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**United Nations Counter-Proliferation Sanctions
and International Law**

Daniel H. Joyner

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United Nations Counter-Proliferation Sanctions and International Law

Daniel H. Joyner *

Abstract

This chapter addresses the subject of the legal limitations that international law places on the imposition of coercive international economic and financial sanctions, with particular reference to sanctions with counter-proliferation aims—i.e., purposed in stopping the actual or suspected proliferation of weapons of mass destruction (WMD). Economic sanctions, whether imposed multilaterally by the U.N. Security Council or unilaterally by states, have become an increasingly utilized tool of coercive policy, particularly by powerful states and international organizations against weaker, developing states. This makes the identification and clarification of existing and emerging rules of international law imposing limits upon the ability of states and international organizations to lawfully impose coercive economic sanctions, an important part of the development of a more mature and equitable international legal system. This chapter will focus on two main areas of customary international legal obligation, the sources of which impose limits on the application of coercive international economic sanctions by states and international organizations, including the U.N. Security Council. The first is the general international law principle of economic non-coercion, and the second is international human rights law.

Introduction

This chapter addresses the subject of the legal limitations that international law places on the imposition of coercive international economic and financial sanctions, with particular reference to sanctions with counter-proliferation aims—i.e., purposed in stopping the actual or suspected proliferation of weapons of mass destruction (WMD). However, the analysis in this chapter should be equally applicable to most other cases of the application of coercive economic sanctions.¹

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¹ The sanctions to which I am referring can take a wide variety of forms, focusing alternatively or cumulatively on international trade in goods and services, financial transactions and related services such as insurance, travel restrictions, asset freezes, etc. For purposes of concision, I will use the term “economic sanctions” as a proxy for this entire range of sanctions short of the use of military force.

The subject of legal limitations on coercive economic sanctions is, I think, an important one in the general consideration of the formalization of the international legal regime relative to economic sanctions. As I will discuss in this chapter, economic sanctions, whether imposed multilaterally or unilaterally, have become an increasingly utilized tool of coercive policy, particularly by powerful states and international organizations against weaker, developing states. I think that an identification and clarification of the existing and emerging rules of international law that impose limits upon the ability of states and international organizations to lawfully impose coercive economic sanctions, is an important part of the development of a more mature and equitable international legal system.

Economic sanctions may be organized and applied under a multilateral framework by states acting in a cooperative manner, primarily under the authority of the U.N. Security Council. Alternatively, or sometimes in parallel, economic sanctions can be applied by states on a unilateral basis outside of or in addition to a Security Council mandate. Under this latter paradigm, states may still coordinate sanctions among themselves as against a common target. Nevertheless, for purposes of legal categorization, this chapter will refer to all sanctions undertaken outside the scope of a Security Council mandate as unilateral sanctions.

This chapter will focus on two main areas of customary international legal obligation, the sources of which impose limits on the application of coercive international economic sanctions by states and international organizations, including the U.N. Security Council. The first is the general international law principle of economic non-coercion, and the second is international human rights law.

I. Counter-proliferation Economic Sanctions

One area of international relations in which coercive economic sanctions, both multilateral and unilateral, are increasingly commonly employed is the area of WMD proliferation. In the past twenty-five years the U.N. Security Council has imposed economic sanctions on four states – Iraq, Libya, North Korea, and Iran – on the basis of the Council’s determination that WMD proliferation activity in which the state was allegedly engaged, constituted a threat to international peace and security.

I(A) Iraq

The first of these cases, chronologically, was the case of Iraq in the early 1990’s. Following Iraq’s invasion of Kuwait in August 1990, the Security Council adopted 14 different resolutions pertaining to Iraq, some of which imposed severe economic sanctions. Resolution 661, adopted August 6, 1990, noted Iraq’s refusal to comply with the Council’s previous resolution ordering it to withdraw from Kuwait, and accordingly took steps to implement economic sanctions on Iraq, purposed in compelling Iraq to withdraw to its own territory. These sanctions were comprehensive, and effectively prohibited all international trade and financial transactions with Iraq, except in the areas of medicine and, “in humanitarian circumstances,” foodstuffs. Resolution 665, adopted August 25, 1990, authorized a naval blockade to enforce the embargo against Iraq authorized by Resolution 661. Following Iraq’s refusal to withdraw from Kuwait’s territory and comply with the Security Council’s other demands, the first Gulf War

began with an extensive aerial bombing campaign beginning on January 17, 1991. A ceasefire was declared on February 28, 1991.

Following the ceasefire and the Iraqi withdrawal from Kuwait, the comprehensive economic sanctions initiated in Resolution 661 were extended and explicitly linked to Iraq's compliance with a new and sweeping program for disarming Iraq of its chemical and biological weapons stockpiles, and for the dismantling of its nuclear, chemical and biological weapons programs, pursuant to Resolution 687, adopted on April 3, 1991. Resolution 687 reminded Iraq of its obligations under the 1925 Geneva Protocol and ordered it to unconditionally remove and destroy all chemical and biological weapons in its possession, and all ballistic missiles with a range greater than 150 km. The resolution established the United Nations Special Commission (UNSCOM) and tasked this body with discovering and destroying these weapons. The resolution further ordered Iraq to destroy or remove from its territory all nuclear-weapons-usable fissile material, and any "subsystems or components or any research, development, support or manufacturing facilities" related to the production of nuclear weapons. It tasked the International Atomic Energy Agency (IAEA) with this nuclear-related inspection and destruction program.

Throughout the decade of the 1990's, the IAEA and UNSCOM (and its successor UNMOVIC) carried out the task of disarming Iraq of its WMD stockpiles and related programs. As this work went on, the economic sanctions, which again comprised an almost total ban on all international trade and financial transactions with Iraq and Iraqi nationals, imposed on Iraq since August of 1990, continued with the limited exception of the "Oil-for-Food" program, authorized by the Security Council in Resolution 986 on April 14, 1995. Cutting Iraq off from international trade and financial markets for over a decade had a severe impact upon the civilian populace of Iraq. High rates of malnutrition, lack of adequate medical supplies, diseases caused by a lack of clean drinking water, and increased infant mortality rates were widely reported during the decade.² Dennis Halliday, the United Nations Humanitarian Coordinator in Iraq from 1997-1998 resigned in that year, after a 34-year career with the United Nations. He is reported to have stated: "We are in the process of destroying an entire society. It is as simple and terrifying as that." And further: "I don't want to administer a program that satisfies the definition of genocide."³ Halliday's successor, Hans von Sponek, subsequently also resigned in protest.⁴

The comprehensive economic sanctions program implemented by the U.N. Security Council against Iraq was only lifted following the second Gulf War in 2003. In Resolution 1483, adopted May 22, 2003, after recalling all previous resolutions on the situation between Iraq and Kuwait, the Security Council lifted trade sanctions against Iraq (excluding an arms embargo) and terminated the Oil-for-Food Program.

The Security Council's handling of the Iraq sanctions program was its first foray into applying multilateral economic sanctions – something that was only made possible because of the quite recent ending of the Cold War and the renewed ability of the permanent members of the Security Council to cooperate on threats to international peace and security. Much criticism followed the Council's comprehensive and, in the minds of many in the West, draconian sanctions on Iraq during the 1990's, that were responsible for so much humanitarian suffering among the Iraqi civilian populace. This criticism led to a revised approach in future applications of sanctions by the Security Council, that came to be termed the "targeted sanctions" or "smart

² Barbara Crossette, "Iraq Sanctions Kill Children, U.N. Reports," *New York Times*, December 1, 1995.

³ David Rieff, "Were Sanctions Right?," *New York Times*, July 27, 2003.

⁴ John Pilger, "Why we Ignored Iraq in the 1990's," *New Statesman*, October 4, 2004.

sanctions” approach.⁵ As Joy Gordon has explained:

In the wake of these concerns, there were efforts in many venues to design sanctions that would not have the humanitarian impact of broad trade sanctions, and that would also be more effective by putting direct pressure on individual national policy-makers. These targeted sanctions included arms embargoes, financial sanctions on the assets of individuals and companies, travel restrictions on the leaders of a sanctioned state, and trade sanctions on particular goods.⁶

The Security Council’s subsequent WMD counter-proliferation-related economic sanctions regimes applied to Libya, North Korea, and Iran can be seen as illustrating this changed approach by the Security Council.

I(B) Libya

Economic sanctions were applied by the Security Council against Libya during the 1990’s and early 2000’s due to several different yet related concerns regarding threats to international peace and security posed by Libya. First, as a result of the terrorist bombing of Pan Am Flight 103 and UTA Flight 772, which were supported by the Libyan government. Second, in response to concerns related to Libyan stockpiling of chemical and biological weapons, and trade in nuclear related technologies with the A.Q. Khan smuggling network out of Pakistan.⁷ Security Council Resolution 883, adopted on November 11, 1993, exemplifies the newer, more targeted sanctions approach. In it, the Security Council targets primarily trade and financial transactions with the government of Libya and government officials, and not Libyan nationals or commercial entities generally. It only adopts circumscriptions on commercial trade with selected industries in Libya, namely the petroleum and airline industries. Resolution 1506, adopted on September 12, 2003, lifted these and other economic sanctions against Libya, following Libya’s August 15, 2003 agreement to compensate the victims of the Pan Am bombing, and acceptance of responsibility for that attack. Later that year, on December 19, 2003, Libyan President Gaddafi made the surprising announcement that Libya would renounce its WMD programs, and would welcome international inspectors in to verify the implementation of this commitment.⁸

I(C) North Korea

Since 2006, the Security Council has adopted four primary resolutions imposing and strengthening economic sanctions on North Korea in response to its continued development of a nuclear weapons program. The first two resolutions, Resolutions 1718 and 1874, were adopted in response to North Korean nuclear weapon tests in 2006 and 2009 respectively. The third

⁵ Gordon (2011). See also Shagabutdinova and Berejikian (2007).

⁶ See id.

⁷ Kelsey Davenport, “Chronology of Libya’s Disarmament and Relations with the United States,” Arms Control Association, February 2014.

⁸ Kelsey Davenport, “Chronology of Libya’s Disarmament and Relations with the United States,” Arms Control Association, February 2014.

sanctions resolution, Resolution 2087, was adopted shortly after North Korea successfully launched a satellite into space with a ballistic missile in December 2012. And the fourth, Resolution 2094, was adopted following North Korea's third nuclear weapon test in February 2013.⁹ These four resolutions impose an arms embargo on North Korea, but otherwise target their proscriptions (e.g. trade controls, travel bans, asset freezes) on persons and entities directly involved in North Korea's nuclear program, and on senior government officials. In fact, in the hope of targeting the "bite" of economic sanctions upon members of the ruling elite in North Korea, Resolution 1718 explicitly forbids, *inter alia*, the supply to North Korea of "luxury goods." States have differed in their interpretation of the term "luxury goods," but common inclusions in this category are gold, other precious metals, diamonds, caviar, wine, luxury automobiles, luxury tobaccos and cosmetics, designer clothing and jewelry.¹⁰ The effectiveness of these targeted sanctions on North Korea was called into question by the state's fourth nuclear weapon test, conducted on January 6, 2016.

I(D) Iran

Also since 2006, the Security Council has adopted eight resolutions on the subject of Iran's nuclear program, amidst suspicions that this program has included a military dimension. Four of these resolutions by the Security Council have provided for economic and financial sanctions against Iran.¹¹ Following Iran's refusal to suspend its uranium enrichment program, as demanded by the Security Council in Resolution 1696 in July 2006, the Council in December 2006 adopted Resolution 1737, which *inter alia* banned Iranian export and import of goods and technologies relating or potentially relating to its nuclear program, and imposed financial sanctions including the freezing of assets on a list of Iranian persons and entities determined to have provided support for Iran's nuclear program. Resolution 1737 and its list of targeted persons and entities has been extended and amended by subsequent resolutions. On March 24, 2007, Resolution 1747 added a conventional arms embargo on Iran to the framework of trade sanctions, and on June 9, 2010, the Security Council adopted Resolution 1929, which further restricted trade in ballistic missile technologies with Iran. Resolution 1929 also significantly expanded the list of persons and entities subject to financial sanctions, though as in the case of North Korea these persons and entities are restricted to those directly or indirectly involved in Iran's nuclear program.

I(E) Unilateral State Sanctions Supplementing U.N. Sanctions

While the Security Council has itself adopted a "targeted" or "smart" sanctions approach to its counter-proliferation-oriented economic sanctions on Libya, North Korea, and Iran, in each of these cases - and particularly in the cases of North Korea and Iran - states acting unilaterally

⁹ See Kelsey Davenport, "U.N. Security Council Resolutions on North Korea," Arms Control Association, October 2015.

¹⁰ See Security Council Sanctions Committee Panel of Experts on North Korea, Final Report, February 23, 2015, S/2015/131, Annex 11.

¹¹ Resolutions 1696 (31 July 2006); 1737 (23 December 2006); 1747 (24 March 2007); 1803 (3 March 2008); 1835 (27 September 2008); 1929 (9 June 2010); 1984 (9 June 2011); and 2049 (7 June 2012).

have supplemented the Security Council's economic sanctions regime with their own primary and secondary economic sanctions on the target state. In both the North Korean and Iranian cases, these unilateral sanctions, imposed primarily by the U.S. and the E.U., have encompassed a far greater scope of prohibited trade and, in particular, banking and other financial transactions between the targeted country on the one hand, and on the other hand both the nationals of the sanctioning states themselves and secondarily entities that have economic ties with the sanctioning state.¹² Through these primary and secondary unilateral sanctions by the U.S. and the E.U. in particular, both North Korea and Iran have been effectively cut off from international financial markets, and in the case of Iran its petroleum industry, from which most government revenue derives, has been effectively embargoed. U.S. and E.U. sanctions have banned trade in Iranian petroleum products, prohibited banking transactions involving Iranian banks including the Iranian Central Bank, prohibited insurers from dealings with Iran's shipping industry, and frozen the overseas assets of a large number of Iranian individuals and public and private entities, in addition to those named in the resolutions of the Security Council. These economic sanctions have been adopted by the U.S. and the E.U. for the explicit purpose of pressuring Iran to accept the Security Council's and the IAEA's demands regarding its nuclear program.¹³

In Iran's case, the cumulative effect of both the U.N. Security Council's multilateral sanctions regime, and the U.S. and E.U. unilateral sanctions regime, has been profound. Since 2006 the Iranian economy has overall contracted, the Iranian currency has been devalued, unemployment has risen dramatically, inflation has been rampant, and critical shortages of medicines and other medical supplies have been reported.¹⁴

This dynamic of states acting unilaterally, through the adoption of their own financial and trade sanctions, to supplement and significantly expand the scope and depth of the economic sanctions adopted by the U.N. Security Council in counter-proliferation cases, has had the effect in recent cases of, in a meaningful sense, returning the situation of the targeted state to one very close to the situation in which Iraq found itself in the 1990's under the comprehensive sanctions program of the Security Council, inclusive of the severe humanitarian suffering caused to the civilian populace of the target state.¹⁵ This fact has led to a renewal of attention to the question of whether there are limits, either in treaty law or in general customary international law, on the legality of coercive economic sanctions imposed either by the Security Council itself, or by states acting unilaterally. It is to this question that consideration will now turn.

II. Legality

The question of the legality of international economic sanctions as a means of foreign policy coercion is a complex but important one. Since the end of the Cold War, economic sanctions have become the favored default tool of foreign policy, particularly for powerful states acting alone or cooperatively through international organizations to express their displeasure with the policies of less powerful states, and to bring pressure to bear on those target states to change their

¹² See Zarate (2013).

¹³ See Katzman, 2014; Dupont, 2012; Vaez, 2013.

¹⁴ See Gordon, 2013. Under a diplomatic accord reached between Iran and the P5+1/E.U. in July 2015, both multilateral and unilateral economic sanctions on Iran's nuclear program are to be lifted as of January 16, 2016. See Joyner 2016.

¹⁵ See Miller (2014); Zarate (2013).

behavior. The U.N. Security Council itself seems to have come to regard economic sanctions as the most attractive tool in its toolbox of options for dealing with states and non-state actors that it determines to constitute a threat to international peace and security.

Consistent with the *Lotus* principle of international law, as a general proposition and in the absence of positive legal obligations to the contrary, it is certainly correct that a state has the legal discretion to choose with which other states it pleases to have, and to allow the legal and natural persons subject to its jurisdiction to have, economic dealings.¹⁶ Pursuant to this observation, there is undoubtedly a range of economic sanctions that are applied by states against other states and non-state actors, that are not prohibited by any positive rule or obligation of international law, and are therefore lawful to maintain, such as in the case of a simple retorsion.¹⁷

It is also possible, pursuant to the law of state responsibility, for a state to unilaterally apply lawful economic sanctions in response to an unlawful act of another state, even if the sanctions are themselves *prima facie* illegal, as long as the sanctions meet the criteria for lawful countermeasures.¹⁸ The criteria for lawful application of countermeasures, both procedural and substantive, can be found in the ILC's Draft Articles on State Responsibility.¹⁹

There are thus a number of possibilities for the lawful application of economic sanctions by states and by international organizations for counter-proliferation or other purposes. However, it is also true there are a number of sources of positive international legal obligation, located within a variety of substantive areas of international law, which may be applicable to the imposition of certain coercive international economic sanctions, and which may significantly circumscribe states' and international organizations' - including the U.N. Security Council's - lawful discretion to impose them. Some of these sources of obligation can be found in discrete treaty regimes, such as the World Trade Organization and the International Monetary Fund. In this chapter, however, I would like to focus rather on two substantive areas of customary international law. First, the general international law principle of economic non-coercion; and second, international human rights law.

II(A) Economic Warfare and the Principle of Economic Non-Coercion

Although coercive international economic sanctions applied unilaterally by states are generally held not to comprise *per se* a breach of Article 2(4) of the U.N. Charter, which prohibits the threat or use of international force, nor on their own to constitute the commencement of an armed conflict, nevertheless in a meaningful sense coercive sanctions adopted during peacetime, either unilaterally or multilaterally through the Security Council, are a means of economic

¹⁶ This principle provides that "restrictions upon the independence of States cannot . . . be presumed" and that international law recognizes that States possess "a wide measure of discretion which is only limited in certain cases by prohibitive rules." Case of the S.S. *Lotus* (France v. Turkey), 1927 P.C.I.J. (ser.A) No.10.

¹⁷ See Dupont 2012, p.311; Lowe and Tzanakopoulos 2012, p.8 ("It is generally accepted that the prohibition of the use of force under [UN Charter] Article 2(4) and under customary law does not preclude the use of economic force.") The ICJ in the *Nicaragua* case found 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." *Military and Paramilitary Activities (Nicaragua v. United States)*, Judgment. 1986 I.C.J. 14, 138.

¹⁸ See generally Dupont 2012.

¹⁹ Articles on Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, U.N. Doc. A/RES/56/83/Annex (12 December 2001). See, e.g., Dupont 2012.

warfare.²⁰ And indeed, some of the chiefest proponents of the use of coercive economic sanctions refer to them as such.²¹ Though ‘economic warfare’ is not a legal term of art, it does usefully capture both the intent of those applying such sanctions, as well as the effects of those sanctions upon the target state. As Vaughan Lowe and Antonios Tzanakopoulos have written:

Economic warfare is not only a means of imposing pressure which supports military action. Certain measures taken in peacetime resemble traditional means of economic warfare to such an extent that it may be fair to say that economic warfare, in the form of economic coercion, is also an *alternative to*—and not simply a *complement of*—armed conflict.²²

President Hassan Rouhani of Iran has recently commented on the violent nature of the sanctions imposed upon Iran by the Security Council and by states acting unilaterally:

Unjust sanctions, as manifestation of structural violence, are intrinsically inhumane and against peace. And contrary to the claims of those who pursue and impose them, it is not the states and the political elite that are targeted, but rather, it is the common people who are victimized by these sanctions. Let us not forget millions of Iraqis who, as a result of sanctions covered in international legal jargon, suffered and lost their lives, and many more who continue to suffer all through their lives. These sanctions are violent, pure and simple; whether called smart or otherwise, unilateral or multilateral. These sanctions violate inalienable human rights, inter alia, the right to peace, right to development, right to access to health and education, and above all, the right to life. Sanctions, beyond any and all rhetoric, cause belligerence, warmongering and human suffering.²³

Particularly as the authorization and use of economic sanctions, especially by powerful states and international organizations against weaker states, has become so commonplace during the post-Cold War period, it is important to recognize that international economic sanctions that are purposed in coercing a target state to change its behavior, are measures of economic warfare potentially no less destructive in their effects upon the target state, and particularly upon its civilian population, than military force.

In recognition of this fact, a number of scholars have proposed that the law of armed conflict, or at least principles derived from that body of law, should apply to the imposition of coercive economic sanctions, both by states acting unilaterally as well as under the authorization of the Security Council, even during peacetime. In a comprehensive presentation of this line of analysis, in an article published in the *European Journal of International Law* in 1998, Michael Reisman identified a number of these principles.²⁴ First, the related principles of necessity and proportionality:

²⁰ See Lowe and Tzanakopoulos 2012, p.8.

²¹ See e.g., Zarate 2013.

²² Lowe and Tzanakopoulos 2012, p.8.

²³ Statement by H. E. Dr. Hassan Rouhani, President of the Islamic Republic of Iran, at the Sixty-eight Session of the United Nations General Assembly [sic], New York, 24 September 2013, *available at* <https://papersmart.unmeetings.org/media2/157530/iran.pdf> (accessed 5 July 2014).

²⁴ Reisman and Stevick 1998, p.86-141.

The principle of proportionality under international law caps the quanta of damage that the necessity inquiry suggests. Therefore, even if necessary, a sanctions programme cannot exceed the somewhat broadly construed bounds of proportionality. Collateral damage, as part of general damage, must also be proportional. The referential point of evaluation for proportionality under the law of armed conflict is the immediate or prospective consequences of the act that triggered the contingency. This inquiry into proportionality must also necessarily be prospective.

Second the principle of discrimination between combatants and non-combatants:

Economic sanctions are destructive. Potentially, they could be even more destructive, at least in terms of collateral damage, than uses of the military instrument . . . To allow unilateral or multilateral actors to use economic sanctions in a manner inconsistent with the minimization of collateral harm would undermine the fundamental goals of international law that are expressed in the prescribed law of armed conflict . . . More limited and precise economic sanctions are to be preferred over more general and indiscriminating programmes. Given the destructiveness of economic sanctions programmes, it would seem that genuinely effective general embargoes, which, by definition, cannot discriminate between combatant and non-combatant, should be impermissible and that there is now a need for a much more refined use of the economic sanction.

Third, the principle of necessity of a periodicity of review of sanctions programs:

[E]conomic sanctions programmes must continuously update their information as the programme proceeds to ensure that they are consistent, in their effects, with international law. The necessity for the use of explicit contextuality here is very important to ensure compliance no less than to test allegations of abuse.

Implicit in Reisman's analysis is the conclusion that serious, coercive economic sanctions, applied unilaterally by states or under the authorization of the Security Council, should *per se* trigger the application of the *jus in bello*, and principles contained therein. This is a problematic conclusion, as it is difficult to square the idea of economic sanctions satisfying the requirements for constituting a formal armed conflict, with the orthodox interpretation of provisions in sources of the *jus in bello* defining an armed conflict.

However, many of the same principles that Reisman identifies in the law of armed conflict—necessity, proportionality, discrimination, review—can be found, and argued more persuasively to be formally applicable to coercive economic sanctions, in general international law. As Lowe and Tzanakopoulos observe:

The exercise of economic pressure, even in the absence of specific obligations, must not exceed a certain limit, lest it constitute a violation of the customary principle of non-intervention. Accordingly, economic measures not otherwise prohibited by international law become unlawful if they aim to coerce the target State in respect of matters which each State has the right to decide freely, such as the choice of a political, economic, social and cultural system . . . Certain parallels between measures of economic warfare in

armed conflict and economic measures in peacetime are clearly identifiable. The concept of imposing a strain on the targeted economy so as to procure submission (in war) or to induce compliance with international obligations (in peacetime) is one common feature. So, too, is the basic limitation of proportionality, even if the precise test will differ depending on whether economic warfare is waged during armed conflict or in peaceful circumstances.²⁵

Lowe and Tzanakopoulos here identify as applicable *inter alia* the general international law principle of non-intervention, and note that one aspect of the principle of nonintervention is a corollary principle which has been iterated in a number of treaties and U.N. General Assembly resolutions, i.e. the right of states to be free from political or economic coercion by other states.²⁶ As stated in U.N. General Assembly Resolution 3281:²⁷

Article 1

Every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever.

Article 32

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.

The number of occasions on which this principle has been included in U.N. General Assembly resolutions, and the overwhelmingly positive voting record in favor of these resolutions in the General Assembly, provides evidence supporting the conclusion that this principle of economic non-coercion has likely entered into the corpus of customary international law.²⁸ In a 2012 report, the United Nations High Commissioner for Human Rights gave the following assessment of the status of this principle in customary law:

Since the 1960s, the non-intervention principle has repeatedly figured in General Assembly resolutions, culminating in the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, the 1970 Declaration on Friendly Relations and the 1981 Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, with a particular emphasis on economic measures. . .

²⁵ Lowe and Tzanakopoulos 2012, pp. 11, 13.

²⁶ See Shaw 2008, p.1147.

²⁷ Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), Art. 1, U.N. Doc. A/RES/29/3281 (12 December 1974); see also G.A. Res. 2625 (XXV), Annex, principle 3, U.N. Doc A/RES/25/2625 (24 October 1970); G.A. Res. 44/215, U.N. Doc A/RES/44/215 (22 December 1989); G.A. Res 66/186, U.N. Doc. A/RES/66/186 (22 December 2011).

²⁸ See Dupont 2012, p.316.

The difficulty lies, however, less in accepting the non-intervention principle as a principle of international law. Rather, it has proven difficult to agree on the precise definition of what constitutes “intervention” and, in particular, whether economic coercive measures fall under the core of the customary international law principle of non-intervention

What can be deduced from the above-mentioned resolutions and from the [International Court of Justice’s] judgment in the *Nicaragua* case is that two elements are crucial for assessing to what extent measures, including economic ones, may contravene the principle of non-intervention: coercion and the intention to change the policy of the target State where the latter choice should be a free one.²⁹

Accordingly, international economic sanctions that are purposed in coercing states to change their behavior in issue areas in which it is their sovereign right to choose their own policies, are likely in violation of the customary international law principle of non-coercion, which again is simply one specific manifestation of the customary law principle of nonintervention.

Here a distinction may exist as between economic sanctions applied unilaterally by states, and sanctions applied under the authority of the Security Council. While the principle of economic non-coercion applies to states acting unilaterally—*e.g.* to the previously referenced primary and secondary sanctions applied by the U.S. and the E.U. against Iran for counter-proliferation purposes—in Article 41, the U.N. Charter explicitly authorizes the Security Council to mandate economic sanctions in response to a determined threat to international peace and security. It is therefore less clear what application the principle of economic non-coercion should be understood to have upon the actions of the Security Council itself.

This question of course ties into a larger debate which has obtained among international legal scholars for some time, regarding whether and to what extent the Security Council is bound by rules of customary international law, and whether through acting under its Chapter VII authority the Security Council may override some or all of those principles of general international law.³⁰ Most scholarly commentary accepts the notion that the Security Council is *prima facie* bound by general customary international law.

Article 103 of the U.N. Charter does, however, provide that: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” Some observers have argued on the basis of this provision that when the Security Council acts under its Chapter VII powers, the obligations of states to obey those decisions should be taken in priority to any contradictory principle of customary international law. However, by the plain meaning of its terms, the supremacy principle of Article 103 applies only to circumstances in which a state’s obligations under the U.N. Charter come into conflict with its obligations under some other treaty. Article 103 is therefore a simple conflict of treaty obligations provision, that should be read narrowly.³¹ Article 103 may therefore not be invoked to legally justify Security Council decisions that violate principles of general customary

²⁹ United Nations Document A/HRC/19/33, pg. 6 (January 11, 2012).

³⁰ *See, e.g.,* Schweigman 2001; Reinisch 2001; Michaelsen 2014.

³¹ *See* Paulus 2012 at Volume 2, Pgs. 2132-2133 (“The wording of Art. 103 suggests that it only applies to treaties and other agreements, not to customary international law. The *travaux préparatoires* support this view. The drafters refused to adopt a formula that explicitly included customary international law and other legal sources.”)

international law, including principles of international human rights law, the law of armed conflict, or, arguably, the principle of economic non-coercion, as it has been described above. In fact, the balance of case law from international tribunals, and scholarly commentary argue the contrary.³²

The opposing argument could, of course, be made that if one concludes that the Security Council cannot adopt coercive economic sanctions against states that it finds to be a threat to the peace, one is taking away substantially from the Security Council's powers under Article 41 of the Charter to impose economic sanctions. I respectfully disagree with this argument. In my view, the Security Council's powers under Chapter VII can be read to be fully in harmony with the customary law prohibition, applicable to the Security Council as it is to states, on the adoption of coercive economic sanctions.

Separate from the question of applicability, is the substantive question of when economic pressure upon a target state created through economic sanctions, imposed either by the Security Council or by states acting unilaterally, rises to the level of coercion. The International court of Justice has had occasion to consider the concept of coercion in the context of the principle of nonintervention on at least three occasions; the *Corfu Channel* case, *Nicaragua v. United States*, and *DRC v. Uganda*. In all three of these judgments, however, the consideration of the principle of nonintervention, and the aspect of coercion, are performed by the court in the context of a use of military force which was joined with economic coercive measures. This fact makes these cases of only marginal assistance in discerning under what circumstances the use of economic coercive pressure alone will run afoul of the legal principle of non-coercion. At this point it can probably only be said that the assessment of whether economic pressure has amounted to unlawful coercion will be highly fact specific, and must be assessed on a case-by-case basis.

Relatedly, there is also the question, which is often present in counter-proliferation sanctions cases, of whether a state against whom coercive economic sanctions are applied, is in fact being coerced to change its behavior "in an area in which it is its sovereign right to choose its own policies." I am referring here to instances in which the sanctions being applied against a state are purposed, at least partially, in pressuring the state to bring its actions into harmony with its legal obligations. These underlying legal obligations may derive from customary or treaty law, or, arguably, as an extension of treaty law, from the decisions of the U.N. Security Council itself. In counter-proliferation cases, the question of whether the sanctioned state is in fact violating its legal obligations relative to WMD proliferation is typically a disputed one, making the question of whether the sanctioned state is being coerced into doing something it doesn't otherwise legally have to do, an even more complex and contested one.

North Korea, for example, announced in January of 2003 that it was withdrawing its membership from the 1968 Nuclear Nonproliferation Treaty (NPT). This withdrawal from the NPT simultaneously effected North Korea's withdrawal from its comprehensive safeguards treaty with the IAEA as well.³³ Three years later, on October 9, 2006, North Korea conducted its first nuclear weapon test.³⁴ In response to this test, the Security Council adopted Resolution 1718 on October 14, 2006. North Korea's legal position with regard to its nuclear test was that, since it had withdrawn from the NPT and from its IAEA safeguards agreement in 2003, it was under no legal obligation in 2006 to refrain from the possession and testing of nuclear weapons.

³² See generally Joyner 2012; Schweigman 2001; de Wet 2004; Tzanakopoulos 2011; de Wet 2013.

³³ Article 26 of the DPRK's safeguards agreement provides, "This Agreement shall remain in force as long as the Democratic People's Republic of Korea is party to the Treaty [the NPT]."

³⁴ See Chronology of US-North Korean Nuclear and Missile Diplomacy, Arms Control Association Fact Sheet.

This position was refuted by the IAEA, which argued that North Korea's withdrawal from the NPT had been invalid and ineffectual, because it had not properly followed the procedures stipulated in Article X of the NPT, addressing the withdrawal of a state party.³⁵

In Resolution 1718 the Security Council first condemns North Korea's nuclear weapon test, and demands that North Korea halt any further nuclear weapons and ballistic missile development. It then demands "that the DPRK return to the Treaty on the Non-Proliferation of Nuclear Weapons and International Atomic Energy Agency (IAEA) safeguards" and decides that North Korea "shall act strictly in accordance with the obligations applicable to parties under the Treaty on the Non-Proliferation of Nuclear Weapons and the terms and conditions of its International Atomic Energy Agency (IAEA) Safeguards Agreement." Finally, the Security Council imposes a long list of economic sanctions on North Korea, purposed in pressuring North Korea to abide by the Council's commands. These economic sanctions were later supplemented through Resolution 1874 in 2009.

Essentially, this was a case of disputed underlying legal obligations – i.e. whether North Korea's withdrawal from the NPT was effective - and the Security Council's entry into this normative fray through the imposition of its own ostensibly legally binding commands, which it then attempted to enforce through the imposition of economic sanctions of increasing scope and intensity. Scholarly commentary at the time in fact sided with North Korea's legal argument that it had, indeed, effected a withdrawal from the NPT in 2003.³⁶ If correct, this conclusion would in turn appear to call into question the lawfulness of the Security Council's extraordinary command that North Korea rejoin the NPT and its IAEA safeguards treaty (i.e. treaties from which it had lawfully withdrawn), and abide by the obligations therein.³⁷

Returning therefore to the principle of economic non-coercion, was the Security Council in this case acting in violation of this rule of customary international law, by its actions of economically coercing North Korea to change its behavior in an area in which it was North Korea's sovereign right to choose its own policies? I think that a sound legal argument could be made to this effect. Again, in this case, I think the answer depends on the resolution of the underlying question of whether North Korea was lawfully obligated to act in the manner in which the Security Council's economic sanctions were coercing it to act, either on the basis of the NPT itself or on the basis of the Security Council's own commands. The answer to this question, again as is often the case in counter-proliferation cases, is disputed.³⁸

II(B) Human Rights

The possibility that international economic sanctions, whether applied unilaterally by states, or multilaterally through the Security Council, in a range of issue areas, may violate international legal obligations of the sanctioning entity under customary international human rights law, has been a subject of increasing recent concern.³⁹ As noted previously, severe, coercive economic sanctions, particularly as applied by powerful states against weaker states, can have devastating

³⁵ See Asada, 2004; Kirgis, 2003.

³⁶ See Asada, 2004; Kirgis, 2003.

³⁷ See Joyner, 2012.

³⁸ See a description of a similar situation of legal dispute concerning Security Council sanctions on Iran in Joyner, 2012.

³⁹ See, e.g., Reinisch 2001.

effects on the economy and infrastructure of the target state, leading to widespread suffering and deprivation for the civilian population of the state.

There is a controversial threshold issue on this question, regarding whether states have human rights obligations regarding persons not in their territory or under their effective control. The most recent scholarship and case law recognizes that extra-territorial human rights obligations can apply to states when they engage in forceful action abroad, even in peacetime.⁴⁰ As Nils Melzer has explained:

The notion of ‘jurisdiction’ for the purposes of human rights law has been said to focus on *conduct* rather than *territory*, and to emphasize the duty of states to conduct their operations according to human rights standards with regard to all individuals who may be under their effective control or who may be directly affected by their actions.⁴¹

In brief, international human rights obligations follow a state’s conduct, and the effects of that conduct upon individuals, whether they are located within the acting state or extraterritorially. It would appear that the use of coercive international economic sanctions upon a target state would fit well into this scope of application. And particularly since similar forcible actions against a foreign civilian population would be prohibited or at least severely limited by customary international humanitarian law during a time of armed conflict, as a simply intuitive matter it would seem impossible for states to argue that their use of targeted force through economic warfare during peacetime against a foreign civilian population, should not give rise to obligations to respect the human rights of those targeted civilians.⁴² Economic sanctions imposed during peacetime may therefore unlawfully infringe upon *inter alia* the following human rights of civilians in target states, found in both conventional and customary international law: the rights to life; health; an adequate standard of living, including food, clothing, housing and medical care; and freedom from hunger.⁴³

Similarly, there is another threshold question as to whether and to what degree the Security Council itself is bound by international human rights law obligations in its authorization of economic sanctions pursuant to its Chapter VII powers. As recognized previously, the Security Council does have explicit authority under Article 41 of the UN Charter to authorize economic sanctions in a case in which it determines the existence of a threat to international peace and security. However, Security Council-authorized sanctions regimes, because of their coordinated nature potentially among many states, also have the greatest potential to severely affect the civilian population of the sanctioned state.

It is important to recall that in Article 25 of the U.N. Charter, member states are obligated to “accept and carry out the decisions of the UNSC in accordance with the present Charter.” This provision has been interpreted to require Member state compliance only with Security Council sanctions decisions which are themselves in compliance with the provisions and principles of the

⁴⁰ See Milanovic 2013; Melzer 2008, p. 138-139; *Issa and Others v. Turkey*, App. No. 31821/96, 41 EHRR 567 (2004), paragraphs 69-71.

⁴¹ Melzer, 2008, p. 138.

⁴² See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Arts.54, 69, 70, 8 June 1977, 1125 U.N.T.S. 3.

⁴³ See UDHR, Arts.3, 25, G.A. Res. 217A(III), U.N. Doc. A/810 (1948); ICCPR, Art.6.1, 16 December 1966, 999 U.N.T.S. 171; Convention on the Rights of the Child, Arts. 6.1, 27.1, 20 November 1989, 1577 U.N.T.S. 3; ICESCR, Arts.11.1, 11.2, 12, 16 December 1966, 993 U.N.T.S. 3.

U.N. Charter.⁴⁴ This interpretation is strengthened by a view of Article 25 in its context within the U.N. Charter, and in particular by the text of Article 24 which immediately precedes it. Article 24 provides that:

In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.

These purposes and principles therefore comprise important limitations on the power of the Security Council to act, even under its Chapter VII authority. Among the paragraphs in Article 1 of the U.N. Charter, which are explicitly designated to constitute the “Purposes of the United Nations,” is paragraph 1, which lists one such purpose as:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and *in conformity with the principles of justice and international law*, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.⁴⁵

Thus, the obligation on U.N. member states to “accept and carry out the decisions of the Security Council” is intrinsically linked to the Security Council itself acting in accordance with the purposes and principles of the United Nations, one of the foremost of which is to act in accordance with international law. As noted previously, there is a growing consensus among international legal scholars that the Security Council is bound by general customary international law, inclusive of customary international human rights law.⁴⁶

Yet another purpose of the United Nations, included among the paragraphs of Article I of the U.N. Charter, is contained in paragraph 3:

To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, *and in promoting and encouraging respect for human rights and for fundamental freedoms for all* without distinction as to race, sex, language, or religion.⁴⁷

Thus, in order for the Security Council to exercise its Chapter VII powers lawfully in accordance with the purposes of the United Nations, it must promote and encourage respect for human rights. It can hardly do so if it, itself, violates human rights law in its application of economic sanctions, in the counter-proliferation context, or in any other context.⁴⁸

This subject of the application of international human rights law to Security Council sanctions has recently been thoroughly considered by Christopher Michaelsen, in an article in the *Journal of Conflict and Security Law*.⁴⁹ Michaelsen discusses in particular the principle of

⁴⁴ See Joyner 2007; Peters 2012.

⁴⁵ Emphasis added.

⁴⁶ See, e.g., Schweigman 2001; Reinisch 2001; Michaelsen 2014

⁴⁷ Emphasis added.

⁴⁸ See Schweigman 2001; Reinisch 2001.

⁴⁹ See Michaelsen 2014.

derogation, present in many human rights law instruments, and the argument made by some scholars that, when the Security Council acts pursuant to its Chapter VII powers, it is implicitly signaling its intention to derogate from normally applicable human right law. This derogation argument could also be made more directly by states acting unilaterally as well.

In the context of Security Council sanctions, Michaelsen finds significant utility in the principle of proportionality, which is a general principle of international law, whose manifestations can be found throughout the sources of both international human rights law and international humanitarian law. Specifically, the principle of proportionality is generally applicable to derogations from human rights obligations.⁵⁰ Thus, Michaelsen argues, if one assumes (in harmony with the bulk of jurisprudence and scholarly commentary on the issue) that the Security Council *is* bound by international human rights law obligations with regard to its decisions to impose international economic sanctions, then in order for the Security Council to validly derogate from those obligations in a given case of sanctions application, the sanctions program being authorized must, *inter alia*, be demonstrably compliant with the principle of proportionality.

This conclusion is particularly persuasive as it provides a mechanism for application of a principle that is so pervasive in both international human rights law and international humanitarian law, and which seems so commonsensical as a prudent limitation upon the ability of both states acting unilaterally, and the Security Council acting multilaterally, to impose economic sanctions – i.e. to engage in economic warfare - against a target state.

So what would be the practical application of the requirement of proportionality upon the ability of states acting unilaterally, and the Security Council acting multilaterally, to lawfully impose economic sanctions upon a target state? The calculation of proportionality in this context could of course be quite complex – but then it ever is so (e.g. civilian casualties vs. legitimate military goals in the *jus in bello*). Each case would of course be unique, and driven by its own particular facts. But a recognition that both the Security Council, and states acting unilaterally, are bound by international human rights law to apply economic sanctions against other states and non-state-actors only to the extent to which the effects of those sanctions against the civilian population of the sanctioned state are proportional to the threat to international peace and security posed by the state behavior targeted by the sanctions, would be an important recognition, and could influence debate on both the initiation and the escalation of a sanctions regime.

In the cases of Iran and North Korea, where crippling international sanctions have been imposed by the Security Council and by states acting unilaterally, that have caused serious and widespread privation and suffering for ordinary civilians, in attempt to coercively influence the autocratic leaders of those countries to change policy course on a matter of national security sensitivity, a persuasive case can in my view be made that these counter-proliferation economic sanctions have run afoul of this principle of proportionality.

But what of the concept of “targeted sanctions,” which as explained above arose as a concept from the experience of the truly draconian international embargo imposed on Iraq after the 1990-1991 Gulf War? What if international economic sanctions are targeted only at specific industries related, for example, to a country’s nuclear program, and to government officials directly involved in that program? Could not such sanctions be seen to pass a proportionality test? The answer is likely yes, in theory. And as discussed previously, it is in this targeted vein that counter-proliferation sanctions on Iran and North Korea, for example, began. However, as

⁵⁰ See Michaelsen 2014. P. 462-464.

time passed, and the target governments (predictably) did not change their behavior in the manner purposed by the sanctions, in both cases there was a steady “sanctions creep” phenomenon, through which the Security Council’s sanctions decisions steadily increased in scope and application. Furthermore, in both cases, unilateral sanctions were imposed in parallel by powerful states, including particularly the U.S. and the E.U., that went well beyond the scope of the sanctions program approved by the Security Council, and in particular tightened restrictions on financial transactions with target state financial institutions. As both the multilateral and unilateral sanctions regimes grew more comprehensive in scope, the effect upon the civilian populace of the targeted states became more severe. So again, it is in theory possible for international economic sanctions, in the counter-proliferation issue area or in other areas, to be targeted *and to remain targeted* on only those actors who are closely related to the perceived threat animating the sanctions. And in such a factual circumstance, the proportionality test for proper derogation under international human rights law may potentially be met and maintained. Unfortunately, however, recent counter-proliferation case studies do not provide illustrations of this proportionate approach.

Conclusion

This brief review has attempted to demonstrate that, notwithstanding the general freedom of states to choose those other states with which they please to have, and to allow their subject natural and legal persons to have, economic relations, there are nevertheless principles of positive customary international law which at least in some contexts will circumscribe the ability of states and international organizations, including the Security Council, to lawfully apply coercive economic sanctions against other states and non-state-actors. I have sought to illustrate considerations relative to this thesis through a discussion of WMD counter-proliferation sanctions cases.

The application of these principles of law will, of course, differ in their applicability and implication on a case by case basis. Overall, however, I think it is important for these principles to be present in the minds of state and international organization officials, to act as a temper upon the over-utilization of coercive economic sanctions that has been witnessed in recent decades. I think that these limiting principles are an important element of the necessary maturation and formalization of international law relevant to international economic sanctions.

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