Sanctions and International Law[1]

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Abstract

This paper demonstrates that, under modern international law, the imposition of economic sanctions is only admissible as a measure of collective security under the authority of the United Nations (UN) Security Council (multilateral) or as countermeasure when a state is either directly affected by illegal acts by another state, or acts in the defence of vital security interests under the "security exceptions" of the General Agreement on Tariffs and Trade (GATT) (unilateral). In all other cases, unilateral sanctions, and in particular their extraterritorial enforcement, are a violation of the norms of national sovereignty and non-interference in the internal affairs of other states. Against this background, the paper analyzes the notion of coercion in the context of the UN Charter, undertakes a structural comparison between multilateral and unilateral sanctions regimes, and analyzes the political use of unilateral sanctions as a major challenge to the international rule of law.[2]

Key words: sanctions; international law

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Coercion in Modern International Law

Since the end of absolutist rule in Europe and following the fiasco of great power politics in the course of World War I, international law was gradually reoriented toward *cooperation* on the basis of *sovereign equality* of states. The absolute (imperial) understanding of sovereignty – in the sense of unrestrained exercise of power by a ruler who is answerable to no one, whether within or outside his realm – was transformed into a perception of joint responsibility among equals.[3] The jus ad bellum, the right to wage war as an attribute of sovereignty, has been effectively abrogated by the Briand-Kellogg

[1] The editorial board received the article in February 2019.

[2] Analyzing existing regulations in the context of contemporary international law and identifying normative contradictions, the paper applies a qualitative empirical approach.

[3] This also follows from the affirmation in the UN Charter [UN, 1945] of "sovereign equality" as a "Principle" determining each member state's actions (Article 2(1)), in tandem with the provision of Article 2(2).

Pact of 1928.[4] After World War II, the ban on the use of force between states was incorporated into Article 2(4) of the Charter of the United Nations (UN).[5] Affirming the "importance of the progressive development and codification of the principles of international law" for a stable order of peace, in 1970 the UN General Assembly adopted the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations [UN, 1970]. In this resolution, the international community recalled the "duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State." The Declaration explicitly stated, as a principle of international law, the "duty not to intervene in matters within the domestic jurisdiction of any State," an obligation that is also binding upon the United Nations itself according to Article 2(7) of the Charter.[6]

In the context of modern international law based on norms derived from the notion of sovereign equality of states, *coercive measures* against states[7] – whether political, military or economic[8] – are only admissible on the basis of *exception*, i.e. as emergency measures: (1) to maintain or restore international peace and security (multilateral), and (2) as measures in defence of legitimate rights or vital (national) interests of states (unilateral). Measures under (1), defining the organization's system of "collective security" under Chapter VII of the Charter, are within the exclusive competence of the United Nations Security Council [de Wet, 2004]. Measures under (2) are based for example on the right of states to react to violations of treaty obligations by any state (in relations with the sanctioning state) or to defend vital security interests in matters of economic relations with other states. Whether taken by a single state or a group (alliance) of states, those measures, in their very nature, are *unilateral*, in strict distinction from the *multilateral* action of the Security Council on behalf of the community of states as such. Coercive measures under (1) include complete or partial interruption of economic relations as well as of means of transport and communication and, ultimately, the use of armed force [UN, 1945, Art. 41, 42], while measures under (2) are confined to non-military means.[9]

[4] Article I: "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another." Article II: "The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means" [Kellogg-Briand Pact, 1928].

[5] "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state..." [UN, 1945].

[6] "Nothing in the present Charter shall authorize the United Nations Organization to intervene in matters which are essentially within the domestic jurisdiction of any state..."

[7] For an overview of the problem in the context of actual debates see Matthew Happold and Paul Eden [2016].

[8] On the legal and political dimension of economic sanctions see A. Kern [2009].

[9] In this paper, the focus of the analysis is on *economic* sanctions. The resort to unilateral sanctions, whether justified or not in the defence of vital security interests or national interests, is not to be confused with a state's use of *military* force, individually or with a group of states acting in its defence, in the case of an armed attack. These are different legal categories. Furthermore, the "inherent right of individual or collective self-de-

In the multilateral framework, economic sanctions are one of the tools, also including military force as last resort, to maintain or restore international peace and security (a goal that is directly related to the principle of the non-use of force as defined in Article 2(4) of the Charter). In the context of unilateral action, sanctions are a "measure of last resort" to induce another state, after negotiations have failed, to cease behaviour that violates the rights or affects vital security interests of the sanctioning state.[10]

It is a truism that coercive measures in and of themselves are defined by the actual power the enforcing state(s) or intergovernmental organizations possess. Coercion without actual power is mere *recommendation* – in fact, a contradiction in itself. Any legal norm, whether domestic or international, requires a mechanism of enforcement that is based on what Max Weber called the *Gewaltmonopol* (monopoly of force) of the state.[11] It is, thus, obvious that any policy of sanctions is directly related to the *actual power constellation*. Sanctions are only effective if there are reliable mechanisms of enforcement, i.e. if they are imposed by a state, group of states or organization that is the *predominant actor* in a given constellation. It is no surprise that – especially since the collapse of the global power balance upon the end of the Cold War – sanctions, from the perspective of those states, have become a favoured tool of foreign policy.

At the level of *multilateral* action, this has meant an increase in the number of Chapter VII resolutions of the Security Council, enforcing partial or comprehensive sanctions regimes or authorizing the use of military force (in particular since the Council's decisions in the Iraq crisis since 1990).[12] Coercive action of the Council became possible because, in the new constellation, there suddenly was less restraint on the most powerful global actor from among the permanent members of the Council. In this period, post-1990, and particularly after the dissolution of the Soviet Union in 1991, no state (permanent member) in the Council dared to challenge the United States by resorting to the veto right. This is the procedural aspect, so to speak, of the imbalance in power relations, meaning that, in this period, no permanent member made use of its special privilege under the voting procedures of the Security Council according to Article 27(3) of the Charter.[13]

At the *unilateral* level, there was an even more drastic increase in the number of sanctions since 1991, when President George H. W. Bush declared his New World Order at the onset of the Gulf War against Iraq [U.S. Government Publishing Office, 1991]. This development was also directly related to the imbalance of power relations at the

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fence" (as *unilateral* emergency measure), as defined in Article 51 of the Charter, is only valid until the Security Council has taken action under the Charter's provisions of collective security (i.e. at the *multilateral* level).

[10] As mentioned above, unilateral sanctions are not to be confused with individual or collective self-defence under Article 51 of the Charter. Unlike in the case of measures of collective security under Chapter VII, use of force under Article 51 is not a measure of last resort, but an immediate reaction to an act of aggression until the Security Council has taken necessary measures to maintain the peace.

[11] On the definition in the context of his theory of state see M. Weber [(1921/2) 2009, § 17]. According to H. Kelsen [(1934) 2017, pp. 94ff] it is its very *enforceability* that defines a legal norm (in distinction from a moral norm). The aspect of enforceability is also implied in the phrase "international *rule* of law."

[12] For details see H. Köchler [2004a].

[13] On the veto provision in the framework of contemporary international law see H. Köchler [1991].

time – when there was much less fear by the dominant global actor of counteraction by other states who, unlike as under the bipolar balance of power after World War II, now found themselves facing only *one* hegemon. This is the material aspect of the imbalance of power relations, meaning that for the imposition of punitive measures in the form of sanctions, the sanctioning state, because of its overwhelming power, does not feel any need to calculate potential repercussions – not to speak of questions concerning the legality of these measures. The norm of "sovereign equality" of states notwithstanding [UN, 1945, Art. 2(1)], it is evident that an obviously weaker state realistically will not consider imposing sanctions on the stronger state. In the logic of power, not of law, it will always be the other way around. In other words, as a matter of realpolitik, sanctions only make sense if there is an *imbalance of power*. As regards the international rule of law, however, the use of coercive measures requires careful scrutiny in each and every instance.

The conceptual distinction between multilateral and unilateral sanctions must not be confused semantically with the distinction between individual and collective self-defence under the UN Charter. "Unilateral" means that one state or a group (collective) of states – acting as an organization (such as the EU) or as an ad hoc coalition, but not on behalf of the United Nations – imposes sanctions as measures of economic coercion. While legally justified under certain specific conditions, such acts do not result from any legal, let alone internationally binding, obligation. "Multilateral" sanctions, on the other hand, are measures imposed to exert economic pressure within the United Nations system of collective security. They are binding upon *all* UN member states. "Multilateral," in this context, means that sanctions are imposed by the international community as a whole, and therefore legally binding on all its members (in accordance with Article 24(1) of the UN Charter).[14]

Multilateral Sanctions

Under the United Nations system of collective security, the imposition of sanctions by the Security Council, under the provisions of Chapter VII of the UN Charter, is conditional upon a determination, by the Council, of the existence of a threat to or breach of the peace, or act of aggression [UN, 1945, Art. 39]. According to the voting rule of Article 27(3), any such determination as well as any subsequent imposition of coercive measures under Article 41 requires an affirmative vote of nine out of 15 members, "including the concurring votes of the permanent members."[15] Those measures, legally binding upon all member states, are meant to give effect to the Council's decisions relating to the maintenance or restoration of international peace and security. Article 42 authorizes the Council to take military action should it consider that eco-

[14] "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

[15] In view of repeated abstentions by a permanent member on Chapter VII resolutions (particularly since 1990), it is to be noted that, according to established Council practice, abstention is not considered to be in violation of the consensus requirement among the permanent members.

nomic sanctions or a blockade of transport and communication lines "have proved to be inadequate." In this sense, economic sanctions may be seen as part of an "arsenal of war," i.e. of a strategy of coercion that may culminate in the use of military force. In this multilateral context, any measure is subordinated to the higher goal of securing peace, and – in view of the enforcement of the norm of Article 2(4) on the non-use of force – of upholding the international rule of law.

Decisions of the Security Council under Chapter VII of the Charter are final. No legal review is possible in the existing normative framework of the UN – neither by the International Court of Justice (ICJ)[16] nor in any other context.[17] This raises the issue of arbitrariness since – unlike executive power in any domestic jurisdiction – the Council acts outside a framework of checks and balances. The problem also relates to the authority of the Council under Article 39: the determination of a threat to or breach of the peace, which must precede any decision on coercive measures under Chapter VII, cannot be challenged. The Council enjoys a virtually unlimited margin of discretion in what it considers a situation (incident) under Article 39, as it is also free in the subsequent choice of coercive measures. The list of such measures in Article 41, including economic sanctions, is explicitly non-exhaustive [UN, 1945].[18] The risk of arbitrary decisions is only mitigated by the consensus requirement of Article 27(3), not by any other provisions for checks and balances. This makes the importance of a *balance of power* among the Council's permanent members more than obvious.

What is at stake here was made drastically evident in the case of the comprehensive sanctions regime of the Security Council against Iraq. Once imposed, sanctions cannot be lifted unless all permanent members agree. Any permanent member can hold the Council hostage to its previous decisions. In the case of Iraq, the Council maintained the punitive measures over a period of more than 10 years – until, after the invasion and occupation of the country by the United States, that permanent member was satisfied with the situation, namely regime change in the targeted country.

There exists no legal remedy or corrective to the problem of arbitrariness in the Council's decisions on the imposition and scope of sanctions. In the UN system, Chapter VII resolutions have precedence not only over decisions of any other UN body, including the General Assembly and the ICJ, but also over any obligation a state may have in regard to international treaties. This is also the case for obligations under the rules and regulations of the World Trade Organization (WTO). When the Security Council

[16] This follows e.g., by implication, from the Judgment of the ICJ of 27 February 1998 in the case Libya vs. United States (Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie [Libyan Arab Jamahiriya v. United States of America]) [ICJ, 1998, esp. Para. 39–44]. In this Judgment, the Court held the view that it is only competent to decide on matters that are related to resolutions of the Council under Chapter VI (which, legally, are mere recommendations), but not when the Council has acted on the basis of Chapter VII (ordering coercive measures that are binding upon all member states and, as such, are final).

[17] Article 24(2) merely states that the Council "shall act in accordance with the Purposes and Principles of the United Nations." Under the UN system, there exists no body to monitor compliance of the Council with this requirement [UN, 1945].

[18] The wording in the Article is: measures "may include..."

imposes sanctions, the free trade norms of GATT (General Agreement on Tariffs and Trade) do not apply. As problematic as this may be from a strictly legal standpoint, in view of the Council's supremacy in the UN system the measures ordered by it are quasi "legal" by definition; or in the words of John Foster Dulles: "The Security Council is not a body that enforces agreed law. It is a law unto itself" [1950, p. 194].

Another serious problem in terms of the legality of sanctions regimes imposed and maintained by the Security Council is their compatibility with fundamental norms of human rights.[19] The Council's obligation under Article 24(2) is no assurance in that regard, since there is no effective monitoring of the Council's actions, and there is no possibility of legal redress, neither within the UN system nor by legal action from outside the organization. The comprehensive sanctions against Iraq are a case in point.[20] The Council maintained these punitive measures, amounting to a form of collective punishment of the entire population of the country, over a period of more than 10 years. According to a 1996 survey by a U.S.-based research team, these coercive measures caused death and suffering of hundreds of thousands of people [Harvard Study Team, 1996]. In actual fact, the Council, in the name of international security, applied coercive measures that resulted in grave violations of the basic human rights of the civilian population of an entire nation [Gordon, 2010, p. 231ff]. Because of the veto, it was impossible to lift the sanctions, and because of the Council's supremacy in decisions under Chapter VII, there was no way of effective legal challenge.[21]

In the absence of legal remedies and accountability under clearly defined rules, the only antidotes against an arbitrary use of coercive measures in the framework of the UN system of collective security are the mechanisms of international realpolitik. A functioning balance of power among the permanent members will be a more effective means to restrain major global players in their excessive and potentially illegal use of the Council's authority than any resolution or declaration by bodies, whether political or judicial, that are ultimately, in the architecture of the Charter, subordinated to the Security Council. The developments in the Council after the Libya resolution of 2011 [UN, 2011] particularly as regards the situation in Syria, have again made this obvious.[22]

Unilateral Sanctions

Since the collapse of the bipolar balance of power, the number of unilateral sanctions regimes has skyrocketed, with the most powerful global actor dominating the statistics.[23] This is again testimony to a law of realpolitik according to which the frequency of

[19] For a general analysis see, inter alia, M. Bossuyt [2000].

[20] Cf. the discussion of coercion in modern international law, above.

[21] On the legal and moral aspects of the Security Council's sanctions policy see Köchler [1995a, pp. 117–54].

[22] For an assessment of the problematic aspects of multilateral sanctions within the UN framework of collective security, see also G. Hakimdavar [2014].

[23] According to a recent empirical study, the number of active sanctions regimes has increased from under 100 (around the year 1990) to over 600 in just 15 years. See F. Jonas [2017, p. 1].

resort to coercive measures by individual states is directly proportional to the *imbalance* in power relations.[24]

Unlike multilateral sanctions of the Security Council, unilateral coercive measures are only legal under certain specific conditions. In modern international law, state sovereignty is not a license for an arbitrary, unrestrained projection of power. Accordingly, coercive measures by one state, or a group of states, against another state cannot simply be justified as an outflow of absolute state power that is accountable to no one. Sovereignty is defined on the basis of *mutuality*, i.e. as sovereign equality, which ties the international conduct of states to a clearly defined set of norms. In this framework, there are essentially two distinct normative scenarios where unilateral sanctions may be considered in conformity with international law: (1) when national security is at stake and (2) as countermeasures against internationally wrongful acts by states.

In general, unilateral economic sanctions are incompatible with the WTO's free trade regime. The principle of *non-discrimination* in international trade stands at the core of the rules and regulations of GATT,[25] as set out in Article I ("General Most-Favoured-Nation Treatment").[26] Non-discrimination as defined by GATT is also in conformity with the common sense expectation that the trading partner beyond the borders should be dependable and predictable, which obviously cannot be the case if governmental decisions violating the rule of non-discrimination make the continuation of trade relations – and the fulfilling of contracts – impossible.

As regards the legality of unilateral sanctions under scenario (1), the "security exceptions" under Article XXI of GATT and Article XIV of the General Agreement on Trade in Services (GATS) are particularly problematic.[27] These provisions have been extensively used by states to justify punitive economic measures for the mere assertion of national interests, or as part of an actual agenda of power politics. The provisions are phrased in a rather vague and imprecise manner, allowing states to decide in a self-serving way whether the conditions for an exception are met. According to Article XXI of GATT, a WTO member may invoke these exceptions when its "essential security interests" are at stake.[28] This specifically relates to the following: trade with "fissionable materials," "traffic in arms, ammunition and implements of war," and any action of a

[24] Cf. also the general observations in the discussion of coercion in modern international law, above.

[25] General Agreement on Tariffs and Trade (30 October 1947), entered into force on 1 January 1948. The provisions, with modifications agreed in 1994 ("GATT 1994"), are still in effect in the framework of the World Trade Organization, established on 1 January 1995.

[26] Article I (1): " ...any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." This provision is mirrored in Article II of the General Agreement on Trade in Services (GATS), negotiated in the course of the establishment of the WTO and entered into force in January 1995.

[27] Apart from the use of the national security exceptions clause of GATT/GATS, we do not deal here with countermeasures in disputes over the application of the rules and regulations of the World Trade Organization in cases of violations of these rules by a state party. These are handled on the basis of the organization's "Dispute Settlement Understanding" (DSU).

[28] "Nothing in the 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 ..."

state taken "in time of war or other emergency in international relations"[29] (without any further specification or definition of the term "emergency").

In the Agreement, there are no provisions requiring states to give any reasons or provide specific evidence for the existence of a threat to their (undefined) "essential security interests." How a sanctioning state makes use of an exception from free trade rules is at the sole discretion of that state. Although there are, within the framework of the WTO, mechanisms to resolve disputes between members (with the General Council convening a Dispute Settlement Body and an Appellate Body at WTO headquarters in Geneva consisting of seven independent persons), the criteria for so-called "self-judging security exceptions"[30] have not been subject to arbitration or scrutiny so far. Exception rules of this kind almost unavoidably invite abuses of power. The vagueness of these provisions, so extensively used by contracting parties,[31] has made GATT almost a self-defeating statute when it comes to the enforcement of free trade rules.

As explained above in the discussion of multilateral sanctions, exceptions from free trade rules may also be claimed by states in regard to their obligations under the UN Charter. This applies to resolutions of the Security Council under Chapter VII with which all members must comply (Article 24(1)). Consequently, sanctions decisions of the Council overrule free trade regulations of other intergovernmental organizations as well as treaties between member states. This is reflected in Article XXI(c) of GATT, which provides that no contracting party may be prevented "from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security." Unlike the provisions under Article XXI(b), this particular provision is not ambiguous. It clearly relates to Chapter VII resolutions of the Security Council. Certain interested parties, however, have claimed in the past that exceptions from free trade rules resulting from their obligations under the Charter may also be invoked independently of Chapter VII resolutions. However, this interpretation cannot be derived from the actual wording of the text.[32] The interpretation is also highly questionable insofar as it may invite arbitrary action by states that are more interested in the unhindered pursuit of their national interests than in ensuring respect for international law. The obligation under Article 24(1) of the Charter, mirrored in the above-quoted provision of GATT, must not be used as a pretext for the unilateral imposition of sanctions.

Apart from the vaguely defined and often abused exceptions under international trade law, unilateral sanctions may also be admissible under above-mentioned scenario (2): as countermeasures against internationally wrongful acts by states. Again,

[29] Article XXI (b), subparagraphs (i) (ii) (iii) respectively.

[30] For details see R.P. Alford [2001, pp. 697–759].

[31] Sweden's use of the provision in 1975 to justify restrictions on the import of certain footwear dramatically illustrates the problem of an arbitrary use of these exceptions. The government argued that the decline in domestic production of a certain type of shoes "had become a critical threat to the emergency planning of Sweden's economic defence as an integral part of its security policy" (sic!) [Alford, 2011, p. 704].

[32] Under the UN Charter, "obligations" of this nature (i.e. regarding international peace and security) stem from Chapter VII resolutions of the Security Council. A single country cannot act on behalf of the Council. In the absence of a resolution by the Council, there simply is no binding obligation for any state. When it comes to collective security under the UN Charter there is no space for "self-judging" measures.

the problem lies in the lack of precision of the respective provisions. The articles on Responsibility of States for Internationally Wrongful Acts, acknowledged by the UN General Assembly in 2001 [UN, 2001],[33] though legally non-binding, have repeatedly been used to justify unilateral sanctions regimes.[34] Article 49 (Object and limits of countermeasures), Paragraph 1 provides that a state may, under certain conditions, "take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations." According to Article 50, these measures must not constitute a "threat or use of force" under the United Nations Charter, must not be in violation of "fundamental human rights," and must not be of the nature of "reprisals." This leaves no room for self-righteous actions by self-appointed enforcers of the law on behalf of the international community. Collective enforcement action is the sole responsibility of the United Nations Security Council. The main issue here is that, according to the formulation of Paragraph 1, not *any*, but only an "injured State," has the right to take countermeasures, and on a temporary basis (Paragraph 2). The "injured" status must not arbitrarily be expanded to serve the political agenda of other states that are not directly affected. Under Article 49, there is no justification for action against a "responsible" state by a third state *on behalf* of an "injured" state.

Apart from the rather imprecise and often legally dubious exceptions under above-mentioned scenarios (1) and (2), unilateral economic sanctions constitute serious violations of general international law. They are at variance with the fundamental norm of sovereign equality (Article 2(1) of the UN Charter) and, subsequently, the prohibition of interference in the internal affairs of states (implied in Article 2(7)).[35] Especially in situations of armed conflict (whether domestic or international),[36] those coercive economic measures may, as in the multilateral context, also violate human rights.[37]

In the absence of legal justification, these measures are often cloaked in the garb of human rights, democracy or the rule of law. However, in the present architecture of international law, any coercive action must take place under the authority of the United Nations Security Council, provided that the Council determines possible violations of the above values and principles as threats to the peace under Article 39 of the Charter.[38] As has often been the case in recent years, ideological claims in support of sanctions

[33] The text was adopted by the International Law Commission (ILC) of the United Nations (2001) and submitted to the UN General Assembly as part of the Commission's regular report.

[34] For an overview and analysis of the notions of "internationally wrongful act" and "state responsibility" according to the ILC see D.M. Bodansky and J.R. Crook [2002, pp. 773–91].

[35] Cf. also the affirmation of this norm in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations [UN, 1970], that explicitly states the "duty not to intervene in matters within the domestic jurisdiction of any State..."

[36] Cf. the blockade imposed by Saudi Arabia and its allies on Yemen. According to an assessment of the UN Special Rapporteur on human rights and international sanctions, Idriss Jazairy, the blockade "involves grave breaches of the most basic norms of human rights law" [UN, 2017].

[37] For a general assessment see, inter alia, I. Jazairy [2018, Agenda Item 3].

[38] Cf. the discussion of multilateral sanctions, above.

may actually serve as cover for the pursuit of narrow economic or strategic interests – and in particular, for the global projection of power by dominant players who seem to define their sovereignty in an exclusionary sense, and without any respect for multilateral treaty obligations.

With the exception of cases under (1) and (2) above, unilateral sanctions also raise the question of *extraterritorial jurisdiction*, a highly disputed notion in international law.[39] The International Law Commission of the United Nations (ILC) has described the problem in the following way: "The assertion of extraterritorial jurisdiction by a State is an attempt to regulate by means of national legislation, adjudication or enforcement the conduct of persons, property or acts beyond its borders which affect the interests of the State in the absence of such regulation under international law" [UN, 2006].

This aspect of power politics has been particularly evident in the unilateral sanctions of the United States on the basis of executive orders (EO) of the president, according to the International Emergency Economic Powers Act of 1977. It gives the president the right to declare a national emergency to deal with "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States,"[40] and to prohibit financial and commercial transactions.[41] Although Paragraph (b) of Section 1702 of this law specifies that the authorities granted to the president "may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared [...] and may not be exercised for any other purpose," the actual practice of the almost 30 "emergencies" declared since 1979 has demonstrated that the margin of discretion enjoyed by U.S. presidents is extremely wide.[42] This invites arbitrary and erratic decisions.[43] The provision according to which not only threats to "national security," but also threats to "foreign policy" and "economy" – without precise definition – entitle the president to order coercive measures against officials and institutions of other states has indeed encouraged an aggressive assertion of national interests.[44] In tandem with vaguely defined, often dubious ideological justifications for the declaration of emergencies and imposition of sanctions, the enforcement of this law has been tantamount to blatant interference into the domestic affairs of the targeted countries.[45]

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[39] The concept is most frequently used in international criminal justice; cf. note 49 below.

[40] United States Code, Title 50, Chapter 35, Section 1701.

[41] Loc. cit., Section 1702.

[42] The margin of discretion is also an issue regarding decisions of the Security Council under Article 39 of the UN Charter, with the remarkable difference, however, that in the Council the arbitrariness is mitigated because any determination under this Article requires consent among the five permanent members.

[43] On the attempt of Congress to limit, through this law, the extensive powers of the president under the Trading with the Enemy Act of 1917 cf. also The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power [1983].

[44] For an alternative approach see the earlier study by J.J. Collins and G.D. Bowdoin [1999]. According to the authors' assessment, the United States can cope with complex human rights and security problems "without a preemptive or ill-considered resort to unilateral economic sanctions" [p. 2].

[45] This has been particularly obvious e.g. in Executive Order 13818 [2017, pp. 6039 ff]. It is to be noted that this EO also quotes, inter alia, the Global Magnitsky Act as additional legal basis.

The arrogation of sovereign rights by way of unilateral sanctions in open violation of international law has been particularly obvious in two laws adopted by the United States Congress. Both, the Global Magnitsky Human Rights Accountability Act (GMA) [2016][46] and the Countering America's Adversaries Through Sanctions Act (CAATSA) [2017], claim a right of the United States to interfere into the sovereign domain of other states, whether on the basis of human rights (GMA) or in regard to specific policies of Iran, Russia and North Korea (CAATSA). The GMA "authorizes" the president of the United States to impose entry and property sanctions against any non-U.S. national in connection with responsibility for or support of (purported) serious human rights violations anywhere in the world. The CAATSA, specifically targeting Iran, Russia and North Korea, entitles the president to impose sanctions, inter alia, in connection with Iran's military programme and against persons responsible for human rights violations in Iran (Countering Iran's Destabilizing Activities Act); with Russia's policies concerning the economy (crude oil projects), cyber technology and human rights (Countering Russian Influence in Europe and Eurasia Act); and with North Korea's economic and financial activities as well as defence industry (Korean Interdiction and Modernization of Sanctions Act).[47]

These two laws are tantamount to a *global projection of U.S. sovereignty* for which there exists no legal justification in any shape or form. Not only do they constitute a violation of the sovereignty of other states[48] but in the total absence of due process they also institutionalize judicial arbitrariness in the actions of the world organization's most powerful member and seriously undermine the system of international law on which the United Nations is built. The passing of these bills has once again demonstrated the adverse impact of the absence of a balance of power on international law. In the reasoning of the GMA in particular, with the U.S. seemingly insisting to establish itself as global arbiter of human rights and the rule of law, there exists a certain structural similarity to the dubious rationale of "universal jurisdiction" in international criminal law.[49] Not surprisingly, certain states closely aligned with the U.S. have emulated this approach and adopted their own version of the GMA.[50] In addition to the universal sovereignty claim implicit in the GMA (that tries to justify interference by reference, among other norms and principles, to fundamental human rights), the CAATSA, without any inhibition puts the economic and strategic interests of the United States above international law, thereby totally undermining

[46] This law was preceded by the Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012 (Public Law 112–208), which specifically related to Russia.

[47] On signing the law, President Trump criticized it as "seriously flawed," stating that, "[b]y limiting the Executive's flexibility, this bill makes it harder for the United States to strike good deals for the American people, and will drive China, Russia, and North Korea much closer together" [The White House, 2017].

[48] The GMA's self-declared "primary" jurisdiction covers all states, while CAATSA covers three states specifically. However, its extraterritorial application implies a kind of "secondary" universal jurisdiction that potentially covers all states.

[49] Cf. the analysis of H. Köchler [2004b, pp. 33ff].

[50] This is the case with the United Kingdom, Canada and the Baltic states.

the principle of sovereign equality of states. The wording of the Act is clear and unambiguous testimony to these intentions.

The global scope of the GMA implies an extraterritorial understanding of the application of U.S. law, in fact an absolute, imperial interpretation of sovereignty that is at variance with modern international law. Similarly, the provisions for the extraterritorial enforcement of sanctions in the CAATSA and other U.S. sanctions regimes, euphemistically described by the U.S. as "secondary sanctions," are in outright contradiction to the basic principle of fairness in relations between sovereign states. Irrespective of the legal evaluation of unilateral sanctions in a given case, their extraterritorial enforcement is *intrinsically illegal*. It implies the violation of economic rights – or sovereignty rights, respectively – of third parties. Under no circumstances is it acceptable in legal terms that third states which are not involved in a dispute a state may have with another state can be subjected to unilateral sanctions of that state against the second state. These "secondary" – i.e. third-party – sanctions may also infringe upon treaty obligations of third parties. In general, no state has the right to dictate to other states, or individuals and companies in other states, how they conduct their economic relations or go about their business. More than 20 years ago, a similar controversy arose around the so-called Helms-Burton Act [1996][51] by which the United States enforced its unilateral sanctions against Cuba also vis-à-vis companies from third countries.[52]

By including provisions for so-called secondary sanctions in its unilateral sanctions regimes, the United States assumes the right to take action against any foreign government or company doing business with a sanctioned state, or sanctioned companies or individuals in that state, if they have branches in the U.S. or undertake financial transactions via U.S. banks.[53] One of the most recent and drastic cases of an extraterritorial enforcement of sanctions involved measures imposed by the U.S. administration on the Equipment Development Department of China's Ministry of Defence, and its Director, under Section 231[54] of the CAATSA for buying military equipment from Russia.[55]

The contrast of this extraterritorial ("secondary") sanctions practice with the UN General Assembly's Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States [UN, 1970] could not be more striking. The Declaration solemnly states: "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."[56] Apart from constituting serious violations of state sovereignty resulting from outright interference

[51] Economic sanctions of varying scope and range against Cuba have been in place since 1960, initially under President Dwight D. Eisenhower and also under the provisions of the Trading with the Enemy Act [1917].

[52] For details see, inter alia, A. Puig [1997, pp. 65–9] and H. L. Clark [1999, pp. 61–96].

[53] For an overview and critical analysis of the practice since the 1990s see also Gordon [2016].

[54] "Imposition of Sanctions with Respect to Persons Engaging in Transactions with the Intelligence or Defense Sectors of the Government of the Russian Federation."

[55] For details of the use of CAATSA in regard to China's procurement of military equipment from Russia see the Special Briefing document of the U.S. Department of State [2018].

[56] Third principle in the Declaration, annexed to Resolution 2625 (XXV).

into the internal affairs of other states, these illegal secondary measures – in some cases even more than the "primary" unilateral sanctions – further increase tensions, undermine international security and may even trigger an escalation that could lead to armed confrontation.[57] By arrogating, through extraterritorial enforcement, a kind of multilateral authority, the sanctioning state also intrudes into the exclusive domain of the United Nations Security Council.[58]

In the present statutory framework of the United Nations, there are no effective legal mechanisms to independently investigate and adjudicate violations of the law that result from the unilateral application of sanctions. The International Court of Justice may only deal with legal disputes and propose a settlement if states have generally recognized its jurisdiction and referred the respective dispute to the Court for arbitration or if an international treaty provides for dispute settlement by the Court.[59]

The Politics of Coercion: Challenge to a Rule-Based International Order

Summing up, it can be said that, apart from instances of the defence of legitimate security interests or in cases where a state is directly affected by illegal acts of another state, unilateral sanctions are a tool of international politics that is incompatible with the norms of diplomacy and peaceful co-existence among nations. As is evident from the provisions of Chapter VII of the UN Charter,[60] multilateral sanctions are coercive measures just one stage below the use of armed force. In moral terms, measures of this type share the characteristics of war. U.S. president Woodrow Wilson minced no words in a commentary shortly after World War I: "A nation that is boycotted is a nation that is in sight of surrender. Apply this economic, 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."[61]

Multilateral sanctions, enforced by the United Nations, are an instrument of collective security. In that regard, they are not only morally, but also legally justified[62] in

[57] These practices were also sharply criticized by the U.S. Chamber of Commerce. In a briefing document of 15 September 2016, the Chamber notes: "some sanctions legislation has imposed restrictions on commercial activity in an extraterritorial fashion that incites economic, diplomatic, and legal conflicts with our allies" [U.S. Chamber of Commerce, 2016]. Cf. also the earlier analysis by H. Wolff [2006].

[58] See the discussion of multilateral sanctions, above.

[59] This is the avenue Iran and Qatar decided to pursue concerning the unilateral sanctions imposed on them by the United States and Saudi Arabia (and allies) respectively. Iran has invoked Article XXI, paragraph 2 of the Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran (signed at Tehran on 15 August 1955, entered into force on 16 June 1957), which provides that any dispute regarding the application of the treaty "shall be submitted to the International Court of Justice." Qatar invoked Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination [UN, 1965], which stipulates that any dispute over the interpretation or application of the Convention "shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision."

[60] Articles 41 and 42.

[61] Address in 1919, quoted in S.K. Padover [1942, p. 108].

[62] Provided they do not violate fundamental human rights of the population in the targeted country. See Bossuyt [2000] and Köchler [1995b].

view of the security interests of the international community represented by the Security Council. Ultimately, their rationale is one of law enforcement at the global level, meant to ensure compliance with the norm of the non-use of force and, subsequently, to maintain peace among nations. It is obvious that the legitimacy of this mechanism essentially depends on the commitment, stipulated in Article 24(2) of the Charter, of the Council's permanent members to the Purposes and Principles of the United Nations.

If unilaterally imposed, whether by a single state or a grouping or alliance of states, sanctions, due to their outright negation of sovereign equality, effectively belong to the law of the jungle. They are part of the old system of international relations that is best described by the German term *Souveränitätsanarchie*[63] – where self-help in defence of the national interest, not a joint commitment to a rule-based order, determined the interaction between states. In such a context, the jus ad bellum, the "right to wage war," as a prerogative of the sovereign state was seen as integral part of the law of nations.[64] This understanding of the international status of the state, including the right to use coercion, has effectively been abolished since the entering into force of the Briand-Kellogg Pact after World War I and the adoption of the Charter of the United Nations after World War II.

However, due to the absence of credible checks and balances, i.e. of effective deterrence in the post-Cold War era, unilateral sanctions have almost become the tool of choice for an *imperial projection of power*. The politics of coercion has increasingly undermined, in some respects even replaced, the rule-based international order envisaged by the founders of the United Nations. It is worthy of note, in this regard, that a recent report of the Human Rights Council of the United Nations also likens such policies to economic warfare: "It may reasonably be argued that applying a comprehensive regime of unilateral coercive measures extending to the imposition of domestic sanctions legislation on third parties, the effects of which almost equate to those of a blockade on a foreign country, amounts to using economic warfare" [Jazairy, 2018, pp. 7 ff]. The special rapporteur further recalled the Council's emphasis on the promotion of the international rule of law "with a view to eliminating economic coercion as a tool of international diplomacy" [ibid., Ch. 6, Para. 51].[65]

Concerning unilateral sanctions and particularly their extraterritorial enforcement, there is, under these circumstances, no effective legal redress. The International Court of Justice in most circumstances lacks jurisdiction as well as enforcement power since, under Article 94 of the UN Charter, the authority of its judgments is tied to the Security Council (where a permanent member may veto any enforcement action, particularly when it is the sanctioning state). The dispute settlement mechanism of the World Trade Organization is not effective either, especially as regards the highly controversial self-judging security exceptions that totally undermine the free trade rules of the WTO.[66]

[63] "Anarchy among sovereign states."

[64] On the development of international law regarding the jus ad bellum see Köchler [2006, pp. 13ff].

[65] Cf. also Elements for a Draft General Assembly Declaration on Unilateral Coercive Measures and the Rule of Law, annexed to the Report.

[66] Concerning the scope of these exceptions and the view that the invocation of a security exception by a member state is non-justiciable see A.D. Mitchell [2017, pp. 292ff].

In the absence of adequate and tested legal procedures – and in view of an obvious inconsistency, not yet resolved within the UN system, between basic norms of the Charter and the principle of national sovereignty as interpreted by certain states[67] – the only alternative measure of redress against the arbitrary (and in itself illegal) use of unilateral sanctions is non-legal,[68] but not extra-legal: namely, *countersanctions* by targeted countries.[69] Especially as regards secondary (extraterritorially enforced) sanctions, joint action of affected third-party states may be the only efficient means to defend and safeguard national sovereignty.

In the harsh environment of global power politics, such a *corrective of realpolitik* will be indispensable as long as legal provisions are not ultimately effective. In this regard, the only reason for hope lies in the gradual emergence of a multipolar balance of power. The creation of new multilateral forms of cooperation at regional and global levels, enabling affected states to circumvent the trade and currency monopoly of sanctioning states, may eventually weaken the impact of unilateral measures by single states or intergovernmental organizations (with the exception of the United Nations) – and it may gradually prepare the ground for wider respect of the norms of international law, first and foremost the sovereign equality of states.[70] In any polity or constitutional framework, the law can only be upheld within a system of checks and balances, which at the international level requires a credible balance of power.

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[67] On the status of sovereignty and normative inconsistencies with other norms and practices in the contemporary system of international law see Köchler [2017].

[68] In terms of not resorting to (dubious or ineffective) legal procedures.

[69] Such countermeasures – as exceptions – are legally admissible also in view of Article 49 of the articles on Responsibility of States for Internationally Wrongful Acts [UN, 2001].

[70] Democratization of the United Nations would be an important step in that direction. See Köchler [2014].

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Санкции и международное право[1]

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В статье наглядно продемонстрировано, что в рамках современного международного права введение экономических санкций является допустимым инструментом обеспечения коллективной безопасности только в случае применения по решению Совета Безопасности ООН (меры многостороннего принуждения) или как контрмера в случае, если государство испытывает прямое или косвенное влияние неправомерных действий другого государства, или предпринимает действия для защиты своих жизненно важных интересов в соответствии с правилами ГАТТ об «исключениях по соображениям безопасности» (меры одностороннего принуждения).

Во всех других случаях односторонние санкции, особенно если они применяются экстерриториально, являются нарушением национального суверенитета и принципа невмешательства во внутренние дела других государств. Учитывая эти обстоятельства, автор статьи проанализировал сущность понятия «сдерживание» согласно Уставу ООН, сравнил режимы многосторонних и односторонних санкций, а также доказал, что односторонние санкции, вводимые по политическим мотивам, являются одной из основных угроз верховенству международного права.[2]

Ключевые слова: санкции; международное право

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[2] При анализе существующих механизмов регулирования в рамках современного международного права и выявлении нормативных несоответствий был применен качественный эмпирический подход.

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