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EXTRATERRITORIAL SANCTIONS IN RESPONSE TO GLOBAL SECURITY CHALLENGES: COUNTERMEASURES AS GAP FILLERS IN THE UNITED NATIONS COLLECTIVE SECURITY SYSTEM

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Abstract: This article challenges the common understanding according to which unilateral and extraterritorial sanctions are a threat to the international legal order. It shows that sanctions of this kind may have a role to play as responses to challenges to global security, particularly when the centralised action by the United Nations (UN) encounters limitations. The article considers two examples of extraterritorial sanctions that may be lawful in this sense: those expanding on the territorial scope of restrictive measures decided by the UN Security Council; and those mapping on certain measures recommended by the UN General Assembly. In these circumstances, countermeasures may provide the legal basis to support otherwise unlawful unilateral and even extraterritorial measures provided that certain conditions are met. The article shows that such measures act as gap fillers to ensure

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the widest possible compliance with communitarian norms and may ultimately strengthen the international rule of law.

1. Introduction

The rise of unilateral and extraterritorial sanctions in the practice of states has generated considerable debate.[1] Opinions diverge, but most commentators agree that the use of sanctions outside of a multilateral framework such as that of the United Nations (UN) is problematic. Extraterritoriality is seen as 'the latest sign of the sad decline of … the rules-based international order, under which big powers at least pretended to play by the same rules as everybody else'.[2] The use (or abuse) by some states – particularly by the United States[3] – of restrictive measures targeting individuals and entities located outside the territory of the sanctioning state has prompted strong objections by other states. A recent

[1] Debate on the 'problem of extraterritorial jurisdiction' began in the 1980s in response to the Siberian pipeline dispute; see Ann dePender Zeigler, 'Siberian Pipeline Dispute and the Export Administration Act: What's Left of Extraterritorial Limits and the Act of State Doctrine' (1983) 6 *Houston Journal of International Law* 63. See more generally Vaughan Lowe, 'The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution' (1985) 34 ICLQ 724; Brigitte Stern, 'L'extra-territorialité «revisitée»: où il est question des affaires Alvarez-Machain, Pâte de Bois et de quelques autres' (1992) 38 AFDI 239; Karl Meessen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (Martinus Nijhoff 1996); Armand De Mestral and T Gruchalla-Wesierski, *Extraterritorial Application of Laws of Export Control Legislation: Canada and the USA* (Martinus Nijhoff 1990); Andrea Bianchi, 'Extraterritoriality and Export Controls: Some Remarks on the Alleged Antimony Between European and US Approaches' (1992) 35 GYIL 366; Cedric Ryngaert, 'Extraterritorial Export Controls (Secondary Boycotts)' (2008) 7 CJIL 625. For more recent debate, see contributions in 'Symposium on Unilateral Targeted Sanctions' (2019) 113 AJIL Unbound 130 and Charlotte Beaucillon (ed), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar 2021).

[2] Gideon Rachman, 'Beware the long arms of American and Chinese law' (*Financial Times*, 21 September 2020) <https://www.ft.com/content/33e23a5b-3e33-4b2e-a8ee-e7b341ef3a30>.

[3] See Daniel Franchini, '"With Friends Like That, Who Needs Enemies?": Extraterritorial Sanctions Following the United States' Withdrawal from the Iran Nuclear Agreement' (*EJIL: Talk!*, 29 May 2018) <www.ejiltalk.org/with-friends-like-that-who-needs-enemies-extraterritorial-sanctions-following-the-united-states-withdrawal-from-the-iran-nuclear-agreement>.

example is the reaction to the re-imposition by the Trump Administration of extraterritorial sanctions against foreign entities 'trafficking' in property confiscated by the Cuban government.[4] Among others,[5] the European Union 'firmly and continuously opposed any such measures, due to their extraterritorial application and impact on the European Union, in violation of commonly accepted rules of international trade'.[6]

Despite the criticism levelled at these measures, their use does not appear to be abating. On the contrary, the reaction by several states to Russia's aggression against Ukraine in February 2022 – resulting in the imposition of unprecedented economic sanctions against the world's 11th largest economy[7] – has only reinforced the view that 'sanctions are now a central tool of governments' foreign policy'.[8] So long as states resort

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4 White House, 'President Donald J. Trump Is Taking a Stand For Democracy and Human Rights In the Western Hemisphere' (17 April 2019) <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-taking-stand-democracy-human-rights-western-hemisphere>. On the aftermath, see Gergana S Sivrieva, 'The Helms-Burton Act Backfires: Surprising Litigation Trends following Title III's Long-Feared Activation' (2021) 42 *Northern Illinois University Law Review* 1.

5 The UN General Assembly has condemned the US embargo on Cuba on several occasions and instructed the Secretary General to prepare a report on the implementation of its resolutions; see 'Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba', UNGA Res 72/4 (10 November 2017) UN Doc A/RES/72/4; Report of the Secretary-General (29 August 2018) UN Doc A/73/85.

6 Delegation of the European Union to the United Nations in New York, 'EU Explanation of Vote: UN General Assembly Resolution on the embargo imposed by the USA against Cuba' (3 November 2022) <https://www.eeas.europa.eu/delegations/un-new-york/eu-explanation-vote-un-general-assembly-resolution-embargo-imposed-usa_en>. The European Parliament's Committee on International Trade commissioned a study on the topic; see Tobias Stoll et al, *Extraterritorial Sanctions on Trade and Investments and European Responses: Study Requested by the INTA Committee* (European Union, 2020). In 2021, the European Commission proposed an anti-coercion instrument to 'to deter countries from restricting or threatening to restrict trade or investment to bring about a change of policy in the EU': 'EU strengthens protection against economic coercion' (8 December 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6642>.

7 For a general overview, see Nicholas Mulder, 'The Sanctions Weapon' (IMF, June 2022) <https://www.imf.org/en/Publications/fandd/issues/2022/06/the-sanctions-weapon-mulder>.

8 'Sanctions are now a central tool of governments' foreign policy' (*The Economist*, 22 April 2021) <https://www.economist.com/finance-and-economics/2021/04/22/sanctions-are-now-a-central-tool-of-governments-foreign-policy>.

to unilateral sanctions, they will have strong incentives to extend as much as possible the scope of applications of these measures to increase their effectiveness, including by expanding them extraterritorially and bringing third states within the sanctions thread.[9] Although it remains unclear the extent to which the recent wave of sanctions against Russia may have extraterritorial effects, there are indications that the EU – historically, one of the strongest opponents to the use of extraterritorial sanctions – 'is now a convert to the need for sanctions to be applied extraterritorially'.[10]

At the same time, the use of unilateral sanctions in response to the invasion of Ukraine has shown that these measures can be responses to threats that transcends the interests of individual states and affect 'global security'. Though not a term of art in international law,[11] when global security is examined in its 'collective'[12] and 'human'[13] components, a link can be drawn between this concept and the protection of collective interests of the international community enshrined in several international legal instruments.[14] The most notable example is the UN Charter, where the 'maintenance of

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9 See Charlotte Beaucillon, 'Practice Makes Perfect, Eventually? Unilateral State Sanctions and the Extraterritorial Effects of National Legislation' in Natalino Ronzitti (ed), *Coercive Diplomacy, Sanctions and International Law* (Brill Nijhoff 2016) 104–105.

10 Lode Van Den Hende, Eric White and Daniel Hudson, 'The impact of the war in Ukraine on Trade Policy' (24 May 2022) <https://www.lexology.com/library/detail.aspx?g=5ce3c683-2cc2-49bb-b49d-dceec4fcf6c6>.

11 The very notion of 'security' has been described as an 'essentially contested' concept; see Avril McDonald and Hanna Brollowski, 'Security' (2011), in *Max Planck Encyclopedia of Public International Law*, para 2.

12 See Erika de Wet and Michael Wood, 'Collective Security' (2013), in *Max Planck Encyclopedia of Public International Law*.

13 See Martin Wählisch, 'Human Security' (2016), in *Max Planck Encyclopedia of Public International Law*.

14 On the link between security and community interests, see Hisashi Owada, 'Human Security and International Law', in Ulrich Fastenrath et al (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011) 512.

international peace and security' is listed as the first purpose of the United Nations.[15] Despite its prominent place, there are however considerable limitations to what UN organs such as the Security Council (UNSC) and the General Assembly (UNGA) can do in order to fulfil this function, particularly – as the aftermath of the invasion of Ukraine shown – when the threat to international peace and security originates from or with the support of one of the permanent members of the Security Council.

In such circumstances, it can be questioned whether the protection of global security should be reserved exclusively to the action of the United Nations or whether unilateral action of states – potentially even of an extraterritorial character – may serve a useful role. General international law already provides for a degree of self-help by injured states (and possibly other states[16]) in response to internationally wrongful acts in the form of countermeasures.[17] Nonetheless, whether this framework may provide a legal basis for the use of unilateral and extraterritorial sanctions in response to challenges to global security is a question that, to date, has received no firm answer.

This article tackles this controversial issue and argues that, under certain circumstances, countermeasures may serve a gap filling function to supplement the system of collective security established under the UN Charter. Though some form of collective coordination in the form of UNSC or UNGA resolutions may still be required,

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15 Charter of the United Nations, 26 June 1945, 1976 UNTS 16, art 1(1) ('UN Charter'). Indeed, the term 'sanctions' in the international legal discourse is more accurately reserved for institutional measures not involving the use of force enacted to restore international legality, such as those decided by the UN Security Council; see Alain Pellet and Alina Miron, 'Sanctions' (2013), in *Max Planck Encyclopedia of Public International Law*, para 6.

16 See text at n 55 below.

17 See text at n 39 below.

countermeasures may justify unilateral measures that expand the territorial scope of collective measures adopted under the UN umbrella.

The article proceeds as follows. Section 2 examines the legal framework governing unilateral sanctions under international law and illustrates why this framework is generally deemed unsuitable to provide a legal basis for the use of sanctions, especially when they are extraterritorial. The subsequent sections analyse two scenarios in which extraterritorial sanctions may qualify as lawful countermeasures to fill the gaps left open by the UN system of collective security. Section 3 investigates extraterritorial sanctions taken to expand the scope of application of measures decided by the Security Council. Section 4 explores extraterritorial sanctions taken pursuant to recommendations made by the General Assembly. By way of conclusion, Section 5 consider some of the benefits and limitations of the framework examined in this article.

2. The problem of extraterritorial sanctions under general international law and the applicability of the countermeasures framework

Unilateral and extraterritorial sanctions are not per se incompatible with international law; their legality depends on the features of each specific measure.[18] States have great leeway in adopting measures that, although unfriendly, are not in breach of international legal

[18] Charlotte Beaucillon, 'An introduction to unilateral and extraterritorial sanctions: definitions, state of practice and contemporary challenges', in Beaucillon (n 1) 7.

obligations,[19] such as the withdrawal of voluntary foreign aid.[20] From a legal standpoint, such acts of retorsion can be used at any time and for whatever reason.[21] Many of the restrictive measures commonly associated with the notion of 'sanctions', particularly those of an economic character, are however likely to clash with a number of international obligations. Common sanctions such as restrictions on imports, exports, and free movement of people in service sectors may be incompatible with several obligations under the General Agreement on Tariffs and Trade and the General Agreement on Trade in Services.[22] Financial sanctions such as restrictions on international transfers and payments on current transactions – which are currently the most widely used type of sanctions[23] – may also be contrary to Article VIII of the Articles of Agreement of the International Monetary Fund.[24]

Alongside obligations under specific treaty regimes, unilateral sanctions may give rise to issues of consistency with general rules of customary international law. Chief among

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19 Articles on the Responsibility of States for Internationally Wrongful Acts (2001) UN Doc A/56/10, II(2) YBILC 31, 128, para 3 ('ARSIWA'). See Linos-Alexandre Sicilianos, *Les réactions décentralisées à l'illicite* (LGDJ 1990) 7; Martin Dawidowicz, *Third-Party Countermeasures in International Law* (CUP 2017) 27–28.

20 On the effectiveness of such measures, see Simplice Asongu & Jacinta Nwachukwu, 'Is the Threat of Foreign Aid Withdrawal an Effective Deterrent to Political Oppression? Evidence from 53 African Countries' (2017) 51 *Journal of Economic Issues* 201.

21 See Antonios Tzanakopoulos, 'The Right to Be Free from Economic Coercion' (2015) 4 CJICL 616, 626.

22 When challenging the extraterritorial application of certain US sanctions against Cuba, the European Communities alleged violations of GATT artts I, III, V, XI and XIII, and GATS artts I, III, VI, XVI and XVII; see *United States – The Cuban Liberty and Democratic Solidarity Act*, Request for the establishment of a Panel by the European Communities, WT/DS38/1 (13 May 1996) G/L/71. See also Lena Chercheneff, 'Challenging unilateral and extraterritorial sanctions under international economic law: exploring leads at the WTO and the OECD', in Beaucillon (n 1).

23 Gabriel Felbermayr et al, 'The Global Sanctions Data Base' (*VoxEU*, 4 August 2020) <https://cepr.org/voxeu/columns/global-sanctions-data-base>.

24 See Annamaria Viterbo, 'Extraterritorial Sanctions and International Economic Law', in *Building Bridges: Central Banking Law in an Interconnected World* (European Central Bank, 2019) 164.

them is the principle of non-intervention, according to which states must refrain from adopting measures of coercion 'bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely'.[25] While this does not rule out the use of economic means to advance foreign policy goals, it is not always easy to draw the line between permitted economic pressure and prohibited intervention.[26] Certain economic sanctions are likely incompatible with this principle because of their intensity and objectives sought.[27]

Besides non-intervention, when unilateral sanctions are extraterritorial in nature, the main obstacle to their legality is represented by the customary rules of prescriptive jurisdiction.[28] While states are not in principle prohibited from regulating the conduct of individuals and entities located outside their territory, they are required to show the existence of certain 'connecting factors' (or 'heads of jurisdiction') with the situation over which jurisdiction is asserted.[29] Commonly accepted heads of jurisdiction do not easily fit the framework of extraterritorial sanctions. These sanctions are by definition imposed outside the territory of the state and often target non-nationals; they thus go beyond the two

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25 *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v USA*) (Merits) [1986] ICJ Rep 16, para 205. Yet, there is no 'core' of sovereign prerogatives: see Barry Carter, 'Economic Sanctions' (2011), in *Max Planck Encyclopedia of Public International Law*, para 30; Tzanakopoulos (n 21) 623.

26 See UNGA, 'Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty' (21 December 1965) UN Doc A/RES/20/2131; 'Declaration on principles of international law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations' (24 October 1970) UN Doc A/RES/2625(XXV). See also Philip Kunig, 'Intervention, Prohibition of' (2008), in *Max Planck Encyclopedia of Public International Law*, para 26.

27 Stoll et al (n 6) 54.

28 See Yann Kerbrat, 'Unilateral/extraterritorial sanctions as a challenge to the theory of jurisdiction', in Beaucillon (n 1) 165.

29 Bernard Oxman, 'Jurisdiction of States' (2007), in *Max Planck Encyclopedia of Public International Law*, para 10; Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015) 29–48; James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 442.

most widely recognised heads of jurisdiction. Other principles of jurisdiction such as the effects doctrine, passive personality, or the protective principle have been deemed equally unsatisfactory when seeking to justify restrictive measures of this kind.[30]

The most challenging of all extraterritorial sanctions from this point of view are so called 'secondary sanctions'. These are measures that display their effects entirely outside the jurisdiction of the sanctioning state and are designed to discourage individuals and entities of third states to engage in business and other transactions with a state subject to primary sanctions.[31] The measures against Cuba reactivated by the Trump Administration in 2019 offer a clear example of this kind. Under the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (the 'Helms-Burton Act'), no person, wherever located and whatever their nationality, is permitted to 'traffic'[32] in confiscated property that formerly belonged to US nationals or nationals of Cuba who later acquired US nationality.[33] The geographical scope of these sanctions is virtually unlimited, since they apply to 'any person or entity' who traffics in confiscated property.[34] Although US Congress attempted to justify these measures on the basis of the 'effects theory',[35] no effects on the United States can realistically be discerned from the economic activities

30 Stoll et al (n 6) 53. On the shortcomings of the so-called protective principle, see De Mestral and Gruchalla-Wesierski (n 1) 24; Stern (n 1) 7.

31 See Viterbo (n 24) 161; Beaucillon (n 18) 6.

32 As in 'trade' in the widest possible meaning, including 'engag[ing] in a commercial activity using or otherwise benefiting from the confiscated property'; s 4(13), 110 Stat 790 (22 USC 6023). The use of a term with criminal connotations is deliberate; see Andreas Lowenfeld, 'Trade Controls for Political Ends: Four Perspectives' (2003) 4 CJIL 355, 366.

33 S 4(13), 110 Stat 790 (22 USC 6023).

34 S 4(11), 110 Stat 790; (22 USC 6023). Since 'virtually all commercial enterprises in Cuba' were taken over by the Castro government, anyone engaging with an enterprise established before 1959 is captured by the boycott: Andreas Lowenfeld, 'Congress and Cuba: The Helms-Burton Act' (1996) 90 AJIL 419, 428.

35 S 301(9), 110 Stat 815 (22 USC 6081).

targeted by the Helms-Burton Act.[36] Secondary measures of this kind have been met with strong objections by other states and are widely considered unlawful.[37]

When unilateral sanctions are *prima facie* inconsistent with international law, their justification is frequently sought in the framework of countermeasures.[38] Under customary international law, the wrongfulness of measures that *prima facie* constitute breaches of international legal obligations may be precluded when these are taken in response to prior breaches of international law in order to induce the wrongdoing state to comply with its international obligations.[39] As recognised by the International Law Commission (ILC) in its Articles for Responsibility of States for Internationally Wrongful Acts (ARSIWA), countermeasures are subject to substantive and procedural conditions.[40] Among other things, they must be temporary and, whenever possible, reversible.[41] Countermeasures must also be proportionate – or in the ILC's words, they 'must be commensurate with the injury suffered, taking account of the gravity of the internationally wrongful act and the rights in question'.[42] Any state resorting to such measures should first call upon the

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36 See, eg, Lowenfeld (n 34) 431; Brigitte Stern, 'Can the United States Set Rules for the World? A French View' (1997) 31 JWT 5, 14–15; Ryngaert (n 1) 643–644; Beaucillon (n 9) 123.

37 See Vaughan Lowe, 'US Extraterritorial Jurisdiction: The Helms-Burton and D'Amato Acts' (1997) 46 ICLQ 378, 388. Stern (n 36) 7; Sarah Cleveland, 'Norm Internalization and US Economic Sanctions' (2001) 26 YJIL 1, 56.

38 See Beaucillon (n 18) 7.

39 See *Air Service Agreement of 27 March 1946 between the United States of America and France* (*USA/France*) (1978) 18 RIAA 417, paras 81–82; *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*) (Merits) (1997) ICJ Rep 56, para 87. See also Charles Leben, 'Les contre-mesures inter-étatiques et les 10eactions à l'illicite dans la société internationale' (1982) 28 AFDI 9, 18–19; Elisabeth Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Brill Nijhoff 1988) 36; Carlo Focarelli, *Le contromisure nel diritto internazionale* (Giuffrè 1994) 2–3; Dawidowicz (n 19) 4–7; Federica Paddeu, *Justification and Excuse in International Law* (CUP 2018) 228–236; Crawford (n 29) 572–573.

40 See Crawford (n 29) 573.

41 ARSIWA (n 19), art 49(2)(3), art 53.

42 ARSIWA (n 19), art 51.

responsible state to comply with its obligations.[43] It must also ensure that certain international obligations, such as those concerning fundamental human rights, are not affected by its measures.[44]

The framework of countermeasures appears to be ill suited to preclude the wrongfulness of otherwise unlawful extraterritorial sanctions. Extraterritorial sanctions – and particularly secondary sanctions – are not directed at the wrongdoing state but target third states that bear no responsibility in relation to the original wrongful act. Looking, for instance, at the Helms-Burton Act, even under the assumption that the United States might be responding to some alleged wrongful act by Cuba – over which there are serious doubts[45] – it is evident that third states such as EU states and Canada – whose nationals and companies are targeted by US sanctions – bear no obligation with respect to the bilateral dispute between Cuba and the United States. If a measure *prima facie* incompatible with international law is enacted in response to a prior wrongful act but does not target the wrongdoing state, such a measure cannot be justifiable as a countermeasure. Countermeasures have a 'relative preclusive effect';[46] they exempt sanctioning states from international responsibility only to the extent that they direct their measures at the wrongdoing state(s). Conversely, it may be said that third states have a right not to be

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43 See *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique* (*Portugal/Allemagne*) (1928) II RIAA 1011, 1026; *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*) (Merits) (1997) ICJ Rep 7, 56.

44 ARSIWA (n 19) art 50(1).

45 The Helms-Burton Act contains a laundry list of allegations against Cuba, including: (i) the 'continuing violations of fundamental human rights' and use of torture; (ii) 'illegal international narcotics trade'; and (iii) threats to 'international peace and security by engaging in acts of armed subversion and terrorism'. See s 2, 110 Stat 786-788 (22 USC 6021). US measures against Cuba have however been described as an attempt to 'squeeze one of the last communist States in the world'; Ryngaert (n 1) 636.

46 Dawidowicz (n 19) 288–289.

targeted by countermeasures.[47] If the state taking extraterritorial sanctions cannot provide a jurisdictional basis to support its measures, these are bound to remain unlawful even if taken in response of a prior wrongful act of another state.

While these issues are generally deemed to disqualify the framework of countermeasures as a potential justification for extraterritorial sanctions,[48] it is worth questioning whether challenges to global security may warrant a reconsideration of this common understanding. The bilateral logic with which countermeasures are traditionally conceived can be traced back to the long history of self-help in international relations.[49] If international law could initially be regarded as 'bundles of bilateral obligations',[50] it followed that the means of decentralised enforcement responded to the same bilateral logic. Accordingly, the injured state (and only the injured state) would be entitled to take measures of self-help against the wrongdoing state (and only the wrongdoing state).[51] This bilateral framework began to show cracks with the emergence of collective obligations, that is obligations that are not owed to a single state but to a group of states (*erga omnes partes*) or to the international community as a whole (*erga omnes*).[52] Responses to breaches of these obligations have given rise to considerable debate during the ILC work of

47 See Sicilianos (n 19) 98–99; Tzanakopoulos (n 21) 625.

48 See Stoll et al (n 6) 55: 'State responsibility does not justify sanctions taken for other foreign policy objectives and cannot justify "extraterritorial" sanctions, which affect third States'. See also Kerbrat (n 28), 184.

49 See Mary O'Connell, *The Power and Purpose of International Law* (OUP 2008) 19.

50 Commentary to art 42 ARSIWA (n 19) 118.

51 Martin Dawidowicz, 'Public Law Enforcement without Public Law Safeguards' 334.

52 See Linos-Alexander Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002) 13 EJIL 1127, 1135–6; Iain Scobbie, 'The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law"' (2002) 13 EJIL 1201, 1208; Giorgio Gaja, 'States Having an Interest in Compliance with the Obligation Breached' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010).

codification of the law of state responsibility.[53] Ultimately, the Commission recognised that states other than the injured state may be entitled to invoke responsibility for breaches of such obligations, but the question of whether these states could go as far as to take countermeasures was left deliberately open.[54] The question has however continued to inform scholarly debates and recent contributions have shown growing acceptance of so called 'collective' or 'third party' countermeasures.[55] The ILC went as far as to recognise that, in the case of serious breaches of certain communitarian norms (those of a peremptory character), all states may be subject to international obligations with respect to the wrongful act.[56]

Despite the ambiguity of the terms, challenges to global security are not exclusively a matter of bilateral relations but may concern obligations owed to a multitude of states (*erga omnes partes*) or the international community as a whole (*erga omnes*). When unilateral and extraterritorial sanctions are enacted in response to such breaches of international law, the relative preclusive effect of countermeasures may be less problematic than in circumstances in which the sanctioning state is acting on the basis of its exclusive

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53 See ILC, 'Report on the Work of Its Fifty-third Session' (2001) UN Doc A/56/10(Supp), 36, para 54. For a summary of the debate in the Sixth Committee, see Dawidowicz (n 19) 10–11.

54 Art 54 ARSIWA contains a saving clause preserving the right of states other than the injured state to take 'lawful measures' to ensure cessation and reparation 'in the interest of the injured State or of the beneficiaries of the obligation breached'. On the drafting history, see James Crawford, 'Fourth report on State responsibility', UN Doc A/CN.4/517 and Add 1 (2 and 3 April 2001) 18, para 71.

55 See Focarelli (n 39) 273; Denis Alland, 'Countermeasures of General Interest' (2002) 13 EJIL 1221; Christian J Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005) 249; Linos-Alexandre Sicilianos, 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community', in Crawford, Pellet and Olleson (n 52); Dawidowicz (n 19) 383; Paddeu (n 39) 266.

56 On the link between responses to serious breaches of peremptory norms and communitarian norms, see James Crawford, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts', in Fastenrath et al (n 14) 234.

national interests. This is because states other than the injured state may be subject to international obligations in relation to the original wrongful acts.

The framework of the United Nations offers the ideal case study to illustrate this point. Article 24(1) of the UN Charter confers 'primary responsibility' for the maintenance of international peace and security on the Security Council and it is generally deemed that this responsibility is also shared by other organs of the organisation, such as the General Assembly.[57] At the same time, all UN member states are bearers of obligations *erga omnes partes* under the UN Charter to strengthen UN action in achieving maintenance of international peace and security, such as the prohibition on the use of force,[58] the obligation of peaceful dispute settlement,[59] the obligation to give assistance in action taken by the United Nations and to refrain from giving assistance to states subject to preventive or enforcement action by the United Nations,[60] and the obligation to comply with the measures mandated by the Security Council under Chapter VII of the Charter.[61]

In such a system, each and every member state has a legal interest in compliance with these obligations. However, it is not fully understood how far states can go in taking enforcement measures to ensure such compliance. As explained in the next sections, although not expressly authorised by the Charter, the use of individual and extraterritorial

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57 See Michael Wood, 'United Nations, Security Council' (2007), in *Max Planck Encyclopedia of Public International Law*, para 21.

58 UN Charter, art 2(4). This is not only a communitarian norm but also one widely regarded as having *jus cogens* character; on its content, see Katie A Johnston, 'Identifying the *Jus Cogens* Norm in the *Jus Ad Bellum*' (2021) 70 ICLQ 29.

59 UN Charter, art 2(3), art 33.

60 UN Charter, art 2(5).

61 UN Charter, arts 25, art 48. These being UN Charter obligations, they also prevail over conflicting obligations under other agreements pursuant to art 103.

sanctions may have an essential role to play in filling some of the implementation gaps left open by the Charter.

3. Extraterritorial sanctions in response to failure to implement Chapter VII resolutions by the UN Security Council

Following the determination of 'the existence of any threat to the peace, breach of the peace, or act of aggression', the Security Council has the power to 'make recommendations, or decide what measures shall be taken' under Chapter VII of the UN Charter.[62] Measures not involving the use of force ordinarily consist in sanctions such as such as arms embargos, comprehensive economic sanctions, and 'targeted' sanctions, whether sectorial or aimed at particular individuals.[63] As a matter of course, when the Security Council decides on the imposition of restrictive measures vis-à-vis states, individuals, or entities, it confines these measures to what is within the jurisdiction of each member state.[64] For instance, with the recent Resolution 2653 (2022) the Security Council imposed, among others, an arms embargo related to the situation in Haiti, which is phrased in the following terms:

> [A]ll Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to, or for the benefit of, the individuals and entities designated by the Committee *from or through*

62 UN Charter, art 39.

63 See Wood (n 57) para 29. Tarcisio Gazzini, 'The Normative Element Inherent in Economic Collective Enforcement Measures: United Nations and European Union Practice' in Linos-Alexander Sicilianos and Laura Picchio Forlati (eds), *Economic Sanctions in International Law* (Brill 2004) 290; Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 AJIL 175.

64 See Stern (n 36) 22.

> *their territories or by their nationals, or using their flag vessels or aircraft* of arms and related materiel of all types ….[65]

Pursuant to this and similarly worded UNSC resolutions, UN member states have an obligation to enact measures restricting the supply of weapons to listed entities within the boundaries of the two most uncontroversial heads of jurisdiction: territory and nationality.

When it comes to the implementation of UNSC resolutions by UN member states, it is not uncommon for domestic legislation to expand the content of the mandated measures through a phenomenon called 'gold plating'.[66] In a 2016 study, Biersteker et al found that 90% of the analysed UNSC sanctions were supplemented by unilateral measures once implemented at the domestic level.[67] The unilateral expansion of UNSC sanctions may not only concern their content but also their territorial scope. This is particularly the case for states that already have in place domestic legislation with broad extraterritorial effects such as the United States. An example is the Arms Export Control Act of 1976 (AECA), as amended in 1996, which prescribes that 'every person' who engages in 'brokering activities with respect to the manufacture, export, import, or transfer of any foreign defense article' is subject to restrictions determined by the State Department.[68] The International Traffic in Arms Regulations (ITAR), which implement the AECA, specify that 'every person' includes '[a]ny foreign person located outside the United States where the foreign person is owned or controlled by a US person'.[69]

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65 UNSC Res 2653 of 21 October 2022, UN Doc S/RES/2653 (2022), para 11 (emphasis added).

66 Stoll et al (n 6) 17.

67 Biersteker TJ, Eckert SE and Tourinho M (eds), *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action* (CUP 2016) 30.

68 s 151, 110 Stat 1437 (22 USC 2778(b)(1)(A)).

69 22 CFR 129.2.

The so called 'control theory' of jurisdiction – pursuant to which the United States claims to be entitled to regulate foreign companies merely owned or controlled by US persons – is not based on a widely recognised rule of international law and is generally deemed inconsistent with the principle of nationality-based jurisdiction.[70] Thus, unilateral attempts by the United States to impose arms embargos through this basis – even in response to alleged wrongful acts by the target state – would, without further qualifications, be inconsistent with international law as they would affect entities located in 'innocent' third states.

However, when the imposition of an arms embargo is mandated by a resolution of the UN Security Council, the extraterritorial dimension of implementation measures may not give rise to the same issues. Given that under the UN Charter all member states have an *erga omnes partes* obligation to implement the decisions of the Security Council, each and every member state has a legal interest in ensuring compliance with these resolutions by all member states. The imposition of extraterritorial sanctions mapping onto Chapter VII resolution may thus be a means by which the sanctioning state is implementing the international responsibility of other UN member states that may be failing to implement the UNSC-mandated measures.

The Iran and Libya Sanctions Act of 1996 (ILSA) offers an interesting case study in this respect. Through ILSA, US Congress imposed penalties on persons investing in the oil and gas industry in Iran and Libya, and exchanging certain goods, services, and

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70 Andrea Bianchi, 'Reply to Professor Maier' in Karl Meessen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (Martinus Nijhoff 1996) 93–94; Ryngaert (n 29) 108; Beaucillon (n 9) 112–113.

technology with Libya.[71] The extraterritorial nature of these measures was particularly exorbitant. The Act applied to all persons, wherever located, entering into business of this nature with these two states. Strikingly, there was 'no attempt to show even the semblance'[72] of a jurisdictional basis under which jurisdiction could be extended beyond the territory/nationals of the United States. The extraterritorial imposition of these sanctions gave rise to strong protests particularly by the EU, which enacted blocking legislation in order to prevent compliance by EU companies with the (exorbitant) US measures.[73]

Nevertheless, the reasons justifying the restrictive measures against Iran were not the same as those concerning Libya. In the case of Iran, the Act was premised on US allegations according to which the Iranian government was seeking to acquire weapons of mass destruction and support acts of international terrorism.[74] The US position toward Iran was at odds with that of other states such as EU member states, which – at the time – were pursuing a strategy based on economic incentives and dialogue with Iran.[75] It is therefore no surprise that the extraterritorial imposition of US sanctions was deemed particularly problematic and unlawful by EU member states.

The case of Libya, on the other hand, was markedly different. The stated objective of the Act was 'compliance by Libya with its obligations under Resolutions 731, 748, and

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71 110 Stat 1541, 1543 (50 USC 1701).

72 Lowe (n 37) 385.

73 Council Regulation (EC) No 2271/96.

74 s 2(a), 110 Stat 1541.

75 See Sascha Lohmann, 'The Convergence of Transatlantic Sanction Policy Against Iran' (2016) 29 *Cambridge Rev Int Aff* 930.

883 of the Security Council of the United Nations'.[76] These resolutions had been imposed by the Security Council on the basis that the Libyan government had 'fail[ed] … to demonstrate … its renunciation of terrorism and … to respond fully and effectively to the requests [of prior resolutions]'.[77] In other words, they were imposed not on the basis of a unilateral determination of illegality by the United States, but on the basis of the findings of a multilateral body. The Security Council had mandated on all member states a number of restrictive measures vis-à-vis Libya including: an arms embargo; a ban on the supply of aircrafts or aircraft components; and assets freeze (but not with respect to assets derived from the sale or supply of petroleum products).[78]

The US measures against Libya contained in ILSA mapped onto the first two types of UNSC restrictions by providing for penalties for the supply of items 'contributing to Libya's military capabilities' and to 'Libya's aviation capabilities'. [79] Despite their extraterritorial dimension, there is a good argument that these two measures may have been justified pursuant to the countermeasures framework since the results sought was to implement collective obligations under the UN Charter.[80] A UN member state in which companies were targeted by US measures – for instance, because accused of exporting military technology to Libya in breach of the relevant UNSC resolutions – could not oppose its sovereign right not to be targeted by sanctions directed against other states, as it was

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76 s 2(b), 110 Stat 1542.

77 UNSC Res 748 of 31 March 1992, UN Doc S/RES/748 (1992) 1.

78 See UNSC Res 748 of 31 March 1992, UN Doc S/RES/748 (1992), paras 4(b) and 5; UNSC Res 883 of 11 November 1993, UN Doc S/RES/883 (1993), paras 5–6.

79 s 5(b)(1), 110 Stat 1543.

80 cf Lowe (n 37) 388 (arguing that ILSA is the expression of a more widely espoused policy of reinforcing UNSC resolutions 'to which the EU would in principle subscribe').

subject to the same obligation to implement the UNSC sanctions. In other words, the extraterritorial reach of US measures would be seeking to achieve the goal that the targeted state should have ensured in the first place. In so doing, extraterritorial sanctions act as gap filler to remedy wrongful non-compliance of the targeted state with its obligations under the UN Charter. This clearly sets apart the extraterritorial measures against Libya compared, for instance, to the measures adopted by the United States against Cuba.[81]

The Security Council may have mechanisms in place to determine non-compliance of a state's obligations with the duty to implement UNSC-mandated measures.[82] In the case of sanctions administered by one of the UNSC sanctions committee, there may be also provisions for third party monitoring.[83] Clearly, an institutional finding of non-compliance would strengthen the claim to legality of a state taking unilateral action in the form of extraterritorial sanctions. Nevertheless, institutional mechanisms are not the only way to determine non-compliance with UNSC resolutions. The controversy over Iraq's compliance with its UNSC-mandated disarmament obligations in the lead-up to Operation Iraqi Freedom in 2003 is an infamous example in this regard.[84] In that case, the United

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81 The absence of a UNSC determination was a core element of the opposition that the EC Commission launched against the unilateral measures taken by the United States against Cuba: see 'The EC Calls for Veto of the Cuban Democracy Act' (8 October 1992) <http://europa.eu/rapid/press-release_IP-92-800_en.htm>.

82 The UN Charter says little about violations of the obligations it imposes, though clearly situations arising from non-compliance with its measures are matters that can be assessed by the Security Council. Art 14 states that the General Assembly may also make recommendations for measures to be adopted in the face of non-compliance with obligations under the Charter. See further Oscar Schachter, 'The Quasi-Judicial Role of the Security Council and the General Assembly' (1964) 58 AJIL 960.

83 See Eric Rosand, 'The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions' (2004) 98 AJIL 745; Jeremy Farrall, 'Should the United Nations Security Council Leave It to the Experts? The Governance and Accountability of UN Sanctions Monitoring' (2009) ANU College of Law Research Paper No 10-59, <https://ssrn.com/abstract=1656163>.

84 The focal point of the debate was the implementation of UNSC Resolutions 687 (1991) and 1441 (2002); see Efthymios Papastavridis, 'Interpretation of Security Council Resolutions under Chapter

States, United Kingdom, and Australia claimed to be entitled to exercise a power that they would not otherwise possess – the power to use force against Iraq – through a purported authorisation deriving from a combination of UNSC resolutions – an argument that ultimately failed to convince the vast majority of states.[85] The case of unilateral sanctions not involving the use of force is different because states have a right under customary international law to use non forcible measures of self-help in response to the wrongful acts of other states.

When unilateral sanctions expand the territorial scope of UNSC resolutions, the resolutions themselves do not constitute the source of their legality. It is the breach of the Charter obligations (particularly the duty to comply with UNSC decisions) that establishes the legal interest of each and every member state to take unilateral measures – under their own interpretation and at their own risk[86] – in response to non-compliance. While certain legal systems may exclude resort to countermeasures for compliance with obligations deriving from a common intuitional framework (such as in the case of the EU[87]), it is not evident that the system of the United Nations constitutes a self-contained regime where states contracted out of countermeasures. Moreover, unlike forcible measures taken in the absence of an express authorisation by the Security Council,[88] sanctions mapping onto

VII in the Aftermath of the Iraqi Crisis' (2007) 56 ICLQ 83, 85; Christine Gray, *International Law and the Use of Force* (4th ed, OUP 2018) 367 ff.

85 Gray (n 84) 372.

86 See text at n 126 below.

87 See William Phelan, 'What Is *Sui Generis* About the European Union? Costly International Cooperation in a Self-Contained Regime' (2012) 14 *International Studies Review* 367, 369.

88 The absence of UNSC authorisation to use force may be seen as choice of restraint on part of the organisation; see Philippa Webb, 'Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria' (2014) 19 *Journal of Conflict & Security Law* 471, 472–3.

Chapter VII resolutions – even if expanding the territorial scope of the latter – are still aiming at enforcing the will of the Security Council. In these cases, the action of individual states is synergic to that of the organisation and may very well be taken alongside (or in support of) other institutional initiatives to ensure implementation with UNSC resolutions.

To be sure, unilateral and extraterritorial measures mapping onto Chapter VII resolutions are not devoid of problems. For instance, the abovementioned US measures against Libya went beyond what was strictly required by the UNSC resolutions not only in terms of territorial scope but also substance. While the UNSC resolutions were carefully worded so as to avoid affecting the Libyan oil industry, the US measures targeted directly 'investments that contribute[d] to the development of petroleum resources'.[89] To the extent that such sanctions were applied extraterritorially and affected entities located in third states which had a right to engage in oil trade with Libya, they could not be justified as countermeasures.

In the light of this, the first obstacle that the framework examined thus far encounters is that a state cannot use a determination of illegality made by the Security Council to target third states that are not themselves in breach of obligations under the Charter. Measures taken pursuant to the countermeasure framework must also comply with the abovementioned procedural and substantive requirements identified by the ILC. Thus, a state adopting extraterritorial measures should take steps to notify the states affected by these measures. It also has an obligation to monitor the situation and ensure that the unilateral measures are removed when non-compliance with the UNSC-mandated

[89] s 5(b)(2), 110 Stat 1543.

sanctions has ceased. For instance, while some of the measures taken by the United States against Iran may have been justified while Iran was under UNSC sanctions,[90] they could no longer be justified once most of the sanctions were suspended following the negotiation of the Joint Comprehensive Plan of Action (the 'Iran nuclear deal').[91] A state cannot unilaterally reimpose UNSC measures that have been suspended or terminated, such as when in September 2020 the Trump Administration sought to impose extraterritorial sanctions against Iran by asserting that all UN sanctions eased or lifted by the Iran Nuclear Deal were reinstated.[92] When extraterritorial measures target individuals, compliance with human rights norms may also require ensuring due process and opportunities for review by a competent organ.[93]

A final, practical, obstacle may arise when the UN Security Council becomes deadlocked and unable to agree on measures to be taken in response to a threat to international peace and security, even if the threat is manifest. The most obvious case is that of a threat to international peace and security originating from or with the support of one of its permanent members, who are able to prevent the adoption of any UNSC resolutions through the use of their veto power.[94] It has been suggested that, in these

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90 Resolution 1929, among other things, tightened the arms embargo and severely limited the provision of financial services to Iran; see UNSC Res 1929 of 09 June 2010, UN Doc S/RES/1929 (2010); Jansen Calamita, 'Sanctions, Countermeasures, and the Iranian Nuclear Issue' (2009) 42 *Vanderbilt Journal of Transnational Law* 1393, 1396–1397.

91 See UNSC Res 2231 (20 July 2015) UN Doc S/RES/2231.

92 Stoll et al (n 6) 26.

93 See Elena Chachko, 'Due Process Is in the Details: US Targeted Economic Sanctions and International Human Rights Law' (2019) 113 AJIL 157.

94 The failure of the Security Council to sanction Russia for its use of force in Ukraine has attracted considerable criticism and prompted renewed calls for reform of the veto system; see Raphael Schäfer, 'The Echo of Quiet Voices. Liechtenstein's Veto Initiative and the American Six Principles' (*EJIL: Talk!*, 10 October 2022) <www.ejiltalk.org/the-echo-of-quiet-voices-liechtensteins-veto-initiative-and-the-american-six-principles>.

circumstances, it would be up to the General Assembly to step in and fulfil the function that the Security Council is unable to exercise.[95] However, as the next section shows, the General Assembly is turn faced with considerable limitations when discharging its responsibility. It can thus be questioned whether measure taken unilaterally by states (potentially even of an extraterritorial character) may be capable of complementing the action by the General Assembly.

4. Extraterritorial sanctions mapping onto certain measures recommended by the UN General Assembly

Under Article 10 UN Charter, the General Assembly has the power to make recommendations on any matters within the scope of the Charter. If the Security Council has primary responsibility for the maintenance of international peace and security, the General Assembly can be regarded as having 'secondary' or 'residuary' responsibility.[96] This responsibility becomes particularly crucial when the Security Council is deadlocked. In 1950, amidst the inability of the Security Council to take action with respect to the Korean War due to the Soviet veto, the General Assembly adopted the famous Uniting for Peace Resolution, stating that

> if the Security Council, because of a lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a

95 Devika Hovell, 'Council at War: Russia, Ukraine and the UN Security Council' (*EJIL: Talk!*, 25 February 2022) <ejiltalk.org/council-at-war-russia-ukraine-and-the-un-security-council>.

96 See *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ Rep 151, 163; Kamrul Hossain, 'The Complementary Role of the United Nations General Assembly in Peace Management' (2008) 4 *Review of International Law & Politics* 77; Rebecca Barber, 'A survey of the General Assembly's competence in matters of international peace and security: in law and practice' (2021) 8 *Journal on the Use of Force and International Law* 115.

> threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary.[97]

This resolution prompted considerable doctrinal debate concerning the extent to which the General Assembly may in fact be entitled to recommend the use of force by UN member states.[98] There is however little doubt that the General Assembly may recommend that UN member states adopt measures not involving the use of force, the sole limitations being that measures should not be recommended while the Security Council is dealing with the same dispute or situation.[99] The General Assembly has on several occasions made use of this prerogative and recommended coercive action in the form of economic sanctions.[100] A notable case is the UNGA response to the apartheid regime in South Africa.

The 'question of race conflict in South Africa resulting from the policies of apartheid of the Government of the Union of South Africa' was first elevated to the agenda of the General Assembly in 1952.[101] In 1961, the General Assembly requested 'all States to consider taking such separate and collective action as is open to them, in conformity with the Charter of the United Nations, to bring about an abandonment of these policies'.[102] Starting the following year, the content of the recommended measures against South Africa

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97 UNGA Res 377A (V), UN Doc A/RES/377(V) (3 November 1950).

98 See Christina Binder, 'Uniting for Peace Resolution (1950)' (2013), in *Max Planck Encyclopedia of Public International Law*, para 10; Andrew Carswell, 'Unblocking the UN Security Council: The Uniting for Peace Resolution' (2013) 18 *Journal of Conflict and Security Law* 453.

99 UN Charter, art 12.

100 See Barber (n 96) 150.

101 UNGA Res 616 (5 December 1952) UN Doc A/RES/616(VII)A–B.

102 UNGA Res 1598 (13 April 1961) UN Doc A/RES/1598(XV).

was specified in a number of UNGA resolutions. These included breaking diplomatic relations, closing ports, boycotting South Africa goods, and closing the airspace to South African aircrafts.[103] Shortly thereafter, the General Assembly began to expressly target the oil industry and urged all states to 'refrain also from supplying in any manner or form any petroleum or petroleum product to South Africa'.[104] It took several years for the Security Council to follow suit and impose a number of binding restrictions on South Africa. In particular, UNSC Resolution 418 (1977) mandated an arms embargo and Resolution 569 (1985) imposed severe restrictions on investments in South Africa.[105] The UNSC measures, however, stopped short of imposing a full embargo on South Africa and, unlike the measures recommended by the General Assembly, never affected the oil industry because of the joint vetoes of the United States and the United Kingdom.[106]

In the light of this, it may be questioned whether states implementing unilateral sanctions on South Africa's oil industry following the recommendations by the General Assembly would have exposed themselves to international responsibility. The problem is that, unlike the Security Council, the General Assembly does not have the power to make binding decisions. Indeed, the relevant UNGA resolutions made no mention of the legal basis on which the measures could be taken. As observed by Halderman with respect to similar UNGA sanctions, 'it was no doubt thought that the resulting measures would be

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103 See, eg, UNGA Res 1761 (6 November 1962) UN Doc A/RES/1761(XVII), para 4.

104 UNGA Res (11 November 1963) UN Doc 1899 A/RES/1899(XVIII), para 7.

105 UNSC Res 418 (4 November 1977) UN Doc S/RES/418, para 2; UNSC Res 569 (26 July 1985) UN Doc S/RES/569 (1985), para 6.

106 'US and Britain Veto UN Move to Impose Penalties on Pretoria' (*The New York Times*, 9 March 1988) 12.

taken by States on their own responsibilities'.[107] One view grounded on an expansive interpretation of Article 103 of the UN Charter is that measures authorised by the General Assembly should be considered presumptively consistent with other international legal obligations of UN member states.[108] In this sense, Dugard argued that measures adopted against South Africa following UNGA recommendations would be lawful in light of 'a presumption in favour of the release of those States which comply with these recommendations from any conflicting obligations arising from treaties to which South Africa is party.'[109]

This view – which is not without controversy[110] – would have justified at most unilateral sanctions taken directly against South Africa, as the latter was the target of the UNGA recommendations. Sanctioning states would not have been able to extend their measures extraterritorially, as they would not have been released of their obligations vis-à-vis third states. Not even the countermeasures framework would ordinarily be capable of precluding the wrongfulness of extraterritorial sanctions of this kind given that, unlike with measures mandated by the Security Council, third states are under no obligation to adopt measures recommended by the General Assembly and thus there can be no implementation of their responsibility for failing to execute them.

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107 John Halderman, 'Some Legal Aspects of Sanctions in The Rhodesian Case' (2008) 17 ICLQ 672, 686.

108 Francis Vallat, 'The Competence of the United Nations General Assembly' (1959) 97 *Recueil des cours* 204, 231. For a similar argument, see Nicholas Tsagourias and Nigel White, *Collective Security: Theory, Law and Practice* (CUP 2013) 104.

109 Christopher JR Dugard, 'The Legal Effect of United Nation Resolutions on Apartheid' (1966) 83 *South African Law Journal* 44, 59.

110 See Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure' (1958) 34 BYIL 1, 5 ('it must be assumed that it is not the intention of the Assembly to call upon its Members to act in breach of the ordinary rules of international law.').

Despite this, it may be the case that serious breaches of a particular subset of obligations owed to the international community as a whole may justify extraterritorial responses of states beyond the framework of the UN Charter. Apartheid is an emblematic example, as the breach of this prohibition does not exclusively amount to a 'threat to peace' but also rises to the level of a 'serious breaches of peremptory norms of international law' (*jus cogens*).[111] As recognised by the ILC, under customary international law all states are bound to fulfil certain obligations when faced with serious breaches of peremptory norms. Specifically, Article 41 ARSIWA identifies three obligations: (i) the duty not to 'recognize as lawful' a situation created by the serious breach; (ii) the duty not to render aid or assistance in the maintenance of the situation; (iii) the duty to cooperate with other states in order to bring to an end 'through lawful means' the serious breach.[112] The difficulty with these obligations is that their content is fundamentally vague and state practice is not sufficiently developed so as to conclusively determine what they entail.[113] This, however, does not mean that these obligations are devoid of content.

An indication as to how the indeterminacy of these obligations can be remedied is provided by the International Court of Justice (ICJ). In the *Namibia* Advisory Opinion,

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111 ARSIWA (n 19), Chapter III, 110-116. See also Commentary to Draft Art 53(2) (1996) II(2) YILC 114.

112 Commentary to art 42 ARSIWA (n 19) 113-114.

113 Stefan Talmon, 'The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens And Obligations Erga Omnes* (Martinus Nijhoff 2006) 105; Martin Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation' in Crawford, Pellet, and Olleson (n 52) 679; Nina Jørgensen, 'The Obligation of Non-Assistance to the Responsible State' in Crawford, Pellet, and Olleson (n 52) 688.

upon establishing that UN Member States were under a duty to recognise the illegality of the continued presence of South Africa in Namibia, the ICJ added that:

> [t]he precise determination of the acts permitted or allowed—what measures are available and practicable, which of them should be selected, what scope they should be given and by whom they should be applied—is a matter which lies within the competence of the appropriate political organs of the United Nations acting within their authority under the Charter.[114]

Similarly, in the *Wall* Advisory Opinion the Court held that:

> the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated *régime*, taking due account of the present Advisory Opinion.[115]

According to the Court, the political organs of the United Nations could remedy the inherent vagueness of the provisions concerning the duties to deny recognition and bring the breach to an end by indicating which action is required in the specific case. In these scenarios, a binding resolution of the Security Council is not necessary because the obligations themselves stem directly from customary international law.[116] The role of the General Assembly and the Security Council is 'one of coordination, rather than creation,

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114 *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, 55, para 120.

115 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 200, para 160.

116 Some treaty law also supports this. Art VIII of the 1948 Genocide Convention, for example, requires state parties to 'call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide'. According to Bruno Simma, '[i]n the face of genocide, the right of States, or collectivities of States, to counter breaches of human rights most likely becomes an obligation'; see 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 EJIL 1, 2.

of the obligation, as uncoordinated acts of non-recognition by individual States will not usually be very effective'.[117]

Measures implemented pursuant to the UNGA recommendations in response to South Africa's apartheid policies corroborate this point. Ironically, it was the United States – one of the states who vetoed the UNSC ban on South Africa's oil industry – to enact extraterritorial measures to expanding on UN sanctions. In 1986, US Congress approved the Comprehensive Anti-Apartheid Act, a complex statute including multiple restrictions on imports and exports from the United States to South Africa.[118] These were generally limited to US nationals;[119] however, Section 321 of the Act prohibited the exports of crude oil and petroleum products by any 'person[s] subject to the jurisdiction of the United States'.[120] In the light of the dominant interpretation at the time, this should be read as an assertion of jurisdiction over all US-owned companies with virtually unlimited territorial reach. Despite these broad ranging sanctions, no protest was recorded – in fact, other states followed suit and adopted measures of their own.[121]

No UNSC resolutions justified the unilateral and extraterritorial application of US sanctions against South Africa's oil industry. At the same time, all states were bound not to recognise the legality of the South African Government's policy of apartheid and to cooperate to bring it to an end. Thus, the United States had a realistic claim that, by

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117 Talmon (n 113) 113.

118 100 Stat 1086 (22 USC 5001-5116). See Winston Nagan, 'An Appraisal of the Comprehensive Anti-Apartheid Act of 1986' (1987) 5 *Journal of Law and Religion* 327.

119 eg s 301 (22 USC 5051); s 303 (22 USC 5053); s 305 (22 USC 5055).

120 100 Stat 1105 (22 USC 5071).

121 Various OPEC states had autonomously implemented an oil embargo against South Arica since 1973; see Philip Levy, 'Sanctions on South Africa: What Did They Do?' (1999) 89 *American Economic Review* 415.

extending its own sanctions extraterritorially, it was implementing the secondary obligations owed by all states in response to South Africa's serious breaches of peremptory norms. Multiple UNGA resolutions had authoritatively interpreted the content of these obligations, in the specific circumstances of the case, as including an oil embargo.

Similar to the case of UNSC mandated measures, non-compliance with communitarian norms such as the secondary obligations deriving from breaches of serious breaches of peremptory norms can be assessed in institutional fora.[122] Thus, a finding by the General Assembly that UN member states are failing to comply with their customary obligations would strengthen the claim to legality of a state taking unilateral action in the form of extraterritorial sanctions. However, such findings are not a pre-requisite for the taking of unilateral measures in response to non-compliance. If all states are under the same obligations under customary international law and have a legal interest in compliance with such obligations, each and every state may be entitled to take enforcement action in the form of countermeasures. The legality of these measures hinges on whether they adhere to the substantive and procedural requirements of countermeasures, and is closely linked to the unresolved question of the legality of 'third-party' or 'collective' countermeasures, which was discussed earlier.[123] Yet, comparted to other countermeasures of this kind, unilateral measures mapping onto recommendations by the UN General Assembly have a stronger claim to legality given that: (i) the wrongfulness to which they respond has not

122 A recent example is Resolution ES-10/19, passed in the wake of the decision by the United States to move its embassy to Jerusalem, with which the General Assembly declared that 'any decisions and actions which purport to have altered the character, status or demographic composition of the Holy City of Jerusalem have no legal effect, are null and void': UNGA Res ES-10/19 (21 December 2017) UN Doc A/RES/ES-10/19, para 1.

123 See text at n 55 above.

been determined unilaterally by the individual sanctioning state but by an multilateral organ representing almost the entire international community; and (ii) the enforcement action is not (only) based on the calculations of the induvial sanctioning state, but it is coordinated by an institutional organ which – through subsequent recommendations – may further guide the action of the sanctioning state(s).[124] Considering the favourable responses to the unilateral measures adopted by several states against South Africa, the framework of countermeasures may provide a plausible justification for remedial unilateral and extraterritorial measures of the kind explored thus far.

5. Conclusion

This article set out to investigate whether unilateral and extraterritorial sanctions may be permissible under international law in response to challenges to global security, particularly when the centralised action by the United Nations encounters limitations. The answer that it reached is that international law does offer opportunities for the use of such measures when several states are under the same international obligations, such as the duty to implement UNSC mandated sanctions or the duty to bring to an end serious breaches of peremptory norms. In these circumstances, the framework of countermeasures may provide the legal basis to support otherwise unlawful unilateral measures when the latter's objective is to remedy wrongful non-compliance of third states with collective obligations. In this sense, countermeasures act as gap fillers to ensure the widest possible compliance with communitarian norms.

[124] In this sense, see Binder (n 98) para 30.

As seen above, unilateral measures of this nature are subject to limitations and must conform to both procedural and substantive conditions to be considered lawful. However, these requirements cannot be assessed in the abstract, but must be evaluated with respect to each set of sanctions. Ultimately, the legality of unilateral sanctions hangs on the power vested on each state of 'auto-interpretation' of international law with all its limitations.[125] Given the absence of a centralised system of determination of international responsibility, each state proceeds to take countermeasures on the basis of its own autonomous appreciation of the legal situation, and at the risk of exposing itself to international responsibility.[126] One can be sympathetic with the argument that such a mechanism could be exploited. Nevertheless, so long as international law remains a decentralised legal system, decentralised enforcement is the fallback option whenever institutional action is unavailable.

Resort to unilateral measures may be an imperfect solution, but in exceptional circumstances it may be a preferable alternative to inaction. As seen above, some limited form of coordination in the form of UNSC or UNGA resolutions may still be necessary to prevent these measures from escalating beyond control. At the same time, where the interests of the international community are at stake, acknowledging a limited unilateral

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125 See Leo Gross, 'States as Organs of International Law and the Problem of Auto-Interpretation' in George A Lipsky (ed), *Law and Politics in the World Community* (University of California Press 1953) 77; Josef Kunz, 'Sanctions in International Law' (1960) AJIL 324; Leben (n 39) 21, 35; Sicilianos (n 19) 31; Georges Abi-Saab, '"Interprétation" et "auto-interprétation": quelques réflexions sur leur rôle dans la formation et la résolution du différend international', in Ulrich Beyerlin et al (eds), *Recht zwischen Umbruch und Bewahrung* (Springer 1995) 15; Antonios Tzanakopoulos, *Disobeying the Security Council* (OUP 2011) 114.

126 See Omer Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Clarendon Press 1988) 52–55; Tzanakopoulos (n 125) 117.

power of states to take enforcement measures can provide a more effective framework for evaluating state practices and ultimately reinforce the international rule of law.