage caused by comprehensive sanctions against Iraq was known.

Subject to the point made above (re smart sanctions taken against 'elites') it is probably important to keep the analysis of smart sanctions against state actors and those taken against NSAs separate as they raise different legal and political issues. Smart sanctions against leaders of states are successors to those imposed generally against states; they are taken within the modern inter-state paradigm, while sanctions against NSAs are part of the post-Cold War move towards enforcing individual responsibility within a post-modern paradigm where sovereignty is variable and international relations are not solely structured around the state.

The realisation that NSAs could represent a real (existential) threat to the established state actors, culminating in coercive sanctions against them, was something of a slow process. In fact, the early post-Cold War instances of sanctions against NSAs were imposed against those holding power who had not attained full status as state actors; measures in the 1990s were imposed against de facto governments (e.g. Taliban) or rebel groups with de facto belligerent status (e.g. UNITA). Even

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[7] UNSC Res 1970 (2011), explicitly invoked Article 41 of the UN Charter and imposed a travel on listed individuals (members of the regime, and Gaddafi's family), an assets freeze on individuals under a separate list (a shorter list of members of Gaddafi's family).

[8] A. Peters, L. Koechlin, G.F. Zinkernagel, 'Non-State Actors as Standard Setters: Framing an Issue in an Interdisciplinary Fashion', in A. Peters, L. Koechlin, T. Forster, G.F. Zinkernagerl (eds), *Non-State Actors as Standard Setters* (Cambridge University Press, 2009) 14.

[9] UNSC Res 841, 16 June 1993. Note, however, that these were imposed against the de facto authorities in Haiti i.e. a military regime that had overthrown the democratically elected (under UN supervision) government of Jean-Bertrand Aristide – J.M. Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge University Press, 2007) 326. See also targeted sanctions imposed against the military junta that had seized power from the democratically elected authorities – UNSC Res 1132, 8 October 1997.

[10] In July 2008, Russia and China vetoed a draft resolution (UN Doc S/2008/447) that would have imposed and arms embargo and targeted sanctions (travel ban and assets freeze) against President Mugabe and 13 top military and government officials in Zimbabwe following a flawed and violent elections process UN Doc S/PV 5933, 11 July 2008). In October 2011 Russia and China vetoed a draft resolution (UN Doc S/2011/612) that threatened measures under Article 41 against the Syrian regime (UN S/PV 6627, 4 October 2011).

[11] UNSC Res 418, 4 November 1977.

[12] P. Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in P. Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press, 2005) 17.

historically the first UN sanctions regime was imposed against the illegitimate white racist regime in S. Rhodesia in the late 1960s, a de facto government, though the measure imposed were not targeted and had a wider impact on the population. Thus, the first 'generation' of smart sanctions against non-state actors were pragmatically driven measures against those in control of territories even although they had not achieved recognition as legitimate leaders of states. A clear departure in the UN from measures analogous to sanctions against states was only taken with the extension of the Taliban sanctions regime imposed in 1999 to Al Qaida in 2000 and by so doing removing the link between Al Qaida and the territory of Afghanistan,[13] and then in 2011 the complete separation of the two. A contrast can be made with measures taken by the EU and the US that, because of the narrower consensus necessary to take decisions to impose sanctions and broader agreement on the values to be protected or promoted, shows a faster and deeper trend towards sanctions directed against regime elites,[14] although lesser development has occurred as regards NSAs such as terrorist groups.[15]

3. The Nature and Purposes of Sanctions Against NSAs

The legal nature of sanctions, whether imposed against state actors or NSAs, has not been fully agreed upon,[16] and so it is important to try and do this while considering the nature and purpose of sanctions specifically taken against NSAs. The problem for international lawyers is that analogies with domestic legal orders can be misleading but, in general terms, sanctions are central to any legal system. Kelsen takes this truism and applies it to the international legal order, arguing that sanctions are an inherent component of any legal order including one providing for collective security. Kelsen wrote that 'a social order guaranteeing collective security is by its very nature a legal order, and a legal order is a system of norms providing for sanctions'.[17] Sanctions, for Kelsen, are 'coercive reactions against an actual violation of the law', or alternatively, against suspected or expected violations.[18] This does allow for some anticipatory sanctions but the trigger remains an actual or potential violation of the law; but it is clear that in the international order, especially in its collective security component, 'sanctions' are not confined to actual or potential violations of international law, rather the primary triggers are actual or threatened ruptures of the peace. Kelsen accepts that legal systems recognise the legitimacy of coercive measures that have no relation to actual or potential violations of the law but remain necessary to maintain or restore peace and security, the examples given show that this is the exception rather than the rule. Kelsen's examples include the forcible destruction of buildings to prevent the spread of fire, or the forcible internment of people

[13] Farrall, above n.9 at 131.

[14] See, for example, EU targeted sanctions against regime individuals in Zimbabwe (Council Decision 2011/101/CFSP, OJ L 42, 16 February 2011, p.6) and Syria (Council Decision 2013/255/CFSP OJ L 147, 1 June 2013, p.14). Targeted sanctions were imposed against certain Russian individuals following intervention in Ukraine (Council Decision 2014/145/CFSP, OJ L 78, 17 March 2014, p. 16).

[15] Measures against Al Qaida in Common Position 2002/402/CFSP, OJ L 139, 29 May 2002, p.4; measures against individuals and entities associated with Al Qaida in Council Regulation (EC) No 881/2000, OJ L 139, 29 May 2002, p.9. See also Common Position 2001/931/CFSP OJ L 344, 28 December 2001, p.93; Council Regulation (EC) No 2580/2001, OJ L 344, 28 December 2001, freezing funds and economic resources of certain persons, groups and entities with a view to combating terrorism.

[16] F. Dopagne, 'Sanctions and Countermeasures by International Organizations', in R. Collins and N.D. White (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge, 2011) 180.

[17] H. Kelsen, *Collective Security under International Law* (Washington DC: Naval War College, 1957) 101. For alternative positivist views see H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon, 1961) 91-5; J.L. Brierly, 'Sanctions', (1932) 17 *Transactions of the Grotius Society* 68.

[18] Kelsen, above n.17 at 102.

suffering infectious diseases in order to prevent an epidemic from spreading.[19] Arguably in the international order these sorts of exceptions are the norm, so that sanctions are imposed to address threats to the peace, whether or not those threats entails actual or possible violations of the law.[20] However, the trend towards sanctions against NSAs might be indicative of a move towards punishment being the primary aim, given that this development has occurred against the background of a move towards addressing individual criminal responsibility. The case studies at the end of this chapter include a consideration of this matter. Given that the overriding purpose of targeted sanctions against NSAs, whether to punish or prevent, is to change the behaviour of individuals either directly (to stop them for example from committing terrorist acts) or indirectly (to influence states or NSAs to stop them supporting the acts or threats that are of concern), it is important to discern whether it is behaviour that constitutes a threat or the behaviour that constitutes the crime that it the target. The intended deterrent aspect of sanctions as punishment is to prevent future breaches, whereas the deterrent effects of sanctions to tackle threats to the peace is the immediate end of the behaviour that comprises the threat. Of course the dichotomy of threat and crime is not always easy to maintain and often criminal behaviour, particularly at the international level, can be a threat to international peace. Nonetheless, there is stark difference between the nature and purpose of sanctions imposed against NSAs (for example members of a rebel group) aimed at bringing them to the negotiating table, and sanctions imposed on them as punishment for crimes they might have committed during their insurgency. Furthermore, analysis might reveal that it is better to separate out different forms of non-forcible measures and confine 'sanctions' to a narrow response to breaches of international law. Arguably such sanctions should be more clearly grounded within the legal order than sanctions imposed to tackle an emergency situations arising from threats to peace and security. There may be the equivalent of 'non-derogable' rights and duties, to borrow an analogy with human rights law,[21] in collective security responses to threats, but the legal framework is pared down in comparison to normal conditions.

This is not an argument for saying that there is no international legal order, but it is suggesting that the order is weak and so there is greater discretion within it to deal with what might be called the pre-legal *conditio sine qua non* – that there is sufficient peace and security to preserve, or upon which to build, a legal order; what Hart might call the minimum content of natural law – self-evident conditions and norms of public order.[22] Just as an infectious disease might temporarily justify that exercise of discretionary executive power at the national level, at the international level the equivalent of infectious diseases or rampant fires in the form of threats to international peace caused by civil wars, refugee flows, natural disasters, famine, climate change, arms proliferation, and yes infectious diseases, none of which are breaches of international law per se, are unfortunately too prevalent to be dealt with as the exception within the international legal order.

4. The Legal Basis of Sanctions Against NSAs

Further arguments for developing a more sophisticated legal typology of sanctions can be made when considering the variety of legal bases for sanctions against NSAs, ranging from measures taken under the framework of collective (international and regional) security law, to measures taken as a form of collective or unilateral countermeasures by states against influential actors within states, to forms of collective, multilateral and unilateral (criminal) punishment. This is encapsulated in the

[19] Ibid.

[20] But see V. Gowlland-Debbas (ed), *United Nations Sanctions and International Law* (The Hague: Kluwer, 2001) 7-9.

[21] Article 4, ICCPR 1966.

[22] Hart, above n.17 at 188. N. Tsagourias and N.D. White, *Collective Security: Theory, Law and Practice* (Cambridge University Press, 2013) 221.

debate about whether targeted sanctions are administrative or preventive measures or forms of criminal punishment, discussed in the jurisprudence and literature.[23]

A preliminary consideration of sanctions against NSAs would suggest that UNSC measures, at least, are certainly focused on the threat to the peace represented by the purposes, actions and activities of the targeted NSAs, rather than the punishment of individuals for actual or potential breaches of international law; while EU and other regional sanctions regimes tend to promote wider values other than peace and security, such as democracy and human rights. This proposition remains to be tested against practice. Unilateral sanctions by powerful states are imposed for a variety of reasons and under a range of legal justifications, from promoting human rights and democracy, to punishing individuals for international crimes and acts of terrorism. Again this proposition has to be tested against practice.

Unilateral sanctions, for example by the US against Cuba, are often at least in part responses to breaches of international law; the initial expropriations of UN properties and assets by Cuba following the revolution of 1959, the interventions by Cuba in Latin America and Africa in the 1960s and 1970s, with a focus from the 1980s on the denial of democracy and civil/political rights in Cuba; but they are also clearly ideologically motivated and a product of domestic US politics and law. Such on-going measures raise issues of the legality of countermeasures, more broadly economic coercion, but they are themselves in violation of the norms of non-intervention, self-determination and socio-economic rights.[24] These are not temporary measures aimed at ending a violation of international law by Cuba and restoring normal relations but are aimed at the form of government in Cuba and changing that regime.[25] The question for further research is whether unilateral sanctions targeted at NSAs suffer from the same legal problems, or whether they are a 'smarter' form of measure designed to deter or punish those in violation of international law, and whether, as such, they operate within the confines of international law. The endemic problem even with this more precise form of punishment is that it does not necessarily follow from any judicial determination of guilt, thereby rendering it automatically a violation of due process rights.

There does seem to be a gulf between the legal nature of collective sanctions, designed to tackle threats, and unilateral sanctions designed to punish governments, regime elites and NSAs. As lawyers we may want to separate them for legal analysis, in particular by not viewing collective measures aimed at threats as 'sanctions' but as 'coercive non-forcible measures';[26] leaving us free to review the legality of each: coercive non-forcible measures designed to restore public order, and unilateral punitive measures that are measures of self-help taken in response to alleged breaches of international law. The question then is whether the doctrine of countermeasures is sufficient to contain and regulate sanctions; whereas when we are considering coercive non-forcible measures designed to tackle threats the legal parameters are potentially much broader, although they cannot disregard basic human rights obligations, especially ones of due diligence. As obligations of conduct not result,[27] due diligence obligations would require the UN to take measures to prevent as far as

[23] See for example *Nabil Sayadi and Patricia Vinck v. Belgium*, Communication No. 1472/2006, 29 December 2008, 16 IHHR 427.

[24] White, above n.3, 139-44.

[25] On the limitations of countermeasures see Articles 49-54, above n.6.

[26] Although the UNSC sometimes uses the term 'sanctions' for its non-forcible measures imposed under Chapter VII. See for example paragraph 25 UNSC Res 1333, 19 December 2000, in which the UNSC '*Expresses* its readiness to consider the imposition of further measures, in accordance with its responsibility under the Charter of the United Nations, with the aim of achieving full implementation of this resolution and resolution 1267 (1999), inter alia, taking into account the impact assessment referred to in paragraph 15 (d) with a view to enhancing the effectiveness of sanctions and avoiding humanitarian consequences'.

[27] S. Marks and F. Azizi, 'Responsibility for Violations of Human Rights Obligations', in J. Crawford, A. Pellet and S. Olleson (eds) *The Law of International Responsibility* (Oxford University Press, 2010)728-9.

possible its actions having consequences for the human rights of the civilian population. For instance, during sanctions against the Haitian junta in the 1990s there was strong evidence that the regime elite benefited from the black market that sprang up to compensate for the restrictions caused by sanctions, thereby pushing the general population further into poverty.[28] It is questionable whether the humanitarian exception, standard in UN sanctions regimes, is enough to consider that the UN has fulfilled its due diligence obligations.[29]

Further analysis of practice will reveal the legal effect of sanctions against NSAs, showing that they generally are applicable to (member) states when imposed by the UN or regional organization, binding them under the provisions of the constitutive treaty. [30] UN sanctions do not have direct effect within states, it is for states to implement them within their legal orders for example by making it illegal to trade with the targeted NSAs or requiring banks to freeze their assets, and the same is the case for regional organizations (with the EU being exceptional in this regard). The difficulty is that these obligations are not directed at the NSA, their immediate impact is on states and then in turn upon other actors such as banks, companies and individuals by requiring them to act in certain ways towards the NSAs in order to restrict and isolate them to that their behaviour is curtailed. The focus on the state in terms of compliance with sanctions regimes is clearly a natural result of the restrictive form of international legal order based on states that has not fundamentally changed even with the advent of powerful NSAs. Just as it is very difficult to make international law directly applicable to MNCs, we encounter the same problem with rebel groups, insurgents, organized criminals, terrorists etc.

Thus, just as we might quibble with the term 'sanctions', we also might object to the rest of the title to this chapter 'against NSAs', because what we are really talking about, in the main, are coercive non-forcible measures placing duties upon states to take measures against NSAs most commonly indirectly (by obliging legal persons within their domestic legal to undertake certain measures against the NSAs under penalty for non-compliance). One interesting aspect to unravel here is the role of domestic criminal law as a weapon potentially used by states to fulfil their obligations to the UNSC, imposed by its decisions on matters of peace and security, although normally the UNSC only calls upon states to bring proceedings and impose penalties against violators.[31] It may be possible to justify this use of criminal law, as part of a response to threats rather than breaches of international law, as a lawful and legitimate consequence of breaches of public order norms. The UNSC has directly required states to criminalise the behaviour of NSAs or their supporters within their domestic legal orders, but this was in the form of a UNSC piece of 'legislation' against the general threat posed by international terrorism, namely UNSC Resolution 1373 of 2001, rather than 'sanctions' against specific threats.

Certainly for those sanctions imposed against NSAs for the purpose of dealing with existential threats to states and their citizens, there are strong arguments that they should, at least temporarily, have priority over other obligations. Just as it might be necessary to temporarily suspend some human rights in times of genuine emergency when the life of the nation is threatened, and only so long as it is, so will it be necessary to suspend competing rights when trying to tackle threats to international peace and security. The debates about Article 103 of the Charter tend to veer towards interpretations of its provisions so as to either assert supremacy over any

[28] S. Chesterman, T.M Franck and D.M. Malone, *Law and Practice of the United Nations: Documents and Commentary* (Oxford University Press, 2008) 359-60.

[29] But see Farrall, above n.9 at 224-7, who argues that proportionality is the applicable standard.

[30] For example, Article 25 UN Charter; Article 215 TFEU.

[31] For example UNSC Res 1267, 15 October 1999, para 8, the UN SC 'calls upon States to bring proceedings against persons and entities within their jurisdiction that violate the measures imposed by paragraph 4 above and to impose appropriate penalties'.

competing or conflicting obligations including fundamental rights, or to deny its primacy altogether; while the approach of the European Court of Human Rights suggests a more practical approach - that the Security Council should be able to override clearly conflicting rights in certain circumstances, including being explicit about what it is doing.[32] UNSC practice in invoking the language of Article 103 is also equivocal as the case studies reveal.[33] Clearly there are also issues of regional sanctions and their place within the constitutional orders of member states, all of which require further consideration. It must be noted too that there have been attempts to assert the supremacy of unilateral sanctions, for instance those imposed against Cuba by the US,[34] the aim of which was to prevent the other states and their nationals, as well as US companies and nationals, from trading with the enemy. Whether US sanctions against NSAs have similar claims to extraterritoriality, as well as associated legal problems, needs further consideration.

5. Implementation, Oversight and Enforcement

The typical method used by the UN is the established one used for most sanctions regimes, namely the creation of a sanctions committee as a subsidiary organ, the task of which is to receive and review state reports on implementation. However, this has become more sophisticated over the years, and the case studies show how these methods of implementation and oversight have been adapted to when sanctions have been applied against NSAs, including a consideration of the role of experts in this regard. Responses to non-compliance are considered in the case studies. Differences are revealed when considering regional organizations and their methods of implementation; and the methods used by states when imposing unilateral sanctions, including attempts to bring extraterritorial violations within their own legal orders.

The Informal Working Group of the Security Council on sanctions has recommended measures to improve the effectiveness of sanctions. In 2006 it reported that:

> For targeted sanctions to be effective, appropriate action must be taken at all decision-making levels: the Security Council, the sanctions committee, Member States and their administrative agencies. Proper design, implementation, ongoing evaluation and follow-up of sanctions regimes are key elements that contribute to the effectiveness of sanctions.[35]

Further:

> The establishment of sanctions monitoring mechanisms is an important innovation in the structure of Security Council sanctions regimes, which has contributed to more effective sanctions implementation.

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[32] *Al-Jedda v. United Kingdom*, Application No.27021/08, Judgment 7 July 2011; *Nada v. Switzerland*, Application No. 10593/08, 12 September 2012

[33] But see Bernhardt, 'Article 103', in B. Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford University Press, 2nd ed., 2002) 1300, where he states, after noting the formula used whereby the UNSC 'calls upon' all states and other state-based actors to act in accordance with the provisions of the resolution notwithstanding the existence of rights and obligations under treaties, agreements, contracts or licences: 'It is interesting to note that the present standard formula does not expressly refer to Art. 103, but is obviously based on this Article (and Art. 25) of the Charter. At the same time the formula is broader than Art. 103 in several respects. It is not only addressed to States (to all States), but also to international and regional organizations, and it includes rights and obligations derived from contracts, licences and permits. In conclusion, it seems now to be general y recognized in practice that binding SC decisions taken under Chapter VII supersede all other commitments'.

[34] By the Helms-Burton Act 1996. See A. Reinisch, 'A Few Public International Law Comments on the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996', (1996) 7 EJIL 545.

[35] See also Report of the Informal Working Group of the Security Council on General Issues of Sanctions (UN Doc S/2006/997), para 2.

> Through their inquiries in States affected by sanctions, these mechanisms have shed significant light on how targeted sanctions, including arms embargoes, are implemented, as well as on various possible ways that sanctions are violated. These mechanisms have contributed to an understanding of both the nature and scope of obstacles to more systematic compliance, thereby enhancing the overall capacity of the United Nations to refine and tighten targeted sanctions measures.[36]

While effectiveness in targeting NSAs with the specific design of stopping them from acting in ways that threaten international peace and security is increasing we have to bear in mind the balance between effectiveness and legality. It is interesting how the Working Group connects the two:

> Sanctions monitoring mechanisms are established by the Security Council in support of subsidiary organs. As such, they are organs with different and distinct mandates, of independent, expert and non-judiciary character, with no subpoena powers, whose primary role is to provide sanctions-related information to the relevant committees. However, given that the findings of the monitoring mechanisms (either their reports or documents or testimonies of their individual members), may be used by judicial authorities, their methodological standards may affect the credibility of the Organization.[37]

This leads to a discussion of possible review and other mechanisms of accountability that may be available to the targets of sanctions.

6. Accountability

Under those sanctions against NSAs operated by means of listing individuals or entities the process in the UN is relatively straightforward one whereby a state can request the listing of such. The relevant Committee (the 1267 Sanctions Committee for instance) then makes decisions, normally by consensus, to add to the list.[38] Once an individual or entity is on a list the range of measures decided upon by the UNSC are imposed by member states carrying out their obligations under the UN Charter. The 'listing of individuals is conceived as an executive or administrative process on the basis of perceived security threats, rather than a judicial one' or penal one, 'even though the listing results in a set of coercive measures, arguably de facto punishment, of those listed'.[39] Nonetheless, this has not prevented some targeted individuals from successfully bringing claims before judicial bodies: national, regional, and international, on the basis that their rights have been violated, the jurisprudence of which has been analysed elsewhere.

The temporary freezing of an individual's assets, and restricting their movements, are preventive administrative measures necessary to prevent the threat from terrorism manifesting itself in indiscriminate acts of violence. As such they are not subject to due process, at least fair trial, protections. However, a number of listings appear to be almost permanent without real review, and like indefinite preventive detention, cease to be a response to an imminent existential threat but are rather forms of punishment without due process of law. There is a clear need to be able to challenge these decisions, if sanctions against NSAs are to maintain their legitimacy as a modern and sophisticated form of tackling threats. There is a danger that by allowing for quasi-permanent listings the UN is endorsing a system of punishment for wrongs determined by the executive of states and organizations without any determination or trial before a court. Rather like targeted killings, the roles of judge, jury and executioner are rolled together. This is even more so as regards

[36] Ibid., para 17.
[37] Ibid., para 19.
[38] On the lack of transparency in this process see D. Hovell, 'The Deliberative Deficit: Transparency, Access to Information and UN Sanctions', in J. Farrall and K. Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* (Cambridge University Press, 2009) 96.
[39] Tsagourias and White, above n.22 at 239.

the auto-interpretation system of targeted measures triggered by UNSC Resolution 1373 (2001) adopted after 9/11 of 2001. This piece of UNSC 'legislation' has legitimated the development of separate 'lists' of terrorists by member states, fulfilling their obligations under that resolution to: criminalise the financing of terrorism; freeze any funds related to persons involved in acts of terrorism; deny all form of financial support for terrorist groups; suppress the provision of safe haven, sustenance or support for terrorists. Given that there are no specific terrorist organisations listed in the resolution, or by a collective process set up by the resolution, 1373 gives states discretion to target those organisations and individuals it considers to be terrorists. In the UK, for example, the Terrorist Asset-Freezing Act 2010 gives effect to Resolution 1373 (2001) in the UK. The 2010 Act provides HM Treasury with powers to freeze the funds and economic resources of those suspected or believed to be involved in terrorist activities, and restricts the making available of funds, financial services and economic resources to, or for the benefit of, such persons. This allows states to list NSAs for a wide range of reasons some of which are only very loosely connected to peace and security. There was some recognition of the need for remedies at least on the part of those claiming to be wrongly listed when it responded to judicial criticism of a lack of remedy at the international level by creating an ombudsperson to receive complaints from such individuals.[40]

7. Case Studies

In this section sanctions against specific NSAs by the UN, EU and US (whichever is applicable) are evaluated under all the above headings, in order to discern whether practice can answer some of the legal problems highlighted. The dynamic role of practice within the international legal system must be addressed so that in undertaking this analysis the line between practice that helps to develop the law and practice that actually is in breach of the law must be borne in mind. A range of measures are examined and, where applicable, will include measures imposed by the UN, EU and US, in order to analyse their differences and to consider them from the perspectives of their compatibility with the international legal order. The analysis below is as work in progress, at the moment only covering a limited number of case studies, and then only those imposed by the UN.

7.1 UNITA in Angola

An early example of targeted sanctions against NSAs, were those measures first imposed against the Angolan rebel group – UNITA, starting in 1993. In UNSC Res 864, adopted on 15 September 1993, the UNSC strongly condemned 'UNITA and holding its leadership responsible for not having taken the necessary measures to comply with the demands made by the Council in its previous resolutions'; and expressed determination to 'ensure respect for its resolutions and the full implementation of the "Acordos de Paz"'. The UNSC determined that 'as a result of UNITA's military actions, the situation in Angola constitutes a threat to international peace and security, acting under Chapter VII of the Charter of the United Nations'. The decision is a clear response to a threat to the peace for which UNITA is responsible. Responsibility is for the continuing threat caused by failure to comply with the peace agreement. This is made clear in the operative parts of the resolution that decided 'that the provisions set forth in paragraphs 19 to 25 below shall come into force ten days after the date of adoption of the present resolution unless the Secretary-General notifies the Council that an effective cease-fire has been established and that agreement has been reached on the implementation of the "Acordos de Paz" and relevant resolutions of the Security Council'.[41] This constitutes an express threat of sanctions unless UNITA fulfils its obligations under a peace agreement. The primary aim is to change behaviour and thereby address the threat to the peace.

[40] UNSC Res 1904, 17 December 2009.
[41] UNSC Res 864, 15 September 1993, para 17.

The aim is to secure peace not to enforce the law, except in the sense that we can understand preventing and tackling threats as a form of enforcement of international public order norms.

The measures threatened by the UNSC, and then imposed when UNITA did not comply, were initially sanctions requiring states to prevent the supply to UNITA of 'arms and related matériel of all types, including weapons and ammunition, military vehicles and equipment and spare parts for the aforementioned, as well as of petroleum and petroleum products'.[42] The sanctions fit the violations in the sense that the continuing threat has been caused by UNITA's commitment to continue fighting, and the measures are aimed at cutting off its capacity to do so. Furthermore, the UNSC promised further measures including 'trade measures against UNITA and restrictions on the travel of UNITA personnel, unless by 1 November 1993 the Secretary-General has reported that an effective cease-fire has been established and that agreement has been reached on the full implementation of the "Acordos de Paz" and relevant resolutions of the Security Council'.[43] The gradual ratcheting up of pressure against UNITA was manifested in subsequent resolutions of the UNSC as it continued to press UNITA into compliance with the peace process and thereby ending the threat to the peace UNITA was posing. It wasn't until 1997 that travel restrictions were put in place on all senior UNITA officials and their families, immediate closure of UNITA offices around the world and also preventing UNITA access to aircraft.[44] There is an element of punishment of UNITA members and denial of their rights – to freedom of movement – rather than just measures imposed that address the threat caused by UNITA, but such broadening of measures is inevitable if the target refuses to comply. The realisation of the potential impact of these broader measures led to the invocation for the first time in this case of the humanitarian exception in the 1997 resolution, whereby the UNSC decided 'that the measures set out in paragraph 4 above shall not apply to cases of medical emergency or to flights of aircraft carrying food, medicine, or supplies for essential humanitarian needs, as approved in advance by the Committee created pursuant to resolution 864'.[45] Further measures were threatened in 1997 against UNITA unless it complied with its obligation to comply with the peace process.[46] Such measures, including an assets freeze on UNITA and its senior official and an obligation to prevent the import of conflict diamonds from Angola, as well as a prohibition on the supply of mining equipment and vehicles. These were imposed by the UNSC in 1998,[47] thereby trying to prevent UNITA using funds from the export of diamonds or other minerals to fuel its continuing rebellion. It was not until 2002, some 9 years after the initial application of sanctions against UNITA that the UNSC was able to welcome UNITA's commitment to the full implementation of the 'Accordos de Paz'. Both the measures and the monitoring mechanism were terminated in that year.[48]

In contrast to explicitly requiring states to prevent arms and other supplies in 1993, the UNSC did not order states to places these obligations over any other commitments states have that conflict with those. Article 103 is invoked in non-obligatory terms by the UNSC calling upon 'all States, and all international organizations, to act strictly in accordance with the provisions of the present resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any licence or permit granted prior to the date of adoption of this resolution'.[49] Nonetheless, in order to fulfil their obligations under the resolution, it is inevitable that states will have to give priority to those obligations. In this vein the

[42] UNSC Res 864, 15 September 1993, para 19.
[43] UNSC Res 864, 15 September 1993, para 26.
[44] UNSC Res 1127, 28 August 1997, para 4.
[45] UNSC Res 1127, 28 August 1997, para 5.
[46] UNSC Res 1127, 28 August 1997, para 10.
[47] UNSC Res 1173, 12 June 1998, para s 11 and 12.
[48] UNSC Res 1448, 9 December 2002.
[49] UNSC Res 864, 15 September 1993, para 20. See also UNSC Res 1127, 28 August 1997, para 10.

UNSC also called 'upon States to bring proceedings against persons and entities violating the measures imposed by this resolution and to impose appropriate penalties'.[50] Again the language is not one of obligation but it is difficult to see how states can ensure compliance with their obligations unless it criminalises behaviour that breaches such and punishes such behaviour.

In terms of monitoring and implementation the 1993 resolution established a Committee of the Security Council consisting of all the members of the Council to undertake tasks of reviewing state reports on measures taken to comply with the obligations imposed by the Security Council and gathering information on violations to report on its work to the Council with its observations and recommendations.[51] The measures against UNITA were best characterised as non-forcible collective measures to tackle the threat to international peace and security caused by UNITA's on-going failure to comply with the peace accords by continuing to fight, and not as a punishment for UNITA's violation of the accords or rules of international law such as IHL.

7.2 Bosnian Serbs

The division between measures imposed to confront threats to the peace and sanctions for breaches of international law may appears to break down when considering those measures imposed against the Bosnian Serbs in the 1990s, the party to the conflict seen as acting most often in violation of international humanitarian law. While certain measures were imposed on this basis that the violation of international law themselves constituted threats to the peace, particularly the creation of the ICTY,[52] other non-forcible measures were imposed upon the Bosnia Serb leadership for refusing to settle peacefully and to continue fighting, and so were clearly imposed and designed to tackle the threat to the peace caused by the Bosnian Serb party refusing to agree to a peaceful settlement. Furthermore, the non-forcible measures taken by the UNSC to tackle violations of international law (viz the establishment of the ICTY) was not targeted at the Bosnian Serbs leadership per se but at individual violators of international criminal law. That aspect of the threat consisting of violations of the law was addressed by the creation of a criminal tribunal with powers of punishment, while the continuing conflict and refusal to settle peacefully were addressed by a variety of non-forcible and forcible measures imposed by the UNSC.

In a resolution adopted in 1994 (UNSC Resolution 942), the Security Council:

> Expressing appreciation for the efforts undertaken by the representatives of the United Nations, the European Union, the United States of America and the Russian Federation to assist the parties in reaching a settlement,
> Reaffirming the need for a lasting peace settlement to be signed by all the Bosnian parties, and implemented in good faith by them, and condemning the decision by the Bosnian Serb party to refuse to accept the proposed territorial settlement (S/1994/1081),

[50] UNSC Res 864, 15 September 1993, para 21.
[51] UNSC Res 864, 15 September 1993, para 22.
[52] The ICTY was created by UNSC Res 827 (1993), which expressed its grave alarm at the widespread violations of IHL; determined that 'this situation' constitutes a threat to international peace and security; determined to put an end to such crimes and to take effective measures to bring to justice those persons responsible for them; 'convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council; of an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration of peace and maintenance of peace'. In other words the tackling of violations of international law is itself a measure to tackle a threat to the peace – see Judgment of the Appeals Chamber of the ICTY in the *Tadic* case Case No. IT-94-1-IT, 10 August 1995, para 19.

> Viewing the measures imposed by the present resolution and by its previous relevant resolutions as a means towards the end of producing a negotiated settlement to the conflict.[53]

To drive home the link between recalcitrance in the peace process with its determination of the threat to the peace; the Security Council first expressed 'its approval of the proposed territorial settlement for the Republic of Bosnia and Herzegovina which has been put to the Bosnian parties as part of an overall peace settlement; secondly expressed 'its satisfaction that the proposed territorial settlement has now been accepted in full by all except the Bosnian Serb party'; and finally strongly condemned the 'Bosnian Serb party for their refusal to accept the proposed territorial settlement, and demands that that party accept this settlement unconditionally and in full'.[54]

The Resolution then obliged all states to undertake a range of measures to prevent 'economic activities' carried on within their territories by any entity, wherever incorporated or constituted, which was owned or controlled, directly or indirectly, by individuals or entities within areas of Bosnia controlled by the Bosnian Serbs. 'Economic activities' were defined broadly to include 'all activities of an economic nature, including commercial, financial and industrial activities and transactions, in particular all activities of an economic nature involving the use of or dealing in, with or in connection with property or interests in property'.[55] After making it clear that the embargo did not apply to supplies for medical purposes and foodstuffs, or products for essential humanitarian needs, notified to the Sanctions Committee established by the UNSC in 1991.[56] In addition, to a range of other non-forcible measures designed to cripple the economy of the Bosnian Serb areas, the 1994 resolution includes an early version of the 'listing' process that has become emblematic of targeted sanctions in the modern era. The UNSC decided that states 'shall prevent the entry into their territories of' members of Bosnian Serb authorities, Bosnian Serb military and paramilitary authorities, those persons supporting Bosnian Serb forces, and those violating the measures imposed by this and a previous resolution, and further requested that the relevant Sanctions Committee 'establish and maintain an updated list, based on information provided by States and competent regional organizations, of the persons falling within this paragraph'.[57] The final paragraph of the 1994 resolution reinforced the aim of the resolution when the Security Council decided 'to remain actively seized of the matter and to consider immediately, whenever necessary, further steps to achieve a peaceful solution in conformity with relevant resolutions of the Council'.[58] These measures were only terminated in 1996 following the Dayton Accords and the holding of peaceful elections in Bosnia.[59]

7.3 Taliban & Al Qaida

UNSC sanctions against the Taliban and Al Qaida originated in the late 1990s, with UNSC Resolution 1267 (1999) being adopted specifically in response to the harbouring of Al Qaida by the Taliban regime in Afghanistan, and more generally as measures against international terrorism essential for the maintenance of international peace and security. Al Qaida had already established its global terrorist credentials before September 2001 by, for instance, its attacks on the US embassies in Tanzania and Kenya in 1998, mentioned in the preamble of Resolution 1267. The resolution was directed at the Taliban for harbouring Al Qaida and for refusing to extradite them. If the Taliban did

[53] UNSC Res 942, 23 September 1994. See UNSC Res 820, 17 April 1993.
[54] Ibid., paras 1-3.
[55] Ibid., paras 7-9.
[56] UNSC 724, 15 December 1991.
[57] UNSC Res 942, 23 September 1994, para 14.
[58] Ibid., para 22.
[59] UNSC Res 1074, 1 October 1996.

not comply with the UNSC's demands to cease harbouring Al Qaida, to take measures against them, and to hand Osama bin Laden over to countries where he had been indicted, the UNSC required all states to freeze funds owned and directly controlled by the Taliban, specifically to:

> Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need.[60]

The UNSC called upon 'all states to act strictly in accordance with the provision of this resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any licence or permit granted prior to the dates of coming into force of the measures'. Again the reference to the supremacy of UNSC obligations seems to be softened by the non-mandatory language whereby states are 'called upon' to act in accordance with those obligations notwithstanding any inconsistent obligations. The measures would cease to apply as soon as the Taliban complied with its obligations under the resolution.[61]

UNSC Resolution 1333 (2000) extended these measures to Osama bin Laden and 'individuals and entities associated with him as designated by the Committee', including those in Al Qaida. As well as an assets freeze, and being denied access to finances and arms, members of the Taliban and Al Qaida and their supporters were, if listed, also subject to travel bans. The relevant paragraph required states:

> To freeze without delay funds and other financial assets of Usama bin Laden and individuals and entities associated with him as designated by the Committee, including those in the Al-Qaida organization, and including funds derived or generated from property owned or controlled directly or indirectly by Usama bin Laden and individuals and entities associated with him, and to ensure that neither they nor any other funds or financial resources are made available, by their nationals or by any persons within their territory, directly or indirectly for the benefit of Usama bin Laden, his associates or any entities owned or controlled, directly or indirectly, by Usama bin Laden or individuals and entities associated with him including the Al-Qaida organization and *requests* the Committee to maintain an updated list, based on information provided by States and regional organizations, of the individuals and entities designated as being associated with Usama bin Laden, including those in the Al-Qaida organization.[62]

Resolutions 1989 and 1988 of 2011 separated the measures against the Taliban from those against Al Qaida, with the sanctions first imposed in 1267 being applied by the 1267 Committee to Al Qaida,[63] while Resolution 1988 created a new committee to administer the sanctions imposed against the Taliban.[64] Review by the ombudsperson established by UNSC Resolution 1904 (2009)

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[60] UNSC Res 1267, 15 October 1999, para 4(b). Under para 6 a Committee is established also to receive and consider information supplied by states on compliance and violations.

[61] UNSC Res 1267, 15 October 1999, paras 4, 7, 14.

[62] UNSC Res 1333, 19 December 2000, para 8(c).

[63] UNSC Res 1999, 17 June 2011; reaffirms the assets freeze, travel ban and arms embargo affecting all individuals and entities on the 1267 Committee's Al Qaida Sanctions List. Decides to split the Consolidated List, after 'noting with concern the continued threat posed to international peace and security by Al-Qaida and other individuals, groups, undertakings and entities associated with it'.

[64] UNSC Res 1988, 17 June 1998, 2011; imposes an assets freeze, a travel ban and an arms embargo on individuals, groups, undertakings and entities associated with the Taliban in constituting a threat to the peace,

only applies to those on the Al Qaida Sanctions List as administered by the 1267 Committee. This seemingly curious anomaly is probably explained by the overarching pragmatism of the UNSC on the matter of accountability for wrongly listing individuals; that complaints to international, regional and judicial bodies derived largely from the 1267 list and the office of the ombudsperson is a response to that. The lack of remedies elsewhere in the UN system, for wrongly listed individuals, puts the creation of the Ombudsperson in perspective.

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stability and security of Afghanistan as designated by the Committee on the List established pursuant to resolution 1988 (2011).

(6)

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ROME, 13 FEBRUARY 2015

Palazzo Rondinini

Via del Corso, 518

Draft paper on

Sanctions and Erga Omnes Obligations in the Protection of Human Rights

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Introduction

1 Obligations *erga omnes* in International Law

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Introduction

1. Obligations *erga omnes* in International Law

The notion of "obligations *erga omnes*" was first introduced by the International Court of Justice in the Barcelona Traction (Second phase) case in 1970[1]. Following is the part of the Court's reasoning which refers to the notion:

33. ... *Une distinction essentielle doit en particulier être établie entre* **les obligations des Etats envers la communauté internationale dans son ensemble** *et quelles qui naissent vis-à-vis d'un autre Etat dans le cadre de la protection diplomatique. Par leur nature même, les premières* **concernent tous les Etats. Vu l'importance des droits en cause, tous les Etats peuvent être considérés comme ayant un intérêt juridique à ce que ces droits soient protégés; les obligations dont il s'agitsont des obligations erga omnes. 34. Ces obligations découlent par exemple, dans le droit international contemporain, de la mise hors la loi des actes d'agression et du genocide mais aussi des principes et des règles concernant les droits fondamentaux de la personne humaine, y compris la protection contre la pratique de l'esclavage et la discrimination raciale. Certains droits de protection correspondants se sont intégrés au droit international général (Réserves à la convention pour la prévention et la répression du crime de génocide, avis consultatif, C.I.J. Recueil 1951, p. 23); d'autres sont conférés par des**

[1] Having said this, Giuseppe Sperduti referd to this notion, with slightly defferent expression, as early as 1958: "le norme istituive di vincoli solidali nel senso che in virtù di esse una lesion arrecata ad un soggetto si concreta nella violazione di un dovere verso la collettività, intesa come pluralità di singoli soggetti o come loro società personificate..." Sperduti, *Lezione di diritto internsionale* (Giuffre, 1958), p.140.

instruments internationaux de caractère universel ou quasi universel. *Les obligations dont la protection diplomatique a pour objet d'assurer le respect n'entrent pas dans la même catégorie. En effet, si l'on considère l'une d'elles en particulier dans un cas déterminé, on ne saurait dire que les Etats aient tous un intérêt juridique à ce qu'elle soit respectée.*

What the Court said in these sentences are often characterized by scholars as *obiter dictum*. But in my opinion, it is less than that in the sense that this part had nothing to do with the mainstream of the reasoning and it was, in my guess, inserted at the final stage of the drafting process of paragraph 33. One can easily reproduce the original argument, just skipping those sentences, as follows:

33. Dès lors qu'un Etat admet sur son territoire des investissements étrangers ou des ressortissants étrangers, personnes physiques ou morales, il est tenu de leur accorder la protection de la loi et assume certaines obligations quant à leur traitement. Ces obligations **ne sont toutefois ni absolues ni sans réserve.** ... **[Why? Because,]**
34. ... **Un Etat ne peut présenter une demande de réparation** du fait de la violation de l'une de ces obligations **avant d'avoir établi qu'il en a le droit**, car les règles en la matière supposent deux conditions: ((Premièrement, 1'Etat défendeur a manqué à une obligation envers 1'Etat national, à l'égard de ses ressortissants. Deuxièmement, seule la partie envers laquelle une obligation internationale existe peut présenter une réclamation à raison de la violation de celle-ci.)) (Réparation des dommages subis au service des Nations Unies, avis consultatif, C.I.J . Recueil 1949, p. 181 et 182.)

In sum, in the original text, what are neither absolute nor unqualified were always obligations relating to the treatment of aliens. Moreover, the Court split the original text into two parts and put the sentences that I capitalized in block letters above in between, with bonding agent sentences italicized above.

Since the Barcelona Traction case of 1970, there have made much discussion on this concept, especially with regards to the legal consequences arising from the violation of *erga omnes* obligations in the context of the codification of State responsibility in the International Law Commission of the United Nations. The ILC finalized the draft articles on State responsibility in 2001 and its Article 48 states that, if a State breached an obligation *erga omnes*, any other State (parties) is entitled to invoke the responsibility of the wrongful State and may legally demand against that State to cease the internationally wrongful act.

In 2005, l'institut de droit international adopted the resolution on obligations *erga omnes*, of which Articles 1 and 2 show us the authentic definition, to date, of the obligations as follows:

Article 1: For the purposes of the present articles, an obligation erga omnes is:

(a) an obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action; or
(b) an obligation under a multilateral treaty that a State party to the treaty owes in any given case to all the other States parties to the same treaty, in view of their common values and concern for compliance, so that a breach of that obligation enables all these States to take action.

Article 2: When a State commits a breach of an obligation erga omnes, all the States to which the obligation is owed are entitled, even if they are not specially affected by the breach, to claim from the responsible State in particular:
(a) cessation of the internationally wrongful act ;
(b) performance of the obligation of reparation in the interest of the State, entity or individual which is specially affected by the breach. Restitution should be effected unless materially impossible[2].

2. Obligations *erga omnes* in the Context of the Protection of Human Rights

Human Rights obligations are designed to protect collective or "extra-State" interest (Riphagen) rather than individual State interest. It follows that these obligations are owed, not to a particular State, but to all other States (parties).

In 2004, Human Rghts Committee of the Civil and Political Rights Covenant expressly recognized the obligations of states under the Covenant are obligations *erga omnes*: "2. While article 2 is couched in terms of the obligations of State Parties towards individuals as the right-holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the 'rules concerning the basic rights of the human person' are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms. Furthermore, the contractual dimension of the treaty involves any

[2] INSTITUT DE DROIT INTERNATIONAL, KRAKOW SESSION – 2005, Adopted on August 27, 2005. RESOLUTION: OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW

State Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty[3]."

More recently, in 2012, the International Court of Justice classified the obligations under the Convention against torture as "obligations *erga omne partes*": "68. As stated in its Preamble, the object and purpose of the Convention is "to make more effective the struggle against torture . . . throughout the world". The States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. ... All the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. All the States parties "have a legal interest" in the protection of the rights involved (Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 32, para. 33). These obligations may be defined as "obligations *erga omnes partes*" in the sense that each State party has an interest in compliance with them in any given case."[4]

So it will be safe to say that Human Rights obligations, customary[5] or treaty, are characterized as obligations *erga omnes* in the sense that each State has a legal interest in compliance with them in any given case. These obligations, however, are neither absolute nor unqualified.

First, if there exists a State who was directly injured by a breach of Human Rights obligations by another State against the former State's nationals, as in the case of two Application of the Genocide Convention cases as well as the Dialo case before the ICJ, those who are entitled to invoke the responsibility of the violating State must primarily be the injured State(s).

Secondly, generally speaking, Human Rights obligations first have to be implemented in the municipal legal system of each State. Victims may bring their cases before domestic

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[3] Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

[4] QUESTIONS RELATING TO THE OBLIGATION TO PROSECUTE OR EXTRADITE (BELGIUM v. SENEGAL), International Court of Justice, JUDGMENT OF 20 JULY 2012

[5] On customary international law of huma rights and remedies for its violation, see The American Law Institute, Restatement of the Third, Volume 2 (1987), pp.161-183.

courts or, following the exhaustion of local remedies, before international courts or committees, relying on the relevant international Human Rights norms. However, at this stage, in spite of the indisputable *erga omnes* nature of Human Rights obligations, this nature remains potential and dormant in terms of the legal consequences arising therefrom.

Thirdly, several universal or local Human Rights protection regimes are equipped with inter-State complaint mechanisms, according to which any State party may refer to the mechanisms any alleged breach of treaty obligations by other parties (ex. Article 33 of the European Convention). Invocation, by all other States, of the responsibility of a State who is violating Human Rights obligations as well as their standing before relevant international fora certainly constitute some of the legal effects of *erga omnes* obligations, but they will fall short of sanctions.

Consequently, the possibility of imposing sanctions against a State may arise only when that State continues to commit grave breaches of Human Rights obligations and, in addition, local or international remedies available by victims are totally ineffective or inexistent.

3. So called "Third Parties" Countermeasures as Sanctions under International Law

With respect to the difficult question on whether any other State (parties) may or may not take countermeasures against the responsible States, the ILC refrained from giving some definitive answer to it (Article 54). However, in 2005, l'Institut de Droit International took a more positive stance on this question, suggesting that any other State (parties) may take countermeasures if a widely acknowledged grave breach of an *erga omnes* obligation occurred[6].

Although Crawford, former special rapporteur on State responsibility in the ILC, maintains that the legal position in respect of countermeasures by States other than directly injured State remains uncertain and that a review of state practice does not lead to clear

[6] Article 5: Should a widely acknowledged grave breach of an erga omnes obligation occur, all the States to which the obligation is owed: (a) shall endeavour to bring the breach to an end through lawful means in accordance with the Charter of the United Nations; (b) shall not recognize as lawful a situation created by the breach; (c) are entitled to take non-forcible (*n'impliquant pas le recours à la force*) counter-measures under conditions analogous to those applying to a State specially affected by the breach.

conclusions[7], other scholarly surveys on the relevant state practices rather seem to confirm the position taken by the Institut in 2005[8].

Turinig to "third party" countermeasures against Human Rights violations, according to the survey conducted by Dawidowicz, the following cases come under such category: Developping countries against South Africa (1960-1964), EC Member States against Greece (1967-1970), US and EC Member States against Uganda (1971-1978), EC Member States and France against Central African Republic (1979), EC and ECOWAS Member States against Liberia (1980), Western Countries against Poland (1981), US against Panama (1988), African States against Buruni (1996), US against Sudan (1997-2005), European Countries and US against Burma/Myanmar (1997-2005), EC Member States against Yugoslavia (1998), Countries associated with the EC against Zimbabwe (2002-2006), US against Syria (2003-2004), EC Member States and US against Belarus (2004-2006)[9].

Consequently, if domestic and international remedies mechanisms were totally ineffective to protect Human Rights in a State, and where grave violations of Human Rights obligations have been continued as a matter of policy of the State[10], all other States (parties) may take countermeasures against the State to try to put pressure on it to cease the Human Rights violations[11]. This must be one of the legal effect of *erga omnes* obligations in the field of

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7 Crawford, James, *State Responsibility, The General Part* (Cambridge, 2013), pp.703-706.

8 Among others, Dawidowicz, Martin, Public Law Enforcement without Public Law Safeguards?: An Analysys of State Practice on Third-Party Countermeasures and their relationship to the UN Security Council, *British Yearbook of International Law* (2006) 77 (1), pp.333-418. Tams, Christian J., *Enforcing Obligations* Erga Omnes *in International Law* (2005, 2010 with new Epilogue).

9 Dawidowicz, op.cit., pp.352-398.

10 In this context, one may recall the notion of "composite act." According to Article 15 of the State Responsibility Articles of 2001, a series of actions or ommissions, by a State, in aggregate may constitute an internationally wrongful act. According to the commentary of the ILC thereto, examples include the obligations concening genocide, apartheitd,or crimes against humanity, systematicacits of racial discrimination, etc. Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (Cambridge, 2002), p.141.

11 According to Article 48 of the State Responsibility Articles of 2001, any State may claim from the responsible State (a) cessation of the internationally wrongful act, and guarantees of non-repetition; and (b) performance of the obligations of reparation in the interest of the beneficiaries of the obligation breached. According to Gaja's observation, however, states are unlikely to take countermeasures in order to seek reparation so that cessation of the breach is their main or only object, Gaja, Giorgio, The Protection of General Interests in the

sanctions under general international law.

It must, however, be noted that one thing is that States may take countermeasures against grave breaches of obligations *erga omnes* including Human Rights violations, another thing is whether the measures actually taken by the States were in accordance with the conditions to be met to resort to countermeasures and thus not abusive ones[12].

4. Countermeasures Eclipsed by Sanctions Taken by Universal or Regional Organizations

It is true that the term "sanctions" has been used for measures taken by State members in accordance with the constituent instrument of some international organizations, in particular under Chapter VII of the United Nations Charter[13]. However, our argument here is that those measures are not so much different from countermeasures or retorsions by States under general international law. This is because economic sanctions under the Security Council resolutions are in essence taken by the member States. The Security Council cannot itself take economic sanctions simply because it has not established economic relations, to be interrupted due to the sanctions, with a target State...

Our argument above may be endorsed by the ILC's commentary to Article 30 of the first reading text: (22) As has been seen, the terms "countermeasures" and "measure" used in the present article [Article 30 of the first reading text] refer both to action by a State within the framework of sanctions ordered by a competent international organization on the basis of the rules by which it is governed and to action that a State is authorized to take, under general international law, in reaction to an internationally wrongful act committed against it by another State. In both cases, as the article states, the measures in question must constitute "a measure legitimate under international law" against the State which has previously committed the internationally wrongful act. The word "constitutes" was carefully selected in order to emphasize that the legitimacy of the measure must be objectively

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International Community, *Recueil des Cours*, tome 364 (2012), pp.132-133.

[12] de Guttry estimates that the US economis sanctions against Nicaragua in 1985 were abusive, de Guttry, Some recent cases of unilateral countermeasures and the problem of their lawfulness in international law, *Italian Yearbook of International Law* (1986-87), pp.169-189. With regard to the US sanctions against Cuba, although the US government claims to enforcing human rights norms, many has seen the measures as imposed for ideological reasons... Shelton, Dinah, L., *Advanced Introduction to International Human Rights Law* (2014), p.274.

[13] Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (Cambridge, 2002), p.168.

established by reference to international law[14].

What the Security Council has done in this context is nothing but a kind of coordination of measures by the member States. What is new here is the collective decision[15], recommendatory or obligatory, to take measures, that means retorsions or countermeasures, by the member States against the responsible State, together with some institutional mechanisms for coordination (Sanctions Committees).

In terms of the law of State responsibility, the above mentioned Security Coucil's collective decision may be constructed as a "sub-system" of State responsibility under Article 55 of the Articles on State responsibility of 2001[16]. It must be added that this sub-system is not "self-contained" in the sense that member States may take countermeasures without the SC authorization as we have seen in the previous section[17].

One more possible "sub-system" under Article 55 would be the suspension of the membership of an international body. The decision will be made through an organizational, as opposed to normative, resolution by that body. As a recent example, in 2012, the UN Human Rights Council decided to suspend Libya's membership of the Council because of gross human rights violations in accordance with the procedure under the General Assembly Resolution 60/251[18].

In the case where all the measures taken by States are not totally eclipsed by the UN sanction's special regimes, the measures "not eclipsed"by the UN sanction, in order to be opposable against the target State, must be justified in light of general international law

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14 YILC, 1979, II-2, p.121.

15 In other words, the Security Coucil has adopted normative resolutions, as opposed to operational ones, for economic sanctions under Article 41. Cf. Conforti/Focarelli, *Le Nazioni Unite*, Ottava edizione (CEDAM, 2010), pp.405-415.

16 For the purpose of this paper, sub-system of the law of State responsibility means special rules purporting to exclude or modify the legal effects of certain general rules of State responsility, as well as to create new and additional legal effects for State responsibility. Moreover, a sub-system of State responsibility may be self-contained or not in its relation with the existing general rules.

17 On the contrary, under the WTO dispute settlement mechanism, claiming States may take coutermeasuers only when the appellate body authorized to take the measures and decided their scope.

18 The resolution states that it "...the General Assembly, by a two-thirds majority of the members present and voting, may suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights..." http://www.ohchr.org/EN/NewsEvents/Pages/HRCSpecialSessionLibya.aspx

regime, that is ritorsions or countermeasures. By way of example, following the Iraq's invasion into Kuwait, the Security Council, with its resolution 661 on 6 August 1990, decided that all States shall prevent he import into their territories of all commodities and products originating in Iraq or Kuwait exported therefrom etc. Now, measures taken "before the date of the resolution" by some thirteen countries including the US and EC member States, measures by the (then) non UN member Statesˌ i.e. the Switzland and South Korea, and lastly measures taken "beyond the scope of the resolution" by some EC member Sates needed to be evaluated in accordance with general international law[19].

5. Non-recognition as a Sanction[20] under International Law[21]

Chapter III of Part Two, entitled "Serious breaches of obligations under peremptory norms of general international law", of the State responsibility Articles contains the following two articles:

Article 40 (Application of this Chapter)

1. This Chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law; 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfill the obligation.

Article 41 (Particular consequences of a serious breach of an obligation under this Chapter)

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40; 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation; 3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this Chapter applies may entail under international law.

What must be first recalled is that the reference to *jus cogens* was introduced at the very last

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[19] Cf.

[20] Arangio-Ruiz, the then Special Rapporteur on State Responsibility in the ILC, envisaged non-recognition as a countermeasure. Viewed as a countermeasure, according to him, non-recognition was subject to the same limitations as those set for countermeasures in the draft articles. A/47/10, 1992, pp.40-41 (para.276).

[21] This section is, basically and temporalily due to the time constraint, reproduced from my previous article on "International *jus cogens* in the Law of State Responsibility," in Carlo Focarelli (a cura di) *Le nuove frontiere del diritto internazionale* (Morlacchi Editore, Perugia, 2008), pp.145-165.

stage of the drafting in 2001, changing from the title of "serious breaches of essential obligations to the international community" at the stage of 2000[22]. The ILC succinctly explains the reason as follows: "... the previous references to serious breach of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests, which mostly dealt with the question of invocation as expressed by the International Court of Justice in the Barcelona Traction case, would be replaced with the category of peremptory norms. Use of that category was to be preferred since it concerned the scope of secondary obligations and not their invocation. A further advantage of this approach was that the notion of peremptory norms was well established by now in the Vienna Convention on the Law of Treaties.[23]" It is, however, not clear at first sight why the reference to *jus cogens* is preferable when the scope of secondary obligations is at issue

With respect to the obligation of non-recognition, Cassese argues that, referring to Security Council Resolution 662 (1990) of 9 August 1990, although it did not use the term *jus cogens*, it substantially relied upon this notion, for it clearly articulated the idea that the illegality of Iraqi occupation rendered the occupation legally invalid and all other States were bound not to recognize the annexation[24]. With respect, Cassese's argument is not without difficulty. First, the occupation, as such, was an internationally wrongful act and to that extent one could not talk about its validity or invalidity. Second, one could, on the contrary, talk about the invalidity of the internal order of the occupation probably made and signed by the then president, Saddam Hussein. But, generally speaking, international law is unable to render it directly invalid. The only thing international law can do is to compel the responsible State to render it invalid. Third, if, for the sake of argument, the Security Council could give, with its authority, a plain effect to the declaration of null and void of the annexation, one cannot see why it is necessary to demand that all other States do not recognize the illegal situation.

The bottom line is thus that the Security Council was unable, even with the binding effect of the resolution, to invalidate the order of Saddam Hussein in spite of its declaration of null

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[22] *UN Doc.* A/CN.4/L.600, 21 August 2000, p. 11. But, in fact, this title itself was something that substituted the original title of "International Crimes" in the 1996 first reading text. For our comment on Articles 40 and 41 of the 2000 drafting committee's text, see K. Kawasaki, The Content and Implementation of the International Responsibility of States: Some Remarks on the Draft Articles on State Responsibility Adopted by the ILC's Drafting Committee in 2000, 29 Hitotsubashi Journal of Law and Politics (2001), pp. 39-40.

[23] UN Doc. A/56/10, 2001, p. 34 (para. 49).

[24] A. Cassese, International Law, Second edition, 2005, p. 203.

and void. That is why the Security Council, in its Resolution 662, following the declaration of null and void of the annexation, needed, or was obliged, to call upon all States not to recognize the annexation and to demand Iraq rescind its actions purporting to annex Kuwait[25].

From this perspective, one could consider, in my opinion, the legal consequences proposed by the ILC in the case of a serious breach of a jus cogens obligation as a substitution effect for the non-applicability of international *jus cogens* to the internal legal acts including laws and orders. In other words, States are requested not to recognize the illegal situation, not because *jus cogens* is applied, in its entirety, to internal legal acts, but precisely because it is not applied to them. The obligation of non-recognition on the part of all other States appears to have an object of preventing the illegal effects from spreading outside of the territory of the responsible State[26]. Within the territory, the responsible State is requested, among others, to terminate or invalidate the laws or regulations in question.

Turning to the cases involving grave breach of Human Rights obligations *per se*, the following observation will be pertinent: "... what appears to be decisive is not the character of the particular peremptory norm but rather the extent to which an unlawful situation flowing from the violation of a peremptory norm results in a legal claim to status or rights by the responsible State. While this is relatively common where there is an unlawful annexation of

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[25] In the Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory case of 2004, the ICJ finds, in its paragraph 163, that Israel is under an obligation to repeal or render ineffective forthwith all legislative and regulatory acts relating to the construction of the wall and that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction.

[26] Talmon indicates, in his interesting survey on this subject, that non-recognition can operate only in cases of a factual situation that also takes the form of a legal claim (to statehood, territorial sovereignty, governmental capacity, etc.) intended to have an erga omnes effect. In contrast, according to his observation, with regard to situations created by genocide, torture, crimes against humanity and other serious breaches of a jus cogens norm, there is no practice of non-recognition because these situations do not automatically give rise to any legal consequences which are capable of being denied by other States. S. Talmon, The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?, in C. Tomuschat and J.-M. Thouvenin (Eds.), The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes, 2006, pp. 120 and 125. Christakis refers to the obligation on the part of all States to refuse all legal effects arising from the internal laws and orders causing jus cogens violations. T. Christakis, L'obligation de non-reconnaissance des situations créés par le recours illicite à la force ou d'autres actes enfreignant des règles fondamentales, in C. Tomuschat and J.-M. Thouvenin (Eds.), op. cit., pp. 158-160.

territory, it is rather less obvious when such a situation would arise in respect of some other peremptory norms, such as the prohibition of torture and genocide.[27]"

6. Limitations through Human Rights Obligations on Countermeasures by States

One more legal effect of Human Rights obligations *qua erga omnes* might be that countermeasures shall not affect obligations for the protection of fundamental human rights (Art. 50, paragraph 1 (a), of the Articles on State Responsibility).

However, on the provision of this Article, one may pose a question on its reference to "fundamental" human rights only. This question may be raised because the (counter)measures must remain to be the non-performance of obligations *towards the responsible State* (Art. 49). It follows that, theoretically, obligations towards all other States (parties) including Human Rights obligations, irrespective of their fundamental nature, must not be breached as a tool of countermeasures...

Conclusions

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(7)

INTERNATIONAL CONFERENCE ON
COERCIVE DIPLOMACY, SANCTIONS AND INTERNATIONAL LAW

ROME, 13 FEBRUARY 2015

Palazzo Rondinini

Via del Corso, 518

Draft paper on

Sanctions and the Protection of Human Rights: The Role of Sanctions Committees

By Thilo Marauhn and Ignaz Stegmiller

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1. Introduction

Sanctions committees have been established to facilitate the administration, monitoring and implementation of sanctions imposed by the UN Security Council. Typically sanctions committees are tailor-made subsidiary bodies of the Council, set up to serve the particular sanctions regime adopted and normally identifiable by the number of the resolution on the basis of which they were created. Over time there were two major shifts in the roles performed by these committees: while initially handling economic sanctions directed against states, their administrative role changed with the increasing move towards targeted or smart sanctions, focusing upon individuals; the second change pays tribute to the growing concern about human rights implications of such targeted or smart sanctions, and can be described as a move from effectiveness to fairness or from mere administration to rule of law-based governance.

The paper will highlight the institutional setting of sanctions committees, discussing their legal basis, their composition, and their mandates; furthermore, the paper will provide an overview of their human rights-related practice and critically review their contribution in so far. The main hypothesis is that sanctions committees enhance the effectiveness and the fairness of sanctions regimes but do not (and perhaps will never) serve as a review mechanism for sanctions regimes in light of human rights standards. They remain political, though embedded in a law-like procedural framework.

2. Legal basis

Since the first of these committees, which were set up in 1966/1968 (Southern Rhodesia) and in 1977 (South Africa), their legal bases have been Articles 29 and 41 UN Charter. In most cases, the resolutions imposing sanctions include an explicit decision of the Council "to establish a Committee". Occasionally, such decision was included in a subsequent resolution adopted by the Council. In contrast to commissions of inquiry set up by the UN Security Council, the contribution of the UN Secretary-General to establishing sanctions committees is more limited. The Secretary-General only assists or supports the Committees. Committees are subsidiary organs of the UN Security Council and share their political nature.

3. Composition

The composition of the Committees has – apart from the very first one – always been the same as the composition of the UN Security Council at the time of its establishment. This means that all the 15 members of the Council are also represented on the Committee. Some have described the Committees accordingly as "Committees of the Whole". Normally, there is a rotating system for the chair on the basis of informal elections, however, excluding the permanent UN SC members from chair and vice-chair. Given the two-year term of office of non-permanent members of

the Security Council, membership of sanctions committees has likewise been on the basis of a two-year term of office.

4. Mandates

Due to the ad hoc nature of sanctions committees their mandates have varied a lot over time, depending on the nature and substance of the sanctions regime. The primary source for identifying the mandate is the original resolution setting up the sanctions regime. However, often these regimes have evolved over time and their substance has been changed by subsequent resolutions. This necessitates a comprehensive look at all pertinent resolutions forming part of the sanctions regime in order to get a clear picture of the mandate to be fulfilled by the committee.

Pertinent resolutions by no means have been comprehensive in ascertaining the committees' mandates. Due to the fact that the UN Security Council has normally delegated quite a few powers to the committees, their practice has likewise shaped their mandates, however, within UN SC authority and subject to UN SC supervision – and thus not to be read as a free-floating self-authorization. Notwithstanding the many differences between sanctions committees, they share a number of common features, which will be identified in the following:

a) Reporting

Sanctions committees have examined reports produced by the UN Secretary-General, they have themselves reported on the implementation of sanctions, they have made proposals for improving the effectiveness of sanctions regimes and on their expansion and further development, and they have – through their respective chairs – presented oral reports to the UN SC.

b) Handling exemptions

A core administrative function performed by sanctions committees from the very outset has been the administration of applications for exemptions to the sanctions regime. The identification of supplies not covered by the sanctions regime was part and parcel of this administrative function as well as the consideration of humanitarian needs to be respected by the Council. Also included was the consideration of situations covered by Article 50 UN Charter, which reads: "If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems".

c) Sanctions monitoring

An important task assigned to many sanctions committees has been the monitoring of the implementation of sanctions regimes, sometimes through the development of

pertinent monitoring mechanisms. Some of this monitoring resembles mechanisms of compliance control, with the committees considering information about sanctions violations and recommending appropriate measures to redress such situations. In one instance (UNITA), the committee was tasked to investigate reports of violations of sanctions.

Two special roles were performed by sanctions committees on the basis of their respective mandates in this context: first, they contributed to improvements in the implementation of sanctions regimes; second, they served as a kind of liaison institution with other subsidiary organs of the UN Security Council.

d) Administration of targeted sanctions

As already indicated above, the sanctions committees played an important role in the administration of targeted sanctions. They were not only instrumental but decisive in the specification and identification of individuals and entities against which smart sanctions were to be applied. This was not a one-time operation but a continuous responsibility of the committees, not just setting up the list but maintaining the list. In addition to the identification of addressees, a number of the practical matters in the operation of sanctions regimes remained in the hands of the committees: designation of aircraft and points of entry in the application of travel sanctions; designation of funds in the application of financial sanctions; and the information of states about all such decisions in order to uphold the effectiveness of the sanctions regimes.

Likewise the humanitarian impact of sanctions was a matter to be addressed by the sanctions committees. This involved reporting not just on the impact of sanctions as such but also on unintended side effects resulting from the application of sanctions.

A distinct responsibility arising in this context is the informal ombudsman or review procedure that has been established in light of human rights concerns in respect of the application of smart sanctions.

5. Addressing the human rights implications of sanctions regimes

Apart from selecting specific targets of UN SC sanctions these powers have contributed to improving the fairness of sanctions regimes. Having gradually obtained a role in implementing procedural safeguards to respect the rights of non-state addressees of sanctions and to avoid arbitrary decisions, sanctions committees have to some extent compensated the lack of judicial control over such listings.

From 2005 onwards, a number of resolutions have included procedural safeguards to protect the rights of the persons listed and to avoid arbitrary decisions, focusing on the most far-reaching sanctions regime adopted until now, namely the one concerning Al Qaeda and associated individuals and entities – emerging from UN SC Resolution 1267. On the basis of these rules, states are subject to an obligation of motivation when proposing listings in order to enable the 1267-Committee to decide on the appropriateness of the listing. This whole process included refining the

substantive criteria for listings. Indeed, the committees by now have to publish the lists on their websites and the states of residence of the listed person. Furthermore, they have to notify the listing to the individual and a periodic review of listings has now been set up. Even more: individual persons listed can indirectly submit their case to the committee, by addressing the so-called Focal Point, which is a bureau that was established on the basis of UN SC Resolution 1730 in order to receive pertinent applications and files.

In the case of the most far-reaching sanctions regime, and thus in the context of the 1267-Committee even a third-party review was introduced: UN SC Resolution 1904 established the Office of the Ombudsperson and UN SC Resolution 1989 strengthened its role. On that basis, individuals and entities subject to sanctions on the 1267 Consolidated List now have the possibility to submit their request for delisting to an independent and impartial Ombudsperson, appointed by the UN Secretary General. This Ombudsperson is empowered to collect information and material, in order to start a dialogue with the person listed. This dialogue may eventually involve the state concerned. At the end, the Ombudsperson drafts a report and submits a recommendation to the committee on the request for delisting. While the recommendation as such is not binding, the matter can in case the committee does not follow the recommendation be referred to the Security Council.

6. Evaluation

How does this change the role of the sanctions committees and how does this impact the effectiveness and the fairness of sanctions regimes?

It has been argued that these developments should not be exclusively read in a human rights perspective but rather as a step towards establishing rule of law-based governance in the administration of sanctions. Whether this is really a convincing assessment may be put into question by the following considerations:

Indeed, the sanctions committees have obtained a rather powerful position in the implementation of sanctions regimes. They specify and detail the more or less general framework established by the UN Security Council. The implementation of these sanctions regimes by the sanctions committees entails law-making elements (a kind of delegated law-making) and administrative elements. And the administrative part of their work must indeed respect basic principles of good governance. However, by addressing the human rights implications of the imposition of smart sanctions as a matter of (international) administrative law, the political nature of pertinent decisions are pushed to the back seat. This is highly problematic both from the perspective of the effectiveness of sanctions regimes and from the perspective of protecting and safeguarding the human rights of those affected by such regimes. The balancing of imposing (harsh) sanctions and of protecting (procedural) human rights standards is a matter that should not be handled in the backyard or behind closed doors. There are, indeed, good reasons to impose harsh sanctions against individuals from the perspective of peace and security; and in most circumstances, pertinent human rights

guarantees entail limitations clauses. Furthermore, the UN Security Council is a political and not a judicial body, and nothing else applies to sanctions committees.

Indeed, substantive human rights considerations should be handled by the Council itself in an open discourse, providing outer limits for the implementation of sanctions regimes by sanctions committees. Procedural safeguards, however, are best dealt with by an ombudsperson, not by the various sanctions committees; the ombudsperson is the best protection against wrong listings. Lawyers and political scientists should understand the risks of de-politicizing certain decisions, enabling decision-makers to hide behind true or perceived standards of (global) administrative justice. Rather they should pinpoint where the conflict lines are – and they should not weaken the ever-more important mechanism for the maintenance of international peace and security by opening a platform for quasi-political discourse in administrative disguise. Sanctions committees and an ombudsperson will only be able to safeguard minimum standards in respect of human rights; but given the central importance of maintaining international peace and security, and of addressing the terrorist challenges through state-based international organizations, the UN, and the Security Council, should neither be deprived of their political discretion nor of their legitimacy.

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COERCIVE DIPLOMACY, SANCTIONS AND INTERNATIONAL LAW

ROME, 13 FEBRUARY 2015

Palazzo Rondinini
Via del Corso, 518

Draft paper on

Sanctions and Individual Rights

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1. Foreword. – 2. Some necessary preliminary observations. – *Section I: case law and practice: an overview.* – 3. Case law. – 4. Practice. – *Section II: the applicable law.* – 5. The obligation to respect human rights. – 6. The obligation to "accept and carry out" UN Security Council Chapter VII resolutions and its priority over conflicting conventional obligations. – 7. Are human rights obligations displaced by art. 103? – 8. Conclusions.

1. Of the many issues that can possibly be drawn under the topic "sanctions and individual rights", this paper focuses on the legal relationship between individual rights and targeted sanctions/restrictive measures. Although recourse to this typology of measures has been dictated by the concern for the dramatic effects of country sanctions on innocent populations[1], their adverse impact on the rights of the targeted persons and entities has in turn become a serious issue. Sustained commentary and the pertinent case-law have allowed to overcome the initial conundrum concerning legal accommodation of the interests at stake. However, many questions, specific and systemic, remain unanswered. Two in particular: do human rights obligations limit the power of international institutions and of States to enact and implement smart sanctions? What is the applicable legal framework, under international law in particular? In these regards, it is our purpose to add a few reflections to the on-going debate.

After some schematic preliminary observations, the first section of the paper will look at practice – what is the attitude so far taken in practice on targeted sanctions and human rights; the second will discuss the applicable law. The bulk of case-law and practice available so far mostly concerns counter terrorism restrictive measures. Therefore, reference will mainly be to targeted anti-terrorism measures. It is to be noted, however, that a significant number of cases are pending in front of EU Courts concerning restrictive measures adopted against Russia.

2. Before dwelling on practice, some preliminary observations are necessary:

- it is nowadays generally recognised that targeted/smart sanctions (restrictive measures) heavily impact the individual rights of targets; one of the most recent statements in point, by the General Court of the EU, is very clear: "restrictive measures adopted under Regulation No 881/2002 have substantial negative

[1] D. Cortright, G. A. Lopez, L. Gerber-Stelllingwerf, The sanctions era: Themes and Trends in UN Security Council Sanctions since 1990, The United Nations Security Council and War, V. Lowe, A. Roberts, J. Welsh, D. Zaum (eds.), Oxford, New York, 2008, 205 ff.

consequences and a considerable impact on the rights and freedoms of the persons covered " [2];

- the individual rights at stake, in the light of the case-law so far developed, are primarily the right to effective judicial protection with its numerous corollaries, i.e., the right to be informed of the reasons underlying listing, the right to defence, to be heard, to have access to evidence (Kadi I and II; T-392/11, Iran Transfo c. Conseil, §§24, 25); freedom of movement (HRC, Sayadi et Vincks; Federal Court of Canada, Abdelrazik), the right to respect for personal and family life (ECtHR, Nada, UKSC, Ahmed and Others), the right to personal freedom (Nada), the right to property (Kadi I and II), proportionality (Kadi I and II, Nada);

- however, one must bear in mind that this is simply descriptive of current practice and by no means a limit to further individual rights issues arising: worth mentioning, within recent developments, the right to life *vis-à-vis* restrictions on the payment of ransoms[3]; freedom of expression *vis-à-vis* measures to be adopted to counter the spread of terrorist violence[4] and measures to counter the phenomenon of foreign fighters[5];

- States implementing targeted sanctions have to ensure their "robust implementation", be they directed at countering terrorism or other violations of international law, while abiding by international law and human rights, humanitarian and refugee law: this is the position of the UN General Assembly and of the Special Rapporteur on Human Rights while countering terrorism, of States and of the Security Council itself [6].

Section I

Case-law and Practice: an overview

[2] CJEU, Grand Chamber, Case C_239/12 P, § 70; also, specifically on the asset freeze, the same General Court recently held that it "est susceptible de restreindre l'exercice de leurs droits fondamentaux", T-392/11, *Iran Transfo v. Conseil*, § 35, available in French.

[3] SC res. 2133(2014); Conclusions of the Council of the European Union, 23 June 2014, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/143318.pdf; Monitoring Team, Fifteenth Report, S/2014/41, §§ 10, 20 and 35-38.

[4] Committee of Ministers of the Council of Europe, *Declaration sur la liberté d'expression et d'information dans les medias dans le context de la lute contre le terrorisme*; *Déclaration conjointe des Ministres de la culture de l'Union éuropéenne sur la liberté d'expression*, Riga/Paris, 15 janvier 2015.

[5] SC res. 2178 (2014).

[6] See *infra*, the section on practice.

3. So far complaints against targeted sanctions have been brought at UN, regional and national level. Targets have claimed that the sanctions breached their procedural and substantive rights; those concerning UN restrictive measures have been more of a challenge than those concerning measures autonomously adopted by the EU. The primacy of Security Council binding resolution under articles 25 and 103 of the Charter is the main reason for that.

i) judicial review of UN sanctions

As is well known, human rights complaints by targeted individuals/entities, against listings based upon Security Council Chapter VII resolutions, were initially rejected by national and regional courts, mainly with the argument that the State's obligation to implement Security Council Chapter VII resolutions prevails over its human rights obligations under articles 25 and 103 of the UN Charter [7].

Subsequent to the leading judgment by the Grand Chamber of the (then) EU Court of Justice in the Kadi (I) case, in 2008[8], the approach changed: regional and national courts would review national implementations measures rather than the Security Council's resolution imposing the restrictive measures. This allowed them to argue that implementing measures remained subject to human rights under the national constitution[9], under human rights treaties[10], under the regional organization's founding treaty[11]. Having regard to EU courts, this brought their case law concerning judicial review of the acts of the institutions implementing Security Council binding resolutions in line with their case-law on autonomous sanctions[12], that, being "purely" internal acts of the Union had from the start been reviewed for compliance with the fundamental rights provision of the EU legal order[13].

[7] Notably: ATF 14 November 2007, Nada v. State Secretariat for Economic Affairs and Federal Department for Economic Affairs; House of Lords, 12 December 2007, Al-Jeddah; Court of First Instance, T-315/01, *Kadi* v. *Council and Commission*, and T-306/01, *Yusuf and Al-Barakaat International Foundation* v. *Council and Commission*, 21 September 2005.
[8] ECJ, 3 September 2008, joined cases C-402/05 P and C-415/05 P, "Kadi I".
[9] Federal Court of Canada, Abousfian Abdelrazik and the Ministry of Foreign Affairs and the Attorney General of Canada, 4 June 2009
[10] HRC, Sayadi and Vincks v. Belgium, 29 December 2008.
[11] Starting with the mentioned decision in the leading Kadi case: fn. 8 above.
[12] GC, Kadi II, §§ 138-139.
[13] Eg., the OMPI *saga*.

Currently, the latter approach continues to be followed and substantiated, with leading judgments pronounced both by the Court of justice and General Court of the European Union[14], by the ECtHR and the Supreme Court of the UK[15].

In essence, national implementation measures have been reviewed, notably, for compliance with due process, freedom of movement, right to personal and family life, proportionality.

ii) judicial review of EU autonomous restrictive measures

EU courts have accepted right from the start claims concerning violation of fundamental rights by EU autonomous restrictive measures against terrorism on the basis that acts of the Union are not immune from fundamental rights review by the EU courts[16]. It was only with the judgment in Kadi I that the same principle was extended to UN restrictive measures implemented by the EU. The bulk of these claims has been due process claims.

As sanctions regimes multiplied and diversified (country sanctions, non-proliferation sanctions in addition to terrorism sanctions), EU courts have come to emphasise that "il n'y a pas lieu de faire une distinction, s'agissant de l'intensité du contrôle juridictionnel, selon que les mesures restrictives ont pour but de lutter contre certaines politiques menées par le régime au pouvoir dans un État tiers ou de lutter contre le terrorisme"[17].

Case-law is abundant and on the rise, as sanctions regimes are strengthened and new regimes are set up. It is not surprising, therefore, that new issues arise, as for example, the thorny issue of compensation: for the first time recently the General Court has accepted a claim for compensation from a listed entity found to have been listed with no grounds. The General Court has however recognised non-material damages only, in a very limited amount (50000€), whereas it has denied material

[14] The leading cases remaining the ECJ's/CJEU's judgments in "Kadi I" (supra fn. 9) and in "Kadi II", joined cases C–584/10 P, C–593/10 P and C–595/10 P.
[15] UKSC, *Ahmed & others v. Her Majesty's Treasury*, 27 January 2010.
[16] (Then) CFI, OMPI, 2006.
[17] T-392/11, Iran Transfo v. Conseil, §§ 35-37. However, it is arguable that where the measures are intended towards countering an imminent threat of terrorism there is a broader scope for lawful limitations on individual rights (and, in turn, limited latitude as to implementation: cf. ECtHR, Al Dulimi).

damages, arguing that the applicant had not given evidence of the material harm suffered[18].

4. The Security Council has acknowledged the shortcomings of the smart sanctions under human rights law. Starting from 2006 it has introduced a number of mechanisms to ensure fair and clear procedures for listing and delisting, as well as for granting humanitarian exceptions (according to a mandate entrusted on the SC by multiple sources). Resolution 1730(2006) established the Focal point for delisting, amended a number of times in the following years: it receives de-listing requests for all sanctions regime except for the Al-Qaida one; and it also receives requests for humanitarian exemptions.

Under resolution 1904 (2009), the Security Council established the Office of the Ombudsperson to deal with de-listing requests for the Al-Qaida sanctions list. Within a set time frame, such requests are the object of an impartial assessment by the Ombudsperson, through a gathering of information and a dialogue with the interested party phases, and then of a report where the Ombudsperson recommends maintaining the person/entity on the list or *viceversa*, delisting. Following recent amendments to the procedure[19], in case the Ombudsperson recommends maintaining listing, that assessment is final; whereas if delisting is recommended, it can be overturned by consensus in the Sanction Committee or in case that consensus is lacking it becomes effective 60 days, unless any Member of the Sanctions committee decides to refer the matter to the Security Council.

The Focal point and the Ombudsperson represent improvements of the pre-existing situation, which did not contemplate any remedy at UN level for listed individuals/entities, but the prevailing view is that neither can be equated to an effective remedy. The Ombudsperson, in particular, which is the more effective between the two, is no substitute for judicial review and it does not afford an effective remedy[20]: therefore as long as effective and independent judicial review is not

[18] Case T-384/11 Safa Nicu Sepahan v.Council (25 November 2014). Previous damages claims had been rejected: see, in particular, the decision of the (then) Court of first instance in case T-341/07, Sison v. Consiglio (30 September 2009) §§ 110-111.

[19] Security Council Resolution 1989 (2011).

[20] The view is shared by the Special Rapporteur on human rights in the fight against terrorism (2012 Report, A/67/396, § 22); the Court of Justice of the EU (Kadi II §§ 133,134); ECtHR, Al Dulimi; the UKSC, the Fedearl Court of Canada

ensured at the UN, courts have held that it is "*essential*" that the targeted individuals/entities could ask national courts to examine *any* measures taken in application of the sanctions regime[21]. Basically, issues remain with its limited mandate (Al-Qaida sanctions list only), lack of independence in decision-making (her decision on delisting is not final but subject to executive review), access to evidence (no access to confidential evidence is ensured) and also, it seems to me, the fact that a decision to delist is, from a legal point of view, different from a judicial decision of annulment of a listing, entailing, from the point of view of the affected individual or entity, substantially more limited effects.

A further important element in the practice of the Security Council is that the majority of its resolutions on targeted sanctions "reaffirm" "the need to combat by all means, in accordance with the Charter of the United Nations and international law, including applicable international human rights, refugee and humanitarian law, threats to international peace and security caused by terrorist acts, *stressing* in this regard the important role the United Nations plays in leading and coordinating this effort"[22]. The same call has been steadily reiterated by the General Assembly: the *UN Global Counter-terrorism Strategy* recognizes that fighting terrorism and respecting human rights are "not conflicting goals but complementary and mutually reinforcing aims" and commit to "take measures aimed at addressing violations of human rights and to ensure that any measures taken to counter terrorism comply with their human rights obligations"[23]. This is difficult to reconcile with the idea that human rights are displaced by these resolutions[24].

iii) State practice would be impossible to account for in the limits of the present paper. What can usefully be observed for present purposes is, on the one hand, that some States, and the Council and the Commission of the EU, have taken strong positions in favour of an "absolutist' approach to Security Council's targeted sanctions resolutions, and, therefore, in favour of their unconditional implementation.

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[21] ECtHR, Al Dulimi. The view that an "appropriate review process" of Security Council's listings and de-listings should be created at the UN level is defended by M. Bothe, *Security Council's Targeted Sanctions against presumed Terrorists. The need to comply with Human Rights Standards*, in *Journal of International Criminal Justice*, 2008, 541 ff.
[22] Res. 2161 (2014).
[23] A/Res/60/288, of 8 September 2006.
[24] *Infra*, Section II.

They have done so, in particular, as defendants (or in support of defendants) in targeted sanctions litigation[25]. On the other hand, official statements that the fight against terrorism has to comply with human rights standards abound, at national and international level. At the Sixty-ninth session of the Legal Committee of the UN, under agenda item 107 relating to "Measures to eliminate international terrorism", "commitments to the protection of fundamental freedoms and the rule of law were identified as essential elements in the fight against terrorism. The need for strict observance of the Charter of the United Nations and international law, including human rights, humanitarian and refugee law, as well as due process in countering terrorism was underscored"[26]. States adopted by consensus, that is with no objections, General Assembly resolution 68/276 on The United Nations Global Counter-Terrorism Strategy Review, where they "recognized" once more that "*international cooperation and any measures taken by Member States* to prevent and combat terrorism must fully comply with their obligations under international law, including the Charter of the United Nations, in particular the purposes and principles thereof, *and relevant international conventions and protocols*, in particular human rights law, refugee law and international humanitarian law"[27]. Note the explicit references, for one, not only to States but also to "international cooperation" as bound by human rights obligations, and, for two, to "relevant international conventions and protocols", annulling speculations that the call concerns general international law only.

According to the US Department of State – and notwithstanding a "more decentralized and geographically dispersed terrorist threat" –, "[d]efeating a terrorist network requires us to work with our international partners to disrupt criminal and terrorist financial networks, strengthen rule of law institutions while respecting human rights, address recruitment, and eliminate the safe havens that protect and facilitate this activity. In the long term, we must build the capabilities of our partners and counter the ideology that continues to incite terrorist violence around the world"[28]. In a motion passed on 1 March 2010, the Foreign Policy Commission of the Swiss National Council (the lower house of the federal parliament) requested the Federal Council to inform the UN Security Council: that from the end of 2010 it would no

[25] For example the United Kingdom; it is worth mentioning, however, that the Government's position has been questioned in various occasions by the UK Parliament.
[26] Summary of work, http://www.un.org/en/ga/sixth/69/int_terrorism.shtml
[27] Italics added. See also specifically, §§ 13, 33 and 37 of the resolution.
[28] Digest of United States Practice in International Law, 2013, at 35.

longer unconditionally apply restrictive measures on individuals under the counter terrorism resolutions[29]. In the official statement concerning its sanctions policy, both as far as autonomous and UN measures are concerned, the EU states that "[r]estrictive measures must respect human rights and fundamental freedoms, in particular due process and the right to an effective remedy in full conformity with the jurisprudence of the EU Courts" [30]. Another interesting feature of the above mentioned practice is the emphasis put on the fact that implementation of the measure is a "principal responsibility of the Member States", while acknowledging the "important role" that international organisms, *in primis* the complex UN apparatus on counter-terrorism have, "in facilitating and promoting coordination and coherence in the implementation of the Strategy at the national, regional and global levels and in providing assistance, upon request by Member States, especially in the area of capacity-building"[31].

Section II
The applicable law

The case-law and practice briefly described suggest, first, that the authority deciding restrictive measures has to abide by international law including human rights, humanitarian law and refugee law; second, that the authority implementing the measures also has to comply with international law including human rights, humanitarian law and refugee law. As a result, acts not complying with the indicated standards, can be challenged. What are the legal underpinnings here?

5. The obligation to respect human rights is binding upon all actors involved. The Security Council – as well the UN as a whole – is bound to respect human rights. Leaving aside the easier case of human rights having the status of *jus cogens*, where a positive answer is generally given, it seems arguable that the Security Council is bound to respect human rights under customary law, which applies to the UN as a

[29] ECtHR, Nada, § 63.
[30] Cf., http://eeas.europa.eu/cfsp/sanctions/index_en.htm.
[31] Eg., General Assembly resolution 68/276 (fn. 23), § 6. In a similar vein, Digest of United States Practice in International Law, 2013, at 35 f.

subject of international law, and under Charter's Articles 1(3)[32], and 55; Article 1(1) is also significant, although overlooked, where it states that collective action to maintain international peace and security has to be "in conformity with the principles of justice and international law". The general, according to some undetermined, nature of these provisions does not, in our view, deprive them of significance for the purposes of the present discussion: in fact, they appear to be a sufficient legal basis to argue that the UN, and its organs, are bound by a general principle of respect for human rights while performing the tasks assigned to them by the Charter[33]. What is more, those general principles have been remarkably developed and detailed both in customary law and in the subsequent practice of the Organization which is, as is well known, and to say the least, one of the criteria of interpretation of any international agreement, providing additional ground to argue that the Organization is not free of human rights constraints. In the area under discussion, the mentioned general statements that the fight against terrorism has to abide by international law, international human rights law, international humanitarian law, refugee law are evidence that the UN organs acknowledge that their action and the action of Member States is limited by international human rights law.

The EU is "founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights" (art. 2 TEU). As a consequence of the attitude ECJ, that consistently acted to safeguard fundamental rights in the EU legal order, said rights are today spelled out in the Charter of Fundamental Rights, which under the Treaty of Lisbon "shall have the same legal value as the Treaties" (art. 6, para. 1, TEU); the common foreign security policy "shall be guided" "by [...] democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law" (art. 21, para. 1, TEU).

[32] See ECtHR, Al Jedda, § 101: in the light of Art. 1, Para. 1, UNC it is to be presumed that the Security Council "does not intend to impose any obligation on Member States to breach fundamental principles of human rights". M. Lugato, 2010, 321 f.; R. Kolb, 132 ff.

[33] V. Gowlland-Debbas, An Emerging International Public Policy?, From Bilateralism to Community Interest, Essays in Honour of judge Bruno Simma, U. Fastenrath, R. Geiger, D.-E. Khan, A. Paulus, S. von Schorlemer, c. Vedder, (eds.), Oxford, New York, 2011, 241 ff., 253

Individual States are bound to respect human rights under international customary law, under international agreements to which they are parties, and in most cases under their national constitutions.

6. Next, the obligation "to accept and carry out" UN Security Council Chapter VII resolutions, under art. 25 UNC has to be brought into the picture: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". Those resolutions do not have direct effect in the legal orders of the Member States, which, therefore, are under an obligation to implement them at national level. The obligation spelled out in art. 25 UNC has to be interpreted in the light of art 103 UNC, entailing priority to Charter's obligations over conflicting obligations set out under any other international treaty.

7. In the first years of targeted sanctions, the legal framework just sketched has determined a major difficulty, as a number of courts have held that art. 103 implied that no scrutiny at national or regional level could be exercised upon human rights complaints arising from the implementation of Security Council targeted sanctions. Subsequently, courts have prevailingly turned towards a "technique d'évitement de l'art. 103"[34]. The Court of Justice of the EU and, after 2008, the General Court, have relied on the principle that EU acts implementing sanctions – even Security Council sanctions under Chapter VII – are subject to the principles on respect for fundamental rights, which are the foundations of the EU legal order[35]. The ECtHR, based on a presumption that the Security Council would not impose on Member States the obligation to breach human rights, unless "clear and explicit language" to the contrary was used, held in favour of harmonizing interpretation; finding that the discretion available to the Contracting State at the implementation stage allowed conflict with human rights obligations to be avoided; or has found a violation of the principle of proportionality[36]. The International Court of Justice so far has not had any occasion to deal with Art. 103, with respect of human rights treaty

[34] A. Tzanakopoulos, Collective Security, 52 ff.; R. Kolb, *L'article 103 de la Charte des Nations Unies*, RCADI, Tome 367 (2013), 9-252; see also Watson's Report update, 26 ff.; EU courts; UKSC, *Ahmed & others v. Her Majesty's Treasury*

[35] Paradigmatically, Kadi I and II

[36] ECtHR, Al Jedda, Nada, §§ 175-180; Al Dulimi, §§ 117- 120 (compare with Behrami and Saramati, § 148)

obligations. The Lockerbie decision does not offer specific guidance on the issue we are examining, as the potential conflict in the case did not involve human rights obligations. In general, courts have therefore taken the position that human rights obligations are not displaced by the obligation to carry out Security Council's smart sanctions, but have not dealt with the issue under art. 103 UNC.

As to scholars, the prevailing view remains that obligations stemming from human rights treaties are no exception to the priority rule incorporated in art. 103. It is at times conceded that this is not entirely satisfactory, particularly in respect of international human rights obligations. However, it is held, the text of the provision and international practice allow for no other interpretation[37].

In our view, the approach according to which, under art. 103 UN Charter, the obligation to implement Security Council Chapter VII resolutions on targeted sanctions has to be afforded priority over the human rights obligations of UN Member States towards targeted individuals, groups or entities does not stand closer scrutiny. The main criticisms can be summarized as follows. First, it results from an "absolutist" interpretation of art. 103, entailing legally absurd results: to say the least, one would have to accept that the Security Council is *legibus solutus*. Also, one would argue that, under Art. 32 of the 1969 Vienna Convention on the Law of Treaties, when interpretation under Art. 31 "leaves the meaning ambiguous or obscure" or "leads to a result that is manifestly absurd or unreasonable", recourse is to be had to supplementary means of interpretations in order to clarify the interpretation of treaty provisions. Perhaps further effort is required to overcome the "not entirely satisfactory but inevitable' interpretation of Art. 103 in relation to human rights obligations.

Secondly, the reading under examination disregards the fact that, as we have seen, the Security Council itself calls on Member States (and at times also on non Member States) to ensure "robust implementation" of counter-terrorism measures while respecting international law, including human rights, humanitarian and refugee law. This casts doubts on the existence of the "conflict" to be solved through Art. 103. In that call one is authorized to see recognition, by the Security Council, that Member States of the United Nations have equally reinforced obligations to implement

[37] Recently R. Kolb, L'article; A. Tzanakopoulos, Collective Security, 49; further references in M. Lugato, Sono le sanzioni, 320 ff.

Security Council Chapter VII resolutions and to protect human rights. On this basis, effective protection of listed subjects' rights can be pursued, at the implementation stage, in harmony with international human rights agreements themselves, which allow for derogations, without sacrificing the equally imperative objective to fight international terrorism (and, more in general, to abide by Security Council's action to maintain international peace and security). Interestingly in this regard, the ECtHR has recently observed that "while the government [of the UK] placed repeated reliance on the relevant UNSCRs, they had failed to refer to the obligations clearly expressed therein that the States concerned had to comply with their international obligations, including under humanitarian and human rights law"[38]. Both States and courts have so far not reserved sufficient attention to these "compatibility clauses"[39].

Third, one has to underline the relevance of the case law and practice we have been discussing for the solution of the general underlying issue concerning the legal relations between coercive diplomacy and human rights. The facts that the case law has, by and large, avoided to hold that, under Articles 25 and 103, Security Council's targeted sanctions displace human rights obligations; that the majority of States and international institutions have repeatedly committed to robustly conducting the fight against terrorism while respecting human rights; that, to my knowledge, no claim has been officially raised that States are breaching Articles 25 and 103 UNC, as a consequence of their judges annulling listings for violation of human rights obligations are elements of practice that offer supplementary evidence of how problematic the traditional interpretation of Article 103 is, in the face of the current challenges stemming from the two paramount collective interests at stake: to effectively fight international terrorism, while at the same time upholding the rule of law.

8. The main points offered for reflection are:

- that individual rights are a limit both to the decision and to the implementation of restrictive measures. These limits stem from international law (customary, possibly *jus cogens*, law, international treaties, case-law of treaty bodies), EU law and national law;

[38] Al-Saadoon and Mufdhi v. United Kingdom, 2 March 2010, § 105.
[39] M. Lugato, Sono le sanzioni, 329 ff.; R. Kolb, L'Article, 125 f.

- that the scope of the human rights obligations *binding international institutions* stems from the "rules of the organization", that is "in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization" (Art. 2, para. 1 (*j*), 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations) and possibly by international agreements that they may have concluded;

- the scope of the human rights obligations *binding on States*, stems from general international law (possibly having peremptory character), from the human rights treaties to which they are Parties and from the national constitutions. As is obvious, therefore, the applicable human rights standards will vary within the perimeters – substantial and procedural – accorded to States for limitations and derogations by the applicable rules.

- the obligation to accept and carry out Security Council binding resolutions on restrictive measures has to be implemented while respecting international human rights law: the interpretation according to which such obligations are displaced as an effect of Art. 103 does not find recognition in case-law, nor in the practice of States, which, on the contrary, recognize that countering terrorism, in particular, requires respect for international law, human rights law, humanitarian law and refugee law.

The challenging step ahead for all those involved – international institutions, States, legislators, judges, scholars, once the applicable legal standards are determined is to objectively assess the functions of coercive diplomacy and its aims in any given case – counter terrorism, prevent or fight against major violations of international law, punish those responsible for major violations of international law – in order to correctly identify and apply effective measure, compliant with those standards; and to establish the tools, for example as far as dealing with confidential information, enhancing capacity to meet the objectives of effective coercive diplomacy without renouncing to our standards of civilization beyond what is strictly required and admissible.

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COERCIVE DIPLOMACY, SANCTIONS AND INTERNATIONAL LAW

ROME, 13 FEBRUARY 2015

Palazzo Rondinini
Via del Corso, 518

Draft paper on

International Legal Limits on the Ability of States to Lawfully Impose International Economic/Financial Sanctions

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DRAFT - NOT TO BE QUOTED

Introduction

This chapter addresses the subject of the legal limitations which international law places on the imposition of international economic/financial sanctions, with particular reference to sanctions with counter-proliferation aims—*i.e.*, purposed in stopping the actual or suspected proliferation of weapons of mass destruction (WMD), including particularly the original development of WMDs within the target state. However, the analysis in this chapter should be equally applicable to most other cases of the application of coercive economic/financial sanctions.

In terms of definitions, economic/financial sanctions may be organized and applied under a multilateral framework by states acting in a cooperative manner, under the authority of the UNSC. Alternatively, or sometimes in parallel, sanctions can be applied by states on a unilateral basis outside of a UNSC mandate. Under this paradigm, states may still coordinate sanctions among themselves as against a common target. Nevertheless, for purposes of legal categorization, this chapter will refer to all sanctions undertaken outside of a UNSC mandate as unilateral sanctions.

This chapter will argue that there are at least three sources of international legal obligations which impose limits on the application of coercive international economic/financial sanctions: 1) the general international principle of non-coercion; 2) the law of countermeasures; and 3) human rights law. It will conclude that the totality of these obligations of international law limiting the lawfulness of both unilaterally and multilaterally-applied coercive sanctions purposed in counter-proliferation, leaves a vanishingly small window for the lawful application of such sanctions.

I. Effectiveness

First a word regarding the effectiveness of economic/financial sanctions in accomplishing their stated policy ends. This is not to be confused with the effectiveness of sanctions in causing harm to the target state's overall economy, or suffering to the citizens of the target state, both of which are frequently caused by sanctions. However, the leading academic study of the use of economic sanctions as a tool of foreign policy finds that economic sanctions have historically achieved success in changing target state behavior in the manner desired by the sanctioning states in only thirty-four percent of cases.[1] It further notes that, in cases where high-level political interests, such as national security (*e.g.* WMD proliferation) are involved, the likelihood of sanctions significantly affecting target State behavior in the desired direction is even further diminished. These findings are applicable to both multilateral and unilateral sanctions. A study of the effectiveness of international economic sanctions specifically in the context of nuclear nonproliferation, similarly finds that the imposition of economic sanctions against a target state with an existing nuclear program, aimed at halting that program, is unlikely to succeed in changing the target state's policy toward that program.[2]

A further observed corollary problem in the area of counter-proliferation-oriented sanctions specifically is that, once adopted, economic sanctions often become entrenched in either or both

[1] Hufbauer at al 2007, p.162.
[2] See Miller 2014, p. 937.

national and international law and policy, and can become very difficult to rescind without the sanctioning authority losing perceived credibility. For example, in the cases of UNSC - authorized sanctions against Iran and North Korea, where longstanding counter-proliferation sanctions have not had the desired policy effects—even though their collateral effects upon the economy and the civilian populace have been severe—the sanctions programs adopted by the UNSC now arguably stand as a hindrance in and of themselves to a final resolution of the standoff between these countries and their Western detractors.[3]

The UNSC has, for example, ordered Iran to cease uranium enrichment—a fundamental element of a peaceful nuclear fuel cycle program. The economic sanctions that the UNSC has imposed upon Iran are tied directly to Iran's compliance with this command, among others.[4] However, it is clear from the record of diplomatic negotiations between the P5+1 and Iran that any final resolution of the diplomatic crisis regarding Iran's nuclear program will necessarily involve Iran keeping intact a significant proportion of its uranium enrichment program. This then raises the potential of a diplomatic resolution to the crisis, which includes a requirement of lifting the international sanctions regime on Iran, but which does not include Iran's strict compliance with the command of the UNSC to cease its uranium enrichment program. This not-unlikely outcome would force the UNSC into a difficult position, in which it might be forced to choose between its own credibility on the one hand, and a practical resolution to the diplomatic crisis on the other.

Thus, observation of counter-proliferation-oriented sanctions cases demonstrates that not only are sanctions typically unsuccessful in this context, but worse, they have the potential to become impediments *per se* to achieving desired policy aims.[5]

II. Legality

The question of the legality of international economic/financial sanctions as a means of foreign policy coercion is a complex one. Economic/financial sanctions have effectively become the favored default tool of foreign policy, particularly for powerful states, acting alone or cooperatively, to express their displeasure with the policies of less powerful states in a range of issue areas, and to bring pressure to bear on those target states to change their behavior.

The UNSC itself seems to have come to regard economic sanctions as the most attractive (*i.e.* least costly to them) tool in its toolbox of options for dealing with states and non-state actors that it determines to constitute a threat to international peace and security. This notwithstanding the above referenced empirical research which demonstrates the ineffectiveness of sanctions. This observation has led many to conclude that economic/financial sanctions, in fact, have more to do with cathartically satisfying the sanctioners and their domestic constituencies that they are "doing something," than with meaningfully addressing the sanctionee's displeasing behavior.

Consistent with the *Lotus* principle of international law, as a general proposition, and in the absence of positive legal obligations to the contrary, it is certainly correct that a state has the legal discretion to choose with which other states it pleases to have, and to allow the legal and

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[3] *See* Yousaf Butt, By Not Lifting Sanctions, West and Obama are Helping Iran Enrich Uranium, CHRISTIAN SCIENCE MONITOR, 25 May 2012.

[4] For a listing of UNSC Resolutions on Iran *see* Arms Control Association, UN Security Council Resolutions on Iran, https://www.armscontrol.org/factsheets/Security-Council-Resolutions-on-Iran (accessed 5 July 2014).

[5] *See e.g.*, Daniel Joyner, EJIL:Talk!, The New Deal Between the P5+1 and Iran, 26 November 2013 (accessed 5 July 2014).

natural persons subject to its jurisdiction to have, economic/financial dealings.[6] Pursuant to this observation, there is undoubtedly a range of sanctions that are applied by states against other states and non-state actors, that are not prohibited by any positive rule or obligation of international law, and are therefore lawful to maintain, such as in the case of a simple retorsion.[7]

However, it is also true there are a number of sources of positive international legal obligation, located within a variety of substantive areas of international law, which may be applicable to the imposition of certain international economic/financial sanctions and which may significantly circumscribe states' and international organizations' lawful discretion to impose them. The balance of this chapter will briefly review and consider a number of these sources of international legal obligation, focusing on obligations applicable to the implementation of economic/financial sanctions outside of the context of an active armed conflict.

II(A) Economic Warfare

Although coercive international economic/financial sanctions applied unilaterally by states are generally held not to comprise *per se* a breach of Article 2(4) of the UN Charter, which prohibits the threat or use of international force, nor on their own to constitute the commencement of an armed conflict, nevertheless in a meaningful sense coercive sanctions adopted during peacetime, either unilaterally or multilaterally through the UNSC, are a means of economic warfare.[8] And indeed, some of the chiefest proponents of the use of coercive sanctions refer to them as such.[9] Though 'economic warfare' is not a legal term of art, it does usefully capture both the intent of those applying such sanctions, as well as the effects of those sanctions upon the target state(s). As Vaughan Lowe and Antonios Tzanakopoulos have written:

> Economic warfare is not only a means of imposing pressure which supports military action. Certain measures taken in peacetime resemble traditional means of economic warfare to such an extent that it may be fair to say that economic warfare, in the form of economic coercion, is also an *alternative to*—and not simply a *complement of*—armed conflict.[10]

President Hassan Rouhani of Iran has recently commented on the violent nature of the sanctions imposed by the UNSC, and by states acting unilaterally, against Iran for espoused counter-proliferation purposes:

> Unjust sanctions, as manifestation of structural violence, are intrinsically inhumane and against peace. And contrary to the claims of those who pursue and impose them, it is not the states and the political elite that are targeted, but rather, it is the common people who are victimized by these sanctions. Let us not forget millions of Iraqis who, as a result of sanctions covered in international legal jargon, suffered and lost their lives, and many more who continue to suffer all through their lives. These sanctions are violent, pure and

[6] This principle provides that "restrictions upon the independence of States cannot . . . be presumed" and that international law recognizes that States possess "a wide measure of discretion which is only limited in certain cases by prohibitive rules." Case of the S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser.A) No.10.

[7] *See* Dupont 2012, p.311; Lowe and Tzanakopoulos 2012, p.8 ("It is generally accepted that the prohibition of the use of force under [UN Charter] Article 2(4) and under customary law does not preclude the use of economic force.") The ICJ in the *Nicaragua* case found that "[a] State is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific legal obligation." Military and Paramilitary Activities (Nicaragua v. United States), Judgment. 1986 I.C.J. 14, 138.

[8] *See* Lowe and Tzanakopoulos 2012, p.8.

[9] *See e.g.*, Zarate 2013.

[10] Lowe and Tzanakopoulos 2012, p.8.

> simple; whether called smart or otherwise, unilateral or multilateral. These sanctions violate inalienable human rights, inter alia, the right to peace, fight to development, right to access to health and education, and above all, the right to life. Sanctions, beyond any and all rhetoric, cause belligerence, warmongering and human suffering.[11]

Particularly as the authorization and use of economic/financial sanctions, especially by powerful states against weaker states, has become so commonplace during the post-Cold War period, it is important to recognize that international economic/financial sanctions that are purposed in coercing a target state to change its behavior are measures of economic warfare, potentially no less destructive in their effects upon the target state, and particularly upon its civilian population, than military force.

In recognition of this fact, a number of scholars have proposed that the law of armed conflict, or at least principles derived from that body of law, should apply to the imposition of coercive economic/financial sanctions, both by states acting unilaterally as well as under the authorization of the UNSC, even during peacetime. In a comprehensive presentation of this line of analysis, in an article published in the *European Journal of International Law* in 1998, Michael Reisman identified a number of these principles.[12]

First, the related principles of necessity and proportionality:

> The principle of proportionality under international law caps the quanta of damage that the necessity inquiry suggests. Therefore, even if necessary, a sanctions programme cannot exceed the somewhat broadly construed bounds of proportionality. Collateral damage, as part of general damage, must also be proportional. The referential point of evaluation for proportionality under the law of armed conflict is the immediate or prospective consequences of the act that triggered the contingency. This inquiry into proportionality must also necessarily be prospective.

Second the principle of discrimination between combatants and non-combatants:

> Economic sanctions are destructive. Potentially, they could be even more destructive, at least in terms of collateral damage, than uses of the military instrument . . . To allow unilateral or multilateral actors to use economic sanctions in a manner inconsistent with the minimization of collateral harm would undermine the fundamental goals of international law that are expressed in the prescribed law of armed conflict . . . More limited and precise economic sanctions are to be preferred over more general and undiscriminating programmes. Given the destructiveness of economic sanctions programmes, it would seem that genuinely effective general embargoes, which, by definition, cannot discriminate between combatant and non-combatant, should be impermissible and that there is now a need for a much more refined use of the economic sanction.

Third, the principle of necessity of a periodicity of review of sanctions programs:

> [E]conomic sanctions programmes must continuously update their information as the programme proceeds to ensure that they are consistent, in their effects, with international law. The necessity for the use of explicit contextuality here is very important to ensure compliance no less than to test allegations of abuse.

Implicit in Reisman's analysis is the conclusion that serious, coercive economic sanctions, applied unilaterally by states or under the authorization of the UNSC, should *per se* trigger the

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[11] Statement by H. E. Dr. Hassan Rouhani, President of the Islamic Republic of Iran, at the Sixty-eight Session of the United Nations General Assembly [sic], New York, 24 September 2013, *available at* https://papersmart.unmeetings.org/media2/157530/iran.pdf (accessed 5 July 2014).

[12] Reisman and Stevick 1998, p.86-141.

application of the *jus in bello*, and principles contained therein. This is a problematic conclusion, as it is difficult to fit the idea of economic/financial sanctions satisfying the requirements for constituting a formal armed conflict, with the orthodox interpretation of provisions in sources of the *jus in bello* defining armed conflict.

However, it is likely that many of the same principles that Reisman identifies in the law of armed conflict—necessity, proportionality, discrimination, review—can be found and argued more persuasively to be formally applicable to coercive economic/financial sanctions, in general international law. As Lowe and Tzanakopoulos observe:

> The exercise of economic pressure, even in the absence of specific obligations, must not exceed a certain limit, lest it constitute a violation of the customary principle of non-intervention. Accordingly, economic measures not otherwise prohibited by international law become unlawful if they aim to coerce the target State in respect of matters which each State has the right to decide freely, such as the choice of a political, economic, social and cultural system . . . Certain parallels between measures of economic warfare in armed conflict and economic measures in peacetime are clearly identifiable. The concept of imposing a strain on the targeted economy so as to procure submission (in war) or to induce compliance with international obligations (in peacetime) is one common feature. So, too, is the basic limitation of proportionality, even if the precise test will differ depending on whether economic warfare is waged during armed conflict or in peaceful circumstances.[13]

Lowe and Tzanakopoulos here identify *inter alia* the general international law principle of non-intervention.[14] This principle is closely akin to a principle which has been iterated in a number of treaties and UNGA resolutions—the right of states to be free from political or economic coercion by other states. As stated in UNGA Resolution 3281:[15]

> Article 1
> Every State has the sovereign and inalienable right to choose its economic system as well as it political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever.
>
> Article 32
> No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights.

The number of occasions on which this principle has been included in UNGA resolutions, and the overwhelmingly positive voting record in favor of these resolutions in the UNGA, provides evidence supporting the conclusion that this principle has likely entered into the corpus of customary international law.[16] Accordingly, international economic/financial sanctions that are purposed in coercing states to change their behavior in issue areas in which it is their sovereign right to choose their own policies are likely in violation of the customary international law principles of nonintervention and non-coercion.

Here a distinction may exist as between sanctions applied unilaterally by states, and sanctions applied under the authority of the UNSC. While this statement of law applies to states acting

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[13] Lowe and Tzanakopoulos 2012, pp. 11, 13.
[14] *See* Shaw 2008, p.1147.
[15] Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), Art. 1, U.N. Doc. A/RES/29/3281 (12 December 1974); *see also* G.A. Res. 2625 (XXV), Annex, principle 3, U.N. Doc A/RES/25/2625 (24 October 1970); G.A. Res. 44/215. U.N. Doc A/RES/44/215 (22 December 1989); G.A. Res 66/186, U.N. Doc. A/RES/66/186 (22 December 2011).
[16] *See* Dupont 2012, p.316.

unilaterally—*e.g.* sanctions applied by the U.S. and the EU as against Iran for counter-proliferation purposes—in Article 41, the UN Charter explicitly authorizes the UNSC to mandate economic/financial sanctions in response to a determined threat to international peace and security. However, it is unclear to what extent the UNSC has authority to violate principles of general international law through its decisions, even when acting under its Chapter VII authority. This is a subject that has been long debated by international legal scholars.[17]

Article 103 of the UN Charter does provide that, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." However, this provision is likely best viewed narrowly, as a conflict of treaty law provision. It is not at all clear that Article 103 may be invoked to justify UNSC decisions that violate principles of general or customary international law, including principles of international human rights law, the law of armed conflict, or, arguably, the principle of non-coercion as it has been described above. In fact, the balance of case law from international tribunals, and scholarly commentary argue the contrary.[18]

II(B) Countermeasures

However, under the law of state responsibility, it is possible for states to unilaterally maintain lawful economic/financial sanctions that are applied in response to an allegedly unlawful act of the target state, even if the sanctions are themselves *prima facie* illegal, if the sanctions meet the criteria for lawful countermeasures.[19] The criteria for lawful application of countermeasures, both procedural and substantive, can be found in the ILC Draft Articles on State Responsibility.[20]

The subject of the lawfulness of sanctions applied by the EU specifically in the context of counter-proliferation oriented sanctions targeting Iran, has been comprehensively examined by Pierre-Emmanuel Dupont. Referring to the criteria for lawful application of countermeasures in this context, Dupont has concluded the following:

> As regards the substantial conditions for the recourse to countermeasures found in ARSIWA, applied to the measures considered—namely the oil embargo and the measures taken against the Central Bank of Iran—it may be argued inter alia that (i) the existence of the wrongful act, on which the lawfulness of the countermeasures ultimately rests, is dubious in this case; (ii) whether the EU, in the case considered, qualifies as an 'injured' international organization, entitled as such to take countermeasures, is also dubious, (iii) the measures at issue do not prima facie comply with the requirement of proportionality of countermeasures and (iv) the availability of recourse by States (or regional organizations) to countermeasures in situations in which the Security Council has taken action under Chapter VII of the UN Charter, is a matter of controversy.[21]

This same analysis would apply *mutatis mutandis* to any other unilateral application of countermeasures under these or similar facts, including unilateral US sanctions on Iran. As Dupont's analysis has shown, unilateral countermeasures applied for counter-proliferation purposes will typically be difficult to apply lawfully by reference to the criteria for lawful

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[17] *See*, e.g., Schweigman 2001; Reinisch 2001; Michaelsen 2014.
[18] *See generally* Joyner 2012; Schweigman 2001; de Wet 2004; Tzanakopoulos 2011; de Wet 2013.
[19] *See generally* Dupont 2012.
[20] Articles on Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, U.N. Doc. A/RES/56/83/Annex (12 December 2001).
[21] Dupont 2012, p.325.

countermeasures under the law of state responsibility. It is further important to note, that, as Lowe and Tzanakopoulos have explained:

> If the peacetime measures of economic warfare are in violation of obligations of the acting State under international law and cannot be justified as countermeasures, they will engage the international responsibility of the State. They will thus themselves serve as grounds for resort to countermeasures or even self-defence by the injured State.[22]

Thus, the application of sanctions as countermeasures, if unlawfully applied, can result in the liability of the sanctioning state and additionally give rise to the potential for the target state to itself apply lawful countermeasures.

II(C) Human Rights

Lastly, the possibility that international economic/financial sanctions, whether applied unilaterally by states, or multilaterally through the UNSC, may violate obligations of the sanctioning states, or the United Nations itself, under international human rights law, has been a subject of increasing modern concern. As noted previously, severe, coercive economic sanctions, particularly applied by powerful states against weaker states, can have devastating effects on the economy and infrastructure of the target state, leading to widespread suffering and deprivation for the civilian population of the state.

There is a controversial threshold issue on this question, regarding whether states have human rights obligations regarding persons not in their territory or under their effective control. The most recent scholarship and case law recognizes that extra-territorial human rights obligations can apply to states when they engage in forceful action abroad, even in peacetime.[23] As Nils Melzer has explained:

> The notion of 'jurisdiction' for the purposes of human rights law has been said to focus on *conduct* rather than *territory*, and to emphasize the duty of states to conduct their operations according to human rights standards with regard to all individuals who may be under their effective control or who may be directly affected by their actions.[24]

In brief, international human rights obligations follow a state's conduct, and the effects of that conduct, upon individuals, whether they are located within the acting state or extraterritorially. It would appear that the use of coercive international economic/financial sanctions upon a target state would fit well into this scope of application. And particularly as similar forcible actions against a foreign civilian population would be prohibited or at least severely limited by customary international humanitarian law during a time of armed conflict, as a simply intuitive matter it would seem impossible for states to argue that their use of targeted force through economic warfare during peacetime against a foreign civilian population, should not give rise to obligations to respect the human rights of those targeted civilians.[25] Economic/financial sanctions imposed during peacetime may therefore unlawfully infringe upon the following human rights of civilians in target states, found in both conventional and

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[22] Lowe and Tzanakopoulos 2012, p.12.

[23] *See* Milanovic 2013; Melzer 2008, p. 138-139; *Issa and Others v. Turkey*, App. No. 31821/96, 41 EHRR 567 (2004), paragraphs 69-71.

[24] Melzer 2008, p. 138.

[25] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Arts.54, 69, 70, 8 June 1977, 1125 U.N.T.S. 3.

customary international law: the rights to life; health; an adequate standard of living, including food, clothing, housing and medical care; and freedom from hunger.[26]

Similarly, there is a question as to whether the UNSC itself is bound by international human rights law obligations in its authorization of economic/financial sanctions pursuant to its Chapter VII powers. As recognized previously, the UNSC does have explicit authority under Article 41 of the UN Charter to authorize economic/financial sanctions in a case in which it determines the existence of a threat to international peace and security. However, UNSC-authorized sanctions regimes, because of their coordinated nature potentially among many states, also have the greatest potential to severely affect the civilian population of the sanctioned state.

It is important to recall that in Article 25 of the UN Charter, Member states are obligated to "accept and carry out the decisions of the UNSC in accordance with the present Charter." This provision has been interpreted to require Member state compliance only with UNSC sanctions decisions which are themselves in compliance with the provisions and principles of the UN Charter.[27] Furthermore, Article 24 of the Charter provides that the UNSC must exercise its powers on issues of international peace and security "in accordance with the Purposes and Principles of the United Nations." These provisions are important limitations on the power of the UNSC to act, even under its Chapter VII authority.

Among the paragraphs in Article 1 of the UN Charter, which are explicitly designated to constitute the "Purposes of the United Nations," is paragraph 3, which lists one such purpose as:

> To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, *and in promoting and encouraging respect for human rights and for fundamental freedoms for all* without distinction as to race, sex, language, or religion. (emphasis added)

Thus, in order for the UNSC to exercise its Chapter VII powers lawfully in accordance with the purposes of the United Nations, it must promote and encourage respect for human rights. It can hardly do so if it, itself, violates human rights law in its application of economic/financial sanctions, in the counter-proliferation context or in any other context. [28]

This subject of the application of international human rights law to UNSC sanctions has recently been thoroughly considered by Christopher Michaelsen, in an article in the *Journal of Conflict and Security Law*.[29] Michaelsen discusses in particular the principle of derogation, present in many human rights law instruments, and the argument made by some scholars that, when the UNSC acts pursuant to its Chapter VII powers, it is implicitly signaling its intention to derogate from normally applicable human right law. This derogation argument could also be made more directly by states acting unilaterally as well.

In the context of UNSC sanctions, Michaelsen finds significant utility in the principle of proportionality, which is a general principle of international law, whose manifestations can be

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[26] *See* UDHR, Arts.3, 25, G.A. Res. 217A(III), U.N. Doc. A/810 (1948); ICCPR, Art.6.1, 16 December 1966, 999 U.N.T.S. 171; Convention on the Rights of the Child, Arts. 6.1, 27.1, 20 November 1989, 1577 U.N.T.S. 3; ICESCR, Arts.11.1, 11.2, 12, 16 December 1966, 993 U.N.T.S. 3.

[27] *See* Joyner 2007.

[28] *See* Schweigman 2001; Reinisch 2001.

[29] *See* Michaelsen 2014.

found throughout the sources of both international human rights law and international humanitarian law. Specifically, the principle of proportionality is generally applicable to derogations from human rights obligations.[30] Thus, Michaelsen argues, if one assumes (in harmony with the bulk of jurisprudence and scholarly commentary on the issue) that the UNSC *is* bound by international human rights law obligations with regard to its decisions to impose international economic/financial sanctions, then in order for the UNSC to validly derogate from those obligations in a given case of sanctions application, the sanctions program being authorized must, *inter alia*, be demonstrably compliant with the principle of proportionality.

This conclusion is particularly persuasive as it provides a mechanism for application of a principle that is so pervasive in both international human rights law and international humanitarian law, and which seems so commonsensical as a prudent limitation upon the ability of both states acting unilaterally, and the UNSC acting multilaterally, to impose economic/financial sanctions – i.e. to engage in economic warfare - against a target state.

So what would be the practical application of the principle of proportionality to the ability of states acting unilaterally, and to the UNSC acting multilaterally, to lawfully impose economic/financial sanctions upon a target state? The calculation of proportionality in this context could be quite complex – but then it ever is so (e.g. civilian casualties vs. legitimate military goals in the *jus in bello*). Each case would of course be unique, and driven by its own particular facts. However, some considerations generally bearing on this calculation can perhaps be identified.

Particularly applicable would seem to be the principle of prohibition of collective punishment of a civilian populace derived from the Fourth Geneva Convention, which is of course focused on the protection of civilians during armed conflict. Article 33 of the Fourth Geneva Convention provides:

> No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited

In its 2005 study of the state of customary international humanitarian law, the International Committee of the Red Cross (ICRC) determined that this prohibition of collective punishment has achieved the status of a rule of customary international law. The authors of the ICRC commentary observed:

> State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts. This prohibition is an application, in part, of Rule 102 that no one may be convicted of an offence except on the basis of individual criminal responsibility. However, the prohibition of collective punishments is wider in scope because it does not only apply to criminal sanctions but also to "sanctions and harassment of any sort, administrative, by police action or otherwise."[31]

In light of previously mentioned observations regarding economic/financial sanctions as tools of economic warfare, and the frequent effect that international sanctions have of causing serious suffering and economic hardship for the civilian populace of a target state, in an attempt to influence the government of that state, this general prohibition on collective punishment taken from customary international humanitarian law seems persuasively applicable as a prudential limitation on the ability of states and international organizations to lawfully apply international

[30] *See* Michaelsen 2014. P. 462-464.
[31] Henckaerts & Doswald-Beck 2005.

economic/financial sanctions. The prohibition of collective punishment through economic sanctions is essentially a manifestation of the principle of proportionality, as it seeks to prevent harmful effects from being caused to civilians, in attempt to affect governmental policy choices that they typically have very little to do with on a practical level.

Thus, in the cases of Iran and North Korea, where crippling international sanctions have been imposed, that have caused serious and widespread privation and economic suffering for ordinary civilians, in attempt to influence the autocratic and idealistic leaders of those countries to change policy course on a matter of national security sensitivity, it would appear that international sanctions have run afoul of this principle of prohibition of collective punishment.

But what of the concept of "targeted sanctions," which is an idea arising from the experience of the truly draconian international embargo imposed on Iraq after the 1990-1991 Gulf War. What if international sanctions are targeted only at specific industries related, for example, to a country's nuclear program, and to government officials directly involved in that program? Could not such sanctions be seen to pass a proportionality test and not result in collective punishment? The answer would appear to be yes in theory. And indeed, it is in this targeted vein that international sanctions on Iran and North Korea began. However, as time passed, and the target governments did not change their behavior in the manner purposed by the sanctions, in both cases there was a steady "sanctions creep" to make the sanctions program at the multilateral level larger in scope and application. Furthermore, in both cases, unilateral sanctions were imposed by powerful states, including particularly the U.S. and the E.U., that went beyond the sanctions programs approved by the UNSC, and in particular tightened restrictions on financial transactions with target state financial institutions. As both the multilateral and unilateral sanctions regimes grew more comprehensive, the effect upon the civilian populace of the targeted states became more severe. So again, if international sanctions can be targeted, *and remain targeted*, on only those actors who are closely related to the threat deemed to exist, the proportionality test for proper derogation may be met.

Finally, one further aspect of the application of human rights law to the imposition of international economic/financial sanctions in the counter-proliferation context can be viewed in the recent decisions of the European General Court and the European Court of Justice, which have annulled certain financial sanctions applied by the EU against Iranian individuals, companies, and financial institutions.[32] The essential holdings of these cases are that the right of the targeted entities to due process of law was violated by the failure of the sanctioning authorities to reveal the evidentiary basis for the application of sanctions. This common practice by sanctioning bodies in the context of counter-proliferation-oriented sanctions—to withhold evidence concerning the rationale for application of sanctions from the accused—has been importantly checked in these EU cases.[33]

Conclusion

As this brief review has demonstrated, notwithstanding the general freedom of states to choose those other states with which they please to have, and to allow their subject natural and

[32] Maya Lester, European Sanctions Law and Practice, ECJ Signals its Approach to Iran Sanctions Cases in 2 Appeals, 2 December 2013, http://europeansanctions.com/2013/12/02/ecj-signals-its-approach-to-iran-sanctions-cases-in-2-appeals/ (accessed 5 July 2014).

[33] *See* Daniel H. Joyner, Arms Control Law, EU Courts and Iran Sanctions, 25 July 2013, http://armscontrollaw.com/2013/07/25/eu-courts-and-iran-sanctions/ (accessed 5 July 2014).

legal persons to have, economic/financial relations, there are a number of positive sources of international law which circumscribe the ability of States to lawfully apply coercive economic/financial sanctions against other States.

The totality of these obligations of international law limiting the lawfulness of both unilaterally and multilaterally-applied coercive economic/financial sanctions, reveal a legal landscape in which there is a vanishingly small window of lawfulness for such sanctions, applied for counter-proliferation purposes, or indeed for any purposes.

It is almost certain that no application of unilateral counter-proliferation sanctions to date has met all of these legal requirements. Further, multilateral applications of such sanctions under the authority of the UNSC should be reevaluated in light of the recognition of these limitations.

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COERCIVE DIPLOMACY, SANCTIONS AND INTERNATIONAL LAW

ROME, 13 FEBRUARY 2015

Palazzo Rondinini
Via del Corso, 518

Draft paper on

The Impact of International Sanctions on Treaties and Contracts

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1. Introduction

This paper analyses the impacts of international sanctions on treaties – Bilateral Investment Treaties (***"BITs"***) and Treaties of Friendship, Commerce and Navigation (***"FCN"***) – as well as on contracts.

The subject matter of this work is potentially so broad that it is not possible to extensively deal with any specific issue. Furthermore this paper is only a draft, which needs to be improved with additional research and considerations and its aim is basically to provide an overview of the topics that we will further consider in order to deliver a final piece of work.

In the notion of international sanctions we have included both sanctions imposed by the United Nations Security Council pursuant to Chapter VII of the UN Charter and the sanctions imposed by the Council of the European Union pursuant to EU treaties. Their legal regime is undoubtedly different and to some extent EU sanctions may easily be more assimilated to national sanctions such us those imposed (for instance) by the United States Government. Nonetheless, they are adopted at an international level and impact national legal systems, and must therefore be considered as international.

Regarding the impact of international sanctions on BITs and FCN, the possible conflicting obligations between their provisions and decisions imposing sanctions shall be examined from both a national and an international perspective. Particularly, the analysis will focus on provisions governing the conflict of rules and remedies available to states (either the sanctioned state or the counterparty) that are parties to BITs and FCN treaties.

Regarding contracts, the analysis is obviously more focused on a national level as it is the law governing the relevant contract that regulates the contract's implementation and determines the legal consequences of certain situations as well as the remedies potentially available to the parties. Since it is assuredly not possible to proceed with a comparative exam of a number of different national systems, the Italian legal system has been taken into account as way of example and to serve as possible term of comparison for further discussion. In particular, we have taken into account the impact of the implementation of sanctions on the effectiveness of existing contracts – which cannot be performed as a result of UN Security Council measures or of EU Council decisions – and the remedies available to both the sanctioned party (which can be a state or a private entity) and the counterparty.

Lastly, since BITs and FCN treaties as well as transnational contracts often include and arbitral clause, it is in our view appropriate to understand if and to what extent the adoption and implementation of international sanctions can be reviewed by international arbitrators. In our opinion, an exam of the

"contractual remedies" of the parties to an international treaty or to a transnational contract is sufficiently comprehensive without this further analysis. However, due to time constraints, it has not been possible to deal with this issue that will be nonetheless duly considered in the following weeks.

2. Bilateral Investment Treaties and Friendship, Commerce and Navigations Treaties: Content and Legal Effects

A BIT is an international agreement establishing the terms and conditions for private investment by nationals and companies of one country in another country, whilst FCN treaties have been considered as the US alternative to the European BIT Model[1]. FCNs did not specifically focus on investments: their principal goal was to facilitate trade and navigation, but at the same time they contained three main components of the modern BITs, namely treatment provisions, expropriation and exchange control[2].

As in the early 1980s the US gradually shifted from FCNs to BITs, a number of scholars consider that FCNs represented the first generation of BITs[3]. However, even after this shift, FCN treaties continued to impact investment policy-making in the United States. Firstly, key FCN features such as pre-establishment commitments, non-conforming measures, and investor rights survived the US policy-shift and have since found their way into International Investment Agreements (IIAs) around the world. Secondly, as an alternative to simple and specialized European BITs, FCN treaties have inspired a new generation of IIAs that are complex and comprehensive, containing a fine-tuned mix of rights and obligations, and treating investment alongside other policy concerns. Thirdly, the spread of FCN-inspired treaties coincides with a certain demise of European-style BITs. As policy-makers turn to the US instead of Europe for investment policy innovation, we observe an Americanization of the IIA universe[4].

Historically speaking, BITS are, as some scholars believe, the product of the fear of developed countries of nationalization and expropriation[5]: indeed, by the 1950s both customary international law and its practice were under attack by developing country hosts. The expropriation of Liamco's concessions in Libya in 1955, and the nationalization of the Suez Canal by Egypt a year later served notice of a new militancy on the part of investment hosts. The nationalization of sugar interests by

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[1] W. ALSCHNER, *Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law*, in *Goettingen Journal of International Law*, 5, 2013, 2, at 456.
[2] F. GHODOOSI, *Combatting economic sanctions: investment disputes in times of political hostility, a case study of Iran*, in Fordham International Law Journal, Vol. 37, at 1757.
[3] E.g. W. MICHAEL REISMAN *et al.*,*International Law in Comparative Perspective*, 2004, p. 460; M. SORNARAJAH, *The International Law On Foreign Investment*, (2010), pp. 180-82.
[4] W. ALSCHNER, *Americanization of the BIT Universe*, *op. cit.*, at 456.
[5] K. J. VANDEVELDE, *A Brief History of International Investment Agreement*, 12,in U.C. DAVIS J. Int'l I. & Pol'y, 2006, pp. 167-169.

Cuba in the 1960s further undercut the assumptions about the security of international investments[6]. The earliest and most significant nationalization processes was performed by Iran in 1951. The UN General Assembly also recognized this nationalization of rights of developing states. This further complicated the scene for developed countries, as it caused them to search for and find alternative ways to protect their investment and obtain proper compensation such as in cases of expropriation.

Bilateral Investment Treaties were the solution to this problem. Indeed, by no coincidence the date of birth[7] of BITs is contemporary (or little subsequent to) the years of large nationalizations and/or expropriations performed by certain developing countries, and, more specifically, 25 November 1959, when Pakistan and Germany signed the first Treaty of such kind[8]. Since then – particularly since the 1990s – BITs have become the most important international legal mechanism for the encouragement and governance of foreign direct investments, and now there are around 2,600 BITs all over the world[9].

BITs were innovative in a number of respects, as, for instance, they require an explicit commitment on the part of the potential host government and involve direct negotiations with the government of potential investors. In this way, BITs increase the political ante for the host government and raise expectations of performance, which turn out to meddle in a complex way if an international sanction is imposed. The typical BIT offers a wider array of substantive protections than did the customary rule[10].

For example, two typical clauses (which are now cornerstones of WTO trade law, too[11]) are the Most Favourable Nation clause (MFN) and the National Treatment clause (NT). The former means that the "investing country" must, nominally, receive equal trade advantages as the "most favoured nation" by the country granting such treatment. This includes also the amelioration of the agreements, which turn out to be less favoured as a consequence of a new agreement with another state. The latter, instead, provides that foreign investments have to receive a standard of protection and treatment equal to domestic investments. Also the umbrella clause often applies. This specific clause protects investments by bringing obligations or commitments that the host state entered into in connection with a foreign investment under the BITs' protective "umbrella". Investors often rely on the umbrella

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[6] Z. ELKINS, A. T. GUZMAN, B. A. SIMMONS, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, in International Organization 60, 2006, p. 813. Downloaded from the University of Texas at Austin Library Digital Repository for the Working Group on Law and Democracy at: http://www.utexas.edu/cola/orgs/wgold/

[7] W. ALSCHNER, *Americanization of the BIT Universe*, op. cit., at 456.

[8] 1959 Germany–Pakistan BIT, 25 November 1959, 457 UNTS 23. R. DOLZER, C. SCHREUER, *Principles of International Investment Law*, 2nd ed. (2012), at 6.

[9] K. J. VANDEVELDE, *Bilateral investment treaties*, 2010, at 1.

[10] Z. ELKINS, A. T. GUZMAN, B. A. SIMMONS, *Competing for Capital*, op. cit., at 811.

[11] ...as they are found in all 3 of the main WTO agreements (GATT, GATS and TRIPS).
WTO: Understanding the WTO http://www.wto.org/english/theWTO_e/whatis_e/tif_e/fact2_e.htm

clause as a catch-all provision to pursue claims when a host state's actions do not otherwise breach the BIT. Umbrella clauses are usually broadly written to cover every conceivable obligation of the host state.

Other contents of BITs also pertain to the protection of contractual rights, assurance of the right to transfer profits in hard currency to the home country, and prohibition or restriction of the use of performance requirements[12]. However, the distinctive feature of most BITs is that they allow for an alternative dispute resolution mechanism, granting the possibility for the investor to bring a claim before an arbitral tribunal, often under the auspices of the ICSID (International Center for the Settlement of Investment Disputes) or in accordance with UNCITRAL Rules (UN Commission on International Trade Law).

In any event, the main subject of BITs concerns, of course, investments. According to some scholars, there are four possible ways that BITs relate to investments[13]. They can protect, promote, liberalize, or regulate them. The majority of BITs, however, focus on protection of investments as this implicitly promotes investments as well. BITs rarely tend to rule investments since this might defeat their purpose to encourage investment, and also because regulations of specific investments, for the same reason, occur in the contract between the investor and the host state[14].

BITs typically incorporate four major components[15]:

1) General treatment of investments and investors: in this part of the BITs, governments commit themselves to national treatment, the most favourite nation, fair and equitable treatment and also the umbrella clause.

2) Standards related to expropriation: in these clauses, governments usually commit themselves to compensate the investor in the case of nationalization and expropriation. Typically the compensation is calculated based on the fair market value of the investment.

3) Provisions related to the free transfer of currency, investments and investment interests both in and outside the country: countries impose different currency policies and limitations on the amount exported on foreign currencies. The BITs guarantee free transfer of foreign currency for investors.

4) Arbitration Clauses: an important part of almost all BITs, which is pivotal to the attraction of foreign investment, is the dispute settlement mechanism. Foreign investors tend to be sceptical

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[12] Z. ELKINS, A. T. GUZMAN, B. A. SIMMONS, *Competing for Capital*, op. cit., at 814.
[13] K. J. VANDEVELDE, *Bilateral investment treaties*, 2010, at 5.
[14] F. GHODOOSI, *Combatting economic sanctions*, op. cit., at 1757.
[15] M. REISMAN *et al.*, *Foreign investment disputes: cases, materials and commentary*, 2005, pp. 10-11.

about national courts deciding cases related to government measures. They prefer arbitration bodies to mainly adjudicate based on international laws and standards.

3. Conflicting Obligations under International Law

As mentioned, for the scope of this paper we have taken into account sanctions imposed by the UN Security Council or that the EU council may adopt in a situation of crisis[16]. International sanctions interact in a very complex way with BITs, FCNs and, in general, with foreign investments: the main issue emerges when a state is caught in the middle between the obligation to comply with the international sanctions and the obligations undertaken with the BIT or FCN treaty stipulated with the sanctioned state. This problem arises with both traditional (such as an embargo) and targeted sanctions against individuals and corporations although some differences may be emphasized, especially when discussing about impacts on contracts. The main difference when dealing with conflicting obligations under international sanctions and other treaty obligations is between sanctions imposed by the UN Security Council and sanctions imposed at a EU level.

UN sanctions are imposed in accordance with Chapter VII of the UN Charter[17] whilst the EU applies sanctions within the framework of the Common Foreign and Security Policy (CFSP), in pursuit of the specific CFSP objectives set out in the European Union Treaty. Restrictive measures have been frequently imposed by the EU in recent years, either on an independent basis or upon implementing binding resolutions of the UN Security Council[18].

Conflicting obligations can find an easier solution in case of UN sanction as, pursuant to article 103 of the UN charter, "*In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail*". In other words, Security Council resolutions are binding on member states regardless of other obligations that countries might have undertaken under other treaties. Therefore, if, for example, the Security Council declares a resolution sanctioning an individual's assets because of terrorism links, the host state in which he/she invested, when the resolution enters into force, should seize his/her assets regardless of domestic BIT provisions[19].

16 http://www.pbmstoria.it/dizionari/storia_mod/s/s035.htm
17 http://www.un.org/sc/committees/
18 http://eeas.europa.eu/cfsp/sanctions/docs/index_en.pdf
19 D. F. DONOVAN, *Investment Treaty Arbitration*, in *Mandatory rules in international arbitration*, George A. BERMANN *et al.* eds.,2011, pp. 278-79. On the same line, F. GHODOOSI, *Combatting economic sanctions*, *op. cit.*, at 1775.

According to some scholars, treaties that are at odds with UN sanctions may be terminated pursuant to Article 64 of the 1969 Vienna Convention on the Law of Treaties whereby "*If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates*". This approach cannot be shared. Even though the content of existing *ius cogens* provisions is unclear, sanctions are imposed by the UN Security Council based on a treaty provision which, by definition, cannot be considered as a *ius cogens* rule. Furthermore, sanctions are imposed on a temporary basis and the termination of conflicting treaties is not even a practical and fair solution. Conversely, it might be argued that in case of UN sanctions, BITs and FCN treaties with the sanctioned state are automatically suspended, in line with the approach the Italian Government when sanctions have been adopted against Libya in 2011[20]. In the Parliamentary session of 24 March 2011, the then-Italian Minister of Foreign Affairs, Marco Frattini, spoke about the effects of sanctions over the Italo-Libyan BIT: "*until the adoption of UN resolution 1973, the agreement was de facto suspended, but now, with the entry into force of resolution 1973, pursuant to article 103 of the UN charter, there is an absolute and automatic prevalence of UN obligations over those undertaken by member states with any other international or bilateral agreement.*" As a consequence, there had been "*not just a de facto suspension, but a legal and automatic suspension of all the provisions set forth by the BIT, whose application would of course be formally forbidden by resolution 1973*". That is why "*within UN framework* [...] *we have seized between 6 and 7 billion euro attributable to Gaddafi. We have also provided sanctions in the energy sector*". Minister Frattini also noted that "*colonel Gaddafi threatened EU countries that he would have replaced European suppliers with non-EU ones. Now he can no longer do it, because* [...] *we are all protected in the same way*".

Article 103 of the UN Charter may certainly be invoked when a EU regulation implements sanctions previously imposed by the Security Council but an EU Member State cannot rely on such provisions to escape treaty obligations and relevant responsibility when complying with sanctions that the EU imposed on an independent basis. The EU treaties do not include a rule similar to Article 103 of the UN Charter and European countries cannot rely on the primacy of EU obligations to put aside international obligations undertaken with a BIT or FCN treaty. The primacy of European provisions only pertains to possible conflicts between EU rules and national legislation, but does not affect other treaty obligations[21]. The solution must be sought elsewhere[22] and, in particular, in the impact that an international sanction might have on the effectiveness of an existing BIT / FCN treaty. In

[20] Resolution 1973 of the UN Security Council, adopted on 17 March 2011.
[21] R. KWIECIEŃ, The Primacy of European Union Law over National Law Under the Constitutional Treaty, in German law journal, Vol. 06, n. 11.
http://www.germanlawjournal.com/pdfs/Vol06No11/PDF_Vol_06_No_11_1479-1496_Special%20Issue_Kwiecien.pdf
[22] See *infra*.

other words, query if a BIT/FCN treaty may be suspended or terminated in case of international sanctions in accordance with Articles 54-64 (particularly 61 and 62) of the Vienna Convention of the Law of Treaties?

According to Article 61 of the Vienna Convention, "*a party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty*". The second paragraph excludes that a party may invoke Article 61 "*if the impossibility is the result of a breach by that party*" and thus it may be argued that the suspension or termination of the BIT / FCN could be invoked only by the sanctioned state. However, the sanctioned state may have no interest in requesting the termination or the suspension of the BIT/FCN (it would rather have an interest in claiming compensation) unless this is the result of its intention to apply countermeasures against the European state. In such context, there would be no need to ground a possible request for suspension/termination on Article 61 of the Vienna Convention. This possibility would stem from the general principles governing international state responsibility.

It might be argued if the European state may ground the suspension/termination of the BIT/FCN on Article 62 of the Vienna Convention whereby "*A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties*", may be invoked as a ground for terminating or withdrawing from the treaty if "*The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and the effect of the change is radically to transform the extent of obligations still to be performed under the treaty*". In this respect, the supervening EU sanction - and most of all, the crisis situation that triggers the adoption of sanctions against a state or its individuals - could be regarded as a "*fundamental change of circumstances*". As a consequence of such termination and/or withdrawing, the BIT would become ineffective and no breach could be attributed to the European state.

However, we must take into account that the termination/suspension of the BIT - for states that are parties to the Vienna Convention - is not automatic and we must consider the procedure set forth by section 4 of the Vienna Convention. In any event, the arbitration clause included in the BIT/FCN will continue to be binding for the states and nothing would prevent the sanctioned state to claim compensation for breach of treaty obligations in the meantime. In a possible dispute, the European state might argue that in case of non-compliance with EU sanctions, it would be reprimanded by EU institutions, but the sanctioned state could easily object that this is a domestic problem with no

relevance on an international level. Invoking US and EU sanctions is similar to invoking internal laws for justification of breach. Neither party can resort to conflicting internal laws for the breach of a contract[23]. Indeed, similarly to US sanctions, EU sanctions are not compelling for non-member states. However, unlike with the US, a specific argument relating to EU member states could be invoked, i.e. the fact that the EU is indeed an international organisation, whose determinations are separated from those of single EU member states. Clearly this issue requires further investigation.

Unfortunately, state practice provides no support since states are quite reluctant to bring claims against their counterparties in case of international sanctions. Countermeasures are, indeed, clearly easier and more effective and represent the swiftest possible reaction for the sanctioned state. For instance, after EU sanctions were issued against Russia for the Ukrainian crisis, Russia adopted counter-restrictive measures against European countries, such as Decree (Ukaz) no. 560, a ban over EU agricultural products[24] and - so far - no EU member state has undertaken any claim in response.

4. The Implementation of International Sanctions at a Domestic Level: A Justification for Withdrawal or a Ground for Compensation?

International sanctions also impact contractual relationships between sanctioned states and private parties or – in case of targeted sanctions – between corporations/individuals. For instance, many multinational corporations that principally invested in the oil and gas sectors have withdrawn their business due to sanctions (including the targeted ones) that have affected the Islamic Republic of Iran. Nonetheless, we shall mainly focus on the implementation of targeted sanctions as this entails multiple (and new) issues on a different level.

Consider the following scenarios:

- a Rome-based company enters into a supply contract with a foreign seller which, after the execution of the first supplies and before finalisation of any payment, is included among those listed entities whose assets and cash flows are frozen; or
- a Milan-based manufacturer enters into a supply contract with a foreign buyer which is subsequently sanctioned with a target measure banning the latter company from exporting its own goods.

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[23] F. GHODOOSI, *Combatting economic sanctions*, op. cit., at 1776.

[24] http://www.confindustria.it/wps/wcm/connect/www.confindustria.it5266/096b4bdf-d44b-441b-935e-21be262d68b3/Misure+restrittive+Federazione+Russa+e+Sanzioni+Unione+Europea_22.09.14.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=096b4bdf-d44b-441b-935e-21be262d68b3

Should the Roman buyer execute the relevant payment despite the "freezing asset measure"? Would the Milanese company be under the obligation to supply relevant commodities notwithstanding the freezing asset measure? What contractual remedies could these companies seek? In short: what happens to contractual obligations in the event of a targeted sanction?

In addressing the questions at issue a preamble is to be made: the consequences and impacts of targeted sanctions on international contracts depend on the law applicable to the relevant agreement. Hence, no single answer to the above questions can be given. In the context of this paper, it is not even possible to proceed with a comparative analysis of different legal systems, thus the Italian civil rules have been taken into account by way of example and as a term of comparison for possible further discussion.

As a general remark, Italian law provides for a number of contractual remedies that a party may trigger to face the pathological phase of an agreement and/or a breach of contract.

Among such remedies is, for instance, filing a claim to seek performance of the relevant contractual obligations. In the case at issue, however, such a remedy would not be viable considering that the listed party would likely not be in the position to perform the obligation given the sanction constraint. Hence, for the purposes of this paper, light is to be shed on those Italian law provisions allowing the parties to an agreement to seek compensation and to unilaterally terminate the contract, this latter remedy being enforceable only under certain circumstances.

Specifically, contract termination can be triggered whenever, after perfecting the agreement: ***a)*** the counterparty has seriously breached the agreement; ***b)*** the performance of the obligation has become excessively onerous because of extraordinary and unforeseeable events; ***c)*** the implementation of the contract has become impossible (so-called supervened impossibility, *impossibilità sopravvenuta*).

In the event that termination is caused by a serious breach of the contract, the performing party (*i.e.* the party not in breach) may also seek damage compensation. Conversely, this claim is not explicitly provided for the case of supervened impossibility.

Also, damage compensation can generally be sought by creditors in the event the counterparty does not correctly perform the relevant obligation, except if the latter entity proves that the breach of contract had been determined either by a supervened impossibility to perform the obligation or by other factors that are not attributable to its own conduct.

Having specified the foregoing in terms of contractual remedies, it is to be mentioned that a Italian case law research has not revealed any judgment specifically pertaining to the effects of target

sanctions vis-à-vis existing contracts[25]. Nevertheless, inspiring inputs for approaching the issue under reference can be retrieved from the case *Fincantieri – Oto Melara S.p.A v. Iraq Government and Ministry of Defence*, addressed by the Court of Genoa in 1995.

In short, the case can be summarised as follows.

In the 1980's a number of Italian warships manufacturers entered into a supply contract with the Iraqi Ministry of Defence for the supply of warships and weapons. Subsequently, part of the supply could not be provided because of the embargo sanction that affected Iraq for having invaded Kuwait in 1990.

This being the factual background scenario, the Court of Genoa ruled that the contract was to be considered terminated due to supervened impossibility faced by the Italian companies in performing the relevant obligation, i.e. the supply.

Interestingly, the Court found that the abovementioned impossibility was attributable to and caused by Iraq because the country had consciously – and culpably – exposed itself to the risk of incurring international sanctions by invading Kuwait. In light of the above, the Genoa court found the plaintiff's claim grounded, ruling for the termination of the contract and finding the Italian companies entitled to be compensated by Iraq's government for its culpable conduct.

In agreeing with the general principle set out by the *Fincantieri- Oto Melara v. Iraq* case, some Italian scholars have argued that the termination of the abovementioned contract would not be justified under the "supervened impossibility" clause. Rather, in this case Fincantieri – Oto Melara's right to consider the agreement as terminated would find its own cause in a "breach of contract" carried out by the Iraqi government. To support their argument, scholars recall the *bona fides* clause (*buona fede contrattuale*) which, in their view, is to be considered breached when a party engaging in an illicit conduct (attack to Kuwait) which is capable of making the counter-obligation (supply of ships and other assets) impossible to execute.

In short, scholars appear to base their approach on the principle that "*a self-induced frustration is not a frustration at all, but a breach of contract*"[26].

Agreeing with such interpretative line would make it easier to justify the award of damages ordered by the Court of Genoa, which, as seen above, under Italian law is explicitly provided only for termination for serious breach of contract.

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[25] Further research will be carried out on this point.

[26] Atiyah, *An Introduction to the Law of Contract*, Oxford, 1961, at 141.

The scholars' theory, despite being stimulating and appreciable, appears far-fetched as it could hardly be argued that a conduct that has nothing to do with the contractual obligations set forth by the relevant agreement can fall within the scope of "breach of contract".

The *Fincantieri-Oto Melara v. Iraq* case sets out a *post-sanction scenario* that could theoretically be deemed viable also in the context of contractual relationship where a party is included in the list of targetable entities. Indeed, in the event of a targeted sanction issued after the perfection (and possible partial performance) of the contract, the investor could trigger the unilateral termination of the agreement and, thus, argue that it is no longer bound to the contractual provisions and relevant obligations set forth therein.

Hence, for instance, in our case, the Italian company could invoke the termination of the agreement and opt not to proceed with the payment or with the supply of the manufactured commodities.

Although this kind of approach would seem to be theoretically reasonable and applicable in a number of concrete cases, it also leaves a number of open issues.

One of the problems, for instance, is that the reasoning which bases the *Fincantieri-Oto Melara v. Iraq* case – albeit suitable in the event of traditional measures taken against a Government because of the violation of an international law provision (e.g. Iraq's attack on Kuwait) – might not be always replicable when sanctions are ordered against specific targets.

Indeed, as mentioned above, the principle underlying the decision of the Court of Genoa consisted in recognizing the existence of a causal link between the conduct of the Iraq Government and Fincantieri's impossibility to perform the obligation (determined by the international sanction against Iraq). In short, the Court ruled that the international sanction was foreseeable – and thus avoidable – by the Iraqi government which, thus, was also ordered to compensate damages to the Italian company.

On the contrary, in the context of targeted sanctions, it could hardly be claimed that the listed entity can always foresee or avoid the measure. This is so also because the inclusion of any entity into the targeted sanction list is often the result of mere bilateral discussions between countries that do not grant the interested parties with any chance of counter-reply. There is neither a hearing nor a trial that could enable the relevant individual/entity to avoid the listing and, accordingly, to elude the targeted sanction.

In light of the above, a causal link between the targeted sanction and the listed entity's conduct not always exists. In turn, the circumstance that a listed entity is sanctioned does not always mean that,

with its behaviour, such entity has consciously exposed itself – and the lifespan of the contract entered into with a foreign party – to the risk of termination.

Solutions to the questions and issues raised at the opening of this paragraph might be given by the contracting parties themselves in the phase of the formation of the agreement.

Indeed, nowadays, the most sagacious and farsighted investors opt to place "anti-international-sanction" representations and obligations in contractual arrangements. According to such contractual provisions, the parties, *inter alia*:

- declare not to be included in any sanction list nor to be controlled by or linked to any entity that is included in the sanction list;
- declare not to be located or organised in any sanctioned country;
- undertake not to contribute nor to fund any entity linked to the terrorism activities or included in the so-called black lists.

Hence, in the context of international contracts, a good recommendable practice would be to conceive and include clauses and representations that clearly define the consequences of targeted sanctions on the fate of the contract. This would result in making multinational, medium-sized and small companies feel safer in investing in those countries that are more exposed to the risk of targeted sanctions.

6. Arbitral Review of International Sanctions

To be drafted

7. Concluding Remarks

To be drafted.

IAI
Istituto Affari Internazionali

INTERNATIONAL CONFERENCE ON

COERCIVE DIPLOMACY, SANCTIONS AND INTERNATIONAL LAW

ROME, 13 FEBRUARY 2015

Palazzo Rondinini
Via del Corso, 518

Draft paper on

The effectiveness of sanctions: lessons learned from the European Union

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Chapter prepared for IAI Conference "Coercive Diplomacy, Sanctions and International Law", Rome, 13/02/2015

The effectiveness of sanctions: lessons learned from the European Union

By

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ABSTRACT: The European Union has emerged as one of the most active sanctioners in the past decade. The turmoil of the MENA region brought the attention to the intensive use of *restrictive measures* by the Council of ministers. Sanctions have been imposed on targets in Tunisia, Egypt, Libya and Syria, while the case of Iran had been on the headlight for longer time. These cases are to be added to several others, such as the ones of Zimbabwe and Guinea-Bissau to mention two African countries, and to the well-known case of the measures that followed the Russian annexation of Crimea and the tensions in eastern Ukraine. Given this intense activity, it is striking to know that the debate on the effectiveness of sanctions is far from giving a final judgment on whether they "work". This contribution aims at dealing with the question of how we think about success of sanctions, it suggests a framework for analysis that I introduced in my previous work, and it applies it to the recent case of Russia. The argument is that sanctioning is an extremely useful foreign policy instrument even if it does not appear to achieve the goals attributed to it. The chapter is divided in four parts. First, it presents a four-step methodology that should be applied in assessing sanctions. Second, it shows how the procedure for assessment suggested in this contribution can shed a different light on how the targeted measures of the European Union are generally viewed. Third, the case of Russia is attentively scrutinized with the view of enhancing the understanding of sanctions in international crises. Finally, the concluding part of the chapter suggests ways in which the sanctioning process of the EU can be improved.

Introduction

The sanctions imposed by the Council of Ministers in the aftermath of the MH17 accident in July 2014 on Russian entities and citizens were seen as a strong diplomatic measure, but also as a natural step after the escalation of the crisis in eastern Ukraine. This came after years of discussions on Iran and Syria, the several rounds of sanctions imposed to deal with the consequences of the protests in the MENA region (also known as Arab Spring, Arab awakening, among others) and the two-decade-long arms embargo imposed on China after the events of Tiananmen Square. Sanctions are clearly at the center of the EU foreign policy, but it is less clear whether their adoption brings about desirable policy outcomes (Eriksson 2011). Moreover, to add complexity to the matter, sanctions have changed overtime and this evolution has not been duly acknowledged by those interested in understanding the effectiveness of sanctions. Whereas sanctions targeted states or economic sectors with general impact on the economy in the past, they do target individuals and non-state entities, both directly and indirectly. Sanctions have become *targeted* and the analytical instruments that we adopt to study the utilization of this foreign policy instrument need to be changed.

This chapter deals with the question of effectiveness of sanctions. The aim is to present a four-step procedure that takes into account the complexities characterizing both the use of sanctions in general and the practice of targeting individuals and non-state entities. The chapter argues that sanctions are to be assessed considering their relative importance in the overall strategy adopted towards a particular issue, the logic that motivates the imposition, the outcomes that the impacts of sanctions produce, and the comparative utility of sanctions. Indeed, such an approach leads to identify effects of sanctions rather than conducing to definitive and quantifiable evaluation ('sanctions work' or 'sanctions do not work'). This chapter acknowledges that sanctions operate in multi-variable contexts and that the dynamic of crises wherein sanctions are used is filled with context-specific conditions and relational elements that make sanctions unique case-by-case. The procedure suggested is, therefore, a heuristic device to conduct analyses and to contribute to comparisons across space and time, but it has the policy implication to indicate the objectives that sanctions can achieve even in situations in which there seems to be little point in resorting to sanctions.

For instance, sanctions did not work in Uzbekistan since the human rights sitation in the country did not improve. However, this procedure led to the conclusion that the EU sanctions on Uzbekistan did facilitate high-level forum to discuss human rights issues, even though the overall record of Uzbekistan when it comes to human rights has not changed when sanctions were in place. Else, China did not change is approach towards the events in Tianaman Square, but sanctions did contribute to consolidate a common foreign policy in the EU, which cannot be overlooked in analyzing foreign policy, and kept the attention on the Chinese conduct regards human rights. Overall, this chapter suggests that although sanctions may not be the silver bullet to resolve "silently" international crises as described by President Wilson in 1919, sanctions are definitely an extremely useful instrument in foreign policy.

The chapter is divided in four sections. The first section introduces the effectiveness debate and presents the four-step methodology showing how this moves beyond the ongoing debate on how to measure the effectiveness of sanctions. The second part illustrates the EU records in resorting to sanctions since the end of the Cold War. The third part shows how the analysis of three cases studies can help to identify effects that sanctions can have in foreign policy. Finally, the conclusion of the chapter shows again the added value for this methodology.

The success of sanctions

The effectiveness of sanctions has been greatly debated in the past decades. From a nearly general consensus in the 1970s and 1980s claiming that sanctions do not work (Baldwin 1985), there exist today more nuanced views on how sanctions work and what they can achieve. Starting with the publication of *Economic sanctions reconsidered* in 1990 (Hufbauer, Schott and Elliott 1990), there were several studies that challenged the mainstream negative perception of sanctions as a foreign policy instrument. However, although there were several final assessments, the range of methods to assess the effectiveness of sanctions was no wide. This section reviews the different views related to both questions.

It was widely acknowledged that sanctions were not a successful foreign policy instruments. Studying the effects of sanctions on Southern Rhodesia, Galtung claimed that sanctions have little effect because they trigger the rally-around-the-flag effect consolidating the support for the leadership and increasing the tolerance to bear the economic costs of the crisis. Galtung argued that the logic according to which sanctions ought to work, namely that the economic impact would lead to political concessions from targets, is *naïve* (Galtung 1967). It was evident that we could not 'ask the pistol to inflict damage of which only the cannon is capable' (Daoudi and Dajani 1983: 168), and that sanctions were not determinant to change the behavior of states (Doxey 1987). In 1985, David Baldwin wrote that there are few subjects in political science that achieve greater consensus than the claim that sanctions do not work (Baldwin 1985).

This wide consensus was the product of case studies generalizations and from theoretical inductions, so when the Institute for International Economics in Washington published the results of an empirical research on 114 cases claiming that sanctions worked 34% of the time, then the debate entered into a new phase of sanctions' studies (Hufbauer, Schott and Elliott 1990; confirmed later in third edition published in 2007). The publication of the database invited for further re-evaluations, so *International Security* hosted a public discussion between Robert Pape, whose analysis suggested that sanctions worked only 5% of the time (1996), and Kimberly Elliott, who held that the sanctions' glass should be seen as half full and not only half empty (1997). Empirical research done by Cortright and Lopez (1995) investigated the matter from a more policy perspective and attempted to go beyond the behavioral change way, but the overall focus struggled to produce an alternative system of analysis. The behavioral change criterion was, then, used by both sanctions' enthusiasts and pessimists, such as Pape and Hufbauer et al.

Baldwin also participated in the discussion by shifting the focus from whether sanctions work to how do we know when a sanction has worked (Baldwin 1999/2000) and he was referring to a growing body of literature challenging the state of the art. Some thought that sanctions'

effectiveness should be measured according to certain political objectives (Nossal 1979; Linsday 1986), others pointed out the importance of the signaling element of sanctions (Morgan and Schwebach 1995, Fearon 1997, Schwebach 2000), and others indicated that the comparative utility of sanctions, namely what would have been a better course of action *in the place* of sanctions, should be an important component of the assessment (Baldwin 1999/2000).

Thus, there are at least three types of attitude when it comes to discuss the effectiveness of sanctions. First, there are those who think that sanctions work occasionally. Second, there are the hard-liners claiming that sanctions rarely work. And third, there are those that claim that the real effectiveness of sanctions should be evaluated only by looking at the specific objective that sanctions aim to achieve. Whereas the first two groups appear to be trapped and self-limited by the success criteria identified with the behavioral change element maily, which has been unable to explain many of the sanctions in the past (Giumelli 2011), the third group fell short to provide a set of analytical tools that would allow for comparisons and knowledge accumulation. Furthermore, targeted sanctions present peculiarities that are not accounted for by the literature on sanctions. Cortright and Lopez (2002) have provided a wonderful starting point, both empirical and theoretical, but have not yet completed the task. Biersteker, Eckert and Tourinho (2014) have attempted to apply a more refined methodology to measure the success of sanctions, but the behavioral change was still dominant in their framework and the comparative utility still unaccounted. This chapter illustrates and further develops my contribution to the literature on effectiveness with a four-step procedure to evaluate sanctions that deal with the shortcomings presented above.

How to Think about Success: A Four-step Process[1]

The measurement of success is a challenging exercise that has steered the debate on sanctions towards a dead end. The current frameworks for understanding and discussing the success of sanctions do not yield conceptual tools that allow different views to engage in the discussion.

[1] This section is taken from the book *The Success of Sanctions. Lessons Learned from the EU experience*, Ashgate 2013.

This situation fails to lay the foundations for the natural enhancement of knowledge that such a process should lead to. This chapter tackles this gap between practice and theory, reformulating the terms of the discussion to arrive at an alternative way to look at sanctions. This means that a new method to evaluate success is presented here with the objective of learning lessons on effectiveness that can contribute to answering the question of why sanctions are imposed despite the skepticism that surrounds them. The evaluation of sanctions should be carried out in four steps.

The first step of the analysis is to place sanctions within the larger foreign policy strategy context. Sanctions are very rarely imposed in isolation from other foreign policy instruments, and a proper understanding of what else the sender is doing can provide essential insights to measure the effectiveness of sanctions. Placing sanctions within the larger context of the strategy used by the sender is of utmost relevance in determining their effectiveness. A foreign policy can be conducted thought different methods aiming to influence other actors and achieve policy goals. To put it simply, actors can use diplomatic means, they can offer incentives, impose sanctions and use force to determine the outcome of political processes in a favourable way. In a strategy, defined as a plan to achieve a long-term aim encompassing all the foreign policy instruments adopted, each foreign policy tool should cause effects, and the combination of these effects should contribute to the achievement of foreign policygoals. In general terms, the objective of this first step is to determine the relative importance of sanctions in the sender's foreign policy.

The second step is to define the logic of sanctions. The operationalization of coercive, constraining and signaling sanctions revolves around two indicators: expected direct impact and the feasibility of demands. The first element is constituted by the direct material impact that sanctions are expected to have. If sanctions are designed to impose a toll on targets, then coercive and constraining sanctions are more likely to be applied than signalling ones. A direct material impact is a synonym of coercion – the imposition of a cost to extract political concessions (the pain–gain nexus) – and of constraining – the weakening of targets to limit their

capacities to pursue certain policy options. The lack of such expected material impact defines signaling sanctions. It is worth noting that this is not an ex-post assessment, rather it is the analysis of what sanctions are expected to cause when they are adopted that guides the classification, not whether the sanctions actually had an impact. For instance, an oil boycott on Iran is expected to have a direct impact on the target, while the travel ban on local authority officials in Uzbekistan is not expected to impose a direct material cost on the targets. The second indicator is the feasibility of demands, defined as the ability of targets to comply with the senders' demands without undermining their own survival. Assuming that sanctions are supposed to cause a material damage – 'to bite' – if the demands are feasible, then it is more likely that sanctions are working through a coercive logic, while they are following a constraining one if it is not feasible for the targets to comply. Coercion – persuading targets to do something – implies that the targets can decide whether to do so or not, so that compliance is a voluntary decision that does not affect their political existence. There is a voluntary dimension in coercing targets that is not present when targets are constrained, namely that they do not have any alternatives to compliance, whatever it takes. For instance, a feasible demand would be to insist that Lukashenko allow the regular operation of foreign embassies, whereas an unfeasible demand would be to ask Milošević to go to jail for life. This taxonomy of logics is based on general conceptual types, acknowledging that the distinction is analytical and that it only regards the dominant logic at work. Compatibly with the regime under scrutiny, the same sanctions can apply different logic on different actors.

The third step of the analysis is to elaborate on the impacts, effects and effectiveness of sanctions. This is an ex-post evaluation aiming to assess the contribution of sanctions to a sender's strategy. Impact refers to the direct material consequences of the restrictive measures. This step of the process also considers unintended consequences and indirect impacts of sanctions. Unintended consequences may be both negative and positive. They may be humanitarian and adverse. The former became notorious with the case of the 500,000 Iraqi children who paid with their lives for the impact of the UN embargo imposed after the 1990 invasion of Kuwait, and the latter are mechanisms that make the targets stronger, such as the

military junta in Haiti which made extra profits from the managementof illegal smuggling as a response to economic sanctions. Whereas these are known in the literature (Galtung 1967, Cortright and Lopez 2000, Gibbons 1999), positive externalities of sanctions, such as the strengthening of international co-operation, the upholding of a norm or the creation of institutional capacities, are rarely accounted for. This evaluation also accounts for indirect material impact, namely whether the imposition of sanction affects sectors other than those directly targeted (for instance, trade balance or credit availability). Even if sanctions have a material impact, success would still be determined by the effects, defined as the political consequences of sanctions that the material impact (or the lack of it) brings about. A successful sanction is not one that provokes an economic cost, but one that causes the anticipated effects. This involves looking at the effectiveness of sanctions, including analysing unintended consequences and the costs borne in imposing them. This aspect is often neglected in the sanctions literature, but the costs that senders bear is important, both in strategic terms – Martin argues that if there is no cost, then the action is not credible (Martin 1992) – and in absolute terms – considering that a good deal is not defined in terms of the object bought, but by its price. Having three logics at play can be informative about what to expect from the imposition of sanctions in different contexts. When coercive sanctions are imposed, the effect is an alteration of the cost–benefit calculations that increases the incentives for targets to do something that senders want. In this case, the actual behavioural change is a good indicator of success, but it should not be the only one. The focus should remain on the effectiveness of sanctions, not on the success of senders' foreign policy. In fact, coercive sanctions should be imposed in parallel with other foreign policy tools, as the goal is to increase the costs of undesired behaviours while increasing the incentives for targets to carry out specific functions by, for instance, imposing rewards for compliance. Constraining sanctions work under a different logic, whereby the desired effect is to increase the costs that targets have to sustain to achieve certain objectives. Constraining sanctions are expected to make the lives of targets more difficult and to prevent policy options being available to targets. This occurs when senders and targets have incompatible goals and senders ask targets not to do something, which is conceptually very different from a case of coercion, in which senders ask targets to do

something specific. If behavioural change was not the only indicator for success of coercive sanctions, it should barely be considered to measure the success of constraining sanctions, which should be assessed by looking at the degree of constraint sanctions impose on targets. Constraint should not be intended in material terms exclusively, but rather on the effects that are produced by the sanctions. Finally, signalling sanctions have the widest range of objectives of the three logics. Signalling sanctions can also have a coercive intent, but how they produce the desired outcome is radically different compared to coercive sanctions. The distinguishing aspect is that signalling sanctions do not cause direct materialdamage to targets, and the exercise of power occurs in ways not captured by the pain–gain approach. While lack of impact might be interpreted as ineffectiveness by mainstream approaches to the study of sanctions, it is simply one aspect of sanctions that makes them more likely to (or apt to) be used in specific contexts. Signalling sanctions can also have direct and indirect, explicit and implicit targets, but they can also aim to send signals to both international and domestic audiences. The success of signalling sanctions should not be based on the costs they inflict on targets, but on whether the effects that were expected from their imposition were achieved. Therefore, the evaluation of foreign policy tools should be based on the effects they produce, independently from the achievement of a foreign policy objective.

The fourth step is to take into consideration the comparative utility of sanctions – what could have been done instead of their imposition (Baldwin 1999/2000). This counterfactual exercise is important in order to enhance the assessment, as it makes it possible to judge whether sanctions were the best option available to senders. The assessment of any foreign policy action is conducted after an evaluation of the options available to policy-makers, and this procedure should also be applied to the study of sanctions. Meghan O'Sullivan (2003) did this with her study of US sanctions, and this method should be extended to the study of EU sanctions as well. Despite the methodological weaknesses that accompany it, this counterfactual exercise is instrumental in clarifying the quality of sanctions' contribution to foreign policy strategies. In other words, did sanctions bring about effects that could not have been caused by other foreign policy tools and at a minor cost?

Discussing the success of sanctions is far from being an exact science; it is rather a logical process of analysis and a discursive elaboration. The four-step process proposed here provide the analytical tools to compare episodes of sanctions across time and space. In this framework, the search for 'lessons learned' is a necessary step towards a broader understanding of what sanctions do, what they can achieve, and whether they 'work' in foreign policy.

The EU restrictive measures: what, where and why?

The EU has imposed restrictive measures in several occasions and contexts since the end of the Cold War. The number of sanctions regimes administered by the Council contemporarily has increased steadily since the entry into force of the Maastricht Treaty. In December 2014, the EU was administering 20 sanctions regimes imposed beyond the mandate of the United Nations. This section summarizes what are the sanctions that the EU adopts, where sanctions have been imposed and the circumstances under which the EU has decided to resort to sanctions. The overall picture suggests that given the variety of forms that sanctions have, the different regional contexts and the crisis types, the effectiveness of sanctions should not be assessed by applying rigid criteria, but the matter would be better dealt with by adopting a broader approach as presented above.

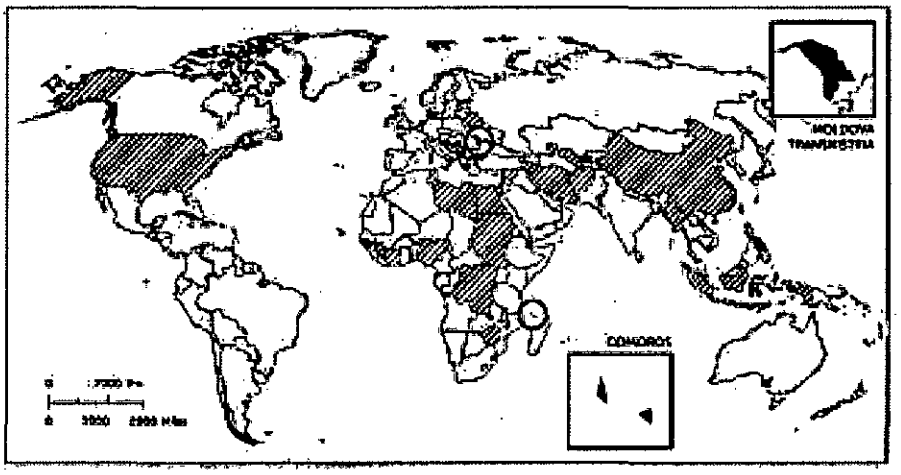
Sanctions have been divided into four categories: (1) assets freezes, (2) commodity and service boycotts, (3) travel bans and (4) arms embargoes (Cortright and Lopez 2002). Arms embargoes encompass decisions to ban the sale of weapons to a certain country, region, group or individual that may use them to carry out actions against peace processes, to undermine the stability of regimes and to violate human rights. These decisions may be directed at dual-use goods (related materiel and UN jargon) and the provision of services such as training or technical support to the targets. Whereas the implementation of such measure is delegated to national authorities, EU member states managed to agree on a list of dual-use technologies that would have to be treated with scrutiny when sanctions are imposed.

Travel bans refer to prohibitions imposed on certain individuals preventing their leaving or entering the territory of the EU and, whenever applicable, the states that associate themselves with the decision of the Council. This causes inconvenience or prevents banned individuals from carrying out certain actions. A simple example pertains to the new worldwide threat of terrorism, since it is obviously easier for members of terrorist groups to organize attacks if they are allowed to travel in the targeted areas. Travel bans have been criticized for violating the human rights of blacklisted individuals if they have to travel for medical reasons or for undermining peace processes in cases where government leaders are not allowed to participate in international meetings for such purposes. Therefore, exemptions and exceptions are usually considered when the official decisions are made (Cosgrove 2005, Cortright et al. 2002: 133–52).

Financial restrictions can take several forms, such as seizing of bank accounts, prohibition of financial transactions and denying loans to central banks of targeted countries. A ban on new investments in specific areas would also fall under this category, since it would prohibit the granting of loans or the opening of credit lines that could support, either directly or indirectly, the implementation of a target's plans. There is a lengthy list of measures that fall under this category, and they are imposed with the dual objective of undermining the capabilities of targets while creating personal inconvenience that may affect their decision-making (Cortright et al. 2002: 93–114, Biersteker and Eckert 2007, Cortright, Lopez and Rogers 2002, Newcomb 2002).

Commodity and service boycotts resemble financial restrictions in their expected impact. Commodity boycotts ban the trade in specific products, such as timber, oil, copper and diamonds. Very specific bans have been also imposed on luxury goods, sensitive technologies, minted coins and gold. Services boycotts can cover any assistance to build state or national capacities supporting the achievement of political objectives that have been deemed undesirable by the sender, such as the insurance services provided to oil tankers, training courses in sensitive areas, and the operating of commercial and private flights (Cortright et al. 2002: 181–200).

The four types of sanctions have been imposed across the world with the only exception being Latin America and Australia. Indeed. The Council has resorted to sanctions in West Africa, Central Asia, the Middle East, but also in America on the United States. The image below shows the countries where targets have been sanctioned from 1992 to 2012.



This figure should be complemented with sanctions imposed in 2013 and 2014, such as the measures on the Central African Republic, Ukraine and the Russian Federation.

Sanctions regimes evolve overtime as crises enter in new phases. This is accounted for with the adoption of the concept of 'episode', therefore one sanctions case can have more episodes. Applied to the sanctions experience of the EU, we count 47 episodes of sanctions from 1992 to 2014, and they have been divided in five different categories regarding the type of crisis in which sanctions are imposed.

Taking inspiration from Andrea Charron's work on UN sanctions (2011: 7–11), five different categories can be identified, since restrictive measures are imposed: (1) to manage conflicts, (2) to promote democracy and protect human rights, (3) to assist the consolidation of democratic transitions, (4) to counter the proliferation of dangerous weapons, and (5) to fight international terrorism. Managing conflicts refers to situations wherein the EU intervenes in civil conflicts or crises where an outbreak of aggression between third parties has already taken place. Episodes under the category promotion of democracy are instances in which the Council has taken action to react to human rights violations and to the deterioration of democratic standards within the targeted community. This category does not include the cases of post-conflict areas, where

sanctions complement domestic local institutions with a view to strengthening the process of institutional consolidation. Finally, the categories of non-proliferation and countering terrorism complete the picture of the types of crisis where the EU has resorted to sanctions over the past twenty years. The most common crisis type is promotion of democracy, with 19 instances. The second most frequent use of sanctions was in post-conflict consolidation, with 13 instances, followed by conflict management-like crises, with 11 episodes. Finally, non-proliferation and countering terrorism justified the imposition of sanctions in two episodes each.

Lessons learned from the case studies

This section presents the analyses of case studies from the EU experience since the Cold War. The aim is to present what lessons have been learned about the benefits from imposing sanctions. In other words, what are the lessons learned that the EU can derive from its experience? For instance, the application of the four-step procedure shows that sanctions produced effects that would not have been possible otherwise in some cases, and sanctions are vested with too ambitious expectations in others. In this earlier version of the chapter, I will include the discussion of two case studies in order to show how the four-step procedure would work in practice. This early drat discusses the cases of Iran and Syria, and the final version will also discuss the cases of Uzbekistan, Myanmar, Belarus and Transnistria. The empirical analysis confirms that sanctions play an important role in the dynamic of the crisis and produce effects that positively contribute to the strategy of the EU.

Iran: Slowing down the nuclear program[2]

Crisis background and EU sanctions

In 2003, the international community discovered that Iran had established a programme to

[2] The Iran and Syria case are excerpts from Giumelli F. and Ivan P. "The effectiveness of EU sanctions – An analysis of Iran, Belarus, Syria and Myanmar (Burma)", *EPC Report N. 76*, November 2013. For the notes, please see http://www.epc.eu/documents/uploads/pub_3928_epc_issue_paper_76_-_the_effectiveness_of_eu_sanctions.pdf

enrich uranium, and Tehran's decision to conceal the programme was deemed a violation of the Non-Proliferation Treaty (NPT). The International Atomic Energy Agency (IAEA) and the international community tried to persuade Tehran to follow the NPT principles which allow Iran to process uranium only for peaceful purposes. Despite several offers, in December 2006 the UN imposed sanctions in response to Tehran's lack of cooperation.

The EU implemented the sanctions imposed by the UN – consisting of a travel ban, arms embargo, freezing of assets and commodity boycotts – but decided to more broadly interpret the instructions indicated by UN Resolution 1737 and extended the assets' freeze and travel ban to 23 new targets, including individuals and companies. The EU's list was associated to that of the UN but the Council extended the list in 2008 and 2009 to reach 79 targets in June 2010.

The UN Security Council further tightened the screw in 2008 and 2010 following the discovery of new nuclear plants. The EU Council followed suit and regularly went beyond the UN's mandate by extending the list of targets, compiling a long and detailed list of technologies which were not supposed to be sold to Iran due to the risk of them being used to support either the nuclear or missile programme, and imposing a number of financial restrictions on Iranian financial institutions as well as an embargo on oil and gas in 2012. The oil and gas embargo clearly went beyond the mandate of the Security Council, as denounced by Russia and China on several occasions.

This last round of sanctions was particularly heavy for Iran. The ban on imports was extended to the import of natural gas and the list of goods "which might be relevant to industries controlled directly or indirectly by the Iranian Revolutionary Guard Corps or which might be relevant to Iran's nuclear, military and ballistic missile programme". A number of sectors, such as graphite, and raw or semi-finished metals, such as aluminium and steel, fell under the ban which also included software for integrating industrial processes and key naval equipment and technology for ship-building, maintenance or refit. States were also prohibited to enter into

new commitments with Iran, either to provide financial support or to construct new oil tankers. Finally, financial transactions between EU and Iranian banks and other financial institutions were not allowed unless authorised by Member States. In the Council Decision 270 of 6 June 2013, the EU indicated about 350 targets beyond the UN listing, including the Islamic Revolutionary Guard Corps (IRGC) and the Islamic Republic of Iran Shipping Lines (IRISL).

Analysis: the four steps

Step 1: Placing sanctions within the EU's overall strategy

In 2002 the EU and Iran began negotiations on a Trade and Cooperation Agreement (TCA) and a Political Dialogue Agreement (PDA), but disagreements over the nuclear programme put the negotiations on hold. In cooperation with the Security Council, the US and Russia, the EU has been tasked with finding a diplomatic solution to the Iranian nuclear programme since its beginning.

Sanctions have played an increasingly important role in the EU's overall strategy towards Iran, but restrictive measures are indeed only one component of a more complex approach which consists of intense diplomatic activity, elaborate economic incentives and the threat (mainly from Israel and the US) of force.

The EU has pursued a dual-track approach, imposing sanctions but at the same time trying to engage Iran through several offers of cooperation in the nuclear field. The EU is a member of the 5+1 negotiating format (also called E3+3: United Kingdom, France, Germany, the US, Russia and China), and the EU's High Representative Catherine Ashton played an active role in the meeting in Istanbul in 2012. More recently, in two rounds of talks in Kazakhstan in February and April 2013, the E3+3 tried to convince Iran to stop the production of uranium enriched to 20%. This strategy seems to revolve around the centrality of sanctions; economic incentives would have become part of the strategy only once normal relations were reinstated. Sanctions would be lifted only in exchange of clear steps from Tehran to abandon its nuclear ambitions, in which case Iran would be able to benefit from access to the EU market and would become

eligible for technical, economic and other cooperation. Both sides failed to reach an agreement, but the recent election of President Rohani seems to have created a new dynamic to exit the crisis, as demonstrated by the November 2013 talks in Geneva.

Step 2: The purpose of sanctions

The EU sanctions linked to the Iranian nuclear programme have evolved over time, so there should be a different emphasis according to the time referred to by evaluation. For instance, in the early sanctioning phase, the coercive element was central, while later, the constraining aspect gained prominence. The action itself to sustain the non-proliferation efforts has a signalling dimension which should not be underestimated.

The **coercive** dimension consists of the EU's attempt to convince the Iranian leadership to abandon its nuclear ambitions – an objective which has not yet been reached, but for which sanctions alone should not be assessed.

If the coercive dimension is central, the **constraining** element should not simply be regarded as secondary. When targets are strongly motivated to reach their goals, the purpose of sanctions is also to increase the costs for the target to achieve its own policy objectives. In the case of Iran, it can be argued that Tehran has shown resilience in pursuing its nuclear ambition, despite the fact that several sanctions have been in place since 2006. At the same time, sanctions have decelerated the programme development by limiting access to certain technologies, creating impediments for private companies to participate in the nuclear programme and by increasing strain on the national budget. All of these elements were achieved thanks to the EU's sanctioning policy.

Finally, the EU sanctions on Iran have a number of **signalling** effects which should be considered beyond the direct targets. First, sanctions contribute to the credibility of the NPT regime. This strong response from the international community sends a signal to the signatories of the NPT treaty who may have an interest in going nuclear that their actions will

have consequences. Second, sanctions send a strong signal to Washington, with Brussels showing political loyalty to its ally. This is also intended to other international actors, such as Israel, who showed willingness to escalate the conflict had the international community shown a lack of interest in solving the crisis.

Step 3: Impact and cost

Sanctions have certainly contributed to Iran's worsening economic conditions in recent years. After 1% of GDP growth in 2010 and 2% in 2011, in 2012 its economy shrank for the first time in two decades by 1.9%, with a further contraction of 1.3% expected in 2013 before a slight recovery forecast in 2014. Rampant inflation led to the Rial losing two thirds of its value since late 2011 and prices of basic food items such as bread, milk, vegetables, and cooking oil rose by 47% between 2011 and 2012. Officially, Iran's unemployment rate is around 12%, but it is believed that the actual figure may be double that. Although sanctions do contain very specific provisions to limit their humanitarian impact, they have been accused of causing a shortage of medicine in the country. The perception of increased instability also reduced foreign investments. Thus the analysis of the impact of sanctions should focus on three aspects: the availability of technology for the development of the nuclear programme; the growing difficulties for Iranian banks to access the financial markets; and the weakening of the state budget thanks to the prohibition of EU companies and states of trading with oil and gas.

The EU ban concerns the supply of technology which could be used to develop the nuclear programme. The UN panel of experts' report refers to a number of goods, namely valves and carbon fibre, which could have reached Iran from European companies. The fear of reputational costs has led banks to adopt cautious behaviour in order to avoid paying the costs of defying UN, EU and especially US financial bans. This has meant that companies from other – non-banking – sectors have also been restrained in their activities. This causes 'over-sanctioning' or, in other terms, 'over-compliance'. In order to avoid problems and investigations, companies are suspending any cooperation with actors in Iran *de facto* turning sanctions from targeted to comprehensive.

Despite the 'over-sanctioning' behaviour of certain firms, there are still problems regarding implementation. The black market is an invaluable source of goods for the Iranian government. In the October 2013 meeting of the EU non-proliferation consortium, Aaron Dunne from SIPRI, a specialist in border control, warned that the UK government is able to control only 5% of the items exported every year, and London is "among the ones who do a good job in the EU". The UN panel of experts' report listed 11 potential sanctions violations, including metals swap deals by commodities companies Glencore Xstrata and Trafigura, export of machine tools by Spain and satellite equipment sales by Germany. This implies that sanctions can create hurdles for targets, but they can hardly stop specific technologies from reaching Iran in the long run. Therefore, the deceleration of the nuclear programme should be seen as a positive consequence of the sanctions.

In March 2012, in a Council move with extraterritorial elements, 19 Iranian banks which were already on the EU sanctions list were disconnected from SWIFT, the organisation which manages international wire transfers, in order to stop their transactions with other banks in the world. This was only the last drop towards the financial isolation of Iran. Trading with Iranian-based actors is extremely difficult due to the difficulties in sending and receiving funds. Banks have to authorise the transaction, but there is a general fear that any transaction could be censored at the international level, so banks have been very conservative in authorising any payment to and from Iran. For instance, these sanctions have slowed down the acquisition of certain products from EU countries, as confirmed by the UN panel of experts on Iran, but the effects of the ban have spilled over to other sectors of the economy such as medicine and rice.

Financial sanctions also had unexpected consequences. First, the SWIFT sanctions raised concerns about the neutrality of SWIFT and the risk that the banks excluded could develop parallel systems to SWIFT. Second, the ban on payments has created incentives to rely on alternative markets, with several European banks using foreign banks (from Turkey, Hong Kong etc.) for their legitimate Iranian transactions. On the other hand, Iran has been forced to embark on bartering practices or to accept payments in Indian rupees or Turkish lira for some

of its oil deliveries.

Finally, the sanctions were challenged in Court by some of the Iranian companies affected and, in 2013, the Court of Justice of the European Union ruled against EU decisions concerning several Iranian companies and individuals for insufficient evidence in demonstrating involvement in Iran's nuclear programme, errors of assessment or breach of the obligation to state reasons and the obligation to disclose the evidence used against the entities under sanctions. The Court has however dismissed the action of Bank Melli, thus maintaining sanctions on Iran's biggest bank.

EU and US oil sanctions were the core of the strategy towards Iran. In wider terms, the oil market has suffered important alterations. In 2011, the EU was Iran's first trading partner, accounting for almost a third of Iran's exports and for about 23% of Iran's oil exports, with Italy, Spain and Greece as its top customers. More than 90% of the EU's imports from Iran were represented by fuels and mineral products. The entry into force of the EU embargo on oil imports in July 2012 has led to a sharp drop in EU imports from Iran, a development which is clear in Figure 1 below. As a result, the EU dropped to the fourth position among Iran's largest trading partners.

Figure 1 – EU Trade with Iran 2008-2012 (millions of euros)

Iran's oil exports represent 80% of its total export earnings and 50-60% of government revenue. According to the US Energy Information Administration, Iran's oil exports fell from $95 billion in 2011 to $69 billion in 2012, a 27% decrease. The International Energy Agency (IEA) estimates that, in 2012, Iran sold around 1.5 million barrels of oil and condensate per day abroad, the lowest volume since 1986 and 25% less than in 2011 (see Figure 2 below).

Figure 2 – Iran Exports of Crude Oil and Condensate 1992-2012

The embargo has also been strengthened by other measures. For instance, the EU has stopped European Protection and Indemnity Clubs (P&I Clubs) providing Iranian oil carriers with insurance and reinsurance, given that more than 90% of the market is covered by EU companies.[31] While such measures have proven very effective in the short term, the longer they are in force, the higher is the incentive for economic operators to look for alternatives. Countries such as China, India, South Korea or Japan found solutions to circumvent the EU's measures. Some countries (China, India, South Korea) have started importing Iranian oil on Iranian tankers while India has also allowed its insurers to cover oil shipments. It is difficult to quantify the overall cost of EU sanctions on Iran. Part of it could be ascertained by looking at the overall trade and existing flows with Iran, but another part takes the form of missed opportunities. Overall, the EU paid a manageable toll regarding oil sanctions, while a few Member States have suffered losses due to the reduced trade flow. Oil imports from Iran accounted for about 5% of EU consumption, but this figure was considerably higher in some of the southern EU Member States; Greece, Italy and Spain accounted for about 68% of Iranian oil exports to Europe. Iran's crude oil represented about 30% of Greece's oil imports, and about 14% for Italy and 12% for Spain.

Severely hit by the economic crisis, in 2011 Greece encountered difficult conditions in the oil market, with banks refusing to provide financing for fear that Athens would default on its debt. Iran offered very good credit conditions to Greece and the share of Iranian oil in Greece's oil imports grew during 2011 to more than 50%, up from 16% in 2010. Following the introduction of the embargo, Greece was able to replace Iranian oil with imports from Russia, Saudi Arabia and Iraq with relative ease thanks to the cooperation of EU states. Italy has also found new sources of oil and has obtained an exception in the sanctions regime that allowed the Italian company ENI to continue to receive paybacks in oil from Iran for decade-old deals worth €1.3 billion. The return of Libya as an oil producing state compensated for the Italian losses. Other problems were also noted, such as Shell's $2.3 billion loss with Iran, but, overall, the oil shock was contained.

The EU's trade with Iran fell from €27.7 billion in 2011 to €12.8 billion in 2012 – a 53% decrease – with imports decreasing from €17.2 billion in 2011 to only €5.5 billion in 2012 (see Figure 3) .

Figure 3 – EU Trade with Iran in 2012

Although the decrease was significant, in relative terms, imports from Iran represented only 1% of EU imports in 2011, and the economic impact was accepted by EU Member States (although some states were more affected than others).

Step 4: The comparative utility of sanctions

Despite UN, US and EU sanctions, the Iranian nuclear programme has continued to advance; therefore, it could be concluded that sanctions did not achieve their main objective. However, the nuclear programme has slowed down and it is doubtful that the alternative to this sanctioning policy would have led to a better outcome.

After a long diplomatic confrontation, by 2006 sanctions were widely believed to be the most appropriate policy response. At that time, there were two options: the first was to avoid sanctions. The risks in this scenario included strengthening those actors in Iran who were pushing for the enrichment of uranium and, possibly, of the radical components of the regime. This would have reduced the diplomatic solutions to the crisis *de facto* paving the way either for a military intervention or for the acceptance of Iran as nuclear power. A second option was to impose comprehensive sanctions in order to decisively cripple the economy of Iran. Assuming that a political consensus would have been reached with China and Russia to adopt such measures, the humanitarian costs would have been extremely high.

Neither scenario would have led to a better outcome. In hindsight, it is clear that the mobilisation of a broad and burdensome sanctions regime, however costly, contributed to a delay to the nuclear enrichment programme, but it did not lead to a behavioural change of the

Iranian regime to follow its NPT commitments. However, elements of coercion are present if we consider that a new round of negotiation talks on the nuclear programme may soon be held under the new Iranian leadership.

Conclusions

The four-step process has highlighted the pros and cons of the EU's sanctioning policy towards Iran. Overall, the restrictive measures appear to have contributed positively to the strategy of the EU and its allies to prevent Iran from acquiring nuclear capability. The Iranian plans have been delayed, a military escalation of the conflict has been avoided and the credibility of the NPT has been reinforced. In addition, sanctions have proved useful in bringing Iran back to the negotiating table. However, these results do not amount to a fully-fledged positive evaluation of the sanctions.

A number of unintended effects, such as the strengthening of Iran's capacity to be independent of external influence, have been identified and should be considered when the EU is in a position to revise the sanctions. The Iranian regime has shown resilience in the face of sanctions. The country's economy has adapted to sanctions and has developed ways of circumventing them. Tehran has developed relatively good relations with UN Security Council members Russia and China, and generally receives their support against tougher UN sanctions. This also allows countries such as India, Turkey and Pakistan to continue their economic relations with Iran and thus support the stability of its economy.

The imposition of sanctions has also shown some of the EU's structural limitations when implementing targeted measures. The limited border control and some of the rulings by the Court of Justice are good indications which help us to correctly evaluate what sanctions can and cannot achieve in countering the proliferation of nuclear weapons. The rulings of the Court have also served as a reminder to the Council that targeted sanctions on individuals and entities pose new challenges compared to the sanctions which are imposed on states. Within the current legal framework, listings have to be backed by sufficient evidence and the rights of

due process, fair trial and effective remedy have to be taken into account when fundamental rights of individuals and companies are affected. Further annulments would undermine the credibility of the EU sanctions regime and would expose the Council to claims for damage being brought against it by the affected parties.

The EU would need to reinforce its diplomatic efforts and use the opportunities created by the changes in Tehran. While keeping the sanctions in place will maintain pressure and send the signal that Iran continues to break international norms, the EU should also make it clear that it is opposed only to the military component of the nuclear programme and that it does not seek regime change in Tehran. Moreover, the EU should try to engage in a broader dialogue with the moderate forces in Iran, offer a clearer picture of what would restore international confidence in the peaceful nature of Iran's nuclear programme and offer clear incentives to Tehran to engage in serious and comprehensive negotiations.

Syria: limited role for sanctions

Crisis background

Following Tunisia, Egypt, Yemen and Libya, Syrian requests for political rights were expressed in organised protests in the cities of Homs and Aleppo. The protests mounted and violence soon became central in the conflict, with national forces shelling districts of cities and being accused of using violence indiscriminately, which further precipitated the situation. What had begun as a peaceful and unorganised set of rallies became, within a few months, an open civil conflict. Two years later, the government was accused of targeting civilians with chemical weapons, leading to speculation over an international military strike.

The EU issued warning statements to the government in Damascus, asking it to respect human rights and refrain from using violence. After the statements fell on deaf ears, the Council decided to resort to restrictive measures to pressure the ruling elite to prepare for elections

(coercion), and to reduce the capacity of the regime to crush the rebellion. The EU condemned the violent repression and decided to impose sanctions "against Syria and against persons responsible for the violent repression against the civilian population in Syria".

Council Decision 273 of 9 May 2011 imposed a travel ban and a freeze of assets on 13 individuals, as well as an arms embargo on the country. This list did not include President Assad, with a view to coerce the political leadership into entering a negotiation phase in which the EU could have mediated with those in power for the preparation for future elections.

The defiant response of the President led the Council to extend the list to Assad's family. Council Implementing Decision 302 of 23 May 2011 listed 23 individuals. The number of individuals and entities was updated to 66 individuals and entities with Council Decision 522 of 2 September 2011, which also included individuals and entities benefitting from supporting the regime. The list was updated and expanded to include 179 individuals and 53 entities in May 2013.

The screw was tightened not only with the listing, but also with the quality of the measures imposed. From November 2011, the travel ban and financial restrictions were extended to include a ban on the import of crude oil, the suspension of new investments of the European Investment Bank, and the suspension of gold and minted coin imports. The Bank of Syria, accused of working towards the evasion of sanctions, was included in the sanctions list. Finally, a ban on luxury goods as well as on technology which could be used for internal repression was added.

Despite the sanctions, the civil war continued to escalate, leading the EU to alter its sanctions policy. At the request of the United Kingdom and France, who were concerned that the victories obtained by the forces loyal to President Assad were facilitated by the fact that the EU was not supplying the rebels with military equipment, in May 2013 the Council decided to drop the arms embargo and refine the sanctions regime towards a more explicit support for

the rebel forces, while renewing all previous measures until 2014.

Analysis: the four steps

Step 1: Placing sanctions within the overall EU strategy

The EU has repeatedly called on the Assad regime to refrain from using force against civilians, as well as for a political solution to the Syrian crisis. As the conflict escalated, the EU imposed sanctions swiftly and toughened them as the regime failed to comply with its demands. Although at the centre of its response to the Syrian conflict, restrictive measures were not the only course of action taken by the EU.

In the early stages of the conflict, EU diplomats tried to convince the Assad regime to change its course. As the conflict worsened as of summer 2011, the EU tried to isolate and weaken Assad. In 2012, it reduced its diplomatic contacts with the regime to a minimum, closing its delegation in Damascus in December 2012. The EU has looked for a political solution to the civil war and has supported international diplomatic initiatives to end the conflict through supporting the diplomatic efforts of the Joint UN-Arab League Special Envoys Kofi Annan, and then Lakhdar Brahimi, and the Geneva international conferences on ending Syria's civil war. The EU has also used the Security Council and the UN system (e.g. Human Rights Council and UN General Assembly) to raise the profile of the conflict and gather international support against Assad. In addition, it has worked to prevent regional destabilisation and has provided humanitarian, economic and development assistance to the Syrian population affected by the conflict. In short, although the EU's sanctions on Syria are quite broad, they are only one of the foreign policy tools which the EU has employed to deal with the Syrian civil war.

Step 2: The purposes of sanctions

The EU's sanctions on Syria have evolved very rapidly compared to other sanctioning regimes. The coercive element of sanctions was visible in the early sanctioning phase and was later replaced by a stronger constraining aspect.

In the early phases of the Syrian conflict, the EU wanted to **coerce** the regime to change its behaviour, and thus did not include President Assad on the travel ban list. The President was given the opportunity to cooperate while retaining a central role in the process. The **constraining** element was limited to the politically acceptable threshold that such international attention had set for the repression of the revolt. The **signal** was, from the beginning, very important to express the political stand of the EU and its members, their strong ties with the US and the support for the groups opposing the regime in Damascus.

As the regime's resilience did not lead to a quick resolution of the crisis, the EU added Assad, his family and many of his collaborators to the list in order to **constrain** their actions. The oil embargo, imposed in September 2011, as well as banning the trade of gold aimed to weaken the public accounts, which were dependent on sales from oil. Once again, the **signalling** purpose of censoring the behaviour of the regime was to show the commitment to resolving the conflict.

Step 3: impact and cost

Before the imposition of sanctions, the EU was Syria's first trading partner. Energy products (mainly oil) represented around 90% of Syria's exports to the EU and about one third of Syria's export income. The EU oil embargo, imposed in September 2011, and the prohibition of providing insurance or loans to this sector led to a decrease in trade of almost €5 billion in 2012, with EU imports from Syria dropping by 90% and exports by 61%, compared to 2011 (see Figure 4 below). Six months after the oil embargo was imposed, the Syrian oil minister evaluated the losses produced by Western sanctions in $4 billion. The Assad regime has managed to divert some of the country's trade to other markets, such as Lebanon and Iraq, and has mitigated the impact of EU financial sanctions by using the Russian banking sector.[38] However, the high share of oil in Syria's exports to the EU make the oil embargo the toughest of the restrictive measures adopted since the start of the war as shown in Figure 4 below.

Figure 4 – EU Trade with Syria 2008-2012

The civil war and the oil embargo have led to a decrease in oil production from 345,000 barrels per day in May 2011 to 71,000 in June 2013. This is not enough to meet Syria's internal needs and has led to fuel shortages and price hikes, affecting the population. Nevertheless, the Syrian government has been able to secure regular supplies of Russian and Iranian fuel, showing the limits of autonomous sanctions.

In order to limit the impact of the oil embargo and help the Syrian civilian population and the opposition to the regime, the EU allowed for exceptions to the Syrian oil embargo in April 2013, permitting the import of Syrian crude oil and petroleum products to the EU. This is allowed under certain conditions, which include the consultation of the Syrian National Coalition, the main (non-Islamist) opposition group, and in agreement with the EU Member States. But given that the regime controls the oil pipelines and the existing export terminals on the Mediterranean Sea, this change has had few consequences in terms of exports. At the same time, conflict for control of oil wells and pipelines in the oil-rich areas has increased warlordism, with various tribal leaders and organisations gaining control of the oil wells, further fragmenting the Syrian opposition. Among the organisations that have managed to assume control over several oil wells is Jabhat al-Nusra, the al-Qaeda-affiliated Islamist group fighting in Syria.

The arms embargo did not have a significant impact as EU Member States were not among Assad's regime top weapons sources. Among the main unintended consequences of the sanctions are the problem of 'over-sanctioning', mainly linked to payment clearances for projects and trades which were not intended to be subject to the restrictions of sanctions, the practical difficulties to sustain opposition groups and the humanitarian consequences on the population, such as inflation and interruption of public services, even though the latter may be more so attributed to the conflict than to EU sanctions.

Indeed, the impact of sanctions is infinitely modest compared to the effects of the open conflict

affecting Syria. The costs borne by the EU and its members to maintain sanctions are overall contained. The EU imported only 1.5% of its crude oil from Syria, so the oil embargo on the country has not seriously disrupted the EU's oil supply. Germany, Italy and France, the main importers of Syrian oil, and companies such as BP, Royal Dutch Shell, Total and MOL, previously active on the Syrian oil market, managed to find new oil supplies fairly quickly.

Step 4: The comparative utility of sanctions

The EU has relied on sanctions since the very early stages of the conflict. The initial phase was characterised by the EU retaining the possibility of a negotiated solution which could have been led by the Assad government. The situation precipitated in open conflict, but it is unclear how not imposing sanctions or relying on heavier restrictive measures since the beginning of the crisis would have helped to resolve the situation. A lack of sanctions would have attracted criticism by domestic actors in the EU and would have given Assad impunity in dealing with the opposition, while heavier sanctions may have contributed to accelerating the radicalisation of the conflict with high humanitarian costs.

The entry into force of the oil embargo in December 2011 marked a new phase for the EU's sanctioning policy. This choice was, again, made based on the options of leaving the situation untouched or relying on even more stringent sanctions in combination with some form of military intervention at a moment of further escalation of the conflict. The costs of this decision have been marginal for the EU, unevenly spread, and compensated by other energy sources.

Conclusions

By swiftly imposing sanctions, the EU reaffirmed its condemnation of the use of indiscriminate violence against the civilian population and limited the resources at the disposal of President Assad's government. The EU also acted in tune with Syria's neighbours in the region, and with the US. However, unsurprisingly, the EU's restrictive measures on Syria did not stop the conflict and did not prevent the Assad regime from using chemical weapons against the civilian

population. The Syrian regime was more open to cooperation only when, following the sarin gas attacks in the Damascus suburbs in August 2013, it was faced with the imminent threat of military strikes.

There is no simple resolution to the conflict. Sanctions have contributed to keeping the attention on the crisis and the threat of using force has triggered a new dynamic, but divisions became clearly visible within Europe, with a minority of countries (mainly the UK and France) favouring the lifting of the arms embargo, and a reluctant majority opposing it.

The Syrian case shows that sanctions alone are unlikely to change the fate of a civil war, especially when the targets have significant external support and the senders of the sanctions have a reduced leverage and reduced capacity to control the flow of goods and the movement of people across borders. In this case, the role of sanctions is merely to contain an active conflict, to keep the attention of the international community on events, and to send the signal that there is a line between acceptable and unacceptable behaviour.

Conclusions

The EU has resorted international sanctions even though the effectiveness of this foreign policy instrument has always been questioned. This chapter reviewed the way in which effectiveness has been studied and suggested a different procedure to evaluate the restrictive measures imposed by the Council. The analyses of the cases from Iran and Syria indicate that international sanctions can be a very useful tool when it comes to international crises. The negative perception is formed because sanctions carry ambitious expectations that can hardly be met in reality. Instead, the four-step procedure that has been presented here allow to form pragmatic and realistic expectations regarding the role of sanctions in international crises, distinguishes what sanctions do compared to other foreign policy instruments, and delegate part of the responsibility for the assessment to the practitioners who decided to resort to them in the first place.

The four-step procedure encompasses the relative importance of sanctions within the strategy, the motivating logic, the impacts and the policy alternatives that could have led to similar (or better results). The case of Iran shows that sanctions did slow down the development of the nuclear program, and did keep the attention high on the alleged threat that Iran poses to the international system. Surely, there are setbacks such as the externalities from imposing financial sanctions, and the costs shouldered for the sanctions, but the effects remain. Second, the case of Syria show also some limits of sanctions. Whereas they are usually considered as a tool-fit-all situations, sanctions can only marginally influence the conflict cycle of complex conflicts such as the one in Syria. Thus, sanctions can only produce marginal effects, such as reducing the support to certain groups, but the overall evaluation cannot be complete unless the context and the alternatives to sanctions are duly taken into consideration.

IAI
Istituto Affari Internazionali

INTERNATIONAL CONFERENCE ON

COERCIVE DIPLOMACY, SANCTIONS AND INTERNATIONAL LAW

ROME, 13 FEBRUARY 2015

Palazzo Rondinini
Via del Corso, 518

Draft paper on

Western Economic and Political Sanctions as Instruments of Strategic Competition with Russia – Opportunities and Risks

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Western Economic and Political Sanctions as Instruments of Strategic Competition with Russia – Opportunities and Risks

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Paper delivered to the International Conference on Coercive Diplomacy, Sanctions and International Law; Rome, Istituto affari internationali, 13 February 2015

(draft paper, please do not quote)

Since the occupation and annexation of the Crimea in February and March of 2014, the Western community (i.e. the EU, NATO as well as the broader Western world) has imposed both political and economic sanctions against Russia. The intention of these sanctions was often expressed in vague and general language, but they were understood as measures against the unlawful annexation of the Crimea. More sanctions were imposed after the incursions of Russian regular and irregular military and FSB units in various parts of the Ukraine and the de-facto secession (which forebodes the eventual annexation by Russia) of Donetsk, Luhansk and other cities in the Donbass area in Southeastern Ukraine. These sanctions obviously have the purpose of restoring the sovereignty and territorial integrity of the Ukraine. In December 2014, a group of sanctions have been imposed by the US, Canada and the EU in order to force Russia to keep to the provisions of the Minsk ceasefire agreement from 7 September 2014.

As this paper was being written, increasingly more voices were heard within Europe, demanding an easing of the sanctions in order to give Russia a real chance to fulfil the provisions of the Minsk Protocol, which foresees, inter alia, the withdrawal of irregular forces from the contested area of the Eastern Donbass. Some seem to be concerned with the possibility of Russia suffering too much under the burden of sanctions. The governments of Austria, the Czech Republic, Slovakia, Hungary and Bulgaria have already voiced their concern and the new government of Greece is striking a pro-Russian tone. But even German Foreign minister Walter Steinmeier, German Vice Chancellor Sigmar Gabriel, and the High Representative of the EU for Foreign Affairs and Security Policy, Mrs. Federica Mogherini, have stated that Western sanctions should not force Russia onto its knees. German Foreign Minister Frank Walter Steinmeier added that it never was the intention of sanctions diplomacy to force Russia into economic disaster. Steinmeier argued that an economic downfall of Russia would mean havoc for other European states as well, since

we are all interdependent. Vice Chancellor Gabriel even added that sanctions diplomacy should not be used to start a new cold war. This reasoning was shared by leading Socialist politicians as well as by business representatives, however German Chancellor Angela Merkel insisted in the continuation of the sanctions without referring to the possibility of Russia winding down in economic disaster. These statements seem to indicate that not much reflection was spent on the idea of what to achieve with sanctions against Russia.

Sanctions diplomacy is a kind of coercive diplomacy. Usually, such a form of diplomacy means that one has to use economic levers until the other sides gives in – even if (or because) the other side would otherwise face economic havoc and disaster. Unlike other forms of coercive diplomacy, sanctions diplomacy intents to avoid the use of military force or even the threat of the use of military force (deterrence) even in light of a direct or indirect military threat. At least in Germany and Italy, the very idea of using military force or of applying deterrence is politically so compromised that sanctions almost came as a default solution after the Russian acts of aggression against the Ukraine. It is to be feared, however, that Western sanctions diplomacy against Russia is not only lacks a comprehensive understanding of what has to be achieved, but that it is devoid of any plan of how to deal with a recalcitrant Russia that rather goes into escalation than giving in. Even worse, Western sanctions diplomacy might increase the risk of armed conflict in Europe rather than reducing it.

This paper starts with some general remarks about the role of sanctions under conditions of existing or emerging strategic competition. It then turns to the efforts of the EU and the US to put pressure on Russia since March 2014 and it aims to address the subsequent four questions:

1. Is there a consistent strategic logic behind Western sanctions diplomacy against Russia or has it rather been the outcome of hasty decisions and uneasy compromises?
2. What are the effects of the sanctions and how far have they actually contributed to the economic plight of the Russian economy?
3. Should we really panic if the Russian economy would go into a deep recession?
4. Are there indications that Western sanctions diplomacy might drive Russia into a military escalation?

The author arrives at the conclusion that most Western governments have been more or less incapable of dealing properly with the kind of strategic challenge Russia is posing today and that

sanctions diplomacy has been predominantly symbolic politics with no clear idea on what id to be done in case sanctions fail to change the course of Russian policy or, even worse, if they drive Russia into seeking a military solution. Europeans, and to a lesser degree the US, seem to be unable to cope with a situation of strategic competition (or confrontation) with Russia. In terms of international stability, the current strategic blindness of the EU and of the broader West might be as alarming as the re-emergence of Russian revisionism and imperialism.

The role of sanctions diplomacy and the emergence of strategic power competitions

With the term 'international sanctions', coercive measures are meant which were adopted by a country, a group of countries or by international organizations against states, individuals, companies, or organizations as a response to undesired behaviour, to breaks of international law, or as part of broader strategic competition. International practice shows that various kinds of sanctions have emerged during the past decades: financial restrictions, restrictions on the access to certain technologies and materials, economic boycotts, travel bans and arms embargoes. Moreover, less frequent forms of sanctions include diplomatic sanctions, sanctions against individuals and sanctions against companies. Sanctions are part of coercive diplomacy, whereby the whole spectrum of coercive diplomacy is much broader.[1] There is a long tradition of using sanctions in international diplomacy in cases of serious human rights violations by individual governments, or where a certain state should be brought to respect international law.[2] Yet, the scope of sanctions diplomacy has always been much broader. During the past decade, sanctions have become important instruments of coercive Western diplomacy in efforts to cope with strategic challengers or upcoming peer-competitors. This has been the case with sanctions against Russia's annexation of the Crimean Peninsula and its hybrid war against the Ukraine, with sanctions against the Iranian

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[1] See George, Alexander, *Forceful Persuasion: Coercive Diplomacy as an Alternative to War* (Washington, D.C.: United States Institute of Peace Press, 1991) and George, Alexander/Simons, William, *The Limits of Coercive Diplomacy* (Boulder, Colorado: Westview Press, 1994).

[2] Førland, Tor Egil, "The History of Economic Warfare: International Law, Effectiveness, Strategies", in: *Journal of Peace* Research, vol. 30, no. 2 (May 1993), pp. 151-162; see also Hufbauer, Gary Clyde/Schott, Jeffrey J./Elliot, Kimberly Ann/Oegg, Barbara, *Economic Sanctions Reconsidered* (Washington, D.C.: Peterson Institute for International Economics, 2009).

nuclear weapons program and with sanctions against North Korea. They might someday be an instrument to cope with China. The basic logic behind this new emphasis on sanctions is that in face of a direct or indirect military threat they are helpful in avoiding the use of military means or even the threat of their use. Resorting to sanctions reflects the growing uneasiness within Western societies to use military means, even under conditions of strategic confrontation.

In scholarly literature, sanctions have primarily been analysed with regard to their effectiveness, i.e. their ability to change the behaviour of a given, targeted government concerning a specific topic.[3] In looking at the value of sanctions diplomacy with regard to strategic competitors or emerging peer-competitors, the picture is much more complex. Here, it is interesting to look back at the debate on the role of sanctions during the period of East-West conflict. The Western Alliance used economic and other sanctions to target the Soviet Union and its allies.[4] The goal was not to alter the behaviour of the Soviet leadership, but rather to deny the Soviet military access to weapons and other strategically relevant technologies, thus raising the costs (including opportunity costs) of confrontation and preventing the Soviet military from making use of innovative technologies for military purposes. They also had the purpose of aggravating economic problems that were already bedevilling the Soviet economy, thus forcing the Soviet authorities to shift investments away from military purposes to civilian ones. Sanctions were part of the overall confrontation with the communist regimes and were intended to indirectly influence the overall balance between the conflicting sides. Sanctions were often deemed economic warfare.[5] They were highly contentious, since many argued that economic cooperation was a much better way to over-

[3] See Hufbauer/Schott/Elliot/Oegg, *Economic Sanctions Reconsidered;* Pape, Robert A., "Why Economic Sanctions Do not Work", in: *International Security*, vol. 22, no. 2 (1998), pp. 90-136; De Jonge-Outdraat, Chantal, "Making Economic Sanctions Work", in: *Survival*, vol. 42, no. 3 (Autumn 2000), pp. 105-127; Drezner, Daniel W.; *The Sanctions Paradox. Economic Statecraft and International Relations* (Cambridge: Cambridge University Press, 1999); Kirshner, Jonathan, "Economic sanctions. The state of the art", in: *Security Studies*, vol. 11, no. 4 (Summer 2002) pp. 160-179; Malloy Michael P., *United States Economic Sanctions: Theory and Practice* (The Hague: Kluwer, 2002); Portela, Clara, *European Union sanctions and foreign policy: when and why do they work?* (Abingdon: Routledge, 2010).

[4] Adler-Karlsson, Gunnar, *Western Economic Warfare. 1947-1967* (Stockholm: Almquist & Wiksell, 1968).

[5] See Førland, Tor Egil (1991), "Economic Warfare' and `Strategic Goods': A Conceptual Framework for Analyzing COCOM", in: *Journal of Peace Research*, vol. 28, no. 2 (May 1991), pp. 191-204; and Mastanduno, Michael, *Economic Containment: CoCom and the Politics of East-West Trade* (Ithaca: Cornell University Press,1992).

come the East-West confrontation.[6] Western sanctions diplomacy during the Cold War was mainly effective as it contributed to the overall weakening of the Soviet economy and military posture (mainly through embargoes on technologies). It also was underpinned by a military posture which allowed the deterrence of the Soviet Union from a military invasion against Western Europe.

While economic relations between both blocs grew during the latter part of the Cold War, various measures imposed under the framework of the Coordinating Committee for Multilateral Export Controls (COCOM) established by the Western bloc powers remained effective until the early 1990s, including exports of strategically relevant technologies. In scholarly literature regarding the Cold War period, the potential of sanctions as an instrument of forcing targeted states to change their behaviour was credited as being limited at best.[7] A study on the effectiveness of the economic sanctions against the Soviet Union came to the conclusion that the United States was quite successful in denying arms and key technologies to the Soviets; however the collapse of the Communist regime was attributed to the internal inefficiencies of the system rather than to United States (US) economic sanctions.[8]

Already in the 1980s, the same method applied in COCOM – harmonizing export restrictions by the listing of certain technologies which were not to be exported to certain states – was adapted to the nuclear proliferation regime. In 1986, the Nuclear Suppliers Group was founded in order to withhold crucial technologies for the production of nuclear weapons from suspicious states. This regime was complemented in 1987 by the Missile Technology Control Regime (MTCR).[9] These regimes were further developed in the 1990s and today have become important elements of the non-proliferation regime.[10] They all were intended to weaken potential strategic competitors and

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[6] Stent, Angela, *From Embargo to Ostpolitik. The Political Economy of West-German Soviet Relations 1955-1980* (Cambridge: Cambridge University Press, 1981)

[7] See George, *Forceful Persuasion: Coercive Diplomacy as an Alternative to War*, see also George and Simons, *The Limits of Coercive Diplomacy.*

[8] See Hufbauer/Schott/Elliot/Oegg, *Economic Sanctions Reconsidered.*

[9] Scheffer, David J. , "Die Verhinderung der Weiterverbreitung von chemisch-biologischen Waffen sowie von Trägerraketen: amerikanische Gesetzgebung über Sanktionen", in: Europa-Archiv, vol. 44 (1989), pp. 577-586.

[10] See Henshaw, John H., *The Origin of COCOM. Lessons for Contemporary Proliferation Control Regimes* (Washington, D.C.: The Stimson Center, 1993); Bertsch, Gary T./Cupitt, Richard T./Elliot-Gower, Steven, eds., *Interna-*

to keep them at bay. The pivotal country for an application of a whole set of sanctions in order to prevent it from rising to the status of a regional strategic competitor was (for many years) Iraq under Saddam Hussein. The UN Security Council (UNSC) imposed sanctions against Iraq after the invasion of Kuwait in the summer of 1990 and after the Operation Desert Storm in the spring of 1991, which lasted for more than ten years. The UN sanctions regime against Iraq was intended to coerce the Iraqi leadership into the UN imposed arms control regimes and to prevent the Iraqi regime from using its oil revenues for rearmament efforts.[11] The result, however, was a humanitarian catastrophe. Due to a lack of cooperation by the Iraqi authorities, the economic situation of the broad population dramatically worsened and was used by the Iraqi leadership to compromise Western sanctions diplomacy in public. In particular, the Iraqi authorities reported an increase in child mortality, which was attributed to the international sanctions. The number of victims of this sanctions regime was estimated as numbering into hundreds of thousands.[12] More recent calculations have shown that these figures were grossly exaggerated.[13] Yet, as a consequence of these failures, the overall assessment in academic literature during the late 1990s was that economic sanctions are futile instruments and that their humanitarian side-effects might often thwart whatever their intended positive impact may be.[14] The eventual invasion of Iraq by the US in 2003 was also based on the notion that sanctions diplomacy had failed.[15]

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tional Cooperation on Nonproliferation Export Controls. Prospects for the 1990s and Beyond (Ann Arbor: University of Michigan Press, 1994).

[11] Krause, Joachim, „Die Kontrolle der irakischen Rüstung durch Vereinte Nationen und IAEA"; in: *Vereinte Nationen,* vol. 40, no. 2 (June 1992), pp.46-51; Trevan, Tim, *Saddam's Secrets: The Hunt for Iraq's Hidden Weapons* (London: Harper Collins, 1999).

[12] Cordesman, Anthony H., *Iraq: sanctions and beyond.* (Boulder, Colo.: Westview Press, 1997); see also Conlon, Paul, *United Nations sanctions management: a case study of the Iraq Sanctions Committee, 1990-1994* (Ardsley, N.Y.: Transnational Publishers, 2000); and Alnasrawi, Abbas, "Iraq: economic sanctions and consequences, 1990-2000", in: *Third World Quarterly*, vol. 22, no. 2 (April 2001), pp. 205-218; Sponeck, Hans-Christof von, *Ein anderer Krieg. Das Sanktionsregime der UNO im Irak* (Hamburg: Hamburger Edition, 2005).

[13] Spagat, Michael, "The Iraq Sanctions Myth", in: *Pacific Standard* (26 April 2013), http://www.psmag.com/navigation/politics-and-law/the-iraq-sanctions-myth-56433.

[14] Pape, "Why Economic Sanctions Do not Work", see also Weiss, Thomas G., "Sanctions as a Foreign Policy Tool: Weighing Humanitarian Impulses", in: *Journal of Peace Research*, vol. 36, no. 5 (1999), pp. 499-509; see also Kirshner, "Economic sanctions. The state of the art"; Cortright, David/ Lopez, George A./Gerber, Linda, *Sanctions*

What can be inferred from the past debate is that under conditions of an existing or an emerging strategic competition or rivalry, the role of sanctions diplomacy has to be assessed within a different framework. This framework has the following components:

1. The effectiveness of sanctions diplomacy cannot be measured exclusively in looking at whether or not certain stated goals have been achieved. Rather, the effects of sanctions on the nature of the strategic competition should be looked at, i.e. how do they contribute to a weakening of the strategic competitor? To what extent do they contribute to a favourable change of the military balance? Do they offset own military efforts? Do they prevent a military confrontation from unfolding? To what extent are they helpful in furthering diplomatic solutions over a broad range of issues? How are they helpful in furthering or in blocking underlying strategic trends that might shape the nature of the overall competition?
2. Since sanctions diplomacy under conditions of existing or emerging strategic competition most likely needs some time to show results, the management of consequentiality becomes an element of utmost importance. It starts with the clarity with which the imposition of sanctions is being justified and the spelling of mid- and long-term goals. But the main problem is how to keep up the pressure of sanctions if the targeted side retains a recalcitrant attitude. Hence, without consequentiality sanctions diplomacy cannot lead to any success. With too much consequentiality, however, diplomatic opportunities to solve the underlying political dispute might be forfeited. Governments might lose their ability to control the management of consequentiality if public opinion is becoming critical with regard to the alleged or actual humanitarian collateral damage of sanctions, whereas targeted governments might seek to mobilize Western public opinion by (often false) information in order to escape the sanctions.

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and the search for security, Challenges to UN action (Boulder, Col.: Lynn Rienner, 2002); Cortright, David/Lopez, Georg, *The sanctions decade: assessing the UN strategies in the 1990s* (Boulder, CO: Lynne Rienner, 2000); Babic, Jovan/Jokic, Aleksandar, "Economic sanctions, morality and escalation of demands on Yugoslavia", in: *International Peacekeeping*, vol. 9, no. 4 (Winter 2002), pp. 119-126; Tehindrazanarivelo, Djacoba Liva, *Les sanctions des Nations Unies et leurs effets secondaires, assistance aux victimes et voies juridiques de prevention* (Paris: Presses Univ. de France, 2005).

[15] Joachim Krause, „Multilateralism: Behind European Views", in: *The Washington Quarterly*, vol. 27, no. 2 (Spring 2004) pp. 43–59 (pp. 45-49).

In result, this kind of diplomacy is a very complex policy area, in which public diplomacy is an important component.

3. Sanctions as a substitute for other means of coercive diplomacy, in particular as an alternative to the use of military force, has to be looked at in a different way than sanctions diplomacy that is directed at the human rights record of a certain country. If they do not suffice to substitute military means, the role of military means will have to be reassessed, which is politically extremely difficult in most European states.

The strategic logic behind Western sanctions diplomacy against Russia

Western sanctions diplomacy against Russia started immediately after the "cold annexation" of the Crimea by regular Russian military units which acted as if they did not belong to Russia. On 6 March 2014, the EU-Council strongly condemned the occupation and demanded negotiations between Russia and the Ukraine. After it became evident that Russia was not interested in de-escalation and negotiation, the first set of sanctions was imposed by the EU as well as the US in mid-March 2014. These were measures of limited scope and were intended to force Russia into a dialogue with the Ukraine, which was already a very unlikely option. In their decision from 17 March 2014, the Council of Europe stated ..."that the solution to the crisis should be found through negotiations between the Governments of Ukraine and of the Russian Federation, including through potential multilateral mechanisms, and that in the absence of results within a limited timeframe the Union will decide on additional measures, such as travel bans, asset freezes and the cancellation of the EU-Russia summit."[16] The language was vague and evasive; it avoided any expression that would force Russia into anything except negotiations. The restrictive measures were individual sanctions against persons thought to be involved in the annexation the Russian side.

Since Russia didn't show any sense of cooperation and, in April 2014, rather incensed so-called people's insurgencies in various cities of Eastern and Southern Ukraine (which mainly were exercised by regular Russian soldiers and intelligence officers as well as irregular soldiers from all

[16] Council of Europe, Decision of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (2014/145/CFSP).

parts of Russia), the US Government imposed a ban on business transactions of seven Russian officials and seventeen Russian companies at the end of April 2014. At the same time, the EU Council issued travel bans against another 15 individuals. On 29 April 2014, the EU issued a fact-sheet paper stating the aims of their sanctions. According to this paper, "sanctions are not punitive, but designed to bring about a change in policy or activity by the target country, entities or individuals. Measures are therefore always targeted at such policies or activities, the means to conduct them and those responsible for them. At the same time, the EU makes every effort to minimise adverse consequences for the civilian population or for legitimate activities". This paper, which was neither an official statement of the Council of Europe nor a statement of the European Council, has subsequently mysteriously disappeared from the website of the EU and can only be retrieved through secondary sources.[17]

In July 2014, after the shooting down of the Malaysian Airlines flight MH 17 (by Russian separatists or, more likely, by Russian military personnel leased out to the separatists), Western states imposed further sanctions on Russia, including a ban to sell weapons, a ban on investments in and exports to the Crimea and the occupied territories in Eastern Ukraine, and a prohibition which hinders Western financial institutions to extend credits to Russian banks and companies. In September 2014, the Ukrainian government and representatives of the separatists agreed upon the Minsk Protocol (under OSCE mediation and Western supervision), which included a cease fire and a political roadmap for a political solution within the jurisdiction of the Ukraine. Russia didn't sign the agreement and the representatives of the separatists were loath to implement most parts of the protocol from the beginning, in particular those provisions which stipulate that the political solution for the conflict should be sought within the framework of the Ukrainian constitution. Hence, , many sanctions were already further sharpened in September 2014 as well as in December 2014 in order to force Russia to exert pressure on the separatists.

In retrospect, all these sanctions have been imposed as reactions to Russian military actions or violent moves by the separatists (which are highly dependent on the Russian government and who are more or less instruments of the Russian government), which were considered to escalate tensions. However, in looking at the language used by the European Council or the Council of the

[17] The quotation was retrieved from the Wikipedia entry *International sanctions during the 2013–15 Ukrainian crisis* (accessed 15 January 2015).

EU, one is surprised to see that no clear conditionality has been defined. There is no statement which sets up the conditions, which have to be fulfilled by Russia, for the sanctions to be lifted. Sanctions are not even called "sanctions", they are just referred to as "restrictive measures". This reflects the highly contentious nature of the sanctions diplomacy. There is a clear divide among Europeans between those who want to have biting sanctions (and even military preparations) against Russia, and those who display a quite relaxed attitude and even do not restrain from accusing the Ukraine of having provoked Russia. Not only Southern European states are unsupportive of sanctions: In addition to Italy, Spain and France, primarily the Czech Republic, Slovakia, Austria and Hungary are among those who were highly sceptical of sanctions against Russia. It has been mainly the German government which has been able to bridge the differences and to arrive at a common language which at least allowed for some kind of sanctions. Hence, Europeans are far away from any kind of consequentiality management. They neither have clear goals nor clear cut conditions, and since the sanctions will be upheld for only 12 months, it is to be expected that in March and April as well as in September and December 2015, heavy disputes will again come up that might weaken pressure on Russia. Seen from Moscow's perspective, Europe is not a strong force, but an institutional actor which consists of various power centres with differing opinions on which one can work in order to further drive deep wedges. In looking at Russian commentaries, the view is openly discussed that the strength of Russia is its centralized leadership and clear strategic guidance, while the greatest weakness of Europe is its diversity which results in strategic confusion.[18]

US-sanctions diplomacy is much clearer and more consequential and it sanctions last longer. However, given the lesser degree of US-Russian economic ties, their impact will be felt lesser than any European measure. The consequentiality of European sanctions diplomacy is hence the most important factor in determining success or failure of Western sanctions diplomacy in this situation.

[18] Trenin, Dmitri, The Ukraine Crisis and the Resumption of Great-Power Rivalry, Carnegie Endowment, Moscow Office, 8 July 2014 http://carnegie.ru/2014/07/09/ukraine-crisis-and-resumption-of-great-power-rivalry; Karaganov, Sergey: The Watershead Year, Interim Results, *Russia Global Affairs Magazine*, no. 4 (2014), reprinted under http://karaganov.ru/en/publications/353.

How effective are the sanctions?

In order to establish the effectiveness of Western sanctions, one has to proceed from the notion that there are different kinds of sanctions that will produce quite different effects. Moreover, there are secondary effects and developments which will also have an impact on the overall scene.

Most sanctions are directed against individuals (either from the Russian political, military or economic establishment or among the separatist forces). As a rule, these measures include travel bans or restrictions against business activities in Europe or the US. In some cases, they also involve the freezing of bank accounts. The effectiveness of these measures is limited, since most of the persons concerned have not been in the West for years and seem to have no interest in travelling abroad. Only those oligarchs and billionaires close to Russian president Vladimir Putin, who have major financial assets at Western banks, might feel uncomfortable. But for billionaires, temporarily losing access to some millions might not spell havoc. So far, there is no indication that these sanctions have had any tangible effect.

Some sanctions are of purely symbolic nature, such as suspending sessions of the NATO-Russia Council (which has in any case turned out to be totally incapable of being a forum for a strategic dialogue) and ousting Russia from G8. These are measures which have had no significant effect so far.

Another set of sanctions relates to investment and trade activities with the occupied territories of the Ukraine. Banning investments and trade with the illegal new authorities and with private actors is a necessary element of any sanctions diplomacy, but it surely will not force the Russian government to seriously reconsider its overall strategy. Most likely, very few strategically relevant activities are noticeably affected.

Some sanctions concern transfers of weapons systems, arms and dual use goods, such as technologies suited for civilian and military purposes. Since July 2014, no new arms sales are permitted to go to Russia, even pending transfers, such as the delivery of a modern helicopter carrier from France to Russia, have been put on hold. The effect of these measures will be felt only in the mid- to long-term future. They do not reduce the quantities and qualities of weapons systems available to the Russian military, but they increase the costs and opportunity costs of Russian armaments efforts. Since the economic basis of Russian arms production is relatively small – Russia's GNP lies in the range of the GNP of Italy or Spain – it is to be expected that any meas-

ure that would restrict the acquisition of military and dual-purpose technology would be felt much stronger than in any similar state.

A similar picture emerges with regard to sanctions banning the transfer of modern technology and equipment for exploiting oil and natural gas resources. Russia's economy is heavily dependent upon the income from exports of natural gas and petroleum. Restrictions on the export of most modern technologies does not inhibit the exploitation of these resources by Russia, but they slow down any efforts towards expanding the upstream production of natural gas and petroleum.

All measures listed so far have only limited or long-term effects at best. The only sanction that has already a tangible effect on Russia has been the closing of Western financial institutions for Russian banks, state entities and companies seeking credits in US Dollars or Euros. Given the high degree of dependency of Russian companies and banks on access to Western financial markets, this measure has turned out to be quite effective. Major Russian companies such as Rosneft or Gazprom have a need for hard currency credits at 20 to 30 billion $ per year. Among the existing total of 500 billion $ credits Russian companies and banks have drawn from Western financial institutions in the past, there is a need to re-finance credits within the range of 150 billion $ in 2015 alone. As long as they are banned from Western financial markets, they have to ask the Russian state to step in as a creditor or to look for other creditors, such as China. The ability of the Russian state and the Central Bank of Russia to step in with hard currency credits is limited, however, since the indirect consequences of the war have started to haunt the Russian economy:

- After the annexation of the Crimea and after it had become obvious that Russia was not ready to give in to the demands of the international community, foreign investment capital was hastily withdrawn from Russia. While Russia was proud to have a per year positive net balance of foreign direct investment at an amount of 40 to 70 billion $ in previous years, in 2014 the Central Bank had to register a negative capital flow of more than 130 billion $. The withdrawal of international capital from Russia is unrelated to sanctions. It is a reflection of the deep uncertainty about the trustworthiness of the Russian government, which has broken all relevant international treaty obligations during the aggressions against Ukraine.
- Beginning in 2013, the price for petroleum has decreased from 120 $ per barrel (in early 2013) to 80 $ per barrel in November 2014 and is now (early 2015) at less than 50 $ per barrel. The decline of the oil price has its origins in the changing structure of international oil markets,

which is partly caused by the increased use of fracking and other new technologies in the US and Canada. The Russian state is heavily dependent on an oil price of more than 100 $ per barrel.

As a consequence, the foreign currency reserves of the Bank of Russia decreased in 2014 from 470 billion $ to 370 billion $, thus inhibiting its ability to ease the consequences of the sanctions diplomacy. It is to be expected that the foreign currency reserves will further shrink in 2015 as long as the Russian government does not give in with regard to Ukraine. The prospects for growth are already quite dim in Russia: the World Bank currently predicts a three-percent negative growth in 2015, Fitch Ratings even assumes that Russia's economy will suffer from a drop-down of 30 % during this year.

In sum, sanctions imposed upon Russia by the EU, the US and other Western powers have only limited effects; however, in combination with the economic consequences of the decline of oil prices and the radical withdrawal of international capital from Russia, at least the prohibition to access Western financial markets has shown remarkable effects. Given the current trends, in at least one year from now, the Russian economy (as well as the citizens of Russia) will feel the dire consequences of these economic trends.

Will Russia collapse?

While it is foreseeable that Russia will have to face serious consequences during 2015, it is hard to predict what the nature of these consequences will be. Some have expressed the fear that Russia's economy might collapse, thus putting Western economies at risk, which are dependent on Russian oil and gas supplies. In principle, one can never exclude the possibility that economic sanctions would bring about unforeseen consequences, but the probability might nevertheless be assumed to be quite low. Given the limited nature of Western sanctions and the known resilience of the Russian economy, the idea seems to be quite far-fetched that the sanctions could cause the collapse of Russia's economy. Hence, it is surprising to see so many European politicians musing about this very possibility. If Russia's economy should suffer from a very deep recession in the coming years, it might rather be the result of the structural weaknesses of the Russian economy, which is too highly dependent on the natural gas and petroleum sector, and due to the tight grip of the state (and the financial interests of President Putin's cronies, who are all dollar billionaires), which has become the biggest obstacle for a thorough reform of the economy. A much more im-

portant factor is the lack of trust of investors and the business sector into the soundness of the Russian government. A government that easily breaks international treaties might be equally ready to break commercial treaties as well – in particular a government well-known for the greed and corruption among its ranks.

Will Western sanctions diplomacy drive Russia into military escalation?

There is much greater chance that Russia might try to eschew the effects of economic sanctions by resorting to military means. The use of military means could involve threats of military action, but it could also mean the launching of an armed aggression. Surprisingly, very few politicians in Europe are ready to discuss this possibility. Obviously, it does not fit into the overall narrative according to which the West is trying to de-escalate the situation by renouncing the use of military means. Such a scenario also does not fit with the basic tenet of European diplomacy, which assumes that military means would not solve any problem. As seen from the Russian side, however, resorting to military solutions might solve their problems. Russia is economically weak and vulnerable, while the Western alliance, in particular the EU states, are poorly equipped and politically hardly prepared to seriously address any Russian military threat. The only threat that is being discussed in European capitols (in particular in Berlin and Brussels) is the threat of a Great War (World War III) or of an "escalation", whereby no one really has defined what an escalation would be.

The danger of a Great War does not exist, since neither Russia nor the West has the military means available to launch any major invasion – for the time being NATO might not even be able to conduct a defensive war. The overall level of armed forces in Europe is quite low since the Treaty on Conventional Forces in Europe (CFE-Treaty) was agreed upon and implemented in the 1990s. However, there are military options available to Russia to counter the Western economic dominance and to punish the West for imposing sanctions against Moscow. Some of these military options might pose insurmountable problems for the EU and NATO if they do not prepare themselves for these contingencies. It is to be feared that the Russian President will look into these options the more the economic situation in Russia deteriorates. There are at least four options that need to be mentioned here:

- *The constant improvement and upgrading of the so-called separatist armed forces in the Eastern Ukraine:* Originally, these forces were militias consisting of local hotheads and criminals, professional Russian servicemen and intelligence officers, who were formed to occupy public buildings and secure major cities. Since summer 2014, they have been upgraded and augmented by regular Russian units (from the level of companies up to full battalions) in order to be able to withstand and even defeat regular Ukrainian forces. In January 2015, it became obvious that the "modernization" of these militias has progressed to a degree that they were able to be a match for regular Ukrainian troops.
- *The initiation of military offensives in the Ukraine with the intention to enlarge the separatist held territory:* While the separatist armed forces claim to be independent from Russia, their dependency on Russia weapons, Russia ammunition and Russian "volunteers" (which are partly drafted privates and NCOs) makes them an instrument of Russian policy. As this paper was drafted, the separatist forces started a military offensive against the city of Mariupol in Eastern Ukraine as well as against other objects in the area.[19]
- *The intimidation of European states, in particular smaller and neutral states, by openly threatening with military intervention or aerial attacks:* This has been the case since early 2014. During 2014, more than 150 aerial feint-attacks have been made by Russian aircraft against the Baltic states, Sweden, Poland and Finland. Similarly, the Russian navy undertook mock-up attacks against Lithuania, Latvia and Estonia. Since December 2014, nuclear capable aircraft were among the deployed aircraft, adding a nuclear dimension to those threats. In addition, nuclear bomber fighters flew through international airspace over the North Sea and the Eastern Atlantic close to national borders of NATO member states. NATO's Nuclear Planning Group is taking up this issue in its session on the 5th of February 2015. The nuclear dimension of this threat is particularly worrisome, since the tactical nuclear arsenal of NATO is limited to a few scores of warheads that are distributed among various European states, which is nothing in comparison to 2,000 to 3,000 theatre nuclear weapons that Russia holds in its western regions.

[19] Rick Lyman and Andrew E. Kramer: „War is Exploding Anew in Ukraine; Rebels Vow More", *New York Times*, 23 January 2015.

- *Occupation of the Baltic states by a surprise attack:* Already in 2013, Western intelligence services observed two seemingly independent Russian military exercises, which had a common denominator. One exercise tested Russia's ability to occupy the Baltic states, the other its ability to fend off an attempt by NATO to liberate these states. Since Lithuania, Latvia and Estonia are member states of NATO, it is unclear whether Russia would actually dare to launch such an invasion. Russian armed forces would be able to successfully launch such an offensive, since local defence forces are too small and there are no substantial units of other NATO states which could assume their defence. However, there is great amount of uncertainty about the reaction of the US in this case. Nevertheless, this possibility cannot be excluded, in particular if President Putin feels himself cornered due to the deteriorating economic situation. Putin might be tempted to pursue such a step, since it could expose the weaknesses of NATO and lead to its eventual disintegration. If, for instance, NATO would not be able to launch a counter-offensive against the occupation of the Baltic states and if the US was reluctant to threaten Russia with the use of nuclear weapons, this could be viewed by Putin as an opportunity to destroy NATO as a political entity. Nobody knows whether he and his advisors think in this way, but the preparations for the occupation of the Baltic states in combination with the aerial nuclear threats speak a certain language and might forebode some nasty scenarios, which could have been avoided if NATO would have been ready to station foreign troops on a permanent basis on the territory of the Baltic states. However, the NATO summit in September 2014 only could agree on limited measures to enable the NATO Reaction Force to establish a few land-based units and to preposition material in the Baltic states by the end of 2015.

Thus, looking at these developments, it can obviously be concluded that it is reasonable to expect that Russia will proceed with military measures in case the combination of sanctions and economic disaster would spell havoc for Russia's president. It would at least be more appropriate to think along these lines than to muse about the possibility that the Russian economy will collapse due to Western sanctions. If the Russian economy should collapse, it would be mainly due to the falling prices of petroleum and the loss of confidence by private investors in the soundness of Russian political and economic leadership. Thinking publicly about Russian military options is a taboo. Deploring the possibility of a collapse of the Russian economy as a consequence of Western sanctions, however, has become a standard repertoire of European politicians.

Outlook

Western sanctions imposed against Russia in 2014 have been implemented without a clear concept of what is to be achieved and without any clear conditionality. In particular, European sanctions have been mainly symbolic and might only become effective in the long run. The only effective measure – in the sense that it would restrain the Russian president – is the ban placed on Russian banks and companies which hinders them from refinancing themselves at western financial institutions. There is no management of consequentiality on the side of the EU; on the contrary, the disputes among Europeans have become public. The divide is, on the one hand, between those who see the strategic challenge posed by Russia as a prime concern, and those, on the other hand, who are primarily looking for business opportunities with Russia (or who share the authoritarian values of Putin). The main motive behind European and US preferences for economic sanctions is to avoid a military confrontation and to eschew the use of military forces at all. However, the outcome might turn out to be exactly the opposite of this desire. Applying economic screws against a state with so many economic weaknesses and with such a well-known preference for military options such as Russia, it is extremely risky. It would have been more prudent to apply biting sanctions and to prepare for military contingencies that the other side might take up in case the sanctions would have become effective. The European Union and the Atlantic Alliance have ushered themselves into the most serious test of their foreign policy strategies since the Yugoslav wars between 1991 and 1994. This time, it is not a Russia proxy that the West is facing, but Russia itself. However, Russia is currently stronger than in the 1990s and is being ruled by a president who has domestically almost absolute power and absolutely no inclination to acknowledge defeat.