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To what extent may country-based sanctions act as an instrument for the promotion of human rights objectives, and under what circumstances may they give rise to human rights compliance obligations?

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“*We refer to this theory as ‘naive’ […]. The collective nature of economic sanctions makes them hit the innocent along with the guilty.*”

Johan Galtung
On the Effects of International Economic Sanctions, 1967

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INTRODUCTION

International sanctions (or restrictive measures, as they are officially known) have long been a feature of international relations, and with them wider concerns about their humanitarian implications. But human rights issues have become the focus of heated debate in the last decades, as the end of the Cold War has seen a proliferation of United Nations-mandated or autonomous sanctions regimes, leading some observers to refer to the 1990s as the "sanctions decade" (Cortright and Lopez 2000).

The more activist approach of the United Nations Security Council (UNSC) towards sanctions was driven by the belief that these measures could enforce international norms and avoid conflict without resorting to the use of force (Pape 1997). International sanctions are tied to the coercive implementation of norms and principles of international law. This is a consequence of the particular structure of the international legal order, in which there is no supranational entity which is entrusted with enforcing State compliance with international law.

The term sanctions "under international law generally refers to coercive measures, taken by one State or in concert by several States, which are intended to convince or compel another State to desist from engaging in acts violating international law" (Joyner 1995, 242). They are meant to pressure the target countries to comply with the sender's demands by causing significant socio-economic and political damage (Galtung 1967; Peksen 2009). The promotion of human rights, as the focus of the present work, is indeed one of the most frequent objectives behind the imposition of sanctions by the United Nations, groups of States and individual countries.

The last decades have indeed seen an unprecedented rise in the use of sanctions as a central foreign policy tool in international relations. Judging from the preceding, an observer would expect that an international consensus has emerged about sanctions as a legitimate means of foreign policy-making (Boogaerts 2018). Yet an analysis of the consequences of these measures in target countries may draw a quite different conclusion. Sanctions, both collective and unilateral, may "entail unintended effects in the form of adverse human rights impacts on non-designated third parties" (Bossuyt 2000, 18), especially on innocent civilians in target countries.

In fact, too often are the humanitarian effects and the well-being of people in a target country ignored by policy-makers and politicians in favour of the question of effectiveness, despite the fact that sanctions tend to fail between 65-95 percent of the time in achieving their intended goals (Hufbauer, Schott and Elliot 1990; Pape 1997; Pape 1998; Bapat and Morgan 2009). As

the criticism of the devastating effect of early comprehensive trade sanctions grew increasingly loud, a movement emerged that aligned well with critical developments in policy-making on sanctions (Cortright and Lopez 2000). More targeted tools, also known as 'smart' sanctions, were created in order to put direct pressure on the political leadership responsible for human rights violations without unduly hurting the population of the target State.

Despite occasional disclaimers, however, the empirical evidence to date indicates that targeted sanctions do not work any better at promoting compliance from the sanctioned country. Moreover, they do not end the humanitarian suffering for civilians or the ethical questions raised by traditional broad sanctions. In the present work, the decisive question we ask is precisely whether international sanctions can ever be a humane instrument for achieving foreign policy objectives, and if so, under what conditions. We do not address, if not in passing, the issue of whether they represent an effective policy tool.

It is worth emphasising that it is challenging to attempt to measure the human rights implications of sanctions from a methodological point of view, because there is no commonly agreed definition for humanitarian impact. Moreover, it will also be difficult to isolate the effect of these coercive measures from the hardship caused by causal other factors, such as war or economic recession. The consequences of the sanctions on Iraq, for example, cannot be disaggregated in a quantifiable manner from the destruction caused by the long war with Iran or the Gulf War air campaign. Therefore, it is essential to appreciate the "causal complexity" (Boogaerts 2018, 240) behind the workings of sanctions.

In the first chapter, we investigate the popularity of international sanctions as a key foreign policy instrument and the emergence of the 'smart' sanctions movement designed to address the shortcomings identified with regard to traditional comprehensive sanctions. Afterwards, focusing on alternative views in the literature of why and how sanctions might improve or worsen the record of rights protection in target countries, we try to shed light on the contradiction of perpetuating human suffering in the name of attempting to foster human rights. No matter how hard one tries, the dilemma is unavoidable. "Are they a legitimate policy if they inflict suffering on citizens who are least responsible for the abhorrent policies that have led to sanctions?" (Lopez and Cortright 1997, 2).

As the first chapter demonstrates, a striking feature of the sanctions programmes imposed by the United Nations has been the nearly complete failure to consider human rights standards in implementing them. These issues, however, have led some observers to question the extent to

which countries and international organisations applying sanctions mandated by Security Council resolutions are bound to comply with certain international legal obligations. The question of the Security Council's duty to comply with international humanitarian and/or human rights law when imposing sanctions forms the central issue of the second chapter. We conclude that the main implication of international law is that the right to impose sanctions is not unlimited. Against this background, we analyse the necessary standards applicable under public international law to evaluate the lawfulness and legitimacy of international sanctions.

Within the international community, the authority to mandate sanctions is the exclusive purview of the UN Security Council, which can apply them in situations involving threats to international peace and security, such as the proliferation of weapons of mass destruction and human rights violations (Bossuyt 2000; Giumelli and Ivan 2013). But regional organisations such as the European Union (EU) and individual States, and especially the United States, have also taken on the new role of sanctions enforcers in recent years. Following the example of the second chapter, the aim of the third chapter is to evaluate the legality and legitimacy of the autonomous, or unilateral, sanctions under international human rights and humanitarian law. We contend that unilateral sanctions are impermissible under international law, unless they meet stringent criteria. This chapter will also discuss certain specific concerns arising from the growing use of 'extraterritorial' sanctions in international relations, that is, measures intended to target natural and legal persons outside the jurisdiction of the side imposing the sanctions. This is a worrying development for international law given the detrimental impact that extraterritoriality may have on the enjoyment of the human rights of the sanctioned and third-party countries.

The fourth chapter applies the preceding analysis to practice. In fact, in the wake of the American withdrawal from the Iran nuclear deal in 2018, the US administration has applied an unprecedented set of unilateral sanctions as part of a 'maximum pressure' policy, targeting all the key sectors of the Iranian economy. This policy raises important issues related to legality under international law and adverse human rights consequences for ordinary people, and is therefore worth studying more closely.

Ultimately, the last section will summarise our main conclusions and point out the implications of the present research.

CHAPTER I: SANCTIONS AS A FOREIGN POLICY TOOL – A REALISTIC ASSESSMENT

In 1919, speaking to advocate the passage of the covenant for the League of Nations, US President Woodrow Wilson, one of the great supporters of economic sanctions, said:

> *A nation that is boycotted is a nation that is in sight of surrender. Apply this economic, peaceful, silent, deadly remedy and there will be no need for force. It is a terrible remedy. It does not cost a life outside the nation boycotted, but it brings a pressure upon the nation which, in my judgment, no modern nation could resist.*[1]

Part of Wilson's speech – that sanctions are, in his own words, silent, deadly and terrible – still holds true today. Another part, however – that these tools are "peaceful" – certainly cannot be said to apply to the targets of the sanctions. That optimistic declaration concerns our present inquiry.

Since 1966, the UN Security Council has established thirty mandatory sanctions regimes, in Southern Rhodesia, South Africa, the former Yugoslavia (twice), Haiti, Iraq (twice), Angola, Rwanda, Sierra Leone, Somalia and Eritrea, Eritrea and Ethiopia, Liberia (three times), Democratic Republic of the Congo, Côte d'Ivoire, Sudan, Lebanon, North Korea, Iran, Libya (twice), Guinea-Bissau, Central African Republic, Yemen, South Sudan and Mali, as well as against ISIL (Da'esh) and Al-Qaida and the Taliban. Precisely because these measures have now become a favourite tool of statecraft in the 21st century, an examination of what sanctions are, why they are deployed and what they can achieve is timely and necessary.

With these concerns in mind, the chapter proceeds as follows. The first section focuses on the international community's radical increase in the recourse to sanctions in the 1990s, beginning with the broad economic embargo against Iraq. The second section examines the improvements in sanctions' strategy to address the ethical question of the civilian suffering inflicted with the imposition of comprehensive trade and financial restrictions. More targeted tools called "smart" sanctions were created to make possible improved sanctions design and implementation against those responsible for human rights violations. The final section assesses how smart sanctions (are supposed to) work and some of the cases where they were applied, devoting particular

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[1] Quoted in Hufbauer C., Schott J., Elliott K. (1990), *Economic Sanctions Reconsidered*, Washington, DC, Peterson Institute for International Economics, 2nd edition, p. 1.

attention to the unintended consequences and controversies with regard to the use of targeted measures to protect human rights.

I. The "Sanctions Decade"

Prior to the 1990s, institutionally endorsed sanctions were rare. In the forty-five years since the founding of the United Nations (UN), the Security Council resorted to them only twice, each time with regard to a form of structural racial discrimination – against the white minority regime in Rhodesia in 1966 and an arms embargo against South Africa in 1977 (Reisman and Stevick 1998; Cortright and Lopez 2000).

Freed from the Cold War constraints after the dissolution of the Soviet Union, the UN began to intervene more actively in international affairs, including through the imposition of mandatory country-based sanctions (Hufbauer, Schott and Elliot 1990). In August 1990, the Security Council responded to Iraq's occupation of Kuwait by introducing Resolution 661 (1990), which set a total ban on all imports and exports except for "supplies intended strictly for medical purposes and, in humanitarian circumstances, foodstuffs" (UNSC 1990, 19). The Security Council also imposed a marine and air blockade with Resolution 665 (1990) and 670 (1990).

This opened an extraordinary period of "sanctions activism" (Cortright and Lopez 2000) in the Security Council, which contrasted strongly with the previous years and resulted in the application of new broad sanctions on the former Yugoslavia (1992 and 1998), Libya (1992), Haiti (1993) and other countries (Weiss 1999; Cortright and Lopez 2000). The underlying logic of comprehensive sanctions – the two main categories being the suspension of trade and financial restrictions – was to inflict pain on the entire opposing economy in order to force policy change. The greater the economic pain, the higher the probability of compliance (Lopez and Cortright 1997; Weiss 1999).

Given the rogue regimes targeted at the time, there was little concern for the humanitarian impact of sanctions. Recourse to unilateral (non-UN mandated) sanctions also increased at that time, but the change was not as pronounced as other users of sanctions, and especially the US, had already been active during the Cold War (Henderson 1986; Elliot 2009). These factors led some observers to define the 1990s as the "sanctions decade" (Cortright and Lopez 2000), while one commentator worried the pattern had become a "sanctions epidemic" (Helms 1999).

The end of the Cold War allowed the once opposing camps to work together as a means of combating threats to peace and enforce international norms through measures not involving the use of force (Biersteker 2009). As Robert Pape once stated, "economic sanctions have come to be viewed as the liberal alternative to war" (Pape 1997, 90). Moreover, as governments are rarely willing to pay the costs of intervention when they perceive no vital interests, as the UN's performance in Yugoslavia's wars demonstrate, sanctions gave politicians the possibility to 'do something' while refraining from serious engagement (Weiss 1999).

The evidence that sanctions could be an effective foreign policy instrument was a research by Hufbauer, Schott and Elliot – a study of sanctions episodes covering the period 1914 to 1990, which found sanctions to be at least partially successful in 34 percent of the cases overall (Hufbauer, Schott and Elliot 1990). Others (Baldwin 1985) argued that international sanctions should be considered effective provided that they created costs that played a role in the decision-making by the target nation. The relatively high success rate meant that sanctions came to be viewed as the best alternative to escalating to military force, and the HSE study played an important role in American and international foreign policy debates (Pape 1997).

A new trend, however, was evident not only with regard to the frequency with which sanctions were applied, but also by the diverse range of purposes for which they were employed: deter from territorial aggression, restore a democratic government, denounce human rights abuse, support for better governance of natural resources, control nuclear proliferation and punish terrorists and international war criminals (Weiss 1999; Elliot 2009).

In fact, with UN Secretary-General Boutros-Ghali's *Agenda for Peace* (1992), which responded to a Security Council's request to outline a way to improve the modern understanding of peace, the notion of security was going through a process of redefinition at the international political level to include socio-economic, environmental and especially humanitarian threats (UNGA 1992). Targeting individuals and non-State entities also led sanctions to be used in a wide range of crises (Giumelli 2015).

Despite the modest successes, these cases were considered failures by most policy analysts (Center for Economic and Social Rights 1996; Normand 1996; Pape 1997). The sanctions imposed against Iraq, initially welcomed as a nonviolent alternative to war, were something that was never seen before. The allowances in the sanctions regime for 'humanitarian' imports (the so-called "oil-for-food programme") were rendered almost illusory by the fact that oil revenues, which accounted for over 90 percent of the resources necessary to buy food and

humanitarian supplies, were cut because of the ban on the purchase of Iraqi oil (Normand 1996). Measured in terms of their cumulative impact, this sanctions regime was, by far, the most comprehensive and tightly enforced in history (Hufbauer, Schott and Elliott 1990; Weiss 1999).

While the consequences of sanctions in Iraq cannot be separated from the destruction caused by the Gulf War and the effects of the eight-year war with Iran, they indeed had a devastating effect on the Iraqi economy and the livelihood of the population, resulting in the destruction of civil infrastructure and increased social hardship. By 1993, living standards had already fallen by one-third (Reisman and Stevick 1998). Various studies by the United Nations, NGOs and independent groups and activists documented widespread malnutrition and disease, especially among children. In March 1991, an envoy of the UN Secretary General described the situation on the ground as "near-apocalyptic" (UN 1991).

As the collateral damage was severe and enduring, the public awareness of the humanitarian shortcomings prompted a backlash (Gordon 2013). A review of multilateral sanctions against the former Yugoslavia, Iraq and Haiti raised the concern that sanctions alone did not bring desired changes. As the decade progressed, instead, "the increased visibility of suffering among Iraqi children, and the deterioration of the social situation and health-care systems in Haiti, created a palpable sense of fatigue" (Cortright and Lopez 2000, 12) among members of the Security Council.

The blame for the disaster in Iraq was placed heavily on the US and the United Nations, both within the country and all over the world. Humanitarian groups ranging from the International Committee of the Red Cross to Amnesty International started to voice their concerns about the ethics of comprehensive sanctions, even when qualified by 'humanitarian exemptions' (Weiss 1999). The Secretary-General of the United Nations himself acknowledged the dilemma. In *Supplement to An Agenda for Peace*, published in 1995, Secretary-General Boutros-Ghali labelled economic sanctions as a "blunt instrument", openly questioning the ethics of international sanctions:

> *They raise the ethical question of whether suffering inflicted on vulnerable groups in the target country is a legitimate means of exerting pressure on political leaders whose behaviour is unlikely to be affected by the plight of their subjects.*[2]

[2] United Nations General Assembly, *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the occasion of the 50th anniversary of the United Nations*, A/50/60 (25 January 1995), p. 16.

Critics began to argue that sanctions were a counterproductive foreign policy instrument that indiscriminately inflicted a broad array of harms upon the weakest elements of society. Questions about the brunt of sanctions on innocent bystanders and their failure to achieve immediate results also encouraged a new wave of research work into sanctions to shift in new directions (Drezner 2011).

There soon was widespread acknowledgement by scholars that the consequences of sanctions plausibly outweighed whatever political gain may have been accomplished (Weiss 1999). Pape (1997, 1998) tested again the HSE database and held that sanctions worked as a policy tool only 5 percent of the time – far lower than the 34 percent claimed by Hufbauer, Schott and Elliott. By the mid-1990s, more attention was paid, on several fronts, to the situation inside sanctioned countries, and different proposals were introduced to implement measures that would shield the population and neighbouring countries from suffering.

II. The Quest for 'Smart' Sanctions

Secretary-General Boutros-Ghali was careful not to refuse outright the use of sanctions, but made a strong call for reforms to further minimise humanitarian suffering and provide special assistance for civilian populations. Driven by the outrage against the negative consequences caused by sanctions, the Security Council started a decade-long reform process, which "included a series of research studies, diplomatic seminars, expert processes and conferences, and some trial and error in designing new sanctions instruments, methods for their implementation, and means for systematic monitoring of sanctions impact" (Lopez 2013, 774).

As the criticism of the deleterious effect of broad trade sanctions grew increasingly loud, a movement emerged among scholars to design sanctions in a way that would put direct pressure on the leadership responsible for wrongdoing without unduly hurting the populace of the target nation (Gordon 2013).

Towards the end of the 1990s, the countries of Switzerland, Germany and Sweden convened a number of conferences and working group meetings with the goal of improving the implementation and maximising the effectiveness of Security Council sanctions (Drezner 2011; Gordon 2011; Lopez 2013). The first of these initiatives, a series of discussions aimed to improve the practice of financial sanctions, known as the Swiss "Interlaken Process" (1998–1999), examined the extent to which the structures utilised in fighting money laundering could

achieve the goal of cutting off the financial support needed to support abusive regimes. During the meetings, a sanctions manual for practitioners and a white paper by the Brown University's Watson Institute for International Studies were also produced (Drezner 2011).

The German government, in partnership with the UN and the Bonn International Center for Conversion, followed up with a series of expert seminars and working groups that focused on the implementation of arms embargoes and sanctions related to travel. The "Bonn-Berlin Process" (1999-2000) developed recommendations and model resolutions concerning these two instruments, with the latter considered to be especially relevant for the protection of human rights (Lopez 2013).

This was followed by the Stockholm Process, an initiative of the Swedish Ministry for Foreign Affairs and Uppsala University focused on strengthening the monitoring and enforcement of the sanctions machinery at the United Nations, and whose findings were presented to the Security Council in early 2003. The Swedish meetings built on the work that the Swiss and German governments had conducted, and helped promote an international understanding of the requirements for implementing sanctions that are effective and humane at the same time (Lopez 2013).

Numerous academics, NGOs and consultants participated in the whole three-pronged process, as well as in other workshops and studies to develop more tailored instruments, which received a significant buy-in from government representatives and UN officials. Indeed, although the Security Council was not formally involved, this research trend aligned well with critical developments in policy-making on sanctions (Cortright and Lopez 2000). In 2006, a working group of the Security Council prepared a report with recommendations regarding the use of sanctions, which included the use of experts, methods for a better design and implementation of sanctions programmes and the evaluation of the sanctions' effectiveness and possible humanitarian impacts (Gordon 2013).

Targeted sanctions were introduced for the first time in 1992 to isolate and exert pressure on Libya's leadership to surrender individuals suspected of being involved in the Pan Am flight bombings of 1988[3] (Reisman and Stevick 1998; Biersteker 2009). The Security Council soon began to distinguish between the measures and the specific actors of the conflicts (Weschler 2009). Sanctions implemented against Haiti from June 1993, following the overthrow of the

[3] S/RES/748 (1992).

legitimate government of President Jean-Bertrand Aristide, illustrate the point that is being made.

Following Washington's example, the Security Council applied sanctions on members of the Haitian military regime under the command of Raoul Cedras[4]. However, when the Security Council first responded to Haiti's crisis in June 1993, it imposed a trade embargo that included a freeze on arms (and related material) and oil shipments, financial sanctions and a ban on all traffic from entering the territory of the island.

But the growing criticism of the deleterious consequences on the Haitian population led the Security Council to develop new tools that targeted specific individuals so as to raise the pressure on the *de facto* government while reducing the harm to the poor and vulnerable (Gibbons and Garfield 1999; Biersteker 2009). In order to do so, the Council asked the newly established sanctions committee to draw a list of the names of the Haitian leadership and military for targeting purposes. In the case of Angola of September 1993[5], the Security Council similarly reacted to the deteriorating political, military and humanitarian situation in the country by establishing an arms embargo only against a non-State actor for the first time – the UNITA rebel group (Weschler 2009).

Within the United Nations machinery, already through Resolution 1997/35 in August 1997, the Sub-Commission on the Promotion and Protection of Human Rights expressed concerns about the shortcomings of economic sanctions. A working paper drawn up for the same Sub-Commission defined the UN comprehensive economic embargo against Iraq as "unequivocally illegal under existing international humanitarian law and human rights law" (Bossuyt 2000, 18). A series of subsidiary committees of the Security Council were soon created to monitor the implementation of the different sanctions programmes and assess their effects. In addition, the Security Council also began appointing panels of experts to support the work of the sanctions committees, including through providing information relevant to the potential designation of individuals, gathering information regarding the implementation of international sanctions and investigating possible violations.

Finally, the Security Council has also tried to guarantee minimal standards of due process and judicial review, for instance through the creation of a 'Focal Point for Delisting'[6] and the Office

[4] S/RES/841(1993).
[5] S/RES/864 (1993).
[6] S/RES/1904 (2009).

of the Ombudsperson[7], the latter for names inscribed on the ISIL (Da'esh) and Al-Qaida list. These two bodies are empowered to collect information and to interact with the petitioner and relevant countries with regard to delisting requests (Elliot 2009; Weschler 2009).[8] Therefore, one would not be wrong in saying that considerable effort has gone into trying to design targeted instruments that would be more effective in affecting the decision-making of those responsible for the situation that the sanctions sought to address, while attempting to avoid the collateral damage that comprehensive sanctions often created.

"The resulting period of sanctions development saw a shift from the use of comprehensive and general trade sanctions toward more targeted and specialised economic instruments that significantly advanced the sophistication of global sanctions" (Lopez 2013, 774). The cumulative result of these policy-making processes, research studies and diplomatic efforts was indeed the institutionalisation of so-called targeted or "smart" sanctions – a variety of economic and other restrictive measures that are intended to inflict damage only upon the specific entities that are responsible for, and/or benefit from, policies or actions deemed unacceptable. Smart sanctions can be used not only in wars between States but also in intra-State conflicts. Rather than punishing an entire economy through trade sanctions, these instruments aim to coerce identifiable perpetrators and their principal supporters (Moret 2014).

Deliberately crafted to be different from comprehensive sanctions, the logic of targeted sanctions is that the behaviour of an individual or a group will change because of the pressure imposed on the main actors in the decision-making process. For this to work, lists of potential targets are generally drawn up. Smart sanctions are said to be able to "isolate the arena of economic coercion to a specific micro-level economic activity that can be identified as contributing to increased human rights violations" (Lopez 2013, 776) in order to punish the actors directly responsible for these immoral policies and the elites who support them.

In this way, they represent a promising tool to eliminate the suffering of the mass public associated with comprehensive sanctions (Hufbauer, Schott and Elliot 1990; Weiss 1999).

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[7] S/RES/1730 (2006).

[8] Indeed, the imposition of targeted sanctions that have accompanied measures to fight terrorism since the events of September 11, 2001, has raised important concerns about human rights conformity. The legal challenges and human rights issues here are significant – in particular with regard to the compatibility with procedural rights, but virtually all of them have stemmed from the way in which individuals were designated within broader counterterrorism efforts, not from targeted measures imposed to signal opposition to human rights violations. For this reason, while these concerns should not be underestimated, we will refer to them only in passing, as they do not represent the main topic of this research.

Carefully calibrated sanctions, the argument runs, can also mitigate the damage inflicted on third-party countries, thereby removing incentives to circumvent them (Bossuyt 2000).

Sanctions can be targeted in several ways at the subnational or transnational level – against an individual, a corporate entity (such as a company) and a criminal syndicate, against a specific commodity and sector of an economy (ban on the import of arms or the trade in high-value products) and/or against a particular region in a country (ban on imports of goods originating from occupied lands) (Biersteker 2009). More precisely, the list of measures below includes the most common types of sanctions available to constrain or end conflict and large-scale breaches of human rights[9]:

- freezing any funds or financial resources that (a) the leadership of a government, (b) regime members in their individual capacity or (c) those designated as key supporters or enablers of the regime, hold outside the country;
- suspending the flow of credit, development aid and grants available to the national government and agencies and those economic actors in the nation who deal with transactions involving international financial institutions;
- restricting the provision of any financial service, including international transfer payments and access to financial markets abroad to the target government's national bank and other governmental entities, as well as to designated private credit institutions, investors and individual designees;
- restricting the trade of specific commodities (export ban) that provide power resources and revenue to the norm-violating actors, most especially highly-traded raw materials and mineral resources such as petroleum;
- banning trade of weapons[10], ammunition, military replacement parts and vehicles, dual-use goods that can be used with military aims, including communications technologies, and termination of military technical assistance;
- restrictions from traveling across international borders (denial of visa) for individuals designated and/or against a State's land, maritime and aviation transportation systems;
- diplomatic sanctions, such as the interruption of diplomatic relations with the offending country and prohibition to participate in international bodies;

[9] The following list is largely taken from Lopez G. (2013), "Enforcing Human Rights through Economic Sanctions", in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law*, Oxford, Oxford University Press, p. 776-777.

[10] Within the UN system, there is no singular technical definition for what is included under the terms "arms" or "weapons".

- denying shipments of particular commodities (import ban) labelled as 'luxury goods' generally only consumed by the ruling elite.

In contrast to comprehensive sanctions, selective sanctions are expected to be less harmful to sanctioned countries. "Rather than a single tool, sanctions can now more properly be seen as a whole drawer in the Security Council toolbox, in which a wide range of tools are available for use in a variety of situations against a variety of targets" (Boulden and Charron 2009, 3). This is very different from the Cold War and the early post-Cold War era, when, as we noted, the Security Council resorted mainly to the complete or nearly complete cut of economic ties with regard to an entire country.

By influencing the material incentives of political leaders and their powerful base, it is argued, smart sanctions can have a direct impact on the offending regime's costs of non-compliance, while minimising the collateral human rights effects that result from traditional trade embargoes (Drezner 2003). Targeted sanctions can be applied in a gradual manner, integrated with positive incentives, and lifted more easily as the relevant foreign policy goals are achieved. For this reason, smart sanctions advocates view them as both more effective and humane than broad sanctions (Lopez and Cortright 1997; Shagabutdinova and Berejikian 2007; Lopez 2012). There have indeed been several cases of success, and significant improvements in the implementation of sanctions programmes.

However, this view of sanctions is problematic. Despite what has already been said, the empirical evidence to date indicates that targeted sanctions do not work any better at promoting compliance from the sanctioned country. More discouragingly, smart sanctions did not end the humanitarian suffering for civilian populations or the ethical questions raised by traditional trade sanctions – in any case not in the way expected:

> *It may even be that the rhetoric of targeted sanctions has caused, so to speak, a certain collateral damage: it seems that the trend toward designing – or at least labelling – economic measures as 'targeted' has done much to silence the discussion of the humanitarian impact.*
>
> *It seems that the common view is that since sanctions are now "smart," we no longer have to worry about harming the innocent. But that is clearly not the case. Sanctions*

targeting a nation's financial system, or critical industries or exports, disrupt the economy as a whole, much like traditional trade sanctions.[11]

Since the protection of human rights is often a clear goal behind the imposition of sanctions, especially for those applied by the West, the question then arises as to whether this form of coercion increases or decreases respect for human rights in the sanctioned countries. It is crucial to determine whether the practice of targeted sanctions can improve the human rights situation in the target State or if they possibly exacerbate an already difficult situation.

III. An "Outright Human Rights Paradox"[12]?

As we saw, concerns about humanitarian consequences eventually came to be a part of the sanctions debate, but the discussion has become more heated as the number and the differentiation of sanctions regimes has increased. Empirical evidence from the 'Targeted Sanctions Consortium' (TSC) (Biersteker et al. 2018), which gathered data on all twenty-three targeted sanctions regimes between 1991 and 2013, shows nine types of situation in which smart sanctions have been imposed. The most frequently pursued efforts are stopping armed conflict and peace enforcement, any one of which occurs about 49 percent of the time (Biersteker et al. 2018). This is unsurprising given the nature of sanctions as an instrument of the Security Council created to address threats to the peace, breaches of the peace or acts of aggression, within the framework of Chapter VII of the UN Charter.

The promotion of human rights, however, is the next most frequent objective according to the TSC, applying to 35 percent of the cases, and constitutes an ever-growing concern for the UN. Long before the end of the Cold War, indeed, the United Nations had sought to uphold the protection of human rights within countries. As we have said, both episodes of UN sanctions during the Cold War had a dimension of structural racial discrimination. Moreover, in the second half of the 20th century, "new rationales for sanctions have been provided by the development of new international norms […] which go beyond respect for territorial integrity and political independence to encompass self-determination in colonial situations, racial equality, and a broad spectrum of human rights" (Doxey 1996, 48).

[11] Gordon J. (2011), "Smart Sanctions Revisited", *Ethics and International Affairs*, 25(3), p. 332.

[12] Fausey J. (1994), "Does the United Nations' Use of Collective Sanctions to Protect Human Rights Violate its Own Human Rights Standards?", *Connecticut Journal of International Law*, 10, pp. 193-218.

In the fifteen years that followed the first Iraq-related resolution, most of UN sanctions cases – Libya, Haiti, former Yugoslavia, Somalia, Ethiopia and Eritrea (that mainly involved the leadership of the country), and Angola, Rwanda, Ivory Coast, Sudan, Sierra Leone, DR Congo, Afghanistan and Liberia (that targeted multiple non-State actors as well) – had at least incorporated some form of human rights concerns in the resolutions that mandated them (Lopez 2013).

To show how measures to protect human rights aim to bring about the political change they intend to create, and the unintended consequences that arise from their use, we turn to the examination of how sanctions influence the relationship between the ruler and the ruled in sanctioned States.

III.I Targeted Sanctions in Theory: The 'Deprivation Logic'

According to smart sanctions advocates, the use of targeted measures can weaken target regimes by denying their leadership the necessary economic, military and other resources that are crucial for elites to maintain stability and rally broad political support, while at the same time minimising hardships for the most vulnerable. Instead of punishing the general populace, smart sanctions exert pressure primarily on the government and military leaders responsible for wrongdoing (Lopez and Cortright 1997; Weiss 1999). Once repressive regimes are denied the access to external tools of repression, sanctions should limit their coercive capacity and therefore reduce the incumbent's capacity to suppress dissent through violence.

Furthermore, because scarce economic resources are a critical tool to reward the loyalty of the regime's supporters such as those in the civil service, police or military, the lack of access to these resources could cause a loss of support and defections among influential groups, further diminishing the grip on power of the regime (Kaempfer, Lowenberg and Mertens 2004; Marinov 2005; Peksen 2009). Personalist regimes, which are more dependent on resource rents to maintain their patronage system, are particularly likely to be affected by sanctions (Escribà-Folch and Wright 2008).

If, however, the direct economic impact of sanctions does not raise the cost of repression and/or loyalty, efforts to evade sanctions may. Members of the regime are often able to redirect the economic pressure onto vulnerable sectors of the population while protecting themselves and their collaborators (Cortright and Lopez 2000; Allen 2008).

The uneven redistribution of economic costs in response to sanctions could create tension among the public not benefiting from them, increasing feelings of frustration and the incentives for pro-reform movements to challenge the regime (Wood 2008). As the economic hardship of sanctions affects them more and more, citizens will pressure their leaders to alter their behaviour. This happened, for example, in South Africa, the nation's white minority government worked to shield supporters from the pain of sanctions, which in turn worsened racial conflicts (Allen 2008).

Sanctions may also signal support from the international community, thereby raising the opposition's perceived likelihood of success and enhancing their legitimacy. The African National Congress in South Africa, but also Solidarity in Poland and others, all benefited from the imposition of sanctions in this way (Allen 2008; Wood 2008). To put it simply, sanctions are thought to improve respect for human rights by undermining target governments' coercive power and support from elites, as well as public support. As a result, emboldened opposition groups will gain more leverage to remove the incumbent and promote more protection for human rights and freedom (De Vries, Portela and Guijarro-Usobiaga 2014).

III.II Targeted Sanctions in Practice

Yet, there are limits to how much sanctions can be fine-tuned. An empirical examination of the impact of sanctions may lead to a quite different conclusion: that even smart sanctions have often inadvertently worsened the political, social, and physical conditions in the target nation. While, as discussed, the prevailing assumptions on sanctions explain how sanctions could reduce the power of a recalcitrant regime, they cannot directly speak to the level of repression that will be applied.

What is meant is that "it is problematic to infer declining levels of repression from increasing costs or declining incumbent power because weak or destabilised autocrats are arguably the most likely to respond to threats with violence" (Wood 2008). Contrary to the expectation that they can improve humanitarian conditions, targeted measures that threaten the stability of the ruling elite lead them to enhance their level of repression in order to stabilise the regime, shield core collaborators and minimise the threat posed by popular dissent.

The empirical evidence suggests that domestic response to sanctions varies by the type of sanctioned regime. Where the political space is more open, the domestic opposition can to a

certain degree impose costs on leaders who do not concede to sanctions. A system of government in which leaders are held accountable in regular elections is unlikely to respond to anti-government behaviour with repressive measures (Allen 2008). However, as one would expect, most of the targets of UN sanctions are authoritarian regimes (Marinov 2005)[13]. When regimes are threatened from the outside (as is the case with sanctions), they often employ every instrument at their disposal to limit internal threats. As States play to their strengths, the governments that are most likely to employ repressive measures are those already doing so at some level (Allen 2008).

In countries where societal control is exploited to the fullest, for instance under military regimes (Escribà-Folch and Wright 2008), the political costs of suppression for the government may be lower than conceding to the demands of either the people or the sanctions sender. In fact, "the anticipated audience costs caused by conceding to external economic pressure – especially to the pressures demanding more domestic reforms – create an incentive for the regime to be less conciliatory […] and gives another excuse to employ repression against pro-reform groups to show the regime's determination against any external pressure" (Peksen and Drury 2010, 246).

The theory constructed before suggests that sanctions also contribute to weakening the rights-abusive regime by limiting its capacity to provide resources to supporters. Failing to guarantee benefits can decrease the collaborators' utility from supporting the ruler and the loyalty of the winning coalition. This threatens the stability of the regime and encourages incumbents to maximise the level of coercion to prevent defections from within the coalition (Escribà-Folch and Wright 2008; Wood 2008).

In the hope of weathering sanctions, however, the targeted elites can opt to redistribute the resources made scarce by sanctions to their base, diverting the cost to the average citizens (Weiss 1999). For elites that have had their flow of resources hindered by targeted sanctions, exploiting their access to public resources can be a useful remedy. As we have said, feelings of frustration and economic grievances, together with the perception of sanctions as a sign of support from foreign allies, are likely to increase the level of political violence in the sanctioned nation. However, the consequences may be that, in turn, the government will resort to repression to quell opposition and maintain the *status quo* (Peksen 2009).

[13] Currently, 85% of the UN sanctions targets are countries rated as 'authoritarian' in the 2019 Democracy Index compiled by The Economist. My calculation.

Additionally, the effect of sanctions on the economic and social infrastructure of a country can cause various humanitarian problems by weakening the target government's ability to deliver welfare goods and services, such as healthcare and education (Drury and Peksen 2012). The same thing can happen when targeting a key sector such as exporting oil comes to affect, at least indirectly, the whole economy of a country (UNGA 2015). Failing to provide public services will consequently contribute to the decline of overall socio-economic conditions in the sanctioned nation. Due to their vulnerable status, women, children and those heavily reliant on the social safety net often suffer significantly from the effects of such situations, as the maintenance of sanctions can prevent the provision of assistance and protection by humanitarian organisations.

In addition, even when a sanctions regime incorporates humanitarian exemptions (for necessities such as medical products and foodstuffs), the economic and social rights of the people of these countries may be endangered by the unwillingness to trade of exporters in danger of risking prosecution for violating sanctions (Happold 2016a). This is especially the case when central bank transactions are targeted.

Finally, as economic integration through international trade is thought to be essential in encouraging government respect for human rights, sanctions coercion inadvertently deteriorates human rights by isolating sanctioned countries (Peksen 2009). Economic integration, it is argued, encourages the advancement of human rights by promoting development and creating economic wealth (Vázquez 2003). Thus, limiting the target's participation to the global economy through sanctions contributes to the strengthening of the rule of the repressive regime.

Drury and Li (2006) show that the US threat to remove China's most favoured nation (MFN) status following the Tiananmen Square killing of pro-democracy protestors was not only ineffective but may have led to lower Chinese accommodation towards political freedoms. They add that a policy of 'constructive engagement' by the Americans might have proved a more productive effort to improve Chinese human rights practices.

At times, targeted sanctions can even have the perverse consequence of strengthening the autocratic regime in power by generating a 'rally-round-the-flag' effect (Galtung 1967; Lopez and Cortright 1997; Weiss 1999; Allen 2008; Wood 2008; Peksen and Drury 2010). The arguments presented above assume that sanctions increase the probability of regime defection and/or popular frustration. While there is such evidence (Marinov 2005), sanctions may equally stoke nationalist sentiments and shore up support for the leadership.

The possibility that sanctions could cause a rally effect was hypothesised as early as 1967 by Galtung. “Pervasive nationalism often makes States and societies willing to endure considerable punishment rather than abandon what are seen as the interests of the nation, making even weak or disorganised States unwilling to bend to the demands of foreigner” (Pape 1997, 93). The sanctioned government, especially if it has a firm grip on the media, can push the people to unite behind it in defiance the external threat posed by the foreign intruders (Reisman and Stevick 1998; Bossuyt 2000). The case of Iraq points from the very beginning to serious problems in the traditional assumptions of international sanctions.

Whether the imposition of sanctions leads to a ‘rally-round-the-flag’ event or emboldens opposition groups to challenge the incumbent will depend upon a variety of domestic factors that are exogenous to the sanctions environment (Kaempfer, Lowenberg and Mertens 2004; Wood 2008). Rallies are more likely when sanctions are applied against rulers who have broad popular support and do not only rely on violence to maintain their positions. In addition, a patriotic response is more common during a period of ideological or ethnic tension, as can be seen from Castro’s Cuba within the Cold War struggle.

As sanctions are depicted as a serious threat to national unity and integrity, political leaders justify their crackdown against dissidents who are critical of the government under the guise of safeguarding domestic cohesion (Wood 2008; Peksen 2009). The application of sanctions enables targeted leaders to blame for economic hardship the sender State, which can be used as a focal point for the elites to unify the country (Allen 2008). A rally effect would in all probability not lead to more repression, and might indeed reduce repression as loyalty to the ruler, and therefore stability, is boosted (Kaempfer, Lowenberg and Mertens 2004). However, as they consolidate the regime’s power, sanctions may inadvertently contribute to a decrease in respect for political rights and civil liberties (Peksen and Drury 2010).

In some cases, sanctions may also enhance the power of elites owing to their monopoly on illegal trade. In fact, sanctions have often unintentionally given rise to black markets. The incumbent may respond to sanctions by securing the supplies of scarce resources and profiting from smuggling and other unethical business practices (Bossuyt 2000; Reinisch 2001). In Haiti, the regime of Raoul Cedras and his associates controlled the black-market of oil and other commodities that flourished after the trade embargo came into effect (Lopez and Cortright 1997).

The empirical evidence demonstrates that human rights sanctions are counterproductive, resulting in a higher probability of human rights violations. According to Eriksson (2016), 44 percent of UN smart sanctions were associated to adverse humanitarian consequences within the target country. Using the TSC dataset, Lucena Carneiro and Apolinário (2016) analyse all the episodes of targeted sanctions against African countries between 1992 and 2008. They find the unwanted impact of smart sanctions not to be statistically different from the shortcomings already identified in the past with regard to comprehensive sanctions.

What is more, it appears that sanctions implemented on the premise of improving human rights are more detrimental to physical integrity rights than sanctions unrelated to them. For instance, in a study on sanctions and integrity rights violations, Peksen (2009) finds that targeted human rights sanctions are 62 percent more likely to cause disappearances than non-human rights sanctions. These findings based on the sanction objectives also hold for other integrity rights abuses (Peksen 2009).

As we have seen, country-based sanctions applied indiscriminately by both individual countries and international organisations increase the likelihood of human rights abuse in target nations, by incentivising the use of repression and providing the elites with more reasons to violate human rights. Inevitably, this varies on account of the duration, severity, and scope of the sanctions.

IV. Concluding Remarks

From the analysis conducted, we can conclude that the negative consequences remain a critical element to take into consideration when thinking about smart sanctions. Although these targeted measures in most cases do not have the same devastating impact as broad sanctions, it would be problematic to assume that they do not have unwanted consequences. “On the contrary, we find that sanctions which aim specifically at improving human rights protection in the target country lead to a deterioration of said rights, even when the endogeneity of the imposition of sanctions is accounted for” (Gutmann et al. 2018).

Put it differently, international sanctions could be a counterproductive foreign policy tool, because of the inadvertent destabilising effects they cause in sanctioned countries. More specifically, sanctions may cause disproportionate pressure on innocent citizens, while the targeted regimes are able to avoid the cost of coercion and stay in power. When the rulers did

change their behaviour, sanctions were part of the mix of foreign policy tools and domestic factors that resulted in an improved human rights situation.

Some experts have even talked about a "human rights paradox" (Fausey 1994), that is, that after the end of the Cold War the promotion of human rights has increasingly become the purpose behind the recourse to sanctions, while precisely the adoption of such sanctions has led the United Nations to disregard more and more these same principles[14]. Rather, there is no systematic evidence that smart sanctions in the two past decades have been better at generating concessions from the target nation. "They do, however, appear to solve several political problems for sender countries. Because they are billed as minimising humanitarian and human rights concerns, they receive only muted criticism from global civil society" (Drezner 2011, 104).

These issues, however, have led some international lawyers to question the extent to which countries and international organisations applying sanctions mandated by Security Council resolutions are bound to comply with domestic and international human rights obligations. The question of the Security Council's legal obligation when imposing sanctions forms the central issue to which we now turn our attention.

[14] A statement from 26th International Conference of the Red Cross & Red Crescent concluded that sanctions could result in a "contradiction". International Red Cross and Red Crescent Movement, *The Humanitarian Consequences of Economic Sanctions*, 1995.

CHAPTER II: UNDERSTANDING THE INTERNATIONAL LAW LIMITS OF COLLECTIVE SANCTIONS

As the previous chapter demonstrates, a striking feature of the sanctions programmes imposed by the United Nations is the Security Council's nearly complete failure to consider international human rights standards in implementing them. It is only because of the persistent complaints of the international community regarding the detrimental impact on innocent civilians in the target country that the legal implications raised by sanctions have become an issue of sustained concern.

However, before delving into the extent to which collective or 'multilateral' sanctions mandated by Security Council's resolutions are bound to comply with international humanitarian and/or human rights law, this chapter discusses the roles and interrelationship of the main sanctions actors, and how they collectively apply and monitor compliance with sanctions. It is necessary to map out the relevant actors in order to understand the origin, scope and existence of any possible obligations in international law when using this coercive instrument.

I. Sanctions Implementation Actors and Roles

When speaking about the collective imposition of sanctions under international law, the starting point is Art. 41 of the Charter of the United Nations, which states that the authority to use sanctions lies exclusively with the Security Council, even though the word "sanction" appears nowhere in the Charter (Pellet 2015). Art. 41 does not discuss the situation under which sanctions may be applied, but it solely provides a non-exhaustive list of the types of measures[15] that the Security Council may call upon the Members of the United Nations to apply, while decision-making authority resides centrally within the Council (Ilieva, Dashtevski and Kokotovic 2018). In fact, Art. 39 allows the Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression and […] decide what measures shall be

[15] Art. 41 of the UN Charter reads: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." As we saw in the previous chapter, the list of measures available to the Security Council is quite extensive.

taken in accordance with Art. 41 and 42, to maintain or restore international peace and security".

Therefore, sanctions may only be imposed against a government or other entity that is capable of representing a threat to international peace or security or that is in actual fact threatening international peace and security. "The 'threat' may not be determined on the basis of ulterior political motives […]. Sanctions may not be imposed to secure any of the other purposes and principles of the United Nations as set out in Article 1 of the Charter" (Bossuyt 2000, 9).

Member States are the primary enforcers of international collective sanctions under Art. 25 of the Charter[16]. Effective sanctions implementation, however, requires the active commitment of a wide range of actors besides States, such as the private sector and civil society. Art. 103 provides that, "in the event of a conflict", the obligations of a Member under the Charter prevail over those entered into under any other international agreement, including international human rights treaties[17]. Regional organisations also have the power, in line with Art. 52 of the Charter, to employ sanctions without the specific permission of the Security Council to "achieve pacific settlement of local disputes", "provided that […] their activities are consistent with the purposes and principles of the United Nations".

The preparation of a resolution that creates a multilateral sanctions programme is normally undertaken by the Council member (often one of the five permanent members) who has the highest level of interest in the issue, referred to as the 'penholder'. As is the case with any Security Council non-procedural decision to be taken, the adoption of a proposal requires the affirmative votes of at least nine Members and no veto by any of the permanent members.

[16] In principle, UN sanctions adopted under Chapter VII of the Charter become immediately enforceable and require no other national law or convention. However, many States have a number of prerequisite constitutional, legal or regulatory requirements to meet when implementing UN-mandated sanctions.

[17] The wording of Art. 103, which reads "obligations under any other international agreement", would appear to imply that only conventional treaty law is covered by that provision. However, commentators do not agree on if Art. 103 also extends to conflicting customary law obligations. According to the International Law Commission (2006), the history accompanying the drafting of the Charter, where a formula according to which Charter powers were to supersede all other commitments was ultimately removed from the final document, probably means that Art. 103 was meant to cover only other treaty obligations. A literal interpretation of "international agreements" supports this line of reasoning. At the same time, treaties often function as *lex specialis* in relation to customary law and general principles – including, arguably, treaties establishing an international organisation as powerful as the United Nations. Moreover, "the practice of the Security Council has continuously been grounded on an understanding that Security Council resolutions override conflicting customary law" (ILC 2006, 176). Therefore, it would seem reasonable, it is argued, to consider that UN Charter obligations prevail also over Member States' customary law commitments – that is, of course, unless they conflict with norms of *jus cogens*, as we will see.

Security Council resolutions imposing sanctions set out the type of sanction and the relevant criteria for designation under targeted regimes, the mandate of the sanctions committee[18] and the panel of experts, the reporting requirements of States and the possible exemptions from sanctions.

In most cases, the purpose of the committee is monitoring sanctions compliance and implementation, mainly through the review reports prepared by the Member States and the panel of experts, and take appropriate action; to review and act on requests for exemptions from sanctions; considers names submitted for listing and delisting; to prepare sanctions reviews for the Security Council. These decisions are approved by consensus on a 'case-by-case' basis. However, the particular design of the various sanctions regimes and the *ad hoc* nature of the committees may often mean that their functioning is rather uneven (Weschler 2009).

As we have seen, sanctions committees are usually assisted by independent panels of experts (sometimes referred to as groups of experts) in monitoring sanctions implementation. The latter perform the following actions: report on, and make recommendations to enhance, the effectiveness of the sanctions measures; give an account of the nature of sanctions violations; assist States that may require improving their compliance with certain measures. Sometimes, the panels of experts are also asked to report on the side effects of the sanctions regimes on the general population and neighbouring countries. The respective committee determines the follow-up work required, if any, on the findings contained in the panel's reports. Neither the sanctions committees nor the panel of experts are expressly mandated to monitor or report on the humanitarian or socio-economic impact of the sanctions (Gordon 2013).

II. UN Sanctions and Their Limit under International Law

From the above discussion, it is easy to see that the UN Charter conceives the Security Council's powers as those of a political organ enjoying a wide margin of discretion about how to maintain or restore international peace and security. In the early years of the United Nations,

[18] Sanctions committees are formed on an *ad-hoc* basis pursuant to Art. 29 of the Charter, which affirms that the Security Council may nominate "a commission or committee or a rapporteur" during the consideration of a particular question. The UN regimes currently in force all have a sanctions committee, although some (for instance the one against the Somalia) did not initially.

the first legal question to emerge in the matter of multilateral sanctions actually concerned the issue of when the Security Council could lawfully impose sanctions (O'Connell 2002).

As an organ of an international organisation, the Council only has the powers that is explicitly granted by the Member States of the UN. As we know, Art. 39 authorises the Security Council to take measures, including sanctions under Art. 41, for the maintenance of international peace and security. If, however, the Council imposed measures in situations not explicitly contemplated in Art. 39, would it be acting unlawfully or, more precisely, *ultra vires* in some way?

When the Security Council applied mandatory economic sanctions for the first time against Rhodesia in 1966, and then a comprehensive arms embargo on South Africa in 1977, questions emerged as to whether the sanctions could lawfully be imposed in response to human rights violations – in this case, to signal opposition to structured forms of racial discrimination (O'Connell 2002). In both cases, the Security Council made formal findings that international peace was threatened. Building on developments in policy-making, a number of influential scholars, among them McDougal and Reisman (1968), concluded that the Security Council not only could, but also should, take action under Chapter VII in response to breaches of human rights.

After the collapse of the Soviet Union, the Security Council embraced a flexible approach to interpreting Art. 39, and, as noted, began to intervene more actively in international affairs. Today, it is generally not disputed that the Security Council has the power to impose sanctions to promote the protection of human rights (Happold 2016b). An early observer has even gone as far as saying that the Security Council is not bound by any legal constraint, as the function of restoring international security can be carried out best when the Council decides how to react without hindrance (see Kelsen (1951), as cited in Reinisch 2001).

The *ultra vires* debate, however, soon lost the main attention of the scholarly research, as the international community began to learn of the toll sanctions were taking on innocent populations in the target countries (O'Connell 2002). The deleterious impact of UN sanctions on Iraq fully shifted the debate towards the question of whether the Security Council must observe any particular legal standards in the application of sanctions. In the previous chapter, we showed how the public outcry over the sanctions regimes in Iraq and Haiti led the Security Council to attempt to make more targeted, or 'smarter', sanctions with the aim of paying more attention to humanitarian needs.

II.I Limitations Arising From the Charter of the United Nations

As early as 1948, the International Court of Justice (ICJ) had ruled that "the political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers […]."[19] Admittedly, determining the precise limits for Security Council action is not easy. Nevertheless, it is a fundamental issue that should complement the political control wielded by the members of the Security Council, and in particular the permanent ones, through their voting power.

The view of almost unlimited powers of the Security Council is mostly based on a literal reading of the Charter, which does not expressly require the Security Council to respect international law (Reinisch 2001). Art. 24 of the Charter demands the Security Council to "act in accordance with the purposes and principles of the United Nations", which are listed under Art. 1(1). Among them, the maintenance of peace and security "in conformity with the principles of justice and international law."

Therefore, it would appear that no act of the Security Council could be exempt from scrutiny as to whether or not it complies with the purposes and principles enumerated in the Charter. Nevertheless, if one remains within a Charter-based interpretive discourse, this duty to respect general international law is considerably weakened by the fact that Art. 1(1) requires conformity only with "the principles of […] international law," not with international law as such (Reinisch 2001).

On the other hand, the position that the fundamental purposes and principles of Art. 1(1) apply to all Security Council actions, including when responding to threats to the peace, breaches of the peace and acts of aggression, and therefore that Art. 24 sets relevant legal constraints to the Council's powers[20], finds support in the provision in the preamble declaring as one of the main goals of the UN "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained" (Reinisch 2001).

Art. 55 reinforces the international law-inspired limitations with the requirement that the Members of the United Nations cooperate to promote, among others, higher standards of living

[19] *Conditions of Admission of a State to Membership in the United Nations of May 28 1948 (Article 4 of the Charter)*, Advisory Opinion, ICJ Rep. 1948, 57.

[20] This line was also endorsed by the ICJ in 1971. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Rep. 1971, 16.

and respect for and observance of human rights. Clearly, collective sanctions regimes that reduce socio-economic well-being, give rise to health problems or are deleterious to the protection of human rights would violate both articles (Bossuyt 2000). Particularly relevant for the focus of the present work is also the requirement for the United Nations to solve issues of a pressing humanitarian nature (under Art. 1(3)), and not to create them. Sanctions need not to result in undue suffering for the population of a country. Therefore, one could agree with the International Criminal Tribunal for the former Yugoslavia (ICTY) that "neither the text nor the spirit of the Charter conceives of the Security Council as unbound by law" (ICTY 1995, as quoted in Reinisch 2001, 856).

Overall, however, a consideration of the historical background of the wording may suggest that the lack of an explicit requirement to respect human rights was perhaps because the framers of the Charter did not envisage the UN to possibly commit human rights violations, rather than considering them as permissible (Reinisch 2001).

II.II The Obligation to Respect International Human Rights Law

Beyond the textual intricacies that we have seen, an argument may be made in favour of an obligation of the Security Council (and subsidiary bodies) to respect the rules of human rights law, the body of international law designed to promote the basic rights and fundamental freedoms inherent to all human beings. In *Reparations* (1949), the ICJ affirmed that the UN had rights as well as responsibilities that go beyond the specific provisions of the Charter[21].

The starting point here is that individuals and groups possess rights consistent with the norms of international law spelled out in several multilateral human rights instruments, such as the Universal Declaration of Human Rights (1948) and the two International Covenants of 1966 on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR). As with the Charter, however, there is no consensus that the rights contained in the Universal Declaration of Human Rights can be considered to represent established principles of customary law (Reinisch 2001; O'Connell 2002).

While legally binding nature of human rights obligations outlined in the Declaration is disputed, the ICCPR and the ICESCR are generally considered binding multilateral human rights treaties

[21] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ REP. 1949, 174.

creating legal norms relevant to assessing the legality of international restrictive measures. The ICCPR contains the so-called ‘first generation’ civil and political rights (such as physical and mental integrity, the right to vote, freedom of thought and expression, peaceful assembly and due process). ICESCR, instead, incorporates the ‘second generation’ economic, social and cultural rights (and in particular the right to an adequate standard of living, including freedom from hunger and the right to health, clothing, housing and medical care). Both treaties, interestingly for the field of country-based sanctions, also proclaim, among others, rights to free disposition of natural wealth and non-deprivation of means of sustenance (Hernandez-Truyol 2009).

However, in *Legal Opinion of the Secretariat of the United Nations, Question of the Possible Accession of Intergovernmental Organisations to the Geneva Conventions for the Protection of War Victims* (1972)[22], the United Nations argued that the Organisation does not have the necessary powers that would allow the fulfilment of many obligations arising from being a party to any human rights treaties, including a number of powers in administrative and criminal matters. Therefore, the UN cannot considered to be bound by any human rights obligations as a matter of treaty law (Reinisch 2001). Moreover, it is generally understood that most of the substantive rights at issue are qualified rights (Happold 2016b).

Nevertheless, in analysing limitations to multilateral sanctions implicit to human rights law, it should be borne in mind that some basic human rights are seen as having attained the status of non-derogable norms in the sense of *jus cogens*, in this way necessarily imposing limits, including making any sanctions void[23] (Bossuyt 2000). Therefore, when asking whether there are any specific human rights constraints to the exercise of the Security Council’s power to impose sanctions, one has to focus on whether – in the absence of any treaty obligations, as we saw – general international law binds the United Nations and specifically the Security Council.

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[22] *Legal Opinion of the Secretariat of the United Nations, Question of the Possible Accession of Intergovernmental Organisations to the Geneva Conventions for the Protection of War Victims*, UN Jurid. Y.B. 1972, 153.

[23] Art. 53 of the Vienna Convention on the Law of Treaties reads: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law”. *Vienna Convention on the Law of Treaties*, UN Treaty Series 1155 (1969), 331. As a report of the International Law Commission puts it, “both doctrine and practice unequivocally confirm that conflicts between the United Nations Charter and norms of *jus cogens* result not in the Charter obligations’ pre-eminence, but their invalidity. […] This is particularly relevant in relation to resolutions of the Security Council, which has more than once been accused of going against peremptory norms” (ILC 2006, 176-177).

In fact, it is acknowledged that certain rights, for instance that no one should be subject to starvation, torture or slavery, have risen to the level of peremptory *jus cogens* norms, which must be respected in all circumstances, including in times of war or any other public emergency (O'Connell 2002). Hence, while the general status as customary law of human rights law has been more controversial (Reinisch 2001), sanctions lead to violations of human rights to the extent they deny the above-mentioned fundamental rights, such as when they deprive the general population of essential foodstuffs, thereby causing hunger and starvation.

II.III Limitations to Sanctions under International Humanitarian Law

Most of the sanctions imposed in recent times by the Security Council to enforce the prohibition on the use of force, on the possession of nuclear or chemical weapons, or to protect human rights, do not fall clearly in the category of conduct regulated by international human rights law. The humanitarian law of armed conflict would appear to fit better the context (O'Connell 2002). In fact, any sanctions regime imposed during a war or as a result of a war is governed by humanitarian law, which establishes that the civilian population must be protected (as much as possible) from the consequences of war and that their essential needs be ensured.

As humanitarian law must be respected in all circumstances, sanctions in contravention of humanitarian law are also void (Bossuyt 2000). That was confirmed by the International Law Commission, which stated that "some of the [rules of humanitarian law] are, in the opinion of the Commission, rules which impose obligations of *jus cogens*" (ILC 1980, 46).

In a policy statement of 1995 on the humanitarian impact of sanctions[24], the permanent five members of the Security Council also characterised international sanctions as a tool to which a standard of humanitarianism applies. The document says that "further collective actions in the Security Council within the context of any future sanctions regime should be directed to minimise unintended adverse side-effects of sanctions on the most vulnerable segments of targeted countries", adding that the Council considers necessary to design sanctions regimes "assess[ing] objectively the short- and long-term humanitarian consequences of sanctions". We have seen how the Council's practice has turned to using targeted or 'smart' sanctions precisely in response to the backlash over the inhumane impact of comprehensive sanctions.

[24] UN Doc. S/1995/300.

While preceded by the Hague Convention and Regulations of 1907, the Geneva Conventions and their Additional Protocols form the core of international humanitarian law. Geneva Conventions' rights may not be abrogated or waived in any circumstance[25]. Many provisions included in the Conventions are relevant to the application of sanctions. For example, they mandate the free passage of humanitarian goods (Art. 21-22, Convention IV) and objects necessary for religious worship (Art. 23, Convention IV). The Additional Protocols reinforce some of the provisions of the Convention. For example, Additional Protocol II (1977) provides for the protection of "objects indispensable to the survival of the civilian population".

As we have seen, however, the UN Secretariat stated that the Organisation is not in a position to be bound by human rights or humanitarian law rules as a matter of treaty law. But this fact does not mean that international law frees the sanctioning body from legal restrictions. The implementation of coercive measures in the context of armed conflict must respect the customary principles of international humanitarian law, which have attained *jus cogens* status and from which no derogation under any circumstances is permitted (Gardam 1993).

> *The basic postulates of the law of armed conflict are the sharp distinction between combatants and non-combatants and the imperative that any use of force be demonstrably necessary, proportional to the necessity, and capable of discriminating between combatants and non-combatants.*[26]

Traditionally, this same type of assessment, changed according to the situation at issue, has not been transposed to the prospective appraisal of UN sanctions regimes. This persistent omission rests on the wrong premise that only the military instruments can be destructive. Today, however, the consensus among contemporary scholars is that categorising sanctions as weapons is "reasonable" (O'Connell 2002, 74). Consequently, applicable norms must be deduced from the general rules on protection of the civilian population in times of military conflict.

Irrespectively of the applicable treaty law, when sanctions are associated with unintended consequences occurring to entities that are not a party to the dispute, the core humanitarian law principles of necessity, proportionality and discrimination thus represent the standard gauge for determining the scope of 'acceptable' collateral damage (Reisman and Stevick 1998). Gardam, too, had argued in 1993 that humanitarian law mandates respect for the criteria of the

[25] Common Article (I,7; II,7; III,7; IV,8) of the Geneva Conventions of 1949.

[26] Reisman M., Stevick D. (1998), "The Applicability of International Law Standards to United Nations Economic Sanctions Programmes", *European Journal of International Law*, 9(1), p. 94.

international law of armed conflict both in the decision authorising the use of sanctions and in the way they are applied (Gardam 1993). Scholars of the just war tradition (JWT), as well, see them as the morally preferable method of evaluating the legality of international sanctions (Early and Schulzke 2019).

Therefore, if the Security Council must respect these central customary law principles of international humanitarian law in its conduct, what are the limits for sanctions? It is that analysis that we now turn our attention to.

II.III.I The Principle of Necessity

The principle of necessity requires that the coercing power limit itself to those actions that have a reasonable probability of achieving their objective (that is, changing the target country's conduct). The 'necessity test' does not give an unconditional margin of discretion as to the choice of the measure an actor considers necessary to achieve the goal sought. Rather, the restrictive measure in question should be subject to an empirical assessment with regard to the likelihood of a favourable outcome (Early and Schulzke 2019). Therefore, an initial comparative test should take place, assessing the proposed measure and its prospective effects in comparison to alternative strategies (Reisman and Stevick 1998). If economic sanctions were to be ineffective, then such a policy is always disproportionate regardless of whether the impact on civilians can be mitigated through more precise targeting.

This effectiveness of sanctions may be questionable in most cases: we have already discussed how comprehensive trade sanctions were judged at least partially successful only from 5 to 34 percent of the cases (Hufbauer, Schott and Elliot 1990; Pape 1997). Targeted sanctions appear even more impotent: Bapat and Morgan (2009), among others, found that smart sanctions are effective approximately 23 percent of the time. Therefore, "if sanctions do more harm than good to those who they are supposed to help – if they adversely affect those who are supposed to be the beneficiaries of the coercive policies – then the moral justification for imposing these policies is severely weakened" (Early and Schulzke 2019, 67).

II.III.II The 'Proportionality Test'

The reasonable probability of success is closely related to the principle of proportionality, which is meant to ensure that the costs of a coercive policy is not excessive compared to the goal being pursued. Proportionality limits the magnitude of harm that may be approved by the necessity test, calling for balance between means and ends. This principle is measured against the anticipated injury. Assessing by this standard rather than the wrong suffered pre-empts the damage done by a retorsion from overriding that of the original wrong. Even if considered necessary, a sanction must not exceed the bounds of proportionality (Reisman and Stevick 1998).

The jurisprudence has not offered a precise yardstick for the purposes of weighing collateral damage. While the International Court of Justice has interpreted proportionality in regard to the use of armed force, which can also inform decisions in the case of the unintended impact of collective sanctions on civilians, as prohibiting the infliction of "a harm greater than that unavoidable to achieve legitimate military objectives"[27] (Gutmann et al. 2018).

The indeterminacy of the principle of proportionality is, nonetheless, a disadvantage if the aim is to reflect on a possible restraint for Security Council sanctions (O'Connell 2002). A proportionality standard, at least, prescribes a limit on discretion by demanding that the means used are not evidently inappropriate to the situation. Moreover, it must be added that it is often difficult to isolate the adverse effect of sanctions from the hardship caused by other causal factors in a context of an armed conflict, as the case of Iraq demonstrates from the very beginning.

II.III.III The 'Need' for Distinction

The principle of proportionality also implies, according to the ICJ ruling quoted above, "never [to] use weapons that are incapable of distinguishing between civilian and military targets". The principle of distinction, or discrimination, indeed forbids reprisals against civilians[28] or an irresponsible use of violence without due care for the population that may be hurt (Early and

[27] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep. 1996, 226.

[28] International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3.

Schulzke 2019). Although the principle is traditionally interpreted as granting immunity from armed violence, it has also been invoked as the basis for condemning the application of broad sanctions that threaten innocent people. As we saw, civilians face a variety of negative consequences as a result of the decline of overall socio-economic conditions and how autocratic leaders tend to react to their countries being sanctioned.

These effects of sanctions do not always infringe on the principle of discrimination directly, as it only prohibits intentional strikes against civilians (Early and Schulzke 2019). Nevertheless, even accidentally inflicting pain on innocent people raises the concern of whether targeted sanctions are appropriate to the goal sought. This calls for as much attention to context and capacity for discrimination as when using military force. In fact, the potentially significant costs for the general population may be disproportionate even if civilians are not specifically targeted in a manner that would violate the principle of discrimination. For example, "given the destructiveness of economic sanctions programmes, it would seem that genuinely effective general embargoes, which, by definition, cannot discriminate between combatant and non-combatant, should be impermissible" (Reisman and Stevick 1998, 132).

The question of legality, especially in terms of human rights and humanitarian law, has been for a long time peripheral to the international dialogue on UN sanctions. Future uses of a sanctions strategy, whether by the international community or on a unilateral basis, should be examined in each case with regard to the requirements of the law of armed conflict.

After an examination of international law accountability of the Security Council for the imposition of economic sanctions, we can conclude that the main implication of international law, especially human rights and humanitarian law, is indeed that the right to impose sanctions is not unlimited. Against this background, the standard applicable under public international law to evaluate the legality of economic sanctions is based on the several empirical premises that we addressed. The obligation to evaluate continuously every proposed or ongoing sanctions programme is recognised today as a binding aspect of international law. Equally important, an impact assessment of expected policy-effectiveness would also make known what the sanctioner's expectations are. In this way, the international community could gain access to otherwise concealed information (Reisman and Stevick 1998).

The objective of smart sanctions is attempting to prevent harm from being inflicted on innocent civilians. Nevertheless, we showed that attempts to comply with this principle fell short when

assessed according to moral considerations of proportionality, discrimination and reasonable probability of success. In spite of their appearance of precision, current UN sanctions continue to indirectly hurt innocent people. Problems could arise if States consider that they are being asked to implement sanctions regimes considered unlawful.

> *This overall assessment of the question of the Security Council's duty to respect humanitarian law and human rights provisions when imposing economic sanctions is another piece of evidence signalling the urgent need for more control and limitations of the power exercised directly by an international organisation*.[29]

Comparatively speaking, smart sanctions are easier to employ for the senders because they can be less disruptive than broad regimes. However, it is hard to see how being politically cheap is associated with effectiveness or fairness when it comes to sanctions. To be sure, they do have significant retro-costs for the side imposing the sanctions as well, but they "do not generate sombre processions of body bags bringing home the mortal remains of the sons and daughters of the constituents" (Reisman and Stevick 1998, 94).

III. Concluding Remarks

There is little to no evidence that a political decision, whether at the UN or unilateral level, to initiate a sanctions programme was preceded by a preliminary impact assessment study by the panels of experts into the lawfulness of the programme based upon the collateral damage likely to be caused. Non-military measures need to be appraised accurately against the criteria of humanitarian law and other relevant norms of contemporary international law that we identified before a sanctioning body decides to apply them. If they were so tested, it is quite likely that, in some cases, they would be found to require improvements or abandonment.

With these concerns in mind we should ask ourselves whether smart sanctions have a reasonable enough probability of success to be justifiable and whether it is even legitimate to apply policies that could hurt those they are intended to defend (Early and Schulzke 2019). Of course, however, the most important criterion in evaluating sanctions is their legality, and it can hardly be disputed that the Security Council's practice of imposing sanctions is legal. The same cannot

[29] Reinisch A. (2001), "Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions", *The American Journal of International Law*, 95 (4), p. 869.

be said of sanctions unilaterally imposed by individual countries in furtherance of their strategic interests, which represent the focus of the next chapter.

CHAPTER III: LEGALITY OF UNILATERAL SANCTIONS UNDER INTERNATIONAL LAW

There is no single universally accepted definition of unilateral (or autonomous) restrictive measures or sanctions. One could assert, however, that the term generally refers to "economic and political [measures], imposed by States or groups of States to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights with a view to securing some specific change in its policy" (UNGA 2015, 4). This form of coercion has become an increasingly common instrument in international relations, in particular for the US and the European Union (Jazairy 2019).

As one may expect, autonomous coercive measures can be comprehensive or targeted. Traditional forms of unilateral sanctions include, as with comprehensive sanctions, boycotts and embargoes, often used in combination, but also actions that aim to restrict financial or investment flows from and to the targeted country. Alongside broad trade and financial sanctions, as we previously saw, targeted or 'smarter' forms of unilateral sanctions have developed in recent decades to try to mitigate the humanitarian consequences of comprehensive sanctions regimes. In some recent cases, however, it may be hard to tell the difference because a massive use of unilateral smart sanctions has come to amount in practice to some form of comprehensive sanctions regime. For instance, fifty-two different types of targeted sanctions were applied against Syria by the US and EU as of 2019[30] (Jazairy 2019).

Following the example of the previous chapter, the aim is now to evaluate the legality and legitimacy of autonomous restrictive measures under international human rights and humanitarian law, and specifically under which legal standards these instruments may be regarded as unlawful. Moreover, we will discuss certain specific concerns arising from the growing use of 'extraterritorial' sanctions, that is, measures intended to target natural and legal persons outside the jurisdiction of the side imposing the sanctions. This is a worrying development given the detrimental impact that extraterritoriality may have on the enjoyment of the human rights of the sanctioned country.

This examination is confined to unilateral coercive measures, and thereby excludes by definition multilateral measures such as those mandated under Chapter VII of the UN Charter,

[30] Ironically, in May 2018, the EU cited the violation of Syrians' human rights by their government as the reason behind the extension of the sanctions programme for another year. See Council of the European Union, *Syria: EU Extends Sanctions against the Regime by One Year*, Press Release, 28 May 2018.

which were the focus of the previous chapter. It goes without saying, however, that in countries where both unilateral and multilateral sanctions are applied, it will be difficult to completely isolate the adverse effect that the former may have on civilian populations.

I. Historical and Current Trends in the Practice of Unilateral Sanctions

Although the use of unilateral coercive measures has augmented significantly since the 1990s, it is surely not a new phenomenon.

As discussed in the first chapter, before the end of the Cold War, the Security Council had intervened to apply sanctions only on two occasions – in Southern Rhodesia and South Africa – both under the brutal system of apartheid. Apart from these two cases, restrictive measures were implemented mainly unilaterally and along the East-West divide. Reflecting an unprecedented moment of economic, military and political primacy following World War II, the United States during the Cold War "attempted to impose its will on many countries through the use of economic sanctions, seeking a broad array of objectives. By comparison, the Soviet Union generally confined its use of sanctions to efforts at keeping rebellious allies in line" (Hufbauer, Schott and Elliot 1990, 128).

Then in 1975, there was an attempt to stop the autonomous use of coercive measures through the Helsinki Accords. As stated under Principle VI of the Final Act of the Conference on Security and Cooperation in Europe (CSCE), the States parties to the treaty (including the US and most European countries) committed "in all circumstances [to] refrain from any other act of […] economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent to sovereignty". Expectations, however, ultimately did not meet reality.

When the Security Council imposed sanctions on Southern Rhodesia and South Africa, their unintended impact on human rights in the two countries was relatively low, because the measures were evaded by the sender countries themselves (UNGA 2015). On the contrary, the imposition of unilateral coercive measures had an immediate negative impact on the protection of human rights in the target States. In most cases, these sanctions were imposed by developed countries on poorer countries, and thereby affected the weakest groups within those States (UNGA 2015). The opposite happened only in a few cases: for instance during the 1973 Arab-

Israeli War, when oil-producing Arab countries autonomously deployed an embargo against the West.

As we discussed, the use of sanctions has grown in recent decades, but their nature has also evolved. In 1994, the UN Security Council imposed a comprehensive sanctions regime for the last time to date on Haiti, as there has been an overall trend towards resorting to smart sanctions.

Unsurprisingly, translating good intentions into positive action is easier said than done. Safeguarding the protection of human rights of individuals and communities of a target country, especially in the developing world, is a daunting mission: even the introduction of smart sanctions, when they are indiscriminate in character (e.g. banning the use of international financial telecommunications), can often end up having *de facto* the same effects on States of broad sanctions (UNGA 2015). Similarly, as we said, unilateral smart measures can in practice turn into comprehensive sanctions when they are imposed on top of Security Council's measures. Such comprehensiveness not only has had clearly negative effects in terms of human rights, but it also does not necessarily improve the efficiency of these measure – as it is occurring, for instance, in the case of sanctions deployed against Cuba or Iran.

A positive development here, which we will analyse, has been the establishment of a *corpus* of legal rules whose aim is submitting the practice of unilateral sanctions to certain conditions, reducing their excesses and monitoring the impact on the enjoyment of human rights of vulnerable groups (UNGA 2015). However, this development has been rather heterogeneous in sender countries.

Moreover, observable trends do not show that advanced countries are prepared to give up the resort to unilateral measures, much to the contrary. In recent years, there has also been a shift back to an emphasis on comprehensive economic sanctions, as it is evident from those currently imposed by the United States against Cuba, Iran and Syria, including their extraterritorial application to third parties (Jazairy 2019). In many occasions, these measures have led to *de facto* blockades.

In the words of the UN Special Rapporteur on Unilateral Coercive Measures, "the increasing use of economic warfare in the context of the erosion of multilateralism more generally seems to have overturned previous achievements in regulating unilateral sanctions" (Jazairy 2019, 291). Furthermore, sanctions are now also being applied as a tool of pressure between countries of the South, as the Saudi-led coalition embargo targeting Qatar shows, whereas until recently

they were generally mounted by powerful Western nations against smaller or emerging countries.

Overall, the point remains that commitments on paper by sanctioning powers often do not match the needs of communities affected by unilateral coercive measures. Progress has been made in a few source countries that have renounced the use of unilateral comprehensive sanctions (this is the case for the EU), even though, as discussed above, the imposition of autonomous smart measures can come to have the same impact on the population of a target country. Nevertheless, there is growing recognition that the purpose of unilateral coercion should be "the upholding of international law, human rights law and humanitarian law," rather than the pursuit of the strategic interests of sender countries. The next section analyses precisely the relationship between autonomous restrictive measures and a variety of sources of international law.

II. The Legality of Unilateral Restrictive Measures under International Law

The issue of the lawfulness of unilateral coercive measures under international law is disputed. As is the case with multilateral UN sanctions, much depends on the type of measure, potential applicability of treaty law and on the assessment of these coercive instruments under pertinent international customary law. The potential illegality can indeed arise from various sources, some specific to autonomous measures and some shared by collective sanctions. The present section will therefore discuss the legality of unilateral restrictive measures, including the extent to which their adverse human rights consequences may make such measures illegal.

II.I Obligations Arising from Treaty Law

International humanitarian law and human rights treaties may apply to cases of unilateral sanctions having a negative impact on the fundamental rights of the population at large. While, as we discussed, the UN cannot considered to be bound by any human rights obligations as a matter of treaty law, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights are generally considered binding treaties for their Member parties, in respect to which they create legal norms relevant to assessing the legality of unilateral coercive measures.

Within human rights law, the most appropriate standards to evaluate the legality of autonomous sanctions are a number of rights enshrined in the 'International Bill of Human Rights', such as the right to life, to freedom from hunger and to health.[31] The Committee on Economic, Social and Cultural Rights (CESCR), whose interpretation of the provisions of the ICESCR is considered authoritative, affirmed that sender countries must give consideration to human rights when designing a sanctions programme and that an efficient monitoring process should be carried out through the entire duration of measures. It also added that "the external entity imposing the sanctions has an obligation to take steps, individually and through international assistance and cooperation […] to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country" (CESCR 1997, as quoted in UNGA 2017).

While the classic understanding of international humanitarian law is that it applies to State conduct only in time of war, in the previous chapter we showed that humanitarian principles represent an appropriate paradigm to reflect on the design and implementation of economic sanctions outside war (Gardam 1993; O'Connell 2002). This approach is justified by the massive collateral damage that sanctions have caused on those inside the sanctioned country, possibly on the same scale of military intervention. Some observers have defined the strict application of international humanitarian law a "persistent blind spot in international legal analysis" (Reisman and Stevick 1998, 95). Indeed, it appears to be logical that the minimum standards applicable in a situation of armed conflict are also relevant in peacetime.

Under international humanitarian treaty law, the most relevant provision appears to be the prohibition against the use of starvation of civilians as a method of warfare[32]. Furthermore, the duty to allow the free passage of food and medical supplies, as well as the prohibition of collective punishment [33], remain essential for assessing the lawfulness of unilateral coercive measures as well (UNGA 2017).

[31] The relevant provisions are contained in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which are collectively known as the 'International Bill of Human Rights'.

[32] Protocols I and II additional to the Geneva Conventions.

[33] International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287.

II.II Customary international law and general principles

Besides the obligations under treaty law, the application of unilateral sanctions might violate different provisions of general international law, meaning both customary international law and general principles of law (UNGA 2017).

II.II.I Commercial Relationships between States

A disruption of trade relations is the most commonly employed form of unilateral sanctions. The central question in this case is whether, and to what extent, States may be required to maintain commercial relations with one another. Treaty obligations can represent significant limitations upon the economic conduct of nations that have entered into an agreement covering transnational economic relations (Henderson 1986; Happold 2016a)[34].

Despite not being customary international law, it is relevant to mention that the basic principles on which the GATT, now WTO, operates do forbid quantitative restrictions on the movement of any product for political purposes. However, there are exceptions to these general rules. The most significant one is the national security clause contained in Art. XXI. Art. XXI of the GATT (1994)[35] provides that "nothing in this Agreement shall be construed […] to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests".

Arguably, a State could justify in this any measure inconsistent with the GATT as one taken to protect its vital security interests. For example, in *Nicaragua v. United States of America*[36], although the trade embargo applied against Nicaragua appeared to violate Art. 11 and 13 of the

[34] The only limit to *pacta sunt servanda* principles are *jus cogens* norms. In this respect, it is interesting to note the recent application for contentious proceedings brought by Iran before the ICJ to challenge the re-imposition of secondary sanctions by the US. The application considers the unilateral imposition of sanctions as violating the Treaty of Amity, Economic Relations, and Consular Rights agreed between Iran and the United States in 1955. In October 2018, the ICJ ruled unanimously in favour of Iran and ordered the US to ease the new sanctions.

[35] General Agreement on Tariffs and Trade, *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, Annex 1A, 1867 UNTS 187, 33 ILM 1153 (1994).

[36] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, ICJ Rep. 1986, 14.

GATT, the United States asserted that the national security exception allowed the prohibition on trade with Nicaragua (Henderson 1986)[37].

In any event, in line with the jurisprudence of the International Court of Justice, the consensual view is that, lacking a clear treaty obligation in place, States are at liberty to decide whether or not entertaining commercial relations (UNGA 2017). It is not considered unlawful to bring an end to such relations on the grounds of political or otherwise motivated decisions.

II.II.II The Doctrine of Non-Intervention

Despite the fact that economic coercive tools do not always fall under the concept of the use of force, an important tool to assess their lawfulness may be the principle of non-intervention. The principle, as in the Montevideo Convention[38], is concerned with the motivation behind the action and the severity of the interference.

Within the international community, a growing movement led by many Latin American countries considers unilateral economic sanctions as constituting unlawful interferences in the internal affairs of other States (UNGA 2017) and a denial of self-determination. The doctrine of non-intervention, with a focus on economic coercion, has been reflected in various General Assembly resolutions since the 1960s, including the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (1965)[39], the Declaration on Principles of International Law concerning Friendly Relations (1970)[40] and the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (1981)[41].

Despite the fact that the resolutions of the General Assembly are generally seen as not establishing binding legal obligations, they often restate legal principles that may reflect a rule

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[37] "The determination of legitimate security interests poses a significant problem in the interpretation of article" (Henderson 1986, 185), because leaving within the discretion of a contracting party the assessment of the validity of measures taken under Art. XXI creates the potential for States to freely escape freely their obligations. It is interesting to note in this regard that, in April 2019, the Dispute Settlement Body of the World Trade Organization (WTO) passed for the first time a judgment on the validity of measures taken under Article XXI, ruling in a dispute between Russia and Ukraine that the legitimacy of the actions taken under the article can be objectively observed and are therefore reviewable.

[38] Seventh International Conference of American States, *Convention on Rights and Duties of States*, 26 December 1933, 165 LNTS 19.

[39] A/RES/2131(XX).

[40] A/RES/2625 (XXV).

[41] A/RES/36/103.

of customary international law or contribute to its development. Among them, the *Friendly Relations Declaration*, which provides that "no State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind". It was approved by the General Assembly without a vote and is often regarded as an authoritative interpretation of the tenets in Art. 2 of the Charter (Orakhelashvili 2016).

However, reaching an agreement on whether unilateral restrictive measures constitute 'intervention' under customary international law has proven very difficult.

The resolutions listed above and the ruling of the ICJ in *Nicaragua v. United States* lead us to the conclusion that there are two features that are fundamental for evaluating the extent to which autonomous economic sanctions could conflict with the doctrine of non-intervention: coercion and the intent to alter a policy decision that the target State should be making freely (UNGA 2017). The declaration of US Secretary of State Pompeo that, after the re-imposition of sanctions, Iran would "be battling to keep its economy alive"[42] shows a clear example of both coercion and the willingness to influence the policy of the target State through a massive, indiscriminate impact on the economy and the population of Iran.

Unilateral economic measures can assume coercive character as a result of a State's economic dependence on the coercing actor. In addition, the sanctions, in order to be deemed as 'prohibited intervention', need to have the goal of affecting the sovereign will of another country in an undue manner. Therefore, "where unilateral coercive measures intend to induce compliance with international legal obligations, such as non-use of force or human rights, they are less likely to infringe the principle than when they are directed against the legitimate sovereign political decision-making of a State" (UNGA 2017, 7).

II.II.III Customary Human Rights and International Humanitarian Law Norms

We have already discussed how international humanitarian and human rights can set a limit to the breadth of actions taken by the Security Council. The same holds true for the activities of individual States. Indeed, several international humanitarian law and human rights norms that have been mentioned above are likely to represent customary international law.

[42] Pompeo M., *After the Deal: A New Iran Strategy*, Speech at the Heritage Foundation, Washington, D.C., 21 May 2018.

While the general qualification as customary law of human rights norms has been controversial (Reinisch 2001), in the previous chapter we saw that some basic human rights have achieved the status of non-derogable peremptory norms. For instance, the rights that may be endangered by a complete economic embargo, such as the deprivation of essential foodstuffs, are widely regarded as having attained *jus cogens* status.

The same can be said with regard to core provisions of humanitarian law, which, as we said, must be respected in all circumstances, meaning that sanctions in contravention of principles of humanitarianism are void. As in relation to UN multilateral sanctions, this translates to a use of restrictive instruments in both wartime and peacetime that must be demonstrably necessary, proportional to achieving the aim pursued and capable of discriminating between combatants and non-combatants (Reisman and Stevick 1998; Early and Schulzke 2019).

II.III Potential Instances of Legality under International Law

The International Law Commission's Articles on State Responsibility for Internationally Wrongful Act[43], which develop the customary law principles governing States' responsibility for a breach of an international obligation, affirm that "the wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure" (ILC 2001, 48).

Chapter V of the Articles lists specific circumstances precluding the wrongfulness of a countermeasure: it has to be employed against a State responsible for the continued performance of an internationally wrongful conduct. In fact, with regard to *erga omnes* obligations – human rights or similar obligations owed to the whole international community – any country may impose coercive measures on a State responsible for breaching the obligation in question so as to compel the cessation of that wrongful behaviour and reparation for the victims directly affected by such an act. Subsequent State practice has increasingly demonstrated that such countermeasures are perceived as legitimate. Indeed, many sanctions regimes established by the US through the *Global Magnitsky Act*[44] and the European Union[45]

[43] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chap. IV.

[44] *Global Magnitsky Human Rights Accountability Act*, Subtitle F, Public Law 114–328, 22 U.S.C. 2656.

[45] The EU is also preparing a Magnitsky-style sanctions framework against human rights abusers anywhere in the world. An estimated two-thirds of EU country-specific sanctions are imposed in support of human rights and

were created in response to patterns of human rights and humanitarian law abuses (Happold 2016a). The emergence of the principles of the responsibility to protect bolsters this prospect (Lopez 2013).

Unilateral restrictive measures can only be justified as a temporary resort, provided that the above-mentioned conditions are met. Nevertheless, these countermeasures need not to affect the obligations for States to refrain from the use of force and reprisals violating humanitarian norms, protect human rights and other obligations under peremptory norms of general international law. Moreover, a standard of proportionality will be fundamental in determining the legality of a specific measure.

In addition, sanctions applied by an international organisation against one of the parties to the treaty – such as those by the African Union (AU) to respond to unconstitutional changes in Member States' governments – are considered lawful on the basis of consent. That is, the target State, as a member of the organisation, has committed voluntarily to be bound by a certain set of rules (Happold 2016b).

Finally, sanctions that are not taken unilaterally by a State, but are rather mandated by the UN Security Council according to Chapter VII of the Charter, "can be considered to be legally justifiable despite their contradiction with treaty obligations or customary international law norms per se" (UNGA 2017, 8). As we saw, as a result of an extensive reading of Art. 103, Charter-based obligations are generally regarded to prevail over Member States' treaty and customary law commitments – that is, of course, unless they violate peremptory norms of *jus cogens*.

Over the years, however, when autonomous sanctions prove ineffective and consensus on multilateral sanctions is impossible, sanctioning powers, and especially the US, have turned to a highly controversial type of unilateral sanction, which is designed to deter third-country actors from transacting with a primary target of unilateral sanctions. Most observers consider these coercive measures, to which we now turn our attention, to illegally exceed the bounds of US authority under customary principles of international jurisdiction law (Meyer 2014).

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democratic goals. See European Parliament, *MEPs call for EU Magnitsky Act to Impose Sanctions on Human Rights Abusers*, Press Release 20190307IPR30748, 14 March 2019.

III. Extraterritoriality and Unilateral Sanctions in International Law

Recent efforts of the United States to apply sanctions extraterritorially represent a significant development in the practice of country-based sanctions, and have generated the most controversy in recent decades. The goal of extraterritorial, or 'secondary', sanctions is not only to impose national legislation to the internal situation of a foreign State, but also to coerce non-national companies or persons into applying similar measures against a targeted country, leading to a de facto 'multilateralisation' of unilateral sanctions.

As a result, it is crucial to draw attention to the key legal controversies and the potential harmful consequences arising from an extraterritorial application of unilateral restrictive measures, in particular with regard their potential impact on human rights. We will subsequently move to an examination of whether an extraterritorial interpretation of relevant human rights instruments can create certain obligations to take into account in the practice of secondary sanctions, and what the implications might be.

III.I The Multilateralisation of Domestic Sanctions Policies

Secondary sanctions are, as we have said, measures intended to target countries, individuals or businesses acting beyond the jurisdiction of the sanctioning power, "when they conduct business with individuals, groups, regimes or countries that are the target of the primary sanctions regime" (Ruys 2017, 28), even if that activity has no connection to the sender directly. Beyond individual measures, violating the provisions of the sanctions regime, in particular, can lead to serious consequences: generally, they consist of restrictions to access the financial system and/or broader economy of the side imposing them.

Extraterritorial coercive measures become particularly challenging when applied by the US, the world's unrivalled sanctioning power (Hufbauer, Schott and Elliot 1990; Dreyer and Luengo-Cabrer 2015), in the light of the importance of continued access to their market for most foreign businesses, and the overwhelming dominance of the dollar in cross-border transactions (SWIFT 2015)[46]. A lack of clarity on how to interpret the extraterritorial character of sanctions has led to a phenomenon of pre-emptive alignment and over-compliance on the part of companies in

[46] A recent example is the US move to impose sanctions on any company that helps Russia's state-owned gas company, Gazprom, finish the Nord Stream 2 pipeline into the European Union.

third-countries, which often prefer to cut ties with a smaller economy rather than being excluded from the lucrative American market (Geranmayeh and Lafont Rapnouil 2019)[47].

This may result in a *de facto* blockade of the primary target State and affect the ability to entertain economic relations with the international community: the sanctions imposed against Cuba in the 1990s, for instance, not only limited the island's access to international financial institutions, but are even said to have compromised Cuba's access to development aid (Gordon 2016).

Even more than with 'simple' unilateral measures, there are strong objections to the legal viability of secondary sanctions, because they disregard the generally accepted traditional law of the jurisdiction of States (Beaucillon 2017). This position is reflected in a number of General Assembly and Human Rights Council resolutions, starting from Resolution 57/5 of October 2002, which condemned the use of extraterritorial sanctions "as a means of political and economic compulsion". Several countries and independent organisations share this view. A study by the Asian-African Legal Consultative Organisation (2013) has concluded that extraterritorial sanctions are impermissible, while the European Union, on the basis of a strategic document called "Guidelines on implementation and evaluation of restrictive measures" (Council of the European Union 2004), has formally refrained from the use of secondary sanctions as being in violation of international law (Gestri 2016).

"It should also be added that the enactment of domestic legislation with purported extraterritorial reach, resulting in a *de facto* multilateralisation of unilateral coercive measures, could be seen as infringing on the competences of the Security Council" (UNGA 2017, 19). As we saw in the previous chapter, it is the Security Council who has the primary responsibility for the maintenance of peace and security according to Art. 24 of the Charter, and has to determine if an act necessitates a collective security response. Therefore, it questionable, to say the least, that a single State should take responsibility for applying sanctions "without borders, without any justifiable right to exercise universal jurisdiction, which is in the purview solely of the Security Council" (UNGA 2017, 19).

[47] In 1996, EU introduced the so-called *Blocking Statute* (Regulation 96/2271), which prohibits EU natural and legal persons from complying with specific US extraterritorial sanctions, in order to nullify a US trade embargo on Cuba and sanctions related to Iran and Libya. The EU recently amended the *Blocking Statute* following the American withdrawal from the Joint Comprehensive Plan of Action (JCPOA) and the unilateral decision to re-impose secondary sanctions against Iran. This mechanism, however, appears to be underutilised in practice, and is generally considered unlikely in itself to be sufficient to protect European companies from sanctions enforcement by the American authorities.

Besides worsening security and economic relationships with allies (Geranmayeh and Lafont Rapnouil 2019), secondary sanctions can entail additional adverse consequences on the protection of human rights in third countries that are forbidden from entering into economic relations with the target State. The extraterritorial character of unilateral measures could affect especially developing countries that rely heavily on trade with the target country and may not be in a position to confront restrictions in those economic relations. Communities whose individuals tend to be employed as foreign workers in the target economy may also suffer negative consequences. Taken together, such a situation threatens to impact the realisation of the right to development, as enshrined in *Declaration on the Right to Development*[48] and other human rights instruments that require the international cooperate with each other in ensuring development in poorer countries (UNGA 2017).

III.II Extraterritorial Human Rights Obligations and Secondary Sanctions

It is generally understood that international human rights treaties can attribute certain obligations to State parties beyond their territory. However, there is ongoing controversy over the extent of such responsibility, given that human rights instruments are thought to govern solely the relation between a State and their nationals or those present on their territory at a given moment, that is, within the 'jurisdiction' (Coomans 2011). It is considered to be a *condicio sine qua non* to be protected by the human rights treaties to which the State is a member. Among others, the International Covenant on Civil and Political Rights (ICCPR) contains a provision limiting the applicability of the treaty's protection to the individuals subject to each Party's jurisdiction (UNGA 2017). As a consequence, the extent to which a country has human rights obligations in the circumstances is uncertain (Kannis 2015).

On the contrary, the International Covenant on Economic, Social and Cultural Rights (ICESCR) does not set out any territorial limitations. Art. 2 requires all States "to take steps, individually and through international assistance and cooperation, with a view to achieving progressively the full realisation of the rights recognised in the Covenant". Moreover, as seen in the previous chapter, the ICESCR is generally considered a treaty creating binding norms of human rights protection. As a consequence, it is considered to be asserting certain legal obligations for States parties towards third-country citizens when their actions produce effects abroad (UNGA 2017).

[48] A/RES/41/128 (1986).

Over time, the Committee on Economic, Social and Cultural Rights (CESCR), a body of independent experts that monitors the implementation of the Covenant, has tried to articulate the scope of these obligations. Although the legal bindingness of the jurisprudence of the Committee is disputed, its interpretation of the provisions of the treaty is considered authoritative (Coomans 2011):

> *Extraterritorial obligation to respect requires States parties to refrain from interfering directly or indirectly with the enjoyment of the Covenant rights by persons outside their territories. As part of this obligation States parties must ensure that they do not obstruct another State from complying with its obligations under the Covenant*.[49]

For instance, in regard to the right to adequate food, the CESCR affirmed, with General Comment No. 12 (1999), that Parties should refrain from measures that endanger the ability of other countries to achieve the access to adequate food[50]. The Human Rights Council also seems to understand that States can be ascribed certain duties outside their national territory in the field of human rights[51].

In a number of recent cases, international courts have also found human rights treaties to be applicable to State action producing effects outside territories, regardless of an assertion of jurisdiction in a narrow sense (UNGA 2017). In *Georgia v. Russian Federation* of 2011[52], the International Court of Justice was called upon to examine the extraterritorial scope of the International Convention on the Elimination of All Forms of Racial Discrimination, which, as the ICESCR, does not foresee a territorial or jurisdictional limitation clause.

In the ruling, the Court appeared to operate on the assumption that unless expressly provided otherwise, human rights treaties apply to the extraterritorial actions of a State (here, the Russian Federation), and that this approach is not limited to the International Convention on the Elimination of All Forms of Racial Discrimination, but is relevant as a general rule to all human rights treaties.

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[49] UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, E/C.12/GC/24, 12 August 2017.

[50] UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 12 (1999): The Right to Adequate Food (Art. 11)*, E/C.12/1999/5, 12 May 1999.

[51] A/HRC/RES/21/11 (2012).

[52] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Rep. 2011.

The European Court of Human Rights has similarly found that States may be responsible under the European Convention on Human Rights (ECHR) as a result of actions "producing effects outside their own territory"[53]. This "cause and effect" approach, as Kannis has defined it, means that "persons fall within a State's jurisdiction when a State through lawful or unlawful exercises of power causes human rights violations extraterritorially" (Kannis 2015, 234).

However, it is controversial whether the fact that States may have duties beyond their territory under the ICESCR extends to a point at which a foreign State assumes positive obligations in relation to the effects they produce abroad through the application of sanctions. In the words of the UN Special Rapporteur on Unilateral Coercive Measures, "it seems difficult to deny, in that respect, that international sanctions come within the category of situations where States can influence situations located abroad […] to the extent that they affect the enjoyment of human rights" (UNGA 2017, 16) even in territories where they exercise no formal jurisdiction.

There is indeed a growing recognition that a State could incur liability for human rights violations because of the extraterritorial obligations that it takes upon under human rights instruments when it imposes international sanctions. Even more so under the International Covenant on Economic, Social and Cultural Rights, which, as we said, does not contain a territorial limitation clause (UNGA 2017). The CESCR shares the view that a foreign State influencing with its conduct the situation within a country also assumes a duty to do all it can to protect the affected population[54].

Applying a traditional reading of jurisdiction to violations of human rights caused by the extraterritorial actions of a State would lead to a paradoxical outcome where victims would essentially be left without legal redress only because they do not reside within the jurisdiction of the third-country that imposed the sanctions doing harm to them (Coomans 2011).

To the degree that States are bound by human rights requirements when implementing extraterritorial sanctions, the international responsibility of a sanctioning power may derive also when third-countries impose sanctions on the primary target State in order to comply with the wishes of the coercing State.

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[53] *Drozd and Janousek v. France and Spain*, 12747/87 [1992] ECHR 52 (26 June 1992).

[54] UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 8 (1997): The relationship between economic sanctions and respect for economic, social and cultural rights*, E/C.12/1997/8, 12 December 1997.

Art. 18 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts may be considered pertinent to this situation (UNGA 2017). According to the ILC, "A State which coerces another State to commit an act is internationally responsible for that act if: (a) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and (b) the coercing State does so with knowledge of the circumstances of the act" (ILC 2001, 69). In the commentary to the Draft Articles, the International Law Commission further clarified that serious economic pressure meets the requirements of 'coercive interference' in the affairs of another State when the pressure is so strong as to coerce a State into committing a breach of an international obligation towards another State.

There is no logical reason to exclude that an illegal assertion of jurisdiction through secondary sanctions should not entail the responsibility of the sender in the event that this results in adverse consequences (UNGA 2017).

IV. Concluding Remarks

Unfortunately, the fact that unilateral (secondary) sanctions are widely regarded as a challenge to the existing international legal order has not discouraged a range of international actors, and particularly the United States, from applying the most far-reaching coercive measures to date in response to the Iranian nuclear programme and alleged support of terrorist organisations.

The United States have repeatedly strengthened direct and indirect measures against Iran, including retributions against third-country companies that trade with Iran in fields unrelated to the nuclear programme. Over the years, and especially because of the tightening of economic sanctions following the US withdrawal from the Iran nuclear deal, sanctions have taken a heavy toll on the country's economy and people. The suffering inflicted on the Iranian population raises serious questions of international human rights and humanitarian law which are important to investigate in more depth.

CHAPTER IV: US ‘MAXIMUM PRESSURE’ POLICY – PUNISHING THE VULNERABLE

On 8 May 2018, President Donald Trump announced that the United States would withdraw from the Joint Comprehensive Plan of Action, also known as the ‘Iran nuclear deal’, the agreement concluded in July 2015 between the Islamic Republic of Iran (hereafter Iran), China, France, Germany, the Russian Federation, the United Kingdom, the United States and the European Union. The deal aimed to limit Iran’s ability to develop nuclear weapons in return for relaxing the numerous sanctions imposed against Tehran[55]. The President directed the administration to immediately start the process of re-imposing several unilateral sanctions on Iran[56].

The unprecedented set of unilateral sanctions subsequently applied by the US is part of a ‘maximum pressure’ policy, targeting all the key sectors of the Iranian economy, and raise important issues related to legality under international law and adverse human rights consequences. Despite occasional disclaimers, the American sanctions on Iran do not even endeavour to work as targeted sanctions (Gordon 2013).

The starting point is that the US leaving the Iran deal clearly represents a breach of a multilateral agreement, which consists of a series of reciprocal commitments that under international create binding rights and duties for the parties. Therefore, it is subject to the principle of general international law *pacta sunt servanda*[57], which underlies the entire system of treaty-based relations between countries.

In addition, the Security Council formally endorsed the Joint Comprehensive Plan of Action with Resolution 2231 (2015), and demanded that “all Member States, regional organisations and international organisations to take such actions as may be appropriate to support the implementation of the JCPOA, including by taking actions commensurate with the implementation plan set out in the JCPOA and this resolution and by refraining from actions that undermine implementation of commitments under the JCPOA” (UNGA 2018). Under Art. 25 of the Charter, States are obliged to follow the decisions of the Security Council and therefore must refrain from imposing restrictive measures terminated under the agreement. In

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[55] Iran received relief from US (only on non-US entities), European Union and United Nations’ nuclear-related sanctions.

[56] White House, *President Donald J. Trump is Ending United States Participation in an Unacceptable Iran Deal*, Fact Sheet, 8 May 2018.

[57] Art. 26 of the Vienna Convention on the Law of Treaties.

the *Advisory Opinion on Namibia*, the ICJ held that "to hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter".

The combination of comprehensive autonomous sanctions, together with the enforcement of secondary sanctions on foreign countries, amounts in practice to a peacetime blockade. The re-imposition of a broad trade and investment embargo, in fact, also bars non-national companies or persons to do business with Iran under the threat of loss of access to the US market. According to the Trump administration, this led more than fifty international companies to withdraw from Iran for fear of the impact of US sanctions, even when their activities had no connection to nuclear proliferation or Iran's human rights violations (Manson 2018). The (allegedly) malign activities and extraordinary threat posed by Iran are used in this case as a justification to support the most extensive sanctions regime in history (UNGA 2018).

It is clear that the consequences of sanctions will harm innocent people in Iran and impact their enjoyment of a range of human rights. "Not only is such an adverse effect not denied, but this is even an intended, assumed and claimed consequence of the sanctions to come" (UNGA 2018, 11).

It is also worth noting the recent targeting by the American authorities of the airline Dena Airways, which is used for official visits by the government of Iran, and another Iranian civil aviation company, Mahan Air, the biggest airline in the country by number of countries served, which according to the administration are aiding the Iranian regime's alleged proliferation of weapons to Syria and Yemen.

Imposing sanctions that impair the normal operation of civilian carriers is a problematic action with the potential to affect the safety of commercial flights. The ban of aircraft used by officials of the Iranian administration is instead seen as illegal under international law considering that Heads of State and their aircraft are granted immunity, as was emphasised by the Secretary-General in relation to the 2013 Morales grounding incident[58] (UNGA 2018). The designation of high-ranking Iranian officials, such as Iran's Supreme Leader or the governor of the country's central bank, are an unprecedented, if symbolic, step in the same direction.

[58] Bolivian President Morales's plane was denied airspace by France, Spain, Portugal and Italy, after US officials suspected whistle-blower Edward Snowden to be being on board.

I. Humanitarian Consequences of Iran Sanctions

Despite occasional disclaimers, comprehensive sanctions regimes such as the one implemented against Iran are not geared to differentiate between the political decision-makers and the population at large. As the administration's so-called 'maximum pressure' campaign against the country goes beyond targeting key figures within Iran's leadership, it is clear that ordinary Iranians will bear the brunt of sanctions. Gordon's words (2013, 1000) remain as relevant as ever: "given the many ways that the measures of the United States and its allies have broadly targeted Iran's shipping, financial transactions, and energy sector, it is unsurprising that the effects of the sanctions go well beyond simply depriving Iran of the means to produce nuclear weapons".

While sanctions are not the only cause of the country's socio-economic woes, they have exacerbated existing problems (Vogt and Jalilvand 2019). While Iran's leaders have remained defiant, the re-imposition of US sanctions led to a severe economic downturn of more 4.5 percent in the fiscal year 2018-2019 (Institute of International Finance 2019).

Government finances have been hard hit by the decline in revenues from Iran's oil, gas and metals sector, which have been the primary target of American sanctions. Stringent US measures, combined with a steady devaluation of the Iranian rial, have led to high rates of inflation, eroding families' purchasing power and resulting in a rise in commodities and energy costs. Economic decline and high inflation continue to put further pressure on the labour market (Vogt and Jalilvand 2019). Youth and female unemployment show particularly worrying trends. Moreover, efforts to mitigate the blow of sanctions paved the way for an increase in smuggling activities detrimental to the real economy. Limitations on trade, banking system and cargo shipments have also made it very difficult for private business to get lines of credit.

At the same time, the adverse economic impact has also had direct and indirect social consequences. According to Human Rights Watch, as in the past waves of sanctions, "at the core of the harmful knock-on effects of renewed US sanctions on Iran is that in practice, these sanctions have largely deterred international banks and firms from participating in commercial or financial transactions with Iran" (HRW 2019a) for fear of becoming entangled in US sanctions.

Although Washington has exempted the humanitarian export of food and medical supplies in principle, international companies have shied away from doing so, as they fear that doing

business with Iran will result in a loss of access to the US banking and financial system[59]. In addition, broad sanctions against the Iranian banking system, which include cutting off their access to SWIFT, the global network used for all international financial transactions, has dramatically limited the country's ability to finance such humanitarian imports (HRW 2019a). This has contributed to shortages of essential products in the medical and pharmaceutical sector (Vogt and Jalilvand 2019), which creates a serious threat to Iranians' right to health.

As we saw, the right to health is reflected in several international human rights treaties such as the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights (Kokabisaghi 2018). According to Art. 12 of the ICESCR as interpreted by the Committee on Economic, Social and Cultural Rights, the right to health includes a right to "access timely and appropriate health care but also to the underlying determinants of health"[60]. Parties to the Convention are obliged to cooperate towards the progressive realisation of the right "by all appropriate means" and "to the maximum of its available resources".

For now, amid constant American pressure, the European Union has said they remain committed to the Iran nuclear deal and announced the creation of a financial vehicle, known as *Instex*, to protect companies willing to continue trading with Iran from renewed US sanctions. However, *Instex* has proved extremely hard to realise in practice and to date remains unable to provide the necessary humanitarian relief (Lynch 2020). Today, the EU maintains only some limited restrictions on Iran in response to serious human rights violations in the country[61].

In line with the traditional premise of sanctions policy, the expectation in Washington seems to be that the pressure on ordinary Iranians would result in further unrest and protests against the regime. However, as we have already seen, scholarly research shows that international sanctions often harm opposition groups and have little impact on, and may even enhance, the coercive capacity of the State (Peksen and Drury 2010). Allen has demonstrated how this is especially the case in countries with limited political freedom (Allen 2008). Moreover,

[59] We discussed the phenomenon of 'over-compliance' in chapter III.

[60] UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, E/C.12/2000/4, 11 August 2000.

[61] Council of the European Union, *Iran: Council extends by one year sanctions responding to serious human rights violation*, Press Release, 8 April 2019.

sanctions that attempt to threaten the stability of the target State generally increase the fear of the incumbents, frequently leading to more repression (Wood 2008).

Indeed, looking at the case of Iran, sanctions appear to have confined the space of democratic societal voices, by undermining the country's middle class while strengthening of the rule of the regime. The further tightening of the domestic sphere has been a consequence of the sanctions regime. Iranians have been reluctant to take to the streets, but when the economic hardships did spark widespread protests at the end of 2019, they were met with unprecedented levels of violence by the authorities (HRW 2019b). Furthermore, "while dissatisfaction with their own government is still high, the international community has become an additional source of frustration for Iranians. As Washington has not taken active steps to shield ordinary civilians from the sanctions fallout, 'maximum pressure' has been perceived largely as punishment rather than support" (Vogt and Jalilvand 2019, 8).

The current regime of comprehensive unilateral sanctions, combined with the imposition of extraterritorial measures on third parties, has had the practical effect of blocking nearly all trade with Iran and is severely constraining the ability of international actors to carry out any sort of humanitarian work in the country (UNGA 2018). The result amounts to a blockade on a foreign country, the only difference being that it is debated whether the international protection provided by international humanitarian law applies to a situation not categorised as armed conflict. However, we demonstrated in the previous chapters how the potential collateral damage inflicted by sanctions calls for an assessment (and eventual termination) of those measures against the core humanitarian law principles of necessity, proportionality and discrimination.

To maintain that the sanctions are targeting Iran's regime and do not affect the lives of ordinary people is completely disingenuous. Even though this time these measures have been somewhat more the focus of public attention, the lack of regard for the human toll the sanctions are exacting is staggering, following the devastating damage done to the people of neighbour Iraq not so long ago. Indeed, the Iraqi and Iranian sanctions programmes reach the same results just by different means: whereas Iraq was formally subject to a full financial and trade embargo of the UN Security Council, the US has imposed a variety of restrictions and penalties on Iran which now equate to an almost total ban.

Joy Gordon's words from 2013 seem to be once again very relevant, and not only with reference to Iran:

> *The end result is that the two sets of measures, both those imposed by the Security Council and those imposed unilaterally by these nations, in combination affect Iran's economy, infrastructure, and civilian population in a way that is deeply damaging and indiscriminate, affecting even food security, access to health care and education.*[62]

We discussed how the catastrophic impact of comprehensive trade embargoes mandated in the 1990s under the command of the United Nations, especially as regards Iraq, induced a move away from broad sanctions to so-called targeted or smart sanctions. As stated by the UN Special Rapporteur on Unilateral Coercive Measures, "it could be hoped that this move would be irreversible" (UNGA 2018, 11). While United States has mostly been alone in applying measures on Iran (and others) that are so indiscriminate, this has proven not to be the case.

Throughout the present work, we have questioned on multiple occasions the 'smartness' of targeted sanctions and the only muted criticism they receive from the international community. At the same time, it was recognized that broad financial and trade sanctions have the potential to harm innocent civilians in a much stronger way. With these waves of open-ended and comprehensive sanctions against Iran, the Trump administration has chosen to follow the latter course of action, despite many consider these measures to be an explicit violation of international human rights and humanitarian law. However, while, as we saw, obligations do exist in relation to the application of unilateral and extraterritorial coercive measures, there is no international accountability system for States that do not conform to international law. In the meantime, Iran, and with it the Middle East, remains dangerously on the edge.

[62] Gordon J. (2013), "Crippling Iran: The U.N. Security Council and the Tactic of Deliberate Ambiguity", *Georgetown Journal of International Law*, 44(3), p. 975.

CONCLUSION: A MORAL IF NOT A LEGAL FAILURE?

Already in 1967, Norwegian sociologist Johan Galtung criticised the conventional 'pain-equals-gain' understanding on sanctions of the time, which assumed that the greater the economic damage inflicted on a population, the higher the likelihood of obtaining compliance from the target State. Soon enough, the adverse humanitarian consequences resulting from the early cases of big power economic coercion prompted several observers to "question whether sanctions can ever be an ethical tool, or other than harmful, to human rights" (Lopez 2013, 774).

The question that we explored in the present work is indeed how sanctions can be a legitimate policy tool for the promotion of human rights when they also perpetuate the suffering for the ordinary people who are least responsible for the reprehensible conduct that has led to these measures in the first place. Despite being the tool of choice for the Security Council to maintain or restore international peace and security in the post-Cold War world, the experience of the last decades shows that sanctions are not 'flawless' in their potential humanitarian impact, even when they are designed in order to put direct pressure on the political leadership responsible for wrongdoing without harming the population of the sanctioned State.

In fact, if such measures result in targeted leaders strengthening their autocratic powers, an increase in their recourse to repressive and human rights-violating policies, also contributing to the large-scale systemic corruption of the incumbents' rule, they are not only ineffective, they are dangerous.

Given these concerns, Gordon affirmed that any effort to examine the possible morality of sanctions will only have the counterproductive consequence of disguising their immorality. In her words, "establishing criteria for the ethical use of sanctions does not resolve these contradictions, but instead masks them" (Gordon 1999, 142). Yet, our criticism of sanctions does not go as far as saying that their use is never justified. Moreover, it is simply a statement of fact that sanctions are here to stay. Besides military intervention, they are the only instrument of foreign policy pressure which allows States and international organisations to react to crises and human rights abuses abroad (Lopez 2013).

In the meantime, we saw that a key development in international law as a result of twenty years of international sanctions has been the emergence of a consensus view that some human rights compliance obligations do apply to the imposition of Chapter VII and autonomous sanctions.

While there is no specific provision in the UN Charter that sets out any standard for the proper application of collective sanctions, let alone for unilateral restrictive measures, as a result of own practice of the Security Council and individual States, authoritative interpretations by organs of the UN system and sanctions scholars, core human rights and humanitarian law norms and principles have come to represent the standard gauge for determining the scope of 'acceptable' collateral damage of these measures and in this way their legality and legitimacy (O'Connell 2002). On the other hand, there is still no universally authoritative mechanism at the international level to determine if an international sanction meets these criteria and is therefore legal under international law.

> *The decision to impose sanctions should be approached with prudence and evaluated with a more realistic perspective on their adverse moral implications. The case against targeted sanctions should give grounds for heightened caution – for recognizing that any coercive intervention can have far reaching consequences that are morally problematic.*[63]

In conclusion, it may be stated that there is a requirement of a better integrated strategy when weighing the application of sanctions. The success of having the targets to alter their conduct results less over time from the economic harm suffered and more from the potential gains to be made at the bargaining table to which the imposition of sanctions brought them (Lopez 2013). Other policy instruments – particularly by way of incentives such as foreign aid – might eventually be as, if not more, effective to compel the cessation of a wrongful behaviour and at the same time avoid the collateral damage that sanctions so often carry with them.

[63] Early B., Schulzke M. (2019), "Still Unjust, Just in Different Ways: How Targeted Sanctions Fall Short of Just War Theory's Principles", *International Studies Review*, 21(1), p. 58.

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SUMMARY

International sanctions (or restrictive measures, as they are officially known) have long been a feature of international relations, and with them wider concerns about their humanitarian implications. But human rights issues connected to their use have become the focus of heated debate, as the last decades have indeed seen an unprecedented rise in the practice of sanctions as a central foreign policy tool in international relations.

Judging from recent experience, an observer would therefore expect that an international consensus has emerged about sanctions as a legitimate means of foreign policy-making. Yet an analysis of the adverse humanitarian consequences of these measures may draw a quite different conclusion. Given these concerns, the decisive question that the present work will try to answer is precisely whether international sanctions can ever be a humane instrument for achieving foreign policy goals, and if so, under what conditions.

In the first chapter, we trace the evolution towards more ‘targeted’ types of sanctions to address the ethical concerns raised by traditional broad sanctions. Afterwards, we study how sanctions, both comprehensive and targeted, influence the relationship between the ruler and the ruled, often leading to unintended effects in the form of negative human rights consequences for innocent civilians in target States.

In the second chapter, we examine the question of whether the Security Council is bound to comply with international humanitarian and/or human rights law when imposing sanctions. The main conclusion is that the right to impose sanctions is not unlimited. Against this background, we analyse the necessary standards applicable under public international law to appraise the lawfulness and legitimacy of international sanctions.

In the third chapter, we evaluate the legality of unilateral sanctions under international law. We contend that these measures are impermissible under international law, unless they meet stringent criteria. This chapter will also discuss certain worrying concerns arising from the growing use of ‘extraterritorial’ sanctions in international relations, and the impact that these may have on the enjoyment of the human rights of the sanctioned and third-party countries.

In the fourth chapter, we apply the preceding analysis to practice, by studying the significant issues raised under international law by the current US ‘maximum pressure’ policy against Iran. Ultimately, the last section will summarise and comment on the main conclusions and point out the implications of the present research.