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ULUSARARASI İLİŞKİLER ANABİLİM DALI

EXAMINING THE LEGITIMACY OF THE SANCTIONS IMPOSED ON ZIMBABWE REGARDING INTERNATIONAL LAW

ZIMBABVE'YE UYGULANAN YAPTIRIMLARIN MEŞRUİYETİNİN ULUSARARASI HUKUK AÇISINDAN İNCELENMESİ

(YÜKSEK LİSANS TEZİ)

Matora HUPILE

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ABSTRACT

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Field **:** International Relations

Degree Awarded **:** Masters

Number of pages **:** VII + 100

Graduation Date **: …../……/2021**

Supervisor : Associate. Prof. Mehmet Halil. M. BEKTAŞ

EXAMINING THE LEGITIMACY OF THE SANCTIONS IMPOSED ON ZIMBABWE REGARDING INTERNATIONAL LAW

The use of sanctions is not a new phenomenon in the discipline of International relations. However, with the disappearance of the Cold War, Western countries increasingly started to adopt sanctions as the means to attain their foreign policy interests. The main objective of this research is to examine the sanctions imposed on Zimbabwe by the European Union (EU) and the United States of America (USA) in the context of international law. The USA crafted its first batch of sanctions on Zimbabwe in 2001 through the Zimbabwe Democracy and Economic Recovery Act (ZIDERA) and the Presidential Executive Order, which derives its legal basis from the USA statutory instrument (International Economic Emergency Powers Act (IEEPA) in 2003. On the other hand, the EU introduced sanctions on Zimbabwe utilising the Cotonou Agreement as its legal basis. In addition, the EU used the Treaty of European Union, which advocates for the Common Foreign and Security Policy (CFSP). Therefore, the focus of this research lies on highlighting the legitimacy of such sanctions on Zimbabwe, which is a member of the United Nations (UN), and yet the UN did not take any sanction measures to address such grievances as laid down by the EU and the USA. The thesis argued that unilateral sanctions imposed on Zimbabwe are illegitimate based on the principle of non-interference in the internal affairs of another state, equality of sovereign states and the International Law Commission on the Responsibility of States for Internationally Wrongful Act. The sanctions are negatively affecting Zimbabwe to carry out its duties and obligations as a sovereign state. On the same note, International Law Commission drafts are regarded as non-binding in international law.

Keywords: EU, USA, Zimbabwe, Sanctions, legitimacy and United Nations

ÖZET

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Anabilim : Ulusararası ilişkiler

Tezin Niteliği : Yüksek Lisans Tezi

Sayfa Sayısı : VII + 100

Mezuniyet Tarihi : **……/……./2021**

Tez Danışman : Doç. Dr. Mehmet Halil M. BEKTAŞ

ZİMBABVE'YE UYGULANAN YAPTIRIMLARIN MEŞRUİYETİNİN ULUSARARASI HUKUK AÇISINDAN İNCELENMESİ

Uluslararası ilişkiler disiplininde yaptırımların kullanılması yeni bir olgu değildir. Fakat Soğuk Savaş'ın sona ermesiyle birlikte Batılı ülkeler, dış politikada ulusal çıkarlarına ulaşmak için yaptırımları giderek daha fazla benimsemeye başlamıştır. Bu araştırmanın temel amacı Avrupa Birliği (AB) ve Amerika Birleşik Devletleri (ABD) tarafından Zimbabve'ye uygulanan yaptırımları bu yönüyle irdeleyip uluslararası hukuka uygun olup olmadığını tespit etmektir.ABD ilk yaptırımlarını Zimbabve'ye 2001 yılında uygulamaya başlamıştır. Bu yaptırımlarını Zimbabve Demokrasi ve Ekonomik İyileşme Yasasını (ZIDERA) ile meşru göstermeye çalışmıştır. Buna ek olarak, daha sonraki süreçte de çeşitli araçlar kullanarak bu yaptırımları arttırmıştır. Bu bağlamda, 2003 yılında, yasal dayanaklarını ABD yasal belgesinden [Uluslararası Ekonomik Acil Durum Yetkileri Yasası (IEEPA)] alan Başkanlık İcra Kararları aracılığı ile Zimbabve'ye yönelik daha fazla yaptırım kararı alınmıştır. Öte yandan AB, Cotonou Anlaşması'nı yasal dayanak olarak kullanarak Zimbabve'ye yaptırımlar getirmiştir. Ayrıca AB, Ortak Dış ve Güvenlik Politikası'nı (CFSP) savunan Avrupa Birliği Antlaşması'nı kullanmıştır. Bu nedenle, bu araştırmanın odak noktası, Birleşmiş Milletler (BM) üyesi olan Zimbabve'ye yönelik bu tür yaptırımların meşruiyetini irdelemektir. BM henuz, AB ve ABD tarafından belirlenen bu tür mağduriyetleri gidermek için herhangi bir yaptırım önlemi almamıştır. Zimbabve'ye uygulanan tek taraflı yaptırımların, başka bir devletin içişlerine karışmama, egemen devletlerin eşitliği ve Devletlerin Uluslararası Haksız Eylemden Sorumlu Uluslararası Hukuk Komisyonu hükümlerine dayalı olarak gayrimeşru olduğu kabul edilmektedir. Yaptırımlar, Zimbabve'yi egemen bir devlet olarak görev ve yükümlülüklerini yerine getirmesini olumsuz etkilenmektedir. Aynı zamanda, Uluslararası Hukuk Komisyonu taslaklarının uluslararası hukukta bağlayıcı olmadığı kabul edilmektedir.

Anahtar Kelimeler: AB, ABD, Zimbabve, Yaptırımlar, Meşruiyet ve Birleşmiş Milletler

ACKNOWLEDGEMENTS

I would like to express my sincere gratitude to my supervisor, Associate Prof Mehmet Halil M Bektaş, for his unwavering support throughout my studies. He offered constructive criticism. His guidance made this work to see the light. Besides my supervisor, I would like to thank lecturers in the department of International Relations for in-depth lectures. I really appreciate their inexorable contribution through their lectures. Important gratitude is directed to the Turkish government scholarship for funding my studies.

I also want to thank my family for their motivation and support during my studies. Special thanks goes to Monalisa Awali, Chilizani Phiri, Musa Simbili and Tinashe Chikafa, who always encouraged me to keep hitting the ground.

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ABREVIATIONS /ACRONMYS

ARSIWA	Article on Responsibility of States For Internationallly Wrongful Act
AU	African Union
CPA	Cotonou Partnership Agreement
CFSP	Common Foreign and Security Policy
EEAS	European External Actions Services
ECJ	European Court of Justice
EU	European Union
HR	High Representives
IEEPA	International Economic Emergency Powers Act
ICJ	International Court of Justice
ILC	International Law Commission
IMA	International Migration Act
IMF	International Monetary Fund
MDC	Movement for Democratic Change
NCA	National Constitution Assembly
OFAC	Office of Foreign Assets Control
RELEX	Working Party of Foreign Relations Counsellors
SADC	Southern African Development Committee
TEU	Treaty of European Union
UK	United Kingdom
UN	United Nations
USA	United States of America
UNSC	United Nations Security Council
ZANU PF	Zimbabwe African National Union – Patriotic Front
ZIDERA	Zimbabwe Democracy and Economic Recovery Act

INTRODUCTION

The powerful States and International Organisations in the World have increasingly started to use sanctions as a means to transform the attitude of targeted states. Sanctions are often used against aggressors or violators of international law because they are less risky than military intervention and usually affect the efficacy of a regime.[1] This leads to a result whereby there is an internal conflict that triggers a regime change. In the same vein, sanctions are accepted as the major instrument of foreign policy. However, the UN imposes sanctions for the purposes of maintaining peace and security. This mandate is delegated to the United Nations Security Council through the provision of the UN Charter Chapter VII.[2]

Interestingly, sanctions have become the subject of hot debate in the discipline of international law, politics, security, and trade among others. Sanctions, in general, can be imposed on a state for several reasons, including but not limited to fulfilling a policy goal, preventing or stopping violation of universally accepted norms and values.

As the use of sanctions has gained momentum in the 21st century, Zimbabwe finds itself among the countries on the sanction list of the United States of America (USA), the European Union (EU), and other powers such as Canada, Australia, and New Zealand. At the same time, Britain had also crafted its sanctions against Zimbabwe after the BREXIT in 2019. It utilised the Sanctions and Money Laundering Act of 2018.[3] However, this thesis did not discuss the sanctions that were imposed on Zimbabwe by Canada, Australia, New Zealand and the United Kingdom. It concentrates on the sanctions imposed by the EU and USA.

The sanctions imposed on Zimbabwe by the USA and EU are motivated by several reasons, including concern over the violation of human rights, suppression of democracy,

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[1]Weiss Thomas. "Sanctions as a Foreign Policy Tool: Weighing Humanitarian Impulses", *Journal of Peace Research* ,Vol 36(5),1999, p. 500, https://www.jstor.org/stable/424530 (et.15.04.2021).

[2]Burkle Frederic, "United Nations Charter Chapter VII, Article 43: Now or Never," *Harvard International Review* , Vol. 38, No. 4 , 2017, p. 26 https://www.jstor.org/stable/10.2307/26528702 (et.03.01.2021).

[3]United Kingdom Parliament, The Zimbabwe (Sanctions (EU Exit) Regulations 2019 and Anti-Money Laundering Act 2018 is conferred on an "appropriate Minister". Section 1(9)(a) of the Act defines an "appropriate Minister" as including the Secretary of State, 2019 https://www.legislation.gov.uk/uksi/2019/604/introduction/made(et.20.05.2021) .

lack of the rule of law, and radical land reform program.[4] The EU advocates for human rights and democracy in the world. Thus its foreign policy is built based on respecting human rights, fostering democracy and the rule of law.

The EU introduced sanctions on Zimbabwe using the Cotonou Agreement that governs the relationship between the Caribbean, Pacific, African and European Union and the Common Foreign and Security Policy (CSP) as its legal basis. The Cotonou Agreement has a clause that allows the EU to invoke Article 96, which gives the EU the green light to suspend funding or stop projects whenever there is suppression of democracy. The main elements of Article 96 include consultations procedure and appropriate sanctions for violating human rights, democratic tenets and the rule of law.[5] This is done in the spirit of promoting good governance structures as well as a universalism of Eurocentric standards of governance, which African leaders usually perceive as a machination of neo-colonialism.[6]

The USA implemented sanctions on Zimbabwe supported by the Zimbabwe Democracy and Economic Recovery Act (ZIDERA) of 2001, and the same act was amended in 2018. Additionally, the USA sought further action on Zimbabwe through the Presidential Executive Orders, and the USA President has been renewing the Executive Orders every year since 2003. These Executive Orders are targeted on individuals and entities to increase pressure on Zimbabwe's political leadership to reform itself.[7]

It is based on the uniqueness of the EU and USA sanctions that motivated the researcher to interrogate the legitimacy of these sanctions imposed on Zimbabwe in the context of international law. Unlike other researchers such as Jan Grebe (2010), and Hove Mediel (2012) concentrated on the effectiveness and influence of sanctions imposed on

[4] Amanuel Yokabel, "The effect of International Organised punishment of foreign policy,The effect of sanctions imposed against the government of Zimbabwe 2002-2020." Unpublished thesis,Linnaaus University Sweden, 2020 , http://www.divaportal.org/smash/record.jsf?pid=diva2%3A1533882&dswid=4805 (et.17.09.2021)

[5] Dipama Samiratou and Emel Parlar, "The Effectiveness of Political Conditionality as an Instrument of Democracy Promotion by the EU: Case Studies of Zimbabwe, Ivory Coast and Niger," *Perceptions: Journal of International Relations*, Vol 20 (1), 2015 pp. 109-132 https://dergipark.org.tr/en/pub/perception/issue/48962/624617 (et.20.05.2021)

[6] Taruberekera Brighton, "The Lion - Bear Allegory: Impact Of Sanctions On Zimbabwe And The Related Neo-Imperial Narratives," *Journal of Development*, Vol 3 (13), 2021 ,p. 95, https://digitalcommons.kennesaw.edu/yaljod (et.15.09.2021)

[7] Ibid

Zimbabwe as a tool to change its policy and advance regime change agenda.[8] This research examines the legitimacy of the EU, which is not a regional body Zimbabwe belongs to, had the legal impetus to enact trade and political sanctions. At the same time, interrogating the legitimacy of the autonomous sanctions imposed by the USA. Therefore, the gist of the research lies in highlighting the legitimacy of such sanctions on a state which is a member of the UN and yet the UN did not take any "correctional action' to address such grievances as laid down by the EU and the USA.

The thesis examined the legitimacy of sanctions imposed on Zimbabwe regarding international law using the qualitative research method. This research adopted the literature and judiciary review techniques. The research further utilised an analytical and explanatory approach to examine the legitimacy of sanctions imposed on Zimbabwe in international law.

This thesis comprises three chapters, with chapter one providing definitions and explanations of sanctions in international law. The two broad categories of sanctions in international relations are defined in this chapter (autonomous and universal sanctions). This thesis has chosen to refer to the sanctions in their different forms and terms as "sanctions". Chapter one further discusses the supposed legal framework which justifies the adoption of sanctions in international law.

Furthermore, Chapter two focuses on the USA and EU Sanctions. The general political and legal basis of the USA and E U sanctions are discussed and explained in greater detail. For instance, the USA President is given the powers by the USA laws to declare Executive Orders in the interest of the USA. On the other hand, the USA Congress has the power to table bills to impose sanctions on the USA adversaries and enemies, be it entities, states or individuals who threaten the USA foreign policy or interests. The Actors in the USA sanctions are provided, such as the Office of the Foreign Assets Control and State department. This chapter also discusses the legal basis of the EU sanctions supported by the Cotonou Agreement and the Treaty of European Union

[8] Hove Mediel, "The Debates and Impact of Sanctions: The Zimbabwean Experience," *International Journal of Business and Social Science,* Vol. 3 No. 5, 2012, pp .72-84, https://pdf4pro.com/amp/view/the-debates-and-impact-of-sanctions-the-zimbabwean-59fbde.html (et.05.02.2021), also see Grebe Jan, "And They Are Still Targeting: Assessing the Effectiveness of Targeted Sanctions against Zimbabwe," *Africa Spectrum*, 45(1),2010, pp. 3-29, https://journals.sub.unihamburg.de/giga/afsp/article/view/246.html

(Common Foreign and Security Policies). Moreover, it provides the critical players in implementing EU sanctions.

Chapter three discusses the background and reasons behind the imposition of sanctions on Zimbabwe by the EU and the USA. At the same time, the thesis examines the legal basis of those sanctions in the EU and USA laws. It proceeds to offer the evaluation and analysis of the sanctions imposed on Zimbabwe regarding international law. It is also in this chapter that the researcher provides the conclusion

CHAPTER ONE

SANCTIONS IN INTERNATIONAL LAW

1 SANCTIONS

In the context of International law, sanctions have been defined or explained in two categories; in the first category, sanctions are defined as the restrictive measures taken by the injured state or states for self-help. The second group comprises the restrictive measures implemented by the international community or organisation to restore the international order or peace destroyed by the illegal acts of an international legal subject.[9] International organisations or institutions impose sanctions acting as the international custodian of the international order.[10] Therefore, sanctions are generally viewed as coercive measures in the sense that the targeted state is deprived of accessing benefits, rights, or privileges.[11]

Moreover, according to the International Law Commission, the term sanction should only be used for the measures taken by international institutions, not limited to only the United Nations as a reaction to breaching of the international law. Asada (2020) defined sanctions in international law as coercive measures implemented after a thorough assessment by the proficient social organ which is legally authorised to take actions for the society controlled by the legal system.[12]

On the other hand, sanctions are defined as a tool or instrument used by international organisations, state or many states to influence another state's behaviour or policies in the international arena.[13] Sanctions are also viewed as an economic power utilised by powerful countries to advance foreign policy objectives.[14] In the international

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[9] Lale, Berat, Akkutay, "Birleşmiş Milletler Andlaşması Çerçevesinde Ekonomik Yaptırımların Hukuki Niteliği ve Yargısal Denetimi." *TBB Dergisi*, 111, , 2014, pp.411 – 446 https://app.trdizin.gov.tr/publication/paper/detail/TWpJeE5qUTRPQT09 (et.18.01.2021).

[10] Pellet Alain and Alina Mıron, "Sanctions", in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, para. 5, online edition, (www.mpepil.com (et.04.03.2021).

[11] Lale Akkutay Berat, op.cit.

[12] Asada Masahiko, Legal considerations. Definition and legal justification of sanctions, In Masahiko Asada (Ed), *Economic Sanctions in International Law and Practice*. Routledge,2020.

[13] Portela, Clara, "Where and why does the EU impose sanctions?"*Politique européenne*, 3 (17),.2005, pp. 83-111 https://doi.org/10.3917/poeu.017.0083 (et.14.11.2020).

[14]Delevic, Milica, **"**Economic Sanctions as a foreign Policy Tool: The case of Yougoslavia"**,** *The International Journal of Peace Studies*: Vol 3 (11), 1998 https://www.gmu.edu/programs/icar/ijps/vol3_1/cover3_1.htm(et.25.01.2021).

arena, states pursue different foreign and security policies. Therefore, states usually implement sanctions as a way of protecting their interests. Sanctions are capitalised by a state or batch of states against individuals or states because they are generally regarded as the major actors and whose activities are governed by international law. On the other side, Kozhanov (2011) considered sanctions to be a punitive measure.[15] Although this view is highly debatable, economic sanctions are not always used in the spirit of punishing the offenders of international law but also as the instrument to advance national policies and interests.[16] This shows that states in the international system have the desire to interfere in other states territorial affairs one way or the other.

The uniqueness of targeted sanctions is its discriminatory nature. The idea is to apply economic force towards the adversaries and those who break international law. Sanctions are applied selectively to government officials, terrorist leaders, and business persons, among others, without affecting the entire population. Kofi Anan, U.N Secretary-General, viewed the targeted sanctions as a means to reduce the devastating outcomes of the economic sanctions on the general citizens.[17]

1.1 **GENERAL CATEGORY OF SANCTIONS**

Sanctions in the World are generally recognised in different forms. The sanctions in international affairs are categorised according to the motive, nature, significance, and number of states involved in the implementation. There are two general categories of sanctions that is universal and unilateral sanctions. On the imposition, sanctions are likely to be used by a single state, group of states, international institutions, and among other non-state actors.

It is pertinent to state that the UN Charter and International Law Commission do not regard sanctions as "sanctions", but rather it regards them as counter measures. However, this thesis regard sanctions in their generality term. The legal provision concerning unilateral sanctions does not accept the term sanctions, but rather it referred

[15]Kozhanov, Nikolay, "U.S. Economic Sanctions Against Iran: Undermined By External Factors:" *Middle East Policy*, Vol. 18, Iss. 3, 2011. https://021030e7u-y-https-onlinelibrary-wiley-com.proxy.uludag.deep-knowledge.net/doi/epdf/10.1111/j.1475-4967.2011.00504.x (et.06.04.2021).
[16] Delevic, Milica, op cit
[17]Anan Kofi, *Secretary-General Reviews Lessons Learned during Sanctions Decades in Remarks to International Peace*, Press Release, 2001https://www.un.org/press/en/2000/20000417.sgsm7360.doc.html (et.07.01,2021).

them as countermeasures. Even though the legal provision has not used the term sanction, political and international law literature prefers to call them countermeasures.[18] Therefore, it is based on international law literature that the terms sanctions and countermeasures will be used interchangeably. At this point, it is necessary to define universal and unilateral sanctions.

1.1.1 **Universal/ Comprehensive Sanctions**

Universal sanctions are defined as collective measures enacted by an organisation on behalf of the international community in the essence of responding to actions or behaviour that threaten international peace and security.[19] Based on the nature of universal sanctions, the UN in principle, is imposing them. Further, the UN Charter does not define the term sanction explicitly, but rather it uses the term measures.[20] However, universal sanctions are rather viewed as measures taken by the United Nations Security Council (UNSC) under Chapter V11 to safeguard or maintain peace and security around the world. The universal sanctions are implemented by all states that are signatories of the U.N Charter.[21] The member states are willing to cooperate in the implementation of sanctions.[22] The decision to impose the sanctions is made after considering how far the international peace and security has been threatened or violated. Under the same notion, the international community will set measures to be taken in the interest of the World. These measures include freezing assets, interruption or suspension of diplomatic relations, and financial and trade restrictions.[23]

The use of universal sanctions is usually traced back to the establishment of the League of Nations. Under the provision of the League of Nations, sanctions were employed to punish and enforce the order in the international system. In short, the League

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[18]Allen Susan Hannah and David J Lektzian, "sanctions A blunt instrument?", *Journal of Peace Research* 50(1), 2013, pp. 121-135 https://doi.org/10.1177/0022343312456224 (et.17.04.2021)
[19] Schrijver, N, "The Use of Economic Sanctions by the UN Security Council: An International Law Perspective" in H.G. Post (ed.), *International Economic Law and Armed Conflict* 1994, p. 125.
[20] Asada Masahiko, op.cit
[21] Lale Akkutay Berat, op.cit
[22] Drezner Daniel, "Bargaining, Enforcement, and Multilateral Sanctions: When Is Cooperation Counterproductive?" *International Organization*, vol 54(1), 2000, pp.73-102, https://web.stanford.edu/class/ips216/Readings/drezner_00.pdf (et.23.02.2021)
[23] Alberto Marco, Velásquez Ruiz, "International Law and Economic Sanctions imposed by United Nations' security Council: Legal implications in the ground of Economic, Social and Cultural Rights" *Int. Law: Rev*. vol 21, 2012, pp 223-254, http://www.scielo.org.co/scielo.php?script=sci_abstract&pid=S1692-81562012000200008 (et.20.12.2020)

of Nations sanctions were introduced as an international law enforcement instrument.[24] Interestingly, the League of Nations pointed out that security and peace can be achieved through collective sanctions. The League of Nations Covenant Article 16 highlights that if a state acts aggressively and goes to war disobeying Article 12, 13 or 15 of the Covenant, it will be viewed as declaring war against all the countries under the League of Nations. Under the Covenant, the member states are required to take measures such as blocking financial relations, including preventing all the trade and financial transactions involving the nationals of the targeted state.[25] However, the League of Nations didn't use the word sanctions explicitly but rather it advised states to impose substantial penalties such as trade and financial restrictions against members who break the covenant.[26]

The Universal Sanctions are prone to fail to meet their intended objectives because not all members are prepared to sacrifice the gains from the targeted state. Even though the Security Council obtains its legality from the United Nations Charter, other states still invade the sanctions. In principle, states are supposed to be abided by the UNSC's decisions or resolutions, but the universal sanctions' implementation depends on the member state's willingness and commitment[27]. However, universal economic sanctions are generally considered to be legitimate, and at the same time, they are adequate enough to attain the intended results.[28]

After World War II, the policymakers were very concerned about peace and security matters. Based on this backdrop, economic sanctions were embraced as a measure to respond to states that violate or threaten international peace and security. Policymakers, politicians and other statesmen blamed the League of Nations for its failure to put up a strong mechanism that could have guaranteed peace and security. The League of Nations used coercive measures, both military and non-military measures, as a mechanism for handling security and peace-related problems. After the League of Nations

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[24] Taher, Othman, Maged , Economic Sanctions In International Law: A legal Study of the Practice, *ProQuest Dissertations and Theses;* 1982; ProQuest Dissertations & Theses Global, p. 40. https://proxy.uludag.deep-knowledge.net/MuseSessionID=021090i0i/MuseProtocol=https/MuseHost=search.proquest.com/MusePath/pqdtglobal/docview/303216091/D4BC516539DF4A20PQ/1?accountid=17219 (16.12.2020)

[25] League of Nations Covenant, Article 16

[26] ibid

[27]Doxey Margaret, "International Sanctions in Theory and Practice", *Journal of International law*. Vol 15, 1983, pp. 273-288, https://scholarlycommons.law.case.edu/jil/vol15/iss2/5 (et.20.02.2021)

[28] ibid

collapsed, the U.N. adopted the sanctions (coercive measures) through the provision of the UN Charter Chapter VII for matters which put peace and security at risk.[29]

1.1.2 Unilateral Sanctions

Unilateral sanctions are generally deemed as the economic measures or coercive measures adopted by a state against another in order to achieve foreign and security policies.[30] In many instances, unilateral sanctions are usually implemented by a State as a way of retaliation, reprisal or retorsion.[31] A group of states may implement unilateral sanctions through regional cooperation. Unilateral sanctions can be imposed by a single or many states. Still, multilateral sanctions may be regarded as significantly unilateral, considering that they are imposed by states sharing common values, opinions, and interests.[32] Generally, superpowers have economic powers to manipulate situations and events to their own favours or interests.

However, unilateral sanctions are not only imposed for self-interest but also used as coercive measures to solve the World's problems, such as enhancing human rights, advancing democracy, and fighting terrorism.[33] It is appropriate to point out that the EU and the USA have been at the forefront of imposing unilateral sanctions against different countries.[34] The USA has implemented sanctions on Zimbabwe, Sudan, Haiti, Venezuela, and Iran, among others. More importantly, the USA uses the national legislation to sanction countries that are against their interests, for example, it specifically passed the Zimbabwe Democracy and Economic Recovery Act (ZIDERA) to sanction Zimbabwe. At the same time, Regional organisations such as the EU have a well-detailed legal framework that allows it to impose sanctions on states that threaten their foreign and security policy (Common Foreign and Security Policy CFSP).[35] Interestingly, the EU

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[29]ibid

[30] Rahmat Mohamad ,"Unilateral Sanctions in International Law: A Quest for Legality," in Ali Z. Marossi, and Marisa R. Bassett (ed), *Economic Sanctions under International Law, Unilateralism, Multilateralism, Legitimacy, and Consequences*, The Hague, 2015, https://link.springer.com/book/10.1007/978-94-6265-051-0 (et.20.11.2020)

[31] Ibid

[32] ibid

[33] Afriyie Frederick Appiah & Jisong Jian, "An Investigation of Economic Sanctions and Its Implications for Africa," *Journal of Politics and Law*; Vol. 11, No. 3; 2018 https://doi.org/10.5539/jpl.v11n3p74 (et.07.02.2021)

[34] ibid

[35] Giumelli Francesco, "How EU sanctions work: a new narrative", *EU Institute for Security Studies Chaillaot Papers*,2013, *https://www.i ss.europa.eu/sites/default/files/EUISSFiles/Chaillot_129.pdf* (06.04.2021)

member states are required to obey the decisions of the European Council. The E.U member states have the legal obligation to be abided by the resolutions of the European Council.[36] However, some of the unilateral sanctions are utilised for the same reason in which U.N employs sanctions to member states because the U.N is considered to be too slow in the execution of the matters which need a quick response.[37]

The unilateral sanctions give problems to the international community's attempts to create a robust and equitable multilateral, non-discriminatory world trading system. They are a stumping block to the strength of international trade.[38] Unilateral sanctions are meant to promote self-interests, unlike the universal sanctions which are binding to UN member states [39] In most cases, they affect how world economic and banking systems operate because states and companies avoid dealing with a sanctioned state because of the fear of persecution. When the economy's fundamental aspects are affected, even the general population is not spared from the suffering. The U.N Commission on Human Rights once highlighted that unilateral sanctions can be considered as a type of collective punishment that is inconsistence with the principles of justice, fairness as well as the fundamental human rights. The sanctions that position the right to life, suitable food, and health care in danger are unacceptable because these are universal rights recognised as part of the general international law's jus cogens.[40]

For the past decades, the United Nations member states have been expressing concern over the imposition of unilateral sanctions that would establish or facilitate illegal meddling in a member State's territorial administration. Therefore, in the 1960s, the sovereignty principle had been repeatedly discussed in the United Nations General Assembly, which led to the 1965 declaration. In the same spirit of solving the problems caused by the acrimonious relations between the states, the General Assembly came up

[36]European Union, *Restrictive measures (sanctions)An essential tool through which the EU can intervene where necessary to prevent conflict or respond to emerging or current crises* https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions_en (et.03.04.2021)
[37] Portela, Clara, op.cit
[38] Caruso Raul, "The Impact of International Economic Sanctions on Trade An empirical Analysis", *European Peace Science Conference*,2013, https://econwpa.ub.uni-muenchen.de/econ-wp/it/papers/0306/0306001.pdf (et.10.03.2021)
[39] ibid
[40] UN General Assembly, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131(XX), U.N. Doc. A/RES/20/2131 https://legal.un.org/avl/pdf/ha/ga_2131-xx/ga_2131-xx_e.pdf (et 21.10.2020)

with the Friendly Relations and Cooperation Declaration of 1970 and 1981. More interestingly, all of these declarations address and emphasise the illegitimacy of the imposition of economic sanctions. However, the United Nations General Assembly resolutions do not establish binding legal obligations on the member states but rather they illustrate the prevailing customary international law or assist in making necessary reforms and improvements.[41]

It should be highlighted that states and multinational institutions capitalise on unilateral sanctions for their common interests, such as implementing common foreign and security policies.[42] For example, during the cold war, there was a bipolar ideological conflict between Eastern and Western powers. Many countries were aligned to two major ideological blocs, and sanctions were also adopted as a method for achieving foreign policy and advancing diplomacy, for example, the USA imposed the sanctions on Cuba for security and foreign policy motives. Remarkably, the USA's message to other states is that they should choose either Cuba or the USA, but they cannot do business with both.[43] Regional organisations also have the capacity and legal justification for utilising the economic sanctions. European Union stands out to be one of the regional organisations that have imposed many economic sanctions.

1.2 TYPES OF SANCTIONS IN THE INTERNATIONAL SYSTEM

The sanctions are implemented through different methods and ways. The sanctions are generally grouped into various groups, such as trade sanctions, financial sanctions, and development aid sanctions.

1.2.1 Economic Sanctions

Most of the sanctions in the international arena are accepted as economic sanctions. Economic sanctions include the imposition of financial sanctions, trade restrictions and embargoes among others. Based on the close analysis, one would argue

[41] United Nations, International Law Commission Sixty-ffth Session,*First Report on the Formation and Evidence of Customary International Law*. Geneva, 6 May-7 June and 8 July-9 August 2013 https://legal.un.org/ilc/documentation/english/a_cn4_659.pdf

[42] Henderson J. Curtis, "Legality Of Economic Sanctions Under International Law: The Case Of Nicaragua," *Washington and Lee University School of Law*, Volume 43 | Issue 1, 1986, https://scholarlycommons.law.wlu.edu/wlulr/vol43/iss1/9/ (et.17.11.2020)

[43] Sanchez Omar, "The Sanctions Malaise: The Case of Cuba", *International Journal* , Vol. 58, 2003, pp. 347-372,https://www.jstor.org/stable/40203845 (et.27.12.2020)

that economic sanctions stand on their own due to their characteristics and nature.[44] These characteristics encompass trade barriers, tariffs, restrictions on financial transactions and among others. The economic sanctions are not usually implemented only for economic reasons, but they are employed for political, military and social leverages.

The significant reason behind economic sanctions is to force the targeted state to amend its behaviour and comply with norms. Arguably, also the objective of economic sanctions is to assist in limiting the resources needed to pursue unacceptable activities, for example, sanctions imposed on Iran are meant to make it hard for the government to accumulate funds to finance the nuclear project. The economic sanctions are used as punishment and coercion, rebuke, and symbolical effects.[45] However, the punitive disposition of sanctions is still a subject of hot debate, as authors of sanctions employed by the UN, EU and USA, among others, have been arguing that sanctions are preventive[46], but the reality has been showing a different story, for example, sanctions led to the violation of fundamental rights of the general population by making it hard for them to access the right to health, education among others.[47] Simultaneously, economic sanctions are sometimes regarded as the foreign policy instrument because they facilitate the sender state to pursue its security and foreign policy. For example, the European Union uses sanctions for foreign and security policy.

1.2.2 Trade sanctions

Trade sanctions involve restricting or preventing the flow of goods and services, both imports and exports.[48] Trade restrictions are either unilateral or universal sanctions. In trade sanctions, the imposing state can actively block goods from the targeted country.

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[44] United Nations Security Council, Sanctions https://www.un.org/securitycouncil/sanctions/information (et.12.03.2021)
[45] Alexander Kern, *Economic Sanctions: Law and Public Policy*, Hampshire: Palgrave, MacMillan, 2009 p.10
[46] ibid
[47] Ilieva Jana, Aleksandar Dashtevski, and Filip Kokotovic. "Economic Sanctions in International Law". *UTMS Journal of Economics* Vol 9 (2), 2018 , pp.201–21 https://utmsjoe.mk/files/Vol.%209%20No.%202/UTMSJOE-2018-0902-09-Ilieva-Dashtevski-Kokotovic.pdf (et.06.04.2021)
[48]Miyagawa Makio, *Do economic sanctions work?* , London: Macmillan Press, 1985, DOI 10.1007/978-1-349-22400-5

At the same time, trade sanctions may be passive because the imposing state can stop exporting its goods to the targeted state.[49]

Trade sanctions are very complicated and complex on the matter of exports and imports control. The export control has a direct effect on the targeted State's economy, while import control influences indirectly.[50] Implementation of imports' control is generally not complicated and complex, although the targeted country may still access the market by using the third party country. The arrangement in which a third party country is involved is referred to as a triangular purchase arrangement.[51] However, this arrangement is only viable when the third country doesn't allow any extra-territorial applications of laws in its domestic jurisdictions. The use of the third party is more pervasive with unilateral sanctions than with universal sanctions.[52]

1.2.3 Financial Sanctions

The world has been globalised, states depend on each other in terms of trade, investments, and banking system, among others. For a state to build a robust economy, foreign development capital from other countries and multilateral financial institutions is required. Therefore, financial sanctions are meant to block access to financial capital.[53] There are many development capital facilities globally not limited to credit, exchange reserve, sale of bonds, and others. However, when financial sanctions are imposed, the targeted state will cease to access foreign capital. Many techniques such as refusing to give agreed credit lines, blocking access to international loans, and freezing assets are used to implement financial sanctions. The financial sanctions are implemented through

[49] Hailu Thomas, *The issue of legal validity of using economic sanction to enforce human rights*, unpublished thesis,University of George, School of Law, 1997, https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1196&context=stu_llm (et.06.04.2021)
[50] Yang Jiawen, Hossein Askari , John Forrer & Hildy Teegen, " U.S. Economic Sanctions: An Empirical Study," *The International Trade Journal*, vol 18, 1, , 2004 , pp. 23-62 https://doi.org/10.1080/08853900490277341 (et.04.02.2021)
[51] Hailu Thomas op.ct
[52] Alexander Kern, opcit
[53]Rudolf, Peter, "Financial Sanctions in International Relations," Stiftung Wissenschaft Und Politik, Research Paper, Berlin 2007 file:///C:/Users/user/Desktop/legality%20of%20sanctions/Financial%20Sanctions%20in%20International%20Relations%20PETER%20Rudolf.pdf (et.21.02.2021)

working hand in glove with multilateral financial institutions, including but not limited to International Monetary Fund (IMF), and World Bank.[54]

1.2.4 Development Aid sanctions

Third World countries depend heavily on foreign aid and international donors. Based on the point that third world countries depend on foreign aid, denying them access to foreign assistance is a blow that can cause untold suffering to the general population and shrink their financial budgets.[55] The effects of these sanctions, in most cases, depends on the extent to which the targeted country has been depending on the foreign aid or the level to which the aid has been contributing to its national economy.

After the end of the cold war, foreign aid gained momentum in the field of international relations. In most cases, western powers have been using foreign assistance to advance their foreign and security policies. Foreign aid is granted to enhance foreign and security policies, humanitarian attitudes or settle political and diplomatic interests. The aid enables a state to take instructions from the donor state, at the same time supporting it on the international stage.[56] For example, during the cold war, two ideological blocs emerged, Capitalists and Communists. These two blocs used foreign aid to attract ideological allies. Moreover, the EU uses foreign aid to implement its foreign policy. On the same note, the EU suspends foreign aid where there is allegation relating to violating human rights and democracy.[57]

1.2.5 Other sanctions, Retorsion and Reprisals

Retorsion is understood as the measure implemented by the state as a response to an unfriendly behaviour of another state. In most cases, States retaliate to unfriendly action by another state, which makes its interests and legal obligations hard to pursue. The retorsion may damage the economy, social and reputation without breaching

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[54] Ogbonna, C. "Targeted or Restrictive: Impact of U.S. and EU Sanctions on Education and Healthcare of Zimbabweans." *An International Multi-Disciplinary,* 11(3), 2017, pp.31-41. http://dx.doi.org/10.4314/afrrev.v11i3.4 (et.22.05.2021)

[55] Jeong Jin Mun, "Economic sanctions and income inequality: impacts of trade restrictions and foreign aid suspension on target countries," *Conflict Management and Peace Science* 2020, Vol. 37(6), 2020, pp.674–693, https://doi.org/10.1177/0738894219900759 (et.06.04.2021)

[56] Palmer Glenn, Scott B. Wohlander and T. Clifton Morgan, "Give or Take: Foreign Aid and Foreign Policy Substitutability", *Journal of Peace Research* ,Vol. 39 (1), pp. 5-26 https://www.jstor.org/stable/425255 (et.21.12.2020)

[57] Ibid

international law.[58] The retortive measure usually takes different forms such as trade restriction, encouraging third countries' business companies to desist from doing business with the targeted country, suspensions of all forms of aid or economic aid. Therefore, retorsion is a legal action that doesn't want legal justification in international law. For instance, the USA, Britain, Turkey and other countries have no legal obligation to allow foreign nationals to visit their countries. Hence, the USA can ban certain people from visiting their country without breaching international law.[59]

States are free to respond to unfriendly actions taken by another state. The measures are implemented for the purposes of normalisation of the relations. Arguably, states are free to take self-help actions, especially when the action can restore previously damaged relations.[60] The retorsion is also implemented as a corrective measure meant to enhance equality and restore fairness between the states.[61] Reciprocity between states can help to see whether fairness and equality have been restored between the disputing countries.

Reprisals

The reprisal sanctions are imposed on the targeted state because of the violation of international law. The justification for the implementation of the reprisal sanctions is based on the breaching of international law.[62] At the same time, it should be highlighted that the sender should implement reprisal when the retorsion measures have failed to bring desired results. The reprisal is supposed to be imposed in relation to the crime that has been committed. Arguably, the targeted state has to be warned before the reprisals are implemented. In the event that the targeted state does not obey the warning, then the reprisals are implemented.[63] Also, the most important point is that once the targeted state has ceased doing the act that motivated the sanctions, then the reprisal has to be

[58] Alexander Kern, op.cit
[59] Tzanakopoulos Antonios, State Responsibility for "Targeted Sanctions, *Journal of International Law*, vol.113, pg 134-139, 2019 https://www.cambridge.org/core/services/aop-cambridge-core/content/view/FDE9358D2755854C5C5A57FBC0A702FF/S2398772319000229a.pdf/state_responsibility_for_targeted_sanctions.pdf (et. 17.03.2021)
[60] Alexander Kern, op.cit
[61] International Law Commission (ILC), *Draft articles on responsibility of States for internationally wrongful acts, with commentaries* (ILC Yearbook 2001) p. 128

[62]Shaw Malcolm, *International Law,* Cambridge University Press, 6th Edition, 2008 p. 1129 file:///C:/Users/user/Downloads/International_Law_6th_Edition_2008_Malco.pdf (et.23.12.2020)
[63] Ibid, 1129

terminated with immediate effect by the competent authority after full assessment and evaluation.[64]

Arguably, the reprisals are not justified during the times of peace based on the general provision of the U.N Charter, which prohibits it. At the same time, Non- armed reprisals are not allowed or justified when the targeted country meets the conditions of peace or stops breaching international law.[65] The Geneva Convention is very clear on forbidding reprisals, for instance, against prisoners of war, even property.[66]

2. **THE LEGAL FRAMEWORK OF SANCTIONS IN INTERNATIONAL LAW**

2.1 SANCTIONS UNDER UN FRAMEWORK

In international law, universal, collective or multilateral sanctions are implemented through utilising the Chapter VII of the U.N. Charter. In this framework, the UNSC has the primary obligation or responsibility to ensure peace and security in the international arena.[67] Therefore, UNSC is allowed to impose sanctions on the state that is threatening peace and security or against a state which is using force or aggression against an independent state.

The UNSC sanctions are coercive in nature, at the same time binding on member states.[68] The UNSC is clearly granted by the provision of the UN Charter the power to decide whether an action by a member state is a threat to international peace or a violation of peace. However, the international community has been against these sanctions, particularly third world countries, even though there is a consensus that these sanctions are implemented to enhance or maintain peace and security.[69] The international community is worried about the point that collective sanctions are likely to bring untold suffering to the civilian population.

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[64] Dinstein Yoram, *The Conduct of Hostilities under the Law of International Armed Conflict* Cambridge University Press 2004, p. 220

[65] Brownlie Ian, Principles of Public International Law (Oxford University Press, 7th Edition, 2008, p 466 file:///C:/Users/user/Downloads/Brownlie%E2%80%99s%20Principles%20of%20Public%20International%20Law%20by%20James%20Crawford%20(z-lib.org).epub.pdf (et.06.02.2021)

[66] 58 International Committee of the Red Cross, 'Rule 145. Reprisals' https://ihl-databases.icrc.org/customaryihl/eng/docs/v1_rul_rule145 (et.27.10.2020)

[67] United Nations. Charter, Article 24. https://treaties.un.org/doc/publication/ctc/uncharter.pdf (30.11.2020)

[68]Henderson Curtis op.cit , p.180

[69] Alexander Kern, opcit

It should be highlighted that when collective sanctions or universal sanctions are imposed, it is still unacceptable for an organ such as the UNSC to breach the fundamental human rights of the whole population because of the decision taken under Chapter VII of the U.N. charter.[70] However, there are situations in which collective sanctions are considered to have violated human rights, for instance, when citizens are indiscriminately targeted to influence the targeted State's political policies or behaviour. Collective sanctions or universal sanctions are still considered permissible in international law, even though their impact on the civilian population is too high.

2.1.2 Article 2 of the UN Charter and Sanctions

It should be noted that the United Nations Charter contains the modern codification of the fundamental principles, which are the bedrock for safeguarding and restoring peace and security in the international arena.[71]Article 2 of the U.N. Charter is very clear about forbidding the states from meddling in the internal affairs of other states. It is this article that provides respect to the principle of sovereignty and territorial integrity. Article 2 (4) highlights that states that are members of the UN must interact peacefully without adopting the use of force or threat in their relations. Using force or threat in the interaction is regarded as unacceptable because it is against the fundamental principles of territorial integrity and political independence.[72]

Interestingly, applying Article 2 of the U.N Charter on autonomous or unilateral sanctions is questionable based on legality and justification. Article 2 subsection 4 of the U.N Charter highlights that states are supposed to avoid using force or threat against an independent or sovereign state in a way that is not accepted by the general principles of the U.N.[73]

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[70] Kochler Hans, The United Nations Sanctions Policy and International Law, Turkish Year Book vol 21 1995, 1995, pp. 3–17 https://dspace.ankara.edu.tr/xmlui/bitstream/handle/20.500.12575/65444/8724.pdf?sequence=1&isAllowed=y (et.06.04.2021)

[71] Larson & Malamud, "The United States, Pakistan, The Law of War and The Legality of The Drone Attacks", *Journal of International Business & Law*. Vol. 10, 2011, p. 1, 4

[72] Charter of the United Nations Art. 2(4) https://treaties.un.org/doc/publication/ctc/uncharter.pdf "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or any other manner inconsistent with the Purposes of the United Nations."

[73] Ibid

In contrast, economic sanctions are not regarded to be in the same category concerning the use of force. Therefore, one has to note that Article 2 (4) is viewed as relevant in understanding the fundamental principles of non-interference in another state's governance or affairs.[74] The purpose of Article 2(4) is to safeguard the status quo of states in the international arena. This can be understood in terms of maintaining and protecting sovereign states and protecting territorial integrity based on the principle of non-interference. On this account, Article 2 (7) highlights that anything which is not covered by the provision of the UN Charter will not be regarded as a legitimate basis to authorise UN intervention.[75]

It is significant to highlight that unless the UNSC is acting through the provision of Chapter VII, it is required to refrain from meddling in the domestic affairs of an independent state. The independent state may interfere in the domestic affairs of another state for self-defence as provided under Article 51 of the U.N Charter.[76] However, it should be highlighted that self-defence in regard to economic sanctions is moot, particularly, on whether the state can implement sanctions or oppose them in the pretext of self-defence. Arguably, considering the implementation of unilateral sanctions, the answer is very debatable because unilateral sanctions are implemented in order to advance a foreign policy, at times the right to self-determination.

2.1.3 Application of sanctions through Chapter VII of the UN CHARTER

It is pertinent to state that Chapter VII grants the UNSC authority to take actions on matters perceived to be a threat to international peace and security. More interestingly, the UNSC has the power to decide how far international peace and security has been affected or threatened by the state's behaviour. If a matter is considered to be a threat to international peace, then sanctions are legitimately imposed. The UNSC usually has the freedom to choose how the sanctions will be applied.[77] However, the language that has been used is ambiguous, particularly on the freedom of the UNSC to choose the nature of

[74] Szasz Paul, 'The Law of Economic Sanctions', *International Law Studies*, vol 7, 1998, p.456. https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1602&context=ils (et.27.12.2020)
[75] Charter of the United Nations Art. 2(7) https://treaties.un.org/doc/publication/ctc/uncharter.pdf (
[76] Ibid, Article 51
[77] Kochler Hans, op.cit , p. 9

the sanctions to be adopted. Although, Chapter VII has made it possible to move from the previously more comprehensive sanctions to implementing the targeted sanctions.

The UN Charter's motive is to create a rapid and effective intervention mechanism that can protect peace and security. Therefore, the UNSC is given discretionary powers within the context of Chapter VII.[78] The UNSC decides for itself how peace is threatened and what situations threaten peace. There is no explanation on this subject in the UN Charter. Therefore, the UNSC determines action or event that threatens international peace and security.[79]

In the event that the UNSC decides that peace has been threatened, it is also free to determine what measures will be taken on the matter. Once the UNSC decides that peace has been violated, threatened, or an act of attack or aggression has taken place, it can take different decisions, such as using force or adopting countermeasures.[80] The UNSC takes its decisions. The criteria to be used is left to the UNSC to decide.[81]

It should be noted that resolving to adopt sanctions is hard for the UNSC because the five permanent members of the UNSC are likely to utilise their veto right to block decisions that are against their interests. For example, China has been using its veto powers to vote against the imposition of sanctions.[82] Considering the end of the Cold War and the vanishing of political blocs in parallel, a period of closer cooperation between permanent UNSC members began. China and Russia look at each other in the UNSC to avoid isolation since the USA, United Kingdom, and France support each other as allies.[83]

Traditionally, the sanctions that the UNSC adopts in conformity with Chapter VII are related to cases such as international armed conflict, direct or indirect support of rebels operating in one state by another. Terrorism and the production of weapons of mass

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[78] Lale Akkutay Berat, op.cit , p .415
[79]Kochle Hans r, op.cit., p. 9
[80]Pellet Alain, The Charter of the United Nations: A Commentary of Bruno Simma's Commentary, Michigan Journal of International Law, 25, 135 (2003). p. 146, https://repository.law.umich.edu/mjil/vol25/iss1/4 (et.26.04.2021)
[81] Lale Akkutay Berat, op cit , p. 420
[82]Mu Ren, " China's Non-intervention Policy in UNSC Sanctions in the 21st Century: The Cases of Libya, North Korea, and Zimbabwe", *Ritsumeikan International Affairs* Vol.12, (2014) , pp.101–134 https://core.ac.uk/download/pdf/60549907.pdf (et.09.03.2021)
[83] Von Einsiedel Sebastian, David M. Malone , Bruno Stagno Ugarte, "UN security Council in the Age of the Great Power Rivalry," *United Nations University Working Paper Series*, 04, 2015, p.102 https://collections.unu.edu/eserv/UNU:6112/UNSCAgeofPowerRivalry.pdf (et.19.03.20201)

destruction are amongst matters which are regarded as a threat to peace and security based on the resolution of UNSC 1540 adopted unanimously on 28 April 2004.[84] In the spirit of advancing international peace and security, violation of humanitarian law and human rights is unacceptable. However, these violations did not constitute a reason for the sanctions to be adopted under Chapter VII but rather are regarded as a state's internal issues.[85] Arguably, with the UNSC's practice, the issue of threat to international peace and security has evolved, hence sanctions are adopted to assist in eliminating threats.[86] In a statement made by the UNSC on 31 January 1991, the economic, social, humanitarian and ecological instabilities could threaten international peace and security.[87] The UNSC has been taking measures against the promotion of international terrorism and the development of nuclear, chemical and biological weapons due to the great risk they cause on the advancement of peace and security.[88]

2.1.4 Article 39 of the UN charter and Sanctions to restore peace and security.

It is should be highlighted that the authority of the UNSC to capitalise on sanctions is derived from Chapter VII. At the same time, Article 39 states that the UNSC has the mandate to decide or determine if there is any availability of threats, which are capable of devastating the international order. It also determines actions that are of aggression in nature. Therefore, it is understood that the UNSC issues recommendations or determines suitable actions that shall be adopted in relation to articles 41 and 42. This is done in the essence of safeguarding international order.[89]

The UNSC has the power to legalise any form of intervention in the world. The UNSC legitimacy is absolute or unquestionable because the states recognised the political-legal status of the UNSC as the U.N.'s highest source of power or authority. This gives UNSC the legitimacy power to determine whether the sovereign states' action is a

[84]Moodie Michael, "Reviewed Work(s): Global Non-Proliferation and Counter-Terrorism: The Impact of UNSCR 1540 by Olivia Bosch and Peter van Ham: International Affairs" (Royal Institute of International Affairs 1944-) , Mar., 2009, Vol. 85(2) 2009, pp. 408-409, https://www.jstor.org/stable/27694991 (et.09.05.2021)
[85]Lale Akkutay Berat, op.cit , p. 420
[86] Ibid
[87]Lale Akkutay Berat, op.cit , p. 422
[88] Moodie Michael op.cit , p. 409
[89] Charter of the United Nations op cit 49, Art. 39

threat to peace in the world.[90] The UNSC decides what kind of action shall be adopted in the spirit of providing or safeguarding security and tranquillity in the world. Kofi Annan has described this as the unique legitimacy of the UN.[91]

The UNSC is expected to safeguard and restore international order and security by all means necessary. However, if the UNSC fails to execute its mandate, the General Assembly is normally expected to invoke the right to apply Resolution 377 (unite for the purpose of peace).[92] Arguably, it should be noted that recommendations that are suggested by the General Assembly do not bind the UNSC. It would be up to the UNSC to either adopt the recommendations from the General Assembly or not.[93] This can be understood in the sense that General Assembly has no power to exclude or bypass the UNSC, which is regarded as the highest authority of the UN.

2.1.5 Article 41 Of the U.N. Charter and the authority to implement sanctions

This article doesn't address the sanctions directly, but it grants the UNSC the power to implement them. The article stipulates that the UNSC has the right to decide the measure or actions that don't involve armed forces. In doing so, the UN may easily announce to member states the implementation of the measures. In this case, the measures are likely to cause total or limited breaking of commercial interactions, disrupting the means of transport such as rail, sea, air, and affecting diplomatic relations, among others.[94] This article is very important in providing the guidelines to the UNSC on the measures that may be taken in advancing order in the world.

2.2 SANCTIONS AND THE PRINCIPLE OF NON INTERVENTION

The principle of non-intervention is considered one of the most fundamental principles that the states appreciate. The principle explicitly highlights that interfering in the internal affairs of another country is deemed as harming the sovereignty of another

[90]Claude L., 'Peace and Security: Prospective Roles for the Two United Nations' Global Governance, 2(3), 1996, p.298
[91] Herranz Matilde Pérez , The Security Council and the Legitimacy of the Use of Force: Legal, Normative and Social Aspects, Working Paper Institut Català Internacional per la Pau Barcelona, 2010, https://www.peacepalacelibrary.nl/ebooks/files/357317548.pdf (et.26.12.2020)
[92]Melling Graham, Anne Dennett, "The Security Council veto and Syria: responding to mass atrocities through the ''Uniting for Peace'' resolution," Indian Journal of International Law, 57(34), 2017, p. 298 https://doi.org/10.1007/s40901-018-0084-9 (et.17.03.2021)
[93] Ibid, p. 300
[94] Charter of the United Nations, opcit 49, Art. 41

state.[95] At the same time, the interference into another state's affairs is the same as denying a state its rights or duties over its area of jurisdiction.[96]

The United Nations charter allows the sanctions to be imposed on aggressive countries that harm the international order. It upholds the application of the fundamental principles of non-intervention. Article 2 (7) highlights that no state is allowed to meddle in the internal jurisdiction of an independent state. However, this view doesn't include the imposition of sanctions which falls under the UN Charter Chapter VII.[97] The UNSC has been given the authority to use the sanctions.

The UNSC is required to assess and evaluate thoroughly before imposing sanctions. It is allowed to intervene in domestic matters provided that the state's actions threaten international peace.[98] However, most of the sanctions decisions taken in recent years emphasise the obligations of states to implement sanctions within the framework of humanitarian law and human rights.[99]

Moreover, it should be highlighted that there are no clear indications of the use of sanction in the Charter except Chapter VII. At the same time, there is no clear provision on the prohibition of the sanctions. The Charter didn't qualify the use of sanctions as part of the use of force. Interestingly, the preamble of the Charter, Article 46, points out that the use of force is confined to armed force.[100] Therefore, force articulated in Article 24 is limited to military intervention.

2.3 UNDERSTANDING SANCTIONS THROUGH THE UN GENERAL ASSEMBLY RESOLUTIONS AND DECLARATIONS

It should be highlighted that in 1965 the UN General Assembly passed the declaration regarding non-intervention in the Domestic Affairs of the member state and safeguarding the Independence and Sovereignty. The Declaration regarding Friendly Relations and Cooperation among countries was declared in 1970. This declaration

[95] Curtis J., op.cit ,p.193
[96] Ibid, p. 193
[97] Charter of the United Nations, opcit 60. Article. 2(7) "Nothing contained in the present Charter shall authorise 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."
[98] Lale Akkutay Berat, op cit , p. 420
[99] Ibid
[100] Alberto Marco and Velásquez Ruiz, op.cit

encourages the states to establish sound relations between themselves. Furthermore, the resolution concerning permanent sovereignty regarding natural resources was established in 1973. The resolution concerning Economic Rights and Duties of States was passed. These declarations put emphasis on the unacceptability of the imposition of unilateral sanctions in 1973. The application of them curbs weak states (third world countries) from economic growth. However, even though, U.N General Assembly has made a lot of declarations and resolutions, they do not establish a strong legal binding obligation to the states.[101] Arguably, they can just reveal the existing customary law or assist in its transformation and evolution.

It is appropriate to note that the subject of unilateral sanctions is brought into the debate when one is reviewing these resolutions. The legality of unilateral sanctions is questioned using the traditional principle of non-intervention and prohibition of coercion. On the same note, the 1970 friendly relations and cooperation declaration and 1974 Charter of Economic Rights and Duties clearly stated that no country should utilise or emphasise the implementation of economic, political or any kind of coercive measures on a country with the purpose of influencing another state's sovereignty rights and duties.[102]

According to the Declaration concerning the Friendly Relations and Co-operation, no state is supposed to capitalise its economic or political prowess to force another country into submission.[103] Unilateral sanctions create acrimonious relationships between the states. At the same time, they are viewed as a threat to the state's sovereign rights and international obligations. Powerful member states are expected to desist from imposing unilateral sanctions that destabilise the domestic politics of the targeted state.

[101]Stalls Justin D, "Economic Sanctions," *University of Miami International and Comparative Law Review*, Vol 11, 2003, p.121 https://repository.law.miami.edu/umiclr/vol11/iss2/4 (et.05.04.2021)
[102] Ibid
[103] United Nations, Declaration on Principles of International Law Friendly Relations And cooperation Among states in Accordance with the Charter of The United Nations https://www.un.org/ruleoflaw/files/3dda1f104.pdf (et.30.11.2020)

2.4 THE PRINCIPLE OF EXTRA-TERRITORIAL JURISDICTION AND SANCTIONS

The principle of extra-territorial jurisdiction in international law is the principle whereby a state claims jurisdiction over a matter connected to the territory of another country.[104] The principle of extraterritoriality provides many questions concerning the legitimacy of extra-territorial legislation, particularly on the imposition of unilateral sanctions. Unilateral sanctions are formulated deriving their legal basis from the national legislation.[105] The states have continued to use unilateral sanctions even though their legality in international law is not well addressed. However, it should be highlighted that in most cases, whenever there is no treaty, extra-territorial legislation is buttressed by the provisions of the international customary law.[106] Today under the conventional view, the states are supposed to substantially justify their jurisdictions under the generally accepted rules or international law principles.

The territoriality principle allows the State to freely exercise its legal rights, functions, and duties under its jurisdiction area. The territorial jurisdiction generally supports the sovereignty equality of states. It gives states the authority to exercise their rights within their territory.[107] Based on international law, it is appropriate to conclude that the territoriality principle is one of the major basis of jurisdiction.

The law that governed the imposition of unilateral sanctions against an independent State is a thorn in the flesh. In most cases, unilateral sanctions are imposed based on national legislation. Arguably, the extra-territorial application of the national legislation, particularly the implementation of unilateral sanctions, is not adequately addressed in International law.[108] The common principle of international law states that domestic legislations by and large are territorial in nature, which means that they cannot be used on another sovereign state. It should be argued that the principle of sovereign

[104] Emmenegger Susan, "Extraterritorial Economic Sanctions and their foundation in the International Law." *Arizona Journal of International & Comparative Law* Vol. 33, No. 3 2016
[105] Chipanga Cynthia and Torque Mude, "An Analysis of the Effectiveness of Sanctions as a Law Enforcement Tool in International Law: A Case Study of Zimbabwe from 2001 to 2013," *Open Journal of Political Science*, 2015, 5, 291-310. http://dx.doi.org/10.4236/ojps.2015.55031 (et.13.11.2020)
[106] ibid
[107] Rahmat Mohamad, op cit , p. 77

[108] Ibid

equality and territorial integrity is considered to be of paramount importance to the principle of international law.[109] Interestingly, whenever there is a misunderstanding between domestic law and international law, it is the latter that shall be considered.[110]

The respect rendered to the principles of sovereign equality and territorial integrity facilitates the adequate performance of states to exercise their jurisdictions as long as that jurisdiction doesn't violate the principles of international law. However, there are some scenarios when the State may practice objective territoriality. In this case, the state has the ability to regulate an action that started outside its territory. Conversely, there are some cases when the act is initially regulated within the state's territory and then consummated abroad. This is well known as subjective territoriality.[111] At the same time, it should be emphasised that without a treaty or consent, the state cannot take another country's duty.[112] Extra-territorial jurisdictions are considered legit on matters with immediate and substantial relevance to the interests of both parties. The extra-territorial jurisdictions need to be supported by the legitimate interests of the consent states.

Moreover, evidence shows the rejection of the extra-territorial implementation of domestic legislation to force another state to comply with certain duties and obligations. Even though there are great conflicts and misunderstandings concerning the application of the extra-territorial jurisdictions, states are known for their extra-territorial implementation of domestic legislation. The Extra-territorial application of municipal legislation has resulted in challenges and conflicts in the international arena.[113]

There are a lot of arguments that have been put forward concerning extra-territorial application of municipal law. It has been pointed out that the application of extra-territorial jurisdiction is acceptable on the basis of regulating criminal activities, preventing the criminals from hiding, regulating and monitoring multinational business

[109] Hofer Alexandra, "The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate enforcement or illegitimate intervention?", *Chinese Journal of International Law*, Volume 16 (2), 2017, pp 175–214, https://doi.org/10.1093/chinesejil/jmx018 (et.22.11.2020)
[110]Rahmat Mohamad, opcit , p. 77.
[111]Maillart Jean-Baptiste, "The limits of subjective territorial jurisdiction in the context of cybercrime", *ERA Forum*, Vol 19, 2019, p.377 https://doi.org/10.1007/s12027-018-0527-2 (et.10.04.2021)
[112] Ibid, p. 382
[113]Emmenegger Susan, "Extraterritorial Economic Sanctions and their foundation in the International Law". Vol. 33, No. 3 2016

organisations and ensuring compliance with the international duties regulated by multilateral and bilateral agreements.[114]

However, the application of the extra-territorial legislation breaches the legal equality of countries and the basic or fundamental values of states' sovereignty and non-intervention in another country's domestic administration.[115] According to the Westphalia legal system, state's jurisdiction inside its boundaries should be respected.[116] The law stipulates that no state is supposed to interfere in another state domestic affairs. However, there are some instances where state legislation may go beyond its territory. For example, the nationality principle allows a state to formulate laws regulating its citizen's conduct. Secondly, the passive personality principle gives states the right or power to claim the authority to try foreign nationals for crimes committed outside their territory but affecting their own citizens. Thirdly, the effect of principle is understood through the right of the country to apply the laws that govern matters which affect their interests abroad. Fourthly, the universal jurisdiction principle allows the prosecution of crimes recognised by the international community as offences such as drug trafficking, terrorism, piracy, and war crimes, among others.[117]

The unilateral or secondary sanctions are viewed as extra-territorial because their application is beyond the state's national legislation. Unilateral sanctions are imposed to meet self-interests. The relationship between the legitimate interests of imposing unilateral sanctions and the intended objectives of the sanctions always conflicts.[118]

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[114]Maillart Jean-Baptiste, op.cit

[115]Asia Africa Legal Consultative Organisation, "Verbatim Record of Discussions: Fifty-Second Annual Session", New Delhi, India, 9-12 September 2013, Doc. No. AALCO/52/NEW DELHI (HQ)/2013/VR, http://www.aalco.int/Verbatim%20Record%20of%20Discussion%2052nd%20Annual%20Session%20 2013.pdf.(et.21.02.2021)

[116] Chambers Rachel, "An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct: Jurisdictional Dilemma Raised/Created by the Use of the Extraterritorial Techniques," *Journal of International Law,* vol 14(22), 2018 https://heinonline.org/HOL/LandingPage?handle=hein.journals/belgeint50&div=27&id=&page (et.01.12.2020)

[117] Shaw Malcom, International Law, Cambridge: Cambridge University Press 2008, p. 668. file:///C:/Users/user/Downloads/International%20Law%20by%20Malcolm%20N.%20Shaw%20(z-lib.org).pdf (et.23.12.2020)

[118] Chipanga Cynthia and Tocque Mude, op.cit , p. 298

2.4.1Nationality Principle and the application of laws beyond the borders:

States have the legal right to exercise the active personality principle known as the nationality principle in international law. This principle depicts that countries are legally correct to extend jurisdiction over their citizens even if they are staying in another country. In this regard, states extend their jurisdictions on their nationals abroad, especially on criminal law, family law, tax law, etc. For instance, the United States, under section 61 of the U.S. Tax code, demands that all U.S. citizens and corporations are supposed be taxed on their worldwide incomes.[119]

Furthermore, the International Court of Justice established that corporations are put in the same category as country nationals. The country of its principal business indicates the nationality of the corporation. At the same time, the state cannot request nationality jurisdiction on a foreign-owned business that is managed by its nationals.[120] One can argue that exercising jurisdiction on a corporation incorporated outside and owned by a parent company is not adequately justified in international law.

Moreover, the passive-personality principle allows a country to practice jurisdiction over acts committed in a foreign territory. As a result of the committed offence, its citizen is offended. However, in some situations, this principle is accepted by the majority of states as a basis for jurisdiction, particularly concerning the fight against international terrorism.[121]

2.4.2 Protective Principle and the use of sanctions

Under International law, a state is allowed to exercise extra-territorial jurisdiction for the purpose of safeguarding interests, especially when sovereignty or the right to political freedom is at risk.[122] Extra-territorial jurisdiction under the pretext of protective principle is highly accepted or supported by states because it involves protecting the state from criminals and other unacceptable activities, for example, drug smuggling, trafficking or even counterfeiting of foreign currencies. However, the most debated area is how the principle of protection is applied to the sanctions laws, particularly on

[119] Alexander Kern, op.cit , p 76-77, also see Susan Emmenegger, op.cit , p. 650
[120]Emmenegger Susan, op.cit , p. 650
[121]Olmsteadt Cecil,"Jurisdiction," *Yale Journal of International Law*, Vol. 14:468, 1989 ,p.471 https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1544&context=yjil (et.07.01.2021)
[122] Alexander Kern, op.cit , pp. 77-78

unilateral sanctions such as embargos or freezing assets. The unilateral sanctions even go further to put laws for regulating who will be involved in business or dealings with the targeted states.[123] In this case, the sanctions are made to be universal to the extent of affecting other countries' foreign policies.

2.4.3 The universality Principle and Sanctions

The universal principle is understood based on every state's duty to implement binding principles and norms that are regarded as fundamental in international law. The state has a right to persecute offences that are accepted as of criminal nature by the international community, for example, drug smuggling, trafficking among others. These norms fall under the international legal framework widely known as a jus cogen.[124] It includes the prohibition of state and individuals to conduct illegal and criminal activities such as piracy, kidnapping, breaching of the international human rights convention, trafficking, and slavery. In this case, if a state has breached the peremptory norms of international law, another state shall have the legal basis to exercise extra-territorial jurisdiction to solve the dispute or even suspend diplomatic immunity if necessary.[125]

The principle of universality enables a country to utilise extra-territorial jurisdiction on the state, which breaches fundamental norms. Accordingly, the principle applies to the offence that breaches international law regardless of where the offence has been committed.[126] The offence, which involves violating laws of the international community, requires all the states to cooperate on arresting and punishing the criminals, for example pirates on the high sea are supposed to be arrested and punished accordingly regardless of their nationality and location of the crimes.[127]

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[123] Emmenegger Susan, op.cit , p. 651
[124] Ibid, p. 653.
[125]Knuchel Sevrine, "State Immunity And The Promise Of Jus Cogens," *Northwestern Journal of International Human Rights*, Vol 9 (2), 2011
http://scholarlycommons.law.northwestern.edu/njihr/vol9/iss2/2 (et.06.03.2021)
[126] Emmenegger Susan, op.cit
[127]Rose Gregory and Martin Tsamenyi, "Universalizing jurisdictions over marine living resources crime," *A Report for World Wide Fund international*, 2013, p. 32.
http://d2ouvy59p0dg6k.cloudfront.net/downloads/wwf_universalised_mlr_crime_jurisdiction_131114_hr_sem.pdf (et.21.02.2021)

2.5 INTERNATIONAL LAW COMMISSION DRAFT ARTICLES ON RESPONSIBILITY OF STATE FOR INTERNATIONALLY WRONGFUL ACTS (ARSIWA) AND SANCTIONS.

The legal provision concerning unilateral sanctions does not use the term sanction. In most cases, the term countermeasures appear a lot. Even though the legal provision has not used the term, political and international law literature refers to countermeasures as sanctions.[128] Therefore, based on international law literature, the term sanction and countermeasure is used interchangeably. The legal framework of the autonomous sanctions is mainly understood through the International Law Commission Articles on the Responsibility of the State for the internationally wrongful Act of 2001 (ARSIWA).[129] These provisions are very critical in determining the legal justification of the countermeasures in International Law. There is a need to meet the requirements for the wrongful Act so as the sanctions or countermeasures to be accepted.[130] Arguably, ARSIWA is not regarded as binding in international law. However, ARSIWA has partially embodied the customary law.[131]

There is a legal battle on who is supposed to impose countermeasures or autonomous sanctions on another state. The ARSIWA of 2001 postulates that an injured state has the legal power to utilise countermeasures against the wrongful act. This argument is provided by the International Law Commission (ILC) in Article 49 of ARSIWA, which gives the authority for taking countermeasures in reaction to the State responsible for carrying out the internationally wrongful act. Arguably, the Article on the Responsibility of State is not clear on the state which is accepted as an injured state. However, article 42 attempted to define the injured state as a state which is supposed to take responsibility when the duties and obligations are violated. The violated obligations are necessary to the state as an individual, group of states comprising that country or the

[128] Asada Masahiko, opcit ,

[129] Crawford N.C., Klotz A. "How Sanctions Work: A Framework for Analysis." In: Crawford N.C., Klotz A. (eds), "How Sanctions Work. International Political Economy Series". Palgrave Macmillan, London, 1999. https://doi.org/10.1057/9781403915917_2 (et.19.02.2021)

[130] 52Articles on State Responsibility (ASR), Articles 49–53. https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf (et.17.03.2021)

[131] Burke John, "Economic Sanctions Against the Russian Federation Are Illegal under Public International Law," *Russian Law Journal*, vol 3(3) ,2015, p 136. https://www.russianlawjournal.org/jour/article/view/97?locale=en_US (et.06.02.2021)

international community.[132] The wrongful act affects the state or the community; in some instances, it may disturb the states from executing their legal obligations in the international arena.

There are three different situations in which countermeasures are supposed to be implemented. Firstly, Article 42 of ARSIWA provides that when the obligation due to another state is violated, implementing the countermeasure is regarded as legit. This involves the violation of bilateral agreements.[133] However, bilateral nature is not only limited to bilateral agreements but rather those obligations found in multilateral treaties or customary international law could be accepted as the bilateral responsibilities, for example, the responsibility of the receiving government to safeguard the premises of the sending government, as it is clearly constituted in the Article 22 of the Vienna Convention concerning the Diplomatic Relations.[134] It should be noted that a state in which its diplomats are kidnapped is considered an injured state.[135] The significance of the bilateral responsibilities in a multilateral treaty or customary international law is that they can be understood from the perspective of bilateral relations. The responsibilities or obligations outside the bilateral nature are typically perceived as collective responsibilities or obligations.[136]

Secondly, under the provision of Article 42, the injured state is determined when the collective obligation is violated. In the event that the group of states or the international community has been affected because of the violation of the duties, the state(s) that has been affected directly is regarded as an injured state.[137] States are prohibited from acting aggressively, but if a state acts oppositely, the international

[132] Asada Masahiko, opcit , p.12
[133] Ibid
[134]International Law Comission, Commentary Draft on the responsibility of state for internationally wrongful Act, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (et.20.02.2021)
[135]Matsui, *The transformation of the Law of the State Responsibility, in ed, Rene Provost, State Responsibility in International Law*, Rutledge, 2016, p.10 https://0212v0y2r-y-https-eds-b-ebscohost-com.proxy.uludag.deep-knowledge.net/eds/ebookviewer/ebook/ZTAwMHh0cl9fMTQ4MDkxNl9fQU41?sid=08abc96a-b86c-45c6-bdab-cc8958c6fb03@pdc-v-sessmgr01&vid=1&format=EK&rid=3 (et.04.03.2021)
[136]Asada Masahiko, opcit , p.13
[137]Ibid

community has the legal standing point to take action. In short, the injured state is defined as the country that has been directly affected.[138]

Thirdly, Article 42 constitutes a situation when the collective obligations are violated to radically change the situation of other states. This kind of obligation is usually referred to as an interdependent obligation. It is referred to as such because its consequences affect other states' performance in the International system. Every state's performance concerning the obligation is of paramount importance, for example, the disarmament treaty or the nuclear-free zone treaty.[139] The international law commission has highlighted that if a state develops a nuclear weapon, it will affect other states' performance concerning their treaty obligations. In the event of violating interdependent obligation, all the treaty signatories are regarded as the injured states as they are likely to be affected by the violation of collective obligation. However, it should be highlighted that when the violation of an independent obligation is very important to all states, then the whole international community is considered injured. In this case, necessary countermeasures may be implemented against the offender.

States such as the USA, Canada, United Kingdom and others have been imposing autonomous sanctions even if their rights and legal obligations have not been directly or specifically affected. In respect to this, the justification for imposing sanctions without being directly affected can be attributed to the third situation linked to the interdependent obligation of states. It should be argued that the implementation of countermeasures is legitimate when interdependent obligations are breached, such as the disarmament obligation.[140]

However, Article 48 points out that countries that are not part of the treaty or agreement have the right to take countermeasures if their entitlement has corresponded with the injured states. Any state besides the injured states may choose to impose countermeasures based on the provision of Article 48 if the obligation violated is of significance to states comprising that state and is of paramount importance to the

[138]Aaken Anne van, "Introduction to the Symposium on unilateral Targeted Sanctions," *The American Society of International Law*, vol 113, 2019.pp130-134.. :https://doi.org/10.1017/aju.2019.21 (et.15.03.2021)
[139]Asada Masahiko, opcit, p.14
[140] Ibid,

collective interests of the international community.[141] Article 48 attempts to reconcile the fact that the injured state (s) has the authority to take countermeasure when the states' obligations are breached.

The invocation of the state responsibility by the state excluding the injured states is buttressed by the ARSIWA Article 48 paragraph 2 of the Article on the responsibility of states. The Article stipulates that the obligation violated should be of paramount importance, such as safeguarding the collective interests of the concerned state.[142] However, the targeted state may appeal for the removal of the countermeasures in the condition that the targeted state has agreed to stop the internationally wrongful act and give a guarantee or assurance that it will not repeat the same wrongful act.[143] The assurance and guarantee for not repeating the same wrongful act are provided under article 30. On the same note, (b) pointed out that the reparations may be paid according to the articles, considering the interests of the injured state concerning the violated obligation.[144]

The International Law Commission Commentary explains article 48 of the ARSIWA concerning the violation of the group of states obligations (erga omnes partes) and the international community's obligations as a whole (erga omnes).[145] The international community's obligations as a whole (erga omnes) are better understood through the International Court of Justice judgements, for example, the Barcelona Traction case.[146] The I.C.J highlighted that the international community obligations are the responsibilities of the international community as a whole. The court further highlighted that all the states are perceived to have legitimate interests regarding protecting the obligations involved, such as the prohibition of aggression, racial discrimination, and genocide.[147] Moreover, human rights, environment or security may be added to the list of the obligation owed to the international community (Erga Omnes). On the other hand, Erga omnes partes are the obligations of great significance to the group

[141] International Law Commission, op.cit
[142]Ibid, p. 94
[143] Asada Masahiko, opcit 4, pp. 1
[144] Iinternational Law Commission, op.cit
[145] International Law Commission, op.cit
[146] International Court of Justice, Barcelona Traction (Belg. v. Spain), 1970 I.C.J. 3 (Judgment of Feb. 5) http://www.worldcourts.com/icj/eng/decisions/1970.02.05_barcelona_traction.htm (et.02-05.2021)
[147] ibid.

of states, unlike erga omnes which are the obligations owed to the international community.[148]

The difference and relationship between obligations provided by Article 42 paragraph (b), and Article 48 paragraph I, is very thin, although all of them are regarding the collective obligations of the states. Article 42 paragraph (b) is concerned with the injured state, while article 48 provided the legal basis of state other than the injured state. The issue here is that Article 42, para (b) deals with the obligations of a group of states. On the other hand, article 48, paragraph 1 (a) covers the obligations of collective nature mainly responsible for safeguarding the group interest.[149]

Furthermore, it should be argued that the interdependent obligations, as they are provided in article 42, paragraph (b) (ii) can be viewed as the division or subsection of the obligation erga omnes partes, due to the point that independent obligations affect the administration of a state which is directly connected to the obligation, hence they can not only be perceived as just safeguarding collective interests of the states involved erga omnes partes, but rather be restrictive in nature.[150] Erga Omnes partes are designed to safeguard the collective obligation of the group of states. As far as the interdependent obligations are concerned, one state's performance towards the obligations would affect the other state's performance.

It should be highlighted that according to Article 50 of the ARSIWA, countermeasures are supposed to be taken in a manner that will not affect states to carry out other crucial obligations such as protection and respecting of the human right, desisting from the use of force, and other obligations which are provided under the peremptory norms of international law.[151] For instance, an injured country is not allowed to take countermeasures such as blocking the movement of civilian goods or medical gadgets because it would affect the performance of the international human rights

[148] International Law Commission. Opcit
[149]Asada Masahiko, opcit
[150] ibid
[151] Syed Ali Akhtar, "Do Sanctions Violate International Law?", *Economic and Politic Weekly*, Vol. 54, Issue No. 17, 2019 https://www.epw.in/node/154136/pdf (et.20.03.2021)

obligation.[152] This leaves the injured states with a high risk of violating international law when imposing countermeasures.

[152] ibid

CHAPTER TWO

THE UNITED STATES OF AMERICA AND EUROPEAN UNION SANCTIONS POLICIES

1. UNITED STATES OF AMERICA UNILATERAL SANCTIONS

1.1 GENERAL OVERVIEW OF USA SANCTIONS

The United States of America, particularly starting from the late 20th century, has never hesitated to use military and economic power whenever their interests are threatened.[153] Based on this backdrop, the USA has imposed more sanctions on different states as part of its foreign policy tool than any other state in the 20th and 21st century, respectively. The USA has implemented sanctions to assist its foreign policy objectives and goals, including but not limited to combating drugs, trafficking, terrorism, promoting the implementation of democracy and respect of human rights, advancement of regime change agenda, and tackling nuclear proliferation, among others.[154]

Regarding the USA sanctions, it is almost impossible to talk about the USA's future without sanctions as one of its fundamental mechanisms for advancing foreign policy. The USA sanctions are generally targeted towards its adversaries and rogue states.[155] At the present moment, there are many states under US sanctions, such as Belarus, Haiti, Syria, Iran, Zimbabwe, and North Korea, among others.

1.2THE UNITED STATES OF AMERICA LEGAL AND MANAGEMENT SYSTEM OF SANCTIONS

As far as the USA autonomous sanctions are concerned, many components play a crucial role, but two legal bases are critical. The legal basis of the USA sanction system grants the US Congress and President authority to impose sanctions on states, individuals and institutions.[156] The US Congress has the power to pass the laws concerning foreign commerce, trade among others. In contrast, the President has delegated authority to

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[153]Fox William, "United States and Economic Sanctions: One American Perspective," *Journal of Energy & Natural Resources Law*, Vo,15 (4), 1997, p. 387 https://doi.org/10.1080/02646811.1997.11433117(et.06.04.2021)

[154]United State, State department, Diplomacy: The U.S. Department of State at Work, *Bureau of Public Affairs*, June 2008.https://2009-2017.state.gov/r/pa/ei/rls/dos/107330.htm(et.13.04.2021)

[155]Mensah Priscilla Edusei, "The ineffectiveness of Economic Sanctions: An analysis of the factors leading to the ineffectiveness of United States Helms-Burton Act against Cuba," Master of Arts in International Relations, Specialisation in Global Political Economy, Leiden University's Faculty of Humanities, unpublished thesis, 2019, p. 5

[156]Nephew Richard, "Implementation of Sanctions",in Masahiko Asada, "*Economic Sanctions in International Law and Practice*." Routledge,2020, p 98

impose specific sanctions and declare a national emergency depending on the situation on the ground.[157]

The authority of the USA Congress to enact laws regarding foreign commerce is provided under Article 1 (8) of the USA constitution. Through this provision of the constitution, the USA Congress is in a position to pass orders that administer international economic activities and the international economic agenda of the USA.[158] Notably, all individual states within the USA are not allowed through the same law to independently regulate commerce with the foreign government.

Over the past, the USA Congress has imposed many sanctions on individuals, institutions and states. Countries such as Zimbabwe, Iran, Haiti, and Russia among others have been slapped with different packages of targeted sanctions. The USA Congress set out a framework of what is allowed and not allowed, for example, blocking trade relations, setting out conditions to be followed on financial aid, or using the USA financial system.[159] Since 1970s, the USA Congress has been actively using this constitutional framework to impose restriction measures. Generally, the USA Congress should pass a bill that the President signs to become the law. However, the constitution of the USA gives the President autonomy to operate foreign policy independently hence the President has the executive powers to block sanctions recommendations from the USA Congress.[160]

The President's office enjoys delegated authority which allows it to respond to a national emergency. It is upon the President to decide the suitable means of responding to an emergency. The President may decide to react to an emergency through military, diplomatic or sanctions means. There are legal frameworks that the President uses in responding to an emergency. For instance, the International Emergency Economic Powers Act (IEEPA) of 1977 allows the President to announce an international emergency. When the President declares an international emergency, sanctions policy

[157]Ibid,p.98
[158] Ibid, p.98
[159] US Department of State, *Amended Version of the Iran Sanctions Act of 1996 - Amendments From the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010,* https://2009-2017.state.gov/e/eb/esc/iransanctions/docs/164090.htm (et.30.10.2020)
[160] Makielski Dana C, "Foreign Policy, Can the President Act Alone: Gaps and Conflicts in the Constittutional grants of power," *Law School Journals Public Interest Law Review,* Vol. 1(1) 1996 https://scholarship.richmond.edu/pilr/vol1/iss1/7/ (et.24.02.2021)

might be adopted as a reaction policy.[161] The Immigration and Nationality Act (INA) also grants the President power to reject or nullify individuals' visas, particularly those considered a threat to national security. Trading with the Enemy Act is one of the laws that are used in sanctioning the countries. It allows the President to declare a foreign state as an enemy of the USA, and as soon as the declaration is made, the trade associated with the adversary government is suspended.[162] There is also the Export Administration Act of 1979, which governs exports controls and trade. This legal instrument grants the President authority to control US export for purposes of foreign policy, national interests among others reasons. The President is allowed to suspend exporting certain goods to other states.[163] The Arms Export Control Act governs exports control and trade in arms. It provides the legal grounds for the President to suspend or cease trading in arms with a foreign government for defence and national security purposes.[164] Moreover, the Foreign Assistance Act legalises all the foreign aid programs by the United States. The President of the USA through the Foreign Assistance Act suspends aid that is likely to benefit the adversaries of the USA.

In analysing the use of these Acts by the USA, the International Economic Emergency Power Act (IEEPA) has been used frequently to impose several sanctions across the globe. Through this Act, the President of the USA has been able to impose different sanctions, for example, US President in 1979 used emergency powers to solve the Iranian crisis.[165] Delegating powers to the President enables the President to act quickly on emergency matters concerning foreign policy, terrorism, wars and other challenges. International Relations is very dynamic and complex, hence some matters do not need length parliamentary discussions and debates.

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[161]United States Congress, International Emergency Economic Powers Act, Pub. L. No. 95-223, tit. II, 91 Stat. 1626 (1977) (codified at 50 U.S.C. 1701–1707 (2000) https://uscode.house.gov/view.xhtml?path=/prelim@title50/chapter35&edition=prelim (et.17.04.2021)

[162] Trading with the Enemy Act, 50 U.S.C. app. 5(b) (1994). https://uscode.house.gov/view.xhtml?path=/prelim@title50/chapter53&edition=prelim(et.17.04.2021)

[163]United States. Department of Commerce Bureau of Industry and Security, 2015 Report on Foreign: Based on Export Control. https://www.bis.doc.gov/index.php/documents/pdfs/1285-bis-foreign-policy-report-2015-1/file (03.04.2021)

[164]Nephew Richard op.cit 153

[165] McLaughlin Gerald T., and Ludwik A. Teclaff, "The Iranian Hostage Agreement : A legal Analysis," *Fordham International Law Journal*, Vol 4 (2) , 1981, p. 235 https://core.ac.uk/download/pdf/144226065.pdf (et.06.01.2021)

1.3UNITED STATES EXECUTIVE ORDERS AND AUTONOMOUS SANCTIONS

The sources of power to implement presidential sanctions is derived from the executive orders. The Executives orders are legal declarations made by the President and are accepted by the federal laws. It should be noted that executive orders have no direct constitutional basis, instead, it is widely accepted based on the responsibility of the President as the leader of the US federal government. Implementation of the Executive Orders also finds its legal basis on the International Emergency Economic Powers Act and the National Emergency Act.[166] Executive orders are implemented accordingly for purposes of foreign policy, national security, and other motives.

Moreover, the President is expected to highlight the harmful acts that triggered the issuance of the executive orders. Also, the President can set out the conditions and terms in which sanctions may be exempted. For example, if the President of a certain country is under the US travel ban, he or she may be allowed to attend a conference in New York for purposes of solving the conflict.[167] The criteria for the implementation of the sanctions should be highlighted in the executive orders. Individuals, institutions and countries that are targeted by the executive orders should be explicitly highlighted.

The critical process of implementing sanctions is carried out in the Executive Office of the President (EOP). This office decides how sanctions are supposed to be imposed to counter the threats. The EOP comprises different entities, but the most important entity in executing sanctions is the National Security Council. It comprises the President, Vice President, Secretary of State, Secretary of Energy and Secretary of Defence.[168] According to the statutory, the joint chief of staff and the Director of National Intelligence are required to be the advisors. There are other officials such as Secretaries of homeland security, treasury, Director of Central Intelligence Agency and others may be included in the National Security Council process at the President's pleasure or wish.[169] The officials within the National Security Council meet and deliberate the policy options, including but not limited to sanctions, diplomacy and military interventions. In addition,

[166] Nephew ,Richard opcit ,p.108
[167] Ibid
[168] Best Jr Richard A.., "The National Security Council: An Organization Assessment," Congressional Research Service https://fas.org/sgp/crs/natsec/RL30840.pdf (et.15.05.2021)
[169] Ibid

the sanctions decisions are evaluated and assessed by the National Security Council staff process.[170] After going through the required process, the sanctions decisions are disseminated to the US government departments and declared.

1.4 AGENCIES FOR DEVELOPMENT AND IMPLEMENTATION OF UNITED STATES SANCTIONS

In the US government, many agencies are very critical in the implementation and development of sanctions. Each department has its role in the implementation of sanctions. However, the department of treasury, commerce and State are the major departments as far as sanctions enforcement is concerned.

2.4.1 The role of the Treasury Department in the US sanctions implementation

Management of the financial systems in the Treasury Department includes the direct involvement of intelligence-gathering, particularly on the information concerning the suspicious transactions. The Office of Foreign Assets Control (OFAC) is under the Treasury Department and responsible for managing many US financial sanctions. The OFAC has been critical even after the 9/11 terrorist attack to block international funding of terrorist activities through its financial systems.[171]

After the World War II, the OFAC was established to oversee and implement all the US sanctions, including the UN supported sanctions.[172] The OFAC, since its formation, has been responsible for managing sanctions concerning traffickers, terrorists, weapons of mass destruction, among other sanctions. It has seized assets from different countries such as Iran in 1979 and North Korea in 1950.[173] It also implemented different investment and credit measures against apartheid South Africa in 1986. As of today, it has implemented a lot of economic sanctions. The OFAC derives its powers from different US legal frameworks such as the International Economic Emergency Powers Act and Presidential National Emergency powers. There are many legislative provisions that allow the OFAC to administer transactions and freeze assets in United States jurisdiction.

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[170] Richard Nephew, op.cit

[171] Clunan Anne L., "The Fight against Terrorist Financing," *Political Science Quarterly*, Vol. 121, No. 4 2007, pp. 569-596, https://www.jstor.org/stable/20202763 (et.13.11.2020)

[172] Larsson Kristina, "United States extraterritorial application of economic sanctions and the new international sanctions against Iran," unpublished thesis , Faculty of Law , Lund University, 2011

[173] ibid

It should be noted that the OFAC operates together with the allied states to implement the UN based sanctions and other international duties.[174] The OFAC is responsible for the administration and implementation of the sanctions. It also investigates all transactions which they suspect to be breaching sanctions laws.[175] For example, the OFAC can block or freeze assets or transactions that benefit a targeted state or individuals. As long as the OFAC seize or freeze asset, the targeted state or individual will cease to control that asset. However, the property will remain in the owner's name but without control or privilege over the asset.[176]

It should be stated the OFAC confiscate or freeze any assets that have a value attached to them. The OFAC has defined the blocking or freezing of assets as forbidding any form of transaction or networking with real personal tangible or intangible assets. It also blocks the transfer of properties or assets that have direct and indirect interests with the targeted states, entities or individuals. On the same note, United States citizens are forbidden to make a transaction with the targeted states or individuals unless the transaction is authorised by the OFAC or is clearly exempted by the law.[177]

The OFAC runs sanction programmes targeting different states, individuals, and organisations that are generally deemed enemies or a danger to the national security of the US. The OFAC keeps the list of all the targeted persons and states. The targeted persons are referred to as Special Designated Nationals (SDN). The OFAC has different types of SDN, including Special Designated Global Terrorist Organisations and Terrorists SDGTO, Foreign Terrorists Organisation FTO, Special Designated Global Terrorist, and other designated lists.[178]

All the USA persons are not allowed to transact with a state or special Designated Nationals. USA persons comprise USA citizens (anyone physically present in the US, permanent residence) and US companies. The USA persons are required by law to block

[174] Cortright David and Lopez George, *Smart Sanctions Targeting Economic Statecraft*, Maryland: Rowman & Littlefield Publishers 2002, p. 24.
[175] OFAC, *"Frequently asked questions*," www.treasury.gov/resourcecenter/faqs/Sanctions/Pages/answer.aspx"1 (et.21.02.2021)
[176] Ibid
[177] OFAC, "*Frequently asked questions*,"www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx"1 (et.31.03.2021)
[178] Lee and Slear, "Beware of OFAC – A Little-Known Agency Poses Challenges to International Finance," 2006, p. 58.

or freeze any transaction that involves the Specially Designed Nations. In this case, US persons may block or freeze the asset when the Special Designated Nationals or States have direct or indirect interests in the transaction even though an asset or company is owned by someone else who is not on the sanction list.[179] In the same vein, US nationals are forbidden from investing in an organisation or business controlled or owned by a targeted state or SDN.

The OFAC, through its Special Designated Nationals system has helped the USA government to impose sanctions on individuals and organisations. The OFAC works together with the United States State Department and has the privilege to access banking transactions and other information sources. The SDN system also assists in blocking the funding of criminal networks in the world. However, the system has no control over offshore transactions, and individuals under the sanctions usually change their identity to escape from financial sanctions.[180]

The OFAC uses the powers vested in it by the executive orders and statutes to prepare the Code of Regulations which are published in the Federal Register to enlighten the US nationals. The OFAC runs different types of sanctions programmes, both unilateral and UN-supported sanctions. The penalties for a person or state that breaches sanctions regulations differs from one sanction programme to another, for example, based on the nature of the criminal offence committed, penalties comprise fines ranging from $50.000 to $10.000.000 and the possibility of jail term ranging from 10 to 30 years for deliberately breaching of regulations. On the other hand, civil penalties range between $250.000 (double the amount of the transaction involved) to $1.075.000 for every violation of the rules.[181] As far as the civil penalties are concerned, the OFAC sends a pre-penalty announcement to the one who breaches the regulations to which the accused is supposed to file a written reply. Suppose the violator doesn't pay the fine, the case is transferred to the Department of Justice for recovery actions. The OFAC also sent the matter to the Customs and Federal Bureau of Investigation (FBI).[182]

[179] OFAC opcit
[180] ibid
[181] Ibid
[182] Zagaris, *International White Collar Crime Cases and Materials*, (2010), p. 186.

1.4.2 The Role of the United States of America Department of State in the Implementation of the sanctions.

Regarding the sanctions, the US State Department has three important roles that are sanction design, diplomacy, and enforcement. The State Department is a critical player on sanctions planning at the National Security Council. Sometimes its roles are hard to execute due to the sensitive jurisdictions of different matters at hand. Arguably, within the Department of State, other officials are against the use of sanctions to advance the USA's interests. On the same note, diplomats may seek sanctions to be used as a means to gain power on the negotiation table, or sanctions may place USA economic interests at a gainful level than its rivals.[183]

The State Department has a division assigned with different tasks such as coordinating the USA interests and policy. For example, the Department of State established the office to coordinate sanctions (Coordinator for Sanctions Policy Office) in 2013. The office was primarily responsible for dealing with all misunderstandings concerning sanction policies within the Department of State.[184] This office was dissolved in 2017 by the Secretary of State.[185]

2 THE DEVELOPMENT OF EUROPEAN UNION SANCTIONS POLICY

The European Union has been one of the leading countries in imposing sanctions in recent years as its foreign and security policy mechanism.[186] In the European Union context, sanctions in their policy documents are often called restrictive measures. These restrictive measures have been used to deal with different challenges, such as promoting human rights, democracy, and handling terrorism, among other challenges.[187]

The Maastricht Treaty included sanctions (restrictive measures) as a fundamental apparatus for its foreign and security policy. In this way, the EU imposes unilateral sanctions for the interest of the EU community. At the same time, the EU imposes

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[183] Giumelli Francesco, "Implementation of Sanctions: European Union," in Masahiko Asada, "*Economic Sanctions in International Law and Practice"*. Routledge,2020. ,p.111

[184] ibid

[185]Robbie Gramer and Dan De Luce, **"**State Department Scraps Sanctions Office", *Foreign Policy,* 2017, https://foreignpolicy.com/2017/10/26/state-department-scraps-sanctions-office/ (et21.02.2021)

[186] Hörbelt Christian, "A comparative Study , Where and why does the EU Impose Sanctions", *Revista UNISCI Journal,* Vol 43,2017, https://www.redalyc.org/pdf/767/76749542004.pdf (et.03.04.2021)

[187] Akşemsettinoğlu Gökhan, "The effects of the EU policy İnstruments upon Third countries", Journal of Academic Researches and Studies Year: , 12(22): 2020, p. 164-179

sanctions recommended by the UNSC.[188] The sanctions adopted through UNSC resolutions do not compel the EU Council and Commission to develop the Common Security and Foreign Policy (CSFP) decisions.[189]

It should be highlighted that there is Cotonou Agreement which is a treaty signed by countries from Africa, Caribbean and the Pacific. According to this agreement, the EU is allowed to suspend any form of cooperation or assistance if a signatory has violated human rights.[190] The Cotonou Agreement has been improved from the Lome Convention, which had not adequately covered the suspension of aid or assistance in the case of breaching the obligations.[191] The Lome Convention led to conflicts between the EU and African, Caribbean and Pacific countries because it did not have the specific clause that advocated for the imposition of sanctions in the case of violation of the rule of law, human rights and democracy. The Cotonou Agreement Article 96 expressed the suspension of donor funds when there is a suppression of human rights.

The EU has been regularly defending its sanctions based on promoting fundamental principles of democracy in the world. In most cases, sanctions are given to nationals, entities, and individual business people who have a hand in the violation of human rights. The EU sanction toolbox has sanctions such as travel ban, freezing assets, arms embargo.[192] In some instances, even conducting unfree elections characterised by violence is rendered as the reason enough for imposing sanctions. For instance, the EU applied sanctions on Belarus in August 2020 because of their presidential elections characterised by electoral fraud. In addition, the EU has sanctions meant to counter nuclear program development and missiles, for example, sanctions that were adopted for Iran. European Union sanctions are multi-dimensional because they cover a lot of

[188]Zelyova Nadia, " Restrictive measures - sanctions compliance, implementation and judicial review challenges in the common foreign and security policy of the European Union," ERA Forum, 2021, 22: pp.159–181 https://doi.org/10.1007/s12027-021-00658-6 (et.20.06.2021)
[189] Ibid
[190] Hurt Stephen R., "Co-operation and Coercion? The Cotonou Agreement between the European Union and ACP States and the End of the Lomé Convention," *World Quarterly* , Vol. 24, No. 1, 2003, p.171 https://www.jstor.org/stable/3993636 (et.17.03.2021)
[191] Hazelzet Hadewych, "Suspension of Development Cooperation: An Instrument to Promote Human Rights and Democracy? *European Centre for Development Policy Management Cotonou Article 96",Discussion Paper* No. 64B, 2005, p. 1, https://ecdpm.org/wp-content/uploads/2013/10/DP-64B-Development-Cooperation-Promote-Human-Rights-Democracy-2005.pdf (et.02.05.2021)
[192] Portela Clara, "Are European Union sanctions "targeted?," *Cambridge Review of International Affairs*, 29:3, , 2016, pp. 912-929 https://doi.org/10.1080/09557571.2016.1231660(et.14.11.2020)

matters, from human rights to aggression by powerful states such as Russia. The EU imposed sanctions on Russia as a reaction to the invasion of Crimea, a Ukraine territory.[193]

2.1 EUROPEAN UNION SANCTIONS/RESTRICTIVE MEASURES LEGAL FRAMEWORK

The legal basis of the European sanctions is derived from Article 29, which supports the development of sanctions.[194] Based on this, the EU sanctions are adopted based on the decisions and regulations of the EU legal instruments. The decisions by the European Council are considered to be binding to all member countries of the EU. The European Council decisions derive their legal basis from the EU Treaty, which gives the green light for enacting Common Foreign and Security Policy.[195] The regulations, just like decisions, are legally binding to all member states, but by extension, they are binding to non-state players in the EU, particularly when the law wants to be applied within the common market.

The sanctions specified under Article 29 are meant to give leverage to the EU, particularly in advancing foreign and security policies. The foreign policy of the EU is built on the respect of human rights, good governance, and the rule of law. This gives the High Representative of the Union for Foreign and Security Policy (HR) the power to draft the proposals or suggestions of which state should be placed on the EU sanctions list. [196]

It should be noted that the adoption of sanctions has direct and indirect effects on the normal working of the EU Economy and the financial relations with a targeted state, hence there is Article 215 of the TEU, which regulates the work of the common markets. If the European Council has decided to impose sanctions based on the recommendations and suggestions from the European Commission and the HR, the European Council is

[193] Council of the European Union, *EU restrictive measures in response to the crisis in Ukraine*, https://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/ (et.01.05.2021)
[194]Giumelli Francesco, op.cit, p. 126
[195] European Union Parliament, *Foreign policy: aims, instruments and achievements*, https://www.europarl.europa.eu/factsheets/en/sheet/158/foreign-policy-aims-instruments-and-achievements (et.30.04.2021)
[196] Giumelli Francesco, op.cit

supposed to inform the European Parliament concerning the development (Article 215, TEU).[197]

Restrictive measures or sanctions utilised by the EU include but are not limited to economic boycotts, utilisation of arms embargoes, implementation of travel bans, freezing assets and adoption of financial sanctions. Generally, the economic and financial sanctions are imposed based on the decisions of the European Council. They are deemed to be legally binding to all the member countries.[198] The economic restriction includes forbidding the member states from selling or buying goods and services from the targeted state, region, nationals or organisations. On the other side, the financial sanctions imposed by the EU consist of freezing assets, forbidding loans, financial assistance or payments to targeted people and organisations.

As far as the European Union sanctions are concerned, there are three documents that govern the restrictive measures, namely Basic Principle, The Guideline, and The Best Practice. In June 2004, the Basic Principles on the adoption of sanctions were officially approved by the Political and Security Committee for purposes of coming up with an effective sanction policy framework.[199] According to the Basic Principles document, the EU should develop or impose sanctions in line with the UNSC and also impose sanctions autonomously to meet the objectives and aims of the European Union.[200] The document concerning basic principles highlighted that, if necessary, the targeted sanctions should be imposed in order to attain EU interests without harming the civilian population.

In 2003, "The Guideline" on the implementation and assessment of the sanctions in the context of the Common Foreign and Security Policy was accepted, and then the same document was updated in the year 2005, 2009, 2012 and 2018, respectively.[201] The major aim of this document is to ensure that sanctions are targeted to government officials, entities, terrorists among others, without affecting the civilians. The document

[197] Zagel, Gudrun Monika, "Article 215 TFEU on Restrictive Measures.Smit/Herzog/Campbell/Zagel (eds.), Smit & Herzog on the Law of the European Union," 4 Volumes (looseleaf), Lexis Nexis, 2015, file:///C:/Users/user/Downloads/SSRN-id2683547.pdf (et.07.03.2021)
[198] Giumelli Francesco, opcit ,p. 127
[199]Giumelli Francesco, "How EU sanctions work: a new narrative," *EU Institute for Security Studies,* Chaillot papers**,** *2013*, p. 10, https://www.iss.europa.eu/sites/default/files/EUISSFiles/Chaillot_129.pdf (et.06.05.2021)
[200] Ibid
[201] Ibid

is more concerned about the effectiveness of the sanctions, particularly on the implementation.

The third document is European Union "Best Practice" document was approved in 2008 and it was last updated in 2018. This document is more detailed and explains all the relevant information to ensure homogenous implementation of the restrictive measures.[202] The document helps to identify the targeted individuals or organisations and manage the freezing of assets, travel bans, among others. It provides all necessary information about the exemptions and waivers. In this way, the document assists in ensuring that there is no inconsistency in applying the sanctions.

However, the Common Foreign and Security Policy (CFSP) is not considered the European Court of Justice (ECJ) competence, even though after the September 11 terrorist attack, the ECJ has reviewed several sanctions. The EU imposed the UN targeted sanctions on individuals, which impetus them to challenge the legal basis of the EU decisions to impose the UN sanctions on individuals without following the EU guidelines on restrictive measures.[203] In this case, Kadi submitted his case about sanctions imposed on him to the ECJ in 2005 and the long-awaited judgement was delivered in 2008. The Kadi judgment is one of its kind because the legality of the EU's decision to impose the UNSC sanctions on individuals was tested based on the violation of the basic human rights enshrined in the EU laws.[204] In Kadi judgment, the ECJ found out that the sanctions imposed on him were inconsistent with the European Laws, which requires the European Council to inform the persons involved about the reasons behind the sanctions imposed on them. Also, the ECJ found out that there was no proper hearing when the sanctions were imposed. After that famous judgement, the restrictive measures always consider the probability of violating the European laws, such as the right to be informed.[205] The Treaty of EU (TEU) postulates that the EU can introduce sanctions to the third government,

[202] ibid
[203] Giumelli Francesco, opcit ,p 127
[204] Orakhelashvili Alexander**, "**The Impact of Unilateral EU Economic Sanctions on the UN Collective Security Framework: The Cases of Iran and Syria, in (ed), A.Z. Marossi and M.R. Bassett (eds.), *Economic Sanctions under International Law*," , Asser Press, p 14
[205] Biersteker Thomas J. and Sue E. Eckert, "Addressing Challenges to Targeted Sanctions: An Update of the 'Watson Report'," Watson Institute for International Studies 2009, p. 54 https://www.files.ethz.ch/isn/111057/2009_10_FB09_sanctionsreport.pdf (et.02.04.2021)

natural and legal persons or non-state entities while making all necessary precautions not to breach the European Laws.[206]

2.2 COTONOU AGREEMENT AND SANCTIONS REGARDING THE VIOLATION OF HUMAN RIGHTS, SUPPRESSION OF DEMOCRACY AND RULE OF LAW

The Cotonou Agreement was signed in 2000 as a replacement of the Lome Convention, which was adopted in 1975.[207] The agreement is meant to govern the EU and African, Caribbean and Pacific (ACP) countries. According to the Cotonou Agreement, the interaction between the EU and ACP should be formulated in the spirit of upholding human rights, advancing democratic tenets, enhancing good governance, and the rule of law.[208] In the same vein, all the countries in this agreement should promote fundamental principles through different means, especially through political dialogue.

It should be highlighted that the Cotonou Agreement has procedures that are utilised if one of the signatories is not complying with its fundamental tenets. Based on the Cotonou Agreement's language, the EU is deemed as one party while each specific African, Caribbean and Pacific states are another party. For one to understand the legal procedure to be taken when one party fails to comply with basic principles, article 96 of the Cotonou Agreement is consulted.[209]

Further, the Cotonou Agreement has been applied to several countries accused of breaching basic principles such as human rights and the rule of law. Since its adoption in 2000 more than 15 countries have been put under restrictive measures and suspension of financial assistance because of failing to comply with basic tenets of the agreement.[210]

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[206] İlke Göçmen, ,"AvruBirliği'nin Hedefli Yaptırımları: Temel Hakların Korunması Temelinde Bir Değerlendirme", Uluslararası İlişkiler, Cilt 16, Sayı 63, 2019, s. 119-137

[207] Cotonou Agreement**, https://www.consilium.europa.eu/en/policies/cotonou-agreement/#:~:text=The%20current%20partnership%20framework%2C%20the,to%20expire%20in%20February%202020**(et.21.05.2021)

[208]Mario Negre; Keijzer Niels. Lein Brecht and Tissi, Nicola , "Towards renewal or oblivion? Prospects for post– 2020 cooperation between the European Union and the Africa, Caribbean and Pacific Group," *German Development Institute Discussion Paper*, No. 9, 2013, p. 13, https://www.econstor.eu/bitstream/10419/199395/1/die-dp-2013-09.pdf (et.09.05.2021)

[209] Cuyckens Hanne, "Human Rights Clauses in Agreements between the Community and Third Countries The Case of the Cotonou Agreement," Institute for International Law Working Paper No 147, 2010 https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP147e.pdf (et.14.05.2021)

[210] Council of European Union, *Consultation procedure (article 96),* https://www.consilium.europa.eu/en/policies/cotonou-agreement/article-96-cotonou-agreement/ (05.04.2021)

2.2.1 Application of the Cotonou Agreement Article 96

The first thing to be considered when one party has realised that another party is not complying with its obligations is to launch a comprehensive political dialogue. The Cotonou Agreement puts politics at the centre of the interaction between the EU and Africa, Caribbean and Pacific states.[211] In this case, if the means or possibilities for dialogue are not bringing fruitful results and the concern over the abuse of fundamental principles of the Cotonou Agreement remain, then the parties are supposed to start a consultation process to solve the crisis.

However, there are some exceptional situations when the parties are allowed to skip the political dialogue and launch the consultation process. Firstly the parties may start the consultation process immediately when the problem at hand requires an immediate response.[212] Secondly, failure to comply with the agreements made during the political dialogue. Thirdly, the failure of the accused party to dialogue with the other parties in good faith. These are the situation in which the parties of the Cotonou Agreement are allowed to skip the political dialogue.

Arguably, the launch of the consultations provided under article 96 are considered valid in the event that all the possible avenues for political dialogue have failed to bring results, and the accused party is still violating the basic principles of the Cotonou Agreement.[213] For the EU to begin the consultation process, the European Council is required by the Cotonou Agreement to make a formal invitation to the government of the country being accused of violating fundamental principles.[214] The invitation letter approved by the European Council is supposed to be sent to the accused party. It is within 30 days after the invitation has been sent that consultations should begin.[215]

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[211]Hurt Stephen, "Co-operation and coercion? The Cotonou Agreement between the European Union and ACP states and the end of the Lome Convention," *Third World Quarterly*, Vol 24, No 1, 2003 Pp. 162, https://www.jstor.org/stable/3993636(et.23.02.2021)

[212]Council of European Union, Consultation procedure (article 96) https://www.consilium.europa.eu/en/policies/cotonou-agreement/article-96-cotonou-agreement/ (20.12.2021)

[213] ibid

[214] ibid

[215] Council of European Union, Consultation procedure (article 96) https://www.consilium.europa.eu/en/policies/cotonou-agreement/article-96-cotonou-agreement/ (et.17.04.2021)

Moreover, the consultation process is held at the government level according to the provision of article 96 of the Cotonou Agreement. For purposes of fair representation, the parties are required to have a fair representation during the Consultations process. As for the EU, it is typically represented by the Presidency of the European Council and the European Commission in the Consultation process.[216] The consultation process is usually not required to be more than 120 days, even though the process is more based on mutual agreement and understanding between the involved parties. In most cases, the length of the consultation process is determined by the nature and type of the situation being discussed.

The major aim of the EU in the consultation process is to reach an acceptable solution to the crisis. Based on this, the parties will come up with a roadmap that reflects the steps necessary to be taken by both parties involved to stabilise the relations.[217] However, if no mutual agreement is reached in the consultation process, the party that has initiated the consultation process is allowed to take the necessary measures.[218] These measures are understood as restrictive measures. In the same vein, the measures are supposed to be proportional to the violated fundamental principles. [219] The measures should be directed to those involved in violating basic principles without harming the general population. The measures to be taken include partial suspension of the projects, programmes or other types of assistance.[220] If the situation fails to change, the EU suspends completely the development assistance premised under the agreement.

In the context of the EU, restrictive measures are approved by the European Council decision. After the approval of the restrictive measures, a letter which address the concerned party is sent to inform them about a new development. The restrictive measures are viewed to be appropriate by the European Council are imposed. The restrictive measures have a specific timeframe and conditional clause depending on the

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[216] ibid
[217]Saltnes Johanne Døhlie, "A Break from the Past or Business as Usual? EU-ACP Relations at a Crossroad," *ARENA Centre for European Studies Working Paper,* 2021, p. 12, https://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2021/wp-3-21.pdf (et.23.04.2021)
[218] Gathii James Thuo, "The Cotonou Agreement and economic partnership agreements, **in** United Nations, Realizing the Right to Development," 2013, p. 267 https://www.ohchr.org/Documents/Issues/Development/RTDBook/PartIIIChapter19.pdf(et.06.04.2021)
[219] Saltnes Johanne Døhlie, opcit, p. 12
[220] ibid

situational changes.[221] This means that the restrictive measures that the European Council adopts may expire, and if the situation that has led to imposition of restrictive measures has not improved, the European Council may consider extending the restrictive measures.

2.3 ACTORS IN THE EUROPEAN UNION SANCTIONS

2.3.1The council of ministers and EU sanctions

The High Representative of the Union for Foreign and Security Policy (HR) submits the sanction recommendations to the Council of Ministers, which has the legal position to formalise the imposition of sanctions through the Foreign Affairs Configuration when the foreign relations ministers meet.[222] Regarding the restrictive measures, the Council of the ministers is supposed to have sub-committees in which the sanctions are crafted and prepared according to the requirements of EU laws.

The European Union Council of Ministers has a Political and Security Committee (PSC) that discusses the magnitude of the political crises in the world. The PSC discusses necessary policy options to be taken to tackle different political woes. It is worth mentioning that the PSC's decisions are strategically assessed by the Permanent Representatives of the member state in Brussel. At this stage, all the political suggestions would be discussed in order to adopt the necessary strategy to tackle the problem.[223]

The EU has a regional group of councils that are consulted regarding the information about adopting the sanctions in a particular region. Regional working groups include Transatlantic Relations, Middle East, West Balkan, Africa, Caribbean and Pacific, Latin America, and the Caribbean.[224] The geographical desk is responsible for providing all the information and recommendations regarding imposing restrictive measures on individuals and states. Also, member states submit their sanctions list suggestion to geographical desks. Sanctions are generally adopted according to the political context. In some instances, sanctions are discussed in the horizontal groups, such as terrorism, and chemical weapons. [225]

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[221] Council of European Union, Consultation procedure https://www.consilium.europa.eu/en/policies/cotonou-agreement/article-96-cotonou-agreement/(et.15.04.2021)
[222] Giumelli Francesco, opcit ,p. 127
[223] Ibid, pp. 127
[224] Ibid
[225]Giumelli Francesco, opcit ,p. 127

The legal aspect of the sanctions is premised on the legal draft decisions made by HR and the Commission draft regulations are carefully discussed by the Working Party of Foreign Relations Counsellors (RELEX). The RELEX includes the diplomatic representatives from the member states in Brussels and the commission.[226] The President is the one who administers the meetings of the RELEX, and the position of the President is rotational. The EEAS representatives are also supposed to attend the RELEX meetings. As long as the decision to adopt sanctions is made, the RELEX is required to discuss the management of the sanctions in the European Union.[227]

Moreover, after the Working Party of Foreign Relations Counsellors (RELEX) is done with its discussions, the agreed decision is submitted to the Committee of Permanent Representatives (COREPER II). The heads of missions generally attend this committee. Its main task is to verify and make all the necessary assessments about the sanctions before the draft is submitted to the council for final approval.[228] However, it should be highlighted that since the sanctions are imposed through Common Foreign and Security Policy (CFSP), the EU parliament is not involved in the sanctions decision-making process, but it is rather informed about the development.[229]

3.3.2The European External Actions Service (EEAS) role in the EU sanctions

The office of the European External Action Services was established for the purposes of assisting the member state with the coordination of their foreign and security policies. The suggestion to impose sanctions usually comes from the High Representative of Foreign and Security Policies (HR) that is the head of the European External Action Service (EEAS). Generally, the European External Actions Service prepares or drafts Council decisions which the RELEX receives for debates and discussions.[230]

It should be highlighted that the EEAS has the mandate to coordinate all the European Union sanction programmes. It ensures that all sanctions are within the legal

[226] Ibid,
[227] European Union Council, "Working Party of Foreign Relations Counsellors (RELEX)" https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/working-party-foreign-relations-counsellors/ (et.11.04.2021)
[228] Giumelli Francesco, opcit, p. 127
[229]Cardwell, The legalisation of European Union foreign policy and the use of sanctions. Cambridge Yearbook of European Legal Studies, 17 (1). pp. 287-310.2015 p. 15 https://doi.org/10.1017/cel.2015.11 (et.10.03.2021)
[230]Giumelli Francesco, p. 128

provision of the EU sanction framework.[231] The EEAS plays a leading role in coordinating sanctions and assisting from drafting to implementation.

The implementation of the sanctions at the regional and international levels requires expert advice. Based on this, EEAS gives the Council the regional expertise which helps in designing measures. The regional expertise would assist the EU to make informed decisions that serve the interests of the EU. Considering the sense that the sanctions affect the location in which the targeted country is located, the EU has geographical desks and commission, which try to analyse the suitable possible restrictive measures without untended results.[232]

2.3.3European Commission and Sanctions

As far as sanctions are concerned, the European Commission is involved in the formal and informal discussions about restrictive measures because they involve the markets' changes.[233] The European Commission has the right to participate in the process under the Service for Foreign Policy Instrument (FPI). The European Commission is represented by the Service of the Foreign Policy Instrument FPI in all the discussions related to sanctions in RELEX. Before changes were made, the European Commission handled the regulations regarding the application of restrictive measures. The powers relating to foreign policy have been in the hands of the Council since the signing of the Treaty of Lisbon, hence even the European Commission regulations are known to be the European Council regulations.[234] Arguably, the recommendations or suggestions for regulations regarding restrictive measures are drafted by the Services of the Foreign Policy Instrument (FPI).

The European Commission plays a role in providing expertise on the effects of the restrictive measures on the targeted state and the interests of the EU. This can be evidenced by the European Commission crafting of the three-tier policy regarding the sanctions on Russia.[235] In this case, the document prepared by the European Commission

[231] Ibid
[232] Helwig Niklas, Juha Jokela, Clara Portela, "Sharpening EU sanctions policy for a geopolitical era, Publications of the Government´s analysis, assessment and research activities", 2020, p. 75, http://urn.fi/URN:ISBN:978-952-287-935-6 (et.20.04.2021)
[233] Giumelli Francesco, p. 128
[234] Ibid.,
[235]Ibid.,

estimated the effects of the sanctions both on the EU and Russia.[236] This shows that the commission assesses and evaluates the internal markets and economy of the European Union vis a vis the restrictive measures.

2.3.4 The European Union Member States and Sanction Policy

It is up to EU member countries in the European Council, particularly through the European Council of the Minister, to vote for the restrictive measures.[237] The member states are also responsible for gathering information and evidence that buttress their suggestion for adopting the sanctions against individuals and entities.

The EU competencies require member states to implement travel bans against the targeted countries. The requirement to get read of the travel has evolved overtimes because of the process of the integration of the EU. This can be reinforced by the duties of the member states to control the borders. At the same time, the Schengen Treaty gives the states the power or authority to decide who can enter their territory.[238] The decision to grant individual permission to access or enter member states territory has never been delegated to European institutions. Rather, the national authorities have the responsibility to prohibit or allow anyone to access their country. [239]

Moreover, the decision to implement arm embargoes lies under the member states' responsibility or competencies because matters related to security are considered member states' responsibility.[240] In this way, the arms trade is considered to be the state sovereignty.[241] Arguably, the discussion and decision to adopt arms embargoes are taken

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[236] Pop Valentina and Andrew Rettman, "Leaked Paper: EU Options on 'Stage Three' Russia Sanctions," EUobserver.com, https://euobserver.com/foreign/125075 (et.14.04.2021)

[237] Lațici Tania, Qualified majority voting in foreign and security policy, *European Parliamentary Research Service*, 2021, p. 4 https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/659451/EPRS_BRI(2021)659451_EN.pdf (et.12.06.2021)

[238] The Schengen acquis – "Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders" https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922(02):en:HTML(et.17.03.2021)

[239] Giumelli Francesco, opcit

[240] Papadopoulos Melanie, "Do the Decision-Making Mechanisms in the EU Undermine Member States' National Interest?: A Case Study of the Sanctions Regime," *31 Emory International Law Review*, vol 553 2017 https://scholarlycommons.law.emory.edu/eilr/vol31/iss4/3 (et.01.03.2021)

[241] Giumelli Francesco, Fabian Hoffmann & Anna Książczaková "The when, what, where and why of European Union sanctions," *European Security*, 30:1, 1-23,2021, p. 7 , https://doi.org/10.1080/09662839.2020.1797685 (et.06.05.2021)

in Brussels by the European Council. Still, the final say on the implementation is on the powers of the member states.

The European Council delegates the power to enforce restrictive measures such as financial and trade restrictions to the competent establishments in the member countries. It is upon the member states to control and monitor the work of the companies or organisations in its territory based on the European Council regulations. In the same vein, it is making investigations concerning possibilities of violation of the sanctions.[242]

[242] Giumelli Francesco, opcit , pp.130

CHAPTER THREE

1 ZIMBABWE SANCTIONS IN THE CONTEXT OF INTERNATIONAL LAW

1:2 THE BACKGROUND OF SANCTIONS IMPOSED ON ZIMBABWE

The relationship between Zimbabwe and the western world was sound, especially in the first two decades after it attained its independence in 1980. Most of the EU member states and the USA started diplomatic relations with Zimbabwe soon after getting independence from the colonial administration. The relations were established in different areas of interest, such as the military, economic, political, and socio-cultural sectors. Considering that Zimbabwe was coming from war, nation-building was very critical. Interestingly, the EU and the USA played a technical role in assisting Zimbabwe. However, good days between Zimbabwe and the western world started to deteriorate in the late 1990s because of the political policies.

Zimbabwe has been on the EU, the USA and other Western countries sanction list for the past two decades. It is still under sanctions. Even though the EU removed some of its sanctions on Zimbabwe after holding a successful constitutional referendum in 2012, the late former President Robert Mugabe and his wife were left on the sanction list.[243] On the same note, arms embargos were never lifted or relaxed since 2002. The EU imposed their first sanction package on Zimbabwe in 2002. On the other side, the USA implemented their set of sanctions in 2003 after George Bush signed the Executive Orders in 2003. Besides the Executive Orders, the USA sanctions are premised on the provision of the Zimbabwe Democracy and Economic Recovery Act (ZIDERA)

There is a general understanding among countries that had placed sanctions on Zimbabwe that the Zimbabwean government has not met fundamental tenets of democracy, human rights, and the rule of law.[244] In contrast, the Zimbabwe government argues that sanctions are meant to facilitate the regime change agenda. They further argued that western countries are following the neo-colonial policies.[245]

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[243] Deutsche Welle, "EU softens Zimbabwe sanctions with aid," 2015 https://www.dw.com/en/eu-softens-zimbabwe-sanctions-with-aid/a-18264163 (et.14.05.2021)

[244]Mashingaidze Terrence, "The Zimbabwean Entrapment: An Analysis of the Nexus between Domestic and Foreign Policies in a (Collapsing) Militant State, 1990s-2006," *Alternatives, Turkish Journal of International Relations,* Vol. 5, No.4,2006, p.64 https://dergipark.org.tr/tr/download/article-file/19488 (et.05.06.2021)

[245] Ibid

1:2:1Zimbabwe Land question and imposition of Sanctions

Zimbabwe won its independence from the British colonial administration in 1980 after a fierce liberation war between the Rhodesian Army and Zimbabwe freedom fighters. The battle between the two fronts was brought to a halt by the Lancaster House Agreement in 1980. One of the major agreements at the Lancaster House was returning the land under the hands of the white minority to the black majority. In this way, land distribution in Zimbabwe was expected to be fair and just. The Lancaster House Agreement stated that the land distribution in Zimbabwe was to be held through a "willing buyer, willing seller" approach.[246]This would mean that the government was not supposed to compel the white minority to sell their land.

Under the Lancaster House Agreement, the land reform program in Zimbabwe was to be held in phases. The first phase of land distribution was held between 1980 to 1990.[247] The Lancaster House Agreement through the provision of Section 16 prevented the government of Zimbabwe from amending it. Therefore the government of Zimbabwe had to stick to the Lancaster House Agreement up to 1990.[248] The British government pledged to fund half of the land reform program in Zimbabwe through the "willing buyer, willing seller" approach.[249] It continued to fund the land reform program in Zimbabwe until the late 1990s when the British and Zimbabwe governments were directly conflicting about land policy. Zimbabwe government needed the land reform program to be done as fast as possible.

The conflicts regarding land distribution continued to be on the centre stage of the relationship between Zimbabwe and the United Kingdom. Unlike the Tories, Labour Party had no experience in handling post-colonial conflicts.[250] In 1998 when the donor conference was held, the British government under the Labour Party openly declared that they were no longer interested in funding the land reform program in Zimbabwe.

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[246] Moyo Simbarashe, "A Failed Land Reform Strategy in Zimbabwe. The Willing Buyer Willing Seller," *American Research Institute for Policy Development,* Vol. 2, No. 1, 2014, , pp. 67-74
[247] Thomas Neil H, "Land reform in Zimbabwe," *Third World Quarterly*, Vol 24, No 4, 2003, p. 699 https://library.fes.de/libalt/journals/swetsfulltext/17189054.pdf (et.09.05.2021)
[248] Magaisa Alex ., "The Land Question and Transitional Justice in Zimbabwe: Law, Force and History's Multiple Victims," *Oxford Laws,* 2010, , p.7 https://www.law.ox.ac.uk/sites/files/oxlaw/magaisalandinzimbabwerevised2906101.pdf (et.26.05.2021)
[249] Thomas Neil H, opcit, p.699
[250] Moyo Simbarashe, opcit, p, 73

According to them, Zimbabwe was supposed to fund the Land program itself.[251] At the same time, Britain was complaining about how the funds were being handled. They argued that there was no transparency and accountability in distributing the land and allocating the funds.

The termination of the funding to Zimbabwe exacerbated the conflict between the Zimbabwean government and the British government. The Zimbabwean government had been complaining about the slowness of the land reform program. On the other side, the Zimbabwean government had been clashing with the war veterans and general citizens over their demands for land.[252] According to the War veterans, they had participated in the liberation war to get the land from the colonial masters. Thus, the failure of the Zimbabwean government to execute the land reform program as quickly as possible was deemed a violation of the liberation war promises and ethos. [253]

As pressure mounted on the Zimbabwean government to address the land question, it drafted a new constitution that would have allowed the compulsory taking of the land without compensation in 2000. The constitution was brought for a referendum in 2000 but unfortunately, citizens of Zimbabwe voted against the constitution.[254] At that time, the government of Zimbabwe believed that through the constitution, they could easily take the land from the white farmers without compensation. Unfortunately, the major reason the constitution failed to gain majority votes was the clause that assigns more powers to the executive while making parliament and judiciary weak.

As most Zimbabweans voted against the new constitution in 2001, the government of Zimbabwe through its parliament, enacted the law that accepts the acquisition of land from the white minority without paying for it.[255] This would have allowed the government of Zimbabwe to acquire land without paying for it. In this way, the government was obliged to compensate for developments that were made on the land, for example, the

[251] ibid
[252] Hansungule Michelo, "Who Owns Land in Zimbabwe? In Africa?", *International Journal on Minority and Group Rights*, Vol. 7, No. 4, pg 321, 2000, p. 699 https://www.jstor.org/stable/24675076 (et.10.04.2021)
[253] ibid
[254] Masiiwa Medicine & Lovemore Chipungu, "Land Reform Programme in Zimbabwe: Disparity Between Policy Design and Implementation, in Medicine Masiiwa,(ed) , POST-INDEPENDENCE LAND REFORM IN ZIMBABWE: Controversies and Impact on the Economy," Friedrich Ebert Stiftung and Institute of Development Studies, University of Zimbabwe, Harare, 2004
[255] ibid

government was supposed to pay for infrastructure on the farm such as houses, dams and irrigation among other infrastructures.[256] This triggered the relationship between Zimbabwe and United Kingdom to be acrimonious since the United Kingdom had immediate interests in Zimbabwe as the former colonial power. A lot of diplomatic meetings were held to solve the crisis but to no avail.

The violent and radical grabbing of land (Fast Track Land Reform Program) started after people voted against the constitution in 2000. The government didn't stop people from acquiring the land forcefully from the white minority who owns the large chunk of the Zimbabwe land.[257] This was triggered by the slowness in the implementation of the "willing buyer, willing seller policy" approach on the land reform program. As far as the land distribution in Zimbabwe was concerned, 6,000 white farmers used to occupy 42% of the land while the black people were overcrowded in the native reserve lands.[258] After Land Donor Conference in 1998, the government declared its intention to legalise the land acquisition through a constitutional amendment.[259] In April 2000, the parliament of Zimbabwe voted for a bill that allowed the acquisition of the land by the Zimbabwean black people.[260] At this point, the government of Zimbabwe supported the acquisition of land from the white farmers who benefited from the colonial legacy. The fast track land reform programme was meant to balance the inequality distribution of land in Zimbabwe between whites and blacks. At this point, the relationship between Zimbabwe and the western countries became sour as the western argued that the government was undemocratic and failed to adhere to basic principles of good governance. Furthermore, much emphasis was put on the failure of the Zimbabwe government to respect property rights.[261]

The USA and the EU were highly concerned about how the land reform program in Zimbabwe was being conducted. Consequently, after the failure of the diplomatic

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[256] ibid
[257]Sarimana Ashley ," *A precarious balance Consequences of Zimbabwe's Fast-Track Land Reform*, Unpublished thesis, Department of Sociology and Industrial Sociology," Rhodes University, 2005
[258]Palmer Robin, "Land Reform in Zimbabwe, 1980-1990," *African Affairs*, Vol. 89, No. 355, p. 165, https://www.jstor.org/stable/722240 (
[259]Chingono Heather, **"**Zimbabwe sanctions: An analysis of the Lingo guiding the perceptions of the sanctioners and the sanctionees**,"** *African Journal of Political Science and International Relations* Vol. 4(2), , 2010, pp.66-74 **http://www.academicjournals.org/ajpsir** (et.01.12.2020)
[260] ibid
[261] Ibid

meetings to stop Zimbabwe radical land reform program, they decided to impose the sanctions. The USA highlighted the land reform program in its Act (Zimbabwe Democracy and Economic Recovery Act (ZIDERA).[262] On the other hand, the European Union imposed their sanctions on Zimbabwe based on Article 96 of the Cotonou Agreement.[263] Both the USA and EU unanimously agreed that the government of Zimbabwe had failed to protect white farmers from land grabbing, which they described as a violation of property rights. They argued that property rights are fundamental rights that should be respected at all cost.

1:2:2Zimbabwe internal politics and sanctions

Zimbabwe has been under the leadership of the Zimbabwe African National Union-Patriotic Front (ZANU-PF) since 1980. The late former President Robert Mugabe was in charge of Zimbabwe from 1980 to 2017. He was toppled from power by his party with the military assistance. One of the strongest opposition party Movement for Democratic Change (MDC) was formed in 1999. The MDC gained more popularity within Zimbabwe political arena, and its popularity threatened the ZANU PF political power.[264] The MDC and National Constitution Assembly (NCA) campaigned for voting against the constitution at the referendum held in 2000.[265] People rejected the constitution at the referendum through the influence of the opposition parties. The rejection of the constitution came to ZANU PF as a surprise because it had dominated Zimbabwe politics for two decades without strong opposition.

MDC shocked ZANU PF when it won 57 out of 120 seats in the Zimbabwe parliamentary elections in 2000.[266] The fear of ZANU PF concerning losing power mounted, which marked the beginning of violence and intimidation. The MDC victory meant that the ZANU-PF majority in the parliament had been destroyed. In the 2002

[262] Chingono Heather, op.cit
[263] ibid
[264] Burde Rafael, "Getting your Politics, Philosophy, and Economic Wrong: An Institutional Understanding of Zimbabwe's Collapse," *The Philosophy, Politics and Economics Undergraduate journal*, pp 39-59, 2009, *https://repository.upenn.edu/cgi/viewcontent.cgi?article=1022&context=spice* (et.06.02.2021)
[265] Mapuva Jephias, "The Trials and Tribulations of Constitutionalism and the Constitution Making Process in Zimbabwe," *Alternatives Turkish Journal of International Relations*, Vol 11 (1), 2012, p.115, https://dergipark.org.tr/tr/download/article-file/19283 (et.24.05.2021)
[266] Makumbe John, "The impact of democracy in Zimbabwe, Assessing political, social and economic developments since the dawn of democracy," *Research Report 119 Centre for Policy Studies Johannesburg*, 2009, pg 9, https://media.africaportal.org/documents/RR119.pdf (et.24.02.2021)

presidential elections and 2005 parliamentary elections, there were many allegations regarding widespread political violence and intimidation.[267] In 2008, the presidential elections were characterised by politically driven violence and intimidation of opposition supporters.

Based on the reports of politically motivated violence and intimidation, the adoption of sanctions was regarded as a viable tool by the western countries to transform the behaviour of Zimbabwe. The EU, USA and other Western countries introduced sanctions on Zimbabwe. These sanctions are renewed annually. As for the United States of America, Zimbabwe Democracy and Economic Recovery Act (ZIDERA) was enacted in 2001 and then amended again in 2018 by US Congress,[268] while the Executive Orders were first introduced in 2003 by President Bush and since then, the Executive Orders are renewed annually based on the developments in Zimbabwe.[269] On the other side, the EU imposed their sanctions through using Article 96 of the Cotonou Partnership Agreement after all the consultations failed to bring fruitful results.[270]

1:3 EUROPEAN UNION SANCTIONS POLICY ON ZIMBABWE

In 2002, the EU made a decision to put Zimbabwe under sanctions through the provision of the Common Foreign and security policy (CFSP). These sanctions were imposed after the diplomatic means failed to mend the relationship between Zimbabwe and EU. In the same vein, the CFSP is used by the EU in its pursuit of foreign policy.[271] Therefore, Zimbabwe was considered to be a threat to the EU foreign policy based on the respect of democracy, human rights, enhancing good governance and the rule of law. Consequently, based on these tenets the EU found it necessary to place sanctions on Zimbabwe. At the same time, Zimbabwe is a signatory of the Cotonou Agreement, which has a clearly marked clause that advocates for a relationship based on the respect of

[267] ibid
[268] Chingono Heather, opcit
[269] ibid
[270] Dipama Samiratou and Emel Parlar Dal, "The Effectiveness of Political Conditionality as an Instrument of Democracy Promotion by the EU: Case Studies of Zimbabwe, Ivory Coast and Niger," *Perceptions*, Vol 10(1), 2015, pp. 109-132 http://sam.gov.tr/pdf/perceptions/Volume-XX/Spring-2015/07_DipamaDal.pdf (et.20.05.2021)
[271]ibid

human rights, democracy and the rule of law.[272] It is based on these principles that the EU construct its sanctions legal justification.

The EU sanctions against Zimbabwe were relaxed in 2012 after the successful constitution referendum in Zimbabwe. Only the sanctions imposed on the former President Robert Mugabe, his wife, and other few individuals were left on the sanction list. However, arms embargos were never removed since they were implemented in 2002. Today only Mugabe's wife and three security chiefs are on the EU travel ban, and their assets in EU member states were frozen.[273]

The European Council imposed sanctions on Zimbabwe supported by the treaty of EU of the Maastricht treaty. The sanctions imposed include army embargoes, financial restrictions, travel bans, among others.[274]

1:3:1 Zimbabwe Sanctions under European Union Common Foreign and Security Policy

The EU made a decision to place sanctions on Zimbabwe based on the Common Foreign and security policy (CFSP) in February 2002. In this regard, the EU based on the European Union Treaty, especially Article 29, imposed restrictive measures on Zimbabwe under the resolution of the European Council Common Position 2002/145/CFSP.[275] This decision to impose sanctions on Zimbabwe was reached by considering the recommendations from the European Commission.

The European Council stated that the imposition of the restrictive measures on Zimbabwe was triggered by politically driven violence, intimidation and lack of freedom of the press.[276] In this regard, the EU blamed Zimbabwe for not taking the European Council seriously when they asked Zimbabwe to stop allegations levelled against it. The European Council argued that after its assessment, the Zimbabwe government continued to breach fundamental human rights even after it had been warned. Based on this, the

[272] Giumelli Francesco, opcit, p. 7
[273] Ndakaripa Musiwaro, "Zimbabwe's Economic Meltdown: Are Sanctions Really to Blame?", *The Washington Quarterly*, 44:2, 2021, p 99 : https://doi.org/10.1080/0163660X.2021.1934997 (et.20.06.2021)
[274] Biondo Karen Del, "The Weakness of Political Conditionality in EU Development Policy: The Case Of Zimbabwe," *Studia Diplomatica*, Vol. 62(2), 2009, p. 131, https://www.jstor.org/stable/44838669 (et.06.02.2021)
[275] Ibid
[276] Chingono Heather,op.cit.

European Council considered it necessary to introduce sanctions against Zimbabwe and those who were assisting the regime in violating human rights and attacking the democratic institutions.[277]

It should be indicated that the Common Foreign and Security Position 2002/145/CFSP outlines the restrictive measures introduced to Zimbabwe, such as freezing of bank accounts and financial assets of government entities and individuals. At the same time, the sanctions included the arm embargos, particularly blocking the transfer of military technologies between the EU and Zimbabwe.[278] The arms embargo required all the EU member states that had military contracts with Zimbabwe to terminate them. Consequently, it blocked Zimbabwe from benefiting from military-technical advice and training from the EU member states.

The sanctions on Zimbabwe by the EU are subjected to amendment every year in February. The last renewal of the restrictive measures was done in February 2021. According to the EU, the major aim of extending and amending the restrictive measures every year is to give targeted individuals an opportunity to reject or stop policies that encourage the breaching of human rights principles, suppressing democracy and good governance.[279] In this way, the list of the targeted persons is updated every year.

1:3:2 Zimbabwe Sanctions and Application of the Cotonou Agreement based on Human Rights and Democracy.

At the beginning of the 21st century, the EU expressed great concern about Zimbabwe's crisis, particularly the land reform program. The EU openly criticised Zimbabwe's adoption of legislation that allows land acquisition without compensation. As the radical land reform program continued, the EU encouraged Zimbabwe's government to obey the court orders to stop the farm invasion. The Zimbabwe courts ruled that the farm invasions were illegal. Thus the invasion was supposed to be stopped. The EU expressed concern over allegations related to the breaching of human rights such as property rights and political rights.[280] In 2002, the European Union responded to the Zimbabwean crisis by applying the Cotonou Agreement, particularly Article 8, which

[277] Ibid
[278] Ibid
[279] Jan Grebe, "And They Are Still Targeting: Assessing the Effectiveness of Targeted Sanctions against Zimbabwe," *Africa Spectrum*, Vol 45(1), 2010, pp 3-29
[280] Ibid

allows the political dialogue to be held when there is a political crisis. However, the political dialogue failed to change the behaviour of Zimbabwe, which led the EU to suspend Article 8 and implement Article 96 of the Cotonou Agreement, which is the legal basis for the EU to suspend aid or loans to Zimbabwe.[281] According to the stringent clause of the Cotonou Agreement, political agreement and consultations are necessary before taking actions such as suspension of the development aid or assistance.

As the tension between the EU and Zimbabwe intensified, in October 2001 the EU started the consultation process under the Cotonou Partnership Agreement. The political dialogue between the EU and Zimbabwe was based on the Cotonou Agreement Article 8, while the political consultations were held under the provision of Article 96. Even though the consultation process was going on according to the requirements of the Cotonou Agreement, there were political and diplomatic challenges between the EU and Zimbabwe. These consultations were held in the spirit of encouraging Zimbabwe's government to hold free, fair and credible elections in March 2002[282]. In this way, the EU had been expecting the government to halt violence and intimidation directed to opposition parties, civil societies, and other foreign journalists covering Zimbabwe. As a result of the consultation processes, Zimbabwe agreed to allow the EU and other foreign election observers to come to Zimbabwe.

As expected, a week after the government of Zimbabwe and the EU reached an agreement to allow foreign observers to observe the Zimbabwean elections, the EU leader of elections observer mission Pierre Schori was denied entry into Zimbabwe. This is the immediate cause which pushed the EU to decide to impose sanctions on Zimbabwe.[283] The EU suspended its direct aid to the government of Zimbabwe. As of 2002, the EU started to direct its aid or assistance to the population of Zimbabwe through Non-

[281] Dipama Samiratou and Emel Parlar, Opcit.
[282] Dal Emel Parlar ve Samiratou Dipama Sahraö, "*Altı Afrıka'da Avrupa Bırlığı'nin Demokrasi Teşvik politikalarının Normatif Gücü Zimbabve ve Fil Dişi Sahili Örnekleri*." Ed, . İsmail Ermağan, Dunya Siyasetinde Afrika , Ankara: Nobel Akdemik Yayıncılık Eğitim Danışmanlık TİC.LTD, 2016 https://dergipark.org.tr/en/pub/marusbd/issue/28075/298189 (et.20.05.2021)
[283] Washington Post, *Zimbabwe Forces EU Election Observer to Leave*, 2002, https://www.washingtonpost.com/archive/politics/2002/02/17/zimbabwe-forces-eu-election-observer-to-leave/70eb8fbd-0ebe-49be-bd37-7d447f7ff4d2/ (et.02.03.2021)

Governmental Organisations (NGOs).[284] The sanctions are renewed every year since 2002 based on the development on the ground.

Zimbabwe reacted to the position of sanctions that the EU had taken through evoking article 98.[285] In this case, Zimbabwe's government declared a dispute between Zimbabwe and the EU. It is article 98, which has been adopted as a legal basis for submission of the dispute between parties to the Joint Council of minister for the purposes of arbitration.[286] This appeal by Zimbabwe failed to stop EU's decision to place Zimbabwe under restrictive measures.

The EU restrictive measures on Zimbabwe are justified based on the point that Zimbabwe is a member of the Cotonou Partnership Agreement. The agreement has a stringent clause that allows the suspension of the development assistance in the condition that there is breaching of the fundamental human rights, failure to adhere to major ingredients of democracy.[287] According to the treaty law, a state must adhere to the conditions and terms of the international agreement. Moreover, treaty law is one of the primary sources of law in international law.[288] Therefore, the EU decision to suspend direct aid to the government of Zimbabwe is justified.

1:3:3 The legality of the European Union Sanctions on Zimbabwe in the context of the EU laws

The legality of the EU targeted sanctions on Zimbabwe were tested in the European Court of Justice (ECJ). In 2016, the ECJ admitted the legality of the sanctions imposed on the Zimbabwe former Attorney General, 120 persons and other companies.[289] According to the ECJ, sanctions imposed on them are justified based on the violation of human rights by the Government of Zimbabwe. All the targeted persons were holding senior management positions within the Government of Zimbabwe. Thus the ECJ highlighted that sanctions on them are justified. The same reason was used to justify the

[284] Dipama Samiratou and Emel Parlar, opcit ,
[285] Ibid
[286] Washington post, op.cit
[287] Mario Negre, Keijzer Niels; Lein Brecht and Tissi Nicola, opcit 204, pp. 13
[288] Odek Otieno, ed, "Reporting International Treaties: The Cotonou Treaty Establishing the EU-ACP Partnership: Its Impact on the East African Economies", *Friedrich Ebert Stiftung* (FES: Nairobi, Kenya, 2002, https://library.fes.de/pdf-files/bueros/kenia/01612.pdf (et.09.05.2021)
[289]European Court of Justice, Judgment in Case C-330/15 Johannes Tomana and Others v Council and Commission, *Press Release No 82/16 Luxembourg*, 28 July 2016
https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-07/cp160082en.pdf (et.15.04.2021)

sanctions imposed on the high ranking officials within the army and police. The European Council considered their role in the administration of Zimbabwe as a reason enough to impose restrictive measures on them.[290]

The judgement made by the ECJ cemented the previous judgement by the General Court of 22 April 2015, which argued that Tomana and others were given sanctions based on the correct legal application of the EU laws.[291] The General Courts further pointed out that the sanctions were correctly implemented according to the EU laws. The EU institutions neither violated nor abused their powers when they imposed sanctions on individuals associated with Zimbabwe's government. It argued that the Council did not make an error or mistake on its assessment. The judgement which the General Courts gave forced Tomana and others to appeal.[292]

According to the ECJ, the legal basis of the restrictive measures/ sanctions against Tomana and others is premised on Article 4, paragraph 1 of the European Council Decision 2011/101. The judgement managed to put individuals into distinguished categories namely, members of the Zimbabwe government, natural persons linked to suppression of human rights, the rule of law, and democracy.[293]

Tomana and Others argued that there might be an error or mistake in the imposition of sanction by the European Council on them. According to them, the European Council could have directed sanctions only to those directly connected to suppressing human rights and undermining democracy in Zimbabwe. Tomana and others further argued that the General Court had mistakenly identified individuals as linked to the government of Zimbabwe based on the position they are holding or they have held in the past.[294]

Considering the judgement of the General Court and ECJ, it was established that the European Council adequately assessed and evaluated officials and other natural

[290] ibid
[291] European Court Of Justice, op.cit
[292]Klinkmüller Severin, "The Company You Keep: The Court of Justice Confirms Sanctions Against Persons Associated with Zimbabwe Regime," *European Papers*, Vol. 1, 2016, No 3, pp. 1279-1281 , 2016, https://www.europeanpapers.eu/en/system/files/pdf_version/EP_EF_2016_H_026_Severin_Klinkmuller_00082.pdf (et.06.04.2021)
[293] ibid
[294] ibid

persons who were linked to the Government of Zimbabwe.[295] The link between the government of Zimbabwe and individuals was determined based on sufficient evidence. The Court highlighted that the government of Zimbabwe under President Robert Mugabe had a monopoly of power. Thus the restrictive measures on the individuals were justified.[296] The Court concluded that those individuals with high positions, particularly in the military, police, and other government security institutions, are linked to the Government of Zimbabwe.

The ECJ pointed out that the European Council didn't make a presumption about Tomana and others concerning their connection to violating human rights, abusing the rule of law, and devastating democracy. If the European Council had made presumption, they would have demonstrated their positions by openly rejecting Zimbabwe's practices.[297] Considering those individuals who had already left their top government posts, the court pointed out that those individuals could have legitimately remained linked to Zimbabwe's leaders.

Based on the ECJ, the sanctions targeted Zimbabwe, particularly senior government officials and natural persons, are considered legal under European laws.[298] The judgement by the ECJ approved the lawfulness of EU sanctions on individuals associated with the government of Zimbabwe.

2 UNITED STATES OF AMERICA SANCTIONS POLICY ON ZIMBABWE

The relationship between the USA and Zimbabwe became sour in early 2000 when the USA decided to place sanctions on Zimbabwe based on the reports related to violations of human rights, undermining of the rule of law and democracy, among other factors.[299] Regarding the USA's sanctions on Zimbabwe, two legal instruments are critical namely, the Executive Orders and the Congress Public Law (Zimbabwe Democracy and Economic Recovery Act). The President of the USA imposed sanctions on Zimbabwe

[295] Mapondera Marshal , "Tomana V. The EU: Regional Complementarity or Candy Coated Contemporary Imperialism," *Africa Law Today*, Issue 3, 2015
[296] Klinkmüller Severin, op.cit
[297] European Court of Justice, opcit
[298] Klinkmüller Severin opcit
[299]Chigora Percyslage and Didmus Dewa, "surviving in a hostile environment: An analysis of Zimbabwe's foreign relations in 21st century international relations," *African Journal of Political Science and International Relations*, Vo l3 (3), 2009, p. 95
http://www.academicjournals.org/AJPSIR(et.01.12.2020)

by declaring the Executive Orders, and these powers are derived from the provision of the International Emergence Economic Powers Act (50 U.S.C.1701).[300]

2:1 USA Sanctions on Zimbabwe under the Presidential Executive Orders

The President of the USA has the prerogative powers to introduce sanctions on states, organisations and individuals using the powers given to him under the International Emergency Economic Powers Act (IEEPA). Under the IEEPA, the President is allowed to renew the sanctions as long as the reasons which motivated them in the first place are still there. Also, section 301(3) of the US code permits the President to delegate the authority vested on him under the IEEPA.[301] This legal instrument is widely interpreted in the sense that it is invoked to counter different types of threats regarded as extraordinary or unusual. These threats range from national security, foreign policy to the economy of the United States of America.

Executive order number 13288 was declared for Zimbabwe in 2003. The primary aim of the Executive Order was to change the behaviour and actions of the Zimbabwean Government. It was accused of devastating the democratic institutions, the rule of law. In the same vein, the Zimbabwe government's actions or behaviour contributed to the economic and political challenges in the whole region of Southern Africa.[302] Based on the reasons mentioned above, the USA argued that Zimbabwe action was detrimental to their interests in the region.

Executive Order number 13469 widened the scope of the National Emergency in 2008. With it, the USA froze assets of individuals who were thought to be involved in suppressing democratic systems, committing crimes, contributing to political violence and involving in public corruption.[303] The actions of these individuals were regarded as a threat to United States foreign policy.

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[300] OFAC, *Zimbabwe Sanctions Program*, 2013 , https://home.treasury.gov/system/files/126/zimb.pdf (et.15.04.2021)

[301] Casey Christopher , Ian F. Fergusson, Dianne E. Rennack and Jennifer K. Elsea, "The International Emergency Economic Powers Act: Origins, Evolution, and Use," *Congressional Research Service*, 2014, https://fas.org/sgp/crs/natsec/R45618.pdf (et.10.03.2021)

[302] US Department of Treasury, Executive Orders 13288 Zimbabwe, 2003, https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20030310(et.13.05.2021)

[303] US Office of the Federal Register, Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe, 2008. https://www.federalregister.gov/documents/2008/07/29/08-1480/blocking-property-of-additional-persons-undermining-democratic-processes-or-institutions-in-zimbabwe(et.24.01.2021)

Furthermore, the Presidential Executive Orders clearly stated that any transaction or dealing involving US individuals or related to anything involving US property or interest is not allowed. Under the same notion, it is not allowed to contribute money or assets, goods or service for the interest or benefit of the individuals under sanctions.[304] In this case, only individuals and organisations on the sanctions list are blocked from doing business or trading with the people of the USA. It should be understood that the Presidential Executive Orders on Zimbabwe are not like embargoes that completely cut trade or business with the USA. Instead, the executive orders allow individuals who are not on the sanction list to trade or do business with the USA persons.[305] However, many entities are reluctant to transact with the country under sanctions due to the heavy penalties associated with violating sanction rules. The Treasury Department implements and monitors the USA sanctions through its OFAC.[306] The OFAC has the powers delegated to it by the Presidential Powers to be responsible for listing Special Designated National (SDN). The OFAC performs this duty of listing SDN working together with the Department of State.[307]

2:2Zimbabwe Democracy and Economic Recovery Act as an instrument for the Imposition of Sanctions on Zimbabwe

The legal basis of the USA sanctions against Zimbabwe is derived from the Zimbabwe Democracy and Economic Recovery Act (ZIDERA) of 21 December 2001. This law imposes sanctions on Zimbabwe as a state. In addition, the law directs the Secretary of Treasury to inform or advise the USA Executive directors of the international financial organisation such as World Bank and IMF to vote against any loan, credit or grants that are supposed to be given to Zimbabwe except for human rights or good governance.[308] For the sanctions imposed on Zimbabwe to be removed, the Zimbabwe government must meet conditions stipulated in the ZIDERA. The president of the US has

[304] Ibid
[305] ibid
[306] US Department of the Treasury, Zimbabwe - Related Sanctions, https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/zimbabwe-related-sanctions(et.31.03.2021)
[307]United States Federal Registers, Zimbabwe Sanctions Regulations, 2020, https://www.federalregister.gov/documents/2020/05/22/2020-11093/zimbabwe-sanctions-regulations (et.31.03.2021)
[308] United States Congress, "Zimbabwe Democracy and Economic Recovery Act (ZIDERA) of 2001", Pub. L. No. 107-99, 115 Stat. 962 (2001), Section 4: Support for Democratic Transition and Recovery, https://www.congress.gov/107/plaws/publ99/PLAW-107publ99.pdf.(et.07.04.2021)

to approve the removal of sanctions after a thorough assessment and evaluation. In 2018, the US revised the conditions to be met by Zimbabwe for the sanctions to be removed.[309] However, the USA President has the power to waive certain requirements or conditions of sanctions to further their foreign policy interests.

According to the ZIDERA, Zimbabwe is supposed to meet several conditions, including but not limited to property rights, freedom of association and speech, the rule of law and political rights. Also, the government of Zimbabwe is required to show a high level of commitment towards a legal, equitable and transparent land reform program. The government is also needed to ensure the total implementation of the 2013 constitution, align the legislation with the constitution, and commit itself to sustainable economic reforms while ensuring transparency and accountability on the resources, especially diamond.[310] The security forces are supposed to serve with diligence the elected government officials without exercising partisan politics. Some conditions are specifically meant for the elections in Zimbabwe, for instance, the voters roll is required to be released in printed and digital format, Zimbabwe Elections Commission is supposed to execute its duties independently without the influence of the other arms of government, the Defence Forces should neither actively take part in campaigning for the public office nor involved in intimidating the voters. In addition, the government of Zimbabwe is supposed to allow international observers, particularly those from the African Union, Southern Africa Development Committee, USA and EU, to observe elections in Zimbabwe without fear of being victimised. All the candidates should be free to access media, particularly state media, which is supposed to offer equal time to all candidates without favours. Civil societies should have the freedom to operate freely without fear of being victimised.[311] These are supposedly conditions that are required to be met by Zimbabwe in order for the sanctions imposed on it by the USA to be removed.

According to June 2018 amended ZIDERA, the government of Zimbabwe is expected to admit that human rights had been violated, particularly in the 2008 Zimbabwe general elections and Operation Murambatsvina (the operation to demolish illegal houses

[309]Ndakaripa Musiwaro, opcit, p. 99
[310] United State Congress, "Zimbabwe Democracy and Economic Recovery Amendment Act of 2018," https://www.congress.gov/115/plaws/publ231/PLAW-115publ231.pdf (et.30.10.2020)
[311] Ibid

and structures in the urban areas). Many people were left homeless. [312] In the same vein, the government should take a bold step towards national healing and reconciliation, particularly apologising for the Gukurahundi massacre in the Matebeleland province.[313] Also, the government is required to provide an answer concerning human rights activists who disappeared in Zimbabwe.

Lastly, ZIDERA addresses the issue of the land reform program in Zimbabwe. It states that the Government of Zimbabwe is supposed to enforce the Southern Africa Development Committee tribunal's ruling of 2008.[314] The SADC tribunal ruled in favour of the white commercial farmers. The SADC tribunal argued that the radical land reform program was illegal and unjust. Therefore farmers and the employees who were affected are supposed to be compensated. It further argued that the rights of the farmers and employees were violated.

However, it should be highlighted that Zimbabwe has never been affected by ZIDERA in relation to loans or grants because the USA never voted against Zimbabwe. One of the reasons is that International Financial Institutions requires states to pay back loans before borrowing again. Zimbabwe borrowed from the international financial institutions such as IMF and World Bank and it failed to meet the capacity to borrow again over two decades.[315] In 2016, Zimbabwe succeeded to get rid of its debt with IMF. Still, it failed to further borrow from the IMF because of the pari passu[316] , which states that a state is supposed to clear all the outstanding arrears with all the International Financial Institutions to meet the condition to borrow again.[317] Therefore, based on this point, the USA has never voted against any loan to the Zimbabwe government. The World Bank and IMF suspended Zimbabwe from getting loans in September and October 1999.

In trying to analyse the ZIDERA, it is hard for Zimbabwe to meet all the requirements of the Act because Zimbabwe is a sovereign state. The ZIDERA sounds

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[312] ibid
[313] ibid
[314] ibid
[315] Jan Grebe, op.cit
[316] "The pari passu is a condition clause which is used in the public or private international unsettled debt responsibilities, in short there are collective loans arrangements as well as bond agreements. Literally it can be understood as things that are in similar value, or items that are of the same level or rank."
[317]Mhlanga Phillimon, "Zi m sitting on debt time bomb ...spiralling out of control," *Business Times*, 2020. file:///C:/Users/user/Downloads/20200123-zwe-zim-sitting-on-debt-time-bomb-businesstimes.pdf (et.09.05.2021)

more of extra-territorial jurisdictions and meddling in the domestic affairs of Zimbabwe. Further, one would argue that ZIDERA is a carrot and stick approach. At the same time, they are supposed to assist in creating quality and robust democratic institutions in the country. All these conditions set by the USA through ZIDERA are prone to be contested from the international legal point of view. Zimbabwe, as an independent state has a right to make its own laws, particularly regarding its internal affairs.

3 THE EFFECTS OF SANCTIONS IMPOSED ON ZIMBABWE

The sanctions targeted on Zimbabwe affected the living condition of the general citizens at large. The economic hardships in the country forced many Zimbabweans to leave the country in great numbers in search of the "greener pastors".[318] A large number of Zimbabweans headed to Botswana, South Africa and the United Kingdom. Zimbabwe became the fastest declining economy globally, with hyperinflation and high unemployment estimated to be more than 70%.[319]

The sanctions affected the image of Zimbabwe in the international arena. This led to a situation whereby Zimbabwean businesses encountered a lot of challenges to secure credit lines due to the fact that Zimbabwe was deemed as a risk state.[320] The negative image depicted by the EU and USA sanctions affected the Foreign Direct Investment (FDI) flow to Zimbabwe. According to Kromah (2007), in 1998, the FDI entering into Zimbabwe was estimated at USD 444,3m, but this figure decreased to USD 40m by 2006.[321] On the same note, western-based companies are discouraged from investing in Zimbabwe. All these culminated in several problems, including but not limited to foreign exchange challenges.

Moreover, many European donor agencies and NGOs terminated their projects in Zimbabwe. For instance, Danish International Development Agency (DANIDA), as well

[318] Ogbonna, Chidiebere C, "Targeted or Restrictive: Impact of U.S. and EU Sanctions on Education and Healthcare of Zimbabwe," *Africa Review*, Vo. 11 (3), 2017, pp.31-41 http://dx.doi.org/10.4314/afrrev.v11i3.4

[319] Portela Clara,"EU use of "Targeted" Sanctions Evaluating Effectiveness," *CEPS Working Document*, No 391, 2014, p.15

[320] Nzaro Robert, Njanike Kosmas and Munenerwa Emma, "The Impact of Economic Sanctions on Financial Services: A case of Commercial Bank in Zimbabwe", *Journal of Contemporary Management*, vol, 2011, p. 105

[321] Mbanje B.C Bowden and Mahuku N. Darlington, "European Union Sanctions and their impact on Zimbabwe 2002-2012. Finding Alternative Means to Survive*". Sacha Journal of Policy and Strategic Studies*, Volume 1 Number 2,2011, pp. 1-12

as Canadian International Development Agency, suspended their development projects and employees were retrenched. The DANIDA in 2001 terminated its project meant to maintain and rehabilitate roads. It is acknowledged that USD$48m was allocated for the road and transport sector but unfortunately, DANIDA suspended it.[322]

Starting from early 2000, following the deterioration of relations between Zimbabwe and the western world, the health sector was affected negatively. This is because of the high level of brain drain of qualified health workers. Most of the unexperienced personnel were hired by the government to fill the lacuna. Moreover, the withdrawal of EU aid from Zimbabwe led to decreasing of medicines in hospitals and clinics. At the same time, the health sector suffered from the lack of foreign currency to purchase medicines from abroad. The nurses and doctors have been doing collective industrial actions demanding better salaries for the past two decades.[323] The salaries of the health professionals in Zimbabwe are below the poverty datum line.

Since 1980, the EU has been actively funding education projects in Zimbabwe. This led to the construction of many schools both in the urban and rural areas. EU grants facilitated the construction of classrooms and purchasing of textbooks. Just after independence from 1980 to 1984, almost 1000 schools were built by the government of Zimbabwe in partnership with the EU.[324] However, in 2002, the relation between Zimbabwe and the West deteriorated, most of the grants were suspended. Many teachers started to leave the country, going to South Africa, Botswana, Zambia and Namibia to look for better salaries. The Zimbabwe education sector is declining due to financial constraints.

4 THE EVALUATION OF THE LEGITIMACY OF SANCTION IMPOSED ON ZIMBABWE IN THE CONTEXT OF INTERNATIONAL LAW

The sanctions imposed on Zimbabwe by the USA are justified based on the domestic laws of the USA. The ZIDERA is used as the legal basis. This Act was enacted to change the behaviour of the Zimbabwean government and to foster democracy. The sanctions imposed on Zimbabwe are contested based on the principles of international law. The sanctions stipulated under the ZIDERA demonstrates the breaching of the principle of international law and its universal norms, especially those principles that

[322] Ibid
[323]ibid
[324] ibid

advocate for states to avoid using economic power (economic force) in their engagements. Zimbabwe is forced to adhere to the rules that are set by the USA.[325] ZIDERA has violated the rules that support states' sovereignty and the inadmissibility of intervention in their internal affairs or in the area reserved for those states.

The sanctions imposed by the USA and EU are in the category of unilateral sanctions directed to the state departments, officials and other Zimbabwean companies. It is pertinent to highlight that suppose the ZIDERA and Executive Orders qualify to be referred to as countermeasures. For the countermeasures to be imposed, there should be evidence of a violation of the obligation of erga omnes on the side of the targeted state. As this thesis analyses ZIDERA and Executive orders, it acknowledged that sanctions were imposed on Zimbabwe with the desire to restore democracy, foster human rights and the rule of law. That said, what is significant is to figure out whether the situation in Zimbabwe is mounted to serious breaching of the obligations erga omnes of the common international law. At the same time, there is a need to highlight if the situation in Zimbabwe attracts a legitimacy response by the state that is not directly affected by the actions of Zimbabwe. However, even if one agrees that Article 54 of the ARSIWA accepts countermeasures by the states which are not affected directly, it does not change the point that the wrongful act should consist of the violation of the obligation owed to the community as a whole in terms of Article 48, para 1 of ARSIWA. It is acknowledged that the infringement of fundamental human rights falls under an internationally wrongful act of erga omnes. However, it is debatable that the violation of democratic tenets also amounts to a wrongful act.[326] It is sufficient to express that a right to democracy is yet to be added as part of the international customary law.[327] Moreover, the ARSIWA is not binding in the international law.[328]

Moreover, the principle of sovereignty equality, non-intervention in the internal affairs and territorial integrity of states explicitly opposes imposition of sanctions. The

[325] Chipanga Cynthia, Torque Mude, op.cit

[326] Giuseppe Puma, The principle of non-intervention in the face of the Venezuelan crisis, The Journal of Questions of International Law, Vol 1, 2021, pp 5-26 http://www.qil-qdi.org/the-principle-of-non-intervention-in-the-face-of-the-venezuelan-crisis/ (et.06.09.2021)

[327] G H Fox, 'Democracy, Right to, International Protection' Max Planck Encyclopaedia of International Law paras 35-37, 2008

[328] Burke John A, "Economic Sanctions Against the Russian Federation Are Illegal under Public International Law," *Russian Law Journal* 3(3), 2015, pp. 136. https://doi.org/10.17589/2309-8678-2015-3-3-126-141 (et.06.02.2021)

International Court of Justice (ICJ) pointed out that the principle of non-intervention comprises the right of every sovereign state to carry out its affairs without the interference from outsiders.[329] This principle is at the centre of International law, and it supports states' fundamental rights and duties. The principle of non-interference still plays a crucial role in the international community as it proffers a major obligation meant to enhance the peaceful co-existence of independent states. The ICJ made it clear that the principle of non-intervention is under customary International law.[330]

The principle of non-intervention can be scrutinised based on the Nicaragua judgement, where the ICJ postulated two major elements of the unlawful intervention. Firstly, it must be a matter in which each state is allowed by the principle of sovereignty to decide freely without using force. Secondly, the intervention is regarded as unlawful when it applies the techniques of coercion in relating to such choices.[331] Conversely, international law grants importance to the subjective part as well. In this case, the intention of the intervention is considered too.

It should be pointed out that since at least 1965, the General Assembly has been strongly denouncing the use of sanctions as a mechanism to influence another state's domestic affairs.[332] Moreover, States such as Russia, China, and India issued a joint statement in 2016 that unilateral sanctions are against the principle of sovereignty equality of states, non-interventions in the internal affairs of states and cooperation.[333]

Furthermore, the sanctions imposed on Zimbabwe are not backed or supported by the UNSC Resolution.[334] The UN Charter Chapter VII is regarded as the international legal binding which is used to impose sanctions on the states, individuals, and entities that threaten peace and security in the World. The UNSC imposes sanctions in international law under Chapter VII for the purposes of maintaining global peace and security. Article 39 of the United Nations Charter is very clear regarding the lawfulness of the UNSC to use necessary measures including but not limited to economic means or

[329] International Court Of Justice, Nicaragua (n 44) para 202.
[330] Ibid
[331] Giuseppe Puma, "The principle of non-intervention in the face of the Venezuelan crisis", *Questions of* International, vol 79, 2021, pp.5-26
[332] Ibid
[333] Ibid
[334] Chipanga Cynthia, Torque Mude, op.cit

measures as per the provision of Article 41, to react to actions or an act of aggression that threatens or violates world peace.[335] Although sanctions imposed on Zimbabwe are not universal, the USA has been imposing penalties on the foreign companies which were doing business with the Zimbabwean companies under sanctions. At one point the Barclays bank was fined approximately 2, 5 million dollars for violating the USA sanctions on Zimbabwe.[336]

In 2008, the USA and Britain crafted the draft text at the UNSC, which called for arms embargoes, financial sanctions and travel restrictions on the President of Zimbabwe Robert Mugabe and other government officials.[337] The USA was concerned about the 2008 presidential elections in Zimbabwe, dominated by violence, intimidation, not free and fair. Therefore Zimbabwe was supposed to be given UN targeted sanctions.[338] At the UNSC, nine countries voted in favour of sanctions against Zimbabwe while five countries opposed the sanctions, including Russia and China that hold veto powers. Interestingly, Zimbabwe escaped the UNSC sanctions due to the veto powers of China and Russia.[339]

South Africa, Libya, Russia, Vietnam and China postulated that in the UNSC, Zimbabwe was not a threat to international peace and security. Therefore its situation couldn't qualify for the UNSC to take action. According to International Law, the UNSC is supposed to take actions based on its mandates and duties as the UN charter provides. The imposition of sanctions beyond the scope of maintaining peace and security is not acceptable.[340]

It should be highlighted that according to Article 50 of the ARSIWA, countermeasures are supposed to be taken in a manner that will not affect states to carry out other crucial obligations such as respecting human rights, desisting from the use of force, and other obligations which are provided under the peremptory norms of

[335] UN charter
[336] US Department of the Treasury, "Settlement Agreement between the U.S Department of the Treasury's Office of Foreign Assets Control and Barclaays Bank Plc", 2016
[337] United Nations Security Council, Security Council Fails to Adopt Sanctions Against Zimbabwe Leadership as Two Permanent Members Cast Negative Votes, Press Release SC/9396, 2008, https://www.un.org/press/en/2008/sc9396.doc.htm(et.01.03.2021)
[338] ibid
[339]Wosnip Patrick, "Russia and China veto U.N. Zimbabwe sanctions," Reuters,2008 https://www.reuters.com/article/us-zimbabwe-crisis-un-idUSN0917887320080712 (et.26.04.2021)
[340] United Nations Security Council, opcit

international law.[341] For example, an injured state is not allowed to take countermeasures such as blocking the movement of civilian goods or medical gadgets because it would affect the performance of the international human rights obligation.

The powerful states have been taking advantage of the ill-equipped system to impose sanctions on other states.[342] The USA and EU unilateral sanctions on Zimbabwe have been there for two decades, and their detrimental effects on the civilian population of Zimbabwe are visible. Zimbabwe experienced hyperinflation from early 2000 up to 2010. Sanctions are amongst the causes of that hyperinflation. At the same time, sanctions affected the education and health sector. EU suspended most of the development projects with the government of Zimbabwe.

Zimbabwe sanctions are coercive in the sense that they are meant to change the behaviour of the Zimbabwe government and promote democracy.[343] These sanctions are used for coercive diplomacy and foreign policy. They are crafted to meddle with a Zimbabwe's actions and policies. However, under international law, the principle of non-interference in the affairs of another states is considered unique in states' relations, and states are expected to respect it.

Moreover, the sanctions (countermeasures) are not required to be imposed to punish a state, but they are supposed to assist the state in complying with international law.[344] The breach of international law or obligation has to be clearly identified since sanctions which are motivated by the need to pursue foreign policy are regarded as illegitimate.[345]

Furthermore, the sanctions imposed by the EU on Zimbabwe have been justified based on the Cotonou Agreement and the Common Foreign and Security Policy. Based

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[341] International Law Commission, op.cit

[342]Damrosch Lori Fisler, "The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts," *Berkeley Journal International Law*. vol. 37, no. 2, 2019, p. 249. https://doi.org/10.15779/Z38GM81P45(et.01.02.2021)

[343]Eriksson Mikael, "Targeting the Leadership of Zimbabwe: A Path to Democracy and Normalization?" *Uppsala University, Disciplinary Domain of Humanities and Social Sciences, Faculty of Social Sciences,Department of Peace and Conflict Research*., 2007 http://uu.diva-portal.org/smash/record.jsf?pid=diva2%3A386170&dswid=-4840 (et.10.05.2021)

[344]International Law Commission (ILC), "*Draft articles on responsibility of States for internationally wrongful acts, with commentarie"* (ILC Yearbook 2001) Vol II Part Two.

[345]Ramona Bloj, "Sanctions, privileged instrument of European Foreign Policy," *Robert Schuman Foundation, European issues*, n°598 1st June 2021, https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-598-en.pdf (et.09.07.2021)

on the EU laws, they were qualified as legal through the ECJ judgement on the case of Tomana vs European Council and European Commission. The court found that the European Council followed all the legal requirements and conditions for imposing sanctions on Zimbabwe government officials, entities, and individuals linked to the government.[346] However, their illegitimacy in international law is questioned based on proportionality. The sanctions imposed on Zimbabwe have affected more general citizens than the targeted individuals because one cannot separate the state and its statesmen. Zimbabwe as a state should provide basic human rights such as the right to health and education. The Zimbabwean government ended up failing to adequately provide services because of the sanctions imposed on it.[347]

CONCLUSION

Zimbabwe has been under the EU and USA sanctions for the past two decades. The sanctions introduced to Zimbabwe by the USA and EU are a subject of hot debate regarding their legitimacy in international law. The USA imposed sanctions on Zimbabwe supported by the ZIDERA, and Executive Order 13878. On the other hand, the EU introduced sanctions on Zimbabwe using the Cotonou Agreement and the EU agreed common foreign and security policy (CSFP). Both the USA and EU were convinced that there was a gross violation of human rights, no rule of law and democracy in Zimbabwe.

The thesis highlights that Zimbabwe is a member of the United Nations, yet the UN did not impose sanctions on Zimbabwe after the USA and EU, represented by the United Kingdom and France, presented a sanction draft. Sanctions proposed for Zimbabwe were vetoed by China and Russia in 2008. They argued that the Zimbabwe situation was an internal problem, not an international issue that requires sanctions. According to their argument, Zimbabwe was not putting international peace and security at risk. Moreover, China, Russia, the African Union, and the Southern African

[346]European Court of Justice, op.cit
[347] Ogbonna, Chidiebere C, Op.cit,

Development Committee (SADC) argue that Zimbabwe sanctions are illegitimate in international law.

Furthermore, the thesis establishes that the USA and EU placed sanctions on Zimbabwe with the desire to restore democracy, foster human rights and the rule of law. The study subscribes to the view that breaching the obligations "erga omnes" of the common international law leads to the imposition of sanctions. Article 54 of the ARSIWA accepts the reaction by the states which are not affected directly by the wrongful act. At the same time, it maintains that the wrongful act should consist of the violation of the obligation owed to the community as a whole in terms of Article 48, para 1 of the ARSIWA. It is accepted that violation of fundamental human rights falls under an internationally wrongful act of erga omnes. However, it is debatable that the violation of democracy obligation also amounts to a wrongful act. It is sufficient to express that the democracy obligation is yet to be fully defined under international law. The democracy obligation is a norm in international law which is still in its embryonic phase and it is uncertain.[348] Thus the ZIDERA is dismissed as illegitimate because democracy position is very uncertain in international customary law. At the same time, ARSIWA is not binding in international law.

The thesis further stipulates that sanctions introduced to Zimbabwe by the EU are based on the Cotonou Agreement, of which Zimbabwe is a signatory. The Cotonou Agreement has a human rights and democracy clause that governs the relationship between the European Union and Africa, Caribbean and Pacific countries. Under the law of treaties, international agreements are regarded as legal in international law. However, the sanctions imposed by the EU are illegitimate based on their effects on the civilian population. According to Ogbonna, sanctions led skilled workers from sectors such as health and education to leave their jobs for greener pastures abroad. At the same, the western countries withdrew their funds from the health sector. Hyperinflation in Zimbabwe didn't only affect the health sector but it devastated other sectors. This

[348] Wounters Jan, Meester Dee Bart and Rynagaert Cedric, "Democracy and International Law," *Leuven Interdisciplinary Research Group on International Agreements and Development*, Working Paper 5, 2004, p 48. https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WPLirg5.pdf&ved=2ahUKEwjN2vzCzvvzAhXRgP0HHdzuAbIQFnoECCUQAQ&usg=AOvVaw3TTEXI80EUichlbDM4m-q7

compromised the right to education and health.[349] Zimbabwe government has been failing to exercise its duties and obligations due to the sanctions.

The thesis argued that the sanctions given to Zimbabwe are illegitimate based on the principles of non-intervention. Zimbabwe as a sovereign state, has the right and duties over its area of jurisdictions. Therefore, ZIDERA is considered to be an act of interfering in Zimbabwe's internal affairs. Zimbabwe is supposed to make the reforms without threats or sanctions from the USA. The basis stated in the ZIDERA is more concerned with the political changes in the governance of Zimbabwe. This is tantamount to denying Zimbabwe its right to determine the political system that is good for itself.

In a nutshell, the thesis argued that sanctions introduced to Zimbabwe are illegitimate in international law based on the principle of non-interference in the affairs of another state, sovereignty equality of states, political independence and peaceful settlement of international disputes. Besides, applying extraterritorial jurisdiction to nationals and companies of other states for doing business with Zimbabwe sanctioned companies, nationals and institutions is not justified under international law.

[349] Ogbonna, Chidiebere c, Op.cit, p.39

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