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THE UN SANCTIONS REGIME

Striking a balance between the maintenance of international security and the protection of individual rights

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Abstract: *Sanctions have become nowadays one of the most seminal and used non-forceful instruments of international relations. Over the last decades, the United Nations Security Council has incredibly increased the resort to binding resolutions disposing of the application of sanctions against States alleged for having perpetrated a threat to or a breach of international peace and security. Nevertheless, despite the application of such measures has increased exponentially, the international community has continued to formulate doubts over their implementation, particularly due to the human rights concerns emerged following the humanitarian disaster occurred in Iraq after the establishment of the 661 Sanctions Regime on the State. This has led the UN Security Council, together with international law scholars and academics on sanctions, to initiate an evolutive process which resulted in the emergence of a new typology of such measures: targeted sanctions. Despite it is clear that targeted sanctions have progressively lowered the probability of negatively impacting on the population of the targeted State, as an unintended effect of similar measures, also this new typology of sanctions has ultimately generated new concerns over their application, particularly in the dimension of individual procedural rights.*

Key words: *sanctions, coercive diplomacy, United Nations, international security, comprehensive sanctions, targeted sanctions, individual human rights.*

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INTRODUCTION

Since the creation of the United Nations as an international organization devoted to the protection of the collective security system that emerged from the war, as well as to maintain the pledge of peace within the international community, several international academics gradually begun to argue that eventually the UN Security Council would have ultimately enlarged its mandate in the view of protecting also individual human rights.[1] Nevertheless, throughout the 1990s, the international community has known growing humanitarian concerns related especially to the sanctioning activity of the UN Security Council. Therefore, what was becoming evident in the eyes of many international scholars was that the UN Security Council, in its practice of protecting the international peace and security, was also jeopardizing the human rights of many civilian populations impacted negatively by UN sanctions.

The resort to sanctions as a seminal device to address threats to international peace and security has gradually become a primary feature in the general practice of the UN Security Council. As a matter of fact, since the end of the bipolar system established during the Cold War decades, the use of sanctions, both unilaterally and multilaterally, as instruments of international relations has exponentially increased. Still, despite they are commonly recognized as tools of coercive diplomacy, a universal well-supported and official definition of the term is still lacking within the world scenario – for example, the European Union does not refer to similar measures with the term "sanctions", but rather as "restrictive measures".

In its mandate of being the guardian of the international security within the world community, the UN Security Council may decide to impose sanctions regimes, pursuant to the invocation of Chapter VII of the Charter, anytime it determines the existence of a threat to or a breach of the collective security system as established after the creation of the international organization and the application of the *jus contra bellum* doctrine enshrined in article 2(4) of the Charter. Therefore, article 39 of the UN Charter confers upon the Security Council the authority to define whether there exists a threat to or a breach of international peace, as well as a material act of aggression. The prior determination of a threat to or a breach of the collective security system subsequently triggers the invocation by the Security Council of article 41 or 42 as the constitutional basis for the disposition of, respectively, non-forceful or forceful actions. Being sanctions non-forcible measures, it is clear that the invocation of article 39 by the Security Council unequivocally results into the application of

[1] Bardo Fassbender, *Securing Human Rights? Achievements and Challenges of the UN Security Council*, (Oxford University Press, 2011), p. 9

article 41, or more generally, as we are going to see in the course of the present work, of Chapter VII of the UN Charter.

Due to the frequent resort to the application of UN comprehensive sanctions as instruments to confront the traditional threats which commonly emerged within the international arena, the 1990s decade immediately begun to be referred to by international academics as the "sanctions decade". Nevertheless, this period started to be extensively known for the events that subsequently characterized the decade and which concretely represented a real turning point in the perception on UN sanctions and, following, also on its practice. Therefore, following the invasion of Kuwait by the Iraqi State in 1990, the UN Security Council immediately disposed of the implementation of comprehensive sanctions against the country. However, this resulted into a massive humanitarian disaster, as the comprehensive sanctions on Iraq not only impacted politically and economically on the State, but rather produced a considerable humanitarian crisis for the entire population, particularly on the weakest segments of the Iraqi society, meaning women and children. The publication on the death of thousands of children immediately generated an extensive debate over UN sanctions and their validity as they negatively impacted also on the human rights of the populations of the targeted States.

The subsequent humanitarian concerns resulted into a further transformation of UN sanctions. Indeed, the unintended impacts commonly generated by UN comprehensive sanctions on the targeted States, as well as on their neighboring countries, led the international scholarship on sanctions to question the compatibility of similar measures to the inherent human rights obligations the Security Council had to fulfill while exercising its mandate as guardian of the collective security system. For instance, starting from the mid-1990s, the UN Security Council has clearly diversified, and subsequently further intensified, the use of such measures as devices of international relations. Indeed, also thanks to the work of international academics on sanctions, the UN Security Council progressively adjusted these measures with the view of avoiding the development of unintended impacts on the innocent civilian populations of those States targeted by the Council pursuant to a prior determination of a threat to international peace and security. This ultimately resulted into a gradual transformation of UN sanctions which epitomized into the shift from comprehensive sanctions, impacting not only on the economic performance of the targeted State, but also on the civilian population, as in the case of Iraq in the early 1990s, to the use of more "smart" or targeted measures, with the general purpose of impacting exclusively on those individuals and entities responsible for the actions posing a threat to the international collective security system, and thus limiting the effects of such measure on the alleged wrongdoer.

Furthermore, with the emergence of new untraditional threats within the international collective security system, such as the proliferation of weapons of mass destruction and international terrorism, the use of targeted sanctions also diversified in terms of purposes. As a matter of fact, in modern times, international targeted sanctions have become the most relevant device at the disposal of the UN Security Council, which might resort to such measures whenever addressing threats to the peace and to the international security system, especially as counter-proliferation and counter-terrorism instruments for the enhancement of the protection of international human rights. Therefore, especially since the beginning of the new century, the UN Security Council has substantially expanded its activities of enforcing targeted sanctions against member-States, as well as other international legal entities. Moreover, this practice has also been enlarged due to the recently increased skepticism many UN member-States had in resorting to the use of armed military force, pursuant to the right of self-defense enshrined in article 50 of the UN Charter, in response to serious breaches of international peace and security.

Therefore, the main difference between UN targeted and comprehensive sanctions lies in the distinctive notion of the former measure. Indeed, targeted sanctions are discriminatory policy measures, as they exclusively focus on targeting the individuals, decision-makers and private entities allegedly responsible for having perpetrated an illegitimate wrongful act. Conversely, being comprehensive sanctions non-discriminatory measures, they were rather enforced systematically against the entire responsible State, impacting also on the population. Nonetheless, this does not necessarily mean that targeted sanctions regimes may not negatively impact *a priori* on civilians. As a matter of fact, targeted sanctions may also affect adversely on societies. Still, despite they may lead to unintended humanitarian negative effects on the civilian population of a targeted State, these impacts may still be more normatively tolerable to respect to the ones exercised on the population by comprehensive sanctions.

Despite it is overall acknowledged that the possible adverse effects UN targeted sanctions can *de facto* still exercise on the innocent civilian population of the targeted State are more normatively acceptable than the humanitarian consequences resulted from the application of comprehensive sanctions, additional and new legal concerns on UN targeted measures has started to emerge in relation to the protection of individual procedural human rights. For instance, the criticality of targeted sanctions resides mainly on their intrinsic nature. Indeed, the emergence of targeted measures in the UN practice on sanctions has been the natural derivation of both the external and internal demands to create new instruments conform with the general mandate of the organization to maintain the international peace and security and capable of significantly reducing the humanitarian impacts the old UN model on sanctions exercised on the innocent civilian populations of the sanctioned

countries. Still, at the same time, they started also originating concerns over the protection of individual procedural human rights, especially when dealing with individual sanctions in the counter-terrorism dimension. The prolonged lack of information related to the reasons for the inclusion of the name of individuals and private entities, alleged to be associated to the international terrorist networks, to the Consolidated List,[2] as well as the absence of a system of review of such targeted measures, led to the violation by the UN Security Council of a number of fundamental rights in the form of procedural rights, which created an extensive debate over the legitimacy of such measures, as well as undermined the efficiency of the UN sanctioning framework. Several international scholars on sanctions have tried to justify the development of unintended consequences on procedural rights by identifying such impacts as necessary side effects of the policy measures adopted by the UN. In addition, they further advanced the idea of the UN Security Council as an international *legibus solutus* decision-making authority.[3] This concept has been further used in order to explain the shift in the nature of the body of international law. Accordingly, the imposition of UN targeted sanctions proves how the international law paradigm has progressively moved from being merely a body of law administering the inter-state relationships within the international arena to regulating the entire world community, as well as protecting its peace and security from international threats, as a global law. This shift, according to the previously mentioned view maintained by several international law scholars, *de facto* enables the UN Security Council to be a *legibus solutus* and to adopt measures which will directly impact not only on States, as already occurred in the inter-state model of international law, but also on individuals, either as intended or unintended effects, without violating the principles of customary and human rights law. Nevertheless, such reasoning has *de facto* generated a greater division among international scholars on sanctions. Indeed, part of the international academics have argued that such rationale cannot be assumed to be completely and lawfully correct. Rather, they claimed it is extremely inconsistent with the provisions contained within the UN Charter, which evidently recognizes an extensive authority upon the Security Council,

[2] Under the listing procedure of the 1267 Committee, the Consolidated List was created to include the names of the individuals and entities which, as assumed either to be attached to Al Qaeda or to other terrorist activities, are subject to the sanctioning measures disposed by the UN Security Council. Nowadays, each sanctions committee, established by a UN Security Council resolution subsequently to the determination of a threat to the international collective security system, parallelly publishes the names of the entities and individuals included in the sanctions regime. As the UN Security Council Resolutions are mandatory on its member-States, it therefore follows that they are subsequently obliged to impose such measures on them without possible derogations. See also Annalisa Ciampi, "Security Council Targeted Sanctions and Human Rights" in Bardo Fassbender, *Securing Human Rights? Achievements and Challenges of the UN Security Council*, (Oxford University Press, 2011).

[3] Monica Lugato, "Sanctions and Individual Rights" in Natalino Ronzitti, *Coercive Diplomacy, Sanctions and International Law*, (Brill Nijhoff, 2016), p. 185.

but acknowledging at the same time that its power must always be exercised in accordance with the Charter and the body of international law norms and principles, among which we find also individual human rights.[4]

It is perfectly in this regard that the present work proposes as a comprehensive study on the evolution of the UN practice on sanctions, investigating on the procedural and substantive transformations such measures went on, as well as the main criticalities the two sanctions' models present. For instance, the study will extensively further analyze the impacts both comprehensive and targeted sanctions exercised on the enjoyment of individual human rights, and which were the kinds of legal reactions that subsequently emerged, both internally and externally to the UN system.

To this purpose, the present work will firstly attempt to analyze the definition of sanctions, as an instrument of coercive diplomacy, within the spectrum of international law. This will be done, not only by mentioning the different meanings international law scholars have progressively attributed to the term during the decades and further identifying the kinds of natures such measures can take while being framed by decision-makers, but also trying to compare sanctions, whether unilateral or multilateral, to other existent coercive measures, meaning countermeasures and retortions (Chapter 1). The overall argumentation on international sanctions will lead the discussion also to deal with the general legal limits the enforcement of such measures may encounter (Chapter 2).

After the opening sections on the general definition and limits of international sanctions, as measures of international relations and coercive diplomacy, the UN system will be finally introduced, firstly retracing its initial practice on comprehensive sanctions. To this respect, the constitutional legal basis of UN sanctions will be extensively explored, in the view of better understanding the scope of application of such measures, as well as the functioning and purposes. Furthermore, two case-studies, better representing the implementation and structural design of comprehensive sanctions by the UN Security Council, will be subsequently analyzed: respectively, the sanctions regimes on Southern Rhodesia and on South Africa. Finally, the main concerns relatively to the comprehensive sanctions will be further pointed out, taking as a reference the sanctions regime against Iraq in 1990 (Chapter 3).

As previously anticipated, the humanitarian consequences originated from the implementation of the Iraqi sanctions regime led the UN, as well as international academics, to question about the possibility of reforming the sanctions system as to significantly reduce the impacts on the innocent civilian populations of the targeted States. This resulted into the shift from UN comprehensive to

[4] Monica Lugato, *Sono le Sanzioni Individuali Incompatibili con le Garanzie Processuali?*, (Rivista di diritto internazionale, 2010), p. 320.

smart and targeted sanctions. At this point, the main differences at the level of the kinds of purposes enhanced by the application of such measures will be analyzed, with also the view of better understanding the model and the structural design commonly followed by the UN Security Council in the implementation of targeted sanctions (Chapter 4). With the emergence within the international community of untraditional threats to international peace and security, the Security Council has further intensified and diversified its resort to targeted measures. It is perfectly to this respect that the present work will explore the implementation of targeted sanctions as counter-proliferation instruments, counter-terrorism measures and devices for the enhancement of the protection of international human rights (Chapter 5).

In addition, one of the most recent and noteworthy developments derived from the gradual transformations of the UN practice on sanctions has been the greater involvement of regional organizations in the activity of assisting the UN Security Council in carrying out its functions of monitoring and protecting the international collective security system. Regional organizations, with particular attention on the European Union, have recently increased the number of sanctions imposed both within and outside the UN sanctions system. Furthermore, the role of the EU, particularly through the case-law of the European Court of Justice, has acquired seminal importance in the recent discussions over the international concerns related to the protection of the individual procedural rights (Chapter 6). Finally, after having explored the main criticalities in the modern practice of UN targeted individual sanctions (Chapter 7), the present work will try to assess the effectiveness of sanctions as instruments of coercive diplomacy in the conclusive remarks.

CHAPTER 1

DEFINING THE TERM "SANCTION" WITHIN THE SPECTRUM OF INTERNATIONAL LAW

1. THE CONCEPT OF "SANCTIONS" AS INSTRUMENTS OF COERCIVE DIPLOMACY

Currently "sanctions" are a featured peculiarity of the system of international relations. Still, even though they are generally acknowledged as tools of coercive diplomacy, basically diverging from their national equivalent rooted on the activity of a centralized authority, since dependent on the individual or collective response of States to a prior international wrongful behavior within the international community,[5] a well-supported and official definition of the term is still lacking within the world scenario. Indeed, around the legal and diplomatic terminology of the word "sanction", there is an indefinite agglomeration of different definitions originating from the angle of analysis used to approach the concept.

Stricto sensu, the terminology can be applied to define a set of coercive "measures taken by an international actor (the sanctioner, a State or an international organization) in reaction to an undesirable, most often allegedly illegal behavior of another actor (the sanctionee) for the purpose of making the sanctionee desist from that behavior".[6] By using the mentioned definition provided by Michael Bothe, what is clear is that three different, but relevant, units can be identified anytime we deal with the concept of "sanction": (i) the *nature of the measure* enacted by competent organs as a reaction to the illegal behavior of the wrongdoer; (ii) the *type of actors* (or better, sanctioners), involved in the performance of the measure; and, (iii) *the objective* at the core of the undertaken measure. Consequently, international scholars have derived three different approaches defining the term, each focusing on one of the previous units.

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[5] Francesco Francioni, *Enciclopedia Giuridica* Treccani, (Volume XXVIII, 1991), voce "Sanzione", Sanzioni Internazionali.

[6] Michael Bothe, "Compatibility and Legitimacy of Sanctions Regimes", in Natalino Ronzitti, *Coercive Diplomacy, Sanctions and International Law*, (Brill Nijhoff, 2016), p. 33.

The first approach, primarily used within the field of international relations and diplomacy, is related to the study of *the nature of the measure* enacted in the form of sanction by competent organs. Notably, this approach relies on the heterogeneity of economic measures that are generally applied within the international scenario as a tool of coercive diplomacy to fully explain the term "sanction": for instance, restrictions of a state's imports and/or exports, also in the form of embargoes, both in the general sense or limited to the trade of certain goods, as well as the freezing of individual assets and money and travel bans functioning as targeted sanctions on specific persons. Especially after the so-called "sanctions decade",[7] the international community has witnessed an exponential intensification of such economic coercive measures enacted not only by State actors, but also by prominent international organizations, particularly the United Nations (UN), and numerous regional organizations, such as the European Union (EU) and the African Union (AU), with the general purpose of protecting the international security system. However, at this moment, a more precise specification seems to be necessary: indeed, accordingly, measures which instead pertain to the group of "institutional sanctions", meaning those used by competent organs still within international organizations, but against their member-States, with the intent to suspend their voting rights, as well as the univocal expulsion of the latter, are not objects of study of the present approach since exclusively related to the functioning and membership of the organization itself, and consequently outside the international security dimension.

The second approach, instead, is oriented towards *the analysis of the legal personality of the actor* (or better, sanctioner) adopting the measure. To this regard, a distinction must be mentioned. Indeed, as also previously explained, despite in the last decades there has been a massive proliferation of sanctions enacted by international organizations, historically coercive measures in the form of sanctions have also been a prerogative of States. However, international scholars embracing this approach tend to distinguish measures resulted from the initiative of an international organization, usually, but not only, in the form of "institutional sanctions", and thus as part of their constituent instruments, from those applied by individual States, which instead, following the rationale behind this *author-oriented* approach, are labelled "countermeasures". The reasoning at the basis of this approach is derived from the work of the International Law Commission (ILC), particularly in the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA),[8] and in

[7] David Cortright, George Lopez and Richard Conroy, *The Sanctions Decade: Assessing UN Strategies in the 1990s*, (Rienner, 2000), p. 274.

[8] International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (ILC Yearbook 2001), Vol. II, Part Two.

the 2011 Draft Articles on the Responsibility of International Organizations (DARIO),[9] where the term "sanction" is not predominantly present as its counterparts are, mainly the words "countermeasures" and "retorsions", whose difference will be adequately clarified in the following section. For instance, in the 2001 ARSIWA Commentary, the ILC argues that the term "sanctions" should be used "for measures taken in accordance with the constituent instrument of some international organizations, in particular under Chapter VII of the [UN Charter]",[10] restricting its interpretation of the term in the 2011 DARIO commentary to measures "which an organization may be entitled to adopt against its members"[11] according to the agreed devices contained in the constituent treaty, meaning "institutional sanctions". Nonetheless, it must be noted that this approach has been highly criticized for being, legally speaking, erroneous, since voluntarily excluding the practice of referring the term "sanction" also to those measures derived from the initiative of a State actor, namely unilateral or multilateral-state sanctions.[12]

Finally, the third approach focuses on *the investigation of the intended objectives* to be reached with the application of a sanctioning measure. In order to fully understand the rationale behind this *purpose-oriented approach*, it is useful first to recall the legal meaning of the term "sanction" at the national level, as any kind of measure enacted whenever an individual does not observe a legal norm, and thus, voluntarily disobeys the law.[13] By transposing this general concept to the international law domain, we derive the notion that a sanction is a tool of coercive diplomacy applied any time a legal entity, whether a State actor or a non-State actor, breaches the set of norms constituting the body of international law, with the purpose of inducing the wrongdoer to stop its improper behavior permanently; consequently, an international sanction can be defined as a coercive measure "taken against a State (or a non-State actor) to compel it to obey international law or to punish it for a breach of international law".[14] Despite the "punitive strategy" of sanctions is generally acknowledged as the most common objective for such measures, it must be noted that international actors, whether in the form of international and regional organizations, as well as individual States or groups of States, may

[9] International Law Commission (ILC), *Draft Articles on Responsibility of International Organizations, with commentaries* (ILC Yearbook 2011), Vol. II, Part Two.
[10] International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (ILC Yearbook 2001), Vol. II, Part Two, p. 75.
[11] International Law Commission (ILC), *Draft Articles on Responsibility of International Organizations, with commentaries* (ILC Yearbook 2011), Vol. II, Part Two, p. 72.
[12] Tom Ruys, "Sanctions, Retortions and Countermeasures: concepts and international legal framework", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law* (Edward Elgar Publishing, 2017), p. 21.
[13] Jeremy Farrall, *United Nations Sanctions and the Rule of Law* (CUP, 2007), p. 6.
[14] Jonathan Law and Elizabeth Martin, *A Dictionary of Law* (OUP, 2014), 'sanction'.

decide to resort to the use of sanctions for an indefinite array of reasons, which go far behind the simple reaction to the misconduct of a wrongdoer. Consequently, apart from the mentioned punitive purpose which lies in the action of a competent organ to apply sanctioning measures with the objective of coercing and changing the misconduct of the offender, sanctions can be also used to signal and stigmatize, as well as for preventive reasons. Indeed, several are the cases in which both the UN and the EU have applied sanctions which were not intended to have a punitive purpose, but rather were oriented towards the enhancement of a precautionary strategy: it is clearly in this light that the cases of sanctions for the prevention of the proliferation of the weapons of mass-destruction (WMD), sanctions as counter-terrorism instruments and sanctions as human rights devices will be explored in chapter five. This notion is further supported by the idea that ultimately the UN Security Council, which is the main actor endorsed with the function of protecting the international peace and security, does not always need a concrete breach and violation of international law to act pursuant to Chapter VII of the UN Charter, which encompasses also the application of sanctions, despite never mentioned, but rather identified as "measures" in article 41. Indeed, already taking into consideration article 39 of the Charter, it is clear that it is rather enough to find a possible threat to the collective security system for the UN Security Council to enact preventive measures, also in the form of sanctions. For instance, article 39 provides that:

> *"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security".* [15]

Finally, the use of sanctions by individual States, as well as international or regional organizations, can also be reconducted to unarmed foreign-policy strategies or to coercive political and social instruments (particularly in the case of the US and the EU).

[15] United Nations (UN), *UN Charter* (1945), article 39.

2. ASSESSING THE DIFFERENCE BETWEEN SANCTIONS, RETORSIONS AND COUNTERMEASURES IN INTERNATIONAL LAW

In the previous section, we have witnessed how controversial it is to find a universally agreed notion for the term "sanction" within the spectrum of international law. Nonetheless, what was clear is that ultimately when discussing about sanctions we have to keep in mind its three main units, which are the nature of the sanction, the legal identity of the sanctioner and, the purpose of the measure. Still, despite the lack of an overall accepted notion, what happens to be useful for our purposes is to try to classify what should not be labeled with the term "sanction". To this regard, recalling the ILC work may be necessary: indeed, as reported in the previous paragraph, particularly when discussing the second approach focusing on the legal nature of the sanctioner, in the 2001 ARSIWA commentary, the ILC made a clear distinction between the notion of "sanction" and its legal counterparts, meaning "retorsion" and "countermeasure".

2.1 DEFINING COUNTERMEASURES WITHIN THE INTERNATIONAL LAW DOMAIN

Generally speaking, "countermeasures" totally differ from sanctions: indeed, if the latter can be described as any kind of measure enacted by a competent actor, whether an international organization or an individual State (or groups of States, as collective sanctions), whose purpose is to coerce and change the improper behavior of the wrongdoer; the former, instead, can be defined as forms of "self-help, whereby a State breaches an international obligation incumbent upon it, pursuant to, and in response to, a prior breach of international law by another State".[16]

Some scholars tend to believe that countermeasures are a legal residue of the doctrine on "reprisals", [17] in practice during the 19th century. The definition of the terminology can be found in the 1928 *Naulilaa* case: indeed, "reprisals" were described as "acts of self-help by the injured State, acts in retaliation for acts contrary to international law on the part of the offending State, which have remained unredressed after a demand for amends".[18] Before the establishment of the United Nations

[16] Tom Ruys, "Sanctions, Retortions and Countermeasures: concepts and international legal framework", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law* (Edward Elgar Publishing, 2017), p. 24.

[17] Omer Elagab, *The Legality of Non-Forcible Counter-Measures in International Law*, (Clarendon Press, 1988), p. 255; Linos-Alexandre Sicilianos, *Les reactions décentralisées à l'illicite: des contre-mesures à la légitime defense*, (Librairie générale de droit et de jurisprudence, 1990), p. 523; Nigel D. White and Ademola Abass, "Countermeasures and Sanctions", in Malcom Evans, *International Law* (Oxford University Press, 4th edn., 2014), p. 551.

[18] *Naulilaa Incident Arbitration (Portugal v. Germany)* 1928, 2 RIAA 1012.

in 1945, and the subsequent development of the current collective security system grounded on the doctrine of *jus contra bellum* enshrined in article 2 (4) of the Charter, reprisals could take both the form of actions based on the use of military armed force and one of non-forcible measures. Consequently, the introduction of the prohibition on the unilateral use of armed force in the UN Charter, produced a bifurcation of the terminology, resulting into the adoption of two new notions: (i) countermeasures, meaning acts of self-help as justified peaceful reactions to a previous international wrongful act; and, (ii) self-defense, as framed in article 51 of the UN Charter, meaning lawful military reactions to a previous armed attack.

Even if breaching an international obligation, actions amounting to countermeasures are generally not perceived as an unlawful conduct on the part of the State resorting to these practices since in response to a previous international law violation which has been committed by a second legal entity. This leads to the conclusion that, despite being themselves unlawful actions, countermeasures are considered justified pacific reactions to an internationally non-forcible wrongful act.[19]

Within this framework, the ILC has also clarified the substantive and procedural limitations to the resort to countermeasures in Part III, chapter two, of the 2001 ARSIWA. Firstly, article 49 (1) clearly states that countermeasures can be resorted against a State exclusively in the case of an international law violation committed by the latter and injuring the resorting State or international organization. This implies that the assessment of whether the action undertaken by the responsible State accounts to an internationally wrongful act rests completely on the injured State without the need for the intervention of an international tribunal. Nonetheless, if the assumption that the targeted State has acted unlawfully is held to be unfounded by an international judicial body, then the State resorting to countermeasure will incur responsibility, since at that point this recourse will not be perceived anymore as a justified pacific reaction, but rather as an internationally wrongful act.[20] Secondly, countermeasures may exclusively address only the wrongdoer, without incurring in both intended and unintended consequences harming third States, with the paramount objective to push the injuring State to compel with its international obligations and to stop its misconduct permanently. This leads to the conclusion set also in article 49 (2)-(3), whereby actions amounting to countermeasures should be reversible in nature, as also maintained by the International Court of Justice (ICJ) in its final judgment dated 1997 on the *Gabcikovo-Nagymaros Project* case,[21] meaning

[19] Denis Alland, "The Definition of Countermeasures", in James Crawford, Alain Pellet and Simon Olleson, *The Law of International Responsibility*, (Oxford University Press, 2010), p. 1135.
[20] James Crawford, *State Responsibility – The General Part*, (CUP, 2013), p. 686.
[21] *Gabcikovo-Nagymaros Project (Hungary/Slovakia),* Judgment, I.C.J. Reports 1997, p.56-57.

that they must cease whenever the injuring State ends the misconduct and resumes the application of its international obligations. Thirdly, an additional crucial requirement is the one implying the application of the principle of proportionality with the idea of avoiding escalation and abuse, as framed in article 51 ARSIWA.

Apart from the mentioned restrictions, concerning how countermeasures should be enacted in relation to the targeted State, further limits are then clarified by the ILC in article 50 ARSIWA, dealing with how those measures should be settled by the resorting State in order not to disregard principles of international law. Accordingly, countermeasures should not affect four main international obligations. Indeed, article 50 reads:

> *"Countermeasures shall not affect:*
>
> *(a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;*
>
> *(b) obligations for the protection of fundamental human rights;*
>
> *(c) obligations of a humanitarian character prohibiting reprisals;*
>
> *(d) other obligations under peremptory norms of general international law".*[22]

As previously anticipated, it should be noticed that countermeasures should also follow an array of procedural conditions: in that, before being applied, the injured State or international organization should first at all call upon the wrongdoer to permanently cease the wrongful act, in order to resume the fulfillment of its international obligations. Furthermore, if such a request would not meet any positive answer from the part of the targeted State, then the actor resorting to countermeasures should notify the decision to recourse to such an option, as well as its own intentions to negotiate.

Consequently, after having analyzed countermeasures in their complexity, what can be concluded is that the difference between sanctions and countermeasures lies precisely on the nature of the act that triggers one among the two mentioned measures. Indeed, while at the foundation of the intention of a State, or an international organization, to resort to countermeasures against a second State there is the notion of a previous non-forcible wrongful act violating a norm of international law and consequently injuring the resorting State, the same cannot be held true when discussing sanctions.

[22] International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (ILC Yearbook 2001), Vol. II, Part Two, article 50, p. 131.

In this last case, the situation that triggers the application of sanctions is not necessarily linked to a previous violation of international law. As previously noted, and furthermore maintained by Natalino Ronzitti, the UN Security Council, meaning the primary guardian of the international collective security system, does not necessarily need an act of aggression in order to invoke article 41 of the Charter, comprising also sanctions, which, instead, can also be applied "in case of a threat to peace or a violation thereof. The last two situations do not necessarily presuppose a violation of international law".[23]

2.2 DEFINING RETORSIONS WITHIN THE INTERNATIONAL LAW DOMAIN

Similarly, retorsions completely diverge from both sanctions and countermeasures. Therefore, the difference lies on the assumption that fundamentally retorsions are not necessarily triggered by a violation of an international law norm, despite they often are resorted also as a reaction to a previous international wrongful act. Following the definition provided by the ILC in the ARSIWA commentary, "retorsions" can be explained as "[…] 'unfriendly' conduct which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act".[24] For instance, it is evident that retorsions resorted by States, as well as international organizations, are thus lawful measures as long as they do not implicate an internationally wrongful act. Frequent illustrations of retorsion are the breakdown of diplomatic relations between two States, as well as the decision of one State to withdraw its contribution to a voluntarily aid program.

Accordingly, the distinction between retorsions and sanctions is more blurred to respect to the one involving countermeasures, in that in this case the situation that triggers the engagement of an act of retorsion does not consist in *a priori* violation of an international obligation by the targeted State, but *prima facie* seems to simply involve unfriendly behaviors and measures. For instance, it must be noted that, if not all retorsion can be established in the form of sanctions, some softer sanctions can instead be framed in the form of retorsions, as in the case of a State simply deciding not to engage anymore in trading with another country, as long as there is no international treaty providing as such. Furthermore, a more interesting difference lies in the notion that retorsion, in most of the cases, does not result into subsequent unintended international law and human rights violations.

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[23] Natalino Ronzitti, "Sanctions as Instruments of Coercive Diplomacy: an International Law Perspective", in Natalino Ronzitti, *Coercive Diplomacy, Sanctions and International Law*, (Brill Nijhoff, 2016), p. 15.

[24] International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (ILC Yearbook 2001), Vol. II, Part Two, p. 128.

3. THE DIFFERENT NATURE OF SANCTIONS AND RELATED ACTORS

As resulted from the previous paragraphs, sanctions are*, prima facie*, political coercive measures, neither in the form of countermeasure, nor in the form of retortion, resorted by a State or an international organization, as a competent organ, to respond to a previous non-forcible wrongful act, which had been committed by another State, and which had evidently injured the sanctioner, with the ultimate purpose of inducing the sanctionee to permanently stop its politically inadmissible behavior, and to fulfill again its international obligations. Though domestic sanctions still exist within the national legal domain of nation-states, in most of the cases, contemporary sanctions detain a more evident global character, mainly due to the participation of international organizations, as well as modern States, to an array of sanctioning regimes, whether as sanctioners or sanctionees. Following this reasoning, a more worthwhile distinction is the one between *unilateral sanctions regimes* and *multilateral sanctions regimes*, also commonly referred as *universal sanctions*. However, apart from this first distinction, whose main rationale lies in the relationship between the different political actors involved, mainly States, further categorizations of sanctions can be made. For instance, sanctions can be classified into several sub-groups: (i) targeted sanctions – which will be comprehensively defined and explored during this present work; (ii) collective sanctions – measures that are applied by a group of at least ten States and restricting the trade of a variety of goods; (iii) punitive sanctions – measures with the general purpose of inflicting a specific hardship on the targeted country; and, finally, (iv) mutual sanctions – distinctive of the Cold War period.[25]

3.1 UNILATERAL VERSUS MULTILATERAL SANCTIONS

Unilateral sanctions are individual measures adopted by a single-party, a single sanctioner, against the wrongdoer. This means that this kind of measures is enacted autonomously from the enforcement measures applied by the UN Security Council. Therefore, "unilateral sanctions are adopted in the context of what remains of a non-institutionalized international society, where sovereign States retain the power to pursue the respect of their own legal interests through non forceful measures".[26] For instance, the rationale behind unilateral sanctions is based on the principle of the State's sovereignty right, and this is evidently confirmed by the fact that this typology of

[25] Golnoosh Hakimdavar, *A Strategic Understanding of UN Economic Sanctions: International relations, law and development*, (Routledge, 2013), p. 23-24.

[26] Charlotte Beaucillon, "Practice Makes Perfect, Eventually? Unilateral State Sanctions and the Extraterritorial Effects of National Legislation", in Natalino Ronzitti, *Coercive Diplomacy, Sanctions and International Law*, (Brill Nijhoff, 2016), p. 103.

measures is administered by the body of national law of the State applying them, nonetheless in conformity with the paramount principles of international law. Generally speaking, those measures amount to economic sanctions, such as the restriction on trade: more specifically, in order to provide a tangible example, the sanctioning State may decide to restrict the sanctionee's imports of certain products from its internal market which could be useful for the latter country to increase its national capabilities in the related sector (military, technological, etc.).

On the other hand, multilateral sanctions refer to measures enacted within the international community by a plurality of States, as well as sanctioning measures under the UN umbrella or established by other international and sub-regional organizations (such as the EU) operating within the international collective security system. Multilateral sanctions, for instance, can be defined as such any time those measures are resorted by at least two or more sanctioning actors, namely States, against the same wrongdoer. Furthermore, multilateral sanctions are self-driven measures, in the sense that States may decide voluntarily to adhere to such a measure in the case there are evident and equivalent interests in sanctioning the targeted country. Mainly for the reasons explained, this kind of multilateral sanctions do resemble an upgraded version of unilateral sanctions.

Apart from this first version, the label "multilateral sanction" can be adopted also to make reference to sanctions resulted from the enforcement measures enacted by the UN Security Council. However, even if UN Security Council's sanctions can be classified as multilateral sanctions, they slightly differ from the ones that are enacted by groups of States. Accordingly, sanctions imposed by the UN Security Council, despite being under the umbrella of multilateral sanctions, resemble more what can be categorized as "universal sanctions". While confronting with sanctioning regimes disposed by a UN Security Council Resolution, the general scheme of "sanctioner v. sanctionee" seems not to perfectly fit: indeed, the UN Security Council takes the role of a third party, meaning an actor, which is not the sanctioner, but nevertheless disposes the sanction against the targeted country, meaning the sanctionee, but not directly enforcing those measures. Therefore, the UN member-states, which are not directly involved in the establishment of the sanctioning regime, still take the role of the "sanctioner", in that they will enforce the measure against the targeted State. Consequently, "UN-imposed sanctions are much more intensive and complex than other forms of multilateral sanctions".[27] This observed complexity derives from the notion that whenever the Security Council produces a Resolution calling to enact sanctions, pursuant to Chapter VII of the Charter, each of the 193 member-states are bound to enforce those measures. This means that even those State not sitting within the Security Council and, which had not the possibility to participate in the deliberation process

[27] Golnoosh Hakimdavar, *A Strategic Understanding of UN Economic Sanctions: International relations, law and development*, (Routledge, 2013), p. 25.

that resulted into the disposition of the sanctioning regime, must enforce the sanction against the targeted country or the targeted individuals or entities.

3.2 TYPOLOGY OF INTERNATIONAL SANCTIONS

Sanctions, whether unilateral, multilateral or collective, can take different forms, depending on an array of distinctive factors, such as the sector that is going to be impacted by the mentioned measure. The activity of defining each single typology of international sanctions stands outside the general purpose of this present work. However, the most common ones will be referred throughout this section. Consequently, in order to give a more comprehensive portrait of the different typology of the current international sanctions, a more detailed table will be displayed:

Table 1 – TYPOLOGY OF INTERNATIONAL SANCTIONS[28]

i. FINANCIAL/ECONOMIC SECTOR SANCTIONS
   a. Prohibition of or restrictions on financial transactions
   b. Ban on the access to the financial market
   c. Ban on the investing activity
   d. Withdrawal of financial facilities

ii. COMMODITY SANCTIONS
   a. Restrictions on the trade of specific goods
   b. Interruption of contracts/trade agreements between countries
   c. Total or partial embargoes
   d. Restrictions on imports and/or exports

iii. INDIVIDUAL SANCTIONS
   a. Restriction of the individual right to free movement
   b. Freezing of individual assets/money

[28] The present table has been developed taking into consideration data by Golnoosh Hakimdavar, *A Strategic Understanding of UN Economic Sanctions: International relations, law and development*, (Routledge, 2013), p. 25-26; Margaret P. Doxey, *International Sanctions in Contemporary Perspective* (Palgrave Macmillan, 1987), p. 10-12; Michael Bothe, "Compatibility and Legitimacy of Sanctions Regimes, in Natalino Ronzitti, *Coercive Diplomacy, Sanctions and International Law*, (Brill Nijhoff, 2016), p. 35-40.

iv. COMMUNICATION SANCTIONS

   a. Interruption of the transportation system

   b. Interruption of physical communication

v. DIPLOMATIC AND POLITICAL SANCTIONS

   a. Restriction of diplomatic and/or consular relations

   b. Suspension of the voting right

   c. Expulsion from the membership of an organization

   d. Revision of visa policy

   e. Limitation in the diplomatic personnel and representation

The most frequent typology of international sanctions is the one on the economic and financial sectors. Predominantly, economic sanctions can take the form of: (i) prohibition of or restriction on the financial transactions of the targeted State; (ii) ban on the access to the financial capital market; (iii) ban on the investing activity of the targeted State; and, (iv) the total or partial withdrawal of the financial services. The main logic behind the choice to direct financial sanctions towards a country is to destabilize the economy, as well as, the monetary capabilities and capacities of the targeted State. For instance, these types of measures may all lead to monetary destabilization, since they may also induce the targeted country to experience inflation or deflation, or financial distress, depending on the measure applied.[29] In the majority of situations, whenever economic sanctions are considered a possibility to respond to a previous wrongful acts, the International Monetary Fund (IMF) also takes part in the debate: for instance, in the case of sanctions providing for the restrictions on the financial transactions of the targeted States, the IMF is called to evaluate whether those measures are compatible with the principles enshrined in the Articles of Agreement of the organization. Accordingly, this kind of sanctions falls under the umbrella of the competencies of the IMF as an international regulatory monetary regime. Indeed, the Articles of Agreement provides in article 7 (2) (a) that members to the organization shall avoid such measures, or at least, shall applied them in a way that is not discriminatory, as maintained by article 7 (3).[30] Among all the types of sanctions under analysis, economic sanctions are the ones that are used the most as a tool of foreign policy, mainly because of the perceived impact they will exercise on the targeted State. In most of the cases,

[29] Golnoosh Hakimdavar, *A Strategic Understanding of UN Economic Sanctions: International relations, law and development*, (Routledge, 2013), p. 25.

[30] Michael Bothe, "Compatibility and Legitimacy of Sanctions Regimes, in Natalino Ronzitti, *Coercive Diplomacy, Sanctions and International Law*, (Brill Nijhoff, 2016), p. 37.

sanctions, or the threat of sanctions, have a "sobering effect"[31] on the wrongdoer, since framed in a way that eventually will lead the targeted State to refrain its misconduct and to fulfill again its international obligation.

Another common typology of international sanctions regards, instead, the trade of products within the international market, falling, for instance, under the umbrella of commodity sanctions. In *lato sensu*, this kind of sanctions are generally applied to limit the advance in capabilities of the targeted State in a detailed sector, which often seems to be the military one or the technological one. Indeed, a frequent sanction is the ban on imports and exports, depending on the one impacting more on the economy and capabilities of the latter country, of certain specific commodities, which in most of the cases are weapons or oil. In these particular cases, concerning commodity sanctions, legal complications can arise whenever the chosen commodity is part of the World Trade Organization (WTO) regulatory regime, since eventually in violation of the most-favored-nation clause, provided in Article 1 of the General Agreement on Tariffs and Trade (GATT).[32]

By combining different forms of sanctions, such as embargoes, financial sanctions, economic sanctions, boycotts, ban on the imports/exports, a comprehensive sanction regime will be obtained. Nevertheless, due to the increasing concerns that have been derived from the humanitarian unintended consequences resulted from the application of this typology of sanctioning regime, the UN Security Council, as will be exhaustively reported in the following chapters, has slowly shifted its practice towards the use of targeted sanctions, especially after the events that have characterized the Iraqi sanctioning experience.

4. THE RATIONALE BEHIND THE APPLICATION OF INTERNATIONAL SANCTIONS

After having explored the different natures and nuances concealed behind the term "sanctions", as well as the different actors involved in the process of deliberating and enforcing such international measures, this section will take a deeper look to the main motivations triggering the choice of adopting sanctions against a State. For instance, the rationale behind the application of international sanctions will be finally investigated.

[31] *Enhancing the Implementation of United Nations Security Council Sanctions,* a United Nations Symposium sponsored by the Permanent Mission of Greece to the United Nations, (2007).

[32] Michael Bothe, "Compatibility and Legitimacy of Sanctions Regimes", in Natalino Ronzitti, *Coercive Diplomacy, Sanctions and International Law*, (Brill Nijhoff, 2016), p. 35.

Recalling the above-mentioned notion of the terminology, international sanctions can be commonly defined as a set of non-forcible measures applied in response to an internationally wrongful act committed generally by a State or another international entity (such as non-State actors). These measures can take different shapes, depending first on the purposes which are supposed to be obtained through the enforcement of such a measure and, additionally, on the targeted sector (whether economic, financial or diplomatic) that is going to be impacted by the sanction itself.

Prima facie, despite most of the international scholars on sanctions focus only on the "punitive strategy" residing on the application of such measures on the targeted State, the international community resort to sanctions in order to achieve, not one, but rather three specific purposes. Indeed, sanctions are mainly political instruments with the following objectives: (i) to *coerce*, meaning that sanctions are enforced with the logic of inducing the targeted country to change its behavior by means of coercion; (ii) to *constrain*, whereby sanctioning measures are applied with the rationale of restricting assets and resources of the targeted country which appeared to be necessary for the achievement of its objectives through its misconduct; and, (iii) to *signal*, whereby the international wrongful act is signaled and the responsible State is stigmatized within the international community.[33] It has to be noted that these three objectives are not mutually exclusive, meaning that it happens to have simultaneously more than one of the above-mentioned objectives in the same sanctioning regimes. Nonetheless, despite sanctions can have various objectives, each of them operates following different enforcing mechanisms.

The logic of sanctioning a State that has previously committed an international wrongful act resides on an array of assumptions. First, a paramount notion that is often taken into consideration by international scholars on sanctions is the one assuming that States within the international community are *lato sensu* rational beings capable of assessing by their own whether it is more cost-effective for them to continue to perpetuate the wrongful act and to be presumably sanctioned in a second instance by the international community, or if it is more convenient, always in terms of costs and benefits, to stop the norm violation in order to fulfill again the international obligations. Indeed, this reasoning is evidently confirmed by the view that sanctions, especially in the form of economic coercion, generally raise the costs of the receiving State. This leads to a second assumption, by which States responsible for having committed international wrongful acts, immediately cease their misconduct

[33] Francesco Giumelli, "The Purposes of Targeted Sanctions", in Thomas J. Biersteker, Sue E. Eckert and Marcos Tourinho, *Targeted Sanctions: the impacts and effectiveness of United Nations action*, (Cambridge University Press, 2016), p. 38-40; Sue E. Eckert, "The Evolution and Effectiveness of UN Targeted Sanctions", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 58.

once signaled and stigmatized. Therefore, in most of the cases, sanctions, or the threat of sanctions, have a "sobering effect" on the wrongdoer, as previously anticipated. For instance, financial sanctions, especially those involving the interruption of economic and trade relations with the rest of the international community, may be too costly for the targeted State, since resulting into the deprivation of a variety of benefits that are commonly obtained by participating within the international word arena.[34]

Consequently, sanctions have proven during time to be a fundamental tool of foreign policy within the international community, not only for State actors, but also for international and regional organizations (particularly the UN and the EU). Apart from the "punitive strategy" that is generally inherent of sanctioning measures, they do possess a vital and intrinsic foreign policy dimension. As previously mentioned, one of the three main objectives that are generally addressed by such measures is the one consisting on *signaling and stigmatizing* which generally result into the diplomatic isolation of the targeted country.[35] However, despite sanctions, in all its different forms and nuances, have become in the last decades one of the most widespread foreign policy instrument, as well as a diplomatic coercive measures, their effectiveness have been questioned by a plurality of international scholars. Due to the emergent humanitarian concerns, especially after the experience of the Iraqi sanctions' regime, international scholars, and the international community as well, have started to consider whether the benefits brought by the enforcement of such measures were higher than the unintended costs suffered by individuals living on the targeted States. This reasoning not only has led to a growing questioning debate over such measures, but has also resulted into an ongoing evolution of international sanctions, which will be exhaustively explored in the following chapters.

[34] Daniel W. Drezner, *The Sanction Paradox: economic statecraft and international relations*, (Cambridge Studies in International Relations, Cambridge University Press, 1999), p. 15-17.
[35] John Forrer, *Economic Sanctions: sharpening a vital foreign policy tool*, (Atlantic Council, Global Business and Economics Program, 2017), p. 3.

CHAPTER 2

LEGAL LIMITS ON THE ENFORCEMENT OF INTERNATIONAL SANCTIONS

1. GENERAL DISCUSSION ON INTERNATIONAL LEGAL CONSTRAINTS ON SANCTIONS

Before moving to discuss in detail how sanctions were in principle procedurally framed by the United Nations (UN) system, and how subsequently evolved during time, something that is utterly inherent to the purpose of this work and which will be addressed starting from the next chapter, the legal constraints limiting the enforcement of sanctions within the international community will be investigated. Therefore, it is in the objective of this chapter to assess which are the legal limits set by the body of international norms and principles and how they impact on the lawfulness of the enforcement of economic and financial measures, particularly when dealing with sanctioning regimes on the proliferation of weapons of mass destruction (WMD).

As concluded in the previous chapter, international sanctions can be shaped according to the different existing procedural frameworks. Consequently, sanctions can be disposed by a single State actor, and thus applied on a unilateral framework, which positions completely outside the mandate and control of the UN Security Council. By the same token, sanctions can also be devised by a plurality of State actors or international and regional organizations, often within the collective security system under the mandate of the paramount guardian for the maintenance of peace within the international community, meaning the UN Security Council. In both cases, however, as previously mentioned, economic and financial sanctions are the most appealing ones for the sanctioner power, since they are less costly for them. This explains the motivations for which sanctioning actors tend to resort, whether unilaterally or multilaterally, to the use of economic and financial sanctions in response to an international wrongful act committed by a Stare or a non-State actor, amounting to a threat to international peace and security, pursuant to article 39 of the United Nations Charter. It is mainly for this reason that, while discussing the question of legality of such measures, a clearer reference to economic and financial sanctions will be made within this chapter.

According to the 1927 *Lotus* principle of international law,[36] following which the Permanent Court of International Justice (PCIJ) has held that each State has full decision-making power within its territorial sovereignty, and in the absence of a positive international obligation limiting such sovereignty, it is easily arguable that each and single State within the international community has complete discretion to decide its economic and financial partners, thus the international legal entities it aspires to have trade relations with. This implies that there is a plurality of economic sanctions that are enforced by a State actor or a group of State actors, such as those in the form of retorsions whereby a country decide not to engage in trade with a particular State entity within the international arena, which are lawful, as also confirmed by the International Court of Justice (ICJ) in the 1986 *Nicaragua case*,[37] as long as there is not either an international law obligation or a treaty commitment between the two countries and thus bounding the two subjects to continue commercial intercourses.

On the other hand, however, there is also a number of international law obligations and international customary law principles constraining the enforcement of certain economic and financial sanctions, whether unilaterally or multilaterally framed, "and which may significantly circumscribe States' and international organizations' (comprising also the UN) lawful discretion to impose them".[38] We have already discussed some international obligations limiting the application of certain economic sanctions in the previous chapter: indeed, it is perfectly in this light that the International Monetary Fund (IMF) "non-discriminatory clause" (article 7 (3) of the Articles of Agreement) and the World Trade Organization (WTO) "most-favored-nation clause" (article 1 of the General Agreement on Tariffs and Trade) should be interpreted. Accordingly, under the IMF "non-discriminatory clause", States should avoid to resort to economic sanctions restricting the financial transactions of the targeted State, or at least should avoid to do so in a discriminatory manner; while, under the WTO "most-favored-nation" clause, States cannot resort to measures restricting the trade of specific commodities that are part of the WTO's regulatory regime.

For what concerns, instead, principles of international customary law, two main limits on the application of both unilateral and multilateral economic and financial sanctions will be further explored: (i) economic warfare, as related to the principle of economic non-coercion; and, (ii) the human rights law principle.

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[36] *S.S. "Lotus", (France v. Turkey)*, Judgment of 7 September 1927, P.C.I.J (ser. A) No. 10 (1927).

[37] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment of 27 June 1986, I.C.J Reports 1986, 14, p.138.

[38] Daniel H. Joyner, "International Legal Limits on the Ability of States to Lawfully Impose International Economic/Financial Sanctions", in Natalino Ronzitti, *Coercive Diplomacy, Sanctions and International Law*, (Brill Nijhoff, 2016), p. 194.

2. ECONOMIC WARFARE AND THE PRINCIPLE OF ECONOMIC NON-COERCION

In order to explain how the sanctioners' (indistinctively on whether it consists on a State actor or an international organization) lawful discretion to impose such coercive measures is circumscribed by the international law principle of economic non-coercion, it is first relevant to define the notion of "economic warfare". Indeed, despite economic coercive sanctions are lawful measures to be adopted within the domain of international law, since not in contrast with the general provision prohibiting the unilateral use of armed force, as framed in article 2 (4) of the UN Charter, they can lead to conditions of economic warfare. In modern times, the notion of economic warfare can be exemplified as "(…) an intense, coercive disturbance of the economy of an adversary state, aimed at diminishing its power",[39] traditionally involving measures such as tariffs on certain commodities, general embargoes and blockades, as well as the financial monetary manipulation of the targeted country. Nonetheless, as maintained by Vaughan Lowe and Antonios Tzanakopoulos, despite financial coercive measures amounting to economic warfare may be applied in peacetime, and thus may be consistent with the provision on the prohibition of the unilateral use of force, as established with the advent of the *jus contra bellum* epitomized by article 2 (4) of the UN Charter, the economic pressure and the derived humanitarian consequences exercised on the targeted State can achieve an extent which qualifies such measures as equal alternatives to armed conflicts.[40]

It is generally agreed that there has been an exponential proliferation of economic sanctions after the collapse of the bipolar system intrinsic of the Cold War. For instance, as will be extensively demonstrated in the course of the following chapters, especially starting from the 1990s, economic sanctions became common coercive instruments enforced mostly by developed countries in the context of "rogue States", with the purpose of coercing those targeted States to change their unlawful conducts. However, the kind of sanctions established in those cases, with particular reference to the Iraqi comprehensive sanctioning regime of the earlier 1990s, achieved the degree of economic warfare measures, to the point of exercising unintended destructive impacts, apparently not less detrimental than the harm that an armed conflict generally causes, on the States and on the civilian populations.

In the light of the above-mentioned reasoning by which economic warfare measures have appeared to exercise destructive consequences at the same extent than armed conflicts, several

[39] Tor Egil Førland, *The History of Economic Warfare: international law, effectiveness, strategies"*, (Journal of Peace Research 30, no. 2, 1993), p. 151-162.

[40] Alan Vaughan Lowe and Antonios Tzanakopoulos, "Economic Warfare", in Rudiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, (OUP, 2012), p. 8.

international scholars have begun to advance the idea that the law regulating military conflicts, as well as general principles of *jus in bello*, should also apply and constrain the enforcement of economic coercive sanctions, as both applied unilaterally by State actors or multilaterally under the UN Security Council's framework.[41]

To this respect, the first relevant contribution resulted from the work of Michael Reisman which presented an array of standards derived from the body of law governing armed conflicts possibly applicable also to the doctrine of sanctions, for instance economic coercive measures enacted both unilaterally and multilaterally against a State responsible for an international wrongful act. Accordingly, three are the principles identified by Michael Reisman:

(i) principles of necessity and proportionality;

(ii) principle of discrimination between combatants and non-combatants;

(iii) principle of necessity of reviewing periodically sanctions regimes.[42]

2.1 THE PRINCIPLES OF NECESSITY, PROPORTIONALITY, POSITIVE DISCRIMINATION AND REVIEW

(i)*The principles of necessity and proportionality*

Necessity and proportionality, as framed anew by the ICJ in the *Nicaragua* case dated 1986, are *prima facie* two paramount principles of the *jus in bello*. Under the umbrella of the international law system, as applied within the collective security framework established through the application of the theory of the *jus contra bellum* by the UN, the principles of necessity and proportionality work as counter-balances to the military actions that a victim State will enact in self-defense, pursuant to article 51 of the UN Charter, in response to an armed attack previously committed by the targeted State, "so as to restrict States' room for maneouvre".[43]

The principles of necessity and proportionality in *jus in bello* refers to the notion that the harm that one State is going to perpetrate is the only necessary alternative to respond to a previous armed attack and should be proportionate to the benefits that will be achieved by performing such an action. At the same time, this measure should be the least detrimental means to attain such benefits.

[41] Daniel H. Joyner, "International Legal Limits on the Ability of States to Lawfully Impose International Economic/Financial Sanctions", in Natalino Ronzitti, *Coercive Diplomacy, Sanctions and International Law*, (Brill Nijhoff, 2016), p. 195.

[42] W. Michael Reisman and Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programs*, (European Journal of International Law, Vol. 9, 1998), p. 88-141.

[43] Antonio Cassese, *International Law, second edition*, (Oxford University Press, 2005), p. 355.

Therefore, States resorting to the use of armed force, pursuant to article 51 of the UN Charter, must show the necessity of such an action, as well as its being proportional. This means that by applying these two principles of international law, we can derive three requirements on armed attacks in response to previous forceful wrongful acts: first, in order to be necessary, they must be taken on the premises that there are no feasible peaceful alternatives; second, they must be engaged in a manner that is proportionate to the armed attack suffered; and finally, they must not exceed the offensive extent that is necessary in order to terminate the mentioned military wrongful act.

Following the reasoning of Michael Reisman, the same logic behind the application of the principles of necessity and proportionality in the *jus in bellum*, should also be used in relation to the enforcement of economic coercive sanctions. This implies that economic sanctions should be necessary, in that no other non-forcible measures can be applied, and proportional to the harm suffered by the resorting State. Consequently, by transposing the necessity and proportionality requirements of the *jus in bello*, collateral damage and unintended consequences should be remarkably reduced.

(ii) *The principle of discrimination between combatants and non-combatants*

A second relevant international principle within *jus in bello* is the requirement for the positive discrimination between combatants and non-combatants. The main assumption behind this principle is that there is a primary logic for distinguishing combatants from non-combatants which resides on the notion that only the former can be legitimate targets in wartime. This implies that following the *jus in bello*, non-combatants should not be harmed during wars and the intentional killing of civilians must be counted as a war crime.

This principle, however, has always generated a massive debate among international scholars, starting from the idea that behind the requirement of discrimination between combatants and non-combatants there is also a moral element, which cannot be excluded from the analysis, and by which it cannot be assumed that only the military armies are combatants, as well as not all the members of the military armies are combatants.

Consequently, according to some international scholars challenging the traditional distinction between combatants and non-combatants, political leaders, despite do not engage directly in a war, can be labelled as "combatants" any time it is proven they are involved in the orchestrating of the conflict.[44] Similarly, those civilian people which perform roles that are still affiliated to the military army, meaning that they are making a material contribution to the war, such as ordinary people

[44] Helen Frowe, *The Ethics of War and Peace: an introduction*, (Routledge, 2nd ed., 2016), p. 108.

working in munitions factories, and producing or selling weapons, cannot be classified as "non-combatants", since their working efforts are oriented towards supporting combatants in inflicting harm during wartime. This logic, supported by some scholars, such as Michael Walzer, makes those civilian legitimate targets during wartime.[45] Conversely, those people still in the army, but which are held to perform roles that are not military in nature, but rather civilian, such as military surgeons, cannot be perceived as combatants, and thus legitimate targets, meaning that, despite on the battlefield, they should enjoy the non-combatants immunity.

Despite it is understandable that the distinction between combatants and non-combatants can be ethically complex to define, and thus appears to be blurred, legally speaking we still resume to the combatants and non-combatants distinction provided by article 3 of the Fourth Geneva Convention concerning the protection of civilians in wartime.[46] As a matter of fact, the Fourth Geneva Convention defines combatants as those individuals directly taking part in hostilities, and thus fighting a war; this implies that non-combatants are all those individuals not engaging in a war conflict, including medical surgeons or religious personnel that are members of the military, as long as performing their duties, as explicitly stated in article 25 of the First Geneva Convention.[47] Accordingly, the Geneva Convention prohibits any intentional killing of non-combatants people in armed conflicts.

The proposal by Michael Reisman of transposing the *jus in bello* principle of discrimination between combatants and non-combatants to the theory of sanctions is still related to the notion of reducing the negative impacts of sanctioning regimes to the civilian population, the so-called "collateral damages". Accordingly, economic coercive sanctions should be framed in a manner of harming exclusively the targeted State, and not the civilian population residing in it. Essentially, what was argued by Reisman is that each sanctioning measures unable, by nature, to positively discriminate between combatants and non-combatants, such as general embargoes, should not be allowed by the international community, so to decrease the extent of destructiveness that coercive sanctions may involuntarily exercise on civilians.[48]

[45] Michael Walzer, *Just and Unjust Wars*, (New York, Basic Books, 1977), p. 146.
[46] *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Geneva, 1949, Article 3.
[47] *First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed forces in the Field*, Geneva, 1949, Article 25.
[48] W. Michael Reisman and Douglas L. Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programs*, (European Journal of International Law, Vol. 9, 1998), p. 88-141.

(iii) *The principle of necessity of reviewing periodically sanctions regimes*

Finally, the principle of periodical assessment should also be included in the sanctions debate, following the work of Michael Reisman. Always in the spirit of framing sanctions in a manner of reducing as much as possible the collateral damage on the civilian populations, Reisman argues for the need of identifying systems of assessment and review for those sanctions regimes already in place.[49] Periodical reviews of sanctions are indeed necessary measures for assessing whether sanctions were to be enforced correctly by States, independently on whether autonomously or multilaterally after a binding disposition contained in a UN Security Council's Resolution. Consequently, the main objective was that to avoid abuse in the enforcement of sanctions, whose effects would have impacted negatively on the non-combatant population of the targeted State, something that would have undermined the lawfulness of the sanction regime itself.

Therefore, having noted the degree of destructiveness which coercive economic sanctions, both unilateral and multilateral, could exercise on the non-combatant sector of the targeted State's society, some international scholars, aligned with Reisman in the rationale behind his argument, started proposing legal alternatives possibly constraining the harmful effects of such measures. In the analysis provided by Reisman, it is clear that the logic used is the transposition of principles of international *jus in bello* in the theory of coercive sanctions, as lawful instruments limiting the collateral damages on the population. Consequently, the enforcement of coercive economic sanction "should *per se* trigger the application of *jus in bello*, and the principles contained therein".[50] However, it must be noticed that there is an evident obstacle in applying such principles on sanctions. Indeed, following the requirements provided by the orthodox view in the "just war theory", it is difficult for economic coercive sanctions to be formally acknowledged as armed conflicts.

2.2 THE PRINCIPLE OF NON-INTERVENTION

Conversely, international scholars as Lowe and Tzanakopoulos argue that there is no need to trigger the application of the *jus in bello* principles in conjunction with the enforcement of sanctions. For instance, Lowe and Tzanakopoulos notice that constraints to the imposition of sanctions can also be traced within the customary principles contained within the domain of general international law.

[49] *Ibidem*.

[50] Daniel H. Joyner, "International Legal Limits on the Ability of States to Lawfully Impose International Economic/Financial Sanctions", in Natalino Ronzitti, *Coercive Diplomacy, Sanctions and International Law*, (Brill Nijhoff, 2016), p. 196.

Therefore:

"economic measures not otherwise prohibited by international law become unlawful if they aim to coerce the target State in respect of matters which each State has the right to decide freely, such as the choice of a political, economic, social and cultural system".[51]

Accordingly, it is easily comprehensible that the general principle of international law referred to by Lowe and Tzanakopoulos is the principle of non-intervention in a State's internal and external affairs.

Pursuant to the customary rule principle of non-intervention, States within the international community are prohibited to interfere in the internal and external affairs of a foreign State. However, contrary to its original meaning, with the creation of the UN collective security system back in 1945, which also established the enforcement of the *jus contra bellum* framework enshrined in article 2 (4) of the Charter, the international law principle on State non-intervention started to be confined only to acts not involving the threat or the use of armed force.

Having said that, the international law principle of non-intervention has always been connected with another international law rule codified in article 2 (1) of the 1945 UN Charter: the sovereign equality of States, as both equal sovereign and legal entities within the international community. Consequently, the notion of "sovereign equality of States" encompasses two completely different concepts: equal States' sovereignty and States' legal equality (by which no State within the international arena should be positioned in a situation of disadvantage). For the purpose of this section, however, only the principle of State sovereignty will be further detailed, in order to understand the interconnection with the principle of non-intervention.

To this perspective, it is then interesting to recall first the definition of a State provided by the 1933 Montevideo Convention on the Rights and Duties of States, that in article 1 delineates the main requirements a State should have in order to be acknowledged as such. For instance, article 1 of the Montevideo Convention denotes that a State can be identify as an international law entity as long as it possesses four different qualifications which are a *permanent population* residing in a *defined territory*, over which it exercises jurisdiction through a *central government*, capable also to *enter into relations with other State entities*.[52] Therefore, it is in this light, that starting from the 1920s, many international law scholars started to reformulate the well-known Cartesian maxim in order to apply it

[51] Alan Vaughan Lowe and Antonios Tzanakopoulos, "Economic Warfare", in Rudiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, (OUP, 2012), p. 11-13.
[52] *Convention on the Rights and Duties of States,* (Montevideo Convention, 1934), article 1.

to the concept of State sovereignty: indeed, "*iubeo, ergo sum*"[53] perfectly epitomized the capability of a State, as a sovereign international entity, to exercise jurisdiction within its own territory and over its own population, thus in compliance with the sovereignty principle of international law.

As mentioned before, the international law principles of non-intervention in the internal and external affairs of another State and of State sovereignty are profoundly interconnected by a distinct *fil rouge* which resides in the existence of the *jus excludendi alios*, the intrinsic right that each sovereign State possesses to "exclude the others", meaning the right that no other sovereign State will exercise its influence and jurisdiction in a State's territory.

Not every form of economic sanction, however, can be declared unlawful due to its inconsistency with the international law principle of non-intervention. For instance, only those economic measures with the objective of coercing the targeted State must be regarded as inconsistent with the above-mentioned principle, a statement also maintained by the UN General Assembly in Resolution 2625 (XXV), by which:

> *"no State may use or encourage the use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. (...)".*[54]

The UN General Assembly Resolution 2625 (XXV), as well as many other resolutions devoted to the international law principle of non-intervention in a State internal and external affairs, advocates that economic sanctions enforced in a manner of coercing the targeted State in policy areas which strictly belong to its sovereign right, as a State entity within the international community, are inconsistent with the customary principle of non-coercion as an inherent reflection of the international law rule of non-intervention in a State's sovereignty.

At this point, however, it is necessary to recall a distinction previously made in this work, between economic sanctions delivered unilaterally by States, and sanctions deliberated by the UN Security Council and subsequently enforced by the organization's member-States. Consequently, the principle of non-coercion resulted from the customary rule principle of State non-intervention may be certainly applied as a constraint to sanctions enacted unilaterally by State actors or by regional

[53] Vittorio Emanuele Orlando, "Francesco Crispi" (1923), in *Scritti varii di diritto pubblico e scienza politica* (Milan: Giuffré, 1940), p. 400.

[54] *UN General Assembly Resolution 2625 (XXV)*, UN Doc. A/RES/25/2625 – Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, (Oct. 24, 1970).

organizations acting independently from UN sanctions. If there are no doubts on the application of the international law principle of non-coercion, derived from the customary rule of non-intervention, as a constraint to unilateral sanctions, the same does not hold true for multilateral UN sanctions: indeed, there is an extensive ongoing debate among international law scholars on whether it may also apply for sanctions that are enforced subsequent to an authorization of the UN Security Council.

To this respect, international law scholars have started to divide into two groups propounding two diverging positions on whether the United Nations Security Council may be bound by principles of customary international law, which would imply that its actions must be in every case consistent with those principles; or whether, in the case of a proven threat to international peace and security, it can derogate from some or all of those customary rules, in order to resort to legal instruments codified in Chapter VII of the Charter.[55]

The commentary of most of the international law scholars maintains the idea that the UN Security Council is *de facto* bound by customary rules of international law when performing its mandate, as any other legal entity within the international community. This understanding founds its legal basis on a narrower interpretation of article 103 of the UN Charter, whose intent is that to clarify that obligations contained within the present Charter possess primacy over the obligations of the member-States under additional international treaties and conventions outside the UN framework. By literally interpreting the provision enshrined in article 103 of the Charter, however, the result obtained is that the supremacy of UN obligations on member-States only applies in the occasion of simple conflicts between a UN Charter obligation and another international treaty obligation. This clearly implies that whenever a UN Charter obligation is conflict with a customary rule of international law, the supremacy clause cannot be applied. Consequently, a UN Security Council disposition, which may be found in violation of a customary principle of international law, cannot be justified through the resort to the supremacy clause provided by article 103. Following this reasoning, the principle of non-coercion contained in the general customary rule of non-intervention applies also to economic sanctions enacted by the Security Council within the UN framework.

Conversely, the argument of the opposing faction is instead based on an expansive interpretation of article 103 in order to allow the UN Security Council to completely fulfill its mandate as the guardian of the collective security system of the international community. For instance, following the assumption formulated by this second group of scholars, prohibiting the Security Council to use also coercive economic sanctions against a State responsible for a wrongful act

[55] Daniel H. Joyner, "International Legal Limits on the Ability of States to Lawfully Impose International Economic/Financial Sanctions", in Natalino Ronzitti, *Coercive Diplomacy, Sanctions and International Law*, (Brill Nijhoff, 2016), p. 198.

threatening international peace and security would mean subtracting the powers resulted from invoking article 41 of the Charter. Consequently, for them it would mean depriving the Security Council of part of its mandate, as recognized by the Charter, and thus restricting its authority as the paramount institution protecting the collective security system from possible threats.

Obviously, this last argument has been massively opposed by the majority of international law scholars in that the legal basis used to justify it seems to have no legal validity for two main reasons. First, the drafters of the Charter explicitly avoided to include customary law principles in the wording of article 103.[56] Second, article 41 of the Charter can still be invoked by the Security Council even recognizing the assumption that obligations contained in the Charter are not superior to customary rules of international law. This simply implies that the Security Council has full power to lawfully dispose economic sanctions to targeted State responsible for the commitment of an international non-forcible wrongful act, as long as they fulfill the requirements dictated by international customary principles.

3. THE HUMAN RIGHTS LAW PRINCIPLE

Starting from the Iraqi experience, the eventuality that an international economic sanction, whether enforced unilaterally by State actors or multilaterally under the authorization of the UN Security Council, may be not in compliance with the international obligations of the sanctioners under principles of human rights law, amounting to international customary rules, has been the central concern of the ongoing debate on such measures. Indeed, as previously demonstrated in this chapter, coercive economic sanctions have shown to potentially exercise destructive effects on the targeted States both in terms of economic and humanitarian losses.

Before assessing how the obligation to respect human rights impacts on the enforcement of economic sanctions, it is first useful to understand what is enclosed by this international customary law principle. Differently from the principle of non-intervention, discussed in the previous section, the customary law principle providing for the respect of human rights is much more recent, dating back to the establishment of the collective security system under the UN framework, exactly as for the ban on the unilateral use of armed force, also due to the idea that the protection and promotion of human rights were inherent functions to the domestic affairs of each single State in the international

[56] Andreas Paulus, "Article 103", in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus, *The Charter of the United Nations: a commentary*, (3rd edn., OUP, 2012), p. 2132-2133.

community. The enforcement of the UN Charter first in 1945, and subsequently of the 1948 Universal Declaration of Human Rights[57] and the following two Covenants on Human Rights[58] in 1966, resulted into the recognition by States of their inherent duty to respect and promote human rights everywhere in the international community and into the consequent emergence of a general principle of customary law prohibiting the large-scale violation of human rights. Therefore, the human rights law principle demands international law identities within the community to refrain from committing gross violations of individual freedoms and human rights.

Furthermore, it is interesting to note that, despite the UN Charter provisions inherent to the protection of human rights are approximately "skeletal and lofty",[59] its mandate in relation to the obligation to protect and promote human rights within the international community has further expanded during the last decades. This has been possible only through an extensive interpretation of the provisions contained in article 39 of the Charter. Indeed, it is widely known that article 39 confers upon the Security Council the powers to determine whether there exists a threat or a breach of international peace, as well as a material act of aggression, triggering the application of non-forcible or forcible measures pursuant to article 41 and 42 of the Charter. By considering the gross and large-scale violation of human rights as threats to and breaches of international peace and security, and thus as paramount elements of the collective security systems under the UN framework, a conceptual nexus is established between human rights and the peace; a link by which any time the Security Council determines a violation of human rights, which now may be interpreted as a violation of international peace and security, or better a threat to or a breach of the peace, it has discretion to intervene applying measures enclosed in Chapter VII of the Charter.[60]

At this point it is clear that States within the international community and the UN Security Council have obligations to respect to the general principle on the protection and promotion of human rights while acting both unilaterally and multilaterally. Nevertheless, recently it has been questioned whether this international customary law principle applies also to measures amounting to international sanctions against a State responsible for having committed an international non-forcible wrongful act.

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[57] United Nations (UN), *Universal Declaration of Human Rights* (1948).

[58] United Nations (UN), *International Covenant on Civil and Political Rights* (1966); *International Covenant on Economic, Social and Cultural Rights* (1966).

[59] Daphna Shraga, "The Security Council and Human Rights – from Discretion to Promote to Obligation to Protect", in Bardo Fassbender, *Securing Human Rights? Achievements and Challenges of the UN Security Council*, (Oxford University Press, 2011), p. 9. See United Nation Charter articles 1(3), 55 and 56.

[60] *Ibidem*, p. 12.

3.1 HUMAN RIGHTS OBLIGATIONS ON STATES IMPOSING SANCTIONS

The primary debate related to the means by which the human rights law principle impacts on unilateral sanctions focuses on the question on whether States have also an obligation to promote and protect human rights extraterritorially, meaning concerning people not residing within their own territory and, for instance, not under their sovereign jurisdiction. To this respect, most of the international scholars have recently maintained that whenever dealing with the notion of "jurisdiction" in conjunction with the protection of human rights, the focus should be shifted from the notion of "territory" of a State to the notion of "conduct"; this implies that whenever States perform actions consistent with the human rights law principle, their obligations will address also people outside their national territory but directly affected by their conduct.[61]

Consequently, States within the international community are bound by international human rights obligations not exclusively when performing actions within their territory, since in this case the central element of a State's jurisdiction to which we must refer when concerning with the obligation to promote and respect human rights is not the territoriality, but rather the State's conduct. This leads to the conclusion that States, even when applying unilateral sanctions, are still bound by international human rights obligations.

Therefore, following this reasoning, coercive economic sanctions, even when enforced in peacetime, may be considered unlawful since breaching a range of human rights obligations contained both in customary international law and in international law conventions.[62]

3.2 HUMAN RIGHTS OBLIGATIONS ON UN SANCTIONS

As previously demonstrated, the Security Council has recently expanded its mandate concerning the respect and promotion of human rights; this implies that, while performing its functions as the guardian of the collective security system within the international community, it is as well bound by human rights law obligations. For instance, the principle providing for the respect of international human rights has gradually crystallized into a customary rule; consequently, as confirmed by the previous reading of article 103, imposes obligations also on the UN Security Council while acting in accordance with its mandate, pursuant to the powers conferred in Chapter VII of the UN Charter.

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[61] Nils Milzer, *Targeted Killings*, (OUP, 2008), p. 138.

[62] Daniel H. Joyner, "International Legal Limits on the Ability of States to Lawfully Impose International Economic/Financial Sanctions", in Natalino Ronzitti, *Coercive Diplomacy, Sanctions and International Law*, (Brill Nijhoff, 2016), p. 202.

Furthermore, to this respect, it is also necessary to recall that article 25 requires the organization's member-States should always enforce measures disposed through a resolution by the UN Security Council, comprising also economic sanctions, in accordance to the principles set by the Charter. Similarly, article 24 also provides an obligation for the Security Council to act in conformity with the "Purposes and Principles of the United Nations"[63] set in article 1(1) of the Charter, following which the institution should perform its mandate consistently "with principles of justice and international law",[64] among which international law scholars have also commonly included customary human rights law principles.

[63] United Nations (UN), *UN Charter* (1945), article 24.
[64] United Nations (UN), *UN Charter* (1945), article 1(2).

CHAPTER 3

BACKGROUND ON THE UNITED NATIONS SANCTIONS

1. THE UN CHARTER AND THE SANCTIONS' LEGAL BASIS

The preceding chapters situated the debate on international sanctions on a broader framework. Indeed, while the attention of the previous sections was on identifying the main aspects as well as the natures of modern sanctions within the field of international law, starting from this chapter, the discussion will focus mainly on sanctions adopted by the UN Security Council.

In the quarter century that followed the collapse of the bipolar system established in the years of the Cold War, the resort to sanctions by the UN Security Council clearly intensified and diversified in relation to the distinct environments in which they were to be subsequently applied. Nevertheless, despite the several procedural and substantive transformations the UN sanctions regimes underwent over time, it has to be noted that the legal basis for resorting to such measures has remained unvaried, as will be portraited in the context of the present section.

In its mandate of guardian of the international security within the world community, the UN Security Council may decide to impose sanctions regimes, pursuant to the invocation of Chapter VII of the Charter, anytime it detects a threat to or a breach of international peace. As already mentioned in the previous chapters, article 39 of the UN Charter confers upon the Security Council the power to establish whether there exists a threat to or a breach of international peace, as well as a material act of aggression, subsequently triggering the invocation of article 41 or 42 as the basis for non-forcible or forcible actions. Being sanctions generally acknowledged as non-forcible measures, it is clear that the invocation of article 39 by the UN Security Council unequivocally results into the application of article 41. Accordingly, when imposing its very first sanctioning regime in Southern Rhodesia in 1966, the Security Council explicitly invoked article 39 in conjunction with article 41 of the UN Charter as the legal basis for its actions.[65]

[65] *UN Security Council Resolution 232* (December 16, 1966), UN Doc. S/RES/232, pre-ambulatory clause n. 4.

For instance, article 39 of the UN Charter implies that the Security Council, before applying a sanction regime pursuant to article 41, must determine whether there subsist the conditions for a threat to or a breach of the international peace and security. Nevertheless, despite the fact that the Council has taken into account such a connection between articles 39 and 41 in order to impose sanctions regimes established up to date, it must be recalled that it has *de facto* failed in three different circumstances (the 820 Bosnian Serb sanctions regime, the 1160 Federal Republic of Yugoslavia sanctions regime, and the 1737 Iranian sanctions regime) to make a determination of a threat to or a breach of international peace prior to the application of such measures.[66] Consequently, the lack of the invocation of article 39 has rendered these three cases highly problematic: indeed, many doubts raised within the international community, expressly focusing on the legitimacy and lawfulness of such sanctioning regimes, as well as on the necessary condition of article 39 for the imposition of international sanctions within the UN framework.

From a legal perspective, the first case on the Bosnian Serb sanctions regime seems to be the less problematic among the three. Indeed, in this particular circumstance, the absence of a Security Council's determination of the existence of a threat to the international peace and to the collective security system was basically due to the primary objective intrinsic to Resolution 820.[67] For instance, this last resolution was intended to reinforce the already existing sanctions regime in that region under the Security Council Resolution 757,[68] where the Council had clearly identified a situation amounting to a threat to international peace and security more generally in the Former Republic of Yugoslavia. Therefore, it is clear that such a determination was to be considered by the UN Security Council as the factor also triggering sanctioning measures under the following 820 regime.

Differently, for what concerns the case on the 1160 Federal Republic of Yugoslavia sanctions regime, the reasons for the lack of a previous Security Council's determination lies on a procedural matter. The discussion over this resolution, indeed, has to be positioned within the context of the Kosovo war, which was not considered by the Russian and Chinese delegations, sitting within the Security Council, as an event amounting to a threat to international peace and security. Nevertheless, Resolution 1160,[69] imposing on the Federal Republic of Yugoslavia sanctions regime, was still adopted by the Security Council, despite the abstention of China, which was an action consistent with its previous decision on the lack of a threat to security in the Kosovar context, and with the Russian

[66] Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law*, (Cambridge University Press, 2009), p. 82-83.
[67] *UN Security Council Resolution 820* (April 17, 1993), UN Doc. S/RES/820.
[68] *UN Security Council Resolution 757* (May 30, 1992), UN Doc. S/RES/757.
[69] *UN Security Council Resolution 1160* (March 31, 1998), UN Doc. S/RES/1160.

delegation voting unsurprisingly, due to the prior position, in favor of the resolution. For instance, in this case, the only possible legal explanation to the resort to sanctioning measures in the Yugoslavian State, pursuant to Chapter VII of the UN Charter, was an implicit determination of the existence of a threat in the Kosovar scenario.[70]

Finally, the Iranian case seems to be the most complex one, since in 2006 the Security Council had already manifested in a previous resolution its concern regarding the increasing proliferation threats stemming from the country's nuclear program, expressing at the same time its role to prevent the worsening of the situation, with the intention to maintain peace and security within the international community, and further demanding to Iran to suspend its nuclear activities. Since the Security Council's demands were not fulfilled by the Iranian State, a subsequent resolution was adopted: pursuant to article 41 of the UN Charter, the Security Council proceeded to impose sanctions on the responsible State.[71] Nevertheless, even in this last case, the Security Council resorted to the application of sanctioning measures without firstly determining explicitly the existence of a threat originating from the Iranian nuclear activity.

Therefore, despite the UN Security Council has *de facto* failed to determine explicitly the existence of a possible threat to the international peace and security in three occasions, differently from the 820 Bosnian Serb and the 1160 Federal Republic of Yugoslavia sanctions regimes, in which, as generally recognized by a multiplicity of international law scholars, there has been an implicit determination, only the 1737 Iranian case may be considered as a real exception to the usual determination made by the Security Council prior to the application of sanctions regimes.

Generally speaking, the situations in which the UN Security Council has applied sanctions regimes following a determination of a threat to or a breach of international peace and security, invoking thus articles 39 and 41 in conjunction, can be categorized into two main dimensions: (i) threats pertaining to the international dimension (proliferation of WMDs, international terrorism and humanitarian crisis), and (ii) threats pertaining to the domestic dimension of a country and originating from internal crisis (acts of aggression threatening the security and stability of a country, the violation of fundamental rights protected by international human rights law, civil wars, the use of force by rebel groups).

Finally, article 39 of the UN Charter confers upon the Security Council the authority to determine whether there exists a threat to or a breach of international peace, as well as a material act

[70] Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law*, (Cambridge University Press, 2009), p. 84.
[71] *UN Security Council Resolution 1737* (December 23, 2006), UN Doc. S/RES/1737.

of aggression, subsequently triggering, in the case of sanctions regimes, the invocation of article 41, or more generally Chapter VII of the Charter. As a matter of fact, the occasions in which the UN Security Council has explicitly referred to article 41 for the application of sanctions are limited in number. In most of the cases, the Security Council has simply remarked it was acting under Chapter VII of the UN Charter, despite scholars well acknowledge that sanctions amount to enforcement measures not involving the use of military force as framed in article 41. Nevertheless, it must be noted that the general reference to Chapter VII does not provide any added flexibility for what concerns the enforcement of sanctions than article 41, which, for instance, must be considered the constitutional basis for the application of such measures within the UN framework.[72]

Besides, the drafters of the UN Charter were cautious in avoiding the same mistakes, related to sanctions, incurred by the Covenant of the League of Nations. In particular, the drafters of the Covenant sought to limit the scope of application of sanctioning measures by adding three procedural and substantive constraints in article 16: (i) the circumstances in which sanctions could be applied – which generally amounted to interstate conflicts; (ii) the natures of sanctions – comprehensive diplomatic or economic sanctions; and, (iii) decision-making was not centralized in a single institutional body. These constraints completely undermined the effectiveness of sanctions applied by the League of Nations, reasons for which the drafters of the UN Charter opted for their exclusion, framing article 41 in a way to enlarge its scope of application to respect to article 16 of the Covenant, without delineating the circumstances in which it had to be referred and the natures of such measures, but, most importantly, confining this power to the authority of the Security Council.[73]

2. THE UN SANCTIONS SINCE 1963: THE FIRST COMPREHENSIVE SANCTIONS ON SOUTHERN RHODESIA AND SOUTH AFRICA

The first sanctions regime ever established by the UN Security Council dated back 1963 against the apartheid regime of South Africa, immediately followed by the 1965 Southern Rhodesia sanctions regime. Initially, however, those regimes configured as voluntary sanctions, meaning that UN member-States were not obliged to enforce such measures against South Africa and Southern

[72] Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law*, (Cambridge University Press, 2009), p. 105.

[73] Andrea Charron, *UN Sanctions and Conflict: responding to peace and security threats*, (New York, Routledge, 2011), p. 2-5.

Rhodesia; nevertheless, they subsequently became mandatory comprehensive sanctions following the adoption of Resolution 253[74] on Southern Rhodesia in 1968 and Resolution 418[75] on South Africa in 1977.

For instance, this section will be dedicated to the study of the anatomy of the first UN sanctions regimes imposed in Southern Rhodesia and South Africa, with the idea of understanding the intended purposes and the constitutional framework at the basis of those measures, as well as the general scheme behind UN comprehensive sanctions.

2.1 THE 232 SANCTIONS REGIME ON SOUTHERN RHODESIA

Despite the voluntary sanctions regime on Southern Rhodesia had been established two years after the one on South Africa, the complexity and the significance of the events characterizing the living situations in the territory shortly intensified the international community's concerns on the region, resulting into the imposition of further measures by the UN Security Council and the establishment of the very first mandatory non-military sanctions regime of the UN history.

The core reason for the enforcement of a sanctions regime in the case of Southern Rhodesia was the unilateral declaration of independence, and the subsequent violation of the principle of the right to self-determination, by the illegal regime established in the territory by a white minority under the leadership of Ian Smith. In Resolution 217,[76] pursuant to article 39 of the UN Charter, the Security Council determined that the persistence within the territory of the illegal regime of the white minority, as well as the violation of the right to self-determination of the black majority perpetrated under the control of the illegitimate authorities, denoted the existence of a potential threat to the peace and security of the international community. Furthermore, and more importantly for the purpose of this work, the Security Council also called member-States to voluntarily impose measures in the form of both diplomatic and economic sanctions against the illegitimate regime.

By literally interpreting the provisions contained in Resolution 217, it might appear that the Security Council had provided for the enforcement of diplomatic and economic sanctions against the regime under the leadership of Smith recurring to the invocation of article 41 of the UN Charter. Nevertheless, as lately suggested by some international law scholars, the measures enacted by the Security Council in Resolution 217 had not the necessary conditions to constitute sanctioning measures pursuant to article 41: for instance, in the above-mentioned resolution the Council called

[74] *UN Security Council Resolution 253* (May 29, 1968), UN Doc. S/RES/253.
[75] *UN Security Council Resolution 418* (November 4, 1977), UN Doc. S/RES/418.
[76] *UN Security Council Resolution 217* (November 20, 1965), UN Doc. S/RES/217.

for the enforcement of voluntarily sanctions, as the events characterizing the situation in Southern Rhodesia amounted only to potential threat to the international peace and security, which for instance could not lead yet to the invocation of article 41 or, more generally, Chapter VII of the UN Charter.[77]

In Resolution 253, adopted in May 1968, the Security Council expressed its complete concern for the circumstances identified in Southern Rhodesia and for the worsening of the living conditions in the territory due to the racist policies enacted by the illegitimate regime under the white minority. Consequently, the Security Council determined under article 39 of the UN Charter the existence in the territory of a concrete threat to the international peace and security, which enabled it to trigger article 41 for the disposition of mandatory sanctions.

The kind of sanctions adopted by the Security Council in Resolution 253 amounted to diplomatic and economic measure whose intended objectives for the Council were to put an end to the rising tensions within Southern Rhodesia and to enable the majority of the black population to fully enjoy their right to self-determination. Furthermore, resolution 253 "turned the initial targeted measures into comprehensive sanctions".[78]

Moreover, Resolution 253 provided for the establishment of a sanctions committee, in accordance with article 28 of the rules of procedure of the Security Council, with the purpose of monitoring the application of the sanctions regime, as well as its effectiveness and actual implementation. As provided by the Security Council, the 253 Sanctions Committee had to examine the reports by the UN Secretary-General on the correct enforcement of the sanctioning measures by member-States; at the same time it had to seek possible information from member-States concerning activities that could represent a deviation from the sanctions regime and to report to the Security Council on the performance of its task. The role and functions of the 253 Sanctions Committee were further expanded by following resolutions to the point of including recommendations by the committee in terms of measures to enact by the single member-States, pursuant to the prior indications of the UN Security Council, with the general purpose of increasing the level of effectiveness of the sanctions regime.

From its establishment, the 253 sanctions regime, as well as the functioning of the 253 Sanctions Committee, were only terminated in 1979, after the adoption of Resolution 448[79] by the Security Council which followed the democratic transition of the country and the formation and declaration of independence of the new State of Zimbabwe. Nevertheless, many international scholars

[77] Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law*, (Cambridge University Press, 2009), p. 248.
[78] *Ibidem*, p. 250.
[79] *UN Security Council Resolution 448* (April 30, 1979), UN Doc. S/RES/448.

do believe that the impacts of the sanctions regime on the dissolution of the illegitimate minority regime were not particularly relevant. As a matter of fact, as lately reported, despite the establishment of the 253 sanctions regime, some States members to the United Nations, among which South Africa, Portugal and the United States of America, still continued to maintain relations with the regime under the leadership of Smith, contrary to what demanded by the Security Council in the related 1968 Resolution. Furthermore, it must be noted that the white minority regime also engaged in aggressive foreign policies and military activities against other countries in the region, a factor that enabled the Security Council to trigger article 51 of the UN Charter for the very first time.[80]

2.2 THE 418 SANCTIONS REGIME ON SOUTH AFRICA

Differently from the case of the sanctions regime on Southern Rhodesia, the establishment of mandatory sanctioning measures targeting South Africa occurred more than a decade after the Security Council, in the 1963 Resolution 181,[81] determined the existence in the country of a threat to the normal status of the international peace and security. Nevertheless, despite the sanctions provided by the 1963 Resolution were voluntary in nature – as subsequently stated in Resolution 418 – exactly as the ones imposed against the illegal white minority regime in Southern Rhodesia, the Security Council never characterized the events derived from the formation of the apartheid regime in South Africa as potential threats to the maintenance of the security within the international community, but rather as circumstances "seriously disturbing international peace and security".[82]

By the end of 1977, due to the escalation of violence in South Africa and the failure of the 1963 voluntary arms embargo in lowering the level of the threat to the international collective security system, the Security Council adopted two additional resolutions with the major objectives to eradicate the apartheid regime disseminating racial discrimination and social conflicts within the country and to enable the black majority to fully exercise and enjoy the right of self-determination, as a general customary principle of international law.

Therefore, Resolution 417[83] concretely called upon the South African government to permanently end apartheid and repression against the black majority, as well as the political figures against the regime, with the final intent of enforcing the democratic majoritarian rule within the country and in order to build up a new society based on the principles of equality and justice, where

[80] Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law*, (Cambridge University Press, 2009), p. 255.
[81] *UN Security Council Resolution 181* (August 7, 1963), UN Doc. S/RES/181.
[82] *Ibidem*, pre-ambulatory clause n. 8.
[83] *UN Security Council Resolution 417* (October 31, 1977), UN Doc. S/RES/417.

the right to self-determination of the South African people could be fully affirmed, irrespective of differences of color, creed or race, contrarily to what was voluntarily promulgated by the apartheid regime.

However, since the Security Council's demands were not fulfilled by the South African regime, which still continued to reinforce discriminatory policies within the country, together with acts of aggression against the neighboring States, Resolution 418 was finally adopted. For instance, the Security Council requested again the South African government to permanently cease its illegitimate behaviors perpetrated both internally, against the black African population through apartheid and racial discrimination, and externally, through acts of aggression against the neighboring countries, seriously threatening the security, not only of those States, but more generally of the region and of the international community. It is perfectly in the light of those circumstances that the request by the Security Council to strengthen the previous voluntarily arms embargo should be analyzed. Indeed, the UN Council, by the beginning of November 1977, had become fully aware of the increasing threat represented by the military build-up by the South African government. Therefore, having determined the hazard resulted from the actions committed by the regime, and noting it was acting under the legal framework of Chapter VII of the UN Charter, the Security Council adopted comprehensive mandatory sanctions, always in the form of arms embargo, against South Africa.

The obligations derived from Resolution 418 binding on member-States were indeed consistent with the scope of application of the sanctions regime established therein. As a matter of fact, UN member-States were requested to abstain from supplying and providing arms to South Africa, as well as they were required to refrain from assisting the regime in building up nuclear capability with the intent of developing nuclear weapons.[84] However, it must be noted that, initially, when the resolution was adopted, member-States interpreted the operative clause calling upon them to refrain from providing arms to the South African regime in a literal manner, as to comprise only weapons and the related materials, such as ammunition and military equipment. This is the reason for which the UN Security Council lately explained in a following resolution the meaning and the way of interpreting the previous clause as also applying to nuclear and strategic military weapons.[85]

In addition, the Security Council has attempted to enlarge the scope of application of the 418 sanctions regime in a plurality of circumstances, also due to the frequent resolutions passed by the UN General Assembly urging the Council for expanding the regime beyond the simple arms embargo. Nevertheless, even though several draft resolutions intended to strengthen the 418 sanctions regime

[84] *UN Security Council Resolution 418* (November 4, 1977), UN Doc. S/RES/418, operative clauses n. 2, 4.
[85] *UN Security Council Resolution 591* (November 28, 1986), UN Doc. S/RES/591, operative clause n. 4.

in South Africa were put to the vote, none of them passed, either because the majority of the members sitting in the Council voted them down or because one of the permanent members used the veto power to force the Council from refraining from adopting such a resolution.[86] Although there was clear resistance to enlarge the scope of application of the mandatory sanctions regime among its members, the Security Council succeeded in adopting further resolutions calling upon UN member-States to enact a series of additional voluntary measures, particularly related to the financial and cultural sectors.[87]

Even for what concerns the 418 sanctions regime on South Africa, the Security Council envisaged the creation of a sanction committee. Nevertheless, differently from the case of Southern Rhodesia, analyzed in the previous section, the sanction committee monitoring the enforcement of arms embargo on South Africa was established by the Council only in a subsequent decision, meaning Resolution 421.[88] Precisely as for what concerned the 253 Sanction Committee on Southern Rhodesia, the 421 Sanctions Committee on South Africa had to examine the reports by the UN Secretary-General on the correct enforcement of the sanctioning measures by Member-States and it had to seek possible information from Member-States concerning activities that could represent a deviation from the sanctions regime and to report to the Security Council on the performance of its task. Ultimately, however, despite being the longest Sanctions Committee, the 421 was not significantly active to respect to other committees, such as the one analyzed on the case of Southern Rhodesia.

Finally, both the 418 sanctions regime and the 421 Sanction Committee on South Africa were eventually terminated in 1994, after the very first democratic elections in the country. The peculiarity of those elections was that they were the first with universal suffrage, and thus enabled all citizens, irrespective of the differences of color, creed or race, to run as candidates and to vote. As a matter of fact, those elections will be remembered for the victory of Nelson Mandela, which accordingly became the President of the South African Republic. The 418 sanctions regime on South Africa was thus a fundamental tool to terminate the apartheid regime within the country. Nevertheless, many international scholars still question how this result was to be connected with the establishment of arms embargos against the State. Still, the comprehensive sanctions regime on South Africa made an essential contribution to the evolution of the practice of sanctions by the UN Security Council. As a matter of fact, the 418 regime was the first mandatory sanctioning measure ever addressing a member-

[86] Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law*, (Cambridge University Press, 2009), p. 259.
[87] *Ibidem*.
[88] *UN Security Council Resolution 421* (December 9, 1977), UN Doc. S/RES/421.

State of the United Nations – indeed, by the time of the establishment of the 253 sanctions regime, Southern Rhodesia was neither recognized by the entire international community as a State, nor it was a member of the organization.

3. THE IRAQI SANCTIONS REGIME: THE EVOLUTION FROM COMPREHENSIVE TO "SMART" SANCTIONS

3.1 THE 661 SANCTIONS REGIME ON IRAQ

The function of the previous section was to portrait, by analyzing the cases on Southern Rhodesia and South Africa, the general scheme of comprehensive sanctions, as well as the natures of such measures, their general objectives and scopes of application, as enforced by the Security Council within the UN framework between the end of the 1960s and the 1990s. Although the above-mentioned regimes were fundamental in order to set the basis for the subsequent Security Council's practice on sanctions, the real turning point in the final evolution of UN sanctions profoundly resulted from the events that characterized the Iraqi experience throughout the 1990s.

The enforcement of the Iraqi sanctions regime originated from the military invasion of Kuwait by the Iraqi forces led by Saddam Hussein on 2 August 1990, which subsequently led to the outbreak of the Gulf War. The aggression was immediately condemned by the UN Security Council, sitting in an emergency meeting, through the adoption of Resolution 660.[89] However, Resolution 660 not only was an instrument for the Security Council to simply condemn the invasion perpetrated by the Iraqi government against Kuwait, but rather was adopted with the final objective of determining the aggression as a serious breach of the international peace and security, pursuant to the authority conferred to the Council by article 39 of the UN Charter, and to demand the unconditional withdrawal of the Iraqi army from the Kuwaiti territorial space.

Because of the failure of the Iraqi government to fully comply with the demands requested by the Security Council, a second resolution was further adopted by the Council, which finally provided, under the umbrella of Chapter VII of the UN Charter, for mandatory sanctioning measures and consequently establishing the 661 sanctions regime against the Iraqi State.[90] From the outbreak of the Gulf War, several resolutions on the Iraqi case came after, all reinforcing the invocation of Chapter

[89] *UN Security Council Resolution 660* (August 2, 1990), UN Doc. S/RES/660.
[90] *UN Security Council Resolution 661* (August 6, 1990), UN Doc. S/RES/661, operative clauses 2-4.

VII of the UN Charter and with the general purpose of elucidating and or expanding the scope of application of the 661 sanctions regime.

Nevertheless, by the end of the Gulf War in February 1991, the legal basis for the prolonged application of the sanctions regime against Iraq changed. Indeed, in the subsequent decisions, starting from Resolution 687,[91] the Security Council, while determining the nature of the Iraqi wrongful behavior, pursuant to article 39 of the Charter, did not refer anymore to a breach of peace, but rather to a threat to the international peace or security posed by the widespread presence of WMDs in the area.[92]

This shift by the Security Council, from the determination of a breach of the international peace and security in Resolution 661 to the determination of a threat to the collective security system in Resolution 687, advanced legal reservations on the faith of the sanctions regime against Iraq. As a matter of fact, two possible interpretations can be derived from such a change in the nature of the Security Council's determination of the relevant circumstances: first, the conclusion of the Gulf War in February 1991 could mean, in the Security Council's perspective, also the parallel dissolution of the existence of a breach triggering the invocation of Chapter VII of the UN Charter, which resulted, for instance, into the adoption of the "threat" terminology; second, the decision to change the qualification of the situation from "breach" to "threat" simply meant for the Security Council a way for reiterating the persistence of such a breach of the international peace and security, without *de facto* necessarily using the same terminology.[93] Clearly, we cannot determine with complete certitude which was the reason behind the decision by the Security Council to modify the qualification of the situation. Nevertheless, both interpretations enable us to better understand some specific elements contained in Resolution 687.

By following the former interpretation, it is clear that it was then necessary for the Security Council to determine an additional motivation, in the form of a threat to the peace and security of the international community, able to justify the invocation of Chapter VII of the UN Charter and the enforcement of a sanctions regime against Iraq. For instance, this reasoning enables us to understand why Resolution 687 effectively stresses the need for condemning Iraq for the widespread presence of weapons of mass destruction within the territory, which arguably represented for the Security Council an additional incentive for qualifying such a circumstance as a threat to the international peace and security.

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[91] *UN Security Council Resolution 687* (April 3, 1991), UN Doc. S/RES/687.
[92] Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law*, (Cambridge University Press, 2009), p. 262-263.
[93] *Ibidem*, p. 263.

Conversely, by following the latter interpretation, Resolution 687 configures as a further device with the objective of strengthening and expanding the already existing sanctions regime against Iraq. Accordingly, in this case the continuation of the comprehensive sanctions regime was not explicit, but rather implicit, as confirmed, firstly, by the reiteration of all the previous resolutions adopted on the conflicts derived from the Iraqi invasion of Kuwait, among which there was also Resolution 661, and, secondly, by the decision of the Security Council to expressly mention that, pursuant to the compliance with the disarmament demands, the entire comprehensive sanctions regime against Iraq, meaning as originally established with the adoption of Resolution 661, would have permanently ceased.[94]

Following the overthrow of Saddam Hussein and the collapse of his regime in 2003, which occurred in the framework of the Second Gulf War, the Security Council adopted Resolution 1483,[95] reiterating in its pre-ambulatory clauses the notion of complying with the previous disarmament demands as an essential condition for terminating the sanctions regime against the Iraqi State. In addition, noting that the situation still constituted a threat to international peace and security and that it was acting under the legal framework of Chapter VII, the Security Council modified the arrangement of the sanctions regime against Iraq: indeed, among all the sanctions imposed, only the arms embargo still remained effective, together with new financial measures in the form of the funds and assets freezing. The main reason behind this decision by the UN Security Council was to alleviate the hardship for the Iraqi citizens caused by the comprehensive sanctioning measures.

Finally, through the adoption of Resolution 1518,[96] the Security Council launched a new monitoring administrative committee, replacing the 661 Sanctions Committee, with the additional mandate of identifying additional entities, whether enterprises or individuals attached to the regime, whose financial funds and assets should be frozen.[97]

3.2 THE HUMANITARIAN CONCERNS RESULTED FROM THE 661 IRAQI SANCTIONS REGIME AND THE TRANSITION TOWARDS "SMART" SANCTIONS

The comprehensive sanctions enforced against Iraq pursuant to Resolution 661 has been one of the most controversial and questioned sanctions regimes in the UN Security Council's history and practice. As a matter of fact, never before has a sanctions regime caused such sustained economic

[94] *Ibidem*, p. 266.
[95] *UN Security Council Resolution 1483* (May 22, 2003), UN Doc. S/RES/1483.
[96] *UN Security Council Resolution 1518* (November 24, 2003), UN Doc. S/RES/1518.
[97] Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law*, (Cambridge University Press, 2009), p. 274.

distress for a country, turning the Iraqi financial levels and performance comparable to the ones of the poorest nations, not only in the Middle-Eastern region, but in the entire globe.[98] Most importantly, the humanitarian impacts of the comprehensive international sanction on the Iraqi population marked one of the most profound human tragedies during the 1990s. For instance, many Iraqi people, already under the oppression exercised by the totalitarian regime led by Saddam Hussein, also suffered the massive humanitarian consequences derived from one of the harshest economic sanctions in the human history.

Therefore, the Iraqi population has harshly suffered from the financial and humanitarian impacts the international comprehensive sanctions regime, particularly embargoes, exercised on the country. This has been reported by several international organizations, as well from the United Nations, which in 1995 adopted Resolution 986,[99] also known as "oil for food", whose main objective was to literally exchange the incomes obtained in trading Iraqi oil with foods, medicine and other primary goods, as a temporary device to ensure humanitarian needs for the Iraqi population, as well as to compensate the victims of the war between Iraq and Kuwait. Despite the enforcement of Resolution 986 has evidently improved the overall humanitarian and health condition within the Iraqi State, especially in the Kurdish territory which was no longer under the authority of Hussein's regime, it failed to solve the profound human tragedy the Iraqi population was still living.

As an evidence of that, in the following years, several international organizations, also within the UN framework, such as the United Nations Children's Fund (UNICEF), the Food and Agriculture Organization (FAO) and the World Food Programme (WFP), reported throughout the mid-1990s the enormous intensity of the social impacts exercised by the sanctions regime on the Iraqi population, especially on women and children: in 1996, each month more than 4500 children under the age of five years died from hunger and disease.[100]

In several of his reports to the UN Security Council, Secretary-General Kofi Annan admitted the increasing humanitarian concerns derived from the harsh human tragedy the Iraqi population was experiencing and explicitly identified as a principal cause for such a humanitarian distress the long-term destructive impacts of the general embargo imposed by UN member-States pursuant to the decision by the Security Council disposing the establishment of the sanctions regime against Iraq. Using Secretary-General Kofi Annan's words:

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[98] Anthony H. Cordesman and Ahmed S. Hashim, *Iraq: Sanctions and Beyond,* (Boulder, CO: Westview Press, 1997), p. 127.

[99] *UN Security Council Resolution 986* (April 14, 1995), UN Doc. S/RES/986.

[100] UNICEF Press Release, *Disastrous Situation of Children in Iraq*, (New York: UNICEF, 1996).

> "in the case of Iraq, a sanctions regime that enjoyed considerable success in its disarmament mission has also been deemed responsible for the worsening of a humanitarian crisis – as its unintended consequence". [101]

The humanitarian crisis in Iraq, resulted from the unintended impacts of the comprehensive international sanctions against the country, generated wide debate over the faith on the use of sanctions, not only among international scholars, but rather also within the United Nations. The general idea was that sanctions should configure as instruments of the system of international relations, capable of coercing the targeted State to change their illegitimate policies or behavior, as well as constraining its capability to access resources needed to achieve its objectives through its misconduct, but at the same time able to avoid possible unintended repercussions on innocent civilians, as occurred in the Iraqi case, which could lead to a situation of violation of international human rights.

With this objective in mind, several sanctions reform initiatives have been initiated by the end of the 1990s, especially by the so-called "Friends of the Council"[102]: the Swiss, German and Swedish governments, together with international experts and academics, sponsoring respectively the Interlaken Process, the Bonn-Berlin Process and the Stockholm Process. The three reform initiatives on sanctions focused all on the notion of directing the effects of such measures towards the individuals responsible for the wrongdoing behavior of the State, as well as the elitarian section of society benefiting and, thus supporting, such acts. Therefore, the three processes based their own studies on the assessment of the kinds of sanctions that better fulfilled the above-mentioned objective and advanced the design and the enforcement mechanisms of the new international targeted sanctions.

Apart from identifying in targeted sanctions the only way of achieving the previous objective, each of the three reform initiatives addressed also a different individual factor capable of further strengthening the scope of application and the effectiveness of such measures. For instance, the Swiss government in the Interlaken Process comprehensively focused on the kinds of technical requirements needed in order to trigger financial and economic sanctions, as well as the pre-conditions necessary for targeted sanctions to be completely effective, such as the determination of the target.[103] Conversely, the Bonn-Berlin and the Stockholm Processes, respectively under the lead of the German

[101] UN Press Release SG/SM/7360 - *Secretary-General Kofi Annan Reviews Lessons Learned During "Sanctions Decade" in Remarks to International Peace Academy Seminar*, (April 17, 2000).
[102] Sue E. Eckert, "The Evolution and Effectiveness of UN Targeted Sanctions", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 58.
[103] *Ibidem*, p. 59.

and the Swedish governments, further focused on the enforcement mechanisms of targeted sanctions, especially at the national level, as well as the monitoring of sanctions regimes.[104]

For instance, starting from the Iraqi experience throughout the 1990s, the Security Council, instead of enforcing comprehensive sanctions which could lead to humanitarian crises, deliberately turned its attention towards the application of this new type of sanctions. Indeed, targeted sanctions enable the UN Security Council to better address a situation it has previously identified as a threat to or a breach of international peace and security directly focusing on the leading perpetrators of wrongful acts, such as decision-makers, individuals directly or indirectly supporting the responsible legal entity for the violation of an international norm or law principle, avoiding, for instance, to indirectly cause humanitarian concerns or at least limiting the unintended consequences on innocent civilians.

[104] *Ibidem*, p. 60-61.

CHAPTER 4

THE DESIGN OF UNITED NATIONS TARGETED SANCTIONS

1. UNDERSTANDING UN TARGETED SANCTIONS AND HOW THEY DIFFER FROM COMPREHENSIVE SANCTIONS

In modern times, international targeted sanctions have become the most vital and indispensable instrument at the disposal of the UN Security Council, which might resort to such measures whenever addressing threats to the peace and to the international security system. As a matter of fact, especially starting with the beginning of the new century, the UN Security Council has substantially expanded its activities of enforcing targeted sanctions against member-States, as well as other international legal entities. Moreover, this practice has also enlarged due to the increased skepticism many UN member-States have in resorting to the use of armed military force, pursuant to the right of self-defense enshrined in article 51 of the UN Charter, in response to breaches of international peace and security.

As mentioned in the previous chapter, in the quarter-century that followed the breakdown of the bipolar system established during the Cold War, the UN Security Council has clearly intensified and diversified the use of sanctions as instruments of international relations. This resulted into a progressive transformation of UN sanctions: indeed, instead of comprehensive sanctions which mostly took the form of general embargoes, impacting not only on the economic performance of the targeted State, but also on the civilian population, forced to suffer humanitarian crisis, as in the case of Iraq in the early 1990s, the UN Security Council started to opt for the use of more targeted sanctions, with the general purpose of impacting exclusively on the responsible individuals, such as decision-makers.

Nevertheless, despite the procedural and substantive transformations the UN sanctions regimes underwent beginning with the Iraqi experience, which resulted into the adoption of targeted sanctions, it has to be noted that the legal basis for resorting to such measures has remained completely unvaried. Even in the case of targeted sanctions, as for comprehensive sanctions, the constitutional basis must be found on the conjunctive use of article 39, for the determination of the

threat to or breach of the international peace and security, and article 41, or more generally Chapter VII of the UN Charter, for the disposition of non-forceful measures.

Nowadays, the UN Security Council resorts to the use of targeted sanctions in order to address an array of different threats to international peace and security. If in the last century, the main reasons for enforcing sanctioning measures against a State were mainly civil wars and acts of aggression, in the last decades, as will be further depicted in the following chapters, the Security Council has disposed international targeted sanctions in order to respond particularly to three specific contemporary threats linked to the proliferation of weapons of mass destruction, international terrorism and the violation of human rights. Nevertheless, it must be noted that the Council has further expanded its practice by enforcing targeted sanctioning measures also in order to address nontraditional threats to international peace and security. Accordingly, today the Security Council might apply such measures against persons recruiting child soldiers, entities using natural and wildlife resources to financially invest conflicts, individuals violating women human rights perpetrating gender-based and sexual violence, and many other international challenges.[105]

For instance, UN targeted sanctions do not differ from comprehensive sanctions either in terms of altered constitutional framework or in the types of international threats addressed therein. Rather, the main difference between UN targeted and comprehensive sanctions lies in the distinctive notion of the former measure. Indeed, targeted sanctions are "discriminatory policy measures",[106] as they exclusively focus on targeting the individuals and decision-makers responsible for perpetrating the illegitimate wrongful act. Instead, being comprehensive sanctions indiscriminatory measures, since they did not address specific targets, they rather were enforced comprehensively against the entire responsible State, also impacting on the innocent civilians which subsequently were forced to suffer from the adverse effects exercised by such sanctions regimes. Nonetheless, this does not necessarily mean that targeted sanctions regimes may not negatively impact *a priori* on societies and on the lives of innocent people. As a matter of fact, targeted sanctions, being discriminatory policy measures, which means that they specifically address individuals responsible for the illegitimate wrongful act, and whose prolonged perpetration *de facto* triggered such measures, may still impact negatively on societies, but certainly will do it limitedly to respect to comprehensive sanctions. For instance, despite they may lead to unintended humanitarian negative effects on the civilian population

[105] Sue E. Eckert, "The Evolution and Effectiveness of UN Targeted Sanctions", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 52-53.
[106] *Ibidem*, p. 53.

of a targeted State, these impacts may still be more normatively tolerable to respect to the ones exercised on the population by comprehensive sanctions.[107]

In addition, keeping the humanitarian debate aside for the moment, targeted sanctions are profoundly different from comprehensive sanctions also for the length of the effects exercised on the targeted States. *Stricto sensu*, UN targeted sanctions enjoy a higher degree of flexibility, since they can be easily managed and changed in relation to the response of the targeted country under the sanctions regime. Following this reasoning, differently from comprehensive sanctions, which mainly configured as punitive policy measures and whose objective was that of substantially halting the diplomatic, financial and economic relations of the sanctioned State with other countries in the international community, UN targeted sanctions must instead be perceived as correcting policy measures which, in response of the changing attitude and the subsequent actions undertaken by the responsible State, may be manipulated as to increase or decrease, when necessary, the degree of trade restrictions and further measures. For instance, if the final objective of comprehensive sanctions was generally that of completely isolating the responsible State as to ultimately coerce it to permanently stop its wrongful behavior, in the case of targeted sanctions, the main purpose is that to correct the illegitimate behavior as to generally ensure the maintenance of peace and security within the international community. This, however, does not mean that targeted sanctions will always necessarily be framed as correcting policy measures. Indeed, the diversification of UN targeted sanctions strictly depends on the degree of the international threat the UN Security Council must confront with. Therefore, it is clear that, in exceptional cases, UN targeted sanctions can also be disposed of with the general purpose of coercing the responsible State, which apparently stands, as a general purpose, more in line with the notion of punitive policy measures, rather than correcting ones.

Furthermore, as will be widely described in the course of this work, UN Security Council's targeted sanctions also imply a higher degree of complexity at the level of decision-making and sanctions' design than comprehensive international measures.[108] Drawing from the lessons learned in the past, especially the Iraqi experience related to the 661 sanctions regime, the UN Security Council has become more cautious in framing the scope of application and in designing sanctions, making this typology of instruments far more complex than comprehensive sanctions. This complexity becomes particularly evident when considering the activity underwent by the UN Security Council in determining the specific target to be addressed by the sanction, the procedures to be followed in

[107] Thomas J. Biersteker, Marcos Tourinho, and Sue E. Eckert, "Thinking about United Nations Targeted Sanctions", in *Targeted Sanctions: the impacts and effectiveness of United Nations Actions*, (Cambridge University Press, 2016), p. 13.
[108] *Ibidem*, p. 15.

order to suspend or lift the sanctioning regime, as well as the examination of the environment where these measures will be subsequently enforced in order to understand well in advance how those policy instruments will impact on the targeted State and to avoid humanitarian consequences. This inevitably leads to the assumption that a higher degree of complexity in the design and structure of sanctions might imply a higher maximization of the level of effectiveness of such measures.

Many international law scholars have further advanced the assumption by which the degree of complexity achieved by UN targeted sanctions derived from a parallel increase in the complexity of international issues undermining the international peace and security.[109]

Moreover, also in terms of sanctions' implementation and monitoring there are differences between comprehensive and targeted sanctions. Indeed, despite the general framework remains the same, meaning that sanctions regime, even in the form of targeted measures, are still disposed in binding resolutions by the UN Security Council, pursuant to a prior determination of a situation as a threat to or a breach of the international peace and security, and subsequently enforced against the responsible country by UN member-States, the implementation and monitoring mechanisms have further turned into more sophisticated processes. Accordingly, they now encompass a more elaborated institutional framework involving an array of additional actors, whose functions are the ones of substantially checking the effectiveness of sanctions regime as well as maintaining their legitimacy.[110]

For instance, this higher degree of complexity, both substantive and procedural, not only translates into increased effectiveness of UN sanctions, but also comports higher implementation costs for both the United Nations and the member-States enforcing those measures. If the reasons behind the increase in the costs within the UN seem already to be clear, due to the further sophistication of the institutional framework dealing with the implementation and monitoring of sanctions regime, the motivations at the basis of a parallel increase in the implementation costs for member-States tend to be less obvious. Therefore, the increasing costs pertaining to UN member-States can be explained by still referring to the further complexity achieved by the implementation mechanism itself. This means that, since the activity of the individual States in implementing sanctions against the targeted country has become far more complex, several member-States have been necessarily pushed to further invest into the expansion of their enforcement capacities.[111]

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[109] Sebastian von Einsiedel, David M. Malone, Bruno Stagno Ugarte, *The UN Security Council in the 21st Century*, (Boulder, CO: Lynne Rienner Publishers, 2015).

[110] Thomas J. Biersteker, Marcos Tourinho, and Sue E. Eckert, "Thinking about United Nations Targeted Sanctions", in *Targeted Sanctions: the impacts and effectiveness of United Nations Actions*, (Cambridge University Press, 2016), p. 16.

[111] *Ibidem.*

Despite the increased costs derived from the evolution of UN sanctions in targeted measures, there also exist several benefits resulted into the application of such instruments of international relations, some of which have already been anticipated during the present section. Indeed, as already described, being highly discriminatory policy measures, UN targeted sanctions have substantially decreased the negative unintended effects exercised over the civilian population. Secondly, they can also be easily adjusted by the UN Security Council with less difficulty in order to calibrate, in reaction to the response of the targeted State, the bargaining relations between the former and the latter. Finally, something that has not been mentioned yet, UN targeted sanctions perfectly fit within the spectrum of diplomatic policy measures, as they can be better used in conjunction with other instruments of international relations, such as mediation, UN peacekeeping operations, as well as the threat to use military force.[112]

2. THE INTENDED PURPOSES OF UN TARGETED SANCTIONS: "TO COERCE, CONSTRAIN AND SIGNAL"

As early anticipated in the previous paragraph, UN targeted sanctions slightly differ from comprehensive measures also in terms of the intended purposes behind their enforcement. Each sanctions regime, for instance, has a different purpose, or range of purposes, to be achieved in the long-run throughout its application against the targeted State.

Nevertheless, in order to better understand the general discussion over such measures, it is essential first to clarify the real meaning of the term "purpose", as related to sanctions. Indeed, when referring to sanctions, the term "purpose" strictly indicates the means by which the sanctioners expect to influence the behavior and policy-making of the targeted State, as to induce it to perform its duties and obligations in conformity with the set of international law norms and general principles. This, for instance, as also argued by international law scholars and academics, does not coincide with what is denoted with the term "objective", which instead stands to refer to the political and diplomatic outcomes that the sanctioners broadly desire to achieve.[113]

[112] *Ibidem.*

[113] Francesco Giumelli, "The Purposes of Targeted Sanctions", in Thomas J. Biersteker, Sue E. Eckert and Marcos Tourinho, *Targeted Sanctions: the impacts and effectiveness of United Nations action*, (Cambridge University Press, 2016), p. 39.

The most common purpose at the basis of sanction practice has been broadly epitomized already in 1967 within the "naïve theory of sanctions".[114] According to Johan Galtung, the promulgator of such a theory, multilateral sanctions under the UN framework, as well as unilateral sanctions, are usually enforced with the general purpose of inducing the targeted State to modify its behavior as to permanently stop the illegitimate wrongful act it was previously perpetrating. Despite writing in the 1960s, thus well beyond the widespread emergence of targeted sanctions, the naïve theory by Johan Galtung seems to perfectly fit within our discussion. Indeed, most of the international law academics agree in maintaining that, *de facto*, a consistent fragment of UN targeted sanctions shares such a "behavioral conversion" factor, thus the concept by which sanctions must be applied as to induce targeted States to modify their behavior and to make it conforms with international law standards, as their general purpose.

Nevertheless, it must be recalled that the "naïve theory of sanctions" has its roots in the so-called "pain-gain approach".[115] Following the scheme provided by this latter approach, not only are sanctions generally enforced with the idea of pushing the targeted State to change its behavior, but also suggests that this behavioral conversion is substantially induced by the threats of the economic burden the responsible country will subsequently suffer. To summarize, since the financial pain that the responsible State is going to suffer, immediately after the enforcement of the sanctions regime, may be substantially beyond its economic capacities, it is then more convenient for the targeted country to change, sooner or later, its international attitude and to comply with its international law obligations.

For instance, mainly for the reasons just explained, this approach is not always applicable since, in our modern times, not every sanctions regime imposes economic costs on the responsible State.[116] Indeed, many international scholars on sanctions have advanced the idea that this approach contains some fallacies which render its application completely ineffective for the purposes of our research. At the basis of the pain-gain approach there is the assumption that the targeted State, sooner or later, will change its behavior, by permanently stopping its misconduct and resuming its international law commitments and obligations, in order to avoid bearing the economic burden dictated by the application of such measures. Nevertheless, as anticipated, not all sanctions are formulated as to impose financial restrictions, and subsequently economic costs, on the targeted State.

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[114] Johan Galtung, "On the Effects of International Economic Sanctions: with examples from the case of Rhodesia", *World Politics*, 19 (1967), p. 378-416.

[115] Francesco Giumelli, "The Purposes of Targeted Sanctions", in Thomas J. Biersteker, Sue E. Eckert and Marcos Tourinho, *Targeted Sanctions: the impacts and effectiveness of United Nations action*, (Cambridge University Press, 2016), p. 39.

[116] *Ibidem.*

This assumption results *de facto* into the first failure of this approach, which is that of considering all sanctions regimes equal. Furthermore, not only are they assumed to be equal, but they are also expected to produce the same results throughout their enforcement: targeted States will necessarily change their behaviors. In this last statement resides, instead, the second fallacy of the pain-gain approach. As a matter of fact, even by assuming that all sanctions are equal and that all impose economic pain on the targeted State, this does not necessarily mean that the latter will comply with the sanctioners' demands with the final objective of modifying their behavior. Indeed, often sanctions impose demands that cannot be met by the sanctioned States, either because unable to comply with such requests or because unwilling to do so. Therefore, in order to discuss the different purposes UN targeted sanctions possess, as also related to the effects they will produce on the targeted State, we cannot rely exclusively on the "naïve theory of sanctions" as formulated in 1967 by Johan Galtung.

In order to provide an overall inclusive framework on how sanctioners expect to influence the attitudinal behavior of the targeted State, we can thus rely on the approach that was lately introduced by the Targeted Sanctions Consortium. Following this framework, there exist a plurality of means by which the sanctioners can influence their targets, which also correspond to a multiplicity of purposes sanctions may have. For instance, as previously anticipated during this work, sanctions may induce the targeted State to change its illegitimate behavior by means of coercion, constrain and signal.

Accordingly, in chapter 1 it was already pointed out that, *prima facie,* despite the majority of international academics on sanctions focus mostly on the "punitive strategy" such measures may endeavor to exercise against the targeted States, the international community resort to sanctions in order to achieve three different purposes: (i) to *coerce*, meaning that sanctions are applied under the rationale of inducing the sanctioner to change its behavior by means of coercion; (ii) to *constrain*, whereby sanctioning measures are enforced in order to restrict the necessary assets and resources of the targeted country for the achievement of its objectives through its misconduct; and, (iii) to *signal*, whereby the internationally wrongful act is signaled and the responsible State is stigmatized within the international arena.

This classification of sanctions' purposes, in addition, is derived from the "power relation theory". As a matter of fact, exercising sanctioning measures against another country, responsible for the commitment of an illegitimate international act, is nothing more than an exercise of power.[117] International academics have, for instance, considered the existence of three primary means through which power can be exercised within the international community.

According to Baldwin, Kaplan and Lasswell, the first dimension of power captures the classical situation by which State A forces, or better coerces, State B to do something, from which

[117] *Ibidem*, p. 44.

State A will benefit, that otherwise State B would have not done in normal circumstances.[118] This first power relation can be defined, in terms of international relations, as winning conflicts, as the sanctioners coerce the targeted State to perform an obligation or a duty it would have otherwise refused to execute. By means of coercion, the main objective of the sanctioner country is to force the targeted State to permanently stop its misconduct and to change its behavior in order to comply with international law. This is ultimately done by assuming that, by calculating its costs-benefits analysis, in relation to the demands required in the sanctioning measures, the targeted State finds more convenient to change its attitude, rather than continuing perpetrating the misconduct and subsequently bearing the sanction's costs.

Second, power can also be considered as the ability of State A to prevent State B to achieve certain policy outcomes by constraining the possible alternatives the latter can resort to. This second power relation normally takes the definition of "agenda-setting power",[119] as the sanctioners limit the possible alternatives the targeted State can resort to in order to achieve its intended outcomes. It is perfectly in this light that the "agenda-setting power" should be assessed in relation to the second sanctions' purpose, meaning constraining. By means of constrains, State A limits the possible resources available to State B, the targeted country, such as funds, sensitive infrastructures, arms. This is done by setting the agenda of the targeted State, which rends its engagement in the misconduct much more difficult. By altering the possible alternatives available to State B, which imply the increase in the costs needed to continue to access to the necessary resources, the targeted State is then forced to modify its strategy and behavior.

For instance, constraining sanctions and coercing sanctions can be perceived as two different sides of the same coin. As a matter of fact, despite both measures have been construed with the purpose of impeding the targeted State's objectives to be achieved, while coercing sanctions are enforced with the view of inducing the targeted State to end the misconduct and to comply with international law, constraining sanctions are instead framed by the sanctioner with the rationale to force the targeted State to refrain from committing the misconduct. To summarize, we can argue that constraining sanctions can be defined as *ex-ante* measures, while coercing sanctions as *ex-post* measures against the targeted State.

Finally, the third power dimension encompasses the situations by which there is no open conflict between State A and State B. Thus, differently from the previous two cases, State A, by using

[118] David A. Baldwin, "Power and International Relations", in W. Carlsnaes, T. Risse and B. A. Simmons, *Handbook of International Relations*, (Thousand Oaks, CA: SAGE Publications, 2013), p. 273-297; Harold Lasswell and Abraham Kaplan, *Power and Society: a framework for political inquiry* (New Haven: Yale University Press, 1950).

[119] Felix Berenskoetter and Michael J. Williams, *Power in World Politics*, (Routledge, 2007), p. 7.

this power dimension against State B, neither coerce nor constraint the latter country, but rather shapes its norms and interests.[120] Indeed, sanctioning measures may be useful in order to shape international law norms. By using this third power dimension, the internationally wrongful act is signaled, and the responsible State is stigmatized, within the international community, for having violated international law norms and general customary principles.

3. THE STRUCTURAL DESIGN GOVERNING THE IMPLEMENTATION OF SANCTIONS UNDER THE UN FRAMEWORK

When discussing the structural design governing the implementation of UN sanctions against the targeted State, we should first recall that the UN Charter neither mentions the "sanctions" terminology, nor it contains guidelines concerning the actual application and enforcement of such measures within the international community. Nevertheless, despite not explicitly mentioned within the UN Charter, it is generally acknowledged that sanctions belong to measures not recurring to the use of military armed force, as framed by article 41, which implies that anytime invoked by the Security Council results into the creation of binding obligations for member-States, which are indeed recognized as the primary actors responsible for the implementation of sanctioning measures against the targeted country.

This assumption is further confirmed, following the emerging scholars' perspective in the academic world, by the provision enshrined in article 25 of the UN Charter, which maintains that decisions by the Security Council, taken pursuant to the powers conferred to the organ by the present Charter, must be necessarily agreed and carried out by the organization's member-States. As a matter of fact, international academics have started to broadly interpret article 25 as to provide a more solid constitutional basis to the obligation for UN member-States to implement sanctions regimes against targeted countries.[121]

The procedure of implementing targeted sanctions' by UN member-States is twofold: indeed, UN member-States are not only responsible to implement such policies internationally against the targeted State, through the application of measures directed in limiting the capabilities and capacities of the latter country, but also nationally, whereby sanctions, especially economic and financial

[120] Raymond Duvall and Michael N. Barnett, *Power in Global Governance*, (Cambridge: Cambridge University Press, 2005).

[121] Enrico Carisch and Loraine Rickard-Martin, "Implementation of United Nations Targeted Sanctions", in Thomas J. Biersteker, Sue E. Eckert and Marcos Tourinho, *Targeted Sanctions: the impacts and effectiveness of United Nations action*, (Cambridge University Press, 2016), p. 150.

sanctions, are translated into national regulations addressing specifically banks and individual companies.

Nonetheless, UN member-States are not the only actors involved in the process of implementing sanctions. Indeed, a range of additional international actors, both within the UN framework and outside the organization, directly participate into implementing sanctions as disposed by the Security Council: sanctions committees, the Secretariat, the Panel of Experts, as well as external actors as other international or regional organizations, the private sector and civil society.

Accordingly, the UN Security Council, when resorting to the invocation of article 41, or more generally Chapter VII of the UN Charter, for the enforcement of sanctions regimes against States responsible for an identified threat to the international peace and security, may decide to establish, within the same resolution or in a subsequent measure, as we have seen in the case of Southern Rhodesia and South Africa, a sanctions committee with the mandate of monitoring the implementation of such a regime, as well as ensuring the effectiveness of the same. More precisely, only in the case of Southern Rhodesia was the sanction committee established by the Security Council in a resolution following the one disposing of the enforcement of the 232 Sanctions Regime. At the level of membership, sanctions committees perfectly reflect the composition of the UN Security Council, with the five permanent members (United States, Russia, United Kingdom, France and China) plus the ten rotating ones.

Apart from the role played by the sanctions committees, another fundamental contribution in the activity of the implementation of UN sanctions has been performed by the Panels of Experts, which are independent bodies, authorized by a resolution and appointed by the UN Secretary-General, responsible of investigating the enforcement of such measures directly assessing evidence on the ground. These investigative bodies have been crucial in providing to the sanctions committees direct information related to evasion strategies and sanctions violations.[122]

Furthermore, several other UN-related actors, especially from the last two decades, have started to increasingly contribute into the activity of implementing sanctioning regimes, as well as monitoring their own enforcement. However, it must be specified that, differently from individual member-States, the mandates of sanctions committees and Panels of Experts, to respect to sanctions' implementation, is much more functional in practice, as focused on specific typologies and/or natures of sanctions regimes.[123]

For instance, among this new group of actors involved in the design of UN sanctions' implementation, the Financial Action Task Force (FATF) reserves particular attention. The FATF

[122] *Ibidem*, p. 154.
[123] *Ibidem*, p. 156.

has been established in occasion of the 1989 G7 meeting in Paris with the mandate of fighting money laundering. Created as a trans-governmental network of finance officials, its membership now counts 36 member jurisdictions and 2 regional organizations, comprising, apart from the original G7 members, the European Commission and eight additional countries, the majority of the most industrialized countries within the globe, BRICS included.[124]

The FATF's works nowadays highly contribute to the activity of the UN Security Council in the field of counter-terrorism. Indeed, the level of interactions between the FATF and the United Nations has particularly increased starting with the terrorist events of the 9/11, in particular with the main UN organs that operate within that specific dimension, meaning the Sanctions Committee on the ISIL and Al Qaeda Sanctions Regimes and the Counter-Terrorism Committee (CTC).[125] Therefore, from its establishment, and particularly after 2001, the UN Security Council has agreed in adopting the standards identified for combating the financing of international terrorism by the FATF's activity in its sanctioning measures.

Additionally, since 2008, the FATF's mandate has further expanded, as it now operates also in the dimension related to the proliferation of WMDs. This has led to a parallel expansion of the interconnections between the trans-governmental network and the international organization to include also the fight against the financing of the proliferation of such weapons and which, consequently, resulted into the welcoming, by the UN Security Council, of FATF's informal recommendations also on this subject area. As a matter of fact, the FATF, as well as its regional bodies, the so-called FSRBs, periodically advices the previously mentioned Sanctions Committees on ISIL and Al Qaeda, the CTC, and, additionally, the Sanctions Committee on the Democratic People's Republic of Korea (DPRK) with the purpose of regularly informing those bodies, under the authority of the UN Security Council, on the alternative measures developed by the international community for the fighting against international terrorism and the proliferation of WMDs, as well as in providing further technical assistance for the domestic implementation of UN sanctions measures by member-States. The increasing degree of interconnectedness between the FATF and the UN Security Council's subsidiary organs is further confirmed by referring practice of the latter actors to the former's informal recommendations. Indeed, the UNSC subsidiary organs' guidelines to the UN member-States, on how to effectively implement the array of obligation stemming from the Council's

[124] Anne-Marie Slaughter, *A New World Order*, (Princeton University Press, 2004), p. 6-54.

[125] Alejandro Rodiles, "The Design of UN Sanctions Through the Interplay with Informal Arrangements", in in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 185.

resolutions, regularly include specific references to the recommendations by the FATF, especially when concerning economic and financial sanctions.

4. THE QUESTION OF TIMING: HOW UN SANCTIONS REGIMES ARE TERMINATED

Sanctions termination is another fundamental pillar within the discussion of UN sanctions design. Indeed, we have to recall that a sanction regime can be assumed to be generally effective not only when correctly enforced by UN member-States or when properly monitored throughout its existence, but also in relation to the achievement of its stated purposes and subsequent termination. Despite this, however, the debate over the procedures related to the termination of sanctions regime within the discussion on sanctions' efficiency has always been feeble, and, as a matter of fact, it has started to be considered by academics as a relevant factor for the assessment of a sanctions regime's effectiveness only recently.

This reluctance in considering sanctions' termination as a fundamental element to be considered within the assessment of the efficiency of such measures can be rooted on the notion that the procedures governing the dissolution of UN sanctions regimes have always been criticized to be politically biased, since related, not only to the voting rights of the Security Council's member-States, but rather on the veto power conferred to the five permanent members. For instance, this implies that if just one single permanent member vetoes a UN Security Council's draft resolution intended to lift the sanctions regime in place in one country, the termination provision does not apply, and the sanctions regime does not cease to have effect on the targeted State.

The progressive evolution in the UN sanctions practice from configuring them as comprehensive measures to targeted measures, and the related increase in the degree of complexity that this innovation has comported, has also expanded the debate over the timing and the modalities of terminating such measures. By relying on modern practice, there exist different models of sanctions termination within the UN framework. Indeed, UN Security Council's resolutions with the objective of imposing sanctions regimes against targeted States, generally divide into three categories according to their reference to the modalities to lift the measures they are going to enforce with their adoption. Accordingly, UN sanctions can be enforced through:

(i) a resolution establishing also of the procedure for their termination;

(ii) a resolution not mentioning the date of termination;

(iii) a resolution stressing a commitment to review the sanctioning measures, pursuant to certain conditions.[126]

It is clear, for instance, that the most immediate model for determining the termination procedure of UN sanctions regimes is the first one. As a matter of fact, Security Council's resolutions disposing of targeted sanctions may *de facto* contain also a provision regulating the termination of the same measures. This provision takes the name of "sunset clause",[127] as it specifies the expiry date of a sanctions regime. Generally speaking, sunset clauses defined the deadline of a sanctions regime, which, however, can be postponed if authorized by a subsequent decision by the Security Council. Resolutions belonging to this first termination model, generally contains a sunset clause allowing the regime for a 12-month period, renewable pursuant to a subsequent authorization. By the same token, sanctions regimes can also be disposed of with an initial time limit of one year, following which the regime will be regularly reviewed with the idea of conforming the disposed of measures with the changing environmental circumstances in which the sanctions regime positions.

The second model of sanctions termination, instead, provides no guidelines on the process of lifting sanctions. Indeed, the UN Security Council's resolutions disposing the very first sanctions regimes in the organization's practice contained no provisions limiting in time the application of such measures against the targeted State. This implied that in order to terminate the sanctions regime, the UN Security Council had first to pass a new resolution with such an objective. Nevertheless, this could prove to be highly problematic, since in this way the termination of a sanctions regime against a targeted State was even more politically biased, as it could be subjected to the veto power of one of the permanent members of the Security Council. For instance, it is clear that in order to be terminated, sanctions regime belonging to this second model had to require the agreement of all the five permanent members. This perfectly explains the reason why, in modern practice, the UN Security Council has progressively distanced from this model, which so far is the less recurrent one among the three, as also to increase the level of effectiveness of sanctions regimes.

Finally, the third model, which basically appears to be the most frequent one among the three analyzed, includes the commitment for the review of the sanctions regime. This implies that, since there is no indication about the expiry date of the sanctioning measures in place against the targeted State, the regime remains active until the sanctions committee of that specific regime, in its activity of monitoring and reviewing such measures, recommends the Security Council to terminate its

[126] Kristen E. Bonn, "Timing Matters: termination policies for UN sanctions", in in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 239.
[127] *Ibidem*.

application. Subsequently, the Security Council will pass a new resolution with the purpose of lifting sanctions.

The previously analyzed models of sanctions termination, however, must be complemented by specific review mechanisms whenever dealing with UN targeted sanctions against individuals suspected to belong or to sustain terrorist organizations.[128] The termination of sanctioning measures on individuals, pursuant to the Al Qaeda and ISIL sanctions lists contained in Resolutions 1267/1989/2253,[129] must indeed follow a specific review mechanism, which is priory requested by the targeted individuals. Pursuant to Resolution 1989, the review is mainly conducted by the Ombudsperson's office and, following the results of its assessments, targeted individuals can be de-listed unless each member-State sitting within the Sanctions Committee rejects such decision within 60 days from its pronouncements.

Finally, at this point, it is interesting to note that international scholars tend to divide when trying to define the model of sanctions termination that enhances the most the degree of effectiveness of UN sanctions. Nevertheless, it would be better to say that international academics are inclined to divide between those favoring short and temporary defined sanctions, and those, on the other hand, favoring temporary indefinite sanctions.[130]

Therefore, the majority of international scholars firmly argue that sanctions containing the so-called "sunset clause" are beneficial for several reasons. For instance, limiting the duration of a sanctions regime further improves the supervision of such measures. As a matter of fact, the main idea is that sunset clauses induce the Security Council, as well as its sanctions committees, which are composed of the same States sitting within it, to regularly review sanctions.[131] Regular reviews on sanctions accordingly enable legislators and decision-makers to better develop new informational resources, as well as to perfectionate the implementation mechanisms of such measures, but, most importantly, to periodically assess whether previously framed objectives have been achieved in the meantime. Furthermore, one of the major reason advanced by the supporters of short and definite sanctions is related to the idea that they exponentially increase the sense of urgency which may also incentivize the parties involved in the implementation of a sanctions regime, thus the sanctioners and the sanctioned, to speed up the final dissolution of the targeted State's misconduct.

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[128] *Ibidem*, p. 241.

[129] *UN Security Council Resolution 1267* (October 15, 1999), UN Doc. S/RES/1267; *UN Security Council Resolution 1989* (June 17, 2011), UN Doc. S/RES/1989; *UN Security Council Resolution 2253* (December 17, 2015), UN Doc. S/RES/2253.

[130] Kristen E. Bonn, "Timing Matters: termination policies for UN sanctions", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 245-252.

[131] John Finn, *Sunset Clauses and Democratic Deliberation: assessing the significance of sunset provisions in antiterrorism legislation*, (Columbia Journal of Transnational Law, 48, 2010), p. 448.

On the contrary side, other international scholars agree in maintaining that indefinite sanctions are preferable since they enable the decision-makers to better control the political agenda related to the sanctions regime and over the targeted State. Furthermore, they also argue that a sanction deadline, in the form of a sunset clause, may occasionally lead to time pressures which may trigger brinkmanship.[132]

[132] Marco Pinfari, *Peace Negotiations and Time: deadline diplomacy in territorial disputes*, (Routledge, 2012), p. 22.

CHAPTER 5

EXPLORING THE FUNCTIONS OF THE UNITED NATIONS TARGETED SANCTIONS

1. UN TARGETED SANCTIONS AS COUNTER-TERRORISM MEASURES

It is well acknowledged at this point that in the last decades UN sanctions have experienced an array of substantive and procedural transformations which ultimately resulted into the shift from comprehensive to targeted measures. By the same token, it is also clear that the modern diversification and complexity achieved by UN targeted sanctions strictly depend on the typologies of threats the UN Security Council must confront with. As a matter of fact, the last few decades have witnessed the further emergence within the international community of untraditional threats to the international peace and security, which have exercised a huge pressure on the Security Council in adapting its decision-making activity, as well as the diplomatic instruments and devices at its disposal, to respond effectively to these new circumstances menacing the stability of the international collective security system.

In this light, one of the major examples is the UN counter-terrorism sanctions regime which *de facto*, starting from the post-9/11, completely epitomized the process of transformations experienced by UN sanctions, as instruments of international diplomatic relations, during the last decades. For instance, as we will explore during this section, UN targeted sanctions as counter-terrorism measures have progressed towards individualization, and subsequently also towards formalization, as never before and as no other sanctions regime had done within the UN framework. This has resulted, not only into a transformation of sanctions as instruments in the hands of the UN Security Council in order to confront with possible threats within the collective security system, but also into a progressive metamorphosis of the Council itself, as a guardian of the maintenance of international peace, as its functions are gradually evolving from being an organ with the authority of focusing exclusively on solving threats to and breaches of the international security, to an

international body in charge of framing, not only security measures, but also criminal ones, and thus developing both a legislative and quasi-judicial authority within the international framework.[133]

1.1 THE NOVELTIES EPITOMIZED IN THE 1267 AL QAEDA SANCTIONS REGIME: TOWARDS THE INDIVIDUALIZATION OF COUNTER-TERRORIST SANCTIONS

In order to understand the substantive and procedural transformations the UN sanctions have experienced especially in the international terrorism dimension, it is first relevant to explore the structure of the original counter-terrorist sanctions regime, meaning the 1267 Al Qaeda Regime. For instance, the 1267 sanctions regime established by the UN Security Council in 1999 against Al Qaeda has opened the way towards the individualization of UN sanctions, and consequent formalization.

The Al Qaeda Sanctions Regime is highly relevant in the present discussion, since one of the first targeted sanctions disposed of by the UN Security Council as a counter-terrorism measure. Indeed, the primary mandate of the 1267 sanctions regime was specifically that of targeting the Taliban regime that was *de facto* exercising authority in the territory of the Afghani State. Thus, the above-mentioned sanctions regime perfectly fit within the new practice of the UN Security Council's "smart sanctions",[134] as it addressed exclusively the decision-makers responsible for the perpetration of internationally wrongful acts, and not the State of Afghanistan, which *de facto* was under the control of the Taliban and thus unable to stop by its own the continuation of the misconduct.

Nevertheless, the peculiarity and relevance of the 1267 sanctions regime does not lie only on the concept of being one of the first smart sanctions established by the Security Council when confronted with a terrorist threat, but rather on the fact that its mandate was further enlarged after the Council passed Resolution 1390[135] in 2002, creating also a huge debate on sanctions and their related legitimacy among international law scholars and academics. Indeed, by adopting Resolution 1390, the Security Council disposed that the 1267 sanctions regime was no longer aimed at addressing the political leadership in Afghanistan, as the Taliban were almost being totally removed from power as requested with Resolution 1267, but rather the entire Al Qaeda terrorist network that was behind the Taliban regime in the country. Resolution 1390, for instance, resulted to be a real turning point in the UN Security Council practice, as it represented the first sanctions regime adopted by the United

[133] Lisa Ginsborg, "UN Sanctions and Counter-Terrorism Strategies: moving towards thematic sanctions against individuals?", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 73.
[134] David Cortright and George Lopez, "Reforming Sanctions", in David Malone, *The UN Security Council: from the Cold War to the 21st century*, (Lynne Rienner Publishers 2004).
[135] *UN Security Council Resolution 1390* (January 16, 2002), UN Doc. S/RES/1390.

Nations against a legal entity that was not a State. This implied that, being not linked to a territorial dimension, the 1267 sanctions regime was to become the very first experience of a UN targeted sanctions regime with global reach.[136]

Furthermore, the innovative nature of Resolution 1390 not only lied in the concept of turning the 1267 sanctions regime into a regime addressing individuals belonging to an international terrorist network, and thus with a global dimension, but also on the fact that was adopted by the Security Council exclusively in response to acts of international terrorism.[137] This meant that for the first time the Security Council was determining, pursuant to the provision contained in article 39 of the UN Charter, acts of international terrorism, committed by groups of individuals belonging to a terrorist organization, as threats to international peace and security. For instance, this notion comported also a parallel shift in the interpretation of article 39 of the Charter which, before the advent of international terrorism as a global threat within the international community, was necessarily resorted by the UN Security Council to determine whether acts committed only by States could represent a threat to or a breach of peace and security. Clearly, in order to include international terrorism as an act of aggression committed by non-State actors, such as individuals and groups of individuals, within the set of international threats triggering a UN counter-response, the growing adoption by the Security Council of individual sanctions also resulted into a simultaneous procedural individualization of the interpretation of article 39 or, more broadly, of the entire UN Charter, which instead was initially framed by the founding fathers to address specifically the inter-state dimension of the traditional body of international law.

The 1267, taken in conjunction with Resolution 1390, had become, for instance, the point of departure for developing a new practice within the UN Security Council, rooted into the adoption of sanctioning measures with global reach and against individuals, belonging to an international terrorist network, responsible for the commitment of acts of international terrorism.

Finally, it has to be noted that another novelty epitomized in the 1267 sanction regime, derived by the application of Resolution 1390, was the increased degree of indeterminacy of UN targeted sanctions.[138] Therefore, taking past targeted sanctions regimes disposed of by the Security Council as evidence, what emerges is that the category of individuals addressed by Resolution 1390 is profoundly widened and clouded. As a matter of fact, to respect to previous resolutions targeting

[136] Iain Cameron, *UN Targeted Sanctions and the ECHR*, (72 Nordic Journal of International Law, 2003), p. 159-164.

[137] Lisa Ginsborg, "UN Sanctions and Counter-Terrorism Strategies: moving towards thematic sanctions against individuals?", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 75.

[138] *Ibidem*.

individuals, Resolution 1390 does not address decision-makers, the political or the militia leadership, but rather individuals and entities associated to Al Qaeda, the Taliban, and most importantly, Osama bin Laden. This profoundly increased the level of indeterminacy of targeted individuals, as it was much more complex for the responsible authority, as well as for the UN member-States enforcing such sanctions regime within their own territory and within the international community, to clearly determining and identifying individuals meeting those criteria.

1.2 RESULTED FORMALIZATION FROM THE MOVE TOWARDS INDIVIDUALIZATION: THE LISTING (AND DELISTING) PROCEDURE OF THE 1267 SANCTIONS COMMITTEE

Beginning with the 1267 Al Qaeda Sanctions Regime, the UN targeted sanctions started to further move towards individualization and formalization, as well as globalization of sanctions, resulting into the listing of individuals on the basis of their presumed attachment to the international terrorist network, and subsequent determination of representing possible threats to the international peace and security.

The requests of listing suspected individuals, groups and other entities associated with Al Qaeda, since supporting or financing terrorist activities, into the 1267 sanctions committee, also known as the "Consolidated List", are generally submitted by UN member-States. Nevertheless, only in 2005, after the adoption of Resolution 1617[139] and Resolution 1822,[140] was a clear delineation of the activities determining whether an individual, group, undertaking and legal entity could be associated to the international terrorist network brought in. Accordingly, UN member-States started to request the listing of individuals anytime they possessed the evidence of their participation into the financing and planning of terrorist activities, as well as anytime their efforts were directed towards supporting Al Qaeda as an international terrorist network.

When requesting to add into the Consolidated List a suspected individual, UN member-States should also submit, but are not necessary obliged to so, an irrefutable evidence to the 1267 Sanctions Committee – whose nature, meaning whether it had been obtained through media, the explicit admission by the suspect or intelligence, had also to be demonstrated – proving the association between the suspected individual and the terrorist organization.[141]

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[139] *UN Security Council Resolution 1617* (July 29, 2005), UN Doc. S/RES/1617.

[140] *UN Security Council Resolution 1822* (June 30, 2008), UN Doc. S/RES/1822.

[141] Annalisa Ciampi, "Security Council Targeted Sanctions and Human Rights", in Bardo Fassbender, *Securing Human Rights? Achievements and Challenges of the UN Security Council*, (Oxford University Press, 2011), p. 107.

Once the member-State submits the request for listing an individual assumed to be associated to international terrorist activities, the name of the suspected individual is added into the Consolidated List in the circumstances in which there is no opposition by one of the members sitting in the 1267 Sanctions Committee. This implies that individuals are enlisted into the Consolidates List pursuant to a tacit consensus of each member-State within the Sanctions Committee. If consensus is not achieved, then the listing request must be submitted to the Security Council which will decide therein.

It must be noted, however, that similar circumstances are generally unlikely. As a matter of fact, the idea that there is not a mandatory requirement for UN member-States to present supporting evidence when requesting to add individuals in the Consolidated List, makes the possibility of an objection of one State sitting in the Committee to the listing of an individual much more infrequent. Three days after the Committee accepts the listing of an individual or entity within the Consolidated List, the country in which the individual is national, as well as the country in which the individual or entity resides, are notified and they subsequently have to undertake all the possible actions to inform as soon as possible the listed subject. This last notion has been one of the major debated issues related to the activity of sanctioning individuals suspected to be associated with international terrorist networks. Indeed, the absence of any type of *ex ante* form of protection of listed individuals has always been assumed to infringe upon the integrity and due process of such mechanism.

Despite the lack of *ex ante* protection, there exist forms of *ex post* remedies individuals can apply to request to be de-listed. Prior to 2009, the only possible procedure to request the delisting of the name of an individual or legal entity from the Consolidated List was by referring to the Focal Point, as established in Resolution 1730.[142] Nevertheless, as later criticized by international scholars, the maximum that a petitioner could achieve by referring his delisting request to the Focal Point, was to have his demand included in the political agenda of the Consolidated List, something that was subsequently considered not particularly adequate in terms of guarantees of individual procedural rights. Following the growing human rights concerns related to the listing and delisting procedures to the Consolidated List, in 2009 the UN Security Council provided in Resolution 1904[143] also for the establishment of the Office of the Ombudsperson with the mandate of flanking both the Sanctions Committee and the Focal Point in the delisting activities. Particularly, the Office of the Ombudsperson has to gather information on the individuals requesting to be delisted, as well as it has to maintain dialogue, as a mediator, with the petitioner during the entire procedure. Indeed, at no point the petitioner will be heard by the Sanctions Committee, nor he has the right to directly access to and dialogue with the Committee.

[142] *UN Security Council Resolution 1730* (December 19, 2006), UN Doc. S/RES/1730.
[143] *UN Security Council Resolution 1904* (December 17, 2009), UN Doc. S/RES/1904.

Therefore, as provided by Annex II of Resolution 1904, the Ombudsperson should provide to the Sanctions Committee a "Comprehensive Report" containing all the relevant information and data collected by the Office concerning the petitioner and his request to be delisted. Accordingly, the Sanctions Committee has thirty days in order to review the report and decide whether the name of the petitioner will remain within the Consolidated List by rejecting his request, or whether it will be delisted, and thus accepting his request. Nevertheless, it must be recalled that in both cases the outcome of the entire procedure must be obtained through general consensus among the member-States sitting in the Sanctions Committee. This also implies that, during the overall procedure, each State can prevent the delisting at any time, bringing the request to the Security Council. Following, in the cases in which the request should be referred to the Security Council, the approval or rejection of the delisting request will occur through the normal decision-making mechanisms inherent to the Council.[144] For instance, the delisting would be rejected pursuant to a majority vote against the petitioner's request or any time, despite obtaining a majority vote in favor of disposing of the delisting of the individual, one of the permanent members of the Security Council decides to exercise its veto power.

1.3 PROCEDURAL LEGAL CHALLENGES RELATED TO THE MOVE TOWARDS INDIVIDUALIZATION OF THE 1267 SANCTIONS REGIME

As previously mentioned in the precedent section, apart from the individualization trend underwent by UN sanctions starting from the end of the 1990s, the shift from comprehensive to targeted measures comported also an increased formalization of such devices. Nevertheless, despite this trend in the sanctions' practice, it is well known among international law scholars that the 1267 sanctions regime has failed to guarantee the respect of an array of procedural standards, especially those related to the review mechanisms and, most importantly, the right of due process of listed individuals.[145] This is greatly testified by the expanded case-law of national and regional courts on the subject-area in the following decade, whereby UN member-States were held responsible for their failure to commit in safeguarding the procedural rights of listed individuals when enforcing the sanctioning measures. To this regard, it is indeed enough to recall the *Kadi* saga, which will be

[144] Annalisa Ciampi, "Security Council Targeted Sanctions and Human Rights", in Bardo Fassbender, *Securing Human Rights? Achievements and Challenges of the UN Security Council*, (Oxford University Press, 2011), p. 110.

[145] Michael Bothe, *Security Council's Targeted Sanctions Against Presumed Terrorists: the need to comply with human rights standards*, (6 Journal of International Criminal Justice, 2008), p. 541; Andrew Hudson, *Not a Great Asset: the UN Security Council's Counter-Terrorism Regime: violating human rights*, (25 Berkeley Journal of International Law, 2007), p. 213.

explored in the following chapters, in order to understand the impacts of such legal challenges the UN Security Council had to confront with in order to increase both the effectiveness and legitimacy of sanctions as devices of international relations.

As the Security Council itself subsequently recognized the necessity to provide, when implementing targeted sanctions, an higher degree of protection of the procedural rights of listed individuals, over the years the Council has committed itself in progressively reforming the regime as to increasingly guarantee fair procedures for listing and delisting individuals assumed to be attached to the Al Qaeda regime, such as the notification to the targeted individuals. Furthermore, as previously mentioned, the Security Council has additionally established the Office of the Ombudsperson as an assistant body in the activities related to the delisting procedure.[146]

The Ombudsperson Office's functions, however, especially after the adoption of Resolution 1989 in 2011, have increasingly been reformed and its mandate enlarged, as to guarantee the effectiveness of the system of sanctions, as well as higher levels of protection of procedural rights. Nevertheless, from a theoretical and academic perspectives, despite the improvement in the delisting procedures, this has proven not to be completely sufficient in order to guarantee the minimum level of protection of individual procedural rights,[147] as will be deployed in the following chapters.

1.4 SECURITY COUNCIL'S RESOLUTION 2253 ON ISIL AND THE FURTHER DEVELOPMENT OF INDIVIDUAL THEMATIC SANCTIONS

As the international threats within the world community are constantly evolving due to the emergence of new terrorist entities, such as ISIL, the 1267 sanctions regime has continued to change and develop over the last years. To this regard, it is relevant to mention Resolution 2253 adopted by the UN Security Council on December 2015 with the general objective to expand the mandate of the 1267 sanctions regime as to address also ISIL.

Although the Security Council has acknowledged in several circumstances the affiliation between ISIL and Al Qaeda, a factor that is also confirmed in Resolution 2170,[148] where the Council has explicitly recognized the link among the two international terrorist networks, Resolution 2253

[146] Annalisa Ciampi, "Security Council Targeted Sanctions and Human Rights", in Bardo Fassbender, *Securing Human Rights? Achievements and Challenges of the UN Security Council*, (Oxford University Press, 2011), p. 109.
[147] Lisa Ginsborg, "The United Nations Security Council's Counter-Terrorism Al Qaeda Sanctions Regime: resolution 1267 and the 1267 Committee", in Ben Saul, *Research Handbook on International Law and Terrorism*, (Edward Elgar Publishing, 2014).
[148] *UN Security Council Resolution 2170* (August 15, 2014), UN Doc. S/RES/2170.

has also renamed the above-mentioned Sanctions Committee in the 1267/1989/2253 ISIL and Al Qaeda Sanctions Committee, since the notion of considering ISIL as part of and thus associated to Al Qaeda has numerously been reprimanded, particularly by the USA, for serving exclusively political and legal purposes.[149]

Exactly as in the previous case, the 1267/1989/2253 sanctions regime continues to remain vague in terms of determining the individuals or group of individuals that are going to be targeted by the sanctioning measures. As a matter of fact, the category of individuals targeted is still profoundly widened and indefinite since they are listed on evidence of their association to the ISIL or Al Qaeda terrorist networks. Following the perspective of some legal scholars, this indeterminacy related to the vague criteria applied to enlist individuals can be easily outlined to be partly the product of the lack of an international definition of the term "terrorism".[150] Indeed, it may be actually problematic to provide evidence of the association of an individual to terrorist activities if there is not an overall universally agreed definition of what international terrorism is in terms of international law.

Nevertheless, it is important to underline that with the evolution of the original 1267 sanctions regime in the contemporary 1267/1989/2253 regime against ISIL and Al Qaeda, the UN Security Council has continued to further move towards the establishment of "individual thematic sanctions".[151] Accordingly, based on collected evidence on the association to the international terrorist networks of ISIL and Al Qaeda, the Security Council can impose sanctioning measures on suspected individuals. Therefore, it is for these reasons that international law scholars have argued that, through the imposition of individual thematic sanctions, the Security Council has begun to develop a quasi-judicial function. This has *de facto* generated an extensive debate among academics which, observing the development in the nature of the Security Council and recognizing the evolution towards the acquisition of quasi-judicial functions, have strongly maintained the need for the Council to fully observe the same procedural standards commonly adopted by every single courts and tribunals, both at the national, regional and international levels, as to completely respect the individual right of due process which, up to that moment, had always been argued not to be sufficiently guaranteed by the UN Security Council while implementing individual targeted sanctions.[152]

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[149] Lisa Ginsborg, "UN Sanctions and Counter-Terrorism Strategies: moving towards thematic sanctions against individuals?", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 83.
[150] *Ibidem*.
[151] *Ibidem*, p. 82-86.
[152] Keith Harper, *Does the United Nations Security Council Have the Competence to Act as Court and Legislature?*, (27 New York University Journal of International Law and Politics, 1994), p. 156-157.

In front of the critics moved by international academics over the fairness of the application of individual thematic sanctions in the light of a possible acquisition of quasi-judicial functions, the UN Security Council, despite recognizing the need for improvements, continues to reiterate the relevance of the nature of individual sanctions as the most effective preventive measures applied to fight against terrorism. Nevertheless, it is clear that, in terms of international human rights law, the complete guarantee of individual procedural rights, especially due process, by the UN Security Council in the contemporary delisting model remains highly debatable and deserves further improvements.

1.5 THE CONSEQUENCES OF INDIVIDUALIZATION AND FORMALIZATION IN THE IMPLEMENTATION OF UN SANCTIONS

Finally, it is also interesting to consider which are the main impacts of the trends towards individualization and formalization of UN sanctions in their implementation. The main area of UN individual thematic sanctions in which there have been the most concrete results in terms of State compliance is the one concerning the freezing of suspected individuals' assets, despite, as previously analyzed, it has generated several human rights concerns.[153] The emergence within the UN framework of individual thematic sanctions has indeed provided to national banks a major role in implementing financial dispositions contained in Security Council's resolutions. Many are indeed the cases in which national banks have committed in implementing the 1267 assets freeze, to the point that some international law scholars have argued the idea that the 1267 sanctions regime has provoked the shift from a State-sponsored approach to a transnational criminal finance approach to counter terrorism worldwide.[154]

On the contrary, the move towards individualization and formalization, and the subsequent globalization of UN targeted sanctions, has necessarily led another measure commonly contained in the counter-terrorist devices generally adopted by the Security Council, and also present in the traditional 1267 sanctions regime meaning arms embargo, to gradually lose effectiveness. It is easily understandable that while in the original 1267 Al Qaeda sanctions regime arms embargo where expressly linked to the territory where they were to be enforced by member-States, after the terrorist

[153] Lisa Ginsborg, "UN Sanctions and Counter-Terrorism Strategies: moving towards thematic sanctions against individuals?", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 94.

[154] Anne Clunan, *U.S and International Responses to Terrorist Financing*, (4 Strategic Insights, 2005), p. 4.

attack of 9/11 and the subsequent emergence of individual thematic sanctions against indefinite entities, created further complexity and unclarity in their enforcement by UN member-States.[155]

Therefore, it is clear that the path towards individualization and formalization has further increased the degree of complexity of UN smart sanctions, bringing both positive aspects, such as the increased effectiveness of such measure, and problematic concerns, still deserving improvements before being totally solved. This led to the conclusion that, as simultaneously both the international terrorist threats and the UN counter-terrorism regime continue to evolve and to become more sophisticated, further concerns on the role and activities of the UN Security Council emerge. As a matter of fact, despite UN counter-terrorist sanctions are moving both in the direction of individualization and formalization, the move towards the latter occurs with inadequate pace to respect to the former, as both the protection of procedural individual rights and the implementation mechanisms still present several deficiencies.

2. UN TARGETED SANCTIONS AS COUNTER-PROLIFERATION POLICY MEASURES

Apart from countering international terrorism, over the years the UN Security Council has also implemented targeted sanctions as counter-proliferation policy measures. In this work, we already have mentioned this typology of UN sanctions when discussing the array of international legal limits on the enforcement of both unilateral and multilateral sanctions. As a matter of fact, lately targeted economic sanctions have frequently been used as instruments of coercive diplomacy, both at the UN level and by individual States, in order to prevent or to counter the proliferation of weapons of mass destruction within the international community.

The purpose of this section is mainly that of exploring the UN Security Council's practice related to the application of targeted economic sanctions as counter-proliferation policy measures. Apart from the Iraqi case, whose 661 sanctions regime has already profoundly studied in the course of the present work, the UN Security Council, after having determined an existing threat rooted on the WMD proliferation activity of one State, has disposed sanctions on three other States: Libya, the Democratic People's Republic of Korea and Iran. Therefore, the last two mentioned cases will be further examined, being the most recent one, with the general objective of understanding which is the

[155] Lisa Ginsborg, "UN Sanctions and Counter-Terrorism Strategies: moving towards thematic sanctions against individuals?", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 94.

general scheme followed by the Security Council when confronted with such an international threat and how its practice has evolved during time.

2.1 THE 1718 SANCTIONS REGIME ON THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA

In response to a prolonged development of the North Korean nuclear program, in 2006 the UN Security Council adopted a first measure adopting sanctions against the targeted country. Resolution 1718,[156] adopted in October 2006, was the first of a series of UN resolutions targeting North Korea and specifically addressing the periodic nuclear tests underwent by the State's government.

The North Korean government had already announced the beginning of its campaign to become a world nuclear power since 1993, when it decided to withdraw from the Nuclear Non-Proliferation Treaty (NPT).[157] Although the UN Security Council had already adopted Resolution 825[158] in 1993 in order to persuade the North Korean government to continue to comply with the obligation of the NPT agreement, the situation worsened when in July 2006 an array of nuclear missile tests was carried on over the Japan Sea. The response of the UN Security Council was immediate and clear. As a matter of fact, Resolution 1695[159] was instantly adopted and the Council explicitly maintained that the actions perpetrated by the North Korean government amounted to threat to the international security, as the launch of the nuclear missiles could jeopardize the stability of the region.

Nevertheless, it must be noted that, despite the UN Security Council, before having determined the existence of a threat to the international peace and security, called upon its member-States to enact an array of measures that would have prevented the transfer to North Korea of technological items, as well as missile-related goods, necessary for the country to continue to develop its nuclear capability, neither Article 41, nor Chapter VII, were mentioned and invoked by the Council in Resolution 1695. As a matter of fact, international law scholars still argue that the "binding" nature of the measures adopted by the Security Council in the previous resolution is highly debatable, as also confirmed by the use of the language selected for Resolution 1695.[160]

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[156] *UN Security Council Resolution 1718*, (October 14, 2006), UN Doc. S/RES/1718.
[157] Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law*, (Cambridge University Press, 2009), p. 453.
[158] *UN Security Council Resolution 825*, (May 11, 1993), UN Doc. S/RES/825.
[159] *UN Security Council Resolution 1695*, (July 15, 2006), UN Doc. S/RES/1695.
[160] Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law*, (Cambridge University Press, 2009), p. 454.

Following the performance of an additional nuclear test in October 2006, the Security Council adopted a further resolution, finally authorizing, after having determined the existence of a threat to the international peace and security as recognized by the powers conferred by article 39 of the UN Charter, mandatory sanctioning measures on the North Korean government rooted on the invocation of article 41. The general purpose behind the adoption of Resolution 1718 by the Security Council was to persuade the government of North Korea to permanently stop the continuation of nuclear tests which highly represented a threat to the stability of the entire region, as well as of the fragile international relations equilibria, as well as to induce the State to cease its ambitions to become a world nuclear power and to comply with the obligations provided by the NPT agreement, from which the North Korean government had previously withdrawn.

The adoption of three subsequent UN Security Council's resolution, still targeting the senior government officials and entities directly implicated in the North Korean nuclear weapons tests and the launch of a satellite with a ballistic missile in the space[161] – Resolutions 1874,[162] 2087,[163] and 2094[164] – have led international academics to doubt about the consistency of UN targeted sanctions as counter-proliferation devices. As a matter of fact, there are no doubts that the proliferation of weapons of mass destruction certainly constitute a threat to the international peace and security; nonetheless, recently, apart from North Korea, other States within the international community have started nuclear tests, namely Iran, India, Pakistan and Israel. Following the perspective of a segment of the international scholars on UN sanctions, the choice by the Security Council to condemn and subsequently impose economic targeted sanctions only against the North Korean government, and successively also against Iran, as we are going to analyze in the next section, underlines a selective approach undertaken by the Council while determining which nuclear activity may concretely constitute a threat to the international security.[165] This not only poses questions on the consistency on the application of UN targeted sanctions as counter-proliferation measures, but also advances the need for the UN Security Council to still develop a comprehensive model for their application in that particular dimension.

[161] Daniel H. Joyner, "UN Counter-Proliferation Sanctions and International Law", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 109.
[162] *UN Security Council Resolution 1874*, (June 12, 2009), UN Doc. S/RES/1874.
[163] *UN Security Council Resolution 2087*, (January 22, 2013), UN Doc. S/RES/2087.
[164] *UN Security Council Resolution 2094*, (March 7, 2013), UN Doc. S/RES/2094.
[165] Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law*, (Cambridge University Press, 2009), p. 457.

2.2 THE 1737 SANCTIONS REGIME ON IRAN

As for North Korea, the Security Council adopted a resolution against the Iranian government as an attempt to induce the country to stop its nuclear ambitions. For instance, in Resolution 1737 the UN Security Council requested the Iranian government to stop the continuance of its nuclear tests and to comply again with the international obligations concerning the non-proliferation of nuclear weapons. After having recognized the existence of a threat to the international peace and security in the nuclear activities undertaken by the Iranian government, the Security Council explicitly invoked the application, not only of Chapter VII, but specifically of non-forceful measures as framed in article 41 of the UN Charter.

Therefore, the scheme followed in the application of economic sanctioning measures targeting Iran is the same as the 1718 sanctions regime on the Democratic People's Republic of Korea. Similarly, international scholars also have moved against the sanctions regime on Iran the same perplexities they had already exposed in the North Korean case. As a matter of fact, international academics reiterated even in this case the lack of consistency of the sanctions model applied by the Security Council when addressing the threat of nuclear proliferation.

3. UN TARGETED SANCTIONS AS A HUMAN RIGHTS DEVICE

Last, but not least, the UN Security Council has developed in the course of the last two decades the practice of recurring to the implementation of targeted sanctions also with the view of promoting and further advancing the protection and respect of international human rights.

Despite the UN Charter does not contain exhaustive provisions inherent to the protection of human rights, the UN Security Council's function in relation to the obligation to protect and promote human rights has particularly enlarged during the last decades. As we have explored in the context of the previous chapters, this enlargement of the Council's mandate is a derivation of an extensive interpretation of article 39 of the Charter, which clearly confers upon the Security Council the powers to determine the existence of a threat to or a breach of international peace, triggering the subsequent application of articles 41 or 42. Nevertheless, the spreading of gross and large-scale violation of human rights has led the UN Security Council to fill the existing "protection gap".[166] This has been

[166] Daphna Shraga, "The Security Council and Human Rights – from Discretion to Promote to Obligation to Protect", in Bardo Fassbender, *Securing Human Rights? Achievements and Challenges of the UN Security Council*, (Oxford University Press, 2011), p. 9

possible by identifying human rights violations as threats to and breaches of international peace and security. This means that anytime the Security Council determines a violation of human rights, which now might be understood as a breach of the international peace and security, it has wide discretion to intervene applying measures provided by Chapter VII of the UN Charter.

Therefore, the Security Council has periodically condemned the violation of international human rights in an array of resolutions, calling also those UN member-States involved in the perpetration of acts breaching international human rights law to cease their misconduct and to comply with the body of international law and obligations. Nevertheless, as noted by some international law scholars, it seems that up to now the Security Council has intervened, through the invocation of measures contained in Chapter VII of the UN Charter, with the view of protecting international human rights exclusively in the context of conflicts internal to one State, impacting on both the regional stability and on the security of the international community.[167]

For instance, over the last two decades, the UN Security Council has been active in adopting also resolutions disposing of targeted sanctions in response to violations of human rights and international humanitarian law. This has led the UN Security Council to start to conceptualize the use of sanctions mechanisms as to respond to an array of specific human rights issues emerging within the international community. To this respect, the Security Council has passed resolutions mentioning that the application of targeted sanctions may appear necessary in three different contexts: for the protection of civilians, children and women from armed conflicts.[168]

Especially since the 1990s, the UN Security Council has started to get much more involved in the debate over the impacts of armed conflicts on civilians, children and women, developing also what were then to be known as "thematic resolutions".[169] In each of three thematic dimensions, the Security Council has passed resolutions reiterating the idea that it would have called for the application of targeted sanctions against parties involved if they refused to stop the continuation of armed conflicts, resulting into the perpetration of the violations of international human rights at the expenses of the weakest segments of society, meaning children and women.

For instance, the UN Security Council has constantly reiterated that the invocation of article 41 of the Charter might represent the best measure to respond to threats to or breaches of international

[167] Erika de Wet, *The Chapter VII Powers of the United Nations Security Council*, (Hart Publishing, 2004), p. 150-155.
[168] Metthew Happold, "UN Sanctions as Human Rights and Humanitarian Law Devices", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 128-135.
[169] *Ibidem*.

human rights, especially when dealing with the concepts of sexual violence on women and child soldiers in armed conflicts. Nevertheless, it must be noted that certain States still look at the intervention of the UN Security Council, due to human rights violation, with high skepticism. Indeed, especially among developing countries, there still exists the view that the protection of human rights is a matter pertaining to their own sovereign powers. This perspective shared by some UN members is furthermore advanced by arguing that the UN Charter does not explicitly confer upon the Council the power to protect international human rights, which for instance rests on the States' sovereignty. Nonetheless, we have also seen that there is an overall agreed enlargement of the UN Security Council's mandate, acknowledged by the majority of the international law scholars, as to also include the protection of human rights law as part of the international peace and security, whose breach leads the Council to exercise its obligations to intervene.[170]

Finally, the Security Council has also recurred to the application of targeted sanctions on specific situations amounting to gross violations of human rights: Resolution 1493[171] on the Democratic Republic of Congo (DRC) and Resolution 1591[172] on Sudan are perfect early examples of such practice. The UN Security Council had first imposed sanctions against the DRC in 2003 with the final objective of enhancing the peace-building process within the State. For instance, the Security Council expressed grave concern for the growing hostilities in the country, massively impacting on the humanitarian condition the population. This led the Council to determine the situation as threating the stability of the country and the region, the human rights of the DRC population and, finally, the international peace and security, in the view of triggering, under the scope of application of Chapter VII of the UN Charter, the imposition of targeted sanctions. The sanctions regime against the DRC took initially the form of an arms embargo in order to prevent the armed militia perpetrating, under the command of the military and political leadership, the violation of human rights in North and South Kivu and Ituri. Additional resolutions were subsequently adopted by the Security Council as to further the scope of application of the sanctions regime.

Similarly, also the sanctions regime against Sudan derived from the increasing humanitarian concerns resulted from the gross violation of human rights and humanitarian law perpetrated by the Janjaweed within the Darfur region. The UN Security Council repeatedly called upon the Sudanese government to protect the rights of its population, reiterating its primary responsibility to enhance human rights law within the country. Nonetheless, as the situation in the Darfur region continued to worse due to the indiscriminate attacks on the civilian and the resulted increase in the number of

[170] *Ibidem*, p. 135.
[171] *UN Security Council Resolution 1493*, (July 28, 2003), UN Doc. S/RES/1493.
[172] *UN Security Council Resolution 1591*, (March 29, 2005), UN Doc. S/RES/1591.

displaced individuals and refugees,[173] the UN Security Council determined the existence of a threat to the international peace and security, triggering the application of measures under Chapter VII of the UN Charter. This led to the adoption by the Council of Resolution 1556[174] imposing sanctions against the Janjaweed militia, whose scope was further extended especially with the approval of Resolution 1591. This last resolution finally established the Sanctions Committee on Sudan, whose mandate was firstly that of designating individuals, involved in the perpetration of the human rights violations in the Darfur region, to be subject to the sanctioning measures.

Finally, for the purpose of this last section, and for the reason of perfectly epitomizing the discussion over the inclusion of violations to human rights on the list of the activities amounting to threats to or breaches of the international peace and security, it is then interesting to analyze also Resolution 1970[175] against Libya. The UN Security Council adopted Resolution 1970 in response to the ferocious suppression of the protests against the governing regime by Colonel Gaddafi. For instance, the exceptionality of Resolution 1970 resides in the fact that for the very first time the UN Security Council invoked the application of article 41 for the imposition of targeted sanctions, not pursuant to the determination of a situation threatening international peace and security, but rather because of the grave humanitarian concerns derived by the violations of international human rights law by the Libyan government. For instance, Resolution 1970 demonstrates how the nexus between the violation of human rights and the breach of international peace has petrified in the UN practice, to the point that there is no need to specify it anymore in order to legitimize the resort to sanctioning measures with the intent of condemning such activities and to permanently stop the violation.

[173] *UN Security Council Resolution 1556*, (July 30, 2004), UN Doc. S/RES/1556, pre-ambulatory clause n. 20.
[174] *UN Security Council Resolution 1556*, (July 30, 2004), UN Doc. S/RES/1556.
[175] *UN Security Council Resolution 1970*, (February 26, 2011), UN Doc. S/RES/1970.

CHAPTER 6

THE INTERPLAY WITH REGIONAL ORGANIZATION IN THE SANCTIONING PRACTICE

1. THE ROLE OF REGIONAL ORGANIZATIONS IN THE UN SECURITY SYSTEM

One of the most recent and interesting developments resulted from the substantive and procedural transformations of the practice of sanctions by the UN Security Council has been the greater involvement of regional organizations, which, since the last two decades, have started to participate more actively in assisting the Council in its functions of monitoring and protecting the international collective security system. As a matter of fact, regional organizations, with particular attention on the European Union, have recently increased the number of sanctions imposed on targeted States, both under the UN framework and autonomously. Indeed, as this present section is going to illustrate, whenever dealing with sanctions imposed by regional organizations, a distinction should be made between sanctions directly implementing UN Security Council's measures, and sanctions adopted autonomously by such organizations.

Nonetheless, the involvement of regional organizations into the implementation of autonomous targeted measures has also originated an extensive debate over the consequences such a practice could generate in the long-run. Therefore, international academics have pointed out how the proliferation of sanctioning measures imposed directly by regional organizations, outside the UN framework, is an indicative feature of the acquisition, by such international legal entities, of a more strengthened authority within their geographical area.

This last statement, however, has not only been identified as a positive feature of the evolving international security system. Rather, some international scholars have begun to underline the negative perception shared by the majority of developing countries within the international community towards this emerging attitude by regional organizations. For instance, developing countries observe such a practice as a mean for Western leaders to impose their political agenda; thus,

sanctions by regional organizations are perceived by developing countries as a new emerging feature of post-colonialism.[176]

The interactions between the United Nations and regional organizations on the sanctions dimension has always been portrayed as not particularly clear in terms of international law.[177] This opaqueness in the relationship between the UN and regional organizations, at the basis of their interactions in the implementation of sanctions disposed of by the Security Council, is further derived by the assumption that regional organizations, such as the EU and ECOWAS, are not members of the United Nations. This entails that the implementation of UN sanctions by regional organizations is not to be reconnected to their membership to the organization, but rather must be rooted in a different legal framework. However, we have to recall that, as it has often been argued by international law scholars, despite international organizations, whose legal personality is basically separate from UN member-States, cannot be obliged to enact binding obligations by the Security Council, intergovernmental organizations should generally observe resolutions adopted by the Council.[178]

Consequently, in order to better understand the legal framework at the basis of the interactions between the UN and regional organizations, it is first necessary, by referring to the provisions contained within the Charter, particularly in Chapter VIII, to explore the notion of such international legal entities within the security system enhanced by the functions of the Security Council.

Regarding Chapter VIII of the UN Charter, article 52 (1) provides that there are no legal obstacles in the present text that enable regional arrangements and organizations to assist the Security Council, through cooperation or autonomously, in maintaining the international peace and security.[179] Nonetheless, despite articulating the possibility for regional organizations to undergo activities with the view of participating in the protection and monitoring of the collective security system established through the creation of the United Nations, article 52 (1) does not provide a definition of the term "regional arrangements". It is perfectly in this scenario, characterized by the absence of an internationally acknowledged definition of the term "regional arrangements" within the UN framework, that international academics stepped in, elaborating a defined approach towards the conceptualization of regional organizations within the collective security system. Following the

[176] Andrea Charron and Clara Portela, "The Relationship Between United Nations Sanctions and Regional Sanctions Regime", in Thomas J. Biersteker, Sue E. Eckert and Marcos Tourinho, *Targeted Sanctions: the impacts and effectiveness of United Nations action*, (Cambridge University Press, 2016), p. 101.
[177] Nicholas Tsagourias and Nigel D. White, *Collective Security: Theory, Law and Practice*, (CUP, 2013), p. 130.
[178] Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, (36 Columbia Journal of Transnational Law, 1998), p. 529-609.
[179] United Nations (UN), *UN Charter* (1945), article 52, paragraph 1.

perspective shared by the majority of international scholars, "regional arrangements" cannot be portrayed as institutions whose members share only the same geographical positioning, but rather as non-universal organizations which are basically self-determining in terms of three factors, meaning membership, purposes and values, such as peace and the protection of international human rights, the maintenance of security and the promotion of economic and financial cooperation.[180] It is, for instance, evident that most of the regional organizations and the United Nations share part of their founding values, as well as the objectives to be achieved in order to maintain the international peace and security. This perfectly explains the reasons for which the functions of regional organizations might overlap with those of the UN, particularly the ones of the Security Council.

Similarly, since their establishment in the recent decades, international academics have maintained the idea that one of the major functions of regional organizations was to support the international efforts towards protecting peace and security from the increasing array of possible threats, assuming the role of "guardians" of the stability of their own region. Nonetheless, this view does not perfectly fit with the most recent evolutions in the world system. Indeed, as the emerging untraditional threats are growing in their unpredictability and spreading across the international community, the notion of regional organizations simply monitoring the security of their own region seems not to work effectively anymore. Rather, the development in the complexity of the threats the international community must confront has increased the participation of regional organizations in the activity of maintaining the international peace and security, under the lead of the UN Security Council.

For instance, it is clear that regional organizations are not anymore conceived as isolated bodies acting exclusively within their own region, but rather are more inclined to cooperate among themselves and under the UN collective security framework. To this regard, however, it is then fundamental to investigate the pattern of cooperation among regional organizations and the UN Security Council in order to understand how their relations work within the present collective security system. *De facto*, the growing interactions between regional organizations and the UN is normatively rooted on the concepts of "normative hierarchy" and "functional independence",[181] regulating the relations between the value of universalism embodied by the United Nations, mostly in the activities of the Security Council, and the one of regionalism, instead clearly represented by regional

[180] Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions*, (6 eds. Sweet and Maxwell, 2009), p. 213.
[181] Mirko Sossai, "UN Sanctions and Regional Organizations: an analytical framework", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 397-398.

organizations. As a matter of fact, it is perfectly in the light of the correlation between these two principles that Chapter VIII of the Charter construes the model of relations between the UN and the different regional organizations.

Accordingly, the principle of normative hierarchy basically acknowledges the hierarchical model on which the collective security system, as framed after the establishment of the UN, is based on. This underlines the notion of subordination of regional organizations to the UN which, in terms of international law, figures as an organization of almost universal membership and with an overall comprehensive set of competences.[182] By the same token, however, the principle of functional independence recognizes the separate autonomy of regional organizations from the UN. Indeed, despite in terms of protection and promotion of the collective security system, both regional organizations and the United Nations share the same values and objectives, they are fundamentally separate legal institutions, with an independent decision-making body.

Therefore, the relationship between the UN and the widespread regional organizations is concretely based on the assumptions that the United Nations may be interpreted as a hierarchical superior institution to respect to regional organizations mainly because it enjoys broader competences in the field of the protection of the international peace and security, and because based on the notion of universal membership. Nonetheless, despite such a hierarchical superiority of the United Nations, it must be recalled that regional organizations rest *de facto* independent and autonomous institutions which voluntarily cooperate with the Security Council in enhancing the international collective security system. In conclusion, this higher degree of relations between the two types of organizations, basically testifies the evolution of the model of interactions "from the law of co-existence to the law of cooperation".[183]

Accordingly, in the last decades, the growing resort to the application of sanctioning measures as devices to respond to threats to the international peace and security has increased the need for coordination between the actions undertaken by the Security Council and the various regional arrangements, so to avoid for member-States, both of the United Nations and the ones of the regional organizations, to get trapped by the obstacle of over-compliance.[184] For the reasons underlined before, the leading figure in this cooperative model has been unquestionably entrusted to the UN Security Council, as the ultimate guardian of the international collective security system.

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[182] *Ibidem*, p. 398.

[183] Wolfgang Friedmann, *The Changing Structure of International Law*, (Columbia University Press, 1964).

[184] Mirko Sossai, "UN Sanctions and Regional Organizations: an analytical framework", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 400.

2. THE IMPLEMENTATION OF UN AND AUTONOMOUS SANCTIONS BY REGIONAL ORGANIZATIONS

As mentioned in the previous section, whenever dealing with the role of regional organizations in the impositions of multilateral sanctions, a further distinction should be made between sanctions implementing UN Security Council's measures and sanctions enforced independently from the UN framework by such organizations. Nonetheless, it must be noted that the present distinction is not entirely correct, since does not cover all the different circumstances in which regional organizations might decide to implement sanctions. For instance, the simple distinction between sanctions by regional organizations implementing or not Security Council's measures is not enough in order to explain the much more complex reality behind the decision of similar legal entities to resort to such measures.

Consequently, when regional organizations enforce sanctions not implementing measures disposed by the UN Security Council, two are the possible scenarios: first, the involved regional organization might simply enforce a sanction against one of its member-States, as explicitly conferred upon the decision-making institution within the organization by the funding treaty; otherwise, it might implement a unilateral sanction, outside the UN framework, against a State, presumably within the same region, responsible for having committed a kind of international misconduct. Similarly, even in the case of implementing UN Security Council's resolution, there might be two different scenarios: as a matter of fact, regional organizations may simply decide to implement the Council's sanctions as literally disposed in the relative resolutions; alternatively, regional organizations may adopt those sanctions, but further enlarging their scope of application, by implementing additional measures to the ones previously identified by the UN Security Council.

Therefore, following in this section, the two macro-groups of sanctions by regional organizations will be pointed out and further analyzed, with the main view of understanding how those international legal entities position within the UN framework, specifically in terms of collective security, and, furthermore, with the idea of figuring out which are the additional contributions brought by regional organizations in the activity of enhancing the international security system.

2.1 REGIONAL ORGANIZATIONS IMPLEMENTING UN SANCTIONS

The first framework this section is going to explore is the implementation of UN sanctions by regional organizations. For the objective of this present section, it is then interesting to analyze the specific case of the European Union. As a matter of fact, the EU has become quite recently one among

the regional organizations present within the international community to implement the most UN targeted sanctions against non-EU members. Due to the recent development in the area of its competences on external affairs, the EU has gradually started to perform a relevant position in enforcing UN sanctions, not only as literally disposed by the Security Council, but in some circumstances, also adopting additional measures to the ones authorized by the UN.

Nevertheless, despite the growing practice of regional organizations to adhere in counter-fighting the emergence of untraditional threats to the international peace and security under the UN framework, it is highly difficult to determine whether similar organizations have an obligation derived from the UN Charter to necessarily perform resolutions adopted by the Security Council, as well as enforcing disposed measures, in the form of sanctions. Therefore, it is clear that UN member-States have an explicit duty, as derived from article 25, to implement sanctions whenever the Security Council adopts a resolution enforcing non-forceful measures in accordance with article 41, or more generally Chapter VII of the UN Charter, pursuant to the previous determination of the existence of a threat to or a breach of international peace and security, as provided by article 39. Conversely, the binding nature of UN Security Council's resolutions, whether disposing or not sanctioning measures, on regional organizations remains debatable, at least basing this reasoning on an interpretation of article 25, as they are not members to the organization. This has also been proved by the recent practice developed particularly by the EU consisting in reviewing anti-terrorist sanctioning measures as implemented by its institutions following the dispositions contained within the Security Council's resolutions. Not only the mentioned EU practice demonstrates the lack of a binding effect of UN sanctions on regional organizations, but also reiterates the previously mentioned interplay between the principles of normative hierarchy and functional independence at the basis of the model of interactions between the UN system and regional organizations.[185]

At the same time, however, some international scholars have started to develop the idea that regional organizations should perform their competences and functions within the international community necessarily in accordance with the dispositions emerged within the resolutions adopted by the Security Council, especially when dealing with issues related to the international peace and security. This concept has been derived by an evolutive interpretation of article 48 (2), which reiterates that decisions by the Security Council should be enacted by UN member-States also through the policy-making of the different regional organizations of which they are members, taken in conjunction with article 103 of the UN Charter, also known as the "supremacy clause" within the UN

[185] Laurence Boisson de Chazournes, *Relationships and Interfaces Between Regional and Universal Organizations: room for development*, (9 International Organizations Law Review, 2012), p. 263-265.

framework.[186] To this respect, some international academics have eventually manipulated the literal meaning of article 103 in order to try to construe an effective framework maintaining the obligation for regional organizations to perform decisions adopted by the UN Security Council.[187] This has been possible by assuming that the constituent treaties at the basis of regional organizations have been essentially signed and ratified by States that are also members of the UN; therefore, this implies that those treaties may be subjected to the supremacy clause provided by article 103 anytime it proves to be necessary.

Nonetheless, it has to be noted that the majority of international law academics still argue that regional organizations enjoy complete autonomy to respect to the UN. Behind this reasoning, also the European Court of Justice, in the famous *Kadi* case, which will be subsequently analyzed in the course of the present section, has strongly maintained that the EU has a separate and autonomous legal order from the one of the UN. This has led to the conclusion that article 103 of the Charter cannot be assumed as the constitutional basis of the binding nature of UN Security Council's resolutions on regional organizations. For instance, as argued by Advocate General Maduro in his opinion to *Kadi I*, the EU legal order must be considered as a "municipal legal order of transnational dimension",[188] separate from the international law system and from the UN framework. This, however, does not preclude the binding effect of the Security Council's resolutions on the States members to those regional organizations, since also members to the United Nations.

Despite the mandatory nature of the Security Council's sanctions on regional organizations remains strongly debatable for the reasons already expressed, the implementation of UN sanctioning measures by such organizations still is an emerging and further developing practice, as in most of the cases, regional organizations share the same values and objectives of the UN system in fighting back the progressive rise of untraditional threats to the international peace and security. Consequently, by still focusing on the EU system, something that necessarily has to be further underlined is that the application of the EU provisions establishing sanctions, meaning articles 75 and 215 TFEU, should always be in compliance with the existing general provisions of the EU treaties. To this respect, it is thus relevant to recall also the provision contained in article 3 (5) TEU, which further reinforces the

[186] Mirko Sossai, "UN Sanctions and Regional Organizations: an analytical framework", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 403.
[187] Pasquale De Sena, "Sanzioni Individuali del Consiglio di Sicurezza, art. 103 della Carta delle Nazioni Unite e rapporti tra sistemi normativi", in Francesco Salerno, *Sanzioni "Individuali" del Consiglio di Sicurezza e Garanzie Processuali Fondamentali. Atti del convegno di studio organizzato dall'Università di Ferrara (12 e 13 dicembre 2008)*, (Cedam, 2010), p. 45-36.
[188] Case C-402/05 P *Yassin Abdullah Kadi v. Council and Commission*, Advocate General (AG) Maduro's opinion (16 January 2008), paragraph 22.

need to respect the general principles contained in the UN Charter as part of the body of international law and as guidelines to be observed by the EU institutions while acting in the area of external actions. In conclusion, "the European legal order can be said to open its gates to international law according to a monist conception of the mutual relationship".[189]

Finally, it is perfectly in this light that we should assess and consider additional measures enforced by regional organizations to UN sanctions. Accordingly, in several circumstances, especially in more recent times, have regional organizations, enacted additional measures to the already existing UN sanctions against targeted States responsible for having committed an internationally wrongful act. Particularly, the EU, as initially provided by the *Guidelines on implementation and evolution of restrictive measures*,[190] has been a pioneering institution in developing the practice of enforcing supplementary measures of this kind in a plurality of situations, especially related to the proliferation of weapons of mass destruction, such as the sanctions regime on Iran, as well as the one against the Democratic People's Republic of Korea.

The rationale behind the decision by the EU to implement additional measures to the one already provided by the UN Security Council lies in the notion of reinforcing and strengthening the already standing UN sanctions with further devices. This practice, that is also shared by certain UN member-States, such as the US, has always been argued by some international scholars to be the result of the disappointment over the effectiveness of UN sanctions as instruments of coercive diplomacy.[191]

However, the spreading practice of enforcing sanctioning measures by regional organizations with the view to enlarge the already existing UN sanctions regimes has generated a huge debate among international academics, as well as among different States within the international community.[192] At the basis of this debate there is the question of whether sanctions, as disposed of by the UN Security Council, must be qualified as the minimum level above which regional organizations, as well as other sanctioning actors such as States, may add supplementary measures,

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[189] Christian Tomuschat, "The Kadi Case: what relationship between the Universal Legal Order under the auspices of the United Nations and the EU Legal Order?", in Marise Cremona, Francesco Francioni and Sara Poli, *Challenging the EU Counter-Terrorism Measures through the Courts*, (EUI Working Paper, AEL, 2009/2010), p. 12.

[190] Council of the European Union, *Guidelines on implementation and evolution of restrictive measures (sanctions) in the framework of the EU CFSP*, 11205/12 (EU Guidelines, June 15, 2012).

[191] Michael Brzoska, *International Sanctions Before and Beyond UN Sanctions*, (91(6) International Affairs, 2015), p. 1344.

[192] See Mirko Sossai, "UN Sanctions and Regional Organizations: an analytical framework", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 406-409; Thomas Biersteker and Clara Portela, *EU Sanctions in Context: three types*, (26 European Union Institute for Security Studies, 2015).

or as the maximum level, which regional organizations and States cannot overstep.[193] For instance, depending on the kind of qualification allocated to the measures disposed of by resolutions of the UN Security Council, we will derive a different discussion over the legitimacy of additional measures by regional organizations.

2.2 REGIONAL ORGANIZATIONS IMPLEMENTING SANCTIONS OUTSIDE THE UN FRAMEWORK

Apart from enforcing sanctioning measures previously adopted by the UN Security Council, or at least related to UN sanctions, also through the practice of adopting supplementary measures to the ones authorized by the Council in a first instance, regional organizations also implement sanctions outside the UN framework. This may occur in an array of different circumstances. As a matter of fact, we can refer to sanctions outside the UN framework enacted by regional organizations anytime we confront with:

(i) sanctioning measures against one of the organization's member-States, as prescribed by the constitutional funding treaties of such organizations;

(ii) sanctions that do not implement UN measures, as autonomous devices, but are taken simultaneously and target the same State, which is a member of the regional organization;

(iii) unilateral sanctions implemented *motu proprio* and autonomously by regional organizations against States that are not members of the organizations.[194]

In the first scenario, regional organizations may decide to adopt a sanction (or restrictive measure, in the EU's terminology) against one of their member-States whenever they violate one of the funding obligations contained within the constitutional treaties. An example of such practice is then provided by the African Union. Indeed, as provided by the Constitutive Act, the AU foresaw three different circumstances in which sanctioning measures can be established by the responsible institution against its member-States. For instance, AU member-States can be sanctioned anytime there is an unconstitutional change of government, pursuant to article 30 of the AU Constitutive Act or in the situation in which the targeted State does not fulfill its obligations as a member-State to the AU in terms of budgetary contribution, pursuant to article 23, and enforcement of AU provisions.[195]

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[193] Thomas Biersteker and Clara Portela, *EU Sanctions in Context: three types*, (26 European Union Institute for Security Studies, 2015).

[194] Mirko Sossai, "UN Sanctions and Regional Organizations: an analytical framework", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 410-416.

[195] African Union (AU), *Constitutive Act of the African Union*, (November 7, 2000).

Moving, instead, to the second scenario, regional organizations may also adopt sanctions against non-member States and outside the UN framework. This circumstance may occur either in the situation in which the regional organizations' sanction is prior to the subsequent UN measures targeting the same State, or in the situation in which the sanctioning measures as implemented by regional organizations are coincidental with sanctions regimes adopted by the UN Security Council. Even in this case, as the previous one, the African regional organizations proves to be useful in order to demonstrate this specific practice. *Lato sensu*, while the UN Security Council tends to adopt sanctioning measures for an array of divergent reasons, the African regional organizations are more likely to implement unilateral sanctions with the view of condemning and responding to the undemocratic and unconstitutional change of government particularly within the region.[196] An exemplificative illustration of sanctions adopted by regional organizations autonomously from the UN Security Council, and without any involvement of this latter institution, is the case of Guinea in 2009. Both the AU and ECOWAS, subsequently followed by the EU, enforced targeted sanctioning measures against the new military regime in Guinea after the coup d'état occurred during the same year. Despite the AU Peace and Security Council numerously called the international community to condemn as well the situation in Guinea by universalizing the sanctions regime against the country, the UN Security Council never adopted in that circumstance a resolution invoking the application of article 41, or more generally Chapter VII of the Charter, implementing sanctioning measures.[197] Always remaining within the African context, only in three different situations did the UN and the African regional organizations adopt sanctioning measures coincidentally against the same targeted State: Côte d'Ivoire and Guinea Bissau, where the sanctions implemented by the AU and ECOWAS preceded the subsequent sanctions regimes disposed by the UN Security Council, and Sierra Leone.[198]

Finally, the last scenario concerns regional sanctions adopted against non-member States unilaterally and autonomously from the UN framework, thus *motu proprio*. Assessing the overall recent practice developed by the different regional organizations, only the EU has initiated back to the 1980s to impose unilateral sanctions on targeted States in the absence of similar measures enacted by the UN Security Council. Today, the EU imposes restrictive measures as tools of foreign policy,

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[196] Andrea Charron and Clara Portela, "The Relationship Between United Nations Sanctions and Regional Sanctions Regime", in Thomas J. Biersteker, Sue E. Eckert and Marcos Tourinho, *Targeted Sanctions: the impacts and effectiveness of United Nations action*, (Cambridge University Press, 2016), p. 105.

[197] Mirko Sossai, "UN Sanctions and Regional Organizations: an analytical framework", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 410-407.

[198] Andrea Charron and Clara Portela, "The Relationship Between United Nations Sanctions and Regional Sanctions Regime", in Thomas J. Biersteker, Sue E. Eckert and Marcos Tourinho, *Targeted Sanctions: the impacts and effectiveness of United Nations action*, (Cambridge University Press, 2016), p. 105.

which strictly belong to the dimension of the Common Foreign and Security Policy (CFSP). By analyzing the kinds of unilateral sanctions imposed by the EU institutions against non-member States, we can derive the notion that in most of the cases these instruments are used in the framework of the so-called Partnership Agreements, following the violation of one the provisions contained therein or in the circumstances of violations and breaches of the democratic principles of rule of law and human rights by a country party to the agreement, as well as against any State within the international community pursuant to the violation of an international obligation – is this the case of the EU restrictive measures against the Russian Federation subsequent to the situation of Crimea and Ukraine in 2014. Consequently, by exploring the EU's practice in implementing restrictive measures against non-EU member-States, international academics have deduced the notion that they can *de facto* be categorized into two main groups. First, in the case in which the EU enacts restrictive measures against States that are not members, but are party to an agreement with the organization, as in the case of the EU Partnership Agreements, these sanctions are generally considered consistent with the body of international law obligations, since they do not rise any legal issue. Indeed, as they simply involve the termination or suspension of the benefits granted to the other party through the Partnership Agreement, this kind of restrictive measures can be clearly defined as "retorsions" under international law.[199] Second, whenever the EU implements restrictive measures against States that are neither members to the organization, nor party to one of the development and aid agreements signed under the EU framework, as a response of a violations of an *erga omnes* violation by the targeted State, those measures are generally acknowledged as actions conflicting with the obligations derived by the body of international customary and treaty law. This means that in order to be justified as lawful measures, they can exclusively be qualified as "countermeasures" under international law.[200]

3. THE EUROPEAN UNION AND THE REVIEW ON UN SANCTIONS

The role of the European Union, particularly through the work of the European Court of Justice, has acquired considerable relevance in the recent discussions over the protection of the individual procedural rights related to the debate on UN sanctions. As we have seen in the previous chapters, the UN system has recently failed to grant full procedural rights to individuals enlisted to

[199] Marco Gestri, "Sanctions Imposed by the European Union: legal and institutional aspects" in Natalino Ronzitti, *Coercive Diplomacy, Sanctions and International Law*, (Brill Nijhoff, 2016), p. 74.
[200] *Ibidem*, p. 74-75.

the Sanctions Committees. This has led those persons to contest the validity of the UN sanctions, on the basis of breaches of individual rights – among which the most relevant for our discussion is the right to a fair hearing – , by bringing those cases in front of both domestic and regional courts, such as the ECJ and the ECtHR, with the view of reviewing those measures.

In order to understand whether reviewing UN sanctions is possible, it is first necessary to explore the rules of interpretations of the Security Council's resolutions, meaning the legal instruments used by the UN in order to dispose of sanctions. In order to do so, international scholars have started to refer to the rules of interpretation of international treaties stipulated in the Vienna Convention of the Law of Treaties (VCLT).[201] Drawing on the provisions contained in the VCLT, international academics have acknowledged the notion identifying the Security Council as the ultimate interpreter of UN binding resolutions, being fundamentally also their author, which must be interpreted in compliance with the UN Charter, meaning the legal and constitutional framework on which they should be based on.

Nonetheless, despite there is an overall consensus in drawing on the rules of interpretation of treaties provided by the VCLT in order to understand how to interpret the UN Security Council's resolutions, some international scholars have moved the critique that the transposition of such model basically from the context related to practice of States to bargain treaties to the one of UNSC resolutions may not be completely satisfactory. Indeed, as subsequently argued by some scholars throughout their deductions, being the UN an international organization, with universal purposes and functions, it is not fully appropriate to maintain that only the UN Security Council may interpret its own resolutions, as they will ultimately be enforced by its member-States. Accordingly, it is clear that *stricto sensu* domestic and regional courts do not have jurisdiction to interpret resolutions adopted by the UN Security Council; nonetheless, they do possess an "incidental jurisdiction"[202] to interpret measures enforcing UN resolutions at both the domestic and regional level anytime there subsists in the view of the responsible court a question of law undermining their validity. Reasonably, these interpretations will have a binding effect only the State, in the case of the domestic court, and on the member-States, in the case of the ECJ.

[201] *Vienna Convention of the Law of Treaties*, entered in force on January 27, 1980.
[202] Penelope Nevill, "Interpretation and Review of UN Sanctions by European Courts: comity and conflict", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 420.

3.1 THE KADI SAGA

One of the most relevant law disputes related to the implementation of UN sanctions on individuals is the *Kadi* saga as ruled by the ECJ. The focal point at the basis of the *Kadi* case lies in the procedure of listing individuals as framed with the 1267 Sanctions Committee, established after the adoption by the Security Council of Resolution 1267, as mentioned in the previous chapters, in response to the emerging threat represented by the terrorist network of Al Qaeda, as well as the EU measures subsequently enacted in order to guarantee uniformity in the implementing activity among the EU member-States. Indeed, the Security Council's Resolution 1267 dated 1999, as well as the subsequent resolutions part of the 1267 Sanctions Committee, were immediately implemented by the EU through the use of Common Positions and Common Regulations intended to ensure uniformity in the application of the sanctions regime at the domestic level.[203]

Mr. Kadi firstly challenged, in *Kadi v. Council and Commission* (2005),[204] the validity of the EU Council regulation enforcing the UN individual sanctions in front of the European Court of First Instance (CFI), explicitly demanding the dissolution of the Regulation implementing the listing procedure of targeted individuals under the Al Qaeda and Taliban Sanctions Committee, on the basis of the violation of his right to fair hearing. *Stricto sensu*, the CFI, and subsequently the ECJ, were requested to define whether the implementation of the Security Council Resolution 1267 through the adoption of EU Regulation 881/2002 had consequently made the relevant UN sanctioning measures immune from review since this would have undermined the principle of primacy contained in article 103 of the UN Charter.[205] Accordingly, the difference between the final decisions achieved by the two courts, the CFI and the ECJ, resides perfectly in the diverging approaches used by the CFI and the ECJ relative to the interpretation of the previous rationale. For instance, we may argue that the CFI opted to rely on a more "internationalist approach",[206] as it recognized the principle of UN primacy as a paramount feature in its own judgment; contrarily, the ECJ relied more on a

[203] Erika de Wet, "Human Rights Considerations and the Enforcement of Targeted Sanctions in Europe: the emergence of core standards of judicial protection", in Bardo Fassbender, *Securing Human Rights? Achievement and Challenges of the UN Security Council*, (Oxford University Press, 2011), p. 144.
[204] Case T-315/01, *Kadi v. Council and Commission* (2005), ECR II-3649 (Kadi(CFI)).
[205] Christian Tomuschat, "The Kadi Case: what relationship between the Universal Legal Order under the auspices of the United Nations and the EU Legal Order?", in Marise Cremona, Francesco Francioni and Sara Poli, *Challenging the EU Counter-Terrorism Measures through the Courts*, (EUI Working Paper, AEL, 2009/2010), p. 12; Koen Lanaerts, *The Kadi Saga and the Rule of Law within the EU,* (SMU Law Review, Vol. 67, Issue 4, Art. 4, 2014), p. 709.
[206] Koen Lanaerts, *The Kadi Saga and the Rule of Law within the EU,* (SMU Law Review, Vol. 67, Issue 4, Art. 4, 2014), p. 709.

"conservative approach", due to its primary tendency of advancing, and further protecting, the EU constitutional identity.[207]

Therefore, the CFI immediately rejected the request made by Mr. Kadi. The rationale behind such a decision was clearly based on the reasoning conducted by the CFI over the legitimacy of the measures disposed of by the UN Security Council. As a matter of fact, following the reasoning of the CFI, since the Council Regulations adopting the contested UN listing procedure had substantially and almost literally transposed the UN measures, as previously agreed by the Security Council, reviewing the validity of such EU measures necessarily meant to conduct also a substantive review of the validity of the pertinent Council's measures.[208] Accordingly, the CFI subsequently recognized the fact that the present court had not jurisdiction to initiate a review procedure over the legality of the Security Council's measures, as also confirmed by interpreting article 103 of the UN Charter, which enhances the supremacy of Council's decisions over other international law obligations, with the only exception of those derived from the body of international *jus cogens* norms. Consequently, the European CFI concluded that it would have rejected the claimant's demand not only on the basis of the lack of jurisdiction in reviewing the Security Council's measures, but also because, as derived from its interpretation of article 103 of the UN Charter, the Council had broad authority to temporarily suspend the right to fair hearing of an individual suspected to be associated to international terrorist networks, as this present right does not belong to the body of *jus cogens* norms.[209]

In 2008, Mr. Kadi appealed the CFI's decision, bringing the case in front of the ECJ, which ultimately overturned the 2005 conclusions over the primacy of the Security Council's decisions. The ECJ in *Kadi v. Council of the European Union* (2008)[210] ruled that, following the cardinal principles at the foundations of the EU law, individuals listed under the 1267 Sanctions Committee were thus entitled to enjoy judicial protection. Therefore, these conclusions were achieved by the court through a dualist approach.[211] As a matter of fact, the reasoning of the ECJ centered on the notion of the body

[207] *Ibidem.*

[208] Christian Tomuschat, *Primacy of United Nations Law – Innovative features in the Community Legal Order*, (43 CMLR, 2006), p. 543.

[209] Enzo Cannizzaro, "Security Council Resolutions and EC Fundamental Rights: some remarks on the ECJ decision in the Kadi case", in Marise Cremona, Francesco Francioni and Sara Poli, *Challenging the EU Counter-Terrorism Measures through the Courts*, (EUI Working Paper, AEL, 2009/2010), p. 39; Pasquale De Sena and Maria Chiara Vitucci, *The European Courts and the Security Council: between dédoublement fonctionnel and balancing values*, (20 EJIL, 2009), p. 193-206.

[210] Case C-402/05P, *Kadi v. Council of the European Union* (2008), ECR I-461 (Kadi I).

[211] Erika de Wet, "Human Rights Considerations and the Enforcement of Targeted Sanctions in Europe: the emergence of core standards of judicial protection", in Bardo Fassbender, *Securing Human Rights? Achievement and Challenges of the UN Security Council*, (Oxford University Press, 2011), p. 146.

of EU law as an independent and autonomous legal system, which could not be "prejudiced by an international agreement",[212] meaning the UN Charter, despite it still maintained primacy in terms of international law. Finally, the ECJ disposed the annulment of the EC listing of Mr. Kadi on the grounds of violation of the right to effective judicial review and fair hearing, as well as the breach of his property rights.[213]

The 2008 ECJ's decision on *Kadi I* was of seminal importance for an array of different reasons, among which the most relevant was the identification of a fallacy within the judicial protection foreseen by the UN system in the sanctioning procedures targeting individuals. As a matter of fact, the ECJ's conclusive decision on *Kadi* demonstrated the concreteness of one of the most relevant doubts moved by international academics on the practice of UN targeted sanctions on individuals. Therefore, the *Kadi* case showed that the UN system on individual sanctions had *de facto* failed to completely guarantee individual procedural rights to the persons that were enlisted in the Consolidated List. Prior to the ECJ's judgment on the *Kadi* case, indeed, the only possible procedure to request the delisting of the name of an individual or legal entity from the Consolidated List was by referring to the Focal Point, as established in Resolution 1730. Nevertheless, as this system did not grant the possibility to individuals to be heard directly by the Security Council, the Focal Point, as structured and framed, was far from guaranteeing full and effective protection of individual procedural rights.

Consequently, many international scholars have maintained the idea that the intervention of the ECJ has contributed to shedding light on the criticalities of the UN system of individual sanctions. Viewed from this perspective, the recognition by the UN itself to reform the system of individual sanctions, which subsequently resulted into the establishment of the Office of the Ombudsperson, as the body in charge of reviewing and assessing the validity of the individual delisting request, must be understood as a derivation of the influential power exercised by the ECJ through its final judgment in *Kadi*.[214] For instance, the relevance of *Kadi I* was consequently embodied and expressed by the extensive commentary that immediately generated within the international law and European law academia. Therefore, analyzing the case from a European constitutional perspective, *Kadi I* was emblematic in that it underlined the autonomy of the European legal order from the body of

[212] Case C-402/05P, *Kadi v. Council of the European Union* (2008), ECR I-461 (Kadi I), paragraph 316.
[213] *Ibidem*, paragraphs 354-366.
[214] Penelope Nevill, "Interpretation and Review of UN Sanctions by European Courts: comity and conflict", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 429.

international law.[215] The ECJ *de facto* clearly maintains in its judgment that the incorporation of international law within the body of European law may not appear automatic in the case in which fundamental rights, as also recognized by the EU in its functions of advancing and protecting the principle of rule of law, are at stake.[216]

As for what directly concerns Mr. Kadi, by June 2008 the UN engaged in starting to reform the 1267 Sanctions Committee against Al Qaeda and the Taliban. Accordingly, as established through the adoption of Resolution 1822, the Sanctions Committee had to communicate a summary of reasons for the decision of listing an individual, as well as to engage in periodic review of the names contained in the Consolidated List. Consequently, the 1267 Sanctions Committee provided such a summary to the French government, which subsequently communicated it to the EU Commission. Ultimately, the Commission informed on the same day Mr. Kadi that it would have not proceeded to delisting its name, but rather was to reconfirm his presence in the Council Regulation 1190/2008. This led Mr. Kadi to challenge again the validity of his listing which then resulted into the annulment of the relevant Regulation in 2010 and the subsequent ECJ's *Kadi II* judgment of 2013.[217]

At the origin of *Kadi II*, both the EU Commission and the Council, together with the United Kingdom, challenged the previous decision by the ECJ. Accordingly, the two EU institutions, plus the UK, argued that the ECJ had resulted in erring in law since the level of the intensity of judicial review it had applied in *Kadi I* was too disproportionate and excessive due to an already erred examination on Mr. Kadi's arguments over the violation of his procedural rights.[218] Nevertheless, the ECJ immediately rejected the appeal arguing, in essence, that it was its duty to guarantee the review of EU measures, also when implementing UN Security Council Resolutions, in the light of the protection of fundamental human rights as a paramount feature of the EU constitutional identity. Despite the creation of the Ombudsperson, in the view of the ECJ, the UN had still not established a fully partial and independent judicial body with the mandate of ensuring the effectiveness of the delisting procedure and its conformity with the protection of the fundamental rights and disclosing

[215] Christian Tomuschat, "The Kadi Case: what relationship between the Universal Legal Order under the auspices of the United Nations and the EU Legal Order?", in Marise Cremona, Francesco Francioni and Sara Poli, *Challenging the EU Counter-Terrorism Measures through the Courts*, (EUI Working Paper, AEL, 2009/2010), p. 15-17.
[216] Koen Lanaerts, *The Kadi Saga and the Rule of Law within the EU,* (SMU Law Review, Vol. 67, Issue 4, Art. 4, 2014), p. 711.
[217] Joined Cases C-584/10P and C-595/10P *European Commission & Ors v. Kadi* and *United Kingdom v. Kadi (Kadi II)*, Grand Chamber, 18 July 2013.
[218] *Ibidem,* ¶ 74.

sufficient information to those individuals added within the Consolidated List and thus affected by the sanctioning measures.[219]

[219] Penelope Nevill, "Interpretation and Review of UN Sanctions by European Courts: comity and conflict", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 431.

CHAPTER 7

THE LEGAL CHALLENGES TO THE UN SANCTIONS REGIME

1. THE QUESTION OF TRANSPARENCY AS RELATED TO THE POLITICAL LEGITIMACY OF THE UN SECURITY COUNCIL

Generally, transparency has always been held as a fundamental feature of the decision-making activity. Indeed, in a world society that is growing in the willingness to be constantly informed and which apparently, but not substantially, satisfies this necessity through the use of technological devices, the demand for increased transparency in the decision-making process is also massively surging in the political arena, as a parameter for assessing the legitimacy of the public authority.[220] As a matter of fact, enhancing transparency at the decision-making level means making the political life visible and accessible by the entire public sphere. Nevertheless, it must be underlined the idea that rendering the decision-making activity transparency does not necessarily mean that the resulted measures will achieve higher levels of effectiveness and efficiency. Indeed, transparency and effectiveness are not *de facto* linked by a cause-effect relationship. Rather, the access to information at the political level can be a fundamental element in legitimizing the exercise of authority by the public decision-makers.

Transparency, however, cannot ultimately lead to the absolute public access to the overall body of political policies. Indeed, as acknowledged by Gutmann and Thompson, while transparency may appear necessary in order to legitimize the exercise of public authority, ultimately also secrecy may show to be indispensable to enhance certain policies which need, in order to be effective, not to be immediately disclosed.[221]

The transparency discourse has also been highly relevant to the debate over the legitimacy of the UN Security Council. Indeed, it is perfectly known that, despite claiming the authority to issue decisions and policies with global effect, the UN Security Council cannot be defined as an

[220] Alan Boyle and Kasey McCall Smith, "Transparency in International Law-Making", in Andrea Bianchi and Anne Peters, *Transparency in International Law*, (CUP, 2013), p. 419-435.
[221] Amy Gutmann and Dennis Thompson, *Democracy and Disagreement*, (Harvard University Press, 1996), p. 101.

international government. Furthermore, one of the most frequent critics that are generally formulated against both international and regional organizations is that they derive their authority by depriving the national elected legislators the power to exercise competences in certain policy areas, and to place it in institutional decision-making bodies that are *de facto* unaccountable since not effected by the public scrutiny.[222] This explains the reasons for which the question of transparency becomes fundamental to let the Security Council, as well as other global governance institutions, to be publicly perceived as a legitimate body while exercising its functions, such as disposing targeted sanctions, within the international community. Further enhancing within the public sphere their legitimacy proves to be essential for global governance institutions, as the UN Security Council. As a matter of fact, such institutions have the authority to exercise their own functions, as provided by the funding constitutional treaties, simply because the actors to whom those decisions are addressed perceive those measures as mandatory, and those institutions as legitimate actors enjoying primacy over national measures.[223]

This notion has ultimately led the UN Security Council to build up during the years an effective and adequate transparency apparatus into the process of decision-making. In the case of sanctions, this, together with the demands for higher levels of fair process, which will be subsequently analyzed in the course of this present chapter, has resulted in some circumstances into the disclosure of the reasons behind the final decision to enlist private entities and individuals in the individual sanctions regimes.

Nonetheless, it is noteworthy to underline that the disclosure of such information by the UN Security Council and its affiliated bodies may prove to be unfeasible in certain circumstances due to matters of international security. Therefore, it is clear that in such particular circumstances whereby the disclosure of information may negatively interfere with the Security Council's decision-making activity aimed at the stability of the international security, thus whenever confronted with the choice between fulfilling its mandate as guardian of the international security system and its duty to uphold the surging right to be informed, the UN Security Council will always give precedence to its obligation to defend and maintain the stability of the collective security system, and will also be likely to accomplish this function by renouncing to the possibility of promoting the question of transparency of the decision-making procedure and thus of enhancing higher levels of publicity within the organization.

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[222] Alan Boyle and Kasey McCall Smith, "Transparency in International Law-Making", in Andrea Bianchi and Anne Peters, *Transparency in International Law*, (CUP, 2013), p. 419-435.

[223] Allen Buchanan and Robert Keohane, *The Legitimacy of Global Governance Institutions*, (20(4) Ethics and International Affairs, 2006), p. 405-406.

2. UNINTENDED CONSEQUENCES: THE IMPACTS ON CIVILIANS' HUMAN RIGHTS

2.1 GENERAL DISCOURSE ON THE UNINTEDED IMPACTS OF UN TARGETED SANCTIONS

Anytime decision-makers within the United Nations, the regional organizations and the individual States resort to the use of sanctions in order to respond to internationally wrongful acts committed whether by a State entity or a non-State entity within the international community, they expect those instruments to have certain impacts on the targeted subject. Since sanctions' structure may vary in accordance to the different nuances such measures can have, as described in the previous chapters, it is understandable that the policy-outcomes they achieve on the targeted State can fluctuate in a wide range of different effects, which may involve political, economic and diplomatic impacts. Even though sanctions may result into a variety of impacts, it has to be noted at the same time, that the effects of most of the international sanctions may sooner or later fade away and finally dissolve, as the targeted State will eventually try to adjust its own conditions with the ultimate view to succeed in evading from the sanctioning regime.[224]

Nevertheless, as we have already seen in the course of the present work, not only do sanctions result into the establishment of intended impacts; rather, in several circumstances, especially before the beginning of the 1990s, they have also generated policy-outcomes which were not originally expected by the decision-makers disposing the application of such measures and which potentially could result into disastrous humanitarian impacts on the ordinary population of the targeted State. As pointed out in the previous chapters, this was *de facto* the reason that eventually led the UN to initiate a reform process within the sanctions' dimension, with the view of avoiding, or at least drastically reducing, the effects these measures could exercise on the civilian population, which finally resulted into the evolution from comprehensive to targeted sanctions. However, despite the mostly corrective attitude enshrined by targeted sanctions under the UN framework in our modern times, it has to be noted that, although the negative humanitarian effects on the ordinary citizens have been *de facto* reduced, they may continue to result into an array of unintended consequences which, in certain circumstances, still impact on the civilians' lives. Therefore, according to the perspective of many international academics on the sanctions discipline, the range of potential impacts of UN targeted sanctions strictly depends on the level of discrimination of such measures: the more they configure

[224] Kimberly Ann Elliott, "The Impacts of United Nations Targeted Sanctions", in Thomas J. Biersteker, Sue E. Eckert and Marcos Tourinho, *Targeted Sanctions: the impacts and effectiveness of United Nations action*, (Cambridge University Press, 2016), p. 175-176.

discriminating policies, the less the impacts of sanctions will be felt by the general civilian population of the targeted State.[225]

Despite the growing concerns of international academics on the emergence of unintended effects derived from the application of UN targeted measures, the sanctions scholarship has so far produced very few insights on that particular aspect of sanctions; furthermore, only recently international law scholars have gradually started to focus on this sanctions' feature. This growing awareness can be perceived as the result of the relevance of such a question. As a matter of fact, the emergence of unintended effects of UN targeted sanctions is gradually becoming a core aspect under study especially considering that, paradoxically, the UN reformed the design of such measures from being comprehensive to targeted sanctions specifically for the growing concerns derived from the unexpected humanitarian impacts they notably had on the civilian population of the States under the sanctioning regime.[226]

For instance, unintended impacts of UN targeted sanctions must be understood as the tangible effects derived from the application of such Security Council's disposed policy-measures which were not initially foreseen and expected by the decision-makers at the time of their formulation and ultimate implementation. Unintended impacts can *de facto* be defined as side consequences of targeted sanctions on both the sanctioner, meaning the UN Council and the UN member-States ultimately implementing them, and the sanctionee, which are basically outside the original objective the UN Security Council expected to achieve through the application of such policy-measures. Accordingly, it has to be underlined that the unintended effects of UN targeted sanctions do not necessarily configure as negative impacts. As a matter of fact, the unintended impacts of targeted sanctions disposed of by the UN Security Council can generate, despite in lower number of circumstances than the negative ones, also positive effects. One among the positive impacts they can exercise is certainly the increased reliability and legitimacy of the UN system, which results anytime the sanctions regimes, as imposed by the UN Security Council, effectively result into the prearranged policy objectives at the basis of the establishment of such measures.

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[225] Thomas J. Biersteker, Sue E. Eckert, Marco Tourinho and Zuzana Hudakova, *The Effectiveness of United Nations Targeted Sanctions: finding from the Targeted Sanctions Consortium (TSC)*, (Geneva: The Graduate Institute, 2013), p. 16-17.

[226] Francesco Francioni, "Kadi and the Vicissitudes of Access to Justice", in Marise Cremona, Francesco Francioni and Sara Poli, *Challenging the EU Counter-Terrorism Measures through the Courts*, (EUI Working Paper, AEL, 2009/2010), p. 19; Michael Eriksson, "The Unintended Consequences of United Nations Targeted Sanctions", in Thomas J. Biersteker, Sue E. Eckert and Marcos Tourinho, *Targeted Sanctions: the impacts and effectiveness of United Nations action*, (Cambridge University Press, 2016), p. 191.

In order to better understand the impacts, typology and evolution over time of unintended consequences derived from the application of UN targeted sanctions, it is useful for this present work to adopt the model framed by Mikael Eriksson. As a matter of fact, Eriksson groups unintended impacts into three different generations: the first going from the beginning of the 1990s to the emergence of the untraditional terrorist threat generally identified with the 9/11 events; the second going from 9/11 to the end of the 2000s; and, finally, the third, which basically is the generation we are witnessing in our present times.[227] Accordingly, the first generation of unintended effects generated from the administrative fallacies that were recurrent in the first targeted regimes the UN Security Council implemented during the 1990s.

For instance, the first targeted sanctions implemented by the UN Council still suffered from the inexperience of the decision-makers to enforce measures providing detailed and accurate data concerning the individuals that were going to be concretely targeted by such measures. The existence of similar criticalities in the structural design, and subsequently also in the implementation of such measures, increased the possibility for UN targeted sanctions to result in unintended consequences, which, in certain circumstances, also undermined the expected effectiveness these instruments may have to achieve the policy objectives foreseen by the Security Council.

With the gradual intensification in the use of targeted sanctions, in response to the growing terrorist threat subsequent to the 9/11 events and undermining the stability of the international collective security system, also the previously mentioned administrative deficiencies started to increase, provoking the parallel rise also in unintended consequences. Furthermore, the second generation of unintended effects impacted on both public and private entities, despite in different ways. As for the public sector, unintended impacts took the form of both legal and economic consequences due to the wrongful listing of innocent individuals and/or entities derived from the preemptive security activity undertaken by the UN Security Committees on terrorism. For instance, domestic and regional courts started to judge a considerable number of cases brought by individuals and listed entities which ultimately ruled their compensation.[228] Similarly, also in the case of the private sector, the wrongful listing of private firms, which *de facto* finally came about to be innocent and not to have connections with international terrorist organizations, resulted in significant reputational costs for those companies.

Finally, also the third generation of unintended consequences figures to be characterized for the increase in the impacts on the private sector. As a matter of fact, the growing resort of targeted

[227] *Ibidem*, p. 196-199.
[228] *Ibidem*, p. 197.

sanctions by the UN Security Council, characterized by a predominant economic dimension, has resulted into a parallel increase in the level of uncertainty in the financial activity of private actors. For instance, private banks are growing concerned about the possibility of transferring monetary assets to actors which potentially may be discovered to be associated to international terrorist networks, a situation which may lead them to be faced with financial penalties imposed by the international community. Indeed, while the UN Security Council, as well as regional organizations and the decision-makers at the State level have the instruments to assess whether an enterprise, an individual or an additional legal entity may be attached to a terrorist organizations, such an activity may be more difficult for private entities, such as banks, which may potentially incur in the situation previously described. This explains why private actors, such as banks, are generally speaking more skeptical about engaging in what may seem legitimate bargaining and transactions with entities they do not substantially consider trustful and transparent business.[229]

2.2 UNINTENDED IMPACTS OF UN TARGETED SANCTIONS POSING HUMAN RIGHTS CHALLENGES

Apart from the unintended implication UN targeted sanctions can exercise on the public and private sectors, the international community has particularly focused on the effects these measures can originate also on the individual human rights. As already maintained in the course of this present work, the main reason at the basis of the rationale for the UN to initiate a process of reform of the structural design of sanctions, which eventually led to the establishment of targeted measures, was fundamentally rooted on the growing humanitarian concerns generated by many of the comprehensive sanctioning regime imposed by the Security Council by the beginning of the 1990s, which ended to infringe the security and safety of many the innocent civilians populations of those States under the sanctions regime.

Paradoxically, however, also targeted sanctions, despite in lower measure, do generate unintended humanitarian effects impacting on individual human rights. As a matter of fact, especially UN targeted sanctions implemented as policy measures to counter-fight the terrorist threat to the international peace and security have generated an extensive debate among international law scholars and academics over their potential implications on individual human rights, particularly individual procedural rights, as also underlined in the previous chapter.

Some international law scholars have tried to justify the existence of unintended consequences on the procedural rights of listed individuals by identifying such impacts as necessary side effects of

[229] *Ibidem*, p. 198.

UN sanctions whose aim is that of guaranteeing the maintenance of the international peace and security, thus the security of the world society against the rights of the single individual. This would imply the identification of the UN Security Council as an international decision-making body that is, in order to completely perform its functions and mandate as provided by the Charter, necessarily *legibus solutus*. Indeed, in the case of targeted sanctions on individuals, by assuming the UN Security Council to be a *legibus solutus*, one may also justify the reason for which the Council can exercise its authority to limit the enjoyment of certain rights, such as the right to fair hearing, by individuals suspected to be associated with international terrorist networks.[230] Nevertheless, such reasoning based on the identification of the Security Council as a *legibus solutus*, as further advanced by the majority of international law scholars, cannot be assumed to be lawfully correct. Rather, it is extremely inconsistent with the provisions contained within the UN Charter, which evidently recognizes an extensive authority upon the Security Council, but acknowledging at the same time that its power must always be exercised in accordance with the Charter and the body of international law norms and principles, among which we find also individual human rights.[231]

Therefore, the resort by the UN Security Council to targeted sanctions on individual, especially under the framework of the 1267 Al Qaeda and Taliban Sanctions Regime has *de facto* resulted into the creation of an extensive debate on the question as to which extent the Security Council can push itself when dealing with sanctioning measures ultimately addressing individuals and other international entities and restricting their own liberties as well as procedural rights on the basis of their presumed involvement, whether direct or indirect, to activities and acts perpetrated by the international terrorist organizations. It is mainly in this light that the subsequent section must be read. Indeed, the next section will extensively explore the criticism and challenges related to the impacts the UN targeted sanctions have on the individual procedural rights, by describing and finally evaluating the UN reaction and subsequent evolutionary process undertaken in our recent times.

[230] Monica Lugato, "Sanctions and Individual Rights" in Natalino Ronzitti, *Coercive Diplomacy, Sanctions and International Law*, (Brill Nijhoff, 2016), p. 185.
[231] Monica Lugato, *Sono le Sanzioni Individuali Incompatibili con le Garanzie Processuali?*, (Rivista di diritto internazionale, 2010), p. 320.

3. THE QUESTION OF FAIR AND DUE PROCESS

Over the last two decades, the use of UN sanctions by the Security Council has incredibly enlarged in order to respond to the rise of untraditional and complex threats to the international peace and to the stability of the collective security system. This has led to a gradual transformation of the types of sanctions resorted by the organization. Furthermore, this transformative process experienced by the Security Council, both in the substantive and procedural dimensions of UN sanctions, has consequently generated also additional legal challenges, as these measures started to address explicitly untraditional targets, meaning non-State entities, such as private entities and, most importantly, individuals on the grounds of a presumed association to the activity undertaken by the international terrorist networks.

Nevertheless, as UN sanctions started targeting private entities and individuals, without granting them the complete guarantee of procedural rights as suspected to be attached to international terrorist organizations, concerns over the question of legitimacy of such measures started to emerge within the international scholarship on sanctions. Paradoxically, it is noteworthy to underline, as already pointed out, that the concerns over the guarantee by the UN system of individual procedural rights related to implementation of individual measures were concretely the result of a reform process undertaken by the decision-makers in the organizations initiated with the view of escaping one of the most relevant criticalities derived from the precedent UN practice on comprehensive sanctions.[232]

Therefore, two were the main historical junctures which ultimately resulted into the emergence within the international community of the question of fairness in the imposition of UN sanctions targeting non-State actors. First, the 661 sanctions regime against Iraq *de facto* opened the way towards the beginning of the reform process which subsequently led to the substantive and procedural evolution of UN sanctions. Indeed, the enforcement of the sanctioning regime against the Iraqi government completely showed the main criticalities the UN traditional system of comprehensive sanctions detained. Particularly, the humanitarian consequences, essentially derived from the application of general embargo, on the Iraqi civilian population necessarily induced the Security Council to reassess its practice on sanctions. By acknowledging the overall intolerable and unintended human costs produced by the application of comprehensive measures, the UN Security Council started to conceive a new system on sanctions with the view of minimizing the unintended effects on the civilian population of the targeted States. This reform process undertaken by the

[232] Francesco Francioni, "Kadi and the Vicissitudes of Access to Justice", in Marise Cremona, Francesco Francioni and Sara Poli, *Challenging the EU Counter-Terrorism Measures through the Courts*, (EUI Working Paper, AEL, 2009/2010), p. 19.

Council ultimately resulted into the adoption of more targeted sanctions, thus completely revolutionizing its own traditional practice.

Second, the widespread terrorist attacks and the subsequent realization that terrorist organizations were now able to undertake actions with global reach and international repercussions led the UN Security Council to identify terrorism as a new international threat to the collective security system, thus deserving to be address with new specific instruments capable of limiting its effects. It is in this light that targeting sanctions directing untraditional international actors, meaning individuals and private entities, begun to be implemented by the UN Security Council. This represented the real turning-point in the Security Council's practice, since up to that moment the only individuals it had targeted through the enforcement of sanctioning measures were specifically political leaders and decision-makers held responsible for the continuation of policy-measures which had been identified by the Security Council to be threat to the international peace and security. Rather, with the implementation of the first sanctioning regime directing individuals as instruments to counter international terrorism, the legal grounds of application of such measures shifted from the determination of the targeted individual's responsibility in the perpetration of the wrongful act to the presumed association to the different international terrorist organizations, thus completely changing the traditional "rules of the game" at the basis of the UN practice on sanctions.

To this respect, the 1267 Sanctions Committee, which *de facto* ultimately marked the beginning of the new Security Council's approach towards international terrorism, originated also the above-mentioned concerns on the fairness of UN individual sanctions as they lack the requested guarantee of individual procedural rights in accordance with the general principles of international human rights law. As initially framed in 1999, the primary scope of Resolution 1267 was mainly that of coercing the Taliban regime to ensure the its governed territory was not to be used by Al Qaeda and other minor associations to organize terrorist attacks, as well as to bring individuals suspected to be associated to such terrorist organizations to justice.[233]

Nevertheless, as already pointed out during the course of this present work, the scope of application of the 1267 Sanctions Committee was subsequently enlarged as the Security Council authorized new sanctioning measures, through the adoption of Resolution 1333, to be directed to the person of Osama bin Laden, members of the Al Qaeda terrorist organization and, most importantly, private entities and individuals suspected to be associated to such terrorist groupings. Resolution 1333 is of seminal importance as it expanded the scope of application of the 1267 sanctions regime which

[233] Kimberly Prost, "Security Council Sanctions and Fair Process", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 215.

at this moment included also non-State actors with no specific connections to a State, a territory, nor a government. Eventually, this enlargement led the blacklisting of 162 individuals and 7 private entities to be captured by the 1267 Sanctions Committee in less than a year, further enhancing the concerns related to the lack of proper guarantee of individual procedural rights.[234]

Therefore, it is clear that sanctions regime against Al Qaeda and the Taliban did not actually generated *per se* the fair process questions, but simply intensified the already existing concerns related to lack of *a priori* protections of enlisted individuals and private entities, as well as the absence of concrete means of reviewing the listing of their names.[235] This inevitably led the international scholarship to contest this seminal legal *lacunae*, considering that was to be perpetrated by the UN Security Council, meaning the primary guardian of the international collective security system, as well as the main institution in charge of protecting individual human rights. Following the emerging position of the majority of international scholars on the sanctions discipline, the necessity for the UN Security Council to further protect the stability of the international system, as well the safety and security of the world population from the threat posed by international terrorism, was not a plausible rationale justifying the absence of fair and clear procedures enabling enlisted individuals to be heard and to request to be removed from the Consolidated List. Finally, it was also generally maintained that not only had the Security Council to respect human rights being the guardian of the international security system, but also because the UN Charter itself advances throughout its clauses the obligation for the Council to respect the body of international law norms and principles, among which there is also human rights law, when fulfilling its mandate and functions.

Nonetheless, it is noteworthy to underline the idea that this political criticism on UN individual sanctions was not only directed by the international scholarship, as well as some State within the international community, but rather was emerging even internally in the UN system. As a matter of fact, in 2005, both the UN General Assembly and Secretary-General Kofi Annan mobilized in order to enhance the need and paramount obligation for the Security Council to ensure the complete protection of individual procedural rights in its counter-terrorism commitment. Following, the next year, Secretary-General Annan reiterated the need for the Security Council to reconsider the sanctioning mechanism on individuals with the view of setting minimum standards of protection as well as increasing the transparency of the listing and delisting procedures. Furthermore, he also

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[234] Marise Cremona, Francesco Francioni and Sara Poli, *Challenging the EU Counter-Terrorism Measures through the Courts*, (EUI Working Paper, AEL, 2009/2010); Gavin Sullivan and Ben Hayes, *Blacklisted, Targeted Sanctions, Preemptive Security and Fundamental Rights*, (European Center for Constitutional and Human Rights, 2010), p. 12.

[235] Kimberly Prost, "Security Council Sanctions and Fair Process", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 216.

identified four main pillars, derived by the due process standards applied domestically by most of the UN member-States, which were to be ultimately addressed by the Security Council while reforming the listing mechanism of UN individual sanctions: (i) the right of the enlisted individual to be informed; (ii) the right of the enlisted individual to be hear by competent organs; (iii) the right of the enlisted individual to review; (iv) the duty of the Security Council to periodically review the targeted sanctions directed towards individuals.[236]

Evidently, the extensive debate questioning the fairness process of UN individual targeted sanctions highly impacted on the consequent activity of the Security Council as gradual improvements on the listing procedure were initiated to be discuss internally to the organization and subsequently implemented. Several resolutions were adopted by the UN Security Council, with the view of further amending the 1267 Sanctions Committee, through the introduction of new devices increasing the level of protection of individual procedural rights. This demonstrated how the Security Council itself acknowledged the lacuna of the individual sanctions system on the degree of protection of the rights of enlisted individuals, to the point of introducing new measures specifically addressing such issue, such as the notification of the targeted individual, the provision of a narrative summary explaining the reasons for the listing of the name of the suspected individual, periodic review and, most importantly, the establishment of a new mechanism, called Focal Point, accessible by the listed individuals to request to be delisted from the Consolidated List.

These modifications to the 1267 Sanctions Committee evidently resulted into advances in the general discourse of fair process of UN individual sanctions, as prior to the establishment of the Focal Point there was no mechanism acting as a mediator between the targeted individuals and the Sanctions Committee. As a matter of fact, these improvements were ultimately welcomed by the international scholarship on sanctions, despite they proved quite immediately to fall short in the protection of individual procedural rights. Indeed, despite the establishment of the Focal Point was certainty a step forward in the protection of enlisted individuals' rights, *de facto* it lacked many of the aspects that were previously highlighted by Secretary-General Annan, such as the authority to make decisions over the possibility to review the listing of a targeted individuals, as well as the power to provide remedies.[237] This explains the reason for which international academics continued to criticize both the new established Focal Point mechanism and the system of UN individual sanctions. Particularly, not only international law scholars questioned the lack of the complete guarantee of individual procedural rights, but they started also to doubt on the adequacy of the system on individual sanctions

[236] *UN Security Council 5474th Meeting*, (June 22, 2006), UN DOC S/PV.5474, p. 4-5.

[237] Kimberly Prost, "Security Council Sanctions and Fair Process", in Larissa van den Herik, *Research Handbook on UN Sanctions and International Law*, (Edward Elgar Publishing, 2017), p. 219.

itself, as it violated one of the main principles of global justice, meaning *nemo judex in causa sua*, as the Security Council continued to perform both the functions of decision-maker and body in charge of reviewing the validity of the sanctioning measures.[238]

From the establishment of the Focal Point, further improvements on the listing and delisting mechanisms were only achieved following the judicial intervention of external actors, meaning regional courts, such as the European Court of Justice in Luxembourg and the European Court of Human Rights in Strasbourg. Nevertheless, as mentioned in the previous chapter, the key case that ultimately shed lights on the question of fair process and which consequently initiated a new wave of reforms inside the sanctions system under the UN framework was the *Kadi* judgment by the ECJ. The relevance of the *Kadi* saga lied essentially on the catalyst function it exercised on the jurisprudence of other national and regional courts. Indeed, many were the courts that, founding themselves in front of similar cases, subsequently took inspiration from the final judgment by the ECJ, further pointing out the inadequacy of the Focal Point mechanism as for what concerned the protection of individual procedural rights.

Accordingly, international law scholars agree in maintaining that the intervention of the ECJ has certainly contributed to better understand the criticalities of the UN system of individual sanctions. Viewed from this perspective, the process of judicial intervention started by the ECJ with the seminal case on *Kadi* induced the Security Council, as a driving political force, to rethink the primary features at the basis of the sanctioning system under the UN framework.[239] This subsequently resulted into the establishment in 2009 of the Office of the Ombudsperson through the adoption of Resolution 1904. The new body was for instance framed as an actor internal to the UN framework in charge of reviewing and assessing the validity of the individual delisting request. For instance, it is clear that the ECJ decision on *Kadi* has contributed to further democratize the UN system, affirming the urgency for the Security Council's measures to be necessarily consistent with the human rights principles contained in both the international customary and treaty law, including the UN Charter.[240]

For the very first time, indeed, the UN had introduced a reviewing mechanism for individual sanctions which ultimately increased the degree of protection of individual procedural rights by the 1267 Sanctions Committee, including the previously mentioned features which were demanded in

[238] *Ibidem*.

[239] *Ibidem*, p. 223.

[240] Francesco Francioni, "Kadi and the Vicissitudes of Access to Justice", in Marise Cremona, Francesco Francioni and Sara Poli, *Challenging the EU Counter-Terrorism Measures through the Courts*, (EUI Working Paper, AEL, 2009/2010), p. 29.

2006 by Secretary-General Kofi Annan, meaning the right to be informed, the right to be heard and the right to review.

CONCLUSION

ASSESSING THE EFFECTIVENESS OF UN SANCTIONS

In conclusion, this work has been conducted with the general purpose of exploring the main features at the basis of the international sanctions regime in the view of retracing its evolutive process in the course of the last two decades and the main effects brought by its transformative pattern. Indeed, the present work has proposed as an overall study on the progressive evolution of the UN practice on sanctions, investigating both on the procedural and substantive transformations such measures went on, as well as discussing on the main criticalities the two sanctions' models have originated throughout their application.

As may be deduced from the chapters composing this present work, the word "sanctions" still suffers the absence of an internationally recognized ultimate conceptualization of the terminology. Indeed, whenever referring to the word "sanctions" in general terms as an international instrument of coercive diplomacy, applicable both unilaterally and multilaterally within the international community, one of the first features international academics may take into consideration is the legal *lacuna* derived from the definitional question on international sanctions. Furthermore, despite the ILC has provided a legal distinction between sanctions, countermeasures and retorsions, which tends to be generally accepted, at least in theory, by international law scholars as it provides valuable criteria for determining the legal validity of international measures adopted within the collective security system, this ends up not to be totally applied by States when committing in the practical application of similar non-forcible measures.[241]

Nonetheless, despite they differ in the structural design, as well as in the legal consequences as to the legality of the measures undertaken, sanction, countermeasures and retorsions are commonly resorted within the international community with the general objective of inducing the targeted State to permanently change its wrongdoing behavior, so to conform with the obligations derived from the body of international law norms and principles. It is clear, for instance, that the main scope of those measures is that of coercing the targeted State as they commonly possess a punitive character in their nature. However, it must be recalled, as pointed out during the course of the present work, that this

[241] Natalino Ronzitti, *Coercive Diplomacy, Sanctions and International Law*, (Brill Nijhoff, 2016), p. 287.

"punitive feature" has begun less evident, at least within the UN framework, after the sanctions regime has underwent the processive evolution that resulted into the shift from comprehensive to targeted measures. Indeed, differently from comprehensive sanctions, which were basically framed as punitive measures since their purpose was that of substantially halting the diplomatic, financial and economic relations of the sanctioned State with other countries in the international community, UN targeted sanctions are in their nature correcting policy measures which, in response of the changing attitude and the subsequent actions undertaken by the targeted State, may be easily manipulated as to increase or decrease, when necessary, the degree of trade restrictions and further measures. This, however, as pointed out throughout the discussion over the differences concerning the precedent and the modern practices on UN sanctions, does not necessarily mean that targeted measures disposed of by the Security Council cannot be framed as punitive policy measures, since, in some circumstances, the effectiveness of such measures is ultimately counted on their ability to induce or to coerce the targeted State to permanently change its attitude towards the international community, as well as, in the case of individual sanctions, emerged as a counter-terrorism device, to enable the enlisted individuals and private enterprises to commit terrorist attacks or to financially support international terrorist networks.

As for the effectiveness of UN targeted sanctions, this conclusive section proposes as an evaluative chapter of the capability of such measures disposed of by the Security Council to accomplish the agreed objectives. Despite in modern times is commonly acknowledged that sanctions are generally implemented not only with the ultimate purpose of coercing the target to change its behavior, but, as we have already mentioned in the course of the present work, also to constrain the capabilities of the targeted actor, whether a State or an individual, to continue to perform its international misconduct, it is similarly agreed among international scholars that, at least until the beginning of the 1990s, sanctions were not always successful instruments of international relations. This general consensus on labelling sanctions as ineffective devices of international relations was however derived from the application of the generalization of the debate on the disastrous unintended consequences that sanctions had originated in particular circumstances to the theoretical reasoning on the effectiveness of such international measures.

For instance, an immediate statement on the effectiveness of sanctions of this kind seems to be at least biased, as it refers specifically to some case studies in order to derive a general overview on the overall capabilities of such measures to achieve the purposes for which they were initially disposed. Arguing that sanctions are always effective or ineffective may be counterproductive for the general assessment of such international measures. Indeed, being instruments of international

relations, sanctions can demonstrate to be effective, ineffective or counterproductive in relation to the specific circumstance in which they are resorted to.[242]

It is mainly in this light that is then useful to recall Giumelli's "Four-Step Process"[243] in order to evaluate when sanctions may appear to be productive and thus effective, and when they do not show to be the best instruments to resort. It has to be noted, however, that the objective of this analytical procedure is not that of deriving an overall assessment to the use of sanctions, which, as previously mentioned, may show to be extremely biased and irrespective of the general practice on sanctions, but rather that of analyzing the different constituents of such measures as to underline which were the conditions in which sanctions worked and which were the ones in which sanctions ultimately revealed to be counterproductive.

Following the four-steps procedure designed by Giumelli, the effectiveness of sanctions may be measured as follow: the first step is essentially based on trying to position sanctions within the general context of measures and instruments of international relations that can be adopted by the wide range of global governance institutions, such as the UN Security Council, in order to respond to the emergence of a threat to the collective security system. This first step proves to be highly relevant especially considering that sanctions are adopted independently from other measures of international relations quite rarely. As a matter of fact, sanctions commonly position in a wide range of additional foreign policies institutions can resort to in combination. This last assumption leads us to consider that whenever sanctions are adopted in combination with additional foreign policy instruments, then the effectiveness should not be calculated on the effects derived by the application of sanctions *per se*, but rather on the entire range of measures enacted in concomitance with the sanctioning measures.

The second step, instead, is focused on the study of the rationale behind the application of sanctioning measures. We have explored in the course of the present work that sanctions may be implemented in the view of addressing both traditional and untraditional threats to international peace and security. Still, the different range of objectives that may be attributed to sanctions regime reflects the tripartite model of sanctions' purposes: to coerce, to constrain, to signal. Each of them can be identified as the general purpose behind the implementation of a sanctioning regime, both individually and in combination with the remaining two. In addition, each of the three rationales influences differently the targeted States. This means that, following this second step, sanctions should also be evaluated taking into consideration to what extent they are capable of influencing the

[242] David A. Baldwin and Robert A. Pape, *Evaluating Economic Sanctions*, (International Security, Volume 23, No. 2, 1998), p. 189-198.

[243] Francesco Giumelli, "Lessons Learned from the Experience of the European Union", in Natalino Ronzitti, *Coercive Diplomacy, Sanctions and International Law*, (Brill Nijhoff, 2016), p. 251.

behavior of the targeted State and whether the leverage exercised on the sanctioned country is in line with the rationale at the basis of the application of the sanctions regime.

The third step configures as an *ex-post* phase, as it ultimately analyzes the effects that are concretely produced through the enforcement of the sanctioning procedure. For instance, this third phase, by assessing the range of effects that have been produced, explores whether the sanctions have achieved the overall objectives for which they were initially resorted to and framed. Nonetheless, it is an evaluation that takes into consideration two main economic factors, meaning which has been the cost the sanctionee had to pay for the imposition of the sanctioning measures and which was the impact on the economy of the sanctioned country. Therefore, this step constitutes an *ex-post* costs-benefits analysis over the enacted measure. Still, we do not have to forget that, apart from the intended effects sanctions may produce over the targeted legal entity, such international measures can also originate unintended impacts that were not initially foreseen by the decision-makers. Following the reasoning by Giumelli, however, not only the distinction between intended and unintended consequences must be referred while processing this third step in the overall assessment of sanctions, but also the difference between direct and indirect effects produced by sanctioning measures. Indeed, commonly "smart" sanctions target the singular sectors of the economy of the alleged State. Nonetheless, this does not necessarily mean that the intended effects that the sanctions regime would have had to exercise on the targeted sector would not have also impacts on correlated sectors in the form of indirect effects. For instance, the costs-benefits analysis to which this third step refers to must evaluate all the possible intended and unintended, as well as direct and indirect impacts the sanctioning measures may exercise on the targeted States.

Finally, the fourth and last step, instead, being related to the assessment previously done in the context of the precedent step, measures whether the overall impacts resulted from the imposition of the sanctions regime, both as intended and unintended effects, are worth the costs beared by the sanctionee actors or, in alternative, if it was more convenient to apply different policy measures at their place.

Similarly, many other international scholars have provided their own models to evaluate the effectiveness and related validity of sanctions as instruments of international relations and coercive diplomacy. Interestingly, it must be noted that almost every approach directed towards the assessment of sanctions' effectiveness extensively take into consideration the unintended impacts these measures may produce in the costs-benefits analysis.

Despite the different kinds of analytical frameworks developed by the international scholarship on the assessment of the effectiveness of sanctions prove to be valid as models of analysis of the validity of such measures, it is fundamental to recall that debating over the productiveness and

success of sanctions as instruments of international relations and coercive diplomacy is far from configuring as an empirical and fixed science.[244] As a matter of fact, sanctioning measures are volatile devices as they can be easily manipulated by the decision-makers not only in the context of one single sanctions regime, but throughout the development of the international practice on sanctions. This present work, indeed, has extensively analyzed how sanctions have evolved throughout the decades in order to adjust and to conform with the emerging threats within the international community.[245] Furthermore, the assessment over the effectiveness of sanctions cannot be based only on the above-mentioned criteria, since such measures position in more detailed contexts and impact on the targeted States differently also in relation to the environment in which they are going to be implemented. For instance, the assessment on the sanctions' effectiveness would involve the analysis of a wide and extensive range of variables which appear to necessarily change throughout time and space, undermining, for instance, the endurance over time of the subsequent models of assessment which will be ultimately produced by the international scholarship as years go by.

In conclusion, the doctrine on international sanctions has acquired over the decades seminal importance as global governance institutions, such as the UN Security Council, are resorting to such measures with more frequency in order to respond to the growing emerging untraditional threats to the international peace and security. Despite that, however, it has been demonstrated that targeted measures, in the form of individual sanctions, are still generating an extensive debate among international law scholars as they may negatively impact on the enjoyment of individual procedural rights. As some improvements have been achieved throughout the last decade in relation to the question of fair process, the protection of procedural individual rights due to the implementation of individual sanctions still falls short to be sufficiently guaranteed, especially if we consider that such violations are committed by actors such as the UN Security Council, meaning the guardian of the collective security system. By the same token, however, it must be considered that when applying such individual sanctions the Council confronts with the difficult task of striking a balance between the maintenance of international security and the protection of individual rights. Certainly, improvements are still recommended in order to lower as much as possible the impacts that sanctions may originate on the enjoyment of individual rights. Similarly, improvements in the elaboration of the international literature and scholarship on sanctions may also be further expanded by the international community.

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[244] *Ibidem*, p. 253.

[245] Thomas J. Biersteker, Sue E. Eckert and Marcos Tourinho, *Targeted Sanctions: the impacts and effectiveness of United Nations action*, (Cambridge University Press, 2016), p. 226.

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RIASSUNTO

Since the creation of the United Nations (UN) as an international organization devoted to the protection of the collective security system that emerged from the war, as well as to maintain the pledge of peace within the international community, several international academics gradually begun to argue that eventually the UN Security Council would have ultimately enlarged its mandate in the view of protecting also individual human rights. Nevertheless, throughout the 1990s, the international community has known growing humanitarian concerns related especially to the sanctioning activity of the UN Security Council. Therefore, what was becoming evident in the eyes of many international scholars was that the UN Security Council, in its practice of protecting the international peace and security, was also jeopardizing the human rights of many civilian populations impacted negatively by UN sanctions.

The present work proposes as a comprehensive study on the evolution of the UN practice on sanctions, investigating, also through the examination of several case-studies, on the procedural and substantive transformations such measures went on, as well as the main criticalities the two sanctions' models present. For instance, this work further analyzes the impacts both comprehensive and targeted sanctions exercised on the enjoyment of individual human rights, and which were the kinds of legal reactions that subsequently emerged, both internally and externally to the UN system.

The resort to sanctions as a seminal device to address threats to international peace and security has gradually become a primary feature in the general practice of the UN Security Council. As a matter of fact, since the end of the bipolar system established during the Cold War decades, the use of sanctions, both unilaterally and multilaterally, as instruments of international relations has exponentially increased. Still, despite they are commonly recognized as tools of coercive diplomacy, a universal well-supported and official definition of the term is still lacking within the world scenario – for example, the European Union does not refer to similar measures with the term "sanctions", but rather as "restrictive measures".

Stricto sensu, the term "sanction" can be used, as argued by Michael Bothe, to express a set of coercive policy-measures undertaken by an international legal entity, defined as the sanctioner (a State or an international organization) in reaction to an allegedly unlawful behavior of another legal entity, defined as the sanctionee (both State and non-State actors), with the objective of inducing the sanctionee to desist from that behavior. In the present work, however, it has been demonstrated how controversial it is to find a universally agreed notion for the term "sanction" within the spectrum of international law.

During the course of this work, we have concluded that sanctions are*, prima facie*, political coercive measures, neither in the form of countermeasure, nor in the form of retorsion, resorted by a State or an international organization, as a competent organ, to respond to a previous non-forcible wrongful act, which had been committed by another State, and which had evidently injured the sanctioner, with the ultimate purpose of inducing the sanctionee to permanently stop its politically unlawful behavior, and to fulfill again its international obligations. Though domestic sanctions still exist within the national legal domain of nation-States, in most of the cases, contemporary sanctions detain a more evident global character, mainly due to the participation of international and regional organizations to an array of sanctioning regimes. Following this reasoning, a more worthwhile distinction is the one between *unilateral sanctions regimes* and *multilateral sanctions regimes*, also commonly referred as *universal sanctions*. Unilateral sanctions are individual measures adopted by a single-party against the wrongdoer. The rationale behind unilateral sanctions is based on the principle of the State's sovereignty right, and this is evidently confirmed by the fact that this typology of measures is administered by the body of national law of the State applying them, nonetheless in conformity with the paramount principles of international law. On the other hand, multilateral sanctions refer to measures enacted within the international community by a plurality of States against the same wrongdoer. Apart from this first version, the label "multilateral sanction" can be adopted also to make reference to sanctions resulted from the enforcement measures enacted by the UN Security Council. However, even if UN Security Council's sanctions can be classified as multilateral sanctions, they slightly differ from the ones that are enacted by groups of States. Accordingly, sanctions imposed by the UN Security Council, despite being under the umbrella of multilateral sanctions, resemble more what can be categorized as "universal sanctions". While confronting with sanctioning regimes disposed by a UN Security Council Resolution, the general scheme of "sanctioner v. sanctionee" seems not to perfectly fit: indeed, the UN Security Council takes the role of a third party, meaning an actor, which is not the sanctioner, but nevertheless disposes the sanction against the targeted country, meaning the sanctionee, but not directly enforcing those measures. Therefore, the UN member-States, which are not all directly involved in the establishment of the sanctioning regime, still take the role of the "sanctioner", in that they will enforce the measure against the targeted State. This explains the reasons for which UN sanctions are generally perceived to embody a higher degree of complexity than other forms of multilateral sanctions, as described throughout the present work.

In its mandate of being the guardian of the international security within the world community, the UN Security Council may decide to impose sanctions regimes, pursuant to the invocation of Chapter VII of the Charter, anytime it determines the existence of a threat to or a breach of the

collective security system as established after the creation of the international organization and the application of the *jus contra bellum* doctrine enshrined in article 2(4) of the Charter. Therefore, article 39 of the UN Charter confers upon the Security Council the authority to define whether there exists a threat to or a breach of international peace, as well as a material act of aggression. The prior determination of a threat to or a breach of the collective security system subsequently triggers the invocation by the Security Council of article 41 or 42 as the constitutional basis for the disposition of, respectively, non-forceful or forceful actions. Being sanctions non-forcible measures, it is clear that the invocation of article 39 by the Security Council unequivocally results into the application of article 41, or more generally, as portrayed in course of the present work, of Chapter VII of the UN Charter.

The first sanctions regime ever established by the UN Security Council dated back 1963 against the apartheid regime of South Africa, immediately followed by the 1965 Southern Rhodesia sanctions regime. Initially, however, those regimes configured as voluntary sanctions; nevertheless, they subsequently became mandatory comprehensive sanctions following the adoption of Resolution 253 on Southern Rhodesia in 1968 and Resolution 418 on South Africa in 1977. The core reason for the enforcement of the sanctions regime in the case of Southern Rhodesia was the unilateral declaration of independence, and the subsequent violation of the principle of the right to self-determination, by the illegal regime established in the territory by a white minority under the leadership of Ian Smith. Similarly, the sanctions regime on South Africa called upon the government to permanently end apartheid and repression against the black majority, as well as the political figures against the regime, with the final intent of enforcing the democratic majoritarian rule within the country and in order to build up a new society based on the principles of equality and justice, where the right to self-determination of the South African people could be fully affirmed, irrespective of differences of color, creed or race, contrarily to what was voluntarily promulgated by the apartheid regime. The peculiarity of the latter regime was that it was the first mandatory sanctioning measure ever addressing a member-State of the United Nations – indeed, by the time of the establishment of the 253 sanctions regime, Southern Rhodesia was neither recognized by the entire international community as a State, nor it was a member of the organization.

Due to the frequent resort to the application of UN comprehensive sanctions as instruments to confront the traditional threats which commonly emerged within the international arena, the 1990s decade immediately begun to be referred to by international academics as the "sanctions decade". Nevertheless, this period started to be extensively known for the events that subsequently characterized the decade and which concretely represented a real turning point in the perception on UN sanctions and, following, also on its practice. Therefore, following the invasion of Kuwait by the

Iraqi State in 1990, the UN Security Council immediately disposed of the implementation of comprehensive sanctions against the country. However, this resulted into a massive humanitarian disaster, as the comprehensive sanctions on Iraq not only impacted politically and economically on the State, but rather produced a considerable humanitarian crisis for the entire population, particularly on the weakest segments of the Iraqi society, meaning women and children. The publication on the death of thousands of children immediately generated an extensive debate over UN sanctions and their validity as they negatively impacted also on the human rights of the populations of the targeted States. The comprehensive sanctions enforced against Iraq pursuant to Resolution 661 has been one of the most controversial and questioned sanctions regimes in the UN Security Council's history and practice. Therefore, never before had a sanctions regime caused such a sustained economic distress for a country, turning the Iraqi financial levels and performance comparable to the ones of the poorest nations, not only in the Middle-Eastern region, but in the entire globe.

In several of his reports to the UN Security Council, Secretary-General Kofi Annan admitted the increasing humanitarian concerns derived from the harsh human tragedy the Iraqi population was experiencing and explicitly identified as a principal cause for such a humanitarian distress the long-term destructive impacts of the general embargos imposed by UN member-States pursuant to the decision by the Security Council disposing the establishment of the sanctions regime against Iraq. The humanitarian crisis in Iraq generated wide debate over the faith on the use of sanctions, not only among international scholars, but rather also within the United Nations. The general idea was that sanctions should configure as instruments of the system of international relations, capable of coercing the targeted State to change its illegitimate policies or behavior, as well as constraining its capability to access resources needed to achieve its objectives through its misconduct, but at the same time able to avoid possible unintended repercussions on innocent civilians, as occurred in the Iraqi case, which could lead to a situation of violation of international human rights.

Ultimately, the Iraqi humanitarian concerns resulted into a further transformation of UN sanctions. Indeed, the unintended impacts commonly generated by UN comprehensive sanctions on the targeted States, as well as on their neighboring countries, led the international scholarship on sanctions to question the compatibility of similar measures to the inherent human rights obligations the Security Council had to fulfill while exercising its mandate as guardian of the collective security system. For instance, starting from the mid-1990s, the UN Security Council has clearly diversified, and subsequently further intensified, the use of such measures as devices of international relations. Indeed, also thanks to the work of international academics on sanctions, the UN Security Council progressively adjusted these measures with the view of avoiding the development of unintended impacts on the innocent civilian populations of those States targeted by the Council pursuant to a

prior determination of a threat to international peace and security. This ultimately resulted into a gradual transformation of UN sanctions which epitomized into the shift from comprehensive sanctions, impacting not only on the economic performance of the targeted State, but also on the civilian population, as in the case of Iraq in the early 1990s, to the use of more "smart" or targeted measures, with the general purpose of impacting exclusively on those individuals and entities responsible for the actions posing a threat to the international collective security system, and thus limiting the effects of such measure on the alleged wrongdoer.

Furthermore, with the emergence of new untraditional threats within the international collective security system, such as the proliferation of weapons of mass destruction, international terrorism and the gross violation of international human rights, the use of targeted sanctions also diversified in terms of purposes. As a matter of fact, in modern times, international targeted sanctions have become the most relevant device at the disposal of the UN Security Council, which might resort to such measures whenever addressing threats to the peace and to the international security system, especially as counter-proliferation and counter-terrorism instruments for the enhancement of the protection of international human rights. Therefore, especially since the beginning of the new century, the UN Security Council has substantially expanded its activities of enforcing targeted sanctions against member-States, as well as other international legal entities. Moreover, this practice has also been enlarged due to the recently increased skepticism many UN member-States had in resorting to the use of armed military force, pursuant to the right of self-defense enshrined in article 50 of the UN Charter, in response to serious breaches of international peace and security.

Therefore, the main difference between UN targeted and comprehensive sanctions lies in the distinctive notion of the former measure. Indeed, targeted sanctions are discriminatory policy measures, as they exclusively focus on targeting the individuals, decision-makers and private entities allegedly responsible for having perpetrated an illegitimate wrongful act. Conversely, being comprehensive sanctions non-discriminatory measures, they were rather enforced systematically against the entire responsible State, impacting also on the population. However, this does not necessarily mean that targeted sanctions regimes may not negatively impact *a priori* on civilians. As a matter of fact, targeted sanctions may also affect adversely on societies. Nonetheless, despite they may lead to unintended humanitarian negative effects on the civilian population of a targeted State, these impacts may still be more normatively tolerable to respect to the ones exercised on the population by comprehensive sanctions.

One of the most recent and interesting developments resulted from the substantive and procedural transformations of the practice of sanctions by the UN Security Council has been the greater involvement of regional organizations, which, since the last two decades, have started to

participate more actively in assisting the Council in its functions of monitoring and protecting the international collective security system. As a matter of fact, regional organizations, with particular attention on the European Union, have recently increased the number of sanctions imposed on targeted States, both under the UN framework and autonomously.

In order to better understand the legal framework at the basis of the interactions in the domain of international sanctions between the UN and regional organizations, it is first necessary, by referring to the provisions contained within the Charter, particularly in Chapter VIII, to explore the notion of such international legal entities within the security system enhanced by the functions of the Security Council. Regarding Chapter VIII of the UN Charter, article 52(1) provides that there are no legal obstacles in the present text that enable regional arrangements and organizations to assist the Security Council, through cooperation or autonomously, in maintaining the international peace and security. Nonetheless, despite articulating the possibility for regional organizations to undergo activities with the view of participating in the protection and monitoring of the collective security system established through the creation of the United Nations, article 52(1) does not provide a definition of the term "regional arrangements". It is perfectly in this scenario, characterized by the absence of an internationally acknowledged definition of the term "regional arrangements" within the UN framework, that international academics stepped in, elaborating a defined approach towards the conceptualization of regional organizations within the collective security system. Following the perspective shared by the majority of international scholars, "regional arrangements" cannot be portrayed as institutions whose members share only the same geographical positioning, but rather as non-universal organizations which are basically self-determining in terms of three factors, meaning membership, purposes and values, such as peace and the protection of international human rights, the maintenance of security and the promotion of economic and financial cooperation. It is, for instance, evident that most of the regional organizations and the United Nations share part of their founding values, as well as the objectives to be achieved in order to maintain the international peace and security. This perfectly explains the reasons for which the functions of regional organizations might overlap with those of the UN, particularly the ones of the Security Council.

The development in the complexity of the threats the international community must confront has increased the participation of regional organizations in the activity of maintaining the international peace and security, under the lead of the UN Security Council. For instance, it is clear that regional organizations are not anymore conceived as isolated bodies acting exclusively within their own region, but rather are more inclined to cooperate among themselves and under the UN collective security framework. To this regard, however, it is then fundamental to investigate the pattern of cooperation among regional organizations and the UN Security Council in order to

understand how their relations work within the present collective security system. *De facto*, the growing interactions between regional organizations and the UN is normatively rooted on the concepts of "normative hierarchy" and "functional independence", regulating the relations between the value of universalism embodied by the United Nations, mostly in the activities of the Security Council, and the one of regionalism, instead clearly represented by regional organizations. As a matter of fact, it is perfectly in the light of the correlation between these two principles that Chapter VIII of the Charter construes the model of relations between the UN and the different regional organizations. Accordingly, the principle of normative hierarchy basically acknowledges the hierarchical model on which the collective security system, as framed after the establishment of the UN, is based on. This underlines the notion of subordination of regional organizations to the UN which, in terms of international law, figures as an organization of almost universal membership and with an overall comprehensive set of competences. By the same token, however, the principle of functional independence recognizes the separate autonomy of regional organizations from the UN. Indeed, despite in terms of protection and promotion of the collective security system, both regional organizations and the United Nations share the same values and objectives, they are fundamentally separate legal institutions, with an independent decision-making body, which for instance allows regional organizations to implement sanctions also autonomously from the UN Security Council.

Despite it is overall acknowledged that the possible adverse effects UN targeted sanctions can *de facto* still exercise on the innocent civilian population of the targeted State are more normatively acceptable than the humanitarian consequences resulted from the application of comprehensive sanctions, additional and new legal concerns on UN targeted measures has started to emerge in relation to the protection of individual procedural human rights, especially when dealing with individual sanctions in the counter-terrorism dimension. The prolonged lack of information related to the reasons for the inclusion of the name of individuals and private entities, alleged to be associated to the international terrorist networks, to the Consolidated List, as well as the absence of a system of review of such targeted measures, led to the violation by the UN Security Council of a number of fundamental rights in the form of procedural rights, which created an extensive debate over the legitimacy of such measures, as well as undermined the efficiency of the UN sanctioning framework. Several international scholars on sanctions have tried to justify the development of unintended consequences on procedural rights by identifying such impacts as necessary side effects of the policy measures adopted by the UN. In addition, they further advanced the idea of the UN Security Council as an international *legibus solutus* decision-making authority. This concept has been further used in order to explain the shift in the nature of the body of international law. Accordingly, the imposition of UN targeted sanctions proves how the international law paradigm has progressively moved from

being merely a body of law administering the inter-state relationships within the international arena to regulating the entire world community, as well as protecting its peace and security from international threats, as a global law. This shift, according to the previously mentioned view maintained by several international law scholars, *de facto* enables the UN Security Council to be a *legibus solutus* and to adopt measures which will directly impact not only on States, as already occurred in the inter-state model of international law, but also on individuals, either as intended or unintended effects, without violating the principles of customary and human rights law. Nevertheless, such reasoning has *de facto* generated a greater division among international scholars on sanctions. Indeed, part of the international academics have argued that such rationale cannot be assumed to be completely and lawfully correct. Rather, they claimed it is extremely inconsistent with the provisions contained within the UN Charter, which evidently recognizes an extensive authority upon the Security Council, but acknowledging at the same time that its power must always be exercised in accordance with the Charter and the body of international law norms and principles, among which we find also individual human rights.

The role of the European Union, particularly through the work of the European Court of Justice, has acquired considerable relevance in the recent discussions over the protection of the individual procedural rights related to the debate on UN targeted sanctions. As we have already mentioned, the UN system has recently failed to grant full procedural rights to individuals enlisted to the Sanctions Committees. This has led those persons to contest the validity of the UN sanctions, on the basis of breaches of individual rights, by bringing those cases in front of both domestic and regional courts, such as the ECJ and the ECtHR, with the view of reviewing those measures. One of the most relevant law disputes related to the implementation of UN sanctions on individuals is the *Kadi* saga as ruled by the ECJ. The focal point at the basis of the *Kadi* case lies in the procedure of listing individuals as framed with the 1267 Sanctions Committee, established after the adoption by the Security Council of Resolution 1267 in response to the emerging threat represented by the terrorist network of Al Qaeda, as well as the EU measures (Common Positions and Common Regulations) subsequently enacted in order to guarantee uniformity in the implementing activity among the EU member-States.

Mr. Kadi firstly challenged, in *Kadi v. Council and Commission* (2005), the validity of the EU Council Regulation enforcing the UN individual sanctions in front of the European Court of First Instance (CFI), explicitly demanding the dissolution of the Regulation implementing the listing procedure of targeted individuals under the Al Qaeda and Taliban Sanctions Committee, on the basis of the violation of his right to fair hearing. *Stricto sensu*, the CFI, and subsequently the ECJ, were requested to define whether the implementation of the Security Council Resolution 1267 through the

adoption of EU Regulation 881/2002 had consequently made the relevant UN sanctioning measures immune from review since this would have undermined the principle of primacy contained in article 103 of the UN Charter. Accordingly, the difference between the final decisions achieved by the two courts resides perfectly in the diverging approaches used by the CFI and the ECJ relative to the interpretation of the previous rationale. For instance, we may argue that the CFI opted to rely on a more "internationalist approach", as it recognized the principle of UN primacy as a paramount feature in its own judgment; contrarily, the ECJ relied more on a "conservative approach", due to its primary tendency of advancing, and further protecting, the EU constitutional identity.

Therefore, the CFI immediately rejected the request made by Mr. Kadi. The rationale behind such a decision was clearly based on the reasoning conducted by the CFI over the legitimacy of the measures disposed of by the UN Security Council. As a matter of fact, following the reasoning of the CFI, since the Council Regulations adopting the contested UN listing procedure had substantially and almost literally transposed the UN measures, as previously agreed by the Security Council, reviewing the validity of such EU measures necessarily meant to conduct also a substantive review of the validity of the pertinent Council's measures. Accordingly, the CFI subsequently recognized the fact that the present court had not jurisdiction to initiate a review procedure over the legality of the Security Council's measures, as also confirmed by interpreting article 103 of the UN Charter, which enhances the supremacy of Council's decisions over other international law obligations, with the only exception of those derived from the body of international *jus cogens* norms. Consequently, the European CFI concluded that it would have rejected the claimant's demand not only on the basis of the lack of jurisdiction in reviewing the Security Council's measures, but also because, as derived from its interpretation of article 103 of the UN Charter, the Council had broad authority to temporarily suspend the right to fair hearing of an individual suspected to be associated to international terrorist networks, as this present right does not belong to the body of *jus cogens* norms.

In 2008, Mr. Kadi appealed the CFI's decision, bringing the case in front of the ECJ, which ultimately overturned the 2005 conclusions over the primacy of the Security Council's decisions. The ECJ in *Kadi v. Council of the European Union* (2008) ruled that, following the cardinal principles at the foundations of the EU law, individuals listed under the 1267 Sanctions Committee were thus entitled to enjoy judicial protection. The reasoning of the ECJ centered on the notion of the body of EU law as an independent and autonomous legal system, which could not be prejudiced by an international agreement, meaning the UN Charter, despite it still maintained primacy in terms of international law. Finally, the ECJ disposed the annulment of the EC listing of Mr. Kadi on the grounds of violation of the right to effective judicial review and fair hearing, as well as the breach of his property rights.

The 2008 ECJ's decision on *Kadi I* was of seminal importance for an array of different reasons, among which the most relevant was the identification of a fallacy within the judicial protection foreseen by the UN system in the sanctioning procedures targeting individuals. As a matter of fact, the ECJ's conclusive decision on *Kadi* demonstrated the concreteness of one of the most relevant doubts moved by international academics on the practice of UN targeted sanctions on individuals. Therefore, the *Kadi* case showed that the UN system on individual sanctions had *de facto* failed to completely guarantee individual procedural rights to the persons that were enlisted in the Consolidated List. Prior to the ECJ's judgment on the *Kadi* case, indeed, the only possible procedure to request the delisting of the name of an individual or legal entity from the Consolidated List was by referring to the Focal Point, as established in Resolution 1730. Nevertheless, as this system did not grant the possibility to individuals to be heard directly by the Security Council, the Focal Point, as structured and framed, was far from guaranteeing full and effective protection of individual procedural rights. Consequently, many international scholars have maintained the idea that the intervention of the ECJ has contributed to shedding light on the criticalities of the UN system of individual sanctions. Viewed from this perspective, the recognition by the UN itself to reform the system of individual sanctions, which subsequently resulted into the establishment of the Office of the Ombudsperson, as the body in charge of reviewing and assessing the validity of the individual delisting request, must be understood as a derivation of the influential power exercised by the ECJ through its final judgment in *Kadi*.

As for what directly concerns Mr. Kadi, by June 2008 the UN engaged in starting to reform the 1267 Sanctions Committee against Al Qaeda and the Taliban. Accordingly, as established through the adoption of Resolution 1822, the Sanctions Committee had to communicate a summary of reasons for the decision of listing an individual, as well as to engage in periodic review of the names contained in the Consolidated List. Consequently, the 1267 Sanctions Committee provided such a summary to the French government, which subsequently communicated it to the EU Commission. Ultimately, the Commission informed on the same day Mr. Kadi that it would have not proceeded to delisting its name, but rather was to reconfirm his presence in the Council Regulation 1190/2008. This led Mr. Kadi to challenge again the validity of his listing which then resulted into the annulment of the relevant Regulation in 2010 and the subsequent ECJ's *Kadi II* judgment of 2013.

At the origin of *Kadi II*, both the EU Commission and the Council, together with the United Kingdom, challenged the previous decision by the ECJ. Accordingly, the two EU institutions, plus the UK, argued that the ECJ had resulted in erring in law since the level of the intensity of judicial review it had applied in *Kadi I* was too disproportionate and excessive due to an already erred examination on Mr. Kadi's arguments over the violation of his procedural rights. Nevertheless, the

ECJ immediately rejected the appeal arguing, in essence, that it was its duty to guarantee the review of EU measures, also when implementing UN Security Council Resolutions, in the light of the protection of fundamental human rights as a paramount feature of the EU constitutional identity. Ultimately, international law scholars agree in maintaining that the intervention of the ECJ has certainly contributed as a catalyst to better understand the criticalities of the UN system of individual sanctions. Viewed from this perspective, the process of judicial intervention started by the ECJ with the seminal case on *Kadi* induced the Security Council, as a driving political force, to rethink the primary features at the basis of the sanctioning system under the UN framework. For instance, it is clear that the ECJ decision on *Kadi* has contributed to further democratize the UN system, affirming the urgency for the Security Council's measures to be necessarily consistent with the human rights principles contained in both the international customary and treaty law, including the UN Charter. With the establishment of the Office of the Ombudsperson and its subsequent reforms, the UN had for the very first time introduced a reviewing mechanism for individual sanctions which ultimately increased the degree of protection of individual procedural rights by the 1267 Sanctions Committee.

In conclusion, this work has been conducted with the general purpose of exploring the main features at the basis of the international sanctions regime in the view of retracing its evolutive process in the course of the last two decades and the main effects brought by its transformative pattern. Indeed, the present work has proposed as an overall study on the progressive evolution of the UN practice on sanctions, investigating both on the procedural and substantive transformations such measures went on, as well as discussing on the main criticalities the two sanctions' models have originated throughout their application.

As may be deduced from the chapters composing this present work, the word "sanctions" still suffers the absence of an internationally recognized ultimate conceptualization of the terminology. Indeed, whenever referring to the word "sanctions" in general terms as an international instrument of coercive diplomacy, applicable both unilaterally and multilaterally within the international community, one of the first features international academics may take into consideration is the legal *lacuna* derived from the definitional question on international sanctions. Furthermore, despite the ILC has provided a legal distinction between sanctions, countermeasures and retorsions, which tends to be generally accepted, at least in theory, by international law scholars as it provides valuable criteria for determining the legal validity of international measures adopted within the collective security system, this ends up not to be totally applied by States when committing in the practical application of similar non-forcible measures.

Nonetheless, despite they differ in the structural design, as well as in the legal consequences as to the legality of the measures undertaken, sanctions, countermeasures and retorsions are

commonly resorted within the international community with the general objective of inducing the targeted State to permanently change its wrongdoing behavior, so to conform with the obligations derived from the body of international law norms and principles. It is clear, for instance, that the main scope of those measures is that of coercing the targeted State as they commonly possess a punitive character in their nature. However, it must be recalled, as pointed out during the course of the present work, that this "punitive feature" has begun less evident, at least within the UN framework, after the sanctions regime has underwent the processive evolution that resulted into the shift from comprehensive to targeted measures. Indeed, differently from comprehensive sanctions, which were basically framed as punitive measures since their purpose was that of substantially halting the diplomatic, financial and economic relations of the sanctioned State with other countries in the international community, UN targeted sanctions are in their nature correcting policy measures which, in response of the changing attitude and the subsequent actions undertaken by the targeted State, may be easily manipulated as to increase or decrease, when necessary, the degree of trade restrictions and further measures. This, however, as pointed out throughout the discussion over the differences concerning the precedent and the modern practices on UN sanctions, does not necessarily mean that targeted measures disposed of by the Security Council cannot be framed as punitive policy measures, since, in some circumstances, the effectiveness of such measures is ultimately counted on their ability to induce or to coerce the targeted State to permanently change its attitude towards the international community, as well as, in the case of individual sanctions, emerged as a counter-terrorism device, to enable the enlisted individuals and private enterprises to commit terrorist attacks or to financially support international terrorist networks.

The doctrine on international sanctions has acquired over decades seminal importance as global governance institutions, such as the UN Security Council, are resorting to such measures with more frequency in order to respond to the growing emerging untraditional threats to the international peace and security. Despite that, however, it has been demonstrated that targeted measures, in the form of individual sanctions, are still generating an extensive debate among international law scholars as they may negatively impact on the enjoyment of individual procedural rights. As some improvements have been achieved throughout the last decade in relation to the question of fair process, the protection of procedural individual rights due to the implementation of individual sanctions still falls short to be sufficiently guaranteed, especially if we consider that such violations are committed by actors such as the UN Security Council, meaning the guardian of the collective security system. By the same token, however, it must be considered that when applying such individual sanctions the Council confronts with the difficult task of striking a balance between the maintenance of international security and the protection of individual rights. Certainly, improvements

are still recommended in order to lower as much as possible the impacts that sanctions may originate on the enjoyment of individual rights.