Extraterritorial sanctions in response to global security challenges: countermeasures as gap-fillers in the United Nations collective security system

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

Keywords: extraterritorial sanctions, unilateral sanctions, countermeasures, collective security, international rule of law, global security, United Nations, UN Charter

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

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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’. The use (or abuse) by some States (particularly by the United States) of restrictive measures targeting individuals and entities located outside their territory has prompted strong objections by other States. A recent example is the reaction to the reimposition by the Trump Administration of extraterritorial sanctions against foreign entities ‘traffic[ing]’ in property confiscated by the Cuban government. Among others, the European Union (EU) ‘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’. 


5. The UN General Assembly (UNGA) 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: ‘Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America against Cuba’ UNGA Res 72/4 (1 November 2017) UN Doc A/RES/72/4; Report of the Secretary-General (29 August 2018) UN Doc A/73/85.

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 to unilateral sanctions, they will have strong incentives to extend as much as possible the scope of application 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 to what extent 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 transcend 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 the concept of security 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 ‘international peace and security’ is listed as the first purpose of the UN.\(^15\) Despite its prominent place, there are, however, considerable limitations to what UN organs, such as the Security Council (UNSC) and the

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\(^11\) The very notion of ‘security’ has been described as an ‘essentially contested’ concept: Avril McDonald and Hanna Brollowsk, ‘Security’, Max Planck Encyclopedia of Public International Law (2011) para 2.


\(^15\) Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 1(1). 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 UNSC: Alain Pellet and Alina Miron, ‘Sanctions’, Max Planck Encyclopedia of Public International Law (2013) para 6.
General Assembly (UNGA), can do in order to fulfil this function, particularly, as the aftermath of the invasion of Ukraine has shown, when the threat to international peace and security originates from or with the support of one of the permanent members of the UNSC.

In such circumstances, it can be questioned whether the protection of global security should be reserved exclusively to the action of the UN 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) in response to internationally wrongful acts in the form of countermeasures. 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, 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 UNSC. Section 4 explores extraterritorial sanctions taken pursuant to recommendations made by the UNGA. By way of conclusion, Section 5 considers 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. States have great leeway in adopting measures that, although unfriendly, are not in breach of international legal obligations, such as the withdrawal of voluntary

16. See n 55.
17. See n 39.
foreign aid.\textsuperscript{20} From a legal standpoint, such acts of retorsion can be used at any time and for whatever reason.\textsuperscript{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.\textsuperscript{22} Financial sanctions, such as restrictions on international transfers and payments on current transactions (which are currently the most widely used type of sanctions)\textsuperscript{23} may also be contrary to Article VIII of the Articles of Agreement of the International Monetary Fund.\textsuperscript{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 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’.\textsuperscript{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.\textsuperscript{26} Certain economic sanctions are likely incompatible with this principle because of their intensity and the objectives they seek.\textsuperscript{27}

27. Stoll et al (n 6) 54.
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. 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. 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 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.

The most challenging of all extraterritorial sanctions from this point of view are the so-called ‘secondary sanctions’. These are measures whose effects manifest entirely outside the jurisdiction of the sanctioning State, and are designed to discourage individuals and entities of third States from engaging in business and other transactions with a State subject to primary sanctions. 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 (Helms–Burton Act), no person, wherever located and whatever their nationality, is permitted to ‘traffic’ in confiscated property that formerly belonged to US nationals or nationals of Cuba who later acquired US nationality. The geographical scope of these sanctions is virtually unlimited since the sanctions apply to ‘any person or entity’ who traffics in confiscated property. Although the US Congress attempted to justify these measures on the basis of the ‘effects theory’, no effects on the US can realistically be discerned from the economic activities targeted by the Helms–Burton Act. Secondary measures

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. Viterbo (n 24) 161; Beaucillon, ‘An Introduction’ (n 18) 6.
33. 110 Stat 790 (22 USC §6023) s 4(13).
34. 110 Stat 790; (22 USC §6023) s 4(11). 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 F Lowenfeld, ‘Congress and Cuba: The Helms–Burton Act’ (1996) 90 American Journal of International Law 419, 428.
35. 110 Stat 815 (22 USC 6081) s 301(9).
36. Eg Lowenfeld (n 34) 431; Brigitte Stern, ‘Can the United States Set Rules for the World? A French View’ (1997) 31 Journal of World Trade 5, 14–15; Ryngaert (n 1) 643–644; Beaucillon (n 9) 123.
of this kind have been met with strong objections by other States, and are widely considered unlawful.\textsuperscript{37}

When unilateral sanctions are prima facie inconsistent with international law, their justification is frequently sought in the framework of countermeasures.\textsuperscript{38} Under customary international law, the wrongfulness of measures that prima facie constitute breaches of international legal obligations may be justified when they are taken in response to prior breaches of international law to induce the initial wrongdoing State to comply with its international obligations.\textsuperscript{39} As recognised by the International Law Commission (ILC) in its Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), countermeasures are subject to substantive and procedural conditions.\textsuperscript{30} Among other things, they must be temporary and, to the extent possible, reversible.\textsuperscript{41} Countermeasures must also be proportionate: in the ILC’s words, they ‘must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question’.\textsuperscript{42} Any State resorting to such measures should first call upon the responsible State to comply with its obligations.\textsuperscript{43} It must also ensure that certain international obligations, such as those concerning fundamental human rights, are not affected by its measures.\textsuperscript{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 often not directed at the wrongdoing State, but target third States (and their nationals) 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 US might be responding to some alleged wrongful act by Cuba (over which there are serious doubts),\textsuperscript{45} it is evident that third States, such as EU

40. Crawford (n 29) 573.
41. ARSIWA (n 19) art 49(2)(3) and art 53.
42. Ibid art 51.
44. ARSIWA (n 19) art 50(1).
45. The Helms–Burton Act contains a laundry list of allegations against Cuba, including: (1) the ‘continuing violations of fundamental human rights’ and use of torture; (2) ‘illegal international narcotics trade’; and (3) threats to ‘international peace and security by engaging in acts of armed subversion and terrorism’. See 110 Stat 786–788 (22 USC §6021) s 2. 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.
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 US. 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; 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 targeted by countermeasures. 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 to a prior wrongful act of another State.

While these issues seem to preclude reliance on the framework of countermeasures as a potential justification for extraterritorial sanctions, 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. If international law could initially be regarded as ‘bundles of bilateral relations’, 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). 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). Responses to breaches of these obligations gave rise to considerable debate during the ILC’s work on codification of the law of State responsibility. Ultimately, the ILC 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 open deliberately. The question

46. Dawidowicz (n 19) 288–289.
47. 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.
50. ARSIWA (n 19) 118 (Commentary to Article 42).
53. ILC, ‘Report on the Work of its Fifty-Third Session’ (10 August 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. Article 54 of ARSIWA (n 19) 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
has, however, continued to inform scholarly debates, and recent contributions have shown growing acceptance of so-called ‘collective’ or ‘third party’ countermeasures. The ILC went as far as to recognise that, in the case of serious breaches of certain communitarian norms (ie those of a peremptory character), all States may be subject to international obligations with respect to the wrongful act.

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 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 UN framework 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 UNSC and it is generally deemed that this responsibility is also shared by other organs of the organisation, such as the UNGA. 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, the obligation of peaceful dispute settlement, the obligation to give assistance in action taken by the UN and to refrain from giving assistance to States subject to preventive or enforcement action by the UN, as well as to comply with the measures mandated by the UNSC under Chapter VII of the UN Charter.


58. UN Charter (n 15) 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 International and Comparative Law Quarterly 29.

59. UN Charter (n 15) arts 2(3) and 33.

60. Ibid art 2(5).

61. Ibid arts 25 and 48. These, being UN Charter obligations, also prevail over conflicting obligations under other agreements pursuant to art 103.
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 UN Charter, the use of individual and extraterritorial sanctions may have an essential role to play in filling some of the implementation gaps left open by the UN 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 a ‘threat to the peace, breach of the peace, or act of aggression’, the UNSC has the power to ‘make recommendations, or decide what measures shall be taken’ under Chapter VII of the UN Charter.\(^{52}\) Measures not involving the use of force ordinarily consist in sanctions such as arms embargos, comprehensive economic sanctions and ‘targeted’ sanctions, whether sectoral or aimed at particular individuals.\(^{53}\) As a matter of course, when the UNSC 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 UNSC imposed, among others, an arms embargo relating to the situation in Haiti, which is phrased in the following terms:

\[ \text{[A]ll Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to, or for the benefit of, the individuals and entities designated by the Committee from or through their territories or by their nationals, or using their flag vessels or aircraft of arms and related materiel of all types} \ldots \]^{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, Thomas Biersteker and others found that 90 per cent of the analysed UNSC sanctions were supplemented by unilateral measures once implemented at the domestic level.\(^{67}\)

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62. Ibid art 39.
64. Stern (n 36) 22.
66. Stoll et al (n 6) 17.
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 US. 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 defense article’ is subject to restrictions determined by the State Department. The International Traffic in Arms Regulations, 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’.

The so-called ‘control theory’ of jurisdiction, pursuant to which the US 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. Thus, unilateral attempts by the US to impose arms embargos on 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 UNSC resolution, 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 UNSC, 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 resolutions 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, the US Congress imposed penalties on persons investing in the oil and gas industry in Iran and Libya, and exchanging certain goods, services and technology with Libya. The extraterritorial nature of these measures was particularly exorbitant. ILSA 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’ of a jurisdictional basis under which jurisdiction could be extended beyond the territory/nationals of the US. The extraterritorial imposition of these sanctions gave rise to strong protests particularly by the EU, which enacted blocking legislation to prevent compliance by EU companies with these US measures.

Nevertheless, the reasons justifying the restrictive measures against Iran were not the same as those concerning Libya. In the case of Iran, ILSA was premised on US allegations that the Iranian government was seeking to acquire weapons of mass

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68. 110 Stat 1437 (22 USC §2778(b)(1)(A)) s 151.
69. 22 CFR, §129.2.
72. Lowe (n 37) 385.
destruction, and to support acts of international terrorism. 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. It is, therefore, no surprise that EU Member States opposed the extraterritorial imposition of US sanctions.

The case of Libya, on the other hand, was markedly different. The stated objective of ILSA was ‘compliance by Libya with its obligations under Resolutions 731, 748, and 883 of the Security Council of the United Nations’. These resolutions had been imposed by the UNSC on the basis that the Libyan government had ‘fail[ed] … to demonstrate … its renunciation of terrorism and … to respond fully and effectiv[e]ly to the requests [of prior resolutions]’. In other words, they were imposed not on the basis of a unilateral determination of illegality by the US, but on the basis of the findings of a multilateral body. The UNSC had mandated a number of restrictive measures vis-à-vis Libya for all Member States, including an arms embargo, a ban on the supply of aircraft or aircraft components and an assets freeze (but not with respect to assets derived from the sale or supply of petroleum products).

The US’s measures against Libya contained in ILSA mapped onto the first two types of UNSC restrictions by providing for penalties for the supply of items ‘contribut[ing] to Libya’s … military … capabilities’ and to ‘Libya’s … aviation capabilities’. Despite their extraterritorial dimension, there is a good argument that these two measures may have been justified pursuant to the countermeasures framework, since the result sought was to implement collective obligations under the UN Charter. A UN Member State in which companies were targeted by US measures (for instance, because of allegedly 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 subject to the same obligation to implement the UNSC sanctions. In other words, the extraterritorial reach of measures by the US 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 a gap-filler to remedy the 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 US against Cuba.

The UNSC may have mechanisms in place to determine non-compliance of a State’s obligations with the duty to implement UNSC-mandated measures. In the

74. ILSA (n 71) 1541, s 2(a).
76. ILSA (n 71) 1542, s 3(b).
79. ILSA (n 71) 1543, s 5(b)(1).
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 European Union would in principle subscribe’).
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

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case of sanctions administered by one of the UNSC sanctions committees, there may also be provisions for third party monitoring. 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. In that case, the US, 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). 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 UN Charter obligations (particularly the duty to comply with UNSC decisions) that establishes the legal interest of every Member State to take unilateral measures, under their own interpretation and at their own risk, in response to non-compliance. While certain legal systems may exclude resort to countermeasures for compliance with obligations deriving from a common institutional framework (such as in the case of the EU), it is not evident that the UN system 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 UNSC, sanctions mapping onto Chapter VII resolutions (even if expanding the territorial scope of the latter) are still aiming at enforcing the will of the UNSC. 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 the implementation of UNSC resolutions.

the UNSC. Art 14 states that the UNGA may also make recommendations for measures to be adopted in the face of non-compliance with obligations under the UN Charter. See further Oscar Schachter, ‘The Quasi-Judicial Role of the Security Council and the General Assembly’ (1964) 58 American Journal of International Law 960.

85. Gray (n 84) 372.
86. See n 126.
To be sure, unilateral and extraterritorial measures mapping onto Chapter VII resolutions are not devoid of problems. For instance, the abovementioned measures of the US against Libya went beyond what was strictly required by the UNSC resolutions in question 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 measures of the US targeted directly ‘investments that contribute[d] to the development of petroleum resources’. 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 UNSC to target third States that are not themselves in breach of obligations under the UN 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 to ensure that the unilateral measures are removed when non-compliance with the UNSC-mandated sanctions has ceased. For instance, while some of the measures taken by the US against Iran may have been justified while Iran was under UNSC sanctions, they could no longer be justified once most of the sanctions were suspended following the negotiation of the Joint Comprehensive Plan of Action (Iran Nuclear Deal). 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. When extraterritorial measures target individuals, compliance with human rights norms may also require ensuring due process and opportunities for review by a competent organ.

A final, practical obstacle may arise when the UNSC 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. It has been suggested that, in these circumstances, it would be up to the UNGA to step in and fulfil the function

89. ILSA (n 71) 1543, s 5(b)(2).
that the UNSC is unable to exercise.\(^{95}\) However, as the next section shows, the UNGA is in turn faced with considerable limitations when discharging its own responsibility. It can thus be questioned whether measures taken unilaterally by States (potentially even of an extraterritorial character) may be capable of complementing the action by the UNGA.

4 EXTRATERRITORIAL SANCTIONS MAPPING ONTO CERTAIN MEASURES RECOMMENDED BY THE UN GENERAL ASSEMBLY

Under Article 10 of the UN Charter, the UNGA has the power to make recommendations on any matters within the scope of the UN Charter. If the UNSC has primary responsibility for the maintenance of international peace and security, the UNGA can be regarded as having ‘secondary’ or ‘residuary’ responsibility.\(^{96}\) This responsibility becomes particularly crucial when the UNSC is deadlocked. In 1950, amidst the inability of the UNSC to take action with respect to the Korean War due to the Soviet veto, the UNGA adopted the famous Uniting for Peace Resolution, stating that:

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\text{[I]f 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 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}
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This resolution prompted considerable doctrinal debate concerning the extent to which the UNGA may in fact be entitled to recommend the use of force by UN Member States.\(^{98}\) There is, however, little doubt that the UNGA 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 UNSC is dealing with the same dispute or situation.\(^{99}\) The UNGA 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’s 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 UNGA in 1952.\(^{101}\) In 1961, the UNGA requested ‘all States to consider taking


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


99. UN Charter (n 15) art 12.

100. Barber (n 96) 150.

101. UNGA Res 616 (5 December 1952) UN Doc A/RES/616(VII) A–B.
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 was specified in a number of UNGA resolutions. These included breaking diplomatic relations, closing ports, boycotting South African goods and closing national airspace to South African aircraft. 103 Shortly thereafter, the UNGA began to expressly target the oil industry and urged all States to ‘[r]efrain also from supplying in any manner or form any petroleum or petroleum product to South Africa’. 104 It took several years for the UNSC to follow suit, and impose a number of binding restrictions on South Africa. In particular, UNSC Resolution 418 (1977) mandated an arms embargo and UNSC 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 UNGA, never affected the oil industry because of the joint vetoes of the US 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 UNGA would have exposed themselves to international responsibility. The problem is that, unlike the UNSC, the UNGA 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 John Halderman with respect to similar UNGA sanctions, ‘it was no doubt thought that the resulting measures would be 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 UNGA should be considered presumptively consistent with other international legal obligations of UN Member States. 108 In this sense, John 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 State was the target of the

102. UNGA Res 1598 (13 April 1961) UN Doc A/RES/1598(XV).
110. Gerald Fitzmaurice, ‘The Law and Procedure of the International Court of Justice, 1951–4: Questions of Jurisdiction, Competence and Procedure’ (1958) 34 British Yearbook of International Law 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’.
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 UNSC, third States are under no obligation to adopt measures recommended by the UNGA and, thus, there can be no implementation of their responsibility for failing to execute them.

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 ‘serious breaches of peremptory norms of international law’ (jus cogens). 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 of the ARSIWA identifies three obligations: (1) the duty not to ‘recognise as lawful’ a situation created by the serious breach; (2) the duty not to render aid or assistance in the maintenance of the situation; and (3) the duty to cooperate with other States in order to bring to an end ‘through lawful means’ the serious breach. 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. 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, 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:

> The 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.

Similarly, in the Wall Advisory Opinion, the ICJ 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

111. ARSIWA (n 19) ch III, 110–116. See also ARSIWA (n 19) 137 (Commentary to Article 53).
112. Ibid 113–114 (Commentary to Article 41).
the construction of the wall and the associated régime, taking due account of the present 
Advisory Opinion.115

According to the ICJ, the political organs of the UN could remedy the inherent vague-
ness 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 UNSC is not necessary because the obligations themselves 
stem directly from customary international law.116 The role of the UNGA and the 
UNSC is ‘one of coordination, rather than creation, 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’s recommendations in response to 
South Africa’s apartheid policies corroborate this point. Ironically, it was the US, 
one of the States that vetoed the UNSC’s ban on South Africa’s oil industry, which 
enacted extraterritorial measures to expand on UN sanctions. In 1986, the US 
Congress approved the Comprehensive Anti-Apartheid Act, a complex statute includ-
ing multiple restrictions on imports and exports from the US 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 jur-
isdiction of the United States’.120 In 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 US had a realistic claim that, by 
extending its own sanctions extraterritorially, it was implementing the secondary obli-
gations owed by all States in response to South Africa’s serious breaches of peremp-
tory 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

115. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory 
116. Some treaty law also supports this. Article VIII of the Convention on the Prevention and 
Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 
1951) 78 UNTS 277, eg, 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’: Bruno Simma, ‘NATO, the UN and the Use of 
Force: Legal Aspects’ (1999) 10 European Journal of International Law 1, 2.
117. Talmon (n 113) 113.
119. Eg 22 USC §§5051, s 301; 22 USC §§5053, s 303; 22 USC §§5055, s 305.
120. 100 Stat 1105 (22 USC §5071).
121. Various Member Countries of the Organization of the Petroleum Exporting Countries 
had autonomously implemented an oil embargo against South Africa since 1973: see Philip 
Review 415.
communitarian norms such as the secondary obligations deriving from breaches of peremptory norms can be assessed in institutional fora. Thus, a finding by the UNGA 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 prerequisite 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, 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. Yet, compared to other countermeasures of this kind, unilateral measures mapping onto recommendations by the UNGA have a stronger claim to legality given that: (1) the wrongfulness to which they respond has not been determined unilaterally by the individual sanctioning State, but by a multilateral organ representing almost the entire international community; and (2) the enforcement action is not (only) based on the calculations of the individual sanctioning State, but is coordinated by an institutional organ which, through subsequent recommendations, may further guide the action of the sanctioning State(s).

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 UN 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 their objective is to remedy the 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.

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

122. A recent example is UNGA Resolution ES-10/19, passed in the wake of the decision by the US to move its embassy to Jerusalem, with which the UNGA 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 n 55.
hangs on the power vested on each State of ‘auto-interpretation’ of international law with all its limitations.\textsuperscript{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.\textsuperscript{126} One can be sympathetic to 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 power of States to take enforcement measures can provide a more effective framework for evaluating State practice, and, ultimately, reinforce the international rule of law.


\textsuperscript{126} Omer Yousif Elagab, \textit{The Legality of Non-Forcible Counter-Measures in International Law} (Clarendon Press, Oxford 1988) 52–55; Tzanakopoulos (n 125) 117.