

Séance spéciale

Sanctions unilatérales et droit international  
*Unilateral Sanctions and International Law*

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**A. Memorandum from Mr Alain Pellet**

To : Members of the *Institut de droit international*

From : Alain Pellet

Date : 26 August 2015

RE : A proposal for a New Commission on Unilateral Sanctions and International Law

In a remote past, the grand-father to all of us wrote: “kings have the right to demand punishment not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever”.<sup>1</sup> Unfortunately, for ages, this wise and generous approach was eclipsed by the “Westphalian” conception of absolute sovereignty.

“Mind your business” – this might be seen as one of the mantras of classical international law in the Vattelian conception. Another being: war is a legitimate (if ultimate) means to settle international disputes; as Vattel himself put it: “In doubtful causes which do not involve essential points, if one of the parties will not accede either to a conference, an accommodation, a compromise, or an arbitration, the other has only the last resource for the defence of himself and his rights, — an appeal to the sword”.<sup>2</sup> Whatever *laudatores temporis acti* may think, things have radically changed in both respects and for better. States, at least in words, have renounced war, and more generally the use of force (and even the threat to use force) “as an instrument of national policy in their relations to one another”; and the content of “matters which are essentially within the domestic jurisdiction of any state” has melted away like snow in a sunny day.

As a result, the means for solving disputes have been limited while the possible subject-matters of inter-States disputes have expanded: from now on, States are supposed to only use peaceful means to solve their disputes but they are concerned by the situation existing in other States which, when serious breaches of peremptory norms are at stake, can no longer take shelter behind their “reserved domain”.

Thus, a reiteration of the famous – or, more properly said, infamous – episode of Goebbels declaring (or supposed to have declared... the episode is partly apocryphal) at the League of Nations following

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<sup>1</sup> Grotius, *De iure belli ac pacis*, [1646] Book II Chapter 20 para. 40.

<sup>2</sup> E de Vattel, *The Law of Nation: or, Principles of the Law of Nature, Applied to the Conduct and affairs of Nations and Sovereigns*, [revised ed GG and J. Robinson London 1797] 289.

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Franz Bernheim's claim denouncing the fate of the Jews within the Third Reich is simply unthinkable: "Gentlemen, the Third German Reich is a sovereign State and we are masters of our own home. All that has been said by this individual is not your business. We do what we deem necessary with our own socialists, our pacifists and our Jews".<sup>3</sup> Now, what is unthinkable of course is the discourse, not the fact: whether former Yugoslavia, Rwanda or Syria still behaved or behave as if they can do what they deem necessary with their own populations or parts of them – but their leaders would hesitate to claim it as brutally as the Nazis and in itself this is a progress. And would they claim it, it would clearly be in contradiction with now well established principles of international law. And even more: in such cases, reacting is (or is it: should be?) for other States "the most sacred of their rights and the most peremptory of their duties."

However, admittedly, this is more an abstract proclamation than an operational principle since it leaves open the basic question: "to react, fair enough – but how"? and here come our sanctions.

Now, I am conscious that this presentation in part prejudices the answers to be given to still pending questions – and I suppose that Mrs Damrosch will be more cautious when she'll discuss more precisely whether the topic of sanctions is suitable for a study by the *Institut*. And my presuppositions certainly need to be revisited. Let me however make them explicit in order to arrive to a possible general definition of sanctions:

- (i) sanctions are lawful coercive reactions to an internationally wrongful act;
- (ii) however, only serious violations of peremptory norms of international law, not any breach of international law, call for sanctions;
- (iii) in this respect, sanctions are to be distinguished from counter-measures which can only be taken in case of "non-performance for the time being of international obligations of the State taking the measures towards the responsible State", as said in Article 49, paragraph 2, of the ILC Articles on the Responsibility of States – but the seriousness of the breach does not matter in that case, at least if a damage has been caused to another State or subject of international

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<sup>3</sup> The apocryphal text can be find in Marc Agi, *De l'idée d'universalité comme fondatrice du concept des droits de l'homme d'après la vie et l'œuvre de René Cassin*, [1980 Alp'azur, Antibes, 1980] 354 ; or Mario Bettati, *Le droit d'ingérence - Mutation de l'ordre international*, [1996 Odile Jacob] 18. See also: René Cassin, « Les droits de l'homme », *R.C.A.D.I.* 1974-IV, vol. 140, p. 324.

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law; as very aptly explained by Dr Orakhelashvili: “The purpose of Chapter VII sanctions is essentially different from countermeasures under the law of State responsibility also in the sense that the purpose of sanctions is coordination to respond to common concerns as identified in a centralized manner by the UNSC, not to avenge a previous breach in the interest of particular States.”<sup>4</sup>

- (iv) this also means that, by contrast to counter-measures, when a sanction can be taken, the “sanctioning” State or international organisation needs not be harmed by the breach since it acts in the name of the international community and in the interest of this community as a whole.

I have to recognize that these criteria lead to a definition of sanctions which is broader than the definition I had retained in the entry “sanctions” of the *Max Planck Encyclopaedia*, that I have co-signed with Alina Miron, which is essentially centred on “institutional (and even centralized) sanctions”<sup>5</sup> – those which are imposed by an organ of an international organisation, starting with the Security Council of the UN under Chapter VII – even though the word “sanction” appears nowhere in the Charter.

However, as we wrote in this same contribution, this centralized institutionalized mechanism remains unpredictable, partly because of the veto (or its threat), partly because the Members of the Security Council are not motivated for resorting to those measures which, as is well known, may include the use of force, that is actions “by air, sea, or land forces” when decided under Article 42 of the Charter; however, these actions can only be decided “as may be necessary to maintain or restore international peace and security”. And only the extensive interpretation progressively given to the notion of “threat to the peace” makes this “measures” sometimes used for “sanctioning” gross violations of peremptory norms mainly of a humanitarian character.<sup>6</sup>

These weaknesses of the centralized system have paved the way for the parallel development of what has sometimes been named “third-party countermeasures” – but such a designation is misleading – “that is to say,

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<sup>4</sup> Alexander Orakhelashvili, “The Impact of Unilateral EU Economic Sanctions on the UN Collective Security Framework: The Cases of Iran and Syria”, in A. Marossi *et al.* (eds), *Economic Sanctions under International Law* [2015 Springer] 17-18.

<sup>5</sup> A. Pellet and A. Miron, “Sanctions” in R. Wolfrum *et al.* (eds), *The Max Planck Encyclopedia of Public International Law*, vol. IX [2012 OUP] 1-15.

<sup>6</sup> *Ibid.*

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peaceful unilateral coercive measures adopted by a non-directly injured State in defence of the public interest and not otherwise justified under international law”.<sup>7</sup> These kinds of sanctions “have flourished on the margins of the law”<sup>8</sup> we wrote. And I suggest that they are the ones which could usefully be studied by the *Institut*:

- the measures decided by the Security Council under Chapter VII have been the object of an enormous amount of studies which are hardly manageable by a single Rapporteur or Commission;
- they are (remarkably) dealt with under a particular angle by Judge Wolfrum’s Report on *Judicial Control of Security Council Decisions*; indeed there is still room for elaborating Articles on other aspects of this huge topic; but it might be good not to string together several studies in the same field and to first “digest” the work done by Commission XII (and let me say *en passant* that, from my point of view, Articles are not an end in themselves and that their “life” must be assured by the Secretariat general);
- on the contrary, “unilateral (non military) sanctions” (but let’s think more about the proper designation) are largely a *terra incognita* for the *Institut* and their legal regime is so debated in inter-States practice as well as between scholars that I am convinced that the *Institut* would fully play its role in dealing with the topic which, I think, is suitable for a global study – even if more in depth studies can, in the future, bear upon more specific aspects.

Now, even though I am indeed not a candidate for being the Rapporteur on this most interesting and, I think, useful topic – I should first try to truly start my (and Judge Bennouna’s) assigned topic (and most interesting as well!) on jurisprudence and precedents in international law – let me try to sketch the main issues as I see them.

A first question is: leaving aside the “sanctions” decided by the Security Council, should the topic include those imposed by regional organisations? The answer is far from easy. My first inclination would be to say yes: even though “collective” in that they are taken not by one State, but by a collection of States, their main characteristic is that they are not decided by an organ which, like the Security Council, and, potentially, the General Assembly, can both be seen as representing the international community of States as a whole, but by a gathering of States

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<sup>7</sup> M. Dawidowicz, “Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third-party Countermeasures and Their Relationship to the UN Security Council”, [2006] 77.1 *BYIL*, p. 333.

<sup>8</sup> A. Pellet and A. Miron, “Sanctions”, *op. cit.* note 5.

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which are not representative of this community but declare themselves the champion of its interests.

I have hardly said this that an objection comes to my mind: this is indeed not true concerning measures taken with the authorization or on demand of the Security Council by “regional arrangements or agencies dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action” (Art. 52) “for enforcement action under [the] authority” of the Council. In such a case the measures in question fall within the purview of the centralized system for the maintenance of peace imagined in 1945 and pose problems more similar to those arising from the measures under Chapter VII of the Charter than to those posed by unilateral and decentralize sanctions. However – and this could be seen as an exception in the exception – this is debatable when, on its own initiative, a regional organisation takes over new measures not decided by the Council but as a complement of those it had decided. I think here, for examples, of US economic sanctions against Sudan, or the EU and US sanctions against Iran, Syria<sup>9</sup> or Myanmar.<sup>10</sup> Although it’s difficult to determine a clear boundary, I’d suggest that, if the *Institut* endorses the topic, it should be limited to “autonomous sanctions” opposed to peace keeping measures under Chapters VII and VIII of the Charter. Even if it must be kept in mind that, factually at least, it is not always easy to distinguish between “autonomous sanctions” and those adopted in relation with measures decided by the Security Council.

Another crucial distinction lies in the coercive means used to implement the two types of sanctions. Those decided in compliance with Chapter VII and, more specifically, Article 42 of the UN Charter include the use of force: military sanctions provided for in Article 42 precisely are an exception to the principle of the prohibition of the use of force in international relations – which is more properly enunciated as the prohibition of the use of force contrary to the UN Charter. The only other “exception” is “the inherent right of individual or collective self-defence” in case of an armed attack (an “*agression armée*” says the French text) against a Member of the United Nations. This clearly seems to exclude the possibility of using force – military armed force – in support for

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<sup>9</sup> Alexander Orakhelashvili, *op. cit.* note 4, pp. 3-22.

<sup>10</sup> An up to date list of sanctions by the European Union is available at: [http://eeas.europa.eu/cfsp/sanctions/docs/measures\\_en.pdf](http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf). A minority of them claim to be adopted pursuant a Articles by the UNSC.

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legitimate sanctions outside the framework of Chapters VII and maybe VIII of the Charter.

However, as is well known, things are less clear. First, the question of the lawfulness of humanitarian intervention is still pending and might, in certain cases, be difficult to distinguish from that of legitimate sanctions. Our *Institut* has had occasions to deal with these issues. Let me just recall the recent Articles adopted

- in 1989 at the Session of Santiago de Compostela on *The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States* on the Report of Professor Giuseppe Sperduti;
- in 2003, at the Bruges session the Articles on *Humanitarian Assistance* for which the Rapporteur was Professor Budislav Vukas;
- completed at Santiago in 2007 on the *Present Problems of the Use of Armed Force in international Law and Humanitarian action*, for which the distinguished Rapporteurs were Professor Reisman and Judge Owada – this was completed by yesterday's Report of Professor Reisman; and
- in 2011, at Rhodes on the *Present Problems of the Use of Force in International Law* under the guidance of Professor Raúl Vinuesa.

Moreover and second, regional organisations (and sometimes States acting unilaterally) do not feel prevented from using force in cases where neither self-defence nor any request or authorization by the Security Council can reasonably be invoked; but the sanctions are justified by their authors as necessary to stop gross violations of human or humanitarian rights. And the examples are countless. As Vaughan Lowe and Antonios Tzanakopoulos put it: "A number of instances of practice since 1945 have been invoked by authors – and to a lesser extent by States – as evidence of a general practice of the assertion of a unilateral right to intervene to avert or put an end to a humanitarian crisis or to widespread violations of human rights. The instances commonly cited include, among others, the Indian intervention in East Pakistan (Bangladesh) in 1971; the Tanzanian intervention in Uganda in 1978; the Vietnamese intervention in Democratic Kampuchea in 1978; the French intervention in the Central African Empire (later the Central African Republic) in 1979; the US interventions in Grenada (1983) and Panama (1989); the ECOWAS/ECOMOG interventions in Liberia (1990) and Sierra Leone (1997); the US, UK, and French intervention in Iraq to protect Kurdish and Shia populations from 1991 to 2003 (France intervening until 1998); the interventions in Somalia (1992); Rwanda (1994); and East Timor (1999); and of course the NATO intervention in Kosovo in

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1999.”<sup>11</sup> To these examples, you can add Yemen (last Spring on) or the recent strikes on the Daesh’ criminals. This hypothesis can be included in the general category of humanitarian intervention, but not those aimed at protecting nationals: the ones we are concerned with are designed to safeguard the global interest of the international community – in this respect they can be seen as responding to my definition of “sanctions”. However, my *prima facie* position would be to categorically qualify these actions as unlawful. In this respect, – and still *prima facie*, in principle, I agree with Dr Alexander Orakhelashvili that “[a]s the UNSC possesses the monopoly to use coercion against the State, the overall policy underlying that coercion—its aims, means and impact—should exclusively be determined by the UNSC itself. (...) Such regional institutions can resort to coercion against States only if they are ‘utilized’ by the UNSC to that end, and then only on terms and conditions defined by the UNSC itself.”<sup>12</sup> It is true that I have, in the past, approved some of unilateral sanctions which probably did not meet these requirements and I still consider that some are legitimate – but legality and legitimacy do not always coincide.

Is this enough? I am not sure – and especially in view of Principle 4(h) of the Constitutive Act of the African Union providing for “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.” While the articulation of this right to intervene with the main responsibility of the Security Council in the maintenance of peace is unclear, I would *grosso modo* share Judge Yusuf’s interpretation of this provision – with a small nuance however: “This implies that intervention is used in the context of the AU in the sense of coercive action involving armed force in a Member State without the consent of the government of that State”<sup>13</sup>, although it is probably unlikely “that AU would embark on an enforcement action without the blessing or the support of the UN organs”.<sup>14</sup> Nevertheless, he adds: “should the UN Security Council fail to act, the grave circumstances in respect of which the AU is empowered to take military action, namely genocide, war crimes and crimes against humanity, may

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<sup>11</sup> Vaughan Lowe and Antonios Tzanakopoulos, ‘Humanitarian Intervention’, *The Max Planck Encyclopedia of Public International Law* online.

<sup>12</sup> Alexander Orakhelashvili, *op. cit.* note 4, at 10-11.

<sup>13</sup> A. Yusuf, “The Right of Forcible Intervention in Certain Conflicts”, in Abdulqawi A. Yusuf and Fatsah Ouguergouz (eds), *The African Union: Legal and Institutional Framework. A Manual on the Pan-African Organization* [2012 Brill] 341.

<sup>14</sup> *Ibid.*

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sometimes require the adoption of emergency measures, including military force, aimed at saving human lives. Even in such a situation, the AU may still not be considered to be in breach of its international obligations, so long as its action meets the conditions and criteria laid down in Articles 52 and 54 of the Charter, (...) and thus becomes eligible for an *ex post facto* endorsement or subsequent acquiescence by the Security Council.”<sup>15</sup> The nuance might be more a question: the AU Constitutive Act goes much beyond the strict purpose of maintaining international peace and security; or to put it more clearly: it takes for completed the trend in the Security Council practice consisting in considering that gross violations of human rights may constitute a threat to the peace; but the Council so decides on a case by case basis, while Article 4(h) of the AU Constitutive Act takes for granted that this is so. This said, even if this evolution can be seen as a progress compared with the “Goebbels’ principle”, this re-decentralization of the recourse to the use of force is anything but reassuring in many other respects.

The main concern or concerns is – or are: who decides? And who controls? The questions arise with particular acuity if the “humanitarian sanctions” imply the use of force; but they are more general and must be asked for all kinds of unilateral sanctions. As for the decision, the main problem of the Security Council is that it does not decide enough: the institutionalized sanctions machinery is all too often paralyzed not only by the veto, but also by the inexistence of a “caring majority” – who really cares about the fate of the Moslem minority in Myanmar, or endemic slavery in many countries, or gross human rights violations in Saudi Arabia (and elsewhere! But I am prudent: there is no Saudian in our *Institut*, I’m afraid there are citizens from other countries I could have mentioned (I’ll come back to this shortly!)?

The issue is opposite in respect to unilateral (autonomous) sanctions: the risk (and already in large part the reality) is not vacuum but overflow and abusing what could be called this modern right of taking sanctions in the interest of the community of States as a whole or, even more daring, of the humanity itself or mankind as a whole. From this point of view, the *Institut* will certainly have to try to distinguish between “sanctions” thus understood and extraterritorial measures adopted by a State (or regional) organizations in pursuance of its own economic or political interests. You will remember the perplexed reactions of scholars in relation to the

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<sup>15</sup> *Ibid.*, at 346-347.

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adoption of the laws Helms-Burton and Amato-Kennedy<sup>16</sup> and more recently the fees inflicted by the US administration upon foreign companies and banks held to be in violation of the US embargo against Cuba and Sudan.<sup>17</sup>

In light of this practice, we can hardly deny that there is a risk of “too much sanctions”. But leaving aside the use of force, I am not convinced that there is more risk in admitting sanctions in pursuance of community interests than to recognize the lawfulness of countermeasures. And I now refer to the fundamental Article 54 of the ILC Articles on the responsibility of States – which reads:

“Article 54. *Measures taken by States other than an injured State*

This chapter [that is the chapter on counter-measures] does not prejudice the right of any State, entitled under Article 48, paragraph 1 [which refers e.g. to the case when “the obligation breached is owed to the international community as a whole”] – to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.”

Article 57 of the 2011 Articles on the Responsibility of international organisations is similar (but unfortunately – and for no good reason – only transposes the principles of the 2001 Articles to the relations between international organisations) and does not evoke the right of an international organisation to take such measures against a State; a possibility which goes without saying, but within the limits imposed by the principle of speciality – a principle which, from the point of view of international law, was problematic concerning the European Communities – at least when the first autonomous sanctions were adopted – in 1982 – against the USSR (following the crisis in Poland), then Argentina (after the Falklands war). This has been partly cured since then.<sup>18</sup>

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<sup>16</sup> H. Gherari and S. Szurek (eds), *Sanctions unilatérales, mondialisation du commerce et ordre juridique international - À propos des lois Helms-Burton et D'Amato-Kennedy*, Montchrestien, Paris, 1998, at 338.

<sup>17</sup> Harry L. Clark, “Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures”, 25 *Journal of International Law* [2004] 455-489; M. Audit and R. Bismuth, “Sanctions et extraterritorialité du droit américain : quelles réponses pour les entreprises françaises ? », *La Semaine Juridique Edition Générale* – 12 Jan. 2015, at 64-65.

<sup>18</sup> See on this topic, A. Pellet, “Les sanctions de l’Union européenne”, in M. Benlolo Carabot, U. Candaş, E. Cujo (eds), *Union européenne et droit international. En l’honneur de Patrick Daillier*, [2012 Pedone ] at 431-455.

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But let me come back to Articles 54 and 57 of the 2001 and 2011 Articles on Responsibility – described by Judge Sicilianos as “the oracle at Delphi”. The real problem created by these remarkable provisions is not that they seem to legitimate unilateral sanctions – after all, they are not more threatening than counter-measures and they have – or should have – more noble and dignifying purposes. The problem is that these provisions do it without taking care to determine the legal regime of these legitimate sanctions. In this respect a minority of conservative members of the ILC share the responsibility with probably a minority of States represented in the Sixth Committee but certainly a majority of the most influential ones, which had vociferously opposed the previous draft elaborated by the Commission under then Professor Crawford’s able guidance.

Just as a reminder for those of you who had followed this soap opera: in 2000, the Drafting Committee of the ILC had provisionally adopted an Article 54, much firmer and, at the same time, much more reassuring than the one finally adopted in 2001, in that it sketched a legal regime regulating these measures (which were then called “counter-measures” but I think it was a mistake and that the new appellation is preferable). At the normative level at least, this constituted a guarantee against abuses. This provision – which was entitled: « *Countermeasures by States other than the injured State* » – read as follows:

- “1. Any State entitled under Article 49, paragraph 1, [which has become Article 48] to invoke the responsibility of a State may take countermeasures at the request and on behalf of any State injured by the breach, *to the extent that that State may itself take countermeasures under this chapter.*
2. In the cases referred to in Article 41 [concerning serious papers], any State may take countermeasures, in accordance with the present chapter *in the interest of the beneficiaries of the obligation breached.*
3. Where more than one State takes countermeasures, *the States concerned shall cooperate in order to ensure that the conditions laid down by this chapter for the taking of countermeasures are fulfilled.*”

The changes introduced in 2001 constituted a step backward – what I have called elsewhere a “recessive development”.<sup>19</sup> And it is to be regretted that the safeguards and limitations provided for in the year 2000 have been abandoned, thus creating a legal vacuum.

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<sup>19</sup> ILC Yearbook, vol. I, [2001] at 120.

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And this too pleads for putting the topic on the agenda of the *Institut*: I suggest that there is a real need for Articles and that it would be a challenge – but a useful challenge for the Institute, which is – hopefully – immune from ulterior political motives, to study the issue and adopt a Resolution establishing the foundation for such an Article. I'll come back to this however by way of conclusion.

There is another related point: control. I know the usual objection: Articles are pure abstraction if there is no control mechanism. Let me be dismissive in this respect: norms are one thing; institutions are different. If you condition the adoption of norms to the creation of a control mechanism, forget being an international lawyer! This being said, if the Commission to be constituted were to decide to include the question of control on its agenda, I would simply add some remarks on two questions:

1. who's to control whether the conditions are met?
2. what level of control should be exercised?

On the first question, I certainly agree with my good friend, Judge Koroma, that it is “open to question whether the State imposing the sanction should be the one making the determination that there has been a breach of an international obligation or a violation of international law.”<sup>20</sup> However, my view is that, like the counter-measures, unilateral sanctions are a fact of life and, eventually, they do not raise very specific issues. As I have just said, international law is a world of norms – only exceptionally are the norms enforced through international enforcement mechanisms (hence the survival of counter-measures as “private justice” *faute de mieux*); similarly, it will be very exceptional that the adoption or implementation of international norms be submitted to control – which is usually reduced to “self-control”. And the situation very aptly described in Rüdiger Wolfrum's *Report on the Judicial Control of Security Council Decisions*, where the validity or legality (I have never understood why some colleagues are so keen about the distinction!) of an indirect *ex post* control of the measures taken by the Security Council can be performed by the European Court of Justice or in some even rarer cases by national jurisdictions can hardly occur when unilateral autonomous sanctions are at stake – except maybe if exercised by regional courts of human rights or – on a non judicial level – by the various Committees on Human Rights. And, of course, “by chance”, the validity of unilateral sanctions could be

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<sup>20</sup> Abdul G. Koroma, “Foreword”, in A. Marossi *et alii* (eds.), *Economic Sanctions under International Law* [2015 Springer] p. XV.

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submitted to the ICJ – but, except if a special treaty providing for the seizing of the Court in that matter were to be adopted, this can be only exceptional; and the precedent of Article 66 of the Vienna Convention on the Law of Treaties shows that this kind of precaution is rather vain.

However and paradoxically, the unilateral sanctions could be the object of another form of control – which is, by definition excluded concerning the Chapter VII measures: a control by the Security Council itself (which, with respect, would probably be more efficient and quicker than a Judgment of the ICJ...). And I also flag, just in passing the possibility of resorting to the WTO. It can be recalled in this respect that, Article XXI, paragraphs (b)(iii) and (c) provide as follows:

“Nothing in this Agreement shall be construed...

(b) to prevent any contracting party from taking any action that it considers necessary for the protection of its essential security interests... (iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.”

However, in spite of some “threats” to use it, as far as I know, curiously, except in one aborted case,<sup>21</sup> no State ever resorted to that possibility until now if I am right.<sup>22</sup>

As far as the intensity of the control is concerned, let me just recall the hesitation waltz of the Communities then EU Court of Justice, which had so much difficulty in determining whether it should exercise a restricted or a full control over the validity of the sanctions taken by the EU – whether autonomous or not.<sup>23</sup>

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<sup>21</sup> *United States - The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/1, 3 May 1996, [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds38\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds38_e.htm)); but no recommendation was adopted.

<sup>22</sup> For some indications about the possible seizing of the DSB by Russia against the EU sanctions following the annexation of Crimea, see: <http://www.ejiltalk.org/the-eu-us-v-russia-trade-wars-revisiting-gatt-Articles-xxi-and-the-international-law-on-unilateral-economic-sanctions-2/>.

For a more global (and anterior) analysis, see Michael P. Malloy, “Où est votre chapeau ? Economic Sanctions and Trade Articles”, *Chicago Journal of International Law*, 2003, Volume 4-2, at 372-384.

(<http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?Articles=1218&context=cjil>).

<sup>23</sup> See in particular the Opinion of Advocate General Bot delivered on 19 March 2013, European Commission, Council of the European Union, United Kingdom of Great Britain and Northern Ireland v Yassin Abdullah Kadi, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, paras. 53-123 and the ECJ Judgment in the same case, Grand

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However, it is not my intention to elaborate more on this, for three main reasons:

- first, as a matter of principle, I think that normative and institutional issues should be separated: everything in its own time and sufficient for a day its own trouble!
- second, as I said, I am not sure that the control mechanisms we could envisage in relation with this topic are so specific as to deserve a specific treatment – except maybe if we want to suggest a particular mechanism of implementation; but no urgency in any case;
- third – but indeed not least, I have spoken too long and you are certainly impatient to listen at what Mrs Damrosch has to say – and I wish to reserve as much time as possible for the discussion.

However, by way of conclusion, let me say a few words on an obvious objection which will probably be raised if the Bureau or the Committee of studies were to suggest to put the topic of economic sanctions on the agenda of our honourable company.

Indeed, there is a need for legal Articles on unilateral sanctions and in adopting a Articles on the principles applying to them, the *Institut* would be fully in its role which is, first of all, according to its Statute, “to promote the progress of international law: a) by striving to formulate the general principles of the subject, in such a way as to correspond to the legal conscience of the civilized world”. But, ladies and gentlemen, dear *confrères* and *consoeurs*, are we ready for this. I hope so – but I am not sure we are...

You may have noted that some minutes ago, when I spoke of “humanitarian sanctions”, I gave some examples which were prudently related to none of the countries of which a member of the *Institut* is a citizen... In doing this, I have given a *very* bad example and I certainly should have mentioned ... **bip self-censorship** or this or that other obvious dictatorship. But, in spite of my supposed audacity or sense of provocation, I have looked elsewhere – honestly not because I have not dared; but because I have wished to avoid the usual sterile discussion: “Professor Pellet, scandalously mentioned **bip self-censorship** as the author of gross violations of human rights; he would be better advised to look at what France has done in Algeria or three centuries ago concerning the slave traffic”. I plead guilty – not for what France did in the past, but

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Chamber, 18 July 2013, paras. 97-134. For a discussion of the standards of control, U. Candaş and A. Miron, “Assonances et dissonances de la mise en œuvre des sanctions ciblées onusiennes par les ordres juridiques communautaire et nationaux”, 138 *Journal du Droit International* [2011], at 769-804.

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because I probably should have been more courageous... However, the embarrassing situation in which I have put myself is revealing of an important aspect of the topic I have tried to present this afternoon: it is highly political. From my point of view, it is not a reason for not dealing with it: on the contrary, if the *Institut* were ready to take it and to make concrete normative proposals, it could contribute to de-passionate the debate and to encourage a necessary Article of this so important topic. But I must say that I wonder whether the *Institut* would find the nerve to deal with it in the proper way – that is courageously, without taking too much into consideration the political environment but with a progressive mind. To be honest, I have my doubts; but “hope is not necessary to engagement”!

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