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Toward a Rights-based Model of Economic Sanctions

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TOWARD A RIGHTS-BASED MODEL OF ECONOMIC SANCTIONS

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Abstract

Toward a Rights-based Model of Economic Sanctions

This Paper examines the rights-based boundaries of the United Nations ("UN") sanctions as well as unilateral sanctions by classifying them as embargoes against States, major sectors and entities, and targeted sanctions against individuals and micro entities. For the UN embargoes, its Charter's Preamble and Articles, the proportionality principle, and the preemptive norms of *jus cogens* are all investigated. It also analyzes some recorded rights-based challenges in the International Court of Justice ("ICJ") and the European Court of Justice ("ECJ") for the UN targeted sanctions, highlighting that the Security Council's ("SC") targeted sanctions require reconsideration and independent judicial review.

Sanctions imposed unilaterally or without the approval of SC must adhere to the rules specified in international law sources such as the UN Charter, as well as the boundaries of other rights-based treaties for their member States. These measures should also be consistent with CIL as established by *opinio juris* and State practices. By assessing embargoes against Russia and China, as well as the Magnitsky Act for targeted sanctions, the Paper analyzes how sender States justify their sanctions based on the CIL's framework and *erga omnes* obligations.

Despite the fact that since the 1990s, embargoes have become less harmful in terms of collateral humanitarian effects to people who are not the subjective wrongdoers, yet they have been widely criticized for having some of the similar negative effects on human rights. In this regard, the Paper proposes a three-step rights-based model with a specific policy

objective imposed by a sanctions coalition while taking into account all vulnerable rights during designation and implementation. These rights are highlighted to demonstrate how sanctions can proximately contribute to their violations. Finally, the Paper encourages international lawyers to consider a new shifting era, akin to the 1990s, in which a more realistic, rights-based economic sanctions model is devised and implemented.

Toward a Rights-Based Model of Economic Sanctions

by

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TOWARD A RIGHTS-BASED MODEL OF ECONOMIC SANCTIONS

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To my Amazing Family

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1 INTRODUCTION

1.1 TERMINOLOGY AND CONCEPT

In a novel rights-based approach, the Paper seeks to investigate one of the current main unanswered or what may appear *unanswerable question of international law* of whether sanctions "are consistent with the principles and values underlying the international legal order."[1] As a result, it attempts to provide a model for sanctioners, or what the Paper refers to as *senders*, to consider before designing and during implementation of sanctions in order to avoid deviating from *rules* of international law.

Although the term "sanctions" is defined differently in most fields of humanity literatures,[2] the Paper offers its own definition by also taking into account its elements, nature, objectives and collateral humanitarian effects. In this approach, the first step is to explain sanctions' elements and nature through examination of some of the diverse definitions in order to determine why the Paper appears to require its own definition.

The most basic definition describes sanctions as *a general phrase for a punishment to enforce compliance with law*.[3] Although this definition specified one of the main *policy objectives* correctly, but because it includes a punitive element for sanctions, it turned them

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[1] Damrosch, Lori Fisler, *The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts*, 37 BERKELEY J. INT'L L. 249 (2019).

[2] The international community, as well as legal, economic, and political scholars, have yet to agree on a common definition for sanctions. Hovell, Devika, *Unfinished Business of International Law: The Questionable Legality of autonomous sanctions*, 113 AJIL UNBOUND 140 (2019); *See also* Tzanakopoulos, Antonios, *State Responsibility for "Targeted Sanctions,"* 113 AJIL UNBOUND 135 (2019).

[3] Law, according to John Austin, is defined as "command backed by sanction." *See* Gordon, Richard & Michael Smyth & Tom Cornell, SANCTIONS LAW 1 (2019).

into *reprisals*,[4] and since reprisals with their inherent punitive nature mostly considered illegal under international law,[5] only the part of policy objectives or goals of sanctions in this definition could help developing the Paper's model. It is because the main policy objectives of sanctions, generally is to protect human rights, prevent the proliferation of nuclear and mass-destructive weapons, restore sovereign lands, and free captured citizens, which all endeavor to persuade their target to change its subjective wrongful behavior or foreign policy by compliance with law.[6]

Moreover, the term of sanctions is defined as those *collective coercive measures taken in execution of a decision of a competent social organ*, for example an organ legally empowered to act in the name of the society or community that is governed by the legal system *against a State which is subjected to breach of international law in order to force it to abide by the law and to change its wrongful behavior*.[7] While this definition seems to refer solely to multilateral measures, it includes the *primary* policy objective of sanctions, that is to

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[4] Mudathir, Bakri, SANCTIONS OF INTERNATIONAL LAW WITH SPECIAL EMPHASIS ON COLLECTIVE AND UNILATERAL USE OF ECONOMIC WEAPONS 172 (1984).

[5] Countermeasures were once referred to as reprisals, according to several commentators. *See e.g* Tzanakopoulos, Antonios, *Sanctions and Fundamental rights of States, in* ECONOMIC SANCTIONS AND INTERNATIONAL LAW 68 (Matthew Happold & Paul Eden, 2016); *See also* Damrosch, *supra* note 1, at 258; Others, including the Paper, however, argue that punitive measures that fall short of war, such as peaceful blockades that could have the same effects, are reprisals. *See e.g* Nevill, Penelope, *Sanctions and Commercial Law*, *in* ECONOMIC SANCTIONS AND INTERNATIONAL LAW 232 (Matthew Happold & Paul Eden, 2016); *See also infra* Chapter Two regarding the peacetime blockade and the similarity of its effects with wartime blockade.

[6] *See* Oxman, Steven et. al., *Certified Global Sanctions Specialists Study Guide,* ACAMS 7-8 (2020). Sanctions have primarily been employed to directly induce the target to change its wrongful behavior and attempting to compel it to follow an internationally recognized rule. In other words, a sanctions' policy objective, despite its legality assessment, may be a penalty for a failure to follow what are deemed to be internationally accepted codes of conduct.

[7] Asada, Masahiko, *Definition and Legal Justification of Sanctions*, *in* ECONOMIC SANCTIONS IN INTERNATIONAL LAW AND PRACTICE 4 (Asada Masahiko, 2019).

change the target's internationally wrongful behavior. However, it clearly excludes the unilaterality and individualistic nature of sanctions, which is one of the main areas investigated by the Paper's model.

It is because sanctions could be imposed *unilaterally*, also known as autonomous sanctions,[8] by individual State(s)[9] or an international organization against a nonmember State without the Security Council's ("SC") approval.[10] Sanctions could also be imposed *multilaterally* such as those imposed by the United Nations Security Council ("UNSC")[11] as

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[8] Hovell, *supra* note 2, at 140; Unilateral sanctions also called "non-UN sanctions." *See also* Ruys, Tom, *Immunity, Inviolability and Countermeasures – A Closer Look at Non-UN Targeted Sanctions* 34 (Tom Ruys & Nicolas Angelet eds, CAMBRIDGE UNIVERSITY PRESS 2019). These unilateral sanctions have primarily been used at the discretion of States with the ability to wield political, military, and economic power. *See* Malloy, Michael, UNITED STATES ECONOMIC SANCTIONS: THEORY AND PRACTICE 14 (2001); *See also* Subedi, Surya P., UNILATERAL SANCTIONS IN INTERNATIONAL LAW, v (2021).

[9] Sanctions imposed by two individual States is referred to as bilateral sanctions, according to the UN Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights, Alena Douhan. *See* Douhan, Alena, *Negative Impact of Unilateral Coercive Measures: Priorities and Road Map*, HUMAN RIGHTS COUNCIL 11, (Jul. 21, 2021).

[10] *See* Happold, Matthew, *Economic Sanctions and International Law: An Introduction*, *in* ECONOMIC SANCTIONS & INT'L L. 1 (Matthew Happold & Paul Eden eds., 2016). U.N. Charter arts. 23-24. The authority is under Chapter VII of the UN Charter. According to Article 23 of the Charter, the SC is comprised of five permanents, as well as ten rotating members. The permanent members are the US, France, China, Russia and the UK and its task is to ensure cohesion, objectivity, and universality of international law. *See* Kunz, Josef L., *Sanctions in International Law*, 54.2 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 326 (1960). Also, according to the U.N. Charter art. 27, it stipulates that each UNSC's member should have a vote and that substantive decisions by the SC require the concurring votes of the permanent members. This implies that any of a permanent member can prevent a resolution against itself. *See* Guttry, Andrea De, *How Does the UN Security Council Control States or Organizations Authorized to Use Force?: A Quest for Consistency in the Practice of the un and of Its Member States*, 11.2 INT'L ORGANIZATIONS L. REV. 258 (2014).

[11] The UN employs multilateral sanctions, or collective sanctions. These multilateral sanctions because of their collectivity, have clearer hints to the target with a higher cost of defiance. *See* Bapat, Navin A. & T. Clifton Morgan, *Multilateral Versus Unilateral Sanctions Reconsidered: A Test Using New Data*, 53.4 INTL. STUDIES QUARTERLY 1075 (2009); They were also called generally as "sanctions." Alain Pellet believes that the word of "sanctions" only should be used for the SC's sanctioning resolutions. *See* Pellet, Alain & Alina Miron, *Sanctions*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INT'L L. (Aug. 2013).

well as regional organizations such as the Organization of American States ("OAS"),[12] the African Union ("AU"),[13] the European Union ("EU"),[14] or African subregional organizations against their own member States.[15] The Paper examines the rights-based boundaries of these two broad categories by labeling them as UN sanctions, as the main organization which impose multilateral sanctions, and unilateral sanctions.

Additionally the term of sanctions is defined as "measures of an economic character taken to express disapproval of the acts of the target or to induce that [target] to change some policy or practices or even its governmental structure."[16] This definition has two major flaws: the first is in the way it defines sanctions, which is solely based on their economic nature, and the second is in the policy objective of changing the governmental structure, which respectively, although sanctions are primarily economic in nature, they can also have

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[12] For example, the sanction that were imposed in 1960 against the Dominican Republic and 1962 and 1964 against Cuba, and between 1991 and 1996 against Haiti because of its military coup. *See* Thouvenin, Jean-Marc, *History of Implementation of Sanctions*, *in* ECONOMIC SANCTIONS IN INTERNATIONAL LAW AND PRACTICE, 89 (Asada Masahiko, 2019).

[13] Such as AU's sanctions against Egypt and Sudan. *See generally* Hellquist, Elin, *Regional Sanctions as Peer Review: The African Union Against Egypt (2013) and Sudan (2019)*, 42.4 INT'L POLITICAL SCIENCE REV. 451-468 (2021).

[14] These EU sanctions are primarily implemented through the EU's Common Foreign and Security Policy (CFSP). These sanctions are imposed as a result of violations of certain principles outlined in the Basic Principles on the Use of Restrictive Measures. Article 215 of the Treaty on the Functioning of the European Union (TFEU) allows for partial or complete interruption or reduction of the EU's economic relations with the third country to achieve the objectives of the CFSP; *See* E.U. Treaty art. 3, ¶ 5. Nowadays, the EU asserts multiple sanctions regimes against several States, including Russia. *See* Thouvenin, *supra* note 12, at 89.

[15] Regional sanctions refer to the sanctions imposed by regional organizations. *See e.g,* Charron, Andrea, & Clara Portela, *The UN, Regional Sanctions and Africa,* 91.6 INTERNATIONAL AFFAIRS 1369-1385 (2015).

[16] Carter, Barry, *Sanctions*, Max Planck Encyclopedia of Public Int'l L. (2011).

diplomatic,[17] military,[18] environmental,[19] cultural,[20] cyber related,[21] treaty-based out casting[22] and/or incentive characteristic.[23] The Paper also asserts that sanctions, in order to be rights-based, at least, should not primarily aim to change the governmental structure, which is equivalent to changing the regime of the targeted State.[24]

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[17] Although Article 41 of the UN Charter mentions about "the severance of diplomatic relations," currently, none of the UN sanctions regimes employed it as such as a coercive measure as the UN's policy is to keep the negotiation channels always open; U.N. Charter, art. 41. In rare cases, expulsion from an international organization could be also considered as a type of diplomatic sanctions. U.N. Charter, art. 6; *See* Ronzitti, Natalino, *Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective, in* COERCIVE DIPLOMACY, SANCTIONS & INT'L L. 26-7 (Natalino Ronzitti ed., 2016).

[18] Military sanctions such as the current sanctions against North Korea that specifically mentioned the non-proliferation measures. The North Korean sanctions regime has a package of coercive measures, including asset freezes (SCR 1718 (2006) ¶ 8(d)), travel bans (*Id,* ¶ 8(e)), armory weapons (*Id,* ¶ 8(a)(i)), luxury goods (*Id,* ¶ 8(a)(iii)), and materials relevant to North Korea nuclear and ballistic missile programs (*Id,* ¶ 8(a)(ii))).

[19] Environmental sanctions are a less favorable form of sanctions but definitely most of forms of sanctions have inevitable effects on environment. Madani, Kaveh, *How International Economic Sanctions Harm the Environment*, 8.12 EARTH'S FUTURE (2020).

[20] Cultural sanctions as mostly psychological warfare methods may be seen in different forms but one of the main forms is sport sanctions which have been recorded previously. *See* Keech, Marc & Barrie Houlihan, *Sport and the End of Apartheid*, 88.349 THE ROUND TABLE 109-121 (1999); *See* Nixon, Rob, *Apartheid on the Run: The South African Sports Boycott*, 58 TRANSITION 68-88 (1992).

[21] Cyber sanctions are another type of sanctions that have recently gained popularity. *See* Bogdanova, Iryna & Vásquez Callo-Müller, María, *Unilateral Cyber Sanctions: Between Questioned Legality and Normative Value*, 54.4 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 911 (2021).

[22] Treaty-based out-casting as a form of denying the targeted State or its citizens from the benefits of membership without any physical force, could be considered as a method of sanctions. For example, treaties like the Montreal Protocol on Substances that Deplete the Ozone Layer or the soft laws like the Financial Action Task Force (FATF) on money laundering and terrorist financing could automatically outcast their violator States. However, according to Anne Van Aaken if out-casting prevents individuals and corporations from obtaining the benefits of free contracting or interfere with their property rights by freezing their assets, or expose them to blacklisting or to travel bans, then they can be considered as a nontreaty-based out-casting or sanctions. *See* Van Aaken, Anne, *Introduction to the Symposium on Unilateral Targeted Sanctions*, AJIL UNBOUND 131 (2019); *See also* Hathaway, Oana A. & Scott Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 212 YALE L.J. 252 (2011).

[23] Damrosch, *supra* note 1, at 253.

[24] *See infra* Chapter Three.

Furthermore, economists define sanctions as *measures that have financial objectives to influence on the target to change its policy,* such as gaining market access through tariff and non-tariff barriers, taxation, or fishing rights, by triggering the target's monetary structure, real economy, production, and distribution bodies.[25] Although the first part of the assertion is correct because most sanctions affect the target's monetary structure,[26] sanctions should be distinguished from measures taken by individual States, or in some cases, organizations, to exercise their *economic freedom* under their sovereign right.[27] In other words, sanctions should be differentiated with *retorsions* which may be presumed to work similarly, but are merely unfriendly lawful measures taken by one State in response to a prior unfriendly act committed by another State.[28] Given that the sender of retortions by endorsing taxation laws, withdrawing voluntary aid, or immigration laws,[29] has not violated any legal obligation owed to the target, thus it is not in violation of international law[30].

As seen, there is no breach of an obligation owed to the sender in retorsions; however, if an owed obligation was breached and an injury occurred, the measures taken by the injured State would be considered sanctions.[31] In this case, sanctions may be justified if they are taken in response to a prior unlawful act by another State and meet the conditions specified

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[25] *See generally* Quraeshi, Zahir, *Towards a Framework for Applying US Economic Sanctions*, 9.1 WORLD REVIEW OF ENTREPRENEURSHIP, MANAGEMENT AND SUSTAINABLE DEVELOPMENT 114-7 (2013).

[26] *See infra* Chapter Four.

[27] *See infra* Chapter Three.

[28] Damrosch, *supra* note 1, at 258.

[29] *See* Happold, *supra* note 10, at 2. He asserted that travel restrictions are also could be considered as lawful retorsions as no State is under obligation to admit any foreign national into its territory.

[30] Unless it breaches any mutual treaty.

[31] *See* Van Aaken, *supra* note 22, at 132-3.

by the International Law Commission ("ILC") in the draft Articles on the Responsibility of States for Internationally Wrongful Acts ("ARSIWA"), which has characterized them as countermeasures.[32] Now, by addressing these issues in the aforementioned definitions, the Paper provides its definition, which covers all of the essential requirements for its own discussion. As a result, *Sanctions are coercive measures that do not involve the use of force, are more serious than retorsions, and are utilized to induce the target to change its subjective wrongful act.*[33]

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[32] *See id.* G.A. Res. 56/83, International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Dec. 12, 2001) (Hereinafter ARSIWA).

[33] Although retorsions may fit this definition in some scenarios, they are more likely to be challenged based on violations of international conventional law and treaties such as the General Agreement on Tariffs and Trade (GAAT) and the Energy Charter Treaty (ECT), which are not the subject of this paper. As a result, anti-dumping and countervailing duty laws, as well as importation bans on specific types of products by particular manufacturers (ZTE, Huawei, and maybe Tiktok) based on "national security" concerns, could be mentioned. The national security exception normally is included in most bilateral and multilateral treaties by mentioning that the treaty shall not preclude the application of measures if the action is necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its *essential security interests*. *See e.g.* U.S. Dept. of State Press Release, *On U.S. Appearance Before the ICJ* (Jul. 27, 2018).

While not within the limited scope of this Paper, it should be mentioned briefly that the permissive national security exception has served as the framework for challenging various major sanctioning regimes, such as US sanctions against Russia following the Ukraine crisis. Accordingly, the exception has been widely criticized as being open to abuse by States, being overly broad defined, and undermining the WTO's primary objectives. *See* Doraev, Mergen, *The Memory Effect of Economic Sanctions against Russia: Opposing Approaches to the Legality of Unilateral Sanctions Clash Again*, 37 U. PA. J. INT'L L. 379 (2015). Additionally, this term is specifically challenged by members of the General Agreement on Tariffs and Trade (GATT), for example, the 1986 Panel Report regarding US trade measures affecting Nicaragua, determined that the US cannot justify its sanctions by invoking Article XXI. *Id.*

To find some of the other well-established definitions in legal literature *see* Ilieva, Jana & Aleksandar Dashtevski & Filip Kokotovic, *Economic Sanctions in International Law*, 9.2 UTMS JOURNAL OF ECONOMICS 201 (2018); *See also* Law, Jonathan, *A Dictionary of Law*, "Sanction" OXFORD UNIVERSITY PRESS (9th ed, 2018); Chan, Steve & A. Drury, *Sanctions as Economic Statecraft: Theory and Practice*. SPRINGER 2-10 (2000); Selden, Zachary A., *Economic Sanctions as Instruments of American Foreign Policy*, GREENWOOD PUBLISHING GROUP 17 (1999).

1.2 BRIEF HISTORY OF SANCTIONS

Sanctions have been used outside of aggressive war making, or even as a subordinate instrument of armed conflicts and during times of war, since antiquity and early modern Europe.[34] The first documented use of sanctions as a political tactic, however, dates from 432 B.C., when Athens imposed them on Greek City-States that refused to join the Athenian-led Delian League during the Peloponnesian War.[35] Centuries later, in 1531, States used sanctions to protect Christian minorities during Europe's religious wars.[36] In the 1760s, another notable incident occurred, when English merchants were boycotted by the American colonies.[37] In 1806, Napoleon established the Continental Blockade, effectively prohibiting British exports.[38] From 1807 to 1813, American sanctions prohibited all trade with

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[34] It was an effective sanction because by locking the Francs in their fortress and causing a food shortage, they eventually surrendered. *See* Thouvenin, *supra* note 12, at 83; *See also* Timmermans, Jolien, *The Conflicting Case of Economic Sanctions & Economic Interests Under EU Law*, 54 JURA FALCONIS NUMBER 54, 57 (2017-2018).

[35] In retaliation for the kidnapping of three women, Pericles, the ruler of Athens, sanctioned the Megara. Athens prohibited Megara's products from being sold in the Athenian Empire's market as a result of these sanctions. *See* Ahn, Daniel P., *Economic Sanctions: Past, Present, and Future*, 20.1 GEORGETOWN J., INT'L AFF. 126 (2019); The sanctions were actually motivated by the Spartan fear of Athens' growing power, which was also the main reason for the Peloponnesian War, according to Thucydides, an Athenian historian and author of Aristophanes. *See* Thucydides, *History of the Peloponnesian War* (Trans. Charles Forster Smith, 1988).

[36] *See* Kern, Alexander, ECONOMIC SANCTIONS LAW AND PUBLIC POLICY 8 (2009).

[37] The sanctions were to force England to change the Townshend Acts as a set of rules governing the colonies' taxation and trade. The Townshend Acts were a set of legislation enacted by the British Parliament in 1767 that taxed goods imported into the American colonies. The Acts, however, were viewed as an abuse of power by American colonists, who had no representation in Parliament. *See* Rathbone, Meredith & Peter Jeydel & Amy Lentz, *Sanctions, Sanctions Everywhere: Forging a Path Through Complex Transnational Sanctions Laws*, 44 GEO. J. INT'L L. 1055, 1063 (2012).

[38] *See* Raymond, David J., *The Royal Navy in the Baltic from 1807-1812*, FLORIDA STATE UNIVERSITY LIBRARIES 108 (2010).

foreigners.[39] Another significant sanctioning episode at the time was China's imposition of sanctions against Japan.[40]

On September 18, 1914, less than two months after the start of World War I ("WWI"), the United Kingdom ("UK") passed the "Trading with the Enemy Act."[41] Following that, on September 27, 1914, a French decree banned all trade between the sides of the conflict.[42] As

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[39] The Embargo Act of 1807, the Non-Intercourse Act of 1809, and the Non-Import Act of 1811 caused economic disruption in Great Britain and spread throughout Europe, particularly in northern German cities. *See* Ahn, *supra* note 35, at 126.

[40] From 1905 to 1931, China imposed a number of sanctions against various States in response to the US's anti-Chinese policy. Following the seizure of a Japanese steamer by a Chinese gunboat in 1908, the very next boycotts were launched against Japanese products. After China misinterpreted the 1905 Peking Treaty, the next round of sanctions was imposed on Japan in 1909. Several sanctions were imposed on Japan in 1915, 1919, 1923, 1927, 1928, 1929, and 1931 as a result of nationalist and anti-Japanese movements. *See* Thouvenin, *supra* note 12, at 84.

[41] During the first era of globalization, from 1870 to 1914, the UK was a major player in international trade, including maritime trade, shipbuilding, and insurance. During WWI, Britain weaponized its superiority by refusing to provide these services to Germany, resulting in an economic disaster for both sides. They quickly realized the significant collateral damages to their own economy and other trading partners, particularly the US. As a result, the UK gradually reduced its blockade of Germany. *See* Ahn, *supra* note 35, at 126-132.

The "Trading with the Enemy Act" prohibited any business relationships with nationals of enemy countries and provided grounds for seizing their assets. Several legal cases based on the sanctions triggered the *piercing theory*, also known as *lifting the corporate veil*. For example, a company whose shares were owned by a German resident and whose directors were all German residents was considered as an enemy under the Trading with the Enemy Act. In *Continental Tire and Rubber Co (GB) Ltd*, the House of Lords decided that it was necessary to lift the corporate veil and consider the nationality of the legal person based on the nationality of its shareholders rather than its place of incorporation. The issue has been reflected in the decision of the ICJ in *Barcelona Traction Light and Power Company*: "[E]nemy-property legislation was an instrument of economic warfare, aimed at denying the enemy the advantages to be derived from the anonymity and separate personality of corporations. Hence the lifting of the veil was regarded as justified *ex necessitate* and was extended to all entities which were tainted with enemy character, even the nationals of the State enacting the legislation." *See Barcelona Traction, Light and Power Company, Limited* (*Belgium v. Spain*) (1962–1970), Second Phase, Judgment, I.C.J Reports, ¶ 60 1970 (hereinafter *Barcelona Traction*); *See* Rowhani, Mohsen, LIFTING THE CORPORATE VEIL 12-3 (Ansoo Publication, 2020).

[42] It nullified all contracts signed with the enemies' nationals since the beginning of the war. Then, Germany and Austria nullified all contracts made with the enemies' citizens, including those made before

can be seen, sanctions were widely used in conjunction with wars in the nineteenth and early twentieth centuries, and they were rarely used outside of war until the 1920s. Following the adoption of the League of Nations Covenant, the international community began to debate the dangers of war and therefore, to present sanctions as a viable alternative to wars.[43] As a result of the threat of a nuclear war after both World Wars, sanctions were frequently used on their own, without being accompanied by a war. As a matter of fact, on several occasions, before and after World Wars, even the *threat* of sanctions, such as threatening Japan with sanctions for its invasion of Manchuria, was effective in resolving border disputes.[44]

The relationship between wars and sanctions was not limited to either supporting an ongoing war or preventing a new war. The fact that the United States' ("US") sanctions against Japan influenced Japan's decision to enter World War II ("WWII") by attacking Pearl Harbor, for example, sparked debate over whether sanctions was an alternative to war or compelled nations to start wars.[45] In any case, the US, which was not a member of the League of Nations at the time, was actively involved in implementing long-term sanctions, such as those against communist countries and other countries of concern, as well as international terrorists.[46]

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the war, and froze all their assets, prompting France to tighten its sanctions. *See* Thouvenin, *supra* note 12, at 84.

[43] Davis, Lance & Engerman, Stanley, *History Lessons: Sanctions: Neither War nor Peace*, 17.2 THE JOURNAL OF ECONOMIC PERSPECTIVES 189 (2003).

[44] Kern, s*upra* note 36, at 9.

[45] *See* Hackler, Jefferey, *Japan's Motives for Bombing Pearl Harbor 1941*, 6.1 EDUCATION ABOUT ASIA 54 (2021).

[46] *See* Malloy, *supra* note 8, at 39-46.

At the end of WWII, in 1945, Arab States imposed sanctions by boycotting Jewish-manufactured products.[47] Also, following the political split between Stalin and Tito, the Union of Soviet Socialist Republics ("USSR") and its Eastern European allies sanctioned Yugoslavia in 1948.[48] As a result of Iran's oil nationalization, the UK imposed the first sanctions in the long history of sanctions against Iran in 1951.[49] The briefly mentioned history of sanctions demonstrates that most of the current world's powers, including the US, the UK, France, China, Japan, and Russia, have a background in implementing and imposing sanctions to achieve their foreign policy objectives during times of war or as an alternative to war.

1.3 OBJECTIVES AND ASSUMPTIONS

The primary objective of the Paper is to utilize its proposed model in order to challenge the UN's sanctions and unilateral sanctions' rights-based deficiencies, whether embargoes against States and targeted sanctions against natural and legal persons.[50] However, embargoes, according to the Paper, include not only measures against States, but also sanctions against the States' major entities and sectors. It is because the main approach of the Paper is to analyze sanctions based on their effects on the rights of people who aren't the

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[47] Following the proclamation of the State of Israel, the Arab League amended the boycott targeting all Israeli products, which had long been in place until it gradually faded. *See generally* Turk, N., *The Arab Boycott of Israel,* 55 FOREIGN AFFAIRS 472-93 (1977).

[48] The sanctions were remained in force until the relations were normalized in 1955. *See* Dapray, Muir J., *The Boycott in International Law*, 9.2 JOURNAL OF INTERNATIONAL LAW AND ECONOMICS 189 (1974); *See* Thouvenin, *supra* note 12, at 88.

[49] It was a total boycott of Iranian products, as well as the freezing of Iranian government's assets in England. *See* Stalls, Justin D., *Economic Sanctions*, 11 U. MIAMI INT'L & COMP. L. REV. 115 (2003).

[50] It could also be imposed against a particular good that has been named as "selective" sanctions. *See* Ilieva et. al., *supra* note 33, at 201 (2018); *See* Colussi, Ilaria A., *Action and Reaction: Effects of Country-based Trade Sanctions*, 2.3 STRATEGIC TRADE REV. 110-11 (2016).

subjective wrongdoers. Thus, in this approach, sanctions against major entities must also be investigated in the same way that embargoes are.

The Paper argues that in order to achieve an applicable model, sender States' law scholars need also take into account the viewpoint of law scholars from targeted States.[51] Undoubtedly, one of these differences relates to the definition of embargoes, which, in the literature from sender States' scholars, only refers to comprehensive sanctions against States, leading to the conclusion that the majority of the sanctions in place today are targeted sanctions.[52] However, this assertion is not acceptable by scholars from targeted States. In this regard and as an example, sanctions imposed on a large bank with hundreds of branches, affect not only the wrongdoer shareholders or those who benefited from the bank's services, but also a large number of other customers who have no connection to the subjective wrongdoing. The author thoroughly discussed the issue in other publications by questioning

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[51] Since international law is partly open-ended and flexible, it is inevitable that throughout the history each State has interpreted it in accordance with its own values and alleged circumstances. If the perspective is modified to include the sanctions and their consequences on billions of people worldwide, it may be possible to alter some of the widely accepted definitions and incorporate them into this model.

[52] The Paper challenges this assertion from the perspective of international law academics in the targeted States. Accordingly, the author believes that it would be more advantageous to change the angle and utilize also the opposing sides' beliefs in order to contribute to bridging this huge gap between the literature of these two groups of scholars. The gap is so large that most similar contributions by scholars from sender States could not even be presented and certainly could not be defended in universities in the targeted States.

The author's point of view also could be based on the fact that he personally experienced the effects of so-called targeted sanctions against major entities and also because his background in international law differs greatly from what he read and learnt during the time he spent writing this Paper. Additionally, it will likely broaden the Paper's audience and encourage academics and politicians in the targeted States to read and to examine it, which would be another significant contribution to the field. In addition, because the author has benefited greatly from sender States' sanctions resources and advisors, he strives to avoid being influenced by either side and to focus on a neutral perspective that will be developed during the Paper in order to only respond to the Paper's main question.

whether sanctions against a State's central bank, oil industry, or transportation sectors could be considered merely targeted sanctions, when they affect even small and very basic and fundamental needs such as the right to health and other rights of most people in the targeted States.[53]

Embargoes could be as *comprehensive* as those imposed by the UN against Iraq in the early 1990s,[54] which, despite prior consideration of humanitarian exemptions, has been considered as one of the most heavily criticized sanctioning regimes.[55] These criticisms compelled the UN to take steps to improve the efficacy of sanctions by reducing collateral effects and harmful consequences on civilians, resulting in a limited use of embargoes.[56] Since then, the practice has improved by reducing the negative costs of sanctions on the target's industry and civilians, including their lives and health.[57] Despite the fact that considering humanitarian exemptions was a significant step toward developing a rights-based

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[53] For more information *see* Rowhani, *Sanctions: Violations of the Right to Health*, 31 PERSPECTIVE L. REV. 12-5 (2019); Rowhani, Mohsen et. al., *The Middle East,* 54 ABA/SIL YIR 559-581 (2020); Rowhani, Mohsen, *Weakening the Structure of Sanctions,* 32 THE INT'L. L. PRACTICUM 45-5 (2019); Rowhani, Mohsen et. al., *The Middle East,* 53 ABA/SIL YIR 558 (2019); Rowhani, Mohsen, *Corruption in the Middle East as a Long-lasting Effect of the U.S. Primary and Secondary Boycotts Against Iran*, 3 ABA MIDDLE EAST L. REV. 27 (2019); Rowhani, Mohsen et. al., *The Middle East,* 55 ABA/SIL YIR 415-427 (2021).

[54] Historically, the UN solely imposed five comprehensive embargoes which were against Southern Rhodesia, SCR 232/1966; Iraq, SCR 661/1991; Yugoslavia (Former), SCR 757/1992; Bosnia and Herzegovina, SCR 820/1993; and Haiti SCR 841/1993.

[55] *See e.g.*, Cortright, David et. al., Political Gain and Civilian Pain: Humanitarian Impacts of Economic Sanctions 12-25 (1997).

[56] *See* Cohen, David S. & Zachary K. Goldman, *Like it or Not, Unilateral Sanctions are here to Stay*, 113 AJIL UNBOUND 148 (2019).

[57] Van Aaken, *supra* note 22, at 130. *See* Ahn, *supra* note 35, at 126.

sanctioning model, and its supporters are excited about its sophistication and efficacy,[58] the Paper backs up criticism of its immaturity. In this regard, the it intends to generate a model with specific characters to address the question of whether it is possible to take another rights-based step that is more sophisticated than the previous step of the 1990s. In this approach, it defines targeted sanctions as sanctions against small entities that have no or little effect on people in general. Notably, the term "sanctions" refers to embargoes throughout the Paper; however, when it refers to targeted sanctions, the term "targeted sanctions" is used specifically.

The main question of the Paper is whether there could be any novel right-based model of sanctions in compliance with the rules of international law that not only reduces these collateral humanitarian effects and rights violations, but also increases its efficacy. To avoid the contention that the main question shifts throughout the Paper, it is needed to note that some deviations in approaching the response to the aforementioned question were indeed unavoidable. It means that along the way, the Paper was confronted with other minor questions that could not be ignored. As a result, readers should anticipate additional questions in each Chapter, all of which are related to the Paper's main argument and contribution.

In order to achieve this most important objective, the Paper focuses on the international law resources found in Article 38 of the International Court of Justice Statute ("ICJ

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[58] *See* Giumelli, Francesco, *Understanding United Nations Targeted Sanctions: An Empirical Analysis*, 91.6 INT'L AFF. 1351-58 (2015); *See also* Drezner, Daniel, *Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice*, 13.1 INT'L STUDIES REV. 96, 97 (2011).

Statute").[59] Accordingly, it borrows from the frameworks and rules identified in treaties[60] and Customary International Law ("CIL") [61] on several occasions to assess the rights-based deficiencies of embargoes as well as targeted sanctions. It also analyzes some of the available universally accepted or diverse beliefs and views of sanctions' scholars from international

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[59] Article 93 of the UN's Charter recognizes all member States as parties to the ICJ's statute, and paragraph 1 of Article 94 presumes that all UN's Members undertake to comply with ICJ's decisions, and paragraph 2 of the Article states that if any Member State fails to comply with ICJ decisions, the SC is authorized to enforce judgments. *See* Brabandere, Eric De, *The Use of Precedent and External Case Law by the International Court of Justice and the International Tribunal for the Law of the Sea*, 15.1 THE L. & PRACTICE OF INT'L COURTS & TRIBUNALS 24-55 (2016).

[60] According to Article 38 of the ICJ's Statute, international conventions or treaties are the first source of international law. Notably, the priority is not fixed, and some scholars believe that the priority in international law between treaties and customary norms is the other way around. *See* Jia, Bing Bing, *The Relations Between Treaties and Custom*, 9.1 CHINESE J., INT'L. L. 81-109 (2010). A treaty is an agreement reached between two or more States or international organizations. It plays an important role in facilitating interaction among States by establishing general standards of behavior for treaty parties. *See id.*

[61] CIL, as the second key source of rules of international law, which is the actual practice of States with a high degree of repetitiveness and consistency, supported by *opinio juris* or the belief to have a legal obligation.

Although some commentators believe that CIL only requires a certain level of State practice, this Paper supports the counterargument that State practices in imposing sanctions or condemning their application without support of *opinio juris* cannot have a normative value in favor or against their legality. The same idea came from the ICJ's decision in *the North Sea Continental Shelf case* (Denmark v. Germany), that specified for a State's practice to have CIL normative value, it should also be supported by *opinio juris*.

Respectively, the ICJ explained that "[n]ot only must the acts [of States] concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, *i.e.*, the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*." Thus, the more solidified an existing rule is, in terms of duration and widespread acceptance by *opinio juris*, the greater difficulty States will have in overturning it. *See North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, 44, ¶ 77. Also, in other instances such as *the Case of the SS Lotus* (1927), it has specified that practice alone in not sufficient to create a norm, nor can a norm be created by *opinio juris* with no actual practice as stated in the *Advisory Opinion on Nuclear Weapons* (1996). S.S. Lotus (*France v. Turkey*), Judgment, PICJ 18 (1927) (hereinafter *Lotus*); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226, 258, ¶ 83 (hereinafter *Nuclear Weapons*); *See* Thirlway, Hugh, *The Sources of International Law*, INT'L. L. 4 (2010); *See also* Henderson, J. Curtis, *Legality of Economic Sanctions Under International Law: The Case of Nicaragua*, 43 WASH. & LEE L. REV. 167, 172 (1986).

law and in some few cases political science viewpoints. Notably, although the Paper attempts not to depart from international law and to not analyze States' foreign policies; since the issue of sanctions cannot be investigated without consideration of political scholarship, which primarily raises the issue of *efficacy* and senders' foreign policies, in some instances the political perspectives also stated. This presumption has been supported by the celebrated international lawyer Louis Henkin who stated in *Right v. Might,* that international law and politics must always come together[62] and more broadly, "law is politics."[63]

It should be highlighted that the Paper is highly relevant to US legal scholarship, with the majority of its arguments, literature, and viewpoints coming from US scholars, with only a minority of views and reflected sources coming from other countries and targeted States. Also the US's increasing use of sanctions which may be argued to be in conflict with its parallel role in promoting international human rights around the world; thus, discussing the issue and proposing evolving solutions appears critical.[64] Additionally, it is clear that sanctions will continue to be an integral part of the US foreign policies in the future, and because a substantial investment has been made in sanctions' mechanisms, by addressing their flaws, it could create and enforce a more effective rights-based model that other States and international organizations can replicate. Additionally, by reviewing Iran's Application

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[62] *See* Henkin, Louis et. al., *Right v. Might: International Law and the Use of Force*, COUNCIL ON FOREIGN RELATIONS PRESS (1989).

[63] *See* Henkin, Louis, INTERNATIONAL LAW: POLITICS AND VALUES 4-5 (1995), *cited in* Damrosch, Lori & Sean Murphy, INTERNATIONAL LAW: CASES AND MATERIALS 2 (7th ed. 2019).

[64] Lopez, George A. & David Cortright, *Economic Sanctions and Human Rights: Part of the Problem or Part of the Solution?*, 1.2 THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 1-2 (1997).

and the ICJ's *Provisional Measure*[65] order in the *Alleged Violation*[66] between Iran and the US, the Paper examines whether the ICJ's orders could be a reliable pattern and resource for the US to move forward accordingly in considering vulnerable rights of the targeted States' people.

1.4 PAPER'S STRUCTURE

The Paper assesses the right-based deficiencies of both the UN's and unilateral sanctions by raising three major issues that will be addressed independently. These issues are titled as: rights-based boundaries of the United Nations sanctions, rights-based boundaries of unilateral sanctions, and finally proposing a rights-based model of economic sanctions. In light of the aforementioned issues, the Paper contributes to existing scholarship on sanctions laws while also developing a novel response to the question of their legality under international law. Furthermore, it makes recommendations to mitigate the negative effects of sanctions on human rights.

In order to achieve these objectives, next, in Chapter Two, it focuses on rights-based boundaries and procedural challenges to the UN's embargoes and targeted sanctions. Although any international organization may impose multilateral sanctions on its member State(s), only the UN was selected since it is the most related organization in support of the Paper's arguments. Additionally, when Chapter Two refers to sanctions imposed by other international organizations, such as the EU, it is doing so in cases where the EU serves as the

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[65] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (Iran v. U.S.), I.C.J. ORDER ON PROVISIONAL MEASURES (Oct. 3, 2018) (hereinafter *Provisional Measures*).

[66] Application Instituting Proceedings in *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (Iran v. U.S.), I.C.J. (July 16, 2018) (hereinafter *Alleged Violations*). The Application filed in the Registry of the ICJ by Iran on 16 July 2018.

UN's sanctions' implementing authority rather than imposing its own multilateral sanctions. In these situations, the EU is merely imposing enforcement sanctions, which are outside of the scope of the Paper. Because a basic understanding of the history of the UN's sanctions is required, Chapter Two begins with the UN's sanctioning procedure and then moves on to a brief history of the UN's sanctions. Then it addresses whether the SC's embargoes should be reconsidered in light of their compliance with *jus cogens* preemptive norms, the UN Charter's principles including the principle of proportionality. After that, it turns to investigates the SC's boundaries in imposing targeted sanctions while protecting the substantive and procedural rights of the designated targets. It analyzes rights-based issues encountered during the administrative reconsideration and judicial review phases to show that the SC's targeted sanctions need the institution of its own independent judicial review system.

The Third Chapter in order to advance the development of the Paper's model, examines whether there are any rights-based boundaries in sources of international law that unilateral senders, whether individual States or international organizations against non-members, should adhere. It is due to the fact that a violation of a rule(s) outlined in international law sources, is required to hold a State accountable for the consequences of its actions, whether it is a sender State or a targeted State. Relatedly, it is hypothesized that, targeted States in addition to not depriving their people of fundamental human rights, must also take all reasonable steps to protect those rights, including refraining from engaging in international wrongful acts. In this regard, the Paper also tries to determine whether the targeted State's wrongdoing is both the actual and proximate cause of the sanctions' negative consequences for its citizens, or whether the sender State is also *proximately and contributorily* responsible

for the rights infringements caused as sanctions' collateral effects. As a result, Chapter Three starts with multilateral and bilateral treaties before moving on to CIL and investigating whether there are a widespread and consistent State practices as well as a belief in having a legal duty to do accordingly or *opinio juris*. This path examines the UN's Charter by evaluating its three major related grounds of State sovereignty, non-intervention, and rights-based principles. Following that, three other multilateral treaties are analyzed by determining whether *their member States* have any extraterritorial obligation to protect their defined rights. The International Covenant on Civil and Political Rights ("ICCPR"),[67] the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"),[68] and the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD")[69] are among the multilateral treaties in question. As a representative for bilateral treaties, Chapter Three looks at the 1955 Treaty of Amity, Economic Relations, and Consular Rights, between the US and Iran.[70] Chapter Three also examines CILs by comparing States practices with beliefs, statements, and resolutions from both sides of the debate on the status of unilateral sanctions in international law to see if those States that express their beliefs in opposition to application of unilateral sanctions also avoid imposing sanctions unilaterally in practice. It then examines embargoes (based on the Paper's definition) against Russia and

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[67] *International Covenant on Civil and Political Rights*, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368, 999 U.N.T.S. 171 (hereinafter ICCPR).

[68] *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 933 U.N.T.S. 3, 5 (hereinafter ICESCR).

[69] *International Convention on the Elimination of All Forms of Racial Discrimination*, Dec. 16, 1965, U.N.G.A. Res. 2106 A (XX) (hereinafter ICERD).

[70] *The 1955 Treaty of Amity, Economic Relations, and Consular Rights* (*Iran v. United States of America*) (hereinafter Amity Treaty). It was signed by the two States in Tehran on 15 August 1955 and entered into force on 16 June 1957. The Senate advised and consented to the Treaty of Amity on July 11, 1956. 102 Cong. Rec. 12244 (1956). 8 U.S.T. 899, 284 U.N.T.S. 93.

China (Xinjiang), as well as the Magnitsky Act, as an example for targeted sanctions, in order to determine whether States have *erga omnes* obligations to preserve human rights that are violated by other States or their nationals, and if so, whether imposing unilateral sanctions can be justified in these circumstances.

Chapter Four proposes a three-step rights-based model of sanctions by elaborating its components including identifying a specific policy objective(s) that the target is fully aware of; moving toward forming a sanctions coalition; and considering potential rights violations in sanctions' designation and implementation. As a result, it emphasizes the importance of uncovering the real reason for each sanctioning regime. It means that sanctions in order to be considered rights-based at least need to have a clear and specific policy objective communicated to the target. Next, by looking at a few sanctioning regimes, such as current sanctions against Russia, it focuses on the question of whether sanctions will actually cause the target to change its behavior, or if they are simply and just political tools for the sender State(s) to claim that it is dealing with the wrongdoer. Then, the Paper elaborates that due to the sanctions' low efficacy rate in general, in a rights-based model, they must be implemented in collaboration with other States, suggesting that they should be imposed by a coalition to prevent targets from evading them and committing other international wrongdoings. Following that, it provides several examples of rights violations as a collateral humanitarian effects of different episodes of sanctions to enumerate the types of human rights that are more vulnerable to these measures. In this regard, it emphasizes that in the rights-base model, sanctions need to be designed in a way that their impact be proportionate to the targets' subjective wrongful act.

Finally, in Chapter Five, the Paper goes through the Papers findings to elaborates on all steps that the UN and individual States should take in imposing and enforcing sanctions in order to emphasize the importance of shifting toward a new rights-based model, more sophisticated than the major shift away from comprehensive embargoes which occurred in the 1990s.

2 RIGHTS-BASED BOUNDARIES OF THE UNITED NATIONS' SANCTIONS

2.1 ABSTRACT

The rights-based boundaries of the United Nations ("UN") sanctions as the most analytical sender of multilateral sanctions are examined in this Paper by categorizing them as *embargoes* against States and *targeted sanctions* against individuals and entities. In this regard, the UN Charter, as well as the principles of *jus cogens* serve as the grounds for determining the legality of UN embargoes. The Paper investigates whether the UN embargoes have ever violated *jus cogens*, and if so, whether it is bound to follow them in the same way as UN member States are. It then emphasizes that the Security Council ("SC") is required to comply with the preamble and Articles of the UN Charter as the only international *treaty* that can govern its actions. The Paper then considers whether the SC, in imposing embargoes, should also adhere to the principle of proportionality between subjective wrongdoings and the consequences. Following an examination of the boundaries of the UN embargoes, the Paper assesses how the legality of the UN targeted sanctions should be determined. In this regard it analyzes recorded flaws in their designations, implementations, judicial reviews, and probable violations of the targets' substantive and procedural human rights. The central issue of due process is then addressed by examining some recorded rights-based challenges in international courts such as the International Court of Justice ("ICJ") and the European Court of Justice ("ECJ") to highlight that the SC's targeted sanctions require reconsideration as well as their own independent judicial review.

2.2 INTRODUCTION

International law evolved from *jus ad bellum* to prohibit the use of armed forces, and along the way, the United Nations Security Council ("UNSC") became the sole responsible organ for maintaining international peace and security.[71] In this regard it has the authority under Chapter VII of the UN Charter[72] to issue recommendations or binding decisions such as imposing sanctions,[73] after determining the existence of a threat to the peace, breach of the peace, or act of aggression.[74] According to Article 41 of the Charter, the SC may call upon all UN members to implement its resolutions domestically,[75] and under Article 25 of the Charter,

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[71] *See* Gordon, Richard & Michael Smyth & Tom Cornell, SANCTIONS LAW 12 (2019).

[72] U.N. Charter, art. 1 ¶ 1.

[73] The UNSC in carrying out its mandate is authorized to use the powers outlined in Chapters VI, VII, VIII, and XII of the UN Charter. The SC has the authority to make recommendations under Chapter VI or legally binding decisions under Chapter VII (U.N. Charter, art. 27). Chapter VI of the UN Charter addresses the methods of peaceful resolution of disputes (U.N. Charter, arts. 33-38) and empowers the SC to call on all parties (U.N. Charter, art. 33), to investigate (U.N. Charter, art. 34), to request appropriate procedures or methods of adjustment (U.N. Charter, art. 36), and to make recommendations to the disputing parties (U.N. Charter, art. 38). As a result of meeting the requirements of Article 39, the SC based on its power that is given under Chapter VII, is authorized to impose binding multilateral sanctioning resolutions (U.N. Charter, arts. 39, 41, 24.1, 24.2, 27). These binding resolutions may impose coercive measures involving or not involving the use of force, such as the complete or partial disruption of economic relations (U.N. Charter, art. 42).

[74] The ambiguity in the phrase "threat to peace" has raised some concerns about the specific situations in which the SC may pass sanctioning resolutions. In practice, however, it is widely accepted that any Security Council resolution (SCR) passed under Chapter VII include an implied Article 39 determination, even though most resolutions passed under Article 41 do not explicitly refer to Article 39. The majority of SCRs simply state that they were passed under Chapter VII of the Charter. Only four resolutions authorizing active sanctions regimes referred explicitly to Article 41 as of May 6, 2021. *See* Taft, William H. & Todd F. Buchwald, Preemption, *Iraq, and International Law*, 97.3 THE AMERICAN J., INT'L L. 557-63 (2003); *See also* Gordon et. al., *supra* note 71, at 12.

[75] U.N. Charter, art. 41 reads: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may 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."

they must agree to accept and employ Chapter VII resolutions.[76] As a result, all UN member States are clearly obligated to respect and implement Security Council Resolutions ("SCR"s). It is because they consented to the potential invasion of their sovereignty by joining the UN under the *pacta sunt servanda* principle.[77] This principle affirms that the legality of all international organizations' sanctions imposed on their member States can be proven based on the primary consent given by the targeted member State, and thus agreeing to implement the organization's Charter. Consequently, any sanctioning regimes established by the SC must be implemented by all UN member States, as the ICJ has also frequently advised so.[78]

Notably, according to Article 103 of the UN Charter, the obligations of member States under the UN Charter take precedence over other obligations under separate international treaties.[79] In this regard, the ICJ's *2 Lockerbie* cases more than affirming this supremacy,[80] also contribute to the Paper's opinion that the ICJ is authorized to review the SC's

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[76] U.N. Charter, art. 25.

[77] *Pacta sunt servanda* or the rule that any treaty in force is binding on the parties and must be carried out in good faith, is enshrined in the Vienna Convention on the Law of Treaties (VCLT) (Article 26 VCLT 1969), as well as the preamble and Article 2 of the UN Charter and is frequently invoked in international jurisprudence. *See* Baetens, Freya, *Pacta Sunt Servanda*, in *Elgar Encyclopedia of International Economic Law* 283 (CHELTENHAM, UK: EDWARD ELGAR PUBLISHING, 2017).

[78] For example, ICJ specified that the SCRs are "binding on all Member states of the United Nations, which are thus under obligation to accept and carry them out." *See Legal Consequences for States of South Africa's Continued Presence in Namibia (South West Africa) Notwithstanding Security Council Resolution* (Advisory Opinion) [1971] ICJ Rep 16, 50, ¶ 115 (hereinafter *Namibia*). This advisory opinion was a reaffirmation of the ICJ's previous opinion. *See Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949] ICJ Rep 174, ¶ 178 (hereinafter *Reparation*).

[79] U.N. Charter, art. 103.

[80] Questions of interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at 1992 (Libyan Arab Jamahiriya v. United states of America), Provisional Measures, Order of 14 April 1992, ICJ Reports (1992); Questions of interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at 1992 (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, ICJ Reports (1992).

decisions,[81] and that the obligations under Article 103 gives effect to Chapter VII's measures and takes precedence over other multilateral or bilateral treaties.[82] The rule of *lex specialis* has also confirmed this supremacy that any SCR takes precedence over other treaties.[83] It is clear that the supremacy of SCRs over other sources of international law, such as *jus cogens*, the UN Charter is not precluded by these rules or the ICJ's opinions and judgements.

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[81] The ICJ's *2 Lockerbie* cases which initiated against the United States (US) and the United Kingdom (UK) were concerned about the interpretation of *Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 (Montreal Convention). Accordingly, Libya requested ICJ to issue a preliminary decision to halt the two countries' efforts to impose UN embargoes on Libya. The basis was due to the alleged involvement of Libya in the attack on a civilian plane and the deaths of many passengers. The attack took place over Lockerbie, Scotland, on December 21, 1988, and resulted in 270 deaths, making it one of the worst terrorist attacks of the time. *See* Shiels, Robert, *The End of the Lockerbie Case*, 74 J. CRIM. L. 27 (2010).

Libya asserted in the applications that the efforts of the two countries violated Article 14(1) of the Montreal Convention that was the only appropriate means of communication between the Parties. According to Libya, any disagreement between two or more contracting States over the interpretation or application of the Convention that could not be resolved by negotiation must be brought to arbitration at the request of one of them. If the parties were unable to agree on the organization of the arbitration within six months following the request for arbitration, any of the parties could refer the dispute to the ICJ by submitting a request in accordance with the Court's Statute. Based on Article 36(1) of the ICJ Statute, the Court's jurisdiction extends to all matters expressly provided in the Charter or in treaties and conventions, which means that parties can bring a dispute about the interpretation or implementation of the conventions to the Court. The two cases raised a complicated question about the relationship between the UN's two main organs, the ICJ and the SC. Wellens, Karel, *The Legal Significance Given to the Security Council in the Court's Jurisprudence since Lockerbie*, 55 JAPANESE Y.B. INT'L L. 135-6 (2012).

[82] The Governments of all parties jointly notified the Court, in two letters dated September 9, 2003, that they had "agreed to discontinue with prejudice the proceedings." Following those notifications, on September 10, 2003, the President of the Court issued an order in each case recording the Parties' agreement to end the proceedings with prejudice and directing the case to be removed from the Court's docket. *See Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) and (Libyan Arab Jamahiria v. United States)*, Preliminary Objections, Judgments ICJ (Feb. 27, 1998) (hereinafter *Lockerbie*). *Available at* https://www.icj-cij.org/en/case/88 (Last visited on May 6, 2021).

[83] Asada, Masahiko, *Definition and Legal Justification of Sanctions*, *in* ECONOMIC SANCTIONS IN INTERNATIONAL LAW AND PRACTICE, 3,6 (Asada Masahiko, 2019).

In order to debate the rights-based boundaries of the SC's sanctioning resolutions, sanctions are classified as embargoes and targeted sanctions. According to the Paper's definition, embargoes are coercive measures that impose costs on States and major entities and sectors of States, such as the oil industry or a State's central bank. In addition, the Paper defines targeted sanctions as coercive measures such as asset freezes and travel bans against individuals, whether official or non-official, and entities governing privately or without affiliation with any State, as well as those against entities acting on behalf of the States but with minimal effects on people in general.

The Paper, according to this classification, examines whether the embargoes imposed by the SC should be reconsidered in light of their compliance with the preemptive norms of *jus cogens* as well as the UN Charter. Next is the SC's boundaries in imposing targeted sanctions while protecting the listed targets' substantive and procedural rights through evaluating rights-based challenges in the administrative reconsideration and judicial review phases. To understand how this Paper classified UN sanctions as embargoes and targeted sanctions, it is necessary to first review the history of sanctions imposed by the League of Nations and then the UN sanctions.

2.3 BRIEF HISTORY OF THE UNITED NATIONS' SANCTIONS

In 1917, Woodrow Wilson, the then-US President, addressed the notion of "economic weapons" as an alternative to the use of force in order to demonstrate the necessity of joining to the League of Nations. He stated that

> A nation that is boycotted is a nation that is in sight of surrender. Apply this economic, peaceful, silent, deadly remedy, and there will be no need for force. It is a terrible remedy. It does not cost a life outside the nation

> boycotted, but it brings pressure upon the nation which, in my judgment, no modern nation could resist.[84]

The League of Nations' coercive actions were legally codified in international relations by the League of Nations Covenant, which was used on a number of countries in the 1920s and 1930s.[85] However, most of them failed because the US neither joined the League nor endorsed the sanctions.[86] Following WWII, the international climate was favorable to any notion of global cooperation, which resulted in the establishment of the UN in 1945.[87] Since then, the SC has established thirty sanctions regimes including embargoes and targeted sanctions.[88] Only two of the thirty sanctions regimes were in place prior to the end of the

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[84] *See* Pape, Robert A., *Why Economic Sanctions do not Work*, 22.2 INT'L SECURITY 90-3 (1997)

[85] The Covenant in its article 16, paragraph 1, stated that "[s]hould any Member of the League resort to war in disregard of its covenants under Articles 12, 13, or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of another State, whether a Member of the League or not."

[86] Following WWI, some leaders began to believe that sanctions, which were usually associated with other forms of warfare, could replace all of them and be a complete alternative to any armed force. *See* Baer, George W., *Sanctions and Security: The League of Nations and the Italian-Ethiopian war, 1935-1936*, INT'L ORGANIZATION 165-9 (1973); *See also* Thouvenin, Jean-Marc, *History of Implementation of Sanctions, in* ECONOMIC SANCTIONS IN INTERNATIONAL LAW AND PRACTICE, 83, 85-6 (Asada Masahiko, 2019).

[87] In 1935, for the first time, sanctions' efficacy began to be questioned after they were unsuccessful in forcing Italy to extract its military from Abyssinia and Ethiopia's invasion by Mussolini's troops. Furthermore, because the United States had not joined the League, the sanctions could not get a significant effect. This ineffectiveness did not prevent other States to not employ another war after WWI. Preventing initiation of a new war caused sanctions to be used even during WWI and the interwar period. Nonetheless, nothing prevented WWII, during which economic weapons were again an associated measure with the armed force. *See id.*

[88] As of May 6, 2021, in Southern Rhodesia, *See* SRC 253 (1968) (declaration of independence by white minority regime), South Africa, *See* SRC 421 (1977) (Apartheid regime), the former Yugoslavia *See* SRC 713 (1991) (Outbreak of internal fighting), Haiti, *See* SRC 841 (1993) (Military coup), Iraq, *See* SRC 661, (1990) (Kuwait's invasion); SCR 1483 (2003) (Deposed Iraqi regime), Angola *See* SCR 864 (1993)

Cold War in 1990: the first as an embargo regime, was imposed against Rhodesia in 1968 after its unilateral declaration of independence in 1965,[89] and the second embargo was imposed in 1977 to confront the Apartheid government in South Africa.[90] The UN's inability

(Internal political conflict), Rwanda *See* SCR 1011 (1995) (Civil war and genocide), Sierra Leone *See* SCR 1132 (1997) (Civil war), Somalia *See* SCR 733 (1992) (Internal violence), Kosovo *See* SCR 1160 (1998) (Serbian forces violence and terrorist acts of Kosovo Liberation Army), Eritrea and Ethiopia *See* SCR 1298 (2000) (Conflict between Eritrea and Ethiopia), Liberia *See* SCR 985 (1995) (Liberian civil war); SCR 1343 (2001) (Liberian support for rebels in Sierra Leone); SCR 1521 (2003) (Internal violence), Côte d'Ivoire *See* SCR 985 (1995) (Liberian civil war); SCR 1343 (2001) (Liberian support for rebels in Sierra Leone); SCR 1521 (2003) (Internal violence), Sudan *See* SCR 1572 (2004) (Internal conflict); *See* SCR 1556 (2004) (Atrocities committed by Janjaweed militia), Lebanon *See* SRC 1636 (2005) (Investigations into assassination of Rafiq Hariri by ICCC), DPRK *See* SCR 1718 (2006) (Nuclear program), Iran *See* SCR 1737 (2006) (Uranium enrichment program), Libya *See* SCR 748 (1992) (Bombing the Pan American flight over Lockerbie); SCR 1970 (2011) (Internal conflict and use of force against civilians), Guinea-Bissau *See* SCR 2048 (2012) (Military coup), Yemen *See* SCR 2140 (2014) (Terrorist attacks inside Yemen), South Sudan *See* SCR 2206 (2015) (Internal conflict between the government and opposition forces) and Mali *See* SCR 2374 (2017) (Violations of the 2015 Agreement on Peace and Reconciliation), Afghanistan *See* SCR 1988 (2011) (Taliban activities in Afghanistan), Congo *See* SCR 1493 (2003) (Domestic conflict and exploitation of natural resources), Central African Republic *See* SCR 2127 (2013) (Breakdown of law and order and domestic conflict), as well as against ISIL (Da'esh) and Al-Qaida and the Taliban *See* SCR 1267 (1999) (International terrorism).

[89] The unilateral declaration of independence in 1965 had started by Ian Smiths' white minority regime. After three years, the SC employed a regime of embargoes on Rhodesia and prohibited all importations and exportations to and from the Rhodesian territory. *See* SCR 253 (1968).

[90] These measures which prohibited the sale of military equipment to the South African regime (*See* SCR 418 (1977), made them be regarded as one of the most successful UN targeted sanctions. The success of these measures was largely due to the type of Apartheid government that was accountable to its constituents. *See* Rodman, Kenneth A., *Public and Private Sanctions Against South Africa*, 109.2 Political Science Quarterly 330-4 (1994).

It should be noted that, while the UNSC labeled this regime as "a mandatory arms embargo against South Africa," in the sense that the Paper uses the term, these measures are considered targeted sanctions. It is because not only their adverse effects on the public are very minimal, but they may even have beneficial effects on the civilian population if funds that would have otherwise been used to purchase weapons to repress civilians are instead used to provide for their essential needs. *See* https://digitallibrary.un.org/record/66633?ln=en (last visited Jan. 3, 2023).

Notably, the SC has recently introduced the specific term "targeted arms embargo" in paragraphs 11 to 14 of S/RES/2653 (Oct. 21, 2022). These paragraphs explain targeted arms embargoes which are imposed against individuals and entities that have been designated by "the Committee established pursuant to paragraph 19 of this resolution, as responsible for or complicit in, or having engaged in, directly or indirectly, actions that threaten the peace, security or stability of Haiti." *See id*, at ¶15. *Available*

to agree on proposed resolutions between 1945 and the end of the Cold War in 1989 explains the limited use of economic sanctions between 1945 and 1989.[91] The situation significantly improved in the late 1980s and early 1990s, when the US-Soviet Union relationship improved, allowing the two countries to collaborate more effectively and take decisive actions, causing the SC to become overly active, to the point where the 1990s were dubbed the "sanctions decade."[92] It means that for slightly more than three decades, the UN has used multilateral sanctions including embargoes and targeted sanctions.

The sanctions decade began on August 2, 1990, four days after the Kuwait invasion, when the SC imposed a series of embargoes against Iraq.[93] These embargoes were designed to persuade Iraq to withdraw its troops from Kuwait, to begin the reparation process, and, ultimately, to ensure the elimination of its alleged weapons of mass destruction programs.[94] Subsequently the regime resulted in serious collateral humanitarian effects to civilians, by prohibiting the importation of all products and commodities into Iraq, as well as the exportation of all products and commodities originating in Iraq.[95] After a few years and by

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at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/646/04/PDF/N2264604.pdf?OpenElement (last visited Jan. 3, 2023).

[91] *See* Brzoska, Michael, *International Sanctions Before and Beyond UN Sanctions*, 91.6 INT'L AFF. 1339-49 (2015).

[92] *See* Asada, *supra* note 83, at 3.

[93] *See* Alnasrawi, Abbas, *Iraq: Economic Sanctions and Consequences, 1990–2000*, 22.2 THIRD WORLD QUARTERLY 205 (2001).

[94] A trade embargo, an oil embargo, the freezing of Iraqi government financial assets abroad, an arms targeted sanctions (based on the Paper's definition), the suspension of international flights, and the prohibition of financial transactions were among the restrictions imposed. All commerce in the Shatt-al-Arab waterway in the south of Iraq was intercepted, and all vessels approaching the Jordanian port of Aqaba were boarded and inspected. *See* Alnasrawi, *supra* note 93, at 208.

[95] The Iraqi embargoes remained in place until Saddam Hussain was overthrown from power in 2003.

finding the negative consequences of Iraqi embargoes, the UNSC shifted toward designing the first generation of rights-based sanctions, which targeted political leaders or armed organizations while exempting other civilians.[96]

Meanwhile, Yugoslavia was embargoed in 1991, for many violations of humanitarian law,[97] and in 1992, Somalia embargoed for its internal conflict and subsequent humanitarian crises.[98] Concurrently, the UN imposed embargos against Libya for international terrorism.[99] In 1993, the National Union for Total Independence of Angola ("UNITA") rather than the Angolan government triggered by the UN embargoes.[100] In 1993, in order to resist the military coup, the SC passed multiple resolutions and imposed embargoes prohibiting the sale or supply of petroleum products and armory materials to Haiti.[101] In 1994 and due to the horrific genocide, the SC employed embargoes against Rwanda.[102] Three years later, in 1997, it imposed embargos on Sierra Leone as a result of the military coup.[103]

Since 1999, the main UN targeted sanctions regime has been in place, which encompasses a package of sanctions targeting the Taliban, and since then has become one of the most critical regimes.[104] Following the September 11, 2001 terrorist attacks, the SC

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[96] Lynch, Colum, *Sunset for UN Sanctions?* FOREIGN POLICY (Oct. 14, 2021).

[97] U.N. Doc. SCR 713 (1991).

[98] U.N. Doc. SCR 733 (1992).

[99] U.N. Doc. SCR 748 (1992).

[100] U.N. Doc. SCR 864 (1993).

[101] U.N. Doc. SCRs 841, 861, 862, 867, 873 (1993).

[102] U.N. Doc. SCR 1118 (1994).

[103] U.N. Doc. SCR 1132 (1997).

[104] It was mainly because of the bombing of the US embassies in Dar-el-Salam in Tanzania and Nairobi in Kenia. It targeted the funds of Taliban because of protecting Osama Bin Laden. The resolution

amended that regime by compiling a list of individuals, including Osama Bin Laden and individuals or entities associated with him, as well as Al-Qaida.[105] This Resolution serves as the basis for the vast majority of rights-based challenges to the UN targeted sanctions, some of which will be discussed in this Paper.

In 2003, the SC imposed embargos in a limited way against the Democratic Republic of Congo following its internal turmoil.[106] The UN embargoes against Liberia and Sudan in 2003 and 2005 were founded on the same logic.[107] As a result of the political assassination, Lebanon became the next target of the UN targeted sanctions in 2005.[108] The main reason for the embargoes imposed on North Korea[109] and Iran by the SC in 2006 was their nuclear proliferation.

Iran's embargoes regime specifically attempted to put an end to its uranium enrichment program, which was suspected of being part of an effort to develop a nuclear weapon.[110] In 2006, the SC enacted Resolution 1696, which demanded Iran to stop its nuclear developments, despite Iran's claims that its program is peaceful and poses no threat.[111] Iran

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demanded that the Taliban turn over Bin Laden and ordered that all Taliban's assets be frozen. U.N. Doc. SCR 1267 (1999).

[105] Notably, the task of deciding on listings at the UN level is often delegated to the Sanctions Committee, a body entrusted with managing the sanctions regime. Because designated persons feature as entries on blacklists, sanctions are easy to modify, and designations can be added to or removed from the list without fundamentally altering the sanctions regime. *See* Gordon et. al., *supra* note 71, at 30.

[106] U.N. Doc. SCR 1493 (2003).

[107] U.N. Doc. SCR 1591 (2005).

[108] U.N. Doc. SCR 1636 (2005).

[109] U.N. Doc. SCR 1718 (2006).

[110] *See* Laub, Zachary, *International Sanctions on lran,* COUNCIL ON FOREIGN RELATIONS 1 (2015).

[111] U.N. Doc. SCR 1696 (2006).

refused, and five months later, the SC passed Resolution 1737, which imposed a broad range of embargoes on Iranian financial sectors, as well as targeted sanctions against identified individuals and entities.[112] The regime imposed severe restrictions on the supply of goods and services to Iran, as well as freezing the assets of individuals mentioned in the resolution's Annex.[113]

Although the sanctions were a mix of embargoes and targeted sanctions, this Paper classified them as embargoes in general because they primarily targeted Iran's main sectors entities and industries. Furthermore, it is because the SC had urged States to be vigilant in their dealings with Iranian banks, including the Central Bank of Iran in providing financial services to Iranian companies and their nationals that have effectively triggered Iran's main industry of oil exportation.[114] Iran's embargoes were lifted on January 16, 2016, following the UN's approval of the Joint Comprehensive Plan of Action ("JCPOA").[115]

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[112] U.N. Doc. SCR 1737 (2006).

[113] *See, e.g.*, S.C. Res. 1737, ¶ 12; S.C. Res. 1803, ¶¶ 5, 8; S.C. Res. 1929, ¶¶ 11-12, 19.

[114] S.C. Res. 1803, U.N. Doc. S/RES/1803 ¶ 3,9,10 (Mar. 3, 2008); S.C. Res. 1929, U.N. Doc. S/RES/1929 ¶ 14,21,23,24 (June 9, 2010).

[115] The JCPOA agreed by Iran and the five permanent members of the SC and Germany and entered into effect on July 14, 2015. Based on the JCPOA, Iran agreed *inter alia* to reduce its stockpiles of enriched uranium substantially in return for lifting the UN embargoes and easing the EU and US unilateral embargoes. Notably, JCPOA is not a legally binding treaty because of the parties were volunteer in implementing the measures. *See Joint Comprehensive Plan of Action*, U.N. SCR 2231 (2015), Annex A. The provisions for the termination were specified in resolution 2231. U.N. Doc. S/RES/2231 ¶ 7(a). The JCPOA has a *snapback* procedure to be implemented if any party files a complaint concerning Iran's noncompliance. If the snapback procedure be triggered, all the UN embargoes against Iran would be reactivated immediately. *See* SCR 2231 (2015) ¶¶¶ 11, 12, and 13. Although the US withdrew from the JCPOA on May 8, 2018, the other parties remained committed to the agreement, and all members, including the US, are currently negotiating to resurrect the JCPOA As of May 6, 2021.

In 2009, the UN designated Eritrea as the next target of UN embargoes for endangering international security and supporting terrorism.[116] Today, fourteen ongoing sanctions regimes are in place which mainly are embargoes, against Somalia, Al-Qaida, the Islamic State of Iraq and the Levant ("ISIL"), Iraq, Liberia, Congo, Sudan, Lebanon, the Democratic People's Republic of Korea ("DPRK"), Libya, Afghanistan, Guinea-Bissau, the Central African Republic, and South Sudan, with the objectives of advancing conflict resolutions, nuclear non-proliferation, and counterterrorism.[117]

2.4 BOUNDARIES OF THE UNITED NATIONS' EMBARGOES

Although the SC's sanctioning resolutions supersede any conflicting treaty, this Paper supports the controversial view that the SC's embargoes are also subject to *jus cogens* and the UN Charter's limitations. As a result, it claims that the notion that the UNSC is unbound by law is factually inaccurate.[118] The fundamental issue is that the SC's sanctioning power

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[116] U.N. Doc. SCR 1907 (2009).

[117] A sanctions committee chaired by a non-permanent member of the SC oversee each regime. As of January 3, 2023, 11 of the 14 sanctions committees are supported by ten monitoring groups, teams, and panels. *See* https://www.un.org/securitycouncil/sanctions/information (Last visited Jan. 3, 2023).

[118] The Paper contends that for any council to be unbound by law, its authority must be granted by all of its member States, with periodic affirmation and approval, which is not the case with the SC but could be satisfied in the case of the United Nations General Assembly (UNGA), where all members have an equal share and voting power. In this regard, the SC functions similarly to some trade organizations, such as the International Monetary Fund (IMF) or the World Trade Organization (WTO), with broad powers granted to developed countries due to the size of their financial contribution or their priority in establishing the organization as WWII victors. Because of this flaw, other vulnerabilities have been discovered such as where SC is unable to obtain the necessary consent from its permanent members. Embargoes against Syria in 2011 and against Ukraine in 2014 were two instances where the P5 veto prevented the SC from acting. *See Principal Legal Instrument*, Council Regulation (EU) No 36/2012 (Syria) and No 833/2014 and 692/2014, (Ukraine); *See* Bedjaoui, Mohammed, *The New World Order and the Security Council: Testing the Legality of its Acts* (THE HAGUE: MARTINUS NIJHOFF, 1994); *See also* Nolte, Georg, *The Limits of the Security Council's Powers and its Functions in the International Legal System: Some Reflections*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS 315–20 (Michael Byers ed., 2000).

should be limited, and this Paper states that when imposing embargoes, the SC must follow *jus cogens* and act within the UN Charter's bounds, which will be dealt with separately.

2.4.1 The Principle of *Jus Cogens*

The rights-based boundaries of UN actions according to a wide body of literature in international law, should first be determined by their adherence to preemptory norms of *jus cogens*.[119] The main question is whether the SC is legally bound to uphold *jus cogens* in imposing and implementation of embargoes, as such the people's starvation proximately caused by these measures in the targeted States.[120] It is due to the fact that the effects of some episodes of sanctions are so severe that a large body of literature has labeled them as "a genocidal tool", claiming that embargoes imposed by the UN in some episodes drastically increased mortality rates.[121]

One of these episodes was the UN sanctions against Iraq in 1991, which were designed to suffocate the country's leadership, but it was the Iraqi people who mostly suffered,[122] to the extent that Denis Halliday, the former UN humanitarian coordinator in

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[119] Petculescu, Ioana, *The Review of the United Nations Security Council Decisions by the International Court of Justice*, 52 NETHERLANDS ILR 167-195 (2005); Schweigman, David, *The Authority of the Security Council Under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice*, BRILL NIJHOFF 197-202 (2001).

[120] Doehring, Karl, *Unlawful Resolutions of the Security Council and Their Legal Consequences*, 1.1 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 98-9 (1997).

[121] For a list of literature *See* Farrall, Jeremy, UNITED NATIONS SANCTIONS AND THE RULE OF LAW 5 (2007).

[122] *See identical letter from the Permanent Representative of Iraq to the UN Secretary General and the President of the Security Council*. *Available at* https://digitallibrary.un.org/record/110595?ln=en (Last visited on May 6, 2021).

Iraq, has specifically characterized them, as "genocidal".[123] After remaining for more than a decade, Iraqi embargoes have resulted in a humanitarian crisis, particularly affecting women, and children through increasing hunger, sickness, and mortality.[124] For example, the infant mortality rate for Iraqi children under the age of five reached an all-time high of 40,000 per year, because of diarrhea, pneumonia, and malnutrition as a result of a lack of nutritious meals, as well as contaminated water and sanitation.[125] Based on a Harvard study, 47,000 more children died in Iraq during the first eight months of 1990, for a total of 567,000 deaths as a result of diseases and food, water, and medicine shortages during the embargoes.[126] Also based on the statement of the Chief of the UN's World Food Program in Iraq in 2000 "70% of household income is spent on food, which is considered an indicator of imminent famine by the UN and world standards."[127]

All of these horrible consequences led to the assumption that, at the very least, the UN embargoes against Iraq violated the obligation to prevent genocide under the Genocide

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[123] Halliday, Denis, *Iraq: The Impact of Sanctions and U.S. Policy*, *in* IRAQ UNDER SIEGE 45 (Anthony Arnove ed., 2000).

[124] Buck, Lori & Nicole Gallant & Kim Richard Nossal, *Sanctions as a Gendered Instrument of Statecraft: The Case of Iraq*, 24.1 REV., INT'L STUDIES 71-2 (1998).

[125] Various websites have been dedicated to chronicling the human costs of Iraqi embargoes, and several books have been produced concerning the destructive impacts of UN embargoes on Iraq. For a list of the publications *see* McGee, Robert, *Trade Sanctions as a Tool of International Relations*, 2 COMMENTARIES ON L. & PUBLIC POLICY 85-89 (2004).

[126] *See* Bisharat, George, *Sanctions as Genocide*, 11 TRANSNAT'L L. & CONTEMP. PROBS. 379 (2001).

[127] See Bennis, Phyllis, *Will the Last Humanitarian Coordinator in Iraq Please Turn Out the Lights*? THIRD WORLD RESURGENCE (Feb. 18, 2000); As another example, despite having a more limited scope than the Iraqi embargoes, the Haitian embargoes in 1993 were claimed to have contributed to severe human rights violations, such as an increase in infant mortality. *See generally* Swindells, Felicia, *UN Sanctions in Haiti: A Contradiction under Articles 41 and 55 of the UN Charter*, 20 FORDHAM INT'L. L. J. 1878-85 (1996).

Convention, which was adopted by the UN General Assembly in December 1948. However, the following four issues must be addressed in order to determine whether the UN embargoes actually violated *jus cogens* by not preventing the genocide.

Primarily, how the duty to prevent genocide recognized as *jus cogens*? Secondly, how is it extended to the actions of the SC, given that the convention governs sovereign States that commit genocide? Thirdly, since genocide is defined as specific "acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group" in Article 2 of the Genocide Convention, and thus requires intent to destroy or *dolis specialis*, how can the existence of intent to destroy the Iraqi people be proven in the case of UN embargoes against Iraq? Is it accurate to conclude that the sanctions imposed on Iraq contained elements of the crime? And, if so, how is genocide possible under the administration of international legal order? And the final question is whether Iraqis were killed basically because they were Iraqis, without regard for any other reason?

To respond in order, primarily it should be noted that the prohibition of genocide[128] and the obligation of States not to encourage or condone genocide[129] are two main grounds of *jus cogens* in international and national law scholarship. It also was recognized by Article 53 of the VCLT, which states that a treaty is null and void if it is concluded in conflict with peremptory norms which cannot be broken or deviated from, because they are believed to be crucial to the welfare and even survival of the global community.[130] While drafting what

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[128] *See e.g. Armed Activities on the Territory of the Congo*, New Application (*Democratic Republic of Congo v. Rwanda*), Jurisdiction and admissibility, Judgment of 3 February 2006, para 64.

[129] *See e.g.* Restatement (Third) of the Foreign Relations Law of the United States (Revised), § 702.

[130] Article 53 VCLT 1969.

became Article 53 of the Vienna Convention, the ILC determined that it is the subject-matter importance of a rule that makes it peremptory and proposed few substantive norms as examples of *jus cogens*, such as prohibitions on aggression, *genocide*, slavery, as well as basic human rights and self-determination.[131]

In addition, the ICJ has recognized the supremacy of peremptory norms of *jus cogens* over SC's decisions in a number of cases, and outside the genocide convention, including the *Legality of the Threat or Use of Nuclear Weapons*[132] and the *Gabcikovo-Nagymaros Project, Hungary v. Slovakia.*[133] Domestic courts have also affirmed the supremacy of *jus cogens* over domestic implementation of the UN sanctions, because of their very high situation in international law.[134]

Also it has been widely discussed in international law scholarship, that implementation of the UN embargoes could be considered illegal if they do not adhere to *jus cogens* norms, meaning that States must not comply with SC's embargoes in these instances.[135] As such professor Orakhelashvili emphasizes that if the SC makes a sanctioning

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[131] *See* Farrall, Jeremy, UNITED NATIONS SANCTIONS AND THE RULE OF LAW 71 (2007).

[132] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226, 258, ¶ 83 (hereinafter *Nuclear Weapons*).

[133] Gabcikovo-Nagymaros Project, *Hungary v. Slovakia*, Judgment Merit, [1997] ICJ Rep 7 (hereinafter *Hungary v. Slovakia*).

[134] "[T]he appropriate test is the universal acceptance of the proposition as a legal rule by states, and the recognition of it as a rule of *jus cogens* by an overwhelming majority of states, crossing ideological and political divides". *See* Gordon et. al., *supra* note 71, at 14-15; Weatherall, Thomas, *JUS COGENS* INTERNATIONAL LAW AND SOCIAL CONTRACT, 231-2 (2015).

[135] Gasser, Hans-Peter, *Collective Economic Sanctions and International Humanitarian Law An Enforcement Measure Under the United Nations Charter and the Right of Civilians to Immunity: An Unavoidable Clash of Policy Goals?* 56 Zeitschrift for AUSLANDISCHES OFFENTLICHES RECHT UND VOLKERRECHT 871, 883 (1996).

decision that contravenes *jus cogens*, that decision should be considered void ab initio.[136] It is because these non-derogable rules are preemptive in nature with a significance that makes their breach unjustifiable under any circumstances or waivable in the sense of *jus dispositivum*.[137] There are investigations of those SC's practices in which the SC extended implicit support for a violation of a peremptory norm or failed to act when faced with such a breach.[138]

In this regard, Judge Lauterpacht in *Bosnia* stated that as *jus cogens* unconditionally binds the SC, it would not deliberately adopt a resolution violating a peremptory norm such as that prohibiting genocide.[139] Specifically, he examined the hypothesis that SCR 713 could be interpreted as a call for the UN members to become, to some extent, supporters of the Serbs' genocide, and insisted that because genocide is prohibited by a rule of *jus cogens*, the SCR would be null and void, and UN members would be free to disregard it.[140] He also emphasized that "the relief which Article 103 may give the Security Council in case of one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of

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[136] Orakhelashvili, Alexander, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 EJIL 83 (2005).

[137] Article 53 of the VCLT addressed: "[A] peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."; Doehring, Karl, *Unlawful Resolutions of the Security Council and Their Legal Consequences*, 1.1 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 99 (1997).

[138] Orakhelashvili, Alexander, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 EJIL 71-3 (2005).

[139] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), Further Requests for the Indication of Provisional Measures, Order of 13 September 1993, ICJ Reports, 1993, p 407.

[140] *See id,* at 102-3.

norms – extend to a conflict between a Security Council resolution and *jus cogens*."[141] Also in response to the issue that the UNSC also would be required to respect prevention of genocide, he remarked, "one only has to state the opposite proposition thus—that a Security Council resolution may even require participation in genocide—for its unacceptability to be apparent."[142]

As has been demonstrated, the obligation to prevent genocide is recognized as *jus cogens* in numerous scholarships, also the ICJ and domestic courts agree that this obligation could be extended to cover the actions of the SC as well as sovereign States in putting those actions into practice domestically. Still, the third issue which is proving the hateful motivation or determining the specific intent, is more problematic to address.

It is because some commentators believe that if the non-derogable nature of *jus cogens* norms would imply that States have strict liability in those cases and they are precluded from modifying these norms through ordinary consensual processes and it would be necessary to conclude that States have very little control over the contents of *jus cogens* and that the element of intent would no longer be the defining characteristics of *jus cogens* and its components such as genocide.[143] However, even though the Convention's drafters were aware that genocide is regarded as *jus cogens*, they explicitly mentioned the element of specific intent, making it impossible to ignore at all.

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[141] *See id,* at 100.

[142] *See id,* at 440.

[143] Linderfalk, Ulf., UNDERSTANDING JUS COGENS IN INTERNATIONAL LAW AND INTERNATIONAL LEGAL DISCOURSE 102 (2020).

Therefore, it must be clearly established that an action was motivated by a prohibited motive; however, this requirement may create additional issues, as noted specifically in the words of genocide specialist Leo Kuper, who stated that "[g]overnments hardly declare and document genocidal plans in the manner of the Nazis. The intent requirement provides easy means for evading responsibility."[144] To resolve this issue, we may use the criminal law's element of intent, because it assumes that an actor intends the foreseeable consequences of his or her actions and that no further proof of intention or motive is necessary as long as the action was neither involuntary nor unknowing.[145]

If we accept the definition of criminal intent, then if it could be established that the sanctions placed on Iraq were deliberate, systematic, and had foreseeable humanitarian consequences, they might have constituted genocide, and violating *jus cogens*. The possible explanation for this, is apparent because the sanctions were planned deliberately and implemented systematically for more than a decade, with the impact on public health—particularly that of children—being a foreseeable and actual consequence. According to Elias Davidsson, in the case of the UN sanctions against Iraq, "an assessment of the acts committed, the degree of premeditation available to the defendants, the foreseeability of the consequences, the feedback received regularly by the defendants regarding the consequences of their deeds and the span of time in terms of months or years of the act" all are enough to constitute a prima facie case of genocide.[146]

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[144] Kuper, Leo, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY 35 (1981).

[145] Gordon, Joy, *When Intent Makes All the Difference in the World: Economic Sanctions on Iraq and the Accusation of Genocide*, 5 YALE HUM. RTS. & DEV. L.J. 57 (2002).

[146] Davidsson, Elias, THE ECONOMIC SANCTIONS AGAINST THE PEOPLE OF IRAQ: CONSEQUENCES AND LEGAL FINDINGS 133-34 (1998).

However, this assertion is still incomplete and there is one more element to be proved to determine the UN embargoes against Iraq constituted genocide and thus violated *jus cogens*, which is whether the Iraqis suffered and died simply because they were Iraqis, or whether the SC's intention was just imposing the authorized measures to maintain international peace and security as the UN stated policy objective of the Iraqi sanctions was to eliminate any weapons of mass destruction? (Despite the fact that sanctions killed more people in the twentieth century than all weapons of mass destruction combined.)[147]

Nonetheless, the answer to the latter question is that, while the people died because they were living in Iraq, the UN did not impose sanctions to kill them because they were Iraqis and thus while this is not a moral assertation but based on the rules of international law and the plain wording of the Convention, the UN did not commit genocide and did not violate *jus cogens*. Relatedly, Professor Gordon by labling the collateral situation that was caused by the sanctions in Iraq as the "perfect injustice"[148] mentioned that "[w]hat was probably not foreseen [in the process of drafting Genocide Convention] was the possibility that atrocities might be committed by institutions of international governance, acting in the name of international law and human rights."[149]

2.4.2 The United Nations' Charter

Apart from *jus cogens*, the Paper reaffirms the SC's adherence to the UN's Charter, which includes the UN's primary purpose, as stated in the Charter's preamble, as well as the

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[147] Mueller, John & Karl Mueller, *Sanctions of Mass Destruction*, *Foreign Affairs*, 43 (May 1999).

[148] *See generally* Gordon, Joy, *Smart Sanctions Revisited*, 25.3 ETHICS & INT'L AFF. 317-18 (2011); Gordon, Joy, *When Intent Makes All the Difference in the World: Economic Sanctions on Iraq and the Accusation of Genocide*, 5 YALE HUM. RTS. & DEV. L.J. 83 (2002).

[149] *Id*, at 77.

other conditions stated in its articles. In this regard, it assessed the fundamental rights-based boundaries as well as the principle of proportionality.

2.4.2.1 Human Rights Boundaries

The UN's Charter insists in fundamental human rights and pledges to use international mechanisms to promote the economic and social advancement of all peoples, as specified in Article 1(3) and the Preamble, by stating that one of the UN's purposes is to promote and encourage respect for human rights and fundamental freedoms.[150] As a result, it is reasonable to assume that the primary policy objective for the UN sanctioning implementation is to address global economic, social, cultural, or humanitarian issues.[151] This objective, which can be interpreted as a boundary, is also suggested by the principles of the UN, which state that the SC's primary responsibility is to "maintain peace and security."[152] However, the Paper contends that the negative effects of embargoes could themselves jeopardize peace and security.[153] It indicates that implementing embargoes would endanger the UN's major goal of promoting "a higher standard of living, full employment, and conditions of economic and social progress and development [. . .] universal respect for, and observance of, human rights and fundamental freedoms for all."[154]

It implies that all UN embargoes must be implemented within the framework of the UN Charter; however, it could be argued that the UN Charter only required UN member States to

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[150] U.N. Charter art. 1, ¶ 3.

[151] U.N. Charter art. 1, ¶ 1.

[152] U.N. Charter art. 24, ¶ 2.

[153] It will be discussed later *infra* part 3.2.

[154] U.N. Charter art. 55.

implement SCRs, not the SC itself.[155] Because a UN organ cannot act in violation of the UN Charter, and the UN Charter requires upholding human rights standards, both member States and the SC are obligated. Thus, States are required to carry out and domestically implement only those SCRs that are in accordance with the Charter and since the use of comprehensive embargoes clearly violates the Charter's principles, these resolutions are not binding.[156]

Comprehensive embargoes imposed by the UN, such as those imposed on Iraq, are considered illegal in this Paper, because it would be impossible to uphold the Charter's obligations while implementing these measures.[157] In other words, if SCRs violated the UN's purposes or, more broadly, international human rights obligations, they possibly would be in violation of the Charter.[158] However, this is not the case with limited embargoes or targeted sanctions that have gone through the proper assessment and implementation process. This position was emphasized by the ICJ in *Certain Expenses* as well, which asserted that even when the SC's actions are required to maintain international peace and security, the presumption should be that it is not acting *ultra vires*.[159] Furthermore, the International

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[155] U.N. Charter arts. 24, 25. The argument will be discussed later *infra* part 3.2.

[156] The UN had already imposed comprehensive embargoes on five occasions: in Southern Rhodesia (SCR 232/1966), Iraq (SCR 661/1991), Yugoslavia (Former), SCR 757/1992, Bosnia and Herzegovina (SCR 820/1993), and Haiti (SCR 841/1993).

[157] *See* Swindells, *supra* note 127, at 1878.

[158] To read the comments of other supporters of this argument *see* Stalls, Justin D., *Economic Sanctions*, 11 U. MIAMI INT'L & COMP. L. REV. 137 (2003); Schweigman, David, *The Authority of the Security Council Under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice*, BRILL NIJHOFF 202 (2001); *See also* Orakhelashvili, Alexander, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 EUROPEAN J. INT'L. L. 64 (2005); *See generally* Gordon et. al., *supra* note 71, at 14.

[159] *Certain Expenses of the United Nations* (Advisory Opinion) (1962) ICJ Reports 151, 168 (hereinafter *Certain Expenses*).

Tribunal for the Former Yugoslavia ("ICTY") confirmed in *Prosecutor v. Dusko Tadic* that the SC's power is not unlimited and that the SC is subject to the boundaries of the Charter in all circumstances.[160]

Nonetheless, the Paper was unable to identify specific characteristics for these limitations because they appear to be overly broad defined. In other words, the SC's limitations on imposing embargoes under the Charter may be interpreted so broadly that they become practically meaningless and ambiguous, necessitating only the most basic elements. Notwithstanding, the Paper believes that, while the UN purposes are very broadly and more politically than legally defined, the legally binding nature of the UN purposes is undeniably clear under Article 24(2), and they are thus expressly stated to be subjected of legal protection.

The Paper trusts that the SC's actions are limited to the main principles outlined in Articles 1 and 2 of the Charter, as well as the more explicitly defined Charter-based fundamental limitations imposed to UN member States and the SC.[161] These Charter-based fundamental limitations include the respect to the principle of self-determination,[162] human rights,[163] sovereign equality,[164] good faith,[165] disputes settlements through peaceful means,[166]

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[160] *Prosecutor v. Dusko Tadic a/k/a 'Dule'*, Case No. IT-94–1-AR72, 2 October 1995, para. 28 (hereinafter *Tadic*).

[161] *See* Schweigman, *supra* note 158, at 167-8.

[162] U.N. Charter art. 1, ¶ 2.

[163] U.N. Charter art. 1, ¶ 3.

[164] U.N. Charter art. 2, ¶ 1.

[165] U.N. Charter art. 2, ¶ 2

[166] U.N. Charter art. 2 ¶ 3.

refraining from the threat or use of force,[167] and lastly respecting the principle of non-intervention to the member States' sovereignty.[168] As such, Article 1(2) states that the UN's founding purpose is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of people."[169] According to the ICJ's advisory opinion in *Western Sahara*, the right to self-determination requires a free and genuine expression of the concerned peoples' will,[170] which means each State has the sovereign right to determine its own political structure, that is also mentioned in Article 2(1) of the Charter through the principle of sovereign equality among all UN Members.[171]

Relatedly, Article 1(3) emphasizes the importance of preserving "human rights and fundamental freedoms for all, without regard to race, sex, language, or religion."[172] It could be assumed that the SC is required by this Article to consider the negative consequences of its embargoes on the targeted State's population when drafting and implementing sanctioning resolutions. However, one could argue that while embargoes are in place, infringement of people's right to self-determination, human rights, or even a state's sovereignty is unavoidable.[173] Also, respecting the will of the people concerned should be considered when designing any sanctioning resolution in order not to violate their genuine expression of their

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[167] U.N. Charter art. 2 ¶ 4.

[168] U.N. Charter art. 2 ¶ 7.

[169] U.N. Charter art. 1, ¶ 2.

[170] The *Western Sahara* case, Adv. Op., ICJ Rep. ¶ 55 (1975) (hereinafter *Western Sahara*).

[171] U.N. Charter art. 2, ¶ 1.

[172] U.N. Charter art. 1, ¶ 3.

[173] *See* Schweigman, *supra* note 158, at 167-9. Similarly in cases where targeted sanctions are imposed on leaders and governments who themselves violate their people's right to self-determination, the UNSC struggles to justify them accordingly, because they often exceed their objectives.

will in selecting their political structure and subsequently the State's sovereignty. It could be argued that when people freely elect their leaders, the actions of those leaders will be judged in accordance with the people's will. However, the majority of scenarios for imposing embargoes are against those States where the actions of their leaders differ over time, implying that the concerned people may freely elect their leaders, but the leaders' actions will differ after the election.

As a result, determining whether each regime's target is a State with an authoritarian regime or a democratic regime in terms of freely electing officials and the ability to monitor their actions over time is critical. This is especially true when the concerned people democratically elect their leaders, who then go on to become authoritarians and commit international wrongful acts. In the latter case, UN embargoes should be extremely limited and implemented only to the extent that they narrowly change the leaders' wrongdoings; otherwise, the embargoes would be in violation of the Charter. As it had been shown in the history, the majority of UN's embargoes are aimed at States that have violated the rights of other States or the international community as a whole by engaging in some type of international wrongful act.

As a result, the Paper claims that a probable and short-term impact on a State's sovereignty can be justified by that State's prior wrongdoing; however, it concludes that long-term embargoes are illegal because they can impinge on that State's sovereign rights for

decades after they are lifted.[174] Relatedly, the Paper believes that the majority of UN's embargoes against a State's main sector and product could have such long-term effects.[175]

2.4.2.2 The Principle of Proportionality

As stressed by the late Thomas Franck, the principle of proportionality has traditionally not been recognized as one of the general principles under CIL, and it has to be seen if proportionality is fit to function as a self-standing principle in its own right.[176] Also, despite being addressed in International Humanitarian Law ("IHL") and countermeasures scholarships, the SC's boundaries in imposing sanctions in accordance with the principle of proportionality are primarily set in the UN Charter.

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[174] *See* Rowhani, Mohsen, *Corruption in the Middle East as a Long-lasting Effect of the U.S. Primary and Secondary Boycotts Against Iran*, 3 ABA MIDDLE EAST L. REV. 30-33 (2019).

[175] *Id.* For example, Iranian oil embargoes had long-term consequences because the target was unable to reclaim their previous positions in the lawful international oil market once the embargoes were lifted, forcing it to sell in the black market, which leads to corruption and its long-term consequences.

[176] Franck, Thomas, *On Proportionality of Countermeasures in International Law*, 102 AJIL 715 (2008); *See also* Franck, Thomas, *Proportionality in International Law*, 4(2) LAW ETHICS OF HUMAN RIGHTS 229 (2010).

It is because sanctions do not easily fit into the category of countermeasures,[177] and relying on IHL, which is normally applicable in times of war,[178] conflicts with the fact that

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[177] Some commentators label UN sanctions as countermeasures, to align them with the proportionality set forth in ARSIWA. *See* Elagab, Omer Yousif, *The Legality of Non-forcible Countermeasures in International law*, DISS. UNIVERSITY OF OXFORD 227-40 (1986). Article 49 of ARSIWA defines countermeasures as a State's failure to comply with international commitments in response to an international wrongful act committed by another State that is justifiable in specific situations. Accordingly, they conclude that UN sanctions can be considered as countermeasures, thus, they must adhere to the ARSIWA's framework and its proportionality principle.

However, "sanctions, which an international organization may be entitled to adopt against its members (States or other international organizations) according to its rules, are *per se* lawful measures and cannot be assimilated to countermeasures." *See* Alland, Denis, *The definition of Countermeasures*, 1135 (Crawford, Pellet and Olleson (eds), n 52); *See also* Ruys, Tom, *Sanctions, Retortions and Countermeasures: Concepts and International Legal Framework*, *in* RESEARCH HANDBOOK ON UN SANCTIONS AND INTERNATIONAL LAW, 40 (Edward Elgar Publishing, 2017). Similarly, some commentators have asserted that UN embargoes lack the important component of countermeasures; "[t]hat is, their intrinsic contrariety to what is normally required from them by international engagements." *See id*. *See also* Helmersen, Sondre Torp, *The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations*, 61.2 NETHERLANDS INT'L L. REV. 171-2 (2014).

Furthermore, they assert that UN sanctions are fundamentally a response to international wrongdoings, as is the primary idea of countermeasures and thus, UN embargoes should not be viewed solely as institutional sanctions; rather, countermeasures are a better description of their nature. They conclude since Article 51 of ARSIWA specifies that the countermeasure should be proportionate to the gravity of the international wrongful act and the injury incurred, the UN sanctions should be proportionate too. *See* Sossai, Mirko, *Legality of Extraterritorial Sanctions*, *in* ECONOMIC SANCTIONS IN INTERNATIONAL LAW AND PRACTICE 63 (Masahiko Asada, 2020).

[178] Some other commentators assert that the IHL proportionality which requires an assessment as to "whether the overall evil a war would cause was balanced by the good that would be achieved" can be applied in a sanctions or non-war situation. *See* Gardam, Judith Gail, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 395 (1993). Accordingly, even though the UN is not a State subject to the Geneva Convention, it cannot violate the laws of war as its member States, otherwise the UN purpose of maintaining world's peace will be compromised. The UN previously authorized the use of force by peacekeeping forces in the event of humanitarian law violations such as in the UN's armed intervention in Somalia, thus, "principles and rules of international humanitarian law [. . .] are applicable to United Nations forces [. . .] in enforcement actions, or in peacekeeping operations." Secretary-General's Bulletin, *Observance by United Nations Forces of International Humanitarian Law*, ST/SGB/1999/13 (Aug. 6, 1999). *See also* Gieseken, Helen, *The Protection of Migrants Under International Humanitarian Law*, 99.1 INT'L REV. OF THE RED CROSS 121-152 (2017). The other issue is that sanctions normally are imposed in times of peace. Henderson, Ian & Kate Reece, *Proportionality under International Humanitarian Law: The Reasonable Military Commander Standard and Reverberating Effects*, 51 VAND.

sanctions are rarely considered equivalent to the use of force.[179] The issue is acknowledged as a general concept of law by major legal systems which mostly adhere to the fundamental principle that the law should be proportionate to the situation, respond in a measured and reasonable manner, and not go beyond what is required to accomplish the objective of doing

J. TRANSNAT'L L. 835 (2018). This issue will almost certainly encounter conceptual difficulties due to the normative understanding of IHL that deems it only governs during armed conflicts. *See* Dupont, Pierre-Emmanuel, *Human Rights Implications of Sanctions, in* ECONOMIC SANCTIONS IN INTERNATIONAL LAW AND PRACTICE, 39, 42 (Asada Masahiko, 2019). The effects of both wars and some embargoes were recorded similar such as in military blockades and armed conflicts. *See generally* Garfield, Richard & Julia Devin & Joy Fausey, *The Health Impact of Economic Sanctions*, 72 BULLETIN OF THE NEW YORK ACADEMY OF MEDICINE 458-62 (1995). Also, the practice of embargoes was considered "tantamount to a peacetime blockade." U.N. Human Rights Council, *Rep. of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights*, U.N. Doc. A/HRC/39/54, ¶ 34 (2018) (hereinafter U.N. Special Rapporteur). The UN Special Rapporteur emphasized that "legal rights holders in target countries where the negative impact of such measures is particularly acute could be considered as in a war zone." *Id*, at ¶42. Also, some IHL rules such as the prohibition of civilian hunger and the unrestricted movement of essential food and medication, are identical to the situation with some sanctions. *See* Gasser, Hans-Peter, *Collective Economic Sanctions and International Humanitarian Law An Enforcement Measure Under the United Nations Charter and the Right of Civilians to Immunity: An Unavoidable Clash of Policy Goals?,* 56 Zeitschrift for AUSLANDISCHES OFFENTLICHES RECHT UND VOLKERRECHT 871, 901 (1996); The differentiation between civilian and military targets and the prohibition on causing unnecessary suffering to combatants are the other principles of IHL which may be used in the case of sanctions as well, making IHL to "serves as the most appropriate paradigm through which economic sanctions should be governed, even when implemented outside the armed conflict context." *See* Reisman, W.M. & D.L. Devick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 EUROPEAN J., INT'L L., 86, 95 (1998).

[179] The Paper emphasizes that, while several commentators have referred to embargoes as a political weapon or economic warfare, it is preferable not to compare them to any type of armed force. This is due to the fact that economic sanctions, in general, were designed to prevent military aggressions and wars in the first place. *See also* Peksen, Dursun, & A. Cooper Drury, *Economic Sanctions and Political Repression: Assessing the Impact of Coercive Diplomacy on Political Freedoms*, 10.3 HUMAN RIGHTS REV. 393-4 (2009); Warde, Ibrahim, *The Price of Fear: The Truth Behind the Financial War on Terror*, UNIV., CALIFORNIA PRESS (2007); *See also* Galtung, Johan, *On the Effects of International Economic Sanctions, with Examples from the case of Rhodesia*, 19.3 WORLD POLITICS 378-9 (1967); *See generally* Mayall, James, *The Sanctions Problem in International Economic Relations: Reflections in the Light of Recent Experience*, 60.4 INT'L AFF. 631-3 (1984). Gordon, Joy, *A Peaceful, Silent, Deadly Remedy: The Ethics of Economic Sanctions*, 13 ETHICS & INT'L AFF. 123-4 (1999).

justice.[180] The ICJ and other international tribunals have also recognized the rule of proportionality since 1969 such as in the *North Sea Continental Shelf*,[181] and even before that in 1928 in the *Naulilaa* arbitration between Portugal and Germany.[182]

Nonetheless, within the UN Charter, the principle of proportionality applies equally to the practice of the SC, as a legal principle falling under the category of "principles of justice and international law" referred to in Article 1(1) of the Charter which also has been recognized by a number of commentators.[183] They concur that Chapter VII's measures must avoid disproportionality for achieving its objectives and must not adversely affect other interests in a disproportionate manner.[184] There is a broad consensus that the SC has considerable latitude in deciding whether Chapter VII measures are proportionate to the

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[180] *See generally* Newman, Ralph Abraham, *Equity in the World's Legal Systems: a Comparative Study, Dedicated to Rene Cassin*, ÉTABLISSEMENTS ÉMILE BRUYLANT (1973).

[181] In which the ICJ determined that proportionality was a factor to be considered in the delimitation of the continental shelf and stated, "whereas the Federal Republic considered that such an outcome would be inequitable because it would unduly curtail what the Republic believed should be its proper share of continental shelf area, on the basis of proportionality to the length of its North Sea coastline." *See North Sea Continental Shelf*, Judgment, I.C.J. Reports 17 (1969); *See* Friedmann, Wolfgang, *The North Sea Continental Shelf Cases—a Critique*, 64.2 AMERICAN J., INT'L L. 229 (1970); *See also* Blecher, Maurice David, *Equitable Delimitation of Continental Shelf*, 73.1 AMERICAN J., INT'L L. 60 (1979); *See* Fausey, Joy K., *Does the United Nations' Use of Collective Sanctions to Protect Human Rights Violate Its Own Human Rights Standards*, 10 CONN. J. INT'L L. 210-11 (1994); *See also* Restatement (Third) of the Foreign Relations Law of the United States, INTRODUCTORY NOTE 18-9 (1987).

[182] Naulilaa Award, 31 July 1928, UN REP. INT'L ARB. AWARDS 1011 (1949); *Gabcikovo-Nagymaros Project, Hungary v. Slovakia*, Judgment Merit, [1997] ICJ Rep 7; *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America) Merits, Judgment, ICJ Reports 1986, 14¶276; *See* Damrosch, Lori, ENFORCING INTERNATIONAL LAW THROUGH NON-FORCIBLE MEASURES, 57-9 (1997).

[183] Angelet, Nicolas, *International Law Limits to the Security Council*, *in* UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 71-82 (Brill Nijhoff 2001).

[184] Kirgis, Frederic, *The Security Council's First Fifty Years*, 89.3 AJIL 517 (1995).

objectives pursued.[185] It means that the SC must consider the proportionality principle to guarantee that its measures are proportional as the Permanent Members of the SC also emphasized in 1995, by stating that all the future UN sanctions "should be directed to minimize unintended adverse side-effects of sanctions on the most vulnerable segments of targeted countries"[186] and they should be "in support of clear objectives and are implemented in ways that balance effectiveness against possible adverse consequences."[187]

It is difficult to determine the precise scope of the proportionality principle as it applies to the SC; however, it is in this context that international human rights law can play a crucial role to advise the scope of a procedural constraint rather than constituting a substantive limit for the SC as a matter of law.[188] Human rights laws may evaluate proportionality within the framework of SC, with a particular emphasis on how it should take this principle into account when designing sanctions adopted in accordance with Article 41 of the UN Charter.

It implies that the SC should make a distinction between the subjective wrongdoers and other civilians in order to not go beyond the targets. In this context, proportionality refers to the requirement to make sure that the effects of the SC's sanctions on civilian populations are proportionate to the harm caused by the target's wrongdoing and are consistent with the sanctions' objectives. This principle requires that the negative effects of applying sanctions on civilians kept minimized. On this path, the Secretary-General and sanctions committees

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[185] *See e.g.,* Schweigman, *supra* note 158, at 188.

[186] UN Doc. S/1995/300 p.2 (Apr. 13, 1995).

[187] UN Doc. S/PRST/2006/28 (Jun. 22, 2006).

[188] Michaelsen, Christopher, *Human Rights as Limits for the Security Council: A Matter of Substantive Law or Defining the Application of Proportionality?* JOURNAL OF CONFLICT & SECURITY LAW 468 (2014).

responsible with executing sanctions in the pursuit of proportionality and assessing the objective and commensurate response while taking fundamental human rights into account.[189]

2.5 BOUNDARIES OF THE UNITED NATIONS' TARGETED SANCTIONS

Following the discussion of the SC's boundaries in imposing embargoes against States, the next issue is whether the SC has boundaries in imposing targeted sanctions to protect the substantive and procedural rights of the targets. Targeted sanctions, according to the Paper's definition, are those that impose economic and/or travel restrictions on natural and legal persons who are not fully associated with the State, or those that have minor effects on the people at large. As a result, it is likely that they infringe some substantive and procedural rights such as the right to property, the right to privacy and reputation, the right to freedom of movement, and the right to a fair and public hearing and an effective remedy by an impartial tribunal, or, in other words, due process rights. In this section, the Paper supports that the aforementioned CILs could be used to challenge some existing targeted sanctions regimes, and it seeks to establish a pattern of rights-based considerations for future designations.

In this regard, the fundamental concern stems from the evidence for determining the existence of a threat to international peace and security that allows the UN to list a target in a sanction's regime. Despite the fact that Article 39 of the UN Charter's determination criteria in assessing a threat to international peace and security is vague,[190] the Paper supports the

[189] O'Connell, Mary, *Debating the Law of Sanctions*, 13.1. EJIL 77 (2002).

[190] U.N. Charter art. 39.

view that declares those SC's sanctioning resolutions that do not include a prior Article 39 determination could be considered non-binding under Chapter VII of the Charter.[191]

The ambiguity is exacerbated by the fact that several of UN's targeted sanctions on individuals and entities are based on classified evidence and undisclosed information.[192] To address this lack of transparency, the Paper focuses on the procedural boundaries in sanctioning designations, the infringements of which could result in a violation of due process, which is recognized as a customary international norm,[193] as well as the right to a fair and transparent listing procedure, which was stated as a SC commitment in SCR 1730 in 2006.[194] It is because when mistakes in listing based on false evidence occur, "the individuals who are wrongly designated will find their funds and assets frozen and their lives disrupted, without their having any realistic prospect of putting matters right."[195]

2.5.1 Administrative Reconsiderations

According to Resolution 1730, the Focal Point for De-listing, as a dedicated part of the UN's Secretariat, is responsible for receiving and processing de-listing requests from UN

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[191] *See* Schweigman, *supra* note 158, at 185.

[192] *See* Biersteker, Thomas, *Targeted Sanctions and Individual Human Rights*, 65.1 INT'L J. 109 (2010); *See also* Gehring, Thomas & Thomas Dorfler, *Division of Labor and Rule-based Decision Making Within the UN Security Council: The Al-Qaeda/Taliban Sanctions Regime*, 19 GLOBAL GOVERNANCE 567 (2013).

[193] It is a recognized rule that a judgment cannot be executed if it was obtained in a way that did not comport with the principles of due process. For example, in the United States precedent *see Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1410, 1412 (9th Cir. 1995).

[194] Biersteker, Thomas & Eckert, S. E., *Addressing Challenges to Targeted Sanctions: An Update of Watson Report*, THE GRADUATE INSTITUTE OF UN ACADEMIA 20-1 (2009); Regarding the establishment of the Focal Point for De-listing *see* https://www.un.org/securitycouncil/sanctions/delisting. (Last visited on May 6, 2021).

[195] *HM Treasury v. Mohammed Jabar Ahmed and Others* (FC)¶ 182 (hereinafter HM Treasury).

member States and individual petitioners, as well as serving as the primary source for preserving the due process rights of targeted individuals and entities.[196] The resolution stated that the SC is committed to ensuring a fair and clear procedure for listing and delisting individuals and entities, as well as granting humanitarian exemption.[197] Because of this obligation, the SC passed Resolution 1735,[198] to protect fundamental rights and increase the level of scrutiny for States proposing additional individuals or entities to be sanctioned.[199] In this regard, the Resolution 1735 emphasized that after listing a new target, States should make a releasable portion of the statement available to the public.[200] Despite these attempts, there have been complaints about how the delisting mechanism works, including one from the then-President of the SC, who described the Resolution as "very modest and weak" which "does not at all constitute an effective means of fairness."[201]

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[196] The other function of the Focal Point for De-Listing is to facilitate communication during the de-listing process. To find the procedure of de-listing *see* https://www.un.org/securitycouncil/sanctions/delisting/ (Last visited on May 6, 2021).

[197] UN General Assembly Resolution 60/1, WORLD SUMMIT OUTCOME ¶ 109 (2005).

[198] It was passed only three days after Resolution 1730. UNSC Res 1735 (Dec. 22, 2006) UN Doc S/RES/1735 (2006).

[199] For example, in some domestic cases like *Ahmed v H.M. Treasury*, Lord Roger, has made specific reference to the veto power of the Committee members, and has expressed his concern by stating that "if a State applies on their behalf, the name will still not be removed unless all members of the Committee agree. There is an obvious danger that States will use listing as a convenient means of crippling political opponents whose links with, say, Al-Qaida may be tenuous at best." *See HM Treasury, supra* note 195, at ¶ 181.

[200] *See* UNSC Res 1735, *supra* note 198. The obligation has been strengthened by the UNSC Resolution 1822 adopted on June 2008 that mentions: "For each such proposal Member States shall identify those parts of the statement of case that may be publicly released, including for use by the Committee for development of the summary [to be placed on the committee's website] or for the purpose of notifying or informing the listed individual or entity, and those parts which may be released upon request to interested States." UNSC Res 1822 (Jun. 30, 2008) UN Doc S/RES/1822 (2008).

[201] *See* UNSC Verbatim Record (Dec. 19, 2006) UN Doc S/PV.5599, p 4.

Due to these flaws, the UN Focal Point for Delisting was replaced on December 17, 2009, by the Office of the Ombudsperson, which exists solely to review designations under SCR 1267.[202] Furthermore, the UN established additional review panel for complaints of individuals and entities incorrectly included to the 1267 regime list, entrusted with guaranteeing the fairness of the de-listing request reviews.[203] The preamble to SCR 1989 specified the SC's *intention* to ensure due process rights and fair and transparent procedures, which was emphasized in the statement of the Austrian representative who spoke in support of the resolution and called it a significant step toward improving the sanctions regime's fairness and transparency.[204] However, the Costa Rican representative voiced his displeasure and hoped that the SC to be able to "achieve a sufficient consensus to incorporate new improvements into the sanctions regime established by this resolution."[205]

Following that, in 2011, the Ombudsperson was empowered, under the SCR 1989, in order to preserve the rights-based boundaries by making recommendations to the Committee to examine a de-listing request. If the Ombudsman considers de-listing, the Committee obliged to vote unanimously to keep the listing.[206] Furthermore, because the Al-Qaida

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[202] It should be noted that applications for review of other UN sanctions regimes can still be submitted to the relevant Focal Point. According to the SCR 1904 ¶ 22 "the Focal Point shall continue to receive requests from individuals and entities seeking to be removed from other sanctions lists."

[203] *See* the Report of the High-level Panel on Threats, Challenges and Changes addressed to the UN Secretary General, 1 December 2004, UN Doc A/59/596.

[204] UNSC Verbatim Record (Dec. 17, 2009), UN Doc S/PV.6247.

[205] SCR 1989 (2011), UN Doc S/RES/1989 (2011).

[206] Regarding the delisting request by the petitioner, the task of the Ombudsperson consists of three main levels: Information gathering in two months that is extendable to four months, making dialogue in two months that is extendable to four months, committee discussion and decision in two months. *See* Gordon et. al., *supra* note 71, at 6-9.

Sanctions and Taliban Committee was assumed to make all decisions by consensus, it gave each member of the committee veto power over a delisting request, paving the way for a more rights-based administrative reconsideration procedure.[207] The Ombudsperson was also tasked in this procedure with providing anyone who requested it with openly releasable, non-classified information about Al-Qaida and Taliban Sanctions Committee procedures, as well as informing individuals or entities about the status of their listing and submitting biannual reports to the SC.[208]

2.5.2 Judicial Review

Aside from developing steps taken in transparency of the administrative reconsideration process of the UN targeted sanctions, yet the SC may face a number of judicial reviews and legal challenges in various domestic and international courts. These judicial reviews primarily determine whether these sanctions violate rights-based boundaries while also contesting their legality status. By highlighting these inadequacies, the Paper hopes to highlight the fact that, in order to achieve a rights-based model of UN targeted sanctions, the UN must establish a specialized judicial organ.

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[207] Annex II of UNSC Resolution 1904 (2009) mentioned the tasks that the Ombudsperson is required to perform. Eden, Paul, *United Nations Targeted Sanctions, Human Rights and the Office of the Ombudsperson, in* ECONOMIC SANCTIONS AND INTERNATIONAL LAW 135, 139-42 (Matthew Happold & Paul Eden 2019); *See also* Tladi, Dire & Gillian Taylor, *On the Al Qaida/Taliban Sanctions Regime: Due Process and Sunsetting*, 10.4 CHINESE J. INT'L. L. 771-9 (2011).

[208] UNSC Res 1904 Annex II, 15.

Whereas the validity of the ICJ's judicial review power to challenge the violation of SCR boundaries is still debated,[209] this Paper asserts that, based on *Lockerbie*[210] and the absence of any exclusion of the ICJ's power over the SC's decisions, the ICJ should be regarded as the primary available judicial forum for States to determine whether rights-based boundaries have been violated by SCRs. This assertion also could be understood by other cases such as *Certain Expenses*, that the UNGA asked the ICJ to provide an Advisory Opinion on whether the UN member States were responsible for expenses of the UN operations in Congo in 1960–1961 and in the Middle East in the 1950s.[211] Also according to *Namibia*, the ICJ confirmed that it has power to decide whether a SCR is in conformity with the Charter.[212]

Outside the ICJ, the most well-known of these rights-based challenges began in 2008, when the European Court of Justice ("ECJ") overturned a decision by the European Community ("EC") in implementing UN targeted sanctions against *Kadi* and *Al-Barakaat*, resulting the first court-ordered disobedience for domestic employment of a UN targeted sanctions.[213] These cases initially filed in 2005 before the European Court of First Instance ("CFI"), also known as the European General Court ("EGC"), concerning the legality of the

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[209] Zamani, S. Ghasem & Jamshid Mazaheri, *The Need for International Judicial Review of UN Economic Sanctions*, *in* ECONOMIC SANCTIONS UNDER INTERNATIONAL LAW 227-8 (Marossi, Ali & Bassett, Marisa eds, 2015).

[210] *Lockerbie*, *supra* note 82.

[211] *Certain Expenses*, *supra* note 159, at 151. In response the ICJ recognized the expenses are related to the purpose of the UN and needs to be paid.

[212] *Namibia*, *supra* note 77, at 22.

[213] Two Cases of C-402/05 P and C-415/05 P were joined and commenced *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351.

European Union's ("EU") implementation of the SC targeted sanctions.[214] It entailed the application of UN targeted sanctions imposed through SCR 1267 at the EU level,[215] without informing the designated individuals, including Yasin Kadi and the Yusuf and Al Barakaat International Foundation, about the basis for the freezing of their assets.[216]

As a result, the targets filed an appeal with the CFI, claiming that the designation violated their due process rights, specifically the right to a fair hearing, the right to property, and the right to effective judicial protection.[217] Article 230 of the Treaty Establishing the European Community ("TEC") states that "[t]he Court of Justice shall review the legality of acts adopted."[218] The court counted the grounds for annulment including "lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers."[219] Following that, the CFI stated that the ECJ prioritized the EU's Constitutional identity,[220] and that because the

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[214] Council Regulation 881/2002, 2002 O.J. (L139) 9 (EC) of 27 May 2002, imposing financial sanctions against Certain Persons and Entities Associated with Usama bin Laden, the Al-Qaida Network and the Taliban, and Repealing Council Regulation (EC) 467/2001, Annex 1.

[215] In order to preserve Article 103 of UN Charter, the CFI and, on appeal, the ECJ were requested to decide whether by implementing the Resolution 1267, the targets' procedural rights had been protected. *See Kadi and Al Barakaat*, *supra* note 213, at ¶¶ 20-21.

[216] They became subject to Article 2(1) of the Council Regulation 881/2002, that states "[a]ll funds and economic resources belonging to, or owned or held by, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I shall be frozen."

[217] *See Kadi and Al Barakaat*, *supra* note 213, at ¶¶ 20-21.

[218] *See* Treaty Establishing the European Community, arts 230-231, November 1997, O.J. (C 340).

[219] *See id,* art. 230 ¶ 2.

[220] *See e.g.*, Lenaerts, Koen, *The Kadi Saga and the Rule of Law within the EU*, 67 SMU L. REV. 709 (2014); *See also* Halberstam, Daniel & Eric Stein, *The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46 COMMON MKT. L. REV. 13, 50, 62 (2009).

EU is not a member of the UN, it is not legally bound by the UN Charter in the event of procedural challenging grounds, but it ultimately rejected the annulment request.[221]

As a result of this rejection, Kadi and Al Barakaat filed a joint appeal with the ECJ, which successfully reversed and set aside the two CFI judgments.[222] It broadened the possible grounds and rights-based boundaries of UN targeted sanctions and granted full reviewability to all European acts, including the domestic implementation of SCRs.[223] Nonetheless, the ECJ rejected the argument that it has jurisdiction over SCRs, emphasizing that it only has jurisdiction over the domestic implementation of SCRs.[224] Subsequently, it ruled that the

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[221] Case T-315/01, *Kadi v. Council of the European Union and Commission of the European Communities* 2005 E.C.R. II-3649, ¶ 192; It should be noted that the EU is bound by the UN Charter based on the EU law. *Id*. ¶ 193; The court specified that, under Article 103, it lacked jurisdiction to assess the legality of the UN targeted sanctions, and that the only exception to Article 103's supremacy is when *jus cogens* norms are violated. It was because as earlier stated, they cannot be superseded by any rules of public international law, including UNSC resolutions. *See Id,* at ¶ 226.

Despite the fact that the CFI classified the right to property, the right to be heard, and the right to appear in court as *jus cogens*, it stated that UN sanctions could not take precedence over *jus cogens*, and so it only has authority to assess the resolution's validity on those violations. However, the Court determined that the asset freezes imposed on Kadi did not violate the universal protection of the fundamental human rights of the individuals covered by *jus cogens*. *See* Gordon et. al., *supra* note 71, at 15.

[222] *See Kadi and Al Barakaat*, *supra* note 213. According to Article 16 of the Statute of the Court of Justice the ECJ sits in a Grand Chamber consists of 11 out of the total of 27 judges, instead of the normal chamber size of three or five judges. *Statute of the Court of Justice*, Article 16, 10 March 2001 O.J. (C 80).

[223] According to paragraph 326 "EC judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all EC acts in the light of the fundamental rights forming an integral part of the general principles of EC law, including review of EC measures which, like the contested regulation, are designed to give effect to the resolutions of the Security Council under Chapter VII of the Charter of the United Nations." *See Kadi and Al Barakaat*, *supra* note 213, ¶ 326.

[224] *Id*, ¶ 287; It also followed the CFI's direction in expanding the scope of *jus cogens* to include fundamental rights to be respected by EC institutions, such as the right to be heard and effective judicial review of those rights. It mentioned that European Community in their sanctions' implementations should "communicate those grounds to the person or entity concerned, so far as possible, either when that inclusion is decided on or, at the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise, within the periods prescribed, their right to bring an action." *Id*, ¶ 336.

appellants were not fully informed and notified, resulting in a violation of their fundamental rights, and it confirmed the implementation of the SCRs could be subject to judicial review in order to protect fundamental rights such as property rights, freedom of movement rights, reputation, family, and privacy rights which targeted sanctions may violate them.[225] Finally, the ECJ ordered the Council Regulation relating Kadi and the Al Barakaat International Foundation to be annulled.[226]

2.6 CHAPTER'S CONCLUSIONS

The Paper touched on the reasoning, mechanism, and members' implementation obligations of the UN sanctions. It outlined the presumption of their legality based on the *pacta sunt servanda* principle and ICJ's confirmation in *Namibia*, as well as *Reparation*. It also elaborated that the basis for the UN Charter and SCRs' precedence over other treaties verified by the ICJ's ruling in *Lockerbie* and the norm of *lex specialis*. The Paper asserted that the UN Charter's supremacy is limited to solely other treaties, and that member States could argue that they are not obligated to implement SC sanctions if the measures violate *jus cogens*, the UN Charter, and are not proportionate to the wrongdoing in terms of their negative consequences. It underlines the supremacy of *jus cogens* over SCRs, citing the ICJ's judgements in *Nuclear Weapons* and *Hungary v. Slovakia.* Even though the Paper found no

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The Paper contends that by including other customary international norms as *jus cogens*, the CFI and ECJ both idealized its definition in order to challenge the UN targeted sanctions.

[225] Notably, if the SC fails to meet the procedural requirements for listing the targets, their due process rights, as enshrined in the Universal Declaration of Human Rights, may be violated. Article 8 of the UDHR recognized "the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights", also, according to Article 10 of the UDHR, "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

[226] *Id*, ¶ 51; Verdirame, Guglielmo, *Implementation of UN Sanctions*, *in* THE UN AND HUMAN RIGHTS 304 (Guglielmo Verdirame ed., 2011).

instances of UN embargoes that dishonored *jus cogens*, it contends that specific episodes of UN embargoes, such as those against Iraq in 1991 and Haiti in 1993, had the potential to constitute genocide, thus violating *jus cogens* or at the very least other CIL norms.

It also stated embargoes may function in violation of the UN Charter's right-based boundaries and goals, which also confirmed by the ICJ in *Certain Expenses* as well as the ICTY in *Tadic*. Despite the fact that these boundaries and purposes are described broadly, the SC is obligated to respect them because they are clearly mentioned as being subject to legal protection, which the ICJ in *Western Sahara* also approved. In any case, UN embargoes should be used cautiously in order to change leaders' wrongdoings and while a short-term impact on a State's sovereignty can be justified by that State's earlier wrongdoing; long-term embargoes against States or their main sectors are unacceptable. Also, based on the UN Charter's proportionality principle, an analysis of a suitable balance between the effects of embargoes and the State's wrongdoing is required.

In addition, individuals sanctioned under a targeted sanctions regime based on classified evidence may have had their due process rights violated, specifically the right to a fair and transparent listing procedure, which is a SC's commitment. Due to deficiencies in the administrative reconsideration process at the UN Office of Ombudsperson and Focal Point for De-listing, these individuals have filed challenges in domestic and international tribunals such as the ICJ and ECJ. The ICJ has jurisdiction over the SC's decisions based on *Lockerbie*, *Certain Expenses*, and *Namibia*, and also domestic courts have jurisdiction over assessing the legality of internally implementing the SC's targeted sanctions based on the *Kadi and Al-Barakat*. Despite the existence of all of the aforementioned forums, the Paper emphasizes the need for an independent rights-based mechanism and procedure to review the

SC's sanctioning resolutions. This mechanism should address deficiencies in upholding the UN embargoes' rights-based boundaries, as well as shortcomings in the process of filing an application for delisting and upholding due process rights.

3 RIGHTS-BASED BOUNDARIES OF UNILATERAL SANCTIONS

3.1 ABSTRACT

Sanctions imposed without Security Council ("SC") authorization or unilateral sanctions must be in accordance with international law in order to be considered rights based. In this regard, this Paper serves as a model for sender States to take into account before designing and implementing their measures. It also provides a framework for targeted States to challenge the legality of sanctions imposed on them. In this context, the Paper investigates several multilateral treaties, including the United Nations ("UN") Charter and its principles of non-intervention and sovereignty and its rights-based Articles, by broadening the definition of embargo to include all sanctions that may cause collateral damages to people who are not the subjective wrongdoers. Other rights-based treaties were also examined to establish whether their member States may have any extraterritorial obligations to promote human rights beyond their borders or to refrain from implementing measures that could result in human rights violations. The Paper also analyses a few International Court of Justice ("ICJ") orders in cases where one party claims that the opponent is responsible for those rights infringements caused by its unilateral sanctions to determine whether a sender State may be held contributory liable as a proximate cause for the collateral negative effects caused by its measures on the people of the targeted State. The Paper subsequently, focuses on Customary International Law ("CIL") by delving into existing *opinio juris* to find if it supports State practices to the point of forming a new norm barring or authorizing application of unilateral sanctions. This Path focuses on the voting paterns of those international organizations' resolutions opposing unilateral sanctions, as well as the sanctioning practices of both sides of the debate. The Paper endeavors to ascertain how sender States can justify

their sanctions based on CIL norms. It refers to those measures, embargoes, and targeted sanctions that are attempting to be implemented in accordance with *erga omnes* obligations. It specifically examines embargoes against Russia and China, as well as targeted Magnitsky Act sanctions, to determine whether they are justified under CIL's rights-based boundaries.

3.2 INTRODUCTION

The term "sanctions" refers to a technical notion with applications and definitions in international law, economics, international trade, and politics.[227] However, for the purposes of this Paper, which seeks to assess the rights-based boundaries of sanctions imposed outside the SC or unilaterally, the term is defined as follows: coercive measures taken to condemn or induce to change the target's disfavored policy or its wrongful behavior. The Paper endeavors to find out whether employment of unilateral sanctions is legal in international law, and if so, whether there are any rights-based boundaries that senders should follow when designing and implementing them.

The Paper understands that the legality assessment of unilateral sanctions is "one of the least developed areas of international law"[228] which is also called "the grey area of

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[227] To find some of well-established definitions in humanity literature *see* Gordon, Richard & Michael Smyth & Tom Cornell, SANCTIONS LAW 1 (2019); Ilieva, Jana & Aleksandar Dashtevski & Filip Kokotovic, *Economic Sanctions in International Law*, 9.2 UTMS J., ECONOMICS 201 (2018); *See also* Law, Jonathan, *A Dictionary of Law*, "Sanction" OXFORD UNIVERSITY PRESS (9th ed, 2018); Asada, Masahiko, *Definition and Legal Justification of Sanctions*, *in* ECONOMIC SANCTIONS IN INTERNATIONAL LAW AND PRACTICE, 3,4 (Asada Masahiko, 2019). Chan, Steve & A. Drury, *Sanctions as Economic Statecraft: Theory and Practice*. SPRINGER 2-10 (2000); Selden, Zachary A., *Economic Sanctions as Instruments of American Foreign Policy*, GREENWOOD PUBLISHING GROUP 17 (1999).

[228] *See* White, Nigel D. & Ademola Abass, *Countermeasures and Sanctions*, *in* INTERNATIONAL LAW 537 (Malcolm Evans ed., 2014).

international law."[229] Thus, it is not intended to startle international lawyers by its findings; rather, it aims to develop a novel perspective on its introduced model of sanctions, *rights-based sanctions*, by studying the rights-based boundaries offered by international law sources. It also endeavors to remind international lawyers that, while rights-based conventions and principles condemn all forms of human rights violations, a breach of an international *rule(s)* is required to hold a State, whether sender or target, accountable for the consequences of its actions.

To accomplish these objectives, the Paper presumes that, in addition to not depriving their people of fundamental human rights, targeted States must also take all reasonable steps to protect those rights, including refraining from engaging in international wrongful acts that may result in sanctions being imposed on them. Therefore, the classic Westphalian approach to the concept of sovereignty is hypothesized, as which the targeted State bearing primary responsibility for the preservation of these rights.[230] It does, however, attempt to answer the issue of whether the targeted State's wrongful act meets both the *actual* and *proximate* causes of the sanctions' adverse consequences on its people, or whether the sender State is also *proximately and contributory* responsible for them. For this purpose, it divided unilateral sanctions into two categories: embargoes and targeted sanctions. Embargoes according to this Paper, are coercive measures imposed on States and/or their *major entities and sectors*, whereas targeted sanctions are those imposed on natural nationals, whether official or non-official, and legal nationals or entities governing privately or without affiliation with any

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[229] *See* Hofer, Alexandra, *The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?* 16 CHINESE J., INT'L L. 175 (2017).

[230] *See generally* Jackson, John H., *Sovereignty - Modern: A New Approach to an Outdated Concept,* 97 AM. J. INT'L L. 782-5 (2003).

State, as well as those imposed on entities acting on behalf of States but with minimal effects on people in general. In other words, sanctions in a rights-based model are labeled based on the collateral negative humanitarian effects they cause.

Based on this definition, unilateral sanctions are primarily embargoes, unless they expressly target individuals or relatively insignificant sectors by freezing their assets or prohibiting them from traveling to the sender's or a third State's territories. The Paper also considers the following types of sanctions as targeted sanctions: military sanctions, such as the termination of military assistance or training or the exportation of armory to the target; diplomatic sanctions, such as the revocation of visas for diplomats and political leaders; cultural and sport sanctions, such as the exclusion of athletes from international sporting competitions and artists from international events. Thus, throughout this Paper, the term "sanctions" generally represents embargoes; however, when referring to the latter mentioned targeted sanctions, the term "targeted sanctions" is used.

In this path, the key international law sources found in Article 38 of the International Court of Justice Statute ("ICJ Statute") are investigated, to that all United Nations ("UN") member States are also parties[231] and are presumed to comply with its decisions,[232] failing which the SC is authorized to enforce judgment.[233] Although the order of the sources of international law is not fixed,[234] the Paper begins with international treaties and then moves

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[231] U.N. Charter, art. 93.

[232] *Id.* art. 94¶1.

[233] *Id.* art. 94¶2.

[234] *See* Hynning, Clifford J., *Sources of International Law*, 34 CHI.-KENT L. REV. 134 (1956)

on to customary international law ("CIL").[235] In this regard, while it does not appear to be widely accepted by international law scholars,[236] according to the ICJ's judgment in *North Sea Continental Shelf,* it pursues the debate over CIL's sanctions boundaries by looking into not only State practices but also *opinio juris*.[237] Then it tries to figure out how sender States justify their sanctioning practices and how their measures can be viewed as rights-based sanctions.

Therefore, the Paper is structured in two main parts: Part one begins with international treaties that establish a legally binding framework for member States to interact with each other in specific areas. This Part by labeling treaties as multilateral and bilateral, focuses primarily on the UN Charter as the most analytical multilateral treaty. It evaluates three major Charter's basis that may be violated by unilateral sanctions: the principle of State sovereignty and the principle of non-intervention and human rights boundaries. Following that, three other rights-based multilateral treaties are examined in order to determine which

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[235] Treaties are the most important source, even though some scholars believe the priority between treaties and CIL is debatable. *See* Jia, Bing Bing, *The Relations Between Treaties and Custom*, 9.1 CHINESE J., INT'L. L. 81-109 (2010).

[236] Some commentators assert that CIL only needs a certain degree of State practice and there is no need for a CIL norm to be supported by *opinio juris*. *See, e.g.*, Henderson, J. Curtis, *Legality of Economic Sanctions Under International Law: The Case of Nicaragua*, 43 WASH. & LEE L. REV. 167, 172 (1986); *See also* Baxter, Richard R., *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. YB INT'L L. 275 (1965).

[237] *See North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, 44, ¶ 77. Accordingly, ICJ explained that, for a customary rule to exist, both conditions must be fulfilled and "[n]ot only must the acts [of States] concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, *i.e.*, the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates.*" Thus, the more solidified an existing rule is, in terms of duration and widespread acceptance by *opinio juris*, the greater difficulty States will have in overturning it. *See* Thirlway, Hugh, *The Sources of International Law*, INT'L. L. 4 (2010).

rights are vulnerable to unilateral sanctions. It also responds to the question of whether member States have any extraterritorial obligation to uphold these rights. These treaties include the International Covenant on Civil and Political Rights ("ICCPR"),[238] the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"),[239] and the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD").[240] The Paper then examines the 1955 Treaty of Amity, Economic Relations, and Consular Rights ("Amity Treaty")[241] and the lawsuit before the International Court of Justice ("ICJ") between its parties, the United States ("US") and Iran, as an example of a bilateral treaty.[242]

Part two focuses into CILs, which is the actual practice of States with a high degree of repetition and consistency, backed up by *opinio juris*. It means that the Paper asserts in detecting the lawfulness and rights-based boundaries of unilateral sanctions, States practices alone cannot be utilized to establish a CIL norm. As a result, it first examines the opinions and statements of both sides of the debate on the status of application of unilateral sanctions

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[238] *International Covenant on Civil and Political Rights*, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368, 999 U.N.T.S. 171 (hereinafter ICCPR).

[239] *International Covenant on Economic, Social and Cultural Rights,* Dec. 16, 1966, 933 U.N.T.S. 3, 5 (hereinafter ICESCR).

[240] *International Convention on the Elimination of All Forms of Racial Discrimination*, Dec. 16, 1965, U.N.G.A. Res. 2106 A (XX) (hereinafter ICERD).

[241] *The 1955 Treaty of Amity, Economic Relations, and Consular Rights* (*Iran v. United States of America*) (hereinafter Amity Treaty). It was signed by the two States in Tehran on 15 August 1955 and entered into force on 16 June 1957. The Senate advised and consented to the Treaty of Amity on July 11, 1956. 102 Cong. Rec. 12244 (1956).

[242] Application Instituting Proceedings in *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (Iran v. U.S.), I.C.J. (July 16, 2018) (hereinafter *Alleged Violations*). The Application filed in the Registry of the ICJ by Iran on 16 July 2018.

in international law, to determine whether the available *opinio juris* support emergence of a new supportive or prohibitive norm. Following that, State practices are examined to see if those States that express opposition to unilateral sanctions also avoid imposing sanctions unilaterally in practice. Next, it endeavors to respond to the main question how sender States justify their sanctioning practices. Also, it tries to elaborate whether States have *erga omnes* obligations to preserve human rights that are violated by other States or nationals of other States, and if so, whether unilateral sanctions can be justified in these circumstances. To that end, the Paper examines embargoes against Russia and China, as well as the Magnitsky Act, as examples of targeted sanctions against natural and legal nationals.

3.3 TREATY-BASED BOUNDARIES

The Paper begins by reviewing the related principles outlined in the UN Charter as the most important multilateral treaty. It is because the main source of doubt about the legality of unilateral sanctions is that the Charter makes no mention of any permissive indication for their application without the authorization of the SC. Due to this lack of authorization, unilateral sanctions may be regarded unlawful or even as a form of use of force against sovereign nations, which is prohibited by Article 2(4) of the Charter.[243] In addition to Article 2(4), the principle of non-intervention under Article 2(7),[244] as well as rights-based boundaries mentioned in the UN Charter's Preamble, Article 1(3), Article 13 (1), Articles 55(c), Article 56, Article 62(2), and Article 76, are Charter-based principles that may be violated by unilateral sanctions. Having followed that, it focuses on three main multilateral

[243] U.N. Charter, art. 2¶4.

[244] *Id*, at 2¶7.

rights-based treaties of ICCPR,[245] ICESCR,[246] and ICERD,[247] which include rules for challenging the application of unilateral embargoes. The Paper then investigates the rights-based violations that may be caused by unilateral sanctions that breach bilateral treaties. For this purpose, it cites the Amity Treaty and examines Iran's recent legal proceeding against the US, which was filed in 2018.

3.3.1 The United Nations' Charter

3.3.1.1 The Principle of State Sovereignty

The first step toward a rights-based model of unilateral sanctions is to determine whether the subjective regime is in accordance with the Principle of State Sovereignty enshrined in the UN Charter. In this regard, Article 2(4) urges member States to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or any other manner inconsistent with the purposes of the United Nations."[248] The main issue concerns the applicability of Article 2(4) as well as extending the notion of *force* to the concept of unilateral sanctions because of its ignorance of the SC's authority in determining a threat to or breach of international peace and security.[249]

In response, Sarah Cleveland claims that the definition of force includes economic coercion as a nonmilitary measure, which could be considered illegal because it violates the

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[245] ICCPR, *supra* note 238.

[246] ICESCR, *supra* note 239.

[247] ICERD, *supra* note 240.

[248] U.N. Charter, art 2¶4.

[249] *Id*, art. 39.

principle of State sovereignty.[250] Also, Jordan Paust specifically considered Arab oil sanctions against the US as a means of using force.[251] In contrary, the ICJ's decision in the *Military and Paramilitary* clearly stated that the scope of force does not include economic coercion and that sanctions against Nicaragua did not violate Article 2(4).[252]

In the view of the Paper, Article 2(4), is specifically limited to the threat or use of military force. Even the institution of the UN, which was established shortly after the World War II ("WWII"), plainly demonstrates that Article 2(4) was not intended to cover economic sanctions. Because of increased awareness of the human cost of war, as well as globalization, which has made States increasingly vulnerable to trade disruptions, the post-World War II global climate made these measures as an alternative to war more popular.[253]

In addition, it might be argued that the consequences of sanctions are comparable to military blockades and armed conflicts, and therefore it is equivalent with the use of force. Thus, Article 2(4), which is primarily applicable to war situations, could be extended to non-war situations. However, sanctions were intended to deter military aggressions and wars, so

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[250] Cleveland, Sarah H., *Norm Internalization and U.S. Economic Sanctions,* 26 YALE J. INT'L L. 1, 50-52 (2001).

[251] Paust, Jordan J. & Albert P. Blaustein, *The Arab Oil Weapon - A Threat to International Peace,* 68 AM. J. INT'L L. 410 (1974). The Arab oil embargo, a temporary halt to oil supplies from the Middle East to the US, the Netherlands, Portugal, Rhodesia, and South Africa, was imposed in October 1973 by oil-producing Arab countries in retaliation for Israel's support during the Yom Kippur War; the embargo on the US was lifted in March 1974, but the embargo on the other countries remained in effect for some time afterward. *See* Britannica, *Arab oil embargo,* ENCYCLOPEDIA BRITANNICA (Oct. 1, 2020).

[252] *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America) Merits, Judgment, ICJ Reports 1986, 14, ¶ 276 (hereinafter Military and Paramilitary)

[253] *See* Anguelov, Nikolay, ECONOMIC SANCTIONS VS. SOFT POWER LESSONS FROM NORTH KOREA, MYANMAR, AND THE MIDDLE EAST 3 (2015); *See also* Mastanduno, Michael, *Economic Statecraft*, FOREIGN POLICY: THEORIES, ACTORS, CASES 204 (2012).

the comparison with an important phrase in the Charter merely because the collateral effects of sanctions allegedly reached the level of peacetime blockades in a few episodes could not make them totally equal to force. Nonetheless, the Paper claims that only those regimes that deviate from the main purpose of sanctions (to prevent wars) to the point of being comparable to military blockades in terms of collateral effects, could be considered in violation of Article 2(4).

3.3.1.2 The Principle of Non-Intervention

The second step is to determine whether the Charter's non-intervention principle applies to individual States' actions, and if so, whether unilateral sanctions would violate that principle. According to Article 2(7) "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."[254] Accordingly, it may be argued that the imposition of unilateral sanctions is an unlawful intervention in matters which are essentially within the domestic jurisdiction of targeted States, and thus violates the Charter's principle of non-intervention.

In response it should be primarily noted that Article 2(7) specified that the mentioned acts are limited only to the resolutions and actions occurred and decided by the UN, and nothing could be interpreted to stretch it to the actions of individual States. In other words, this specific Article does not prevent intervention in the domestic issues of individual States

[254] U.N. Charter, art. 2¶7.

by other member States.[255] Even within the UN, the importance of this Article has diminished significantly as the SC has become much more active, and most of the UN's interventions are authorized by the SC under Chapter VII, so the UN in general, does not violate the principle of non-intervention by its acts.

Some commentators still assert that in any case, the UN member States do not have a right to impose sanctions unilaterally among themselves.[256] They argue that unilateral sanctions would be certainly prohibited based on this principle,[257] while others believe that although the scope of unilateral sanctions should be reconsidered but the principle of nonintervention did not seem to have crystallized into a clear rule prohibiting economic coercion.[258] Others have gone further by arguing that it remains altogether unclear to what extent exactly the principle of nonintervention prohibits certain economic sanctions.[259] Furthermore, some argue that, despite the existence and relevance of the principle of

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[255] *See* Duke, Simon, *The State and Human Rights: Sovereignty Versus Humanitarian Intervention*, 12.2 INTERNATIONAL RELATIONS 25-48 (1994).

[256] *See generally* Burke, John J. A., *Economic Sanctions against the Russian Federation Are Illegal under Public International Law*, 3.3 RUSSIAN L. J. 126-141 (2015).

[257] Dupont, Pierre-Emmanuel, *Human Rights Implications of Sanctions*, *in* ECONOMIC SANCTIONS IN INTERNATIONAL LAW AND PRACTICE, 39,41 (Asada Masahiko, 2019); *See* Stein, Eric & Daniel Halberstam, *The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46.1 COMMON MARKET L. REV. (2009).

[258] *See* Elagab, Omer Yousif, *The Legality of Non-forcible Countermeasures in International law*, DISS. UNIVERSITY OF OXFORD 542 (1986); *See also* Doraev, Mergen, *The Memory Effect of Economic Sanctions against Russia: Opposing Approaches to the Legality of Unilateral Sanctions Clash Again*, 37 U. PA. J. INT'L L. 355 (2015).

[259] *See* Ruys, Tom, *Sanctions, Retortions and Countermeasures: Concepts and International Legal Framework*, in RESEARCH HANDBOOK ON UN SANCTIONS AND INTERNATIONAL LAW 22-30 (L van den Herik ed, 2017).

nonintervention with regard to unilateral sanctions, illegal acts of economic coercion are rare in modern international law, particularly under the Charter.[260]

While international law is flexible, the Paper argues that contenders should not change the clear language of the Charter's Articles, because, outside of the Charter, such as in CIL, the principle of nonintervention is mentioned and, to some extent, recognized by the international community.[261] It is contained, for example, in the Friendly Relations Declaration of 1970, and therefore it is plausible to say that the use of sanctions to gain the target's subordination to the exercise of its sovereignty violates the non-intervention principle.[262]

However, there are several exceptions in CIL that justify the violation of the non-intervention principle. For example, while diplomats should not interfere in the internal affairs of the State to which they are accredited,[263] human rights infringement as a legitimate international concern, could justify their intervention which also called as a type of humanitarian intervention.[264] The authority that is similarly predicted in rights-based treaties,

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[260] *See generally* Tzanakopoulos, Antonios, *The Right to be Free from Economic Coercion*, 4.3 CAMBRIDGE INT'L. L. J. 616 (2015); *See also* Hofer, *supra* note 229, at 183.

[261] *See generally* Jamnejad, Maziar & Michael Wood, *The Principle of Non-intervention*, 22 LIDEN JOURNAL OF INT'L. L. 350-1 (2009).

[262] *See id.*

[263] Denza, Eileen, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, OXFORD UNIVERSITY PRESS 12-4 (2016). It specified that "they have a duty not to interfere in the internal affairs of that State." Vienna Convention on Diplomatic Relations, Art. 41 (1961).

[264] *See generally* Pease, Kelly & David Forsythe, *Human Rights, Humanitarian Intervention, and World Politics*, 15 HUM. RTS. Q. 290 (1993).

recognizes States' rights to intervene in the internal affairs of other States by criticizing their human rights records and filing complaints with inter-State complaint mechanisms.[265]

In any case, while Article 2(7) explicitly refers to UN actions, interference of individual States that could lead to the use of force or facilitate regime change would be unlawful under Article 2(4). The issue was also raised in the ICJ's decision in *Congo v. Uganda*, which stated that Uganda had violated the DRC's sovereignty as well as its territorial integrity, and that Uganda's actions constituted an interference in the DRC's internal affairs as well as the civil war that was raging there.[266] The Paper also claims that, while the Charter, when interpreted broadly, appears to condemn the use of unilateral sanctions to influence a State's internal affairs, it seems that States' use of their sovereign right is a double-edged sword that both sides of the debate can wield. It means sender States may also justify their sanctions as a means of assertion of their internal right of sovereignty by relating that to the theory of *economic freedom* and thereafter considering it as a sovereign right to regulate the trade relations with other nations.[267] They believe principle of sovereignty grant them a right to freely decide to whom and which States engaging in economic relationships and avoiding to economically interact with a targeted State.[268]

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[265] *See generally* Leckie, Scott, *The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking*, 10 HUM. RTS. Q. 249 (1987).

[266] *Democratic Republic of Congo v. Uganda, Judgment* ¶ 165 (Dec. 19, 2005) (hereinafter Congo v. Uganda).

[267] They also consider it as a legitimate *self-help* act and recognize it as an element of an economic statecraft. *See* Doraev, *supra* note 258, at 359.

[268] *See id.*

The ICJ in the *Military and Paramilitary* has supported the theory of economic freedom by affirming 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 obligations."[269] This was an approval to the previous judgment of the Permanent International Court of Justice ("PICJ") in the case of *Lotus*.[270] Accordingly, the application of unilateral sanctions could also be considered to fall within the scope of Lotus principle since States have liberty to conduct their economic relations.[271]

The Paper contends that supporters of extending the theory of economic freedom to economic sanctions overlook the element of coercion that is at the heart of sanctions. These hostile acts with no coercive element have been labeled as retorsion in international law, which are always lawful as long as they do not violate a treaty.[272] Retorsions can be occurred in a variety of ways, including immigration laws, taxation, fishing rights, and withdrawal of voluntary aid. The main reason for the legality of these hostile acts is that, in the absence of a treaty, the sender State has no obligation to the target, and thus their measures are merely unfriendly and labeled as retorsion.[273]

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[269] Notably, the affirmation of ICJ in the *Military and Paramilitary*, also opened the door toward the next section's topic (which will be discussed later) by bringing the argument that the ICJ clearly justified the propriety of the US embargo of Nicaragua under customary international law. Porotsky, Richard D., *Economic Coercion and the General Assembly: A Post-Cold War Assessment of the Legality and Utility of the Thirty-Five-Year Old Embargo against Cuba*, 28 VAND. J. TRANSN'L L. 901, 920 (1995).

[270] S.S. Lotus (*France v. Turkey*), Judgment, PICJ 18 (1927) (hereinafter *Lotus*).

[271] *Id.*

[272] Tzanakopoulos, Antonios, *State Responsibility for "Targeted Sanctions"*, 113 AMERICAN J., INT'L L. 135-139 (2019).

[273] *See* Damrosch, Lori Fisler, *The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts*, 37 BERKELEY J. INT'L L. 257-8 (2019); *See also* Happold, Matthew, *Economic Sanctions and International Law: An Introduction, in* ECONOMIC SANCTIONS & INT'L L. 2 (Matthew Happold &

In any event, the level of political relationships between two parties should be considered when deciding whether this principle has been violated. For example, while economic cooperation with another country is permissible, financial assistance for a certain presidential candidate in that State may be regarded as an illegal intervention. Furthermore, despite the fact that it is commonly suggested to help building democracy extraterritorially, any support or forceful tactic aiming at overturning the targeted State is prohibited under international law.[274] Thus, since the stated or unstated policy objective of multiple unilateral sanctioning episodes is to cause people to rise up to the point of changing the governing regime, those unilateral sanctions could be considered violations of the CIL principle of non-intervention and the UN Charter's principle of State Sovereignty.

3.3.1.3 Human Rights Boundaries

The third phase is to determine if a sanctioning regime adheres to the UN charter's rights-based boundaries. These boundaries are also the most common basis for theoretical challenging of unilateral sanctions. The UN Charter's Preamble, Article 1(3), Article 13 (1), Articles 55(c), 56, 62(2), and 76 all expressly recognize the importance of human rights in the UN's purposes and responsibilities. The Paper examines all of them to determine whether they are simply recommendations or if they create any obligations for UN member States to

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Paul Eden eds., 2016). It also could be demonstrated in targeted sanctions imposed against the designated nationals of the targeted State, such as travel restrictions, which is lawful as no State is under obligation to admit any foreign national into its territory.

[274] For example, the Organization of African Unity (OAU) established the Convention for the Elimination of Mercenaryism in Africa, which stated in Article 1 that mercenaries hired to overthrow governments or OAU-recognized liberation movements committed crimes against peace and security, making it the most aggressive international codification of mercenaryism's criminality. *Convention of the O.A.U. for the Elimination of Mercenaryism in Africa*, Jul. 3, 1977, O.A.U. Doc. CM/433/Rev. L. Annex 1 (1972); Singer, Peter, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 528 (2003).

take or refrain from taking action that may have an impact on these purposes, such as unilaterally imposing sanctions.

It starts with the Preamble which states that "[w]e the peoples of the United Nations [. . .] reaffirm faith in fundamental human rights."[275] Also, Article 1(3) declares that one of the purposes of the UN is "to achieve international cooperation in solving international problems of [. . .] 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."[276] However, it is evident that the UN's *general purpose* is stated in both the preamble and Article 1(3), and the phrases *reaffirm*, *achieve*, *promote*, and *encourage* bear no implication of obligation. Article 13(1) asks United Nations General Assembly ("UNGA") to initiate studies in order to make recommendations for the objective of "the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[277] However, this Article plainly referred only to the UNGA rather than the UN's member States, and since the UNGA's recommendations are not binding on member States, this Article does not impose any obligations on them.

Furthermore, Article 55(c) of the Charter specified that: "for the principle of equal rights and self-determination of peoples, the United Nations shall promote: [. . .] c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[278] Article 55(c) was supplemented by

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[275] U.N. Charter, Preamble.

[276] *Id*, at 1¶3.

[277] *Id*, at 13¶1.

[278] *Id*, at 55¶c.

Article 56, which said that the UN member States "pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55."[279] Article 55 requests that the UN only to *promote* human rights, whereas Article 56 requests that member States to *cooperate* with the UN. It indicates that, based on the wording of these Articles and the mere use of the phrases of *promote* and *cooperate*, no explicit responsibility will be imposed on member States.

Another rights-based reference in the Charter is Article 62(2), which directs one of the Charter's principal organs, the Economic and Social Council ("ECOSOC"), to make recommendations with the goal of "promoting respect for, and observance of, human rights and fundamental freedom for all."[280] The *recommendations* of ECOSOC, like those of the UNGA, are not binding on member States. This lack of power was also highlighted by Leo Pascolsky, one of the Charter's authors, who said: "[t]he powers given to the Assembly in the economic and social fields in these respects are in no way the powers of imposition; they are powers of recommendation; powers of coordination through recommendation."[281] The final reference of the Charter to human rights is found in Article 76(c), which states that the trusteeship system's goal is "to encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world."[282] This Article also

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[279] *Id*, at 56.

[280] *Id*, at 62¶2.

[281] *Supreme Court of the United States*, 413 TRANSCRIPT OF RECORD 50 (Oct. 1952).

[282] U.N. Charter, art. 76¶c.

merely states a purpose for the UN, specifically its trusteeship system, by using the words of *encourage* and *respect*, with no indication of imposing an obligation on member States.

Therefore, it is plausible to conclude that the above-mentioned Preamble and Articles, especially Article 55(c), are only the UN's fundamental objectives, without creating any responsibility for member States other than *cooperation* to *promote* and to collaborate with the UN in achieving those objectives. Furthermore, these human rights are not expressly defined in the Charter, and there is no UN organ with the legislative authority to do so. Therefore, the Paper concludes that the Preamble and these Articles merely could be used to require the SC itself to refrain from taking measures that endanger human rights and not the UN members.

3.3.2 The International Covenant on Civil and Political Rights

The ICCPR, which primarily refers to civil and political rights, is a *negative* rights-based treaty that *might* be used to challenge unilateral sanctions amongst its Member States.[283] It mainly identifies the actions that States cannot take against their *own* citizens including preserving their right to life,[284] right to be free from slavery and forced labor, right to liberty[285] and freedom of expression[286] and thought.[287] The issue is whether the ICCPR's party

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[283] ICCPR, *supra* note 238. ICCPR as an enforceable Covenant has 173 member States such as the US which could assert the obligations under the treaty, and only eighteen States have not joined the Covenant, such as Sudan and Saudi Arabia. General information is *available at* https://indicators.ohchr.org/ (Last visited on May 6, 2021).

[284] *Id.*, art. 6.

[285] *Id.*, art. 9.

[286] *Id.*, art. 19.

[287] *Id.*, art. 16. It also requires member states to guarantee their people' right to a fair and public hearing before an impartial tribunal with an appropriate remedy. *Id.*, art. 14; Other duties that member states must uphold include freedom of religion, freedom of movement, property rights, the right to seek

which is challenged with regard to its sanctions, can be held responsible for civil and political rights violations caused by these measures imposed on another ICCPR's member State.

Article 2(1) of the ICCPR has pointed to the issue by mentioning that States parties' main obligation is "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the […] Covenant."[288] The proper interpretation of this Article requires further research because this clause raises the question of whether the suffered people must be *both* within a State's territory and also subject to its jurisdiction, or whether States must guarantee these rights to all individuals within their territories as well as to all who are subject to their jurisdiction.

According to the Human Rights Committee's General Comment No. 31, para. 10, the ICCPR's "States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction."[289] It also specified that "[i]t would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the covenant on the territory of another State, which violations it could not perpetrate on its own territory."[290]

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refuge, the right to privacy and reputation, and family rights. *See* Dupont, *supra* note 255, at 43; Wilson, Bryn P., *State Constitutional Environmental Rights and Judicial Activism: Is the Big Sky Falling?*, 53 EMORY L.J., 627, 635 (2004); *See also* Howlett, Amy, *Getting Smart: Crafting Economic Sanctions That Respect All Human Rights*, 73 FORDHAM L. REV. 1204 (2004).

[288] ICCPR, *supra* note 238, at art. 2(1).

[289] U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

[290] Human Rights Committee, *Sergio Euben Lopez Burgos v. Uruguay*, Communication No. R.12/52, U.N. Doc. Supplement No. 40 (A/36/40) para. 12.3 (1981).

It may be also claimed that this view is more in accord with the treaty's goal and object which supports *universality* and human dignity. Historically, the ICCPR did not include analogous territorial wording at first and merely had a general idea of jurisdiction until Eleanor Roosevelt, the US representative during the Covenant's drafting, proposed the reference to territory and article 2(1) and justified it as follows:

> The purpose of the proposed addition [is] to make it clear that the draft Covenant would apply only to persons within the territory and subject to the jurisdiction of the contracting states. The United States afraid that without such an addition the draft Covenant might be construed as obliging the contracting states to enact legislation concerning persons, who although outside its territory were technically within its jurisdiction for certain purposes. An illustration would be the occupied territories of Germany, Austria and Japan: persons within those countries were subject to the jurisdiction of the occupying states in certain respects, but were outside the scope of legislation of those states.[291]

It adequately demonstrates that the ICCPR was not intended to have extraterritorial application in conformity with US purposes, which not only precludes the Covenant's extraterritorial application to *occupied territories* but also in the case of external locations such as Guantanamo. Professor Milanovic regarding the latter US viewpoint mentioned that:

> If we ask them whether under the treaties they were drafting Auschwitz would *technically* not have been a violation thereof because it was located in occupied Poland, rather than in a territory over which the German Reich had legal title, it would be very doubtful that Roosevelt et al. would have

[291] *See* UN Doc. E/CN.4/SR.138, at 10.

> found such an interpretation acceptable. And yet this is *precisely* what the US position on strict territoriality would entail.[292]

In this regard, it should be noted that the notion of jurisdiction as a criterion for the applicability of a State's human rights obligations has developed over time, from occupied territory to territory over which a State exerts some form of *effective control*. According to the ICJ in the *Wall* Advisory Opinion, "State party's obligations under the Covenant apply to all territories and populations under its effective control"[293] and thus some commentators mainly from developing countries argue "a State imposing sanctions should incur liability for violations of human rights even if it does not exercise formal 'jurisdiction' or 'control' over the population of the territory occupied."[294] As mentioned it is primarily due to the fact that Article 2(1) of the ICCPR can be read in two different ways, each with a radically different conclusion, and whether a member State may impose measures on its fellow members that result in human rights violations is dependent on whether the elements of the Article are read conjunctive or disjunctive.

If read conjunctive, it leads to the conclusion that the covenant precludes the extraterritorial application of its rights, and that sender States are only responsible within their own occupied territory, with no obligation to protect civil and political rights beyond

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[292] Milanovic, Marko, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 226 (Oxford University Press, 2011).

[293] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ REPORTS 136, ¶ 112 (2004) (hereinafter Wall); Coomans, Fons, *The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights*, 11.1 HUMAN RIGHTS LAW REVIEW 6 (2011).

[294] U.N. Doc. A/HRC/36/44, para. 35; Quoted by Dupont, Pierre-Emmanuel, *Human Rights Implications of Sanctions, in* ECONOMIC SANCTIONS IN INTERNATIONAL LAW AND PRACTICE, 39, 52 (Asada Masahiko, 2019).

their borders.[295] Then, if the elements are read disjunctively by differentiating between those who are inside a State's territory and those who are outside it but under that State's jurisdiction, both of these groups are entitled to the rights established in the ICCPR. It means that it should be determined whether a sender State has ever exercised jurisdiction over the territory of the targeted State or its residents in order for that State to *theoretically* assumed liable.[296]

The ICJ in the *Wall* emphasized the latter reading and recognized the extraterritoriality of the application of ICCPR by stressing that the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their occupied territory.[297] They just sought to prevent people from claiming rights that are the responsibility of the State of origin rather than their State of residence when they are traveling overseas.[298]

Consequently, a member State is not bound to guarantee civil and political rights extraterritorially unless it had previously claimed its jurisdiction through an effective controlling in that State, according to the disjunctive reading. Otherwise, if the conjunctive interpretation of Article 2(1) is being used, the Paper is unable to answer the question of what

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[295] *See id,* at ¶¶ 107-111.

[296] *See id.*

[297] *See id.*

[298] *See id*; Relatedly, the ICJ held the same decision in favor of legality of acts by Uruguay in *Lupez Burgos v. Uruguay* and in *Lilian Celiberti de Casariego v. Uruguay.* Also, it mentioned the same finding of the case of confiscation of a passport by a Uruguayan consulate in Germany in *Montero v. Uruguay*; *See* Sepulveda, M. & C. Courtis, *Are Extra-Territorial Obligations Reviewable Under the Optional Protocol to the ICESCR?,* 27 NORDIC JOURNAL OF HUMAN RIGHTS 54, 55 (2009); *See also* Milanovic, Marko, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 17 (2011).

role the words "within its territory" play because only the second part of "subject to its jurisdiction" satisfies the entire idea of conjunctive reading.

3.3.1 The International Covenant on Economic, Social, and Cultural Rights

The ICESCR, like its sister convention the ICCPR, is intended to offer individuals, rights against their *own* governments. However, in comparison to the ICCPR, the ICESCR as an *affirmative* rights treaty, which outlines the extent to which member States are required to uphold economic, social, and cultural (ESC) rights,[299] presents an additional difficulty in that it lacks any kind of clause addressing the application of such rights to territorial and jurisdictional disputes, which could lead to the claim that such rights are entirely territorial *unlimited*.[300]

Also, as another difference, it should be noted that the acceptance of these ESC rights by the most industrialized States demonstrates a shift in the importance of human rights considerations in the application of sanctions. However, because the US, as the world's leading industrialized country, has yet to ratify ICESCR, it shows that, while many States have accepted international respect for civil and political rights as fundamental rights to human existence, extraterritorial ESC rights have not.[301] The US appears to find it difficult to

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[299] It should be noted that ICESCR, incorporates rights such as the right to an adequate standard of living and its continued improvement, G.A. Res. 217 (III) A, UNIVERSAL DECLARATION OF HUMAN RIGHTS (Dec. 10, 1949), art. 11, the right to food *id*, art. 11(2), to education *id*, art. 13, to work and receive remuneration, *id*, arts. 6-7, the right to form trade unions, *id*, art. 8, and the right to highest attainable standard of health *id*, art. 12. The ICESCR also predicts protection for mothers before and after childbirth and children from child labor. *Id*, art. 10(2).

[300] ICESCR, *supra* note 239. The members States of the ICESCR are 171 that is almost the same number as the ICCPR.

[301] It should be mentioned that while the US is not a member State of ICESCR, it has generally recognized economic and social rights through the Universal Declaration of Human Rights (UDHR).

embrace ESC rights because they go beyond what its domestic Constitution contains and characterizes them mainly as goals rather than rights.[302] Eleanor Roosevelt, the US representative on the adoption of the Universal Declaration of Human Rights ("UDHR") also explained the reason for this denial by mentioning that "my Government has made it clear in the course of the development of the declaration that it does not consider that the economic and social and cultural rights stated in the declaration imply an obligation on governments to assure the enjoyment of these right by direct governmental action."[303]

Nonetheless, according to one common claim, the hardship caused by unilateral sanctions is due to the targeted State's behavior, and thus violations of these rights generated should be addressed to the targeted State's government; however, it is also argued that it is always the responsibility of sender States not to undermine the ICESCR's objectives through their own actions in any circumstances.[304] It raises the question of whether a sender State can *ideally* be held liable for any subsequent deprivation of the right to food or health due to the subjective sanctions, even if it lacks official jurisdiction over the people concerned.

Despite the fact that the majority of affirmative rights treaties lack explicit jurisdictional language, some commentators argue that it is now widely accepted that these human rights treaties may impose *positive* obligations on members insofar as the State has the ability to

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However, it should be noted that although the US recognized the rights but since the UDHR is not a treaty or international agreement, it is not legally binding.

[302] Howlett, *supra* note 287, at 1204.

[303] Roosevelt, Eleanor, *On the Adoption of the Universal Declaration of Human rights*, PARIS (Dec. 9, 1948).

[304] Simonen, Katariina, *Economic Sanctions Leading to Human Rights Violations: Constructing Legal Argument*, *in* ECONOMIC SANCTIONS UNDER INTERNATIONAL LAW 192 (Marossi, Ali & Bassett, Marisa eds, 2015).

influence situations located abroad, of which sanctions fall under.[305] The Paper contends that this unlimited territorial interpretation is very ideal for going toward *utopia*, but in practice, what would the EU, for example, do to preserve Iraq's population's right to health during sanctions, aside from international support and cooperation as mandated by ICESCR Article 2(1)? The presumption that the Westphalian international order is territorial in origin, as well as that States have the authority to protect their territory from outside intervention, both give credibility to this criticism.

One could argue that adopting universality as the foundation of *human rights* is a break into the Westphalian approach. Although the Paper supports the universality of human rights, its focus in this section is limited to international law, so it will take a different route by mentioning that some sanctions could cause the targeted State to lose control over its own territory, such as those imposed on Iraq (rather than merely having an external influence), which in this case it may cause that State not to be expected to secure or uphold the rights of its citizens, while also holding the sender State liable. In these cases, according to the General Comment 8 of Committee on Economic, Social and Cultural Rights ("CESCR"), entitled as *the relationship between economic sanctions and respect for economic, social and cultural rights*,[306] ICESCR's member States are required to refrain from enacting food embargoes and measures that *directly* restrict or jeopardize the production and supply of food, as well as pharmaceuticals and sanitation materials.[307] While the ICESCR considers

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[305] Dupont, Pierre-Emmanuel, *Human Rights Implications of Sanctions*, *in* ECONOMIC SANCTIONS IN INTERNATIONAL LAW AND PRACTICE, 39, 51 (Asada Masahiko, 2019).

[306] *U.N. Comments on Economic, Social and Cultural Rights*, General Comment No. 8 on the Work of Its Seventeenth Session, E/C. 12/1997/8, (1997) (hereinafter *Comment No. 8*).

[307] *Id*, at 3.

that the imposition of sanctions does not relieve the targeted State of its obligation to protect its citizens' human rights,[308] it *asks* sender States to strike a right balance between their policy objectives and their sanctions' collateral damages.[309] Despite the fact that unilateral sanctions frequently result in collateral effects to the civilians' ESC rights in targeted States,[310] it went on to say that the civilians of the targeted States do not lose their core ESC rights as a *direct* result of any decision or wrongdoing by their leaders.[311] It means that sender States are *indirectly* responsible for ESC rights abuses, and hence may be held jointly liable as the proximate cause of this suffering. As a result, the question is whether the ICESCR

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[308] Paragraph 10 reads: "The imposition of sanctions does not in any way nullify or diminish the relevant obligations of that State party. As in other comparable situations, those obligations assume greater practical importance in times of particular hardship. The Committee is thus called upon to scrutinize very carefully the extent to which the State concerned has taken steps "to the maximum of its available resources" to provide the greatest possible protection for the economic, social and cultural rights of each individual living within its jurisdiction." *Id*, at 10.

[309] Paragraph 4 reads: "it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing élite of the country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country. For that reason, the sanctions regimes established by the SC now include humanitarian exemptions designed to permit the flow of essential goods and services destined for humanitarian purposes. It is commonly assumed that these exemptions ensure basic respect for economic, social and cultural rights within the targeted country." *Id*, at ¶ 4.

[310] Commission on Human Rights, *The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights*, Working Paper prepared by Mr. Marc Bossuyt, U.N. Doc. E/CN.4/Sub.2/2000/33 (June 21, 2000), ¶ 63.

[311] Paragraph 16 reads: "In adopting this general comment the sole aim of the Committee is to draw attention to the fact that 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." *Comment No. 8, supra* note 306, at 16.

compelled its members to protect ESC rights extraterritorially in these scenarios, and if their failure to do so resulted in their liability.

The ICESCR particularly addresses this issue in Article 2(1), which says that any State party "undertakes to take steps, individually and through international assistance and co-operation, [. . .] to achieving progressively the full realization of the rights recognized in the present Covenant."[312] It is clear that the ICESCR, ignores the territorial issue of promoting economic rights and implies that States bear certain external or international obligations.[313] Article 2(3) even asked developing countries to "guarantee the economic rights recognized in the present Covenant to non-nationals."[314] As a result, it is possible to conclude that member States have extraterritorial obligations to protect ESC rights even with regard to non-member States as well as *non-nationals* and even in respect of individuals in third countries.[315]

In response, even though the ICESCR contains no extraterritorial exclusion, the Paper contends that the *wording* of a multilateral treaty imposing obligations should specifically point to *all of the elements* and details of the obligation. Because of this flaw, the existence of extraterritorial obligation is hardly acceptable. It asserts that even if all of the obligatory

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[312] ICESCR, *supra* note 239, at 2¶1.

[313] Craven, M., *The Violence of Dispossession: Extraterritoriality and Economic, Social, and Cultural Rights*, *in* ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN ACTION 71 (M. Baderin & R. McCorquodale eds., 2007).

[314] *Id*, at 2¶3.

[315] Coomans, Fons, *The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights*, 11.1 HUMAN RIGHTS LAW REVIEW 1-35 (2011).

elements are met, the Covenant's phrasing could be interpreted as a *recommendation*,[316] and there appears to be no mandatory tone. The ICESCR's recommendatory tone also implies that similar to the UN Charter, it merely advises the international community to *cooperate* in order to protect ESC rights all over the world. The lack of an obligatory tone is also evident in the CESCR, which calls to "take steps, individually and through international assistance and cooperation, especially economic and technical."[317] *Take steps*, *assist*, and *cooperate* are all words that illustrate the Covenant's provisions are merely advisory.

It should be noted that, while the "right of everyone to an adequate standard of living"[318] and the universal right to physical and mental health[319] appear to have an advisory tone under the ICESCR, the tone shifts and becomes more *obligatory* on other occasions. For example, in Article 41, it requires all member States to "*refrain* [emphasis added] at all times from imposing embargoes or similar measures restricting another state's supply of adequate medicines and medical equipment."[320] Paragraph 33 also reads:

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[316] Some commentators believe that the debate over "whether the focus on human responsibilities for the promotion and protection of human rights will weaken the protection of individuals against States—Western countries—or the obedience of individuals to God's commandments as the true source of human rights—the view of many Islamic countries" is the reason for this recommendatory tone. *See* Mahmoudi, A., *Islamic Approach to International Law*, 6 MPEPEL 396-7 (2011).

[317] *Comment No. 8*, *supra* note 306, at 16.

[318] *U.N. Comments on Economic, Social, and Cultural Rights*, General Comment No. 12: The Right to Adequate Food (Art. 1), E/C.12/1999/5 (1999) ¶ 8 (hereinafter *Comment No. 12*).

[319] Which have been categorized under the right to life That is the most basic economic right likely to be affected by economic sanctions. *See* De Wet, Erika, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 219 (2004); *See* Razavi, Seyed & Fateme Zeynodini, *Economic Sanctions and Protection of Fundamental Human Rights: A Review of the ICJ's Ruling on Alleged Violations of the Iran-U.S. Treaty of Amity*, 29 WASH. INT'L L.J. 303, 312 (2020); G.A. Res. 44/25, CONVENTION ON THE RIGHTS OF THE CHILD, at art. 24 (Nov. 20, 1989).

[320] *U.N. Comments on Economic, Social and Cultural Rights*, General Comment No. 14: The Right to the Highest Attainable Standard of Health ¶ 41, E/C. 12/2000/4 (2000) (hereinafter *Comment No. 14*).

> The right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil. In turn, the obligation to fulfil contains obligations to facilitate, provide and promote. The obligation to respect requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to protect requires States to take measures that prevent third parties from interfering with article 12 guarantees. Finally, the obligation to fulfil requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.[321]

Therefore, member States have three *obligations* including to respect, protect and fulfill the *right to health*. It means even if it lacks legal jurisdiction or control over the people or territory targeted, a member State of the ICESCR that imposes sanctions unilaterally could be held accountable for its impact to the infringement of the right to health. Thus, under the ICESCR,[322] its member States are required to respect and protect and fulfill this right for individuals in other jurisdictions by *refraining* from enacting unilateral sanctions especially those which could deprive civilians of the right to health.[323]

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[321] *Id*, ¶ 33.

[322] As well as other public international law conventions such as the Convention on the Rights of the Child that accordingly, the coercive measures "should at the very least not result in denying children access to the basic goods and services essential to sustain life." *See* CONVENTION ON THE RIGHTS OF THE CHILD, November 20, 1989, 1577 UNTS 3, arts 6, 24(2). Also, conventional international law prohibited such measures such as the General Agreement on Tariffs and Trade (GAAT), and the Energy Charter Treaty (ECT). *See e.g.,* Bothe, Michael, *Compatibility and Legitimacy of Sanctions Regime, in* COERCIVE DIPLOMACY, SANCTIONS AND INTERNATIONAL LAW (Brill Nijhoff, 2016); *See also* Atteritano, A. & MB Deli, *An Overview of International Sanctions' Impact on Treaties and Contracts, in* COERCIVE DIPLOMACY, SANCTIONS AND INTERNATIONAL LAW (Brill Nijhoff, 2016).

[323] Inter-American Court of Human Rights, *Villagrán Morales and Others v. Guatemala* (hearinafter *Street Children*), Judgment, November 19, 1999, Joint Concurring Opinion of Judges A.A. Cançado Trindade and A. Abreu Burelli, ¶ 2: "The right to life [which includes the right to health] implies not only the negative obligation not to deprive anyone of life arbitrarily, but also the positive obligation to take all

In any event, it should be reminded that the *potential* of human rights treaties, including this seemingly mandatory language, is more *theoretical* than practical, and that we require more treaties and agreements with *stricter* mandates and more forceful terms. One probable explanation is that the Paper believes that human rights law, and the mentioned treaties, in terms of extraterritorial obligations imposed on its members in sanctioning situations, is unduly *utopian* and *ambiguous*. The Paper contends that recognizing extraterritorial obligations based on the stated treaties will ultimately *burden* all member States with various highly difficult expectations that they will be unable to perform, and finally causing the treaties to be abandoned. In addition, not only there is *no system* for determining whether or not governments act responsibly in relation to other members, but also the current international legal system is unprepared to comprehend the specific volume and *precision* of information concerning human rights violations and suffering of people residing within the borders of the targeted States for which the sender States are claimed to be held responsible. In conclusion, the last two rights-based treaties do little to address the extraterritorial effects of sanctions on people's rights—positive or negative—in targeted States and we should accept this reality, even if it is *not morally* right, and move on to find the legal justification in other international law principles.

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necessary measures to secure that that basic right is not violated."; *See* Dupont, *supra* note 255, at 43. Nonetheless, some commentators like Howlett mentioned that the two covenants entered into force almost thirty years later (the UDHR was proclaimed and then States started the process of drafting the two covenants) and based on the wordings of both covenants and the broadly defined obligations, they have a long way to go before being extraterritorially enforceable. *See* Howlett, *supra* note 287, at 1203.

3.3.2 The International Convention on the Elimination of All Forms of Racial Discrimination

The majority of unilateral sanctions could be viewed as discriminatory measures and be challenged on the grounds that they violate the principle of non-discrimination, which is among the most fundamental principles of international human rights.[324] ICERD, as one of the major rights-based treaties, was the cornerstone of Qatar's application in *Qatar v. UAE* before the ICJ in 2018 to challenge unilateral sanctions.[325] Accordingly, Qatar, as the target of sanctions imposed by UAE, Saudi Arabia, Bahrain, and Egypt, for its alleged terrorism financing, filed an application against the sender States before the ICJ based on Article 22 of the ICERD.[326]

These measures, among others, endeavored to cut diplomatic ties with Qatar and expelled all Qatari residents and visitors.[327] It was indicated that the majority of those

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[324] *See* Leary, Virginia, *The Right to Health in International Human Rights Law*, HEALTH AND HUMAN RIGHTS 27 (1994). Virginia Leary specifically mentioned that "fundamental principles of human rights [are] dignity, non-discrimination, participation, and justice." The principle of non-discrimination, also addressed in conventional law and a number of international trade and the World Trade Organization (WTO) agreements, such as the General Agreement on Trade in Services (GATS), which is one of the WTO's primary features. *See* Ortino, Federico, *Chapter Five. The Principle of Non-discrimination and Its Exceptions in Gats: Selected Legal Issues*, *The World Trade Organization and Trade in Services*, BRILL NIJHOFF 172 (2008).

[325] ICERD, *supra* note 240. *See* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar v. United Arab Emirates*), Preliminary Objections, Judgment (Feb. 4, 2021) (hereinafter *Qatar v. UAE*).

[326] Article 22 reads: "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement." ICERD, *supra* note 240, at 22.

[327] Qatar claimed racial discrimination on three counts: The first claim stemmed from the travel bans and expulsion orders and it asserted that referring to Qatari nationals expressly constitutes discrimination based on current nationality; Second claim arose from restrictions on Qatari media corporations and asserting that measures directly targeted those corporations in a racially discriminatory manner; third claim

affected by the sanctions are not blacklisted, State officials, or even involved in any alleged illicit activities, but are civilians who bear no responsibility for the alleged wrongdoings.[328] Qatar concluded that the sanctions discriminate against people based on their nationality and country of residence.[329] The evidence presented by Qatar might be used as a model to show how unilateral sanctions that harm civilians should be condemned for their discriminate and disproportionate application to disadvantage of people who are powerless to change their leaders' behavior.[330]

The Application main argument was the dispute between the notions of *nationality* and *national origin* for those civilians affected by sanctions. Qatar claimed that the unilateral sanctions violated equal treatment and other fundamental rights protected by the ICERD, and asserted that the term national origin, one of the five grounds in the definition of racial discrimination in Article 1(1) ICERD, includes nationality as well. Qatar maintained that national origin in ICERD encompasses Qatari people, Qatari nationals, and Qatari residents and visitors, and in general it triggers nationality and thus the measures fall within the scope

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that actions taken result in "indirect discrimination" based on Qatari national origin and that expulsion orders and travel bans result in "indirect discrimination" as well. *See Qatar v. UAE, supra* note 325, at 1.

[328] *See id.*

[329] *See id.*

[330] For example, UAE's diplomatic relations were cut, Qatari citizens were barred from accessing UAE territory (especially Qatari News and Al-Jazeera), and were given 14 days to leave the UAE, and were denied access to all forms of transportation, including the use of the UAE's airways and seaports. *See* Hofer, Alexandra., *Introductory Note to Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Qatar v. United Arab Emirates): Request for the Indication of Provisional Measures (ICJ)*, 57.6 INT'L LEGAL MATERIALS 973 (2018).

ratione materiae of ICERD.[331] However, the UAE argued that national origin does not include nationality and thus the measures fall outside the scope of the Convention.[332]

The dispute previously resolved in favor of Qatar by the Committee on the Elimination of Racial Discrimination (CERD) which was the suitable chamber under Article 11 of CERD as the inter-State communications mechanism.[333] CERD's holds that nationality is within the scope of the term national origin and those sanctions which are imposed against a *particular nationality* may also be considered a specific breach of Article 1(3).[334]

However, after filing the case before ICJ, The Court's judgment found the interpretation of the term national origin in accordance with Articles 31–32 of the Vienna Convention on the Law of Treaties (VCLT) and found: "These references to 'origin' denote, respectively, a person's bond to a national or ethnic group at birth, whereas nationality is a legal attribute which is within the discretionary power of the State and can change during a person's lifetime."[335] It justified its decision by asserting that because the object of the ICERD was concerned to "any attempt to legitimize racial discrimination by invoking the superiority of

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[331] *See Qatar v. UAE, supra* note 325, at 1.

[332] Article 1(1) specified "the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." ICERD, *supra* note 240, at 1¶1.

[333] Article 11(1) reads that "[i]f a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee." ICERD, *supra* note 240, at 11¶1.

[334] Article 1(3) reads that "[n]othing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality." ICERD, *supra* note 240, at 1¶3.

[335] *Qatar v. UAE, supra* note 325, at 47 ¶ 46.

one social group over another" and "to bring to an end all practices that seek to establish a hierarchy among social groups as defined by their inherent characteristics," the Convention does not encompass discrimination based on nationality.[336]

Although at the end the ICJ decided that "the dispute fell outside of the scope of *ratione materiae* of the ICERD," and found that it did not have jurisdiction, over the case,[337] its decision received several major critics even among the six judges who voted against it. For example, Judge Robinson contends that "there is no reason why the Court should not attach great weight to the recommendations of CERD, if they are not in conflict with international human rights law or general international law."[338]

The Paper support the assertion of Judge Robinson that CERD's decision was a legitimate understanding of the Convention's scope and should be given significant weight by the Court. Despite the fact that the diplomatic channels and negotiation mechanisms between sender States and targets should not be closed under any circumstances, the ICJ in *Qatar v. UAE* rendered the only internal mechanism for diplomatic level discussions and dispute settlement chamber nearly meaningless, causing Qatar to cease communication.[339]

In *Georgia v. Russia* this significance of inter-state mechanism of CERD was asserted by Russia in its preliminary objection to the ICJ's jurisdiction over the application filed by

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[336] *Id*, at 28 ¶ 87.

[337] On March 15, 2021, following the Al Ula agreement, both States decided to suspend the proceedings. Decision of the ad hoc Conciliation Commission on the request for suspension submitted by Qatar concerning the interstate communication *Qatar v. UAE* (March 15, 2021).

[338] *Qatar v. UAE, supra* note 325, Opinion of Judge Robinson, ¶ 7.

[339] *See* Hofer, *supra* note 330, at 973-5.

Georgia.[340] Russia argued that Georgia had failed to meet the CERD's communication mechanism step and preconditions for Court seisin by failing to negotiate and use CERD procedures prior to filing the application with the ICJ.[341] The issue of the dispute between these two States, was dated back to four days after armed conflict occurred between them as ICERD's parties in the Georgian territories of South Ossetia and Abkhazia on August 8, 2008.[342] It was the time that Georgia instituted proceedings against Russia by alleging that Russia "practiced, sponsored and supported racial discrimination through attacks against, and mass-expulsion of, ethnic Georgians" in two territories in violation of Russia's obligation under ICERD.[343] Nonetheless, the ICJ asserted that it lacked jurisdiction over the matter[344] and ruled against what it had ordered earlier on October 15, 2008, by issuing provisional measures against both parties.[345]

To summarize, the status of the CERD inter-State mechanism must be stabilized, as requested in *Georgia v. Russia*, then, based on the CERD's judgments in *Qatar v. UAE*, unilateral sanctions could be challenged under the ICERD and between its parties as a means of discriminating against people of targeted States based on their nationality. Otherwise, the

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[340] *See* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v. Russian Federation*), Preliminary Objections, Judgment (2011) (hereinafter Georgia v. Russia).

[341] *See* Szewczyk, Bart, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, 105.4 THE AMERICAN J., INT'L L. 748 (2011).

[342] *Id*, at 747.

[343] *Id.*

[344] *See Georgia v. Russia, supra* note 340.

[345] *See id,* Provisional Measures, at ¶ 353 (Oct. 15, 2008).

settlement channels will be rendered ineffective, and tensions will rise, an issue that should concern the ICJ more than any other organ.

3.3.3 Bilateral Treaties: Treaty of Amity

Treaty parties may also defend or challenge a sanctioning regime based on their mutual adherence to a bilateral treaty among themselves. These treaties could be utilized to establish whether a State Party infringed the treaty with its sanctions and, as a result, bears responsibility for human rights violations caused by those sanctions. In this context, the Paper, by employing the Amity Treaty as a bilateral treaty,[346] investigates the ongoing ICJ case[347] of *Alleged Violations* to see if the ICJ has already set any rights-based restrictions for unilateral sanctions.[348]Accordingly, Iran on July 16, 2018, by filing the *Alleged Violations*,[349] claimed that the re-imposition of the US sanctions formed a violation of the Amity Treaty.[350]

Since the Iranian revolution, the Amity Treaty has been asserted for claims between the two States before the ICJ on previous occasions. On November 29, 1979, the US initiated in *Tehran Hostages* a legal action against Iran for the occupation of the American embassy in Tehran asserting that Iran had failed to provide constant protection and security to US citizens on its territory.[351] The ICJ ruled on May 24, 1980, that Iran violated its obligations

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[346] Amity Treaty, *supra* note 241.

[347] As of May 6, 2021.

[348] *See Alleged Violations*, *supra* note 242.

[349] *See Alleged Violations*, *supra* note 242.

[350] The US and Iran entered into the Treaty of Amity before the Iranian revolution in 1979, which sent relations between the two States into a decline. Amity Treaty, *supra* note 241.

[351] *Concerning United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), Judgment, 1979 ICJ (Nov. 29) (hereinafter Tehran Hostages).

under the Amity Treaty and ordered Iran to release the US hostages and make reparations to the US.[352] On November 2, 1992, as another occasion, Iran invoked the Amity Treaty against the US, stating that the US Navy's destruction of three offshore oil production complexes owned and operated for commercial reasons by the National Iranian Oil Company was a fundamental infringement of the Amity Treaty and international law.[353] In response, the US filed a counter-claim demanding that the Court adjudicate and declare that Iran had likewise infringed its obligations under Article X of the Amity Treaty due to its conduct in the Persian Gulf in 1987 and 1988.[354] On November 6, 2003, the ICJ concluded that neither the US nor Iran had breached their obligations under the Treaty, thus rejecting both Iran's claim and the US's counterclaim for reparation.[355]

This Paper focuses on the latest assertion of the Amity Treaty before the ICJ, which was after the US withdrew from the Joint Comprehensive Plan of Action (JCPOA).[356] The withdrawal led to "one of the most comprehensive recent programs of US economic sanctions"[357] by broadly reimposition of various sanctions against Iran, its natural and legal

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[352] *Id*, at ¶3.

[353] *See* Oil Platforms (*Islamic Republic of Iran v. United States of America*), Judgment, 1992 ICJ (Nov. 2, 1992).

[354] *Id*.

[355] *Id*. at ¶161.

[356] *See Joint Comprehensive Plan of Action*, U.N. SCR 2231 (2015) (hereinafter JCOPA). The provisions for the termination were specified in resolution 2231. U.N. Doc. S/RES/2231 ¶ 7(a). *See* SCR 2231 (2015) ¶¶¶ 11, 12, 13. Although the US withdrew from the JCPOA on May 8, 2018, the other parties remained committed to the agreement, and all members, including the US, are now negotiating to resurrect it as of May 6, 2021.

[357] Damrosch, *supra* note 273, at 254. Iran has initiated two proceedings against the US before the ICJ between 2016 and 2018. The first one as the *Certain Iranian Assets*, which was filed before the US withdrew from the JCPOA and is about the seizure of some of the Iranian State's assets under the terrorism exception to the US Foreign Sovereign Immunities Act (FSIA). 28U.S.C. § 1605A which reads

nationals, including all US sanctions that had already been lifted or waived in connection with the JCPOA.[358] Iran also filed a request for provisional measures in order to avoid irreparable harm to human rights as a real and imminent risk resulting from the implementation of US sanctions.[359] Accordingly, Iran requested the ICJ to rule, among other measures, forcing the US to "cease any and all statements or actions that would dissuade U.S. and non-U.S. persons and entities from engaging or continuing to engage economically with Iran and Iranian nationals or companies"[360] as well as "the suspension of the implementation and enforcement of all of the 8 May sanctions."[361] The basis of the main assertions of Iran was the infringement of the right to life and the right to health as a result of the US sanctions by claiming the violation of Articles IV(1), VII(1), VIII(1), VIII(2), IX(2), and X(1) of the Amity Treaty.[362]

"in which money damages are sought against a foreign State for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources [. . .] for such an act" *See* Certain Iranian Assets (*Islamic Republic of Iran v. United States of America*), 2016/19 ICJ 8 (Jun. 14, 2016) (hereinafter *Certain Iranian Assets*). The Paper only focuses on the second proceeding of the *Alleged Violations* which was filed after the US withdrew from the JCPOA. *See Alleged Violations*, *supra* note 242.

[358] The sanctioning program also has targeted "US and third country nationals and companies who engage in such dealings." 31 C.F.R. § 560 (2019); *See* Damrosch, *supra* note 273, at 254; *See Alleged Violations*, *supra* note 242.

[359] *See Alleged Violations*, *supra* note 242, at ¶ 42 (July 16, 2018).

[360] *See id,* at ¶ 42 (July 16, 2018).

[361] *See id.*

[362] Article IV(1): Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; Article VII(1): Neither High Contracting Party shall apply restrictions on the making of payments, remittances, and other transfers of funds to or from the territories of the other High Contracting Party; Article VIII(1): Each High Contracting Party shall accord to products of the other High Contracting Party [. . .] and to products destined for exportation to the territories of such other High Contracting Party [. . .] treatment no less favorable than that accorded like products of or destined for exportation to any third country; Article VIII(2): Neither High Contracting Party shall impose restrictions

Although, Iran as a basis for the jurisdiction of the ICJ, invoked Article XXI (2) of the Amity Treaty,[363] in response to the request for provisional measures, on July 27, 2018, the US submitted a letter to the ICJ with five preliminary objections that mainly asserted that the Court doesn't have appropriate jurisdiction in respect to this case.[364] The US in its first objections challenged the Court's jurisdiction by mentioning that the real dispute with Iran was on the application of the JCPOA, and not the Amity Treaty.[365] Under the objections four and five respectively, the US also argued that, the sanctions fell under the "essential security interest" exception mentioned expressly in Article XX(1)(b) of the Treaty and described Iran's arguments as "meritless" and "a misuse of the Court" based on Article XX(1)(d).[366]

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or prohibitions on the importation of any product of the other High Contracting Party or on the exportation of any product to the territories of the other High Contracting Party; Article IX(2). Nationals and companies of either High Contracting Party shall be accorded treatment no less favorable than that accorded nationals and companies of the other High Contracting Party, or of any third country, with respect to all matters relating to importation and exportation; Article X(1): Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.

[363] Article XXI(2) of the Amity Treaty reads: "[a]ny dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the ICJ, unless the High Contracting Parties agree to settlement by some other pacific means."

[364] *See Alleged Violations*, *supra* note 242, at ¶39.

[365] *See id,* at ¶40.

[366] According to Article XX(1) the Treaty shall not preclude the application of measures if the action is: "necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests." *See* U.S. Dept. of State Press Release, *On U.S. Appearance Before the ICJ* (Jul. 27, 2018). The permissive national security exception has served as the foundation for challenging some major sanctioning regimes, such as US sanctions against Russia following the Ukraine crisis. It has been widely criticized as being open to abuse by States, being overly broad, and undermining the WTO's primary objective. *See* Doraev, *supra* note 258, at 379. This term is specifically challenged by members of the General Agreement on Tariffs and Trade (GATT), for example, the 1986 Panel Report regarding US trade measures affecting Nicaragua, determined that the US cannot justify its sanctions by invoking Article XXI. *Id.*

The US also asserted that the Amity Treaty is simply referred to trade and transactions between Iran and third countries, or their natural and legal nationals.[367]

Subsequently, the ICJ issued an order on October 3, 2018,[368] that unanimously provided for limited provisional measures,[369] and concluded that it has jurisdiction over many of Iran's claims in the *Alleged Violations* by stressing that "the dispute between the Parties has arisen in connection with and in the context of the decision of the United States to withdraw from the JCPOA [. . .] which might constitute breaches of certain obligations under the Treaty of Amity."[370]

In addition, the ICJ by recognizing the adverse effects of the US sanctions on Iranian people, required the US to promptly "remove, by means of its choosing, any impediments arising from the measures announced on 8 May 2018 to the free exportation to the territory of the Islamic Republic of Iran of [. . .] medicines and medical devices,"[371] "foodstuffs and agricultural commodities,"[372] and "spare parts, equipment and associated services [. . .] necessary for the safety of civil aviation."[373] ICJ also ordered the US to "ensure that licenses and necessary authorizations are granted and that payments and other transfers of funds are

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[367] *See Alleged Violations, supra* note 242, at ¶ 98. In general, US persons, including US citizens, lawful permanent residents, and foreign nationals temporarily residing in the US, are prohibited from directly or indirectly supplying or facilitating any goods, technology, or services to Iran.

[368] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (Iran v. U.S.), I.C.J. ORDER ON PROVISIONAL MEASURES (Oct. 3, 2018) (hereinafter *Provisional Measures*).

[369] *See Provisional Measures, supra* note 368, at ¶12.

[370] *Id,* at ¶56.

[371] *Id,* at ¶102(1).

[372] *Id.*

[373] *Id,* at ¶102.

not subject to any restriction in so far as they relate to medicines and medical devices."[374] It emphasized that the orders "create international *legal obligations* [emphasis added] for any party to whom the provisional measures are addressed."[375]

The ICJ specifically mentioned that "while the importation of foodstuffs, medical supplies and equipment is in principle exempted from the United States' measures, it appears to have become more difficult in practice, since the announcement of the measures by the United States, for Iran, Iranian companies and nationals to obtain such imported foodstuffs, supplies and equipment."[376] It repeated that as a result of the US sanctions "it has become difficult if not impossible for Iran, Iranian companies and nationals to engage in international financial transactions that would allow them to purchase items not covered, in principle, by the measures, such as foodstuffs, medical supplies and medical equipment."[377]

The court also by 15 to 1 vote rejected the other preliminary objection of the US, which sought the inadmissibility of Iran's Application due to the alleged "misuse of the Court" when the real dispute exclusively concerns the JCPOA, and Iran did not resort to the mechanisms under the JCPOA.[378] Judge Charles Brower was the only opponent who considered Iran's application as inadmissible by abusing of process, since granting Iran's requested relief of removing sanctions related to the non-binding JCPOA would legally bind

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[374] *Id*.

[375] *Id*, at ¶100.

[376] *Id*, at ¶89.

[377] *Id*.

[378] *Id*, at ¶ 87.

the US, while Iran has already admitted to non-compliance of the JCPOA.[379] The Court also ruled that "the two objections raised by the United States on the basis of Article XX, paragraph 1(b) and (d), cannot be considered as preliminary [. . . and] a decision concerning these matters requires an analysis of issues of law and fact that should be left to the stage of the examination of the merits."[380]

Then the ICJ affirmed its jurisdiction to the extent that does not preclude the humanitarian asserted rights,[381] and "at least" with respect to "the revocation of licenses and authorizations granted for certain commercial transactions between Iran and the US, the ban on trade of certain items, and limitations to financial activities."[382] In consideration of the rights-based boundaries of the US sanctions, the ICJ instructed it to remove hurdles to imports medicine, food, and certain goods and services relevant to civil aviation by finding that *irreparable prejudice* with respect to the health and safety of Iranians would rise from the absence of the limited provisional measures granted.[383] The order also addressed the US to not suffice to the mere existence of specific exemptions for humanitarian trade and asked

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[379] *Id*, at ¶ 95.

[380] *Id*, at ¶ 110.

[381] *Id*, at ¶ 70.

[382] *Id*, at ¶¶ 41-44.

[383] *Id*, at ¶¶ 91-102. However, after the ICJ issued the order, the US announced its intention to totally terminate the Amity Treaty that seemed effectless as the termination did not impact retroactively. U.S. Dept. of State Press Release, Remarks to the Media (Oct. 3, 2018), For more discussion of the U.S. withdrawal from this treaty, *see* Galbraith, Jean, *Contemporary Practice of the United States*, 113 AJIL 133 (2019); *Iran Initiates Suit Against the United States in the International Court of Justice, While Sanctions Take Effect*, 113(1) AMERICAN J., INT'L L. 173-182 (2019).

the US to "ensure payments and other transfers of funds [. . .] relate[d] to [the] goods and services" are facilitated.[384]

The effects of the sanctions on the Iranian banking system, which *prima facie* may seem merely as targeted sanctions, but effects-wise based on the Paper's perspective, are comparable with embargoes, were so strong and broad on the right to health that the Iranian government was unable to import medicine, vaccines, and other medical supplies in order to respond to the COVID pandemic.[385] During the pandemic, the OFAC's general license limited importation of several medical pieces such as the medical equipment crucial for this illness.[386] According to quarterly reports from a US Treasury Department enforcement agency, the US has reduced the number of licenses it grants to companies for certain medical exports to Iran, such as oxygen generators, full-face respirator masks, and thermal imaging equipment, since the beginnings of COVID, citing their dual-use nature, making them to fall outside the scope of the general license issued for medical devices.[387]

Although the orders of the ICJ in provisional measures have binding effects,[388] " in light of the U.S.'s post Order actions and the fact that it did not make any significant policy changes to make medical supplies and equipment more accessible [. . . as well as its failure to remove all] impediments arising from the measures announced on 8 May 2018 to the free

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[384] *See Provisional Measures, supra* note 368, at ¶ 98.

[385] *See* Cunningham, Erin, *As Coronavirus cases explode in Iran, U.S. Sanctions Hinder its Access to Drugs and Medical Equipment*, THE WASHINGTON POST (Mar. 29, 2020).

[386] *See id.*

[387] *See id.*

[388] *See Provisional Measures, supra* note 368, at ¶100.

exportation to the territory of the Islamic Republic of Iran of … medicines and medical devices, [. . .] it seems likely that the U.S. has breached the Order."[389]

Despite the US's failure to comply, the ICJ's *Provisional Measures* order could be seen as a step forward in establishing the rights-based boundaries or extraterritorial obligations of a party to a bilateral treaty or *even outside a treaty due to irreparable prejudice to the health and safety* of people whose State targeted by unilateral sanctions. It means that any State, regardless of being member of a similar treaty, that intends to employ sanctions should at the very least follow the rights-based orders mentioned above to ensure that no adverse effects are imposed on medicines and medical devices, foodstuffs and agricultural commodities, and spare parts, equipment, and associated services required for civil aviation safety.[390]

3.4 CUSTOMARY INTERNATIONAL LAW-BASED BOUNDARIES

The Paper has thus far attempted to address the question of whether, treaties as the main source of international law, can establish right-based boundaries that sender States must respect when designing and implementing unilateral sanctions. Next, it seeks to establish these boundaries in CIL, as the second most important source of international law. It examines some of the most significant resources in *opinio juris* and State practices, but it does not imply that one can simply observe State practice and *opinio juris* to reach a general

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[389] Klingler, Joseph, Beau Barnes & Tara Sepehri Far, *Is the U.S. in Breach of the ICJ's Provisional Measures Order in Alleged Violations of the 1955 Treaty of Amity?* 24.12 ASIL INSIGHTS (May 26, 2020).

[390] Notably, the ICJ's ruling on preliminary objections in *Alleged Violations,* was handed down on February 3, 2021, which accordingly, the court's jurisdiction was established "on the basis of Article XXI, paragraph 2 of the Treaty of Amity, Economic Relations, and Consular Rights of 1955" and overruled all of the US's preliminary objections and pronounced Iran's application admissible.

conclusion about the legality of unilateral sanctions in CIL.[391] The Paper asserts each regime of unilateral sanctions must be examined individually in order to reach a viable conclusion about its legality or compliance with the rules of CIL. It is because CIL achieves its goals through a variety of methods and not only State practices and *opinio juris* and thus it must be studied on a case-by-case basis.[392]

Nonetheless, in this Paper, CIL's employed only those resources which are classified under these two broad categories, in order to provide a general framework for a State to follow when challenging unilateral sanctions. To achieve this objective, it is hypothesized that there is no general agreement among international lawyers on the existence of a CIL norm prohibiting the use of unilateral sanctions against a sovereign State without the SC's authorization. Some of the reasons, such as the theory of economic freedom, State sovereignty, or the principle of non-intervention, have already been discussed in the previous Part by using relevant treaties. First, the Paper looks at *opinio juris* before moving on to State practices and researching existing norms to answer the main question of whether there is any rule that could justify applying unilateral sanctions in the case of violation of human rights or committing an international wrongful act by a State.

3.4.1 Opinio Juris

In general, it is assumed that CIL is formed through State practices, but the Paper supports the assertion that these State practices also should be supported and recognized by

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[391] *See generally* d'Aspremont, Jean, *The Modern Splendour of Customary International Law*, *in* THE DISCOURSE ON CUSTOMARY INTERNATIONAL LAW 1-11 (Oxford Public International Law, 2021).

[392] *Id.*

other States as components of international law.[393] This recognition or the belief to have a legal obligation to practice in a certain way is also known as *opinio juris*.[394] It seeks to determine whether States recognize the practice of imposing unilateral sanctions as a legitimate act in international law, despite the fact that it could violate human rights. In this path, it assumes that, in order to create a CIL norm under international law, a practice such as unilaterally implementing sanctions must be widely recognized by *opinio juris*.

Nonetheless, in the case of imposing unilateral sanctions, it seems general practice exists only among developed States. It means several other developing States would prefer that all States refrain from practicing sanctions unilaterally. As a result, the purpose of this Section is to ascertain whether *opinio juris* of these developing States can prevent such a practice from becoming CIL. It also aims to determine whether the developed States' sanctioning practices generate a CIL towards the practice's permissibility. In this regard, the Paper examines international organization resolutions to determine if a majority of States and international organizations support or oppose unilateral sanctions. It also aims to establish if their *opinio juris* has sufficient normative value to warrant the creation of a CIL.

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[393] *See* Dahlman, Christian, *The Function of Opinio Juris in Customary International Law*, 81 NORDIC J. INT'L L. 327-8 (2012).

[394] Despite the fact that several scholars have attempted to define *opinio juris*, it always turns out that the definition has some kind of fundamental flaw such as logical inconsistencies or misrepresentation of the reality of international law. Some scholars have concluded that it is superfluous and have suggested that we discontinue its use, but this has not occurred because it appears that it serves a purpose for international law, even if we cannot explain what that purpose is. *See id.*

3.4.1.1 Resolutions of International Organizations

In general, resolutions of international organizations such as the UN, may affect on the formation of CILs.[395] It is because their member States subjectively intend for the organization to be able to contribute to the creation of at least some types of CILs and to comply with its international legal personality.[396] The main international organization to be studied in this Paper is the UN which has condemned the use of unilateral sanctions based on their negative humanitarian consequences on a yearly basis and through its General Assembly (GA).[397]

The main resolution is entitled *Human Rights and Unilateral Coercive Measures* and it urges "all states to cease adopting or implementing any unilateral measures not in accordance with international law."[398] These resolutions are annually submitted by Non-Aligned Movement (NAM) to the Third Committee which is the GA's social, humanitarian, and cultural committee, and then voted by the GA.[399] For example, the Resolution adopted by the GA on 29 October 2020, stressed that "unilateral coercive measures and legislation are contrary to international law, international humanitarian law, the Charter of the United Nations and the norms and principles governing peaceful relations among States."[400]

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[395] *See* Daugirdas, Kristina, *International Organizations and the Creation of Customary International Law*, 33.1 THE EUROPEAN J., INT'L L. 201 (2020).

[396] *See id.*

[397] *See* Jamnejad, *supra* note 262, at 351; *See* Hofer, *supra* note 229, at 184-8.

[398] *See e.g.*, GA Res 71/193 (20 January 2017), Operative clause 1.

[399] *See id.*

[400] GA Res 75/28 (29, Oct. 2020).

They also have been labeled as *Unilateral Economic Measures as a Means of Political and Economic Coercion Against Developing Countries* which calls for the elimination of unilateral sanctions, that are adopted by the Second Committee, which is the economic and financial committee, and are introduced on a biannual basis on behalf of the Group of 77 (G77) and China.[401] In 2015, the UNGA on the 2030 Agenda for Sustainable Development mentioned "states are strongly urged to refrain from promulgating and applying any unilateral economic, financial or trade measures, not per international law and the Charter of the United Nations that impede the full achievement of economic and social development, particularly in developing countries."[402]

The UNGA in several other occasions and by several resolutions[403] also asked "[t]he international community to adopt urgent and effective measures to eliminate the use of unilateral coercive economic measures against developing countries that are not authorized by relevant organs of the United Nations or are inconsistent with the principles of

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[401] *See e.g.*, GA Res 71/185 (22 Dec. 2015), Operative clause 2.

[402] U.N. Doc. A/RES/70/1, ¶ 30.

[403] G.A. Res. 44/215, U.N. Doc. A/RES/44/215 (Dec. 22, 1989); G.A. Res. 46/210, U.N. Doc. A/RES/46/210 (Dec. 20, 1991); G.A. Res. 48/168, U.N. Doc. A/RES/48/168 (Dec. 21, 1993); G.A. Res. 50/96, U.N. Doc. A/RES/50/96 (Dec. 20, 1995); G.A. Res. 52/181, U.N. Doc. A/RES/52/181 (Dec. 18,1997); G.A. Res. 54/200, U.N. Doc. A/RES/54/200 (Dec. 22, 1999); G.A. Res. 56/179, U.N. Doc. A/RES/56/179 (Dec. 21, 2001); G.A. Res. 58/198, U.N. Doc. A/RES/58/198 (Dec. 23, 2003); G.A. Res. 60/185, U.N. Doc. A/RES/60/185 (Dec. 22, 2005); G.A. Res. 62/183, U.N. Doc. A/RES/62/183 (Dec. 19, 2007); G.A. Res. 64/189, U.N. Doc. A/RES/64/189 (Dec. 21, 2009); G.A. Res. 66/186, U.N. Doc. A/RES/66/186 (Dec. 22, 2011); G.A. Res. 68/200, U.N. Doc. A/RES/68/200 (Dec. 20, 2013); U.N. Doc. A/HRC/24/20, ¶ 11; A/HRC/28/7, ¶ 8; *See e.g.*, U.N. Doc. A/RES/72/168 (2017), A/RES/71/193 (2016) and A/RES/70/151 (2015).

international law as set forth in the Charter of the United Nations and that contravene the basic principles of the multilateral trading system."[404]

The number of these resolutions are as much as they are becoming broadly recognized by other international organizations as well.[405] For example the Organization of American States (OAS) also condemned application of unilateral sanctions as it is in contrary with its Charter.[406] Article 19 of OAS reads "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."[407] Also Article 20 of OAS Charter stress that "[n]o 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 its advantages of any kind."[408]

Correspondingly, these UN member States follow the assertion of Article 32 of the 1974 Charter of Economic Rights and Duties of States that declares "no State may use or

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[404] *See* Resolution 2625 (XXV) titled Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (1970), Resolution 2131 (XX) Declaration on the Inadmissibility of Intervention (1965), Resolution 3281, the Charter on the Economic Rights and Duties of States (1974), Resolution 36/103 Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (1981). The UN Human Rights Council also frequently condemned the application of these measures. *See e.g.*, HRC Resolutions 27/21 (2014), 30/2 (2015), 36/10 (2017) and 37/21 (2018).

[405] *See* Doraev, *supra* note 258, at 375.

[406] *See* Charter of Organization of American States.

[407] *See id,* at art. 19.

[408] *Id.* Art. 20.

encourage the use of unilateral 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, as unilateral economic sanctions violate the sovereignty of the target."[409] All of these resolutions contend that unilateral sanctions violate international law by undermining human rights. The question now is whether these resolutions can create a norm to make their assertions binding for the international community to conform.

3.4.1.2 Normative Value of Resolutions

The issue is whether these international organizations' condemnations regarding application of unilateral sanctions are sufficient *opinio juris* to support the creation of a new CIL aimed at limiting the use of these measures or creating a norm requiring sender States to halt or at least use them within a specific framework.[410] In response, the Paper presumes that since the UNGA is not a legislative body and its resolutions are not binding, the frequency of its condemning resolutions and UN official assertions only if accompanied by States practices, could create a new norm. However, to identify the value of these *opinio juris*, the International Law Commission (ILC) has provided a guideline. The ILC's Draft Conclusion 4(2) acknowledges that in certain circumstances, *opinio juris* "of international organizations also contributes to the formation, or expression, of rules of customary international law."[411]

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[409] Charter of Economic Rights and Duties of States, G.A. Res. 3281(XXIX), U.N. Doc. A/RES/29/3281 (Dec. 12, 1974).

[410] *See* Jazairy, Idriss, *Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights*, U.N. Doc. A/HRC/30/45 ¶ 4 (2015). *See* UN Secretary-General, Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, UN Doc. A/50/60-S/1995/1, at ¶ 70 (Jan. 3, 1995).

[411] *See* Deplano, Rossana, *Assessing the Role of Resolutions in the ILC Draft Conclusions on Identification of Customary International Law: Substantive and Methodological Issues*, 14.2 INT'L

According to the ILC's Draft Conclusion 12(3) "a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*)."[412] It emphasized that "[a] resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law."[413] However, it asserts that these resolutions "may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development."[414]

Despite the fact that the phrase "may" made the assertion clearly tentative, it could be used as a guideline to determine the normative value of international organizations' resolutions. In this regard, as specified in the statement of the Arbitrator of *Texas v. Libya*, for international organizations' resolutions to establish an *opinio juris* to the extent of creating a CIL's norm, the type of resolution and the voting pattern and the circumstances as well as the legal provisions are the essential criteria and even if a majority of States adopt the resolution, it needs to represent various groups of States.[415]

The resolution of *Human Rights and Unilateral Coercive Measures* is studied as an example of voting pattern. It was voted in 1996 and had 57 votes in favor, 45 votes against

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ORGANIZATIONS L. REV. 229-231 (2017); DRAFT CONCLUSIONS ON IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW, with commentaries 12(3) (2018).

[412] *Id*, at 12(3).

[413] *Id*. at 12(1).

[414] *Id*. at 12(2).

[415] *See Texaco Overseas Petroleum Company/California Asiatic Oil Company v. the Government of the Libyan Arab Republic* 17 ILM 1 (1987) (hereinafter Texas v. Libya) (Professor Dupuy acted as Sole Arbitrator in this case).

and 59 abstained.[416] Also, in the subsequent years, about 130 developing countries voted in favor of these resolutions whereas around 50 developed countries such as the US and EU member States and their allies gave a negative vote.[417] The mentioned voting structure is almost similar to the voting structure of the resolutions of *Unilateral Economic Measures as a Means of Political and Economic Coercion Against Developing Countries* that are adopted by about 130 positive votes *vis-a-vis* only two negative votes from US and Israel (as persistent objectors and therefore not obliged) and around 50 abstain votes from EU Member States.[418]

Specifically regarding the UNGA resolutions, according to the ICJ in its Advisory Opinion in *Legality of the Threat or Use of Nuclear Weapons* in 1996, it had been confirmed that these resolutions can potentially offer a normative value and can possess "evidence of a rule or the emergence of an *opinio juris*."[419] However, it emphasized that if a resolution adopted by a divided vote[420] or its normative value is in contradiction with its member States' practices, then it cannot offer a new norm.[421]

Therefore, as the main resolutions condemning the application of sanctions: Human Rights and Unilateral Coercive Measures and Unilateral Coercive Measures as a Means of Political and Economic Coercion Against Developing Countries, both have been adopted by

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[416] Hofer, *supra* note 229, at 188.

[417] *Id*.

[418] *Id*.

[419] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226, 258, ¶ 83 (hereinafter *Nuclear Weapons*).

[420] *Id*, ¶ 71-2.

[421] *Id*, ¶ 73.

profoundly divided votes with over fifty abstentions coming from the US and the EU member States and their allies, according to this Paper, they could not establish an opinio juris needed to create a CIL norm.[422]

Additionally, a report commenting on the ILC's draft conclusions written for the Informal Expert Group on CIL of the Asian-African Legal Consultative Organization (AALCO) required the existence of reflection of State practice and their true support.[423] It reads: "the practice of an international organization can count toward the formation or expression of customary international law only if it reflects the practice and positions of the member States and can be counted only with due regard to the strength of the support of its membership and the representativeness of the practice among the States in the international community."[424] This highlight of having the support of member States' rationally is essential for considering an organizational resolution as "constituent material for legally binding rules under customary international law."[425]

The Paper asserts that while so far, the voting pattern has never been in favor of establishing an *opinio juris* in support of creating a CIL based on the mentioned criteria, the *precedent* which accordingly international organizations frequently acknowledge the unlawfulness of unilateral sanctions could *lead* to gain the support of States practice and gradually create a new CIL norm against unilateral application of these measures in the

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[422] These abstentions mean the EU did not accept the resolutions as a law which is also apparent based on the EU's application of unilateral sanctions. *See* Hofer, *supra* note 229, at 194-5.

[423] *See* Yee, Sienho, *Report on the ILC Project on "Identification of Customary International Law,"* 14 CHINESE J., INT'L L. 33-4 (2015).

[424] *Id.*

[425] *Id.*

future. The relevant literature might also potentially be utilized to propose a new norm as part of a legislative reform to prohibit, or at the very least to specify rights-based boundaries for States to follow in their practice.

3.4.2 States Practices

After reviewing some of the main available *opinio juris* condemning the use of sanctions due to their negative effects on human rights, the Paper attempts to investigate States' practices in order to determine the rights-based boundaries of unilateral sanctions in CIL. It seeks to determine whether the primary opponents of unilateral sanctions which are Russia and China, also refrain from using them in practice. In this regard, it examines some of the main sanctions regimes against and initiated by these opponents and provides enough grounds to assess whether there is such a norm of prohibition or permission of imposing unilateral sanctions. Subsequently, by exemplifying some of the State practices in imposing embargoes and targeted sanctions, it endeavors to respond to the essential question of whether CIL in some instances even obliged individual States to impose sanctions unilaterally in compliance with their *erga omnes* obligation.

The Paper starts its argument with the main critic of unilateral sanctions which is Russia.[426] This State has demonstrated on several occasions through the imposition of unilateral sanctions that its practice is clearly different with its political statements. The Paper attempts to investigate some of these practices in order to assert that a State may not rule on the illegality of an action while also engaging in the same action.

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[426] Russia is currently subject to a number of embargoes and targeted sanctions, as will be discussed in the following Section.

As examples, Russia imposed sanctions by completely prohibiting food imports from the US, Canada, Norway, and Australia, as well as Japan, Albania, Iceland, Liechtenstein, and Montenegro.[427] Also, Russia sanctioned Poland and Moldova in 2005, Georgia and Ukraine and Latvia in 2006.[428] In addition, Russia imposed targeted sanctions on several parliamentarians, government members, business and academic leaders, media figures, and public figures from Iceland, Norway, Greenland, and the Faroe Islands.[429] In 2022, it also imposed targeted sanctions against the US President, and other US officials.[430] In 2022 Russia, among imposing other sanctions, also has expanded its airspace restriction to include 38 EU's member States, as well as Canada and the UK.[431]

China is the other major critic of unilateral sanctions. For example, during a SC meeting, the Chinese representative cited violations of fundamental civil and political rights as the collateral damages of several unilateral sanctions episodes, and stated that: "[a] small number of countries act at will according to their domestic laws and impose or threaten to impose unilateral sanctions against other States, which is not only in violation of the principle of sovereign equality among member States but also undermines the authority of council sanctions."[432] He also emphasized that "sanctions should not be a tool for one country to use

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[427] *See* Stulberg, Adam & Jonathan Darsey, *Russia's Responses to Sanctions: Reciprocal, Asymmetrical, or Orthogonal?* PONARS EURASIA (Jan. 2, 2020).

[428] *Id.*

[429] Russia Sanctions Officials of Four European Countries, ANADOLU AGENCY WORLD (Apr. 29, 2022).

[430] *See* Dean, Sarah, *Russia Imposes Sanctions on US President Joe Biden, his son and other US Officials*, CNN (Mar. 15, 2022).

[431] *See* Katz, Benjamin, *Russia Reciprocates with Airspace Ban After EU, Canada Prohibitions*, THE WALL STREET JOURNAL (Feb. 28, 2022).

[432] S/PV.7323, 14 (China); Hofer, *supra* note 229, at 207.

in pursuit of power politics. The domestic law of one country should not become the basis for sanctions against other States. China is opposed to any practice of imposing sanctions on other countries on the basis of one's domestic law."[433] However, despite of its official condemnations against the application of unilateral sanctions, China on several occasions imposed targeted sanctions against politicians, diplomats and think-tanks.[434]

One may argue that Russia and China employed sanctions to respond to prior imposed sanctions against them. This practice of sanctions has been called retaliation by some international law scholars.[435] Under the theory of retaliation, if a State violates a rule against it, the victim States are entitled to suspend respective international law norms with the violator.[436]

The Paper does not support this assertion and assumes that these States use sanctions primarily as a countermeasure. It is because retaliation or *reprisal* with its punitive nature does not appear to be justiciable under international law.[437] As a result, the issue should be discussed in light of the framework of countermeasures to determine whether the countermeasures were in response to a lawful measure or an illegal sanction. If they were countermeasures in response to the targets' international wrongful acts, then their subsequent

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[433] *See id.*

[434] *China boycotts Western clothes brands over Xinjiang cotton*, ECONOMIST (Mar. 27, 2021). *Available at* https://www.economist.com/business/2021/03/27/china-boycotts-western-clothes-brands-over-xinjiang-cotton. (Last visited on May 6, 2021).

[435] *See* Schachter, Oscar, *International Law in Theory and Practice*, BRILL NIJHOFF 126 (1991).

[436] *See id.*

[437] *See generally* Bowett, Derek William, *Self-Defense in International Law*, THE LAWBOOK EXCHANGE, LTD. 8-12 (2009).

sanctioning reactions were illegal. Otherwise, Russia and China could justify their *reciprocity sanctions* by citing to previous breaches of the senders' obligations to them. In this regard, the issue of *erga omnes* obligations of States under CIL should be investigated in order to determine whether the sanctions initially imposed on Russia and China were in response to an internationally wrongful act or not.

In general, because of existence of veto power, the permanent members of the SC, in practice, cannot be targeted by UN sanctions,[438] and the only means to respond to their international wrongdoings is to impose unilateral sanctions. It should be emphasized that *erga omnes* obligations have been widely recognized in international law by specifying that as a breach of a legal norm by a State leads to its reparative responsibility to the injured State(s) or international community.[439]

This is the case where international law requires States to uphold their *erga omnes* obligation, specifically when *jus cogens* are violated.[440] The notion of humanity's common goals or the universality of human rights and the mentioned *erga omnes* obligations, allow, rather than setting forth a prohibition, the issue of imposing unilateral sanctions when UN's sanctions is impossible.[441] It has a permissive nature for a non-injured State to adopt unilateral countermeasures or lawful sanctions to respond to an internationally wrongful

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[438] *See* generally Lei, Xue, *China as a Permanent Member of the United Nations Security Council*, GLOBAL POLICY AND DEVELOPMENT 1 (2014).

[439] *See* Crawford, James & Simon Olleson, *The Continuing Debate on a UN Convention on State Responsibility*, 54.4 THE INT'L. & COMP. L. Q. 971-2 (2005).

[440] *See generally* De Wet, Erika, *jus cogens and Obligations erga omnes*, THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 541-4 (2013).

[441] *See id.*

act.[442] This objective was supported by policy makers as well, for example, the Portugal's representative on behalf of the EU in 2007 specified that sanctions are "admissible in certain circumstances, in particular, when necessary, in order to fight terrorism and the proliferation of weapons of mass destruction, or to uphold respect for human rights, democracy, the rule of law and good governance."[443]

The ICJ has acknowledged the *erga omnes* obligation in various judgments and advisory opinions and even extended it to some of human rights which are outside the scope of *jus cogens* such as the right to self-determination.[444] Also according to the ICJ in *Barcelona Traction*, these *erga omnes* obligations are duties owed to the "international community as a whole" and all States have a legal interest in their protection.[445] The Court also specifically enumerated four *erga omnes* obligations including Protecting against acts of aggression, genocide, slavery, and racial discrimination.[446] These four grounds have been originated from the landscape of basic human rights that all States have an interest in enforcing it.

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[442] Tzanakopoulos, Antonios, *Sanctions Imposed Unilaterally by the European Union: Implications for the European Union's International Responsibility*, ECONOMIC SANCTIONS UNDER INTERNATIONAL LAW 145-51 (2015).

[443] A/C.2/62/SR.28 (Nov. 16, 2007), ¶ 30.

[444] "[R]espect for the right to self-determination is an obligation *erga omnes*, all States have a legal interest in protecting that right." *See e.g., Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* Advisory Opinion, at ¶ 180 (25 February 2019) (hereinafter *Chagos*); *See also East Timor* (*Portugal v. Australia*), Judgment, I.C.J. Reports 1995, p. 102, ¶ 29.

[445] *See Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain) (1962–1970), Second Phase, Judgment, I.C.J Reports, ¶ 33 1970 (hereinafter *Barcelona Traction*)

[446] *See* Dufour, Geneviève & Nataliya Veremko, *Letter to the Journal Unilateral Economic Sanctions Adopted to React to An Erga Omnes Obligation: Basis for Legality and Legitimacy Analysis?—A Partial Response to Alexandra Hofer's Article*, 18.2 CHINESE J., INT'L L. 450 (2019).

Following that, the Paper examines some of the present States' practices based on *erga omnes* obligations. The purpose of focusing on this sort of sanctions is to show that one of the key aspects of a rights-based model of sanctions is their policy objectives, thus the issue is whether unilateral sanctions pursuing *erga omnes* obligations could be included in this model. The Paper in turn, investigates embargoes and targeted sanctions that are implemented in accordance with these obligations.

3.4.2.1 Embargoes

Many States have incorporated specific provisions into their domestic legal systems that allow them to impose unilateral sanctions as an *erga omnes* obligation.[447] However, it seems that these States went beyond the four grounds which is specified by the ICJ in *Barcelona Traction* by extending them to the fight against gross human rights violations and including public corruption and terrorism.[448] For example, the US sanctions against Argentina was in response to human rights violations in 1977-1983.[449] The EU, the US, and Israel imposed sanctions on Hamas-led Palestinian Authority in 2006, with the objective of combating public corruption.[450] Since 1988, the US, the EU, Japan, Switzerland, and Canada have imposed unilateral sanctions against Myanmar due to the crackdown on Rohingya minority.[451]

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[447] *See generally* Tzanakopoulos, *supra* note 442, at 150-4.

[448] *See id.*

[449] *See id.*

[450] While there is as yet no international peremptory norm to combat systemic public corruption, there is broad understanding that this phenomenon violates fundamental human rights". *See* Dufour et. al., *supra* note 446, at 450.

[451] *See generally* Smith Finley, Joanne, *Why Scholars and Activists Increasingly Fear a Uyghur Genocide in Xinjiang*, 23.3 JOURNAL OF GENOCIDE RESEARCH 348-352 (2021).

This scope has expanded to the point that a considerable number of post-2001 regimes, particularly those imposed by the US, might be justified solely on the basis of *erga omnes* obligations.[452] Even the US sanctions that resulted in the *Aviation Dispute* between the US and France in 1978[453] and the *Tehran Hostages Dispute* between the US and Iran between 1979 and 1981 were justified as *erga omnes* obligations.[454] Furthermore, between 2000 and 2006, just one unilateral targeted sanctions regime, that implemented by the US against members of the International Criminal Court (ICC), was unrelated to human rights violations.[455] As demonstrated, the majority of the sanctions imposed as *erga omnes* obligations were embargoes and against States.

Russia as one of these targeted States which is a permanent member State of the SC, has been targeted since 2014.[456] These sanctions have started following the Ukrainian crisis in 2014, and Russia's subsequent activities in Crimea and the Donbass region and specifically in response to the annexation of Crimea and the conflict between separatists in the Donbass region and the central government of Ukraine.[457] Consequently, based on the US targeted

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[452] Dufour et. al., *supra* note 446, at 454.

[453] *Case Concerning the Air Services Agreement of 27 March 1946* (U.S. v. France), 54 I.L.R. 304 (Arbitral Trib. 1978).

[454] *See* Damrosch, *supra* note 273, at 254; *See also* Sossai, Mirko, *Legality of Extraterritorial Sanctions*, *in* ECONOMIC SANCTIONS IN INTERNATIONAL LAW AND PRACTICE 63 (Masahiko Asada, 2020).

[455] *See* Damrosch, *supra* note 273, at 249-50.

[456] *See* Trenin, Dmitri, *How Effective are Economic Sanctions?*, WE FORUM (Feb. 26, 2015), *available at* https://www.weforum.org/agenda/2015/02/how-effective-are-economic-sanctions/ (Last visited on May 6, 2021).

[457] It should be noted that the sanctions have contributed to a surge in Putin's popularity and the growth of Russian patriotism and nationalism. *See id*.

sanctions, Russian officials, firms, and private individuals have been sanctioned as well.[458] Similarly, the EU sanctioned Russia, claiming that individuals and legal entities linked to the annexation of Crimea and Russia's actions in eastern Ukraine were involved in actions undermining or threatening Ukraine's territorial integrity, sovereignty, and independence, thus, their assets in the EU may have been frozen.[459]

The EU also imposed an embargo on Russia by preventing the import of commodities from Crimea into the EU, limiting access to EU financial markets, and blocking the sale of arms, dual-use goods, equipment, and services to Russia's oil industry.[460] These embargoes caused that Russian President to call them as illegitimate sanctions, argued that these sanctions could substantially effect on the global economy in the wake of the devastation brought by the COVID-19 pandemic.[461] He addressed that "freeing world trade from barriers, bans, restrictions and illegitimate sanctions would be a great help in revitalizing global growth and reducing unemployment."[462]

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[458] The US sanction regime referred to: Asset freezes for specific individuals (close to the President Vladimir Putin) and; prohibition of US natural and legal persons to engage in financial transactions with the sanctioned; Asset freezes and prohibition to conduct economic transactions with specific entities, particularly state-owned banks, defense and energy companies; Restrictions on financial transactions with Russian key sector firms (such as in defense, energy, financial services); Restrictions on exports of oil-related and dual-use technology; Restrictions on specific exports (such as on military items and dual-use). *See id*.

[459] *See* Doraev, *supra* note 258, at 364-8.

[460] *See id.*

[461] *World Leaders, Including Trump and China's Xi Jinping, Take the Stage Virtually at UN Meeting*, CBC (Sept. 22, 2020), https://www.cbc.ca/news/world/united-nations-virtual-general-assembly-1.5733659 (Last visited on May 6, 2021).

[462] *See id.*

Although these measures were targeted sanctions at first, further sanctions have been imposed in response to Russia's military aggression in 2022 that could be classified as embargoes.[463] This round of sanctions which imposed by the US, triggered new investment in Russia, two Russian financial institutions, and critical major State-owned enterprises.[464] Also UK refreshed its embargoes against Russia's largest bank and imposed a ban on importation of Russian coal and oil.[465] In addition, all Russian flights have been prohibited from UK, US, EU, and Canadian airspace.[466] Moreover, despite understanding the risk, Germany has postponed the certification of the Nord Stream 2 gas pipeline.[467] These sender States also barred certain Russian banks from participating in SWIFT, a high-security network that facilitates payments between 11,000 financial institutions internationally.[468] The regime also embraces targeted sanctions against more than 1000 Russian individuals and businesses as well as Russian government officials and their family members including the President and Foreign Minister.[469]

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[463] *What Sanctions are Being Imposed on Russia over Ukraine Invasion?*, BBC NEWS (Apr. 11, 2022).

[464] *See id.*

[465] *See id.*

[466] Katz, Benjamin, *Russia Reciprocates with Airspace Ban After EU, Canada Prohibitions*, THE WALL STREET JOURNAL (Feb. 28, 2022).

[467] *See* Dewan, Angela, *Nord Stream 2 Pipeline is on the Scrap Heap Because of the Ukraine Crisis*, CNN BUSINESS (Feb. 23, 2022).

[468] *See* Riley, Charles, *What is SWIFT and why it Might be the Weapon Russia Fears Most*, CNN BUSINESS (Jan. 27, 2022).

[469] *What sanctions are being imposed on Russia Over Ukraine Invasion?*, BBC NEWS (Apr. 11, 2022).

The other permanent member of the SC, China, has also been targeted by the sanctions against its province of Xinxiang.[470] The sanctions are based on the human-rights abuses committed by China against Uyghur in the north-western region of Xinjiang.[471] The horrible genocide that is occurring in Uyghur, which the Chinese government is referring to them merely as a prosecution, is the imprisonment of approximately one million individuals in a prison camp mislabeled as vocational training centers.[472] Because of this genocide, the US employed coercive measures by mentioning that "it is not a question of coercion against a targeted State, but of extending a hand of support to their peoples when their government have coerced them."[473]

Although these sanctioning regimes clearly were in accordance with *erga omnes* obligations, but it does not mean that all sanctions were adopted unilaterally could be justified in a same way. For example, the international community has not considered the US sanctions on Cuba as a measure to serve its humanity common interests.[474] Also, the US lifted its sanctions in different occasions even though the human rights concerns have not improved such as in cases that the cooperation with the US national security interest

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[470] In general sanctions against China, have militarily, economically and humanitarian reasons. Militarily, China is committed to pushing US Navy and Air Force away from the Western Pacific, including the South China Sea and the East China Sea. Economically, trade talks between the two countries have struggled to make substantial progress, and ideologically. Fan, Wang, *The Future of China-US Relations: Toward a New Cold War or a Restart of Strategic Cooperation?*, 86 CHINA INT'L. STUD. 103 (2021).

[471] *See generally* Hayes, Anna & Kearrin Sims, *Violent Development in Xinjiang Uyghur Autonomous Region*, THE ROUTLEDGE HANDBOOK OF GLOBAL DEVELOPMENT 431-4 (2022).

[472] *See id.*

[473] Speech by the US before the UN GA, A/60/PV.68 ¶ 7 (Dec. 22, 2005).

[474] On 3 October 2018 the UNGA adopted its latest resolution condemning these sanctions, GA Res. 73/8, (2018).

allegedly justifies the breach of *erga omnes* obligations. As such the military cooperation of Uzbekistan as the US partner in Afghanistan's war, justified its condemned human rights violations as the main objective of sanctions, and led to the lifting of these measures by the US in 2012.[475]

3.4.2.2 Targeted Sanctions

Although most sanctions based on *erga omnes* obligations rationally should be targeted, it was established that most of them are now characterized as embargoes (based on the definition of embargoes in this Paper). It's because sender States target not only human rights violators, but also major States' sectors, resulting in actual negative consequences for people in general. However, some of these measures, such as the Magnitsky Act or Magnitsky Rule of Law Accountability Act, are clearly targeted and can serve as a credible model for targeted sanctions in human rights protection.[476] Sergei Magnitsky was a Russian lawyer who opposed the Russian government and was tortured and murdered in Moscow's notorious Matrosskaya Tishina prison in 2009.[477]

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[475] Dufour et. al., *supra* note 446, at 454.

[476] SERGEI MAGNITSKY RULE OF LAW ACCOUNTABILITY ACT OF 2012 § 401-407, Pub. L. No. 112-208, 126 Stat. 1496 (2012). The Act was proposed by Senator Ben Cardin in 2011 at S.1039, 112th Cong. § 1 (2011).

[477] Magnitsky was a tax lawyer for Firestone Duncan in Russia, whose client, Hermitage Capital, was the world's best performing private investment fund in 1997. Due to Hermitage's success, the former majority owners, who were also billionaires with significant ties to the Russian government, initiated a successful deportation campaign against the company's founder and CEO, Bill Browder, who fled Moscow to the United Kingdom. Sergei Magnitsky was also threatened with violence, but he stayed in Russia and discovered that Hermitage had paid the Russian government $230 million in a massive tax rebate fraud scheme, which he reported in a formal complaint. This complaint led to him being charged with fraud and sent to a prison where he was tortured and beaten in order to withdraw his complaint against the interior ministry, which he refused until his death. *See* Gomes-Abreu, Adam, *Are Human Rights Violations Finally Bad for Business? The Impact of Magnitsky Sanctions on Policing Human Rights Violations*, 20 J. INTL. L. & J. 173 (2021).

In Magnitsky, US Congress has imposed several targeted sanctions against natural and legal persons specifically those involved in Magnitsky's torturing and were responsible for his death.[478] It has authorized the US President to decide who are those persons responsible or related to the death of Magnitsky or other violations of international human rights "to forbid them to enter the United States" and to "freeze and prohibit all transactions in all property and interests in property of person."[479] Following the first Magnitsky Act, the US enacted the second set of Magnitsky Laws, which included any other person found liable by the State Department and Congress in violation of the statute.[480] Because of the Acts' high rate of effectiveness in reducing similar offenses, the EU and Canada adopted the same coding pattern in order to advance international civil and political human rights.[481]

Although the Magnitsky Act appears to be enacted to prevent human rights violations, it is primarily aimed at corrupted leaders and in order to combat corruptions. As a result, the Act provides a powerful sanctioning model for shaming corrupt leaders and human rights violators. It appears that the US should be praised for assisting the UN in promoting its anti-

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[478] As of May 6, 2021, there are 49 individuals listed under the Magnitsky sanctions program. *Available at* sanctionssearch.ofac.treas.gov/; Browder, Bill, RED NOTICE: A TRUE STORY OF HIGH FINANCE, MURDER, & ONE MAN'S FIGHT FOR JUSTICE 262-281 (2015).

[479] Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012 § 404-406.

[480] *See id* § 402(a)(15) "Murders of Nustap Abdurakhmanov, Maksharip Aushev, Natalya Estemirova, Akhmed Hadjimagomedov, Umar Israilov, Paul Klebnikov, Anna Politkovskaya, Saihadji Saihadjiev, and Magomed Y. Yevloyev, the death in custody of Vera Trifonova, the disappearances of Mokhmadsalakh Masaev and Said-Saleh Ibragimov, the torture of Ali Israilov and Islam Umarpashaev, the near-fatal beatings of Mikhail Beketov, Oleg Kashin, Arkadiy Lander, and Mikhail Vinyukov, and the harsh and ongoing imprisonment of Mikhail Khodorkovsky, Alexei Kozlov, Platon Lebedev, and Fyodor Mikheev".

[481] Gomes-Abreu, *supra* note 477, at 177.

corruption objective, as stated in the UN Convention against Corruption.[482] However, the Paper emphasizes that sanctions with this objective must always be targeted; otherwise, they will exacerbate subsequent corruption.[483]

3.5 CHAPTER'S CONCLUSIONS

The purpose of the Chapter was to develop a rights-based model for unilateral sanctions and determining the boundaries to their implementation by examining some of the most important sources of international law. The UN Charter was the first of four multilateral treaties mentioned in the Paper that could be used by States to challenge these measures. Within the Charter, the first ground is Article 2(4)'s principle of State sovereignty, which prohibits States from threatening or using force. Although the effects of sanctions, particularly embargoes, can be similar to those of wars in some episodes, since the primary goal of sanctions is to prevent war and the ICJ has stated in *Military and Paramilitary* that the scope of force does not include economic coercion, most unilateral sanctions are unlikely could be challenged as a violation of the principle of sovereignty. It asserted that sanctions could not be justified as a sovereign right of a State to express its economic freedom, which is established by *military and paramilitary* and *Lotus*, because those actions lack coercion and are so purely retorsions and always legal. According to the Paper, only sanctions with

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[482] UNITED NATIONS CONVENTION AGAINST CORRUPTION (UNCAC), Article 14(1)(a), *available at* https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf (Last visited on May 6, 2021).

[483] *See generally* about the consequences of sanctions on the growth of corruption in Iran, Rowhani, Mohsen, *Corruption in the Middle East as a Long-lasting Effect of the U.S. Primary and Secondary Boycotts Against Iran*, 3 ABA MIDDLE EAST L. REV. 30 (2019). Also regarding the effects of sanctions on creating corruptions *see* Early, Bryan R., *Economic Sanctions Aren't Just Ineffective -They Lead to Corruption and Organized Crime*, QUARTZ (May 1, 2015), *available at* https://qz.com/394607/economic-sanctions-arent-just-ineffective-they-lead-to-corruption-and-organized-crime/ (Last visited on May 6, 2021).

adverse effects similar to a military blockade could be considered a use of force and a violation of the principle of state sovereignty mentioned in Article 2(4) of the Charter. The second ground for challenging is the principle of non-intervention specified in Article 2(7), which clearly addresses the UN rather than individual States, and even the UN's interventions are mostly justified because they are authorized by the SC. Outside the Charter, the principle of non-intervention can be found as well, such as in the Friendly Relations Declaration of 1970. However, based on *Congo v. Uganda*, at least those sanctions aimed at regime change are considered unlawful intervention in internal affairs of sovereign States. As a result, a targeted State may challenge a regime if it can show that the sender State wants to destabilize its government by using sanctions to suffer people and then to incite them against their government in order to change it. The Paper then moved on to the third premise for challenging unilateral sanctions, which is claimed to be in violation of the UN Charter's preamble and Articles 1(3), 13(1), 55(c), 56, 62(2), and 76. It asserted that the UN's references to human rights in the Charter not only lack a precise definition, but also serve primarily as UN purposes and its mandates, not its member States' obligations. It means that members States should merely cooperate with the UN to achieve these purposes, but that they are under no obligation to do so. As a result, targeted States are unable to challenge a regime based on infringement of the UN Charter's human rights articles, to which the sender State is a party as well.

After discussing the UN Charter as the main treaty, for the second treaty, the ICCPR chose and argued that a party member State has extraterritorial obligations if it has effective control over the targeted territory, as established in *Wall*. It means that member States ideally cannot claim jurisdiction over a targeted State and then apply unilateral sanctions that violate

its people's civil and political rights. The third treaty, the ICESCR as a more acceptable challenging ground, with its obligatory tone, prohibited member States from adopting sanctions or any other coercive measure that could restrict the supply of food and specifically medicine extraterritorially and even to non-nationals at any time. A challenger should always keep in mind that it can only claim a violation caused by unilateral sanctions imposed by a member State. It means that States like the US might not be held accountable for the negative effects of their unilateral sanctions on food and health rights under the ICESCR. ICERD, which was the basis of legal procedures before the ICJ between *Qatar v. UAE* and *Georgia v. Russia*, is the fourth treaty that might be used to challenge unilateral sanctions. Although the ICJ rejected both cases because of lack of jurisdiction, they demonstrated the importance of resorting to the CERD's inter-State mechanism. CERD in the dispute between Qatar and UAE decided in favor of breaching the treaty because of the imposition of sanctions against a particular nationality.

The Paper also cited the Amity Treaty between Iran and the US as an example of bilateral treaties, which served as the foundation for one of the most recent applications before the ICJ based on the alleged rights violations caused by unilateral sanctions. In its order in *Provisional Measures*, the ICJ required the US to ensure that there are no further adverse effects of its sanctions on medicines and medical devices, foodstuffs and agricultural commodities, and spare parts, equipment, and associated services required for civil aviation safety. The ICJ also acknowledged that, while the sanctions appear to be targeted, they have far-reaching consequences for people's rights because they target Iran's financial institutions, thus, limiting Iran's access to the international market. Despite the fact that the ICJ's order

required the US to lift those measures affecting the rights to health, food, and life (civil aviation safety), records show that the US has yet to fulfill its obligations.

The next step goes through another essential source of international law, the CIL norms, which are created by existing *opinio juris* with support of States' practices. Although international organizations, particularly the UNGA, have condemned the use of unilateral sanctions, they are still a long way from establishing norms barring their use. It's because of the voting patterns of these resolutions, as well as the presence of persistent objectors who aren't obligated to follow a CIL even if it leads to emergence for others.

Following that, the Paper delved deeper into the actual practices of those States whose *opinio juris* is opposed to the imposition of unilateral sanctions. In this regard, Russia and China studied and asserted that only those sanctions initiated by these countries could be lawful which are determined as countermeasure in response to unlawful sanctions imposed on them. However, the Paper contended that both the 2014 sanctions against Russia and the current regime of 2022 are lawful sanctions imposed in accordance with sender States' *erga omnes* obligations. It also claimed that sanctions against China's Xinxiang are *erga omnes* obligations in response to the genocide occurring in Uyghur against its Muslim community. As a result, neither of these States could claim that the sender States' unilateral sanctions were illegal.

Finally, the Magnitsky Act was brought up as an example of a right-based model of sanctions with a clear objective that was enacted in response to an internationally wrongful act of corruption and targeted corrupt leaders with minimal collateral effects on others. The Paper attempted to show to international lawyers that, while unilateral sanctions are legal

under the mentioned sources of international law, they must be targeted in reality and with no objective of suffering people to demonstrate and change their regime, which is nearly impossible in the current world.

4 TOWARD A RIGHTS-BASED MODEL OF ECONOMIC SANCTIONS

4.1 ABSTRACT

Employing sanctions to prevent armed conflicts or to persuade a target to change its wrongdoing has raised hopes that military conflicts and civilian casualties can be avoided. Although sanctions achieved this goal in several episodes, they were also criticized for having some of the similar negative effects as wars on human rights of those who were not the subjective wrongdoer. These negative consequences contradict the basic logic of most sanctions, which is to protect the welfare of people in a targeted State by convincing their government to make some political or behavioral changes in their favor. In this regard, the Paper by proposing a three steps model, investigates some episodes of sanctions, specifically embargoes imposed on States or major sectors of States. It establishes that rights-based sanctions must have specific stated policy objectives, be imposed in coordination with other States, and take all humanitarian collateral damages into account during designation and implementation. It attempts to quantify the negative effects of sanctions on human rights of the targeted State's civilians in order to persuade sender States to reconsider their measures to mitigate these consequences. This path examines the most vulnerable rights to sanctions by walking through the principle of proportionality to show how sanctions may proximately contribute to these rights' violations in the targeted States and even third States. The Paper tries to show that most of current sanctions, while failing to achieve their primary policy objectives, even worsen the subjective wrongdoings. Finally, by elaborating these effects, the Paper suggests to international lawyers to consider a new shifting era, similar to the 1990s, toward a more achievable, rights-based model of economic sanctions.

4.2 INTRODUCTION

The Paper seeks to establish a rights-based model of sanctions, and accordingly it defines the term of "sanctions" as "coercive measures taken to condemn or induce the target's disfavored policy or wrongful behavior." Sanctions are divided into embargoes, which are measures imposed against States or their major sectors, and targeted sanctions, which are measures imposed against natural persons or legal entities with minimal effects on public. Towards its path, it mainly discusses embargos, their effects, and frameworks, and labels them generally as sanctions; however, whenever it refers to targeted sanctions, it specifically mentions the term of targeted sanctions. In this regard, a rights-based model must include three major components:

- The first element is defining a specific *policy objective*(s) that the target is fully aware of. It tries to demonstrate that if the sender pursues unstated and ambiguous policy objectives, the sanctions will never be ended, nor will the target's compliance by changing its behavior.

- The second element is moving toward multilateralism. The Paper tries to ascertain that *creating a sanctions coalition* makes sanctions to leave fewer channels open for the targeted State to exploit them with the help of its allies. As a result, it prevents the subsequent international wrongful act caused by sanctions circumvention.

- The final element prompts the creation of sanctioning measures that specifically target the wrongdoing or is in accordance with changing the target's unfavorable policy. It means that sanctions should not deviate from their main objective by being

> the proximate contributory cause of those human rights violations of people who are not the subjective wrongdoers.

As a result, the first part of the Paper examines senders' main policy objectives in order to emphasize the importance of disclosing the actual reason for each sanctioning regime. It also searches to find whether in reality all the sanctions are imposed to protect rules of international law or to defend international community. It wants to find whether there are some unclear objectives as well, which sender States pursue by their measures. It tries to determine that sanctions to be considered rights-based at least should have a clear and specific policy objective(s) which the target is also informed of.

Part two focuses on how these measures can effectively influence their targets' wrongful act or unfavorable policy. In other words, it addresses international lawyers' major concern about whether sanctions will actually cause the targeted State to modify its behavior, or if they merely have political utilities for sender State's leaders to claim that they are dealing with the wrongdoer. The cause for bringing the issue of effectiveness that may appear more political than legal, to a law scholarship is that the Paper is essentially attempting to build a bridge between international law and political scholarships in the sanctions' world. In this context, it examines a few sanctioning regimes and studies by listing effectiveness assessment criteria to see if they were successful in practice and if senders were able to achieve their policy objectives. Then it claims that, due to sanctions' low effectiveness rate, they must be implemented in cooperation with other States, implying that sanctions should be imposed multilaterally, even if they do not originate from the Security Council (SC). Establishing a sanctions coalition also prevents targets from evading sanctions by collaborating with their allies or neighbors, reducing the effectiveness of sanctions in

changing subjective wrongdoing or even preventing the commission of other international illegal acts.

Part three describes the types of human rights that are more vulnerable to sanctions, as well as elaborating how violations of these rights are frequently reported when sanctions deviate from their primary objectives, resulting in collateral damages to the general public. In this regard, the Paper reminds readers, through examples, that sanctions will have a negative impact not only on the rights to life, water, food, and health, but also on the rights to education and development. As a result, the Paper searches for the stated bounds that are envisaged under customary international law (CIL), focusing on the proportionality criterion and emphasizing that the impact of sanctions must always be proportionate to the wrongful act of the targets. For this approach, it examines the rights-based boundaries outlined in the Articles on States' Responsibility for Internationally Wrongful Acts (ARSIWA).[484]

4.3 DEFINING SPECIFIC POLICY OBJECTIVES

What specific responses are desired from the targeted States' governments? Do they have any idea what exactly they need to do to get the sanctions lifted? Do sender States also estimated the degree of influence their measures will have on the targeted State's subsequent behavior? These are the first questions to address when determining how close a sanctioning regime is to being classified as rights-based sanctions. In order to respond to these questions, initially the policy objectives should be studied to find out if sender States have different levels of objectives and if they declare all of them explicitly.

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[484] International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries*, II (2) Y. B. INT'L L. COMM'N 31, 128 (2001) (hereinafter ARSIWA).

4.3.1 Types of Policy Objectives

The Paper tries to establish that although sanctions could have two major types of objectives by triggering the target's disfavored policy and/or wrongful behavior, only those sanctions that are at least pursuing to modify a disfavored policy that is also wrongful behavior and communicated to the target, could be developed to fit in the rights-based model. In other words, it tries to argue that sanctions should not be imposed solely because the target's policy is unfavorable with, which in many cases, cannot even be clearly itemized.

These policy objectives may have been found as *stated* and/or *unstated* objectives. Thus, a real assessment of the success of a regime needs deeper research and analysis of both of these types of objectives. These objectives in a rights-based model, should be clearly defined and publicly declared first, and then the least restrictive measures to implement them should be devised. It's because the Paper assumes if the targets believe the sanctions are being unfair or following unspecified policies, their cooperation would be doubtful.

In this regard, sanctions can have three levels of objectives, and most unilateral sanctions regimes combine all three, making them difficult to communicate to the target. *Primary* objectives are those announced, for example, to force the target to change relevant wrongful act, advancing conflict resolutions, nuclear non-proliferation, counterterrorism, prevention of violation of international law and to pressure conformity with international norms of conduct which are often clearly stated. As such, the United Nations (UN) sanctions against Rhodesia

in 1968,[485] South Africa in 1977,[486] Iraq in 1990,[487] and the Democratic People's Republic of Korea (DPRK) in 2006 could be represented.[488]

Secondary objectives can be symbolic with domestic *political utility* or "manipulation of economic relations for political objectives,"[489] which relate to the sender State's domestic expectations or policy preferences that are generally unstated, such as when they actually pursue effecting on the target State's economy and not its wrongful behavior.[490] Also the political utility means that when something happens that the citizens of the sending State find horrifying, they put pressure on their leaders to act against the wrongdoer and their common response to these situations is employing sanctions as long as they serve their political objectives.[491]

Finally, *tertiary* objectives refer to the inherent preventive nature of sanctions by signaling the power to other States who may be in similar positions with target to avoid acting in a similar manner, such as the US sanctions against Cuba,[492] Chile and Iraq that

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[485] Southern Rhodesia, *See* SCR 253 (1968). Declaration of independence by white minority regime.

[486] South Africa, *See* SCR 421 (1977) (Fighting the Apartheid regime).

[487] Iraq, *See* SCR 661 (1990) (Kuwait's invasion); SCR 1483 (2003) (Deposed Iraqi regime).

[488] North Korea, *See* SCR 1718 (2006) (Nuclear non-proliferation).

[489] *See* Merom, Gil, *Democracy, Dependency, and Destabilization: The Shaking of Allende's Regime*, 105.1 POLITICAL SCIENCE QUARTERLY 75 (1990).

[490] *See* Stalls, Justin D., *Economic Sanctions*, 11 U. MIAMI INT'L & COMP. L. REV. 150 (2003). Although military forces have political utility as well, but it has decreased because of their human cost, which was also a major motivator for States to use sanctions.

[491] *See* Baldwin, David A. ECONOMIC STATECRAFT 65 (1985).

[492] *See* 31 C.F.R. § 515.207.

seems to have had these unstated objectives as well.[493] They could aim to make a statement to a diverse audience of policymakers, own citizens, leaders of the target State, or third-party States, or even to changing the regime of the target.[494]

Here, it is crucial to explain why, according to the Paper, only sanctions with stated policy objectives can fit into its rights-based model, grounded on its methodological approach: In this regard, the major issue is that sanctions are only rights-based if they are limited to *inducing* the target to change its international wrongful behavior, and they must be lifted as soon as this is achieved. As a result, from an *international law* standpoint, the success rate of sanctions must be assessed based on this stated objective; however, the Paper agrees that sanctions with unstated policy objectives can be labeled as successful sanctions, but only by those who are aware of the unstated and actual objectives and their achievement. The emphasis on objectives clarification and communication in the Paper is not based on the interests of the sender States, but on the issue that subjective wrongdoing should be stopped.

The Paper reiterates that sanctions should be distinguished from *retorsions*, which are exclusively hostile but legal acts as long as they *do not violate international conventional law and treaties*. Thus, the success or failure of a sanctioning program would be determined not by the sender States' unstated interests, but by the international legal order in order to prevent the international wrongful act from proceeding.

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[493] *See* Mudathir, Bakri, SANCTIONS OF INTERNATIONAL LAW WITH SPECIAL EMPHASIS ON COLLECTIVE AND UNILATERAL USE OF ECONOMIC WEAPONS 232-3 (1984); *See* Miyagawa, Makio, DO ECONOMIC SANCTIONS WORK? 91 (2016). They asserted that US sanctions against Cuba, Chile and Iraq have had these unstated objectives to send signal to other audiences.

[494] *See* Hufbauer, Gary C., *Economic Sanctions: America's Folly*, *in* ECONOMIC CASUALTIES: HOW U.S. FOREIGN POLICY UNDERMINES TRADE, GROWTH, AND LIBERTY 92 (Solveig Singleton eds. 2001).

On this approach, the success and efficacy of sanctions are assessed solely based on their *stated* policy objectives, *whether primary, secondary, or tertiary*. For example, in the US sanctions against Russia, all three levels of objectives are *stated*, including: imposing a cost on Russia to stop its invasion as the primary objective; responding to Americans' public opinion or, in other words, the domestic political utility to show that the US is doing something in response to Russia's act of aggression; and finally sending a message to third States to know what would happen if they acted similarly, which is its tertiary objective. If the sanctions' efficacy rate is to be evaluated, it should be based on all these three levels.

However, if the sanctions also have other objectives, such as reducing Russia's hegemony in the region or the EU's reliance on its resources, their effectiveness can only be measured using the notion of *retorsion* and exclusively by the US. Nevertheless, the Paper and its public international law perspective claim that sanctions can only fit in the model if the target is aware that sanctions will be lifted if its behavior changes in order to accomplish the stated objectives; otherwise, sanctions will never be lifted, and the subjective wrongful act will be continued to increase.

4.3.2 Scrutinizing Policy Objectives

As pointed out, all three levels of policy objectives should be considered when scrutinizing the adoption of each sanctioning regime with the rights-based model's criteria. It is reasonable to assume that sender States may not even expect to achieve the stated objectives in some episodes, but only imposed sanctions to achieve those unstated objectives. It appears that investigating these unstated and hidden objectives, which could go beyond the scope of subjective internationally recognized wrongdoing's prevention, deterrence, and

denunciation, may be impossible.[495] Thus, the main concern is assessing the success rates of sanctions without regard to their unstated objectives, which could result in a false indication of effectiveness.

If the achievement of unstated objectives is used to determine the success of each sanctioning regime, the likelihood of success increases significantly;[496] however, the Paper for its purposes and from the public international law perspective asserts that sanctions (not retorsions) will be successful only when their stated objectives in all three levels are achieved. Because if the success of sanctions is judged in a hazy fashion, senders may claim that they are satisfied with the results, implying that sanctions are always successful because they may achieve some hidden objectives, even if the primary international wrongful behavior has not changed.[497] In these cases, the assessment may be made solely on the basis of the sender State's unstated policy objectives, despite the fact that the actual cost of achieving it is undisclosed.

It is important to emphasize that the Paper is unconcerned with the policy objectives of the sanctions imposed by the SC, which are mostly stated and publicly communicated.[498] These objectives predominantly include conflict resolution, nonproliferation,

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[495] *See* Kerr, William A. & James D. Gaisford, *Note on Increasing the Effectiveness of Sanctions*, 28 J. WORLD TRADE 169-71 (1994).

[496] Stalls, *supra* note 490, at 152.

[497] *See* Malloy, Michael, UNITED STATES ECONOMIC SANCTIONS: THEORY AND PRACTICE 341 (2001).

[498] *See* Hufbauer, Gary C. et al., ECONOMIC SANCTIONS RECONSIDERED 72-6 (3rd ed. 2007). SC's sanctions also may have tertiary unstated objectives aimed at sending various messages to various groups of audiences and other UN members.

counterterrorism, democratization, human rights promotion, and civilian protection.[499] Although, the SC's sanctions objectives differ depending on each regime, but the main objective appears to be to exert pressure on governments or non-State actors without resorting to force to change their stated precise wrongdoings.[500]

In this step, the Paper's main concern is with unilateral sanctions, or measures imposed outside of the SC that are more likely having unstated policy objectives. It is because while unilateral sanctions can take many different forms and types, it is widely argued that their main unstated objective is to increase whatever costs it needed in order to "exercise sufficient bite that citizens in the target country will exert political pressure to force either a change in the behavior of the authorities or their removal all together."[501]

For example, the US has sanctioned Cuba since the late 1950s,[502] and while the Castro family continues to rule the country, only the suffering of the people prompted Biden's administration to gradually start the process of lifting the sanctions.[503] Furthermore, the US government has been sanctioning the Assad regime in Syria since 2004 because of its support

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[499] Security Council Report, SPECIAL RESEARCH REPORT ON UN SANCTIONS 3 (Nov. 2013).

[500] *See generally* Giumelli, Francesco, COERCING, CONSTRAINING AND SIGNALING: EXPLAINING UN AND EU SANCTIONS AFTER THE COLD WAR 19-23 (ECPR PRESS, 2011); *See also* Ruys, Tom, *Sanctions, Retortions and Countermeasures: Concepts and International Legal Framework*, *in* RESEARCH HANDBOOK ON UN SANCTIONS AND INTERNATIONAL LAW 22 (L van den Herik ed, 2017).

[501] *See* Cortright, David et. al., POLITICAL GAIN AND CIVILIAN PAIN: HUMANITARIAN IMPACTS OF ECONOMIC SANCTIONS 4 (1997).

[502] *See e.g.*, 31 C.F.R. § 515.207.

[503] *See* Lauren, Ban, *Biden Administration to Partially Lift Sanctions Against Cuba*, JURIST (May 17, 2022).

for terrorism and pursuit of weapons of mass destruction,[504] but the Assad family continues to rule the country, and there is no indication that the country has adapted its behavior to the US stated policy objectives.[505]

Furthermore, the US sanctioned the DPRK after its attack on the South since 1950,[506] which is so far only contributed to the poverty of its people, and the target insistently continues to develop the country's nuclear program.[507] Besides all, the US has sanctioned Russia since 2014 for its invasion of Ukraine and annexation of Crimea,[508] however, sanctions have not only failed to change Putin's behavior, but have allegedly contributed in making him more aggressive in pursuing his invasions.[509]

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[504] *See e.g.*, 31 C.F.R. pt. 542, Syrian Sanctions Regulations (SSR). *See generally* Sharp, Jeremy Maxwell, & Christopher M. Blanchard, *Unrest in Syria and US Sanctions Against the Asad Regime*, CONGRESSIONAL RESEARCH SERVICE (2011). The Office of Foreign Assets Control's (OFAC) Syria sanctions program began in 2004 with the issuance of Executive Order (EO) 13338 to address the Syrian government's policies of supporting terrorism, continuing its occupation of Lebanon, pursuing weapons of mass destruction and missile programs, and undermining US and international efforts to stabilize Iraq. Following the events in Syria that began in March 2011, subsequent Executive orders were issued in response to the ongoing violence and violations of human rights in Syria. OFAC's sanctions against Syria are one of the most comprehensive sanctions programs currently in place.

[505] *See* Scheller, Bente, *Bashar al-Assad's Unlikely Comeback*, FOREIGN POLICY (Dec. 15, 2021).

[506] *See* Fischer, Hannah, *North Korean Provocative Actions, 1950-2007*, CONGRESSIONAL RESEARCH SERVICE (2007).

[507] Ahn, Sung-mi, *UN Says 42 Percent of North Koreans Undernourished*, THE KOREA HERALD (Jul. 13, 2021) "As many as 10.9 million people in North Korea, or 42.24 percent of the population, were undernourished from 2018 to 2020, according to the report jointly published by five UN agencies, including the Food and Agriculture Organization, the World Food Program and the World Health Organization."

[508] Bown, Chad, *Russia's War on Ukraine: A Sanctions Timeline*, PIIE (May 20, 2022).

[509] *See* Hufbauer, Gary Clyde, & Megan Hogan, *How Effective Are Sanctions Against Russia?*, PIIE (Mar. 16, 2022).

Therefore, the Paper emphasizes that the major current sanctioning regimes have failed to meet their stated objectives; however, they undoubtedly have other unstated objectives that have caused all of the various US's administrations to uphold and even toughen them, implying that the sanctions were successful in the eyes of those who imposed them rather than those who heard the main objectives.

4.3.3 Scope of Policy Objectives

The Paper claims that these policy objectives are hidden behind the broad scope of justifications of national security, economic development, peacekeeping, human rights, or even regime change, on which sender States typically base their sanctions rather than the *rules* of international law. Although some may argue that these objectives are also based on international law and the sender States' sovereign rights, international law has never allowed individual States to go beyond the scope of their sovereign rights, as the Paper demonstrates here.

In addition, despite the Paper's assertion that episodes with stated and specific objectives are more likely to achieve the main purpose of changing the target's wrongful behavior, unilateral sanctions may generally *take place* by having stated objectives; but they *remain in place* based on unstated objectives. These breadth causes the targets to be unable to comprehend them in precise detail in order to adopt their behavior accordingly, which is why the Paper's rights-based model requires specificity in objectives.

It should be taken into consideration that bringing some of the related episodes here does not imply that the Paper condemns all of their objectives or the US foreign policy; these measures are brought here to demonstrate that unilateral sanctions and some domestic

legislation may give leaders plenty of power to enact sanctions quickly with less assessment of their *actual* effect on their national security or other adverse consequences.

For example, the US imposed sanctions on several episodes to support its national security objectives including nonproliferation of mass destruction weapons, as such those sanctions by which imposed against Argentina,[510] Brazil,[511] India,[512] Pakistan,[513] South Africa,[514] and Taiwan,[515] could be named. Also, as codified under Section 6(j) of the Export Administration Act of 1979,[516] sanctions against States sponsorship of terrorism, referring to those which have "repeatedly provided State support for acts of international terrorism," such

[510] *See generally* Gonzalez, Fernando, *International Sanctions and Development: Evidence from Latin America and the Caribbean (1950–2019),* 42.1 ECONOMIC AFFAIRS 73-5 (2022).

[511] *See generally* Adamson, Matthew & Simone Turchetti, *Friends in Fission: US-Brazil Relations and the Global Stresses of Atomic Energy, 1945–1955,* 63.1 CENTAURUS 51-6 (2021).

[512] *See* Tellis, Ashley, *How Can US-India Relations Survive the S-400 Deal?,* CARNEGIE ENDOWMENT 29 (2018).

[513] *See generally* Pandey, Shubhangi, *US Sanctions on Pakistan and Their Failure as Strategic Deterrent*, ORF ISSUE BRIEF 251 (2018).

[514] Rodman, Kenneth, *Public and Private Sanctions against South Africa,* 109.2 POLITICAL SCIENCE QUARTERLY 313-4 (1994).

[515] *See, e.g.*, Purcell, Susan Kaufman, *Cuba, in* ECONOMIC SANCTIONS AND AMERICAN DIPLOMACY 40 (Richard N. Haas ed., 1998). Discussing the US sanctions regime against Cuba and the broader political disputes driving that sanctions program.

[516] *See* Carter, Barry E., *International Economic Sanctions: Improving the Haphazard US Legal Regime*, 75 CALIF. L. REV. 1159 (1987).

as Cuba,[517] Sudan,[518] Iran,[519] Iraq,[520] Libya,[521] North Korea,[522] and Syria[523] are also based on the broad objective of protecting the national security.

The Nuclear Proliferation Prevention Act of 1994,[524] enacted by the US, expanded this scope and accordingly the *Glenn Amendment* necessitated the US President to impose sanctions on any *non-nuclear-weapon State* that received or exploded a nuclear explosive device and transported such a device to a non-nuclear-weapon State.[525] The Glenn Amendment first used in 1998 against India[526] and Pakistan[527] after testing nuclear weapons, however, three years later, in 2001, both measures failed and revoked because of their fast implementation and ineffectiveness.[528]

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[517] *See e.g.*, 31 C.F.R. § 515.207.

[518] *See* Verjee, Aly, *Sudan after Sanctions: Sudanese Views of Relations with the United States*, US INSTITUTE OF PEACE (2018).

[519] *See* Fadlon, Tomer & Sason Hadad, *Collateral Damage: How US Sanctions against Iran Harm Iraq*, INSTITUTE FOR NATIONAL SECURITY STUDIES (2018).

[520] *See generally* Koshy, Ninan, *Continuing Sanctions against Iraq*, 30.47 ECONOMIC AND POLITICAL WEEKLY 2985-6 (1995).

[521] *See generally* Kerr, Paul, *U.S. Lifts Remaining Economic Sanctions Against Libya*, 34.8 ARMS CONTROL TODAY 31-2 (2004).

[522] *See* Berger, Bernt. *Sanctions against North Korea: A Tricky Dilemma*, EU INSTITUTE FOR SECURITY STUDIES (EUISS) 1-4 (2015).

[523] *See* 50 U.S.C. app. § 2405(j) (2006). This type of sanctions restricts import and export licenses and financial transactions and assistance by US persons. *See* Nguyen, Michael, *U.S. Sanctions Syria*, 34.5 ARMS CONTROL TODAY 42 (2004).

[524] *See* 22 U.S.C. Ch. 72 (1994).

[525] *See* 22 U.S.C. § 2799aa-1(b) (2006).

[526] *See* Pandey, *supra* note 513.

[527] *See id.*

[528] The sanctions banned targeted foreign financial assistance and export licenses. *See* 22 U.S.C. § 2799aa-1(b) (2006).

Other sanctions based on the same justification, were imposed by the US in 1996, when it enacted several statutes to punish foreign companies doing business in Iran,[529] and Libya[530] according to the Iran-Libya Sanctions Act (ILSA),[531] as well as those that targeted Cuba based on Helms-Burton Act.[532] The International Emergency Economic Powers Act (IEEPA) has been the leading legal grounds for implementing sanctions to protect national security,[533] which accordingly the US President has declared national emergencies on several

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[529] *See* Torbat, Akbar, *The Economic Sanctions Against Iran, Politics of Oil and Nuclear Technology in Iran*, PALGRAVE MACMILLAN, CHAM 201-4 (2020).

[530] *See generally* Nephew, Richard, LIBYA: SANCTIONS REMOVAL DONE RIGHT? A REVIEW OF THE LIBYAN SANCTIONS EXPERIENCE 1980–2006, 1-21 (2018).

[531] *See* Nephew, Richard, *Implementation of Sanctions: United States*, *in* ECONOMIC SANCTIONS AND INTERNATIONAL LAW AND PRACTICE 98 (Masahiko Asada, 2019).

[532] Rathbone, Meredith & Jeydel, Peter & Lentz, Amy, *Sanctions, Sanctions Everywhere: Forging a Path Through Complex Transnational Sanctions Laws*, 44 GEO. J. INT'L L. 1055 (2012). Title III of the Helms-Burton Act allows the US nationals to initiate civil suits against any person (regardless of their nationality) that traffics the properties that has been confiscated by the Cuban government after the 1959 revolution. Also, it banned issuance of visas to any company manager that has trafficked the US national's properties confiscated by the Cuban government. *See* White, Nigel D., THE CUBAN EMBARGO UNDER INTERNATIONAL LAW 105 (2015); *See* Clagert, Brice M., *Title III of the Helms-Burton Act is Consistent with International Law*, 90.3 AMERICAN J. INT'L. L. 434 (1996); *See also* Lowe, Vaughan, *US Extraterritorial Jurisdiction: The Helms-Burton and D'Amato Acts*, 46.2 INT'L & COMP. L. QUARTERLY 378 (1997).

[533] 50 U.S.C. §§ 1701-1706 (2006). Under IEEPA, the President can declare a national emergency to deal with any unusual or extraordinary threat that originates in whole or in part outside the US.

occasions[534] such as in July 2003, by Executive Order (EO) of 13312, against those trafficking in blood diamonds,[535] and those EOs against North Korea.[536]

The other broad justification is those measures which were imposed to *promote peacekeeping* and were claimed to justify those US sanctions against the United Arab Republic[537] and Indonesia in 1963, aiming to cease military invasion, against India and Pakistan in 1971 to force them to end the war in Bangladesh and against Turkey in 1974, to force it to extract its soldiers from Cyprus.[538]

Regime change, while argued to be illegal under UN Charter Article 2(4) and the principle of State Sovereignty,[539] was the other broad goal for which the US imposed sanctions. For example, the US employed sanctions fourteen times during the Cold War,

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[534] According to Drezner, before the twenty-first century, the US was regarded as the most powerful country that could be challenged, which is why the US only found it necessary to impose sanctions in a small subset of international relations, such as nuclear proliferation and war crimes. However, as US hegemony has waned, there are more countries that disagree with the US, owing to visible US policy failures in Afghanistan, Iraq, Libya, and Syria, necessitating US sanctions. As a result, imposing sanctions in the current manner is a sign of the US's declining power, and China will soon replace the US's hegemony. *See* Drezner, Daniel, *The United States of Sanctions: The Use and Abuse of Economic Coercion*, FOREIGN AFFAIRS (Oct. 2021).

[535] EOs as the main way of implementation of economic sanctions are President's legally enforceable announcements with no specified constitutional bases. But they are generally accepted following to the President's power as the US chief executive. E.O. No. 13312, Fed. Reg. 45151 (July 29, 2003).

[536] The sanctions against North Korea implemented by the EOs of 13466, 13551, 13570, 13687, 13722, and 13810. *See e.g.*, 50 U.S.C. § 4301.

[537] Rathbone et. al., *supra* note 532, at 1066.

[538] Hufbauer et. al., *supra* note 498, at 17.

[539] Rathbone et. al., *supra* note 532, at 1066.

often successfully, with the same objective of regime change in Brazil, the Dominican Republic, Nicaragua, and Chile.[540]

Human rights promotion and protection is the other broad objective that could be investigated. Countries sanctioned by the US for their human rights violations have included South Korea and Chile in 1973, and Uruguay and Ethiopia in 1976, and Brazil, Argentina, Paraguay Nicaragua, El Salvador, and Guatemala in 1977.[541] Also the US based on Iran Threat Reduction Act sanctioned the human rights abuses in Iran.[542]

The US also employed sanctions to achieve *economic objectives* against Chile in 1965,[543] and to reduce the copper price. It also imposed sanctions against India to change some agricultural policies.[544] Similarly, it employed sanctions against Peru to pressure it to stop importing French aircrafts.[545] Long before the US imposed sanctions on Cuba and Philippines to pressure Spain.[546]

Although the ultimate political objectives of all of these episodes may be to protect international law, it was unclear what the exact main objective of most of these sanctions were, as well as how these measures were intended and designed to change internationally wrongful behavior. It could be simple responded that all of these were intended to compel a

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[540] *Id*.

[541] *Id*.

[542] *See* 31 C.F.R. pt. 560; *also see* 31 C.F.R. § 515.329; *See id.* § 560.215; *See* 31 C.F.R. pt. 594; 31 C.F.R. § 560.314.

[543] Hufbauer et. al., *supra* note 498, at 16.

[544] *Id*.

[545] *Id*.

[546] *Id*, at 23.

change in behavior by imposing costs in order to ensure that the target would not commit the wrongdoing again in the future. The issue could only be addressed by analyzing the number of sanctions that have been lifted after achieving their objectives, as well as determining the efficacy rate of these regimes, which could imply the achievement of these objectives.

4.3.4 Fulfilment of Policy Objectives

According to the Paper, sanctions are ineffective unless the sender can communicate the exact objective(s) to the target, and if the sender's objectives are unclear, the target is hesitant or unable to change its behavior. As a result, it is critical that senders interact and communicate with the targets in order to inform them of what they need to do to have the sanctions lifted. It means that any rights-based sanctions must include a sunset clause and a timetable for termination, requiring sender States to fully commit to lifting the sanctions if the specific stated policy objectives are met.

For example, it is still unclear what conditions must be met in order for the unilateral sanctions imposed against Russia in response to Russia's invasion of Ukraine[547] to be lifted, or even whether they will be lifted at all. As such will the sanctions be lifted if Russia leaves Ukraine? or when it changes its policy of recognizing Crimea and Donetsk as an independent State? Accordingly, Russia may be skeptical of the conditions for lifting the sanctions, given that the regimes' guidelines and senders' statements both do not indicate that they are willing to lift the sanctions if Russia takes specific steps.[548] As a result, the Russian government

[547] As of Aug. 6, 2022, US, EU, UK, Japan, Canada, Australia imposed sanctions against Russia. For a full list of unilateral sanctions against Russia *see* Bown, *supra* note 508.

[548] Lieven, Anatol, *When Do We Lift the Sanctions?*, THE CRITIC MAGAZINE (Apr. 2022).

believes that sanctions will not be lifted, and that the country should be prepared to live with them indefinitely.[549]

The Paper argues that if the unstated policy objectives are to impose costs on Russia or to reduce its hegemony and the European Union's (EU) reliance on its resources, it appears that these objectives will be achieved sooner or later, and the sanctions, as well as the invasion of Ukraine, may never be ended. It is rationale to understand that these costs alone will not change Russian wrongful behavior in these circumstances, and that an agreement with all parties is required to end sanctions and, possibly, invasion.

As a result, the main consideration is that the US, the EU, and Russia should keep the negotiation channels open at all times so that both sides can reach an agreement sooner. It means that some statements by leaders such as "sanctions never deter [. . .] a brute"[550] or "Putin [. . .] cannot remain in power"[551] may simply close these channels by demonstrating that the senders are aware that Russia will not change its policies toward Ukraine and that the sanctions are pursuing additional objectives.[552] It could also send a message to Russia that the EU and US are unwilling to de-sanction Russian targets while planning to increase sanctions against them.

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[549] Sweet, Ken, *Russia's Ruble Rebound Raises Questions of Sanctions' Impact*, AP NEWS (Mar. 31, 2022).

[550] Fung, Katherine, *Biden Says Sanctions Weren't Meant to Deter Putin from Invading Ukraine*, NEWSWEEK (Mar. 24, 2022).

[551] Liptak, Kevin, *Biden Says Putin Cannot Remain in Power*, CNN (Mar. 26, 2022).

[552] Pamuk, Humeyra, *U.S. has No Strategy of Regime Change in Russia, Blinken Says*, AL JAZEERA (Mar. 27, 2022).

Concerning US sanctions, there is another issue that is related to those regimes that are enacted as a law and passed by Congress, such as those against Cuba,[553] Iran,[554] Russia,[555] and North Korea.[556] The process of lifting each of these regimes requires Congressional approval and consent, which is difficult to obtain given the continual diversion of political views in the US Congress. As a result, the targets lack sufficient practical incentives to return to the negotiations in order to benefit from the sanctions being lifted.

Another issue with this lack of transparency is that the targets believe that sanctions will never be lifted or lifted in a long time, and in order to survive the separation from the international economy, they must find ways to bypass the sanctions. Although sanctions may aim to make the target to realize that its wrongful behavior is not worth the cost of being cut off from the international economy and having to bear the costs of changing its behavior, in practice they primarily open new channels for the target to violate other aspects of international law leading to money laundering and global corruption.[557]

Regarding the US, it needs to send positive signals to current targets by beginning the process of removing some targets from the sanctioned list, either partially or entirely. The Paper asserts that the fact that the US President is not in a position to lift sanctions and

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[553] *See e.g.,* CUBAN DEMOCRACY ACT OF 1992, Pub. L. No. 102-484 (106 Stat. 2575); 22 U.S.C. §§ 6001-6010.

[554] *See e.g.,* INTERNATIONAL SECURITY AND DEVELOPMENT COOPERATION ACT OF 1985, Pub. L. No. 99

[555] *See* Welt, Corry et al., CONG. RES. SERV., R45415, *U.S. Sanctions on Russia* 1 (2020).

[556] *See e.g.,* U.S.C. § 4301.

[557] Rowhani, Mohsen, *Corruption in the Middle East as a Long-lasting Effect of the U.S. Primary and Secondary Boycotts Against Iran*, 3 ABA MIDDLE EAST L. REV. 27 (2019).

Congress, with its undeniable diversion, is the ultimate authority, is the main reason that some countries, such as Iran, could not be persuaded to effectively rejoin the negotiation table in order to meet the requested objectives.

In addition, any sanctioning act or regime, such as the current regime against Russia, must have a sunset clause that requires it to automatically expire unless an extension is approved based on their established monitoring group's report. It means that targets must understand precisely why it has been sanctioned, as well as how and under what circumstances the sanctions will be lifted and they will be able to benefit again from engaging in economic relations internationally. As a result, the Paper emphasizes that unilateral sanctions should be used sparingly and in conjunction with a more systematic and detailed approach, rather than as a first resort to achieve policy objectives.

A rights-based model of economic sanctions requires a clearly stated policy objective(s) that is officially crystallized with an exact plan for achieving them, as well as precise conditions for the target to act in order to be de-sanctioned and the assurance that the sanctions will be thoroughly removed after compliance. It should also be noted that all of these criteria must be specified in the sanctions' guideline and made publicly available in both States for the people to understand lifting sanctions does not imply a President's or foreign policy's weakness and at the same time help the people of the targeted State to exert pressure on their government to change its behavior.

4.4 ESTABLISHING A SANCTIONS COALITION

Lack of international cooperation was the initial concern regarding the issue of sanctions' *efficacy* which was originated from the sanctions imposed against Italy in 1935

and the subsequent cooperation problems between States because of their significant varying degrees of interest.[558] Although cooperation problems still are a big obstacle for the senders to achieve their objectives, but besides the level of cooperation between the Senders and other countries, many additional factors influence the assessment of whether sanctions which were imposed unilaterally were effective to achieve their policy objectives.

The Paper aims to draw attention to the issue that current sanctions practices are not balanced and thus effective, and one of the main reasons for this is because States have been unable to coordinate with one another in implementation of these regimes. Therefore, the main concept here is that whether current sanctioning practices may be considered generally a failure, at least in terms of altering the target's governmental behavior in an acceptable way as changing behavior may even become harder when sanctions are in place.[559] There is thus a need for reassessing whether current unilateral sanctions are capable of changing or at least facilitating a change in the targeted leaders' behavior, and if they are ineffective, whether the main reason is that they are imposed without coordination with other States.

4.4.1 Effectiveness of Sanctions

The main question is whether unilateral sanctions are generally ineffective? The above-mentioned factors although may help to assess the effectiveness or failure of a sanctioning regime, but the fact that sanctions' objectives are modified over time is a further factor of the complex assessment. Due to the varied aspects that influence the outcome of sanctions,

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[558] Hufbauer et. al., *supra* note 498, at 8, 13.

[559] Bremmer, Ian, *How U.S. Sanctions Are Working (or not) in 5 Countries*, TIME (Jul. 31, 2017). For example, Syria, which is fighting for survival, always has more pressing issues than sanctions guiding its decisions.

senders are likely to modify the objectives that they seek throughout the application of a regime and also the nature of their immediate objectives which may shift over time.[560] Therefore, the relationship between the progress of sanctions over time and their objectives adds to the complexity of determining whether they are in balance, which depends significantly on what point in time one assesses them and which objective is used for the analysis.

It's also possible that they accomplish their primary objectives while not being prevented from achieving secondary objectives. Furthermore, it's possible that the primary objectives aren't met, but secondary or tertiary objectives are. As a result, determining which objectives must be met and the degree of success for each is extremely difficult, which may explain why the majority of the sanctions' effectiveness studies do not appear to be comprehensive or up to date.

This concern about the sanctions effectiveness, is not only concerned with embargoes, or sanctions imposed on States or their major sectors, but also it has deficiencies about targeted sanctions. For example a study conducted by the Targeted Sanctions Consortium (TSC) in 2012, which was the first investigation of the targeted sanctions in the post-Cold War era,[561] concluded that for the travel ban and freezing asset sanctions to be effective, primarily they should have psychological impacts on those targeted or their supporters.[562] The targeted

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[560] Stalls, *supra* note 490, at 148.

[561] *See* Biersteker, Thomas J., et al., *UN Targeted Sanctions Datasets (1991–2013)*, 55.3 JOURNAL OF PEACE RESEARCH 404-7 (2018).

[562] *See id.*

sanctions in some cases even brought a domestic blessing or immunity for the targets,[563] while inconvenienced some targets in their personal as well as professional capacity.[564] Accordingly, only in a few episodes, efficient political changes have been observed,[565] and in any episodes that the targeted entity became broader to the extent of embargoes, based on the Paper's definition, evidence of economic and social impacts on civilians were more detected.[566]

4.4.2 Assessment Criteria

Some criteria to consider in this assessment include the personalities of the targeted State's leaders, the rationale and legitimacy behind the policy objectives, the senders' level of competence in using the sanctions instrument, and the level of political endeavors to end the conflict.[567] Also, in assessing effectiveness, it should be noted that sanctions in general,

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[563] The effects on two closely related individuals to their regimes, who were listed under UN sanctions on Sierra Leone (1997-2010) and Liberia (2003-2016), are worth mentioning as examples. Mr. Golley, a lawyer with dual citizenship in the UK and Sierra Leone, was one of them, and he confirmed the psychological effects of shame and fear, as well as the significant economic loss caused by the loss of prestige. He did not, however, attribute any changes in his political opinions or loyalties to the government. Mr. Carbah, a former member of the Liberian Cabinet, was the other who explained that if his name had not been blacklisted alongside fellow ministers, he would have been viewed with suspicion. As a result, the sanctioning confirmed his devotion to the Liberian leadership, and he did not feel singled out because he saw the blacklist as government mistreatment. According to him, the sanctions "brought a lot of blessings to me to have been included, otherwise I might have been taken for somebody who is in the government and is not part of the government and probably accused of providing information that probably led to this kind of situation." *See* Portela, Clara, *Are European Union Sanctions "Targeted"?* 29.3 CAMBRIDGE REV., INT'L AFF. 920-21 (2016).

[564] For example, Belarusian opposition leader Sannikov expressed concern that the travel ban would prevent him from enjoying everyday life. *See id.*

[565] *See id.*

[566] *See* Biersteker, *supra* note 561, at 410-3.

[567] Baldwin, David A., *Success and Failure in Foreign Policy*, 3.1 ANNUAL REVIEW OF POLITICAL SCIENCE 174-5 (2000).

impose restrictions on the people of the sending States as well, as they will be unable to do business with the targeted State and its citizens.[568] The citizens, including natural and legal, will potentially be subjected to punishments for the sanctions' violations. In the US, for example, each violation of the OFAC's[569] sanctions may result in a fine of up to $250,000, or twice the amount of the violation.[570] Furthermore, based on their *mens rea*, it can be adjudicated as a crime punishable by up to 20 years in prison and a US$1 million fine.[571]

Although one could add another criterion that effectiveness assessments should also consider the issue of what would happen if sanctions were not in place, such as those imposed on Venezuela and North Korea, and Iran. In response, the ultimate objectives of those sanctions, as well as their failure to achieve them, should be recalled, as all of them have so far failed to produce any significant change in behavior. It means the response to the

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[568] Stalls, *supra* note 490, at 166.

[569] OFAC as the main sanctioning enforcement body, designs and administers and implements sanctions against States and groups of individuals including terrorist and narcotics traffickers by blocking their assets and imposing sanctions to accomplish foreign policy objectives and national security missions. The OFAC sanctions can be divided into programs targeting a country or a specific region or situation, such as the sanctions against Burma, and programs targeting a particular issue, group or activity such as Counter Terrorism Sanctions or the Cyber-related Sanctions. *See* Cozzi, Fabio, *Will Blockchain Technologies Strengthen or Undermine the Effectiveness of Global Trade Control Regulations and Financial Sanctions?*, 20.2 GLOBAL JURIST 2 (2020).

[570] The US State Department has mentioned that "For munitions export control violations, the statute authorizes a maximum criminal penalty of $1 million per violation and, for an individual person, up to 10 years imprisonment. In addition, munitions violations can result in the imposition of a maximum civil fine of $500,000 per violation of the [International Traffic in Arms Regulations], as well as debarment from exporting defense articles or services. For dual-use export control violations, criminal penalties can reach a maximum of $500,000 per violation and, for an individual person, up to 10 years imprisonment. Dual-use violations can also be subject to civil fines up to $12,000 per violation, as well as denial of export privileges. It should be noted that in many enforcement cases, both criminal and civil penalties are imposed." US DEPARTMENT OF STATE, *Overview of US Export Control System*, *available at* www.state.gov/strategictrade/program/index.htm (Last visited on May 6, 2021)

[571] *See id*; *See also e.g.* 50 U.S.C. § 1705.

mentioned questions already has happened as that, North Korea has not yet been denuclearized, and the Bolivarian regime in Venezuela has not yet been overthrown and although the US government assessed the Iran's regime is an "extraordinary effective" regime,[572] Iran has accelerated the Uranium enrichment to the weaponized level.[573]

The related research of "Economic Sanctions Reconsidered" by studying 174 episodes of sanctions which is the most comprehensive study of sanctions' effectiveness by using statistical data, has determined the sanctions' success rate is around 36 percent.[574] It assessed that the probability of achievement of military impairment objective is 20 percent, for destabilization is 52 percent, for modest policy change the success rate is 33 percent and for the other major policy objectives it is 25 percent.[575] Also, the current effectiveness rate of US sanctions at best is around one-third, according to a 2014 study published by the University of North Carolina.[576] In addition, in another study, Pape claimed that the success rate of sanctions in 1990s was only 5 percent.[577]

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[572] Brennan, David, *Pompeo Celebrates 'Extraordinarily Effective' Sanctions on Iran As Rouhani Dismisses 'Unruly' Trump*, NEWSWEEK (Nov. 19, 2020).

[573] Murphy, Francois, *Iran Accelerates Enrichment of Uranium to Near Weapons-Grade, IAEA says*, REUTERS (Aug. 18, 2021). Iran's officials claimed "[i]f the other parties return to their obligations under the nuclear accord and Washington fully and verifiably lifts its unilateral and illegal sanctions [...] all of Iran's mitigation and countermeasures will be reversible."

[574] Hufbauer et. al., *supra* note 498, 80.

[575] *See id*; *See also* Elizabeth, Rosenberg, *The New Tools of Economic Warfare: Effects and Effectiveness of Contemporary us Financial Sanctions*, CENTER FOR A NEW AMERICAN SECURITY 9 (2016). It discusses about the policy makers' disagreement with the application of economic sanctions because of their low-level efficacy.

[576] *See* Drezner, *supra* note 534.

[577] Pape, Robert, *Why Economic Sanctions do not Work*, 22.2 INT'L SECURITY 105 (1997).

4.4.3 Effective Multilateralism

The issue is what was the main reason of this low of 36 percent probability of sanctions' success in further of the lack of transparency of their objectives. In response it should be mentioned that these studies all look at two main components of the assessment including what was the stated policy objective of the sender State as well as, whether they reached to that specific objective, and are assessed by an outsider monitoring establishment and not an insider one by the sender State.[578] If the monitoring establishments could be implemented inside the sender State's agencies, by knowing the actual objectives, it could more precisely assess the cost and benefits of the sanctions. These studies also lack the consideration of other elements such as provoking adversaries, rights violations of civilians and specially damaging relations with allies.[579]

As a result of these consequences, a more definitive assessment in some cases may reduce the success rate, causing senders to reconsider their decision to use sanctions as a preferable tool over all other possible foreign policy measures, such as cultural reputation, diplomatic influence, technological prowess and economic aid. It may also encourage Senders to avoid imposing sanctions individually and instead act collectively in collaboration with their allies. For example, regarding China, the US sanctions because of being imposed with no coordination with other allies, only led to the change of China's market to be more

[578] For example, according to a 2019 Government Accountability Office study, US officials lacked an assessment and monitoring mechanism to determine their effectiveness, as well as an agency responsible for conducting such assessments. *See* Drezner, *supra* note 534.

[579] *See id.*

friendly with other countries, such as lowering the tariffs to EU's States and more hostility toward the trade war with the US.[580]

In this regard, the Paper suggests that senders and their allies establish rights-based sanctions with multilateral support, and that these States share common values and policies at least in some major areas so that decisions can be made quickly, multilaterally, and efficiently. Their sanctions should be imposed in accordance with an explicitly agreed-upon guideline, which includes a concrete, realistic request and objective that the target can satisfy, as well as being supervised throughout the process by an internal monitoring character. The decision must be determined by a group on a multilateral basis in order to apply a stricter test for adopting the least restrictive measure that is balanced with the ultimate objectives.

All of the guidelines must be revised on a regular basis according to the monitoring groups' reports and success rates, as well as the actual impact on the target. The sanctions' guideline must state why a measure is necessary, what the specific objective is, and how it will be implemented in accordance with CIL or treaties and in response to whatever initial wrongful act. Also, because of the multilateral nature of these sanctions, each succeeding administration may be unable to reverse its previous administration's decisions without approval of other members of the coalition. Finally, because any compliance with international law requires a dispute resolution mechanism, this model must include a mechanism to make negotiation channels available to both parties in order to reduce tensions and provide a path to diplomatic settlement.

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[580] According to Moody's Investors Service, 93 percent of the additional tariff costs were borne by US importers and ultimately passed on to US consumers in the form of higher prices. *See* Altmann, Thomas et. al., *Sanctioned Terror: Economic Sanctions and More Effective Terrorism*, INT'L POLITICS 3 (2021).

The proposed vehicle will improve senders' chances of success while also providing genuine hope for relief and serving as a true incentive measure for targets. It can also be used to guarantee that businesses will be able to continue doing business with previous customers. Furthermore, because most international banks treat sanctioned individuals as if they have been sanctioned indefinitely, the financial sector will be forced to stop permanently listing targets by freezing their accounts. It will also make the de-risking process and compliance officers' responsibilities a two-sided route, terminating and re-offering services.

4.5 CONSIDERING POTENTIAL RIGHTS INFRINGEMENTS

When asked "whether the US sanctions' objectives worth the death of millions innocent Iraqis?" former US Secretary of State, Madeleine Albright, responded that "this is a very hard choice, but the price, we think the price is worth it."[581] To respond to this point of view, the Paper offers some examples of the internationally accepted social and economic rights that proximately infringed by some sanctioning regimes. It also examines the importance of proportionality in sanctions and their rights-based effects on targeted States, particularly embargoes. This approach explores some of the rights that have been proximately and contributorily violated as a result of these measures, emphasizing the importance of developing a new model of rights-based sanctions that is more effective with less collateral damages. It seeks to establish that, prior to imposing sanctions, the humanitarian costs should be calculated in order to minimize the impact on civilian populations and to help determine the regime's subsequent effectiveness more precisely. To avoid imposing an undue burden

[581] Spagat, Michael, *Truth and Death in Iraq Under Sanctions*, 7.3 SIGNIFICANCE 116 (2010).

on targets, as well as potentially affected third countries, this model must be guided by the proportionality principle.

It should be noted that most developed countries' domestic laws and constitutions, such as the US Constitution's Eighth Amendment, recognize the principle of proportionality and the avoidance of excessive punishment.[582] Also, the EU's Guidelines on implementation and evaluation of restrictive measures has specified that all sanctions should "always be proportionate to their objective."[583] However, it appears that the concept of national security has prevented the application of this principle beyond the borders of States, which is the other major issue raised by the rights-based model.

The Paper's emphasis on proportionality also stems from an ethical perspective known as *utilitarian theory*, which states that all actions are good only if the good outcomes outweigh the bad ones.[584] Although this theory is mostly used by economists, the Paper borrowed it to employ in its model due to the economic nature of sanctions. It argues that an embargo whether imposed against a State or based on its definition against a main sector of that State, will cause at least a slight increase in the price of some products. For example, in the case of sanctioning oil products, any shortage in the market will cause the price to

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[582] U.S. CONST. amends. V, VIII. It reads "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[583] Council of the European Union, 7, para. 9. (Brussels, 4 May 2018); It's worth noting that the term "sanctions" has been translated to penalty rather than sanctions in the German version of the EU's Guidelines, with the caveat that all penalties must be proportionate to the wrongdoing. This type of translation could be interpreted as a way to demonstrate the importance of the proportionality principle in imposing sanctions in German law.

[584] *See* Gordon, Joy, *A Peaceful, Silent, Deadly Remedy: The Ethics of Economic Sanctions*, 13.1 ETHICS & INT'L AFF. 123-27 (1999).

slightly rise, implying that the adverse economic consequences will affect people all over the world.[585]

The negative consequences of these measures are not limited to their global economic consequences. Sanctions also may make wrongdoers more aggressive and motivate them to commit even more heinous global crimes, as such, Osama bin Laden cited the US sanctions against Iraq as the main reason for the World Trade Center attack on September 11, 2001.[586] The same allegation was made by Richard Reid, the attempted shoe bomber who mentioned the death of two million Iraqis caused by the sanctions as a reason for his attempted attack to blow up an airplane, which led to the worldwide practice of airport shoe searches for all passengers.[587] Though it is impossible to assess the veracity of these allegations, it appears that the sanctions have also asserted as a motivator for some terrorist activities.

These consequences are different from the adverse humanitarian effects on civilians who are not responsible for the subjective wrongdoing. The Paper tries to emphasize and determine whether these humanitarian costs could become proportionate to the likely gains of sanctions by adhering to its model. It also attempts to establish that, because sanctions have negative consequences for people who are not the subjective wrongdoers, a rights-based model of sanctions, which is actually aimed at persuading the target to stop its wrongful

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[585] *See e.g,* Horsley, Scott, *U.S. Gas Prices Hit Record Highs Following Sanctions on Russia,* NPR (Mar. 12, 2022).

[586] *See* Bin-Lādin, Usāma, *Messages to the World: The Statements of Osama Bin Laden,* VERSO (2005). He also mentioned two other reasons for the attack: the US support for Israel and the US troop presence in Saudi Arabia.

[587] *See* Jager, Avraham, *The "Shoe Bomber" Richard Reid-His Radicalization Explained,* INTERNATIONAL INSTITUTE FOR COUNTER-TERRORISM (2018).

behavior, should only trigger the wrongdoer while having the least impact on others. In this regard, it elaborates its assertions that the direct and indirect consequences of sanctions, should be proportionate with the subjective wrongdoing.

To that end, by giving some examples of sanctions that contributed to rights violations, the main considerations that sender States should bear in mind in their sanctions designing and implementation will be listed. In this regard, the Paper emphasizes that the targeted State bears primary responsibility for the preservation of these rights, but it also wants to establish that the sender State may be proximately and contributorily responsible for these rights violations if they are member parties of other treaties or CILs.

Also, one could argue that mentioning the negative effects of sanctions in some cases does not help in developing a proposal for a rights-based model. However, according to the Paper, the most important motivator for senders to shift toward a rights-based model is not their desire for the sanctions to become more effective, but rather an understanding of the harms to people's rights caused proximately by their current practices. When viewed through the eyes of civilians inside the target rather than as a leader outside of it, their response to the question of the value of sanctions in comparison with the death of millions may differ.

4.5.1 The Right to Life

In this approach, the right to life is the most vulnerable right, and there is every evidence to suggest that no one should be deprived of her own means of subsistence because of governmental wrongdoings. The importance of the right to life found in Article 6 of the

International Covenant on Civil and Political Rights (ICCPR)[588] by affirming that "every human being has the inherent right to life."[589] Also the Human Rights Committee have explained that the right to life is "a right which should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity."[590] In addition, Article 2 paragraph 1 of the European Convention on Human Rights (ECHR) also mentioned that "everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally,"[591] which exclusively focused on preventing mortality.[592]

The Paper asserts that Article 6 paragraph 1 obliged its member States to refrain from imposing sanctions which "direct threats to life" also, it obliges them to remove "obstacles to the enjoyment of a right to life with dignity."[593] Nonetheless, these violations have been reported in many instances of past sanctions programs and entailed actual violations of the right to life, by reducing the life expectancy and increasing the mortality rates.[594] For

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[588] *International Covenant on Civil and Political Rights*, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368, 999 U.N.T.S. 171 (hereinafter ICCPR).

[589] ICCPR, *supra* note 588, art. 6 ¶ 1.

[590] Human Rights Committee, General comment No. 36 (2018) on article 6 of the ICCPR, on the right to life, ¶ 3, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018).

[591] Y.B. Eur. Conv. On H.R., art. 2 ¶ 1.

[592] EUR. CT. OF HUM. RTS., Guide on Article 2 of the European Convention on Human Rights: Right to Life 6, 8-30 (2020).

[593] *Id.*

[594] Commission on Human Rights, *The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights*, Working Paper prepared by Mr. Marc Bossuyt, U.N. Doc. E/CN.4/Sub.2/2000/33 ¶ 63 (June 21, 2000); *See* U.N. Doc. A/HRC/28/74; *See also* the research-based progress report of the Human Rights Council Advisory Committee, U.N. Doc. A/HRC/28/74 ¶ 15 (February 10, 2015).

example, it is claimed that the US sanctions episodes typically reduces life expectancy by 0.4 to 0.5 years.[595] It is because the mortality rate has a strong correlation with access to clean drinking water, nutritious food, and quality health care, as reported their deficiency in cases of sanctions against Iran, Venezuela, and North Korea.

In Venezuela, for example, there was a 31 percent increase in general mortality from 2017 to 2018.[596] Also, in the same year in North Korea more than 3,968 people died including 3,193 children under age 5 and 72 pregnant women among them, as a result of sanctions-related malnutrition, vitamin A deficiency, water, sanitation, hygiene, and reproductive health kits.[597] Regarding Iran, sanctions' effect on the right to life of peoples has been recognized to some other vulnerable industries such as the civil aviation system.[598]

It has been affirmed in the *provisional measures*[599] phase of the *Alleged violations.*[600] Accordingly, the International Court of justice (ICJ) in the *Provisional Measures* regarding the sanctions prohibiting access to aircraft spare parts by Iranian airlines, mentioned that

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[595] Gutmann, Jerg et. al., *Sanctioned to Death? The Impact of Economic Sanctions on Life Expectancy and its Gender Gap*, 57.1 THE JOURNAL OF DEVELOPMENT STUDIES 139-162 (2021). Accordingly, the main UN-imposed sanctions episodes reduced life expectancy by 1.2 to 1.4 years.

[596] Bahar, Dany et al., *Impact of the 2017 Sanctions on Venezuela: Revisiting the Evidence*, GLOBAL ECONOMY AND DEVELOPMENT 8 (May 2019).

[597] Zuesse, Eric, BIGOTRIES ORIGINATE FROM THE BILLIONAIRES, NOT FROM THE PUBLIC 11 (2020).

[598] *See generally* Omidi, Ali, *The United States' Breaching of the Iranian People's Right to Health and its Legal Liability in Donald Trump's Administration*, 27.2 AUSTRALIAN JOURNAL OF HUMAN RIGHTS 249-50 (2021).

[599] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (Iran v. U.S.), I.C.J. ORDER ON PROVISIONAL MEASURES (Oct. 3, 2018) (hereinafter *Provisional Measures*).

[600] *Application Instituting Proceedings in Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (Iran v. U.S.), I.C.J. ¶ 1& 21(July 16, 2018) (hereinafter *Alleged Violations*).

"[t]he measures adopted by the United States have the potential to endanger civil aviation safety in Iran and the lives of its users to the extent that they prevent Iranian airlines from acquiring spare parts and other necessary equipment, as well as from accessing associated services [. . .] necessary for civil aircraft."[601] Similarly, the ICJ found that rights asserted by Iran "so far as they relate to the importation and purchase of goods required for humanitarian needs" are acceptable and not even the treaty's national security exception can ban Iran's right to humanitarian goods.[602] In this regard, a report that has prepared by Peterson Institute for International Economics, specifically shows as of January 4th, 2021, out of a total of 1733 sanctions against Iran, 195 Iranian aircrafts and 205 vessels that mainly are used for the importation and purchase of goods including those required for humanitarian needs, have been sanctioned and subsequently are unable to provide services.[603]

4.5.2 The Right to Water

The Committee on Economic, Social, and Cultural Rights in General Comment No. 15 established the right to water in international law.[604] Treating water as a human right would allow anyone to claim water without relying on the government's support,[605] which also according to the preamble of the International Covenant on Economic, Social, and Cultural

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[601] *Provisional Measure*, *supra* note 599, at ¶ 102(1).

[602] *Id*, at ¶ 70.

[603] Dall, Emil, *Sanctions are now a Central Tool of Governments' Foreign Policy: The More They are Used, However, the Less Effective They Become*, THE ECONOMIST (Apr. 24, 2021); *See also* Adelsberg, Sam et. al., *The Chilling Effect of the Material Support Law on Humanitarian Aid: Causes, Consequences, and Proposed Reforms*, 4 HARV. NAT'L SEC. J. 282 (2012).

[604] *U.N. Comments on Economic, Social and Cultural Rights*, General Comment No. 15, The Right to Water, UN Doc. E.C. 12/2002/11, (2002).

[605] *See* Bluemel, E., *The Implications of Formulating a Human Right to Water*, 32 ECOLOGY LAW QUARTERLY 963 (2004).

Rights (ICESCR),[606] cannot be taken away in any circumstances.[607] Notably, the right to water also is connected to the right to an adequate standard of living.[608] These measures may prevent the supply of water, and the goods and services safeguarding the right to water.

The non-availability of clean drinking water and functioning sanitation systems have been seen in the cases of sanctions on Cuba, by decreasing its ability to provide clean drinking water and effective sanitation for their people.[609] The UN High Commissioner for Human Rights stressed that "the restrictions imposed by the embargo help to deprive Cuba of vital access to [. . .] chemical water treatment and electricity."[610] As such, the sanctions on Cuba decreased the availability of potable water by preventing the purchase of parts for water chlorination from the US company Wallace & Tiernan after the Torricelli Act of 1992 which had threatened the safe drinking water of all cities with over 100,000 people and about four million people causing more incidents of tuberculosis among Cubans in 1993 and 1994 rapidly rose.[611] Also, Iraq's sewage system was not functioning and subsequently their water had more than 100 times more than the World Health Organization's standard for water

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[606] *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 933 U.N.T.S. 3, 5 (hereinafter ICESCR).

[607] *See id*, Preamble; *See also* Scanlon, John et al, *Water as a Human Right?*, 51 PAPER FOR THE 7TH INT'L CONFERENCE ON ENVTL. L. 29 (Sao Paulo, 2003).

[608] *See generally* McCaffrey, Stephen, *A Human Right to Water: Domestic and International Implications*, 5 GEO. INT'L ENVTL. L. REV. 1 (1992).

[609] Adelsberg et. al., *supra* note 603, at 283-6.

[610] Chanet, Christine, *Situation of Human Rights in Cuba, Report submitted by the Personal Representative of the High Commissioner for Human Rights*, HUMAN RIGHTS COUNCIL A/HRC/4/12, ¶ 7 (Jan. 26, 2007).

[611] *See generally* Gordon, Joy, *Economic Sanctions as 'Negative Development': The Case of Cuba*, 28.4 J., INT'L DEVELOPMENT 473-84 (2016).

contamination which led to more cholera and typhoid.[612] It was because sewage and water treatment plants require electrical generators, and these parts could only be licensed on a case-by-case basis, making the process extremely time-consuming.[613] For example, in 1991, the Organization of American States (OAS) imposed sanctions on Haiti, as a result of which water and sanitation projects, which were considered part of the development agenda, were halted, resulting in terrible negative consequences for the right to water and health.[614]

4.5.3 The Right to Food

The right to food and food security, as another vulnerable rights to sanctions, which is connected with other human rights, has been protected by international law and specifically in *Vienna Declaration*.[615] The food security represents the "physical and economic access by all, at all times [. . .] to sufficient, safe, and nutritious food to meet their dietary needs [. . .] for an active and healthy life."[616] The ICESCR further recognized the right to "adequate food" and also the "fundamental right of everyone to be free from hunger."[617] In addition, the Universal Declaration of Human Rights (UDHR) states that "everyone has the right to a

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[612] *See generally* Abunimah, Ali, IRAQ UNDER SIEGE: THE DEADLY IMPACT OF SANCTIONS AND WAR 8-14 (2002).

[613] Lopez, George A. & David Cortright, *Economic Sanctions and Human Rights: Part of the Problem or Part of the Solution?*, 1.2 THE INT'L J., HUMAN RIGHTS 1-15 (1997).

[614] *See* Gibbons, Elizabeth et. al., SANCTIONS IN HAITI: HUMAN RIGHTS AND DEMOCRACY UNDER ASSAULT 177 (1999).

[615] *Vienna Declaration and Programme of Action,* U.N. Commr. for HR, 49th Sess., U.N. Doc. A/CONF.157/23 (1993) (hereinafter *Vienna Declaration*); *See also* International Treaty on Plant Genetic Resources for Food and Agriculture, art. 1 ¶ 1 (June 29, 2004).

[616] *World Food Summit: Rome Declaration on World Food Security* ¶ 1, (Nov. 1996).

[617] ICESCR, *supra* note 239, arts. 11 ¶1, 11¶ 2.

standard of living adequate for the health and well-being of himself and of his family, including food."[618]

Accordingly, States obliged to "respect [. . .] the right to food" and to "ensure that every individual has permanent access at all times to sufficient and adequate food and should refrain from taking measures liable to deprive anyone of such access.[619] Also States must protect this right, to "ensure that individuals and companies do not deprive people of permanent access to adequate and sufficient food,"[620] and finally they need to fulfill it.[621] This right is extremely vulnerable in case of existence of sanctions since they will affect people's rights to obtain adequate food, either through growing it or purchasing it, as required for food security, as well as render the targeted States unable to respect, protect, and fulfill their respective obligations.

As an example, since 1961, US sanctions against Cuba have significantly reduced food imports and shifted to lower-quality and vegetarian protein sources.[622] Furthermore, in 2017, US sanctions against Venezuela resulted in sharp reductions in food imports, culminating in child malnutrition and stunting.[623] Besides that, after the US imposed sanctions on Haiti, the

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[618] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25 (Dec. 10, 1949) (hereinafter UDHR).

[619] The Right to Food: Report by the Special Rapporteur on the Right to Food, Mr. Jean Ziegler, Submitted in Accordance with the Commn. on Human Rights, ECOSOC Res. 2000/10, 57th Sess., Agenda Item 10, at ¶ 27. U.N. Doc. E/CN.4/2001/53 (2001).

[620] *Id.* at ¶28.

[621] *Id.* at ¶30.

[622] *See generally* Akbarpour, Narges, & Mohsen Abbasi, *The Impact of the US Economic Sanctions on Health in Cuba,* Int'l J., 6.2 RESISTIVE ECONOMICS 17-20 (2018).

[623] *See generally* Bahar, *supra* note 596, at 9-12.

number of malnourished children increased from 5 percent to 23 percent.[624] According to the Food and Agriculture Organization (FAO) and the World Food Program (WFP), sanctions had an indirect impact on agricultural production in North Korea by restricting the importation of fuel, machinery, and spare parts for agricultural production, resulting in food insecurity for 70 percent of the North Korean population.[625]

Iran, as another example, relied heavily on food imports prior to the current US sanctions,[626] and following the US withdrawal from the Joint Comprehensive Plan of Action (JCPOA),[627] and reimposition of the so-called crippling sanctions,[628] food imports are sharply declining.[629] Even when food is smuggled in, much of it is rotten or moldy.[630] Sanctions are also destroying the main components of Iran's food infrastructure by drastically reducing food and seed imports and depleting food stocks, leading to the implementation of food

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[624] *See* Garfield, *supra* note 178, at 458-62.

[625] *See* Hanania, Richard, *Ineffective, Immoral, Politically Convenience: America's Overreliance on Economic Sanctions and What to Do about It*, CATO INSTITUTE POLICY ANALYSIS 884 (2020); *See also* Garfield, Richard, *Economic Sanctions, Humanitarianism, and Conflict After the Cold War*, 29.3 SOCIAL JUSTICE 94-100 (2002).

[626] Saul, Jonathan, & Parisa Hafezi, *Exclusive: Global Traders Halt new Iran Food Deals as U.S. Sanctions Bite – Sources*, REUTERS (Dec. 21, 2018).

[627] *See Joint Comprehensive Plan of Action*, U.N. SCR 2231 (2015) (hereinafter JCPOA). The provisions for the termination were specified in resolution 2231. U.N. Doc. S/RES/2231 ¶ 7(a). *See* SCR 2231 (2015) ¶¶¶ 11, 12, 13. Although the US withdrew from the JCPOA on May 8, 2018, the other parties remained committed to the agreement, and all members, including the US, are now negotiating to resurrect it as of May 6, 2021.

[628] Wong, Edward, *U.S. Turns Up Pressure on Iran with Sanctions on Transportation Firms*, NY TIMES (DEC. 11, 2019); Daemi, Yunos, *Crippling Sanctions and Iran's Poverty: Necessity of Ending the US Sanctions Based on International Human Rights*, STRATEGIC CENTER OF IRAN'S PRESIDENTIAL OFFICE (2020).

[629] *See* Saul, *supra* note 626.

[630] Jalalpour, Ahmad, *The US Sanctions on Iran Are Causing a Major Humanitarian Crisis*, THE NATION (Jan. 21, 2020).

rationing in some categories.[631] There was not a shortage of foodstuffs in Iran, but after the sanctions, the essential needs' prices are excessively high.[632] The 400 percent increase in meat, chicken, rice, corn, and bean prices, as well as a production shortfall, is causing widespread malnutrition among the population.[633] Other essential foods have increased in price by at least fourfold, with a monthly food basket for a family costing 200,000 Tomans in July 2017, 2 million Tomans in July 2020,[634] and 5 million Tomans in September 2021.[635] Furthermore, the process of transporting food and other essential goods from production sites to points of consumption is a major factor in increasing their price and security, which has increased as a result of Iran's reliance on importation of essential goods as a developing or underdeveloped country.[636] Therefore sanctions raise transaction costs by making goods unavailable in Iran, resulting in an economic and social disaster.[637]

Because the sanctions are disabling Iran's oil industry, one of the country's most vulnerable income-generating sectors,[638] they are also causing economic inflation in the

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[631] *Id.*

[632] Kokabisaghi, Fatemeh, *Assessment of the Effects of Economic Sanctions on Iranians' Right to Health by Using Human Rights Impact Assessment Tool: a Systematic Review*, 7.5 INT'L J., HEALTH POLICY & MANAGEMENT 374 (2018).

[633] *Id.*

[634] Rajabi, Azam, *Sanctions Effects of on Iranian's Social Affairs*, PHD. DISS, (2020)

[635] Soltani, Ehsan, *The Biggest Drop in Food Purchasing Power in the History of the Country*, MEIDAAN (Sep. 29, 2021).

[636] *See id*; *See also* World Food Summit, Rome Declaration on World Food Security ¶ 37 (1996).

[637] *See generally* Razavi et. al., *supra* note 637, at 316.

[638] These far-reaching sanctions, usually discourage foreign business entities from engaging in the oil-related transactions, to avoid any US imposed penalties. *See e.g.,* Jungman, Claire et. al., *August 2021 Iran Tanker Tracking*, UNITED AGAINST NUCLEAR IRAN (Sept. 1, 2021).

country, preventing people from purchasing healthy food.[639] As such Iran's ability to continue normal trade and meet its citizens' basic needs, particularly the right to food, is hampered by targeting this income-generating sectors causing Iran to be unable to combat inflation.[640] Although this inflation has only harmed the wealthy, it has created a significant barrier for the poor and even the middle-class families who can no longer afford healthy food.[641]

4.5.4 The Right to Health

The right to health is enshrined in the UDHR and has been declared a universal standard by the United Nations General Assembly (UNGA).[642] The UDHR establishes the right to a "standard of living adequate for the health and wellbeing of himself and his family, including [. . .] medical care and [. . .] the right to security in the event of [. . .] sickness, disability."[643] The right to health was also included in article 12 of the ICESCR which explicitly defines steps that States should take to "realize progressively" "to the maximum available resources" the "highest attainable standard of health," including "the reduction of the still-base-rate and of infant mortality and for the healthy development of the child"; "the prevention, treatment and control of epidemic, endemic, occupational and other diseases"; and "the creation of

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[639] High inflation and the inaccessibility of external finance following the sanctions led Sudan's annual gross domestic product to decline. *See generally* Petrescu, Ioana, *The Humanitarian Impact of Economic Sanctions*, 10 EURO POLITY 205–06 (2016); *See* Garfield, Richard, *The Silently, Deadly Remedy*, 14 F. APPLIED RES. & PUB. POL'Y 55 (1999).

[640] Razavi et. al., *supra* note 637, at 325.

[641] *See id.*

[642] UDHR, *supra* note 618.

[643] *Id*, art. 25.

conditions which would assure to all medical service and medical attention in the event of sickness."[644]

Regarding the vulnerability of the right to health to the sanctions, in Iran, as an example, with sharp increases in medicine prices, many citizens turned to the black market for life-saving drugs, forcing them to rely on substandard alternatives, including dangerous counterfeit drugs smuggled from neighboring countries such as Turkey.[645] Thus, it is expected that the decline in Iran's economic activities, inefficient resource allocation, and budget cuts in the all-important sector, particularly the health sector, will result in the spread of diseases, some of which will become untreatable due to a lack of access to medicines.[646]

As another example, following the imposition of sanctions, the availability of essential medicine in Yugoslavia decreased by more than half, and outbreaks of typhus, measles, and tuberculosis increased.[647] The country also experienced deteriorating public health infrastructure, drug shortages, and a shortage of hygiene supplies and diagnostic equipment.[648] Also, more than 300,000 people in Venezuela lack access to medicine, including 80,000 people living with HIV, 16,000 people requiring dialysis, 16,000 people with cancer, and four million people suffering from diabetes and hypertension.[649]

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[644] ICESCR, *supra* note 239, art. 12.

[645] Rowhani, *Sanctions: Violations of the Right to Health*, 31 PERSPECTIVE L. REV. 12-5 (2019).

[646] Razavi et. al., *supra* note 637, at 303.

[647] Kheirandish, Mehrnaz, *A Review of Pharmaceutical Policies in Response to Economic Crises and Sanctions*, J. RES. PHARM. PRACT. 115-22 (2015).

[648] *See id.*

[649] *See id.*

As such the significant consequences of sanctions on access to medical systems, rational drug selection, affordable prices, sustainable financing, and reliable health and supply systems, should not be underestimated.[650] It means that any sanctioning regime must take into account the right to health in order to avoid jeopardizing the nondiscriminatory availability and accessibility of basic health facilities, goods, and services.

4.5.5 The Right to Education

Despite being mentioned in several international treaties, the right to education is one of the rights that has received less attention in assessments of rights-based sanctions consequences.[651] As such, Article 26 of the UDHR, which was one of the first documents to recognize this right, states that "everyone has the right to education."[652] In addition, Article 13 of the ICESCR recognizes the right to education and states that "the State Parties to the present Covenant recognizes the right of everyone to education.[653] They agree that education shall be directed to the full development of the human personality and sense of its dignity and shall strengthen the respect for human rights and fundamental freedoms."[654]

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[650] *World Health Organization (WHO) Medicines Strategy: a Framework for Action in Essential Drugs and Medicine Policy 2000-2003*, WORLD HEALTH ORGANIZATION, GENEVA, SWITZERLAND (2000).

[651] The right to education is also protected by the following international legal treaties: Article 12, 30, 31 of the American Declaration on the Rights and Duties of man, 1969; Act 2 Protocol No.1 European Convention on Human Rights; Article 16 of African Charter on Human and People's Rights, 1981; Articles 5 and 7, International Convention on Elimination of all forms of Racial Discrimination; Articles 10, 14 and 6, Convention on the Elimination of All forms of Discrimination against women; and Article 4 and 22, Convention relating to the Status of Refugee.

[652] UDHR, *supra* note 618, art. 26.

[653] ICESCR, *supra* note 239, art. 13.

[654] *Id*.

The negative impact of sanctions on education, for example, has been documented in a study by the Human Rights Council's Advisory Committee, which found that after US sanctions, Iranian women had a lower rate of access to higher education.[655] Furthermore, the sanctions made it impossible to buy research materials and services from other countries without violating OFAC regulations.[656] Iranian researchers are also barred from attending international scientific conferences or even paying application fees for schools and conferences.[657] To put it another way, Iranian students and researchers have been totally isolated from international educational institutions.[658]

4.5.6 The Right to Development

The UNGA Resolution on the Declaration on the Right to Development (UNDRTD) of 1986,[659] which received 146 votes in favor and only one vote against, is regarded as the first international instrument to express both the individual and collective right to development on a global scale.[660] The UNDRTD declares that "every human person and all peoples are

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[655] *See generally* Shirazi, Faegheh, *Educating Iranian Women*, 1.2 INT'L J., EDUCATION AND SOCIAL SCIENCE 28-42 (2014).

[656] *See* Butler, Declan, *How US Sanctions are Crippling Science in Iran*, 574.7776 NATURE 13-15 (2019).

[657] *See id.*

[658] Furthermore, the sharp decline in the value of the Iranian rial has decimated university budgets; in 2017, 3,000 Tomans would buy $1, but that figure has now risen to over 30,000 Tomans for $1. It demonstrates how economic sanctions can have a direct and negative impact on a target's overall economy and, by extension, on the right to education. As of May 6, 2021.

[659] The UNGA Resolution on the Declaration on the Right to Development, UN Doc. A/RES/41/128, adopted on 4 December 1986 (hereinafter UNDRTD).

[660] The US voted against, while Denmark, Germany, Finland, Iceland, Israel, Japan, Sweden, and the United Kingdom abstained. *See* Subedi, Surya, *Declaration on the Right to Development*, AUDIOVISUAL LIBRARY OF INT'L L. 2 (2021).

entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."[661]

The right to development was also reaffirmed in a number of international documents, including the World Conference on Human Rights in Vienna in 1993.[662] In 1993, the UNGA established the post of High Commissioner for Human Rights as a follow-up to the World Conference and reaffirmed that "the right to development is a universal and inalienable right which is a fundamental part of the rights of the human person."[663] In the face of sanctions, the defenseless right to development could result in job losses, inflation, economic inefficiency, and eventually impoverishment, threatening international stability.[664]

Sanctions against Burma, for example, resulted in the layoff of 100,000 women in the textile industry, forcing many of them into prostitution.[665] Sanctions would also make it more difficult for aid agencies to raise funds for humanitarian assistance and wire through traditional financial channels. As such, international banks are hesitant to do business with nonprofits such as the Pyongyang Spine Rehabilitation Center in North Korea, that treats

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[661] *See* UNDRTD, *supra* note 659, art. 1¶1.

[662] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, UN Doc. A/CONF.157/23 (Jul. 12, 1993).

[663] UN Doc. A/RES/48/141 (Dec. 20, 1993).

[664] *See generally* Pape, *supra* note 577, at 90-6.

[665] *See* Seekins, Donald, *Burma and U.S. Sanctions: Punishing an Authoritarian Regime*, 45 ASIAN SURV. 442 (2005); Bunn, Isabella, THE RIGHT TO DEVELOPMENT AND INTERNATIONAL ECONOMIC LAW 225 (2012).

children with developmental disabilities.[666] It also severely limited humanitarian aid organizations' ability to operate effectively inside the country.[667]

As a result, when traditional money-transfer channels are blocked, all legitimate and reasonable needs must be met through alternative channels. Sanctions circumvention is the term for this phenomenon, and these alternative channels are meticulously designed to be covert and difficult to trace, lest they fall into the sanctions net.[668] Therefore, this sanctions' circumvention is becoming a routine practice in these targeted States like North Korea as well as Iran.[669] Sanctions against mono-product countries like Iran, tend to increase corruption and reduce the ability of the targeted government to combat corruption and money laundering,[670] and even worse, forcing it to raise or assist individuals to circumvent the sanctions,[671] which leads to limiting the right to development.[672] For Example after sanctions, the Board of Ministers of Iran enacted new resolutions that authorized currency exchange offices to commence importing foreign bills in cash,[673] also "gold imported [to Iran] are immune to any taxes, legal fees and value-added tax."[674]

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[666] The Human Costs and Gendered Impact of Sanctions on North Korea, KOREA PEACE NOW 13 (Oct. 2019).

[667] See id.

[668] *See* Rowhani, *supra* note 557, at 25.

[669] *See id,* at 29.

[670] *See id,* at 26-7.

[671] Rowhani et. al., *The Middle East*, 53 ABA/SIL YIR 558 (2019).

[672] Rowhani, *supra* note 668, at 30.

[673] Rowhani et. al., *supra* note 671, at 558.

[674] *New Government Decisions: Allowed Exchange Plans Can Sell Traveler's Currency*, BBC PERSIAN (Aug. 5, 2018).

Corruption is a key factor in economic underperformance and a major roadblock to development and poverty reduction which impedes the government's ability to plan and deliver services such as health, education, and welfare, which are all necessary for the advancement of economic, social, and cultural rights. It also undermines public support for democratic institutions and discourages citizens from demanding and exercising their civil and political rights.[675]

It may be assumed that countries subjected to long-term economic sanctions would be more likely to devise illegal tools to circumvent sanctions, resulting in increased corruption. Surprisingly, there is no discernible difference between long-term and short-term sanctions when it comes to causing corruption in sanctioned countries.[676] According to a study of 73 sanctioned and 60 non-sanctioned countries, as well as corruption data from 1995 to 2012, countries that have been subjected to sanctions, even for a short period, appear to be more corrupt than countries that have not been sanctioned.[677] The targeted government's ability to supervise, monitor, and control monetary transactions and financial processes is weakened or destroyed as a result, and this lack of transparency ultimately promotes corruption and economic crimes, even by those officials themselves.[678]

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[675] *See generally* Early, Bryan R., *Economic Sanctions Aren't Just Ineffective -They Lead to Corruption and Organized Crime*, QUARTZ (May 1, 2015).

[676] Rowhani, *supra* note 668, at 26.

[677] In such a situation, methods such as money transfers through currency exchange offices rather than banks or in cash, as well as other forms of payment and value transfer that leave no trace or record with relevant authorities, gradually become the norm. People usually register multiple companies and build a sophisticated network of proxy companies to make it difficult for regulators to detect transactions that attempt to circumvent sanctions. *Id*.

[678] *See generally* Sabri, Behzad, *Sanctions Crippling Human Rights*, ODVV 6-8 (2018). Bribery, cronyism, extortion, nepotism, parochialism, patronage, influence peddling, and embezzlement are

When the unusual becomes the norm, when the irregular becomes the routine, what was once transparency becomes obscurity, monitoring and transparency are no longer possible. Even after the sanctions are lifted and the channels are reopened, returning to normalcy will be difficult, due mainly to a corrupt and opaque economic structure that will thwart all efforts to prevent and combat financial crime.

4.5.7 Right-Based Model in Customary International Law

The main available rights-based model that could regulate current sanctioning regimes is ARSIWA, which, despite its lack of formal treaty status, it has been accorded a high level of authority by the ICJ and other international tribunals, which were citing early drafts of what would become the Articles even before they were finalized and continue to do so.[679] ARSIWA's primary objective is to regulate and promote CIL on the basis of State responsibility, and to control the implementation of sanctions by an injured State.[680] It also defines the meaning of a breach of international obligation and its consequences, as well as guiding how States should react and to what extent an injured State's reaction is permissible.

Countermeasures are described in Article 49 of ARSIWA as acts that would otherwise be wrongful toward another State if and to the extent that they are taken to force it to comply with international law obligations.[681] Article 54 also asserted that a State's breach of an

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examples of this type of political corruption. According to Transparency International's Global Corruption Barometer Series, 45 percent of the Middle East and North African population is highly corrupt. Nearly 50 million people in the Middle East and North Africa paid bribes in 2015.

[679] Damrosch, Lori, *The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts*, 37 BERKELEY J. INT'L L. 259 (2019).

[680] *See* Asada, Masahiko, *Definition and Legal Justification of Sanctions*, *in* ECONOMIC SANCTIONS IN INTERNATIONAL LAW AND PRACTICE, 4-6 (Asada Masahiko, 2019).

[681] *See* ARSIWA, *supra* note 484, art. 49.

international obligation entails international responsibility, which may be met with countermeasures.[682] Article 42 codifies that an injured State should be legally injured, not only in its interests,[683] and that this injured State is also entitled to proportionate reparation,[684] with its non-punitive nature, to re-establish the situation that existed before the wrongful act was committed, or paying compensation for the damage caused by the State that committed the internationally wrongful act.[685]

As a result, States may impose countermeasures "in response to a previous international wrongful act of another State [...] directed against that State,"[686] but they must first call on "the state committing the wrongful act to discontinue its wrongful act or to make reparation for it." This "[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation, and satisfaction, either singly or in combination."[687]

Furthermore, because the fate of civilians is universal, the international community could be presumed to be an injured State, which has been authorized through Article 48, which states that "any State [injured and non-injured] is entitled to invoke responsibility" as an "obligation owed to the international community as a whole" to protect the collective

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[682] *Id*, art. 54.

[683] *Id*, art. 42.

[684] *Id*, art. 37 ¶ 3.

[685] *Id*, arts. 37 ¶ 1 & 35 & 36; Van Aaken, Anne, *Introduction to the Symposium on Unilateral Targeted Sanctions*, AJIL UNBOUND 131 (2019).

[686] Gabcikovo-Nagymaros Project (*Hungary v. Slovakia*), Judgment, ICJ Reports 1997, 7, ¶ 83.

[687] ARSIWA, *supra* note 484, art. 34.

interests.[688] According to Article 49, these States can use countermeasures "in a more limited range [...] as compared to those of injured states under Article 42,"[689] by only requesting the "cessation of the internationally wrongful act" or "performance of the obligation" according to Article 48(2).[690]

Because the right of States referred to in article 48 to take countermeasures in the collective interest is not clearly defined,[691] non-injured States may take lawful measures, not countermeasures, against the wrongdoer State.[692] These legal actions begin with a request for the wrongful act to be stopped, followed by assurances and guarantees of non-repetition, and finally a claim for reparation on behalf of the injured State.[693] Although the ARSIWA initially acknowledged the use of countermeasures by non-directly injured States for violations of *erga omnes* obligations, it later differentiated countermeasures by referring to the phrase of "lawful measures."[694]

Following that, in Article 50, ARSIWA specifically created its rights-based model by stating that sender States must refrain from using or threatening to use force in accordance with the UN Charter, and they must protect fundamental human rights as well as humanitarian obligations in prohibiting reprisals and those peremptory norms of general

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[688] *Id*, art. 48, ¶1(b) & 126 ¶ 1.

[689] *See* Van Aaken, *supra* note 685, at 132.

[690] ARSIWA, *supra* note 484, arts. 48 ¶ 2 & 46.

[691] *Id*, art. 54.

[692] *Id*.

[693] *See* Van Aaken, *supra* note 685, at 132.

[694] *Id*, art. 54.

international law.[695] It means regardless of the gravity of a State's wrongdoing or the severity of its failure to comply with international obligations, any countermeasure taken will not affect the obligations to protect fundamental human rights. Thus, these measures are only countermeasures if they do not "inflict harm on human beings who are not themselves committing internationally wrongful acts."[696]

Furthermore, in order to design countermeasures that encourage the wrongdoer to follow the law, the proportionality between the subjective wrongful act and its consequences on target should be considered. In this regard Article 51 stated that countermeasures "must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question."[697] To summarize, sanctions must meet the tests of proportionality and rights-based boundaries in order to be considered countermeasures and thus legal, which necessitates that they be temporary and reversible, and that other obligations must not be suspended. In this regard, the Paper attempts to determine whether US sanctions against Iran are appropriate as rights-based countermeasures.

4.5.7.1 The United States' Sanctions Against Iran

Because the majority of current sanctioning regimes are in response to *erga omnes* obligations and thus may serve as a countermeasure,[698] an examination of one of the main current regimes may aid in determining whether it is compatible with ARSIWA's rights-

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[695] *See* ARSIWA, *supra* note 484, art. 50.

[696] *See* Damrosch, *supra* note 273, at 262-3.

[697] *See* ARSIWA, *supra* note 484, art. 51.

[698] *See generally* Tams, Christian, ENFORCING OBLIGATIONS *ERGA OMNES* IN INTERNATIONAL LAW 14 (2005).

based framework. In this regard, the Paper discusses the current US sanctioning program against Iran following its withdrawal from the JCPOA.[699] Because the former US sanctions against Iran were mainly justified as enforcement measures by corresponding to UN sanctions[700] and were in accordance with Article 25 of the UN Charter,[701] there was no need for separate justification under international law to the extent of the UN sanctions.[702]

The current sanctions, on the other hand, are evaluated differently because they lack a prior justification for UN sanctions and are in conflict with multiple affirmations from other JCPOA member States that Iran adhered to the JCPOA's obligations and never crossed its nuclear boundaries.[703] One could assert that the sanctions are countermeasures based on an internal definition of *erga omnes* obligation, as a result of which Iranian corporations' licenses have been revoked, nearly a thousand entities' properties have been blocked, and some Iranian nationals have been barred from entering the US even to participate in the yearly meeting of UNGA.[704] However, because the US has suffered no clear injury and cannot claim that Iran has breached an international obligation owed to it, the sanctions may not be justified as a countermeasure or in response to a direct injury caused by an internationally wrongful act. Also defining the wrongful act by each individual State, may give them an unconditional power of enforcement to apply maximum pressure for

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[699] Rowhani et. al., *supra* note 671, at 557.

[700] *See generally* Damrosch, *supra* note 273, at 254.

[701] U.N. Charter art. 25.

[702] In any case, those measures could not go beyond the authority and scope of the UN Sanctions.

[703] See Menkes, Marcin, The Legality of US Investment Sanctions Against Iran Before the ICJ: A Watershed Moment for the Essential Security and Necessity Exceptions, 56 CAN Y.B. INT'L L. 331, 339-43 (2018).

[704] *Alleged Violations, supra* note 600.

compliance, and this ambiguity makes the proportionality of countermeasures questionable.[705]

Because Iran's compliance with the JCPOA has been approved by the international community on several occasions, including by the International Atomic Energy Agency,[706] Iran has not breached its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, and thus has not committed any *related* international wrongful act after joining the JCPOA and before the US withdrawal and reimposition of sanctions. Even if it is assumed that the US sanctions against Iran are in accordance with its *erga omnes* obligations, they must adhere to the ARSIWA human rights framework as countermeasures. In this regard, the Paper examines Iran's claim in the *Alleged Violations* against the US before the ICJ to see if these measures have taken into account rights-based boundaries.

In its *Alleged Violations* application, Iran has claimed that US sanctions violate basic human rights such as the right to food, medicine, and safe transportation.[707] The ICJ unanimously ordered the US to implement a humanitarian exemption to the measures in order to avoid irreparable harm.[708] Iran, on the other hand, claims that while US sanctions include exemption clauses for food and medicine imports, they are ineffective because the

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[705] *See* Borelli, Silvia & Simon Olleson, *Obligations Relating to Human Rights and Humanitarian Law*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 1187-88 (James Crawford et al. eds., 2010). This obligation applies to both the Sender and the Targeted State, and it places restrictions on the use of economic sanctions. Disproportionate sanctions `would allow the targeted State to place the main responsibility on the Sender.

[706] Press Release, Aabha Dixit, Int'l Atomic Energy Agency (IAEA).

[707] *Alleged Violations*, *supra* note 600, at ¶ 91.

[708] *Provisional Measures*, *supra* note 599, at ¶ 12. Finding that irreparable prejudice with respect to the health and safety of Iranians would rise from the absence of the limited provisional measures granted.

financial sectors' sanctions, as well as inflation caused by oil sanctions have made it difficult for people to afford essential medicines and food.[709]

It means that, at the very least, these rights, particularly the right to health, may be violated by a lack of medical supplies, rising prices, or health infrastructure deficiencies. According to reports, 85,000 cancer patients in Iran, who require chemotherapy and radiotherapy treatment, are in immediate danger due to the sanctions on international payment systems SWIFT.[710] Meaning that sanctions can reduce an economy's size and cause a downturn by restricting import and export activities, making financial transactions more difficult, and preventing Iran from obtaining healthcare supplies and causing a public health disaster by drastically decreasing the availability of life-saving medicine and pharmaceuticals.[711] Although allegedly sanctions' humanitarian exemptions covered most of these life-saving medicines, but they are still in shortage which severely impacts over six million patients in 2018.[712]

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[709] *See generally* Rowhani, *supra* note 645, at 11-5.

[710] *See* Soares, P. Pinto, *UN Sanctions That Safeguards, Undermine, or Both, Human Rights, in* MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK 38-40 (J.P. Bohoslavsky and J.L. Cernic eds., 2014).

[711] Sanctions have also harmed Iran's health-care system's ability to treat serious diseases such as cancer and asthma, according to 73 shortage drugs tracked with disease burden, 44 percent of which were classified as essential medicines by the World Health Organization (WHO). Iran is also prohibited from importing Ciprofloxacin (an antibiotic) and Atropine under the sanctions (a drug required for surgeries involving anesthesia). Sanctions also contributed to a shortage of the blood-clotting protein factor VIII (which is deficient in people with hemophilia). Notably, Iran's health-care inflation rate is around 44.3 percent in cities and 45.6 percent in rural areas, with medicine prices rising by 50 percent. *See* Rowhani, *supra* note 645, at 11-15.

[712] *Id*.

Another reason for this shortage is overcompliance meaning that pharmaceutical companies and financial institutions do not bear the risk of doing business with Iran based on the general exemption, so they apply for long and complicated OFAC licenses, which delays and eventually discourages them from trading with Iran.[713] The issue of overcompliance or de-risking, according to risk analysis considerations, requires financial institutions to reject all transactions with a high-risk party.[714]

It is clear that not only there is no proportionality between the alleged internally defined wrongdoing and the consequences, but also the ARSIWA's human rights boundaries are not fulfilled. The unlawfulness of these measures is likely to be reflected in the ICJ's final judgment in the *Alleged violations*, and the question then becomes whether the US will comply with the court's decision to pay the monetary judgment or will ignore it as it did with the provisional measure's court order.[715]

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[713] Another example is highlighted in the UN High Commissioner for Human Rights' statement about the negative consequences of sanctions against Zimbabwe: "there seems little doubt that the existence of the sanctions regimes has at the very least, acted as a serious disincentive to overseas banks and investors. It is also likely that the stigma of sanctions has limited certain imports and exports. Taken together, these and other unintended side-effects will in turn inevitably have had a negative impact on the economy at large, with possibly quite serious ramifications for the country's poorest and most vulnerable populations." Opening remarks by UN High Commissioner for Human Rights, Navi Pillay, Harare (May 25, 2012). For more information *see* Chikukwa, Walter, *Democratizing Africa, American sanctions on Zimbabwe*. PH.D. DISS. (2017).

[714] In response to US sanctions against Cuba (*See e.g.*, 31 C.F.R. § 515.207), third-party creditors and some portrayed opportunity-seeking parties decided to charge Cuba eight to ten percent, rather than the standard five to six percent, to account for the risk meaning that targeted country embraces other hostile countries, which are then portrayed as the saviors. For example, as a result of US sanctions, Iran, rather than the EU, drew closer to China in order to sell its oil at a much lower price. *See* Quraeshi, Zahir, *Towards a Framework for Applying US Economic Sanctions*, 9.1 WORLD REVIEW OF ENTREPRENEURSHIP, MANAGEMENT AND SUSTAINABLE DEVELOPMENT 114-130 (2013).

[715] Klingler, Joseph, Beau Barnes & Tara Sepehri Far, *Is the U.S. in Breach of the ICJ's Provisional Measures Order in Alleged Violations of the 1955 Treaty of Amity?*, 24.12 ASIL INSIGHTS (May 26, 2020).

4.6 CHAPTER'S CONCLUSIONS

The Paper attempted to develop a rights-based sanctions model by taking into account three main factors: specific policy objectives, creating sanctions coalition, and consideration of the Senders' measures' proportionality to the vulnerable human rights in the targeted States. It was emphasized in this regard that the senders should specifically communicate their desired responses to the target, as well as inform the target of what it needs to do to have the sanctions lifted. These measures should have stated policy objectives that are more specific and less broad, requiring the sender to design the least restrictive measures possible to achieve those concrete objectives. Even secondary or tertiary objectives should be stated; otherwise, sanctions will never be satisfied or lifted, and assessing effectiveness will be impossible because only the sender knows what the actual objectives are. In this perception, UN sanctions are more rights-based because their objectives are always stated, and in several instances, they have been lifted in response to compliance, such as the UN sanctions against Iran that were lifted due to the implementation of the JCPOA. Furthermore, reports on the effectiveness rates of UN sanctions are more reliable because the assessments are based on actual objectives and rates of fulfillment. Nevertheless, if the success of unilateral sanctions is to be measured, according to the Paper, most current regimes are failures because they failed to achieve their stated policy objectives; however, they are not failures from the perspective of their senders because they pursue unstated objectives such as having political utility or sending messages to third countries. These unstated objectives are also hidden behind a broad range of justifications such as national security and human rights which give the leaders authority to quickly employ sanctions with little regard for how these measures may change the targets' wrongful behavior. Also, rights-based sanctions must include sunset

clauses that specify all of the steps for the termination of sanctions and require sender States to fully commit to lifting them while keeping the negotiation channels open. Otherwise, the wrongdoing will continue, and the target believes that it should be subject to sanctions indefinitely, forcing it to devise ways to avoid them, which may lead to other international wrongdoing.

The lack of multilateralism, as the other major reason for sanctions' low rate of efficacy, determined that as the number of sender States increased, so did the rate of sanctions' efficacy, implying that rights-based sanctions cannot be imposed by a single State and must be employed by a sanctions coalition. In order to respond to the issue of sanctions efficacy, several other factors must be considered as well, including the time of assessment because some objectives change over time, the characters of the targeted State's leaders, the rationale behind the policy objectives, the senders' proficiency in using the sanctions device, and the level of political desire to stop the controversy. Also, the cost of sanctions on sending States and their citizens, as well as the issue of provoking adversaries, and the probable motivation of wrongdoings after the imposition of sanctions should be taken into account. Senders and their allies who share common policies should form a sanctions coalition so that decisions can be made quickly, multilaterally, and efficiently, with a concrete, realistic request and objective, and supervised throughout the process by an internal monitoring character.

The third step is to understand the most vulnerable rights to sanctions in order to follow the proportionality principle between the effects of the measures and the subjective wrongdoing and reduce the contribution to rights infringement. As recognized by the ICJ in the Provisional Measures, the vulnerable begin with the right to life of those people other

than the subjective wrongdoers, as sanctions may increase mortality rates due to a lack of access to clean drinking water, nutritious food, health care, sanitation, hygiene, and a safe civil aviation system. Also, sanctioning the supply of water, as well as the tools used to protect it, such as electrical generators and water chlorination required for sewage and water treatment plants, could jeopardize the right to water. Sanctions also contribute to a reduction in food and seed imports, as well as raising prices and reducing food quality and security by restricting the importation of fuel, machinery, and spare parts for agricultural production. It also contributes to the right to health violations by lack of access to rational drug selection, affordable prices, sustainable financing, and reliable health and supply systems, causing people to turn to the black market for life-saving drugs, which are mostly counterfeit and smuggled. Sanctions may also target access to international educational databases, and eventually contribute to violations of the right to education by lowering the rate of access to education, prohibiting attendance at international conferences and schools, or even being able to wire their application fees. Sanctions can lead to job losses, inflation, economic inefficiency, and poverty, as well as restricting aid agencies' ability to raise funds for emergency assistance and the government's ability to plan and deliver rights-based services, all of which play a role to violations of the right to development. As a result of sanctions that block traditional money-transfer channels, all needs must be met through alternative channels, increasing corruption and reducing the targeted government's ability to combat economic crimes, particularly money laundering, and even forcing it to assist people in the circumvention.

Although ARSIWA allows the injured State to receive proportionate reparation or compensation for the damage caused by the targeted State, it must first call on the State to

stop its act or make reparation for it, followed by guarantees of non-repetition, and always consider the right-based boundaries throughout the process. Sender States' actions must be proportionate to the harm done, and they must refrain from using or threatening to use force, as well as not inflicting harm on human beings who are not themselves committing the subjective wrongdoing. Most current sanctions, such as US sanctions against Iran, lack UN prior justification and are contradicted by multiple affirmations from other JCPOA member States, and thus the sender State cannot claim that the target has breached an international obligation owed to it, and the sanctions cannot be justified as a countermeasure. Even if it is claimed that the sanctions are based on *erga omnes* obligations and thus countermeasure, the ARSIWA's rights-based boundaries have not been respected, at least in terms of the right to food, medicine, and safe transportation, according to the *Provisional Measures*.

5 PAPER'S CONCLUSIONS

Because of the evils of armed wars and comprehensive embargoes, as well as the horrifying human rights records of some of those targeted States, the Paper was positioned in favor of imposing targeted sanctions from the start and believed that the sender States should continue to use these measures. Also, despite all the criticism, it supposes that sanctions will never be disconnected from international foreign policy, and that the number of States using them, as well as the number of targeted States, will rapidly grow in the near future. To protect international legal order, however, it must be done within a significantly revised framework in order to minimize civilian harm and protect international law norms that legal professionals are tasked with preserving. It is because there is no other alternative but to re-regulate them, or, in the best-case scenario, to use them sparingly and only as a last resort after several rounds of negotiations to at least persuade the target that it has committed a wrongdoing. It is difficult to believe that sanctions will cause the target to change its behavior if the target seriously thinks it is acting legally, or if the senders have different standards for determining whether an action is wrongful in front of different countries.

The Paper's uniform rights-based model for the use of economic sanctions proposed a few workable solutions for this reregulation. It began by reviewing UN sanctions to determine whether the UN itself acts in accordance with the rules of international law, and if not, whether member States may implement them in a more limited manner and within a rights-based framework domestically. In this regard, The Paper discussed the reasoning, mechanism, and members' implementation obligations of UN sanctions, as well as the presumption of their legality by elaborating on how the Charter and SCR's resolutions take precedence over other international treaties. Accordingly, the Paper argued that the UN

Charter's supremacy is limited to other treaties, and that member States are not required to implement SC sanctions if they genuinely assert that the measures violate *jus cogens*, the UN Charter itself, and are not proportionate to the wrongdoing in terms of their negative consequences. Even though it found no instances of UN embargoes that dishonored *jus cogens*, it contends that specific episodes of UN embargoes, had the potential to constitute genocide, thus violating at the very least, the principle of proportionality. It also stated that embargoes may violate the UN Charter's right-based boundaries and goals, and that despite the fact that these boundaries and goals are described broadly, the SC is obligated to respect them because they are explicitly mentioned as being subject to legal protection. While a short-term impact on a State's sovereignty may be justified due to previous wrongdoing, long-term embargoes against States or their key sectors are unacceptable. In addition, the UM's Charter proportionality principle necessitates an examination of a suitable balance between the effects of embargoes and the State's wrongdoing.

Individuals sanctioned under a targeted sanctions regime based on classified evidence may have had their due process rights violated, which is a SC's commitment. Although the ICJ has jurisdiction over the SC's decision and domestic courts have jurisdiction over determining the legality of implementing the SC's targeted sanctions internally, the Paper emphasizes the need for an independent rights-based mechanism and procedure to review the SC's sanctioning resolutions in order to uphold the UN embargoes' rights-based boundaries, as well as addressing flaws in the delisting application process.

Outside of the administration's reconsideration and due process concerns, the effects of targeted sanctions on humanitarian aid delivery by humanitarian organizations due to donor over-compliance or the lengthy licensing process were highlighted. In this regard, the

adoption of SCR 2664 on December 9, 2022, drafted primarily by the US and Ireland, was a recent SC milestone.[716] The resolution has established a cross-cutting humanitarian exemption for all current and future UN sanctioning regimes (unless otherwise decided), including the 1267 ISIL/al-Qaida regime, to ensure the timely and effective conduct of humanitarian activities.

It also affirms that any financial transactions or provision of goods and services required for humanitarian assistance and basic human needs are permitted, and that these assistances do not violate the UN targeted sanctions. While this general exemption will not solve all of the concerns associated with providing humanitarian assistance, it demonstrates the SC's intention to shift toward a more rights-based model of sanctions. This advancement may also lead unilateral sanctions' senders to implement similar general humanitarian exemptions in their own current and future sanctioning regimes, in addition to taking other rules of international law into account.

The most observant of these rules can be found in the UN Charter. The UN Charter's principle of State sovereignty, which prohibits States from threatening or using force, could be the first step in determining the rights-based boundaries of unilateral sanctions. However, because sanctions contain no element of force, only those measures that have negative consequences similar to a military blockade could be considered a use of force and a violation of the principle of State sovereignty. The second step in determining adherence to the rights-based model is to ensure that sanctions do not seek to change the regime, as this

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[716] S/RES/2664 (2022). *Available at* https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/736/72/PDF/N2273672.pdf?OpenElement (last visited Jan. 3, 2023).

would be considered unlawful intervention in sovereign States' internal affairs. For the third step, despite the fact that the UN's references to human rights in the Charter lack a precise definition and merely serve as UN purposes, member states should cooperate with the UN to achieve these goals, and this cooperation should be reflected in their sanctioning practices. As the second multilateral treaty, member States of the ICCPR must take another step to ensure that they are acting in accordance with international legal order. These States cannot claim jurisdiction over a targeted State and then impose unilateral sanctions that violate its people's civil and political rights. As the third treaty, the ICESCR prohibits member states from imposing sanctions that could restrict the supply of food and medicine extraterritorially at any time. As the fourth international rights-based treaty, the ICERD also obligated its member States not to impose sanctions against specific races or people of specific national origin; however, nation of origin differs from nationality. States should also ensure that their sanctioning measures do not violate bilateral treaties with the targeted States. In this regard, the ICJ's *Provisional Measures* in the *Alleged Violations* required the US to ensure that it is in compliance with the terms of the Amity Treaty with Iran and that its sanctions have no adverse effects on medicines and medical devices, foodstuffs and agricultural commodities, and spare parts, equipment, and associated services required for civil aviation safety.

The CIL norms, which are created by *opinio juris* and State practices, determine the next steps. Although international organizations, particularly the UNGA, have condemned unilateral sanctions, they are still far from establishing norms prohibiting their use. Also, the actual practices of those countries that oppose unilateral sanctions, such as Russia and China, show that their actions do not correspond to their opinions. Only those sanctions initiated by these States that were in response to unlawful sanctions imposed on them could be

considered lawful; however, both the 2014 sanctions against Russia and the current regime of 2022, as well as sanctions against China's Xinxiang, are lawful sanctions imposed in accordance with sender States' *erga omnes* obligations, and thus neither of these States could claim that the sender States' unilateral sanctions were unlawful. The Magnitsky Act is also considered a rights-based sanctioning regime with a clear objective that was enacted in response to an internationally wrongful act of corruption and targeted only corrupt leaders with minimal collateral effects on others because it contains all of its components.

These components include having specific policy objectives, forming a sanctions coalition, and weighing the Senders' measures with the target's vulnerable human rights. Senders should communicate their desired responses to the target in detail, as well as what the target must do to have the sanctions lifted. The objectives should be examined to see how these measures might affect the targets' wrongful behavior. In order for the efficacy assessment to be possible, all levels of objectives should be stated. It's critical to include sunset clauses and all of the steps for ending sanctions that require senders to be committed. Senders and allies with similar policies should form a sanctions coalition so that decisions can be made quickly, multilaterally, and efficiently, with a concrete, realistic request and goal, and supervised throughout the process by an internal monitoring character. The third component is to identify the most vulnerable rights to that specific sanctioning regime in order to ensure that the effects of the measures are proportional to the subjective wrongdoing and that the contribution to rights infringement is minimized. Regardless of sanctions, the injured States could initially receive proportionate reparation or compensation for the damage caused by the targeted State by first requesting that the targeted State cease its action or make reparation, as well as guarantees of non-repetition. In any case, their actions must be

proportionate to the harm caused, and they must refrain from using or threatening to use force, as well as from harming human beings who are not involved in the subjective wrongdoing.

Although it is assumed that sanctions are less costly, more feasible, and certainly easier to implement than other measures such as starting a war, and thus there are no alternative and practical measures to enforce wrongdoers, the Paper demonstrated that current unilateral sanctions mostly do not work and induce targets to comply with the main objective in the way that was desired. This lack of alternative rights-based measures in international disputes is a fundamental question, but as Judge Donoghue points out, "there is no single, homogenized answer to many legal questions that arise in international disputes."[717] More specifically this question is reflected in the UN Secretary-General's report by stressing that "[t]here is no clear consensus in international law as to when coercive economic measures are improper."[718] Thus, the purpose of the Paper was not to surprise international lawyers with its answer to this question, but rather to present an idea and model that States, whether senders or targets, could use to determine whether and how they could justify or challenge a relevant sanctions regime.

This Paper merely attempted to request the contestants to unlearn the main assumption that there is no other alternative with less adverse effects, by proposing the mentioned rights-based model of sanctions and trusting that all scholars are aware of the reality that the current

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[717] Judge Donoghue, REFLECTIONS ON THE 75TH ANNIVERSARY OF THE INTERNATIONAL COURT OF JUSTICE (Apr. 16, 2021), https://www. un.org/en/un-chronicle/reflections-75th-anniversary-internationalcourt-justice. (Last visited on May 6, 2021)

[718] A/48/535 (Oct. 25, 1993), ¶ 2(a).

form of sanctions violates various aspects of human rights and thus they need to be redesigned or, in other words, reregulated in the manner that had been successfully experimented with in the 1990s.

Finally, the Paper acknowledges that, despite all efforts, it is still far from elaborating a realistic well-established model, but it attempted to expand the idea of establishing a new multilateral systematic vehicle to better absorb the targets compliance with international law. It also attempted to contribute modestly to such a shift toward a new rights-based model of economic sanctions, believing that sanctions are not only a problem for the targets, but also, at this frequency, a major problem for international law as a whole and the future of international legal order.

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7 List of Abbreviations

AALCO: Asian African Legal Consultative Organization
AECA: Arms Export Control Act
AEDPA: Effective Death Penalty Act of 1996
APA: Administrative Procedure Act
ARSIWA: Draft Articles on Responsibility of States for International Wrongful Acts
AU: African Union
CAATSA: Countering America's Adversaries Through Sanctions Act
CELAC: Community of Latin American Caribbean States
CERD: Convention on the Elimination of All Forms of Racial Discrimination
CFR: Code of Federal Regulations
CISADA: Comprehensive Iran Accountability, Sanctions, and Divestment Act
DNI: Director of National Intelligence
EC: European Council
EO: Executive Order
EOP: Executive Office of the President
EU: European Union
FATF: Financial Action Task Force
FINCEN: Financial Crimes Enforcement Network
FSIA: Foreign Sovereign Immunities Act
FTO: Foreign Terrorist Organizations
IAEA: International Atomic Energy Agency
ICJ: International Court of Justice
IEEPA: International Emergency Economic Powers Act
ILC: International Law Commission
ILSA: Iran and Libya Sanctions Act
INA: Immigration and Nationality Act
INARA: Iran Nuclear Agreement Review Act
ISA: Iran Sanctions Act
JCPOA: Joint Comprehensive Plan of Action
JCS: Joint Chiefs of Staff
NSC: National Security Council
OFAC: Office of Foreign Assets Control
P5+1: The UN Security Council's five permanent members (the P5), China, France, Russia, the United Kingdom, and the United States, plus Germany
SCR: Security Council Resolution
SDGT: Designated Global Terrorist
SDN: Specially Designated Nationals
SDNTK: Specially Designated Narcotics Trafficking Kingpins
SWIFT: Society for Worldwide Interbank Financial Telecommunication
TFEU: Treaty on the Functioning of the European Union
TWEA: Trading with the Enemy Act
UK: United Kingdom
UN: United Nations

UNASUR: United Nations of South American States
ESC: Social and Cultural Rights
UNPA: United Nations Participation Act
UNSC: United Nations Security Council
UPA: United States Participation Act
US: United States
USSR: Union of Soviet Socialist Republics
WMD: Weapons of Mass Destruction