AN EXPLORATION OF THE GENERAL ASSEMBLY'S TROUBLED RELATIONSHIP WITH UNILATERAL SANCTIONS

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Abstract This article seeks to make sense of two seemingly contradictory aspects of the General Assembly's practice: its history of recommending to States that they impose unilateral sanctions; and its series of resolutions denouncing unilateral coercive measures as illegal. It examines the seeming discrepancy between the customary international law position regarding unilateral sanctions, and the position asserted by the Assembly, and argues that on a nuanced reading of the Assembly's resolutions, these positions are not so divergent as is often supposed. The article concludes by examining the scope for the Assembly to make future sanctions recommendations, consistently with its prior condemnation of unilateral coercive measures.

Keywords: public international law, human rights, United Nations, General Assembly, sanctions, unilateral coercive measures, non-intervention, economic intervention.

I. INTRODUCTION

Sanctions—restrictions on trade, arms embargoes, asset freezes and various other measures—are a core component of the diplomatic toolkit of States. In the settlement of international disputes, sanctions have a critical role to play as a strategy that falls between diplomatic negotiation and, in very specific circumstances, the use of military force.[1] They have particular value as a means of punishing or deterring perpetrators of human rights atrocities, given the inherent weaknesses in the international criminal justice system; and they

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[1] See generally: G Hufbauer, JJ Schott and KA Elliot, *Economic Sanctions Reconsidered* (3rd edn, Petersen Institute for International Economics 2007) 1–42; RN Haass, 'Sanctions as an Instrument of American Foreign Policy' (2000) 32(1) Law and Policy in International Business 1; RW Parker, 'The Cost Effectiveness of Economic Sanctions' (2000) 32(1) Law and Policy in International Business 21; S Cleveland, 'Norm Internalization and US Economic Sanctions' (2001) 26 YaleJIntlL 1 (focusing on the effectiveness of sanctions on promoting and protecting human rights); JF Blanchard and NM Ripsman, *Economic Statecraft and Foreign Policy: Sanctions, Incentives, and State Calculations* (Taylor & Francis Group 2013).

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also have particular value as a way of depriving individuals, entities and in some cases States of the means to commit human rights atrocities.[2]

In the framework of the UN Charter it is envisaged that sanctions will be imposed by the Security Council, however in practice most sanctions are imposed without the Council's authorisation. In one major study of sanctions regimes from the First World War through to 2000, just 20 of 174 regimes studied were imposed by the Council.[3] Since the end of the Cold War the Security Council has demonstrated greater willingness to adopt sanctions, but still, and inevitably, it rarely if ever imposes sanctions against human rights violators whose interests align with those of one of its five permanent members (P5). The Council's disinclination to impose sanctions targeting the alleged perpetrators of genocide against the Rohingya ethnic minority in Myanmar, despite recommendations from the UN's Independent International Fact-Finding Mission that it do so, is one stand-out example;[4] as is the Council's imposition of sanctions in relation to the conflict in Yemen targeting only individuals aligned with the Houthi movement, despite evidence from its own Panel of Experts that individuals aligned with the Saudi Arabian-led Coalition also fall within the Council's designation criteria.[5]

Given the potential for well-targeted, coordinated sanctions to play a role in protecting and promoting human rights, and the inevitable selectivity with which such measures are mandated by the Security Council, as well as the frequency with which sanctions are in any case employed by States, there is scope for the UN General Assembly—not subject to the veto of any single State—to play a constructive role. A more proactive approach by the Assembly in relation to sanctions could open up the possibility of such measures being imposed more consistently and by more States in response to large-scale human rights violations, in contexts in which the Security Council is paralysed by the veto of one or more of the P5; and moreover, could increase the likelihood that the measures that are in any case imposed by States are not only coordinated internationally but accompanied by appropriate precautionary

[2] This article examines the role of the General Assembly in relation to sanctions, rather than the effectiveness of such measures in promoting and protecting human rights. Research on the effectiveness of sanctions in achieving their objectives has generally found that sanctions can in some circumstances influence State behaviour, although success rates are limited. One major study of 174 sanctions regimes from the First World War through to 2000, for example, found that sanctions were 'at least partially successful' in 34 per cent of cases: Hufbauer, Schott and Elliot (n 1) 158.

[3] ibid 17.

[4] UN Human Rights Council, 'Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar' (17 September 2018) UN Doc A/HRC/39/CRP.2, 418.

[5] See UNSC Res 2140 (26 February 2014), imposing an asset freeze and travel ban on individuals and/or entities associated with the conflict in Yemen, to be designated by a Sanctions Committee. For the designation of Houthi-aligned individuals see UNSC, 'Security Council 2140 Sanctions Committee Designates Three Individuals as Subject to Assets Freeze, Travel Ban' (7 November 2014) Press Release SC/11636; and for the findings of the UNSC's Panel of Experts regarding the Saudi-led Coalition see UNSC, 'Final Report of the Panel of Experts on Yemen' (31 January 2017) UN Doc S/2018/193.

measures, such as human rights impact assessments and processes for judicial review.

The General Assembly has a rich history of recommending sanctions. Throughout the 1960s–1980s the Assembly recommended to States that they adopt a range of coercive measures in various contexts including struggles for self-determination and independence in Africa,[6] South African aggression and apartheid,[7] and Israeli aggression in the 1980s and 1990s.[8] This practice, together with the Assembly's well-established legal competence to make recommendations on any matters within the scope of the UN Charter,[9] provides a solid foundation for the Assembly to make recommendations to States regarding the imposition of sanctions.

Since the mid-1960s, however, the General Assembly has passed resolutions denouncing economic intervention in the affairs of States, and since the mid-1990s it has persistently condemned 'unilateral coercive measures'—also known as autonomous or unilateral sanctions—as illegal.[10] In the law and practice of international organisations, this presents a conundrum. How is one to reconcile the Assembly's past practice of recommending to States that they impose unilateral coercive measures—understood by most scholars to mean measures imposed without Security Council authorisation—with its denunciation of what appears to be exactly the same thing? If one is to understand what role the Assembly may play in relation to the imposition of sanctions in the future, these seemingly contradictory aspects of the Assembly's practice must be understood and reconciled.

This article seeks to provide such a reconciliation, by eliciting the precise legal position that since the 1960s has been asserted by the General

[6] See eg UNGA Res 2107 (XX) (21 December 1965) on the Portuguese Territories; UNGA Res 2383 (XXIII) (7 November 1968) on Southern Rhodesia; UNGA Res 1899 (XVIII) (13 November 1963) on South West Africa.

[7] UNGA Res 36/172 D (17 December 1981); UNGA Res 41/35 A-B (10 November 1986).

[8] See eg UNGA Res 36/27 (13 November 1981); UNGA Res 42/209 B (11 December 1987); UNGA Res 46/82 A (16 December 1991).

[9] See R Higgins *et al.*, *Oppenheim's International Law: United Nations* (Oxford University Press 2017) 963–73; MJ Petersen, 'General Assembly' in TG Weiss and S Daws (eds), *The Oxford Handbook on the United Nations* (2nd edn, Oxford University Press 2018) 124–8; E Klein and S Schmahl, 'Ch. IV The General Assembly, Functions and Powers, Article 10' in B Simma *et al.* (eds), *The Charter of the United Nations* (3rd edn, Oxford University Press 2012) vol 1; R Barber, 'A Survey of the General Assembly's Competence in Matters of International Peace and Security: In Law and Practice' (2020) JUFIL 4–8.

[10] 'Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States', UNGA Res 2131 (XX) (21 December 1965); 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States', UNGA Res 26/25 (24 October 1970); 'Charter on the Economic Rights and Duties of States', UNGA Res 3281 (XXIX) (12 December 1974); 'Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States', UNGA Res 36/103 (9 December 1981); 'Economic Measures as a Means of Political and Economic Coercion against Developing Countries', UNGA Res 46/210 (20 December 1991) and subsequent annual resolutions with the same title; 'Human Rights and Unilateral Coercive Measures', UNGA Res 51/103 (12 December 1996) and subsequent annual resolutions with the same title.

Assembly concerning the legality of unilateral coercive measures. It begins (Part II) with a discussion of the legality of such measures, with particular attention to the question of whether human rights-related sanctions interfere with a targeted State's *domaine reserve*, and thus violate the international legal principle of non-intervention. Part III then examines the position that has been asserted by the Assembly on unilateral coercive measures. It examines the incongruity of the Assembly's practice of recommending unilateral coercive measures in particular circumstances, while simultaneously adopting resolutions condemning such measures as illegal; and then describes what is often portrayed as a dichotomous debate between the customary international law position regarding unilateral sanctions, according to which such measures are permissible, and the position asserted by the Assembly, according to which—as commonly interpreted—they are not. It is then argued that on a nuanced reading of the Assembly's resolutions, the position taken by the Assembly is not in fact so divergent from the customary international law position as is often supposed. To the contrary, the Assembly's resolutions on unilateral coercive measures can in fact be read in such a way as to assist in clarifying the law. Finally, Part IV explores what actions the Assembly may practically take, in the event that violations of international human rights and/or international humanitarian law in a particular context are such as to warrant the imposition of sanctions, but the Security Council is prevented from acting due to the political allegiances of one or more of the P5.

II. THE LEGAL FRAMEWORK FOR THE IMPOSITION OF SANCTIONS

A. Note on Terminology: Multilateral, Unilateral and in Between

'Sanctions' is not a term of art in international law. It does not appear in the UN Charter; nor is it authoritatively defined in any legal instrument. On a narrow interpretation, the term refers to punitive measures taken by an international organisation against its own members, in accordance with its constituent instrument, for breaching the rules of the organisation.[11] These include measures imposed by the Security Council under Chapter VII of the UN Charter, and also measures taken by other international and regional organisations against their own members. In much of the scholarly literature however, the term sanctions is used more broadly to encompass measures of an economic nature imposed by a State or group of States against another State for political purposes, and is used more or less

[11] See A Tzanakopolous, 'Sanctions Imposed Unilaterally by the European Union: Implications for the European Union's International Responsibility' in AZ Marossi and MR Bassett, *Economic Sanctions under International Law* (TMC Asser Press 2015) 147; International Law Commission (ILC), 'Report of the International Law Commission on the Work of its 53rd Session' (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, 75.

interchangeably with 'coercive economic measures' or 'economic coercion'.[12] Such was the approach taken in 1997 by a group of experts on 'economic measures as a means of political and economic coercion against developing countries', convened by the UN Secretariat, which defined coercive economic measures as 'negative economic activities (eg, economic sanctions) imposed, unilaterally or collectively, by the sender State(s) on the target State(s) for primarily political (ie, non-economic) purposes'.[13] Similarly, the first UN Special Rapporteur on the negative impact of unilateral coercive measures, Idriss Jazairy, said in his 2018 report that the terms '"unilateral coercive measures", "unilateral sanctions", "international sanctions" and simply "sanctions"' would be used 'loosely and interchangeably'.[14]

Economic sanctions are typically described as either multilateral or unilateral/autonomous. In the analysis of most scholars, 'multilateral' means mandated by the Security Council under Chapter VII of the UN Charter. Devika Hovell, for example, defines 'autonomous sanctions' as 'sanctions either lacking or exceeding authorisation by the UN Security Council';[15] Daniel Joyner, similarly, distinguishes between sanctions that are 'organised and applied under a multilateral framework by States acting in a cooperative manner, under the authority of the UNSC', and those 'applied by States on a unilateral basis outside of a UNSC mandate'.[16] A similar approach to the multilateral/unilateral distinction is evident in the documents of the UN. The UN Secretariat's 1997 group of experts reserved the term 'multilateral economic sanctions' specifically for measures mandated by the Security Council.[17] In 2015, Special Rapporteur Jazairy said that only measures 'taken by the Security Council under article 41 of the Charter of the United Nations' were 'truly multilateral from the point of view of the United Nations', and that measures 'other than those taken by

[12] See MW Reisman and DL Stevick, 'The Applicability of International Law Standards to United Nations Economic Sanctions Programmes' (1998) 9 EJIL 87; AF Lowenfeld, *International Economic Law* (Oxford University Press 2008) 698; Hufbauer, Schott and Elliot (n 1) 3.

[13] UNGA, 'Economic Measures as a Means of Political and Economic Coercion Against Developing Countries: Report of the Secretary General' (14 October 1997) UN Doc A/42/459, 16.

[14] UNGA, 'Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights' (30 August 2018) UN Doc A/HRC/39/54, 3.

[15] D Hovell, 'Unfinished Business of International Law: The Questionable Legality of Autonomous Sanctions' (2019) 113 AJIL Unbound 140, 141.

[16] DH Joyner, 'International Legal Limits on the Ability of States to Lawfully Impose International Economic/Financial Sanctions' in AZ Marossi and MR Bassett (eds), *Economic Sanctions under International Law* (TMC Asser Press 2015) 84. See also A Hofer, 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?' (2017) 16 ChinJIntlL 177.

[17] UNGA, 'Economic Measures as a Means of Political and Economic Coercion: Report of the Secretary General' (1997) (n 13) 21–2.

the Security Council under article 41' would be considered unilateral coercive measures.[18] In 2018, Jazairy affirmed again that 'unilateral coercive measures' were measures 'other than those enacted by the Security Council acting under Chapter VII of the Charter of the UN'.[19]

In practice there is a third category of sanctions that falls between the legal categories of unilateral and multilateral, namely, sanctions imposed by a group of States acting in concert with each other, pursuant to the recommendation of an international or regional organisation. These include sanctions imposed pursuant to a recommendation of the General Assembly, and—more prominently, in State practice—sanctions imposed by Member States of the European Union (EU) on non-Member States, pursuant to a decision of the EU. While such measures may not be truly 'unilateral' so far as foreign policy is concerned, they lack the legal basis of multilateral sanctions imposed by a competent international organisation against its members pursuant to the terms of its constituent instrument.[20] The fact that such measures cannot be categorised as 'multilateral' from a strictly legal point of view is seemingly accepted by the EU, the policy of which states that while some EU sanctions are mandated by the Security Council, 'others are adopted *autonomously* by the EU'.[21] Special Rapporteur Jazairy has similarly referred to EU sanctions as both 'autonomous' and 'unilateral'.[22] In the case of sanctions imposed pursuant to a recommendation of the General Assembly, some scholars have suggested that the Assembly's resolutions may themselves be interpreted as having an 'authorising' effect;[23] however such argument is controversial and is beyond the scope of this article. On a traditional view, even if coercive measures are imposed in concert with other States, and/or pursuant to the recommendation of an international organisation, this does not exempt the sanctioning States from relevant rules and principles of international law, including the principle of non-intervention. It is this third category of sanctions—referred to most commonly in UN documents as unilateral coercive measures—that is the focus of this article.

[18] UNGA, 'Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights, Idriss Jazairy' (10 August 2015) UN Doc A/HRC/30/45, 5.

[19] UNGA, '2018 Report of the Special Rapporteur' (n 13) 3.

[20] Hovell (n 15); Tzanakopoulos, 'Sanctions Imposed Unilaterally' (n 11).

[21] European Commission, 'Restrictive Measures (Sanctions)' (2020) <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions_en> (emphasis added).

[22] UNGA, '2015 Report of the Special Rapporteur' (n 18) 9–10.

[23] See R Barber, 'Revisiting the Legal Effect of General Assembly Resolutions: Can an Authorising Competence for the Assembly be Grounded in the Assembly's "Established Practice", "Subsequent Practice" or "Customary International Law"?' (2020) JCSL <https://academic.oup.com/jcsl/advance-article-abstract/doi/10.1093/jcsl/kraa025/6044451>; M Ramsden, '"Uniting for Peace" and Humanitarian Intervention: The Authorising Function of the UN General Assembly' (2016) 25(2) WashIntlLJ.

B. The Legality or Illegality of Sanctions Not Authorised by the UN Security Council

The legality of sanctions not authorised by the Security Council is a grey area of international law—remarkably, in light of the frequency with which such measures are employed in practice. In 1993, the UN Secretary General observed that there was 'no clear consensus in international law as to when coercive economic measures are improper'.[24] In 2019, Hovell echoed a view of many scholars when she said that 'the precise line between lawful and unlawful autonomous measures remains a matter of debate rather than law', and that 'the issue is clearly ripe for some sort of comprehensive resolution'.[25]

Article 41 of the UN Charter empowers the Security Council to impose 'measures not involving the use of armed force' in response to threats to the peace, breaches of the peace or acts of aggression.[26] Such measures may include, *inter alia*, 'complete or partial disruption of economic relations', and the 'severance of diplomatic relations'—in other words, sanctions. There is nothing in the UN Charter that allows States to unilaterally impose such measures; but equally, there is nothing explicitly preventing them from doing so. Article 2(4) prohibits the threat or use of force, but as many commentators have observed, this provision was never intended to encompass economic coercion.[27]

In the absence of any provision in the Charter prohibiting the use of coercive economic measures between States, the starting point for an assessment of the legality of such measures is the principle established by the International Court of Justice (ICJ) in the *Lotus* case—that is, that 'restrictions upon the independence of states cannot … be presumed', and 'all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction'.[28] This principle was affirmed by the ICJ in *Case Concerning Military and Paramilitary Activities in and Against Nicaragua,* with specific reference to trade relations—the Court in that case said 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

[24] UNGA, 'Economic Measures as a Means of Political and Economic Coercion against Developing Countries: Note by the Secretary General' (25 October 1993) UN Doc A/48/535, 1.

[25] Hovell (n 15) 145. See also M Helal, 'On Coercion in International Law' (2019) 52 NYUJIntL&Pol 2; M Doraev, 'Comment: The "Memory Effect" of Economic Sanctions against Russia: Opposing Approaches to the Legality of Unilateral Sanctions Clash Again' (2015) 37 PaJIntlL 373; R Porotsky, 'Economic Coercion and the General Assembly: A Post-Cold War Assessment of the Legality and Utility of the Thirty-Five-Year Old Embargo against Cuba' (1995) 28 VandJTransnatlL 930.

[26] Charter of the United Nations 1945, 1 UNTS XVI ('UN Charter').

[27] See OY Elagab, 'Coercive Economic Measures Against Developing Countries' (2008) 41 ICLQ 688; Porotsky (n 25) 920; CJ Henderson, 'Legality of Economic Sanctions Under International Law: The Case of Nicaragua' (1986) 43 Wash&LeeLRev 181.

[28] *The Case of the S.S. "Lotus",* 1927 PCIJ Rep Series A, No 10, paras 44–47.

obligation'.[29] In other words, States are free to conduct their economic and diplomatic relations however they wish, and to determine how and with whom they will trade, provided there is no positive rule of international law to the contrary.[30]

Positive rules of international law restricting economic relations between States are found primarily in international treaties. Many multilateral and bilateral trade agreements protect the freedom of trade between States: examples include the General Agreement on Tariffs and Trade;[31] regional free trade agreements; and treaties of friendship, commerce and navigation. Economic sanctions such as embargoes and boycotts imposed by one State party against another are typically inconsistent with such treaties. Many trade agreements contain national security exceptions, however, allowing States to renege on their obligations if they deem it necessary to do so,[32] and some scholars have argued that sanctions can generally be justified under these provisions—particularly as they are typically 'self-judging' and 'self-executing'.[33] Ultimately the assessment of whether coercive economic measures violate treaty obligations must be made on a case-by-case basis, with attention to the particular obligations of the imposing State.

Outside of treaty law, the most significant rule of international law restricting the ability of States to impose coercive economic measures on each other is the well-established principle that States may not intervene in each other's affairs. In the *Nicaragua* case, the principle of non-intervention was affirmed by the ICJ to be 'part and parcel of customary international law'.[34] The Court in that case defined the principle in the following terms:

> The principle [of non-intervention] forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other states. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. … Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.[35]

The Court said that the 'essence of the principle of non-intervention' was coercion.[36] It did not define coercion, but it did say, with regard to the

[29] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 ('*Nicaragua*'), para 276.

[30] See also Porotsky (n 25) 918; Joyner (n 16) 86; A Tzanakopoulos, 'The Right to be Free from Economic Coercion' (2015) 4 CJIntl&CompL 620; Henderson (n 27) 179; Elagab (n 27) 691.

[31] General Agreement on Tariffs and Trade (adopted 30 October 1947, entered into force 1 January 1948) 64 UNTS 187.

[32] The General Agreement on Tariffs and Trade (GATT), for example, permits a State to take 'any action which it considers necessary for the protection of its essential security interests': ibid, art XXI.

[33] Helal (n 25) 104; see also UNGA, 'Economic Measures as a Means of Political and Economic Coercion: Report of the Secretary General' (1997) (n 13). For a contrary view see CM Vázquez, 'Trade Sanctions and Human Rights – Past, Present, and Future' (2003) 6 JIEL 797.

[34] *Nicaragua* (n 29) para 202. [35] ibid para 205. [36] ibid.

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particular economic measures in question in the case—the cessation of economic aid to Nicaragua, a reduction in the sugar quota for US imports from Nicaragua, and a trade embargo—that it was 'unable to regard such action on the economic plane as … a breach of the customary-law principle of non-intervention'.[37] The Court left open, however, the question of whether such measures may *ever* be considered a breach of the non-intervention principle, by reason of being coercive; and if so, what threshold would need to be applied.

The statement of the ICJ in the *Nicaragua* case is most usefully understood as articulating a two-part test for determining whether a particular measure violates the non-intervention principle. First, the intervention 'must be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely'. Second, and *additionally*, the intervention must use 'methods of coercion'. The ICJ's reference to coercion as the 'essence of the principle of non-intervention' is thus something of a red herring, because it is only once *both* components of the two-part test are satisfied that a measure will fall within the scope of the prohibition. Such an interpretation is broadly in line with that of most scholars, who—albeit not necessarily articulating a two-part test—accept the *Nicaragua* case as standing for the broad proposition that the non-intervention principle prohibits coercive interference in a State's *domaine reserve*.[38]

Understood in this way, the principle of non-intervention can only be understood with direct reference to the precise limits of a State's *domaine reserve*—that is, the matters on which a State is permitted to decide freely, by virtue of its sovereignty. The ICJ in the *Nicaragua* case did not precisely define the scope of such matters, but cited, by way of example, 'the choice of a political, economic, social and cultural system, and the formulation of foreign policy'.[39]

Since the earlier decision of the ICJ in *Case Concerning the Barcelona Traction, Light and Power Company Limited*, it has been broadly accepted that a State's *domaine reserve* does not encompass an unlimited freedom to violate international human rights law. The Court in that case said that the 'principles and rules concerning the basic rights of the human person' are 'by their very nature … the concern of all states', and that 'all states … have a legal interest in their protection; they are obligations *erga omnes*'.[40] In 1989, the International Law Institute in its Resolution on the Protection of Human

[37] ibid para 245.

[38] Hofer (n 16) 181; M Jamnejad and M Wood, 'The Principle of Non-intervention' (2009) 22 LJIL 347; Joyner (n 16) 89; AF Lowe and A Tzanakopoulos, 'Economic Warfare' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e292>; Helal (n 25) 1.

[39] *Nicaragua* (n 29) para 205.

[40] *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (Judgment) [1970] ICJ Rep 3 ('*Barcelona Traction*') para 33.

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Rights and the Principle of Non-Intervention in the Internal Affairs of States affirmed similarly that 'a State acting in breach of its obligations in the sphere of human rights cannot evade its international responsibility by claiming that such matters are essentially within its domestic jurisdiction'.[41] That Resolution explicitly stipulated that 'economic, diplomatic and other measures' taken by States in response to human rights violations 'cannot be considered an unlawful interference in the internal affairs of states'.[42]

It is generally accepted that not *all* human rights give rise to *erga omnes* obligations, but only those that satisfy a certain threshold. The ICJ in the *Barcelona Traction* case suggested as such when it noted that some of the rights giving rise to obligations *erga omnes* had 'entered into the body of general international law', while others were 'conferred by international instruments of a universal or quasi-universal character'.[43] While the full corpus of such rights is not authoritatively defined in international law, consensus has converged around—as Sarah Cleveland observes in her analysis of 'human rights sanctions'—a 'core of civil, political and economic rights that enjoy near-universal recognition'. Cleveland cites the principles identified in the *Restatement (Third) of the Foreign Relations Law of the United States* as *jus cogens*, 'together with war crimes, crimes against humanity and the prohibition against forced labour', as rights that 'are broadly recognised as rights that no state officially claims the right to violate', and that 'may be considered among the core *jus cogens* principles of the human rights system'—giving rise to obligations *erga omnes*.[44]

In other words, if measures imposed by one State on another are aimed at ensuring respect for human rights that fall within this established 'core', or for the prohibition of war crimes and crimes against humanity, those measures ought not be regarded as an intervention in matters on which the targeted State may decide freely. Thus, the question of whether the measures are coercive—for purposes of determining whether the measures breach the non-intervention principle—does not arise. Such measures must not go so far as to violate the prohibition in Article 2(4) of the UN Charter on the use of force, but provided they are economic and not military in nature, they will not do so. This accords with the position taken by the UN Secretary General's expert group on unilateral coercive measures in 1997, that unilateral coercive economic measures might be 'both permissible and appropriate' if adopted 'in response to a clear violation of universally accepted norms, standards or obligations'.[45]

[41] Institute of International Law, 'The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States' (13 September 1989) Session of Santiago de Compostela, art 2. [42] ibid. [43] *Barcelona Traction* (n 40) para 33.
[44] Cleveland (n 1) 29, referring to The American Law Institute, *Restatement, Third, of the Foreign Relations Law of the United States* (1987) para 102.
[45] UNGA, 'Economic Measures as a Means of Political and Economic Coercion: Report of the Secretary General' (1997) (n 13) 22.

The question of precisely what measures not involving the use of military force may constitute coercion is more difficult, because coercion has not been authoritatively defined; and the matter is not helped by the tendency of many scholars to simply define coercion *as intervention*, or vice versa. Antonios Tzanakopoulos, for example, says that 'coercion *is effectively tantamount to intervention* ..., and is defined by the fact that it is unlawful *because it invades a state's "sphere of freedom"*'.[46] Such statements misunderstand the ICJ's two-part test: an intervention is not coercive simply because it encroaches upon a State's 'sphere of freedom'; rather, an intervention into a State's 'sphere of freedom' is only coercive *if* it uses coercive methods. The few scholars who have properly attempted to define coercion have typically focused on elements of compulsion, power disparities between the coercing and coerced State, and the elimination of options available to the coerced State.[47]

In sum, so-called unilateral coercive economic measures do not fall foul of the non-intervention principle unless they: (i) encroach upon a State's *domaine reserve*; and (ii) use coercive methods. This relatively restrictive interpretation of the non-intervention principle is not only implicit from the judgment of the ICJ in the *Nicaragua* case; it is also strongly affirmed in State practice. As many scholars have observed, economic sanctions are one of the most frequently used foreign policy tools of States, imposed with or without a Security Council mandate.[48] The US currently maintains 35 sanctions regimes, only ten of which are described as associated with Security Council resolutions.[49] The EU currently maintains 45 sanctions regimes, just 19 of which are described as having a UN mandate.[50] Many other countries also impose unilateral sanctions, among them Australia, Canada, Russia, Japan, Norway, Switzerland and the Ukraine.[51] The

[46] Tzanakopoulos, 'The Right to be Free' (n 30) 623, (emphasis added); see also Hofer (n 16) 191.

[47] See Jamnejad and Wood (n 38) 348; Hofer (n 16) 181; Helal (n 25) 72.

[48] Reisman and Stevick (n 12) 87; D Hawkins and J Lloyd, 'Questioning Comprehensive Sanctions: The Birth of a Norm' (2003) JHumRts 441, 446; Jamnejad and Wood (n 38) 349; Henderson (n 27) 176.

[49] See US Department of the Treasury, 'Sanctions Programs and Country Information' (Financial Sanctions 2020) <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>.

[50] European Commission (n 21).

[51] On Australia see Australian Government, 'Australia and Sanctions' (2020) <https://www.dfat.gov.au/international-relations/security/sanctions/Pages/about-sanctions#types>; on Canada see M Nesbitt, 'Canada's "Unilateral" Sanctions Regime Under Review: Extraterritoriality, Human Rights, Due Process, and Enforcement in Canada's Special Economic Measures Act' (2017) 48 OttLRev 509; on Russia see Doraev (n 25); on Japan see M Kanetake, 'Implementation of Sanctions: Japan' in M Asada (ed), *Economic Sanctions in International Law and Practice* (Routledge 2019); on Norway see Global Legal Group, 'Norway: Sanctions 2021' (*International and Comparative Legal Guide* 5 October 2020) <https://iclg.com/practice-areas/sanctions/norway>; on Switzerland see Swiss State Secretariat for Economic Affairs, 'Situation in Ukraine: Federal Council Decides on Further Measures to Prevent the Circumvention of International Sanctions' (Press Release, 27 August 2014) <https://www.seco.admin.ch/seco/en/home/seco/nsb-news/medienmitteilungen-2014.msg-id-54221.html>; on Ukraine see M O'Kane, 'Ukraine and Other Countries Align with EU's Extension of its Ukraine Territorial Integrity

imposition of unilateral sanctions for these countries is not an aberration; it is formally enshrined in foreign policy.

The vast majority of unilateral sanctions relate not to matters falling with the targeted State's *domaine reserve,* but to matters regulated by international law —principally human rights but also other matters such as counter-terrorism and weapons of mass destruction. Both the US and the EU, for example, maintain global thematic sanctions regimes relating to counter-terrorism, counter-narcotics, transnational crime and the non-proliferation of nuclear weapons, as well as country-specific sanctions which typically cite human rights violations, acts of aggression and threats to international peace and security.[52] To cite just a few other examples: Australia, Canada, New Zealand and members of the EU have all at various times imposed sanctions in response to human rights abuses in Burma/Myanmar; in 1998 Russia joined the US and the EU in imposing unilateral sanctions on the former Yugoslavia in response to human rights violations against ethnic Albanians; and the EU, the US, Australia, Canada, Japan, Norway, Switzerland and Turkey have all imposed sanctions on those responsible for violations of international human rights and/or humanitarian law in the Syrian conflict.[53] Most recently, in the last few years the US, Canada, the EU and the UK have adopted 'Magnitsky-style' sanctions legislation, authorising the imposition of sanctions targeting individuals responsible for human rights violations anywhere in the world.[54]

Given the breadth of State practice in adopting unilateral sanctions in response to human rights violations and other matters regulated by international law, and in line with the above analysis of the non-intervention principle, most scholars agree that customary international law does not prohibit such measures. Cleveland, for example, concludes that 'the relatively frequent use of economic sanctions by the US and other developed nations since WWII makes it difficult to conclude that a customary international norm exists against the practice.'[55] Barry Carter concludes similarly that 'economic

Sanctions' (EU Sanctions, Press Release, 6 November 2019) <https://www.europeansanctions.com/2019/11/ukraine-and-other-countries-align-with-eus-extension-of-its-ukraine-territorial-integrity-sanctions/>.

[52] US Department of the Treasury (n 49); European Commission (n 21).

[53] For discussion of these sanctions see EJ Criddle, 'Standing for Human Rights Abroad' (2015) 100 CornellLRev 271; UNGA, 'Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights on his Mission to the Syrian Arab Republic' (11 September 2018) UN Doc A/HRC/39/54/Add.2.

[54] See Council of the European Union, 'EU Adopts a Global Human Rights Sanctions Regime' (Press Release, 7 December 2020) <https://www.consilium.europa.eu/en/press/press-releases/2020/12/07/eu-adopts-a-global-human-rights-sanctions-regime/?utm_source=dsms-auto&utm_medium=email&utm_campaign=EU+adopts+a+global+human+rights+sanctions+regime#>; UK Foreign and Commonwealth Office, 'UK Announces First Sanctions Under New Global Human Rights Regime' (Press Release, 6 July 2020) <https://www.gov.uk/government/news/uk-announces-first-sanctions-under-new-global-human-rights-regime>; Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law) SC 2017 c 21 (Canada); Global Magnitsky Human Rights Accountability Act (Public Law 114–328) (2017) (US).

[55] Cleveland (n 1) 53.

sanctions have become a fact of international life and a tool of international diplomacy',[56] while Tzanakopoulos observes that States do not have a 'right to be free from economic coercion'.[57]

The fact that human rights-related economic sanctions do not breach the principle of non-intervention does not necessarily mean that such measures are lawful unless they breach international trade treaties. Sanctions may also be unlawful if they negatively impact the human rights of the population in the targeted State, fail to respect established international law principles of due process, purport to apply extraterritorially in violation of established international law principles of jurisdiction, or amount to the imposition of a blockade. These particular legal grounds on which unilateral coercive measures may be illegal are discussed below, in the context of the General Assembly's condemnation of such measures.

III. THE GENERAL ASSEMBLY'S PRACTICE AND POSITION ON SANCTIONS

Throughout its history, the General Assembly—as noted above—has on many occasions responded to human rights violations and acts of aggression, as well as struggles for self-determination and independence, by recommending to States that they impose sanctions of various types. In the context of the Korean War in 1951, for example, the Assembly recommended that every State 'apply an embargo on the shipment … of [among other things] arms, ammunition and implements of war', and cooperate with other States in carrying out the embargo.[58] In relation to the Congolese civil war in 1960, the Assembly similarly called upon States to refrain from providing 'arms or other materials of war and military personnel and other assistance for military purposes in the Congo'.[59] In support of the struggle for self-determination and independence in the Portuguese Territories in the 1960s, the Assembly urged member States 'separately or collectively' to, *inter alia*: break off diplomatic relations with Portugal; close their ports to Portuguese vessels; prohibit their ships from entering Portuguese ports; refuse landing and transit facilities to Portuguese Government aircraft; and boycott trade with Portugal.[60] In relation to the self-determination struggle in Southern Rhodesia in the 1960s and 1970s, the Assembly called upon States more broadly to, *inter alia*, 'sever immediately all economic and other relations' with the 'illegal, racist, minority regime'.[61] In relation to South African apartheid and aggression in

[56] BE Carter, 'Economic Sanctions' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (2011) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1521?rskey=X8wVBV&result=1&prd=OPIL>.

[57] Tzanakapoulos, 'The Right to Be Free' (n 30) 633.

[58] UNGA Res 500 (V) (18 May 1951).

[59] UNGA Res 1474 (ES-IV) (20 September 1960).

[60] UNGA Res 2107 (XX) (21 December 1965).

[61] UNGA Res 2262 (XXII) (3 November 1967). See also: UNGA Res 2383 (XXIII) (7 November 1968); UNGA Res 2508 (XXIV) (21 November 1969); UNGA Res 2765 (XXVI) (16

the 1960s through to the 1980s, the Assembly—in terms similar to those used for the Portuguese Territories—called on States to break off diplomatic relations, close ports to South African vessels, prohibit ships from entering South African ports, boycott trade and refuse landing and passage to South African aircraft; and it later called upon States to impose 'comprehensive mandatory sanctions' and to 'adopt legislative and other comparable measures' to ensure South Africa's 'total isolation'.[62] In response to Israeli aggression in the 1980s, the Assembly called upon States to cease providing 'arms and related material of all types which enable [Israel] to commit acts of aggression';[63] and later to 'put an end to the flow to Israel of any military, economic, financial and technological aid, as well as of human resources, aimed at encouraging it to pursue its aggressive policies against the Arab countries and the Palestinian people'.[64] In all these cases, the Assembly's recommendations for coercive measures were made without the Security Council having imposed mandatory sanctions.[65] As such, the Assembly's recommendations were for States to act 'unilaterally'—at least insofar as that term has since been defined by the Special Rapporteur on unilateral coercive measures to mean without the authorisation of the Council.

In contradistinction to this practice, and in contradistinction also to the position of most scholars regarding the permissibility of coercive economic measures, outlined above, since 1965 the General Assembly has passed a series of resolutions *denouncing* economic intervention in the affairs of States. The most significant of the Assembly's resolutions on non-intervention are the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States (1965), the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States (1970) and the Charter on the Economic Rights and Duties of States (1974).[66] These resolutions all assert that 'no state may use or encourage the use of economic, political, or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights'. Mention should also be made of the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (1981), which refers to the duty of a State 'not to use its external

November 1971); UNGA Res 2796 (XXVI) (10 December 1971); UNGA Res 3298 (XXIX) (13 December 1974); UNGA Res 3397 (XXX) (21 November 1975); UNGA Res 31/154(B) (20 December 1976); UNGA Res 33/38B (13 December 1978).

[62] See eg UNGA Res 1761 (XII) (6 November 1962); UNGA Res ES-8/2 (14 September 1981); UNGA Res 41/35 A-B (10 November 1986).

[63] UNGA Res 36/27 (13 November 1981).

[64] See eg UNGA Res 42/209 B (11 December 1987).

[65] The UNSC did impose mandatory sanctions in relation to Southern Rhodesia in 1968 (SC Res 253 (29 May 1968)), however the UNGA had by that stage already called upon States to impose sanctions (UNGA Res 2262 (XXII) (3 November 1967)). The UNGA continued to recommend sanctions after the UNSC's imposition of sanctions: see UNGA resolutions cited at n 61.

[66] UNGA Res 2131 (XX) (21 December 1965); UNGA Res 26/25 (24 October 1970); UNGA Res 3281 (XXIX) (12 December 1974).

economic assistance programme or adopt any … economic reprisal or blockade … as instruments of political pressure or coercion against another State'—and makes no reference to the subordination of a State's sovereign rights.[67]

In addition, since 1991 the General Assembly has adopted bi-annual resolutions titled 'economic measures as a means of political and economic coercion against developing countries';[68] and since 1996 it has adopted resolutions on 'human rights and unilateral coercive measures'.[69] The former set of resolutions urge the international community to 'eliminate the use of unilateral coercive economic measures against developing countries that are not authorised by relevant organs of the UN or are inconsistent with the principles of international law'. The latter set of resolutions assert more broadly that 'unilateral coercive measures and legislation *are contrary to international law*' and urge States to 'cease adopting or implementing any unilateral measures not in accordance with international law'.

In the 1970s and 1980s, many of the General Assembly's recommendations regarding coercive measures were adopted more or less simultaneously with the Assembly's resolutions condemning such measures. The Friendly Relations Declaration, for example, was adopted by consensus just two months after one of the Assembly's resolutions on the Portuguese Territories, adopted by a majority of 94 to 6 with 6 abstentions,[70] calling on States to 'prevent the sale or supply of weapons, military equipment and material to the Government of Portugal'.[71] The Charter on the Economic Rights and Duties of States, adopted by a majority of 115 to 6 with 10 abstentions,[72] was passed just days prior to one of the Assembly's resolutions recommending coercive measures in relation to South African apartheid,[73] which was adopted by a majority of 95 to 13 with 14 abstentions.[74] The 1981 Declaration on the Inadmissibility of Intervention, adopted by a majority of 120 to 22 with 6 abstentions,[75] was adopted just days before the Assembly adopted a resolution on Israel, by a majority of 94 to 16 with 28 abstentions,[76] calling on States to 'put an end to the flow to Israel of any military, economic and financial resources that would encourage it to pursue its aggressive policies against the Arab countries'.[77]

[67] UNGA Res 36/103 (9 December 1981).
[68] UNGA Res 46/210 (20 December 1991) and subsequent annual resolutions with the same title.
[69] UNGA Res 51/103 (12 December 1996) and subsequent annual resolutions with the same title.
[70] See UNGA Verbatim Records, 25th Session, 1928th Plenary Meeting (14 December 1970) UN Doc A/PV.1928.
[71] UNGA Res 2707 (XXV) (14 December 1970).
[72] UNGA Res 3281 (XXIX) (12 December 1974).
[73] UNGA Res 3324 (XXIV) E (16 December 1974).
[74] UNGA Verbatim Records, 29th Session (16 December 1974) UN Doc A/PV.2320, 1500.
[75] UNGA Verbatim Records, 36th Session (9 December 1981) UN Doc A/36/PV.91, 1631.
[76] UNGA Verbatim Records, 36th Session (17 December 1981) UN Doc A/36/PV.103, 1980.
[77] UNGA Res 36/226 A (17 December 1981).

As these numbers suggest, some States have voted in favour of the General Assembly's resolutions condemning unilateral coercive measures, while simultaneously voting in favour of resolutions recommending such measures against particular States. Moreover, some States have voted in favour of the Assembly's resolutions condemning unilateral coercive measures while simultaneously imposing such measures themselves. In 1996, for example, African States announced economic sanctions against Burundi, and later that same year some of those same States voted in favour of the Assembly's annual resolution on human rights and unilateral coercive measures, condemning such measures as illegal.[78] In 2012, Russia authorised the imposition of sanctions targeting individuals involved in human rights violations or unfriendly acts against Russian citizens,[79] and that same year, it voted in favour of the Assembly's annual resolution condemning unilateral coercive measures as illegal.[80] Similarly, from 2017 to early 2021, Saudi Arabia, the United Arab Emirates, Bahrain and Egypt have all maintained sanctions against Qatar, while simultaneously supporting the Assembly's resolutions condemning unilateral coercive measures.[81]

In order to reconcile the General Assembly's decades-long history of recommending coercive measures in response to human rights violations and acts of aggression, with its equally sustained history of denouncing unilateral coercive measures, and also to reconcile the continuing practice of member States of condemning unilateral coercive measures while simultaneously adopting such measures themselves, it is essential to precisely understand *exactly what type of measures* the Assembly's resolutions have condemned, and continue to condemn. Such an understanding is also essential in order to keep the Assembly's toolbox open for possible use in future crises—because if the Assembly decides it wants to recommend sanctions in response to human rights atrocities in the future, it will need to be able to reconcile any

[78] On the sanctions against Burundi see UNSG, 'Report of the Secretary General on the Situation in Burundi' (3 May 1996) UN Doc S/1996/335; for the voting record on UNGA Res 51/103 (12 December 1996) on human rights and unilateral coercive measures see UNGA Verbatim Records, 51st Session (12 December 1996) UN Doc A/51/PV.82, 17.

[79] Federal Law of the Russian Federation on Coercive Measures for Individuals Violating Fundamental Human Rights and Freedoms of the Citizens of the Russian Federation, Russian Federation Collection of Legislation, 2012, No. 53, Item 7597.

[80] For voting data on UNGA Res 67/170 (20 December 2012) on human rights and unilateral coercive measures see UNGA Verbatim Records, 67th Session (20 December 2012) UN Doc A/67/PV.60, 14.

[81] On sanctions against Qatar see: UN High Commissioner for Human Rights (UNHCHR), 'Human Rights and Unilateral Coercive Measures: UN Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights, Ms Alena Douhan, Concludes her Visit to Qatar' (Press Release, 12 November 2020) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26495&LangID=E>. For the voting records on the UNGA's resolutions on unilateral coercive measures see: UNGA Verbatim Records, 72nd Session (19 December 2017) UN Doc A/72/PV.73, 16; UNGA Verbatim Records, 73rd Session (17 December 2018) UN Doc A/73/PV.55, 26; UNGA Verbatim Records, 74th Session (18 December 2019) UN Doc A/74/PV.50, 23.

new recommendations with its persistent condemnation of economic intervention.

The following discussion first examines the apparent discrepancy between the position of the General Assembly and the weight of scholarly opinion regarding the legality of unilateral coercive measures. It then seeks to understand exactly what measures the Assembly has been referring to in its resolutions condemning coercive measures, and suggests that the position asserted by the Assembly is not in fact so divergent from the commonly-understood customary international law position—nor inconsistent with State practice—as is sometimes portrayed. The discussion then examines why, if it is indeed the case that the position asserted by the Assembly is broadly in line with customary international law and the bulk of State practice, the Assembly continues so persistently to issue resolutions condemning the use of unilateral coercive measures.

A. The General Assembly vs the ICJ, State Practice and the Weight of Scholarly Opinion

The unsettled nature of the law on autonomous sanctions, described in Part 2, stems in part from what is sometimes portrayed as a dichotomous debate between the judgment of the ICJ in the *Nicaragua* case, State practice and the view of most scholars, on the one hand, in support of the view that unilateral sanctions are not necessarily illegal; and General Assembly resolutions, on the other, which assert that they are. Carter, for example, States that 'many developing and non-aligned states have tried … to develop a rule against international economic sanctions', including by 'pass[ing] declarations and resolutions in the UN General Assembly', but that '*in spite of these efforts*', and particularly following the *Nicaragua* case, 'it is generally accepted that a rule of customary international law against economic sanctions does not exist'.[82] Mergen Doraev, similarly, distinguishes between 'the majority of western commentators [who] do not support the contention that the UN Charter and customary international law expressly bar states from using … economic coercion', and the position 'expressed in General Assembly resolutions' that 'unilateral coercive measures violate the UN Charter and the customary international law principle of non-intervention'.[83]

Central to this dichotomous framing of the debate is the interpretation of the General Assembly's resolutions as standing for the unqualified proposition that *unilateral, coercive economic measures are illegal*. Many scholars seemingly

[82] Carter (n 56) (emphasis added).

[83] Doraev (n 25) 374–5; see also M Happold, 'Economic Sanctions and International Law: An Introduction' in P Eden and M Happold (eds), *Economic Sanctions and International Law* (Hart Publishing 2016) 3; Hofer (n 16) 176.

interpret the Assembly's resolutions in this way. Alexandra Hofer, for example, says that 'economic coercion is frequently invoked in [General Assembly] resolutions, whereby developing States contest the legality of unilateral sanctions, arguing that they constitute an act of coercion contrary to the principles of international law'.[84] Doraev observes similarly that the 'position that unilateral economic measures violate the UN Charter and the customary international law principle of non-intervention … can be seen in many resolutions of the General Assembly';[85] while Richard Porotsky refers to the Assembly's 'attempts to distill [a] specific norm against economic coercion'.[86] In 2015, Special Rapporteur Jazairy went so far as to query whether the 'numerous resolutions and outcome documents adopted [*inter alia*] by the General Assembly … strongly urging States to refrain from promulgating and applying unilateral coercive measures … does not signal an emerging customary law and evolving peremptory norms calling into question' the continuing use of such measures.[87] The point here is not to suggest that these scholars regard the Assembly's resolutions as evidence of an *actual norm* prohibiting unilateral coercive measures (most do not); rather, to illustrate the tendency for the Assembly's resolutions to be interpreted as *asserting* such a proposition.

For the international lawyer interested in the effectiveness of the General Assembly there are two major conceptual problems with this framing of the debate.

First, accepting this degree of divergence between the law as affirmed by the ICJ and State practice on the one hand, and the laws as expressed in General Assembly resolutions over the course of more than four decades, on the other, is patently unsatisfactory. A legal principle so consistently asserted by a majority of States, in some cases unanimously and in other cases by large majorities, would generally have a strong claim as a rule of customary international law. But in this case, scholars such as Cleveland, Carter and many others are clearly correct in asserting that there cannot be a rule of customary international law prohibiting coercive economic measures, when there is such widespread State practice to the contrary. How can this persisting divergence between the jurisprudence of the ICJ and State practice on the one hand, and the position expressed by States through General Assembly resolutions, on the other, be satisfactorily explained?

The second, more practical problem is that interpreting the General Assembly's resolutions as standing for the unqualified proposition that coercive economic measures are illegal is extremely difficult to reconcile with the Assembly's past practice of recommending such measures; and moreover, seems to foreclose the possibility of the Assembly re-assuming

[84] Hofer (n 16) 176.
[85] Doraev (n 25) 373.
[86] Porotsky (n 25) 920; see also Elagab (n 27) 692.
[87] UNGA, '2015 Report of the Special Rapporteur' (n 18) 14.

such a role in the future. Accordingly, the next section re-examines the Assembly's resolutions on non-intervention and on unilateral coercive measures and seeks to understand what *exactly* the Assembly has been asserting—and continues to assert—is illegal.

B. The General Assembly's Resolutions Re-Examined

In order to better understand this seemingly tangled state of affairs, it is necessary to analyse the precise language of the General Assembly's resolutions, as well as the context in which they were adopted, and the related reports of the UN High Commissioner on Human Rights (UNHCHR) and the UN Special Rapporteurs on the negative impacts of unilateral coercive measures. The following discussion first re-examines the Friendly Relations Declaration, the Charter on Economic Rights and Duties of States and the Declarations on the Inadmissibility of Intervention. It then turns to the Assembly's more recent resolutions on unilateral coercive measures and human rights, and unilateral economic measures and developing countries.

1. The Friendly Relations Declaration, Charter on Economic Rights and Duties of States and Declarations on the Inadmissibility of Intervention

The Friendly Relations Declaration is generally regarded as the most significant of the General Assembly's resolutions on non-intervention, having been adopted by consensus, and being the only resolution to expressly describe itself as a codification of international law principles.[88] Similarly to the 1965 Declaration on the Inadmissibility of Intervention and the 1974 Charter on the Economic Rights and Duties of States, the Declaration condemns economic or other coercive measures that are used to 'coerce another state to obtain from it the *subordination of the exercise of its sovereign rights*'.[89] On a strict reading, these resolutions say nothing about economic measures *not* aimed at subordinating a State's sovereign rights—that is, that do not encroach upon a State's *domaine reserve.* Read in this way, they are consistent with the principle of non-intervention articulated by the ICJ in the *Nicaragua* case and broadly accepted by scholars: that measures imposed by one State against another only breach the non-intervention principle if they coercively encroach upon a State's *domaine reserve*. Read in this way these resolutions are also broadly consistent with State practice, because as noted above, most unilateral sanctions are imposed in relation to matters that fall outside a State's *domaine reserve*—human rights, terrorism, weapons of mass destruction, etc. Finally, interpreting these three resolutions in this way makes it possible to reconcile

[88] See UNGA, '1997 Report of the Secretary General on Economic Measures as a Means of Political and Economic Coercion' (n 13) 21.

[89] UNGA Res 26/25 (24 October 1970) (emphasis added).

their adoption with the Assembly's simultaneous adoption of resolutions recommending to States that they impose unilateral coercive measures in response to human rights violations and acts of aggression—these being matters falling outside a State's *domaine reserve*.

The 1981 Declaration on the Inadmissibility of Intervention, as noted above, describes the non-intervention principle in broader terms, not being explicitly limited to measures subordinating a State's sovereign rights. There has been a tendency on the part of scholars to dismiss this resolution as insignificant, primarily because it was adopted with substantial negative votes: Philip Kunig, for example, asserts that this Resolution was 'passed against the will of many States and does not represent international opinion on the topic';[90] Maziar Jamnejad and Michael Wood assert that the resolution 'embodied a very broad concept of non-interference and cannot be said to reflect customary international law'.[91] But a General Assembly resolution passed in the form of a 'declaration' by 80 per cent of States should not be so easily dismissed—it may have limited normative value, but it nevertheless serves to illustrate the majority view at the time on unilateral coercive measures. In the case of this resolution, the more important qualifier is not the fact that it was adopted with negative votes, but the context to which it refers. The resolution's preambular paragraphs express the Assembly's concern regarding the 'use of force, aggression, intimidation, military intervention and occupation, … and all other forms of intervention and interference, … threatening the sovereignty or political independence of States, with the aim of overthrowing their Governments'; and they refer to the need for foreign forces to be withdrawn 'so that people under colonial domination, foreign occupation or racist regimes may freely and fully exercise their right to self-determination'.[92] The Declaration itself refers to the 'right of a state freely to determine its own political, economic, cultural and social systems, to develop its own international relations and to exercise permanent sovereignty over its natural resources'. The resolution was clearly a response to concerns about colonial domination—highlighted by the fact that it did not prevent the Assembly from just days later urging States to impose coercive measures in response to apartheid in South Africa,[93] and Israeli aggression against Palestine.[94] Evidently the Assembly had no objection to sanctions aimed at promoting compliance with international law; what it objected to was intervention aimed at subordinating the exercise of a State's sovereign rights.

[90] P Kunig, 'Intervention, Prohibition of' in R Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (2008) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1434?rskey.V5a1XH&result.2&prd.EPIL>.

[91] Jamnejad and Wood (n 38) 355; see also Hofer (n 16) 185.

[92] UNGA Res 36/103 (9 December 1981).

[93] UNGA Res 36/172 (A) (17 December 1981).

[94] UNGA Res 36/226 (A) (17 December 1981).

2. Resolutions on unilateral coercive measures and human rights, and unilateral economic measures and developing countries

The General Assembly's resolutions on unilateral coercive measures and human rights, and unilateral economic measures and developing countries, are more difficult to reconcile with the customary law position articulated in the *Nicaragua* case, and with the Assembly's history of recommending to States that they impose coercive measures. This is because although the operative paragraphs of these resolutions urge States only to cease adopting unilateral measures that are 'not in accordance with international law'[95] or that are 'inconsistent with the principles of international law,[96] the preambular paragraphs contain sweeping statements that, in the case of the human rights resolutions, 'unilateral coercive measures … are contrary to international law',[97] and in the case of the developing countries resolutions, 'such measures constitute a flagrant violation of the principles of international law'.[98] It is argued here that while seemingly out of step both with the weight of scholarly opinion and State practice, these unqualified statements must be understood—and read down—in light of the surrounding text in the resolutions themselves and the related reports of the UNHCHR and the Special Rapporteurs on the negative impacts of unilateral coercive measures. These reports are issued as documents of the Human Rights Council—a subsidiary body of the General Assembly—and inform and underpin the Assembly's resolutions.

The obvious starting point in interpreting these resolutions is the question of how 'unilateral coercive measures' and 'unilateral economic measures' are defined. The General Assembly's resolutions themselves offer no definition, but reference can be made to the related reports of the Special Rapporteurs on the negative impact of unilateral coercive measures. The first point to note on the question of definition is that, as noted above, Special Rapporteur Jazairy in his reports to the Human Rights Council has defined unilateral coercive measures as measures not mandated by the Security Council. In other words, in the literature of the Human Rights Council and the General Assembly, the term unilateral coercive measures *includes* measures imposed by States pursuant to a General Assembly recommendation.

Beyond defining unilateral coercive measures as those lacking a Security Council mandate, in his 2015 report, Special Rapporteur Jazairy further defined unilateral coercive measures as 'measures including, but not limited to, economic and political ones, imposed by States or groups of States to

[95] See, eg, UNGA Res 74/154 (18 December 2019) on human rights and unilateral coercive measures, para 1.

[96] See, eg, UNGA Res 74/200 (19 December 2019) on unilateral economic measures as a means of political and economic coercion against developing countries.

[97] See, eg, UNGA Res 74/154 (18 December 2019) on human rights and unilateral coercive measures, para 2.

[98] See, eg, UNGA Res 74/200 (19 December 2019) on unilateral economic measures as a means of political and economic coercion against developing countries.

coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights with a view to securing some specific change in its policy'.[99] Assuming that this same definition is to be understood as applying also to 'unilateral coercive measures' in the General Assembly's resolutions, what this suggests is that the Assembly's resolutions on unilateral coercive/economic measures—consistently with the Friendly Relations Declaration and the Charter on the Economic Rights and Duties of States—pertain specifically to coercive measures *aimed at subordinating a state's sovereign rights*. In both sets of resolutions (the resolutions on unilateral coercive measures and human rights, and unilateral economic measures and developing countries) this interpretation is supported by the text surrounding the broad statements about the illegality of coercive measures. In the case of the human rights resolutions, the paragraphs immediately preceding the statement about the illegality of unilateral coercive measures reaffirm the provision in the Charter of the Economic Rights and Duties of States referring to measures that subordinate a State's sovereign rights; and other paragraphs in the resolutions refer similarly to unilateral measures 'not in accordance with international law'.[100] In the case of the resolutions on unilateral coercive measures and developing countries, the statement that '*such measures* constitute a flagrant violation of … international law' is similarly preceded by an affirmation of the principle enshrined in the Friendly Relations Declaration, that no State may use coercive measures against another State 'in order to obtain from it the subordination of the exercise of its sovereign rights'.[101]

It is pertinent to note that this understanding of the term 'unilateral coercive measures' as applying only to measures aimed at subordinating State sovereignty does not accord with the way in which that term appears to have been understood by the group of experts appointed by the UN Secretariat in 1997; nor with the way in which the term appears to have been understood by the UNHCHR in 2012. The UN Secretariat's group of experts concluded that unilateral coercive economic measures might be permissible if adopted 'in response to a clear violation of universally accepted norms, standards or obligations.'[102] In other words, such measures *are* unilateral coercive measures, even if adopted for purposes other than subordinating state sovereignty, but they are not necessarily illegal. Similarly, the 2012 report of the UNHCHR said that while the question of 'whether unilateral coercive measures are legal or illegal … cannot be easily answered', where such measures 'intend to induce compliance with international legal obligations, … they are less likely to infringe the principle [of non-intervention] than

[99] UNGA, '2015 Report of the Special Rapporteur' (n 18) 4.
[100] See eg UNGA Res 74/154 (18 December 2019) preambular paras and paras 1, 2, 4, 15–16.
[101] UNGA Res 74/200 (19 December 2019) preambular paras (emphasis added).
[102] UNGA, 'Economic Measures as a Means of Political and Economic Coercion: Report of the Secretary General' (1997) (n 13).

when they are directed against the legitimate sovereign political decision-making of a state'.[103] In other words, again, unilateral coercive measures do not lose their character as unilateral coercive measures just because they are adopted in order to enforce compliance with legal obligations; but they may lose their illegality. While the approach taken by the UN Secretariat's group of experts and the UNHCHR appears to differ from that of Special Rapporteur Jazairy on the issue of definition, the approaches coincide in one important respect: they both suggest that the unilateral coercive measures referred to—and condemned by—the General Assembly in its resolutions should be understood as those aimed at subordinating State sovereignty.

The task of interpreting the General Assembly's resolutions on unilateral coercive measures is aided by the focus in the reports of the Special Rapporteurs on particular legal questions arising from unilateral sanctions. In annual reports between 2015 and 2019, Special Rapporteur Jazairy focused on: the requirement for the imposition of targeted sanctions to follow due process; the legality of sanctions that apply extraterritorially; the legality of sanctions that negatively impact human rights; and the legality of comprehensive sanctions tantamount to a 'peacetime blockade'. The 2020 preliminary report of the second Special Rapporteur on the negative impact of unilateral coercive measures, Alena Douhan, similarly focused specifically on sanctions believed to be negatively impacting human rights—in this case the sanctions targeting Qatar, and their impact on the enjoyment of human rights of Qataris.[104]

Regarding due process requirements, Special Rapporteur Jazairy has recalled the requirement in international human rights law regarding the availability of judicial review, and observed that some targeted sanctions regimes effectively suspend the right to a fair trial.[105] Regarding extraterritorial sanctions, Jazairy has repeatedly asserted that such measures disregard commonly accepted rules governing State jurisdiction.[106] Regarding sanctions negatively impacting human rights, Jazairy has suggested that a sanctioning State should incur liability for human rights violations even if that State 'does not exercise formal "jurisdiction" or "control" over the population of the territory targeted'.[107] Finally, regarding comprehensive sanctions, Jaziry has called for the 'applicability, mutatis mutandis, of the requirements of the law of armed conflict … and the principles of necessity, proportionality and discrimination to non-forcible (peacetime) economic sanctions that may amount to a

[103] UNGA, 'Thematic Study of the Office of the United Nations High Commissioner for Human Rights on the Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights' (11 January 2012) UN Doc A/HRC/19/33, 7.
[104] UNHCHR (n 81).
[105] UNGA, '2018 Report of the Special Rapporteur' (n 14) 7.
[106] UNGA, 'Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights' (26 July 2017) UN Doc A/HRC/36/44, 6; UNGA, '2018 Report of the Special Rapporteur' (n 14) 12.
[107] UNGA, '2017 Report of the Special Rapporteur' (n 106) 10.

blockade'.[108] Jazairy's 2019 report focused specifically on blockades and 'blockade-like sanctions', and asserted that 'comprehensive coercive measures with extraterritorial reach are almost universally rejected as unlawful under international law'.[109] In 2020, Special Rapporteur Douhan said she considered illegal 'any unilateral measures, the wrongfulness of which cannot be excused or justified as countermeasures or on any other basis, if they have significantly detrimental and disproportional impacts on the enjoyment of fundamental human rights and freedoms'.[110]

The principles of international law elaborated by the Special Rapporteurs are affirmed in the Draft Declaration on Unilateral Coercive Measures and the Rule of Law, annexed to the Special Rapporteur's 2017 and 2018 reports. Among other things, the draft text affirms that 'unilateral coercive measures involving extraterritorial application of domestic measures are unlawful under international law'; that sanctions 'become clearly illegal' where they 'inflict undue suffering/have an egregious human rights impact, on the population of a targeted State'; and that 'mechanisms to guarantee due process, and the availablity of judicial review for obtaining remedies and redress … should be available'.[111] The 2018 draft also affirms that

> [w]hen comprehensive embargoes coupled with secondary sanctions … produce effects comparable with those of a wartime blockade, the relevant rules of international humanitarian law applicable to blockade, as well as the general requirements of necessity, proportionality and discrimination and the prohibitions of starvation and collective punishment, should become applicable mutatis mutandis.[112]

In short, the reports of the Special Rapporteurs have asserted—and elaborate the legal basis for the assertion—that unilateral coercive measures are illegal if they: (i) violate well-established legal principles regarding due process; (ii) purport to extend the sanctioning State's domestic jurisdiction extraterritorially, in violation of well-established principles of jurisdiction; (iii) negatively impact the human rights of the target State's population, in violation of the sanctioning State's treaty obligations; or (iv) are so comprehensive as to amount to a blockade. Between 2015 and 2020, all the

[108] UNGA, '2018 Report of the Special Rapporteur' (n 14) 8.

[109] UNGA, 'Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights' (15 July 2019) UN Doc A/74/165, 5.

[110] UNHCHR (n 81).

[111] UNGA, '2018 Report of the Special Rapporteur' (n 14) Annex, 18–19. The principles in the Draft Declaration explicitly rely upon the UN Committee on Economic, Social and Cultural Right (CESCR), 'General Comment No. 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights' (4 December 1997) UN Doc E/C.12/1997/8. In particular, the Draft Declaration cites the statement of the CESCR that 'when an external party takes upon itself even partial responsibility for the situation within a country …, it also unavoidably assumes a responsibility to do all within its powers to protect the economic, social and cultural rights of the affected population': at Annex, 18.

[112] UNGA, '2018 Report of the Special Rapporteur' (n 14) Annex, 19.

sanctions regimes explicitly addressed by the Special Rapporteur were critiqued because of their negative impact on human rights; and some were also critiqued because of their extraterritorial reach, and/or the lack of due process followed in their imposition, and/or the fact that they amounted to a blockade.

All that being said, it cannot be ignored that the reports of the first Special Rapporteur also contain sweeping statements regarding the illegality of unilateral coercive measures. In line with this expansive language, the Draft Declaration asserts that the 'basic principle should be that States … should commit themselves to refraining from imposing unilateral coercive measures', and it proposes 'rules of behaviour' to be used in a 'transitional period preceding the *total removal ... of all existing unilateral coercive measures*'.[113] Respectfully, it is argued that this language needs to be tightened, including in particular by defining precisely what 'unilateral coercive measures' are being referred to. As discussed above, the Special Rapporteurs' reports elaborate specific reasons for which sanctions may be illegal. The arguments presented in the reports do not justify the assertion that sanctions are illegal even if they narrowly target human right violators, respect due process, do not have extraterritorial reach and do not negatively impact human rights amongst the affected population. These sweeping statements—and the expressed desire to ultimately eliminate unilateral coercive measures—cannot meaningfully be understood with reference to Special Rapporteur Jazairy's 2015 definition of unilateral coercive measures (measures aimed at subordinating State sovereignty), because then the statements would have no application to sanctions *not* aimed at subordinating State sovereignty—such as sanctions imposed in response to human rights violations. As some of the sanctions described in the Special Rapporteur 2015–2019 reports are aimed at enforcing compliance with international human rights law (sanctions targeting Syria and Zimbabwe, for example), it is clearly not the intention that the principles enunciated in the Draft Declaration do not apply to these measures. Special Rapporteur Jazairy's 2018 report provides an alternative definition for unilateral coercive measures, describing them more loosely as 'transnational, non-forcible coercive measures, other than those enacted by the Security Council'.[114] The sweeping statements regarding the illegality of coercive measures may feasibly be understood with reference to this definition, but if so, the legal basis for the statements is not provided in the reports.

These flaws aside, the Special Rapporteurs' reports and the Draft Declaration on Unilateral Coercive Measures and the Rule of Law nevertheless shed light on the type of measures driving the General Assembly's persisting condemnation of unilateral coercive measures (comprehensive sanctions, particularly blockades, and those with extraterritorial reach), the reasons for that condemnation (lack of due process and human rights impacts), and the legal

[113] ibid at Annex, 19 (emphasis added).

[114] ibid 18.

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analysis underpinning the Assembly's resolutions. What all this means is that when the Assembly's resolutions on unilateral coercive/economic measures are read together with the reports of the UNHCHR and the Special Rapporteurs on the same subject, this series of legal instruments can be interpreted as doing two things. First, as discussed above, they reaffirm the well-established proposition that a State must not impose coercive measures on another State in order to subordinate the exercise of that State's sovereign rights. Second, they assert that the legality of sanctions must be assessed not only on the basis of whether they breach the principle of non-intervention, but also on the basis of whether they respect due process in relation to their manner of adoption, violate human rights, violate established international law principles of jurisdiction, and/or amount to a blockade. Understood in this way, the Assembly's resolutions are broadly in line with the way in which the non-intervention principle was articulated, albeit ambiguously, in the *Nicaragua* case; as well as with State practice of imposing sanctions in relation to matters regulated by international law (human rights, counterterrorism etc); as well as with the Assembly's own history of recommending sanctions in response to human rights violations and acts of aggression.

C. *Impetus for the General Assembly's Persistent Objection to Unilateral Coercive Measures*

The above conclusion begs the following question: if the General Assembly's position on the legality of unilateral coercive measures is broadly consistent with the most commonly accepted customary international law position (that economic sanctions are not necessarily unlawful if they do not coercively subordinate State sovereignty), and if the practice of most States is also most commonly in line with that customary international law position, why does the Assembly keep adopting resolutions condemning unilateral coercive measures?

There are three broad answers to this. The first is that although most of today's sanctions are targeted, there remain a number of unilateral sanctions programs that, however they measure up against the non-intervention principle, are not at all targeted and have devastating impacts on the human rights of the population of the target State.[115] The blockades and blockade-like sanctions targeting Gaza, Yemen and Cuba stand out as obvious examples, and are described in the 2018 Report of the Special Rapporteur; but the preliminary findings of Special Rapport Douhan following her visit to Qatar also highlight the extent to which less extreme measures can also

[115] See discussion in CESCR (n 111); SMH Razavi and F Zeynodini, 'Economic Sanctions and Protection of Fundamental Human Rights: A Review of the ICJ's Ruling on Alleged Violations of the Iran-US Treaty of Amity' (2020) 29 WashIntlLJ 327; A Howlett, 'Colloquium: Deborah L Rhodes Access to Justice: Getting "Smart": Crafting Economic Sanctions that Respect all Human Rights' (2004) 73 FordhamLR 1217.

negatively impact human rights in the target State.[116] Following the analysis of the Committee on Economic, Social and Cultural Rights, Special Rapporteur Jazairy and many scholars regarding the obligations of States to respect human rights even outside their jurisdiction, at least those that are protected either by treaty or by customary international law, there is good authority for the proposition that these non-targeted sanctions violate the obligations of sanctioning States under international human rights law.[117] The concern that unilateral coercive measures negatively impact human rights in the targeted States is by far the most pervasive criticism in the General Assembly's resolutions on unilateral coercive measures and human rights, as indeed is clear from the resolutions' titles.

Second, while the bulk of State sanctions practice relates to matters regulated by international law (such as human rights) and thus falling outside the *domaine reserve* of States, this cannot be said of all unilateral sanctions. The sanctions which until January 2021 were imposed by Saudi Arabia, the United Arab Emirates, Bahrain and Egypt on Qatar, demanding *inter alia* that Qatar shut down Al Jazeera and other Qatari media outlets, provide perhaps the most obvious example;[118] however, even States who employ sanctions primarily in order to promote respect for international law typically have sanctions policies that leave scope for sanctions to be applied in relation to matters falling within *domaine reserve*. The EU, for example, states that it will adopt restrictive measures to promote the objectives of its Common Foreign and Security Policy, including 'safe-guarding the EU's values, its fundamental interests and security'.[119] It is possible to envisage matters that the EU might regard as threatening its values, interests or security, but that in fact are matters in relation to which, under international law, States are entitled to have free reign. The US sanctions policy states even more broadly that the US will impose sanctions against countries threatening the 'foreign policy or economy of the United States'.[120] Again, this allows for the imposition of sanctions in relation to matters on which States ought to be entitled to decide freely, as indeed some US sanctions do—as Cleveland observed in 2001, US

[116] UNHCHR (n 81).

[117] See CESCR (n 111); F Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' (2011) 11 HRLRev 1 (albeit observing that the CESCR has failed to elaborate the 'theoretical legal basis' of extraterritorial obligations in the field of economic, social and cultural rights: at 34); Razavi and Zeynodini (n 115); ETO Consortium, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (2013) <https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23>.

[118] UNHCHR (n 81).

[119] European Union, 'European Union Sanctions' (3 August 2016) <https://eeas.europa.eu/topics/sanctions-policy/423/european-union-sanctions_en>.

[120] US Department of the Treasury, 'Office of Foreign Assets Control – Sanctions Programs and Information' (2020) <https://www.treasury.gov/resource-center/sanctions/Pages/default.aspx>; see also statement at UNGA, 'Summary Record of the 52nd Meeting of the Third Committee' (20 November 2015) UN Doc A/C.3/70/SR.52, para 32.

sanctions policy has been critiqued for 'reflect[ing] the whims and fads of US domestic politics'.[121] Reflecting this criticism, the General Assembly's 2019 resolution on unilateral coercive measures condemned 'the inclusion of Member States in unilateral lists under false pretexts, … including false allegations of terrorism sponsorship, considering such lists as instruments for political or economic pressure against Member States'.[122]

And third, while most sanctions regimes apply only to actors and entities within the jurisdiction of the sanctioning State, there are a small number of States that persist in imposing extraterritorial sanctions. In 2018 Special Rapporteur Jazairy critiqued the 'imposition of further wide-scale secondary sanctions purporting to apply to third parties not concerned with the dispute' and highlighted in particular the US sanctions against Iran and Russia.[123] The General Assembly's 2019 resolution on unilateral coercive measures and human rights explicitly objected to the 'extraterritorial nature of those measures' and called upon States 'neither to recognise those measures nor to apply them'.[124]

D. Conclusion on the General Assembly's Resolutions on Non-Intervention and Coercive Measures

It was observed at the outset of this section that, in seeming contrast to the position asserted by the ICJ in the *Nicaragua* case and widely supported by scholars that economic sanctions do not necessarily breach the principle of non-intervention, the General Assembly has consistently condemned such measures and called for their elimination. And it was observed, moreover, that the way in which this is frequently portrayed as a dichotomous debate between the Assembly on the one hand (representing the views of most States) and customary international law, on the other, is problematic for two reasons: first, because customary international law typically ought to broadly align with the long-held and consistently asserted views of most States; and second, because taking the Assembly's statements regarding the illegality of unilateral coercive measures at face value is difficult to reconcile with the Assembly's practice of recommending such measures, and seemingly forecloses the possibility of the Assembly recommending such measures again. The preceding discussion has sought to resolve this legally unsatisfactory state of affairs by elucidating *precisely* what sort of measures the Assembly has described as contrary to international law. It is argued that the Assembly's resolutions are most appropriately understood as standing for the proposition that: (a) unilateral coercive measures are illegal if they coercively encroach upon a State's *domain reserve*; and (b) that regardless of whether they encroach upon a State's *domaine reserve*, such measures are

[121] Cleveland (n 1) 75.
[122] UNGA Res 74/154 (18 December 2019).
[123] UNGA, '2018 Report of the Special Rapporteur' (n 14) para 35.
[124] UNGA Res 74/154 (18 December 2019).

illegal if they fail to respect established principles of due process, negatively impact human rights, apply extraterritorially, or amount to a blockade. Understanding the Assembly's resolutions in this way achieves four things. First, it reveals that the position asserted by the Assembly is not as divergent from the customary international law position as is commonly portrayed; indeed, the two positions are broadly in line. Second, it reveals that the position taken by the Assembly is also broadly in line with the bulk of State practice—although there is still enough practice to the contrary to warrant the Assembly's persistent attention. Third, when the Assembly's resolutions are interpreted in this way, instead of confusing the law on the legality of unilateral coercive measures, they can be regarded—when read together with the reports of the UNHCHR and the Special Rapporteurs—as assisting to clarify it, by delineating the specific legal bases upon which such measures may be illegal. And fourth, interpreting the Assembly's resolutions in this way leaves open the possibility of the Assembly acting in the future to recommend the imposition of targeted sanctions in response to human rights violations or violations of international humanitarian law, as it has done in the past.

IV. POSSIBLE ACTIONS FOR THE GENERAL ASSEMBLY IN RELATION TO SANCTIONS

Building on the propositions asserted in the preceding sections regarding the legality of unilateral sanctions, and the position asserted by the General Assembly in relation to such measures, this section considers what role the Assembly may feasibly play in a scenario in which the majority of members feel that the scale of violations of international human rights law and/or international humanitarian law warrant the imposition of sanctions, but the Security Council is unlikely to act owing to the political allegiances of one or more of the P5. This section considers three possible actions for the Assembly: (a) making a recommendation to the Security Council and/or States that sanctions be imposed; (b) making a statement regarding the consistency of targeted sanctions, in the particular circumstances of a case, with international law; or (c) making a determination regarding the permissibility of sanctions as countermeasures.

A. Recommendations to the Security Council and/or to States

The first and arguably least controversial thing that the General Assembly could do is to recommend to the Security Council that it impose mandatory sanctions. The UN Charter explicitly empowers the Assembly to make recommendations to the Security Council on any matter within the scope of the UN Charter,[125] and the Assembly has on many occasions acted on this power to recommend to the Council that it impose coercive measures. Its recommendations have ranged

[125] UN Charter (n 26), art 10.

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from broadly worded recommendations that the Council adopt 'appropriate measures', to explicitly articulated requests regarding the particular measures the Council should impose, including 'comprehensive and mandatory sanctions'.[126]

It is similarly uncontroversial that the General Assembly may itself recommend to States that they impose coercive measures, as indeed it has done in the past, as shown throughout this article.[127] Particularly in a context in which States are in any case imposing such measures unilaterally—Myanmar, for example, which is currently targeted by US, Canadian and EU sanctions due to the military's alleged role in genocide against the Rohingya[128]—such a recommendation could increase the likelihood of such sanctions being both appropriately targeted and well-coordinated.

A well-constructed General Assembly recommendation for targeted sanctions in response to large-scale human rights violations could also increase the likelihood of such sanctions complying with established principles of international law, in accordance with the Assembly's own previously expressed positions. If recommending to the Security Council that it impose mandatory sanctions, and/or recommending to States that they impose such measures voluntarily, the Assembly could (and should) simultaneously recommend that such measures be accompanied by appropriate precautionary measures such as human rights impact assessments and processes for judicial review, as outlined in the Assembly's Draft Declaration on Unilateral Coercive Measures and the Rule of Law. This would be a necessary departure from the Assembly's practice in the cases alluded to above, in which the Assembly has on various occasions made sweeping recommendations for sanctions without stipulating the precautionary measures that should also be put in place.

[126] See UNGA Res 36/172 D (17 December 1981) (recommendation for 'comprehensive and mandatory sanctions') and UNGA Res 2107 (XX) (21 December 1965) (recommendation for 'appropriate measures'). For a discussion of the General Assembly's practice of making recommendations to the Security Council see Barber, 'A Survey of the General Assembly's Competence' (n 9) 37–40.

[127] On the UNGA's competence to recommend coercive measures see: N White, 'The Relationship between the UN Security Council and the General Assembly in Matters of International Peace and Security' in M Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 305; LD Johnson, '"Uniting for Peace": Does it Still Serve Any Useful Purpose?' (2014) 108 AJIL Unbound 110; S Talmon, 'The Legalizing and Legitimizing Function of UN General Assembly Resolutions' (2014) 108 AJIL Unbound 123; Higgins *et al.* (n 9) 977.

[128] See: D Psaledakis and S Lewis, 'US Slaps Sanctions on Myanmar Military Chief over Rohingya Atrocities' (Reuters, 11 December 2019) <https://www.reuters.com/article/us-usa-myanmar-sanctions/us-slaps-sanctions-on-myanmar-military-chief-over-rohingya-atrocities-idUSKBN1YE1XU>; Government of Canada, 'Canadian Sanctions Related to Myanmar (14 January 2020) <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/myanmar.aspx?lang=eng>; European Council, 'Myanmar/Burma: Council Prolongs Sanctions' (29 April 2019) <https://www.consilium.europa.eu/en/press/press-releases/2019/04/29/myanmar-burma-council-prolongs-sanctions/>.

B. *Affirming the Consistency of Targeted Sanctions in Particular Circumstances with International Law*

The second thing that the General Assembly may do if it wishes to see sanctions imposed in a particular context is to make a statement affirming the consistency of the proposed targeted sanctions, in the circumstances, with established principles of international law. As discussed above, while the Assembly's resolutions may be interpreted as condemning unilateral coercive measures as illegal specifically because they (a) coercively interfere with *domaine reserve*, and/or (b) fail to respect due process, negatively impact human rights, apply extraterritorially and/or amount to a blockade, the sweeping nature of the Assembly's condemnation of unilateral coercive measures since the mid-1990s cannot be ignored. Thus, if a situation were to arise in relation to which the Assembly wished to see targeted sanctions, the Assembly could as a first step make a statement that essentially distinguishes the measures being recommended from those that the Assembly has previously condemned. The Assembly could, for example, pass a resolution that: *affirms* the principle enshrined in the Friendly Relations Declaration and the Charter on the Economic Rights and Duties of States that coercive measures are illegal if they are used to subordinate a State's sovereign rights; *affirms* the principles enshrined in the Assembly's previous resolutions regarding the illegality of unilateral coercive measures that negatively impact human rights and/or apply extraterritorially; and simultaneously *recognises* that given the overwhelming evidence of violations of human rights and international humanitarian law in a particular context, sanctions targeting the responsible individuals would be consistent with international law provided those measures respect rules of due process, do not apply extraterritorially, and do not negatively impact the human rights of the population at large—in other words, provided such measures align with the Draft Declaration on Unilateral Coercive Measures and the Rule of Law. Such a statement would enable States wishing to impose such sanctions to do so without contravening the Assembly's previously expressed (and persisting) position on unilateral coercive measures, and without contributing to an undesirable precedent regarding the imposition of unilateral sanctions in violation of well-established principles of State sovereignty.

C. *A Determination Regarding Sanctions as Countermeasures*

As a more substantial alternative to merely making a statement regarding the consistency of targeted sanctions in the circumstances with international law, the General Assembly could pass a resolution determining that the circumstances in a particular case—for example, the occurrence of widespread human rights violations, and the risk of such violations continuing—are such as to warrant the imposition of targeted sanctions as countermeasures.

In its 2001 Draft Articles on the Responsibility for Internationally Wrongful Acts, the International Law Commission (ILC) affirmed that the wrongfulness of the breach of an international legal obligation may be precluded if the conduct in question can be characterised as a countermeasure.[129] To qualify as a countermeasure, the conduct in question must be: taken against a State which is responsible for an internationally wrongful act, for the purpose of inducing that State to comply with its obligations; time-limited; taken in such a way as to permit the resumption of performance of the obligations in question; and proportionate.[130] The Articles on State Responsibility define countermeasures as applying only 'in the relations between an *injured State* and the State which has committed the internationally wrongful act'.[131] In its commentaries, the ILC states that Article 22 (permitting countermeasures) does not cover measures taken by a State to ensure compliance with obligations 'in the general interest as distinct from its own individual interest' (such as human rights sanctions); however, Article 54 says that the provisions on countermeasures do 'not prejudice' the right of a State to take 'lawful' measures against a State in the interests of the beneficiaries of the obligation breached.[132] The ILC's commentaries describe Article 54 as a 'savings clause', which 'leaves the resolution of the matter [whether countermeasures may be taken in the collective interest] to the further development of international law'.[133] Several scholars have critiqued the ILC's narrow conceptualisation of countermeasures, asserting that it does not reflect State practice, and moreover, is difficult to reconcile with the concept of obligations *erga omnes* —recalling the statement of the ICJ in *Barcelona Traction* that all States may assert a legal interest in the protection of human rights. Nigel White, for example, argues that the approach 'leaves a great deal of practice on non-forcible forms of coercion unregulated by international law';[134] Margo Kaplan asserts that prohibiting collective countermeasures would 'illogically … prohibit all parties owed an obligation from reacting to the most serious and systematic violations of peremptory norms that international law has recognised as being most grave';[135] David Bederman asserts simply that 'the restrictions in Article 50(1) [according to which countermeasures are only available to an injured State] are not likely to have an impact on the development of human rights sanctions practice'.[136] If one were to accept the

[129] ILC (n 11) 75.

[130] ibid 129–35 (arts 49, 51); ICJ, *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, (Judgment) [1997] ICJ Rep 7, 56–7.

[131] ILC (n 11) 75 (emphasis added). [132] ibid 76, 137 (art 54). [133] ibid 139.

[134] N White, 'Sanctions and Restrictive Measures in International Law' (2018) 27(1) ItYBIL 8.

[135] M Kaplan, 'Using Collective Interests to Ensure Human Rights: An Analysis of the Articles on State Responsibility' (2014) 79(5) NYULRev 1930.

[136] DJ Bederman, 'Counterintuiting Countermeasures' (2002) 96(4) AJIL 827. See also L-A Sicilianos, 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community' in J Crawford *et al.* (eds), *The Law of International Responsibility* (Oxford University Press 2010) 1146–7; Tzanakopoulos (n 11) 156; Kaplan (n 135).

proposition that sanctions imposed on States responsible for large-scale human rights violations may be characterised as countermeasures, this would have the effect of exonerating the sanctioning State(s) from competing legal obligations, including the obligation to respect the principle of non-intervention, as well as other obligations such as those contained in bilateral/multilateral treaties, or those associated with international law principles of jurisdiction.

The ICJ has accepted that in certain situations, the General Assembly may pass resolutions with determinative effect. In its 1971 *Namibia* Advisory Opinion, in relation to a determination by the Assembly that South Africa had breached its mandate in Namibia, the Court said that the Assembly was not 'debarred from adopting, in special cases within the framework of its competence, resolutions which make determinations or have operative design'.[137] The Court found the Assembly's 'determination' in that case to have been validly made. Numerous scholars have also accepted that the Assembly has a broad competence to make quasi-judicial determinations—affirmed in practice, albeit not explicitly provided for in the UN Charter. White, for example, notes that during the Cold War the Assembly adopted numerous resolutions 'which applied principles of international and Charter law to situations, disputes and conflicts', and that 'because they were clearly based on principles of international law, there was no doubt about their legal effect'.[138] Schachter, similarly, asserts that Assembly resolutions 'may be said to exhibit a broad consensus on the characterisation of certain conduct as legally impermissible'; [139] and Ramsden, similarly again, argues that the Assembly is 'able to certify the existence of a state of affairs in international relations', and that such certifications are 'capable of having a "quasi-judicial character", resolving questions that are not readily susceptible to judicial determination'.[140]

The making of quasi-judicial determinations is firmly entrenched in the General Assembly's practice. Among other things, the Assembly has: characterised particular State conduct as aggressive;[141] characterised situations as threats to international peace and security;[142] characterised conflict as international or non-international in character;[143] and pronounced on the existence of human rights violations and breaches of international

[137] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, para 105.

[138] N White, *The Law of International Organisations* (2nd edn, Manchester University Press 2005) 179.

[139] ibid.

[140] M Ramsden, '"Uniting for Peace" in the Age of International Justice' (2016) 42 YJIL 15.

[141] UNGA Res 37/233 A (20 December 1982) on Namibia; UNGA Res 36/172 C (17 December 1981) on South Africa; UNGA Res 3061 (XXVIII) (2 November 1973) on the Portuguese Territories; UNGA Res 36/27 (13 November 1981) on Israel/Iraq.

[142] UNGA Res ES-8/2 (14 September 1981) on Namibia; UNGA Res 35/6 (22 October 1980) on Kampuchea; UNGA Res 36/27 (13 November 1981) on Israel; UNGA Res 46/242 (25 August 1992) on Bosnia and Herzegovina.

[143] UNGA Res 39/50 A (12 December 1984) on Namibia.

humanitarian law.[144] The Assembly has also reaffirmed a State's entitlement to self-defence in a particular context,[145] and reaffirmed a State's entitlement to compensation due to the wrongful conduct of another State.[146] Following on from this practice, it would seem feasible that in a context of large-scale human rights violations, the Assembly could pass a resolution affirming the right of States to take time-bound, proportionate countermeasures, in the form of targeted sanctions, against the responsible State in order to ensure cessation of the violations—on the basis that those violations breach an obligation owed to the international community as a whole.

In light of what has been said about the legality of sanctions that do not coercively encroach upon a State's *domaine reserve*, respect due process, do not apply extraterritorially and do not negatively impact human rights, a determination regarding the permissibility of targeted sanctions pursuant to the law of countermeasures should not be required. It should suffice, as suggested above, for the General Assembly to make a statement distinguishing the particular measures it is recommending from its general condemnation of unilateral coercive measures. But a quasi-judicial determination regarding the permissibility of targeted human rights sanctions as countermeasures could nevertheless achieve several things. First, it would more definitively distinguish the situation at hand from the Assembly's broad-brush condemnation of unilateral coercive measures, thus enabling the Assembly to more solidly circumvent the appearance of inconsistency with its own previously asserted position. Second, insofar as there *is* still a debate about the legality of unilateral human rights-related sanctions, a determination regarding the permissibility of sanctions as countermeasures would buttress the legal case for their imposition. Third, a determination regarding countermeasures would open the possibility for States to get out of any existing treaty obligations that might otherwise prohibit the imposition of sanctions. And fourth, and importantly, a determination regarding targeted human rights sanctions as countermeasures could set a useful precedent that the Assembly could follow if it wished to recommend unilateral coercive measures in the future, without undermining its own principles enshrined in earlier resolutions.

A determination by the General Assembly regarding the permissibility of countermeasures would not be binding; however, it would not be without legal effect. It is useful here to recall David Johnson's description of the legal effect of General Assembly resolutions as 'elements indicative of the law, which an international court could take into account',[147] or White's observation that

[144] UNGA Res 47/121 (18 December 1992) on Bosnia and Herzegovina; UNGA Res ES-10/12 (19 September 2003) on the occupied Palestinian Territory.
[145] UNGA Res 47/121 (18 December 1992) on Bosnia and Herzegovina.
[146] UNGA Res 40/6 (1 November 1985) on Israel and Iraq; UNGA Res 41/38 (20 November 1986) on the Socialist People's Libyan Arab Jamahiriya.
[147] DHN Johnson, 'The Effect of Resolutions of the General Assembly of the United Nations' (1955–6) 32 BYIL 118.

General Assembly determinations 'adopted by a very large majority or consensus … [may be] acceptable as authoritative … legal determinations'.[148] A General Assembly resolution asserting that (for example) the occurrence of large-scale human rights violations, and the risk of those violations continuing, is such as to permit the characterisation of targeted human rights sanctions as countermeasures, could create a presumption of legality that could be difficult for the targeted individuals and/or entities to refute.

V. CONCLUSION

This article has sought to make sense of the General Assembly's evolving approach to unilateral coercive measures, in a manner that might open up the possibility of the Assembly recommending such measures in the future, as it has done in the past.

It has been established above that customary international law, as articulated by the ICJ in the *Nicaragua* case and interpreted by most scholars, holds that unilateral economic sanctions only breach the principle of non-intervention if they coercively encroach upon a State's *domaine reserve*. Conversely, the General Assembly has consistently critiqued unilateral coercive measures, in sweeping terms, as contrary to international law. It has been argued here that this seeming disconnect is problematic for two reasons: first, because a principle so consistently reiterated by a majority of States would generally have a solid claim as customary international law; and second, because accepting the General Assembly's resolutions as standing for the proposition that *unilateral sanctions are illegal* is not only difficult to reconcile with the Assembly's practice, but seems to foreclose the possibility of the Assembly recommending such measures in the future. Given the importance of economic sanctions as a diplomatic tool that can assist with the promotion and protection of human rights, even if only with limited effect, and the infrequency with which the Security Council imposes them, interpreting the Assembly's resolutions in a way that forecloses the possibility of the Assembly recommending sanctions in the future would not appear to be in the interests of advancing human rights.

This article has posited that the General Assembly's resolutions should not be read as asserting that unilateral coercive measures are illegal *per se*. Rather, they should be read as asserting that unilateral coercive measures are illegal if they either coercively encroach upon a State's *domaine reserve*, and/*or* fail to respect established principles of due process, negatively impact human rights, apply extraterritorially or amount to a blockade. Reading the Assembly's resolutions in this way assists in clarifying the unsettled nature of the law on unilateral sanctions, and moreover, opens up the possibility of the Assembly

[148] White, *International Organisations* (n 138) 178.

recommending targeted sanctions against human rights violators in the future. In the event that a context arises in which the General Assembly feel that sanctions are warranted, options for the Assembly include: recommending to the Security Council and/or to States that sanctions be imposed; making a statement regarding the consistency of targeted sanctions in the particular circumstances of a case with established principles of international law; and making a quasi-judicial (non-binding) determination regarding the permissibility of sanctions as countermeasures.