



THE (IL)LEGALITY OF UNILATERAL SANCTIONS IN LIGHT OF THE INADEQUACY OF HUMANITARIAN EXEMPTIONS

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This article argues that unilateral economic sanctions are unlawful because their design and implementation inherently result in violations of human rights that all states are obliged to respect, protect and fulfil under international law. In explaining this, it details the structural reasons why humanitarian exemptions are incapable of fully eliminating the problem. The article then considers the legality of imposing sanctions in the knowledge that human rights will be violated; whether such a violation must be intentional to constitute a breach of international law; and whether the principle of proportionality is relevant to a determination of the legality of the sanctions. In concluding that unilateral sanctions constitute an element of state conduct that has become increasingly widespread and frequent despite the damage they cause to human rights, the article presents three possible scenarios from which their legality might emerge: their entry into customary international law, which would imply an erosion of the obligations of states to respect and protect human rights; the development of a dedicated area of international law that encompasses sanctions to ensure that human rights are respected and protected when they are used; and the prospect for sanctions themselves to be reconceptualised and structured in a way that makes them benign with respect to human rights.

Keywords: unilateral sanctions; human rights; humanitarian exemptions; legality; effectiveness.

(НЕ)ПРАВОМЕРНОСТЬ ОДНОСТОРОННИХ САНКЦИЙ В СВЕТЕ НЕАДЕКВАТНОСТИ ГУМАНИТАРНЫХ ИЗЪЯТИЙ

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Обосновывается неправомерность односторонних экономических санкций, поскольку их разработка и применение неизбежно приводят к нарушениям основополагающих прав человека, обязанность соблюдать которые возлагается на все государства в соответствии с международным правом. Подробно описаны причины структурного порядка, по которым применение гуманитарных изъятий не может полностью устранить данную проблему. Также оценивается правомерность введения санкций в случаях, если известно, что права человека будут нарушены. Рассматривается вопрос о том, должно ли подобное нарушение прав быть преднамеренным, чтобы считаться несоблюдением международного права и актуален ли принцип соразмерности для определения законности санкций. В свете того, что односторонние санкции, несмотря на негативный гуманитарный эффект, становятся все более распространенным и частым явлением, дается оценка трех возможных сценариев обоснования правомерности подобных санкций: формирование обычной нормы международного права, которое повлечет неполное соблюдение обязательств государств по уважению и защите права человека; разработка специальной области международного права в сфере

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санкций для обеспечения соблюдения и защиты прав человека при их введении; переосмысление и реструктуризация, проведенные таким образом, чтобы смягчить их влияние на права человека.

Ключевые слова: односторонние санкции; права человека; гуманитарные изъятия; правомерность; эффективность.

Introduction

Questions about the legality of unilateral economic sanctions are focused on the argument that they are prohibited by international law unless they meet one of three conditions:

- they are authorized by the UN Security Council under powers granted to it by art. 39 and 41 of the UN Charter;
- they are permitted as countermeasures against the wrongful acts of another state [1, p. 71–72];
- they receive the consent of the sanctioned state, such as through its participation in a multilateral dispute settlement mechanism that authorizes sanctions¹ [2, p. 11].

This article asserts that the conditions must be seen as frameworks in which unilateral sanctions may lawfully exist, while the legality of the actual sanctions is a separate matter that must be judged on the basis of the lawfulness of their content and consequences. Considered in this sense, unilateral sanctions as currently designed and implemented are of doubtful legality:

either they block the targeted states from complying with their legal obligations pertaining to human rights, or they directly breach human rights themselves.

For the most part, states that impose economic sanctions openly support human rights and do not engage in conduct that purposely subverts them. Indeed, a common reason for using sanctions is to put pressure on other states to improve their own human rights situations. The violations that arise from sanctions are undesired side-effects of their implementation, as evidenced by the fact that sanctioning states have developed three types of corrective action:

- the inclusion of humanitarian exemptions in comprehensive or sectoral economic sanctions;
- the use of targeted sanctions against specific individuals, companies and organizations;
- the provision of humanitarian aid to offset the sanctions' impact.

It is known today that none of these, either alone or in any combination, resolves the problem.

Addressing the harm to human rights arising from sanctions

Economic sanctions are a means of coercion that states and international organizations apply against countries to pressure them into changing their conduct, policies or political systems when diplomatic efforts do not yield the desired outcomes. From their earliest use by the ancient Greeks through most of the 20th century, sanctions entailed broad restrictions on trade with the targeted political entity [3, p. 9–11]. Since the end of the Great Patriotic War, and particularly in the last three decades, sanctions have been used with increasing frequency while being influenced by two major trends – the growth in cross-border financial transactions that have accompanied globalization, and the expansion of international legal norms pertaining to human rights. The first of these is commonly addressed by sanctions that impose financial constraints in addition to trade restrictions. The second has led to a body of international law that requires states to respect, protect and fulfill human rights at all times, including when they impose sanctions.

During the 1990s, when the UN Security Council made greater use of comprehensive economic sanctions to enforce its decisions, it became evident that

these measures were routinely causing humanitarian problems by preventing the targeted countries from ensuring the human rights of their populations, with dire consequences. This was seen most dramatically in Iraq; an outside study commissioned by the United Nations described the UN sanctions against Iraq as creating a “humanitarian catastrophe”, citing an alarming deterioration of the population’s health and a disastrous increase in infant and child mortality [4, p. xx–xxi]. Other assessments of Security Council sanctions by various UN organs and agencies came to similar conclusions; a committee of the Economic and Social Council, for example, found that the sanctions “almost always have a dramatic impact” on rights enshrined in the International covenant on economic, social and cultural rights: “They often cause significant disruption in the distribution of food, pharmaceuticals and sanitation supplies, jeopardize the quality of food and the availability of clean drinking water, severely interfere with the functioning of basic health and education systems, and undermine the right to work”².

The Security Council responded by incorporating “humanitarian exemptions” into its sanctions to

¹Understanding on rules and procedures governing the settlement of disputes : annex of the WTO agreement. 1994.

²General comment of the UN Economic and Social Council No. 8 on implementation of the Covenant on economic, social and cultural rights. 12 December 1997. Para 3. E/C.12/1997/8.



allow the continued flow of vital goods and services into the targeted countries, but it was apparent that these did not halt the negative impact on human rights³, and the United Nations shifted toward using targeted sanctions in order to shield the broader populations of sanctioned countries from harm. This created a new problem, however, as the targeted sanctions directly breached the rights of listed individuals, a matter discussed later in this article. Meanwhile, the practice of applying comprehensive economic sanctions did not end, as individual states and regional groups of states began using them, in addition to using targeted sanc-

tions, to pursue their foreign policy interests – often without or beyond the Security Council’s authorization or the other conditions for sanctions to legally exist. The humanitarian exemptions contained in these “unilateral” (also called autonomous) sanctions have similarly been unable to fully respect or protect the human rights of the sanctioned countries’ populations; even now, among the rights commonly violated are the rights to food and to health, and by extension the right to life⁴. In sum, “while human rights are so often invoked, sanctions have never succeeded in safeguarding human rights” [5].

The failure of humanitarian exemptions and the desire to keep sanctioning

As states have refined their sanctions regimes and humanitarian exemptions to address this dilemma, no solution has emerged. Sometimes states imposing sanctions provide humanitarian assistance to the countries they target with them, either independently of the sanctions or built into them to supplement the humanitarian exemptions, but this invariably fails to restore full respect or protection of human rights [6, p. 1]. This is because the sanctions and the assistance operate in two different spheres: “Even with a significant program of external humanitarian assistance... humanitarian exemptions cannot provide an adequate safety net to compensate for the large scale social and economic dislocation that trade sanctions cause. Humanitarian assistance does have an impact at micro-level but trade embargoes have an impact at macro-level. <...> Even streamlined and generous humanitarian assistance cannot compensate for such dramatic economic decline” [7, p. 27].

The inclusion of humanitarian exemptions represents a *de facto* recognition by states that their sanctions produce human rights violations – and the provision of additional humanitarian assistance is a *de facto* recognition that human rights are still harmed despite the exemptions. Even if humanitarian exemptions can reduce the scope and (or) severity of the breaches⁵, the pervasive inability to fully eliminate violations makes it possible to conclude that damage to human rights is integral to the sanctioning practice. The fact that supplemental aid is of limited help highlights the intractable nature of the problem.

Numerous reasons have been put forth to explain why humanitarian exemptions do not succeed. These include complex and evolving rules of unilateral sanctions regimes, which create the risk of accidental violations and penalties that discourage humanitarian exports to sanctioned countries; lengthy and (or) costly processes for approving exports of exempted items to sanctioned countries, which impede humanitarian actors from responding to emergency situations; a reticence among banks to finance exports by humanitarian actors to sanctioned countries, or to allow them to transfer funds to sanctioned countries, due to perceptions that such transactions are risky in terms of the banks’ exposure to secondary sanctions and (or) compliance with banking regulations; the vigorous and sometimes extraterritorial enforcement of sanctions regimes, including the imposition of secondary sanctions and large fines, which has led to widespread over-compliance with sanctions by suppliers, transporters and financiers that are unwilling to take advantage of humanitarian exemptions out of fear of technical violations; difficulties in providing due diligence assurances that humanitarian items arriving in a sanctioned country will not be diverted toward military uses, other unacceptable purposes or unauthorized recipients; the inability of the sanctioned country to fully benefit from items they obtain through humanitarian exemptions because of the impact of the sanctions on other goods and services, such as fuel for transporting them at their destination; and the restrictive nature of the exemptions⁶ [7, p. 25; 8, p. 10; 9, p. 45].

³General comment of the UN Economic and Social Council No. 8 on implementation of the Covenant on economic, social and cultural rights. 12 December 1997. Para 4–5. E/C.12/1997/8.

⁴UN experts: sanctions proving deadly during COVID pandemic, humanitarian exemptions not working : press release of the Office of the High Commissioner for human rights of the 7 August 2020.

⁵High-level review of United Nations sanctions. UN sanctions: humanitarian aspects and emerging challenges [Electronic resource]. URL: http://www.hlr-unsanctions.org/HLR_WG3_report_final.19.1.15.pdf (date of access: 12.09.2020).

⁶Douhan A. Negative impact of unilateral coercive measures on the enjoyment of human rights in the coronavirus disease pandemic [Electronic resource]. URL: https://www.ohchr.org/Documents/Issues/UCM/A_75_209_AEV.docx (date of access: 15.10.2020) ; Dyer G, Arnold M, Barker A. Sanctions confusion leaves European banks wary of Iran business // Financial Times. 17 January 2016 ; Sun M. Evolving Venezuela sanctions pose problems for banks // Wall Street Journ. 25 February 2019 ; Debarre A. Safeguarding humanitarian action in sanctions regimes. International Peace Institute [Electronic resource]. URL: https://www.ipinst.org/wp-content/uploads/2019/06/1906_Sanctions-and-Humanitarian-Action.pdf (date of access: 20.09.2020).



While any one of these deterrents can be enough to dissuade humanitarian trade with sanctioned countries, what is striking is that many or most of these factors coexist as part of, or as a result of, the same unilateral sanctions regimes⁷, compounding the difficulty of making humanitarian exemptions attractive to potential users.

Recent evidence that sanctioning states are aware that humanitarian exemptions do not facilitate as much trade as intended comes from the fact that the United States and the European Union tried to encourage greater use of them during the COVID-19 pandemic in 2020–2021; while neither altered their existing exemptions, both sought to make it easier for humanitarian actors to comply with the relevant rules. The US government issued a fact sheet that consolidated, for the first time, information that previously was not as readily accessible about exemptions, exceptions and authorizations for humanitarian assistance and trade under its economic sanctions regimes targeting Cuba, Iran, North Korea, Russia or Ukraine, Syria and Venezuela⁸. The European Commission began publishing detailed guidance on providing goods and services for humanitarian purposes in countries where the EU imposes sectoral and targeted sanctions⁹. Despite such efforts, reports from sanctioned countries showed that their ability to obtain supplies and services to fight COVID-19 was still being impeded by the sanctions¹⁰.

The persistent incapacity of humanitarian exemptions and supplemental aid to eliminate the negative effect of sanctions on human rights is not unexpected. A report by the British House of Lords in 2007, for example, stated: “It is predictable that sanctions which inflict high economic costs on a country run by a ruthless government are likely to result in severe suffering among the general population even if there are humanitarian exemptions and relief programs”¹¹.

Despite the proliferation of unilateral economic sanctions today, it is amply documented that they are often unsuccessful in coercing targeted countries into making the changes desired [10; 11, p. 148; 12, p. 479]. This leaves the harm they cause to human rights as their only consistent achievement. With such serious flaws, the question naturally arises as to why sanctions remain in use.

It is frequently argued that sanctions avert armed conflict when diplomacy cannot resolve serious international disputes, and this is sometimes true¹² [13] despite “substantial evidence that the imposition of sanctions, rather than preventing war, can actually lead to war” [14, p. 130–131]. The aforementioned outside study done for the United Nations suggests that “some of the attraction may be explained by the reality that sanctions, despite appearing as an “alternative” to direct use of force, are always meant to convey “punishment” on the target for their behavior” [4, p. 78]. It has also been noted that a sanctioning country’s leadership may benefit by imposing sanctions that generate political support from certain domestic constituents [15] or show that policy makers are “doing something about a given problem” [11, p. 171]. Sanctions may have a broader political objective in the targeted country than the goal that is publicly announced, and the objective may not be limited to the targeted country alone [16, p. 18–19]. Indeed, the political motive for using sanctions can be strong enough to outweigh the concern for human rights in the sanctioned state: “It appears that policy makers simply do not regard the suffering and death that will occur in the target state to be more important than the political utility of the enactment of sanctions” [11, p. 167].

A further motive for using sanctions is that a state which actually imposes them is more credible when it threatens sanctions [17, p. 22–23], and the anticipation of a negative humanitarian impact may be integral to how a prospective target country responds. The violation of human rights through the use of sanctions may thus have a certain perverse value in coercing an intended target of new sanctions to effectuate the desired change before any sanctions are imposed.

Whatever benefits may accrue from economic sanctions, the humanitarian problems created by their imposition would sometimes be tantamount to war crimes if they were to occur during armed conflict, due to the importance that the Geneva conventions and Additional protocols place on respecting and protecting the human rights of civilian populations. The corrective actions taken by sanctioning states indicate that they indeed take this problem seriously. Its intractability suggests that it originates at a more fundamental level, in the conceptualization of sanctions as a coercive mechanism.

⁷Douhan A. Negative impact of unilateral coercive measures on the enjoyment of human rights in the coronavirus disease pandemic [Electronic resource]. URL: https://www.ohchr.org/Documents/Issues/UCM/A_75_209_AEV.docx (date of access: 15.10.2020).

⁸Fact sheet: provision of humanitarian assistance and trade to combat COVID-19 [Electronic resource]. URL: https://home.treasury.gov/system/files/126/covid19_factsheet_20200416.pdf (date of access: 16.08.2020).

⁹Commission guidance note on the provision of humanitarian aid to fight the COVID-19 pandemic in certain environments subject to EU restrictive measures [Electronic resource]. URL: https://ec.europa.eu/info/files/guidance-note-provision-humanitarian-aid-fight-covid-19-pandemic-certain-environments-subject-eu-restrictive-measures_en (date of access: 28.10.2020).

¹⁰Douhan A. Negative impact of unilateral coercive measures on the enjoyment of human rights in the coronavirus disease pandemic [Electronic resource]. URL: https://www.ohchr.org/Documents/Issues/UCM/A_75_209_AEV.docx (date of access: 15.10.2020).

¹¹House of Lords, Select Committee on Economic Affairs. The impact of economic sanctions. London : Stationery Office, 2007.

¹²Preventing violent conflict: Swedish policy for the 21st century : government communication. 2000/01:2. Stockholm : Ministry for Foreign Affairs, 2001. P. 28, 32.



Structural obstacles to the effectiveness of humanitarian exemptions

Sanctions cannot achieve their objectives and can be counterproductive for the sanctioning party if the pressure they generate is inadequate, poorly targeted or readily countered by alternative means to accomplish what the sanctions prohibit. An analysis of numerous sanctions regimes found “strong evidence that the economic impact of sanctions has generally been greater when they were more comprehensive in scope or severity¹³,” and also that sanctions which strongly impeded the functioning of target countries’ economies were more likely to succeed in their goals¹⁴. This can make comprehensive economic sanctions attractive to a sanctioning state, but the many variables that comprise the impact on a targeted country make it impossible to measure with precision the minimum threshold for creating an economic disruption of sufficient gravity to provoke the desired change. It is argued that without this knowledge, sanctions against a nation’s economy or one or more vital economic sectors can surpass the degree of coercion that would make them successful, even if success proves elusive for other reasons. Indeed, the potential for ineffective sanctions to have economic and political repercussions in the sanctioning state can create a bias toward designing sanctions that are more extensive than necessary. The same bias may also arise from a desire for sanctions to be sufficiently disruptive to a targeted country that it cannot readily adjust to living under them.

Unsurprisingly, sanctions with the greatest economic impact are those that are most likely to harm the human rights of a sanctioned state’s population¹⁵ [18, p. 59]. Put another way, human rights are impacted the least by sanctions that are not comprehensive – and humanitarian exemptions make sanctions less comprehensive by removing goods and services from their coverage. Consequently, “there is not always strong political will to facilitate exemptions” [7, p. 5] because they affect the sanctions’ success: “Humanitarian exemptions may be regarded as a form of sanctions “leakage” and thus serve to undermine the efficiency or effectiveness of the sanctions regime <...> The near unanimous claim that humanitarian exemptions do not contribute to undermining the effectiveness of sanctions regimes is questionable – and ultimately an empirical question” [19, p. 111].

Accordingly, sanctioning states set limits on humanitarian exemptions to preserve the coercive potential of their sanctions, although this invariably results in the exemptions being too narrow to fully respect human rights: “Exemptions policies use too restricted definitions of what is required for “humanitarian” purposes. Vaccines may be allowed but cold chain equipment or educational materials not. Certain medicines may be exempted but the water and sanitation infrastructure of the country is allowed to collapse, because pumps, spare parts, chlorine and generators are embargoed as supposedly non-humanitarian or potentially “dual-use” items” [7, p. 25].

The restricted scope of humanitarian exemptions can also limit the entities that can avail themselves of them. During the COVID-19 crisis, lawyers at the Canadian firm “McCarthy Tétrault” assessed the exemptions in most Canadian sanctions as “not well-suited for the current pandemic context”, calling them “too narrowly defined”. They noted that the exemptions were sometimes available only to certain categories of entities, with the result that most nongovernmental aid organizations (the exception was the Red Cross and Red Crescent Movement) could not take advantage of them¹⁶.

In order to ensure that human rights are respected and protected, it would appear that the humanitarian exemptions; the procedures and enforcement processes associated with them; and their efficacy in the context of the sanctions’ other restrictions must each be independently sufficient to prevent breaches, as the insufficiency of any one of these can compromise whatever respect or protection is afforded by the others. Moreover, the sufficiency of these factors must be sustained throughout the period when the sanctions are in effect, during which the targeted state’s economic and social circumstances are evolving under the sanctions’ influence – and the more effective the sanctions, the greater this evolution can be.

The obligations of states to respect, protect and fulfill human rights – which includes certain rights that are *jus cogens* – are firmly established in international law through a series of multilateral conventions, other international agreements and the UN Charter, as well as by the Universal declaration of human rights and also custom; these are often mutually reinforcing by

¹³Economic sanctions: agencies assess impacts on targets, and studies suggest several factors contribute to sanctions’ effectiveness [Electronic resource]. URL: <https://www.gao.gov/assets/710/701891.pdf> (date of access: 16.09.20).

¹⁴Ibid.

¹⁵Ibid. ; Øygarden K. F. The effect of sanctions on human rights: assessing the impact of economic sanctions on human rights violations in targeted countries. Oslo : Univ. of Oslo, 2017. P. 136.

¹⁶Boscariol J. W., Migitko O., Koukio Y. As global pandemic spreads, economic sanctions and humanitarian exemptions coming into focus for the business and NGO communities [Electronic resource]. URL: <https://www.mccarthy.ca/en/insights/blogs/terms-trade/global-pandemic-spreads-economic-sanctions-and-humanitarian-exemptions-coming-focus-business-and-ngo-communities> (date of access: 30.10.2020).



referring to the same rights. With regard to unilateral sanctions, some publicists claim that these obligations require states to not only refrain from taking actions that undermine human rights, but also “to ensure that impediments and obstacles to trade of humanitarian goods are effectively removed” [20, p. 314].

It has been proposed in the context of the UN Human Rights Council that mandatory assessments should be made of the humanitarian impact of planned sanctions and that the impact should be monitored once the sanctions are in force, to ensure that humanitarian exemptions can be effective¹⁷; to date, these have not progressed beyond proposals. However, continually monitoring the humanitarian impact throughout a sanctioned country's territory and adjusting the parameters of the humanitarian exemptions and their enforcement accordingly, in real time, during the entire

period when the sanctions are in effect, would substantially complicate and heighten the cost of implementing the sanctions. Indeed, it would likely eviscerate many or most comprehensive or sectoral economic sanctions regimes to the point where their value to the sanctioning states as a means to influence other states is negated and the economic price is too high.

Humanitarian exemptions that are truly adequate to respect and protect human rights in a sanctioned country during the entire period of the sanctions thus appear impossible to design, implement and manage while preserving the sanctions' potential to be an effective means of coercion. UN Secretary-General Kofi Annan summarized the dilemma in 1998 when he stated that “humanitarian and human rights policy goals cannot easily be reconciled with those of a sanctions regime”¹⁸.

The unlawfulness of sanctioning while knowing that human rights will be violated

States have demonstrated their awareness that humanitarian exemptions, even in conjunction with other corrective actions, do not fully avert or remedy the harm to human rights that sanctions bring about. Among other things, this led in 2014 to the Human Rights Council appointing a special rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights. In view of this awareness, it can be stated that imposing economic sanctions entails a conscious infringement of human rights in the targeted state. A sanctioning state may not know in advance which specific rights will be breached, the nature or severity of the consequences, or the number or identities of the victims, but this does not detract from its knowledge that at least some harm to human rights is inevitable.

To the extent that this may breach human rights law, some jurists argue that a conscious violation of human rights must also be an intentional violation to be a wrongful act in international law: “Senders of sanctions cannot be held responsible unless they intentionally seek to violate the rights in question or pursue policies that are so blatantly harmful to those rights that they fail to meet a minimum standard of compliance. The humanitarian exemptions that have been voted with sanctions in almost every case, and the supplemental humanitarian assistance programs funded by the “senders”, as well as their public statements of concern for the plight of civilian populations, make it difficult to find willful intent on the senders' part” [21, p. 1511].

Another publicist contends that because the element of intent is included in the legal definitions of various human rights breaches (an example is torture, defined in the Convention against torture as “intentionally inflicted” severe pain or suffering¹⁹), this can be considered a general rule such that “violations of human rights require an intention to commit the violation. Unintended consequences are not human rights violations”. She adds that “if knowledge of unintended consequences rose to the level of intention, sanctions would have to be eliminated as a tool of law enforcement” [22, p. 73].

It is submitted here that a violation of human rights which can be predicted with certainty as an outcome of state conduct may be an unwanted consequence but cannot be an unintended one if the state decides to proceed with that conduct while discarding the option to act otherwise. Moreover, as soon as sanctions produce evidence that human rights are being breached, a sanctioning state's choice to not immediately suspend or terminate the sanctions or their enforcement if it cannot fully rectify the situation by other means entails a willful intent to tolerate, from that point onward, the violation that its sanctions have provoked.

The notion that breaches of human rights require intent to be true violations of international law is dubious in any case. Art. 2 of the Draft articles on responsibility of states for internationally wrongful acts (DARS) defines a wrongful act as one that “(a) is attributable to the state under international law and (b) constitutes a breach of an international obligation of the state”. The International Law Commission's commentary on

¹⁷Report of the special rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights [Electronic resource]. URL: <https://undocs.org/en/A/HRC/39/54> (date of access: 04.10.2020).

¹⁸Annual report of the Secretary-General on the work of the organization: partnerships for a global community [Electronic resource]. URL: <https://undocs.org/A/53/1> (date of access: 28.09.2020).

¹⁹Art. 1(1) of the Convention against torture and other cruel, inhuman or degrading treatment or punishment. 10 December 1984.



that article states: “In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a state that matters, independently of any intention”²⁰.

An argument consistent with this notion has been made regarding unilateral sanctions specifically: “The intent of the party imposing unilateral sanctions is less important than the foreseeable consequences thereof. It is no excuse that the death of civilians was “unintended” or was merely “collateral damage”. Such collateral damage is imputable to the state imposing the sanctions, which has thereby committed an internationally wrongful act, for which there is a state responsibility and the obligation to make reparations”²¹.

The imposition of comprehensive or sectoral sanctions can also be deemed unlawful on grounds that they prevent a targeted state from being able to comply with its own obligations pertaining to human rights. This must be seen in the context of the targeted state’s dependence on economic and financial interactions with other countries, without which the sanctions would have no coercive potential and consequently would not be used. Regardless of the targeted state’s past record of compliance with its human rights obligations, the imposition of comprehensive or sectoral sanctions deprives it of external resources that can be necessary for full compliance from that point onward. The sanctioning state thus becomes complicit in subsequent compliance shortfalls that might not otherwise occur. Facilitating the targeted state’s breach of its human rights obligations (given that a breach is defined as a wrongful act under art. 2 of DARS) arguably places the sanctioning state into the situation addressed by art. 16 of DARS: “A state which aids or assists another state in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) that state does so with knowledge of the circumstances of the internationally wrongful act;

(b) the act would be internationally wrongful if committed by that state”.

As for targeted sanctions, a state that imposes them against individuals directly violates human rights law as these sanctions have the specific purpose of denying the targeted individuals various rights that are enshrined in international conventions. In practice, these typically include the right to property and related transactions, freedom of movement and (or) the

right to work, among others. Moreover, targeted sanctions are imposed without regard to the individuals’ due process rights, including the right to a fair trial, the right to defend oneself and the right to be presumed innocent until proven guilty²². Indeed, the absence of due process is always the case when sanctions target individuals, as legal proceedings with their prescribed penalties would either remove the reason to penalize through sanctions (in findings of guilt) or show that individuals are wrongly targeted, rendering sanctions ineffective (in findings of innocence). Although humanitarian exemptions associated with targeted sanctions allow limited derogations, such as restoring certain rights of a listed individual when their exercise is necessary for a specified humanitarian purpose²³, the exemptions do not restore the individual’s rights in full because restricting them is integral to the nature of these sanctions.

In addition to sanctions themselves, the enabling legislation at the national level can be deemed illegal in view of the knowledge that its implementation will cause human rights to be violated despite the presence of clauses that create humanitarian exemptions. It has been asserted that “(i)n the human rights context a state’s international law obligation is ... to avoid adoption and enforcement of laws that violate human rights norms” [23, p. 919]. This view was subsequently supported by the Inter-American Court of Human Rights in its advisory opinion on *international responsibility for the promulgation and enforcement of laws in violation of the convention (art. 1 and 2 of the American convention on human rights)*, in which it unanimously concluded:

“1. That the promulgation of a law in manifest conflict with the obligations assumed by a state upon ratifying or adhering to the convention is a violation of that treaty. Furthermore, if such a violation affects the protected rights and freedoms of specific individuals, it gives rise to international responsibility for the state in question.

2. That the enforcement by agents or officials of a state of a law that manifestly violates the convention gives rise to international responsibility for the state in question. If the enforcement of the law as such constitutes an international crime, it will also subject the agents or officials who execute that law to international responsibility”²⁴.

²⁰Draft articles on responsibility of states for internationally wrongful acts, with commentaries // Yearb. Int. Law Comm. 2001. Vol. II. Part 2. P. 36. Para 10.

²¹De Zayas A. Unilateral sanctions and international law [Electronic resource]. URL: <https://dezayasalfred.wordpress.com/2019/06/30/unilateral-sanctions-and-international-law/> (date of access: 01.10.2020).

²²Mandate of the special rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights [Electronic resource]. URL: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25541> (date of access: 04.11.2020).

²³Commission guidance note on the provision of humanitarian aid to fight the COVID-19 pandemic in certain environments subject to EU restrictive measures [Electronic resource]. URL: https://ec.europa.eu/info/files/guidance-note-provision-humanitarian-aid-fight-covid-19-pandemic-certain-environments-subject-eu-restrictive-measures_en (date of access: 28.10.2020).

²⁴Advisory opinion OC-14/94 of the Inter-American Court of Human Rights of 9 December 1994.



Sanctions and lawful infringements of human rights

Infringements on human rights are lawful under tightly restricted circumstances, so it bears examining whether unilateral sanctions that infringe on human rights are legal if their imposition is aligned with them. Specifically, certain rights may be legally derogated from in the case of an armed conflict or another national emergency that threatens a state, as long as such derogations cannot be avoided in addressing the emergency, are strictly limited in scope and duration to the necessities of doing so, and are proportional to the exigencies of the emergency.

The International covenant on civil and political rights (ICCPR) details the procedures and requirements under which the human rights obligations it elaborates may be derogated from in an emergency; it mandates that an emergency be formally declared and notified to the United Nations while also designating certain rights (rights to life, to freedom from torture, to freedom from slavery and several others) as non-derogable even in such situations²⁵. Similarly, at a regional level, the European convention on human rights (ECHR) allows the rights it enshrines to be set aside in declared emergencies²⁶, with some exceptions²⁷.

Under the International covenant on economic, social and cultural rights (ICESCR), states are also allowed to lawfully infringe on human rights by limiting them “to promote the general welfare in a democratic society”²⁸, as long as such limits “respect the minimum core obligations” of the rights involved and are “proportionate to the aim pursued”²⁹.

The imposition of unilateral sanctions that violate human rights thus can be theoretically legal at times. However, state practice shows that while some sanctions are imposed on the basis of declared emergencies, such emergencies generally do not conform to the rules and constraints in the ICCPR that make it lawful for states to derogate from their human rights obligations³⁰. Meanwhile, it is difficult to justify the harmful humanitarian impact of sanctions on grounds

that it improves the welfare of society in line with the ICESCR’s condition. Improving the welfare of society is, at best, an indirect and uncertain result of achieving the sanctions’ aims, and is not known to have ever been a stated objective of sanctions; additionally, the absence of a direct link between unilateral sanctions and the condition of the sanctioning state’s society impedes any determination of whether the harm to rights in the sanctioned state is proportionate to such a result.

Art. 4 of the ICCPR and art. 15 of the ECHR specify that whenever derogations occur, states must continue to comply with their other obligations under international law. This requirement is in harmony with the broader principle that an international agreement or an element thereof is limited to its text and does not extend to other texts [24, p. 627–628], from which it follows that an authorized exception to certain state obligations pertains only to the obligations specified, and that all other obligations throughout the realm of international law remain intact. Applying this to the conditions under which unilateral sanctions may legally exist, mentioned at the start of this article, states must continue adhering to all aspects of human rights law when imposing sanctions under these frameworks. Thus, when unilateral sanctions are authorized by the UN Security Council, imposed as countermeasures or applied with the sanctioned state’s consent, they must be constructed in such a way as to not violate human rights. As this construction has not been achievable, including when humanitarian exemptions are taken into account, the legal space created by the frameworks for the existence of lawful sanctions is, in fact, of little practical value despite its potential.

Meanwhile, sanctions imposed in non-emergency situations and without the intent to improve the welfare of society, such as those used to pursue political objectives, would cause human rights to be violated gratuitously and their illegality may be established on that basis alone.

The problematic principle of proportionality

Given the role of humanitarian exemptions in the sanctioning process, it is appropriate to consider them in conjunction with the principle of proportionality to

determine if the exemptions might mitigate the humanitarian harm from sanctions such in a way that the sanctions may be considered lawful – that is, whether

²⁵Art. 4 of the International covenant on civil and political rights of 16 December 1966.

²⁶Art. 15 of the Convention for the protection of human rights and fundamental freedoms of the 4 November 1950.

²⁷Ibid. Protocol No. 7, Protocol No. 13.

²⁸Art. 4 of the International covenant on civil and political rights of 16 December 1966.

²⁹General comment of the UN Economic and Social Council No. 25 (2020) of 30 April 2020. Para 21. E/C.12/GC/25.

³⁰Mandate of the special rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights [Electronic resource]. URL <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25879> (date of access: 28.02.2021).



the principle renders the residual human rights violations legally acceptable – if all other conditions of lawfulness are met.

Under the proportionality principle, human rights may be lawfully harmed only to the extent that cannot be avoided when a state's action resulting in the harm is appropriate and necessary and the harm is proportionate to the action's objective. The principle's relevance in the sphere of sanctions can be seen, for example, when sectoral or targeted sanctions are used in place of comprehensive economic sanctions in an effort to coerce a state to comply with an international obligation. Nonetheless, causing fewer human rights to be violated does not automatically render the sanctions legal.

A study on quantifying how sanctions have affected human rights notes that “the proportionality assessment rests on empirical parameters, because it requires a sanctioning state to assess the prospective economic, social, and political effect of the sanction” [25, p. 6]. However, the impossibility of setting exact parameters for sanctions that will ensure the respect and protection of human rights at all times during the sanctions' implementation while maintaining the sanctions' potential effectiveness applies equally to parameters that allow a margin of error which can be used to justify compliance with the proportionality principle. In this vein, it has been argued that “proportionality cannot be applied to the use of economic sanctions. In economic sanctions the balance between the damage to the civilian population and the advantage gained by the imposing state is impossible to evaluate, and hence the principle as such cannot be applied. Unlike military operations, any attempt to construct the exact damage caused by the use of economic sanctions, and even more so the specific gains it will achieve, is also impossible. All such attempts will inevitably be hypothetical and impossible to support” [26, p. 139].

Additionally, comprehensive and sectoral sanctions are not simple dynamic processes that operate over time: while their effectiveness and their impact on human rights evolve separately, each can simultaneously influence the evolution of the other throughout the period when the sanctions are in force. This complexity can cause any assessment of proportionality to be a momentary “snapshot” without lasting validity.

Yet assessing proportionality entails more than simply quantifying the magnitude or scope of the impact on human rights. It is broadly accepted that an action which harms human rights may only be considered proportional in a legal sense if it also meets the tests of adequacy, which requires a determination that the action is suitable for achieving the desired result, and necessity, which requires a determination that the action is either the only option or causes the least damage to human rights of any option in achieving that result [27, p. 179–180; 28, p. 135–136; 29, p. 630–634; 30, p. 8; 31, p. 30–32]. As unilateral sanctions tend to perform poorly relative to their stated objectives [11, p. 148], they would generally fail in terms of adequacy. They would also fail the necessity test in view of the options that are normally available but typically bypassed when unilateral sanctions are introduced; these include recourse to international arbitrators, judicial institutions or the UN Security Council, or to due process through national legal systems in the case of individuals.

As for targeted sanctions, the proportionality principle is problematic here, too, as the situations to which it applies are not analogous to the way these sanctions function. Taking into account the aforementioned ways in which states may derogate from their human rights obligations, the principle allows that harm to rights may legitimately occur as collateral damage in the pursuit of an objective, or in the face of conditions, that justify their lawful restriction. However, individuals targeted by sanctions are intentionally designated for the denial of human rights as opposed to being incidental victims: the denial of rights is the coercive act itself rather than a consequence of it.

Further clouding the matter are sanctions that affect the human rights of multiple persons in response to alleged violations of a single individual's human rights, as with the so-called “Magnitsky sanctions” first imposed by the United States under a 2012 law after it deemed the death of an imprisoned Russian tax attorney resulted from breaches of his human rights³¹. This places the violation of the rights of even one person – in this case, Sergei Magnitsky's right to health care and right to life – at the highest level with respect to any comparison that might be made when considering the notion, much less the principle, of proportionality.

Conclusion: scenarios for addressing the human rights problem in unilateral sanctions

The failure of humanitarian exemptions and any supplemental measures to respect and protect human rights in the course of sanctioning points toward the conclusion that imposing unilateral sanctions in vir-

tually any circumstance constitutes an internationally wrongful act. At the same time, the rising use of sanctions as a means of coercion by an increasing number of states and regional groups for an expanding range of

³¹Sergei Magnitsky rule of law accountability act of 2012 (Sergei Magnitsky act) of 14 December 2012.



reasons³² is evidence of a progressively greater acceptance of sanctions as an element of state conduct. Even countries with small economies and those that were previously targets of sanctions are now using them³³, and the speed at which sanctions are sometimes urged³⁴ and imposed³⁵ in response to events suggests a certain willingness to use them as a first choice rather than as a last resort among coercive options, despite their impact on human rights.

This raises the question of whether unilateral sanctions might one day be considered legal on grounds of becoming customary state practice, which would imply an acceptance that the obligations to fully respect, protect and fulfill human rights can tolerate a degree of erosion. As part of the development of customary international law, “previously unlawful conduct may, over time, become lawful” [32, p. 625], especially if the conduct has not been the subject of successful legal challenges or punishment. As unilateral sanctions fall into this category with respect to the resulting human rights violations, such a scenario cannot be ruled out. It may even be encouraged by the absence of legal responsibility assigned to the United Nations or its member states for human rights violations resulting from the Security Council’s sanctions [33].

Countering this prospect, the international community has signalled its resistance to sanctions that erode human rights, for example through the creation and renewal of the mandate of the aforementioned UN special rapporteur on unilateral coercive measures. Moreover, the humanitarian exemptions and other efforts by sanctioning states to avert human rights breaches, despite being imperfect, have legal significance for the evolution of customary international law. It has been noted that violations of legal norms cannot be considered in isolation from the expectations of states and other relevant patterns of their behavior as determinants of the development of customary law [34, p. 77].

Also possible is the development of a body of international law that focuses on sanctions, or on unilateral coercive measures more generally, and addresses the human rights issues they raise. Throughout the last century, specialized areas of international law have

been created in response to emerging concerns and new forms of state conduct, ranging from international investment law to space law [35]. The expansion in the use and types of unilateral sanctions positions them for such treatment; the human rights problem inherent in them offers a reason to act; and the existence of multi-lateral organizations, most notably the United Nations, provides forums in which this development may occur.

As mentioned earlier, proposals emanating in the context of the UN Human Rights Council include a mandatory *ex ante* assessment and ongoing monitoring of the humanitarian impact of sanctions. Its first special rapporteur to deal with unilateral coercive measures, Idriss Jazairy, urged that populations in sanctioned countries be brought under “the same protections provided by the Geneva conventions to people in war”³⁶; he also proposed elements for a hypothetical UN General Assembly declaration that would address such protections³⁷.

While changing international law to accommodate the impact of unilateral sanctions on human rights is one path toward addressing the issue, another may be to alter how sanctions are conceptualized as a coercive mechanism, given that the problem arises from the structural design of the sanctions in use today. Existing sanctions, whether comprehensive or targeted, are conceived as “whole” legal instruments from which elements that negatively affect human rights are subtracted, mainly through humanitarian exemptions, rather than as instruments that are assembled only from elements that do not impact human rights. Whether it is possible to achieve the latter is at present untested, although the proposal to assess in advance the humanitarian impact of planned sanctions might help identify elements that can have a coercive effect while being benign from a human rights perspective.

It has been written that “present global challenges... require better thinking in the sphere of international law at a level whereby creativity and innovation need to be implemented into the norms of new international law effectively” [35, p. 65]. Unilateral sanctions, humanitarian exemptions and their impact on the enjoyment of human rights appear ripe for such treatment.

³²Report of the special rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights: negative impact of unilateral coercive measures: priorities and road map [Electronic resource]. URL: <https://undocs.org/en/A/HRC/45/7> (date of access: 22.10.2020).

³³Беларусь ввела ответные санкции против ЕС [Электронный ресурс]. URL: <https://sputnik.by/politics/20201002/1045-809264/Belarus-vvodit-otvetnyy-sanktsionnyy-sписок-po-otnosheniyu-k-ES.html> (дата обращения: 23.10.2020).

³⁴Letter to US Secretary of State Mike Pompeo from T. J. Cox, Brad Sherman, Jim Costa and Katherine M. Clark et al., members of Congress [Electronic resource]. URL: https://anca.org/assets/pdf/102320_Cox_Sherman_Magnitsky_Azerbaijan_Letter.pdf (date of access: 28.10.2020).

³⁵Ufuoma V. ECOWAS suspends Mali over coup, imposes sanctions. International Center for Investigative Reporting [Electronic resource]. URL: <https://www.icirnigeria.org/ecowas-suspends-mali-over-coup-imposes-sanctions/> (date of access: 28.10.2020).

³⁶Civilians caught in sanctions crossfire need Geneva convention protection, says UN expert : press release of the Office of the High Commissioner of human rights of the 8 November 2018.

³⁷Elements for a draft General Assembly declaration on unilateral coercive measures and the rule of law (updated) [Electronic resource]. URL: <https://undocs.org/A/HRC/42/46/Add.1> (date of access: 28.10.2020).



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