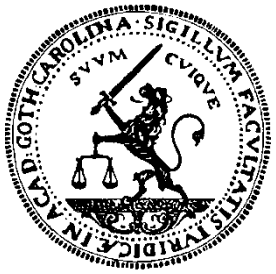

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The Legality of Unilateral Economic Sanctions

An analysis of international law on the lawfulness of unilateral economic restrictive measures

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Contents

Summary

This thesis explores the legality of unilateral economic sanctions in international law. It concludes that economic sanctions imposed by the UN Security Council under Chapter VII of the UN Charter, as well as countermeasures taken by states in accordance with established ILC criteria, are lawful when adhering to the principle of proportionality and aligning with human rights regulations. However, the legality of third-party countermeasures largely remains unclear.

Unilateral economic sanctions implemented outside a competent international institution and without a prior injury pose the greatest uncertainty. Arguments favoring their legality emphasize the inherent economic freedom of States, judgments by international courts and increasing State practice, suggesting a development toward a new norm of customary law. Conversely, opponents cite the prohibitions on coercive measures in UNGA resolutions and highlight concerns about state sovereignty and non-intervention, supported by a significant number of UN member states and the Human Rights Council.

This thesis acknowledges the lack of a definitive answer regarding the legality of unilateral economic sanctions and notes the ongoing legal ambiguity and international political divisions surrounding the issue. The accumulation of State practice may eventually shape a new customary law norm, despite opposition from parts of the international community. Alternatively, a reinterpretation of existing rules on third-party countermeasures could provide a lawful application for unilateral economic sanctions. For now, unilateral economic sanctions are nevertheless likely to persist as states view them as alternatives to forceful intervention or passive diplomatic approaches.

Sammanfattning

I denna uppsats undersöks unilaterala ekonomiska sanktioners laglighet inom folkrätten. Slutsatsen nås att ekonomiska sanktioner upprättade av FN:s säkerhetsråd i enlighet med kapitel VII i FN-stadgan, såväl som motåtgärder tagna inom ramen för kriterierna etablerade av ILC, är att anses som lagliga såtillvida de inte bryter mot proportionalitetsprincipen eller gällande reglering av mänskliga rättigheter. Lagligheten hos motåtgärder instiftade av tredjepartsländer utan direkt skada, förblir dock en fråga utan ett definitivt svar.

Unilaterala ekonomiska sanktioner som implementeras av en stat utan att ha drabbats av en tidigare skada och vid sidan av en kompetent internationell organisation, utgör den största osäkerheten i fråga om legalitet. Förespråkare av lagligheten i denna praktik pekar på staters inneboende ekonomiska frihet, domslut från internationella domstolar och en växande statspraxis, vilket av vissa anses indikera en utveckling mot en ny sedvanerättslig norm i denna riktning. Motståndare till denna hållning menar att praktiken är olaglig med grund i förbud mot tvingande åtgärder utlästa ur resolutioner från FN:s generalförsamling, samt påvisar dess oförenlighet med principer om statssuveränitet och icke-ingripande; en position som understöds av en betydande del av FN:s medlemsstater och av FN:s råd för mänskliga rättigheter.

Uppsatsen framhåller bristen på ett tydligt svar på frågan om laglighet för unilaterala ekonomiska sanktioner och visar på den fortsatta rättsliga tvetydigheten och de internationella politiska splittringarna som omgärdar frågan. Ackumuleringen av statspraxis kan möjligen i framtiden etablera en ny sedvanerättslig norm, trots motstånd från en betydande del av det internationella samfundet. Alternativt kan en utveckling av den existerande regleringen av motåtgärder av tredje-partsstater leda till en laglig väg till implementering av unilaterala ekonomiska sanktioner. I nuläget tycks det oavsett rimligt att förutsätta att unilaterala ekonomiska sanktioner kommer att fortsätta att nyttjas av stater när alternativen framstår som ett val mellan militära interventioner och passiv diplomati.

Abbreviations

ARSIWA	Articles on Responsibilities of States for Internationally Wrongful Acts
EU	European Union
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ILC	International Law Commission
OAS	Organization of American States
UN	United Nations
UNGA	United Nations General Assembly
UNGAOR	UN General Assembly Official Records
UNSC	United Nations Security Council
WTO	World Trade Organization

1 Introduction

1.1 Background

Since the end of the Cold war, the use of unilateral economic sanctions has gained prevalence in international relations, utilized by (mainly Western) States as non-forcible means of enforcement of international obligations, or to pursue foreign policy goals.[1] While collective or institutional sanctions are agreed upon through authoritative multi-state bodies – mainly the UN Security Council – unilateral economic sanctions are directly decided upon and implemented by States without authorization from an international institution. These sanctions are aimed at pressuring the economy, in whole or part, of another country in order to influence domestic policy.[2]

The use of unilateral economic sanctions is as politically sensitive as it is legally controversial. Measures imposed via comprehensive sanction regimes have often resulted in detrimental effects for local populations and disproportionally affected already vulnerable population strata.[3] Furthermore, economic sanctions have been criticized politically, regarded by many as infringing on State sovereignty. The political controversy surrounding the use of unilateral sanctions is visible not least in recurring resolutions of the UN General Assembly, demonstrating the overarching view of a large part of the international community to regard unilateral sanctions as illegal *coercive measures*.[4]

The legality of unilateral economic sanctions is a subject of much debate and differing opinions within the field of international law. This essay will attempt to clarify the situation by exploring the legal environment, pointing to the areas of relative legal consensus as well as the main nodes of debate on the question of lawfulness of unilateral sanction regimes.

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[1] Thouvenin, J.M. (2020) "History of implementation of sanctions" in Masahiko Asada (ed.) *Economic Sanctions in International Law and Practice*, pp. 83-92.

[2] Carter, B.E. (2011) "Economic Sanctions", Rüdiger Wolfrum ed., *The Max Planck Encyclopaedia of Public International Law*, para. 3.

[3] Douhan, A.F. (2022) "Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights", UN Doc A/HRC/51/33.

[4] Happold (2016) "Economic Sanctions and International Law: An Introduction" in Matthew Happold and Paul Eden (eds.) *Economic Sanctions and International Law*, Vol 62, p. 3f.

1.2 Purpose and research question

The legal basis for States' use of unilateral economic sanctions is a matter of lively debate among legal scholars. Still, in this grey area of international law, certain areas of consensus have emerged by which the measures taken by States can be relatively clearly defined as either lawful or unlawful. Identifying the boundaries of established lawful practice is necessary in order to properly analyse the areas of legal uncertainty. As such, the purpose of this essay is twofold; first, to identify the prominent legal grounds for imposing economic sanctions lawfully, and second, to analyse the legality of unilateral economic sanctions that do not fit the criteria of these established practices.

With this purpose in mind, the research question to be answered is the following:

To what extent can unilateral economic sanctions be considered legal under international law?

1.3 Material and methodology

To examine the legality of unilateral economic sanctions, this essay will apply a doctrinal legal method.[5] The underlying rationale for this choice is that the intention of this essay is to contribute to the understanding of the situation *de lege lata*, or the relevant *law as it exists*. Widely used in legal research, the doctrinal legal method is used to analyze, interpret and evaluate relevant sources of law, in order to determine applicable law and its content. This approach, also known as black letter methodology, entails examining relevant data in conjunction with doctrinal commentary. It is therefore not a methodology of empirical observation but rather one of qualitative analysis of norms.[6]

In the study of domestic law, the material used within the scope of the doctrinal legal method is naturally influenced by the national legal order. Normally at the top of the hierarchy is the constitution as the supreme legal act,

[5] For a comprehensive presentation of this legal method see P. Ishwara Bhat (2020) *Idea and Methods of Legal Research*, pp. 143-168.

[6] Maria Nääv & Mauro Zamboni (ed.) (2018), *Juridisk Metodlära*, 2nd ed., p. 24.

followed by laws, decrees, and, depending on the nation in question, preparatory legal documents and relevant case law. International law, largely horizontal rather than vertical in its structure, differs in this regard and presents a bigger challenge to the identification of the source of international law needed to establish the applicable law in question. Some guidance can be found in Art. 38 of the ICJ statute, listing the sources of international law to be applied in the practice of the court. These sources are defined as international conventions, international custom, the general principles of law, judicial decisions, and doctrine of the most highly qualified publicists. The latter two categories are subsidiary sources according to Art. 38, and thus should not be considered equal to the primary sources. However, due to the obscurity of the area of international law governing unilateral sanctions, this essay will lean significantly on legal literature for the purposes of clarifying the legal situation and identifying applicable norms, as well as to establish the main fault lines on the question of legality within the legal field itself.

1.4 Delimitations

The subject of state measures intersects several areas of international law including the law of state responsibility, international economic law, and general principles of international conduct between states. The limited format of this essay necessitates a more focused scope than could have been chosen in a more comprehensive work on the subject. For instance, the international political perspective, important as it is to the subject of unilateral sanctions, is not considered in this essay save for a few general observations. This can in part be explained by the purely legal approach of this work, albeit with the understanding that the political dimension would need to be taken into consideration in more detailed analyses of legality as such. Similarly, adjacent subjects such as the legality of multilateral sanctions authorized by the UN Security Council will be discussed only briefly, even though it largely intersects the research subject.

Importantly, the question of legality will only be approached in a purely *general* sense. This means that the essay will concern itself with the matter of legality as such, rather than with attempting a detailed examination of the

legality of individual acts of States, or how the specific substance of a certain sanction regime influences the legal question.

As evident from the research question and purpose of this essay, the focus will be that of the legality of *unilateral economic* sanctions. Accordingly, forcible (involving the use of force) and diplomatic sanctions will only be addressed to the extent that it benefits the understanding of the legal milieu of the research subject.

Finally, the choice of source material and doctrinal literature is selected and analysed with the aim of providing the most focused yet representative foundation possible for answering the research question of this essay. However, the limited scope of this work naturally entails that some sources and literature be left out. This, I argue, does not take away from the overarching purpose or legitimacy of this essay, but instead suggests that several possible interpretations are possible on this subject and that the reader should be aware that this work neither attempts at nor succeeds in serving them all.

1.5 Structure

The essay will first attempt to define the notion of unilateral economic sanctions, after which it will go on to present an overview of the legal instruments and scholarly opinions surrounding the subject matter. After defining unilateral economic sanctions, the text will be structured to first approach the areas of relative legal clarity, presenting the means of imposing economic sanctions in means generally considered lawful. In the following section, the essay attempts to determine whether a general rule can be said to exist beside these generally accepted lawful means to impose unilateral economic sanctions. Finally, the main conclusions will be summarized based on the findings of the main discussion.

1.6 Defining unilateral economic sanctions

In international law, sanctions can be defined *stricto sensu* as

> coercive measures taken in execution of a decision of a competent social organ, *i.e*. an organ legally empowered to act in the name of the society or community that is governed by the legal system.[7]

The above definition by Georges Abi-Saab contains two crucial distinctions in defining a sanction in international law. Firstly, it defines a sanction as a coercive, i.e., restrictive or constraining, measure. Secondly, it defines the sanction as an enforcement of a decision of a legally competent organ representing the international community, precluding from the notion such measures imposed by single states or groups of states without authorization from a competent, internationally representative organisation.

In contemporary legal and nonlegal practice and literature however, the notion of sanctions covers a much wider scope than could be said the be contained within the *stricto sensu* definition. This confusion of terms creates a discrepancy between the above definition's seemingly narrow application in relation to the actual use of the term in modern international law.[8]

Thus, the notion of sanctions is today used to describe a wide array of situations, including, but not limited to, measures imposed by states vis-à-vis other states without the involvement of centralized international institutions.[9] These situations, in which a single state or group of states impose coercive actions against other states, are commonly referred to as autonomous or unilateral sanctions, the latter of which will be used in this essay.

While unilateral sanctions can take many forms, this essay deals specifically with unilateral *economic* sanctions. This delineation however gives only

[7] Abi-Saab, G. (2001) "Keynote Address – The Concept of Sanction in International Law" in Vera Gowland-Debbas, Mariano Garcia Rubio & Hassiba Hadj-Sahraoui (eds.) *United Nations Sanctions and International Law*, p. 32.

[8] Asada, M. (2020) "Definition and Legal Justification of Sanctions", in Masahiko Asada (ed.) *Economic Sanctions in International Law and Practice*, pp. 3-23.

[9] Pellet A. and Miron, A. (2013) "Sanctions," in Rüdiger Wolfrum ed., *The Max Planck Encyclopaedia of Public International Law*, para. 6.

superficial limitations to the vast scope of measures contained in this term. A broad definition is that economic sanctions are:

> measures of an economic—as contrasted with diplomatic or military—character taken to express disapproval of the acts of the target or to induce that [target] to change some policy or practices or even its governmental structure.[10]

Economic sanctions can amount to a variety of different non-forcible measures ranging from boycotts, trade embargos, asset freezes and blockades, to disruption of customary financial and travel relations between states. They can also take the form of specifically targeted restrictions on individual actors or organisations. These are commonly referred to as *targeted* or *smart sanctions*, popularized in recent years due to their allegedly limited consequences for civilian population as opposed to comprehensive sanctions targeting nationwide populations. While they are considered part of the umbrella term of unilateral economic sanctions, they will not be subject to specific legal analysis within the scope of this essay.

As is shown above, defining unilateral economic sanctions is far from straightforward. In this text, the term will be used to describe economically restrictive measures between individual States or groups of States, imposed outside the framework of legally competent, collectively representative institutions. The notion will thus be applied to encompass several different situations, as this is how the term is commonly used both in legal and nonlegal works. Throughout the text, the subgenres concerning legality of these different situations will be addressed in turn.

[10] Andreas Lowenfeld (2008) International economic law, 2nd ed., p. 926.

2 The legal framework of economic sanctions

2.1 Economic sanctions under GATT

The General Agreement on Tariffs and Trade (GATT) is one of the most fundamental treaties of international economic law in the framework of the World Trade Organisation (WTO), laying out the basic legal principles of world trade and international economic relations. The *golden rule* of the treaty – non-discrimination and most-favoured-nation treatment – is enshrined in Article I, and applies to restraints to both import and export, as does the prohibition of quantitative restrictions in Article XI. These provisions of the treaty, by definition, are inconsistent with the imposing of economic sanctions between States, not least those amounting to trade embargoes and blockades. Despite this apparent obstacle to economic sanctions, the GATT (and other WTO, regional or bilateral treaties) has had little effect to hinder economic sanctions or provide a legal basis to regard them as illegitimate in international law.[11]

The reasons for the relative insignificance of the GATT in relation to economic sanctions range from the unwillingness of the WTO to involve itself in matters of political sensitivity, to the fact that several of the early target countries for economic sanctions by Western States (among others, the Soviet Union, the People's Republic of China, Vietnam, North Korea, Libya, Iran and Iraq) for a long time were not contracting parties to the GATT.[12] In addition to this, the treaty itself contains a security exception clause in Article XXI(b)(iii), which reads:

> Nothing in this Agreement shall be construed […] to prevent any contracting party from taking *any action which it considers necessary* for the protection of its essential security interests […] taken in war or *other emergency in international relations.*
>
> [emphases added]

[11] Lowenfeld (2002) International economic Law, 1st edition, p. 755f.
[12] ibid.

The wording of the paragraph has left it open to wide application and discretion for the contracting parties to themselves define such situations, essentially providing a *carte blanche* for member States.[13] Throughout the history of GATT, the security exception in subparagraph (iii) has indeed been relied on several times, and it remains an essentially self-judging provision.[14]

Apart from the GATT, other bilateral or multilateral trade agreements and treaties can create obligations for the contracting States. The same can be said of treaties created through the framework of regional arrangements such as the Organisation of American States (OAS) or the European Union (EU). The consequences for breaches of the latter can amount to economic sanctions, considered lawful on the premise of consent of the contracting parties. However, the distinctions between jurisdictions of the UN and regional arrangements are not always easily discerned and pose particular difficulties in situations where the objectives and responsibilities overlap.[15] It suffices to note that legal basis for imposing economic sanctions can occur as a result of breaches of such regional arrangements, given that the norms governing this procedure are both agreed upon and enforced collectively.[16]

In other words, treaties of economic international law, such as the GATT, can provide a legal obstacle to imposing economic sanctions, and especially to unilateral economic sanctions, to which the target State cannot conceivably provide prior consent. In the case of GATT, however, this is effectively circumvented via the controversial security exception in Art. XXI(b)(iii). State parties to other multilateral and regional arrangements can be subjected to agreed-upon enforcements (including economic sanctions) but this rests on collective, centralized enforcement and ought not to interfere in matters primarily within the responsibilities of the UN.

[13] Sørensen K., "Trade in Goods", in Olsen, B. E. Steinicke, M, Sørensen, K (eds.) *WTO Law: from a European Perspective* (2006), p. 228f.
[14] Lowenfeld A. (2002) p. 756f.
[15] Ibid., p. 729.
[16] Happold (2016) p. 2f.

2.2 Retorsion and reprisals

Retorsion is a term in international law describing non-forcible acts by one State towards another that, although being unfriendly, do not violate the rights of the receiving State under international law. In other words, acts of retorsion are legal as they breach no obligation toward the target State. Such measures could, for instance, take the form of termination of voluntary aid programmes or official protests directed at the target State.[17]

The term is closely related to the converse, albeit slightly outdated, notion of *reprisals*, which signify unilateral measures taken by States in breach of an obligation owed to the target State, constituting *prima facie* unlawful acts.[18] These acts, when not forcible in nature, can however be considered legal under certain conditions, namely when they are taken as a response to a prior breach of an obligation owed by the target State. Reprisals is a term synonymous to *countermeasures* in the ILC 2001 Articles on the Responsibilities of States for Internationally Wrongful Acts (ARSIWA). As such, otherwise illegal unilateral measures could be allowed if amounting to countermeasures as defined by the ILC.[19] In the following section, the legal basis for enacting countermeasures will be examined.

2.3 Countermeasures

The concept of countermeasures is an area of international law concerning non-forcible measures undertaken by states as means of enforcement. While having been in use since the Air Services Agreement case in 1978,[20] the ILC Articles of 2001 have served to define and delineate the concept of countermeasures to a rather narrow term applicable to situations of a certain given set of circumstances. Importantly, ARSIWA have also come to be generally regarded as an authoritative interpretation on the law of countermeasures in

[17] Pellet and Miron (2013) paras. 64-65.

[18] Ibid., para.

[19] White and Abass (2018) "Countermeasures and Sanctions", in Malcolm D. Evans. (ed.) *International Law* (fifth ed.) p. 543

[20] *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, Arbitral Tribunal, Part II, Decision, 9 December 1978.

international law. As such, the term countermeasures and its relation to unilateral economic sanctions will lean heavily on this instrument by the ILC.

Countermeasures have been defined by the ILC as:

> […] measures that would otherwise be contrary to the international obligations of an injured state *vis-à-vis* the responsible state, if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation.[21]

In other words, countermeasures are lawful acts of otherwise unlawful international conduct, taken specifically by an injured State towards the responsible State to induce it to cease its internationally wrongful acts and procure reparations. Furthermore, ARSIWA Art. 49 stipulates that "countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligation in question".[22] For countermeasures to be lawful, they must also be proportional to the corresponding obligation breach by the responsible State and must not violate fundamental human rights.[23]

Countermeasures can be directed only to the State responsible for an act of international wrongful conduct. As such, measures imposed on a third State could not be justified as countermeasures.[24] If, however, the State imposing the sanctions is a third State, that is, not directly injured by the initial international wrongful act of the receiving state, the question of legality becomes significantly more complex and controversial. As we have noted, the right to impose countermeasures necessitates an injury following from the responsible State's internationally wrongful act; a requirement which normally excludes States not primarily affected from enacting countermeasures.

In the 1970 *Barcelona Traction* judgement, the ICJ first introduced the notion of *erga omnes* obligations – "obligations of a State owed to the international community as a whole" – which "by their very nature […] are the

[21] ILC (2001) *Report of the International Law Commission on the work of its fifty-third session*, Chapter II, para. 1.
[22] Ibid., Chapter II, Art. 49(3).
[23] White and Abass (2018) p. 530.
[24] Ibid., Chapter II, Art. 49, para 4.

concern of all states".[25] These include, among others, obligations derived from:

> […] the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.[26]

The violation of an *erga omnes* obligation thus equates to injuring the international community as a whole, albeit indirectly. The question which naturally arises from this implication is whether the breach of an *erga omnes/erga omnes partes* obligation also results in a corresponding right to impose countermeasures in response to the violation.

The question of the right of third states to impose countermeasures was considered by the ILC in their commentary of their 1996 Draft Articles on State Responsibility, in which they noted, concerning countermeasures, that while the previous consensus was that only the State directly injured by an internationally wrongful act had the right to take reactive measures against the responsible State "the former monopoly […] is no longer absolute in modern international law".[27] Further, it was noted that the modern affirmation of *erga omnes* obligations:

> has led the international community to turn towards a system which vests in international institutions other than States exclusive responsibility, first, for determining the existence of a breach of an obligation of basic importance to the international community as a whole, and, thereafter, for deciding what measures are to be taken in response and how they are to be implemented.[28]

A conclusion of the ILC in its 1996 draft articles is thus that while *erga omnes* and *erga omnes partes* obligations have emerged as legitimate notions in international law, identifying breaches of these obligations, as well as determining the appropriate reactive measures, naturally falls upon international

[25] *Barcelona Traction, Light and Power Company, Limited*, judgment, ICJ Reports 1970, Rep. 3, p. 32, para. 33.

[26] Ibid., para. 34; For an in-depth discussion on the scope of the erga omnes definition, see Lepard (2010) "Defining *Erga Omnes* Customary Norms" in *Customary International Law*, pp. 261-269.

[27] ILC (1996) *Draft Articles on State Responsibility*, Commentary, para. 30, p. 12.

[28] Ibid.

institutions (particularly the UNSC) rather than on individual states.[29] Indeed, the ILC states that "[u]nder the Charter of the United Nations, these responsibilities are vested in the competent organs of the Organization".[30]

With the arrival of ARSIWA in 2001, the question of the rights of third states to enact countermeasures in response to *erga omnes/erga omnes partes* violations was largely left without a clear answer by the ILC. While third states in some instances have the right to invoke responsibilities from a responsible state according to Art. 48, the commentary to Art. 54 clarifies that the ILC refrains from issuing a clear-cut position on the matter of third state countermeasures:

> As this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of [third] States referred to in article 48 to take countermeasures in the collective interest. Consequently, it is not appropriate to include in the present articles a provision concerning the question whether other States, identified in article 48, are permitted to take countermeasures in order to induce a responsible State to comply with its obligations.[31]

In effect, the ILC did indeed ascertain the right in certain situations for third states to *invoke responsibility* for violations of obligations owed *erga omnes* or *erga omnes partes*. At the same time, however, it deferred from taking a position on the question of the rights of third states to legitimately react to unremedied breaches by taking countermeasures against the responsible state. This lack of a clear stance on the issue was argued to be due to the uncertainty of existing norms of international law as well as a result of insufficient state practice, which it describes as "limited and rather embryonic".[32] It should be noted, however, that several authors now claim that this no longer appears to be true, as state practice have evolved significantly to warrant a

[29] Dawidowicz (2017) *Third-Party Countermeasures in International Law*, p. 76f.
[30] ILC (1996) para. 30, p. 13.
[31] ILC (2001) Vol II, Part 2, Chapter III, Art. 54, para. 6.
[32] Ibid., para. 3.

return to the matter of the legality of third state countermeasures.[33] For instance, Dawidowicz argues that state practice and *opinio juris* has developed sufficiently in recent years to suggest an already established customary norm of international law permitting unilateral economic sanctions in the form of third-party countermeasures.[34] Such a conclusion is however far from generally accepted, with authors pointing out that, at the very least "practice is inconsistent, making the drawing of any conclusions as to *opinio juris* extremely difficult, if not impossible".[35]

2.4 Institutional sanctions and authorization

Certain forms of institutional enforcement systems, including some economic sanctions, are largely uncontroversial within the field of international law. These include sanctions imposed internally by regional or international organisations toward one of its member states, as they can be justified based on consent. The sanctioned state is thus considered to have agreed to abide by the organisation's rules and to accept its authority, given of course that the measures are in line with the agreed-upon rules of the organisation and are compliant with other norms of international law.[36]

Similarly, the interruption of economic relations to a certain state can in some instances be required in order not to breach other international obligations. For instance, several countries are parties to treaties prohibiting the sale of arms to states involved in serious human rights violations or breaches to the prohibition on the use of force. If a state abiding under such obligations were to maintain arms exports to the violating state, it would itself act in breach of international law.[37]

In accordance with Art. 41 of the UN Charter, a provision of Chapter VII, the UN Security Council may impose or authorize economic sanctions as a

[33] See for example Dawidowicz (2017) p. 239ff.; Proukaki (2010) p. 201ff.; Tams (2005) p. 306ff.
[34] Dawidowicz (2017) p. 282f.
[35] White and Abass (2018) p. 532.
[36] Happold (2016) p. 2.
[37] Ibid.

response to a threat to international peace and security. While these measures do not stand without criticism, they are generally considered to be legitimate instruments within the field of international law.[38] The basis for this legitimacy derives in large part from the UN Charter, demanding that States accept the authority of the UNSC (Art. 25), and clarifying that charter obligations prevail over other obligations, including treaty obligations (Art. 103). The right of the UN specifically to impose enforcement measures laid out in Chapter VII is itself evident from Art. 2(7) of the Charter. The UNSC is generally considered to be resting on the authority of acting as the main representative organ of the international community as well as being the chief authority for the maintenance of global peace and security. This however is not to say that the UN enjoys absolute discretion in its choice and implementation of sanctions. Aside from the provisions laid out in the UN Charter, sanctions regimes must adhere to human rights norms as well as to the general principle of proportionality.[39]

In terms of regional organisations and their rights to resort to economic sanctions as enforcement actions, the UN Charter provides in Art. 53 that regional arrangements or agencies can be utilised by the Security Council for "enforcement action under its authority". However, Art. 53 also states that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council". In this way, the Charter clearly prohibits the practice of regional organisations to resort to coercive measures outside the UN framework, or to implement measures that are qualitatively different from those already adopted by the UN system under Chapter VII. As such, the UNSC reserves the exclusive right to determine and respond to issues arising from Articles 39 and 41 of the Charter. It should be noted that, as previously described, this provision does not prejudice the use of enforcement measures (including economic sanctions) taken by regional organisations that can be granted legality through the consent of the receiving State, i.e., in line with the agreed upon terms of membership to the organisation.

[38] White and Abass (2018), p. 543f.
[39] Ibid., p. 542.

3 General legality of unilateral economic sanctions

Having now presented an overview of the legal means of imposing economic sanctions or, more generally, legitimately disrupting economic relations between states, we will now move on to analyse the more opaque legal milieu of unilateral economic sanctions. In this area, beside the generally accepted forms of legitimate unilateral economic measures of retorsion, countermeasures and treaty clauses, we will attempt to discern the answer to the question whether it is able to speak of a *general* prohibition to, or approval of, such measures. The following presentation will be structured around a dichotomy of two popular opposing views in the doctrinal discussion on the legality of unilateral economic sanctions in international law. One the one hand, there is the argument that states inherently have the right to freely revise its international economic relations, provided no specific legal obligations are violated in so doing. On the other hand, we have the position favoured in recent years by the Human Rights Council and in resolutions of the UN General Assembly, pointing to the unlawfulness of coercive measures.

3.1 The case for legality – the economic freedom of states

The first argument to be presented is one that generally considers unilateral economic sanctions to be in accordance with international law, as part of the inherent economic freedom of states. More specifically, the argument revolves around the perception of this area of contemporary international law as containing no outright prohibition – neither in treaty nor custom – for states to freely alter its economic relations, including by imposing economic sanctions against other States or actors.[40] Naturally, this freedom would not go so far as to allow states to breach specific international obligations derived from a treaty, but rather, as the argument goes, it suggests that there is no general

[40] Happold (2016) p. 3.

prohibition on the imposition of unilateral economic sanctions.[41] This was certainly the position favoured by the ICJ in the *Nicaragua* case, in which part of the judgment concerned economic restrictions imposed on Nicaragua by the USA. Apart from the question of the arming and training of paramilitaries, it was noted in relation to the trade embargo imposed by the United States that "[a] State is not bound to continue particular trade relations longer than it sees fit to do so in the absence of a treaty commitment or other specific legal obligation".[42] However, while the court found that some of the economic measures imposed on Nicaragua by the USA, such as the cessation of voluntary aid, did not amount to a violation of international law (via the principle of non-intervention), it has been contested that "this conclusion appeared to be limited to the particular actions of the United States in that case and should not be seen as a general proposition".[43]

Proponents of the lawfulness of economic sanctions often argue that since there exists no obligation of customary law demanding that states maintain certain economic relations to other states, this also applies to restrictive and coercive economic measures.[44] In this interpretation, given that the measures imposed do not violate an applicable treaty or breach a customary norm, they are lawful. It is also argued that the use of economic sanctions by individual States is an instrument of foreign policy, practiced well before the UNSC began using them as a primary tool of enforcement. As such, in the absence of precise rules and with customary law being difficult to discern, the practice should be considered lawful until regulated. However, as States have historically resisted on the grounds of State sovereignty, certain extraterritorial measures of unilateral sanction enforcement – such as placing limitations on companies of third States – most agree that customary international law places limits on unilateral extraterritorial measures.[45]

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[41] Ibid.

[42] Case Concerning Military and Paramilitary Activity in and Against Nicaragua (Nicaragua v United States) [Merits] para 276.

[43] Tladi (2020) "The Duty Not to Intervene in Matters within Domestic Jurisdiction", in J. Viñuales (ed.), *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law*, p. 100

[44] Carter (2011) "Economic Sanctions", in *Max Planck Encyclopaedia of Public International Law* (Rüdiger Wolfrum version), para. 29; Happold and Eden (2016) p. 3.

[45] Lowenfeld (2002) p. 761ff.

3.2 The case for illegality – coercive measures

In sharp relief to the argument for general legality of unilateral sanctions, a significant number of works have been published in the field of international law arguing for their general illegality as coercive measures. This position is reached through several different approaches which will be addressed in turn.

Firstly, it has been argued that coercive measures are illegal by rights of Article 32 of the Charter of Economic Rights and Duties of States, which affirms that: "No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights".[46] This seemingly clear prohibition of state interference has however not been considered to establish a general norm of customary international law, although such attempts have occasionally been made by mostly developing and non-aligned countries.[47] In effect, the broad scope and high-minded sentiments of the resolution seems to have rendered it too vague and wide-reaching to be applicable in practice. The Charter of Economic Rights and Duties of states is, after all, just a General Assembly resolution, and while it illuminates the scepticism of a significant part of the international community toward economic sanctions, it arguably lacks the necessary enforceability and international support for it to be considered a general rule of prohibition.

Secondly, proponents of the general illegality of unilateral economic sanctions have argued for the customary applicability of the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (Friendly Relations Declaration).[48] While it is, similar to the Charter on the Rights and

[46] UNGA Res 3281 (XXIX) (12 December 1974).

[47] Akande, D., Akhavan, P., & Bjorge, E (2021) "Economic Sanctions, International Law, and Crimes Against Humanity: Venezuela's ICC Referral", *American Journal of International Law*, p. 501.

[48] UNGA Res 2625 (XXV) (24 October 1970).

Duties of States, a resolution of the General Assembly, it is generally considered to be an authoritative interpretation of principles already laid down in the UN Charter.[49] Among its most prominent contributions, the declaration reinforces the principle of non-intervention, not only in relation to the threat or use of force, but also as regards political and economic coercion:

> No State may use or encourage the use of economic, political or any other type of measure to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.[50]

Idriss Jazairy, the former United Nations Special Rapporteur on unilateral coercive measures, indicated further that the UN Charter should be interpreted broadly, stating that "[o]nly multilateral sanctions approved by the Security Council comply with the letter and spirit of the Charter of the United Nations".[51]

Within the international community, the legality of unilateral coercive measures is often vehemently opposed.[52] For instance, the trade embargo imposed by the USA on Cuba has become one of the most high-profile cases of unilateral economic sanctions, as well as a focal point for the international community's long-standing denouncement of unilateral coercive measures taken at large.[53] This has led to a thirty year row of annual resolutions adopted by clear majority in the General Assembly beginning in 1992, not only urging an end to the trade embargo imposed on Cuba, but also affirming the general illegality of these measures under international law. The latest of the resolutions condemning the economic sanctions imposed on Cuba was adopted in 2022 by a majority of 185 countries, with only the USA and Israel voting against and with two abstentions from Brazil and Ukraine.[54] The 2022 resolution cites, among others, the principles of "the sovereign equality of States, non-intervention and non-interference in their internal affairs" as grounds for

[49] Tladi (2020) pp. 87-104.

[50] UNGA Res 2625 (XXV) (24 October 1970).

[51] Jazairy (2015) Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, A/HRC/30/45, p. 17.

[52] Jazairy (2019) "Unilateral Economic Sanctions, International Law and Human Rights", *Ethics & International Affairs*, p. 293f.

[53] Ibid., p. 293.

[54] UNGA Resolution A/RES/77/7 (2022); For the official press release and voting figures, see GA/12465, 3 November 2022.

the general illegality of coercive measures. The long series of resolutions to this effect, often citing the prohibition of coercive measures in international declarations and resolutions, was commented by Jazairy to amount to at least strongly supporting the near universal view of such measures as illegitimate in the international community, and even suggesting "an emergent (if not already established) rule of customary international law".[55]

[55] Jazairy (2019) p. 293.

4 Conclusions

To summarise, some cornerstones of the legal situation can be concluded. First, we can say with confidence that non-forcible sanctions imposed by the UN Security Council in accordance with Chapter VII of the UN Charter, are lawful. The same can be said of sanctions imposed by individual states in accordance with UNSC authorization, given that the authorization in question is in line with the provisions of Chapter VII of the UN Charter. Thus, the principles of State sovereignty and of non-intervention do not present a legal hindrance to imposing economic sanctions when backed up by authorization from a legally competent international organ, authorized to represent the international community. However, for both direct and indirect UNSC economic sanctions, this lawfulness is dependent on adhering to both the principle of proportionality and to human rights regulation.

Secondly, reprisals, more commonly known as countermeasures, taken in accordance with the stringent criteria of the 2001 ILC Articles on the Responsibility of States for Internationally Wrongful Acts and its related commentary, are also to be considered lawful, so long as they do not violate peremptory norms of international law (*jus cogens*). Similar to the UNSC sanctions described above, in order for countermeasures to be considered lawful, they must also adhere to the principle of proportionality and conform to human rights law.

If the state imposing countermeasures is a third party, that is, not directly injured by the wrongful act in question, the legal situation is less clear. As described above, while third-party States have the right to invoke responsibility of another State for breaches of obligations owed *erga omnes* or *erga omnes partes*, there is currently no legal consensus in favour of granting them the right to take countermeasures against the responsible state. The legal landscape is unclear in this regard, and there is neither a definitive prohibition nor an approval in place as of yet. If, however, a reprisal in the form of a unilateral economic sanction was to be found not to live up to the countermeasure criteria, it would, by definition, amount to an unlawful unilateral economic sanction.

Thirdly, one particular situation in which States implement unilateral economic sanctions presents arguably the most uncertainty and controversy surrounding the legal analysis. This is when a state implements economic sanctions both outside the framework of a competent international institution and without a prior injury inflicted to the sender State by the target State (in the form of a breach of an international obligation owed to the sender state), especially when the economic measures in question are of a more severe nature. Here, the legal discussion junctures into two main strands.

On the one hand, it is argued that the economic freedom of States includes the right for a State to freely revise its economic relations. This finds some support in the *Nicaragua* case judgment, where the court seemingly favoured this line of reasoning, although its precedential value is prone to debate. Further, the case for the legality of unilateral economic sanctions is strengthened by an increasing catalogue of State practice. While this has of yet not appeared to result in a definitive norm of customary law approving the use of unilateral economic sanctions, the prevalence of State practice might suggest a development to that end. It might be added that if unilateral economic sanctions were found to be legal, as this line of thinking suggests, there would be no need to further discuss them in the term of third-party reprisals or countermeasures, as this term only applies to otherwise illegal acts of international conduct. Instead, they would be categorized under the notion of (lawful) retorsion.

On the other hand, the case is made that unilateral economic sanctions are illegal in their capacity of coercive measures. This argument largely revolves around the prohibitions of such measures laid out in UNGA resolutions, primarily the Friendly Relations Declaration of 1970. Taken (at least in part) as an authoritative interpretation and progression of principles laid out in the UN Charter, the primary grounds for illegality of economic sanctions in this resolution is rooted in the principles of State sovereignty and of non-intervention. This position is also supported by a significant majority of UN member States, continually and consistently voting in favour of denouncements of unilateral coercive measures in yearly UNGA resolutions. Similarly, the Human Rights Council has taken to favour the position in recent years, pointing to the often detrimental effects of sanctions on domestic populations.

Further, it could be argued that the very existence of the notion of third-state countermeasures in ARSIWA – as well as the efforts taken by the ILC not to provide a definitive answer to the question of their legality – speaks to the affirmation of the ILC to presume the illegality of unilateral economic sanctions, dependent upon a specific legal rule sanctioning their use.

Within the scope of this essay, no definitive answer can be provided regarding the question of the legality of unilateral economic sanctions, when imposed as described without institutional authorization or successfully amounting to the status of countermeasures. The issue remains controversial, with the legal ambiguity mirroring international political divides surrounding it. It remains to be seen whether the growing accumulation of State practice will lead to establishing a new norm of customary law, despite the vocal opposition of the practice by large segments of the international community. Furthermore, unilateral economic sanctions could find its lawful application through a new interpretation of the already established and accepted rules concerning third-party countermeasures. At present however, unilateral economic sanctions are unlikely to subside, favoured as they are by States as a middle-ground between dangerous military interventions and diplomacy alone.

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