

# THE NIGERIAN JURIDICAL REVIEW

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**THE UNITED STATES AND USE OF UNILATERAL SANCTIONS IN INTERNATIONAL LAW: A CASE FOR PROSCRIPTION\*****Abstract**

*Consequent on the prohibition on the use of force, states turned their attention to sanctions – coercive measures short of armed force – as the primary tool for attaining their foreign policy objectives. The current appeal of unilateral sanctions is further fuelled by the understanding that they are a middle ground between the extremes of diplomacy and force, and a cheap and peaceful means of changing state behaviour. However, contemporary developments in international law and relations belie that conclusion. In the current globalized economy, unilateral sanctions have a devastating impact on international trade, politics and human rights; and have recorded little success in modifying the objectionable policies of target states. Again, the dubious extraterritorial application of sanctions to third states has generated further controversy and international resentment. This paper examines unilateral sanctions in contemporary international law, and establishes that: (1) unilateral sanctions breach customary as well as treaty law and peremptory norms; (2) though generally referred to as countermeasures, unilateral sanctions do not constitute lawful countermeasures under the doctrine of state responsibility. Thus, it advocates the proscription of unilateral sanctions in international law.*

**1. INTRODUCTION**

In international law, sanctions seek to coerce states to change objectionable conduct or policies, and are currently imposed with increasing frequency in international law and relations. They may be multilateral or unilateral – the former are imposed by states acting in concert, often accompanied by the endorsement of an international

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organization e.g. the United Nations (UN); while the latter are imposed by individual states. This paper is concerned with the latter category, and explores the state practice of sanctions in contemporary international law. Since the 1990s, unilateral sanctions were widely heralded as humane and cost-effective alternatives to war. In practice, however, sanctions amount to blunt instruments seemingly unfettered by international law<sup>1</sup> because they breach treaties, custom and peremptory norms with severe consequences for the target states. A case is made in this paper for their proscription. Part I introduces the business of the paper. Part II places unilateral sanctions in context – briefly surveying its meaning and definition, history and evolution, nature and objectives. Part III investigates the legality of unilateral sanctions, weighing same with treaty law, customary law and *jus cogens*. Part IV discusses the doctrine of state responsibility, and contrasts the practice of countermeasures with unilateral sanctions. Part V summarizes views on the effectiveness of unilateral sanctions. Part VI gives an account of international reactions to unilateral sanctions, and Part VII concludes the paper.

### **2. UNILATERAL SANCTIONS IN CONTEXT**

#### **a. Meaning and Definition**

Unilateral sanctions are usually imposed by an individual state as a primary tool of foreign policy with the objective of modifying the target state's behaviour.<sup>2</sup> Hufbauer *et al* define unilateral sanctions as “the deliberate, government-inspired withdrawal, or threat of withdrawal of customary trade or financial relations.”<sup>3</sup> Carter sees sanctions as “coercive economic measures taken against one or more countries to force a change in policies, or at least to demonstrate a country's opinion

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<sup>1</sup> M. Owen, “The Limits of Economic Sanctions Under International Humanitarian Law: The Case of the Congo,” *Texas International Law Journal*, Vol. 48, Issue 1 (2012), pp. 103-123 at p. 104.

<sup>2</sup> “Unilateral Sanctions and International Law: Views on Legitimacy and Consequences” – Symposium organized by the Hague Centre for Law and Arbitration (HCLA) and Doshisha University Graduate School of Global Studies, Japan held at T.M.C. Asser Instituut, The Hague, Netherlands on 11 July 2013, p. 9.

<sup>3</sup> G. C. Hufbauer *et al.*, *Economic Sanctions Reconsidered*, (3rd edn., Washington DC: Peterson Institute for International Economics, 2007), p. 3.



about the other's policies."<sup>4</sup> Sanctions have been used as part and parcel of international diplomacy, and a tool for coercing target governments into particular avenues of response.<sup>5</sup> They are generally perceived as low-cost solutions to the abhorrent behaviour of foreign governments, companies or individuals; positioned somewhere between diplomacy and military engagement.<sup>6</sup> In sanctions' terminology, the 'sender' refers to the author of sanctions, while the 'target' refers to the subject of sanctions. To avoid confusion, the terms "unilateral sanctions", "unilateral coercive measures", "economic sanctions", "economic pressure", "economic force" and "coercive measures short of force" are used interchangeably.

#### **b. Brief History and Evolution**

Sanctions have a long and rich history which predates World War 1. Their employment by states in the pursuit of foreign policy goals is traceable to ancient Greece. However, their most celebrated early use was in 432 BC when, in response to violations of sacred Athenian lands and the kidnapping of three Aspasian women, Pericles instituted the Megarian decree banning all trade between Megara and Athens. This eventually led to the outbreak of the Peloponnesian War.<sup>7</sup> During the religious wars of Europe's reformation, states also used trade embargoes and other sanctions to compel compliance with treaty obligations to protect certain Christian minorities.<sup>8</sup> Since the Megarian decree, sanctions have come in various shapes and forms: the castle sieges of antiquity, colonial America's trade embargoes against Britain,

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<sup>4</sup> B. E. Carter, *International Economic Sanctions: Improving the Haphazard US Legal Regime*, (Cambridge: Cambridge University Press, 1988), p. 4.

<sup>5</sup> Hufbauer *et al.*, above note 3, p. 5.

<sup>6</sup> "The Legality and Effectiveness of Unilateral Sanctions", available at <http://www.lawteacher.net/international-law/essays/the-legality-and-effectiveness-of-unilateral-sanctions-international-law-essay.php> (accessed September 23, 2014).

<sup>7</sup> Thucydides, *History of the Peloponnesian War*, trans. by Rex Warner (New York: Penguin Books, 1972), p. 73 cited in T. M. Nyun, "Feeling Good or Doing Good: Inefficacy of the US Unilateral Sanctions Against the Military Government of Burma/Myanmar," 7 *Washington University Global Studies Law Review*, (2008), pp. 455-518 at p. 461. Also, see Hufbauer *et al.*, above note 3, pp. 9 – 10.

<sup>8</sup> A. Kern, *Economic Sanctions Law and Public Policy*, (London: Palgrave Macmillan, 2009), p. 8.

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and naval blockades during the American Civil War.<sup>9</sup> After World War 1, extensive attention was given to sanctions as a substitute for armed hostilities and a stand-alone enforcement policy.<sup>10</sup> Woodrow Wilson thus proclaimed unilateral sanctions in 1919:

A nation that is boycotted is a nation that is in sight of surrender. Apply this economic, peaceful, silent, deadly remedy and there will be no need for force. It is a terrible remedy. It does not cost a life outside the nation boycotted, but it brings a pressure upon the nation which, in my judgment, no modern nation could resist.<sup>11</sup>

Modern day sanctions were born with the League of Nations, and assumed a central role in the League's collective security scheme.<sup>12</sup> However, the League's sanctions policy was not supported by an adequate adjudicatory framework; and its failure to prevent World War 2 seriously undermined its credibility. The UN was born after the League's demise, and the UN Charter vested its most powerful organ - the Security Council, with the mandate to maintain international peace and security; as well as the power to impose sanctions.<sup>13</sup>

**c. Nature and Form**

Sanctions negatively impact on avenues of state power and authority. Economic or trade sanctions limit exports to or restrict imports from the target state, thereby decreasing its overall economic activity,<sup>14</sup> and may be 'comprehensive' or 'selective.' The former are directed against the economy of the target as a whole, while the latter disrupt the flow of

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<sup>9</sup> Nyun, above note 7, pp. 461-462.

<sup>10</sup> Hufbauer *et al.*, above note 3, p. 10.

<sup>11</sup> S. K. Padover (ed.), *Wilson's Ideals*, (Washington: American Council on Public Affairs, 1942), p.108 cited in W. M. Reisman, "When Are Economic Sanctions Effective? Selected Theorems and Corollaries", *ILSA Journal of Int'L and Comparative Law*, Vol. 2, (1996), pp. 587-594 at p. 588.

<sup>12</sup> Art. 16 of the Covenant of the League of Nations 1919 provided for commercial and financial sanctions to apply automatically to any member who commits an act of aggression without first attempting to settle its dispute peacefully. Under Art. 12, states were also obliged to refrain from acts of aggression until three months after peaceful dispute resolution via arbitration, judicial settlement or the League Council had been attempted.

<sup>13</sup> Kern, above note 8, pp. 22-23.

<sup>14</sup> R. Carbaugh, "Are Economic Sanctions Useful in Discouraging the Proliferation of Weapons of Mass Destruction?", *World Economics*, Vol. 9, No. 4 (2008), p. 184.

specific products essential to the well-being of the target. Financial sanctions interrupt the target state's financial transactions or freeze its financial assets.<sup>15</sup> Most unilateral sanctions regimes involve a combination of economic and financial restrictions. Arms embargoes prevent the flow of arms and military equipment to states or entities engaged in armed hostilities; diplomatic sanctions interrupt official political relations, while travel and flight bans inhibit international travel between the target and the sender.<sup>16</sup>

#### d. Goals and Objectives

As earlier mentioned, multilateral sanctions carry the imprimatur of international organizations, and are generally directed at coercing target conformity with international law.<sup>17</sup> UN sanctions, for instance, are imposed by the Security Council to maintain or restore international peace and security when it determines that there exists a threat to or breach of the peace, or an act of aggression.<sup>18</sup> Unilateral sanctions, on the other hand, are imposed contingent on the sender state's foreign policy, propelled by its national interest. They may be applied for a variety of reasons including to punish a target, signal disapproval, induce changes in policy, or secure regime change. Domestically, they are aimed at mollifying pressure groups or giving the public the impression of decisive action.<sup>19</sup> Unilateral measures may also be imposed to deter or dissuade the target from repeating the disputed action in future.<sup>20</sup> The logic behind unilateral sanctions is that

<sup>15</sup> J. M. Farrall, *United Nations Sanctions and the Rule of Law*, (Cambridge: Cambridge University Press, 2007), pp. 107-120.

<sup>16</sup> *Ibid.*, pp. 123-124.

<sup>17</sup> *Ibid.*, p. 133; also see E. Lopez-Jacoiste, "The UN Security Council and its Relationship with Economic Sanctions and Human Rights", *Max Planck UNYB*, 14 (2010), pp. 273-335 at p. 298; P. Szasz, "The Law of Economic Sanctions," *International Law Studies*, Vol. 71 (1998), pp. 455-481 at pp. 469-470.

<sup>18</sup> Arts. 24(1), 39 and 41 of the Charter of the United Nations 1945 (hereafter UN Charter).

<sup>19</sup> "The Impact of Economic Sanctions", Second Session Report of the House of Lords Select Committee on Economic Affairs, Vol. 1, 2007, p. 9 available at <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconaf/96/96i.pdf> (accessed October 5, 2014).

Also, see Kern, above note 8, p. 10.

<sup>20</sup> J. M. Lindsay, "Trade Sanctions as Policy Instruments: A Re-examination," *International Studies Quarterly*, Vol. 30, Issue 2 (1986), pp. 153-173 at pp. 155-156.

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the severe economic hardship caused by sanctions will induce political discontent in the target state population to rise against its leaders and demand change, forcing the target government to reverse its objectionable behaviour.<sup>21</sup> Alternatively, the leaders in the target state after realizing the error of their ways, will acquiesce to outside demands and change their policies.<sup>22</sup>

### 3. THE LEGALITY OF UNILATERAL SANCTIONS

In determining the legality of unilateral sanctions, this paper focuses on the US because it has the most elaborate sanctioning machinery. The US is also the world's foremost sanctions user, and accounts for 70% of the global sanctions cases. By 2011, the US had imposed more than 120 sanctions regimes against 83 countries;<sup>23</sup> more than the aggregate imposed by other states and international organizations.<sup>24</sup> Unilateral sanctions primarily form part of US foreign policy, employed with great frequency since the Cold War.<sup>25</sup>

The Office of Foreign Assets Control (OFAC) regulates sanctions programmes in the US, and US Presidents enjoy broad authority under several statutes to impose sanctions in response to national security or foreign policy concerns. The Trading with the Enemy Act 1917 (TWEA), the Export Administration Act 1969 (EAA), and the International Emergency Economic Powers Act 1977 (IEEPA) enable US Presidents to prohibit financial transactions with foreign states, groups or individuals.<sup>26</sup> The US Congress also occasionally mandates the imposition of sanctions in three ways: by passing laws aimed at specific

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<sup>21</sup> H. G. Askari *et al.*, *Economic Sanctions: Examining Their Philosophy and Efficacy*, (Westport, CT: Praeger Publishers, 2003), pp. 68-69 cited in Nyun, above note 7, p. 467.

<sup>22</sup> J. K. Fausey, "Does the UNs' Use of Collective Sanctions to Protect Human Rights Violate its Own Human Rights Standards?", 10 *Conn. J. Int'l Law*, (1994), pp. 193, 197-199 cited in Nyun, above note 7, p. 467.

<sup>23</sup> "Will Economic Sanctions Against the Assad Regime Work?", *Sunday's Zaman*, 29 November 2011, available at <http://www.todayszaman.com/columnist-264273-will-economic-sanctions-against-the-assad-regime-work.html> (accessed September 23, 2014).

<sup>24</sup> Hufbauer *et al.*, above note 3, p. 17.

<sup>25</sup> "The Legality and Effectiveness of Unilateral Sanctions", above note 6.

<sup>26</sup> Kern, above note 8, pp. 92-106; Hufbauer *et al.*, above note 3, p. 133.

behaviour rather than specific states; restricting aid or economic assistance to specific states in appropriation bills; and passing stand-alone laws aimed at specific states.<sup>27</sup>

International law has evolved primarily through custom and treaties, which are the principal means of determining the legality of a state's conduct *vis-a-vis* other states.<sup>28</sup> This essay's review of the legality of unilateral sanctions will proceed along these lines.

#### **a. Unilateral Sanctions and Treaty Law**

##### **(i) The UN Charter**

Since the UN Charter only provides for multilateral sanctions in the UN's collective security mechanism, unilateral sanctions are imposed outside its purview and are impermissible under the Charter regime.<sup>29</sup> Under Article 39, the Security Council is empowered to determine threats to and breaches of the peace and acts of aggression. Thereafter, Article 41 presents an array of options for the type of sanctions the Security Council may impose, and authorizes it to call on member states to apply them. Both articles contain no express or implied power by which individual member states may unilaterally impose sanctions.

However, proponents argue that unilateral sanctions are consistent with the Charter<sup>30</sup> because Article 2(4) bars the unilateral "threat or use of force," not the unilateral imposition of non-forcible economic sanctions. Article 2(4) prohibits UN members from resorting to the threat or use of force against the territorial integrity or political independence of any state. The question that arises is whether the term 'force' in Article 2(4) includes economic force. In other words, does the imposition of unilateral sanctions come within Article 2(4), thus

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<sup>27</sup> Hufbauer *et al.*, above note 3, p. 134.

<sup>28</sup> J. C. Henderson, "Legality of Economic Sanctions Under International Law: The Case of Nicaragua," 43 *Washington & Lee Law Review*, (1986), pp. 167-196 at p. 167.

<sup>29</sup> "Unilateral Sanctions and International Law: Views on Legitimacy and Consequences," above note 2, p. 9.

<sup>30</sup> See S. H. Cleveland, "Norm Internalization and U.S. Economic Sanctions," 26 *Yale J. Int'l Law*, 1 (2001), pp. 50-52 cited in Nyun, above note 7, p. 499.

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rendering them illegal? The weight of opinion suggests the latter position.<sup>31</sup>

The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States declares that “No state may use or encourage the use of *economic, political or other measures* to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind.”<sup>32</sup> Paragraph 1 provides more trenchantly that “...armed intervention *and all other forms of interference* or attempted threats against the personality of a state or against its *political, economic and cultural elements*, are condemned.” Precisely the same text was reaffirmed in the Declaration on Principles of International Law Concerning Friendly Relations,<sup>33</sup> which is widely accepted as an authoritative interpretation of the UN Charter,<sup>34</sup> and the International Covenant on Economic, Social and Cultural Rights (hereafter ICESCR) emphasizes the right of all peoples to freely pursue their economic, social and cultural development.<sup>35</sup> The UN General Assembly (hereafter UNGA) further emphasized the principle of non-intervention by unilateral economic measures in the Charter of Economic Rights and Duties of States.<sup>36</sup> Over time, the UNGA adopted several resolutions designed to delegitimize

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<sup>31</sup> Though Brazil’s attempt to include ‘economic force’ in Art. 2(4) was rejected at the San Francisco Conference, subsequent research and developments indicate a shift in perspective. See B. Simma (ed.), *The Charter of the United Nations: A Commentary*, (2nd edn., Oxford: Oxford University Press, 2002), p. 118; R. B. Lillich (ed.), *Economic Coercion and the New International Economic Order*, (Charlottesville, 1976); J. Paust and A. Blaustein (eds.), *The Arab Oil Weapon*, (Dobbs Ferry, 1977); and I. Brownlie, *International Law and the Use of Force by States*, (Oxford, 1963); all cited in M. N. Shaw, *International Law*, (6th edn., New York: Cambridge University Press, 2008), pp. 1124, 1126-1127. See also U. O. Umozurike, *Introduction to International Law*, (3rd edn., Ibadan: Spectrum Books Ltd, 2005), pp. 201-202.

<sup>32</sup> GA Res. 2131 (XX) (1965), para. 2.

<sup>33</sup> GA Res. 2625 (XXV) (1970).

<sup>34</sup> Szasz, above note 17, p. 456; also see R. Rosenstock, “The Declaration on Principles of International Law Concerning Friendly Relations”, 65 *AJIL*, (1971), p. 713.

<sup>35</sup> Shaw, above note 31, pp. 1124-1125. Also see Art. 1, ICESCR.

<sup>36</sup> GA Res. 3281(XXIX) (1974).

the use of economic force by individual states;<sup>37</sup> and has called for urgent and effective measures to eliminate the use by developed countries of unilateral sanctions which are not authorized by the UN, or are inconsistent with Charter principles against developing countries.<sup>38</sup> While it is accepted that UNGA resolutions are not binding, they are declaratory of existing customary law and contribute to its emergence.<sup>39</sup> From the foregoing, it is submitted that the use of unilateral economic pressure by individual states contravenes the prohibition on the use of force in Article 2(4) and the cited international legal instruments and resolutions.

There is also the argument that unilateral sanctions are accommodated by Article 2(7) because the prohibition therein refers to intervention by the UN, not by individual states.<sup>40</sup> Article 2(7) provides that "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state...but this principle shall not prejudice the application of enforcement measures under Chapter VII". The above argument is tenuous in our view because the phrase "... or in any other manner inconsistent with the Purposes of the United Nations" in Article 2(4) is an omnibus provision, incorporating all other actions which do not amount to the threat or use of force, but yet interfere with a state's

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<sup>37</sup> See the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States 1980 [GA Res. 36/103 (1981)]; Resolution on the Elimination of Coercive Economic Measures as a Means of Political and Economic Compulsion [GA Res. 51/22 (1996)]; Resolution on Unilateral Economic Measures as a Means of Political and Economic Coercion Against Developing Countries [GA Res. 52/181 (1997)]; Szasz, above note 17, p. 456.

<sup>38</sup> Resolution on Economic Measures as a Means of Political and Economic Coercion against Developing Countries [GA Res. 50/96 (1995)].

<sup>39</sup> *Legality of the Threat or Use of Nuclear Weapons*, (Advisory Opinion), ICJ Reports (1996), p. 226, paras. 70-71. See also O. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations*, (1967), pp. 46-62 cited in Henderson, above note 28, p. 190.

<sup>40</sup> See R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, (9th edn., London: 1992), pp. 447-449 cited in B. S. Baek, "Economic Sanctions Against Human Rights Violations", Cornell Inter-University Graduate Conference Papers, (2008), p. 8 available at [http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1039&context=lps\\_clacp](http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1039&context=lps_clacp) (accessed October 5, 2014). Also, see Nyun, above note 7, p. 499.

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territorial integrity or political independence. The phrase terminally punctures further recourse to the Charter by advocates of unilateral sanctions. Again, if the Security Council in spite of its broad powers as the UN's primary organ is barred, except when taking enforcement action, from intervening in the domestic affairs of states by Article 2(7), it is incongruous and contradictory to argue that Article 2(7) grants such right to individual member states. What is prohibited for the UN under the provision must also imply *a fortiori*, a prohibition as between states.<sup>41</sup> It is further submitted that neither the spirit of the Charter nor the letter of Article 2(7) accommodates unilateral sanctions. Taken together, Articles 2(4) and (7) implicitly ban all non-military interference including economic force or pressure.<sup>42</sup> Finally, Articles 2(3) and 33 of the UN Charter require member states to resolve their disputes through peaceful means. However, unilateral sanctions do not constitute procedures of pacific settlement, and thereby violate the obligations under these articles.<sup>43</sup>

### (ii) Other Treaties

Sanctions imposed by the UN are covered by Article 103 which gives primacy to the Charter over other treaties in respect of member-state obligations; and may be legally justified even if they contravene treaty obligations, unless they breach peremptory norms.<sup>44</sup> However, unilateral sanctions are not so protected. The result is that unilateral measures infringe upon rights, and breach state-party obligations in

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<sup>41</sup> "Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties", Paper prepared by the Asian-African Legal Consultative Organization Secretariat, India, AALCO/51/ABUJA/2012/SD/S6, p. 8, available at <http://www.aalco.int/51stsession/Sanctions%20Brief%202012.pdf> (accessed October 5, 2014).

<sup>42</sup> GA Res. 39/210 (1984).

<sup>43</sup> H. Brosche, "The Arab Oil Embargo and United States Pressure Against Chile: Economic and Political Coercion and the Charter of the United Nations," 7 *Case W. Ras. J. Int'l L.*, 3 (1974), p. 32 cited in Henderson, above note 28, pp. 182-183.

<sup>44</sup> "The Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights, including Recommendations on Actions aimed at Ending such Measures," Thematic Study of the Office of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/19/33, 11 January 2012, p. 8 available at [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-33\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-33_en.pdf) (accessed October 5, 2014).



numerous bilateral and multilateral agreements. Traditionally, the *raison d'être* of classic international law has been to regulate military actions and the use of arms, not foreign trade policies;<sup>45</sup> but this narrow perspective ignores the indiscriminate nature of economic sanctions and their detrimental effects on target populations.<sup>46</sup> US sanctions on Iran, for example, violate the Treaty of Amity between the US and Iran which obligates both states to refrain from applying discriminatory measures that would impair their legally acquired rights and interests; and provides that there shall be freedom of commerce or navigation between both states.<sup>47</sup> The sanctions also contravene Article VIII(2), which prohibits restrictions on exports to or imports from both states, unless such exports or imports are similarly restricted to all third states.<sup>48</sup> Unilateral diplomatic sanctions also constitute a violation of the Vienna Conventions on Diplomatic and Consular Relations 1961 and 1963 respectively, where they affect diplomats or consular officers of target states; while unilateral travel bans violate the right to movement protected by Article 12 of the International Covenant on Civil and Political Rights 1966 (hereafter ICCPR).<sup>49</sup>

The rights to life,<sup>50</sup> an adequate standard of living,<sup>51</sup> freedom from hunger,<sup>52</sup> health;<sup>53</sup> and other internationally protected economic, social and cultural rights are also violated by unilateral coercive measures

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<sup>45</sup> J. Queguiner, "Precautions Under the Law Governing the Conduct of Hostilities," 88 *Int'l Review of the Red Cross*, (2006), p. 793 cited in Owen, above note 1, p. 114.

<sup>46</sup> W. M. Reisman and D. L. Stevick, "The Applicability of International Law Standards to United Nations Economic Sanctions Programmes," 9 *EJIL*, (1998), pp. 98-105, 110-111, 113-116, 119-121.

<sup>47</sup> See Arts. IV and X, Treaty of Amity, Economic Relations and Consular Rights 1955.

<sup>48</sup> M. Rahimi *et al.*, "Unilateral Economic Sanctions in the light of International Law: Unilateral Sanctions on Islamic Republic of Iran", *Management and Administrative Sciences Review*, Vol. 3, Issue 4 (2014), pp. 1-11 at p. 7 available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2455325](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2455325) (accessed September 23, 2014).

<sup>49</sup> *Ibid.*, p. 9.

<sup>50</sup> See Art. 3, Universal Declaration of Human Rights 1948 (hereafter UDHR) and Art. 6(1), ICCPR.

<sup>51</sup> See Art. 25(1), UDHR and Art. 11(1), ICESCR.

<sup>52</sup> Art. 11(2), ICESCR.

<sup>53</sup> *Ibid.*, Art. 12(1) and para. 3, Committee on Economic, Social and Cultural Rights, General Comment No. 8 (1997) on the Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights.

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which implicate these rights in the target state.<sup>54</sup> Where economic or financial sanctions are so rigid that a target state cannot make exports to generate revenue, or make imports of essential goods, food, drugs and medical equipment, the rights to an adequate standard of living, health and ultimately, the right to life are endangered. Such a situation inevitably induces inflation, unemployment, malnutrition and the spread of deadly diseases. Syria, for example, has languished under stringent US sanctions that prohibit aid and restrict bilateral trade since 2004; cost of living has progressively soared while the standard of living has plummeted, and its economy has only averted collapse by relying on the aid of friendly states.<sup>55</sup> In addition, the humanitarian law prohibition against the starvation of civilian populations as a method of warfare is breached by unilateral measures that cause serious deprivations of food and agricultural produce.<sup>56</sup> Unilateral sanctions further flout the Vienna Convention which provides that a state must refrain from acts which would defeat the object and purpose of a treaty when it has signed or exchanged instruments constituting the treaty or has expressed its consent to be bound by it.<sup>57</sup> Under the *pacta sunt servanda* principle, states are further bound by agreements to which they are parties, and must perform them in good faith.<sup>58</sup> US sanctions on Cuba and Iran also violate the principle of freedom of international trade under the General Agreement on Tariffs and Trade 1947 (hereafter GATT) and World Trade Organization (hereafter WTO).<sup>59</sup>

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<sup>54</sup> “The Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights,” above note 44, p. 4.

<sup>55</sup> J. Masters, “Syria’s Crisis and the Global Response”, available at <http://www.cfr.org/syria/syrias-crisis-global-response/p28402> (accessed October 5, 2014).

<sup>56</sup> Art. 54, Protocol Additional to the Geneva Conventions 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I); Art. 14, Protocol Additional to the Geneva Conventions of 1949, relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II); “The Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights,” above note 44, p. 4.

<sup>57</sup> Art. 18, Vienna Convention on the Law of Treaties 1969 (hereafter VCLT).

<sup>58</sup> *Ibid.*, Art. 26.

<sup>59</sup> See Arts. XI para. 1 and XIII para. 1 of the GATT. Art. 2, Agreement on Trade-Related Investment Measures (TRIMs) provides that no member shall apply any TRIM that is inconsistent with the obligations of national treatment and general elimination of quantitative restrictions in Art. III para. 4 and Art. XI para. 1 respectively of the General Agreement on Tariffs and Trade 1994. Also see M. McCurdy, “Unilateral

Though the national security exception in the GATT hampers the GATT's force,<sup>60</sup> this paper submits that the sanctions are contrary to the spirit of the GATT.

**b. Unilateral Sanctions, Customary Law and *Jus Cogens***

**(i) Overview of Secondary Sanctions**

A controversial outcome of unilateral sanctions is the use of secondary sanctions. While unilateral sanctions are imposed directly on the target, secondary boycotts also impose restrictions on third-state companies and governments that do business with the target. A typical example is US sanctions on Cuba imposed since 1960 in response to Castro's expropriation of US properties and close ties to the Soviet Union; and aimed at destabilizing the regime and exacting a price for Castro's socialist inclinations. By 1962, the sanctions had banned virtually all imports from Cuba, but international opprobrium reached a crescendo when the US Congress passed the Cuban Liberty and Democratic Solidarity Act 1996 (hereafter the Helms-Burton Law). The law extraterritorially extends sanctions to third states doing business with Cuba, allows US citizens and companies to sue foreigners investing in US properties seized by the Cuban government, and deny visas to persons profiting from such investments.<sup>61</sup> The US also imposed sanctions on non-US companies operating in third states outside US jurisdiction via the USA Patriot Act which asserts the right of US authorities to "seize funds in non-US banks."<sup>62</sup> The US defines the Helms-Burton Law as a national security issue<sup>63</sup> and has strangled Cuba for 54 years, though there is no evidence today that Cuba poses a security threat to the US. US sanctions have done severe harm to the

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Sanctions With a Twist: The Iran and Libya Sanctions Act of 1996," *American University International Law Review*, Vol. 13, No. 2 (1997), pp. 397-438 at pp. 417-419, 423-424.

<sup>60</sup> Art. XXI, para. b(iii) of the GATT; McCurdy, above note 59, pp. 419-421, 424-425.

<sup>61</sup> Hufbauer *et al.*, above note 3, pp. 146-147. See also Titles III and IV of ILSA.

<sup>62</sup> S. 319, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act 2001 cited in "The Impact of Economic Sanctions", above note 19, pp. 26-27.

<sup>63</sup> J. Roy, "The Helms-Burton Act: Tightening the Noose on Cuba", *Global Dialogue*, Vol. 2, No. 3 (2000), available at <http://www.worlddialogue.org/content.php?id=96> (accessed September 18, 2014).

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Cuban economy and people, and even governments opposed to former President Fidel Castro consider them illegal and an unfair punishment of ordinary Cubans.<sup>64</sup> Regular condemnations by a majority in the UNGA and the protests of US' allies have failed to produce a change.<sup>65</sup>

Similar secondary sanctions were imposed on third states trading with Iran via the Iran and Libya Sanctions Act 1996 (hereafter ILSA).<sup>66</sup> The US first instituted sanctions against Iran in 1979, when Iranian militants seized the US embassy in Tehran and took 66 hostages. President Jimmy Carter responded by halting all Iranian crude oil imports, declaring a national emergency under the IEEPA and freezing all Iranian assets in the US.<sup>67</sup> In incremental steps, the US imposed new restrictions on Iran targeted primarily at limiting the development of the Iranian oil industry and impairing Iran's military potential and nuclear pursuits. ILSA supplemented these measures by sanctioning foreign companies that undertake new oilfield investments in Iran.<sup>68</sup> The current sanctions on Iran are ostensibly directed at ending Iran's nuclear bid, but Iran maintains that its nuclear programme is for peaceful energy purposes only.<sup>69</sup> Iran's position is consistent with its rights under the Non-Proliferation Treaty.<sup>70</sup> It is unclear how Iran, which is estimated to be far from producing weapons-grade uranium, constitutes a security threat to the US which boasts of the world's largest nuclear arsenal. Consequently, it has been

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<sup>64</sup> *Ibid.*

<sup>65</sup> T. Duffy, "Sanctions and Human Rights: Humanitarian Dilemmas", *Global Dialogue*, Vol. 2, No. 3 (2000), available at <http://www.worlddialogue.org/content.php?id=102> (accessed September 18, 2014).

<sup>66</sup> Libya has been removed from the statute, which was later referred to as the Iran Sanctions Act 1996. In 2010, the Act was amended into the Comprehensive Iran Sanctions and Accountability Act (CISADA).

<sup>67</sup> McCurdy, above note 59, pp. 397-438 at pp. 400-402.

<sup>68</sup> Hufbauer *et al.*, above note 3, p. 145; Kern, above note 8, p. 106.

<sup>69</sup> J. A. Brohamer III, "The Unintended Consequences of Economic Sanctions", Masters Dissertation submitted to San Diego State University, USA, April 2010, p. 47 available at [http://sdsudspace.calstate.edu/bitstream/handle/10211.10/348/Brohamer\\_John.pdf?sequence=1](http://sdsudspace.calstate.edu/bitstream/handle/10211.10/348/Brohamer_John.pdf?sequence=1) (accessed September 18, 2014); also, see Kern, above note 8, p. 305.

<sup>70</sup> Art. IV of the Treaty on the Non-Proliferation of Nuclear Weapons 1970 bestows on state parties the inalienable right to develop research, production and use of nuclear energy for peaceful purposes.

contended that the US decision to impose sanctions is mostly affected by the domestic political groups and directed at regime change rather than any claims of violation of international obligations.<sup>71</sup>

## (ii) Customary International Law

### (a) Sovereignty and Jurisdiction

Unilateral sanctions interfere with the target state's sovereignty and jurisdiction.<sup>72</sup> Sovereignty is the supreme political authority of an independent state within and without its borders. The legitimacy of the principle of sovereignty is recognized in Article 2(1) of the UN Charter, which situates the UN on the foundation of sovereign equality. A central feature of sovereignty is jurisdiction<sup>73</sup> which concerns the right of a state to exercise authority over people, property or circumstances within its territory. The rationale behind this doctrine was to curtail the intrusion of international law on national legal systems.<sup>74</sup> To this end, Article 2(7) of the UN Charter proscribes intervention in matters essentially within the domestic jurisdiction of a state. However, changing principles of international law in the context of human rights have had the effect of limiting its extent; such that domestic matters with international repercussions fall within the ambit of international law. Nevertheless, the concept retains validity in recognising that a state's sovereignty within its territory is the undeniable foundation of international law.<sup>75</sup>

International law permits states to exercise jurisdiction on a number of grounds. The principal ground is the *territoriality principle*, under which a state may punish for crimes wholly or partly committed within its territory. Territoriality may be subjective or objective, a state may claim jurisdiction under the former where a crime is commenced within its borders but consummated outside; and under the latter where the crime was commenced outside but consummated within its

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<sup>71</sup> K. G. Abadi, "Unilateral Sanctions against Iran and International Law," p. 1 available at <http://iranianembassy.nl/en/akhbar/40.pdf> (accessed September 18, 2014).

<sup>72</sup> Cleveland, above note 30, p.3 cited in Baek, above note 40, pp. 24-25.

<sup>73</sup> Kern, above note 8, p. 65.

<sup>74</sup> Shaw, above note 31, p. 645.

<sup>75</sup> *Ibid.*, pp. 647-649.

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territory.<sup>76</sup> Although jurisdiction is primarily territorial, it is not exclusively so. Under the *nationality principle*, a state may try its nationals for crimes wherever they are committed. The nationality of the offender is the basis for jurisdiction.<sup>77</sup> Under the *passive personality principle*, a state may claim jurisdiction to try an individual for crimes committed abroad which affect its nationals. State A can assert jurisdiction for a crime committed by a national of State B on State B's territory simply because the victim is a national of State A.<sup>78</sup> Under the *protective principle*, states assert jurisdiction over aliens who commit acts abroad which are prejudicial to their security or vital economic interests such as treason, espionage or counterfeiting currency.<sup>79</sup> Under the *universality principle*, all states may assert jurisdiction over a narrow category of crimes which pose severe danger to the international community, irrespective of the offender's nationality or the locus of the offence. These crimes include piracy, slave trade, apartheid, aircraft hijacking, genocide, war crimes and crimes against humanity. They have been made punishable in treaties that have been so widely adopted that they have formed part of customary law binding even on non-parties.<sup>80</sup>

US courts construe the objective territorial principle to include an 'effects doctrine' allowing the US Congress to enact laws regulating activity outside US territory if it is foreseeable that such activity would produce effects within US territory. The US relies on the effects doctrine and a broad application of the nationality principle in applying

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<sup>76</sup> Umozurike, above note 31, p. 86; Kern, above note 8, pp. 70-71; Shaw, above note 31, pp. 652-654.

<sup>77</sup> Kern, above note 8, p. 75; Z. O. Özcayir, *Port State Control*, (2nd edn., Great Britain: MPG Books, 2004), p. 63 cited in K. Larsson, "US Extraterritorial Application of Economic Sanctions and the New International Sanctions Against Iran", Masters Dissertation submitted to Lund University, Sweden, May 2011, p. 26 available at <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1969940&fileId=1975926> (accessed September 18, 2014).

<sup>78</sup> B. Zagaris, *International White Collar Crime: Cases and Materials*, (1st edn., USA: 2010), p. 237 cited in Larsson, above note 77, p. 26.

<sup>79</sup> Umozurike, above note 31, p. 85; Kern, above note 8, pp. 77-78; M. D. Evans (ed.), *Aspects of Statehood and Institutionalism in Contemporary Europe*, (Gateshead, Tyne & Wear: Athenaeum Press Ltd, 1997) cited in Larsson, above note 77, p. 26.

<sup>80</sup> Umozurike, above note 31, pp. 84-85; Kern, above note 8, pp. 78-79; Zagaris, above note 78, pp. 237-238 cited in Larsson, above note 77, p. 26.

sanctions extraterritorially.<sup>81</sup> Secondary sanctions by the US have been severely criticized as a violation of international law by states which generally hold the view that extraterritorial jurisdiction applies only to conduct that violates fundamental norms of international law. Still, the US justifies same on the ground that market globalization and technological advances make it vulnerable to the actions of other states.<sup>82</sup> It is noteworthy that the effects doctrine neither constitutes, nor has it been recognized as an independent jurisdictional rule under customary law.<sup>83</sup> Again, state practice and doctrinal evolution in international law reflect a unanimous rejection of the extraterritorial application of national legislation for the purpose of creating obligations for third states.<sup>84</sup> Secondary sanctions run counter to the established principle of jurisdiction in international law that all national legislation are territorial in character; and as such violate the principles of state sovereignty, non-intervention and jurisdiction.<sup>85</sup> Ironically, the US objects to the use of secondary sanctions and has imposed legislation prohibiting domestic companies from complying with them. Under the EAA, US companies are prohibited from complying with secondary sanctions if they are imposed against an ally.<sup>86</sup>

### (b) Non-Intervention

The principle of non-intervention is part of customary law, founded on the concept of respect for the sovereignty of states.<sup>87</sup> In order to protect state sovereignty, customary law historically prohibited forcible intervention in the domestic affairs of states.<sup>88</sup> However, due to the

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<sup>81</sup> Kern, above note 8, pp. 74, 79-80.

<sup>82</sup> *Ibid.*, pp. 56, 91.

<sup>83</sup> Evans, above note 79, pp. 216, 226 cited in Larsson, above note 77, p. 29.

<sup>84</sup> R. Mohamad, "Unilateral Sanctions in International Law," p. 4 available at <http://www.aalco.int/SGStatements2013/Unilateral%20Sanctions%20Text%20-%20The%20Hague%2011%20July%202013.pdf> (accessed October 5, 2014).

<sup>85</sup> "Unilateral Sanctions and International Law: Views on Legitimacy and Consequences," above note 2, p. 9; also see Larsson, above note 77, p. 58.

<sup>86</sup> G. E. Shambaugh, *States, Firms and Power: Successful Sanctions in United States Foreign Policy*, (USA, 1999), p. 118 cited in Larsson, above note 77, p. 25.

<sup>87</sup> See the *Corfu Channel Case*, ICJ Reports, (1949), pp. 4, 35.

<sup>88</sup> See Jennings and Watts, above note 40, pp. 1, 129; Cleveland, above note 30, p.53 all cited in Nyun, above note 7, p. 499.

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increased economic interdependence between states, non-forcible economic coercion achieves the same objectives as forcible interference and ultimately results in a powerful state dictating the domestic policies of a weaker state. As such, economic pressure applied by the sender state to induce policy changes within the target state amounts to intervention whether or not force is used.<sup>89</sup> In contemporary international law therefore, the principle of non-intervention via armed force is extended to include the 'economic' and 'cultural' forms of intervention.<sup>90</sup> The ICJ's exposition of non-intervention is unequivocal:

...the principle forbids all states or groups of states to intervene directly or indirectly in the 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. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.<sup>91</sup>

Secondary sanctions interfere with the sovereignty of third states whose nationals are subject to them.<sup>92</sup> Unilateral economic coercion is interventionary if a state carries out an economic policy that coerces the target state to take a course of action desired by the coercing state.<sup>93</sup> The principle of non-intervention is generally recognized as embedded in the Charter system and is the mirror image of the sovereignty of states.<sup>94</sup>

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<sup>89</sup> Nyun, above note 7, p. 499.

<sup>90</sup> M. Schoroder, "Principle of Non-intervention" in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. II, (Elsevier, 1999), pp. 620-621 cited in Baek, above note 40, p. 6.

<sup>91</sup> *Certain Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua V USA) Merits, ICJ Reports (1986), pp.14, 106-109, paras. 202-207.

<sup>92</sup> J. A. Meyer, "Second Thoughts on Secondary Sanctions," *University of Pennsylvania Journal of International Law*, Vol. 30, No. 3 (2009), pp. 905-968 at pp. 932-933.

<sup>93</sup> A. Thomas and A. J. Thomas, *Non-Intervention*, (1956), pp. 409-414 cited in Henderson, above note 28, p. 193.

<sup>94</sup> "Extraterritorial Application of National Legislation," above note 41, pp. 6-7.



### (c) The Right to Development

The right to development is an inalienable human right intrinsically linked to a peoples' sovereignty.<sup>95</sup> A state's right to development occupies an exalted position in international law; and is protected by foundational documents.<sup>96</sup> In addition to its legitimacy as a principle of international law, Articles 1 and 55(b) of the UN Charter, give member states the responsibility of developing friendly relations among nations based on respect for self-determination of peoples and actively promoting conditions of economic, social progress and development. Article 3 of the Declaration on the Right to Development commits state parties to act in accord with the UN Charter and to create "national and international conditions favourable to the realization of the right to development." The Declaration also places the human person at the centre of development, which it defines not solely in terms of economic growth, but as a comprehensive process including social, cultural and political elements.<sup>97</sup> Since the development of customary law norms is an evolutionary process ascertained by reference to the general practice of states over a period of time, rooted in a sense of legal obligation, the right to development has undoubtedly risen to the level of customary law owing to its ubiquity and broad-based international acceptance.<sup>98</sup>

Despite its near-universal acceptance however, the US remains hostile to the right to development,<sup>99</sup> and generally votes against

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<sup>95</sup> Art. 1, Declaration on the Right to Development, GA Res. 41/128, (1986); B. Manchak, "Comprehensive Economic Sanctions, the Right to Development, and Constitutionally Impermissible Violations of International Law," *Boston College Third World Law Journal*, Vol. 30, No. 2 (2010), pp. 417-451 at p. 424.

<sup>96</sup> See Arts. 55 and 56, UN Charter; Arts. 22 and 28, UDHR; Art. 1, ICCPR; Arts. 1 and 2(1), ICESCR and Arts. 1, 6 and 8, Declaration on the Right to Development.

<sup>97</sup> See Arts. 2(1), 4(2) and 8(1), Declaration on the Right to Development.

<sup>98</sup> H. J. Steiner *et al.*, "Comment on International Dimension of Human Rights Movement" in H. J. Steiner *et al.* (eds.), *International Human Rights in Context: Law, Politics, Morals*, pp. 58, 60 (3rd edn., 2007) cited in Manchak, above note 95, p. 427. See also Art. 38, Statute of the International Court of Justice.

<sup>99</sup> S. Marks, "The Human Right to Development: Between Rhetoric and Reality," 17 *Harvard Human Rights Journal*, (2004), p.142 cited in Manchak, above note 95, p. 429.

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resolutions codifying, promoting or invoking the right.<sup>100</sup> Nonetheless, this does not relieve the US of its international obligations in that respect. Regardless of a state's posture *vis-à-vis* a treaty (for example, as a non-signatory or a party subject to reservations), if that treaty embodies customary law, the state is bound.<sup>101</sup> The comprehensive unilateral sanctions regime imposed by the US on Cuba specifically targets aspects of the state critical for national development. Since the regime systematically undermines the integrity of Cuba's banking system, impedes its technological advancement, frustrates its ability to cultivate human capital, and obstructs the proper functioning of its infrastructure, it directly violates Cuba's right to development.<sup>102</sup> The Cuban embargo incontrovertibly violates international human rights and humanitarian law due to its devastating impact. The comments of the South African delegate, speaking on behalf of the Group of 77 and China, are paradigmatic of the views generally held by the international community concerning the embargo. He said:

[The] long-standing economic, commercial and financial embargo [of Cuba] has been consistently rejected by a growing number of Member States to the point at which the opposition has become almost unanimous. Thus, the need to respect international law in the conduct of international relations has been recognized by most members of this body, as has been evidenced by the growing support for the draft resolution [condemning the embargo]...I believe that the presence of such a large number of Member States in this Hall today and their participation in these deliberations are indications of their opposition to unilateral extraterritorial measures. They express their firm opposition to unilateral measures as a means of exerting pressure on developing countries; as such measures are contrary to international law, international humanitarian law, the UN Charter

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<sup>100</sup> The most significant example of US opposition to the right to development came in 1986, when it entered the only vote against the Declaration of the Right to Development.

<sup>101</sup> Arts. 18 and 38, VCLT; Manchak, above note 95, p. 444.

<sup>102</sup> US Agency for International Development, "Securing the Future: A Strategy for Economic Growth," pp. 13-14 (2008); Marks, above note 99, pp. 141-142 all cited in Manchak, above note 95, pp. 433-438.

and the norms and principles governing peaceful relations among States.<sup>103</sup>

The US is, therefore, not exempt from its dual responsibilities under treaty and customary law regarding the right to development;<sup>104</sup> and this paper endorses the position that independent of their humanitarian impact or dubious extra-territorial legality, US sanctions on Cuba violate international law because they undermine Cuba's right to development.<sup>105</sup> In sum, the application of unilateral economic coercion especially against developing countries, infringes on their right to development.<sup>106</sup>

### (iii) Jus Cogens

According to the Vienna Convention, a treaty is void if at the time of its conclusion it conflicts with a peremptory norm. A peremptory norm (or *jus cogens*) is defined as a norm "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm having the same character."<sup>107</sup> The basic essence of *jus cogens* norms lies in their non-derogability. They include the prohibition on genocide, aggression, torture, apartheid, slavery and slave trade, racial discrimination, self-determination,<sup>108</sup> war crimes and crimes against humanity. As shall be shortly seen, unilateral sanctions also violate *jus cogens*.

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<sup>103</sup> UN Doc. A/61/PV.50 (8 November 2006) cited in Manchak, above note 95, p. 442.

<sup>104</sup> H. E. Chodosh, "An Interpretive Theory of International Law: The Distinction between Treaty and Customary Law," 28 *Vand. J. Transnat'l L.*, (1995), pp. 991-992 cited in Manchak, above note 95, pp. 430, 444.

<sup>105</sup> Manchak, above note 95, pp. 419, 433.

<sup>106</sup> "Extraterritorial Application of National Legislation," above note 41, p. 12.

<sup>107</sup> Art. 53, VCLT.

<sup>108</sup> See J. Crawford, *The International Law Commission's Articles on State Responsibility*, (Cambridge, 2002), pp. 246-247 cited in T. J. Biersteker and S. E. Eckert (eds.), "Strengthening Targeted Sanctions Through Fair and Clear Procedures", White Paper prepared by the Watson Institute Targeted Sanctions Project, Brown University, (2006), p. 20 available at [http://watsoninstitute.org/pub/Strengthening\\_Targeted\\_Sanctions.pdf](http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf) (accessed October 5, 2014).

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**(a) The Right to Self Determination**

The obligations flowing from the principle of self-determination have been recognized by the ICJ as *erga omnes*;<sup>109</sup> and scholars have indicated that the principle has acquired the status of *jus cogens*. The idea of sovereign self-determination has been called “the imperative basis for all human rights.”<sup>110</sup> The UN Charter explicitly refers to the right to self-determination and aims “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination...”<sup>111</sup> The UN Declaration on the Granting of Independence to Colonial Territories and Peoples states that: “All people have the right to self-determination; by virtue of that right, they determine their political status and freely pursue their economic, social and cultural development.”<sup>112</sup> The consequence of this is that all peoples are inherently entitled to a government of their choice as a basis for political, economic and social development.<sup>113</sup> The right to self-determination puts upon states not just the duty to respect and promote the right, but also the obligation to refrain from any forcible action which deprives peoples of the enjoyment of the right.<sup>114</sup>

The right to self-determination is an important fundamental right of developing states, recognized as the right of citizens of such states to determine their political, economic, social and cultural systems; without the interference of other states aimed at dictating a particular form of government or initiating changes in the exercise of sovereign rights. Therefore, unilateral measures restricting the right of such states to determine their approach constitute a violation of this right.<sup>115</sup> A close look at US sanctions on Burma (Myanmar) reveals an ill-considered attempt by the US to force a democratic transition in

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<sup>109</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004).

<sup>110</sup> M. Pomerance, *Self Determination in Law and Practice*, (1982), p. 41 cited in C. Wall, “Human Rights and Economic Sanctions: the New Imperialism”, *Fordham International Law Journal*, Vol. 22, Issue 2 (1998), p. 604.

<sup>111</sup> Arts. 1(2) and 55, UN Charter. Also see Art. 1 common to the ICCPR and ICESCR.

<sup>112</sup> “Extraterritorial Application of National Legislation,” above note 41, p. 10.

<sup>113</sup> Umozurike, above note 31, p. 208.

<sup>114</sup> “Extraterritorial Application of National Legislation,” above note 41, p. 11.

<sup>115</sup> Extraterritorial Application of National Legislation,” above note 41, p. 11.

Myanmar without a thorough assessment of Myanmar's historical, political, economic, social, and cultural climate.<sup>116</sup> Likewise, most states see the imposition of unilateral sanctions as an attempt by the US to impose its will upon them in violation of their right to self-determination.<sup>117</sup> Unfortunately, the target of US sanctions have chiefly been developing states in Asia and Africa which particularly feel discriminated against in international trade and economic relations.<sup>118</sup>

### **(b) The Prohibition on Genocide**

Another peremptory norm is the prohibition on genocide, which may be viewed as the "collective right to life". Article 1 of the Genocide Convention prohibits genocide both in times of peace and war. The Cuban Democracy Act and the Helms–Burton Law deny Cuba the right to import all goods, including food and medicines, thus manifestly seeking to achieve a genocidal outcome. A 1997 report indicated that a "significant rise" in suffering and deaths was reported, with the Cuban embargo taking "a tragic human toll," including "serious nutritional deficits, particularly among pregnant women."<sup>119</sup> It has therefore been vehemently asserted that the US is guilty of genocide in Cuba, not in the popular sense that hundreds of thousands of people have been killed; but in the sense that the US is comprehensively violating the Genocide Convention which provides that an attempt to commit genocide is punishable as genocide.<sup>120</sup> This paper concurs with the view that the US has endeavoured to commit genocide in Cuba, by creating conditions of life calculated to destroy a national group namely, the citizens of Cuba.<sup>121</sup>

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<sup>116</sup> E. H. Preeg, "Feeling Good or Doing Good with Sanctions: Unilateral Economic Sanctions and the U.S. National Interest", (1999), pp. 111-146 cited in Nyun, above note 7, p. 470.

<sup>117</sup> R. Weil, "Of Human Rights and Wrongs: China and the United States", 46 *Monthly Rev.* (1994), p. 6 cited in Wall, above note 109, p. 605.

<sup>118</sup> Extraterritorial Application of National Legislation," above note 41, p. 23.

<sup>119</sup> See G. Simons, "UN Reform: Addressing the Reality of American Power", *Global Dialogue*, Vol. 2, No. 3 (2000), available at <http://www.worlddialogue.org/content.php?id=474> (accessed September 18, 2014).

<sup>120</sup> *Ibid.* Also see Art. 3, UN Convention on the Prevention and Punishment of the Crime of Genocide 1948.

<sup>121</sup> Simons, above note 119. Also see Art. 2(c), Genocide Convention 1948.

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Unilateral sanctions, especially US sanctions as evidenced by history, are designed to maximize damage to the target states and unfriendly governments in the promotion of regime change. In Iraq, the US suborned the Security Council and secured a resolution that sustained a momentous violation of the Genocide Convention.<sup>122</sup> In 1996, former US Secretary of State Madeleine Albright was asked on the CBS programme *60 Minutes* whether she felt that the deaths of over 500, 000 children were an acceptable price to pay for maintaining US interests in Iraq. She replied, "I think this is a very hard choice, but the price, we think the price is worth it."<sup>123</sup> A year later, President Clinton also remarked that "sanctions will be there until the end of time, or as long as Hussein lasts."<sup>124</sup> The humanitarian misery produced by such sanctions is invariably great, and those who suffer are inevitably the weak and powerless at the bottom of the socio-economic ladder of the embargoed country.<sup>125</sup> For instance, US comprehensive unilateral sanctions against Burma exacerbate the deplorable living conditions of the civilian population already deprived of freedom, human rights and the rule of law.<sup>126</sup> In international human rights law, no level of harm is unavoidable. Individuals are protected by human rights principles on the basis of their humanity and no state goal can override the right of the individual with an *ex ante* legitimacy. While rights need to be balanced with other human rights, there is no prior existing norm to trump core human rights.<sup>127</sup>

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<sup>122</sup> Simons, above note 119.

<sup>123</sup> P. S. Jha, "Genocide in Plain View," *Global Dialogue*, Vol. 2, No. 3 (2000), available at <http://www.worlddialogue.org/content.php?id=104> (accessed September 18, 2014).

<sup>124</sup> D. Cortright and G. Lopez, "Are Economic Sanctions Just?," *Journal of Int. Affairs*, Vol. 52, No. 2 (1999), available at [http://www.mtholyoke.edu/~jwestern/ir317/George\\_Lopez1.htm](http://www.mtholyoke.edu/~jwestern/ir317/George_Lopez1.htm) (accessed October 5, 2014).

<sup>125</sup> Duffy, above note 65.

<sup>126</sup> Nyun, above note 7, p. 496.

<sup>127</sup> K. N. Schefer, "Economic Sanctions and Human Rights/Preferential Trade and Human Rights," NCCR Trade Working Paper, (2007) available at <http://phase1.nccr-trade.org/images/stories/publications/IP4/ip4%20benefri%20t&hr.pdf> (accessed September 18, 2014).

#### 4. UNILATERAL SANCTIONS, COUNTERMEASURES AND STATE RESPONSIBILITY

The terms 'unilateral sanctions' and 'countermeasures' are synonymously used in the sanctions literature, but are unilateral sanctions properly characterized as countermeasures? The conventional wisdom is that unilateral sanctions are governed by the customary law of retorsion and countermeasures.<sup>128</sup> Traditionally the term "reprisals" was used to cover otherwise unlawful forcible action rendered legitimate by the prior application of unlawful force. More recently, reprisals have been limited to action taken in time of international armed conflict;<sup>129</sup> and 'countermeasures' is now the preferred term for reprisals not involving the use of force.<sup>130</sup> Article 22 of the International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts 2001 (hereafter Draft Articles) provides that the wrongfulness of an act is precluded if the act constitutes a countermeasure.<sup>131</sup> Countermeasures must be contrasted with retorsion, i.e. lawful but unfriendly conduct adopted in retaliation for the injurious legal activities of another state.<sup>132</sup> Countermeasures are *prima facie* illegal, but justified if in response to an initial illegal act; and need not be identical to the initial hostile act.<sup>133</sup> However, retorsion hurts the other state while remaining within the bounds of legality;<sup>134</sup> and generally involves measures that are identical or closely analogous to the initial hostile act.<sup>135</sup> While retortive acts are within the law,

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<sup>128</sup> Kern, above note 8, pp. 56, 86.

<sup>129</sup> See for example the *Naulilaa* Case, 2 RIAA, p. 1025 (1928) and the *Cysne* Case, 2 RIAA, p. 1056. Also, see Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 128 (hereafter ILC Commentaries).

<sup>130</sup> See Reports of the International Law Commission, 1989, A/44/10 and 1992, A/47/10.

<sup>131</sup> Also, see T. M. Frank, "On Proportionality of Countermeasures in International Law", *American Journal of International Law*, Vol. 102, (2008), pp. 715-767 at p. 738.

<sup>132</sup> Shaw, above note 31, p. 1128.

<sup>133</sup> L. Oppenheim, *International Law: A Treatise*, (London: Longmans, Green & Co, 1905), Vol. 2, pp. 34, 38 cited in Farrall, above note 15, p. 49.

<sup>134</sup> Shaw, above note 31, p. 1128.

<sup>135</sup> Umozurike, above note 31, p. 197.

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countermeasures may only be legitimately adopted under certain conditions<sup>136</sup> addressed below.

To put things in perspective, Article 2 of the Draft Articles provides that there is an internationally wrongful act of a state when conduct constituting a breach of an international obligation is attributable to it. Internationally wrongful acts are only definable by international law, regardless of the provisions of municipal law.<sup>137</sup> This means that a state cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law.<sup>138</sup> Article 49(1) permits the injured state to take countermeasures against the state responsible for the wrongful act. Even so, certain conditions must be satisfied.

First, when faced with a breach of an international obligation, the injured state must call upon the responsible state to fulfil its obligations (of cessation and reparation); notify it of any decision to take countermeasures and offer to negotiate.<sup>139</sup> Using US sanctions on Cuba as our baseline, there seems to be no documentation of a formal notification to Cuba of US intentions to impose countermeasures coupled with an intention to negotiate. Under Article 51, where the responsible state fails to comply, the injured state may take countermeasures, which must be commensurate with the injury suffered, bearing in mind the gravity of the wrong.<sup>140</sup> This is because countermeasures are not intended as a form of punishment for wrongful conduct, but as an instrument for achieving compliance with the obligations of the responsible state.<sup>141</sup> The question of proportionality was central to the legality of counter measures taken by Czechoslovakia in the *Gabčíkovo-Nagymaros Project* case. The ICJ, having accepted that Hungary's actions in refusing to complete the Project amounted to an unjustified breach of the Treaty, held that the diversion of the Danube by Czechoslovakia was not a lawful

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<sup>136</sup> Shaw, above note 31, pp. 1129–1130.

<sup>137</sup> Art. 3, Draft Articles.

<sup>138</sup> ILC Commentaries, above note 129, p. 36. See also *S.S. "Wimbledon,"* PCIJ, Series A, No. 1, (1923), p. 15 at pp. 29-30; and Art. 27, VCLT.

<sup>139</sup> Art. 52(1), Draft Articles.

<sup>140</sup> Art. 51, Draft Articles.

<sup>141</sup> ILC Commentaries, above note 129, p. 130.



countermeasure because it was not proportionate.<sup>142</sup> Given the above criteria for proportionality, can the US total embargo on Cuba for over 50 years be said to be proportionate to Cuba's expropriation of US property? The obvious conclusion is no. Under international law, the expropriation of alien property is legitimate. International law will only be engaged where inadequate or no compensation is offered.<sup>143</sup>

By Article 50, countermeasures shall not affect the obligation to refrain from the threat or use of force, obligations for the protection of human rights, obligations prohibiting reprisals and other obligations of *jus cogens*. An injured state is required to continue to respect these obligations in its relations with the responsible state, because so far as the law of countermeasures is concerned, they are sacrosanct.<sup>144</sup> Here again, US sanctions on Cuba fail to meet the standard of the Draft Articles owing to the wanton and indiscriminate human rights deprivations which have been shown to breach *jus cogens* norms.

The countermeasures imposed must also, as far as is possible, be reversible: once the wrongful act has ceased and reparations have been made, countermeasures must cease, and the legal relations between the involved states must return to the *status quo ante*.<sup>145</sup> However, the duty to choose measures that are reversible is not absolute. It may not be possible in all cases to reverse all the effects of countermeasures after the occasion for taking them has ceased. In contrast, inflicting irreparable damage on the responsible state (as US sanctions on Cuba have done) amounts to punishment rather than countermeasures as conceived in the Articles.<sup>146</sup> The ICJ underscored these requirements in the *Gabcikovo–Nagymaros Project*:

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<sup>142</sup> (Hungary v Slovakia), ICJ Reports (1997), p. 56, paras. 85 and 87; *Territorial Jurisdiction of the International Commission of the River Oder*, Judgment No. 16, PCIJ, Series A, No. 23, (1929), p. 27; *Case Concerning the Air Services Agreement of 27 March 1946*, (US v France) 54 ILR, (1979), p. 443, para. 80.

<sup>143</sup> *AMCO v Indonesia (Merits)* 89 ILR, p. 403.

<sup>144</sup> ILC Commentaries, above note 129, p. 131.

<sup>145</sup> N. J. Calamita, "Sanctions, Countermeasures, and the Iranian Nuclear Issue," *Vanderbilt Journal of Transnational Law*, Vol. 42, No. 5, (2009), pp. 1393-1442 at p. 1421. Also, see Arts. 49(2) and (3), 52(3) and 53 of the Draft Articles.

<sup>146</sup> ILC Commentaries, above note 129, p. 131.

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In order to be justifiable, a countermeasure must meet certain conditions ... In the first place it must be taken in response to a previous international wrongful act of another state and must be directed against that state ... Secondly, the injured state must have called upon the state committing the wrongful act to discontinue its wrongful conduct or to make reparation for it ... In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question ... [and] its purpose must be to induce the wrongdoing state to comply with its obligations under international law, and...the measure must therefore be reversible.<sup>147</sup>

An injured state is entitled to invoke the responsibility of another state. A state is “injured” within the meaning of Article 42 if: (a) the obligation breached is owed to it individually e.g. under a bilateral treaty; (b)(i) it is “specially affected” by the violation of a collective obligation in a way that distinguishes it from the generality of states to which the obligation is owed; and (b)(ii) the breach radically affects all the states to which the collective obligation is owed e.g. obligations under a disarmament treaty.<sup>148</sup> The US qualifies as an injured state under Article 42(a).

As amply demonstrated above, unilateral sanctions, though identical in *modus operandi*, lack the attributes of and legal foundation accruing to countermeasures. While countermeasures are governed by the doctrine of state responsibility, unilateral sanctions lack a legal framework under treaty or customary law. As further established, unilateral sanctions violate the UN Charter, and stand condemned by a plethora of international legal instruments. Again, secondary sanctions imposed extraterritorially on third states violate customary law on countermeasures,<sup>149</sup> which must be imposed only on the defaulting state by the injured state, or any other state acting on its behalf when the wrong breaches a fundamental norm owed to the international

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<sup>147</sup> ICJ Reports (1997), pp. 7, 55–57.

<sup>148</sup> ILC Commentaries, above note 129, pp. 117-119.

<sup>149</sup> M. P. Malloy, *Economic Sanctions and U.S. Trade*, (USA, 1990), pp. 607-608 cited in Larsson, above note 77, p. 24.

community as a whole. Countermeasures may not be directed against states other than the responsible state. Where a third state is owed an international obligation by the state taking countermeasures and that obligation is breached by the countermeasure, the wrongfulness of the measure is not precluded as against the third state.<sup>150</sup> All the above force a conclusion that while countermeasures are unilateral, unilateral sanctions *are not* countermeasures because they do not satisfy the requisites of the Draft Articles.

## 5. EFFECTIVENESS OF UNILATERAL SANCTIONS

US sanctions on Cuba have been frequently cited as a monument to the ineffectiveness of unilateral sanctions.<sup>151</sup> Though the embargo did much harm to the Cuban economy, it failed to achieve its major goal of destabilizing Fidel Castro, who did not budge in spite of the harsh effects of the sanctions, and remained in power for over four decades before handing over to his brother, Raul Castro, in 2008 owing to health issues. Likewise, US sanctions have not persuaded Iran to renounce terrorism or dissuaded its nuclear ambitions. The ILSA sanctions have also been ineffective,<sup>152</sup> though they have caused some companies to defer bidding on oil contracts with Iran, Iranian oil production has grown modestly since ILSA was enacted.<sup>153</sup> US sanctions against Burma,<sup>154</sup> the Alfredo Stroessner regime in Paraguay, and the military regimes in Argentina and El Salvador also failed to change the behaviour of these regimes. Also unsuccessful were the US sanctions against Nicaragua, Panama and Japan.<sup>155</sup>

According to a study by the Institute for International Economics, unilateral sanctions imposed by the US have only been successful in

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<sup>150</sup> ILC Commentaries, above note 129, p. 130.

<sup>151</sup> "The Legality and Effectiveness of Unilateral Sanctions", above note 6.

<sup>152</sup> See McCurdy, above note 59, pp. 428-433.

<sup>153</sup> Hufbauer *et al.*, above note 3, p. 145.

<sup>154</sup> See Nyun, above note 7, pp. 482-494.

<sup>155</sup> Hufbauer *et al.*, above note 3, pp. 13, 112.

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13% of the cases since 1970.<sup>156</sup> The most optimistic study of unilateral sanctions puts their effectiveness at 34%,<sup>157</sup> but this result has been vehemently contested; and the opposing argument concludes that the actual success rate is less than 5%.<sup>158</sup> The consensus of the literature on the efficacy of unilateral sanctions is that they are not an effective tool of foreign policy.<sup>159</sup>

The fact that major powers impose sanctions does not guarantee success. Even for the US, unilateral sanctions have been futile in achieving policy objectives.<sup>160</sup> Sanctions imposed by major powers receive more attention than those imposed by other actors, but media coverage is not success.<sup>161</sup> In the light of the foregoing, this paper submits that unilateral sanctions have abysmally failed to achieve their goals, though they have caused serious economic damage. Economic dislocation is different from target compliance with the sender's demands, the dislocation being the means to reach the goals.<sup>162</sup>

### 6. INTERNATIONAL REACTION TO UNILATERAL SANCTIONS

A look at recent state reaction to the imposition of unilateral and secondary sanctions indicates that the US, its principal advocate, is

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<sup>156</sup> The Use and Effect of Unilateral Trade Sanctions: Hearing before Subcommittee on Trade of the House Committee on Ways and Means, 105th Cong. (1997) cited in McCurdy, above note 59, pp. 434-435.

<sup>157</sup> Hufbauer *et al.*, above note 3, pp. 158-159.

<sup>158</sup> R. A. Pape, "Why Economic Sanctions Do Not Work", *International Security*, Vol. 22, No. 2 (1997), pp. 90-136 at pp. 96-98, 105-106.

<sup>159</sup> Askari *et al.*, above note 21, p. 67 cited in Nyun, above note 7, p. 511; Pape, above note 158, p. 91; Lindsay, above note 20, p. 155; M. T. Clifton and V. L. Schwebach, "Fools Suffer Gladly: The Use of Economic Sanctions in International Crises," *International Studies Quarterly*, Vol. 41, No. 1 (1997), pp. 27-50.

<sup>160</sup> See E. S. Rogers, "Using Economic Sanctions to Prevent Deadly Conflict," CSIA Discussion Paper 96-02, Kennedy School of Government, Harvard University, May 1996, available at [http://live.belfercenter.org/files/disc\\_paper\\_96\\_02.pdf](http://live.belfercenter.org/files/disc_paper_96_02.pdf) (accessed September 23, 2014).

<sup>161</sup> P. Wallensteen, "A Century of Economic Sanctions: A Field Revisited", Uppsala Peace Research Papers No. 1, Uppsala University, Sweden (2000), pp. 9-10 available at [http://www.stanford.edu/class/ips216/Readings/wallensteen\\_00.pdf](http://www.stanford.edu/class/ips216/Readings/wallensteen_00.pdf) (accessed September 23, 2014).

<sup>162</sup> *Ibid.*, p. 6.

almost alone in the international playground. In April 1998, the UN Human Rights Commission voted to criticize the imposition of unilateral sanctions. The text urges states not to adopt unilateral measures that run counter to international law or the UN.<sup>163</sup> From 1992 at Cuba's request, the United Nations General Assembly (UNGA) began voting annually on a resolution calling for the end of the US embargo on Cuba. The first vote was 59 in favour, 3 against, with 71 abstentions.<sup>164</sup> In 2011, the UNGA resolved to end embargo - by a recorded vote of 186 in favour to 2 against (the US and Israel), with 3 abstentions.<sup>165</sup>

Many states have also vehemently objected to the US government's extraterritorial application of sanctions over third-state citizens and corporations; and even US allies argue that the US is destroying the integrity of international organizations and agreements<sup>166</sup> to which it is a party. Canada and Mexico asserted that the US had violated obligations under the NAFTA and filed complaints against it.<sup>167</sup> In a letter to congressional leaders written several months before ILSA's passage, Hugo Paemen and Ferdinando Salleo, the EU and Italian ambassadors to the US respectively, argued that the sanction proposals both violated international law and "depreciated the standing of international organizations such as the United Nations."<sup>168</sup> Foreign companies continue to openly pursue investment ventures with Iran in defiance of ILSA, especially in the field of oil exploration and production.<sup>169</sup>

The EU and the UK condemned the extraterritorial application of US sanctions under the Helms-Burton Law and ILSA as a violation of

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<sup>163</sup> J. A. Paul and S. Akhtar, "Sanctions: An Analysis", *Global Policy Forum*, (1998) available at <http://www.globalpolicy.org/security-council/index-of-countries-on-the-security-council-agenda/sanctions/41612.html?itemid=934> (accessed October 5, 2014).

<sup>164</sup> UN Doc. A/47/PV.70 (9 December 1992), p.88.

<sup>165</sup> GA Res. 66/6 (2011).

<sup>166</sup> Such organizations include the UN and WTO, while the agreements include the GATT and the North American Free Trade Agreement 1992 (hereafter NAFTA).

<sup>167</sup> Kern, above note 8, p. 266.

<sup>168</sup> McCurdy, above note 59, p. 416.

<sup>169</sup> *Ibid.*, pp. 399, 425-428.

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international law,<sup>170</sup> and as an illegal attempt by the US to expand its jurisdiction.<sup>171</sup> The EU promptly enacted the “Blocking Statute,” requiring those affected by US extra-territorial sanctions to notify the Commission within 30 days and not to cooperate with them actively or by deliberate omission or through a subsidiary or intermediary.<sup>172</sup> The Blocking Statute entitles those affected by the Helms-Burton Law and ILSA to claim damages from the US. Prior to the passage of the Blocking Statute, the UK enacted an Order under the Protecting of Trading Interests Act 1980 which prohibits UK companies and nationals from complying with US extraterritorial sanctions.<sup>173</sup>

### **7. CONCLUSION**

The ICJ has described the prohibition on the use of force as a ‘cornerstone of the UN Charter.’<sup>174</sup> As this paper has shown, unilateral sanctions violate this prohibition because post-1945 developments and research strongly indicate that Article 2(4) of the Charter embraces “armed” as well as “economic” force. As copiously demonstrated in the preceding pages, secondary sanctions also interfere with the well-established customary law principles of sovereignty, jurisdiction and non-intervention; and violate *jus cogens* and numerous treaties and instruments, including the UN Charter. They inflict suffering and deprivation on the innocent citizens of target states, and rob states of their right to development and self-determination.<sup>175</sup> Secondary sanctions affect states other than those exhibiting objectionable conduct, and produce ill will and friction rather than conflict resolution.<sup>176</sup> The sanctions literature also justifies unilateral sanctions

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<sup>170</sup> Council of the EU, *Guidelines*, p. 16 cited in “The Impact of Economic Sanctions”, above note 19, p. 27.

<sup>171</sup> Kern, above note 8, p. 248.

<sup>172</sup> Council Regulation (EC) No. 2271/96, 22 November 1996.

<sup>173</sup> “The Impact of Economic Sanctions”, above note 19, p. 27.

<sup>174</sup> *Democratic Republic of the Congo v Uganda*, ICJ Reports, (2005), pp. 168, 223.

<sup>175</sup> “Unilateral Sanctions and International Law: Views on Legitimacy and Consequences,” above note 2, p. 9.

<sup>176</sup> Z. Brzezinski *et al.*, “Differentiated Containment,” *Foreign Affairs*, May/June 1997, p. 28 cited in McCurdy, above note 59, p. 435.

as 'countermeasures' under the doctrine of state responsibility. However, state practice shows that unilateral sanctions possess neither the legal foundation, nor satisfy the criteria for lawful countermeasures.

While the idea of using unilateral sanctions to address human rights violations, counter terrorism and check nuclear proliferation is laudable on paper, it is frequently subject to abuse in practice. Cortright is of the view that sanctions should be applied only in a multilateral fashion, with the support and authorization of the Security Council. According to him, unilateral measures such as the US embargo against Cuba, are politically ineffective, morally questionable, and without foundation in international law.<sup>177</sup> Multilateral action tends towards greater stability, primarily because more perspectives are called upon in making decisions; and resounds with greater authority than unilateral action. The spirit of the UN Charter is one of multilateral cooperation because today, economic coercion can wreak just as much havoc on a target state as military action.<sup>178</sup> This paper does not presume that multilateral sanctions under the UN have fared considerably better than unilateral sanctions in all respects. On the contrary, it submits that the UN's collective security machinery, as structurally and operationally flawed as it may be, provides a safer, legitimate and more reliable recourse in international law enforcement than the fluctuating urges of states galvanised by national interest, and their perennial tendency to subjectively construe international law to justify same. The paper therefore concludes that no state has a legal right to unilaterally impose sanctions against another state under any guise; except in execution of Security Council resolutions pursuant to Article 41 of the UN Charter, or unless the sanctions satisfy the conditions for lawful countermeasures under the law of state responsibility. Consequently, it calls for the proscription of unilateral

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<sup>177</sup> D. Cortright, "Humanitarian Sanctions? Moral and Political Issues", *The Human Rights Brief*, (1995) available at <http://www.wcl.american.edu/hrbrief/v311/cortri31.htm> (accessed September 18, 2014).

<sup>178</sup> Wall, above note 109, pp. 606, 607, 609.

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sanctions in contemporary international law. The Security Council has the sole prerogative to maintain international peace and security, and the role of states in that regard is limited to implementing sanctions imposed by the Security Council. Even where states implement Security Council sanctions resolutions, it is the view of this paper that they are internationally responsible to the target states for measures which exceed the scope of such resolutions, or which offend *jus cogens*.