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Rights-Based Boundaries of Unilateral Sanctions

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RIGHTS-BASED BOUNDARIES OF UNILATERAL SANCTIONS

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Abstract: This Article serves as a model for sender states to consider when designing and implementing unilateral sanctions and also provides a framework for targeted states to challenge the legality of sanctions. In this context, the Article investigates several multilateral treaties, including the United Nations ("UN") Charter and its principles of non-intervention and sovereignty and its rights-based boundaries. The Article also investigates other rights-based treaties to determine if their member states may have any extraterritorial obligations to promote human rights beyond their borders. In addition, the Article analyses International Court of Justice ("ICJ") rulings in cases where one party claims that the opponent is responsible for the rights infringements caused by its unilateral sanctions. It endeavors to determine whether a sender state may be held contributory liable as a proximate cause for the collateral damages that result from its measures on the people of the targeted state.

The Article also concentrates on customary international law ("CIL") and its components of *opinio juris* and state practices. This path focuses on the international organizations' resolutions which condemn application of unilateral sanctions, as well as the sanctioning practices of both sides of the debate. The Article aims to ascertain how sender states 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 sanctions based on U.S. Magnitsky Act, to determine whether they are justified under CIL's rights-based boundaries.

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INTRODUCTION

After facing the major humanitarian consequences of comprehensive embargoes against Iraq in early 2000, the international community started the process of shifting toward limited embargoes and targeted sanctions.[1] Following a few years of progressively improving targeted sanctions, the Security Council took a significant step toward implementing a rights-based model of sanctions in 2022. It was due to humanitarian aid organizations' inability to provide assistance to civilians in targeted states, as well as the observation of the ineffectiveness of previously designed exemptions for medical devices in UN sanctioning regimes in supplying medical aids to targeted states in combating the coronavirus pandemic. To address this shortcoming, the UN adopted Security Council Resolution ("SCR") 2664 on December 9, 2022, and established a cross-cutting humanitarian exemption for all current and future UN sanctions in order to ensure timely and effective humanitarian assistance.[2] As a result, the Security Council authorized any financial transactions or provision of goods and services essential for humanitarian assistance and basic human needs.

This Resolution 2664 was primarily drafted by the United States ("U.S.") which demonstrates the firm *intention* of the leading sender state of today's unilateral sanctions, particularly against Russia and Iran, to shift toward a rights-based model of sanctions. Although these steps are significant in the

[1] *See* Mohsen Rowhani, *Rights-based Boundaries of the United Nations Sanctions*, 8.1 BOLOGNA L. REV. (Forthcoming 2023) [hereinafter Rowhani, *UN Sanctions*]. UN targeted sanctions are constantly evolving to become more rights-based and against specific wrongdoers. In this path toward establishing more sophisticated targeted sanctions the Security Council on October 21, 2022, by introducing the specific term of "targeted arms embargo." Accordingly, the UN established a targeted arms embargo against those who are responsible for the instability of Haiti. *See* U.N.S.C. Res. 2653, ¶ 11–14 (Oct. 21, 2022).

[2] U.N.S.C. Res. 2664 (Dec. 9, 2022).

UN sanctioning practices, yet unilateral sanctions are far from a rights-based model which according to this Article should specifically target the wrongdoing with minimal contribution in rights violations in targeted states, while also in compliance with international law.

The Article assesses the legality of unilateral sanctions,[3] and whether any rights-based boundaries states should abide by when designing and implementing sanctions. The legality of unilateral sanctions is one of the least-developed areas of international law, described as a grey area.[4] This Article seeks to remind international lawyers that, while rights-based conventions and principles condemn all forms of human rights violations, a state, whether sender or target, may only be held accountable in the event of a bona fide breach of international law. In addition, while the targeted state bears primary responsibility for the protection of its people's rights, its wrongful act arguably does not meet both the actual and proximate causes of the sanctions' adverse effects on its people, and the sender state could also be held proximately and contributorily responsible for them.

The Article divides unilateral sanctions into two categories: embargoes and targeted sanctions. Embargoes are coercive measures imposed on states and/or their major entities and sectors. Targeted sanctions are those imposed on natural and legal nationals, including official and non-official individuals as well as public and private entities. Because embargoes target an entire state or its main sectors, they are prone to causing major negative collateral humanitarian effects. On the other hand, targeted sanctions are those which have minimal effects on the general populace. Most unilateral sanctions are embargoes unless they expressly target individuals or relatively insignificant sectors. Throughout this Article, the term "sanctions" generally refers to embargoes; however, when discussing targeted sanctions specifically, the Article uses that term.

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 UN member states are also parties,[5] and are presumed to comply with its decisions,[6] failing which the SC is authorized to enforce judgment.[7] Although

[3] Unilateral sanctions, also known as autonomous sanctions or non-UN sanctions, are imposed by an individual state or an international organization *against a nonmember state* without the approval of the Security Council. By contrast, multilateral sanctions or collective sanctions are imposed by the UNSC. Multilateral sanctions also may be employed by regional organizations *against their own member States*.

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

[5] U.N. Charter art. 93.

[6] U.N. Charter art. 94, ¶1.

[7] *Id.* at ¶2.

the order of the sources of international law is not fixed, the Article begins with international treaties and then moves on to CIL. According to the ICJ's judgment in *North Sea Continental Shelf*, the Article pursues the debate over CIL's sanctions boundaries by looking into not only state practices but also *opinio juris.*[8] 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 Article 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. For this, it labels treaties as multilateral and bilateral and concentrates on the UN Charter as the most recognized multilateral treaty. It evaluates three major Charter's grounds that may be violated by unilateral sanctions: the principle of state sovereignty and the principle of non-intervention and the Charter's human rights boundaries. Following that, three other rights-based multilateral treaties are examined in order to determine which rights are vulnerable to unilateral sanctions. These treaties include the International Covenant on Civil and Political Rights ("ICCPR"),[9] the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"),[10] and the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD").[11] It also responds to the question of whether member states have any extraterritorial obligation to uphold these rights. It then examines the 1955 Treaty of Amity, Economic Relations, and Consular Rights ("Amity Treaty")[12] and the lawsuit before the ICJ between its parties, the United States ("U.S.") and Iran, as an example of a bilateral treaty.[13]

Part two focuses on CIL, which is the actual practice of states with a high degree of repetition and consistency, backed up by *opinio juris*. As a result, it

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[8] ICJ explained that, for a customary rule to exist, both conditions must be fulfilled, and states practices must "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*." *See* North Sea Continental Shelf (Ger. v. Den. & Neth.), Judgment, 1969 I.C.J. Rep. 44, ¶77 (Feb. 20).

[9] 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].

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

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

[12] The 1955 Treaty of Amity, Economic Relations, and Consular Rights, Iran-U.S., Aug. 15, 1955, T.I.A.S. 3853. [hereinafter Amity Treaty] It was signed by the two states in Tehran on August 15, 1955 and entered into force on June 16, 1957. The US Senate advised and consented to the Treaty of Amity on July 11, 1956. 102 Cong. Rec. 12244 (1956).

[13] Application Instituting Proceedings, Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.) 2018 I.C.J. ¶ 42 (July 16) [hereinafter *Alleged Violations*].

first examines the opinions and statements of both sides of the debate on the status of application of unilateral sanctions in international law, to determine whether the available *opinio juris* helps 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 responds to the main question of how sender states justify their sanctioning practices. Also, it tries to determine 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 Article examines embargoes against Russia and China, as well as the Magnitsky Act, as examples of targeted sanctions against natural and legal nationals. Before delving into the arguments, it is essential to understand some sanctions law terminology and concepts in order to comprehend how they apply to this Article.

I. TERMINOLOGY AND CONCEPT

The Article investigates an unanswered (and, arguably, unanswerable) question of international law: whether unilateral sanctions "are consistent with the principles and values underlying the international legal order."[14] In so doing, it attempts to provide a model for sanctioners (also known as "sender" or "sending" states) to consider while designing and implementing sanctions to avoid deviating from international law.

Primarily, sanctions should be distinguished from measures taken to exercise the *economic freedom* under the sender's sovereign right. More succinctly, sanctions should be differentiated with *retorsions* which are defined as *measures which are merely unfriendly, but lawful, taken by one state in response to a prior unfriendly act of another state*. Given that the sender of retorsions by endorsing taxation laws, withdrawing voluntary aid, or immigration laws, has not violated any legal obligation owed to the target, it is not in violation of international law (unless it breaches a mutual treaty).

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. 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 by the

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

International Law Commission ("ILC") in the draft Articles on the Responsibility of States for Internationally Wrongful Acts ("ARSIWA"), which has characterized them as *countermeasures*.[15]

Sanctions are unlawful unless they can be justified on a case-by-case examination. The justification for sanctions under the rights-based model is based on their *policy objectives* of the sanctioning regime and, most importantly, their compliance with international law's rights-based boundaries. Policy objective is the main element in the rights-based model of sanctions which should be examined. Sanctions *generally* aim to prevent war, protect human rights, hinder the proliferation of nuclear and mass-destructive weapons, restore sovereignty, and free captured citizens.[16] These objectives in a rights-based model, should be clearly defined and publicly declared, and accordingly the least restrictive and proportionate measure should be implemented.

Rights-based sanctions also should address precise conditions for the target to act in order to be de-sanctioned and give the assurance that the sanctions will be thoroughly removed after the target's compliance. A target must understand accurately why it is sanctioned, as well as how and under what circumstances the sanctions will be lifted in order to benefit again from engaging in international economy.[17] Furthermore, rights-based sanctions must include sunset clauses that outline all of the steps for sanctions termination and require sender states to fully commit to lifting sanctions while keeping the negotiation channels open. Otherwise, the wrongdoing will continue, and the target believes that sanctions should be imposed indefinitely, forcing it to devise ways to circumvent them, which may lead to other international wrongdoing, such as corruption promotion.[18]

The lack of clarity in policy objectives plays a significant role in the low rate of sanctions efficacy. The related research of "Economic Sanctions

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[15] International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Dec. 12, 2001, Supplement No. 10 (A/56/10) chp. IV.E.1 [hereinafter ARSIWA].

[16] *See* Steven Oxman et al., Certified Global Sanctions Specialists Study Guide (ACAMS eds., 2020).

[17] Although the majority of sanctions are economic in nature, they can also be classified as military sanctions, environmental sanctions, cultural sanctions used as psychological warfare, such as sports boycotts, and cyber sanctions. Sanctions can also have diplomatic nature. Article 41 of the UN Charter mentions "the severance of diplomatic relations," and Article 6 specifies "expulsion from an international organization." Nonetheless, there is no record of the UN diplomatic sanctions as the UN's aims to keep the negotiation channels always open. Treaty-based out casting in a similar way leads to denying the targeted state or its citizens from the benefits of membership without any physical force. For example, 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. *See* Anne van Aaken, *Introduction to the Symposium on Unilateral Targeted Sanctions*, AJIL UNBOUND 130–1 (2019).

[18] *See generally* Mohsen Rowhani, *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).

Reconsidered" by studying 174 episodes of sanctions, demonstrated that the sanctions' success rate is around 34 percent.[19] Also, the effectiveness rate of U.S. sanctions at best is around one-third, according to a 2014 study published by the University of North Carolina.[20] For example, the United States has sanctioned Cuba since the late 1950s, and while the Castro family still rules the country, it was only the suffering of the Cuban people that prompted Biden's Administration to begin the process of gradually lifting the sanctions.[21] Furthermore, the Assad government in Syria has been under U.S. sanctions since 2004, but Assad still rules the nation, and there is no sign that Syria's behavior has changed.[22] The U.S. has also sanctioned the Democratic People's Republic of Korea ("DPRK") for its attacks on the South Korea since 1950, which have only contributed to North Koreans poverty, while the target has continued the developing of its nuclear program.[23] Furthermore, the U.S. has sanctioned Russia since 2014 for its invasion of Ukraine and annexation of Crimea; however, sanctions have allegedly contributed to Putin becoming more aggressive in pursuing his invasions.[24] Moreover, despite the U.S. government's assessment of Iran's regime as "extraordinary effective,"[25] Iran has accelerated Uranium enrichment to a weaponized level.[26]

One reason for the low efficacy is that the targets believe the sanctions are unlawful and in violation of international law. Presumably sanctions in a rights-based model should be devoid of any form of punishment to prevent being coupled with reprisals. Reprisals, also known as non-forcible

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[19] 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. *See generally* GARY C. HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED 80 (3rd ed. 2007).

[20] *See* Daniel Drezner, *The United States of Sanctions: The Use and Abuse of Economic Coercion*, FOREIGN AFFAIRS (Oct. 2021).

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

[22] In response to the Syrian government's policies of alleged supporting terrorism, maintaining its occupation of Lebanon, pursuing WMD and missile programs, and undermining US and international efforts to stabilize Iraq, the Office of Foreign Assets Control ("OFAC") launched the Syria sanctions program in 2004 with the issuance of Executive Order ("EO") 13338. Later EOs were issued in response to the ongoing violence and rights violations in Syria after the incidents there started in March 2011. *See* Bente Scheller, *Bashar al-Assad's Unlikely Comeback*, FOREIGN POLICY (Dec. 15, 2021).

[23] According to a report released jointly by five UN agencies, including the Food and Agriculture Organization, the World Food Program, and the World Health Organization, as many as 10.9 million North Koreans, or 42.24 percent of the population, were malnourished between 2018 and 2020. *See* Ahn Sung-mi, *UN Says 42 Percent of North Koreans Undernourished*, THE KOREA HERALD (Jul. 13, 2021).

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

[25] David Brennan, *Pompeo Celebrates 'Extraordinarily Effective' Sanctions on Iran as Rouhani Dismisses 'Unruly' Trump*, NEWSWEEK (Nov. 19, 2020).

[26] Francois Murphy, *Iran Accelerates Enrichment of Uranium to Near Weapons-Grade, IAEA says*, REUTERS (Aug. 18, 2021). Notably, Iran's officials states that if the U.S. lifts its sanctions completely and verifiably, all of Iran's actions will be reversed.

countermeasures, are acts that are normally illegal under international law due to their punitive nature.[27] Rights-based sanctions also should not aim to change the governmental structure. It is because this policy objective of *regime change* is generally prohibited under international law.[28] As a result, the Article defines rights-based sanctions as *coercive measures with no punitive nature that are compliant with international law, consider vulnerable rights, have clear policy objectives, and precise removal conditions.*

II. TREATY-BASED BOUNDARIES

Applying multilateral treaties is overly idealistic, whereas applying bilateral treaties is more practical for holding unilateral sanctions senders legally responsible for the negative effects of their sanctions on civilians in the targeted states. This Part begins by reviewing the principles outlined in the UN Charter as the most important multilateral treaty. The main reason for disagreement about the legality of unilateral sanctions is the fact that Charter makes no indication that sanctions may be implemented without the SC's permission.

Due to the lack of authorization, unilateral sanctions may be regarded as unlawful or even as a form of use of force against sovereign nations, which is prohibited by Article 2(4) of the Charter. In addition to Article 2(4), the principle of non-intervention under Article 2(7), 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.

Following that, the three main multilateral rights-based treaties of the ICCPR, ICESCR, and ICERD, which include rules for challenging the application of unilateral sanctions, will be examined. The Article then looks into rights violations 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 U.S., which was filed in 2018.

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[27] Rahmat Mohamad, *Unilateral Sanctions in International Law: A Quest for Legality*, *in* ECONOMIC SANCTIONS UNDER INTERNATIONAL LAW 75 (Ali Marossi & Marisa Bassett eds., 2015).

[28] Intervening with the sovereign rights of other states that could facilitate regime change is prohibited under the UN Charter. For instance, in *Congo v. Uganda*, the ICJ held that Uganda had violated the Democratic Republic of Congo's (DRC's) sovereignty and territorial integrity by intervening with the DRC's internal affairs amidst its civil war. Democratic Republic of Congo v. Uganda, Judgment, 2005 I.C.J. Rep. 168, ¶ 165 (Dec. 19) [hereinafter *Congo v. Uganda*].

A. The United Nations' Charter

1. The Principle of State Sovereignty

Unilateral sanctions must have the same humanitarian effects as military blockades to be considered force and violate the UN Charter's principle of state sovereignty. If sanctions deviate from their fundamental objective of preventing wars, they may be held to be in breach of the principle of state sovereignty, which is enshrined in the UN Charter. Article 2(4) of the UN Charter 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."[29]

The primary challenge is how to relate the notion of force to the concept of unilateral sanctions.[30] This Article argues that "force" within the meaning of Article 2(4) does not extend to economic coercion, except to the extent that such measures are applied comparable to war or military blockade. It may be contended that "force" includes economic coercion.

Article 2(4) only applies to the threat or use of military force. The ICJ's decision in *Military and Paramilitary* clearly stated that the scope of force does not include economic coercion and that sanctions did not violate Article 2(4).[31] Even the UN, which was established shortly after World War II ("WWII"), plainly demonstrates that Article 2(4) was not intended to cover economic sanctions. Because of the increased awareness of the human cost of war, as well as globalization that has made states increasingly vulnerable to trade disruptions, the post WWII global climate made these measures a popular alternative to war.[32]

However, it could be argued that humanitarian consequences of sanctions are arguably comparable to those of military blockades and armed conflicts, making sanctions equivalent to the use of force. These humanitarian consequences trigger several vulnerable rights including the right to life, the right to water, the right to food, the right to health, the right to development and even the right to education.

In this approach, the right to life is the most vulnerable right. No one should be deprived of her own means of subsistence because of governmental wrongdoings. The right to life concerns the entitlement of individuals to be

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[29] U.N. Charter art. 2¶4.

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

[31] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1984 I.C.J. Rep. (Nov. 26) [hereinafter *Military and Paramilitary*].

[32] *See* Michael Mastanduno, *Economic Statecraft, in* FOREIGN POLICY: THEORIES, ACTORS, CASES 204 (2012).

free from acts and omissions that are expected to cause the unnatural or premature death of civilians, or interfere with their enjoyment of a life with dignity.[33] Nonetheless, its violations have been reported in many instances of past sanctions programs. In Venezuela, for example, there was a 31 percent increase in mortality rate from 2017 to 2018.[34] 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 humanitarian consequences.[35] 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.[36]

The right to water, which is another right that is susceptible to sanctions, would enable anyone to obtain water without relying on the government's support, which cannot be withheld under any circumstances.[37] Sanctions may prevent the supply of water, and the goods and services safeguarding the right to water. The UN High Commissioner for Human Rights stressed that the sanctions imposed by the U.S. contributed to deprive Cubans of vital access to clean water.[38]

The right to food and food security, as another vulnerable rights to sanctions, has been protected by international law and specifically mentioned

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[33] 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).

[34] Dany Bahar et al., *Impact of the 2017 Sanctions on Venezuela: Revisiting the Evidence*, GLOBAL ECONOMY AND DEV. 8 (May 2019).

[35] ERIC ZUESSE, BIGOTRIES ORIGINATE FROM THE BILLIONAIRES, NOT FROM THE PUBLIC 11 (2020).

[36] *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 AUSTL. J. OF HUM. RTS. 249–50 (2021). In this regard, a report that has prepared by Peterson Institute for International Economics, specifically shows as of January 4, 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. *See* Emil Dall, *Sanctions are now a Central Tool of Governments' Foreign Policy: The More They are Used, However, the Less Effective They Become*, ECONOMIST (Apr. 24, 2021), https://www.economist.com/finance-and-economics/2021/04/22/sanctions-are-now-a-central-tool-of-governments-foreign-policy.

[37] *See* Erik Bluemel, *The Implications of Formulating a Human Right to Water*, 32 ECOLOGY L. Q. 957, 963 (2004).

[38] 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. It was also 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. *See* Christine Chanet (Personal Representative of the High Commissioner for Human Rights), *Situation of Human Rights in Cuba*, ¶ 7, U.N. Doc. A/HRC/4/12 (Jan. 26, 2007). As another 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. *See* ELIZABETH GIBBONS, SANCTIONS IN HAITI: HUMAN RIGHTS AND DEMOCRACY UNDER ASSAULT 177 (1999).

in Vienna Declaration.[39] The food security represents the physical and economic access to sufficient, safe, and nutritious food for an active and healthy life.[40] Sanctions 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 illustration, since 1961, U.S. sanctions against Cuba have significantly reduced food imports, forcing the country's people to switch to lower-quality and vegetarian protein sources.[41]

The other vulnerable right to sanctions is the right to health which is enshrined in the Universal Declaration of Human Rights ("UDHR") and has been declared a universal standard by the United Nations General Assembly ("UNGA").[42] In this regard, consider Iran, where, as a result of U.S. sanctions that caused sharp increases in medicine prices, many Iranians turned to the black market for life-saving drugs, forcing them to rely on subpar alternatives such as dangerous counterfeit drugs smuggled from neighboring countries.43 As a direct consequence, it is expected that the decline in Iran's economic activities, inefficient resource allocation, and budget cuts in critical sectors, particularly the health sector, will result in the spread of diseases, some of which will become incurable due to a lack of access to medicines.44

The right to education is one of the rights that has received less attention in assessments of sanctions humanitarian consequences. Article 26 of the UDHR, which was one of the first documents to recognize this right, states

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[39] World Conference on Human Rights, Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23 (Jun. 25, 1993) [hereinafter Vienna Declaration]; *See also* International Treaty on Plant Genetic Resources for Food and Agriculture, art. 1 ¶ 1 (June 29, 2004), https://www.fao.org/3/i0510e/i0510e.pdf.

[40] World Food Summit, Nov. 13–17, 1996, *Rome Declaration on World Food Security and World Food Summit Plan of Action*, ¶ 1 (Nov. 13, 1996), https://www.fao.org/3/w3613e/w3613e00.htm.

[41] *See generally* Narges Akbarpour & Mohsen Abbasi, *The Impact of the US Economic Sanctions on Health in Cuba*, 6 INT'L J. RESISTIVE ECON. 17, 17–20 (2018). Also, 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. *See* Richard Hanania, *Ineffective, Immoral, Politically Convenience: America's Overreliance on Economic Sanctions and What to Do about It*, CATO INST. (Feb. 18, 2020), https://www.cato.org/policy-analysis/ineffective-immoral-politically-convenient-americas-overreliance-economic-sanctions.

[42] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25 (Dec. 10, 1948) [hereinafter UDHR]. The UDHR established the right to a standard of living adequate for the health and wellbeing of himself and his family, including medical care.

43 *See* Mohsen Rowhani, *Sanctions: Violations of the Right to Health*, PERSPECTIVE (NYSBA Young Laws. Section), Fall 2019 at 10, 15.

44 *See* Seyed M. Razavi & 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, 324 (2020).

that "everyone has the right to education."[45] For example, U.S. sanctions made it impossible for Iranian scholars to purchase research materials and services from other countries without violating the sanctions.[46]

The right to development as another vulnerable right to sanctions was reaffirmed in a number of international documents, including the World Conference on Human Rights in Vienna in 1993.[47] In the face of sanctions, the vulnerable right to development could result in job losses, inflation, economic inefficiency, and eventually impoverishment, threatening international stability. Sanctions against Burma, for example, resulted in the layoff of 100,000 women in the textile industry, forcing many of them into prostitution.[48]

As demonstrated, the negative humanitarian consequences of sanctions can be tremendous. As a result, Article 2(4) of the Charter, which primarily applies to the use of force in times of war, may be extended to other circumstances, such as those sanctioning regimes, in which the enumerated rights are flagrantly violated. Ultimately, only regimes that significantly contribute to the aforementioned rights violations, may be included in the definition of force. It means a sanctioning regime must be pushed to the point of military blockades in terms of its adverse humanitarian consequences. In these situations, sanctions could be deemed in breach of Article 2(4) of the UN Charter.

2. The Principle of Non-Intervention

Employment of unilateral sanctions could arguably violate the non-intervention principle as enshrined in the UN Charter and customary

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[45] UDHR, *supra* note 42, at art. 26. The right to education is also protected by the following international legal treaties: Articles 12, 30, and 31 of the American Declaration on the Rights and Duties of Man, 1948; act 2 protocol no.1 of the European Convention on Human Rights; article 16 of the African Charter on Human and People's Rights, June 27, 1981, 1520 U.N.T.S. 217; articles 5 and 7 of ICERD; articles 10, 14, and 16 of the Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; and articles 4 and 22 of the Convention Relating to the Status of Refugees, Jul. 28, 1951, 189 U.N.T.S. 150.

46 *See* Declan Butler, *How US Sanctions are Crippling Science in Iran*, NATURE (Sept. 24, 2019), https://www.nature.com/articles/d41586-019-02795-y. 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 50,000 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 April 13, 2023.

[47] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights Dec. 20, 1993, U.N. Doc. A/CONF .157/24 (Jan. 7, 1994). 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." U.N. Doc. A/RES/48/141 (Dec. 20, 1993).

48 *See* Razavi & Zeynodini, *supra* note 44, at 324.

international law.[49] If the policy objective of sanctions is to urge people to rise up and change their own regime, those sanctions may be considered a violation of the principle of non-intervention and thus do not fit into the rights-based model of sanctions.

Unilateral sanctions may become an illegal intervention in matters primarily within the domestic jurisdiction of targeted states, arguably violating the Charter's non-intervention principle. However, Article 2(7) applies only to resolutions and actions taken and decided by the UN, not the actions of individual states. Therefore, unilateral sanctions imposed by individual states do not violate the Article 2(7). Moreover, the importance of this Article has diminished significantly due to the increasing sanctioning activities of the Security Council: most of the UN's interventions are authorized by the Security Council under Chapter VII.[50] The UN's interventionist actions do not violate the principle of non-intervention if it properly determines the existence of a threat to international peace and security pursuant to Article 39 before exercising its power under Chapter VII.[51]

Despite that Article 2(7) applies to UN actions only, some commentators still assert that UN member states do not have a right to impose sanctions unilaterally among themselves and that unilateral sanctions would be prohibited based on the Charter's principle of non-intervention.[52] Others

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[49] According to Article 2(7) of the Charter: "[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." U.N. Charter art. 2 ¶7.

[50] The Security Council may make Chapter VI recommendations or Chapter VII binding decisions (U.N. Charter art. 27). Chapter VI of the UN Charter addresses peaceful dispute resolution (arts. 33–38) and authorizes the SC to call on all parties, investigate, request appropriate procedures or methods of adjustment (U.N. Charter art. 36), and make recommendations to disputing parties (U.N. Charter art. 38). The SC can impose multilateral sanctions under Chapter VII if the conditions of Article 39 are met (U.N. Charter arts. 39, 41, 24.1, 24.2, 27). These sanctions may cause the entire or partial disruption of economic relations (U.N. Charter art. 42).

From 1945 until the end of the Cold War in 1989, the UN's inability to agree on proposed resolutions limited employment of sanctions. But in the late 1980s and early 1990s, the US-Soviet Union relationship improved, allowing the two countries to collaborate more effectively and take decisive actions, causing the Security Council to become overly active, resulting in the 1990s being dubbed the "sanctions decade." While employing embargoes and targeted sanctions, the UN has been actively working towards establishing rights-based sanctions for almost 30 years. *See generally* Rowhani, *UN Sanctions*, *supra* note 1.

[51] Even though the majority of resolutions passed under Article 41 do not specifically mention Article 39 and might be regarded as unlawful interventions, it is generally accepted that any SCR made under Chapter VII includes an implied Article 39 determination. Yet, this claim is debatable given that the majority of targeted sanctions are based on classified information and without regard for the targets due process. It is also due to the ambiguity of Article 39's "threat to peace" requirement, which gave each regime's sanctioning committees wide latitude in how to interpret the threat. As of April 13, 2023, only four of UN active sanctions regimes specifically stated that Article 39's requirements had been met. *See id.*

[52] *See generally* Pierre-Emmanuel Dupont, *Human Rights Implications of Sanctions*, *in* ECONOMIC SANCTIONS IN INTERNATIONAL LAW AND PRACTICE, 39, 41–2 (Masahiko Asada ed., 2019).

argue that nonintervention has never established a rule against economic coercion, and that it remains altogether unclear to what extent the principle of nonintervention prohibits certain economic sanctions. [53]

A broad interpretation of Article 2(7) to include non-UN actions is not necessary because the principle of nonintervention is mentioned and acknowledged by the international community outside of the Charter and in CIL.[54] Indeed, CIL in some circumstances justifies the violation of the non-intervention principle. For example, while diplomats should not intervene in the internal affairs of the state to which they are assigned,[55] human rights violations as a legitimate international concern may justify noncoercive intervention.[56]

While it is commonly suggested to help building democracy extraterritorially, application of any coercive measures such as economic sanctions aiming at overturning the targeted state is prohibited under international law.[57] In this sense, unilateral sanctions could also be regarded as a means of unlawful interventions in the political affairs of another country. In this case, the political relationships between the two parties should be examined when determining whether the principle of nonintervention has been breached.[58] As a result, if a unilateral sanctioning regime's stated or unstated policy objective is to urge people to rise up to the point of overturning

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[53] *See* Mergen Doraev, *The Memory Effect of Economic Sanctions against Russia: Opposing Approaches to the Legality of Unilateral Sanctions Clash Again*, 37 UNIV. PA. J. INT'L L. 375, fn. 79 (2015).

[54] In the 1970 Friendly Relations Declaration, for example, it is specified that any attempt to subordinate the target violates the non-intervention principle. *See id.* at 376.

[55] Diplomats are generally prohibited from interfering in the internal affairs of the host country. *See* Vienna Convention on Diplomatic Relations art. 41, Apr. 18, 1961, 500 U.N.T.S. 95.

[56] The authority 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. This practice is also referred to as a type of *humanitarian intervention*. *See generally* Scott Leckie, *The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking*, 10 HUM. RTS. Q. 249 (1987).

[57] For example, the Organization of African Unity ("OAU") established the Convention for the Elimination of Mercenaryism in Africa, which states in Article 1 that mercenaries hired to overthrow governments or OAU-recognized liberation movements commit crimes against peace and security, making it the most aggressive international codification of mercenaryism's criminality. Convention of the OAU for the Elimination of Mercenaryism in Africa art. 1, July 3, 1977, O.A.U. Doc. CM/817 (XXIX) Rev.1, 1490 U.N.T.S. 25573; *See* Peter W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 528 (2003).

[58] For example, while economic cooperation with another country is permissible, financial assistance for a certain presidential candidate or imposing sanctions with the aim of changing the current president in that state may be regarded as an illegal intervention. Foreign electoral interventions are covert or overt attempts by governments to influence elections in another country. The most extensive foreign electoral interventions in 2018 were by China in Taiwan and Russia in Latvia; the next highest levels were in Bahrain, Qatar, and Hungary; while the lowest levels were in Trinidad and Tobago, Switzerland, and Uruguay. *See generally* Anna Lührmann & Staffan I. Lindberg, *Democracy Facing Global Challenges*, V-DEM ANNUAL DEMOCRACY REPORT, 2019.

the governing administration, those sanctions may be considered in breach of both the non-intervention and state sovereignty principles.

States' use of their sovereign rights is a double-edged sword that both sides of the debate can wield. Sender states may justify sanctions as an assertion of their own sovereign right to regulate the trade relations with other nations based on a theory of "economic freedom."[59] Proponents of the economic freedom argument assert that principle of sovereignty provides sender states with a right to freely chose the states with which they engage in economic relationships, including the right to refrain from engaging in economic relations with a targeted state.

This assertion is based on the judgment of the Permanent International Court of Justice ("PICJ") in the case of *Lotus*.[60] The PICJ held in *Lotus* that, absent a rule or law to the contrary, a state could make laws relating to people or events outside of its physical territory, and as a result, states are comparatively free to create laws and rules with extraterritorial effect, including to whom having economic relations. Accordingly, these actions with no coercion, albeit unfriendly, are considered retorsion hence lawful, because, in the absence of a treaty, the sender state has no obligation to the target. In addition, in the *Military and Paramilitary* decision, the ICJ 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."[61]

Retorsions are lawful in international law and solely may be challenged on the basis of violations of international conventional law and treaties such as the General Agreement on Tariffs and Trade ("GAAT") and the Energy Charter Treaty ("ECT"). Anti-dumping and countervailing duty laws, as well as importation bans on specific types of products by specific manufacturers (such as ZTE, Huawei, and possibly TikTok), are among the U.S. retorsions. The national security exception normally is included in most bilateral and multilateral treaties specifying that a treaty shall not preclude the application of retorsions if the action is necessary to fulfill the obligations of a party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.[62]

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[59] Non-performance of trade relationships may also be considered a legitimate act of self-help and recognized as an element of economic statecraft. *See* Doraev, *supra* note 53, at 380.

[60] S.S. Lotus (*France v. Turkey*), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sep. 7) [hereinafter *Lotus*].

[61] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 276 (June 27).

[62] *See e.g.* Press Release, U.S. Dept. of State on U.S. Appearance Before the I.C.J. (Jul. 27, 2018).

However, the range of these actions that can be justified as retorsions should not be increased to include the use of coercion and turn them into sanctions. For instance, sanctions such as those imposed by the U.S. against Russia in response to the Ukraine crisis cannot be justified on the basis of the permissive national security exception in U.S. treaties. Otherwise, the national security exception might be contested as being susceptible to state abuse, having an overly broad definition, and undermining the main purpose of international trade laws.[63] Nonetheless, other principles of international law, which will be covered later in Section 4.2, may allow for the justification of these coercive measures.

3. Human Rights Boundaries

The most common theoretical basis for challenging unilateral sanctions is the UN Charter's rights-based boundaries. 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 as part of the UN's purposes and responsibilities. However, given the wording of the Preamble and these Articles, they could only be used to compel the Security Council, not the UN members, to refrain from taking coercive measures.

The Preamble states that "[w]e the peoples of the United Nations [. . .] reaffirm faith in fundamental human rights."[64] 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."[65] However, the words "achieve," "promote," "encourage," and "reaffirm" denote aspirations, not laws. These Articles do not subject member states to any legal obligations.

Article 13(1), as another instance, asks the 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."[66] However, this Article also imposes no obligations on member states. The Article refers only to the UNGA, as opposed to the UN's member states, and the UNGA's recommendations to member states are not binding.

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[63] The national security exception is specifically challenged by members of the GATT. For example, the 1986 Panel Report regarding US sanctions affecting Nicaragua, held that the US cannot justify its sanctions by invoking Article XXI which is regarding the national security exception. *See* Doraev, *supra* note 53, at 378–9.

[64] U.N. Charter pmbl.

[65] U.N. Charter art. 1, ¶3

[66] U.N. Charter art. 13, ¶1.

Article 55 requests the UN to "promote" human rights, whereas Article 56 requests that member states to "cooperate" with the UN. Article 55(c) of the Charter states 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." [67] Article 55(c) was supplemented by Article 56, which commands 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."[68] Again, the used words such as "promote" and "cooperate" impose no explicit responsibility 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."[69] The recommendations of ECOSOC, like those of the UNGA, are not binding on member states. This lack of power was highlighted by Leo Pasvolsky, one of the American Charter's drafters, who stated that: "[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."[70]

The Charter's final reference 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."[71] This Article also merely states a purpose for the UN, specifically its trusteeship system, by using the words of "encourage" and "respect." Again, there is no indication that this Article imposes an obligation on member states.

In summary, the human rights references in the UN Charter represent only the Charter's fundamental objective and impose no responsibility on member states other than to "cooperate," "promote," and "collaborate" in furtherance of these objective. Thus, sender states cannot be held accountable for violations of UN Charter rights-based articles as a result of the negative humanitarian consequences of their unilateral sanctions.

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[67] U.N. Charter art. 55, ¶c.
[68] U.N. Charter art. 56.
[69] U.N. Charter art. 62, ¶2.
[70] *Supreme Court of the United States*, 413 TRANSCRIPT OF RECORD 50 (Oct. 1952).
[71] U.N. Charter art. 76, ¶c.

B. The International Covenant on Civil and Political Rights

The rights-based treaties do little to address the extraterritorial effects of sanctions on people's rights in targeted states, and we must admit this reality, even if it is not morally acceptable. As such, the International Covenant on Civil and Political Rights ("ICCPR") is a negative rights-based treaty that theoretically may be used to challenge unilateral sanctions amongst its member states.[72] The treaty identifies the actions that states cannot take against their own citizens. These include preserving citizens' right to life,[73] right to be free from slavery and forced labor, right to liberty,[74] and freedom of expression[75] and thought.[76]

Article 2(1) of the ICCPR outlines the main ground for holding a party accountable for civil and political rights violations caused by its sanctions against another party. Under the ICCPR, 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.[77] Article 2(1) can be read in two different ways, each with a radically different conclusion. If read conjunctively, 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 their borders. Then, if it is 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.

According to the Human Rights Committee, ICCPR's states parties are required to respect and to ensure the Covenant's rights to all persons who are within their territory and to all persons subject to their jurisdiction.[78] As a result, it would be unreasonable to interpret responsibility in such a way that

[72] The ICCPR is an enforceable Covenant with 173 member states, including the United States, that can assert the treaty's obligations, and only eighteen states have not joined the Covenant, including Sudan and Saudi Arabia. General information is *available at* https://indicators.ohchr.org/ (last visited on Apr. 13, 2023).

[73] ICCPR, *supra* note 9, at art. 6.

[74] ICCPR, *supra* note 9, at art. 9.

[75] ICCPR, *supra* note 9, at art. 19.

[76] ICCPR, *supra* note 9, at art. 16. It also requires member states to guarantee their peoples' right to a fair and public hearing before an impartial tribunal with an appropriate remedy, as well as freedom of religion, freedom of movement, property rights, the right to seek refuge, the right to privacy and reputation, and family rights. ICCPR, *supra* note 9, at art. 14.

[77] ICCPR, *supra* note 9, at art. 2(1).

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

a state party could commit violations of the Covenant on the jurisdiction of another state that it could not commit on its own.[79]

It is mainly because the notion of jurisdiction as a criterion for the applicability of a state's human rights obligations has developed from *occupied territory* to territory over which a state exerts some form of *effective control*. The ICJ addressed this development in its advisory opinion in *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*.[80] According to the ICJ in the *Wall*, "State party's obligations under the Covenant apply to all territories and populations under its effective control."[81]

The Human Rights Committee in its review of Israel's periodic reports under the ICCPR, concluded that the Covenant applies in the West Bank and Gaza because the areas were under Israel's effective control and expressed concern that the construction of the security barrier would violate the treaty's human rights provisions.[82] The ICJ by relying on the Human Rights Committee's observations stated that Israel's obligations under the ICCPR applied in the occupied territories, and that the construction of the security barrier constituted breach of several of Israel's obligations under this instrument.[83] As a result, one could argue that a sender state should be held liable for human rights violations even if it lacks formal jurisdiction over the population of the targeted state.[84]

One might argue that this viewpoint is more in line with the treaty's intention to uphold the universality of human dignity rather than imposing extraterritorial obligations.[85] Accordingly, the U.S. position, not only

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

[80] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 43 ILM 1009 (July 9). [hereinafter *Wall*].

[81] *Id.* at 112; *See* Fons Coomans, *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 HUM. RTS. L. REV. 6 (2011).

[82] *Id*. at 109, 110, 112, 136.

[83] *Id.* at 134, 137.

[84] Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, U.N. Doc. A/HRC/36/44, at para. 35 (2017); Dupont, *supra* note 52, at 52.

[85] *See* Commission of Human Rights, U.N. Doc. E/CN.4/SR.138, at 10 (1950). Historically, the ICCPR did not include analogous territorial wording at first and merely had a general idea of jurisdiction until Eleanor Roosevelt, the U.S. representative during the Covenant's drafting, proposed the reference to territory in 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

precludes the Covenant's extraterritorial application to occupied territories, but also asserts that the ICCPR was not intended to have extraterritorial application in the case of external locations such as Guantanamo.[86] Based on the U.S. standpoint on strict territoriality, Auschwitz, for instance, would not have technically violated the ICCPR because it was situated in occupied Poland rather than a territory to which the German Reich had legal title.[87]

Ultimately, in order to ascertain liability, it is first essential to determine whether the sender state has ever exercised jurisdiction over the territory of the targeted state. The drafters of the Covenant did not intend to allow states to escape from their obligations when they exercise jurisdiction outside their occupied territory. They merely sought to prevent individuals from asserting rights while travelling abroad that are the responsibility of the state of origin rather than their state of residence.[88] Conclusively, according to the disjunctive reading, a member state is not bound to guarantee civil and political rights extraterritorially unless it has previously claimed jurisdiction by an effective controlling in that state. Instead, if the conjunctive interpretation of Article 2(1) is used, the phrase "within its territory" becomes redundant, implying that only the second portion of "subject to its jurisdiction" satisfies the entire idea of conjunctive reading.[89]

C. The International Covenant on Economic, Social, and Cultural Rights

The ICESCR, is intended to offer individuals, rights against their own governments. As an affirmative rights treaty, the ICESCR outlines the extent

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.

[86] *See* MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 226 (2011).

[87] *See id.*

[88] *See id.*

[89] The European Court of Human Rights' ("ECtHR") interpretation of extraterritorial application of the European Convention on Human Rights ("ECHR") should be briefly mentioned here. The ECtHR has expanded the ECHR Convention's purview over the past 20 years so that it can now be used extraterritorially. As a result, the ECtHR unanimously held in the *Bankovic* decision that jurisdiction is largely a territorial concept and that other basis of jurisdiction are exceptional. *See Banković and Others v. Belgium and Others* App no 52207/99, Eur. Ct. H.R. 59, 61 (2001).

In later cases, the ECtHR widened this concept and applied the ECHR to alleged Turkish agent's actions in Iran and Iraq. In *Al-Skeini*, the ECtHR clarified the ECHR's principles of extraterritoriality by establishing that what matters is not just control over a specific location, but also control over individuals. *See Al-Skeini v. the United Kingdom* App no 55721/07, Eur. Ct. H.R. para. 136 (2011).

of the protected rights which member states are required to uphold.[90] Unlike the ICCPR, the ICESCR lacks any clause addressing the application of such rights to territorial and jurisdictional disputes, which could lead to the claim that such rights are territorially unlimited.[91]

Although many states have embraced international respect for civil and political rights, extraterritorial economic rights have not. As such, the U.S., the world's greatest industrialized nation, has not ratified the ICESCR.[92] It is due to the understanding that Economic, Social, and Cultural ("ESC") Rights promised by the ICESCR extend beyond the constitutional guarantees of many states. Eleanor Roosevelt, the U.S. representative on the adoption of the UDHR explained her state's rejection: "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."[93]

ICESCR's member states insofar as they have the ability to influence situations occurring elsewhere could be held liable. At issue is whether a sender state can or should be held liable for deprivation of the right to food or health caused by its sanctions, even if the state lacks official jurisdiction over the people affected. In other words, whether the ICESCR compelled its members to protect ESC rights extraterritorially, and if that's the case, whether their failure to do so leads to their liability. In our context, unilateral sanctions may contravene member states' duties not to undermine the ICESCR's objectives and not to contribute to rights violations. While the ICESCR emphasizes that sanctions do not relieve the targeted state of its obligation to protect its citizens' human rights,[94] it does require sender states

[90] ICESCR incorporates 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, 1948). ICECSR, *supra* note 11, at art. 11, the right to food; *id*. at art. 11(2), right to education; *id.* at art. 13, to work and receive remuneration; *id.* at arts. 6–7, the right to form trade unions; *id.* at art. 8, and the right to highest attainable standard of health; *id.* at art. 12. The ICESCR also predicts protection for mothers before and after childbirth and children from child labor. *Id.* at art. 10(2).

[91] The members states of the ICESCR are 171 that is almost the same number as the ICCPR.

[92] It should be mentioned that while the US is not a member of ICESCR, it has generally recognized economic and social rights through the UDHR. 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.

[93] *Eleanor Roosevelt On the Adoption of the Universal Declaration of Human Rights*, American Rhetoric, https://www.americanrhetoric.com/speeches/eleanorrooseveltdeclarationhumanrights.htm (last visited Apr. 13, 2023).

[94] U.N. Comm. on Econ., Soc., and Cultural Rts. (CESCR), General Comment No. 8 on the Work of Its Seventeenth Session, E/C. 12/1997/8 (1997) 10 [hereinafter *Comment No. 8*].

to balance between their policy objectives and the collateral damage of their sanctions.[95]

As demonstrated in Section 3.1, unilateral sanctions frequently result in negative humanitarian consequences to the civilians' ESC rights in targeted states.[96] But 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.[97] While the ICESCR does not address the territorial issue, but instead implies that states bear certain external or international responsibilities to promote economic rights. Article 2(1) implies the exterritorial responsibilities by stating that any state party takes steps, individually and through international assistance and co-operation, to achieve the full realization of the ICESCR's rights.[98] 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.

Nonetheless, it may be argued that an unlimited territorial interpretation of ICESCR is idealistic and unattainable in practice. For example, aside from international support and cooperation mandated by ICESCR Article 2(1), what would the United Kingdom ("UK") do to protect Russian peoples' right to health during its sanctions? It seems the ICESCR should not be read as imposing an extraterritorial obligation because the treaty does not clearly delineate all of the elements and details of the obligation. Even if all of the elements are met, the phrasing of the Covenant could be interpreted as a recommendation given the lack of a mandatory tone.[99] For instance, the CESCR calls upon party states to "take steps, individually and through international assistance and cooperation, especially economic and technical."[100] The words "take steps," "assist," and "cooperate" all indicate that the Covenant's provisions are merely advisory. The ICESCR's recommendatory tone is similar to that of the UN Charter, and it merely encourages the international community to cooperate in an effort to protect ESC rights all over the world.

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[95] *Id.* at ¶ 4.

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

[97] *Comment No. 8, supra* note 94, at 16.

[98] ICESCR, *supra* note 10, at 2 ¶1.

[99] Some commentators believe that the basis for this recommendatory tone was the debate over the issue of "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." *See* Said Mahmoudi, *Islamic Approach to International Law, in* MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (Feb. 2019) (ebook).

[100] *Comment No. 8, supra* note 94, at 16.

It should be noted that, while the "right of everyone to an adequate standard of living"[101] and the universal right to physical and mental health appear to have an advisory tone under the ICESCR, the tone is more obligatory with regard to other rights and obligations. The ICESCR requires member states to *refrain* actions which could deprive civilians of the right to health—which could include the imposition of unilateral sanctions. Specifically, Article 41 requires all member states to "*refrain* at all times from imposing embargoes or similar measures restricting another state's supply of adequate medicines and medical equipment" (emphasis added).[102] Paragraph 33 imposes three obligations upon member states—the obligations to respect, protect and fulfill the right to health.[103] Conclusively, even if a member state lacks legal jurisdiction or control over the individuals or territory targeted, by implementing sanctions unilaterally, it may be held theoretically liable for the impact on the right to health.[104]

D. The International Convention on the Elimination of All Forms of Racial Discrimination

The ICERD and the non-discrimination principle, which is a cornerstone of international human rights law, have also been used to challenge unilateral sanctions.[105] The UN Charter was the first international document to embrace the principle of non-discrimination on the basis of race, gender, language, and religion. The Charter aims to ensure all persons, regardless of where they live, to enjoy their basic rights free of discrimination of any sort or form.[106] Article 2 of the UDHR expanded the four Charter's grounds of discrimination to ten, including color, sex, political or other opinion, national or social origin, property, birth, and other status. Furthermore, Article 3 of both the ICESCR and ICCPR obligates Parties to ensure that men and women equally enjoy all rights guaranteed by the respective covenants.[107]

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[101] U.N. Comm. on Econ., Soc., and Cultural Rts. (CESCR), General Comment No. 12: The Right to Adequate Food (Art. 1), E/C.12/1999/5 (1999) ¶ 8 [hereinafter *Comment No. 12*].

[102] U.N. Comm. on Econ., Soc., and Cultural Rts. (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health ¶ 41, E/C. 12/2000/4 (2000) [hereinafter *Comment No. 14*].

[103] *Id.* at ¶ 33.

[104] Notably, after the UDHR was proclaimed, states began the process of drafting the two covenants, which took almost thirty years to complete. Given this timeline, the wording of both covenants, and the broadly defined obligations, it is difficult to accept that they are extraterritorially enforceable.

[105] Fundamental principles of human rights are dignity, non-discrimination, participation, and justice. *See* Virginia Leary, *The Right to Health in International Human Rights Law*, HEALTH AND HUM. RTS. 27 (1994).

[106] U.N. Charter art. 1, ¶3.

[107] The principle of non-discrimination, also addressed in conventional law and a number of international trade and the WTO agreements, such as the General Agreement on Trade in Services (GATS). *See* Federico

The original goal of ICERD was to use all appropriate means to work towards the eradication of racial discrimination. The ICERD was established as a result of pressure from many newly independent African states on the UN to codify prohibiting racial discrimination. According to the ICERD, there is a Committee on the Elimination of Racial Discrimination (CERD Committee) whose purpose is to adopt measures required to enforce the convention and report on the efficacy of those measures. To have the ICJ hear an ICERD claim, the petitioning party must first attempt to resolve the claim by negotiation or via the procedures expressly authorized through the CERD Committee.[108] The CERD Committee specified that "racial discrimination" means differential treatment based on citizenship or immigration status if it is used to pursue something other than a proportional legitimate aim.[109]

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 Georgia.[110] 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.[111] Russia argued that Georgia had failed to meet the CERD Committee's step as a precondition for the ICJ's jurisdiction.[112] Therefore, the ICJ asserted that it lacked jurisdiction over the matter and issued provisional measures against both parties.[113]

In 2018, Qatar challenged sanctions imposed by the UAE, Saudi Arabia, Bahrain, and Egypt by filing an application before the ICJ against the sender

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Ortino, *The Principle of Non-discrimination and Its Exceptions in Gats: Selected Legal Issues, The World Trade Organization and Trade in Services, in* THE WORLD TRADE ORGANIZATION AND TRADE IN SERVICES 172 (2008).

[108] 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 11, at 11¶1.

[109] Comm. on the Elimination of Racial Discrimination. Gen. Recommendation XXX on Discrimination Against Non-Citizens, U.N. Doc. A/60/18, at 2 (2005).

[110] *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*].

[111] *Id.*

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

[113] *Id.*

states based on Article 22 of the ICERD.[114] The sanctions endeavored to cut diplomatic ties with Qatar and expel all Qatari residents and visitors from the sender states.[115] The majority of those affected by the sanctions were not blacklisted state officials, but rather were civilians with no actual involvement in or responsibility for the alleged wrongdoings.[116] The matter was previously decided in Qatar's favor by the CERD Committee. CERD Committee held that *nationality* is within the scope of the term *national origin* and that sanctions imposed against a particular nationality may also be considered a specific breach of ICERD Article 1(3).[117]

Qatar argued that the sanctions discriminated against people based on their nationality and country of residence, both of which fall under the nation of origin basis for the ICERD's prohibition against discrimination.[118] Qatar presented considerable evidence of the sanctions' disproportionate application to the disadvantage of civilians, people who are powerless to change their leaders' behavior.[119] The fundamental point of contention was the application of notions of nationality and national origin to people harmed by sanctions. Qatar claimed that the sanctions violated equal treatment and other basic rights protected by the ICERD, and asserted that the term "national origin," one of the grounds in the definition of racial discrimination in Article 1(1) ICERD, includes nationality as well. Qatar maintained that national origin in the ICERD encompasses Qatari people, Qatari nationals, and Qatari residents

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[114] 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 11, at 22.

[115] 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 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* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar v. United Arab Emirates*), Preliminary Objections, Judgment 1 (Feb. 4, 2021) [hereinafter *Qatar v. UAE*].

[116] *See id.*

[117] 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 11, at 1¶3.

[118] *See Qatar v. UAE*, *supra* note 115.

[119] 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* Alexandra Hofer, *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).

and visitors, and thus the measures fall within the scope *ratione materiae* of ICERD.[120]

The ICJ disagreed. The Court found that: "[t]hese 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."[121] The Court also held that the definition of national origin is in accordance with Articles 31–32 of the Vienna Convention on the Law of Treaties ("VCLT"). To justify its decision, the ICJ looked to ICERD's purpose: to prevent racial discrimination and the superiority of one social group over another, as well as putting an end to all practices that seek to establish a hierarchy only among social groups.[122] To clarify why national origin is not considered a social group, citing *Lichtenstein v. Guatemala*, the Court noted that nationality is a legal attribute that can change, as opposed to a person's national or ethnic origin at birth.[123]

Although the ICJ ultimately determined that it lacked jurisdiction over the case because "the dispute fell outside of the scope of *ratione materiae* of the ICERD,"[124] the position about the notion of national origin was controversial, including among the six dissenting judges. Judge Robinson in particular took issue with the Court rejecting CERD's analysis, noting 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."[125]

To summarize, the ICJ's decision in *Qatar v. UAE* rendered the only internal mechanism for diplomatic level communication nearly meaningless, leading Qatar to cease communication.[126] The status of the CERD inter-State mechanism must be stabilized, as requested in *Georgia v. Russia*. Also, based on the CERD Committee's decision 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 settlement channels will be rendered ineffective, and tensions will rise, an issue that should concern the ICJ more than any other organ.

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[120] *See Qatar v. UAE*, *supra* note 115, at 1.

[121] *See Qatar v. UAE*, *supra* note 115, at 47 ¶46.

[122] *See Qatar v. UAE*, *supra* note 115, at 28 ¶87.

[123] *Id.* at ¶ 81. *See* Nottebohm (Liech. V. Guat.), Judgment, 1955 I.C.J. Rep. 18, at 20, 23 (Apr. 6).

[124] 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).

[125] *See Qatar v. UAE*, *supra* note 115, at Opinion of Judge Robinson, ¶ 7.

[126] *See* Hofer, *supra* note 119, at 973–5.

Ultimately, recognizing extraterritorial obligations based on these treaties would impose a significant burden on all member states, a burden of expectations member states may be unable to perform. Furthermore, there is no system in place to assess whether governments act responsibly in relation to other members. It could be concluded that the potential of human rights treaties to bring about rights-based boundaries to unilateral sanctions is largely theoretical. It seems the notion of applying human rights law or the aforementioned treaties to restrict unilateral sanctions is unduly utopian. Even the seemingly mandatory language has limited implications in practice. Conclusively, we require treaties and agreements with stricter mandates and more forceful terms. The current international legal system is unprepared to comprehend the specific volume and precision of information concerning human rights violations and suffering of people living within the borders of targeted states for which sender states are claimed to be held liable.

E. Bilateral Treaties: Treaty of Amity

A targeted state may also challenge a sanctioning regime based on violation of a mutual adherence to a bilateral treaty. A sender state whose sanctions violate a bilateral treaty could bear responsibility for any resultant human rights violations. To investigate this potential source of sender state liability, this Section examines the ongoing *Alleged Violations* case, which was brought by Iran against the U.S. before the ICJ. Iran filed *Alleged Violations* on July 16, 2018, claiming that the re-imposition of U.S. sanctions on May 8, 2018, after the U.S. withdrew from the Joint Comprehensive Plan of Action ("JCPOA")[127] amounted to a violation of the Amity Treaty.[128]

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[127] *See* Joint Comprehensive Plan of Action, U.N.S.C. Res. 2231 (2015) [hereinafter JCPOA]. The JCPOA agreed by Iran and the five permanent members of the Security Council 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 U.S. unilateral sanctions. Because the parties chose to implement the measures voluntarily, the JCPOA is not a binding agreement. *See id.*, at Annex A. The provisions for the termination of the JCPOA were specified in resolution 2231. U.N.S.C. Res. 2231 ¶ 7(a). Accordingly, 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 sanctions against Iran would be reactivated immediately. *See* U.N.S.C. Res. 2231 ¶¶¶ 11, 12, 13 (2015).

[128] Since the Iranian revolution, the Amity Treaty has been asserted for claims between the two states before the ICJ on previous occasions. As such, on November 29, 1979, the US initiated in *Tehran Hostages* a legal action against Iran for the occupation of the American embassy in Tehran. The ICJ ruled on May 24, 1980, that Iran violated its obligations under the Amity Treaty and ordered Iran to release the US hostages and make reparations to the US. *Concerning United States Diplomatic and Consular Staff in Tehran* (US v. Iran), Judgment, 1979 I.C.J. ¶3 (Nov. 29). On a different occasion, on November 2, 1992, Iran invoked the Amity Treaty against the US, stating that the US Navy's destruction of three offshore oil production complexes was a fundamental infringement of the Amity Treaty. In response, the US filed a

The withdrawal of the U.S. from the JCPOA resulted in one of the most comprehensive U.S. sanctions programs against Iran. The U.S. employed various sanctioning measures against Iran's natural and legal nationals, and also reinstated all sanctions that had previously been lifted or waived in connection with the JCPOA. The reinstatement of theses sanctions, particularly those imposed on the energy, shipping, and financial sectors forbid U.S. as well as foreign nationals and countries from doing business with Iran.[129]

Iran asserted that the U.S. sanctions infringed the right to life and the right to health as a result of the U.S. sanctions by claiming the violation of Articles IV(1), VII(1), VIII(1), VIII(2), IX(2), and X(1) of the Amity Treaty.[130] In addition to the asserting that the U.S. had violated its rights under Amity Treaty, 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 U.S. sanctions.[131] Accordingly, Iran requested the ICJ to, *inter alia*, force the U.S. to cease 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 as well as the suspension of the implementation of all of the May 8th sanctions.[132]

In response to the request for provisional measures, on July 27, 2018, the U.S. asserted that the Amity Treaty is simply referred to trade and transactions between Iran and third countries, or their natural and legal nationals.[133]

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counterclaim 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. On November 6, 2003, the ICJ rejected both Iran's claim and the US's counterclaim for reparation. *See* Oil Platforms (*Iran v. United States*), Judgment, 1992 I.C.J. ¶161 (Nov. 2).

[129] Executive Order ("EO") 13846 and relevant statutory authorities reimposed sanctions on Iran's port operators, shipping, and shipbuilding sectors, petroleum-related transactions, foreign financial institutions ("FFI") transacting with the Central Bank of Iran ("CBI") and designated Iranian financial institutions, Iran's energy sector, etc. The sanctions also have targeted third country nationals who engage in such dealings. This type of sanctions is called secondary sanctions. *See* Exec. Order No. 13846 § 1(a)(ii), 1(a)(iv), 2(a)(iii)-(a)(v), 3(a)(ii)-(a)(iii), 4, 5 (2018).

[130] Iran as a basis for the jurisdiction of the ICJ, invoked Article XXI (2) of the Amity Treaty. Notably, 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"). 28 U.S.C. § 1605. *See* Certain Iranian Assets (Iran v. U.S.), 2016/19 I.C.J. 8 (Jun. 14).

[131] *See Alleged Violations*, *supra* note 13, at ¶ 42.

[132] *Id*.

[133] The US also submitted a letter to the ICJ with five preliminary objections and mainly asserted that the Court doesn't have appropriate jurisdiction in respect to this case. *See Alleged Violations*, *supra* note 13, at ¶39. The US in its first objection mentioned that the real dispute with Iran was on the application of the JCPOA, and not the Amity Treaty. *See id.* at ¶40. Under objections four and five respectively, the US also argued that the sanctions fell under the "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." *See id.* at ¶ 98.

Subsequently, the ICJ issued an order on October 3, 2018,[134] that unanimously provided for limited provisional measures.[135] The ICJ recognized the adverse effects of the U.S. sanctions on the Iranian people. While food, medical supplies, and equipment imports are exempt from U.S. sanctions, the Court acknowledged that it has become more complicated and difficult for Iran, Iranian companies, and Iranian nationals to obtain such imported goods.[136]

The Court emphasized that its orders create international *legal obligations*[137] and specifically instructed the U.S. to remove hurdles to imports of medicine, food, and certain goods and services relevant to civil aviation.[138] In doing so, the Court found that these sanctions would cause irreparable prejudice with respect to the health and safety of Iranians.[139] For this purpose, the Court mandated that the U.S. make sure that no restrictions are placed on payments or other financial transfers.[140]

Although the ICJ's orders on provisional measures are binding effect, the U.S. has not been compliant. For instance, the U.S. has reduced the number of licenses granted to companies to export certain medical equipment to Iran, such as oxygen generators, full-face respirator masks, and thermal imaging equipment.[141] According to the U.S., these items' dual-use nature means they fall outside the scope of the general license issued for medical devices.[142] This led to reduced imports of medical equipment necessary to combat the coronavirus pandemic.[143] The ongoing effects of the sanctions on the Iranian banking system are so strong and broad on the right to health that the Iranian

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[134] 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*].

[135] The ICJ concluded that it has jurisdiction over many of Iran's claims in the *Alleged Violations* by stressing that the dispute has arisen in the context of the decision of the US to withdraw from the JCPOA which might constitute breaches of the Treaty of Amity. *Id.* at ¶56. The ICJ affirmed its jurisdiction to the extent that it does not preclude human rights, at least in terms of the revocation of licenses for certain commercial transactions, the prohibition on the trade of specific commodities, and financial restrictions. *Id.* at ¶ 70. The Court also rejected the US's other preliminary objection of Court misuse by a vote of 15 to 1. *Id.* at ¶ 87. 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 the United States. *Id.* at ¶ 95.

[136] The Court noted the effects of the US sanctions and acknowledged that it has become nearly impossible for Iran, Iranian companies, and Iranian citizens to engage in international financial transactions to buy food, medical supplies, and medical equipment. *Id.* at ¶89.

[137] *Id*. at ¶100.

[138] *Id.* at ¶¶ 91–102.

[139] After the ICJ issued the order, the US announced its intention to totally terminate the Amity Treaty. *See* Press Release, U.S. Dept. of State, Remarks to the Media (Oct. 3, 2018).

[140] *See Provisional Measures*, *supra* note 134, at ¶ 98.

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

[142] *Id*.

[143] *Id*.

government has been unable to import medicine, vaccines, and other medical supplies. The U.S.'s failure to remove all impediments to the free exportation to Iran of medicines and medical devices amount to a breach of the ICJ's Order.

Despite the U.S.'s failure to comply, the ICJ's *Provisional Measures* order could be seen as a step forward in establishing the rights-based boundaries to unilateral sanctions based on extraterritorial obligations of a party to a bilateral treaty due to irreparable prejudice to the health and safety of the civilians of the targeted state. Any state with similar bilateral treaties that intends to use sanctions against another party should look to the ICJ's rights-based *Provisional Measures* order and seek to protect at least medicines and medical devices, foodstuffs and agricultural commodities, and spare parts, equipment, and associated services needed for civil aviation safety.

III. CUSTOMARY INTERNATIONAL LAW-BASED BOUNDARIES

The main issue is whether there is any CIL rule that might justify applying unilateral sanctions in the instance of a state violating human rights or committing an international wrongful act. The Article has thus far attempted to address the issue 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. On this path, it examines *opinio juris* and state practices. The following analysis is premised on the notion that still there is no general agreement among international lawyers as to the existence of a CIL norm prohibiting the use of unilateral sanctions against a sovereign state without the Security Council's authorization.

A. *Opinio Juris*

In contrast to state practice, which refers to practices followed by a sense of legal obligation, *opinio juris* refers to the belief or recognition that an action was carried out as an international legal obligation. In the U.S. legal scholarship, it is generally assumed that CIL is formed through state practices, but this Article endorses the assertion that these state practices should also be supported and recognized by other states.[144] A practice such as unilaterally implementing sanctions must initially be recognized by *opinio juris* in order

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

to create a CIL norm. This section examines whether states recognize the practice of imposing unilateral sanctions as a lawful act in international law, despite the fact that it could violate human rights.

The practice of imposing unilateral sanctions seems to be accepted among developed states only. By contrast, many developing states generally oppose unilateral sanctions. This Section studies whether developing states' disapproval of unilateral sanctions can prevent this practice from becoming a true CIL norm or, alternatively, whether developed states' continued imposition of unilateral sanctions renders them permissible under CIL. This section proceeds by examining international organization resolutions to determine if a majority of states and international organizations support or oppose unilateral sanctions. It also aims to establish if these sources of *opinio juris* have sufficient normative value to warrant the creation of a CIL.

1. Resolutions of International Organizations

In general, resolutions of international organizations such as the UN may lead to the formation of CILs. 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.[145] Numerous UN resolutions condemn unilateral sanctions based on their negative humanitarian consequences. All of these resolutions contend that unilateral sanctions violate international law by undermining human rights. Supporters of these resolutions follow the assertion of Article 32 of the 1974 Charter of Economic Rights and Duties of States that declares no state may use unilateral sanctions to coerce another state to obtain from it the subordination of the exercise of its sovereign rights.[146]

The General Assembly ("GA") resolution *Human Rights and Unilateral Coercive Measures* urges "all states to cease adopting or implementing any unilateral measures not in accordance with international law."[147] Also, the Second Committee, which is the economic and financial committee on a biannual basis call for elimination of unilateral sanctions on behalf of the Group of 77 ("G77") and China. The resolutions adopted by this Committee labeled unilateral sanctions as *Unilateral Economic Measures as a Means of*

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

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

[147] 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. *See e.g.,* G.A. Res. 71/193, at operative clause 1 (20 January 2017).

Political and Economic Coercion Against Developing Countries.[148] In 2015, the UNGA urged states to refrain from applying any unilateral sanctions that impede the full achievement of economic and social development, particularly in developing countries.[149] In another resolution, adopted in 2020, the GA stressed that unilateral sanctions are contrary to international law, international humanitarian law, the UN Charter, and the norms and principles governing peaceful relations among states.[150] The question now is whether these resolutions can create a norm to make their assertions binding for the international community to conform.

2. Normative Value of Resolutions

Since the UNGA is not a legislative body and its resolutions are not binding, its frequent condemning resolutions and UN official assertions only if accompanied by state practices, could create a new CIL. The UNGA resolutions condemning application of unilateral sanctions are insufficient *opinio juris* to support a new CIL limiting sanctions or requiring sender states to halt or use them within a specific framework.[151] The International Legal Council ("ILC") acknowledges that, in certain circumstances, *opinio juris* "of international organizations also contributes to the formation, or expression, of rules of customary international law."[152]

To establish a CIL through the resolutions of international organizations, the type of resolution, voting pattern, and circumstances should be studied.[153] If a majority of states support a resolution's mission, they must represent various groups of states.[154] According to the a resolution adopted by an international organization may reflect a CIL rule only if it is established that

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[148] *See e.g.*, G.A. Res. 71/185, at operative clause 2 (Dec. 22, 2015).

[149] G.A. Res.70/1, at ¶ 30 (Sept. 25, 2015).

[150] *See* G.A. Res. 75/28 (Oct. 29, 2020); In several other occasions and by numerous resolutions, the UNGA asked the international community to adopt urgent measures to eliminate the use of unilateral sanctions against developing countries that are not authorized by the Security Council or are inconsistent with the principles of international law as set forth in the UN Charter and that contravene the basic principles of the multilateral trading system. *See* G.A. Res. 25/2625 (XXV) (Oct. 24, 1970); G.A. Res. 20/2131 (Dec. 21, 1965); G.A. Res. 29/3281 (Dec. 12, 1974); G.A. Res. 36/103 (Dec. 9, 1981).

[151] *See* Idriss Jazairy, Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, U.N. Doc. A/HRC/42/46, at ¶4 (2019).

[152] *See* Rossana Deplano, *Assessing the Role of Resolutions in the ILC Draft Conclusions on Identification of Customary International Law: Substantive and Methodological Issues*, 14.2 INT'L ORGS. L. REV. 229–231 (2017).

[153] *See* Hofer, *supra* note 4, at 195.

[154] *See id.*

the provision corresponds to a general practice that is accepted as law.[155] Thus, these resolutions may provide evidence for determining the existence and content of a rule of CIL or contribute to its development.[156]

The ICJ has also supported the notion that UNGA Resolutions can have normative value. In its 1996 Advisory Opinion in *Legality of the Threat or Use of Nuclear Weapons* the ICJ confirmed that these resolutions can potentially offer a normative value and can possess "evidence of a rule or the emergence of an *opinio juris*."[157] However, the Court emphasized that if a resolution adopted by a divided vote [158] or its normative value is in contradiction with its member states' practices, then it cannot offer a new norm.[159] An international organization's practice can only contribute to the creation of CIL if it accurately reflects the viewpoints of its member states.[160] This significance of having the support of member states' is essential for considering an organizational resolution as "constituent material for legally binding rules under customary international law."[161]

The 1996 resolution *Human Rights and Unilateral Coercive Measures* serves as an illustrative case study for voting patterns. This resolution received 57 votes in favor, 45 votes against, and 59 abstentions, indicating that the majority of states were initially hesitant to condemn unilateral sanctions.[162] However, since then, the resolution has almost always been adopted by a fixed voting pattern and a supported by majority of states. As a result, in recent years, approximately 130 developing countries voted in favor of this resolution, while roughly 50 developed countries, including the U.S. and E.U. member states and their allies, voted against it.[163] This voting structure is comparable to the voting structure of the resolutions *Unilateral Economic Measures as a Means of Political and Economic Coercion Against Developing Countries* which received about 130 positive votes, around 50 abstain votes from EU Member states, and only two negative votes[164] (Israel

[155] Draft Conclusions on Identification of Customary International Law, with commentaries, 12(3), U.N. Doc. A/73/10 (2018). 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." *Id*. at 12(1).

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

[157] Legality of the Threat or use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. ¶ 83 (July 8) [hereinafter *Nuclear Weapons*].

[158] *Id.* at ¶ 71–2.

[159] *Id.* at ¶ 73.

[160] *See* Hofer, *supra* note 4, at 194.

[161] *Id*.

[162] *See* Hofer, *supra* note 4, at 188.

[163] See *id*.

[164] See *id*.

and the U.S. cast the negative votes, both of which are regarded as persistent objectors).

The sharp divergence in voting behavior between developing and developed states demonstrates that the voting pattern has never been in favor of establishing an *opinio juris* in support of creating a CIL based on the mentioned criteria. If developing countries continue to insist on these resolutions to establish that unilateral sanctions are unlawful, they may eventually receive the endorsement of developed states in the future. It might also result in the development of a CIL as part of a new legislative reform that lays out rights-based boundaries for states to follow when enforcing sanctions.

B. States Practices

Russia and China, the primary opponents of unilateral sanctions, do not refrain from implementing them. This section examines the major sanctions regimes imposed on and initiated by Russia and China to determine whether such a prohibition or permission to impose unilateral sanctions exists. States practices as another source of customary international law may give rise to creation of rights-based boundaries of unilateral sanctions or, alternatively, an obligation to impose unilateral sanctions in compliance with *erga omnes* obligations.[165] States practices, defined as the actual practice of states with a high degree of repetition and consistency, are the second key source of CIL rules of international law.

Russia is the main critic of unilateral sanctions. However, its actual practice clearly differs from its political statements: Russia has imposed unilateral sanctions against other states on several occasions. For example, Russia sanctioned Poland and Moldova in 2005, as well as Georgia and Ukraine and Latvia in 2006.[166] In 2022, 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,[167] including targeted sanctions against the U.S. President and

[165] The concept of *erga omnes* obligations will be discussed *infra* Section 4.

[166] Russia also imposed sanctions by completely prohibiting food imports from the US, Canada, Norway, and Australia, as well as Japan, Albania, Iceland, Liechtenstein, and Montenegro. *See* Adam N. Stulberg & Jonathan Darsey, *Russia's Responses to Sanctions: Reciprocal, Asymmetrical, or Orthogonal?* PONARS EURASIA (Jan. 2, 2020).

[167] Elena Teslova, *Russia Sanctions Officials of Four European Countries*, ANADOLU AGENCY WORLD (Apr. 29, 2022), https://www.aa.com.tr/en/europe/russia-sanctions-officials-of-4-european-countries/2576519.

other U.S. officials.[168] That same year, Russia, imposed numerous sanctions including airspace restrictions against 27 EU member states, Canada and the UK.[169]

China is the other major critic of unilateral sanctions. During a Security Council meeting, the Chinese representative formally exemplified some violations of fundamental civil and political rights caused by unilateral sanctions, claiming that these sanctions were imposed solely on the basis of the sender states' domestic laws and values.[170] However, despite publicly and officially condemning unilateral sanctions, China has on several occasions imposed targeted sanctions against politicians, diplomats and think-tanks.[171]

Arguably, Russia and China employed retaliatory sanctions: sanctions imposed in response to previous sanctions imposed against Russia and China.[172] Under the theory of retaliation, victim states are only entitled to suspend respective international law norms in response to aggressor states' violations.[173] Suspension of respective international law norms should not result in the imposition of additional measures that go beyond the suspension. It is because the additional measures seem to have a *punitive nature*, which turns them into *reprisals*. Reprisal, which are acts with an inherent punitive nature, do not appear to be justiciable under international law.[174]

These two states may also consider that they use sanctions primarily as *countermeasures*. 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 as they must adhere to the ARSIWA's framework and its proportionality principle. ARSIWA, despite its lack of formal treaty status, has been accorded a high

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[168] Maegan Vazquez, *Russia Issues Sanctions against Biden and a Long List of US Officials and Political Figures*, CNN (Mar. 15, 2022), https://www.cnn.com/2022/03/15/politics/biden-us-officials-russia-sanctions/index.html.

[169] Benjamin Katz, *Russia Reciprocates with Airspace Ban After EU, Canada Prohibitions*, WALL STREET JOURNAL (Feb. 28, 2022), https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-02-28/card/russia-reciprocates-with-airspace-ban-after-eu-canada-prohibitions-QUQiLPFps3NM9y6PXqzO.

[170] The Chinese representative also emphasized that this practice is not only in violation of the principle of sovereign equality among member states but also undermines the authority of the UN sanctions. In addition, he stressed that China opposes unilateral sanctions and that one country's domestic law should not be used to sanction another state. *See* Hofer, *supra* note 4, at 207.

[171] *China Boycotts Western Clothes Brands over Xinjiang Cotton*, ECONOMIST (Mar. 27, 2021), https://www.economist.com/business/2021/03/27/china-boycotts-western-clothes-brands-over-xinjiang-cotton.

[172] *See* OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND Practice 126 (1991).

[173] *See* Mohamad, *supra* note 27, at 75.

[174] *See id.*

level of authority by the ICJ and other international tribunals.[175] Article 42 of ARSIWA, codifies that an injured state should be legally injured, not only in its interests,[176] and that this injured state is also entitled to proportionate reparation,[177] 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.[178] As a result, states may impose countermeasures in response to a previous international wrongful act of another state directed against that state,[179] but they must first call on the state committing the wrongful act to discontinue its wrongful act or to make reparation for it. This full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation, and satisfaction, either singly or in combination.[180]

Following that, in Article 50, ARSIWA specifically created its *rights-based boundaries* 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 international law.[181] 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."[182]

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 of ARSIWA 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."[183]

In light of the framework of countermeasures it should be determined whether the coercive measures of China and Russia were in response to a

[175] 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. It also defines 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. *See* Damrosch, *supra* note 14, at 259.

[176] ARSIWA, *supra* note 15, at art. 42.

[177] ARSIWA, *supra* note 15, at art. 37 ¶ 3.

[178] *Id*. at arts. 37 ¶1–35–36.

[179] Gabcikovo-Nagymaros Project (*Hungary v. Slovakia*), Judgment, 1997 I.C.J. Rep. 7, ¶ 83 (Sept. 25).

[180] ARSIWA, *supra* note 15, at art. 34.

[181] ARSIWA, *supra* note 15, at art. 50.

[182] *See* Damrosch, *supra* note 14, at 262–3.

[183] ARSIWA, *supra* note 15, at art. 51.

lawful measure or an illegal sanction. It should also be ascertained whether they met the ARSIWA humanitarian and proportionality boundaries in order to be labelled as countermeasures. If they were in response to the targets' international wrongful acts and/or occurred outside of the ARSIWA's limits, their subsequent sanctioning reactions were unlawful. Otherwise, Russia and China could justify their sanctions by citing previous breaches of the senders' obligations to them and demonstrating compliance with ARSIWA's boundaries.

If the initial sanctions against Russia and China were justified under international law, then their sanctions would not be justified. If Russia or China committed an internationally wrongful act in the first place, the initial sanctions could be justified as fulfilling the sender states' *erga omnes* obligations. Widely recognized in international law, *erga omnes* obligations refer to a reparative responsibility to injured state(s) or the international community in response to an aggressor state's breach of a legal norm. According to the ICJ, all states have a legal interest in protecting these duties owed to the "international community as a whole."[184]

The ICJ has acknowledged the *erga omnes* obligation in various judgments and advisory opinions and even extended it to some human rights which are outside the scope of *jus cogens*, such as the right to self-determination.[185] In the *Barcelona Traction* opinion, the Court specifically enumerated four *erga omnes* obligations: protecting against acts of aggression, genocide, slavery, and racial discrimination.[186] These four grounds are deeply rooted in international human rights tradition. When a permanent member of the Security Council, such as Russia or China, commits these actions, UN sanctions are impossible because of the permanent member's veto power. This leaves unilateral sanctions as among the only viable options to uphold *erga omnes* obligations and international human rights.

Many states have incorporated specific provisions into their domestic legal systems that allow them to impose unilateral sanctions as an *erga omnes* obligation.[187] However, these states go beyond the four grounds specified by the ICJ by extending them to the fight against gross human rights violations,

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[184] *See* Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. 3 ¶ 33 (Feb. 5) [hereinafter *Barcelona Traction*].

[185] "[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, 2019 I.C.J. 95, ¶ 180 (Feb. 25).

[186] *See* Geneviève Dufour & 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 CHINESE J. INT'L L. 449, 450 (2019).

[187] *See* Antonios Tzanakopoulos, *Sanctions Imposed Unilaterally by the European Union: Implications for the European Union's International Responsibility*, 4 CAMBRIDGE J. INT'L AND COMPAR. L. 616 (2015).

including public corruption and terrorism.[188] This scope has expanded to the point where a significant number of post-2001 sanctions, particularly those imposed by the U.S., were also arguably based on *erga omnes* obligations.[189] As such, it is claimed that between after 2000, just one unilateral sanctions regime that was implemented by the U.S. against members of the International Criminal Court ("ICC"), was unrelated to *erga omnes* obligations.[190] The remainder of this section examines recent sanctions in a purported effort to uphold the sender state's *erga omnes* obligations. Depending on these sanction regimes' policy objectives, they are viable candidates for inclusion in the rights-based model of unilateral sanctions.

1. Embargoes Against China and Russia

Russia has been targeted by numerous sanctions regimes following the Russian invasion of Crimea in 2014.[191] In response to the annexation and subsequent conflict between the Ukrainian central government and Russian separatists in the Donbass region of Ukraine, the U.S. imposed targeted sanctions against Russian officials, firms, and private individuals.[192] In 2014, the EU also sanctioned Russia by first freezing the assets of individuals and legal entities linked to the annexation of Crimea and Russia's actions in eastern Ukraine.[193] According to the EU, these actions undermined or threatened Ukraine's territorial integrity, sovereignty, and independence.[194] The EU also imposed an embargo on Russia by preventing the import of commodities from Crimea into the EU, limiting access to EU financial

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[188] *See id.*

[189] Even the US sanctions that resulted in the Aviation Dispute between the US and France in 1978 (Case concerning the Air Service Agreement of March 27, 1946 between the United States of America and France Decision of December 9, 1978, REPORTS OF INTERNATIONAL ARBITRAL AWARDS, VOL. XVIII, at 415–493, U.N. Sales No. E/F.80.V.7 (1981)) and the Tehran Hostages Dispute between the US and Iran between 1979 and 1981 were justified as *erga omnes* obligations. *See* Damrosch, *supra* note 14, at 249.

[190] For example, the US imposed sanctions on Hamas-led Palestinian Authority in 2006 with the objective of combating public corruption. 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 & Veremko, *supra* note 186, at 450.

[191] *See* Dmitri Trenin, *How Effective Are Economic Sanctions?*, WORLD ECON. F. (Feb. 26, 2015), https://www.weforum.org/agenda/2015/02/how-effective-are-economic-sanctions/.

[192] The US sanction regime referred to: Asset freezes for specific individuals (close to the President 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; and restrictions on specific exports (such as on military items and dual-use). *See id.*

[193] Foreign Affairs Council, *Council Condemns the Illegal Referendum in Crimea*, COUNCIL OF THE EUROPEAN UNION (Mar. 17, 2014), https://www.consilium.europa.eu/en/meetings/fac/2014/03/17/.

[194] *See* Doraev, *supra* note 53, at 364–8.

markets, and blocking the sale of arms, dual-use goods, equipment, and services to Russia's oil industry.[195]

Although these measures began as targeted sanctions, more sanctions that could be characterized as embargoes were imposed in response to Russia's increased military aggression in 2022.[196] The U.S. sanctions prohibited new investment in Russia, including investments in two Russian financial institutions and critical major state-owned enterprises.[197] UK expanded its embargoes against Russia's largest bank and imposed a ban on importation of Russian coal and oil.[198] In addition, all Russian flights have been prohibited from UK, U.S., EU, and Canadian airspace.[199] Moreover, despite understanding the risk, Germany has postponed the certification of the Nord Stream 2 gas pipeline, which was set to run from Germany to Russia.[200] 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.[201] The regime also includes 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.[202]

Another permanent member of the Security Council, China, has also been targeted by sanctions against its province of Xinxiang.[203] The sanctions are based on the alleged human-rights violations by China against the Uyghur, an

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[195] The Russian President called the embargoes "illegitimate sanctions," arguing that they could substantially affect the global economy in the wake of the devastation brought by the COVID-19 pandemic. He stated that "freeing world trade from barriers, bans, restrictions and illegitimate sanctions would be a great help in revitalizing global growth and reducing unemployment." Thomson Reuters, *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.

[196] *What Sanctions are Being Imposed on Russia over Ukraine Invasion?*, BBC NEWS (Apr. 11, 2022), https://www.bbc.com/news/world-europe-60125659.

[197] *See id.*

[198] *See id.*

[199] *See* Katz, *supra* note 169.

[200] *See* Angela Dewan, *The Nord Stream 2 Pipeline Is on the Scrap Heap Because of the Ukraine Crisis. Here's Why That Matters*, CNN BUSINESS (Feb. 23, 2022), https://www.cnn.com/2022/02/22/business/nord-stream-2-russia-ukraine-europe-germany-climate-intl/index.html.

[201] *See* Charles Riley, *What Is SWIFT and Why It Might Be the Weapon Russia Fears Most*, CNN BUSINESS (Jan. 27, 2022), https://www.cnn.com/2022/01/26/investing/swift-russia-ukraine/index.html.

[202] *What Are the Sanctions on Russia and Are They Hurting Its Economy?*, BBC NEWS (Sept. 30, 2022), https://www.bbc.com/news/world-europe-60125659.

[203] In general, sanctions against China also have militarily and economically reasons. Militarily, China is committed to pushing the 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. *See generally* Wang Fan, *The Future of China-US Relations: Toward a New Cold War or a Restart of Strategic Cooperation?* 86 CHINA INT'L STUD. 103 (2021).

ethnic group in the north-western region of Xinjiang.[204] The U.S. framed its sanctions against China as a human rights measure, underscoring that it is not a question of coercion against China, but of extending a hand of support to their Muslim minorities.[205]

But it is important to note that, historically, U.S. sanctions have not consistently been imposed in response to cognizable human rights violations. For example, the international community does not consider the U.S. sanctions against Cuba as a measure to serve humanity's common interests.[206] Notwithstanding, if the Russian invasion of Ukraine could be proven to be an act of aggression and China's action in the province of Xinxiang against Muslim minorities could be considered genocide, then both regimes against Russia and China are justified as the U.S. *erga omnes* obligations.

2. Targeted Sanctions

Although sanctions based on *erga omnes* obligations should be targeted, most of them are now characterized as embargoes because the main sender states target not only the main violators, but also major commercial sectors of the targeted state. This results in negative consequences for the targeted states' general population. However, some of these measures, such as the U.S.'s Magnitsky Act or Magnitsky Rule of Law Accountability Act, precisely targeted listed persons and can serve as a credible example for targeted sanctions in human rights protection.[207]

The U.S. Congress enacted the Magnitsky Act in response to the alleged torture and murder of Russian lawyer Sergei Magnitsky in a Russian Prison. The Magnitsky Act enabled the U.S. Congress to impose several targeted

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[204] *See generally* Anna Hayes & Kearrin Sims, *Violent Development in Xinjiang Uyghur Autonomous Region*, ROUTLEDGE HANDBOOK OF GLOB. DEV. 431–34 (2022).

[205] Speech by the U.S. representative before the U.N.G.A.. U.N. GAOR, 60th Sess., U.N. Doc. A/60/PV.68 ¶ 7 (Dec. 22, 2005).

[206] On November 1, 2018, the U.N.G.A. adopted a resolution condemning these sanctions. *See* G.A. Res. 73/8 (Nov. 5, 2018).

[207] The Act was proposed by Senator Ben Cardin in 2011. S.1039, 112th Cong. § 1 (2011). Sergei Magnitsky was a Russian lawyer who opposed the Russian government and was *allegedly* tortured and murdered in Moscow's notorious Matrosskaya Tishina prison in 2009. 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. Sergei Magnitsky 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* Adam Gomes-Abreu, *Are Human Rights Violations Finally Bad for Business? The Impact of Magnitsky Sanctions on Policing Human Rights Violations*, 20 J. INT'L BUS. & L. 173 (2020–2021); Russia and Moldova Jackson—Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, H.R. 6156, 112th Cong. § 401–407, 126 Stat. 1496, 1502–59 (2012).

sanctions against natural and legal persons involved in Magnitsky's torture and death.[208] The Act authorized the U.S. President to decide 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."[209]

The U.S. then enacted the second set of Magnitsky Laws, which included any other person found liable for violating international human rights law by the State Department and Congress.[210] Because of the Acts' high rate of effectiveness in reducing similar offenses, the EU and Canada adopted similar statutes.[211] Although the Magnitsky Act appears to have been enacted to prevent human rights violations, in practice it primarily combats corruption.

The Act provides a powerful sanctioning model for shaming corrupt leaders and human rights violators.[212] It was as a result of the sanctions being directed solely at the named wrongdoers and avoiding any negative side effects on the general populace. Additionally, the targets and general public are explicitly informed of the policy objectives of the sanctions. It indicates that the targets are aware of the behavioral modifications that must be made in order for the sanctions to be lifted. The administration process for lifting the sanctions was also specified in the sanctions. As a result, it adheres to the rights-based model of unilateral sanctions set forth in the Article.

IV. CONCLUSIONS

The Article developed a rights-based model for unilateral sanctions and identified their boundaries by examining some of the most relevant international law sources. As for treaties, the UN Charter is the first of four debated multilateral treaties that states might utilize to challenge these measures. In general, unilateral sanctions cannot be opposed on the basis of state sovereignty violations unless they amount to a military blockade or attempt to overthrow a government. On the other side of the coin, sanctions

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[208] BILL BROWDER, RED NOTICE: A TRUE STORY OF HIGH FINANCE, MURDER, AND ONE MAN'S FIGHT FOR JUSTICE 262–81 (2015).

[209] Russia and Moldova Jackson—Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, H.R. 6156, 112th Cong. § 404–406, 126 Stat. 1496, 1505–59 (2012).

[210] *See id.* at § 402(a)(15).

[211] *See* Gomes-Abreu, *supra* note 207, at 177.

[212] *See* United Nations Convention against Corruption (UNCAC), art. 14(1)(a), Oct. 31, 2003, 2349 U.N.T.S. 41.

cannot be justified as a state's sovereign right to express its economic freedom because actions of economic freedom lack coercion and therefore should be regarded as lawful retorsions. However, the UN Charter's human rights references are vague and do not impose any binding obligation on member states which are merely encouraged to cooperate with the UN to achieve its goals, but they are not obligated to do so. ICCPR party states cannot exercise effective control over a territory and then impose sanctions that violate the civil and political rights of the people of that targeted state. With its mandatory tone, the ICESCR forbids member states from imposing extraterritorial sanctions with adverse effects on food and medicine. Furthermore, the ICERD could be used to challenge unilateral sanctions based on their discriminatory consequences. With respect to bilateral treaties, the ICJ's provisional ruling on the alleged U.S. violations of the Iran-U.S. Amity Treaty condemned the U.S.'s restrictions on medicines and medical devices, food and agricultural devices, and civil aviation. The Court emphasized that the U.S. unilateral sanctions effect on human rights violations.

As another important source of international law, CIL norms, are established by existing *opinio juris* with the support of states practices. It was shown that while international organizations, particularly the UNGA, have condemned the use of unilateral sanctions, they are still far from creating norms prohibiting their use. That is due to the voting patterns of these resolutions, as well as the presence of persistent objectors which are not required to follow the CIL. The Article also delved deeper into the actual practices of those states which their *opinio juris* criticize the application of unilateral sanctions. As a result, it demonstrated that the official declarations and opinions of contenders are inconsistent to their practices, and they frequently impose sanctions without the SC authorization. It is also recognized that, based on *erga omnes* obligations and in response to human rights violations, in enumerated situations, states are obligated to impose sanctions. These measures, however, should be executed by targeted sanctions that precisely identify the subjective wrongdoer person(s). The Magnitsky Act was introduced as a successful rights-based targeted sanctions in fulfillment of states' *erga omnes* obligations in prevention of further corruption. As a result, unilateral sanctions are lawful and essential if employed within the rights-based boundaries of the aforementioned sources of international law.