ECONOMIC SANCTIONS, INTERNATIONAL LAW, AND CRIMES AGAINST HUMANITY: VENEZUELA'S REFERRAL TO THE INTERNATIONAL CRIMINAL COURT

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I. INTRODUCTION

Economic sanctions, unilateral and multilateral, have a long pedigree in international relations. From South Africa[2] and Israel,[3] to Iraq,[4] Iran[5] and North Korea,[6] such measures have, with varying results, been used in diverse contexts to influence the behaviour of States.[7] Some would celebrate the use of economic sanctions as a means of punishing "rogue States" for human rights violations or threats to the peace,[8] while others would condemn it as "imperialism" by powerful States against the weak.[9] Leaving aside Chapter VII enforcement action by the UN Security Council,[10] the imposition of unilateral sanctions raises far-reaching questions in respect of the rights and duties of States under international law.[11] A novel issue that has emerged recently is whether, in certain circumstances, such measures could even qualify as crimes against humanity.

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[2] *See* John Dugard, *The Role of International Law in the Struggle for Liberation in South Africa* 18 SOCIAL JUSTICE 83, 85–88 (1991).

[3] *See* European Community, Resolution on the Arab economic boycott of Israel (A3-0239/93), [1993] O.J., C 329/47 at 48.

[4] *See* W. Michael Reisman & Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Sanctions Programmes*, 9 EUR J. INT'L L. 86, 101–107 (1998).

[5] *See* GILBERT GUILLAUME, LES GRANDES CRISES INTERNATIONALES ET LE DROIT 197–218 (1994) .

[6] *See* Leonardo Borlini, *North Korea's Gauntlet, International Law and the New Sanctions Imposed by the Security Council*, 26 ITALIAN YBK. INT'L L. 319 (2016).

[7] *See* G.C. HUFBAUER AND OTHERS, ECONOMIC SANCTIONS RECONSIDERED (3rd edn, 2009).

[8] *See* Jonathan B. Schwartz, *Dealing with a "Rogue State": The Libya Precedent* 101 AJIL 553 (2007).

[9] Christopher Wall, *Human Rights and Economic Sanctions: The New Imperialism* 22 FORDHAM INT'L L. J. 577 (1998–1999).

[10] *See* ROSALYN HIGGINS AND OTHERS, OPPENHEIM'S INTERNATIONAL LAW: UNITED NATIONS 981 (2017).

[11] *See* ECONOMIC SANCTIONS IN INTERNATIONAL LAW (Laura Picchio Forlati & Linos-Alexander Sicilianos eds., 2004); Jean-Marc Thouvenin, *Sanctions économiques et droit international* 57 DROITS 161 (2013); and Antonios Tzanakopoulos, *The Right to be Free from Economic Coercion* 4 CAMBRIDGE J. INT'L & COMP. L. 616 (2015).

This issue has arisen in the context of sanctions adopted by the United States (and other States) against Venezuela. Pursuant to Article 14 of the Rome Statute of the International Criminal Court ("ICC Statute"),[12] on September 26, 2018, six States referred the situation in Venezuela to the Prosecutor of the International Criminal Court ("Referral I"), accusing the Government of President Nicolás Maduro of having committed human rights abuses amounting to crimes against humanity.[13] Following this referral, on February 13, 2020, Venezuela submitted a competing, second referral ("Referral II"),[14] alleging that economic sanctions adopted by the United States (and other States) against Venezuela constitute crimes against humanity.[15]

The US sanctions are far-reaching. Their stated objectives included the removal of President Nicolás Maduro from office, and counteracting what the United States considered to be:

> "human rights abuses, including arbitrary or unlawful arrest and detention of Venezuelan citizens, interference with freedom of expression, including for members of the media, and ongoing attempts to undermine Interim President Juan Guaidó and the Venezuelan National Assembly's exercise of legitimate authority in Venezuela."[16]

The first round of sanctions were imposed through Executive Order 13,808 on August 24, 2017;[17] those measures prohibited US individuals and entities from dealing with the

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[12] *Rome Statute of the International Criminal Court*, July 17, 1998, 2187 UNTS 3, art. 53(1)(a) (entered into force July 1, 2002).

[13] See *Situation in the Bolivarian Republic of Venezuela I*, Referral of the situation in Venezuela under Article 14 of the Rome Statute submitted by the Republic of Argentina, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru (Sept. 26, 2018) (International Criminal Court), online: *ICC* <https://www.icc-cpi.int/itemsDocuments/180925-otp-referral-venezuela_ENG.pdf>. Referral I alleged the commission of crimes against humanity by Venezuelan officials, based primarily on the May 29, 2018 *Report of the General Secretariat of the Organization of American States and the Panel of Independent Experts on the Possible Commission of Crimes against Humanity in Venezuela*, OEA/Ser.D/XV.19 (2018), online: <http://www.oas.org/documents/eng/press/Informe-Panel-Independiente-Venezuela-EN.pdf>.

[14] *Situation in the Bolivarian Republic of Venezuela II*, ICC-01/20, Referral pursuant to Article 14 of the Rome Statute to the Prosecutor of the International Criminal Court by the Bolivarian Republic of Venezuela with respect to Unilateral Coercive Measures (Mar. 4, 2020), online: *ICC* <https://www.icc-cpi.int/RelatedRecords/CR2020_00802.PDF> ("Referral II").

[15] Referrals I and II were, on February 19, 2020, assigned to ICC Pre-Trial Chamber III on the grounds that "the two referrals appear to overlap geographically and temporally and may warrant assignment to the same Pre-Trial Chamber." Decision assigning the Situation in the Bolivarian Republic of Venezuela II and reassigning the Situation in the Bolivarian Republic of Venezuela I to Pre-Trial Chamber III (19 February 2020) at 3 (International Criminal Court, The Presidency), *Situation in the Bolivarian Republic of Venezuela I*, ICC-02/18, online: *ICC* <https://www.icc-cpi.int/CourtRecords/CR2020_00598.PDF>; *Situation in the Bolivarian Republic of Venezuela II*, ICC-01/20, online: *ICC* <https://www.icc-cpi.int/CourtRecords/CR2020_00596.pdf>.

[16] Michael Crowley & Anatoly Kurmanaev, *Trump Imposes New Sanctions on Venezuela*, NEW YORK TIMES, Aug. 6, 2019, at A6.

[17] Exec. Order No. 13,808, 82 Fed. Reg. 41,155 (Aug. 24, 2017).

Venezuelan government and its state-owned oil company PDVSA.[18] Subsequently, on February 25[19] and March 1, 2018,[20] targeted sanctions were imposed on officials aligned with the Maduro government.[21] In April 2019, the United States reinforced its economic sanctions,[22] through the targeting of Venezuelan–Cuban oil shipments,[23] as well as the financial transactions of the Central Bank of Venezuela.[24]

The sanctions have been described as follows:

> "Although the Trump administration's campaign of economic sanctions has effectively drained most avenues for funding by Maduro's government, the Trump administration has consistently exempted humanitarian assistance and insisted that the sanctions 'do not target the innocent people of Venezuela.' Despite this assertion, Venezuela's economic situation has worsened severely under the prolonged sanctions, and the humanitarian crisis remains devastating."[25]

The UN Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Ms. Alena Douhan, reported in 2021 that the Venezuelan Government's revenue has contracted by 99%,[26] and that "[i]mpediments to food imports … have resulted in the steady growth of malnourishment."[27] The UN World Food Programme has reported that while 70% of Venezuelans "report that food is always available . . . access

[18] *See* Jean Galbraith, *Contemporary Practice of the United States*, 112 AJIL 103, 103 (2018).
[19] U.S. Dep't of State Press Release, The United States Sanctions Governors of Venezuelan States Aligned with Maduro (Feb. 25, 2019), *at* <https://www.state.gov/the-united-states-sanctions-governors-of-venezuelan-states-aligned-with-maduro>.
[20] U.S. Dep't of State Press Release, The United States Sanctions Illegitimate Maduro Regime Security Officials Associated with Violence and Obstruction of International Humanitarian Assistance (Mar. 1, 2019), *at* <https://www.state.gov/the-united-states-sanctions-illegitimate-madure-regime-security-officials-associated-with-violence-and-obstruction-of-international-humanitarian-assistance>.
[21] See Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 601, 606 (2019).
[22] *Id.* at 606.
[23] U.S. Dep't of State Press Release, The United States Sanctions Companies Enabling Shipment of Venezuelan Oil to Cuba (Apr. 5, 2019), *at* <https://www.state.gov/the-united-states-sanctions-companies-enabling-shipment- of-venezuelan-oil-to-cuba>.
[24] U.S. Dep't of State Press Release, The United States Takes Action To End Cuba's Malign Influence on Venezuela (Apr. 12, 2019), *at* <https://www.state.gov/the-united-states-takes-action-to-end-cubas-malign-influence-on-venezuela>; U.S. Dep't of State Press Release, The United States Sanctions the Central Bank of Venezuela (Apr. 17, 2019), *at* <https://www.state.gov/the-united-states-sanctions-the-central-bank-of-venezuela>.
[25] Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 601, 608 (2019).
[26] Preliminary findings of the visit to the Bolivarian Republic of Venezuela by the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights (Feb. 21, 2021), *at* <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26747&LangID=E>.
[27] Id.

to food is difficult as the prices are too high when compared to household income,"[28] amidst accusations that "a vast corruption network … has enabled [the] Maduro … regime to significantly profit from food imports and distribution in Venezuela."[29]

There is no doubt that the aim of the Trump administration was—to adopt Sir Anthony Eden's metaphor for Colonel Nasser's capacity to impose an oil blockade against Great Britain during the 1955–56 Suez Crisis—to put a thumb on Venezuela's windpipe.[30] This policy has no doubt had a devastating impact. The question for present purposes is whether it is in violation of international law and, more specifically, whether it constitutes crimes against humanity.

Although the United States has not set out the legal basis for the sanctions under international law, they appear to have been adopted, in part, in response to human rights abuses. It is not clear however, whether they constitute countermeasures, retorsions, or some other category. For its part, Venezuela's Referral II alleges that the US sanctions are, *first*, a breach of general international law and, *second*, amount to crimes against humanity under Article 7 of the ICC Statute. If the first assertion is one that is sometimes heard in international law,[31] the second is entirely novel and has far-reaching implications for the rights and obligations of States, including in respect of peremptory norms.[32]

The present article considers whether Venezuela's legal arguments in Referral II are consistent with general international law and the ICC Statute. It is not intended to be a general exposition on international law and economic sanctions; furthermore, it does not address in detail Venezuela's factual assertions in respect of the United States' sanctions. Instead, it focuses on the specific question of whether and in what circumstances sanctions

[28] WFP Venezuela Food Security Assessment, p. 3 (February 23, 2020), *at* <https://reliefweb.int/sites/reliefweb.int/files/resources/Main%20Findings%20WFP%20Food%20Security%20Assessment%20in%20Venezuela_January%202020-2.pdf>.
[29] US Treasury Disrupts Corruption Network Stealing From Venezuela's Food Distribution Program, (July 25, 2019), *at* <https://home.treasury.gov/news/press-releases/sm741>.
[30] *See* SIR ANTHONY EDEN, FULL CIRCLE: THE MEMOIRS OF SIR ANTHONY EDEN 426 (1960); ALEX VON TUNZELMAN, BLOOD AND SAND: SUEZ, HUNGARY, AND THE CRISIS THAT SHOOK THE WORLD 19 (2016).
[31] *See*, *e.g.*, the argument by Nicaragua in Military and Paramilitary Activities in and against Nicaragua (Nicar. v U.S.), Merits, 1986 ICJ REP. 14.
[32] Referral II is currently at the Preliminary Examination stage, which is "a process of examining the information available in order to reach a fully informed determination on whether there is a reasonable basis to proceed with an investigation pursuant to the criteria established by the Rome Statute." In particular, under Article 53(1)(a) of the ICC Statute, the Prosecutor must consider whether: "The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed".

violate international law, and what implications this has on whether such measures qualify as crimes against humanity. Following the present introduction, Section II considers "Sanctions Under International Law," focusing on Venezuela's arguments that, as a matter of general international law, it is unlawful to impose "unilateral coercive measures." Section III considers Venezuela's contentions that imposition of sanctions, in the circumstances described above, amount to the commission of crimes against humanity.[33] This analysis is followed by brief conclusions, in Section IV, on the implications of the application of established doctrines of international law to such novel circumstances.

II. SANCTIONS IN INTERNATIONAL LAW

Section 4 of Referral II is entitled "Illegality of Unilateral Coercive Measures."[34] It sets forth Venezuela's position on the lawfulness of "unilateral coercive measures"—commonly referred to as "sanctions" in international law—as a predicate to its contentions regarding crimes against humanity. The present Section analyzes the most relevant authorities relied upon by Venezuela in support of its contentions and considers whether its claims are consistent with international law. Referral II makes a number of creative arguments relating to sanctions and crimes against humanity that are as yet untried. As set out below, its extensive reliance on sources that are at best "soft law,"[35] or simply devoid of any authority, does not withstand scrutiny in light of well-established doctrines of international law.

UN Friendly Relations Declaration of 1970

Venezuela maintains that the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States*, adopted by the UN General Assembly on October 24, 1970 ("Friendly Relations Declaration")[36] lays down a prohibition of unilateral economic sanctions.[37] The Declaration, which was famously adopted by consensus, sets out

[33] Referral II, *supra* note 14, paras. 40–52 and 70–115 respectively.
[34] Referral II, *supra* note 14, at 19–24.
[35] See Alan Boyle, *Some Reflections on the Relationship of Treaties and Soft Law* 48 INT. & COMP. L. Q. 901 (1999).
[36] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA Res 2625 (XXV), UNGAOR, 25th Sess., Supp. No. 18, UN Doc A/RES/2625(XXV) (1970) 121 ("Friendly Relations Declaration").
[37] Referral II, *supra* note 14, para. 40.

seven "basic principles of international law" that are considered to be authoritative interpretations of the UN Charter[38] and a codification of customary international law.[39]

As Referral II recognizes, the issue is addressed in the ninth preambular paragraph of the Declaration, which recalls:

> "the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State."[40]

The reason this appears only in the Preamble—and not among the "basic principles of international law"—is that there was no agreement between States on the question of economic coercion.[41] The Preamble sets out "views which did not find the necessary consensus to be included in the main text" and even its relevance for the interpretation of the principles has been regarded as "doubtful."[42] In any event, the preambular paragraph does no more than "acknowledge the existence of a duty not to use economic coercion for the purpose of destroying or dismembering a State,"[43] rather than setting out a duty of wider application.

Although Referral II does not mention it, the Declaration provides in its Third Principle that: "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 and to secure from it advantages of any kind." Brownlie observed of this provision that it "is by no means easy to apply."[44] In any event, the crux of the matter is the term "coerce," on which a great deal turns.

As to the exact relationship between intervention and coercion, the editors of *Oppenheim* observed that, "to constitute intervention the interference must be forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter

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[38] Friendly Relations Declaration, *supra* note 36.
[39] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 ICJ REP. 403, 437 (July 22, 2010); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 ICJ REP. 14, 101–103; Guinea-Bissau v. Senegal, 83 ILR 1, 74 (Barberis, Bedjaoui, Gros, 1989).
[40] Friendly Relations Declaration, *supra* note 36, Preamble, para. 9.
[41] Helen Keller, *Friendly Relations Declaration (1970)*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para. 8 (Rüdiger Wolfrum ed., online ed. 2009), *at* http://www.mpepil.com and Robert Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AJIL 713, 717 (1971).
[42] Keller, *supra* note 41, para 8; *also* Rosenstock, *supra* note 41, at 717.
[43] Ian Brownlie, *Legal Status of Natural Resources in International Law (Some Aspects)*, 162 RECUEIL DES COURS 307 (1995).
[44] *Id.* 306.

in question. Interference pure and simple is not intervention."[45] Measures such as suspending exports or a boycott of products will—although they are intended to persuade the target State to pursue, or cease, a particular course of conduct—be pressure that "falls short of being dictatorial and does not amount to intervention."[46] It is true, as Cleveland has observed, that customary international law has traditionally "allowed States to use economic coercion for a wide range of purposes."[47] "Nothing in customary international law," she correctly concludes, as a general proposition, "appears to bar the use of economic coercion."[48]

As mentioned above, the stated objectives of the sanctions against Venezuela include counteracting what the United States considered to be human rights abuses, including arbitrary or unlawful arrest.[49] The proposition that there is nothing in customary international law that bars economic coercion applies *a fortiori* to matters which are not considered to be solely within the State's domestic jurisdiction ("*domaine réservé*"). In order to be inconsistent with the principle of non-intervention, conduct must not only be coercive, but also concern "matters in which each State is permitted, by the principle of State sovereignty, to decide freely".[50] Arbitrary arrest and otherwise inhuman and degrading treatment are examples of matters that fall outside the State's *domaine réservé* .[51] The principle of State sovereignty does not (any more) let States decide freely on matters relating to fundamental human rights.

Beyond the principle of non-intervention, however, general international law contains few, if any, obligations in this regard. Unless a State has bound itself through particular treaty commitments or other specific legal obligations to continue trade relations with another State, it is free to impose a trade embargo. As Lowe and Tzanakopoulos have put it, "in the absence

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[45] SIR ROBERT JENNINGS & SIR ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW VOL I 432 (9th ed., 1992); *see also* Lady Fox, *The State*, *in* SATOW'S DIPLOMATIC PRACTICE 51, 65 (Sir Ivor Roberts ed, 7th ed., 2017).
[46] Jennings & Watts, *supra* note 45, at 434.
[47] Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L 1, 53 (2001).
[48] *Id. See also* Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AJIL 1, 39–42 (1989); Gerhard Hafner, *Bemerkungen zur Funktion und Bestimmung der Betroffenheit im Völkerrecht anhand des Binnenstaates*, 31 GERMAN Y.B. INT'L L. 187, 226 (1988).
[49] Michael Crowley & Anatoly Kurmanaev, *Trump Imposes New Sanctions on Venezuela*, NEW YORK TIMES, Aug. 6, 2019, at A6.
[50] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 ICJ REP. 14, 108 (para. 205).
[51] Ahmadou Sadio Diallo (Guinea v. DRC), 2010 ICJ REP. 639, 671 (para. 87) ("the prohibition of inhuman and degrading treatment is among the rules of general international law which are binding on States in all circumstances, even apart from any treaty commitments"); United States Diplomatic and Consular Staff in Tehran (US v. Iran), ICJ REP. 3, 42 (para. 91) ("[w]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the … fundamental principles enunciated in the Universal Declaration of Human Rights").

of specific legal obligations to engage in trade with another State, a general trade embargo may be a lawful measure"; the act would be "unfriendly but lawful."[52] Thus, in *Nicaragua*, the International Court of Justice ("ICJ") found that although they were not inconsistent with the principle of non-intervention, some of "the acts of economic pressure" at issue in the case were in breach of the object and purpose of the treaty of friendship and commerce between Nicaragua and the United States:

> "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; but where there exists such a commitment, of the kind implied in a treaty of friendship and commerce, such an abrupt act of termination of commercial intercourse as the general trade embargo of 1 May 1985 will normally constitute a violation of the obligation not to defeat the object and purpose of the treaty."[53]

On the other hand, other leading commentators have espoused a broader view. Mani has observed that the definition of "intervention" set out above is a strict one, implying that it is too strict.[54] Tladi has similarly observed that the threshold of intervention has been met when a State compels another "to change its policy or cause of action, not through influence or persuasion but through threats or imposition of negative consequences."[55] White has argued that States have no unilateral form of autonomous sanctioning power: only collective sanctions can be lawful in international law.[56] These views coincide with those put forward by a number of States, both in the context of UN resolutions and State practice, which is addressed below.

The principle of non-intervention

Venezuela's Referral II does not address the rights and obligations of States under general international law, including, in particular, the principle of non-intervention, which is especially relevant to coercive measures among States. It is evident that, in principle, every

[52] Vaughan Lowe & Antonios Tzanakopoulos, *Economic Warfare*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para. 37 (Rüdiger Wolfrum ed., online ed. 2013), *at* <http://www.mpepil.com>.
[53] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 ICJ REP. 14, 138 (para. 276).
[54] Venkateswara Subramanian Mani, *Humanitarian Intervention Today*, 313 RECUEIL DES COURS 207 (2005).
[55] Dire Tladi, *The Duty Not to Intervene in Matters within Domestic Jurisdiction*, *in* THE UN FRIENDLY RELATIONS DECLARATION AT 50: AN ASSESSMENT OF THE FUNDAMENTAL PRINCIPLES OF INTERNATIONAL LAW 87, 92 (Jorge E. Viñuales ed, 2020).
[56] Nigel D. White, *Autonomous and Collective Sanctions in the International Legal Order*, 27 Italian Y.B. Int'l L. 3, 24 (2017).

State can freely decide the manner in which it enters into economic relations with others.[57] In that regard, as Waldock pointed out, "the operation of political and economic pressures is part of the normal working of the relations between States".[58] As mentioned above, the ICJ considered in the *Nicaragua* case whether the United States was "responsible for an 'indirect' form of intervention in its internal affairs inasmuch as it has taken, to Nicaragua's disadvantage, certain action of an economic nature".[59] This involved the termination of economic aid; a 90 per cent reduction in the sugar quota for United States imports from Nicaragua; and a trade embargo.[60] The US sanctions policy against Nicaragua has rightly been described as "a total trade embargo".[61] Nicaragua argued that the measures constituted "a systematic violation of the principle of non-intervention".[62] The ICJ concluded, however, that, even in these extreme circumstances, it was "unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention".[63]

As leading commentators have pointed out, the unilateral measures imposed by the United States that were "at issue in *Nicaragua* and found not to breach the principle of non-intervention are the most common, and potentially most severe, economic actions that can be employed against a state".[64]

Vienna Declaration of 1993

Venezuela relies on paragraph 31 of the 1993 *Vienna Declaration and Programme of Action*[65] ("Vienna Declaration"), which called:

> "upon States to refrain from any unilateral measure not in accordance with international law and the Charter of the United Nations that creates obstacles to trade relations among States and impedes the full realization of the human rights set forth in the Universal Declaration of Human Rights and international human

[57] Thouvenin, *supra* note 77 at 171.
[58] "Second report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur" in *Yearbook of the International Law Commission 1963*, vol. 2, ILC, 15th Sess., Agenda Item No. 1, UN Doc. A/CN.4/SER.A/1963/ADD.1 at 52, para 6 (1963).
[59] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 ICJ REP. 14, 125–126 (para. 244).
[60] *Id.* at 126 (para. 244).
[61] Maziar Jamnejad & Michael Wood, *The Principle of Non-intervention* 22 LEIDEN J. INT'L L. 345, 370 (2009).
[62] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 ICJ REP. 14, 126 (para. 244).
[63] *Id.* at 126 (para. 245).
[64] Jamnejad & Wood, *supra* note 61.
[65] Referral II, *supra* note 14, para. 40.

> rights instruments, in particular the rights of everyone to a standard of living adequate for their health and well-being, including food and medical care, housing and the necessary social services."[66]

Notwithstanding that such declarations are not binding,[67] the Vienna Declaration merely confirms that "unilateral measures" should be consistent with international law. It does not state that economic sanctions as such are unlawful. In fact, in 1993, the same year as the Declaration's adoption, a Note prepared by UN Secretary-General Boutros Boutros-Ghali entitled *Economic Measures as means of Political and Economic Coercion against Developing Countries*, concluded based on a study of State practice that:

> "[t]here is no clear consensus in international law as to when coercive economic measures are improper, despite relevant treaties, declarations and resolutions adopted in international organizations which try to develop norms limiting the use of such measures."[68]

Other non-binding instruments

Not relied on by Venezuela, but more to the point than the Vienna Declaration, are a number of more recent declarations and statements on the question of unilateral sanctions. In a Joint Declaration on the promotion of international law, the People's Republic of China and the Russian Federation expressed the view that the "imposition of unilateral coercive measures not based on international law" was an example of the imposition by some States of their will on other States,[69] that could potentially "defeat the objects and purposes of measures imposed by the Security Council, and undermine their integrity and effectiveness".[70] The element "not based on international law" is no doubt key to understanding the Sino-Russian position. The same wording was used in a statement, from April 2014, by China, Russia, and India, referring to "[g]ood faith implementation of principles of sovereign equality of States, non-intervention in the internal affairs of States and cooperation excludes imposition of unilateral

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[66] *Vienna Declaration and Programme of Action*, GA Res 48/121, UNGAOR, 48th Sess., Supp. No. 49 UN Doc. A/CONF.157/23, para. 31 (1993).
[67] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ REP. 226, 254–255 (July 8, 1996).
[68] Boutros Boutros-Ghali, *Economic measures as means of political and economic coercion against developing countries*, Note, UNGAOR, 48th Sess., Agenda Item 91(a), UN Doc. A/48/535, para 2 (1993).
[69] Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, signed in Beijing on June 25, 2016, para. 6, *at* <https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2331698>.
[70] *Id*.

coercive measures not based on international law."[71] Despite their significance, it would be difficult to maintain that such statements, along with resolutions of the General Assembly to the same effect,[72] have crystallized a new rule of customary international law. As one commentator puts it, it might "be questioned whether State practice comports with the high-minded statements of the General Assembly": an obvious example is the embargo of Organization of Arab Petroleum Exporting Countries in 1973–74 against Canada, Japan, the Netherlands, the United Kingdom, and the United States for their support of Israel in the Six Days War.[73] Similarly, China's State practice seems not to comport with the words of the Joint Sino-Russian Declaration, as China has begun to impose unilateral sanctions of exactly the kind denigrated in the Joint Declaration.[74] It is generally accepted, no doubt correctly, that a rule of customary international law against economic sanctions does not exist.[75]

Whether sanctions may be imposed only by a competent international organ

Venezuela goes on to assert that for sanctions to be lawful they must be imposed by a competent international organ, such as the UN Security Council.[76] This is wrong. International law recognizes the right of States to adopt unilateral measures against other States,[77] whether acting alone or with others, in respect of either unlawful, or merely unfriendly conduct, in order to induce the other State to change its conduct.[78] To deny this is to misunderstand the nature of international law, which in spite of the multilateralization of recent decades, remains essentially "a network of bilateral relations."[79]

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[71] Joint Communiqué of the 14th Meeting of the Foreign Ministers of the Russian Federation, the Republic of India and the People's Republic of China, para. 6, April, 19, 2016, *at* <https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t1356652.shtml>.
[72] *See*, *e.g.*, "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States", GA Res. 2131 (XX) (Dec. 21, 1965); "Charter on the Economic Rights and Duties of States", GA Res. 3281 (XXIX) (Dec. 12, 1974); and "Economic Measures as a Means of Political and Economic Coercion against Developing Countries", GA Res. 46/210 (Dec. 20, 1991) and subsequent annual reiterations.
[73] Matthew Happold, *Introduction*, *in* ECONOMIC SANCTIONS AND INTERNATIONAL LAW 1, 6 (Paul Eden & Matthew Happold ed, 2016).
[74] Patrick Wintour, *China Imposes Sanctions on UK MPs, Lawyers and Academic in Xinjiang Row*, THE GUARDIAN, March 26, 2021.
[75] Rebecca Barber, An Exploration of the General Assembly's Troubled Relationship with Unilateral Sanctions, 1, 35–36 INT'L & COMP. L. QUARTERLY (forthcoming).
[76] Referral II, *supra* note 14, para 41.
[77] Among numerous other authorities: Jean Combacau, *Sanctions*, *in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 337, 338 (Rudolf Bernhardt ed., 1986); JEAN SALMON, DICTIONNAIRE DE DROIT INTERNATIONAL PUBLIC 1017 (2001); Thouvenin, *supra* note 12; Tzanakopoulos, *supra* note 12.
[78] Salmon, *supra* note 77.
[79] James Crawford, *Chance, Order, Change: The Course of International Law*, 365 RECUEIL DES COURS 66 (2013).

As Higgins explains, "[s]anctions are not an invention of the UN system; on the contrary, they have a long pedigree in the history of inter-state relations."[80] Such measures come in the shape of countermeasures and retorsions. As the UN International Law Commission ("ILC") has observed, a State may take countermeasures against another State "which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations"[81] though subject to certain limits such as the protection of fundamental human rights.[82] Countermeasures are, as the ICJ has observed, "among the circumstances capable of precluding the wrongfulness of an otherwise unlawful act in international law and are sometimes invoked as defences."[83] They "may have a coercive character"[84] and, though they would otherwise be unlawful, their wrongfulness is precluded because their function or objective is to induce the wrongdoing State to comply with its obligations.[85] Retorsion, by contrast, describes lawful measures that one State may take against another simply in response to an unfriendly act.[86] As the ILC has stated, "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."[87]

It is thus incorrect to assert that only international organs may impose economic sanctions.[88] There is, in fact, extensive State practice supporting the unilateral right to impose economic sanctions. An example may be found in the 1993 Resolution of the European Parliament in relation to the Arab sanctions of Israel, which emphasized that under international law "every sovereign state is at liberty to take measures restricting trade in order to protect its national security interests."[89] Another example is the imposition of unilateral economic sanctions by

[80] Higgins and others, *supra* note 10, at 981. As regards terminology, however, Francophone international lawyers have traditionally tended to reserve the term "sanctions" for Security Council- or General Assembly-mandated action (but without questioning the general legality of, *e.g.*, economic boycotts, suspension of arms shipments, and asset freezes), *see* CHARLES ROUSSEAU, LE DROIT DES CONFLITS ARMÉS 597–598 (1983).
[81] "Draft articles on responsibility of States for internationally wrongful acts" in *Yearbook of the International Law Commission 2001*, vol. 2, part 2, UNILCOR, 53rd Sess., UN Doc. A/CN.4/SER.A/2001/Add.1 (part 2) 129 (2001) .
[82] *Id.* at 131.
[83] Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar), Judgment of July 14, 2020, available at <https://www.icj-cij.org/en/case/173/judgments>, para. 49.
[84] ILC Draft articles on responsibility of States, *supra* note 68 at 70.
[85] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 572 (9th ed., 2019).
[86] JEAN COMBACAU & SERGE SUR, DROIT INTERNATIONAL PUBLIC 252–254 (13th ed., 2019).
[87] ILC Draft articles on responsibility of States, *supra* note 87, at 128.
[88] James Crawford, *The Relationship between Sanctions and Countermeasures*, *in* UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 57, 57 (Vera Gowland-Debbas ed., 2001).
[89] Resolution on the Arab economic boycott of Israel, *supra* note 3, at 48.

the Nordic countries against South Africa for its policy of *apartheid*.[90] Similarly, the United States imposed unilateral sanctions against Iran in 1980 in connection with the hostage-taking of its diplomatic staff in Tehran,[91] and against India and Pakistan for conducting nuclear weapons tests in 1998.[92] Another example is the imposition of economic sanctions against Argentina by several States, including Australia, Canada, and New Zealand, following Argentina's military action in the Malvinas/Falklands Islands in 1982.[93] Yet another example is the United Kingdom's unilateral sanctions regime relating to Burma (Myanmar), in force from December 31, 2020.[94] None of these sanctions, imposed unilaterally by States, has been held to be inconsistent with international law.

Human rights obligations under the UN Charter

Venezuela also invokes human rights principles,[95] which raises the question of the extent to which the UN Charter and UN human rights conventions impose obligations in respect of unilateral economic sanctions. Article 1(3) of the UN Charter provides that among the purposes of the United Nations is: "To achieve international cooperation 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".[96] While it is an important statement of purpose,[97] this provision does not actually set out the content of human rights obligations in any detail and, in any event, does not prohibit economic sanctions as such.

Venezuela further invokes Articles 55 and 56 of the UN Charter, which provide:

> *Article 55*
> "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination, the United Nations shall promote: … (c) universal respect for, and observance of, human

[90] *See* e.g. Jarna Petman, *Resort to Economic Sanctions by Not Directly Affected States*, *in* Picchio Forlati & Sicilianos, *supra* note 11, at 370–71.
[91] *See e.g.* Guillaume, *supra* note 5, at 197–218; Rousseau, *supra* note 80, at 597.
[92] See e.g. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law* 93 AJIL 470, 498–99 (1999).
[93] *See*, *e.g.*, Guillaume, *supra* note 5, at 9–43.
[94] *See* <https://www.gov.uk/government/collections/uk-sanctions-on-burma>.
[95] Referral II, *supra* note 14, paras 47–52.
[96] *Charter of the United Nations*, June 26, 1945, 1 UNTS 16, art. 1(3) (entered into force October 24, 1945).
[97] *See* Rüdiger Wolfrum, *Purposes and Principles, Article 1*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY VOL. 1 (Bruno Simma and others eds, 3rd edn., 2012) 108 at 108, regards the provision as "more appropriate for political objectives rather than for legally binding obligations."

> rights and fundamental freedoms for all without distinctions as to race, sex, language, or religion."[98]
>
> *Article 56*
> "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."[99]

Exactly what obligations are imposed by Articles 55–56 is a matter of contention.[100] Member States are arguably under "at least a moral—and, however imperfect, a legal—duty to use their best efforts, either by agreement or, whenever possible, by enlightened action of their own judicial and other authorities, to act in support of a crucial purpose of the Charter".[101] In that sense, it may even be said that these provisions "legally obligate" Member States "to respect and protect human rights",[102] and that they impose "the legal obligation on member States singly or jointly to stand up for respecting human rights".[103] But, crucially, "human rights still have to be filled with substance either by means of conventions or customary international law".[104] In other words, the manner in which States comply with Articles 55–56 is through compliance with conventions and rules of customary international law to which they have consented to be bound. These human rights obligations are considered below.

The UN Human Rights Covenants

The International Covenant on Civil and Political Rights ("ICCPR")[105] and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR")[106] both provide, in common Article 1(2), that: "In no case may a people be deprived of its own means of subsistence."[107] This obligation relates to the right of a people exercising self-determination freely to dispose of their natural wealth and resources.[108] Thus, "measures taken in the framework of inter-

[98] UN Charter, *supra* note 96, art. 55.
[99] *Id*. art. 56.
[100] Higgins and others, *supra* note 10, at 815.
[101] Jennings & Watts, *supra* note 45, at 988–989.
[102] Rüdiger Wolfrum & Eibe H Riedel, *International Economic and Social Co-operation, Article 55(c)*, *in* Bruno Simma and others, *supra* note 97 at 1570.
[103] *Id.* at 1573.
[104] *Id*.
[105] *International Covenant on Civil and Political Rights*, December 16, 1966, 999 UNTS 171 (entered into force March 23, 1976).
[106] *International Covenant on Economic, Social, and Cultural Rights*, December 16, 1966, 993 UNTS 3 (entered into force January 3, 1976).
[107] ICCPR, *supra* note 105, art. 1(2); ICESCR, *supra* note 106, art. 1(2).
[108] *Id*.

State relations should not be such as to threaten starvation of the people of a State."[109] To the extent that economic sanctions breach that rule—and have the effect of threatening the starvation of a whole people—they are illegal under international law. In the description of one prominent author, "measures that tend to asphyxiate a country" are illegal.[110] In principle, this can be the case only in extreme circumstances, and, as regards the UN Human Rights Conventions, where a State exercises control over the territory of another State, as further explained below.

ICCPR

For States Parties to the ICCPR, there are certain other specific obligations that may be potentially relevant to economic sanctions. Where, for example, such measures cause hunger and malnutrition which causes loss of life, it might be argued that the right to life under Article 6(1) of the Covenant is implicated. The Human Rights Committee has stated that: "The duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity." It noted that "[t]hese general conditions may include …widespread hunger and malnutrition …"[111] However, the question is whether and under which circumstances a State's obligations under the ICCPR are extra-territorial, such that it owes them to persons who are in the territory of another State. According to Article 2(1) of ICCPR, "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant".[112]

The ICJ has interpreted the term "within its territory and subject to its jurisdiction" under Article 2(1) to mean "'covering both individuals present within a State's territory and those outside that territory but subject to that State's jurisdiction".[113] In this context, the UN Human Rights Committee has clarified that where a State party exercises jurisdiction over an individual, it may be responsible for extra-territorial violations only "if it is a link in the

[109] James Crawford, *Third Report on State Responsibility*, UNILCOR, 52nd Sess., Agenda Item 3, UN Doc. A/CN.4/507, at 20, para 39 (2000). *See* also Eritrea v Ethiopia, Ethiopia's Damages Claims, 140 ILR 376 at 396–97, paras 19, 21 (van Houtte, Aldrich, Crook, Paul, Reed, 2009).
[110] Philippe Cahier, *Changement et continuité du droit international*, 195 RECUEIL DES COURS 9, 41 (1985).
[111] UNCCPR, General Comment No. 36: Article 6: right to life, CCPR/C/GC/36, 3 Sept., 2019, para 26.
[112] ICCPR, *supra* note 105, art. 2(1) (emphasis added).
[113] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ REP. 136, 178–179 (Jul. 9, 2004).

causal chain that would make possible violations in another jurisdiction" such that "the risk of an extra-territorial violation must be a necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time".[114] Determining the extent of extra-territorial obligations "is a matter of determining which rights are applicable vis-à-vis the relevant state in the light of the nature and extent of the external exercise of that state's public power."[115]

It would be difficult to conclude that the imposition of economic sanctions as such constitutes extra-territorial exercise of jurisdiction. Whether and when a person that is outside a State's territory is to be regarded as within the jurisdiction of the State is a vexed question on which differing views have been expressed by different human rights bodies and tribunals. It is, however, generally accepted that jurisdiction for these purposes simply means that the state exercises authority and control over the person, and for that reason owes them human rights obligations. Thus, in addition to the "spatial model" where a person falls within the jurisdiction of a State because they are in territory that is under the control of that State, jurisdiction can also be "personal" where an individual is "within the power or effective control of that State Party, even if not situated within the territory of the State Party."[116] All human rights bodies have accepted some form of the personal model of jurisdiction.[117] What has remained unclear is precisely what form of authority, power or control would bring a person within the jurisdiction of the State. In its General Comment 36, the Human Rights Committee adopted the view that a State Party to the ICCPR has the obligation to respect and ensure the right to life to "all persons who are within its territory *and* all persons subject to its jurisdiction, that is, all persons over *whose enjoyment of the right to life* it exercises power or effective control."[118] This is as far as any human rights body has been prepared to go. When this view is combined with the position that the right to life includes an obligation to protect from starvation one might begin to construct an argument that the imposition of sanctions could amount to a breach of the right to life under the ICCPR. The Human Rights Committee, however, was careful to stipulate that a person is only within the jurisdiction of a

[114] Munaf v. Romania, UNHRCOR, 96th Sess., Comm. No. 1539/2006, UN Doc. CCPR/C/96/D/1539/2006 at para. 14.2.
[115] CAMPBELL MCLACHLAN, FOREIGN RELATIONS LAW 310 (2014).
[116] General Comment 31, at para. 10.
[117] Even the European Court of Human Rights, which has adopted the most restrictive view of "jurisdiction" of any of the international and regional human rights tribunals, accepts some form of the personal model of jurisdiction: *Ukraine v Russia (re Crimea)*, Nos 20958/14 and 38334/18, December 16, 2020, para 303.
[118] General Comment 36, at para. 63 (emphasis added).

State as a result of control where the enjoyment of rights are affected by the States' "activities in a direct and reasonably foreseeable manner."[119] While it may be argued on this basis that imposing sanctions on another State might lead to economic problems which might lead to worsened circumstances which might in turn, in extreme circumstances, lead to starvation, it will be necessary to establish that this was a direct and foreseeable consequence of such measures.

ICESCR

The provisions of the ICESCR are more directly relevant to economic sanctions and frequently invoked by Venezuela in Referral II. Article 2(1) obliges States Parties "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".[120] This obligation of conduct is "programmatic and promotional,"[121] and requires good faith efforts to realize progressively the relevant rights, rather than achieving a particular result. The ICJ has clarified that ICESCR guarantees rights that are "essentially territorial", though "it is not be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction".[122] The obligation to achieve, particularly by legislative measures, the full realization of the rights under the ICESCR is by its nature territorial in scope.[123] In this regard, the leading commentary on ICESCR clarifies that:

> "While the subject of the potential for arguing that the ICESCR generally, and Article 11 specifically, impose upon states extra-territorial responsibilities has gathered pace in recent years, the fact remains that in terms of legal obligation the Covenant, the Committee [on Economic Social and Cultural Rights] and the relevant [UN] Special Rapporteurs talk mainly in hope rather than expectation."[124]

[119] *Id.* at para. 63 and *also* para 22.
[120] ICESCR, *supra* note 106, at art. 2(1).
[121] Crawford, *Brownlie's Principles*, *supra* note 85, at 614.
[122] *The Wall*, *supra* note 113, at para 112.
[123] This is explicable against the background of "the programmatic requirements for the fulfilment of this category of rights": *The Wall*, *supra* note 113, at 213 (Higgins, J., sep. op.).
[124] BEN SAUL, DAVID KINLEY & JACQUELINE MOWBRAY, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES AND MATERIALS 967 (2014).

This is consistent with the ICESCR Committee's observation that compliance with such obligations:

> "does not in any way call into question the necessity for the imposition of sanctions in appropriate cases in accordance with Chapter VII of the Charter of the United Nations or other applicable international law."[125]

It notes however, though without specifying specific obligations, that the right of States to adopt such measures are not unlimited:

> "the inhabitants of a given country do not forfeit their basic economic, social and cultural rights by virtue of any determination that their leaders have violated norms relating to international peace and security. The aim is not to give support or encouragement to such leaders, nor is it to undermine the legitimate interests of the international community in enforcing respect for the provisions of the Charter of the United Nations and the general principles of international law. Rather, it is to insist that lawlessness of one kind should not be met by lawlessness of another kind which pays no heed to the fundamental rights that underlie and give legitimacy to any such collective action."[126]

Venezuela refers[127] to a UN study by Marc Boussuyt,[128] which recommends in general terms that unilateral sanctions should "meet all the requirements for such sanctions inherent in the [UN] Charter, including conformity with the principles of justice and international law".[129] In this regard, the leading ICESCR commentary observes that:

> "[e]ven economic sanctions are generally not treated as prohibited interventions under international law, despite attempts by developing states to change the law in that direction. … While various UN resolutions have attempted to prohibit economic coercion by unilateral sanctions, with many developing states supporting such efforts, there is strong opposition from certain developed countries which utilize such sanctions and thus insufficient consensus on a prohibition."[130]

Others similarly observe in respect of the ICESCR that:

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[125] UNCESCR, General Comment No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights, UNESCOR, 17th Sess, UN Doc E/C.12/1997/8, at para. 1 (1997).
[126] *Id.* at para 16.
[127] Referral II, *supra* note 14, paras. 49–51.
[128] Marc Bossuyt, *The adverse consequences of economic sanctions on the enjoyment of human rights*, UNESCOR, 52nd Sess, Agenda Item No 12, UN Doc E/CN.4/Sub.2/2000/33 (2000).
[129] *Id.* at para 40.
[130] Saul, Kinley & Mowbray, *supra* note 242, at 106–107.

> "[t]he standard limiting embargoes or boycotts that harm the economic interests of the citizens of the target state is very permissive, because the background doctrine of national independence supports the freedom not to trade".[131]

It is thus very difficult to conclude as a general principle that sanctions would necessarily violate obligations under the ICESCR. Customary international law does not bar the use of economic coercion.[132] In the absence of specific legal obligations to engage in trade with another State, an embargo will in principle be a lawful measure.[133] Where general international law does impose a limit is in the extreme circumstance where unilateral sanctions rise to the level of depriving a people of its own means of subsistence or threatens the starvation of the people of a State.[134] There is in general international law a "duty not to use economic coercion for the purpose of destroying or dismembering a State."[135] This would seem to be some way removed from the US sanctions against Venezuela, whether their ostensible objective is merely to confront human rights violations or to achieve "regime change". In any event, aside from this specific factual context, what matters for present purposes is that conduct that is permissible under general or particular international law cannot qualify as crimes against humanity, as discussed in the following Section.

III. SANCTIONS AND CRIMES AGAINST HUMANITY

Section 6 of Referral II is entitled "Crimes Against Humanity."[136] It asserts that the economic sanctions imposed on Venezuela qualify as crimes against humanity under Article 7 of the ICC Statute. The present Section considers Venezuela's arguments and whether they are consistent with international criminal law.

Acts that are lawful under general international law cannot at the same time be crimes for which individuals, and particularly State officials, can be held responsible under international

[131] Mortimer NS Sellers, *Economic Sanctions against Human Rights Violations*, *in* Picchio Forlati & Sicilianos, *supra* note 12, at 485.
[132] Cleveland, *supra* note 47, at 53.
[133] Lowe & Tzanakopoulos, *supra* note 52, para. 37.
[134] ICCPR, *supra* note 105, art. 1(2); ICESCR, *supra* note 106, art. 1(2); James Crawford, *Third Report on State Responsibility*, UNILCOR, 52nd Sess., Agenda Item 3, UN Doc. A/CN.4/507, at 20, para. 39 (2000).
[135] Brownlie, *supra* note 43, at 307.
[136] Referral II, *supra* note 14, paras. 31–51.

criminal law. For instance, the International Criminal Tribunal for the former Yugoslavia ("ICTY") has endorsed the view that:[137]

> "[i]t is a well-established truism in international law that if a given conduct is permitted by general or particular international law, that permissibility deprives the conduct of its criminal character under international criminal law. But if a given conduct is prohibited by general or particular international law it does not mean that it is criminal *ipso jure*. The problem thus lies in distinguishing between prohibited conduct which falls within the legally defined criminal category and that which does not."[138]

Accordingly, to the extent that sanctions are permitted by general or particular international law, as discussed above, those same acts cannot amount to crimes against humanity. Furthermore, even if they are unlawful, that does not necessarily mean that they constitute an international crime.

It is important to note that, as recognized by the ILC Articles on Crimes Against Humanity, both States and individuals may be responsible for the commission of crimes against humanity.[139] Furthermore, the Preamble to the ILC Articles recalls "that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*)." It would seem illogical to assert that acts which are permissible in international law, or in respect of which the worst that could be said is that there is a debate as to their lawfulness, constitute a violation of a peremptory norm. For a rule of international law to be part of *jus cogens*, it must be "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."[140] Where an act is, by contrast, accepted as lawful by the international community, it cannot be said at the same time that the international community of States *as a whole* accepts a rule that such an act must not be performed *and also* that no derogation from such rule is permitted.

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[137] *Prosecutor v Zejnil Delalić et al (Čelebići Camp Case)*, IT-96-21-T, Judgement (16 November 1998) at para 406 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: *ICTY* <https://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf> (endorsing the statement of the Chair of the Drafting Committee of the Diplomatic Conference on the Establishment of an International Criminal Court).
[138] MAHMOUD CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 113 (1992); *see also* LENA GROVER, INTERPRETING CRIMES IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 161 (2014).
[139] Art. 3(1) ILC Articles on Crimes Against Humanity, UN Doc. A/74/10 (2019); *Yearbook of the International Law Commission*, 2019, vol. II, Part Two.
[140] Art. 53, Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331.

The principle that acts which are permitted under international law ought not to be regarded as crimes against humanity is reflected in the definition of a number of the specified acts which are prohibited as crimes against humanity. Where the particular type of act is by definition wrongful, for example, murder, extermination, enslavement, rape, the definition in the Rome Statute does not specifically refer to the fact that the act must not be unlawful under international law. This is understandable because such acts are *mala in se* (even if there can be questions as to whether a particular act falls within the definition of, say, murder). However, and by contrast, where the type of act is one which is not in itself wrongful, the Rome Statute (and customary international law) excludes from the definition of crimes against humanity those acts in that category which are lawful under international law. Thus, "deportation or forcible transfer of population" is a crime only where it is "without grounds permitted under international law"; "imprisonment or other severe deprivation of liberty" is only a crime only when committed "in violation of fundamental rules of international law"; and "persecution" occurs where there is "intentional and severe deprivation of fundamental rights contrary to international law."[141]

This inextricable relationship with general international law is a function of the prevailing view that "crimes against humanity as understood today are closely linked to the gradual expansion of international human rights law. In fact, the category of crimes against humanity has become the criminal law response to gross violations of human rights."[142] While this crime was included in the 1945 Charter of the International Military Tribunal ("IMT") at Nuremberg[143]—and thus pre-dates the post-World War II human rights conventions—it is widely accepted, both in the jurisprudence[144] and literature,[145] that the protected interests

[141] See Arts. 7(2)(d); 7(1)(e); 7(2)(g), Rome Statute. *See also Prosecutor v Milomir Stakić,* ICTY, March 22, 2006, IT-97-24-A, para 302, making a similar point that under customary international law the crime of deportation occurs only where the forcible transfers is carried out without grounds permitted by international law.

[142] Jonas Nilsson, *Crimes Against Humanity*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 284, 287 (Antonio Cassese ed., 2009). *See also* ANTONIO CASSESE AND OTHERS, CASSESE'S INTERNATIONAL CRIMINAL LAW 92 (3rd ed., 2013) ("Indeed, while ICL concerning war crimes largely derives from, or is closely linked with, IHL, ICL concerning crimes against humanity is to a great extent predicated upon international human rights law.").

[143] Art. 6(c), Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals o the European Axis, August 8, 1945, 82 UNTS 279, No. 251

[144] *See*, *e.g.*, *Prosecutor v Milomir Stakić,* ICTY, March 22, 2006, IT-97-24-A, para 277: "The protected interests underlying the prohibition against deportation include the right of the victim to stay in his or her home and community and the right not to be deprived of his or her property by being forcibly displaced to another location. The same protected interests underlie the criminalisation of acts of forcible transfer, an "other inhumane act" pursuant to Article 5(i) of the Statute."

[145] *See* de Guzman, *Crimes Against Humanity in* ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 121 (Schabas & Bernaz ed., 2011) ("Crimes against humanity … owe strong allegiance to international human

underlying the criminal law prohibitions are the human rights of the victims. Indeed, in its 1991 draft Code of Crimes Against the Peace and Security of Mankind, the ILC even considered renaming "crimes against humanity" as "Systematic or mass violations of human rights."[146] One of the leading commentaries on the Rome Statute observes that:

> "Crimes against humanity might usefully be viewed as an implementation of human rights norms within international criminal law. Just as human rights law addresses atrocities and other violations perpetrated by a State against its own population, crimes against humanity are focused on prosecuting the individuals who commit such violations."[147]

Thus, in principle, economic sanctions would constitute crimes against humanity under international criminal law only where the acts amount to widespread or systematic violations of fundamental human rights under general international law.

As Referral II notes, the UN Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea ("DPRK") found that "decisions and polices violating the right to food, which were applied for the purposes of sustaining the current political system, in full awareness that such decisions would exacerbate starvation and related deaths of much of the population" amount to crimes against humanity.[148] That finding was based on the fact that "relevant DPRK officials adopted a series of decisions and policies that violated international law and aggravated mass starvation."[149] It was noted in particular that there were deliberate "violations of the right to food and other human rights"[150] and that the DPRK violated its obligations under Article 11(2) ICESCR to ensure "the fundamental right of everyone to be free from hunger" within its jurisdiction.[151] This was obviously based on the fact that the violations took place on the territory of DPRK. It would be an entirely different thing to hold

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rights law."); WILLIAM SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE, 186 (2006) ("Crimes against humanity also have much in common with international human rights law, and the language of the relevant provisions reflects this.").

[146] *Yearbook of the International Law Commission,* 1991, UN Doc. A/CN.4/SER.A/1991/Add.l (Part 2), 103–104. The ILC's 1996 final Draft Code of Crimes returned to the standard terminology of "crimes against humanity".

[147] WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 147–148 (2nd ed., 2016).

[148] Referral II, *supra* note 14, para. 77 (citing Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, UNHRCOR, 25th Sess, Agenda Item No. 4, UN Doc. A/HRC/25/63 at para 78 (2014)).

[149] Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, UNHRCOR, 25th Sess, Agenda Item No 4, UN Doc. A/HRC/25/CRP.1 at para 1121 (2014).

[150] *Id.* para 1119.

[151] *Id.* paras 1122–1124.

that a State has violated its human rights obligations and imposed starvation by virtue of its economic policies towards another State, the territory of which it does not occupy or otherwise control. As set out above, a State's obligations to fulfil the right to food apply only within its territory, or otherwise, in cases where it exercises control over the territory of another State.[152]

Referral II also invokes the jurisprudence of the IMT at Nuremberg in respect of deliberate starvation during Germany's belligerent occupation of Poland. It maintains, in the context of a discussion of the "economic policies that result in shortages of food and medicine," that there is nothing in the definition of crimes against humanity "that excludes the possibility that the policies of one State constitute an attack on a civilian population other than its own even when it does not exercise control over the territory." This assertion, however, does not find support in international law, whether in general international law or in the provisions of the ICCPR or the ICESCR discussed above. Here, too, it may be recalled that, according to the ICJ, the ICESCR "guarantees rights which are essentially territorial," applicable "to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction." Where there is no legal obligation on States in respect of conduct relating to territories beyond their jurisdiction, it would be exceedingly difficult to conclude that the same conduct amounts to crimes against humanity.

The foregoing observations on why lawful sanctions cannot fall within the definition of crimes against humanity follows from the requirement in the *chapeau* of Article 7(1) of the Rome Statute that such acts must be part of "a widespread or systematic attack directed against any civilian population."[153] Article 7(2)(a) clarifies that this fundamental element of an "attack directed against any civilian population" "means a course of conduct involving the multiple commission of acts … [such as murder, extermination, enslavement, etc.] … pursuant to or in furtherance of a State or organizational policy to commit such attack."[154] International criminal tribunals, including the ICC, have held that for an attack to be directed against a civilian population, the civilian population must be the "primary object of the

[152] See *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, August 12, 1949, 75 UNTS 287 (entered into force October 21, 1950) art. 55 (which provides that: "To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.").
[153] ICC Statute, *supra* note 12, Art. 7(1).
[154] *Id.*, Art. 7(2)(a).

attack,"[155] rather than an incidental victim of the conduct in question. As the ILC has observed: "the term 'directed' places its emphasis on the intention of the attack rather than the physical result of the attack."[156]

Thus, for instance, even if sanctions could qualify as murder, "the killing of only a select group of civilians—a number of political opponents to the regime—could not be regarded, in principle, as a crime against humanity; in such a case, no 'population' can be said to have been attacked."[157] In particular, where sanctions are directed primarily at the State leadership, it would be difficult to qualify such measures as an attack directed *primarily* against a civilian population, even if there are (very serious) adverse physical results for the population as a result. In appropriate circumstances, however, sanctions directing an attack against a civilian population—including by means of deliberate starvation—in order to weaken or overthrow a government could qualify as crimes against humanity: this is connected *inter alia* to the principle of international law that "measures taken in the framework of inter-State relations should not be such as to threaten starvation of the people of a State."[158]

IV. CONCLUSIONS

Venezuela's Referral II raises questions with far-reaching implications on the scope of the rights and obligations of States. While the right to adopt sanctions is not unlimited, international law allows considerable freedom of action in respect of unilateral measures of this kind. Unilateral economic sanctions are not permitted by international law when they threaten starvation of the people of a State; but that will only be the case in extreme circumstances. As regards sanctions permitted by international law, which is the general position, there can be no basis for a conclusion that their imposition amounts to crimes

[155] The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (15 June 2009) at para 76 (International Criminal Court, Pre-Trial Chamber), online: *ICC* <https://www.icc-cpi.int/CourtRecords/CR2009_04528.PDF>.
[156] "Commentary to Article 2 of the draft articles on the prevention and punishment of crimes against humanity" in *Report of the International Law Commission*, UNILCOR, 71st Sess., Supp. No. 10, UN Doc. A/74/10 (2019) at 35 (para 18) (the report will appear in the forthcoming *Yearbook of the International Law Commission*, 2019, vol. 2, part 2).
[157] GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 165 (2005).
[158] James Crawford, *Third Report on State Responsibility*, UNILCOR, 52nd Sess., Agenda Item 3, UN Doc. A/CN.4/507 at 20 (para. 39) (2000).

against humanity under Article 7 of the ICC Statute. Furthermore, even if the sanctions are not permitted under international law, there must be proof that they constitute an attack directed primarily against a civilian population. Absent these crucial elements, there would be no basis to conclude that "a crime within the jurisdiction of the Court has been or is being committed" within the meaning of Article 53(1)(a) of the ICC Statute, and thus no basis for the Prosecutor to initiate an investigation.

The paradox is that while sanctions could—in extreme circumstances such as deliberate starvation—result in violations of fundamental human rights obligations and even amount to crimes against humanity, they are often invoked in order to pressure States to respect human rights, or otherwise to cause a State to refrain from conduct that is deemed to be a threat to peace and security. Even those most critical of unilateral sanctions would find it difficult to argue, for instance, that such measures against the *apartheid* regime in South Africa were not permissible under international law. Whether in particular circumstances those motivations are genuine or not, the controversy in connection with "unilateral coercive measures" is an opposition between competing appropriations of human rights and international criminal law—as forcefully demonstrated by the contrast and sequence between Referral I and II. Whatever criticism may be levelled against US policy, however, Venezuela's expansive arguments do not find support in international law. Attempts to weaponize accusations of crimes against humanity must be resisted by the ICC if it is to maintain its integrity as a judicial institution. This is so however much one might sympathize with the sentiment (with which the writers agree) that those who suffer most from sanctions tend to be "those whom we were supposed to be helping,"[159] in the present situation, long-suffering, ordinary Venezuelans.

[159] W. Michael Reisman, Assessing the Lawfulness of Nonmilitary Enforcement: The Case of Economic Sanctions 89 AM. SOC'Y INT'L L. PROC. 350, 351 (1995).