

# The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate enforcement or illegitimate intervention?

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## Abstract

Unilateral coercive measures are condemned by the UN General Assembly on a yearly basis for being contrary to international law and for having negative effects on human rights and the economy of developing States. Although legal doctrine generally finds that the limitations of economic coercion are a grey area of international law, these resolutions could be indicative of an emerging prohibition. Upon closer scrutiny, however, it would appear that they do not satisfy the required criteria – as developed by international jurisprudence – for establishing a new custom. That being said, the resolutions clearly illustrate a divide between developed and developing States on the legitimacy of unilateral sanctions that should not be dismissed. In the interests of understanding how this division came into existence and how we can overcome it, the article proceeds to address the social factors that lead to its creation.

## I. Introduction

1. In June 2016, the People's Republic of China and the Russian Federation issued a joint declaration on the *Promotion of International Law*, whereby they expressed the view that “unilateral coercive measures not based on international law, also known as ‘unilateral sanctions’”, are an example of double standards and of the “imposition by some States of their will on other States” which are excluded under the “generally recognized principles and rules

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of international law”.<sup>1</sup> Such measures, they argue, “can defeat the objects and purposes of measures imposed by the Security Council, and undermine their integrity and effectiveness”.<sup>2</sup> Prior to this declaration, in April 2014, the foreign ministers of China, Russia and India issued a similar statement, emphasizing, *inter alia*, that the “imposition of unilateral coercive measures not based on international law” is excluded by the principles of sovereign equality of States, non-intervention and cooperation.<sup>3</sup> Also in 2014, the Asian African Legal Consultative Organization (AALCO) expressed “its profound concern that the imposition of unilateral sanctions on third parties is violation of the United Nations Charter and in contradiction with the general principles of international law [...]”.<sup>4</sup>

2. These statements touch upon issues regarding the legality of unilateral sanctions, which has been a recurring theme within the United Nations (UN) arena as well as an on-going debate in legal doctrine. Indeed, not only do there appear to be difficulties defining economic coercion, commentators struggle to demonstrate that unilateral coercive measures (UCM) are prohibited under international law. Nevertheless, economic coercion is frequently evoked in General Assembly (GA) resolutions, whereby developing States contest the legality of unilateral sanctions, arguing that they constitute an act of coercion contrary to the principles of international law.<sup>5</sup> This led Special Rapporteur on the negative effects of UCM on the enjoyment of human rights, Idriss Jazairy, to question “whether the multiplicity of UN resolutions adopted on such measures does not signal an emerging customary international law or peremptory norm calling into question” resort to unilateral sanctions.<sup>6</sup>

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<sup>1</sup> The Declaration of the Russian Federation and the People’s Republic of China on the Promotion of International Law (25 June 2016) ([http://www.mid.ru/en/foreign\\_policy/news/-/asset\\_publisher/cKNonkJE02Bw/content/id/2331698](http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2331698)), para. 6.

<sup>2</sup> Ibid.

<sup>3</sup> Joint Communiqué of the 14th Meeting of the Foreign Ministers of the Russian Federation, the Republic of India and the People’s Republic of China (19 April 2016) ([http://www.fmprc.gov.cn/mfa\\_eng/wjdt\\_665385/2649\\_665393/t1356652.shtml](http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t1356652.shtml)), para.6.

<sup>4</sup> AALCO, Extraterritorial Application of National Legislation: Sanctions Imposed against Third Parties (2014) ([www.aalco.int/53rdsession/extraterritorial%202014.pdf](http://www.aalco.int/53rdsession/extraterritorial%202014.pdf)), 22.

<sup>5</sup> See, e.g., Pierre-Emmanuel Dupont, Countermeasures and Collective Security: The Case of the EU Sanctions Against Iran, 17:3 *Journal of Conflict & Security Law* (2012), 316-317.

<sup>6</sup> HRC, Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Idriss Jazairy, A/HRC/30/45 (10 August 2015), hereafter “Report of the SR”, para. 47.

3. These resolutions include those entitled *Human rights and unilateral coercive measures*, expressing concern on the negative impact UCM have on human rights and, *inter alia*, urging “all States to cease adopting or implementing any unilateral measures not in accordance with international law [...]”.<sup>7</sup> Though they are not quoted in the Special Rapporteur’s report, reference can also be made to the resolutions on *Unilateral economic measures as a means of political and economic coercion against developing countries*, which call for the elimination of unilateral economic sanctions.<sup>8</sup> Unilateral sanctions can be adopted by groups of States but they are to be distinguished from multilateral sanctions, as they are not adopted by an international or regional organization against a Member State on the basis of the multilateral organization’s constitutive act. The term therefore excludes sanctions adopted by the UN Security Council or by the African Union against their respective Member States pursuant to their respective constituent instruments.<sup>9</sup> However, restrictive measures adopted by the European Union (EU) against non-Member States are considered to be UCM.<sup>10</sup>

4. Although sanctions are generally considered to be part and parcel of a State’s right to conduct its trade relations freely, official statements, UNGA resolutions and Special Rapporteur Idriss Jazairy’s report indicate that an important number of States are opposed to acts of economic coercion and that there is a call for such practice to cease, or at the very least for the implementation of a regulatory framework. To what extent do these debates within the UN and the adopted resolutions provide insight on an issue that has stumped doctrine? Are they, as suggested by Idriss Jazairy, indicative of an emerging prohibition?

5. Against this background, we seek to shed light on the UN debate regarding UCM. The first step comprises an attempt at assessing the value of the legal claims pertaining to unilateral sanctions; the second step aims at understanding the underlying political and social factors that contribute to the construction of these claims. Concretely, we begin by assessing the state-of-the-art on unilateral economic coercion, where we find that the topic remains a grey area of international law (Part II). Following these considerations, we turn to the UNGA resolutions and the debates thereon in an attempt to determine whether or not they constitute, in Special Rapporteur Jazairy’s words, an emerging prohibition (Part III). It would however appear that the texts do not satisfy the required criteria for establishing a new customary rule; not only is the language of the resolutions vague, the debate is heavily divided between

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<sup>7</sup> GA Res 71/193 (20 January 2017), Operative clause 1.

<sup>8</sup> GA Res 70/185 (22 December 2015), Operative clause 2.

<sup>9</sup> Report of the SR, above n 6, 5, para. 14.

<sup>10</sup> Ibid, 5, para. 15.

developed and developing States, bringing the discussions to a stalemate to the extent that it is difficult to draw legal conclusions.

6. Nonetheless, by broadening the analysis to include the social factors that lead to the creation of the deadlock (Part IV) we hope to provide a more comprehensive understanding of a problem that is, in reality, fundamental to international law<sup>11</sup> and uncover the underlying issues related to discussions on unilateral coercion. As Hirsch writes, a “sociological analysis of international legal issues broadens our understanding of social factors involved in the formation [...] of international law”,<sup>12</sup> and hence the construction of States’ legal arguments. Indeed, it is apparent that the debate is strongly influenced by political considerations and social factors, such as States’ sense of identity and the ethical norms they seek to uphold in the international community. The discussion on the legality of UCM is indicative of the issues pertaining to these measures’ legitimacy. In our conclusion we will seek to open the debate to venues of discussion in an effort to overcome the deadlock (Part V).

## **II. The current scope of the prohibition of unilateral coercion in doctrine and jurisprudence**

7. Acts of economic coercion are first and foremost foreign policy tools upon which the international legal order seeks to impose restrictions. Inasmuch as these acts involve forms of pressure whereby one State seeks to compel another into behaving in a certain manner,<sup>13</sup> international law establishes which

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<sup>11</sup> On the importance of the problem see Daniel Joyner, United Nations Counter-Proliferation Sanctions and International Law, in: Larissa van den Herik (ed), *Research Handbook on U.N. Sanctions and International Law* (2017) ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2752623](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2752623)), 2

<sup>12</sup> Moshe Hirsch, *An Invitation to the Sociology of International law* (2015), 2. He also observes that ‘sociological examination may also suggest some better legal mechanisms for [...] enhancing compliance with international law’, which is the stated aim of unilateral coercive measures by the States that adopt them (see below Parts III.A and IV.A).

<sup>13</sup> See, e.g. Lowenfeld’s definition of economic coercion as “measures of an economic – as contrasted with diplomatic or military – character taken to induce [a target State] to change some policy or practices or even its governmental structure”, Andreas F. Lowenfeld, *International Economic Law* (2008), 698. See also Natalino Ronzitti, *Sanctions as instruments of coercive diplomacy: an international legal perspective*, in: Natalino Ronzitti (ed.) *Coercive diplomacy, sanctions and international law* (2016), 1: “Coercion may assume various forms that have in common the will of a State to force another State into taking particular action”.

forms of pressure are permissible and under which circumstances.<sup>14</sup> From a legal perspective, it is necessary to provide a definition of economic coercion where these boundaries are clearly outlined. Yet, not only is defining the concept a difficult exercise,<sup>15</sup> identifying unlawful economic coercion remains a legal grey area.<sup>16</sup> By way of illustration, the International Law Commission's (ILC) commentary to Article 18 of the Draft Articles on State Responsibility (DASR), which deals with "Coercion of another State", does not outline the legal boundaries of coercion. Instead, the Commentaries equate coercion to *force majeure*: "the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State".<sup>17</sup> Coercion is defined as "conduct which forces the will" of the targeted State, "giving it no effective choice but to comply with the wishes of the coercing State".<sup>18</sup> The ILC goes on to say that "coercion for the purpose of article 18 [...] is not limited to unlawful coercion"

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<sup>14</sup> Christopher C. Joyner, Coercion, Max Planck Encyclopedia Public International Law (hereafter "MPEPIL") (2006), (<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1749?rskey=fpJKgW&result=1&prd=EPIL>), para. 1. For instance, the use of force as a coercive act is now prohibited unless the UN Security Council has authorized it or if the operation is taken in self-defence pursuant to UN Charter Article 51. Acts of retorsion and countermeasures are considered lawful under customary international law. The latter have been codified in the ILC Draft Articles on State Responsibility (2001) (hereafter DASR) Articles 22, 49-53, see Annex to GA Res 56/83 'Responsibility of States for Internationally Wrongful Acts' (28 January 2002).

<sup>15</sup> Barry E Carter, Economic Coercion, MPEPIL (2009) (<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1518?rskey=fpJKgW&result=2&prd=EPIL>), para. 1: 'the term 'economic coercion has traditionally been difficult to define'; Omer Yousif Elagab, The Legality of Non-forcible Counter-Measures in International Law (1988), 525: "any definition of the concept of coercion [is] uniquely difficult to obtain". See also Philip Kunig, intervention, prohibition of, MPEPIL (2008) (<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1434?rskey=V5a1XH&result=2&prd=EPIL>), para. 25.

<sup>16</sup> Tom Ruys, Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework, in: van den Herik, above n.11, ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2760853](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2760853)), 7; Nigel White and Ademola Abass, Countermeasures and sanctions, in: Malcolm D. Evans International Law (2010), 531.

<sup>17</sup> ILC Commentaries to DASR, in: ILC Yearbook 2001/11(2), Commentary to Article 18, 69 para. 2; see also Commentary to Article 23, 76 para. 2.

<sup>18</sup> Ibid, 69 para. 2.

without clarifying what unlawful coercion would be except to give two examples: “a threat or use of force contrary to” the UN Charter and “intervention, i.e. coercive interference, in the affairs of another State”.<sup>19</sup>

8. With regard to the second illustration, it is worth quoting Special Rapporteur Idriss Jazairy’s definition of UCM:

measures including, but not limited to, economic and political ones, imposed by States or groups of States to coerce another State *in order to obtain from it the subordination of the exercise of its sovereign rights* with a view to securing some specific change in its policy.<sup>20</sup>

Here, as well as in the second example given by the ILC, the scope of coercion is linked to the scope of a State’s “sovereign rights”. In other words, unlawful coercion requires a breach of the principle of non-intervention. This nexus with the prohibition of intervention can be found throughout academia.

9. It is generally argued that the legality of economic coercive measures is related to two general principles of international law. First, economic sanctions are usually considered to fall within the scope of the *Lotus* principle.<sup>21</sup> States are at liberty to conduct their economic relations as they choose provided they respect the obligations they have freely consented to by adhering to a treaty or the legal norms that have been recognized as customary international law.<sup>22</sup> In light of this first principle, economic coercion is *prima facie* legal; the issue of legality will depend on the rules that apply in a given situation.<sup>23</sup> The second

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<sup>19</sup> Ibid, 70 para. 3.

<sup>20</sup> HRC Report of the SR, above n 6, 4 para. 13 (emphasis added), this definition is based on HRC Res 27/21, Human rights and unilateral coercive measures, (adopted 26 September 2014).

<sup>21</sup> The Case of the S.S Lotus (France v. Turkey), Judgment, PCIJ 1927 ([http://www.icj-cij.org/pcij/serie\\_A/A\\_10/30\\_Lotus\\_Arret.pdf](http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf)), 18.

<sup>22</sup> Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, 14 (<http://www.icj-cij.org/docket/files/70/6503.pdf>) (“Military and Paramilitary Activities”), para. 276: “A State is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific legal obligation”.

<sup>23</sup> Thus recalling the concepts of retorsion and countermeasures. Sanctions adopted within the field of economic freedom are retorsions under public international law, politically unfriendly but lawful acts. If a sanction breaches the sending State’s obligations towards the target State under conventional or customary international law, then the countermeasure argument could be raised as a justification provided certain conditions are respected, as defined in the DASR referred to above n 14. See also Elagab, above n.15, 545; Joyner,

principle that is applied is the prohibition of intervention. A State's freedom to adopt coercive economic measures is limited by the targeted State's freedom to regulate matters that fall within the scope of its internal affairs. However, this is not always an easy line to draw,<sup>24</sup> especially if we consider that fewer matters are strictly within a State's domestic jurisdiction.<sup>25</sup> It follows that a discussion on illegal acts of coercion quickly becomes intertwined with the debate on the scope of the principle of non-intervention. This adds additional complications as the prohibition of intervention has been described as the "most potent and elusive of all principles".<sup>26</sup> Further, it is unclear exactly what threshold UCM need to reach in order to constitute an unlawful intervention as the conduct has to amount to an irresistible pressure on the target State, causing it to be forced to make a decision within the scope of its *domaine réservé* under constraint with no means of escape.<sup>27</sup>

10. In *Military and Paramilitary Activities in and against Nicaragua*, the ICJ explained that an act would be considered as an intervention when it involves trespassing:

directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. [...] Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.<sup>28</sup>

The Court found that coercion forms the very essence of the principle of non-intervention and further stated that this element would be obvious when the

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above n.11, 7-8; Vaughan Lowe and Antonios Tzanakopoulos, *Economic Warfare*, MPEPIL (2013) (<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e292?rskey=zvbIVf&result=1&prd=EPIL>), paras 36 to 42.

<sup>24</sup> Kunig, above n.15, paras 25 and 26.

<sup>25</sup> Ibid, para. 3; Antonios Tzanakopoulos, *The Right to Be Free From Economic Coercion*, 4:1 *Cambridge Journal of International and Comparative Law* (2015), 631.

<sup>26</sup> Maziar Jamnejad and Michael Wood, *The Principle of Non-Intervention*, 22:2 *Leiden Journal of International Law* (2009), 345.

<sup>27</sup> Thomas Giegerich, *Retorsion*, MPEPIL (2011) (<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e983?rskey=nNzN4Y&result=1&prd=EPIL>) para. 24; ILC Commentaries to DASR, above n.17, commentary to Article 23, 76 para. 2.

<sup>28</sup> *Military and Paramilitary Activities*, above n.22, para. 205.

intervention involves the use of force.<sup>29</sup> However, the Court did not discuss the threshold that needs to be met in order for economic pressure to be considered coercive and was quite restrictive when it came to applying the principle of non-intervention to such acts.<sup>30</sup> Indeed, in response to Nicaragua's complaint that the US cessation of economic aid and the imposition of a trade embargo amounted to indirect intervention,<sup>31</sup> the Court found "that it is unable to regard such action on the economic plane [...] as a breach of the customary-law principle of non-intervention".<sup>32</sup> Two remarks can be made on this finding.

11. First, the phrase "such action" is rather ambiguous; it is unclear whether the Court's conclusion was only relevant to the American action against Nicaragua or to embargoes in general.<sup>33</sup> Nevertheless, embargoes are frequently given as examples of retorsion;<sup>34</sup> this is the case, for instance, in the commentaries to the DASR.<sup>35</sup> Thus, according to Ruys, the *Nicaragua* dictum confirms that embargoes are not necessarily unlawful and that the prohibition of measures amounting to economic intervention must be "narrowly construed".<sup>36</sup> Lowe and Tzanakopoulos have indicated that the legal characterization of embargoes adopted "in peacetime will depend on the circumstances and on the particular international obligations in force between the States in question".<sup>37</sup> Consequently, they could qualify as either acts of retorsion, countermeasures or simply as internationally wrongful acts.<sup>38</sup> This reasoning seems to be in line with the Court's finding that the US economic measures against Nicaragua violated the Treaty of Friendship, Commerce and Navigation of 1956.<sup>39</sup> Accordingly, though the embargo did not amount to an intervention in Nicaragua's *domaine réservé*, it still constituted an internationally wrongful act.

12. Second, even if the trade embargo against Nicaragua was not considered to be a breach of the prohibition of intervention, it does not mean

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<sup>29</sup> Ibid.

<sup>30</sup> Jamnejad and Wood, above n.26, 370.

<sup>31</sup> Military and Paramilitary Activities, above n.22, paras 123 and 125. It has been argued that the American measures had devastating effects on Nicaragua's already weak economy, see, e.g., William M. Leogrande, Making the Economy Scream: US Economic Sanctions against Sandinista Nicaragua, 17:2 Third World Quarterly (1996), 329.

<sup>32</sup> Military and Paramilitary Activities, above n.22, para. 245.

<sup>33</sup> Jamnejad and Wood, above n.26, 371.

<sup>34</sup> Dupont, above n.5, 312.

<sup>35</sup> ILC Commentaries to DASR, above n.17, 128, para. 3.

<sup>36</sup> Ruys, above n.16, 7.

<sup>37</sup> Lowe and Tzanakopoulos, above n.23, para. 36.

<sup>38</sup> Ibid.

<sup>39</sup> Military and Paramilitary Activities, above n.22, para. 276.



that the embargo was not coercive. An act does not need to constitute an intervention in the State's *domaine réservé* in order for it to be considered coercive.<sup>40</sup> As we saw in the beginning of this section, a coercive sanction aims at changing the behaviour of the target or its policy objective;<sup>41</sup> this can be achieved without intervening in the State's internal affairs. All the same, there appears to be a general consensus in legal doctrine that economic sanctions must amount to intervention in order to be considered *illegal* coercion.<sup>42</sup> However, not only has the bar been set so high it seems near impossible to reach, as illustrated below, scholars are at pains to argue that the principle of non-intervention encompasses acts of economic coercion.

13. In 1988, Elagab concluded that “the principle of non-intervention did not seem to have crystallized into a clear rule prohibiting economic coercion”, though he believed that there was a gradual emergence of rules that would limit the scope of permissible acts of economic coercion.<sup>43</sup> By contrast, relying on “UN instruments that authoritatively interpret the Charter”, Boumedra argued that there is sufficient evidence that economic coercion would be prohibited under Article 2(4) of the UN Charter.<sup>44</sup> This view does not seem to have convinced many legal scholars. It appears that economic coercion is essentially considered to remain within the scope of a State's freedom to conduct its economic relations and for the most part is only regulated by the legal obligations a State has expressly consented to or that have been recognized as international custom.<sup>45</sup> Recently, Ruys concluded that: “it remains altogether unclear to what extent exactly the principle of non-

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<sup>40</sup> However, see, e.g., Tzanakopoulos, above n.25, 623: the author differentiates between “coercion/intervention/coercive interference” and “mere pressure or interference”, and 626, the distinction is made between “inducement” and “coercion”.

<sup>41</sup> This general definition is given in political science literature; See e.g. Thomas J. Biersteker, Susan E. Eckhart and Marcos Tourinho (eds), *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action* (2016), 225-226. This is also apparent in Lowenfeld's definition, above n.13 and accompanying text, and in ILC Commentaries to DADR, above n.17, commentary to Article 18 where the Commission makes the distinction between “coercion” and “unlawful coercion”.

<sup>42</sup> Joyner, above n.11, 12; Tzanakopoulos, above n.25, 623; Elagab, above n.15, 534; Lowe and Tzanakopoulos, above n.23, para. 38; Ronzitti, above n.13, 6.

<sup>43</sup> Elagab, above n.15, 542 and 544.

<sup>44</sup> Tahar Boumedra, *Economic Coercion under International Law*, 2 African Society of International and Comparative Law Proceedings of the Second Annual Conference (March 1990), 81-83.

<sup>45</sup> White and Abass, above n 16, 538.

intervention prohibits certain economic sanctions. [...] The question continues to puzzle legal doctrine.”<sup>46</sup> Tzanakopoulos has gone further in arguing that illegal acts of economic coercion barely exist in present-day international law.<sup>47</sup>

14. This notwithstanding, numerous General Assembly Resolutions have been adopted condemning coercive economic measures as a means to influence a State’s internal affairs,<sup>48</sup> suggesting that such acts are inconsistent with the prohibition of intervention. Despite the organ’s extensive practice, in 1993 the UN Secretary-General published a report reiterating the findings of an expert group: “[t]here is no clear consensus in international law as to when coercive economic measures are improper”.<sup>49</sup> The difficulty in determining whether or not the UN’s practice would lead to the emergence of a legal norm that restricts the use of economic coercion under the principle of non-intervention lies in establishing the normative value of the said practice. The resolutions are generally political in nature and adopted by a heavily divided vote, thus lacking legal authority.<sup>50</sup> According to Jamnejad and Wood, among the many resolutions that have been adopted the most “significant” ones are Resolution 2131 (XX) Declaration on the Inadmissibility of Intervention (1965), Resolution 2625 (XXV) Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1970) and Resolution 36/103 Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (1981).<sup>51</sup> It is also relevant to refer to Resolution 3281, the Charter on the Economic Rights and Duties of States (1974).

15. The first two resolutions do not explicitly mention economic coercion as a form of intervention. The debates held on Resolution 2131 (XX) reveal that Member States were more concerned about subversion and respect of the right to self-determination.<sup>52</sup> Prior to the adoption of Resolution 2625, only the Bolivian delegation made an express reference to economic sanctions

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<sup>46</sup> Ruys, above n.16, 7.

<sup>47</sup> Tzanakopoulos, above n.25, 633.

<sup>48</sup> Carter, above n.15, para.7. See GA resolutions referred to in subsequent paragraphs.

<sup>49</sup> Note by the Secretary-General, Economic measures as a means of political and economic coercion against developing countries, A/48/535 (25 October 1993), point 2(a).

<sup>50</sup> Carter, above n.15, para.8.

<sup>51</sup> Jamnejad and Wood, above n.26, 350-351. See also Ronzitti, above n.13, 4-5.

<sup>52</sup> Statements made by the USSR, Brazil and Guatemala, A/PV.1408 (21 December 1965), para. 108 (USSR), para. 119 (Brazil) and para. 125 (Guatemala).

as measures encompassed by the principle of non-intervention.<sup>53</sup> Additionally, Pakistan stated that the prohibition of the threat or use of force should include “economic, political and other forms of pressure”.<sup>54</sup> These are the only explicit statements regarding economic pressure as a violation of the principle of non-intervention.

16. The Charter on the Economic Rights and Duties of States (Resolution 3281 (1974)) asserts that economic and political relations between States should be governed by, *inter alia*, the principles of non-aggression and non-intervention.<sup>55</sup> More specifically, Article 32 states that:

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights.

It nevertheless appears that the Charter does not have normative value. Elagab has argued that the Charter is not a binding instrument and that Article 32 cannot be read as legally prohibiting economic coercion; instead it should be read as expressing an “ideal”.<sup>56</sup>

17. Finally, Resolution 36/103 explicitly refers to economic coercion under paragraph 2 point II(k); pursuant to this provision the principle of non-intervention in the internal and external affairs of States comprises:

the duty of a State not to use its external economic assistance programme or adopt any multilateral or unilateral economic reprisal or blockade and to prevent the use of transnational and multinational corporations under its jurisdiction and control as instruments of political pressure or coercion against another State, in violation of the Charter of the United Nations.

Point II(l) of paragraph 2 also highlights:

The duty of a State to refrain from the exploitation and the distortion of human rights issues as a means of interference in the internal affairs of

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<sup>53</sup> Statement made by Bolivia before the UNGA Sixth Committee, A/C.6/SR.1181 (25 September 1970), para. 22.

<sup>54</sup> Statement made by Pakistan before the UNGA Sixth Committee, A/C.6/SR.1179 (24 September 1970), paras. 18-19.

<sup>55</sup> UNGA Res 3281 (XXIX) (12 December 1974) (adopted by 120 to 6 against; 10 abstentions and 2 non-voting), Chapter 1, points (c) and (d).

<sup>56</sup> Elagab, above n.14, 543-544. See also *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. the Government of the Libyan Arab Republic* 17 ILM 1 (1978) (hereafter “Texaco v. Libya”), paras 85-88.

States [and] of exerting pressure (...).

Because resolution 36/103 was adopted with 22 negative votes, it would appear to have little normative value.<sup>57</sup> All the same, the above quoted paragraphs echo the concerns of developing States that allege that developed countries misuse claims concerning human rights violations to justify measures of economic coercion.<sup>58</sup> They also protest against these measures' negative effects. It is within this context that the resolutions entitled *Human rights and Unilateral Coercive Measures* and *Unilateral economic measures as a means of political and economic coercion against developing countries* are adopted. We will now study the content of these texts and the reasons given for their adoption.

### III. The UN General Assembly debates and resolutions on unilateral coercive measures and the absence of an emerging prohibition

18. If we chose to study the resolutions entitled *Human rights and unilateral coercive measures*, it is not only because of the Special Rapporteur Idriss Jazairy's 2015 Report, but also because they explicitly denounce UCM for being incompatible with international law and have done so repeatedly since 1996. For similar reasons, we believe it was useful to complement our analysis with the resolutions on *Unilateral economic measures as a means of political and economic coercion against developing countries*. Additionally, to this author's knowledge, very little has been written on these resolutions' normative value.<sup>59</sup> The goal of this section is to assess the legal value of the denunciations in order to determine if the resolutions constitute an emerging prohibition of UCM, as suggested by Special Rapporteur Idriss Jazairy, and if they provide insight on the legal issues that have puzzled legal doctrine.

#### III.A. The condemnation of economic coercion through the UN General Assembly

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<sup>57</sup> Kunig, above n.15, para. 20.

<sup>58</sup> Statements made before the UNGA Third Committee: A/C.3/63/SR.44 (24 February 2009), paras 103-104 (Myanmar); A/C.3/51/SR.48 (22 November 1996), para. 21 (Syria); A/C.3/51/SR.47 (21 November 1996), para. 6 (DPR of Korea), and para. 9 (Myanmar).

<sup>59</sup> However see Ruys, above n.16, 6: refers to the resolutions on *Unilateral economic measures as a means of political and economic coercion against developing countries* without assessing their normative value. Similarly, see Ronzitti, above n.13, 13-14; and Dupont, above n.5, 316, referring to debates in the "Second Committee of the UN General Assembly" and to the positions of the NAL and G77.

19. Adopted on an annual basis by the Third Committee – the GA’s social, economic and cultural committee – then voted by the GA, the resolutions on *Human rights and unilateral coercive measures* are annually submitted by the Non-Aligned Movement (NAM).<sup>60</sup> UCM are rejected “as tools for political or economic pressure” because of their negative effect on human rights.<sup>61</sup> The resolutions also express concern about these measures’ negative impact “on international relations, trade, investment and cooperation”<sup>62</sup> and urge States to cease adopting them. Since 1996, twenty-one resolutions on *Human rights and unilateral coercive measures* have been adopted.

20. The resolutions entitled *Unilateral economic measures as a means of political and economic coercion against developing countries* are introduced on a bi-annual basis on behalf of the Group of 77 (G77) and China<sup>63</sup> and adopted by the Second Committee, the social and economic committee. From 1993 to the time of writing, nineteen resolutions have been adopted. Since 1993, these resolutions:

[urge] the international community to adopt urgent and effective measures to eliminate the use of unilateral coercive economic measures against developing countries that are not authorized by relevant organs of the United Nations or are inconsistent with the principles of international law as set forth in the Charter of the United Nations and that contravene the basic principles of the multilateral trading system.<sup>64</sup>

A new clause was added in 2007, calling “upon the international community to condemn and reject the imposition of the use of such measures as a means of political and economic coercion against developing countries”.<sup>65</sup>

21. Both resolutions affirm that UCM constitute a violation of international law, including the principles set out in the UN Charter, and urge States to eliminate such practice. These texts refer to the principle of non-intervention in condemning the adoption of “economic, political or any other type of measures to coerce another State in order to obtain from it the

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<sup>60</sup> Since 2006, the draft resolutions have been introduced by Cuba on behalf of the NAM. For a list of the NAM’s members see: <http://www.nam.gov.za/media/040802b.htm>.

<sup>61</sup> UNGA Res 51/103 (3 March 1997) to UNGA Res 71/193, above n.7.

<sup>62</sup> UNGA Res 55/110 (13 March 2001) to UNGA Res 71/193, above n.7.

<sup>63</sup> The texts were first introduced on an annual basis from 1983 to 1987, since 1987 the topic is discussed bi-annually. Note that they were first introduced under the title *Economic measures as a means of political and economic coercion against developing countries*; the word “unilateral” was added in 1997.

<sup>64</sup> UNGA Res 48/168 (22 February 1994) to UNGA Res 70/185, above n.8.

<sup>65</sup> UNGA Res 62/183 (31 January 2008) to UNGA Res 70/185, above n.8.

subordination of the exercise of its sovereign rights”, in reference to Resolution 2526 (XXV)<sup>66</sup> or to Article 32 of Resolution 3281 (1974).<sup>67</sup> The main distinction is that the texts entitled *Unilateral economic measures as a means of political and economic coercion against developing countries* place more emphasis on these measures’ negative impact on the right to development, economic cooperation and the development of a non-discriminating multilateral trading system. The resolutions on *Human rights and unilateral coercive measures*, as their title indicates, are concerned with unilateral sanctions’ negative impact on the fulfilment of human rights in the targeted States, which include the right to development as well as other social and economic rights. These texts also condemn such sanctions’ extraterritorial effect and their harmful influence on areas pertaining to international relations, trade, investment and cooperation.

22. In both cases, the resolutions are adopted by a large majority; we can also observe a political rift in the voting patterns. When the topic on *Human rights and unilateral coercive measures* was first introduced in the United Nations in 1996, the vote was more or less evenly split: 57 voted in favour, 45 voted against and 59 abstained.<sup>68</sup> Since then the voting pattern has changed. In the last years, about 130 developing countries vote in favour of these resolutions whereas more or less 50 developed countries – mainly the US, the EU Member States and their allies – cast a negative vote. Similarly, the resolutions on *Unilateral economic measures as a means of political and economic coercion against developing countries* are adopted by a large majority against only two negative votes emanating from the US and Israel; on the other hand, EU Member States abstain. It follows that these resolutions are generally adopted by roughly 130 positive votes to two negative votes and around 50 abstentions. Consequently, the two texts are typically adopted by slightly over two-thirds of the General Assembly’s Member States.

23. Turning to the explanations of the votes, the NAM<sup>69</sup> and G77 and China are consistent in denouncing the adoption of non-UN sanctions against developing countries. For instance, the latter group has expressed their opposition:

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<sup>66</sup> Ibid.

<sup>67</sup> Resolutions referred to above n.61.

<sup>68</sup> Voting result for UNGA Res 51/103.

<sup>69</sup> See the statements made by Cuba on behalf of the NAM in the UNGA Third Committee: A/C.3/66/SR.44 (15 November 2011), para. 59; A/C.3/67/SR.44 (26 November 2012), para. 7; A/C.3/68/SR.49 (21 November 2013), para. 47; A/C.3/68/SR.43 (7 November 2013), para. 11; A/C.3/69/SR.44 (13 November 2014), para. 17; A/C.3/70/SR.48 (17 November 2015), para. 7.

to the imposition of unilateral economic measures as an instrument of political and economic coercion against developing countries. Such action was not in accordance with the Charter of the United Nations, international law or the rules-based multilateral trading system, and undermined the sovereign equality of States.<sup>70</sup>

The NAM has also called on “States to refrain from [UCM] against other States with the aim of enforcing compliance, particularly where such measures were inconsistent with the Charter and international law”.<sup>71</sup> In addition, we can refer to comments sent by governments to the Secretary-General contesting the adoption of unilateral sanctions.<sup>72</sup>

24. On the other side of the spectrum, developed States cast negative votes or abstain. According to the US, the draft resolutions on *Human rights and unilateral coercive measures* have

no basis in international law and [do] not serve to advance the cause of human rights. [...] The [resolutions challenge] the sovereign right of States to conduct their economic relations freely and to protect legitimate national interests, including by taking actions in response to national security concerns. The [resolutions] undermine the ability of the international community to respond to acts that were offensive to international norms. Unilateral and multilateral sanctions were a legitimate means to achieve foreign policy, security, and other national and international objectives. The United States was not alone in that view or practice.<sup>73</sup>

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<sup>70</sup> Statements made on behalf of the on behalf of the G77 and China in the UNGA Second Committee: A/C.2/60/SR.17 (31 October 2005), para. 24 (Jamaica); A/C.2/68/SR.20 (24 October 2013), para. 26 (Fiji).

<sup>71</sup> Statements made by Malaysia on behalf of the NAM in the UNGA Third Committee: A/C.3/59/SR.48 (19 November 2004), para. 21; A/C.3/60/SR.45 (21 November 2005), para. 49.

<sup>72</sup> Reports of the UN Secretary-General on Unilateral economic measures as a means of political and economic coercion against developing countries, A/64/179 (27 July 2009); A/66/138 (14 July 2011); A/70/152 (16 July 2015).

<sup>73</sup> Statement made before the UNGA Third Committee, A/C.3/70/SR.52 (20 November 2015), para.32. For similar statements by the US before the the UNGA Third Committee see also A/C.3/64/SR.42 (12 November 2009), para.56; A/C.3/66/SR.44 (15 November 2011), para.60; A/C.3/67/SR.44 (26 November 2012), para.12; A/C.3/68/SR.49 (21 November 2013), para.54; A/C.3/69/SR.52 (24 November 2014), para.33.

By describing sanctions as part of a State's right to conduct its economic relations freely, the US is implicitly referring to the *Lotus* principle. The US justifies its negative vote against draft resolutions on *Unilateral economic measures as a means of political and economic coercion against developing countries* in a similar fashion.<sup>74</sup>

25. Although the EU Member States do not explain their vote against the resolutions on *Human rights and unilateral coercive measures*, in the context of the second topic at hand the EU has constantly stated that:

economic measures should be compatible with the principles of international law as set out in the Charter of the United Nations, including in the wider sense the principles of the multilateral trading system and the rules of the World Trade Organization.<sup>75</sup>

Up until 2005, the EU explained that it abstained during the votes on the second topic because the draft resolutions focused solely on developing countries, thus excluding other members of the international community.<sup>76</sup>

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<sup>74</sup> See statements by the US before the UNGA Second Committee: A/C.2/58/SR.36 (9 December 2003), para.4; A/C.2/64/SR.41 (9 December 2009), para.7; A/C.2/66/SR.37 (1 December 2011), para.2; A/C.2/68/SR.36 (14 November 2013), para.8; A/C.2/70/SR.31 (12 November 2015), para.20. See also Statement made before the General Assembly A/62/PV.78 (19 December 2007), at 11-12 (US).

<sup>75</sup> Statement made on behalf of the EU before the UNGA Second Committee, A/C.2/60/SR.33 (2 December 2005), para.13 (UK, speaking on behalf of the EU). Similar statements also made on behalf of the EU in the Second Committee: A/C.2/54/SR.43 (24 November 1999), para.33 (Finland), specifying that "any coercive economic measure should be condemned"; A/C.2/56/SR.36 (4 December 2001), para.5 (Belgium), here the EU also specified that "Unilateral measures should not be taken against any Member State"; A/C.2/58/SR.36 (9 December 2003), para.5 (Italy); A/C.2/62/SR.28 (16 November 2007), para.29 (Portugal); A/C.2/64/SR.41 (9 December 2009), para.10 (Sweden); A/C.2/66/SR.37 (1 December 2011), para.6 (Poland); A/C.2/68/SR.36 (14 November 2013), para.9 (Lithuania); A/C.2/70/SR.31 (12 November 2015), para.21 (Luxembourg).

<sup>76</sup> Statement made on behalf of the EU before the UNGA Second Committee, A/C.2/60/SR.33 (2 December 2005), para.13 (UK, speaking on behalf of the EU). For similar statements made on behalf of the EU see UNGA Second Committee: A/C.2/52/SR.47 (4 December 1997), para.18 (Luxembourg); A/C.2/54/SR.43 (24 November 1999), para.33 (Finland); A/C.2/56/SR.36 (4 December 2001), para.5 (Belgium); A/C.2/58/SR.36 (9 December 2003), para.5 (Italy).



However, since 2007, the EU states that:

unilateral economic measures [are] admissible in certain circumstances, in particular when necessary in order to fight terrorism and the proliferation of weapons of mass destruction, or to uphold respect for human rights, democracy, the rule of law and good governance.<sup>77</sup>

Though it is unclear why the EU changed its justification, this shift could explain why (at least since 2007) the regional organization votes against the resolutions on *Human rights and unilateral coercive measures* as these resolutions are critical of the adoption of sanctions to enforce human rights, which the EU considers as an admissible policy.

26. Given the content of the resolutions and the claims made by UN Member States during the debates, it would appear that a large group of States deem UCM to be contrary to international law because of their negative impact on, *inter alia*, human rights and the right to development as well as the fact that they run counter fundamental principles of international law;<sup>78</sup> including UN Charter principles such as the sovereign equality of States and the peaceful settlement of disputes. Further, UCM are argued to be illegal because they do not emanate from a Security Council decision; hence they are not multilateral.<sup>79</sup> The coercive nature of these measures stems from the fact that they aim at

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<sup>77</sup> Statement made on behalf of the EU before the UNGA Second Committee, A/C.2/62/SR.28 (16 November 2007), para.30 (Portugal, speaking on behalf of the EU). Other statements made on behalf of the EU in the UNGA Second Committee: A/C.2/64/SR.41 (9 December 2009), para.10 (Sweden); A/C.2/66/SR.37 (1 December 2011), para.6 (Poland); A/C.2/68/SR.36 (14 November 2013), para.9 (Lithuania); A/C.2/70/SR.31 (12 November 2015), para.21 (Luxembourg).

<sup>78</sup> See in particular GA RES 69/180 (18 December 2014), Operative Clause 1. See also statements made by Iran before the UNGA Third Committee A/C.3/51/SR.52 (26 November 1996), para.12 and A/C.3/68/SR.35 (31 October 2013), para.72.

<sup>79</sup> Statements made by Mexico and Russia before the UNGA Second Committee A/C.2/66/SR.35 (17 November 2011), para.3 (Mexico) and A/C.2/70/SR.31 (12 November 2015), para.25 (Russia). See also Reports of the UN Secretary-General on Unilateral economic measures as a means of political and economic coercion against developing countries A/68/218 (29 July 2013), responses received from Brazil at 5 and from Qatar at 11; response received from Paraguay in A/70/152 (16 July 2015), at 12.

On this issue see also debate at the Security Council, in particular statements made by Argentina, China and Russia, S/PV.7323 (25 November 2014), at 13 (Argentina), 14 (China) and 19 (Russia). See also Ronzitti, above n.13, 18-21.

pressuring the target State to change a national policy that falls within its sovereign rights; this is the case even when the sanctions are used to enforce human rights. According to some Member States, human rights and terrorism are used as a pretext to justify economic coercion and intervention.<sup>80</sup> Resolution 71/193 explicitly “condemns the inclusion of Members States in unilateral lists under false pretexts [...] including false allegations of terrorism sponsorship”.<sup>81</sup> It is therefore the source of the sanctions, their negative effects on rights and principles under international law, and the fear of abuse that give rise to their condemnation.

27. The EU and the US do not explicitly deny the coercive nature of unilateral sanctions. If at first the EU stated that such measures are inadmissible, it now states that they are “admissible in certain circumstances”.<sup>82</sup> The US on the other hand has argued that it is not a question of “coercion against developing countries, but of extending a hand of support to their peoples when their Governments have coerced them”.<sup>83</sup> These measures’ legality stems from the right of States to conduct their economic relations freely and from their legitimate policy objectives.

28. The debate is therefore centred on whether or not these measures of coercion are compatible with international law, and in particular with Article 41 of the UN Charter whereby the Security Council can adopt coercive measures.<sup>84</sup> Statements issued within the UN arena demonstrate that there is indeed a clear divide between “developed” and “developing” States. The claims seem to be reflected in State practice outside the UN<sup>85</sup> and also confirm the political nature of sanctions: they are an accepted foreign policy tool for the States or group of States that adopt them and are measures contrary to international law according to the States that are targeted as well as the group

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<sup>80</sup> Statements made by China and the Democratic People’s Republic of Korea before the UNGA Third Committee, A/C.3/51/SR.47 (21 November 1996), paras 70 and 79 (China) and para.6 (Democratic People’s Republic of Korea); Statement made by Eritrea before the UNGA, A/67/PV.19 (1 October 2012), at 23; Statement made by Syria before the UNGA Second Committee, A/C.2/70/SR.31 (12 November 2015), paras 28-29.

<sup>81</sup> GA RES 71/193, above n.7, Operative Clause 3.

<sup>82</sup> See above n.77.

<sup>83</sup> Speech by the US before the UN GA, A/60/PV.68 (22 December 2005), 7.

<sup>84</sup> According to the US, UN Charter provides further proof that economic coercion is permissible under international law; see statement made before the UNGA Second Committee A/C.2/66/SR.37 (1 December 2011), para.5.

<sup>85</sup> In the sense that the EU and the US are both active in adopting sanctions and the NAM Member States commit to refraining from adopting unilateral coercive measures (see below, Parts IV (A) and IV (B)).

they belong to.<sup>86</sup>

29. Having briefly provided an overview of the content of the resolutions and the explanations of the votes, we will now turn to the crux of the matter and evaluate these resolutions' normative value and whether or not the resolutions contribute to the development of a prohibition of economic UCM.

### III.B The absence of an emerging prohibition

30. As we saw in Part II of this paper, the majority opinion in doctrine is that there is no autonomous norm prohibiting economic coercion. Such practice is considered permissible to the extent that it does not violate the principle of non-intervention or that it does not violate other rules of customary international law or applicable treaty rules. Based on the previous discussion, we seek to determine if an autonomous prohibition of economic coercion has emerged.<sup>87</sup>

31. Given the political nature of the General Assembly and its lack of legislative power, certain scholars have expressed scepticism about providing normative value to GA resolutions.<sup>88</sup> Nevertheless, it is accepted that they can influence international law by, *inter alia*, crystallizing emerging custom or by acting as a "focal point for the future development" of customary international law,<sup>89</sup> provided certain conditions are met.<sup>90</sup>

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<sup>86</sup> That being said, inconsistencies can be found within the group of developing States. For instance, Mauritius spoke in favour of the sanctions against adopted Myanmar, where the military junta has been accused of using violence against the civilian population, see statement made before the UNGA, A/62/PV.10 (28 September 2007), at 19. Further, regional organizations of the global South, mainly the African Union and ECOWAS, adopt sanctions. However, these are (in principle) only against Member States and would thus be of a multilateral nature, as explained above para. 3.

<sup>87</sup> As suggested by SR Jazairy, recall above para. 3 and accompanying text.

<sup>88</sup> See, e.g., D.H.N Johnson, *The Effect of Resolutions of the General Assembly of the United Nations*, 32 BYBIL (1956); Stephen M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, 73 *American Society International Law Proceedings* (1979).

<sup>89</sup> Blaine Sloan, *General Assembly Resolutions Revisited*, 58 BYBIL (1987), 68-71, referring to Judge de Aréchaga. See also Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963); Jorge Castaneda, *Legal Effects of United Nations Resolutions* (1969) 4-5; Gaetano Arangio-Ruiz, *The UN Declaration on Friendly Relations and the System of the Sources of International Law* (1979).

<sup>90</sup> International Law Association (ILA) Final Report of the Committee on the

32. In the context of its conclusions on the identification of customary international law, the ILC's Draft Conclusion 12(2) acknowledges that: "A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international".<sup>91</sup> In addition, Draft Conclusion 4(2) reads: "In certain cases, the practice of international organizations also contributes to the formation, or expression, or creation, of rules of customary international law."<sup>92</sup> Concerning UNGA resolutions, the ILC called for caution when determining whether they create customary international law.<sup>93</sup> For instance, one should take into account what States actually mean when they adopt a resolution, and hence pay attention to the resolution's wording, the circumstances surrounding its adoption, as well as the reasons behind the vote.<sup>94</sup> The voting figure can also be of importance, a resolution adopted by a two-third majority will carry less weight than one adopted unanimously;<sup>95</sup> it is similarly recommended to observe whether the rule is followed in the practice

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Formation of Customary (General) International Law (London Conference, 2000), 55-65. See also Institute of International Law, Conclusions of the Thirteenth Commission on The Elaboration of General Multilateral Conventions and of Non-contractual Instruments Having a Normative Function or Objective, 'Resolutions of the General Assembly of the United Nations' (Cairo, 1987).

<sup>91</sup> ILC Fourth Report on identification of customary international law (2016) (<http://legal.un.org/docs/?symbol=A/CN.4/695>), 22 Draft Conclusion 12(2). See also ILC Third report on identification of customary international law (2015) (<http://legal.un.org/docs/?symbol=A/CN.4/682>) 31-41, notably para.45.

The ILC's approach has been considered too restrictive and 'state-centric' by some, see Rossana Deplano, Assessing the Role of Resolutions in the ILC Draft Conclusions on Identification of Customary International Law: Substantive and Methodological Issues, *International Organizations Law Review* (forthcoming 2017) ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2972639](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2972639)); and Jed Odermatt, The Development of Customary International Law by International Organizations, 66 *International and Comparative Law Quarterly* (2017).

<sup>92</sup> ILC Fourth Report on identification of customary international law, above n.91, 21.

<sup>93</sup> ILC Third report on identification of customary international law, above n.91, 32, para. 47,

<sup>94</sup> *Ibid*, 33, para. 47 and 34, para. 48.

<sup>95</sup> *Ibid*, 35, para. 49.

of States.<sup>96</sup> Commenting on the ILC's draft conclusions, a report written for the Informal Expert Group on Customary International Law of the AALCO suggested, *inter alia*, that:

the practice of an international organization can count toward the formation or expression of customary international law only if it reflects the practice and positions of the member States and can be counted only with due regard to the strength of the support of its membership and the representativeness of the practice among the States in the international community.<sup>97</sup>

The report also called for the Commission to clarify when resolutions will count as evidence in the identification of custom “in order to ensure better quality in and better respect for the exercise of sovereignty” and to prevent “resolutions of a political nature” to be considered “as constituent material for legally binding rules under customary international law”.<sup>98</sup>

33. Moreover, and as is well known, the ICJ has confirmed that General Assembly resolutions can potentially possess normative value.<sup>99</sup> In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ established that a resolution can provide “evidence of a rule or the emergence of an *opinio juris*”, which can be determined following an examination of “its content and the conditions of its adoption” as well as an examination of “whether an *opinio juris* exists as to its normative character”.<sup>100</sup> A resolution will not have normative value if it is adopted by a divided vote and if the alleged rule refers

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<sup>96</sup> Ibid, para. 51.

<sup>97</sup> YEE Sienho, Report on the ILC Project on “Identification of Customary International Law”, 14 Chinese JIL (2015), para. 33; see also para. 34. In this manner, the report supports the State-centric approach.

<sup>98</sup> Ibid, 398, Comment L on the use of the resolutions of the United Nations General Assembly and similar organizations. This comment illustrates AALCO's concern that State sovereignty be reflected in the ILC's draft conclusions, see Ibid, para. 15.

<sup>99</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, ICJ Reports 1971, 16, (<http://www.icj-cij.org/docket/files/53/5595.pdf>), 31, para.52; Military and Paramilitary Activities, above n.22, paras 99-100, 195 and 204; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Report 2004, 136, (<http://www.icj-cij.org/docket/files/131/1671.pdf>) paras 86-88.

<sup>100</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Report 1996, 226, (<http://www.icj-cij.org/docket/files/95/7495.pdf>), para.70.

to general principles of international law rather than to a more specific one.<sup>101</sup> A further obstacle to a resolution's normative value would be the contradictory State practice outside the United Nations.<sup>102</sup> In addition, we can refer to the criteria outlined by Professor Dupuy, acting as Sole Arbitrator in the *Texaco v. Libya* case (1978), for establishing a resolution's normative value: the type of resolution, the votes and their circumstances, and the legal provisions.<sup>103</sup> In order to be binding, the resolutions must be accepted as such by the UN Member States. Even if a majority adopts the text, it needs to represent various groups of States.<sup>104</sup> With regard to the content of the resolutions, Professor Dupuy made the distinction between provisions asserting a right accepted by the majority of States and provisions introducing new principles.

34. Turning to the topic of our study, the resolutions addressed above do not satisfy the required criteria for establishing the formation of an autonomous customary norm prohibiting economic coercion, or even an emerging prohibition. First, though a large majority adopts the resolutions, it only represents slightly above two-thirds of the Member States, thus carrying less quantitative weight. In addition, the vote remains heavily divided, especially in the case of the topic *Human rights and unilateral coercive measures*, and the majority is insufficiently representative of a variety of States. Concerning the resolutions on economic coercion against developing countries, though there are only two negative votes, on behalf of the US and Israel, there are over fifty abstentions emanating from the EU Member States and their allies. As the explanation of the abstention is ambiguous, it cannot count as inaction and therefore as a form of acceptance as law. Further, given the EU's practice of adopting restrictive measures one could argue with difficulty that the organization believes that UCM are contrary to international law.

35. Second, the objections to sanctions do not refer to a specific prohibition but rather to general principles of international law and the UN Charter, such as the principle of non-intervention. Therefore, because of the broad nature of the condemnations it is unclear exactly what the scope of a potential prohibition would be. Measures of coercion are mainly condemned because of their effects on human rights or on the targeted State's economy; States appear to be objecting to the misuse of UCM. The only clear legal claim would be that coercive measures cannot be adopted without a UNSC mandate, but this is immediately countered by US and EU's voting patterns and their consistent adoption of non-UN sanctions.

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<sup>101</sup> Ibid, paras 71-72.

<sup>102</sup> Ibid, para.73.

<sup>103</sup> *Texaco v. Libya*, above n.56, 29, para.86.

<sup>104</sup> Ibid.

36. Finally, though the resolutions are repeatedly adopted,<sup>105</sup> repetition is not generally considered to be a sufficient basis for arguing that the provisions of a resolution represent custom.<sup>106</sup> Consequently, the most that can be said about the texts is that they demonstrate a majority of the international community's desire to, if not prohibit, then at least regulate resort to UCM and restrict their use. Indeed, the repeated adoption of these resolutions can be understood as an attempt to 'establish international standards of behaviour'<sup>107</sup> by the large majority of States that vote in their favor. Through these resolutions, developing States are expressing their expectation that States refrain from adopting unilateral coercive measures in their international relations.<sup>108</sup> This expectation is however not reciprocated by the developed States, in light of their negative votes and/or abstentions.

37. With these considerations in mind, the present author submits that it would be unsatisfactory to end the analysis here; the resolutions clearly illustrate tension between the aspirations of developing countries to restrict the use of economic coercion, even when their alleged aim is to enforce compliance with essential international norms, and the continuing practice of developed States.<sup>109</sup> The debates on UCM within the United Nations seem to demonstrate that the dispute on the legality of economic coercion can also be read as a dispute on the legitimacy of these measures. On the one hand, developed States – such as the US and EU Member States – justify economic coercion as, among other things, a legitimate means to achieve foreign policy objectives and enforce community norms. On the other hand, developing States – through the Group of 77 and the Non-Aligned Movement – condemn economic coercion by submitting that these acts, *inter alia*, constitute a form of wrongful intervention aimed at pressuring them into changing their internal policies. Though questions of legality are separate from considerations of legitimacy, if a State views a practice as illegitimate it may develop legal arguments as a means to contest the undesired behaviour. This appears to be the case regarding

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<sup>105</sup> See above paras 19 and 20.

<sup>106</sup> ILA Final Report of the Committee on the Formation of Customary (General) International Law, above n.90, 59; Higgins, above n.89, 6; ILC Third report on identification of customary international law, above n.91, 40, para. 53.

<sup>107</sup> Deplano, above n.91, at 20, citing Thomas M. Franck and Mark M. Munansangu, *The New International Economic Order: International Law in the Making?*, UNITAR Policy and Efficacy Studies n. 6 (1982).

<sup>108</sup> Although their own practice may sometimes be at odds with this expectation, see above n.86 and accompanying text.

<sup>109</sup> Similarly see *Legality of the Threat or Use of Nuclear Weapons*, above n.100, para.73. See also Jamnejad and Wood, above n.26, 370-371.

UCM, as the discussions at the UN seem to be influenced by political considerations and lead to a stalemate that has important implications for the development of international law.<sup>110</sup>

38. Thus, having demonstrated the existence of a legal conundrum pertaining to UCM, in the next section we address the political issues it reflects by focusing on the social factors – mainly State identities and values<sup>111</sup> – that contribute to its construction. Indeed, as demonstrated in Part II, commentators are aware of the objections to economic coercion yet struggle to properly address them; accordingly, there is the need for more clarity.

#### **IV. The legal claims on UCM: between justifying enforcement and resisting intervention**

39. If our objective is to address the stalemate resulting from the legal claims of both groups, then it is important to understand what led to its creation in the first place. To quote Koskenniemi, legal arguments do not descend from heaven but are the product of a group's history and socialization.<sup>112</sup> Choosing to apprehend the legal arguments of both groups from a sociological perspective, it is submitted that variables such as “norms” (or values) and “identity” can help explain these rival arguments and what is at stake for both parties. We can also refer to Jouannet, according to whom certain conflicts in international law are existential; their source lies in issues related to culture and identity.<sup>113</sup> She has furthermore written that “all law transcribes the values of those that create it; it is not a substance-less form, but the translation of the values of the society it regulates”.<sup>114</sup> To quote Koskenniemi again, international law “contains arguments and positions, precedents and principles that may be employed to express contrasting interests or values [...]”.<sup>115</sup> It follows that if a conflict on what the law should be arises, this may very well be caused by conflicting values (based on culture and ethical norms) and identities.

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<sup>110</sup> Oisín Suttle, *Law as deliberative discourse: the politics of international legal argument – social theory with historical illustrations*, 12:1 *Journal of International Law and International Relations*, at 176: “the dilemma is political; but it is through legal discourse that the dilemma is constituted.”

<sup>111</sup> Recall Hirsch, above n.12 and accompanying text.

<sup>112</sup> Martti Koskenniemi, *From Apology to Utopia, the structure of the international legal argument* (2007), 11.

<sup>113</sup> Emmanuelle Jouannet, *Universalism and Imperialism: The True-False Paradox of International Law?*, 18:3 *EJIL* (2007), 402

<sup>114</sup> *Ibid*, 387.

<sup>115</sup> Martti Koskenniemi, *International law in the world of ideas*, in: James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (2012), 59.



According to Hopf, “identities strongly imply a particular set of interests or preferences with respect to choices of action in particular domains, and with respect to particular actors”.<sup>116</sup> This reasoning can also apply to international law, in the sense that a particular identity will imply a particular inclination for what should be legal or illegal. Norms are considered as values and as “expected standards of behaviour created within a given social setting”.<sup>117</sup> As law’s purpose is to regulate behaviour, when a State claims that certain conduct is contrary to international law, it can also be using legal principles to argue that the behaviour is not conform to social expectations or to the ideals the community of States should strive to reach.<sup>118</sup>

40. In the section that follows we will assess the norms and identities of the US and of the EU, whose voting pattern in the GA and practice block the emergence of a prohibition of economic coercion. We will then turn to our second group of States, which contains the G77 and China and the NAM, who constantly submit the resolutions to the Second and Third Committees and who vote in their favor. As the positions as well as, to a certain extent, the membership of the G77 and China and the NAM overlap,<sup>119</sup> we will only focus on the latter group. By taking into account discourse from both groups,<sup>120</sup> we will assess how each group defines itself in relation to the other group (identity) and identify what each group considers to be appropriate behavior as well as the values it believes international law should protect (social and ethical norms).

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<sup>116</sup> Ted Hopf, *The Promise of Constructivism in International Relations Theory* 23:1 *International Security* (1998), 175. See also David P. Houghton, *Reinvigorating the Study of Foreign Policy Decision Making: Toward a Constructivist Approach*, 3 *Foreign Policy Analysis* (2007), 29-30.

<sup>117</sup> Jutta Brunnée and Stephan J. Toope, *Constructivism and International Law*, in: Jeffrey L. Dunoff and Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2012), at 1; see also Peter Katzenstein, *Introduction: Alternative Perspectives on National Security*, in: Peter Katzenstein (ed.) *The Culture of National Security: Norms and Identity in World Politics* (1996), 5.

<sup>118</sup> Moshe Hirsch, *The Impact of the Advisory Opinion on Israel’s Future Policy: International Relations Perspective*, *Journal of International Law and International Relations* (2004/2005), 338-339.

<sup>119</sup> China is, however, not a member of the NAM. We will nevertheless incorporate its position on UCM in section IV.B below.

<sup>120</sup> On the link between identity and discourse see Ted Hopf, *Social Construction of International Politics* (2002), 1: “each identity has associated with it a collection of discursive practices”; See also Hirsch, above n.12, 97: “language [...] and the construction of social identity are inextricably linked. [...] Collective narratives and memories often contribute to the emergence and maintenance of social identities.”

#### IV.A. Coercion as legitimate enforcement: the United States and the European Union

41. We begin with the US, which defines itself as a world leader responsible for promoting values that will make the world a better place. These are typically linked to democracy, human rights, the rule of law and liberalism. It would appear logical that sanctions are a necessary and legitimate tool for any State that considers itself a world leader and believes that it should promote specific values.<sup>121</sup> As we saw above, the US consistently states that unilateral economic measures constitute a sovereign right. Sanctions are an important foreign policy tool designed to respond to threats to US interests,<sup>122</sup> including national security, foreign policy and economy. The concept of “threat” has a very broad meaning in American legislation, as a threat can constitute human rights violations in foreign countries. This far-reaching definition can be explained by the fact that if the US aims to promote values such as democracy and human rights, it is because these are viewed as not only serving their interests but also as necessary for the international community.<sup>123</sup> In this sense, sanctions are used to demonstrate the US “commitment to advancing respect for human rights [and] safeguarding democratic institutions”.<sup>124</sup> Acts of economic coercion are permissible in as much as they seek to, *inter alia*, obtain “noble objectives” on behalf of the international community.<sup>125</sup> Individuals and entities that are targeted by American sanctions have been described as “bad” or

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<sup>121</sup> US Department of the Treasury, Press Center “Remarks of Secretary Lew on the Evolution of Sanctions and Lessons for the Future at the Carnegie Endowment for International Peace” (30 March 2016) (<https://www.treasury.gov/press-center/press-releases/Pages/jl0398.aspx>) (hereafter “Remarks of Secretary Lew”): “The power of our sanctions is inextricably linked to our leadership role in the world”.

<sup>122</sup> US Department of the Treasury, Remarks of Secretary Lew, above n.121; US Department of Treasury, About OFAC (Office of Foreign Assets Control) (<https://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx>) ; US Department of State, ‘Economic Sanctions Policy and Implementation’ (<http://www.state.gov/e/eb/tfs/spi/>).

<sup>123</sup> Jeffrey Goldberg, The Obama Doctrine, The Atlantic, April 2016. (<http://www.theatlantic.com/magazine/archive/2016/04/the-obama-doctrine/471525/>); See also US Department of the Treasury, Remarks of Secretary Lew, above n.121.

<sup>124</sup> US Department of State, Venezuela-Related sanctions (<http://www.state.gov/e/eb/tfs/spi/venezuela/index.htm>).

<sup>125</sup> See references above n.74.

“malign” actors.<sup>126</sup> The US has a “like-minded partner”,<sup>127</sup> the EU, which shares similar values and which is not against adopting sanctions, which it calls “restrictive measures”.

42. It is widely recognized that the EU also sees itself as the promoter of human rights and democratic values in international relations.<sup>128</sup> The region differs from the US in the sense that it does not position itself as a world leader but instead defines itself as a partner with key international players, it therefore develops strategic partnerships through which it seeks to promote human rights norms and democratic values.<sup>129</sup> The actions that trigger the implementation of restrictive measures are not necessarily phrased in terms of “threat”, but as policies that the EU perceives as contrary to international law or ethical norms.<sup>130</sup> The aim of the EU’s restrictive measures is to minimise negative effects of “undesirable” policies and to encourage a change in behaviour.<sup>131</sup> Since the EU uses elements of soft power as a means to influence world affairs and promote its values, it needs to maintain relations with other States and in particular those it wants to influence. For these reasons, the EU uses sanctions strategically, arguing that they are permissible in certain circumstances,<sup>132</sup> but that they cannot be used in isolation. The desire for

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<sup>126</sup> US Department of the Treasury, Remarks of Secretary Lew, above n.121.

<sup>127</sup> Ibid.

<sup>128</sup> Evidenced by official documents: Consolidated Version of the Treaty on the EU (2012) OJ C326/15 (hereafter “TEU”), Articles 2, 3(5) and 21. See also EU External Action Service (EEAS), Foreign Affairs ([http://collections.internetmemory.org/haeu/content/20160313172652/http://eeas.europa.eu/policies/index\\_en.htm](http://collections.internetmemory.org/haeu/content/20160313172652/http://eeas.europa.eu/policies/index_en.htm)). Restrictive measures play a key role in achieving foreign policy goals, as described here EEAS, Sanctions policy ([http://eeas.europa.eu/topics/sanctions-policy/423/sanctions-policy\\_en](http://eeas.europa.eu/topics/sanctions-policy/423/sanctions-policy_en)): “Sanctions are one of the EU’s tools to promote the objectives of the [CFSP]: peace, democracy and the respect for the rule of law, human rights and international law”.

On EU identity in relation to restrictive measures see Hirsch, above n.12, 106-116.

<sup>129</sup> Based on TEU, above n.128, Articles 21 and 22.

<sup>130</sup> European Commission ‘Restrictive measures’ (Spring 2008) ([http://eeas.europa.eu/cfsp/sanctions/docs/index\\_en.pdf](http://eeas.europa.eu/cfsp/sanctions/docs/index_en.pdf), accessed 2 June 2016) 1: “Sanctions are an instrument of a diplomatic or economic nature which seek to bring about a change in activities or policies such as violations of international law or human rights, or policies that do not respect the rule of law or democratic principles”.

<sup>131</sup> Ibid, 6. See also EEAS, Sanctions policy, above n.128.

<sup>132</sup> Note that the EU explains that “All restrictive measures adopted by the EU are **fully compliant with obligations under international law**, including

partnership and the need to be strategic can provide an explanation for the ambiguity of the EU's voting pattern in the UN debates on UCM. The EU cannot justify coercion in the same way as the US as this would place it against the States it wants to develop partnerships with, and yet the regional organization cannot entirely side with developing countries as this would be inconsistent with its practice<sup>133</sup> and would place it in opposition to the US. The EU is therefore careful to state that sanctions are "admissible in certain circumstances" but that they should be adopted within a comprehensive policy approach.

43. The desire to enforce particular values is perceptible in the reasons given by the EU and the US as justifications for the UCM adopted against, amongst others, Myanmar, Syria, Belarus and Russia. The EU first adopted restrictive measures against Myanmar for severe violations of human rights, notably the repression of civil and political rights;<sup>134</sup> they were subsequently renewed because there had been insufficient progress in the situation of human rights.<sup>135</sup> As the situation improved the sanctions were progressively lifted but, at present, an arms embargo remains in place.<sup>136</sup> Whereas trade and financial sanctions have been lifted, the EU sanctions against goods that may be used in internal repression have been renewed.<sup>137</sup> Like the EU, the US implemented

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those pertaining to human rights and fundamental freedoms" (emphasis in original) in: Sanctions: how and when the EU adopts restrictive measures (<http://www.consilium.europa.eu/en/policies/sanctions/>).

<sup>133</sup> This is quite different from the Russian approach to sanctions. During the Cold War, the USSR condemned the adoption of unilateral sanctions as a means to win over developing countries even though the Soviet Union also adopted such measures. See, e.g., Mergen Doraev, "The Memory Effect" of Economic Sanctions against Russia: opposing approaches to the legality of unilateral sanctions clash again, 37 *U. Pa. J. Int'l L.* (2015), 355.

<sup>134</sup> Common Position 96/635/CFSP of 28 October 1996 defined by the Council on the basis of Article J.2 of the Treaty on European Union, on Burma/Myanmar, OJ L287/1 (1996).

<sup>135</sup> Council Common Position 2002/310/CFSP of 22 April 2002 extending Common Position 96/635/CFSP on Burma/Myanmar, OJ L107/1 (2002), para. 2.

<sup>136</sup> Council Decision (CFSP) 2016/627 of 21 April 2016 amending Decision 2013/184/CFSP concerning restrictive measures against Myanmar/Burma OJ L106/23 (2016); to be read in conjunction with Council Decision 2013/184/CFSP of 22 April 2013 concerning restrictive measures against Myanmar/Burma and repealing Decision 2010/232/CFSP OJ L111/75 (2013).

<sup>137</sup> Michael O'Kane, EU renews Burma/Myanmar sanctions for 1 year, *European Sanctions* (26 April 2017) (<https://europeansanctions.com/2017/04/26/eu->

sanctions in response to severe political repression. The sanctions were adopted in 1997<sup>138</sup> and adapted over time as Myanmar progressively advanced democracy, culminating in elections in November 2015. Today, after almost 20 years, the US sanctions against Myanmar have been lifted, including the arms embargo.<sup>139</sup>

44. EU restrictive measures were implemented against Syria for acts of political repression in 2011 and are still in force;<sup>140</sup> the EU has affirmed that it “would continue imposing and enforcing sanctions targeting the regime and its supporters as long as repression continues”.<sup>141</sup> Similarly, US sanctions were adopted against Syria in reaction to the government’s “human rights abuses, including those related to the repression of the people of Syria”.<sup>142</sup>

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- renews-burmamyanmar-sanctions-for-1-year/)
- <sup>138</sup> Executive Order (“EO”) 13047 (22 May 1997) (<https://www.treasury.gov/resource-center/sanctions/Documents/13047.pdf>), progressively adapted by EO 13310 (July 30 2003) (<https://www.treasury.gov/resource-center/sanctions/Documents/13310.pdf>); EO 13448 (October 23 2007) (<https://www.treasury.gov/resource-center/sanctions/Documents/13448.pdf>); EO 13619 (July 13 2012) (<https://www.treasury.gov/resource-center/sanctions/Programs/Documents/13619.pdf>).
- <sup>139</sup> EO “Termination of Emergency with Respect to the Actions and Policies of the Government of Burma” ([https://www.treasury.gov/resource-center/sanctions/Programs/Documents/burma\\_eo\\_termination.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/burma_eo_termination.pdf)).
- <sup>140</sup> Council Decision 2011/273/CFSP of 9 May 2011 concerning restrictive measures against Syria, OJ L121/11 (2011); subsequently amended by Council Decision 2012/739/CFSP of 29 November 2012 concerning restrictive measures against Syria and repealing Decision 2011/782/CFSP, OJ L330/21 (2012), and Council Decision 2013/255/CFSP of 31 May 2013 concerning restrictive measures against Syria, OJ L47/14 (2013), which remains in force, see Council Decision (CFSP) 2017/917 of 29 May 2017 amending Decision 2013/255/CFSP concerning restrictive measures against Syria, OJ L319/62 (2017).
- <sup>141</sup> Council of the EU, Press Release, Syria: EU extends sanctions against the regime by one year (27 May 2016) (<http://www.consilium.europa.eu/en/press/press-releases/2016/05/27-syria-eu-extends-sanctions/>).
- <sup>142</sup> EO 13572 (May 3 2011) (<https://www.treasury.gov/resource-center/sanctions/Programs/Documents/13572.pdf>), supplemented by EO 13573 (May 20 2011) (<https://www.treasury.gov/resource-center/sanctions/Programs/Documents/13573.pdf>) in view of the “continuing escalation of violence against the Syrian people”; and EO 13582 (August 22 2011) (<https://www.treasury.gov/resource-center/sanctions/Programs/Documents/13582.pdf>).

45. With regard to the EU restrictive against Belarus, these have been implemented in response to Belarus' alleged imprisonment of political activists and failure to hold free and fair elections,<sup>143</sup> hence for not respecting democratic principles. In February 2016, the EU lifted a significant amount of its restrictive measures, citing "improving EU-Belarus relations".<sup>144</sup> However, sanctions were reintroduced a year later.<sup>145</sup> US sanctions were adopted against Belarus in 2006 for policies that undermine democratic process and human rights abuses related to political repression;<sup>146</sup> these measures have been promulgated.<sup>147</sup>

46. Concerning sanctions against Russia, in 2012, the US Congress adopted the Magnitsky Act, which targets individuals who are, *inter alia*, "responsible for extrajudicial killings, torture, or other human rights violations committed against individuals seeking to promote human rights or to expose illegal activity carried out by officials of the government of the Russian Federation".<sup>148</sup> The scope of the Act was enlarged by Congress to target human

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center/sanctions/Programs/Documents/syria\_eo\_08182011.pdf).

<sup>143</sup> Council Common Position 2004/661/CFSP of 24 September 2004 concerning restrictive measures against certain officials of Belarus, OJ L301/67 (2004), repealed by Council Common Position 2006/276/CFSP of 10 April 2006 concerning restrictive measures against certain officials of Belarus and repealing Common Position 2004/661/CFSP, OJ L101/5 (2006). Further restrictive measures were imposed in 2006, 2010 and 2012 for alleged violations of electoral standards.

<sup>144</sup> Council of the EU, Council Conclusions on Belarus (15 February 2016) ([http://www.consilium.europa.eu/en/press/press-releases/2016/02/15-fac-belarus-conclusions/?utm\\_source=dsms-auto&utm\\_medium=email&utm\\_campaign=Council+conclusions+on+Belarus](http://www.consilium.europa.eu/en/press/press-releases/2016/02/15-fac-belarus-conclusions/?utm_source=dsms-auto&utm_medium=email&utm_campaign=Council+conclusions+on+Belarus)).

<sup>145</sup> Council Decision (CFSP) 2017/350 of 27 February 2017 amending Decision 2012/642/CFSP concerning restrictive measures against Belarus, OJ L 50/81 (2017). See also Michael O'Kane, EU renews Belarus sanctions, *European Sanctions* (28 February 2017) (<https://europeansanctions.com/2017/02/28/eu-renews-belarus-sanctions-2/>).

<sup>146</sup> EO 13405 (20 June 2006) (<https://www.treasury.gov/resource-center/sanctions/Documents/13405.pdf>).

<sup>147</sup> White House Press Release (10 June 2016) (<https://www.whitehouse.gov/the-press-office/2016/06/10/message-continuation-national-emergency-respect-actions-and-policies>).

<sup>148</sup> HR 6156, 112<sup>th</sup> Congress, Russia And Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012 (December 12 2012) (<https://www.congress.gov/bill/112th-congress/house->

rights abuses worldwide.<sup>149</sup> Additionally, since 2014, US sanctions<sup>150</sup> and EU restrictive measures<sup>151</sup> have been implemented against Russia in order to condemn its violation of Ukraine's territorial integrity and sovereignty and its perceived interference in the conflict in Eastern Ukraine. In adopting these measures, the European Council stated that the aim is to send a "powerful signal to the leaders of the Russian Federation: destabilising Ukraine, or any other Eastern European neighbouring State, will bring heavy costs to its economy" and will cause Russian isolation.<sup>152</sup> In light of the concerns that President-elect Trump would lift the sanctions against Russia, prior to leaving

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[bill/6156?q={%22search%22%3A\[%22H.R.+6156%22\]}&r=2](https://europeansanctions.com/2017/05/22/canadian-government-endorses-magnitsky-sanctions-bill/)).

Note that the Canada, Lithuania, Estonia and the United Kingdom have adopted their own "Magnitsky-type" sanctions. See: Michael O'Kane, Canadian government endorses Magnitsky sanctions bill, European Sanctions (22 May 2017) (<https://europeansanctions.com/2017/05/22/canadian-government-endorses-magnitsky-sanctions-bill/>); Maya Lester, Lithuanian parliament introduces Magnitsky sanctions bill, European sanctions (28 April 2017) (<https://europeansanctions.com/2017/04/28/lithuanian-parliament-introduces-magnitsky-sanctions-bill/>); Michael O'Kane, Estonia introduces Magnitsky-style sanctions on human rights violators, European sanctions (19 December 2016) (<https://europeansanctions.com/2016/12/19/estonia-introduces-magnitsky-style-sanctions-on-human-rights-violators/>); Michael O'Kane, UK set to vote on "Magnitsky" sanctions against human rights violators, European sanctions (5 December 2016) (<https://europeansanctions.com/2016/12/05/uk-set-to-vote-on-magnitsky-sanctions-against-human-rights-violators/>).

<sup>149</sup> S 284, 114<sup>th</sup> Congress, Global Magnitsky Human Rights Accountability Act (17 December 2016) (<https://www.congress.gov/bill/114th-congress/senate-bill/284>).

<sup>150</sup> EO 13660 (6 March 2014); EO 13661 (16 March 2014); EO 13662 (20 March 2016), all available here: (<https://www.state.gov/e/eb/tfs/spi/ukrainerussia/>).

<sup>151</sup> Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 78/16 (2014), para. 4; Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine OJ L 229/13 (2014).

<sup>152</sup> European Council, Statement by the President of the European Council Herman Van Rompuy and the President of the European Commission in the name of the European Union on the agreed additional restrictive measures against Russia, EUCO 158/14 (29 July 2014), ([https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/144158.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/144158.pdf)).

office in January 2016 Barack Obama reiterated that the rationale behind the sanctions “has to do with [Russia’s] actions in Ukraine. And it is important for the United States to stand up for the basic principle that big countries don’t go around and invade and bully smaller countries”.<sup>153</sup> At the time of writing, the EU and US sanctions remain in place.

47. Finally, we can also refer to the US sanctions against Venezuela adopted in March 2015 for the Venezuelan government’s human rights violations and repression in response to political opposition.<sup>154</sup> Furthermore, in May 2017, 8 judges of the Venezuelan Supreme Court were sanctioned “for a number of judicial rulings in the past year that have usurped the authority of Venezuela’s democratically-elected legislature, the National Assembly [...] thereby restricting the rights and thwarting the will of the Venezuelan people”.<sup>155</sup>

48. To summarize, sanctions are used to promote US and EU values, which are very much related to their political identities and the importance they attach to democratic regimes. They therefore exercise pressure on States to adopt similar values and to cease what they perceive as “bad” or “undesirable” behavior. Consequently, UCM are framed as legitimate enforcement of essential norms. Unsurprisingly, such policies are not well received by the targeted States, which we will now turn to.

#### **IV.B. Coercion as illegitimate intervention: the Non-Aligned Movement**

49. As is well known, the NAM came into existence during the Cold War; the objectives of this group were not only to safeguard their independence from external pressure, but also to speak against (neo-)colonial and imperialist practices. Today, restructuring the world economic order is also on the NAM’s agenda. Indeed, the NAM final documents reveal that the group is very conscious of the North/ South divide and economic discrepancies. As the NAM group is sensitive to this reality, it resents the fact that the so-called

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<sup>153</sup> Obama’s Last News Conference: Full Transcript and Video, NY Times (18 January 2017) ([https://www.nytimes.com/2017/01/18/us/politics/obama-final-press-conference.html?\\_r=0](https://www.nytimes.com/2017/01/18/us/politics/obama-final-press-conference.html?_r=0)).

<sup>154</sup> EO 13692 (March 11 2015) ([https://www.treasury.gov/resource-center/sanctions/Programs/Documents/venezuela\\_eo.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/venezuela_eo.pdf)); The White House, Office of the press secretary, FACT SHEET: Venezuela Executive Order (March 9 2015) (<https://www.whitehouse.gov/the-press-office/2015/03/09/fact-sheet-venezuela-executive-order>).

<sup>155</sup> US Department of the Treasury, Press Center, Treasury Sanctions Eight Members of Venezuela’s Supreme Court of Justice (18 May 2017) (<https://www.treasury.gov/press-center/press-releases/Pages/sm0090.aspx>).



“Powerful few” use their economic strength to impose behaviour and values.<sup>156</sup>

50. As a matter of policy, the group categorically rejects UCM<sup>157</sup> and seeks to eradicate their adoption.<sup>158</sup> This was reiterated during the NAM summit of 2016, where the NAM heads of State and of government:

expressed their condemnation at the promulgation and application of [UCM] against countries of the Movement, in violation of the Charter of the [UN] and international law, particularly the principles of non-intervention, self-determination and independence of States subject of such practices. In this respect, they reiterated their determination to denounce and demand the repeal of such measures [...].<sup>159</sup>

51. It is clear that the group of developing States expects behaviour that upholds UN principles and that they have a preference for multilateral rather than unilateral practices. This is evidenced by the fact that one of the main purposes and principles of the movement is “to promote and reinforce

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<sup>156</sup> Letter dated 98/10/07 from the Permanent Representative of South Africa to the United Nations addressed to the Secretary-General (“Letter dated 98/10/07 from the Permanent Representative of South Africa”) S/1998/1071 (13 November 1998), Annex I Final Document of the 12th Conference of Heads of State or Government of Non-Aligned Countries (1998): at 13 point 7, 17 point 23, 51-52 points 173, 174 and 177; 16<sup>th</sup> Summit of Heads of State or Government of the Non-Aligned Movement, ‘Tehran Declaration’ Tehran, Islamic Republic of Iran, 30–31 August 2012 NAM/2012/Doc.7, para. 1(e).

<sup>157</sup> 16<sup>th</sup> Summit of Heads of State or Government of the Non-Aligned Movement, ‘Final Document’ Tehran, Islamic Republic of Iran, 26–31 August 2012 NAM2012/Doc.1/Rev.2 (31 August 2012), para. 24.4.

<sup>158</sup> Letter dated 98/10/07 from the Permanent Representative of South Africa, above n.156, 9: “We must take up the challenge to fundamentally transform international relations, so as to eradicate (...) unilateral coercive measures and unfair economic practices”. See also 16<sup>th</sup> Summit, Tehran Declaration, above n.156, para.8. For similar positions expressed by the G77 see: Declaration on the occasion of the Twenty-fifth Annual Ministerial Meeting of the Group of 77 (New York, 16 November 2001) (<http://www.g77.org/doc/Decl2001.htm>), para.30; Ministerial Declaration adopted by the 35th Annual Meeting of Ministers for Foreign Affairs of the Group of 77 (New York, 23 September 2011) (<http://www.g77.org/doc/Declaration2011.htm>), para.39.

<sup>159</sup> Declaration of the 17th Summit of Heads of State and Government of the Non-Aligned Movement, The Diplomatic Society (22 September 2016) (<http://www.thediplomaticsociety.co.za/home/16-home/1939-17th-summit-of-heads-of-state-and-government-of-the-non-aligned-movement>), point 6

multilateralism and, in this regard, strengthen the central role that the [UN] must play".<sup>160</sup> Historically, the UN arena enabled these States to successfully fight colonialism and gain independence; consequently the group attaches importance to the rules and principles of the UN Charter.<sup>161</sup> The NAM believes that multilateralism and equality between States are undermined by the imposition of UCM<sup>162</sup> and condemns "all manifestations of unilateralism and attempts to exercise hegemonic domination in international relations".<sup>163</sup> One of the NAM's principles is to refrain from adopting sanctions against other countries.<sup>164</sup> If UCM are rejected, sanctions adopted by the UN Security Council are acceptable provided certain conditions are respected.<sup>165</sup>

52. The NAM countries also call for dialogue and a culture sensitive approach to human rights issues.<sup>166</sup> Whereas the EU adopts restrictive

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<sup>160</sup> 14<sup>th</sup> Summit Conference of the Heads of State or Government of the NAM, Declaration on the Purposes and Principles and the Role of the Non-Aligned Movement in the Present International Juncture, Havana, Cuba, 11-16 September 2006, NAM 2006/Doc.5/Rev.3, para.8(a), see also paras 2, 9(s), 12(iii); Letter dated 2011/06/29 from the Permanent Representative of Egypt to the United Nations addressed to the Secretary-General "Letter dated 2011/06/29 from the Permanent Representative of Egypt") S/2011/407 (7 July 2011), Annex II Bali Commemorative Declaration on the 50th Anniversary of the Establishment of the Non-Aligned Movement, 187.

<sup>161</sup> 16<sup>th</sup> Summit Tehran Declaration, above n.156, para.1(b).

<sup>162</sup> Letter dated 2011/06/29 from the Permanent Representative of Egypt, above n.160, Annex I Final Document..., para.26.4; 16<sup>th</sup> Summit, Final Document, above n.157, paras 25.4 and 27.8.

<sup>163</sup> 14<sup>th</sup> Summit, Declaration of the purposes and principles, above n.160, para. 8(i).

<sup>164</sup> Ibid, para. 9.i. See also Letter dated 2011/06/29 from the Permanent Representative of Egypt, above n.160, Annex I Final Document..., para. 25.4.

<sup>165</sup> 16<sup>th</sup> Summit, Final Document, above n.157, para. 91.5. In this document it is however indicated that Security Council sanctions are a "blunt instrument" and an "issue of serious concern" to the NAM. The Movement indicated that these measures should be imposed, *inter alia*, only when "there exists a threat to international peace and security or an act of aggression, in accordance with the Charter" and not "preventively" in instances of mere violation of international law, norms or standards". Further, the Security should only adopt sanctions after peaceful settlement measures have been exhausted. When it imposes such measures, the objectives should be "clearly defined". This concern points to the fear of abuse of sanctions by the Security Council. See also Ibid, paras 92.8 and 226.20.

<sup>166</sup> Letter dated 2011/06/29 from the Permanent Representative of Egypt, above n.160, Annex I Final Document, para. 496.1: "human rights issues must be

measures in response to violations of civil and political rights, which are valued as democratic principles, certain developing countries argue that disproportionate attention is given to such rights, and recall the importance of economic, social and cultural rights.<sup>167</sup> Although the US believes that human rights and democratic principles need to be enforced in order to make the world a better place, the NAM has stated that:

We recognise that human rights and democracy do not, of themselves, automatically bring a better world. They require an environment of peace and development, respect for sovereignty, territorial integrity, and non-interference in the internal affairs of States. Socio-economic rights, including the right to development, are inextricably part of human rights.<sup>168</sup>

53. In addition to the NAM, China's stance towards non-UN sanctions is equally relevant to this discussion.<sup>169</sup> Indeed, China would appear to reject the adoption of unilateral coercive measures,<sup>170</sup> as is elucidated in a statement made by the Chinese representative during a Security Council meeting on "General issues relating to sanctions":

a small number of countries act at will according their domestic laws and impose or threaten to impose unilateral sanctions against other States, which is not only in violation of the principle of sovereign equality among Member States but also undermine the authority of Council sanctions. [...]

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addressed within the global context through a constructive, non-confrontational, non-politicized and non-selective dialogue based approach, in a fair and equal manner, with objectivity, respect for national sovereignty and territorial integrity, non-interference in the internal affairs of States, impartiality, non-selectivity and transparency as the guiding principles, taking into account the political, historical, social, religious and cultural particularities of each country". See also 16<sup>th</sup> Summit Tehran Declaration, above n.156, para. 4; 14<sup>th</sup> Summit, Declaration of the purposes and principles, above n.160, point 8(g).

<sup>167</sup> Statement by Iran before the UNGA Third Committee, A/C.3/68/SR.35 (31 October 2013), para. 70; Statement by Nigeria before the UNGA Third Committee, A/C.3/69/SR.35 (30 December 2014), para. 53.

<sup>168</sup> Letter dated 98/10/07 from the Permanent Representative of South Africa, above n.156, 11.

<sup>169</sup> Notably because it votes in favour of the resolutions on Human Rights and Unilateral Coercive Measures and Unilateral economic measures as a means of political and economic coercion against developing countries.

<sup>170</sup> Recall above para. 1 of this article. China is also a member of AALCO, which condemned unilateral sanctions in the report quote above n.4.

Sanctions should not be a tool for one country to use in pursuit of power politics. The domestic law of one country should not become the basis for sanctions against other States. China is opposed to any practice of imposing sanctions on other countries on the basis of one's domestic law.<sup>171</sup>

More recently, a spokesperson of the Chinese Ministry of Foreign Affairs reiterated that “[w]ith regard to unilateral sanctions, the Chinese side has all along disapproved of unilateral sanctions in international affairs. [...]”<sup>172</sup>

54. China's opposition to unilateral sanctions echoes the NAM's preference for multilateralism. Indeed, in 2015 President Xi Jinping asserted before the UN General Assembly that Member States “should be committed to multilateralism and reject unilateralism”.<sup>173</sup> He also emphasized that “[States] should resolve disputes and differences through dialogue and consultation”.<sup>174</sup> The rejection of UCM and a preference for multilateral practices could be explained by what Vanhullebusch identified as China's desire to adopt policies that promote harmony in inter-State relations in accordance with the Five Principles of Peaceful Coexistence.<sup>175</sup> Similarly to the creation of the NAM,

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<sup>171</sup> S/PV.7323, above n.79, 14. Also quoted in ZHU Lijiang, *Chronology of Practice: Chinese Practice in Public International Law in 2014*, 14 *Chinese JIL* (2015), 639-640, para.61. Other non-NAM members that made similar comments during meeting S/PV.7323, above n.79, are Argentina at 13 and Russia at 19.

<sup>172</sup> Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Lu Kang's Regular Press Conference on April 13, 2017 ([http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/2511\\_665403/t1453551.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1453551.shtml)), answer given in response to the following question: “We are recently told by the US official that the US may be considering new economic sanctions for the DPRK, including some which may target Chinese companies and banks. Does China have any response?”. See also Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on January 18, 2017, ([http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/t1431615.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1431615.shtml)): “China always opposes unilateral sanctions [...]”. Recall the Russia-China declaration on the Promotion of International Law, above n.1, as well as the Joint Communiqué of the 14<sup>th</sup> Meeting..., above n.3.

<sup>173</sup> Address by President H.E. Xi Jinping before the UNGA summit meeting, A/70/PV.13 (28 September 2015), 19.

<sup>174</sup> *Ibid.*

<sup>175</sup> Matthias Vanhullebusch, *Regime Change, the Security Council and China*, 14 *Chinese JIL* (2015), 665-707. On the Five Principles of Peaceful Coexistence see the special issue in 13 *Chinese JIL* (2014). On Chinese approach to

these principles were initiated by China, India and Myanmar in “response to developing countries’ appeal against imperialism, colonialism and hegemonism, and reflected the aspirations of those countries for independence, autonomy, self-improvement and development”.<sup>176</sup> The adoption of unilateral coercive measures would seem to run counter the Five Principles. For instance, according to Liu Zhenmin, the principle of peace would require States to “refrain from unilateral actions, and commit themselves to settling disputes through negotiations and consultations”.<sup>177</sup> Additionally, the concept of justice calls for States to avoid “apply[ing] international law selectively, or adopt[ing] double standards in the application of international law”.<sup>178</sup> This issue in particular is illustrated in targeted States’ reaction to the sanctions imposed against them, which they perceive as selectively imposed economic coercion.

55. Myanmar has criticized the “selective targeting of countries for political purposes and the imposition of double standards”.<sup>179</sup> Likewise, Syria has claimed that the measures against it are arbitrary and indiscriminate.<sup>180</sup> Rejecting all justifications of UCM, it believes that the protection of human rights and the fight against terrorism are used as a pretext to apply political pressure on developing States.<sup>181</sup> Belarus has condemned the EU sanctions adopted against it as an attempt at exercising pressure “under the pretext of human rights protection” and has accused Western States of applying double standards.<sup>182</sup>

56. Finally, Venezuelan President Maduro responded to the American targeted sanctions by recalling an American diplomat and denouncing what it

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international law more generally see Wim Muller, *China an Illiberal, Non-Western State in a Western-Centric Liberal Order?*, 15 *Baltic YIL* (2015) and XUE Hanqin, *Chinese Contemporary Perspectives on International Law; History, Culture and International Law* (2012).

<sup>176</sup> LIU Zhenmin, *Following the Five Principles of Peaceful Coexistence and Jointly Building a Community of Common Destiny*, 13 *Chinese JIL* (2014), para. 2.

<sup>177</sup> *Ibid*, para. 5.

<sup>178</sup> *Ibid*.

<sup>179</sup> Statement made by Myanmar before the UNGA Third Committee, A/C.3/69/SR.35 (30 December 2014), para. 70.

<sup>180</sup> Statement made by Syria before the UNGA Second Committee, A/C.2/68/SR.20 (17 December 2013), para. 58.

<sup>181</sup> Response received by Syria in the Report of the Secretary General, A/68/218 (29 July 2013), 13-16; Statement made by Syria before the UNGA Second Committee, A/C.2/70/SR.31 (15 January 2016), para. 29.

<sup>182</sup> Statement made by Belarus before the UNGA Third Committee, A/C.3/69/SR.35 (30 December 2014), para. 44.

viewed as imperialist and interventionist practices.<sup>183</sup> Additionally, in March 2015, the Community of Latin American and Caribbean States (CELAC)<sup>184</sup> and the United Nations of South American States (UNASUR)<sup>185</sup> issued statements protesting the US targeted sanctions against Venezuelan officials for human rights violations. According to UNASUR, the American executive order constitutes “a threat to sovereignty and the principle of non-intervention in the internal affairs of other states”.<sup>186</sup> The Coordinating Bureau of the NAM also expressed solidarity with Venezuela, affirming its support for Venezuela’s sovereignty, territorial integrity and political independence.<sup>187</sup> It appears that solidarity and unity within the group are an important means to resist pressure from a perceived powerful minority of States; as such, the movement has explicitly condemned sanctions against Zimbabwe and Syria.<sup>188</sup>

57. Lastly, although it is not a member of the NAM, Russia’s condemnation of UCM is also worth mentioning,<sup>189</sup> and notably its reaction to the sanctions imposed against it by the EU and the US. In response to these

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<sup>183</sup> Catherine Shoichet, Venezuela recalls top diplomat in U.S. over sanctions, CNN (10 March 2016)

(<http://edition.cnn.com/2016/03/09/americas/venezuela-diplomat-recalled/>); Venezuelan leader Maduro condemns new US sanctions, BBC (10 March 2016) (<http://www.bbc.com/news/world-latin-america-31813127>)

<sup>184</sup> CELAC Unanimously Passes Resolution in Support of Venezuela, Telesur (26 March 2015) (<http://www.telesurtv.net/english/news/CELAC-Unanimously-Passes-Resolution-in-Support-of-Venezuela-20150326-0021.html>).

<sup>185</sup> La Unasur pidió a los Estados Unidos que derogue las sanciones contra Venezuela, Infobae (14 March 2015) (<http://www.infobae.com/2015/03/14/1715929-la-unasur-pidio-los-estados-unidos-que-derogue-las-sanciones-contra-venezuela>).

<sup>186</sup> South American Governments Slam Obama Over Venezuela Sanctions, Huffington Post (16 March 2015) ([http://www.huffingtonpost.com/2015/03/16/unasur-venezuela-sanctions\\_n\\_6881886.html](http://www.huffingtonpost.com/2015/03/16/unasur-venezuela-sanctions_n_6881886.html)).

<sup>187</sup> Communiqué by the Coordinating Bureau of the Non-Aligned Movement Rejecting the Latest Decision by the US Government Under the Executive Order Signed by President Barack Obama to Expand Unilateral Measures Against Venezuela (16 March 2015) (<http://namiran.org/wp-content/uploads/2015/03/23-Communiqu%C3%A9-Rejecting-the-Latest-Decision-by-the-US-Govt-to-Expand-Unilateral-Measures-Against-Venezuela-16-March-2015.pdf>).

<sup>188</sup> 16<sup>th</sup> Summit, Final Document, above n.157, paras 323 and 362. Letter dated 2011/06/29 from the Permanent Representative of Egypt, above n.160, Annex I Final Document, paras 285 and 316.

<sup>189</sup> Recall quotes in the introduction, above n.1 and n.3; see also n.79.

measures, Russia adopted a series of counter-sanctions targeting agricultural products from the sending States<sup>190</sup> and withdrew from nuclear-related agreements it had signed with the US.<sup>191</sup> In his Annual Address in 2014, President Putin explained the Western sanctions were an attempt to undermine and weaken Russia's economic growth.<sup>192</sup> During the GA debate in September 2015, for instance, Vladimir Putin remarked that the sanctions imposed against Russia are illegal as they circumvent the UN Charter and because they are not based on a Security Council decision.<sup>193</sup>

58. Based on the above, we can deduce that when developing countries claim that UCM are contrary to international law, they are criticizing the fact that a minority of powerful States is undermining the multilateral system they want to uphold and imposing a specific understanding of human rights norms. In this sense, coercion is invasive and amounts to intervention because it seeks to dictate how States should interpret or apply rules, or worse, uses these rules as a pretext to apply political pressure. In this way, coercion does not necessarily have to amount to an irresistible pressure. Based on this reasoning, it is submitted that the NAM countries understand "economic coercion" as the wrongful use of economic power, or advantage, in order to unilaterally impose a certain type of behaviour. In this sense, UCM as a means to enforce so-called community norms are perceived as an illegitimate intervention.

59. Nevertheless, while developing countries are critical of non-UN sanctions, this does not mean they automatically refrain from adopting such measures themselves. For example, in March 2017 Iran – an outspoken critic of

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<sup>190</sup> President of Russia, Executive order on applying certain special economic measures to ensure the security of the Russian Federation (<http://en.kremlin.ru/events/president/news/46404>). These measures were adopted against the EU, the US and States that had aligned themselves with their policies.

<sup>191</sup> Russian Government Decision, Suspending the Russian-US Agreement on Cooperation in Nuclear- and Energy-Related Scientific Research and Development (5 October 2016) (<http://government.ru/en/docs/24766/>); Rosatom, Russia withdraws from US Nuclear Cooperation' (12 October 2016) (<http://www.rosatom.ru/en/press-centre/industry-in-media/russia-withdraws-from-us-nuclear-cooperation/>); President of Russia, Draft law suspending the Russia-US Plutonium Management and Disposition Agreement submitted to the State Duma (3 October 2016) (<http://en.kremlin.ru/acts/news/53009>).

<sup>192</sup> President Putin, Presidential Address to the Federal Assembly (the Kremlin, Moscow, 4 December 2014) (<http://en.kremlin.ru/events/president/news/47173>).

<sup>193</sup> Address by President Putin before the UNGA summit meeting, A/70/PV.13 (28 September 2015), 26.

unilateral coercive measures – adopted sanctions against fifteen US companies for “supporting Israel by providing arms and equipment ‘for use against the Palestinians’”.<sup>194</sup> Although this should be understood against the background of tense US-Iranian relations, it could also be indicative of the fact that developing States will be willing to adopt sanctions depending on the norm that is at stake. For instance, Iran’s measures could possibly be justified as a means to support the Palestinian cause and even Palestinians’ right to self-determination.<sup>195</sup> This further illustrates the importance of values in the context of UCM.

## V. Conclusion

60. This paper’s starting point was Special Rapporteur Idriss Jazairy’s inquiry on whether the frequent adoption of UNGA resolutions is indicative of an emerging prohibition of UCM. Following an assessment of legal doctrine’s position on the legality of unilateral economic sanctions, we analysed the resolutions referred to by the Special Rapporteur in order to determine their legal value. From a strictly positivist perspective, we were unable to determine that the resolutions and the statements made by UN Member States possess normative value. In spite of frequent calls for the cessation of such practice, a prohibition of UCM has not crystalized. Nevertheless, the resolutions are indicative of a clear divide on the issue of economic coercion between developing and developed States; a divide that is responsible for the current uncertainty.

61. It would appear that this split is caused not only by a divide on the norms and values of each group, but also by two incompatible group identities. The first group of States believes that UCM are permissible because they are adopted in the service of higher values and seek to pressure States that do not comply with these values to change their behaviour. They believe they are allowed to do this because of their leadership role in the international

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<sup>194</sup> Maya Lester, USA and Iran impose sanctions on new people & entities European Sanctions, 28 March 2017, (<https://europeansanctions.com/2017/03/28/iran-imposes-sanctions-on-15-us-firms/>). Iran has also adopted counter-sanctions against US firms, see Michael O’Kane, Iran imposes reciprocal sanctions on 9 US firms, European sanctions (24 May 2017) (<https://europeansanctions.com/2017/05/24/iran-imposes-reciprocal-sanctions-on-9-us-firms/>).

<sup>195</sup> Another example is the 1973 oil embargo imposed by Arab States in order to pressure Israel into changing its policies towards Palestine. Recall also that developing States were in favor of sanctions against the Apartheid regime in South Africa.



community.<sup>196</sup> The second group of States fears that its values will be overruled by such unilateral acts. Though it values human rights and democracy, it resents powerful States for using their economic advantage in order to enforce changes in conduct. Developing countries therefore turn to acts of solidarity and multilateral practices as a means of resistance. Nevertheless, if developed States continue to impose UCM that target States view as illegitimate, this could have the effect of encouraging developing States to go beyond adopting UNGA resolutions and bite back by adopting UCM, as illustrated by the Iranian counter-sanctions.

62. These conclusions recall the work of Jouannet, who has described “a phenomenon of resistance” emanating from governments in response to values that are perceived as imposed or hegemonic;<sup>197</sup> as international law evolves “towards the universalization of certain legal values, which are perceived of as Western, some very lively cultural resistance [re-emerges]”.<sup>198</sup> This appears relevant for the debate on economic coercion that seems to be driven by cultural divisions. Consequently, if we are to overcome the legal stalemate then political resistance needs to be addressed.<sup>199</sup> It is clear from the analysis that followed that UCM do not promote harmony between States but instead give rise to resistance, resentment and all the friction that follows; thus escalating disputes and increasing tensions. For instance, Prime Minister Medvedev’s assessment of US-Russia relations in January 2017 is particularly critical of the US sanctions negative effect on cooperation between the two States.<sup>200</sup>

63. Therefore, rather than trying to copy the vertical nature of national legal systems, enforcement measures should be adapted to the horizontal system it seeks to strengthen.<sup>201</sup> In this way, practices of enforcement of

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<sup>196</sup> One could even say that they are expected to do something, see Hirsch, above n.12, 113.

<sup>197</sup> Jouannet, above n.113, 391-392.

<sup>198</sup> *Ibid* 390.

<sup>199</sup> Lest the values that the North and South claim to accept will be defeated, see *ibid* 392.

<sup>200</sup> Assessment of Russian-US relations by Dimitri Medvedev (19 January 2017), (<http://government.ru/en/news/26148/>): “The pressure on our country has reached unprecedented proportions. Ill-considered economic sanctions, which did no one any good, have reduced our cooperation to zero. There were the ridiculous individual sanctions that nobody paid attention to. And it doesn’t get any dumber than restricting entry to the United States for the leadership of the Russian parliament, ministers, and businessmen, thus deliberately reducing the possibility of full-fledged contacts and closing the window to cooperation [...]”

<sup>201</sup> See, e.g., XUE Hanqin, above n. 175, 96.

international law should aim at bringing States together and at convincing each member of the so-called international community to strive to meet the ideals that guide the international legal system.<sup>202</sup> As noted by Yee, “it is not intervention in the domestic affairs of a State [...] to attempt to dialogue with or influence a government undergoing difficulties in order to induce it, *without coercion* or use of force, to conduct its affairs in a better way.”<sup>203</sup>

64. We therefore agree with Doxey, who argued that instead of sanctions:

emphasis [...] should be placed on developing ways and means of lessening tension, keeping lines of communication open and avoiding conflict between [States]. In the long run, this would be a more constructive approach to problem-solving than occasional resort to international “enforcement” which suffers from [limitations].<sup>204</sup>

Although some are skeptical about the benefits of communication in order to lessen tensions,<sup>205</sup> when the situation is at a deadlock this may push us to give serious consideration to the unlikeliest solutions.

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<sup>202</sup> Thus recalling Sienho Yee’s theory of co-progressiveness, see, e.g., Towards a Harmonious World: The Roles of the International Law of Co-progressiveness and Leader States, 7 Chinese JIL (2008). Even though the author refers to the idea of sanction as a means to enforce international law of co-progressiveness, the sanction would be more multilateral in nature rather than unilateral as it would be based on a State’s membership to the so-called community: “its enforcement is often characterized by a sort of ‘membership’ sanction so that the community simply excludes a non-performing State from the community and therefore also the benefits deriving from membership” in *ibid*, para. 11. See also YEE Sienho, The International Law of Co-progressiveness: The Descriptive Observation, the Normative Position and Some Core Principles, 13 Chinese JIL (2014), 485-499.

<sup>203</sup> YEE Sienho, The International Law of Co-progressiveness, above n.202, para. 26. Emphasis added.

<sup>204</sup> Margaret Doxey, *Economic Sanctions and International Enforcement* (2<sup>nd</sup> Edition, 1979) 132. More recently, see: Margaret Doxey, Reflections on the sanctions decade and beyond, 64:2 *International Journal: Canada’s Journal of Global Policy Analysis* (June 2009), 549: “Since the beginning of the sanctions decade there have been significant improvements in sanctions design and implementation and it is certainly worth striving for collective pressure in egregious cases, but, as this writer and others have long argued, diplomacy in all cases, and inducements in some, may produce better results.”

<sup>205</sup> Jouannet, above n 113, 402; Tzanakopoulos, above n.25, 617, referring to “sweet talk”.

65. Against this backdrop, it is noteworthy that in reaction to UCM, certain States have called for more emphasis to be placed on the means of peaceful settlement of disputes.<sup>206</sup> This idea is not entirely new: the ILC planned on including a chapter on the peaceful settlement of disputes in the DASR because it was concerned that countermeasures, a type of UCM,<sup>207</sup> would aggravate international disputes.<sup>208</sup> Nevertheless, the chapter was ultimately abandoned, as at the time it seemed too unrealistic. That being said, if we sincerely aspire towards a fair international (legal) system, the question now is whether or not it would be realistic, or even tenable, to continue down the current path.

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<sup>206</sup> Response received from Burkina Faso in UN Secretary-General on Unilateral economic measures as a means of political and economic coercion against developing countries, A/64/179 (27 July 2009), 5; Response received from Brazil in Report of the UN Secretary-General on Unilateral economic measures as a means of political and economic coercion against developing countries, A/68/218 (29 July 2013), 6.

<sup>207</sup> HRC, Report of the SR, above n.6, para. 38.

<sup>208</sup> See, e.g., ILC Sixth report on State Responsibility by Mr. Gaetano Arangio-Ruiz, Special Rapporteur, A/CN.4/461 and Add.1-3 (1994) ([http://legal.un.org/docs/?path=../ilc/documentation/english/a\\_cn4\\_461.pdf&lang=EF5](http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_461.pdf&lang=EF5)), at 5-18.