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THE LEGALITY OF ECONOMIC COERCION UNDER INTERNATIONAL LAW

Submitted in partial fulfilment of the requirements of the degree of LLM (International Law)

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DEDICATION

This mini dissertation is dedicated to international law scholars and policy makers who work tirelessly to highlight the injustices of economic coercive measures and uphold the principles of international law.

ACKNOWLEDGMENT

I would like to express my sincere gratitude to my family and friends for their support throughout the completion of this dissertation. Their encouragement, love, and understanding have been a source of motivation and inspiration throughout this journey. I would like to specifically thank the women in my life for their unwavering support, patience, and encouragement during the times when I felt overwhelmed discouraged or unmotivated.

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* For the purposes of this mini dissertation, the terms 'economic sanctions', 'economic coercion', and 'economic coercive measures' will be used interchangeably.

Chapter One:

1. Introducing to the Study

1.1 Background

The concept of coercion has long existed and been utilised for the purposes of advancing the defence of a certain State.[1] It entails military or political manipulation to exert pressure on the opponent compelling a certain action or omission according to the coercing State's aspirations.[2] Coercion was later developed with the codification of the principles of international law, refraining from the use of force, affirming the maintenance of peace and security, and encouraging diplomacy in conflict resolution.[3] It is important to note that the transition from the use of force into economic sanctions did not emerge suddenly, it became a common and recurring feature in political interactions between States and a foreign policy trend.[4]

An economic sanction is known as an action taken by a State or international organization to prevent, regulate, or otherwise hinder the economic intercourse with another state for the purpose of condemning or influencing the target State's actions or policies.[5] The above clearly differentiates between what is now known as unilateral sanctions and United Nations Security Council 'authorised' sanctions'.[6] Unilateral coercive measures are any type of measures or activity applied by a State, group of States, or regional organization without or beyond the authorisation of the (UNSC) that was not in conformity with international obligations of the

[1] Sullivan *The Mechanism for Strategic Coercion* (1995) 1.
[2] As above.
[3] Article 2(3) and 33 United Nations Charter (UNC) 1945.
[4] Ilieva, Dashtevski, and Kokotovic "Economic Sanctions in International Law"2018 *UTMS Journal of Economics* 204.
[5] Moyer and Mabry "Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases" 1983 LAW *& PoL'Y INT'L Bus* 1.
[6] Bowett "Economic Coercion and Reprisals by States*"* 1972 *VA. J. INT'l L* 7.

sanctioning organ; or the illegality of which was not excluded on grounds of the law of international responsibility, regardless of the announced purpose or objective.[7]

The concern around the legality of unilateral sanctions stems from its employment to attain power and global domination over other States,[8] which infringes on the universality of core international law principles such as sovereignty. Determining the legality of specific State's conduct is hindered greatly within an international context as it lacks the legislative mechanism to monitor, develop international law, and outlaw any ambiguity.[9] Further, such void implicates the availability of judicial avenues to adjudicate against the economic coercive measures imposed, and it leaves the targeted State disabled, with a collapsing economy and no means to reverse the measures inflicted.[10]

On the other hand, any sovereign State is entitled to carry out its trade policies and relations with the international community as it pleases.[11] The question however, is where to draw the line in determining if the imposing country's policy constitutes a coercive economic sanction. Another reoccurring question formulates around the available criteria to analyse the State conduct and determine its legality, considering that States manifest their obedience to an international law rule or norm through treaties and declarations,[12] hence it will require a subjective rather than an objective test that includes an assessment of the State's obligations and motives before embarking on economic coercion.[13]

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[7] UN Human Rights Office of the High Commissioner, "Special Rapporteur on Unilateral Coercive Measures to the Human Rights Council: the Overwhelming Majority of Unilateral Measures Applied Today are Illegal under International Law" https://www.ohchr.org/en/press-releases/2021/09/special-rapporteur-unilateral-coercive-measures-human-rights-council (Last accessed on 2022-5-2).
[8] Henderson "Legality of Economic Sanctions Under International Law: The Case of Nicaragua" 1986 *Wash. & Lee L. Rev.* 167 - 168.
[9] Henderson 1986 *Wash. & Lee L. Rev.* 172.
[10] Henderson 1986 *Wash. & Lee L. Rev.* 167.
[11] Article 2(3) and 33 (UNC).
[12] Henderson 1986 *Wash. & Lee L. Rev.* 167.
[13] Bowett, "International Law and Economic Coercion" 1976 *VA. J. INT'L L.* 254.

The illegality of unilateral coercive measures does not necessarily mean an absolute abolishment, several justifications are permissible in responding to a national emergency or a threat to the lives of the State's citizens.[14] As international law develops, many treaties provide for a specific dispute resolution route to be followed and State parties cannot resort to unilateral self-help. [15]

1.2 Problem statement

Historically, when a dispute arises between two countries, it is usually resolved militarily with a direct confrontation between the two states.[16] Such aggressive measures came to an end when the United Nations Charter was founded, marking a prohibition on the use of force, and encouraging diplomacy to maintain peace and security around the globe.[17] International organisations resorted to sanctions as a tool encouraging member states to refrain from international law and human rights violations.[18] Governments started adopting similar means upon the failure of diplomatic efforts, as a collective response, being part of the international community.[19] Despite the apparent ineffectiveness, there has been an increase in economic sanctions imposed with no legitimate authority under international law . The lack of a specific legality criterion as well as, a policing mechanism, opens the gate for unjustified and unauthorised coercive measures which are deemed unfair on the targeted State.

1.3 Research Question

The aim of this research is to establish a criterion upon which one can assert the legality of imposed economic sanctions. It therefrom answers the following research question: to what extent are economic coercive measures legal under international law. In answering this question,

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[14] Bowett 1976 *VA. J. INT'L L.* 250.
[15] As above.
[16] Alexander *The Origins and Use of Economic Sanctions* (2009) 8.
[17] Article 2(3), (UNC).
[18] Alexander (2009) 8.
[19] Alexander (2009) 9 and 20.

the thesis with discuss the following: The objectives of the mini dissertation are to explore the following:

- The nature of economic coercion, the possible measures, and the mechanism upon which various institutions impose them.
- The legal criteria afforded by sources of international law to assert the legality of economic coercion.
- The legal justifications according to the general principles and sources of international law.

1.4 Methodology

This paper will adopt a positivist approach. It will be based on an analytical desk-top, which will consider international and bilateral treaties, UN resolutions, declarations, national legislations and policies, existing literature, and journal articles. Case studies will be examined and compared to determine the current threshold of legality when it comes to the apparent different pattern followed when imposing sanctions on third world countries versus other countries.

1.5 Literature review

The literature concerning the topic of economic coercive measures discussed four main categories and issues, the definition and what includes an economic coercive measure, the necessity of economic sanctions within an international law context, the available criteria of legality and their viability, and the future of economic coercion. Below, I shall present the scholars views on the above referred to categories.

Firstly, the definition of sanctions. Alexander, in his descriptive historical presentation of the economic sanctions, categorised them into positive and negative measures depending on their effect.[20] He affirmed that in order to determine whether the measures fall within the ambit of

[20] Alexander (2009) 9.

economic coercion, it hugely depends on their objective and the procedure upon which they were introduced and enforced.[21] He attributed their ambiguity to the lack of a universally recognised definition.[22] He also acknowledged the measures' effectiveness when imposed against smaller powers compared to first world countries, and by effectiveness he meant economic devastation rather than a change of policy.[23] Alexander questioned the international legality of the legislative procedure upon which unilateral measures are passed.[24]

His position regarding the effect of foreign policy on the legality of economic coercion was reiterated by Ilieva *et al*,[25] they further introduced a regional organisational leg to the legality analysis.[26] They specifically looked at European Union (EU) imposed measures.[27] Ilieva *et al* established their unique grounds to assess legality of both organisational and unilateral sanctions, which will be highlighted later when discussing the third category.[28] They also filled the gap by attributing the lack of universal definition to the lack of an international legislative institution.[29]

Baldwin, when evaluating coercive measures, focused on motives and the lack of definition,[30] agreeing with Alexander and Ilieva *et al* by reassuring that such gap is the causal link between economic sanction and their lack of effectiveness.[31] His arguments stand for both organisational and unilateral sanctions.[32]

Secondly, the debate intertwines between the necessity and effectiveness of sanctions. Under this section, I will look at the authors' position regarding the necessity of coercive measures

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[21] Alexander (2009) 8.
[22] As above.
[23] Alexander (2009) 23.
[24] Alexander (2009) 10.
[25] Ilieva, Dashtevski, and Kokotovic *2018 UTMS Journal of Economics* 202.
[26] Ilieva, Dashtevski, and Kokotovic *2018 UTMS Journal of Economics* 203.
[27] As above.
[28] Ilieva, Dashtevski, and Kokotovic *2018 UTMS Journal of Economics* 206.
[29] Ilieva, Dashtevski, and Kokotovic *2018 UTMS Journal of Economics* 210.
[30] Baldwin and Pape "Evaluating Economic Sanctions" 1998 *International Security* 190.
[31] Baldwin and Pape 1998 *International Security* 195.
[32] Baldwin and Pape 1998 *International Security* 190

within the international realm. The initial argument is that sanctions are considered as a diplomatic measure compared to war. Such view was adopted by Henderson,[33] Alexander,[34] Lowfield,[35] Coates,[36] Ilieva *et al*,[37] and Maday[38] before elaborating on their intended arguments.

In addition to his core argument, Lowfield describes economic coercion as an alternative to diplomatic failures.[39] He further declares his limited support to the general concept of sanctions and confirms that any contrary argument will be overtaken by global events.[40] He suggested that measures should be taken to regulate sanctions, as they are inevitable.[41]

Alexander, on the other hand, recognises sanctions as a mean of enforcing international law and he gives an example of it being a *remedy* to an international covenant's violation. Otherwise, States will diverge from their obligations.[42]

Like Alexander, Maday reiterated the *remedy* concept within a positive context, and he resonated his use to establish a mechanism of accountability and enforcement. [43]

Joyner agreed with Lowfield by linking the need to economic coercion and their effectiveness, he highlighted that the application of sanctions currently relies on governments rather than international organisations (UN, EU, or AU), which should have been the case.[44] As a result, he concluded that foreign policy's viability depends on economic coercive measures.[45] Coates

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[33] Henderson 1986 *Wash. & Lee L. Rev.* 93.
[34] Alexander (2009) 9.
[35] Lowenfeld. "Trade Controls for Political Ends: Four Perspectives" 2003 *Chicago Journal of International Law* 356.
[36] Coates "A Century of Sanctions Origins: Current Events in Historical Perspective" https://origins.osu.edu/article/economic-sanctions-history-trump-global?language_content_entity=en. (Last accessed 2022-06-10).
[37] Ilieva, Dashtevski, and Kokotovic 2018 *UTMS Journal of Economics* 203.
[38] De Maday, "Economic Sanctions in Cases of Violation of International Law" 1913 *The Advocate of Peace* 257.
[39] Lowenfeld 2003 *Chicago Journal of International Law* 356.
[40] Lowenfeld 2003 *Chicago Journal of International* 360.
[41] Lowenfeld 2003 *Chicago Journal of International* 369.
[42] Alexander (2009) 22.
[43] De Maday 1913 *The Advocate of Peace* 257.
[44] Joyner, *International Legal Limits on the Ability of States to Lawfully Impose International Economic/Financial Sanctions,* (2016) 191
[45] As above.

seconded Joyner's opinion and referred to economic coercion in the 21st century to have become an American rather than a global response.[46]

Despite the type of the enforced coercive measures, the question that persists is whether the available criteria concluded by legal publicists determine the legality of sanctions and if they are universally accepted. Should they not, how can we fill in this gap to determine legality within international law?

Lowfield is of the opinion that when sanctions are imposed for the purposes of foreign policy and advancing national security, they shall not be deemed contrary to international law, hence, unilateral coercive measures are legal. [47] Additionally, he refers to limitations from customary international law, which were interpreted by other authors as grounds of justifications.[48]

Elagab utilised a different lens when assessing the question of legality, as he was analysing it for the purpose of concluding on the legality of non-forcible countermeasures rather than economic coercion, which is a broader assessment.[49] In his analysis, he used two hypotheses; the first being that a prima facie assumption that economic coercion is lawful with certain exceptions and the second being, a prima facie assumption that sanctions are unlawful with certain justifications.[50] He concluded with a probability that they are lawful and that there is no sufficient evidence within international law, customary international law or their commentary that reads to legality's prohibition.[51]

Bowett, in his argument answers two questions, what are the rules upon which one distinguishes between permissible and impermissible economic conduct between States?[52] and can we invent

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[46] *Coates "A Century of Sanctions Origins: Current Events in Historical Perspective"* https://origins.osu.edu/article/economic-sanctions-history-trump-global?language_content_entity=en. (Last accessed 2022-06-10).
[47]Lowenfeld 2003 *Chicago Journal of International* 360.
[48] Lowenfeld 2003 *Chicago Journal of International* 368. E.g., the concept of Proportionality.
[49] Elagab. *The Legality of Non-forcible Countermeasures in International Law* (1988) 345.
[50] As above.
[51] As above.
[52] Bowett 1976 VA. J. INT'L L. 245.

new institutions to apply such rules?[53] He argued that when answering the legality question, one must look at the sources of the legal criteria and summarised them to be the UN Charter, the duty of non-intervention, specific treaty commitment and the general rules of customary international law.[54] He further agreed with Lowfield on his grounds of justifications, Bowett descried them as the legitimate exceptions to the general prohibition of economic coercion, which are founded within several sources.[55] According to Bowett the justifications are: self-defence, act of reprisal and sanctions authorised by a competent international body.[56] I will refer to his second question when discussing the fourth category.

I consider Bowett's analysis to be more complex and holistic compared to other scholars.

Joyner, on the other hand, referred to Bowett when discussing the sources of the criteria of illegality and he included the law of countermeasures and human rights law.[57] He considered them as limits that prohibits States from imposing financial international sanctions.[58]

Henderson believed the concept of economic coercive measures in its nature does not allow for legality.[59] His analysis was case study based, focusing on Nicaragua. He argued that the criterion of illegality depends on the State's bilateral and international obligations.[60] Therefore, one cannot assert a specific, internationally accepted criteria that is applicable to all States.[61]

It is evident from the above presentation, that there are no agreed upon grounds of legality, and the ones available lack universality, and the international sphere requires an international adjudicating body to apply such criteria. This is the gap that needs to be filled.

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[53] As above.
[54] As above.
[55] Bowett 1976 VA. J. INT'L L 252.
[56] Bowett 1976 VA. J. INT'L L 252.
[57] Joyner (2016) 191.
[58] Joyner (2016) 191.
[59] Henderson 1986 *Wash. & Lee L. Rev.* 167.
[60] Henderson 1986 *Wash. & Lee L. Rev.* 168.
[61] Henderson 1986 *Wash. & Lee L. Rev.* 179.

Fourthly, economic coercive measures must be systematically organised, which means that they should be regulated under a unified international institution without any form of lobbying by a single powerful State or a group of States.[62] The idea was considered by Ilieva *et al* as a solution for the lack of a universal definition for economic sanctions.[63] They analysed the current role of the General Assembly and asked the question of its competence to take on the position of the international legislative body, whom will regulate the issue at hand.[64]

Further, Henderson[65] and Brownlie[66] both looked at the same issue regarding the General Assembly and concluded that it cannot be promoted to take on new responsibilities and produce internationally binding rules within its status.[67]

Bowett, on the other hand, went further and asked if we can invent novel institutions to apply the above referred to criteria of legality.[68] He considered the UNSC as well as other trade organisations such as General Agreement on Tariffs and Trade (GATT) now known as World Trade Organisation (WTO).[69] Bowett was leaning more towards UNSC rather than other trade/ good-specific organisations as they are not exclusive to all countries unlike UNSC.[70]

Finally, Lowfield reiterated the importance of sanctions and the need to regulate it for clarity and fairness when applied, and I quote "sanctions will continue to hold a place at the intersection between politics, economics and law".[71]

In conclusion, it is the aim of this study to support legal scholars' arguments that seeks establishing a universally accepted criteria of legality, which can be applied to all types of

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[62] Mansfield "International Institutions and Economic Sanctions"1995 *World Politics* 576.
[63] Ilieva, Dashtevski, and Kokotovic 2018 *UTMS Journal of Economics* 210.
[64] Ilieva, Dashtevski, and Kokotovic 2018 *UTMS Journal of Economics* 203.
[65] Henderson 1986 *Wash. & Lee L. Rev.*
[66] Ian Brownlie *Principles of International Law* (1979) 2.
[67] Henderson 1986 *Wash. & Lee L. Rev.* Also see, Brownlie (1979) 172.
[68] Bowett 1976 VA. J. INT'L L 245.
[69] Bowett 1976 VA. J. INT'L L 255.
[70] Bowett 1976 VA. J. INT'L L 255.
[71] Lowenfeld 2003 *Chicago Journal of International Law* 369.

economic coercive measures irrespective of the enforcing body. It further aims at presenting the grounds of justifications and analyse the need of an international adjudicating body and produce recommendations herein.

1.6 Significance of the study

Legal scholars[72] assumed the legal validity of economic coercive measures once they were deemed effective. It was usually considered a secondary question in the absence of a reviewing institution that holds coercing States accountable[73].

This mini dissertation seeks to elaborate on the legality of such measures under international law, create a concise and applicable criterion, and explore the grounds of justifications.

1.7 Scope and limitation

The scope of the research will be limited to economic coercion and to the assessment of its legality. Where relevant, a comparison shall be drawn between United Nation's Security Council sanctions and unilateral sanctions, sanctions imposed by other regional or subregional organisations (European Union, African Union, World Trade Organisation, and Arab League) in order to seek grounds of legality.

The research does not intend on covering the effectiveness, enforcement, and implementation of sanctions.

1.8 Structure

The first chapter will consist of an introduction, problem statement, research question, methodology, literature review, the significance of the study, objectives of the study, the scope, and limitations of the research. The second chapter will discuss the history of sanctions, their

[72] Alexander (2009) 22. *Also see,* Joyner (2016) 191.
[73] Bowett 1976 VA. J. INT'L L 255.

different types, and case studies to reflect the nature of imposing and targeted subjects. Chapter three will address the legality of economic coercion. The fourth chapter will address legitimate exceptions to the prohibition of economic coercion.

Chapter 2

2. The Historical Development of Economic Coercion as a Concept

2.1 Introduction

The historical background on the development of international coercive measures provides an understanding of its status and it sheds the light on the definitional dilemma. The purpose of this chapter is to navigate the origin of economic coercion, its types and their differences herein. The chapter will conclude by providing an answer to the definitions' gap, which shall contribute to the general argument on legality.

2.2 Historical background

2.2.1 The ancient rise of economic coercive measures

The concept of economic coercion is not 'novel' to international policy, it is rather ancient as it existed in 432 BC and was enforced by the Athenian leader Pericles as a tool of foreign policy, it was known as the Megarian Decree.[74] The decree was in response to the abduction of three Aspasian women, it suspended traders from Megara from all forms of economic intercourse with the Athenian empire including the use of their ports and marketplace. [75] As a result, the Peloponnesian war erupted due to the severe damage in the Megarian economy.[76] The Megarian Decree was the first recorded use of economic manipulation as a political tool.[77]

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[74] Watson "An Introduction to International Political Economy" 2004 *London: A&C Black* 24. Also see, Megarian Decree https://www.livius.org/articles/concept/megarian-decree/ (Last Accessed on 2022-09-06

[75] Abughris, "A Brief History of Economic Sanctions" https://www.carter-ruck.com/insight/a-brief-history-of-economic-sanctions/ (Last Accessed on 2022-09-06).

[76] Milica Delevic "Economic Sanctions As A Foreign Policy Tool: The Case Of Yugoslavia" *IJPS* Available at: https://www3.gmu.edu/programs/icar/ijps/vol3_1/Delvic.htm

[77] Watson 2004 *A&C Black* 24.

The association of economic coercion with foreign policy was considered a historical phenomenon unique to the example in Greece.[78] During the Middle Ages, trade embargos were used as a form of economic pressure.[79] With the increase of trade between States, embargos developed as a unified foreign policy tool.[80] Yet in the times leading to World War I (WWI), economic coercion was usually linked to wars, either resulting in warfare or imposed as one of the acts of war.[81]

In recent history, economic coercion developed as a tool of enforcing international peace and security.[82] It was first introduced during The Hague Peace Conferences of 1899 and 1907 (Hague Conferences).[83] The objectives of the Hague conferences were to secure alternatives to war and to end the progressive development of weapons.[84] It succeeded in codifying the laws and principles on peaceful disputes resolution and it established what we now know as the Permanent Court of Arbitration.[85] The Hague Conferences was the first international arena where economic sanctions were welcomed as an alternative to warfare.[86] The League of Nations followed soon thereafter.

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[78] Bogdanova*, Unilateral Sanctions in International Law and the Enforcement of Human Rights: The Impact of the Principle of Common Concern of Humankind* (2022)17.
[79] "According to the Code of Justinian, which was implemented in the Byzantine Empire, it enforced strategic exports controls forbidding the trade of wine, oil, defensive and offensive equipment, along with the raw materials necessary for their manufacture" Bogdanova, (2022*)* 16.
[80] Stantchev *The Medival Origins of Embargo as a Policy Tool* (2012) 373. Also see, Bogdanova (2022) 16.
[81] Carter *Economic Sanctions* (2011). Para 4.
[82] Scott "The Hague Peace Conferences of 1899 and 1907: A Series of Lectures Delivered before the Johns Hopkins University in the Year 1908" 1909 *Baltimore, Md* 91.
[83] As above.
[84] Encyclopaedia.com "Hague Convention" https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/hague-convention#:~:text=The%20first%20Hague%20Conference%2C%20in,means%20to%20ensure%20lasting%20peace (Last Accessed on 2022-09-06)
[85] The Convention for the Pacific Settlement of International Disputes (1899). Article 20. Also See, Scott 1909 *Baltimore, Md* 91.
[86] Heselhaus "International Law and the Use of Force" *EOLSS* 4.

2.2.2 The League of Nations

In the years between 1914 and 1917, the war triggered the debate around the role of international law and its institutions to eliminate and resolve interstates disputes.[87] When WWI ended, statemen did not want to go through the horrors of the war again.[88] Therefore, the influential intellectuals and the elites of the UK and US suggested a legal code to prevent military confrontation and they came up with the Covenant of the League of Nations,[89] which transformed the international realm from anarchy to community.[90] Accordingly, economic coercion became an instrument of collective security.[91]

Economic coercive measures were partly implemented during WWI, and they have proven their effectiveness.[92] Therefore, western politicians and legislatures considered sanctions as an alternative tool to the use of force, and it was first codified in the drafts to the Covenant of the League of Nations.[93]

> "If any state violates the peace, other states should either provide military and naval force or, as an alternative, *impose financial and economic restrictions*."[94] (Emphasis added).

Economic restrictions were embedded in Article 16 of the League of Nations, despite the opposing views due to sanctions' adverse impact on civilian population.[95] The Article stated that upon failure of arbitration, sanctions shall be deemed the primary mean of coercion and armed

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[87] Wertheim *The League That Wasn't: American Designs for a Legalist-Sanctionist League of Nations and the Intellectual Origins of International Organization, 1914–1920* (2011) 797. Also see, Bogdanova (2022) 19.
[88] Bogdanova, (2022) 20.
[89] Wertheim (2011) 799.
[90] Wertheim (2011) 799.
[91] Alexander (2009) 21.
[92] President Wilson of the US described economic sanctions as "peaceful, silent, deadly remedy". He believed that they are the most viable alternative. Also see, Bogdanova (2022) 20.
[93] Miller & Butler *The Drafting of the Covenant* (1928) 6. "the draft prepared by the Lord Phillimore's Committee." Also see, Bogdanova (2022) 20.
[94] Miller & Butler (1928) 6.
[95] Chandler *The Interpretation and Effect of Article 16 of the Covenant of the League of Nations* (LLM Thesis 1936 University of Chicago) 13 – 14

forces interventions are secondary.[96] Member States were entitled to invoke such measures against other States (members or non-members) should they commit an *act of war* against the League of Nations.[97] The discretion given to States was later amended in 1921 by the adoption of resolutions limiting the self-executing nature of Article 16, member States were to decide if a breach of the Covenant had occurred.[98] None of the Articles or the procedural resolutions adopted soon thereafter included a definition of economic coercion.[99]

In the 1920s, the use of economic coercion by the League of Nation was successful when imposed against smaller States.[100] The League *threatened* with economic restrictions against Yugoslavia in 1921 to cease military operations in the territory of Albania and in 1925 against Greece to withdraw their occupation from Bulgarian territory.[101] It is important to highlight that no actual restrictions were imposed and the mere threats of financial hardships proved their effectiveness and the targeted States retracted immediately.[102] However, in 1935 the League of Nations was unable to exert sufficient economic pressure against Italy for invading Ethiopia.[103] It was considered the sole and unsuccessful application of Article 16.[104] The failure was attributed to the failed embargo on the export of strategic material such as petroleum, coal and steel; as well

[96] Covenant of the League of Nations 1919. Also see, Bogdanova (2022) 20 "The Covenant is deemed to have been the most important product of the Paris Peace Conference of 1919".
[97] Article 16 League of Nations, states: "Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not."
[98] Bogdanova (2022) 21.
[99] Chandler 14. Also see, Bogdanova (2022) 21.
[100] Alexander (2009) 23. Also see, Hufbauer "Economic Sanctions Reconsidered" 2007 *Peterson Institute for International Economics* 124.
[101] Alexander (2009) 23.
[102] Alexander (2009) 23. Also see, Hufbauer 2007 *Peterson Institute for International Economics* 124.
[103] Ristuccia. *1935 Sanctions Against Italy: Would Coal and Crude Oil Have Made a Difference?* http://www.nuffield.ox.ac.uk/economics/history/paper14/14paper.pdf . (Last accessed on 2022-09-06).
[104] Bogdanova (2022) 22. Also see, Alexander (2009) 23.

as the non-adherence of major League members such as the United Kingdom, Spain, and Germany with the League Council's recommendations.[105]

Economic coercive measures, during the League of Nations era, were initially adopted to promote international peace between States, yet it failed.[106] President Wilson described economic coercion as "something more tremendous than war", referring to the fact that sanctions are not as peaceful as they are promoted to be.[107] The only achievement according to Bogdanova is that "The Covenant of the League of Nations rebranded economic sanctions: subsequently, they were no longer considered a part of a military strategy".[108] The United Nations and its Security Council adopted the new brand as discussed below.

2.2.3 The United Nations

Economic coercive measures imposed during the World War II (WWII) had a great impact on belligerents.[109] Allied powers followed the self-executing procedure under the Covenant of the League of Nations despite the League's dissolution for its failure to prevent the war.[110] After the war, statemen were once again driven to prevent the horrors of the war from happening again.[111] The United Nations Charter (UN Charter) was introduced,[112] marking the birth of rules governing

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[105] The League of Nations failed to impose *collective* measures. Also see, Ristuccia. *1935 Sanctions Against Italy: Would Coal and Crude Oil Have Made a Difference?* http://www.nuffield.ox.ac.uk/economics/history/paper14/14paper.pdf . (Last accessed on 2022-09-06). Also see, Coates "A Century of Sanctions Origins: Current Events in Historical Perspective" https://origins.osu.edu/article/economic-sanctions-history-trump-global?language_content_entity=en. (Last accessed 2022-06-10).

[106] World War II began soon thereafter.

[107] Ibid. (Bogdanova, 2022) 20.

[108] Ibid. (Bogdanova, 2022) 23.

[109] Ibid. (Bogdanova, 2022) 23.

[110] Bogdanova (2022) 23. Also see, "On April 19, 1946, the League of Nations dissolved, ending 26 years of the existence of an organization which had proven incapable of preventing World War II". The National WWII Museum, 2021 *The League is Dead. Long Live the United Nations.* https://www.nationalww2museum.org/war/articles/league-of-nations#:~:text=On%20April%2019%2C%201946%2C%20the,of%20preventing%20World%20War%20II. (Last accessed on 2022-09-06.)

[111] On the 25 April 1945, the San Francisco Conference has begun with the goal of drafting a charter that would create a new international organization. The Big Four who sponsored the event are: US, UK, China, and the Soviet Union.

[112] United Nations, *Charter of the United Nations*, 1945. (UN Charter)

and limiting the legitimate use of force between nations. Hence, the UN Charter's core principles revolved around peacefulness.[113]

The purpose of the UN Charter -according to Article 1(1)- is to maintain international peace and security, prevent threats to peace, and to avail peaceful means to settle international disputes and breaches of peace.[114] Generally, the concept of 'international peace and security', which was frequently referred to in the UN Charter, was previously used in the Covenant of the League of Nations.[115] However, it had various interpretations under the UN Charter, especially when it comes to the concept of peace.[116] The narrow interpretation of peace is the mere absence of a threat or use of force and it is known as the 'negative peace', whereas 'positive peace' is the necessary activity to preserve conditions of peace.[117] The organs of the United Nations (The General Assembly and the Security Council) utilised both narrow and wide interpretations to adopt binding and non-binding recommendations giving effect to the purpose of all purposes.[118]

Further, Article 2(3) states:

> "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

This sub-article works hand in hand with the general principles of sovereign equality, non-intervention, and non-use of force under Article 2.[119] It paves the way before alternative and peaceful means of dispute settlement. Article 2(3) includes an implied mandate to the UN

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[113] The preamble and Article 1 of UN Charter.
[114] "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace"
[115] Wessendorf *The Charter of the United Nations: A Commentary* (1991) 2275.
[116] "The preamble and Articles 1, 2 and 3 indicates that peace is more than the absence of war." Wessendorf (1991) 2275.
[117] Wessendorf (1991) 2275.
[118] Wessendorf (1991) 2281.
[119] Wessendorf (1991) 2352.

institutions to fulfil its objectives and contribute to conflict resolution.[120] Furthermore, there is a legally binding -primary- obligation on member States to strive for peaceful resolution of their conflicts but no obligation to achieve a specific result.[121]

The authority to execute the above referred to means of peacefulness -in the case of breach or threat to international peace and security- was bestowed upon the United Nations Security Council in terms of Chapter VII of the UN Charter.[122] Article 41 named economic coercion as the preferred alternative measure. It states:

> "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include *complete or partial interruption of economic relations* and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." (Emphasis added).

Article 41 includes a binding mandate by the UNSC to member States to impose collective measures authorised by the Council which may include economic coercive measures.[123] it is important to highlight that neither the UN Charter nor its commentary included a definition of the economic coercion, its nature or its magnitude.[124] Since the adoption of the UN Charter, the United Nations and its UNSC has invoked the Articles under Chapter VII and imposed economic coercive measures on States that jeopardised international peace and security.[125]

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[120] Wessendorf (1991) 2353. Also see, in the year 1946 the General Assembly passed its first resolution recommending economic coercion against Spain and its fascist government led by General Franco. GA/Res/39(I) (12 Dec. 1946).
[121] Wessendorf (1991) 2359.
[122] Articles 39, 40, 41, and 42.
[123] According to Article 25: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."
[124] Douhan *Unilateral Coercive Measures: Criteria and Characteristics* (2021) https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiIz6fOqpH6AhVIXMAKHTr1BdIQFnoECAcQAQ&url=https%3A%2F%2Fwww.ohchr.org%2FDocuments%2FEvents%2FWCM%2FAlenaDouhan.doc&usg=AOvVaw1UwDSob2lLJzy7I1jVjME7 *(*Last accessed on 2022-09-06).
[125] To date, the UNSC has established 30 sanctions regimes the latest being on 30 August 2021, with the adoption of resolution 2590 (2021), the Security Council renewed until 31 August 2022 the measures set out in paragraphs 1

In 1965, the UNSC imposed its first economic sanctions against the white minority government of Southern Rhodesia.[126] Further, in the year 1985, the Security Council urged member States to adopt various economic measures to coerce the government of South Africa for the apartheid regime.[127] In 1990s, the UNSC enforced a sanctions spree in what was known as the 'sanctions decade',[128] where it imposed sanctions against Iraq for invading Kuwait,[129] on Yugoslavia during the Kosovo crisis,[130] and against Haiti demanding the return of its president who was overthrown by a military coup.[131] In addition, the UNSC imposed sanctions against Afghanistan, Angola, Bosnia and Herzegovina, Liberia, Libyan Arab Jamahiriya, Sierra Leone, Somalia, the Sudan, and Rwanda; All were imposed with different motives that includes maintaining peace, protecting human rights, ending wars, or demanding the return of democratic rule.[132]

It is clear from the above examples that the United Nations managed to effectively utilise economic coercive measures as an 'instrument of implementing peace', a brand that was passed down from the League of Nations.

2.2.4 Non-United Nations coercive measures, post-WWII

Upon establishment of the United Nations and its organs, regional interstates alliances started to formulate around the world following suite. Such included economic, social, militarily, and political cooperation, which was regulated in terms of their independent regional charters that

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to 7 of resolution 2374 (2017) against Mali. Also see, United Nations Security Council *Subsidiary Organs of The United Nations Security Council* (2021) https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/subsidiary_organs_factsheets.pdf (Last accessed on 2022-09-06).

[126] UNSC Res 221 (9 April 1966). UN Doc s/res/221.

[127] UNSC Res 569 (26 July 1985). UN Doc s/res/569.

[128] Bogdanova (2022) 31.

[129] UNSC Res 661 (6 August 1990) UN Doc s/res/661; UNSC Res 665 (25 August 1990) UN Doc s/res/665; UNSC Res 666 (13 September 1990) UN Doc s/res/666; UNSC Res 670 (25 September 1990) UN Doc s/res/670; UNSC Res 700 (17 June 1991) UN Doc s/res/700.

[130] UNSC Res 757 (30 May 1992). UN Doc s/res/757.

[131] UNSC Res 917 (6 May 1994). UN Doc s/res/917.

[132] United Nations. 'Repertory Of Practice of United Nations Organs Supplement Nos. 7- 9 (1985-1999) Volume III'. Page 4. Available at: https://legal.un.org/repertory/art41/english/rep_supp7_9_vol3_art41.pdf Accessed on 6 September 2022.

included their core principles, objectives, as well as the member States' rights and obligations, it also included a retribution procedure for when there is a breach to the their charter just like the UN Charter. An example of those alliances is The African Union,[133] The Southern African Developmental Community, [134] The League of Arab Nations,[135] The European Union,[136] The Association of Southern Asian Nations,[137] and The Organisation of American States.[138]

All the above organisations had stable independence, promotion of peace and security as the predominant objective.[139] The rule of law, member States' sovereignty, and non-interference with other members' domestic affairs were the core principles.[140] Most of the organisations called for peaceful settlement of disputes and established independent regional courts, commissions, and tribunals to deal with same.[141] The enabling charters of some organisations enacted the resort to economic coercion as a peaceful dispute resolution instrument.[142] In the instances where the charter does not include sanctions, the organisations adopted resolutions and implemented coercive measures where needed, to nourish the region's peace, security and stability.[143]

In 1996, the Organisation of African Union -the predecessor of the African Union- imposed sanctions on Burundi, setting a precedent to the African Union's sanctions doctrine. [144] Under the AU, such measures are issued by the AU assembly in terms of Article 4(h) and 23 of the African

[133] Founded on 5 July 2002.
[134] Adopted on 17 August 1992.
[135] Formed on 22 March 1945.
[136] Founded on 1 November 1993.
[137] Established on 8 August 1967.
[138] Founded on 30 April 1948.
[139] Hellquist, "Regional Organizations and Sanctions Against Members: Explaining the Different Trajectories of the African Union, the League of Arab States, and the Association of Southeast Asian Nations." 2014 *KFG Working Paper Series* 10.
[140] Hellquist 2014 *KFG Working Paper Series* 11. Also see, Beirlaen 1984 *SN SI* 75.
[141] Hellquist 2014 *KFG Working Paper Series* 10. Also see, Bowett 1976 *VA. J. INT'L L* 252.
[142] An example is Article 20 of the UN Charter of the Organization of American States of 1948.
[143] Hellquist 2014 *KFG Working Paper Series* 13.
[144] Hellquist 2014 *KFG Working Paper Series* 11.

Union Constitutive Act.[145] The African Union measures include a suspension of membership, limiting their scope to unconstitutional change of government, like what happened to Egypt in 2013.[146] In 2011, the league of Arab Nations implemented coercive measures against Libya and Syria, such was done in terms of Article 18 of the Arab Pact of 1945.[147] The general scope of measures imposed by the league were political responding to regional concerns relevant to the cold war.[148] The European Union, on the other hand, announced -in 2019- the establishment of a global sanctions regime to address serious human rights violations but they have imposed coercive measures prior to the announcement like those imposed against Syria, Venezuela, Ukraine, and Russia.[149]

In addition to regional organisations, individual States started following the trend of imposing economic coercive measures with different motives.[150] The new geo-economic world order encouraged States to enact laws and enforce economic sanctions; some of the examples are the measures imposed against the Soviet Union during the cold war, which were political in nature as western countries tried to implement their capitalist world order.[151] Another example is the Arab States' oil embargo against Israel, such were political and religiously motivated measures.[152] in the late 1970s, the United States established coercive measures against Uganda's Idi Amin for

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[145] African Union Constitutive Act, 2000. According to Article 4: "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"; Article 23(1) states: The Assembly shall determine the appropriate sanctions to be imposed on any Member State that defaults in the payment of its contributions to the budget of the Union in the following manner: denial of the right to speak at meetings, to vote, to present candidates activity or commitments, therefrom"; and Article 23(2): "Furthermore, any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly."
[146] Hellquist 2014 *KFG Working Paper Series* 14. Also see, Lowenfeld 2003 *Chicago Journal of International Law* 360.
[147]Article 18 of the Arab League Pact: "If one of the member States intends to withdraw from the League, the Council shall be informed of its intention one year before the withdrawal takes effect The Council of the League may consider any State that is not fulfilling the obligations resulting from this Pact as excluded from the League, by a decision taken by a unanimous vote of all the States except the State referred to". Also see, Hellquist 2014 *KFG Working Paper Series* 12
[148] Hellquist 2014 *KFG Working Paper Series* 12.
[149] Bogdanova (2022) 40.
[150] Lowenfeld 2003 *Chicago Journal of International Law* 356.
[151] Bogdanova (2022) 24. Also see, Reilly *'China's Unilateral Sanctions'* 2012 *The Washington Quarterly* 35.
[152] Bogdanova (2022) 25.

his brutal violations of human rights through his regime. [153] As well as economic measures by the American president Raegan against Nicaragua in 1986 for the non-democratic overthrow of government.[154] Further, between 1970s and 1980s, different States enacted economic coercive measures against Turkey for invading Cyprus.[155] As well as the United Kingdom's against Argentina for their conflict over the Falkland Island and the United States against Afghanistan in response to its terrorist attack in 2001.[156]

The conceptual evolution that has been impacting economic coercion since its inception does not necessarily mean the abandonment of its ancient associations and motives. To date, economic coercive measures are applied for political objectives, to inflict economic hardships and as remedy for violating international law and human rights law, and to ensure international peace and security. It is evident from the above historical presentation and the abundant experiences - irrespective of the sanctioning body- that economic coercive measure lacks a definition, which is a gap I intend on tackling in the next section.

2.3 Defining Economic Coercive Measures

Now that we have a clear historical background on the nature of economic sanctions and how they have evolved, we shall proceed with bridging the definitional gap, which is the purpose of the following section. To reach such a conclusion, I will answer the question of 'what constitutes economic coercive measures?' and draw a distinction between the different types of such measures, from there a definition will become inevitable. Defining sanctions will help us substantiate the legality argument, which we will be dealing with in the next chapter.

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[153] Bogdanova (2022) 25. Also see, Nurnberger, 'The United States and Idi Amin: Congress to the Rescue' 1982 *African Studies Review* 49.
[154] Henderson 1986 *Wash. & Lee L. Rev.*
[155] Bogdanova (2022) 26. Also see, Campany 'U.S.-Turkish Relations in the Arms Embargo Period 1974–1980' 1984 *ProQuest Dissertations Publishing.*
[156] Bogdanova (2022) 26.

2.3.1 What constitutes economic coercion?

Legal scholars have deduced economic coercion into two categories collective and unilateral.[157] Both consist of the same elements, but they differ on the imposing organ.[158] Despite the fact that both lack a clear definition under international law, collective economic coercion is regulated unlike unilateral measures.[159] Collective economic coercion refers to measures imposed -and/or authorised- by the United Nations through its Security Council guided by the Articles of its founding Charter.[160] Whereas unilateral measures are measures outside the scope of the United Nations Charter, it includes coercive measures imposed by regional organizations and individual States.[161] The joint elements are a sender organ or a State, a receiver State, and a restrictive measure.[162] The parties to coercion can also be called as sanctioning and sanctioned, targeting, and targeted, and sender or source State.[163]

Under international law, sanctions are considered a power that ensures law, a measure in response to internationally wrongful act, an enforcement instrument against the breaching State, and a measure not involving armed forced for the maintenance of international security.[164] It was highlighted that sanctions are introduced today to pursue enhancement of democracy and human rights protection rather than to address threats to peace, breaches of peace or acts of aggression, or in response to violations of *erga omnes* obligations.[165] Furthermore, according to

[157] Douhan "Unilateral coercive measures: notion and qualification" 2021 Journal *of the Belarusian State University* 28. "Compliance companies: classify sanctions as unilateral, multilateral, and global. One also speaks about international sanctions, sectoral sanctions, targeted sanctions, countersanctions, direct or indirect sanctions, primary or secondary sanctions, and intended or unintended sanctions." Also see, Bogdanova (2022) 75.
[158] As above 28.
[159] Collective Sanctions are governed by the UN Charter.
[160] Chapter IIV of the UN Charter.
[161] Douhan 2021 Journal *of the Belarusian State University* 29.
[162] As above 28.
[163] As above 28.
[164] As above 29.
[165] As above 29.

academics, there are five purposes to sanctions: compliance, subversion, deterrence, and international and domestic symbolism.[166]

2.3.2 What are the types of economic coercion?

2.3.2.1 Collective Sanctions

As indicated above, those are coercive measures imposed or authorised by the UNSC.[167] According to the Subsidiary Organs of The United Nations Security Council Factsheet, sanctions regimes imposed by the UNSC have changed in focus and scale throughout the past decades.[168] Prior to 2004, the UNSC used to imposed comprehensive economic and trade sanctions and now it impose what is known as targeted or smart sanctions, which considered more specific and effective.[169]

Comprehensive economic sanctions include an across the board ban of all types of trade (direct or indirect) with the sanctioned State.[170] The UNSC usually recommends that *All States* are to follow suit.[171] The economic measures against Iraq is a good example, it included the ban of all trade with Iraq, the transfer of funds for the purposes of trade, and an arms embargo.[172]

The transition from comprehensive to targeted sanctions -within a UN context- began after the UN Secretary-General's report in 1999.[173] He said that measures imposed by the Security Council needs to be improved with minimum effect on civilian populations and humanitarian needs.

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[166] As above 29.
[167] United Nations Security Council *Subsidiary Organs of The United Nations Security Council* (2021) 4 https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/subsidiary_organs_factsheets.pdf (Last accessed on 2022-09-06).
[168] As above 4.
[169] As above 5.
[170] As above 4.
[171] UNSC Res 661 (6 August 1990) UN Doc s/res/661.
[172] United Nations Security Council *Subsidiary Organs of The United Nations Security Council* (2021) 10 https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/subsidiary_organs_factsheets.pdf (Last accessed on 2022-09-06).
[173] Dupont, *Human Rights Implications of Sanctions: Economic Sanctions in International law and Practice* (2020) 48.

Therefore, Kofi Annan proposed 'smart sanctions' also known as targeted sanctions, and he explained that they needs to be applied carefully.[174]

Smart sanctions usually targets the persons, agents, or governmental organs rather than the State as a whole.[175] Such is done through the listing of the names of (public or private) entities, or individuals and imposes assets freezes, travel bans, and arms embargo.[176] The commonly used designation criteria for listing of targeted sanctions is threats to peace, security or stability, violations of human rights and international humanitarian law, and obstruction of humanitarian aid.[177] The most recent example was in terms of resolution 2374, where the UNSC imposed travel bans and assets freezes against individuals who are responsible for obstructing the implementation of the Agreement on Peace and Reconciliation in Mali signed in 2015.[178]

2.3.2.2 Unilateral Sanctions

Unilateral sanctions also known as autonomous measures,[179] they include all types of coercive measures imposed by non-UN entities.[180] In recent years, unilateral measures has expanded variably into different forms such as political, diplomatic, cultural, economic, trade, financial, cyber and many others.[181] According to Bothe, the measures implemented by States and regional organisations conform to one of the following categories: ban or restrictions on trade in commodities, financial transaction, access to financial market, interruption of communication,

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[174] "[i]t is increasingly accepted that the design and implementation of sanctions mandated by the Security Council need to be improved, and their humanitarian costs to civilian populations reduced as far as possible. This can be achieved by more selective targeting of sanctions, as proponents of so-called "smart sanctions" have urged, or by incorporating appropriate and care- fully thought through humanitarian exceptions directly in Security Council resolutions." (Pierre-Emmanuel Dupont, 2020), Page 48.

[175] United Nations Security Council *Subsidiary Organs of The United Nations Security Council* (2021) 4 https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/subsidiary_organs_factsheets.pdf (Last accessed on 2022-09-06).

[176] As above.

[177] As above 5.

[178] As above 32.

[179] Douhan 2021 Journal *of the Belarusian State University* 28.

[180] As above 36.

[181] As above 29.

freedom of movement of persons, Severing or Restricting Diplomatic or Consular Relations, Interstate Contracts, and Private Transborder Contracts. I shall proceed to briefly explain and provide an example of each if any.[182]

1 Ban or restrictions on trade in commodities

This is a typical ban of trade, it can be comprehensive of all trades between the parties or to a needed goods.[183] An example is the US economic measures against Nicaragua, such had an drastic impact on the Nicaragua's economic and political stability.[184]

2 Financial transaction, access to financial market

This type includes a prohibition of access by persons or enterprises belonging to the sanctionee and to assets situated on the territory of the sender State.[185] As well as barring entities from accessing the capital international market and the freezing of assets. [186]The current sanctions imposed by the European Union and the United States against Russia for invading Ukraine is a good example that touches on all of the abovementioned types.[187]

3 Interruption of communication

Communication in this context means the interruption of air by closing of airspace against private and national carries of the sanctioned States and sea traffic consist of the closure of the ports and the prevention of the vessels from the sanctioning State's territorial waters.[188]

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[182] Bothe "Compatibility and Legitimacy of Sanctions Regimes" 2016 *Koninklijke Brill NV* 35.
[183] As above.
[184] Henderson 1986 *Wash. & Lee L. Rev* 168. "The United States termination of trade with Nicaragua is an example of an economic policy designed to influence the political behaviour of a target state."
[185] Bothe 2016 *Koninklijke Brill NV* 37 – 38.
[186] As above 37 – 38.
[187] European Commission "Ukraine: EU agrees to exclude key Russian banks from SWIFT" https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1484 (Last accessed on 2022-09-12).
[188] Bothe 2016 *Koninklijke Brill NV* 38.

4 Freedom of movement of persons

Movement of persons usually relate to the entry of targeted persons, include the prohibition of entry, the introduction of visa requirements and visa denial.[189]

5 Severing or Restricting Diplomatic or Consular Relations

Generally, all types of coercive measures are considered 'diplomatic', as they do not contain elements of use of force compared to war.[190] The prevention against war have always been the reason why States and organisations resort to coercive measures instead.[191] The restriction of diplomatic relations, in this context, means the suspension of friendly relations between the two States, which might include the reduction or closure of embassies.[192]

6 Interstate Contracts

Those are contracts between governments for the delivery of weapons or any kind of specific contractual agreement between the States.[193]

7 Private Transborder Contracts

Such includes the conclusion of contacts between private enterprises in the sanctioning and sanctioned State. It basically prohibits the execution of past and the formulation of future contracts.[194]

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[189] As above 39.
[190] Beirlaen, "Economic Coercion and Justifying Circumstances" 1984 *SN SI* 66
[191] Beirlaen 1984 *SN SI* 66
[192] France24, "E.Guinea closing UK embassy over sanctions against president's son" https://www.france24.com/en/live-news/20210726-e-guinea-closing-uk-embassy-over-sanctions-against-president-s-son (Last accessed on 2022-09-12)
[193] The United States has suspended all contracts that it has had with Russia in response to its invasion of Ukraine. It included gold and arms imports. US Department of Treasury, "U.S. Treasury Sanctions Russia's Defense-Industrial Base, the Russian Duma and Its Members, and Sberbank CEO" https://home.treasury.gov/news/press-releases/jy0677 (Last accessed on 2022-09-12).
[194] As above.

In recent years, coercive measures also included cyber-attacks, which constitutes of blocking online commerce, and hacking of public and private servers, which has a severe financial effect on the sanctioned State as well as jeopardising their nationals data and privacy.[195]

Legal publicists relied on the above categorisations when referring to economic coercion and they acknowledged the lack of a universally accepted definition hereof,[196] most of them attributed same to the absence of an international legislature.[197] Further, they have also highlighted the fact that the ambiguity results in nothing but illegality,[198] lack of accountability, and inequality between States.[199] Therefore, scholars contributed with their own definition to Unilateral Coercive Measures to include the following elements: A denial of economical access,[200] a coercion to obtain subordination,[201] that is discriminatory in nature,[202] not only politically or economically motivated but also an instrument of economic warfare, rallying domestic political support, demonstrating resolve to third-party audiences,[203] or simply inflicting punishment,[204] it is imposed by an individual State or with its allies,[205] and it lacks UNSC authorisation and it is not retorsion, countermeasure.[206]

From the above discussion, I aver that unilateral economic coercive measures are any types of measure enforced by a State, a group of States or a regional organisation and lacks legal standing

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[195] Douhan 2021 Journal *of the Belarusian State University* 36.
[196] Elagab (1988) 356. According to Elagab, any attempt to define unilateral coercion will cause a methodological dilemma.
[197] Ilieva, Dashtevski, and Kokotovic 2018 *UTMS Journal of Economics* 210; Also see, Henderson 1986 *Wash. & Lee L. Rev.* and Brownlie (1979).
[198] Bowett 1972 *VA. J. INT'L L*. Also see, Douhan 2021 Journal *of the Belarusian State University* 27, and Ilieva, Dashtevski, and Kokotovic 2018 *UTMS Journal of Economics* 210.
[199] Bowett 1972 *VA. J. INT'L L*. 9.
[200] Coates "A Century of Sanctions Origins: Current Events in Historical Perspective" https://origins.osu.edu/article/economic-sanctions-history-trump-global?language_content_entity=en. (Last accessed 2022-06-10).
[201] The United Nations Human Rights Council (HRC) Res 34/13 (2017-04-04) UN Doc hrc/res/34/13.
[202] Lowenfeld 2003 *Chicago Journal of International Law* 368
[203] Baldwin and Pape 1998 *International Security* 190.
[204] As above.
[205] Lowenfeld 2003 *Chicago Journal of International Law* 368
[206] Douhan 2021 *Journal of the Belarusian State University* 43.

under international law as they are implemented without UNSC authorisation. They are usually imposed by Western countries against lower income countries to inflict harm, alternatively, to secure subordination in an economic or political sense and to change targeted State's *status quo* to one that conforms with the global order.

2.4 Conclusion

This chapter have provided an overview of the historical background of economic coercive measures, types, to establish their identity. The historical interpretation of the concept helped trace its development, which was transformative in nature, economic coercion was anciently associated with war and recognized as a tool of military intervention. Then the League of Nations became the first attempt to rebrand economic coercion as an alternative tool to war. Yet the idea did not crystalize until the formation of the United Nations and its Charter, where economic sanctions were introduced as a tool promoting and implementing peace and security across the globe. The UNSC, regional and trade organisations and States soon started to implement the measures and benefiting from its new identity. The utilisation did not necessarily induce legality within international law; therefore, it was necessary to differentiate between the types of economic coercive measures, which were distinguished by their implementing organ, into collective measures and unilateral coercive measures. Since the later lacks a clear legal framework within international law, it will be analysed in detail to find its legality in the following chapters.

Chapter 3

3. The Legality of Economic Coercive Measures Under Sources of International Law

3.1 Introduction

This chapter will answer the main question of this mini dissertation, which is the legality of economic coercive measures under international law. the discussion will analyse and interpret the identity of international law through its sources to assert the ruling of international law on economic coercive measures and their legality.

3.2 Overview of Sources of international Law

Article 38 of the Statute of the International Court of Justice provides for the primary and secondary sources of international law, which include international conventions and treaties; international custom, which includes general practice accepted by law and principles recognized by civilised nations, the judicial decisions and the teachings of legal publicists are recognized as secondary sources of international law, subject to Article 59.[207] As elaborated in chapter two, economic coercive measures have increasingly emerged as an alternate instrument to curb the use of force. Hence, raising the question around its legality, its association with "force" as a prohibited practice under the United Nations Charter, and as a threat to the international order, which is protected by international trade agreements and organizations; as well as its position before predominant international law principles such as equal sovereignty and the duty of non-intervention. In the subsequent section I will explore the above criteria and conclude with the admissibility of economic coercive measures under international law.

[207] Article 38(1), Statute of International Court of Justice.

3.2.1 Legality of Economic Coercion and United Nations Charter

The UN Charter does not specifically deal with the question of the legality of economic coercive measures.[208] However, it provides principles from which one can deduce prohibition. In the following section I will examine whether the general provisions of the UN Charter imply the legality of economic coercion.

As indicated above, Article 2 established the purposes and core principles of the UN Charter, which sought to deviate from the global historical atrocities of war into peaceful settlements of disputes; all while recognizing the individuality and sovereignty of its member States and the importance of implementing international peace and security.[209] Sub-article 4 concluded the numerous international attempts to codify a prohibition on the use of force:[210]

> "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 in any other manner inconsistent with the Purposes of the United Nations."

The International Court of Justice considered Article 2(4) as the cornerstone of the United Nations and its Charter.[211] The General Assembly reiterated the importance of the Article in aiding international peace and security and urged States to refrain from resorting to such in their international relations through multiple resolutions.[212]

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[208] Elagab (1988) 359
[209] Article 2(3), United Nations Charter.
[210] The attempts included Drago-Porter Convention, Covenant of the League of Nations, and the Kellogg-Briand Pact. Also see Bogdanova (2022) 71.
[211] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Reports 2005, p 168* [148].
[212] "States shall strictly observe, in their international relations, the prohibition of the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Accordingly, armed attack by one State against another or the use of force in any other form contrary to the UN Charter of the United Nations constitutes a violation of international law giving rise to international responsibility." UNGA Res 2160 (30 November 1966) UN Doc a/res/2160 (xxi).

The question herein is whether Article 2(4) includes the application of economic coercive measures. Since Article 2(4) is envisaged in an international legal instrument (a treaty), and the issue is a matter of interpretation; one has to refer to the Vienna Convention on the Law of Treaties (Vienna Convention)[213] and its interpretative rules to understand the intention of the legislatures when formulating the legal text. Further, the practice of States will then become the second leg of the analysis.[214] According to Article 31 of the Vienna Convention, the drafting history, the ordinary meaning of the text, its context and purpose, and subsequent agreements and practices are to be applied as general rules when interpreting a treaty. These guidelines will be taken into account when interpreting the Article.

Considering the above quoted text, there is no clear prohibition on the use of economic coercion.[215] However, during the drafting of the UN Charter, Brazil proposed an amendment to the Dumbarton Oak draft Article 2(4) to include "… and from the *threat or use of economic measures* in any manner inconsistent …".[216] The amendment was rejected with a vote of 26 to 2 and no reasons were given as to why.[217] The comments of the US and Belgium representatives explained that the rejection was made for a 'good' reason.[218] Furthermore, during the General Assembly meeting in 1970, Pakistan's representative referred to the General Assembly Resolution 2160 (xxi) and said that the text of the Article did not provide a clear and satisfactory scope of its application and "recognized that the term 'force' included not only armed attacks but also other forms of coercion contrary to international law."[219] This submission was adopted by one of the two main schools of thought, which calls for the broad interpretation of the word

[213] Vienna Convention on the Law of Treaties 1969 (Vienna Convention).
[214] Elagab (1988) 360
[215] Elagab (1988) 360
[216] Doc. 2, G/7(4), 6 May 1945, U.N.C.I.Q. vol. Ill, 1945, p. 251, at pp. 253-254, No. 15. Also see, Elagab, 1988 – 360. (Emphasis Added)
[217] Elagab, 1988 – 361.
[218] The Belgiun representative said: "T]he subcommittee had given the point about "economic measures" careful consideration and for good reasons decided against it." Aslo see, Elagab (1988) 361.
[219] UNGA Sixth Committee (25th Session) Summary record of the 1179th meeting (24 September 1970) UN Doc a/c.6/sr.1179 para 19. Also see, Bangodova (2022) 72.

'force' to include economic coercion.[220] A considerable number of western States supported this interpretation in 1973 during the Arab oil crisis, where Arab oil-producing countries restricted the supply of oil to the US and other European States in response to the Israel apartheid against Palestine.[221] Scholars thereto described economic coercion as 'tantamount' to the use of force prohibited under the UN Charter.[222]

The traditional meaning of 'force', which was sponsored by developed countries and followed by the second school of thought, adopted a narrow interpretation of the text to only include armed force.[223] The Soviet bloc States backed the growing opposition by developing countries against the traditional view.[224] An example to such opposition was presented by Yugoslavia and eight other African countries to the Committee on Friendly Relations, submitting that

> "the term 'force' should include All forms of pressure including those of a political or economic character, which have the effect of threatening the territorial integrity or political independence of any State."[225]

It is evident that the broad interpretation of the Article as well as the attempts to establish a legal persona of economic coercion was continuously rejected;[226] it would limit the means available to States to induce pressure upon developing States.[227]

From the above analysis and the interpretation of the Article, economic coercive measures' legal standing wasn't constrained by the UN Charter.[228] However, other legal instruments and

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[220] According to Kelsen "any action of a member State illegal under general international law which is directed against another State". Kelsen, 'International Law Studies. Collective Security under International Law'. War Naval College, vol. XLIX, (1954), 57. Also see Elagab (1988) 362.
[221] Bangodova (2022) 72. Also see, Bowett 1972 *VA. J. INT'L L.* 260- 262.
[222] Bangodova (2022) 72.
[223] Elagab, 1988 – 362. Also see, Bangodova, 2022 – 72.
[224] Bangodova (2022) 73.
[225] U.N. Doc. A/AC 125/L.21, 1996-03-22. Also see Elagab (1988) 364.
[226] "The representatives of the Westerns Powers supported a restrictive interpretation of the word 'force' on the grounds that the travaux préparatoires of the UN Charter could not be read otherwise." Also see, Elagab (1988) 365.
[227] Elagab, "Coercive Economic Measures Against Developing Countries" 1992 *International and Comparative Law Quarterly* 682.
[228] Elagab (1988) 365.

international principles have had another view, which was frequently referred to by targeted States. Such will be dealt with in the subsequent section.

3.2.2 The Causality Between the Duty of non-intervention and Legality of Sanctions

Despite the fact that the duty of non-intervention was not necessarily linked to the legality of economic coercion under the UN Charter, it was frequently brought up -by targeted States- as a recognized principle by the international community.[229] The purpose of this section is to ascertain whether the duty of non-intervention imposes a weight on the legality of economic coercion. I will consider the nature and development of the duty and analyse its causal connection with the legality of economic coercion through modern State practice.

The American continent witnessed the birth and development of the duty of non-intervention. It was originally established by the Latin States in response to more than 60 American intrusive actions between the years 1813 and 1927, which were not described as wars.[230] Subsequently, the UN Charter referred to intervention as a concept regulating the relationship between the United Nations and its member States and not those among the States themselves.[231] However, Article 1(2) cited 'friendly relations' as one of the UN Charter's core principles governing the nature of relationships between nations.[232] The notion was later linked to the duty of non-intervention by a number of General Assembly resolutions.[233]

The undefined principle of non-intervention was referred to in more than thirty-five resolutions, adopted by the General Assembly.[234] Yet it did not amount to a treaty codification.[235] Some of the most influential resolutions include the Declaration on the Inadmissibility of Intervention in

[229] Bangodova (2022) 74.
[230] Ronzitti, "Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective" 2016 *Koninklijke Brill NV* 3.
[231] Ronzitti 2016 *Koninklijke Brill NV* 4
[232] Bangodova (2022) 74.
[233] Bangodova (2022) 74.
[234] Bangodova (2022) 75.
[235] Bangodova (2022) 75.

the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (1965),[236] the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the UN Charter of the United Nations (1970),[237] and the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (1981).[238] The 1965 and 1970 declarations established the prohibition on the use or encouragement of economic or political measures against another State for the purpose of obtaining their subordination while infringing on their sovereignty.[239] The 1980 declaration formed a positive duty upon which a State is to conduct its international relations without interfering with another State's internal or external affairs.[240] It is important to reiterate that despite the fact that those declarations were clear on their position regarding economic coercion and how it reflects a violation of the duty of non-intervention; they remain a product of the General Assembly; whom legislative eligibility is disputed by legal scholars on its ability to establish custom. A greater pole of scholars agreed that it creates the required uniformity of conduct and conviction, a majority considered it a State practice.[241] Hence, international customary law.[242]

In the case of lack of codification and precision, one relies on case law and the contribution of legal scholars to determine the viability of the duty of non-intervention as an international law principle.[243] The International Court of Justice (ICJ) recognized the duty of non-intervention as an

[236] UNGA Res 2131 (1965-12-21) UN Doc a/res/2131(xx) (UNGA Res 2131).
[237] UNGA Res 2625 (1970-10-24 UN Doc a/res/2625(xxv) (UNGA Res 2625).
[238] UNGA Res 36/103 (1981-12) UN Doc a/res/36/103 (UNGA Res 36/103).
[239] Bangodova (2022) 75.
[240] "This includes, inter alia, the duty of a State not to use its external economic assistance programme or adopt any multilateral or unilateral economic reprisal". Bangodova (2022) 75.
[241] Schwebel "The Effect of Resolutions of the U.N. General Assembly on Customary International Law" 1979 *Cambridge University Press* 305.
[242] "Resolutions of the General Assembly, lack the normative quality of a treaty provision" Bowett 1976 *VA. J. INT'L L.* 246. Further, regional organizations recognized the duty of non-intervention as a fundamental principle. The Organization of American States Article 19 and 20 as well as the African Union, in terms of Article 4(9), UN Charter.
[243] Bangodova (2022) 74.

international customary law principle in the *Nicaragua Case*.[244] It further elaborated on what constitutes a prohibited intervention to be

> "One bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is *wrongful when it uses methods of coercion in regard to such choices, which must remain free ones*."[245] (Emphasis Added)

In addition to the *Nicaragua case*, the ICJ referred to the principle of non-intervention in the case of Corfu Channel[246] and DRC v. Uganda case.[247] All three judgements considered the duty of non-intervention to be closely associated with the prohibition of threat and use of force.[248] Further, the similarities between the use of force and the prohibition of intervention should not preclude the illegality of economic coercion; as the later often more dangerous to the economy compared to a minor use or threat of force.[249]

Notwithstanding the revolutionary nature of the *Nicaragua Case* Judgment. Older generation of legal publicists consider the duty of non-intervention as unviable when it comes to economic coercion, such view was adopted by Elagab. [250] Some scholarly opinions were more optimistic and they took the opinion of the ICJ into account.[251] Hofer affirmed that not all types of coercion infringes on the duty of non-intervention; [252] only if they constitute an intervention in the

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[244] Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v*. United States of America), Judgment of 27 June 1986, ICJ Reports 1986 – Para 202.
[245] Nicaragua case – Para 205.
[246] Corfu Channel (United Kingdom of Great Britain and Northern Ireland *v.* Albania), Judgment of 9 April 1949, ICJ Reports 1949.
[247] Case Concerning Armed Activities Case in the Territory of the Congo (*Democratic Republic of Congo v. Uganda*), Judgment of 19 December 2005, ICJ Reports 2005,
[248] Ronzitti 2016 *Koninklijke Brill NV* 6.
[249] Remarks by Marco Roscini at the IAI Conference of 13 February 2015 (Report edited by C. Franco, on *Coercive Diplomacy, Sanctions and International law*, on the website of the Istituto Affari Internazionali).
[250] "The duty of non-intervention has not crystallized into a clear rule prohibiting economic coercion." Elagab (1988) 379.
[251] Bangodova (2022) 77.
[252] Hofer "The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate enforcement or illegitimate intervention?" 2017 Chinese JIL.

domaine réservé[253] of a targeted state then they are considered illegal coercion.[254] Hofer, in agreement with Ronzitti, concluded that economic coercion include illegal coercion and infringes on the duty of non-intervention.[255]

The prohibition of economic coercion, under the duty of non-intervention, is considered a meaningful development to the question of legality compared to the former section. Codified treaties have contributed to the analysis further.

3.2.3 Other treaty obligations

According to Bothe, imposed economic measures become illegal only when violating a specific treaty obligation. The purpose of the subsequent section is to find whether specific treaty obligations provide a definitive answer to the legality of economic coercion. I will analyse relevant treaty provisions, their application and make conclusions.

It is the general understanding that international agreements usually include regulations relevant to their position on economic sanctions.[256] Such rules are more specific to the identity of economic coercion compared to the general provisions adopted by the United Nations.[257] Therefore, specific treaty provisions afford a clear assessment on the legality of economic coercive measures.[258] 90% of international trade is governed by the General Agreement on Tariffs and Trade (GATT),[259] which was originally founded to facilitate access to the international markets "by eliminating protectionist barriers and restrictions on international commerce".[260]

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[253] "By impeding that state's freedom of choice of a political, economic, social and cultural system, can constitute a prohibited intervention." Also see, Bangodova (2022) 76.
[254] Hofer 2017 *Chinese JIL* 192.
[255] Hofer 2017 *Chinese JIL* 192. Also see, Ronzitti 2016 *Koninklijke Brill NV* 6.
[256] Bowett 1976 *VA. J. INT'L L.* 247.
[257] Bowett 1972 *VA. J. INT'L L.* 11.
[258] Bowett 1976 *VA. J. INT'L L.* 247.
[259] General Agreement on Tariffs and Trade (GATT), 1994, Marrakesh Agreement Establishing the World Trade Organization, 1947.
[260] Anghie & Chimni "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts" 2003 *Chinese JIL* 78. Also see, Henderson, 1986 – 183.

The agreement entered into force in 1948 with 23 founding members.[261] By 1994, when the World Trade Organisation (WTO) replaced GATT, GATT was signed by 28 countries.[262]

GATT prohibited measures of coercive nature as they violate a number of its provisions.[263] Firstly, Article I deals with the principle of the Most Favoured Nations (MFN), which prohibits discriminatory treatment between Contracting Parties.

> "…with respect to all rules and formalities in connection with importation and exportation… any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties".[264]

Furthermore, Articles XI and XIII provide that discriminatory exports restrictions (quantitative restrictions) are unlawful.[265] The less favoured treatment, rejected by the MFN principle, is applied by sanctioning States and organizations against the targeted State. An example of such sanctions is the ban or restrictions on trade in commodities and financial transactions, access to the financial market.[266]

Secondly, Article XXI provides an exemption -relevant to the current topic- to the general prohibition by GATT.[267] According to the Article, a Contracting Party may act in contrary to the MFN principle where "necessary" for the protection of its essential security interests.[268] The interpretation of Article XXI was often invoked as to the ambiguity of the term 'necessary'; and

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[261] Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, United Kingdom and the United States.
[262] World Trade Organization, "About WTO" https://www.wto.org/english/thewto_e/gattmem_e.htm (Last Accessed on 2022-09-26).
[263] Bothe 2016 *Koninklijke Brill NV* 35.
[264] Article I (1).
[265] Article XI and XIII, GATT.
[266] Refer to Chapter Two of this mini dissertation.
[267] Bowett 1976 *VA. J. INT'L L.* 247. "Article XX refers to exemptions, which are more general and do not apply to the current context".
[268] Bothe 2016 *Koninklijke Brill NV* 35.

whether economic coercive measures are necessary.[269] The ICJ, in the Nicaragua Case, confirmed that an objective test is applied when determining if a Contracting Party's actions falls under the exception.[270] The ICJ held that trade embargos were not covered as the facts before the court therefore, unnecessary.[271] Additionally, the court in the matter between the US and Iran, asserted that the Article could not be invoked to cover use of force; since it violates international customary law, and does not fulfil the requirements of proportionality and self-defence.[272]

It is worth noting that the Article XXI applies to arms embargos, whether imposed by the UNSC or autonomously by Contracting States.[273] Additionally, GATT rules and obligations solely apply to Contracting Countries. Therefore, sanctions imposed against non-members are not subject to GATT restrictions unless alternative treaty obligation applies.[274] Moreover, the GATT rules and those establishing the WTO include a dispute settlement system upon which Contracting Countries refer their adjudications before resolving to embargos.[275]

On a regional level, the provisions of the UN Charter of Organisation of American States (OAS)[276] impose explicit obligations regarding the legality of economic coercive measures.[277] OAS was founded within the framework of the United Nations to promote international peace and security among its members.[278] The relevant provision is Article 19 which states:

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[269] As above.
[270] *Nicaragua case*, para 282.
[271] As above.
[272] *Case concerning oil platforms* (Islamic Republic of Iran *v*. United States of America), Judgment of 2003-11-06, ICJ Reports 2003, para. 43. The justifications of economic coercion and their requirements are elaborated in Chapter Four of this mini-dissertation.
[273] Bothe 2016 *Koninklijke Brill NV* 36.
[274] Libya, Sudan, Somalia, Syria, Iraq, Iran, Belarus are example to non-contracting States and they hold observer status. The rule applies to observer States, who are not bound by the GATT rules. Hence are not protected against economic coercion. Also see, Bothe 2016 *Koninklijke Brill NV* 36.
[275] Bangodova (2022) 157.
[276] Organization of American States "*Charter of the Organisation of American States*" 1948 (OAS).
[277] Henderson 1986 *Wash. & Lee L. Rev.* 186.
[278] Preamble, Charter of the Organization of American States.

> "… The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, *economic,* and cultural elements."[279]

The above include a prohibition of the use of coercive economic measures when imposed to hinder the sovereignty of another State.[280] Such prohibition is exempted by Article 22 of the UN Charter of OAS; measures enforced for the maintenance of national security will not violate the provisions of Article 19.[281] The case of American sanctions against Nicaragua is a great example answering the question of legality.

According to Henderson's analysis, the economic measures imposed by the United States against Nicaragua amount to a violation to the international duty of non-intervention, and the obligations under GATT and the UN Charter of OAS.[282] The American administration invoked "to force the Nicaraguan government to pursue a course of conduct desired by the United States appears to be *an interference* with Nicaragua's sovereign right to dictate the course of its own government."[283]

It is clear from the provisions and application of the above examples that the specific treaty obligations impede the adoption of economic coercive measures by member States. In Addition, they resolve the exciting ambiguity, which remains a dilemma under the UN Charter and international law principles .

3.3 Conclusion

The purpose of this chapter is to establish the first leg of the thesis's argument, to answer the legality of economic coercion through sources of international law. Should the sources provide

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[279] Article 19, Charter of the Organization of American States. (Emphasis Added).
[280] Henderson 1986 *Wash. & Lee L. Rev.* 186.
[281] As above 187.
[282] As above 195.
[283] As above 187.

for the admissibility of coercion, it necessitates legality of same. Each of the sources contributed to the argument until it became holistic. The chapter considered the interpretation of 'force' under the UN Charter to find if it includes elements of coercion to find that member States chose between narrow and broader interpretations of the term for their convenience, which is not a definitive answer to legality. The established customary law principle of non-intervention founded a more concrete prohibition of economic coercion under international law as it infringes on the State's sovereignty, which is another recognized principle under international law. Further, trade and regional treaties expressed the illegality of acts of economic coercion. Yet it provided for exceptions that require an objective rather than a subjective test, which might enable many States interfere with other States to achieve their objectives. In conclusion, the illegality of economic coercive measures is embedded within rules and principles of international law.

Chapter Four

4. Justifying Grounds for The Use of Economic Coercive Measures

4.1 Introduction

The above analysis has managed to establish economic coercive measures as *prima facie* illegal. However, there are justifying grounds upon which a State is pardoned to impose coercive measures. The subsequent section argues that the availability of justifying grounds under international law necessitate the illegality of all measures that does not fall within the ambit of the UNSC measures or justified ones. Therefore, Chapter four will examine the available justifying rules and their application herein. I will consider the permissible measures under the relevant articles under the Responsibility of States for internationally Wrongful Acts (The Articles on State Responsibility), acts authorised by a competent international organization, and measures of self-defence as well as exceptions under specific trade agreements. The analysis intends on highlighting the nature and limitations of the justifying grounds while emphasising the illegality of unjustified economic coercive measures.

4.2 Justifying Economic Coercive Measures Under International Customary Law

The International Law Commission (ILC) is an institution mandated by the United Nations General Assembly (UNGA) to codify International Customary Law (ICL).[284] One of the ILC's core topics was State Responsibility, the institution worked with several scholars and publicist,[285] who conducted studies, published on the topic and concluded with the production of the Responsibility of States for Internationally Wrongful Acts (The Articles on State Responsibility), which adopted by the UNGA's resolution 56/83 of 12 December 2001.[286] The Articles on State Responsibility deals with the emergence of wrongfulness, the procedure upon which it can be resolved, as well as available

[284] Crawford, "Articles on the Responsibility of States for Internationally Wrongful Acts" 2012 *United Nations Audio-visual Library of International Law* 1-2.
[285] F.V. García Amador in the 1956 and ending with James Crawford in 1997.
[286] Sixth Committee (Legal), 65th Session.

remedies.[287] The development of the Articles on State Responsibility was closely linked with the attempt to ban the unilateral use of force and to promote peaceful settlement of disputes.[288]

Generally, the nature of State responsibility is bilateral,[289] a State commits a breach against another, which is deemed wrongful and in violation of an international obligations.[290] In terms of chapter III, a breach of an international obligation requires the existence of an obligation and an act or an omission contrary to such obligation.[291] Further, the victim State is called an 'injured State'.[292] The term was adopted and defined narrowly under Article 42 to limit whom may invoke State responsibility to the individual State or a group of States that includes that State or the international community.[293] Once responsibility is invoked, the injured State may resort the wrongful act through remedies such as countermeasures.[294] The term has evolved to replace reprisal,[295] which differs from belligerent reprisal, currently used in the field of international humanitarian law.[296]

4.2.1 Countermeasures

Countermeasures are one of the circumstances that precludes wrongfulness.[297] However, The Articles on State Responsibility regulates the imposition of such measures both substantively and

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[287] Crawford *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries,* (2002) 118.
[288] Bangodova (2022) 78.
[289] As above 79.
[290] Article 1 and 2 of the Articles on State Responsibility. Article 2 stipulates the elements of an international wrongful act to include an action or an omission that is attributed to the State and consists of a breach. The rest of chapter II deals with the instances where a conduct is attributed to a State.
[291] Chapter III, Articles 12- 15.
[292] Bangodova (2022) 80. Also see, International Law Commission *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001) 117 (The Commentary).
[293] As above, Article 42.
[294] As above.
[295] Such occurred through the adoption of the Articles on State Responsibility. Also see, Federica and Paddeu *'Countermeasures,'* [MPEPIL]. https://opil-ouplaw-com.uplib.idm.oclc.org/view/10.1093/law:epil/9780199231690/law-9780199231690-e1020?rskey=p4CHvW&result=4&prd=MPIL (Last Accessed on 2022-10-01).
[296] As above.
[297] Other examples of measures that precludes wrongfulness include, consent, self-defense, countermeasures, force majeure, distress, and necessity. see Articles on State Responsibility, Chapter V, Articles 20 -25.

procedurally under Articles 49 – 52.[298] The distinction between countermeasures and unilateral economic coercive measures almost fades away, as one -*prima facie*- mirrors the other.[299] However, the subsequent section -through the demonstration of the Articles- will demonstrate the magnitude of the differences and compliment the argument of legality.[300]

As indicated above, the lawful application of countermeasures requires a violation of an international obligation.[301] Further, there are perquisites to countermeasures, an injured State is to take steps to induce the responsible State to comply with its obligations of cessation and reparation.[302] Should an injured State apply countermeasures upon its unilateral assessment, it shall bear the risks.[303] Article 49(2) limits the nature of the wrongful act 'for the time being' to the 'non-performance of the obligation'.[304] According to the commentary on the Articles on State Responsibility, the phrase 'for the time being' indicates that countermeasures must be temporary.[305] The general restriction on the imposed countermeasures is that it may not impede the responsible State from resuming its international obligations,[306] which means that they need not be similar in nature to the initial violation.[307] Additionally, countermeasures must be

[298] As above, Part Three, Chapter II.
[299] Bangodova (2022) 80. Also see, International Law Commission (2001) 129.
[300] "Countermeasures are not intended as a form of punishment for wrongful conduct, but as an instrument for achieving compliance with the obligations of the responsible State" Also see, International Law Commission (2001) 130.
[301] The Articles on State Responsibility, 49(1). Also see, *Gabčíkovo-Nagymaros Project* Case. The ICJ pointed out that for countermeasures to apply as a justifiable measure, "… it mut be taken in response to a previous wrongful act". Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I. C. J. Reports 1997, Para 83.
[302] International Law Commission (2001) 130.
[303] As above.
[304] The Articles on State Responsibility, 49(2). Also see, "the element of non-performance is what distinguishes countermeasures from other measures, such as 'termination of a treaty' under Article 60 of the VCLT". Federica and Paddeu '*Countermeasures,*' [MPEPIL]. https://opil-ouplaw-com.uplib.idm.oclc.org/view/10.1093/law:epil/9780199231690/law-9780199231690-e1020?rskey=p4CHvW&result=4&prd=MPIL (Last Accessed on 2022-10-01).
[305] The Articles on State Responsibility 49(2). Also see, International Law Commission (2001) 130.
[306] As above, 49(3) and 50(2). "The injured State is under obligation to satisfy any available dispute settlement procedure; and to respect the involvement of diplomatic or consular agents, premises, archives, and documents.
[307] Bangodova (2022) 80.

proportionate to the wrongful act and directed only against the responsible State.[308] Article 51 elaborated on the element of proportionality:

> "Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question."

Proportionality was emphasised as a requirement of lawful countermeasures and non-compliance may result in responsibility to the injured State.[309] Such was reiterated in the award of the *Naulilaa* Arbitration[310] "… the reprisal should be approximately in keeping with the offence…"[311]. Proportionality was mentioned in more detail in the *Air Service Agreement* Arbitration[312] and the *Gabčíkovo-Nagymaros Project* Case.[313] In the later, the ICJ did not assess proportionality in mere quantitative terms, it took into account the quality or character of the rights in question as well.[314] The qualitative terms were considered by the tribunal in the *Air Service Agreement* Arbitration*,* the economic countermeasures adopted by the United States against Air France were affirmed to be proportionate as they concerned the same route and had similar economic effect.[315]

Article 50, on the other hand, enumerates the obligations that cannot be interfered with when enforcing countermeasures.[316] Therefore, countermeasures shall not affect:

a) "The obligation to refrain from the threat or use of force as embodied in the UN Charter of the United Nations;

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[308] The Articles on State Responsibility, Article 51. Also See, International Law Commission (2001) 134
[309] International Law Commission (2001) 134 – 135.
[310] *Portuguese Colonies* case (Naulilaa incident), UNRIAA, vol. II (Sales No. 1949.V.1), p. 1011, at pp. 1025–1026 (1928).
[311] *Naulilaa* Arbitration Case – Para 1028.
[312] Air Service Agreement of 1946-03-27 between the United States of America and France 417-493 (*Air Service Agreement)*.
[313] *Gabčíkovo-Nagymaros Project* Case - Para 83.
[314] As above, Para 85 and 87.
[315] *Air Service Agreement* - Para 83. Also see, International Law Commission (2001) 134.
[316] The Articles on State Responsibility, Article 50(1) and 50(2).

b) obligations for the protection of fundamental human rights;[317]

c) obligations of a humanitarian character prohibiting reprisals;

d) other obligations under peremptory norms of general international law."

It is evident from that Article 50 poses further legal restrictions on countermeasures.[318]

According to the commentary on the Articles on State Responsibility, Article 52 concerns itself with the procedural aspect of the application of countermeasures.[319] Firstly, the injured State must call on the responsible State to repair the *status quo* and comply with its international obligations.[320] And to resolve the dispute and negotiate a settlement.[321] If not, a sufficient notice must be given that the injured State is proceeding with countermeasures.[322] Thirdly, the injured State is prohibited from proceeding with countermeasures providing that the international wrongful act is ceased,[323] or when the matter is being adjudicated before a court or a tribunal.[324] Finally, the injured State is obliged to terminate imposed countermeasures as soon as the responsible State has complied with its international obligations.[325]

It is evident that the above rules, regulating the application of legal countermeasures, is what distinguishes it from other forms of coercive measures and establishes its legality under international law.[326] Unilateral economic coercive measures, whether imposed by a State or a regional organization -irrespective of their motive- do not fall under the definition of legitimate countermeasures; as they follow more of an impulsive route, where they don't respond to a

[317] According to the tribunal in the *Naulilaa* Arbitration Case, "lawful countermeasure must be limited by the requirements of humanity and the rules of good faith applicable in relations between States"1026. Also see, International Law Commission (2001) 132.
[318] Bangodova (2022) 80.
[319] International Law Commission (2001) 135.
[320] The Articles on State Responsibility, Articles 52 (1)(a) and (b).
[321] As above, Article 52 (1)(b).
[322] As above, Article 52 (2). "When urgent, they may be imposed with no prior notice".
[323] As above, Article 52 (3)(a).
[324] As above, Article 52 (3)(b).
[325] As above, Article Article 53.
[326] Legal countermeasures require an international illegal act; an injured State, which is defined rigidly to limit application, and proportional countermeasures as well as other substantive and procedural requirements.

violation within international law, apply an element of proportionately, or follow a specific procedure recognized under international law .[327]

4.3 Reprisal

Despite the fact that the concept of reprisal has already been substituted and codified as countermeasures, its limitations are worth mentioning.[328] Ruffet defines reprisal as "measures undertaken by one subject of public international law to coerce another subject of public international law to abide by its legal obligations towards the first of the subjects mentioned".[329] The tribunal in the *Naulilaa* Arbitration defined the term reprisal as "acts of self-help by the injured State, acts in retaliation for acts contrary to international law on the part of the offending State, which have remained unredressed after a demand for amends."[330] Both definitions intended an armed force response, which was the initial nature of reprisal.[331] Armed reprisal is prohibited in terms of Article 2(4) of the UN Charter. Such prohibition does not apply to economic measures, which include economic reprisal.[332] The purpose of the following section is to examine the preconditions to imposing economic reprisal as a justifying ground and to highlight how they differ from economic coercive measures.

The recognized traditional requirements for the application of economic reprisal are:

i. A prior international delinquency against the claiming State;[333]

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[327] Bangodova (2022) 82. Also see, the definition as per Chapter Two of this mini dissertation.
[328] Ruffert, 'Reprisal', [MPEPIL] (2015) https://opil-ouplaw-com.uplib.idm.oclc.org/view/10.1093/law:epil/9780199231690/law-9780199231690-e1771?rskey=Ikmfln&result=7&prd=MPIL (Last Accessed on 2022-10-01).
[329] As above.
[330] *Naulilaa* Arbitration Case 1025
[331] Ruffert, 'Reprisal', [MPEPIL] (2015) https://opil-ouplaw-com.uplib.idm.oclc.org/view/10.1093/law:epil/9780199231690/law-9780199231690-e1771?rskey=Ikmfln&result=7&prd=MPIL (Last Accessed on 2022-10-01).
[332] As established in Chapter Three of this mini dissertation.
[333] Bowett 1972 *VA. J. INT'L L* 9. "According to international law, reprisal has to be a reaction to an illegal action" Also see, Beirlaen 1984 *SN SI*.
Both Bowett and Beirlaen asserted that such excludes reprisal against lawful measures. Further, in the absence of an illegal action, the legality of the measures will be contested.

ii. All other means to redress the matter must be exhausted or unavailable. Reprisal must become *ultimum remedium;*[334] and

iii. Reprisal must be propionate *vis-á-vis* the unlawful act.[335]

it is evident that the preconditions of economic reprisal mirror those of countermeasures. Therefore, it is safe to make the same submission that unilateral economic coercive measures does not fall within and are not justifiable under international law.

4.4 Self-defence

The right to self-defence is the sole exception to the prohibition on the threat and use of force.[336] self-defence is invoked to protect a State's territorial integrity, political independence, its nationals, and economic interests.[337] According to legal publicists,[338] there are three requirements to legitimate self-defence, which are:

a) An infringement or a threat of an infringement of the rights of the defending State;[339]
b) The situation did not afford an alternative means of protection;[340] and
c) The acts of self-defence are strictly proportionate to the harm or threat and they are confined to the object of defending, stopping or preventing the imminent harm.

As the compliance with those three requirements justifies the use of force as an act of self-defence under international law, it shall necessarily justify economic coercive measures by the defending State.

[334] *Air Service Agreement Case* – para 340.
[335] Bowett 1972 *VA. J. INT'L L* 10. Also see, Beirlaen 1984 *SN SI* 71.
[336] As above 74.
[337] As above.
[338] Bowett and Beirlaen.
[339] "It has to be imminent" Bowett 1972 *VA. J. INT'L L* 7.
[340] According to Beirlaen "A failure or inability on the part of the other State to use its own legal powers to stop or prevent the infringement". Beirlaen 1984 *SN SI* 74.

4.5 Economic coercive measures authorised by a competent international organisation

Article 41 of the UN Charter empowers the UNSC to authorise member States and impose legitimate economic coercive measures and Article 25 imposes a legal obligation on member States to carry out UNSC decisions.[341] Generally, the violation of the principles of countermeasures, reprisal, or self-defence translates to the violation of the norms of international law.[342] The same rule applies to the incompliance with the UNSC authorisation, alternatively, any *altra vires* action.[343] The UNSC invokes economic coercive measures -through its resolutions- responding to acts of aggression violating international law or in the case of a threat to international peace and security.[344] The UNSC collective coercive measures range from the severance or limitation of economic relations to the interruption of diplomatic relations. [345] It is noteworthy that a substantive resolution remains valid even if all permanent members abstain.[346]

In 1966, the UNSC activated Articles 39 and 41, for the first time, and passed a resolution condemning the minority apartheid government of Southern Rhodesia. Resolution 232 of 1966 described the situation as a threat to international peace and security.[347] Therefore, it called on all member States to do the utmost and break off economic relations with Southern Rhodesia.[348] Resolution 232 was the required justification for members States to impose legitimate economic coercive measures against Southern Rhodesia, and I quote:

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[341] As above 6. Also see, Beirlaen 1984 *SN SI* 72. & Ronzitti 2016 *Koninklijke Brill NV* 15. Also refer to Chapter Two of this mini dissertation.
[342] Ronzitti 2016 *Koninklijke Brill NV* 15.
[343] As above 15.
[344] As above 16.
[345] As above 15.
[346] The issue was brought up by the Portuguese representative, who claimed that resolution 232 (1966) is invalid on the ground that not all permanent members has concurred as per Article 27(3) of the UN Charter. The United Nations Legal Counsel has argued that a substantive resolution remains valid even if all the permanent members abstain. U.N. Doc. S/7735/Rev. 1 (1967).
[347] UNSC Res 232 (1966-12-16). UN Doc s/res/232.
[348] As above, Para 2 and 2(a).

> "2. *Decides* that all States Members of the United Nations shall prevent:
>
> (*a*) The import into their territories of asbestos, iron ore, chrome, pig-iron, sugar, tobacco, copper, meat and meat products and hides, skins and leather originating in Southern Rhodesia and exported therefrom after the date of the present resolution;"[349]

The UNSC cannot actively implement economic coercive measures against the delinquent State, the resolutions are passed and given affect to by member States.[350] Accordingly, resolutions usually include deterring clauses, such as:

> "notwithstanding any contracts entered into or licenses granted before the date of the present resolution;
>
> 3. *Reminds* Member States that the failure or refusal by any of them to implement the present resolution shall constitute a violation Article 25 of the United Nations Charter;[351]"[352]

On the other hand, resolution 661 of 1990 was in response to the acts of aggression and the severe international law violations committed by Iraq for invading Kuwait.[353] The resolution followed the same structure of resolution 232 against Southern Rhodesia; urging all member States to participate and enumerating the type of collective measures to be imposed.[354] The structure and enforcement mechanism was reiterated in 1992 through resolution 748 against Libya for failure to establish responsibility for terrorist acts.[355]

On the other hand, the UNGA is not a competent organ to issue binding resolutions that resolve member States from responsibility.[356] The ICJ in the *Expenses Case* has reiterated this view point

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[349] As above, Para 2 and 2(a).
[350] Ronzitti 2016 *Koninklijke Brill NV* 16.
[351] UN Charter, Article 25**: "**The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."
[352] UNSC Res 232 (1966-12-16). UN Doc s/res/232- Para 3.
[353] UNSC Res 661 (1990-08-06) UN Doc s/res/661.
[354] As above – para 2 and 3.
[355] UNSC Res 748 (1992-03-31) UN Doc s/res/748.
[356] Bowett 1972 *VA. J. INT'L L* 6. Also see, Chapter Three of this mini dissertation.

"… it is the Security Council which exclusively, may order coercive action …".[357] Further, it affirmed that if the measures are 'coercive' they immediately fall within the ambit of the UNSC and the UNGA is merely a supporting organ.[358]

Furthermore, it was established that measures authorised by regional organisations are unilateral coercive measures and does not qualify for a competent organ's authorisation.[359] The Organisation of American States has assumed its competence and issued measures against Cuba (1962 and 1964) and the Dominican Republic (1961) on the ground that the measures do not include an 'enforcement action' within the meaning of Article 53(1) of the UN Charter.[360] Therefore, it can be argued that coercive measures, whether economic or armed, can solely be taken by the United Nations Security Council or by a regional organization after the UNSC's perquisite authorisation.[361]

The above presentation asserts that organisational competency only applies to the Security Council and its resolutions. Therefore, any measures enforced unilaterally by member States, in terms of a UNSC resolution, are justified under international law.[362]

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[357] *Certain Expenses of the United Nations-Case (Article 17, paragraph2 of the UN Charter.* (1962) I.C.J. Para 163.
[358] According to Beirlaen, "in most of the cases, the Security Council acted after urgings by the General Assembly for the application of sanctions and in some cases the Assembly self-had requested members to take measures of the type covered in Article 41." Beirlaen 1984 *SN SI* 72
[359] Bowett 1972 *VA. J. INT'L L* 6. Also see, Beirlaen 1984 *SN SI* 73. Also see, Chapter Two of this mini dissertation.
[360] Bowett 1972 *VA. J. INT'L L* 7. Also see, UN Charter, Article 53(1): "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no *enforcement action* shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state."
[361] Bowett 1972 *VA. J. INT'L L* 7. Also see, Beirlaen 1984 *SN SI* 74.
[362] As above 7. Also see, Beirlaen 1984 *SN SI* 74.

4.6 Specific treaty agreements:

International trade agreements often include an exemption clause for the prohibition of use of economic coercive measures by member States.[363] such clause qualifies as a justifying ground under international law.[364] For example, the norm is in the instances of a dispute between contracting States, the trade organisation provides a settlement procedure -through its enabling agreement- to be followed.[365] Therefore, unilateral acts of reprisal are not permissible within the treaty unless peaceful settlement procedures has been exhausted.[366]

Article XXI of the GATT, under the WTO system repeats verbatim the same provision contained in the GATT 1947, It permits the adoption of unilateral coercive measures.[367] the Article allows contracting States to adopt 'necessary' unilateral coercive measures for security reason.[368] Article XXI(c) does not constrain contracting States from implementing measures approved by the UNSC under Article 41.[369] The ICJ in the *Nicaragua Case* established that an objective test is applied when interpreting the term 'necessary' and to conclude if the contracting State qualified for the security exception under Article XXI.[370]

The security exception applies as a justifying ground to enforcing economic coercive measures. Such measures can either be authorised by the UNSC, or they are objectively necessary for security purposes.[371] It is important to highlight that the security exception applies similarly -as a

[363] Bowett 1972 *VA. J. INT'L L* 11.
[364] Ronzitti 2016 *Koninklijke Brill NV* 23.
[365] Bowett 1972 *VA. J. INT'L L* 11.
[366] As above.
[367] Ro Ronzitti 2016 *Koninklijke Brill NV* 24.
[368] GATT, Article XXI (a) and (b). "(a) to require any contracting party to furnish any information the dis- closure of which it considers contrary to its essential security interests; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests."
[369] "(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."
[370] *Nicaragua case* – Para 282. Also see, Chapter Three of this mini disserataion,
[371] Ronzitti 2016 *Koninklijke Brill NV* 24.

justifying ground- to countermeasures, acts of reprisal and self-defence, which has its own preconditions.[372]

4.7 Conclusion

The purpose of the second leg to the legality assessment is to establish if the rules and principles of international law have adopted avenues for the legal implementation of economic coercive measures. Upon examining the international customary law and its Articles on State Responsibility it was found that countermeasures are an internationally recognized form of coercion that may be economic in nature. Yet its requirements and procedural perquisites does are the factors that guarantees their legality under international law. In addition, acts of reprisal and self-defence have their requirements and once complied with, the State's measures are deemed legal. The UNSC's coercive measures, on the other hand, are imposed in terms of a binding resolutions and States are to comply by virtue of their UN membership. Other States may be exempted to imposed economic coercive measures once authorised by a specific trade agreement. The mere fact that such justifications are available, infers that there is a clear rule on applying economic coercive measures under international law. Should such measures fail to comply afforded rules they are deemed illegal.

In conclusion, this mini dissertation avers that the economic coercive measures imposed unilaterally, which are unprovided for under international law, and they don't form part of the justified coercive measures, hence, are illegal.

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[372] See the discussion under countermeasures, reprisal, and self-defense.

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