

# The Sanctions Debate in the Work of the United Nations Since the 2000 Working Paper

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## Abstract

In recent years the lawfulness of certain types of sanctions and the question about the usefulness of sanctions in general have become topical and widely discussed issues. Of special significance is the expanding use by powerful states of unilateral coercive measures without Security Council authorisation, or beyond Security Council authorisation, to illustrate their displeasure with the domestic or foreign policies of certain members of the international community. Over time the nature of these measures has taken on diverse forms and their encroachment on human rights and freedoms has become a matter of international concern. This contribution examines the developments that have taken place in this context since the 2000 report of the Working Group on the negative impact of sanctions by focussing on the interventions by key United Nations bodies.

## Keywords

Sanctions; unilateral coercive measures; international law; United Nations Charter; developing countries; UN Security Council

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## 1 Introduction

This contribution in honour of the academic career of Charl Hugo, a dear friend and colleague, is inspired by a co-authored chapter on sanctions Charl and I wrote some time ago as part of a cooperative publication initiated by the faculties of law of the University of Johannesburg and Nelson Mandela University.<sup>1</sup> However, as far as scope and focus are concerned, the current piece stands apart from the co-authored chapter I have referred to and draws on the global debate since the 2000's on the adverse consequences of economic sanctions on the enjoyment of human rights and the legitimacy criteria for such sanctions. This debate has again assumed relevance following the Russian military offensive against Ukraine in February 2022 and the sanctions several Western states have imposed on Russia in response. The severity of these sanctions is unprecedented and has again highlighted the divisions in the international community on the lawfulness and usefulness of such sanctions.

At the outset some historical perspective must be provided. The Working Paper was produced at a time when the concept of smart sanctions targeting individuals in government by means of asset freezes, travel bans, and the criminalisation of certain financial transactions has replaced comprehensive economic sanctions as a means of changing government behaviour.<sup>2</sup> The imposition of comprehensive economic sanctions against Iraq in the 1990s and the hardship they caused for the civilian population with no effect on the government of the time were the turning points that necessitated the search for new measures to prevent or end state-sponsored wrongful conduct, causing foreign policy decisions to coalesce on the smart sanctions option.

## 2 The Working Paper of 2000

The 2000 Working Paper prepared by Prof Marc Bossuyt of Belgium on behalf of the then United Nations (UN) Sub-Commission on the Promotion and Protection of Minorities<sup>3</sup> raised several issues relating to the

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<sup>1</sup> Hugo and Strydom "Sanctions, Ships, International Sales and Security of Payment" 109-134.

<sup>2</sup> On the history of this development see Drezner 2011 *International Studies Review* 96-108.

<sup>3</sup> UN Doc E/CN.4/Sub.2/2000/33 (21 June 2000) (the 2000 Working Paper).

consequences of sanctions imposed by the UN, regional bodies and individual states. In the context of the concerns at the time, the Working Paper's sole objective was the promotion of international law and international solidarity and, importantly, the interests of civilian populations affected by the adverse consequences of sanctions.<sup>4</sup> This perspective anchored the substance of the Working Paper in the lawfulness and legitimacy of sanctions.

As the UN Security Council is authorised to impose sanctions under Chapter VII, Article 41 of the *UN Charter*, the Council's decision to do so must be in response to a threat to international peace and security or an act of aggression which violates the territorial integrity or political independence of a state or states and must therefore not be motivated by some other ulterior political or economic reason. A sanctions measure imposed under this authority and with the objective to restore international peace and security could be seen as a first level compliance with lawfulness and legitimacy. However, as the Working Paper illustrates, the lawfulness and legitimacy of sanctions are determined by a much wider normative framework which comprises *UN Charter* provisions outside Chapter VII as well as international human rights law and international humanitarian law.<sup>5</sup> In the case of the Charter provisions outside Chapter VII, Article 24 of the *UN Charter* instructs the Security Council, in fulfilling its primary responsibility for ensuring international peace and security, to act in accordance with the principles and purposes of the Charter.

The reference to "principles and purposes" of the Charter means in brief that the UN is mandated to take effective measures for preventing or removing threats to the peace or act of aggression;<sup>6</sup> to develop friendly relations among nations based on respect for the principle of the equal rights and self-determination of peoples;<sup>7</sup> to promote and encourage respect for human rights;<sup>8</sup> and to be a centre for harmonising the actions of nations in the attainment of these goals.<sup>9</sup> Since these principles are considered by the Working Paper to be part of the normative framework for determining the lawfulness and legitimacy of sanctions some comment is necessary.

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<sup>4</sup> The 2000 Working Paper para 5.

<sup>5</sup> The 2000 Working Paper paras 18 *et seq.*

<sup>6</sup> *Charter of the United Nations* (1945) art 1(1).

<sup>7</sup> *Charter of the United Nations* (1945) art 1(2).

<sup>8</sup> *Charter of the United Nations* (1945) art 1(3).

<sup>9</sup> *Charter of the United Nations* (1945) art 1(4).

The effective measures, equal rights, and harmonisation provisions are the problematic ones. Regarding the effectiveness of a measure, the first question is whether effectiveness is an obligation of intent or of outcome. If it is an obligation of intent then the only question is whether the measure imposed is fit for purpose; namely, whether it is of a kind that may bring about the required change. If the obligation is one of outcome it means that the measure is considered effective only when the outcome (the change) has been achieved because of the measure. Both are indeterminable for lack of credible evidence; namely, whether a particular set of sanctions could bring about the required change or whether the change will occur as a result of the sanctions, more so since a sanctions regime could be one of several factors contributing to the outcome. Furthermore, the effective measures requirement in Article 1 of the Charter has a tenuous existence under the Charter itself because decisions by the Security Council on the imposition of sanctions can be vetoed by a permanent member under Article 27 of the Charter.

The equal rights provision implies, according to the Working Paper, that sanctions causing international dissension or interference with a state's legal rights may not be imposed.<sup>10</sup> But is it not inherently part of a sanctions regime to interfere with a target state's rights with the intent to force it to reconsider and remedy its wrongful conduct? And are dissenting views on whether sanctions should be imposed not the instinctive response to almost each and every condemnatory resolution imposing a sanctions regime on a delinquent member of the international community?

Equally problematic is the harmonisation provision. According to the Working Paper, sanctions imposed unequally on two countries which have committed the same wrongs would violate this provision.<sup>11</sup> Compliance with this principle is far removed from UN practice and from individual action taken by its members when a situation justifies the imposition of sanctions or another Chapter VII measure against a state who has committed a wrongful act in international law. In such instances inconsistent responses are the rule rather than the exception.

Among these principles, respect for human rights has proven to be the most meaningful in determining the lawfulness of sanctions. In particular is this visible in the evolution of the wide-ranging and comprehensive counter-terrorism measures imposed on states after the attacks on 11 September

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<sup>10</sup> The 2000 Working Paper para 25.

<sup>11</sup> The 2000 Working Paper para 27.

2001 in the United States. While human rights concerns were far removed from the thinking of the UN members in the Security Council when Resolutions 1267 (1999) and 1373 (2001) were adopted, human rights concerns became the subject matter of a rather comprehensive global counter-terrorism strategy aimed at including respect for the rule of law and human rights guarantees as crucial elements of the strategy and causing even the UN Security Council to design counter-terrorism strategies in accordance with human rights considerations. Case law that emanated from proceedings instituted by targeted individuals played a valuable role in the evolution of a normative human rights framework for determining the lawfulness of counter-terrorism measures implemented by individual states in response to Security Council-authorized sanctions.<sup>12</sup>

But as the following parts of this paper illustrate, the debate on the lawfulness of unilateral sanctions in general introduces a wide range of considerations in developing the elements of a global response to the increasing use by states of unilateral measures to illustrate their displeasure with the domestic or external policies of certain members of the international community.

### **3 The debate on unilateral sanctions**

The Working Paper is silent on whether unilateral sanctions adopted by individual states outside Security Council authorisation are unlawful. It merely states that such sanctions must meet the requirements for such measures which are inherent in the *UN Charter*.<sup>13</sup> Thus, by implication it means that individual states may resort to such measures if they comply with the elements of lawfulness enunciated in the Working Paper. The Charter contains no explicit prohibition on unilateral sanctions, and it may also be argued that an individual member of the UN is fully entitled, by virtue of its sovereign powers, to impose sanctions on another state whose conduct is in breach of international law. This may be the case particularly if the Security Council is disempowered by the veto.

However, the legality of the unilateral imposition of coercive economic measures had started to attract attention in scholarly contributions already at the time of the sanction's regime imposed on apartheid South Africa. For

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<sup>12</sup> For more on this issue see Strydom "Counter-Terrorism Sanctions and Human Rights" 395-430.

<sup>13</sup> The 2000 Working Paper para 40.

instance, in 1977 Blum<sup>14</sup> took the view that unilateral coercive measures constitute a violation of the rule of non-intervention in another state's domestic affairs (Article 2(7) of the *UN Charter*) and are also incompatible with Article 2(3) of the Charter, which obliges UN member states to first settle disputes by peaceful means. South African authors were divided in their views on the matter. Barrie,<sup>15</sup> for instance, relying on the interpretation by several authors of General Assembly resolutions and Charter provisions, considered such measures as interventionist and unjustifiable unless justified by self-defence or securing redress for an international wrong. He also denounced a justification of such measures on the basis of human rights because state practice and *opinion juris*, according to him, were still lacking at the time for human rights obligations to have become part of customary international law.<sup>16</sup> In opposing this view, Dugard relied on the condemnation of South Africa's racial policies as contrary to international human rights norms by the political organs of the UN and the International Court of Justice as instances of authorisation that transformed what "might have been an 'improper purpose' into a 'proper purpose' thereby rendering the economic sanctions employed lawful".<sup>17</sup>

Ironically, in the course of time the human rights argument in defence of unilateral economic sanctions against South Africa would be used to denounce the imposition of unilateral coercive sanctions, an about turn even the ANC found politically expedient and attractive after it came to power in 1994 and when it needed to defend the interests of its new alliance partners in the African Union and Non-Aligned Movement against individual coercive sanctions from Western countries regardless of the seriousness of the human rights violations in the target country.<sup>18</sup>

But be that as it may, the current objections against such measures have become firmly established in the organs of the UN and other organisations such as the African Union and the Non-Aligned Movement. It is therefore necessary to understand the nature and scope of the objections which have by now gained a certain level of consistency in the wording used in these fora to condemn the use of such measures by individual states. Because much of the work done on this topic is concentrated in the resolutions or reports of the former UN Human Rights Commission, the UN General

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<sup>14</sup> Blum 1977 *Tex Int'l LJ* 10-12. Also see Joyner 1984 *Vanderbilt Journal of International Law* 243-251.

<sup>15</sup> Barrie 1985/1986 *SAYIL* 42-47.

<sup>16</sup> Barrie 1985/1986 *SAYIL* 47-51.

<sup>17</sup> Dugard "Sanctions Against South Africa" 121-122.

<sup>18</sup> On this see Strydom "South Africa's Position and Practice" 37-54.

Assembly, the UN Human Rights Council and the UN Special Rapporteur on unilateral sanctions, the following parts of this paper focus on the contributions made by these bodies over several years.

### **3.1 Resolutions of the UN Human Rights Commission**

A 1994 resolution by the now defunct UN Commission on Human Rights called on the international community to "reject the use by certain countries of unilateral economic measures which are in clear contradiction of international law against developing countries with the purpose of exerting, directly or indirectly, coercion on the sovereign decisions of the countries subject to those measures".<sup>19</sup> Here "certain countries" mean "developed countries" who, the Commission clearly implies, are using their predominant position in the world to coerce weaker and more vulnerable members of the international community to do or refrain from doing something. The Commission then re-affirms that the use of such measures as a means of exercising political, economic or social pressure is in clear violation of international law since it prevents the full realisation of human rights by the people subjected to such measures.<sup>20</sup> What is not addressed is whether such measures, if adopted for the purpose of preventing or ending gross human rights violations, for instance, will still be unlawful. In a following paragraph a request is made to "all states" to refrain from adopting any unilateral coercive measures that are not in accordance with international law and the *UN Charter* that creates obstacles to human rights or impairs the full realisation of human rights.<sup>21</sup> Since this is not further clarified in the resolution, the formulation could imply that certain of such measures may well be justified in terms of international law and the *UN Charter*.

Until its demise in 2006, when it was replaced by the UN Human Rights Council,<sup>22</sup> the Commission upheld the salient elements of its formulations (above) in a number of resolutions.<sup>23</sup> Noteworthy for this period is the low-level response by states to the Commission's resolutions. Two reports by the UN Secretary-General in 1999 and 2000 respectively indicated that only six countries, namely Iran, Paraguay, Congo, Iraq, Russia, and Yugoslavia responded to the Secretary-General's request for inputs on the issue of

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<sup>19</sup> Resolution 1994/47 para 1.

<sup>20</sup> Resolution 1994/47 para 2.

<sup>21</sup> Resolution 1994/47 para 3.

<sup>22</sup> GA Res 60/251 (15 March 2006).

<sup>23</sup> See UN Commission on Human Rights Resolutions 1995/45; 1997/7; 1999/21; 2000/11; 2001/26; 2002/22; 2003/17; 2004/22; and 2005/14.

coercive unilateral resolutions.<sup>24</sup> According to a 2006 report only two countries, Azerbaijan and Cuba, responded to the Secretary-General's request for information.<sup>25</sup>

In reality, the resolutions of the Commission had no effect on state practice. Unilateral coercive sanctions continue to be implemented and enforced despite the resolutions adopted by UN organs, as the resolutions referred to acknowledged.

### **3.2 Resolutions of the UN General Assembly**

The UN General Assembly entered the debate on unilateral coercive sanctions as early as in 1983. A resolution adopted at the time condemned such measures entirely from the developed-developing countries dichotomy. Consequently, the Assembly identified the issue purely as a function of (guilty) developed countries taking advantage of their predominant position in the world economy to exert coercion on the sovereign decisions of (innocent) developing countries.<sup>26</sup> This imagery was maintained in the years between 1983 and 1994.<sup>27</sup>

Noteworthy for this period is the publication of a UN Secretary-General report on the issue,<sup>28</sup> requested by the General Assembly, which contained the views of an expert group on unilateral coercive economic sanctions. Regarding the current state of international law on the matter, it was the general view of the expert group that "international law lacked a clear consensus as to when [such] measures were improper" and that the international legal system also "lacked adequate mechanisms for monitoring and dealing with the use of [such] measures".<sup>29</sup>

A 1995 report by an expert group<sup>30</sup> has done much to lift the debate out of the ideological straight jacket that characterised the General Assembly resolutions on the matter. Giving conceptual meaning to measures such as unilateral coercive sanctions, the working group concluded that the imposition of such measures must be seen in the context of economic

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<sup>24</sup> UN Doc E/CN.4/1999/44 (21 December 1998) and UN Doc E/CN.4/2000/46 (20 April 2000).

<sup>25</sup> UN Doc E/CN.4/2006/37 (23 December 2005).

<sup>26</sup> GA Res 38/197 (20 December 1983) para 1 *et seq.*

<sup>27</sup> GA Res 39/210 (18 December 1984); 40/185 (17 December 1985); 41/165 (5 December 1986); 42/173 (11 December 1987); 44/215 (22 December 1989); 46/210 (20 December 1991); 48/168 (22 February 1994).

<sup>28</sup> UN Doc A/44/510 (10 October 1989).

<sup>29</sup> UN Doc A/44/510 (10 October 1989) Annex para 4.

<sup>30</sup> UN Doc A/50/439 (18 September 1995).



statecraft used as a tool of coercive diplomacy. As such, any definition of coercive sanctions must contain the following elements:<sup>31</sup>

- (a) the motives of the state imposing the sanctions and its policy objectives, i.e., targeting clearly identifiable objectional policies in the target state;
- (b) the suitability of the chosen economic instruments in bringing about changes in the objectionable policies of the target state;
- (c) the implicit assumption that the coercive measures will bring about political, economic and social tension in the target state, which in turn will result in policy changes.

While the working group was alert to the fact that policy objectives may reflect a broad range of options based on unilateral judgments by and specific interests of the imposing state as part of coercive economic diplomacy in inter-state relations, the working group meeting agreed that a classification of motives or objectives should include elements such as deterrence, compliance, punishment, and retaliation.<sup>32</sup>

On the selection of the type of coercive economic measure, the working group accepted that a selection would depend on the policy objectives, the intended economic impact, the economic size of the target state, and the strength of the economic ties between the imposing and the target state. It then concludes that the "interplay between these factors has to be analysed in specific cases in order to permit adequate generalisations".<sup>33</sup> It is unclear what generalisations the working group has in mind or what the role of such generalisations may be in the context of selecting a specific type of coercive economic measure. More helpful would have been some analysis of a rationality test for determining the lawfulness, or otherwise, of a specific measure. Rationality as a justification for a human rights infringement has its most visible presence in constitutional justice to determine whether there is a rational connection between a measure and its objective. Put differently, if the measure is considered fit for purpose, i.e. at least reasonably capable of achieving its objective, it will be considered lawful, provided that it is also proportional. There is no reason why this standard cannot be applied to

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<sup>31</sup> UN Doc A/50/439 (18 September 1995) para 39.

<sup>32</sup> UN Doc A/50/439 (18 September 1995) paras 42, 43.

<sup>33</sup> UN Doc A/50/439 (18 September 1995) para 44.

determine the lawfulness of a coercive economic sanction imposed unilaterally.

Equally cautious is the working group's conclusion on the legal basis for determining the lawfulness of coercive economic sanctions. In this instance the group singles out non-intervention in the domestic affairs of sovereign states (Article 2(7) of the *UN Charter*) and non-discrimination in the application of such measures (i.e., equal application in respect of similarly situated target states).<sup>34</sup> No explicit mention is made of human rights considerations in the selection and enforcement of coercive economic measures. In the case of sanctions against apartheid South Africa, for instance, the protection of human rights was frequently used to justify the non-applicability of Article 2(7) of the *UN Charter*. What the Working Group does concede, with little further explanation, is that evolving norms in international law may allow for exceptions but even then, the working group correctly pointed out that the measure must be proportional to the wrong committed by the target state.<sup>35</sup> But since proportionality is a general principle in international law for determining the lawfulness of enforcement measures,<sup>36</sup> one would expect it to be mentioned as part of the elements identified by the Working Group referred to above.

In the 1990's the UN General Assembly started to rename its resolutions on coercive economic sanctions. This caused the title to change from "unilateral economic measures as a means of political and economic coercion against developing countries" to "human rights and unilateral coercive measures". Seemingly, some shift in the category of target states has also taken place with the result that "any country" in addition to "developing countries" could now count on the backing of the Assembly.<sup>37</sup> States imposing unilateral coercive sanctions were also reminded about their human rights commitments in international treaty law and were on that basis requested to revoke such measures.<sup>38</sup> In essence this has remained the Assembly's position in subsequent years.<sup>39</sup>

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<sup>34</sup> UN Doc A/50/439 (18 September 1995) para 45.

<sup>35</sup> UN Doc A/50/439 (18 September 1995) para 46.

<sup>36</sup> Also see McLachlin date unknown <https://www.hkcfca.hk/filemanager/speech/en/upload/144/Proportionality,%20Justification,%20Evidence%20and%20Deference%20-%20Perspectives%20from%20Canada.pdf>; Jayakodi 2018 *Security and Human Rights* 90-119.

<sup>37</sup> GA Res 52/120 (12 December 1997) para 2.

<sup>38</sup> GA Res 52/120 (12 December 1997) para 3.

<sup>39</sup> See GA Res 53/141 (9 December 1998); 54/172 (17 December 1999); 55/110 (4 December 2000). Also see GA Res 75/181 (28 December 2020).

### 3.3 *The Human Rights Council*

The UN's Human Rights Council has reproduced the wording of the resolutions adopted by its predecessor, the UN Human Rights Commission, and by the UN General Assembly, with the result that its resolutions are unhelpful in bringing more clarity to the matter. For instance, in the preamble of one of its earlier decisions it is stated categorically that "unilateral coercive measures and legislation are contrary to international law, international humanitarian law, the Charter of the United Nations and the norms and principles governing peaceful relations among States".<sup>40</sup> While this makes it clear that unilateral coercive measures are *ipso facto* unlawful in the view of the Council, the substantive part of the resolution is less clear. In this part the resolution urges "all States to stop adopting or implementing unilateral coercive measures not in accordance with international law, international humanitarian law, the Charter of the United Nations and the norms and principles governing peaceful relations among States ...".<sup>41</sup> The phrase "not in accordance with international law" etc. implies again that certain such measures may well be in accordance with international law. However, in the absence of a normative framework for distinguishing between lawful and unlawful unilateral measures, the distinction is bound to result from the subjective views of the individual state imposing the measure. The single most important failure of the three UN organs discussed above is that they have contributed immaterially to the development of such a framework.

Another confusing statement reads as follows:

Rejects all attempts to introduce unilateral coercive measures, as well as the increasing trend in this direction, including through the enactment of laws with extraterritorial application which are not in conformity with international law.<sup>42</sup>

Does the international conformity requirement apply to the extraterritorial application of the sanctions only or to the introduction of unilateral coercive measures in the first part of the statement as well? If it applies to the whole statement then, again, it implies that certain types of unilateral coercive measures may well be in conformity with international law; if not, it means that this type of measure is *per se* unlawful under international law and is therefore a confirmation in the substantive part of the resolution of the statement in the preamble referred to above.

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<sup>40</sup> A/HRC/Res/6/7 (28 September 2007).

<sup>41</sup> A/HRC/Res/6/7 (28 September 2007) para 1.

<sup>42</sup> A/HRC/Res/6/7 (28 September 2007) para 9.

In subsequent years the Council's formula has remained unchanged and repetitive,<sup>43</sup> as is customary for the vast majority of UN resolutions. Another feature is that the practice of states in respect of the imposition of unilateral coercive sanctions has not changed over the years despite the many resolutions calling for an end to this practice, a fact bemoaned in all the resolutions adopted by the UN organs covered in this contribution. The voting in these resolutions also discloses a clear division between developing and developed states with the former voting in favour and the latter voting against as a general rule.

The opposing views held by states in general are also clear from a report back to the Council on the outcome of a biennial panel discussion on unilateral coercive measures and human rights.<sup>44</sup> There, a director of the Office of the High Commissioner for Human Rights reminded the participants that while many states have raised concerns about the negative impact of such measures on the full realisation of human rights and freedoms, others "regarded sanctions as a critical element of their foreign policy toolbox to counter impunity for human rights violations. They argued that, if used appropriately, they could help ensure greater respect for human rights and fundamental freedoms by both State and non-State actors".<sup>45</sup>

But divergent views occur even between UN bodies. An example is the agreement among the panellists in the above event that all unilateral coercive sanctions are *ipso facto* in breach of international law and that states imposing such measures must be held accountable.<sup>46</sup> This disposition is at odds with a 2012 thematic study by the Office of the High Commissioner for Human Rights, where the following was stated<sup>47</sup>:

Whether unilateral coercive measures are legal or illegal under public international law cannot be easily answered in general. Much depends upon the specific form of coercive measures, on the applicable treaty law, if any, and on customary international law rules relevant to the assessment of

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<sup>43</sup> See for instance A/HRC/Res/9/4 (17 September 2008); A/HRC/Res/12/22 (12 October 2009); A/HRC/Res/15/24 (6 October 2010); A/HRC/Res/19/32 (18 April 2012); A/HRC/43/15 (22 June 2020); A/HRC/Res/45/5 (6 October 2020).

<sup>44</sup> A/HRC/28/43/36 (7 April 2020).

<sup>45</sup> A/HRC/28/43/36 (7 April 2020) paras 6, 7.

<sup>46</sup> A/HRC/28/43/36 (7 April 2020) para 31. Yet again there is the following confusing conclusion by the panelists in para 62: "... the panelists stressed that unilateral coercive measures taken against a State or against certain sectors of its economy, thereby causing a disproportional adverse impact on the population, constituted collective punishment, were contrary to international law and should be prohibited". That raises the question whether measures of this kind which do not have a disproportional impact, and which do not constitute collective punishment, will be lawful or not.

<sup>47</sup> A/HRC/19/33 (11 January 2012) para 5.

coercive measures, as well as on potential grounds for precluding the wrongfulness of such measures.

This measured approach is lacking in the resolutions and other contributions by the UN Commission on Human Rights, the UN General Assembly, and the UN Human Rights Council and is arguably one of the reasons why their efforts have had no effect on the practice of states that impose sanctions.

### **3.4 The work of the UN Special Rapporteur**

In October 2014 the UN Human Rights Council decided to appoint a Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights and the rule of law.<sup>48</sup> In a 2019 report, the Special Rapporteur, Mr Idriss Jazairy, stated as follows<sup>49</sup>:

In compliance with article 41 of the UN Charter, the Security Council should be recognised as having the exclusive right to impose economic financial and other non-forcible measures on targeted states or individuals and this is for the purpose of giving effect to its decisions. Accordingly unilateral coercive measures should be phased out as early as possible starting with those found to have the most egregious effects in terms of denials of human rights.

There is no support in the *UN Charter* for this reading of Article 41. It merely states that 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". Nowhere in this provision or elsewhere in the Charter is this power exclusively assigned to the *UN Charter*. Even in the case of a serious matter such as responding to a threat to international peace and security or an act of aggression, the Council is assigned a primary and not an exclusive function in terms of Article 24(1) of the Charter.<sup>50</sup> Furthermore, even before the establishment of the UN, individual states resorted to unilateral measures as a foreign policy tool in demonstrating their displeasure about the conduct of another state and this sovereign power has not been taken away by the *UN Charter*. This is not to say that states are unrestrained in their choice of a unilateral measure, but the source of that restraint is not Article 41 but certain general principles of international law that derive from the responsibility of states in international law, international human rights and international humanitarian law and so forth.

This understanding of the complex issues presented by the imposition of unilateral coercive measures has informed the approach of the successor

<sup>48</sup> UN Doc A/HRC/Res/27/21 (3 October 2014) para 22.

<sup>49</sup> UN Doc A/HRC/42/46/Add.1 (29 August 2019) para 5.

<sup>50</sup> *Certain Expenses of the United Nations* case (Advisory Opinion) 1962, 151.

Special Rapporteur, Alena Douhan, in her first thematic report to the Human Rights Council.<sup>51</sup> There she clarified that:

As the legal status of specific unilateral sanctions is not always clear from the standpoint of international law, it is necessary to address and seek to minimise the humanitarian consequences of their application and engage in a contextual way in the establishment of a comprehensive legal framework, taking due account of the Charter of the United Nations, the fundamental principles of international law, including the observance of human rights and humanitarian standards, and the rule of law.<sup>52</sup>

Matters to be mindful of, it was further elaborated, included the "enormous discrepancies" between source and target states even when it comes to defining what is a legal or illegal activity; what activity outside the authorisation of the security council should or could qualify as a unilateral coercive activity; the legality of unilateral action from the perspective of the *UN Charter* and other sources of international law; and the impact of such action on the enjoyment of human rights and the insufficiency of remedies in the case of violations.<sup>53</sup> Changes in the grounds for and purposes of sanctions have further complicated the issue. The Special Rapporteur referred to data indicating that more than 40 per cent of sanctions introduced today are aimed at the enhancement of democracy, the protection of human rights and similar objectives instead of responding to breaches of the peace, acts of aggression or violations of *erga omnes* obligations, and that nearly all these measures are taken unilaterally by individual states and regional organisations.<sup>54</sup>

A question that emerges from the debates above is whether unilateral measures must be distinguished from unilateral coercive measures for the purpose of their legal status. In the work of the UN Special Rapporteur, for instance, unilateral measures are allowed, provided that they are taken in accordance with international legal standards, i.e. they are authorised by the Security Council under Chapter VII of the *UN Charter*, and they do not violate a treaty or customary international law norm, or their wrongfulness is excluded in terms of international law on countermeasures.<sup>55</sup> By contrast, unilateral measures that do not satisfy these criteria "constitute unilateral coercive measures and are illegal under international law".<sup>56</sup> This means that compliance with the above conditions renders a measure lawful and

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<sup>51</sup> UN Doc A/HRC/45/7 (21 July 2020).

<sup>52</sup> UN Doc A/HRC/45/7 (21 July 2020) para 3.

<sup>53</sup> UN Doc A/HRC/45/7 (21 July 2020) para 28.

<sup>54</sup> UN Doc A/HRC/45/7 (21 July 2020) para 39.

<sup>55</sup> UN Doc A/HRC/48/59 (8 July 2021) para 98.

<sup>56</sup> UN Doc A/HRC/48/59 (8 July 2021) para 99.

non-coercive while non-compliance renders a measure unlawful and coercive.

This is an over-simplification of the matter. Firstly, any measure which is in the nature of a sanction as it is usually understood and applied in international law has an element of coercion in the sense that it aims at "forcing" the target entity to change its conduct. Without this element it is meaningless and not distinguishable from non-forcible measures. Secondly, to make the lawfulness of a unilateral measure dependent upon a Security Council authorisation would require reliance on an argument that rests on a teleological simplification of Article 41 of the *UN Charter*, as indicated earlier. Moreover, denying states the sovereign act of sanctioning unilaterally and beyond authorisation by the Security Council another member of the international community for wrongful conduct would mean that the enforcement of international law by means of sanctions will be entirely dependent upon the hope that the Security Council will not be prevented from acting by the veto right of a permanent member.

#### 4 Conclusion

To what extent states can lawfully resort to unilateral sanctions as a form of economic coercion and at what point economic coercion may become unlawful is a question that remains controversial under international law. The absence of customary international law on the matter causes agreement on the matter to be even more evasive. Currently the debate inside and outside the UN is characterised by sharp divisions and the most sensible conclusion is that economic (coercive) unilateral measures are neither lawful nor unlawful *per se* under the current state of international law.<sup>57</sup>

In almost all the resolutions and reports referred to in this contribution, concern was expressed about the proliferation of new types of unilateral sanctions and the expansion of the grounds for and purposes of such sanctions despite the resolutions taken against such measures by UN organs. In these circumstances there is merit in the analysis of the current Special Rapporteur that progress can be achieved only through consensus and the development of an appropriate legal framework.<sup>58</sup> In this context she indicated that sanctions without or beyond the authorisation of the Security Council can be applied only if they are in accordance with the

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<sup>57</sup> See also Schmidt 2022 *JC&SL* 53-81.

<sup>58</sup> UN Doc A/HRC/45/7 (21 July 2020) para 28.

principles of legality, legitimacy, necessity and proportionality and if due account is taken of the international obligations of states, especially in the sphere of human rights law, refugee law and humanitarian law.<sup>59</sup> This is a sensible starting point for conceptualising and building consensus for the legal framework that is needed to bring an end to the current confusion in this part of the law on sanctions.

Moreover, the issue about the lawfulness of unilateral (coercive) sanctions is ripe for a proper investigation by the International Law Association, arguably the most suitable body for the development of the legal framework the Special Rapporteur has in mind. The Law Commission's work on countermeasures as part of the law on state responsibility is widely accepted and may provide useful elements for developing such a framework. Until such efforts have produced credible results, nothing prevents target states from pursuing a remedy by legal means. Judicial decisions are not only a recognised source of international law under Article 38 of the *Statute of the International Court of Justice* but can over time help ground the debate on a more solid factual and legal foundation.

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<sup>59</sup> UN Doc A/HRC/45/7 (21 July 2020) para 103.



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### List of Abbreviations

ANC	African National Congress
JC&SL	Journal of Conflict and Security Law
SAYIL	South African Yearbook of International Law
Tex Int'l LJ	Texas International Law Journal
UN	United Nations