BUSINESS AND HUMAN RIGHTS IN THE CONTEXT OF SANCTIONS: A ROAD TO FILLING THE GOVERNANCE GAP

by

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To my beloved parents
for their patience, unfaltering love and support
and for always believing in me

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ABSTRACT

As concerns about the negative impacts of sanctions on the human rights of civilians and the environment increases, it is necessary to reflect upon the lawfulness and legal status of such measures in international law, and their impact on business enterprises and the field of Business and Human Rights (BHR). While current academic literature tends to focus on implementation, enforcement and business compliance with unilateral and multilateral sanctions, the negative impacts of sanctions on non-state actors and resulting human rights violations are overlooked. Specifically, the relationship between sanctions law and the responsibility of businesses to respect human rights and the duty of states to protect human rights as endorsed by BHR instruments such as the UN Guiding Principles on Business and Human Rights (UNGPs) and OECD Guidelines for Multinational Enterprises must be examined. This thesis investigates whether sanctions have received any consideration in international BHR normative standards, including whether the state duty to protect human rights as found in the UNGPs is relevant when a home state imposes sanctions either on its own companies operating internationally, or on other TNCs, and whether a corporation can comply with its own responsibility to respect human rights in light of the imposition of sanctions. The thesis concludes with recommendations for policy considerations that must be taken into account in the context of sanctions and BHR in order to fill the sanctions governance gap in BHR guidance tools.

LIST OF ABBREVIATIONS USED

BHR:	Business and Human Rights
CESCR:	Committee on Economic, Social and Cultural Rights
ECtHR:	European Court of Human Rights
ESCR:	Economic, Social and Cultural Rights
EU:	European Union
FCPA:	Foreign Corrupt Practices Act
GA:	General Assembly
GC:	General Comment
GP:	Guiding Principle
IAEA:	The International Atomic Energy Agency
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic Social and Cultural Rights
ICJ:	International Court Of Justice
IHL:	International Humanitarian Law
ILO:	International Labour Organization
ISA:	Iran Sanctions Act
JCPOA:	Joint Comprehensive Plan of Action
MNEs:	Multinational Enterprises
NCPs:	National Contact Points
NPT:	The Non-Proliferation Treaty
NSAs:	Non-State Actors
OECD:	The Organisation for Economic Co-operation and Development
OHCHR:	The Office of the United Nations High Commissioner for Human Rights
SRSG:	Special Representative to the United Nations Secretary General
TNCs:	Transnational Corporations
UCM:	Unilateral Coercive Measures
UN:	United Nations
UNDHR:	Universal Declaration of Human Rights
UNGA:	United Nations General Assembly
UNGPs:	United Nations Guiding Principles on Business and Human Rights
UNSC:	United Nations Security Council
UNSR:	United Nations Special Rapporteur

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Chapter I Introduction

1.1. Problematique and Objectives

"Real concerns and serious political differences between governments must never be resolved by precipitating economic and humanitarian disasters, making ordinary people pawns and hostages thereof."[1]

Maintaining international peace and security has always been a challenging issue throughout history. Due to this, since the establishment of the United Nations (UN), the United Nations Security Council (UNSC) has attempted to address and to minimize these challenges by taking various approaches. One of the tools applied by the UNSC to safeguard international peace and security is the imposition of multilateral sanctions of a universally binding nature against international actors that are engaging in threatening behaviour.[2] In order to become a more effective tool, this approach has evolved to some extent and what used to be practiced as comprehensive sanctions regimes, has now turned into smart or targeted sanctions that usually target a specific state, corporate entity, individual or even a region.[3]

But the UNSC is not the only body imposing sanctions.[4] The European Union (EU) also considers sanctions (or restrictive measures, as they call them), instruments of an economic or diplomatic nature that should be used when certain policies or activities violate international law

[1] *United Nations Special Rapporteur on the negative impacts of the unilateral coercive measures, Mr. Idriss Jazairy.* United Nations Human Rights Office of the High Commissioner (6 May 2019) online:< https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24566&LangID=E>.
[2] See Thomas J. Biersteker et al, "UN Targeted Sanctions Datasets (1991–2013)" (2018) 55:3 J Peace Research 404.
[3] See Clara Portela, "National Implementation of United Nations Sanctions" (2009) 65:1 Intl J 13.
[4] The legitimacy, power and effectiveness of the United Nations is not equivalent to that of any other entity or organizations. Thus, the UN traditionally has a special status based on UN Charter Articles 25 and 103 that require member states to accept and carry out the decisions of the Security Council. The role of the UN in sanctions law will be explored in further detail in Chapter 1.

or human rights, or do not respect the rule of law.[5] The ability to impose regional sanctions either autonomously or pursuant to the binding resolutions of the UNSC is set out by Article 11 of the Treaty on European Union.[6] The restrictive measures practiced by the EU may target states or non-state actors and include a vast range of measures of an economic nature.

Another type of coercive measures that is highly disputed are called autonomous or unilateral sanctions, and arise when a state uses or encourages the use of economic, political or any other measures to coerce another state in order to "obtain from it the subordination of the exercise of its sovereign rights"[7]. The UN General Assembly has adopted many resolutions which condemn the use of unilateral coercive measures (UCM) and consider them to be contrary to "international law, international humanitarian law, the Charter of the United Nations and the norms and principles governing peaceful relations among state"[8]. Nevertheless, unilateral sanctions continue to be imposed by powerful states, and a recent specific example of this practice is the imposition by the United States (US) of unilateral sanctions against Iran.

There are many academic articles and books that discuss various aspects of sanctions law, whether multilateral or unilateral sanctions.[9] Nevertheless, despite the prominent economic aspect

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[5] European Commission, "Restrictive Measures" (Spring 2008) *European External Action Service* online:<http://eeas.europa.eu/archives/docs/cfsp/sanctions/docs/index_en.pdf> at 1. Also see Cristian DeFrancia, "Enforcing the Nuclear Nonproliferation Regime: The Legality of Preventive Measures" (2012) 45:3 Vand J Transnat'l L 705.

[6] European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht, (7 February 1992), Official Journal of the European Communities C 325/5; 24 December 2002.

[7] Matthew Happold, "Economic Sanctions and International Law: An Introduction" in Matthew Happold & Paul Eden (eds), *Economic Sanctions and International Law,* 1ST ed (UK: Hart Publishing, 2016) at 4 para 2. also See International Law Commission (ILC), "Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law" (13 April 2006) UN Doc A/CN.4/L.682 (13 April 2006) 175–78.

[8] Resolution adopted by the General Assembly on 18 December 2014 [on the report of the Third Committee (A/69/488/Add.2 and Corr.1)] 69/180. Human Rights and Unilateral Coercive Measures, UN Doc A/RES/69/180.

[9] For example, see Susan Hannah Allen & David J Lektzian. "Economic Sanctions: A Blunt Instrument?" (2013) 50:1 J Peace Research 121; Ali Z Marossi et al. *Economic Sanctions under International Law Unilateralism, Multilateralism, Legitimacy, and Consequences* (T.M.C. Asser Press: Imprint: T.M.C. Asser Press, 2015); Gary Clyde Hufbauer et al, 3rd ed *Economic Sanctions Reconsidered* (Washington, DC: Peterson Institute for International Economics, 2007); and Jeremy Matam Farrall & Kim Rubenstein, *Sanctions, Accountability and Governance in a Globalised World* (Cambridge, UK: Cambridge University Press, 2009).

of coercive measures, an important concern that has rarely been examined is the impact of sanctions on non-state actors. Specifically, what is the relationship between sanctions law and the responsibility of businesses to respect human rights and the duty of states to protect human rights as endorsed by the UN Human Rights Council in the UN Guiding Principles on Business and Human Rights (UNGPs)?[10]

This thesis will consider a number of related questions. What are the human rights duties of states when dealing with business enterprises that are operating in or associated with a sanctioned country? More specifically, what are the human rights duties of home states as compared to host states in this context? Do Business and Human Rights (BHR) instruments (such as the 2011 UNGPs, the OECD Guidelines for Multinational Enterprises (OECD MNE Guidelines)[11] or the UN Global Compact[12] ever provide guidance specific to the sanctions context? And if so, how do they direct businesses and states (host state and home state) to perform with regard to a sanctioned country or a sanctioned business entity? What is the content of the state duty to protect human rights and business responsibility to respect human rights in the sanctions context?

In order to answer these questions, the thesis engages in a detailed analysis of the state duty to protect and the business responsibility to respect human rights, clarified by the Special Representative to the United Nations Secretary General on Business and Human Rights (SRSG), Mr. John Ruggie, as fundamental pillars of the UNGPs. Many scholars have argued that the state

[10] John Ruggie, Report of the Special Representative of the Secretary-General on the Issues of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UNHRC, 17th Sess, UN Doc A/HRC/17/31 (2011) [Guiding Principles].
[11] Organisation for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises* (Paris: OECD Publishing, 2011), online:< https://www.oecd.org/daf/inv/mne/48004323.pdf>.
[12] United Nations Global Compact (2000), online:< https://www.unglobalcompact.org/>.

duty to protect is not territorially limited.[13] The core question then is whether, and if so, how, BHR instruments have tried to mitigate or to limit the negative consequences of sanctions and their unintended consequences on people and environment in sanctioned states,[14] whether through the state duty to protect rights or the business responsibility to respect human rights.[15] Ruggie asserts in his reports that the lack of respect for human rights mostly occurs in conflict-affected areas[16]. If sanctions, as stated by many, are a form of war, an economic war,[17] then perhaps special measures must be taken along with elaborate due diligence processes, to reduce their detrimental impacts on individuals and on the environment. How can international instruments identify possible approaches and tools for home and host states of transnational corporations, as well as states influenced by the sanctions, to reduce the risk of sanction-related human rights abuses occurring in such contexts?

In order to provide an example of the impact of sanctions on BHR, the case of Iran, one of the most sanctioned countries, will be analyzed.[18] Different types of sanctions have been imposed on Iran over the past forty years. Due to this, many Transnational Corporations (TNCs) did not get

[13] For example see Casajuna Artacho, "Extraterritorial Dimension of the State Duty to Protect Human Rights in Relation to Business Activities" (Paper delivered at The Implementation of the UN Guiding Principles on Business and Human Rights in Spain, Seville, 4-6 November 2013), online: <www.business-humanrights.org/sites/default/files/media/documents/extraterritorial-dimension-of-state-duty-protect-human-rights-e-casajuna.pdf>; Markus Krajewski, "The State Duty to Protect Against Human Rights Violations Through Transnational Business Activities" (2018) 23 Deakin L Rev 13 at 39; and Claire Methven O'brien, "The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal" (2018) 3:1 Bus & Human Rts J 47. Also, the Maastricht Principles address this issue in detail, see Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, (2011) 29 Neth. Q. Human Rights 578.

[14] Sina Khatami, "Environment: The Invisible Victim of Sanctions against Iran" (2014) *Etemad Daily Newspaper*, No. 3115, at 13.

[15] See United Nations Guiding Principles, *supra* note 10 at pillar one and two, also see Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 2003, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2.

[16] See John Ruggie & Tamaryn Nelson, "Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges" (2015) 22:1 Brown J World Affairs 99.

[17] Jack Kenny, "Sanctions: The Economic War on Iran" (2012) 28:22 New American 23.

[18] See Jeffrey J Schott, "Economic Sanctions Against Iran: Is the Third Decade a Charm?" (2012) 47:3 Business Economics 190. Also see Stanislav Mraz et al, "Economic Sanctions Against Iran and Their Effectiveness" (2016) 182 Aktual'ni Problemy Ekonomiky = Actual Problems in Economics 22.

involved in any business relationships with Iran. Those that did took serious precautions to avoid violating the multilateral or unilateral sanctions regimes. The most harmful of all are the unilateral economic sanctions imposed by powerful states and economies. For example, in 2011 seven corporations[19] were punished by the US government because of involvement with petrol trade with Iran[20] and violation of the Iran Sanctions Act (ISA) regulations that ban companies from doing business with Iran.[21] A year later, an Iraqi and a Chinese bank were blacklisted for "business with designated Iranian banks".[22] The extraterritorial reach of UCM has been practiced by the US before as well, such as in 1996 when for the first time the US tried to deter foreign companies from investing in Iran's energy sector.[23] This practice was then disputed by the EU and European firms were prohibited from complying with the ISA.[24] But in such situations, most companies cannot afford provoking a powerful country like the US and try to stay away from investing in a sanctioned country.[25] As can be seen, the effectiveness of the unilateral sanctions depends on coordinated action with other countries.[26]

The dominance of the US in the international financial system and global economy means that US sanctions have a wider reach than just touching on assets and entities located within its jurisdiction. Under most sanction programs, it is not only illegal for US persons to directly transact with a sanctioned person, but also to facilitate a transaction.[27] For example, banks acting as

[19] These companies were registered in Venezuela, the UAE, Jersey, Singapore, Monaco and Israel.
[20] See International Crisis Group (ICG), *Spider Web: The Making and Unmaking of Iran Sanctions* (25 February 2013), Middle East Report N°138, online:<https://www.refworld.org/docid/512c78bf2.html> at 15.
[21] Iran Sanctions Act, Public Law 104-172, 6 August 1996.
[22] International Crisis Group, *supra* note 20, at 14.
[23] *Ibid* at 7.
[24] European Council Regulation (EC) no. 2271/96, *Protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom* (22 November 1996).
[25] International Crisis Group, *supra* note 20, at 28 para 2.
[26] *Ibid*, at 13 para 2.
[27] *Ibid.*

intermediaries between US persons and sanctioned persons can also be held liable for their role in providing financial services or facilitating a transaction to or from a sanctioned person.

In his reports, and as recently at May 2019, Mr. Idriss Jazairy, the Special Rapporteur on Negative Impacts of Unilateral Coercive Measures on Human Rights, has warned against major powers resorting to their dominant positions in the international financial arena against their allies in order to bring about economic hardship to the economy of other sovereign states. He has concluded that this "extraterritorial application of unilateral sanctions" is contrary to international law and undermines the human rights of the sanctioned states by destroying their economies.[28] In case of Iran, he has declared:

> "I am deeply concerned that one State can use its dominant position in international finance to harm not only the Iranian people, who have followed their obligations under the UN-approved nuclear deal to this day, but also everyone in the world who trades with them."[29]

Jazairy has constantly emphasized the importance of engaging in constructive dialogue in order to find a resolution "in compliance with the spirit and letter of the Charter of the United Nations before the arbitrary use of economic starvation becomes the new normal".[30] He has condemned blockades that clearly ignore the state's sovereignty and the human rights of its citizens as well as the rights of third countries trading with sanctioned States.[31]

However, the analysis of coercive measures through the lens of BHR has been mostly untouched by sanctions scholars.[32] The purpose of this thesis is not to discuss why sanctions in

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[28] The Office of the United Nations High Commissioner for Human Rights, "US Sanctions Violate Human Rights and International Code of Conduct, UN expert Says" (6 May 2019), online: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24566&LangID=E>.
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*
[32] See Nigel D White, "UN Sanctions: Where Public Law Meets Public International Law (Book Review)" (2011) 74:3 Modern L Rev 456.

general and economic sanctions in particular are doomed to fail.[33] Instead, an attempt will be made to investigate the implementation and impacts of coercive measures on the operation of transnational corporations (TNCs) both from a practical perspective and a conceptual perspective. Furthermore, the limits of sanctioning foreign entities under public international law will be discussed. The main focus will remain on the home and host state duty to protect and the identification and clarification of existing governance gaps in international normative standards in the context of BHR. Suggestions will be made with regard to how international law and specifically international BHR instruments should move beyond their current limitations and bridge the current governance gap.

1.2. Structure

To accomplish the objectives of the thesis, the second chapter of the thesis considers how the practice of the UNSC has been designed and what objectives are being followed by this practice. This will be followed by an identification of other sources of sanctions law. After providing an overview of sanctions law, the nature and mechanisms of the UNSC in identifying potential threats to international peace and security and role of the UNSC veto will be discussed. Later, the legal basis of the UNSC's powers to impose non-military measures on member states and other sources of the sanctions laws and UCM will be briefly reviewed.

In the third chapter, I thoroughly analyze what economic sanctions are, and will examine whether, and if so, how sanctions including economic sanctions and UCM conform with

[33] See Elena V McLean, "Busted Sanctions: Explaining Why Economic Sanctions Fail" (2017) 15:1 Perspectives on Politics 288. *Also see* Brendan Taylor, *Sanctions as Grand Strategy*, (Routledge: for The International Institute of Strategic Studies, 2010).

international human rights law, what objectives they follow, and in what ways coercive measures could negatively impact business entities.

In the fourth and the fifth chapters of the thesis, the impact of coercive measures in general and unilateral economic sanctions in particular on BHR will be analyzed, in order to assess whether the sanctions regimes are in conflict with international instruments on BHR. To achieve this purpose, an overview of the BHR and UN instruments will be provided, and the instruments examined to determine whether sanctions have received any consideration. This will be followed by an investigation of the impact of sanctions on TNCs and the issue of transnationality and extraterritoriality on the home state duty when sanctions are imposed. Furthermore, the existing gaps in international normative standards (UNGPs and OECD MNE Guidelines) on BHR will be taken into deliberation.

The sixth chapter studies the impacts of sanctions on the operation of transnational corporations in a sanctioned country such as Iran. The reports of the Human Rights Council's Special Rapporteur on the negative impact of the UCM on the enjoyment of human rights, Mr. Idriss Jazairy, include many references to the unconformity of these sanctions with principles of international law that I will concisely discuss. How can business enterprises respect human rights and how can home states deliver on their duty to protect human rights in the context of sanctions against Iran, are among the questions that I will try to answer. The ultimate purpose of this section and indeed the concluding chapter is to discover what lessons could be learned and what policy considerations must be taken into account in the context of sanctions and BHR.

1.3. Research Methodology

Even though there is no "generally accepted definition of the methodology of international law"[34], methodology in general "seeks to define the means of acquiring scientific knowledge".[35] In the area of international law, the methodology cannot be dissociated from sources of international law. Martti Koskenniemi describes International law as "an argumentative practice"[36] that is based on persuasive legal arguments,[37] and sources of international law, as known, could be found in Article 38(1) of the Statute of the international Court of Justice (ICJ)[38].

Article 38(1) refers to obligatory sources of international law such as treaties that are binding on state parties[39], customary international law (rules of international customs) that are binding on all states[40], general principles of law that take a privileged place in the "positive legal order"[41] by filling gaps in international law and representing "the foundation of any legal construction"[42], and ultimately other means for the determination of rules of law such as judicial decisions and the writings of publicists. There are, however, other instruments of international law, known as soft law, that encompass guidelines (such as UNGPs or OECD MNE Guidelines), declarations, as well as UN General Assembly resolutions. The critical analysis and interpretation of law in this thesis has been informed by utilising many international normative standards (soft

[34] Christian Dominice, *Methodology of International Law* (Geneva: Graduate Institute Publications, 1997) at 3-12. Translated from French, available online:<https://books.openedition.org/iheid/1334?lang=en>.
[35] *Ibid.*
[36] Martti Koskenniemi, "Methodology of International Law" in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (London: Oxford University Press, 2007).
[37] *Ibid.*
[38] Statute of the International Court of Justice, (June 26 1945), 59 Stat 1055, 33 UNTS 993.
[39] See Antonio Cassese, International Law, 2d (Oxford, UK: Oxford University Press, 2005) at 170.
[40] *Ibid* at 157.
[41] Elena Anghel, "General Principles of Law" (2016) XXIII:2 *Lex Et Scientia* 120 *at 120.*
[42] *Ibid.*

laws) that are considered to be influential in the context of BHR, given the central importance of "interpretation within human rights law".[43]

This is a doctrinal thesis that utilizes a qualitative method and international legal analysis to answer its questions by interpreting regulatory guidelines.[44] This approach has facilitated the analysis and communication of my thinking and ideas so that I am able to propose suggestions about what the law ought to be as opposed to what it is and what it fails to cover. In addition, given the focus of the thesis on the study of the transnational impacts and enforcement of sanctions as well as the application of transnational normative frameworks in the context of sanctions, it is important to highlight the importance of transnational law – law that goes well beyond the national borders[45] – in investigating the international mechanisms.

[43] Martin Scheinin, "The Art and Science of Interpretation in Human Rights Law" in Bard A. Andreassen, Hans-Otto Sano & Siobhan Mclnerney (eds) *Research Methods in Human Rights: A Handbook* (UK: Edgar Elgar Publishing, 2017) 17.

[44] Many of the materials used in this thesis have taken a similar methodological approach to explain and to analyse the international law materials. For instance, see Matthew Happold and Paul Eden (eds), *Economic Sanctions and International Law*, (Hart Publishing, 2016).

[45] See Peer Zumbansen, "Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism" (2012) 21:2 Transnat'I L & Contemp Probs 305.

Chapter II An Overview of Sanctions Law

2.1. Introduction

Prior to the fall of the Berlin wall, Article 41 of the UN Charter[46] was merely used twice to impose a trade embargo against Southern Rhodesia in 1966 and later an arms embargo against South Africa in 1977.[47] After the cold war era, however, sanctions are said to be the most frequently employed tools of the UNSC and since then, 30 multilateral sanctions regimes have been established by the Council. Apart from the UNSC, other states and other international organizations have also imposed unilateral sanctions against other countries.[48]

This chapter provides an overview of sanctions law. The first part unfolds the nature and mechanisms of the UNSC that identify potential threats to international peace and security, the objectives underlying the imposition of sanctions, and the role of the veto power. The legal basis for the UNSC's powers to impose non-military measures on member states will also be discussed. The second half of the chapter will briefly investigate other sources of sanctions laws including UCM.

2.2. UNSC's Nature and Mechanism:

Since its establishment in 1946, the structure of the UNSC has remained mostly unchanged.[49] As the UN's principal crisis-management body, the UNSC has the primary

[46] *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.
[47] A.S. Mlambo, "We Have Blood Relations over the Border: South Africa and Rhodesian Sanctions, 1965–1975" (2008) 40:1 African Historical R 1 at 1–29.
[48] The most prominent example of this is European Union (EU) that is an international organization comprising 28 European countries and governing common economic, social, and security policies (for example, see European Commission Restrictive Measures at *supra* note 5).
[49] "The UN Security Council", online: *Council on Foreign Relations*<https://www.cfr.org/backgrounder/un-security-council>.

responsibility of maintaining international peace and security.[50] It is composed of 15 member states that are empowered to impose binding obligations on the 193 UN member states by the Charter of the United Nations.[51] Each of the 15 members of the Council, that include five permanent and ten elected members, has one vote and meet on a regular basis in order to examine the existence "of a threat to peace or act of aggression".[52] These issues could be in relation to civil wars, natural disasters, arms control or terrorism.[53]

The UNSC demands parties involved in a dispute to settle it by peaceful means and recommends methods of adjustment or appropriate procedures.[54] The UNSC could resort to imposing sanctions or authorize the use of force if needed.[55] UNSC's voting power has been governed by Article 27 of the UN Charter and rule 40 of the Provisional Rules of Procedure[56]. UNSC Members can cast their votes on procedural and non-procedural matters.[57]

2.2.1. UNSC's Functions and Powers:

Articles 24-26 of the Charter of the United Nations cover the functions and powers of the UNSC.[58] Specifically, its primary responsibility which is maintenance of international peace and

[50] Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council*. (Princeton: Princeton University Press, 2007) at 5 para 1.
[51] Charter of the United Nations, *supra* note 46 at Article 25.
[52]Charter of the United Nations, *supra* note 46 at Article 39. Also see "United Nations Security Council |", online: *United Nations*<https://www.un.org/securitycouncil/>.
[53] "What are economic sanctions?", online: *Council on Foreign Relation* <https://www.cfr.org/backgrounder/what-are-economic-sanctions>.
[54]Charter of the United Nations, *supra* note 46 at Chapter VI.
[55]*Ibid* at Chapter VII.
[56]"Provisional Rules of Procedure Security Council", online: *United Nations*<https://www.un.org/securitycouncil/content/repertoire/provisional-rules-procedure#rule8>.
[57] How to determine whether a matter is procedural or non-procedural could be decided by the role of veto as only permanent members only have the right to veto over non-procedural matters.
[58] For further information regarding different power measures of the UNSC see Barry O'Neil "Power and Satisfaction in the United Nations Security Council" (1996) 40:2 J Conflict Resolution, at 219.

security is pointed out by Article 24(1)[59] and has been also reaffirmed or reiterated implicitly in the last four UNSC's presidential statements.[60] More importantly, the UNSC also highlights "the link between its own primary responsibility and the role or responsibility of other actors, namely, member states and regional organizations".[61]

Article 25 points out the obligation of the member states to accept and carry out the decisions of the UNSC. A recent example of invoking this article is UNSC 7739th meeting, held on July 2016 to discuss the implementation of resolution 2231 (2015) which endorsed the Joint Comprehensive Action Plan (JCPOA) on Iran's nuclear program. Many member states welcomed the progress made in the agreement implementation and considered it a step forward for international peace and security.[62] In this session, different states' delegations emphasized the implementation of resolution 2231 and that all states including Iran must act in accordance with all the provisions of this resolution.[63] Later, it was also considered irresponsible to "selectively implement the provisions" of the resolution endorsing the JCPOA.[64] So the importance of the effective implementation of the UNSC's decisions in accordance with article 25 has been

[59] United Nations, Security Council, *Repertoire of the Practice of the Security Council*, 20th Supplement, 2016-2017 (New York: United Nations, 2017) at Part V "Functions and powers of the Security Council", online:<https://www.un.org/en/sc/repertoire/2016-2017/Part_V/2016-2017_Part_V.pdf>.
[60]UNSCOR, 7675th Mtg, UN Doc S/PRST/2016/4 (25 April 2016) at first paragraph; UNSCOR, 7690th Mtg, UN Doc S/PRST/2016/6 (11 May 2016) at first paragraph; UNSCOR 7694th Mtg, S/PRST/2016/8 (21 May 2016) at second paragraph; UNSCOR, 8082nd Mtg, UN Doc S/PRST/2017/21 (31 October 2017) at third paragraph.
[61] Repertoire of the Practice of the Security Council *supra* note 59 at 10 para 3. Also, with regards to council's primary responsibility, many states representatives have recently stressed that "the respect for human rights is linked to the maintenance of international peace and should therefore be given due weight on the agenda of the council". See UNSC, UN Document 7621st Mtg, S/PV.7621(15 February 2016), at 8 (Spain); at 11-12 (France); at 20-21 (United Kingdom); at. 22-23 (Uruguay); at 26-27 (United States); at 31 (Argentina); at 38 (Sweden); at 66 (Morocco); at 68 (Panama), at 78 (Latvia) and at 89 (Netherlands).
[62] Repertoire of the Practice of the Security Council *supra* note 59 at 22-25.
[63]Repertoire of the Practice of the Security Council, *Ibid* at 23. Also see UNSC, 7739th Mtg, UN Doc S/PV.7739 (18 July 2016), at 5.
[64]Repertoire of the Practice of the Security Council, *Ibid* at 25 para 1. Also see, UNSC, 8143rd Mtg, UN Doc S/PV.8143 (19 December 2017), at 11.

repeatedly discussed regardless of the involvement of states in the design of a particular set of sanctions.[65]

As set out by Article 29 of the UN Charter, the UNSC may also "establish subsidiary bodies as needed for the performance of its functions".[66] Thus, UNSC has a number of committees, working groups and Ad Hoc bodies that are all composed of the fifteen Council members.[67] These subsidiary organs may have mandates that include a range of procedural (e.g. documentation and procedures, meetings away from headquarters) to substantive issues (e.g. sanctions regimes, counter-terrorism, peacekeeping operations).[68] Among the UNSC committees that support the Council's mission, the sanctions committee deals with the imposition of the mandatory sanctions on a state or entity in order to make them comply with the objectives set by the UNSC without resorting to the use of force.[69] The sanctions committee, thus, is a political/administrative body with a complex and politicized practice and every member of the UNSC is a member of it. .[70]

2.2.2. UNSC and The Rationale of the Right to Veto

Each of the five permanent members of the UNSC known as P5 , can veto a Council's resolution.[71] This is not the case for the ten elected members and states with veto hold more voting

[65]UNSC, 7620th Mtg, UN Doc S/PV.7620 (11 February 2016), at 12.
[66] Charter of the United Nations, *supra* note 46 at Article 29. Rule 28 of the UNSC Provisional Rules of Procedure indicates this as well. See *Provisional Rules of Procedure of the Security Council*, UNSC 1st Mtg, UN Doc (S/96) [last modified in 1982, UN Doc (S/96/Rev.7)].
[67]"Committees, Working Groups and Ad Hoc Bodies Security Council." *United Nations*, online:<www.un.org/securitycouncil/content/committees-working-groups-and-ad-hoc-bodies>.
[68] *Ibid.*
[69] Charter of the United Nations, *supra* note 46 at Article 41. Also see Jeremy Matam Farrall, *Strengthening the Rule of Law or Serving as a Tool of War? a Critical Analysis of United Nations Sanctions,* (PhD thesis, University of Tasmania, 2004) [Published] at 220-235.
[70]See "Security Council Report", online: *United Nations* <https://www.securitycouncilreport.org/images/homepage/security_council_sanctions_regimes.pdf>
[71] Charter of the United Nations, *supra* note 46 at Article 27. China, France, Russia, The United Kingdom and the United States are the permanent members of the UNSC.

power.[72] Some argue that having no veto power for non-permanent members means they almost have no power and a fair approximation in this regard is that the UNSC has merely five members.[73]

The privileged status of the P5 stems from the roles these countries played in the establishment of the UN in the aftermath of World War II. The victors of the war, the US, Soviet Union and the UK determined "the post war political order" by shaping what then become the UN.[74] They later added the Republic of China (Taiwan) and France.[75] This voting arrangement proposal that was put forward in February 1945 at the conference of Yalta, faced unsuccessful protests by other states due to "an unacceptable infringement on the sovereign equality of states" but the permanent members made it clear that the veto power was "a *conditio sine qua"* for their participation in establishing the UN.[76]

Even though the term "veto" was carefully avoided in article 27,[77] major powers consider the concept of unanimity[78] as the rationale of the veto power[79] that is also required in order for the UN itself to survive.[80]

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[72] Charter of the United Nations, *supra* note 46 at Article 23. The non-permanent members of the UNSC serve two-year, nonconsecutive terms.

[73] O'Neil, *supra* note 58 at 235. Geographical distribution is a factor in appointing non-permanent members. For example, the African Group has three seats; the Asia-Pacific Group, two; the Eastern European Group, one; the Latin American and Caribbean Group, two; and the Western European and Other Groups, two.

[74] "The UN Security Council" (24 September 2018) online: *Council on Foreign Relations* <https://www.cfr.org/backgrounder/un-security-council>.

[75] *Ibid.*

[76] Jan Wouters & Tom Ruys, "Security Council Reform: A New Veto for a New Century" (2005) 44:1 and 2 Military L & L of War Rev 139 at 142 para 4.

[77] *Ibid* at 143 para 1. Second paragraph of the Article 27 of the UN Charter refers to "the right to veto" and stipulates that "decisions of the Council on procedural matters shall be made by an affirmative vote of nine members" and the third paragraph necessitate the affirmative vote of nine members and "the concurring votes of the permanent members provided that, in decisions relating to the peaceful settlement of disputes, a party to a dispute shall abstain from voting".

[78] Brian Cox, "United Nations Security Council Reform: Collected Proposals and Possible Consequences" (2009) 6:1 J Intl L & Business 89, at 96 para 2.

[79] Saleh Al Shraideh, "The Security Council's Veto in the Balance" (2017) 58 J of L,Policy & Globalization 135, at 136 para 5.

[80] This is outlined by the representative of the US in 1945, Document 936, III/1/45, *Documents of the United Nations Conference on International Organization,* (San Francisco, 1945) Vol. XI, at 474. online:<https://archive.org/stream/documentsoftheun008818mbp/documentsoftheun008818mbp_djvu.txt>.In addition, A lot of effort has been made in order to reform the UNSC voting power. for more information see e.g. Adam

Normally, states do not propose any clarification or rationale as to their incentives for casting a vote which is confusing. Also, the use of the so called “hidden veto” or “pocket veto” which routinely happens behind closed doors in informal consultation meetings is problematic.[81] A hidden veto happens when one of the P5 “threatens to use its veto if a certain measure or statement is put to vote”.[82] As a result of this, there are numerous cases in which draft resolutions have not been formally tabled.[83]

The UN Charter gives enormous formal powers to the UNSC but never the tools to directly control the powers that are given to it.[84] The use of the veto by the P5 has multiple objectives including "defending their national interests”, “upholding a tenet of their foreign policy” or, in some cases, promoting a single issue of particular importance to a state.[85]

In the 2005 UNSC summit, the permanent members were called upon to “pledge themselves to refrain from the use of the veto in cases of the genocide and large scale human roots abuses”.[86] This was later echoed by the French foreign minister in 2013 when making reference to a possible “code of conduct to rein in the veto under such dire circumstances”.[87] The High Commissioner for Human Rights supported the French initiative and called on the P5 to “voluntarily and collectively pledge not to use the veto in case of genocide, crimes against humanity and war crimes on a large scale”.[88]

Chapnick, “Reforming the Security Council: What Goes Around, Comes Around.” (2005) 26:7 Policy Options 21. see further Mathew Gould & Mathew Rablen, *Reform of the United Nations Security Council: Equity and Efficiency*, (Sheffield, UK: University of Sheffield, 2016).

[81] Wouters & Ruys, *supra* note 76 at 145 para 3.

[82] *Ibid,* at 145 para 3.

[83]Security Council Report (2015) at 3, Available online at: <https://www.securitycouncilreport.org/wp-content/uploads/research_report_3_the_veto_2015.pdf>

[84]Ian Hurd, "Legitimacy, Power, and the Symbolic Life of the UN Security Council" (2002) 8:1 Global Governance 35, at 35 Para 1.

[85]Security Council Report (2015), *supra* note 83 at 3.

[86] *Ibid* at 4 para3.

[87]Security Council Report (November 2013), online:< https://www.securitycouncilreport.org/monthly-forecast/2013-11/in_hindsight_the_veto.php>. This trend is called Veto Restraints Initiatives.

[88]Security Council Report (2015), *supra* note 83 at 4 para 4.

2.2.2.1. Abuse of Veto Power and Proposed Reforms

The existence of the veto power of the UNSC's permanent members has been considered as a "traditional stumbling block" that has empowered the P5 to "block any resolution that is not merely procedural in nature".[89] It is also argued that as an unjust tool, veto has been the main reason why UNSC has failed to react adequately to some humanitarian crises such as in Rwanda 1994 and Darfur 2004.[90] Also, some critics point out the biased nature of the veto power that is "the most unfair and inequitable law of the world which enables a powerful and authoritative minority to determine the fate of an indispensable and subjugated majority".[91] Due to this, a great number of states wish to abolish or restrain this right. However, it has not happened yet since any amendment of the UN Charter (pursuant to articles 108 and 109) requires the P5 votes and ratifications.

Due to the unjust nature of the right to veto, ever since the creation of the UN, the debate on the necessity of the UN and veto reform has never stopped. Nevertheless, some argue that "trying to get rid of veto is like trying to get rid of politics" so other member states should make peace with it and consider it a price that has to be paid in order to keep the UN functioning properly.[92]

As recently as November 2018, in the 73rd session of the General Assembly, the necessary changes and reforms that have to occur at the UNSC level were discussed. The need to reform mainly stems from the current "complex international security and peace architecture", that

[89] Wouters & Ruys, *supra* note 76 at141 para 2.
[90] *Ibid.*
[91] Kourosh Ziabari "The United Nations Security Council: An Organization for Injustice" *Global Research Center for Research on Globalization* (20 January 2011) online:< https://www.globalresearch.ca/the-united-nations-security-council-an-organization-for-injustice/22875>
[92] Wouters & Ruys, *supra* note 76, at 164 para 3.

requires adaptation to new political realities that could increasingly boost the legitimacy and implementation of the UNSC decisions.[93] The ideal changes ranged from "broadening the number of permanent members beyond the current five" to "abolishing the permanent membership's use of veto power to overrule the adoption of draft resolutions".[94] The latter was rejected by the representatives of the US and Russian Federation. Conceivably, the best solution would be the creation of an accountability mechanism that would strengthen and increase the legitimacy of the UNSC.[95]

All in all, the right to veto blocks the opportunity for equitable involvement in peace and security questions for all member states and also undermines multilateralism. On the other hand, for the purpose of this thesis it is also important to know that there are instances where powerful P5 states resort to imposing UCM, in order to refrain from being vetoed at the UNSC. This is why explaining the veto power is a critical part of this chapter. Nevertheless, perhaps, as emphasized by the representative of Iran at the 73rd session of the GA, the further involvement and fair representation of developing countries in the UNSC could strengthen the UNSC and prevent permanent members' tendency to downgrade the council. [96]

2.3. UNSC and the use of Coercive Measures

The UN collective security machinery that bears the responsibility of maintaining or restoring international peace and security could pursue enforcement measures, including military

[93] UNGAOR, 73rd Sess, 36th & 37th Plen Mtg, UN Doc GA/12091 (20 November 2018). Online:<https://www.un.org/press/en/2018/ga12091.doc.htm>.
[94] *Ibid.*
[95] Wouters & Ruys, *supra* note 76 at 164-165. Wouters & Ruys explain that such mechanism includes explanatory sessions at the UNGA level before exercising the veto power at the UNSC to prevent permanent members to use their veto randomly. Members should explain why a resolution would affect the vital interests of the Security Council and how. A high-level panel should be involved to evaluate the legitimacy of using the veto power on a case by case basis.
[96] UNGAOR, *supra* note 93.

or economic measures, to meet its objectives.[97] These measures could lead to interference in the domestic affairs of states. Thus, while article 2(7) of the UN Charter "prohibits the UN from intervening in domestic affairs of states", Chapter VII authorizes the application of enforcement measures. The UNSC is the determining institution as to when to use the coercive measures in situations where international peace and security is threatened.[98] After the Cold War, the limited power of the P5 to use coercive measures expanded and UNSC started to take a different path. First, the concept of the security and the threats to the international peace and security developed a broader meaning.[99] Furthermore, there was a sharp increase in the use of Chapter VII and operations authorized by it.[100] To clarify, the following section will provide an overview on the non-military practice of the Council.

2.3.1. UNSC Sanction practice and the Rule of Law

It was mentioned that maintaining international peace was the primary purpose for the establishment of the UN by the UN Charter in the final months of World War II. The formal purposes of the UN that are outlined in Article 1 of the UN Charter stress this primary purpose. To achieve this purpose, the UN resorts to the imposition of sanctions or military actions. While military action (the use of force) is a last resort, non-military sanctions aim to change non-

[97] See Kiho Cha, Tilo Stolz & Maarten Wammes, "United Nations Security Council Sanctions and the Rule of Law: Ensuring Fairness in the Listing and De-Listing Process of Individuals and Entities Subject to Sanctions" (2012) 13:2 Whitehead J of Diplomacy & Intl Relations 133.
[98] See David M. Malone, *The UN Security Council: From the Cold War to the 21st Century* (Colorado: Lynne Rienner, 2004) at 10.
[99] This has been reflected in some UN documents including "The Agenda for Peace" (A/47/227-S/24111, 1992),) and "A More Secure World: Our Shared Responsibility" (A/59/565, 2004) at 6.
[100]See David Carment & Martin Fischer, "R2P and the Role of Regional Organisations in Ethnic Conflict Management, Prevention and Resolution: The Unfinished Agenda" (2009) 1:3 Global Responsibility to Protect 261, at 269-272.

compliant state behaviour that threatens international peace and security while avoiding the use of force.

The application of sanctions could follow different objectives and a wide range of actors will be responsible for sanctions administration and monitoring.[101] However, the important issue of whether and if so, how sanctions could or have strengthened the rule of law remains unanswered. In order to answer this question, Farrall critically evaluates the track-record of the UN sanctions system, identifying shortcomings in respect of the key principles of the rule of law which seek to prevent the abuse of power. The key principles of the rule of law include principles of transparency, consistency, equality, due process and proportionality.[102]

As an outstanding part of the UNSC's sanctions regime, the concept of rule of law is a matter of process and should be differentiated from "the issue of legality" that is mainly about substance.[103] In various meetings of the UNSC, it has been emphasized by states' representatives and high level UN officials that sanctions are instruments that could "strengthen, promote and reinforce the rule of law".[104] It was also suggested that the UNSC's actions "should both promote and respect the rule of law".[105] If sanctions are expected to reinforce the rule of law,[106] then it is

[101] Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law*, (Cambridge: Cambridge University Press, 2007) at 186-199.
[102] *Ibid* at 185-229. These principles will be discussed in a section below.
[103] The issue of legality will be examined in a section below. Also See Mohammed Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts* (Netherlands: Martinus Nijhoff, 1994). See Omer Yousif Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford: Clarendon Press, 1988). And Cassandra LaRae-Perez, "Economic Sanctions as a Use of Force: Re-evaluating the Legality of Sanctions from an Effects-Based Perspective" (2002) 20:1 BU ILJ 161.
[104]Jeremy Matam Farrall, *Strengthening the Rule of Law or Serving as a Tool of War? a Critical Analysis of United Nations Sanctions,* (PhD thesis, University of Tasmania, 2004) [Published], at 32 para 1. For instance, in September 2003, the UNSC held two meetings under the agenda item "Justice and the Rule of Law".
[105] *Ibid*, at 30.
[106] See, e.g. UN Doc S/PV.2977 (16 February 1991), 229-30 (statement by the representative of Sweden, made during the Persian Gulf War. In his statement, he declares: "The basic and most immediate question is: Shall the force of law or the law of force prevail?") see Farrall 2004 *supra* note 104 at 35.

logical to put every effort to diminish the unintended and adverse consequences of sanctions upon civilian populations, business entities and third states.[107]

However, Farrall demonstrates that so far, the UNSC's sanctions practice "has largely failed to respect and promote the core elements of the rule of law".[108] Nevertheless, he argues that the UNSC is capable of improving the rule of law record of UN sanctions by taking simple steps to strengthen, respect and promote each of the five key rule of law principles.[109] Policy innovations and developments such as replacing comprehensive sanctions with targeted sanctions, is an example to the reforms that have already been implemented by UNSC.[110] While targeted sanctions also have many collateral damages, it is alleged that they have resulted in "improved record with respect to the element of proportionality".[111]

However, the system requires further and more substantial reforms because of the major shortcomings that it has in its sanctions practice.[112] Farall advances some reform recommendations to enhance UN sanctions system capacity to strengthen rule of law. First, he suggests that UNSC should improve the transparency of its sanctions-related decisions, in order to demonstrate that "its actions are taken in accordance with legitimate authority".[113] Holding public discussions or open session meetings (by the sanctions committee) concerning probable application of sanctions could be a good example for this .[114] Additionally, UNSC should also exercise its power in a consistent

[107] As Farral explains, many U.N. officials have suggested that "the force of law" should prevail the "law of force". See Farral 2004, *supra* note 104, at 35 para 2.
[108] Farrall 2004, *supra* note 104, at 394 para 1.
[109] *Ibid*.
[110] See Grant L Willis, "Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson" (2011) 42:3 Geo J Intl L673
[111] Farrall 2004, *supra* note 104, at 394 para 2. Farrall argues that some aspects of UNSC decisions under Chapter VII – such as reasonableness and proportionality– may well lie beyond the reach of judicial scrutiny. See Jeremy Matam Farrall & Kim Rubenstein, *Sanctions, Accountability and Governance in a Globalised World* (Cambridge: Cambridge University Press, 2009), at 127.
[112]Farrall 2004, *supra* note 104, at 395 para 2.
[113] Farrall 2004, *supra* note 104, at 350 para 2. Also see Farrall & Rubenstein, *supra* note 111, at131.
[114] *Ibid* at 350 para 1.

and predictable manner in order to respect the principle of consistency.[115] As an example, establishing a consolidated sanctions-related body may result in improved consistency.[116]

Even though in a legal context all parties must be considered equal before the law, the use of veto has undermined the principle of equality. To promote equality, use of veto must be minimized by the UNSC.[117] Furthermore, Farrall emphasizes the importance of the application of the principle of due process in granting target states the opportunity of a fair hearing to express their points of view.[118] The UNSC could also provide due process through presenting objective assessment of fact-finding groups.[119] Last and perhaps the most important consideration that must be taken into account in the context of sanctions is the principle of proportionality. The coercive consequences of the applications of sanctions should remain in proportion to the threat to the peace posed by the target state.[120] The principle of proportionality could be respected by conducting a humanitarian impact assessment before applying the sanctions regime.[121]

2.3.2. UN Sanctions: Definition

It is rather challenging to find a commonly-agreed definition for sanctions under international law.[122] The UN Charter does not explicitly define the term "sanctions" and merely refers to them as measures that the UNSC may take under Chapter VII against a state in order to

[115] *Ibid,* at 352 para 2. According to Farrall, the Security Council's inconsistency with respect to the elaboration of exemptions has not been confined to its comprehensive sanctions regimes.
[116] *Ibid,* at 352-353.
[117] *Ibid,* at 364-365.
[118] *Ibid,* at 373-374.
[119] *Ibid,* at 374-375.
[120] *Ibid,* at 384.
[121] *Ibid,* at 392 para 3.
[122] See Boris Kondoch, "The Limits of Economic Sanctions under International Law: The Case of Iraq" (2001) 7 J Intl Peacekeeping 267, at 269.

restore or maintain international peace and security.[123] Nevertheless, some define sanctions as "coercive measures taken in execution of a decision of a competent social organ, i.e., an organ legally empowered to act in the name of the society or community that is governed by the legal system."[124] Similarly, Schrijver defines the collective sanctions applied by the UNSC as "measures imposed by organs representing the international community, in response to perceived unlawful or unacceptable conduct by one of its members and meant to uphold standards of behavior required by international law."[125]

As opposed to military actions, sanctions are considered "valuable instruments in international efforts to safeguard peace and security and to promote democracy and human rights" according to the definition provided by the Swedish Ministry of Foreign Affairs.[126] As allegedly peaceful means of international law, sanctions are imposed through a collective decision process by other states in order to influence states' behaviors and polices threatening international peace and security. The temporary nature of sanctions is due to the fact that when the specified objectives are achieved, the sanctions regime will be removed.[127] Thus, the idea is to use sanctions as a mean to promote peace and security but in reality, sanctions are mostly incapable of delivering this and

[123]Charter of the United Nations, *supra* note 46, article 41.

[124] Boris Kondoch, "Sanctions in International Law" *International Relation,* (28 September 2016) online:<https://dx.doi.org/10.1093/obo/9780199743292-0191>. Also see Vera Gowland-Debbas, Mariano Garcia Rubio, Hassiba Hadj-Sahraoui & Graduate Institute of International Studies, *United Nations sanctions and international law*, (The Hague: Kluwer Law International, 2001).

[125]Nico Schrijver, "The Use of Economic Sanctions by the United Nations Security Council: an International Law Perspective" in Harry H.G. Post *International Economic Law and Armed Conflict,* (Dordrecht: Martinus Nijhoff, 1994) 62 , See Also Nico Schrijver,"The Ban on the Use of Force in the UN Charter" in Mark Weller et al, *The Oxford Handbook of the Use of Force in International Law* (Oxford, UK: Oxford UP ,2015).

[126] "International Sanctions*"* online: *Governmnet Offices of Sweden*<https://www.government.se/government-policy/foreign-and-security-policy/international-sanctions/>.

[127] Chidiebere C Ogbonna, *Sanctions and human rights: the role of sanction in international security, peace building and the protection of civilian's rights and well-being: case studies of Iran and Zimbabwe* (PhD thesis: Interuniversity Institute of Social Development and Peace, 2016), at 46 para 2.

may result in distorting peace.[128] Moreover, even though sanctions are permitted under UN charter, some argue that they actually contradict the Universal Declaration of Human Rights (UDHR)[129] by violating "the right to live in dignity" through "denying civilians of a target State the opportunity to live in dignity due to the negative consequences and aspects often associated with such measures" thus their legality is in question.[130]

2.3.3. UN Sanctions: Beginning and Legal Basis

As to the legal basis for the UNSC's power to impose sanctions, Chapter VII of the UN Charter comprising articles 39-51, "provides a broad framework for taking action to maintain or restore international peace and security" and encompasses "general powers and responsibilities" of the UNSC in this regard.[131] According to articles 39 and 41 that are considered key provisions "governing the application of non-military sanctions", when the UNSC determines the existence of any "threat to the peace, breach of the peace, or act of aggression", it should further decide what military or non-military actions are required "to maintain or restore international peace and security" in accordance with article 41 and 42.[132] If the UNSC determines that taking measures in the form of non-military sanctions is required, this decision is legally binding on UN member states and they are obligated to comply with and implement those sanctions. This legal obligation stems from Articles 25, 103 and 2(5) of the UN Charter.[133]

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[128] See Michel Rossignol, *Sanctions: The Economic Weapon in the New World Order*, (Canada: Library of Parliament, 1996). In this book, for example, it is extensively discussed how sanctions could distort trade and trading patterns that could turn into a crisis in the target state.
[129] *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948).
[130] Ogbonna, *supra* note 127 at 47 para 1.
[131] Charter of the United Nations, *supra* note 46, at Chapter VII.
[132] Ogbonna, *supra* note 127 at 47.
[133] Farrall 2004, *supra* note 104 at 76. UN Charter, Article 25 obligates states to "carry out the decisions of the Security Council". Also, article 103 states that "In the event of a conflict between the obligations of the members of the United

Thus, sanctions are considered as supportive peaceful means to back up the UN's effort of maintaining international peace and security.[134] UNSC sanctions entails a range of measures including "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".[135] The UNSC determine the imposition of coercive measures on responsible individuals, entities or states through adopting a new resolution establishing a new sanctions regime.[136] As part of the sanctions resolution, a sanctions committee will be established with the role of implementing, monitoring and providing recommendations on the particular sanctions regime to the Council.[137] Also, for the purpose of better implementation of the sanctions, in some cases an expert panel is created to assist them in implementation and prepare reports based on its findings.[138] Once the conflict situation is solved or improved, UN sanctions will be lifted.[139]

One might think that a central concern of the UNSC should be due regard for human rights in sanctions implementation. However, a famous and rather recent example of the UN sanctions regimes that manifestly failed was the Oil-for-Food Program that was meant to ensure humanitarian services after Iraq invaded Kuwait. This sanctions program was impaired by

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Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

[134] Kondoch 2016, *supra* note 124.

[135] "UN Sanctions: What They Are, How They Work, and Who Uses Them" online: *United Nations News*<https://news.un.org/en/story/2016/05/528382-un-sanctions-what-they-are-how-they-work-and-who-uses-them>.

[136] see Devon Whittle, "The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action" (2015) 26:3 European J Intl L 671.

[137] For example, by Resolution 1737 (2006) of 23 December 2006, the UNSC established a Committee to oversee and monitor the UN sanctions imposed against Iran's proliferation sensitive nuclear and ballistic missile programmes. See Michele Gaietta, *The Trajectory of Iran's Nuclear Program*. First ed, (UK: Palgrave Macmillan, 2015). The Committee, also, in a situation where sanctions are being imposed on a state party, considers two sets of obligations; First, with regards to the affected states and second regarding the party responsible for imposition, maintenance or implementation of the sanctions. See Committee on Economic, Social and Cultural Rights, The Relationship between Sanctions and Respect for Economic, Social and Cultural Rights, ECOSOC, UN Doc. E/C.12/1997/8.

[138] For example, Resolution S/RES/2159 renewed for 13 months the Panel of Experts assisting the 1373 Iran Sanctions Committee. See SC Res 2159, UNSCOR, 7193rd Sess, UN Doc SC/11432 (9 June 2014).

[139] For example, following the Joint Comprehensive Plan of Actions, most UN Sanctions against Iran were lifted in January 2016.

corruption and exploitation after being revealed that about 2000 firms mostly located in P5 countries "paid kickbacks totaling nearly $2 billion to the Iraqi government".[140] Thus, protection of the human rights of the targeted states as an important aspect of sanctions regimes must be respected in the sanctions context. With this regard, the General Assembly in the 2005 World Summit Declaration called on members of the international community to ensure that "fair and clear procedures are in place for the imposition and lifting of sanctions measures".[141]

2.4. Other Sources of Sanctions

Sanctions, as alternatives to military actions, could come in various forms and types including "comprehensive and targeted sanctions" and "unilateral and multilateral sanctions".[142] There could also be other forms of coercive measures that include economic, social and political sanctions. There are many scholars and NGOs that discuss the terrible humanitarian consequences of economic sanctions and argue against the use of them.[143] Nevertheless, given the fact that sanctions have different angles, such as historical, economic, ethical, political, and legal aspects, it is possible to analyze them through different lenses. But the important issues associated with sanctions are their effectiveness, objectives and the strategies behind them. For the purpose of this thesis, it is important to differentiate between different forms of sanctions to better understand

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[140] "The UN Security Council", online: *Council on Foreign Relations*<https://www.cfr.org/backgrounder/un-security-council>. The UN Oil-For-Food Program was designed to ensure humanitarian services and yet due to its deep flaws, this program led to human rights violations especially when it became obvious that in exchange for assisting Saddam, about 270 individuals and entities received oil vouchers.

[141]GA Res, UNGAOR, 60th Sess, UN Doc A/RES/10/1 (24 October 2005), "2005 World Summit Outcome", at para 109.

[142] See Marieke De Goede, & Ebooks Corporation, *Speculative Security: The Politics of Pursuing Terrorist Monies*. (Minneapolis: University of Minnesota Press, 2012), at 177. There are other types of sanctions that are comprised of arms embargoes, restrictions on admission (visa or travel bans) or other measures as appropriate. See European Commission, "Restrictive Measures" (Spring 2008) *European External Action Service* online:<http://eeas.europa.eu/archives/docs/cfsp/sanctions/docs/index_en.pdf> at 3.

[143]See Gary Clyde Hufbauer et al, *Economic sanctions reconsidered*, 3rd ed (Washington, D.C.: Institute for International Economics, 2007).

their legal status in international law and later in BHR instruments. Therefore, the next sections will provide a brief description of different forms of coercive measures and their imposition.

2.4.1. Unilateral Vs. Multilateral Sanctions:

The United Nations Human Rights Office of the High Commissioner (OHCHR) defines UCM, as "economic measures taken by one state to compel a change in the policy of another state".[144] Trade sanctions in the form of embargoes and the interruption of financial and investment flows between sender and target country, are examples of such measures. The impact of unilateral sanctions on the full enjoyment of human rights has been of great concern. Due to the seriousness of this issue, UN member states have discussed it in various resolutions such as resolution A/67/118 regarding the necessity to end economic, commercial and financial embargo imposed by the US against Cuba,[145] and resolution A/66/138 regarding UCM as a means of political and economic coercion against developing countries.[146] Moreover, the issue of legality of such measures from a human rights perspective have been investigated in many UN working papers.[147] The Vienna Declaration and Programme of Action[148] adopted by the World Conference

[144] See United Nations Human Rights Council, Sess27th, UN Doc A/HRC/27/32 (10 July 2014), Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, *Proceedings of the workshop on the impact of the application of unilateral coercive measures on the enjoyment of human rights by the affected populations, in particular their socioeconomic impact on women and children, in the States targeted*, at 33.

[145] GA Res, UNGAOR, 67th Sess, UN Doc A/67/118 16 (August 2012), Necessity of Ending the economic, commercial and financial embargo imposed by the US against Cuba.

[146] GA Res, UNGAOR, 66th Sess, UN Doc A/66/138 (14 July 2011) Macroeconomic policy questions: international trade and development.

[147] Working Paper "The Adverse consequences of economic sanctions on the enjoyment of human rights" (UN Doc E/CN.4/Sub.2/2000/33); Human Rights Impacts of Sanctions on Iraq, Background Paper prepared by OHCHR for the meeting of the Executive Committee on Humanitarian Affairs of (5 September 2000) UN Doc A/HRC/19/33; OHCHR thematic study on the impact of unilateral coercive measures on the enjoyment of human rights, including recommendations on actions aimed at ending such measures, (11 January 2012); and Committee on Economic, Social and Cultural Rights, general comment No. 8 of 1997 on the relationship between economic sanctions and respect for economic, social and cultural rights (UN Doc E/C.12/1997/8).

[148] UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23.

on Human Rights in 1993 called upon States to refrain from any unilateral measure not in accordance with international law and the Charter of the United Nations because they will create "obstacles to trade relations among States and impede the full realization of the human rights" set forth in UDHR and in other international human rights instruments.[149]

Multilateral sanctions, on the other hand, are expected to impose "greater terms of trade effects on a target nation" than unilateral sanctions.[150] Nevertheless, many scholars argue that even though multilateral sanctions cause greater damage to the target state, they are less effective in producing the desired political outcome mainly due to the fact that the multilateral coalition is unable to enforce cooperation among members.[151] Haufbauer, Schott, and Elliot also demonstrate that in fact unilateral sanctions "work more often that multilateral sanctions".[152] Others, however, argue that the effectiveness of unilateral or multilateral sanctions "depends on the number of issues at stake, specially whether an international institution is involved or not".[153]

2.4.2. Targeted vs Comprehensive Sanctions:

Currently, formerly comprehensive in nature sanctions have turned into smart or targeted sanctions that are basically targeted against specific individuals and/or nongovernmental entities.[154] Comprehensive economic and trade sanctions have been only imposed against

[149] *Ibid* at para 31.
[150]William Kaempfer & Anton Lowenberg. "Unilateral versus Multilateral International Sanctions: A Public Choice Perspective." (1999) 43:1 Intl Studies Q 37, at 37 & 38 para 1.
[151] *Ibid* at 39 para 1.
[152] Hufbauer et al, *supra* note 143 at 65.
[153] Navin Bapat & Morgan T. Clifton, "Multilateral Versus Unilateral Sanctions Reconsidered: A Test Using New Data." (2009) 53:4 Intl Studies Q, 53:4 1075, at 1080. Also see Hufbauer et al, *supra* note 143 at 68. For example, Hufbauer argues that "International institutions (such as the United Nations and the Organization of American States) played a role in 36 percent of the successful episodes and 24 percent of the failures".
[154] See Francesco Giumelli, "Understanding United Nations Targeted Sanctions: An Empirical Analysis." (2015) 91:6 Intl Affairs 1351 at 1352-1353.

Rhodesia, South Africa, Yugoslavia and Iraq since the establishment of the UN .[155] They deny a target State's access to "international markets and other sources of finance and funding, with the exception of those exempted on humanitarian grounds".[156] The US and the European Union (EU) also enforce such sanctions particularly by using international institutions such as the World Bank and the IMF.[157]

Targeted sanctions, that are known to be less harmful to civilians than comprehensive sanctions, were first imposed in 1992 on the government of Libya. Some consider smart sanctions "a useful focal point for policy coordination among powers"[158] but others argue that the lack of systematic evidence to prove this is noticeable.[159] Thus, even though they are believed to be less harmful to civilians than comprehensive economic sanctions, "inconsistent implementation", "ambiguity in identifying the specific targeted individuals" and the resulting "inevitable effect on untargeted, unintended and innocent actors" make them as damaging and destructive .[160]

Unlike comprehensive sanctions that are imposed by international bodies like the UNSC (in political cases) or the World Trade Organization (in economic cases), unilateral sanctions are often imposed by a single state on a third party on reasons that are related to the targeting state's national interest.[161] The US, for instance, has been recently extensively imposing unilateral

[155] Hufbauer et al, *supra* note 143 at 65-68.
[156] Mrgaret P. Doxey, *International sanctions in contemporary perspective* 2nd ed (New York: St. Martin's Press, 1996), at 139-40.
[157] *Ibid.*
[158]Daniel W. Drezner "Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice" (2011) 13:1 Intl Studies Rev 96, at 97 para 2. Also see Geoffrey Garrett & Barry Weingast, "Ideas, Interests and Institutions: Constructing the EC Internal Market" in Judith Goldstein & Robert Keohane *The Role of Ideas in Foreign Policy* (New York: Cornell University Press, 1993) 173.
[159] Drezner, *Ibid,* at 97 para 2.
[160]Ogbonna, *supra* note 127, at 53 para 2 & 54 para 2.
[161]*Ibid* at 61 para 1. Also see Joanmarie M Dowling & Mark P Popiel, "War by Sanctions: Are We Targeting Ourselves" (2002) 11:2 Currents: Intl Trade LJ at 8.

sanctions through national legislation. The UN Special Rapporteur on Unilateral Coercive Measures (UNSR) considers the use and permissibility of these types of sanctions to be non-compliant with the rule of law.[162] Moreover, some scholars have examined the effectiveness of these type of sanctions and came to the conclusion that they failed to make any significant change in the target state's policy and behavior.[163]

2.5. Conclusion

UNSC was mostly prevented from imposing coercive measures provided for in Article 41 of the UN Charter by cold war politics and merely employed its sanction tools twice from 1946 until the middle of 1990 against Rhodesia and South Africa. However, UN sanctions are now considered to be "a prominent feature of the international relations landscape" as after the cold war, sanctions become a popular tool.[164]

The popularity of sanctions and their increasing imposition by the UNSC is attributed to two contributing factors. The first reason is their less unpalatable nature in comparison with other coercive alternatives such as military actions. As a result of this, the UNSC is more inclined to maintain or restore peace and security by employing sanctions measures. Furthermore, from a political point of view, even though Article 42 of the UN Charter authorizes the use of military action, collecting necessary support for such measures could be extremely difficult due to their serious political, humanitarian and also financial consequences for the governments involved.[165]

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[162] See United Nations Human Rights Office of the High Commissioner (6 May 2019) online:*OHCHR*<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24566&LangID=E>.
[163]See for example, Jiawen Yang, et al. "U.S. Economic Sanctions: An Empirical Study" (2004) 18:1 Intl Trade J 23; Also see "Oppose Unilateral Sanctions" online: *US Chamber of Commerce*:<https://www.uschamber.com/issue-brief/oppose-unilateral-economic-sanctions>.
[164] Farrall 2007, *supra* note 101, at 3.
[165]See Farrall 2007, *Ibid* at 3-10.

Having said that, the political structure of the UNSC and the right to veto makes UN sanctions regimes unreliable and too political. Extensive reforms are necessary to make coercive measures effective and to limit the collateral damages arising from the imposition of sanctions. Nevertheless, effective coercive measures is defined as measures that will punish the target state for its wrongdoing without punishing civilians. The question is that whether it is at all possible to achieve the desired outcomes without any collateral damage and without violating human rights? Also, the UN Charter is silent upon the important question of what steps should be taken by the UNSC to ensure that the imposition of UN sanctions will not violate human rights of individuals residing in target states. On the other hand, powerful states like the US resort to imposing UCM, in order to refrain from being vetoed at the UNSC. Thus, while P5 and many powerful states are capable of imposing coercive measures through the UNSC and also unilaterally (even though unilateral coercive measures are against the principles of international law), other states will be the target of these sanctions.[166] As will be explained in the next chapter, studies show that often neither multilateral nor unilateral sanctions result in a target state's change of behavior and the devastating impacts of sanctions will only bring about hardship and poverty for the civilians.

To better understand the issue of sanctions and its impacts on BHR, the next chapter will focus on the role of economic sanctions, their objectives, implementation and their human rights impacts. In addition, the conformity of economic sanctions with international human rights law will be investigated.

[166] Mostly developing countries or countries from the Global South are the target states. See Angus Francis, "Removing barriers to protection at the exported border: Visas, carrier sanctions and international obligation" in Jeremy Matam Farrall & Kim Rubenstein, *Sanctions, Accountability and Governance in a Globalised World* (Cambridge: Cambridge University Press, 2009), at 378.

Chapter III Economic Sanctions and Critiques

"States resort to unilateral sanctions to coerce other States to their will, but innocent victims bear the brunt of the suffering. Diplomatic solutions are difficult and sometimes slow, but they are definitely the preferred alternatives"[167]

3.1. Introduction:

Most state officials and scholars believe that economic sanctions are a great alternative to armed conflicts. This can be due to the fact that sanctions "generate a sense of civic virtue, without incurring unacceptable domestic political costs" and enable the sender countries to avoid the political backlash of sending armies to receiver country.[168] Also, states (whether democratic or not) may be encouraged to impose sanctions in the face of foreign misconduct instead of sending troops due to the "sense of moral superiority" that accompanies their application.[169]

This being said, there is a considerable amount of literature on sanctions and their collateral damage to the rights of civilian populations as well as their humanitarian impacts on the target state.[170] This chapter will first investigate the nature of UNSC's economic sanctions, and then will address how UCM including economic sanctions conform with the international human rights law, what objectives they follow, and in what ways these measures could negatively impact business entities.

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[167] United Nations Special Rapporteur on the negative impact of the Unilateral Coercive Measures on the enjoyment of Human Rights at the UN General Assembly in New York, (18 October 2017) online:*OHCHR*<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22259&LangID=E>.
[168] Micheal W. Reisman & Stevick L. Stevick, "The Applicability of International Law Standards to United Nations Economic Sanctions Programmes" (1998) 9:1 European J Intl L 86 at 94 para 1. also see Hurst Hannum et al, *International Human Rights: Problems of Law, Policy, and Practice* 5th ed (New York: Aspen Publishers, 2011).
[169]*Ibid*, Reisman & Stevick at 94 para 3.
[170] For examples of this literature, see above, Hufbauer et al, *supra* note 143 and below, Geiss, *infra* note 213.

3.2. Economic Sanctions Under the UN Charter

Among all types of sanctions, economic sanctions are the most controversial and disputed. Economic sanctions include a wide range of measures such as "selective or comprehensive ban on trade, a prohibition on some or all capital and service transactions with the government or nationals of the offending country, an interdiction of transport and communication, and a freezing of assets".[171] Economic sanctions imposed by the UN, could either be based on UN Charter Chapter VII (as extensively discussed in the previous chapter) or could be recommended by the UNSC or the United Nations General Assembly (UNGA). Also, while UNGA resolutions are not binding on the UN member states, measures taken under Art. 41 of the UN Charter by the UNSC are mandatory.[172] There is, also, another form of economic sanctions that must be distinguished from UN economic sanctions and those are economic countermeasures that are "bilateral, imposed in peacetime, and generally considered to be lawful unless not prohibited by the national law".[173]

Apart from the scholars who have discussed the negative impacts of sanctions on the enjoyment of human rights, in December 1997, the UN Committee on Economic, Social and Cultural Rights adopted a General Comment on "the relationship between sanctions and respect for economic social and cultural rights".[174] The General Comment emphasized that sanctions can result in violation of basic economic, social and cultural rights, thus, it is important to safeguard the rights of the vulnerable in target countries. The concept of smart sanctions, that was

[171] Boris Kondoch, "The Limits of Economic Sanctions under International Law: The Case of Iraq" (2001) 7 J Intl Peacekeeping 267, at 269 para 2.
[172] *Ibid* at 269 para 3.
[173] *Ibid*.
[174] ECOSOC, UN Doc. E/C.12/1997/8 *The Relationship Between Sanctions and Respect for Economic, Social and Cultural Rights*. For detailed analysis on Economic sanctions see Gary Clyde Hufbauer et al, *Economic sanctions reconsidered*, 3rd ed (Washington, D.C.: Institute for International Economics, 2007). Also see Dursun Peksen & Drury A. Cooper, "Coercive or Corrosive: The Negative Impact of Economic Sanctions on Democracy" (2010) 36:3 Intl Interactions 240.

recommended by UN Secretary General Kofi Annan in his Millennium Report,[175] and aimed to spare the civilian population while targeting the political leaders or those responsible for the threat or breach of the peace, was basically a response to the critics of UN sanctions that suggested sanctions regimes have "unintended adverse consequences" that must be avoided.[176]

3.2.1. Economic Sanctions : Objectives

As stated in the previous chapter, under Article 41, the UNSC has the responsibility to identify the legal basis and scope of the sanctions as alternatives for military actions, as well as the objectives they follow.[177] However, in general, the objective of sanctions are usually two-fold: an implicit general objective and a more specific objective. The latter concentrates on addressing the particular threat to peace, breach of the peace or act of aggression that has led to the imposition of sanctions, in order to maintain or restore international peace and security.[178]

Nevertheless, the ultimate purpose of imposing sanctions (general objective) is punishment for the target state's wrongdoing.[179] Economic sanctions that are imposed for the purpose of "forcing the government of target state to adjust new policies" are defined as "coordinated restrictions on trade and financial transactions intended to impair economic life within a given territory".[180] Also, apart from punishment, the imposition of sanctions might follow other

[175] United Nations. Dept. of Public Information. *We the People: The Role of the United Nations in the 21st Century: Report of the Secretary-General for the Millennium Assembly of the United Nations, in Brief.* United Nations, Department of Public Information, 2000, at 49-50.
[176]Ogbonna, *supra* note 127, at 98 para 3 & 115 para 3.
[177] Farrall 2007, *supra* note 101, at 133
[178] Farrall 2004 *supra* note 104 at 146-148. Also see Rosemary A. Murphy, *The Development of Economic Sanctions in the Practice of the United Nations Security Council*" (Doctoral Thesis, University of Nottingham,2011).
[179] Christine Lumen, *The Power of Sanctions as a Tool of International Relations: Factors That Defines its Success* (Thesis: Tallin University of Technology, 2018) at 11 para 1.
[180] Ogbonna, *supra* note 127, at 64 para 1.

rationales such as deterrence, coercion or compliance, subversion, international/domestic symbolism and message sending.[181]

Deterrence may be defined as deterring other states from unwanted behavior, "by demonstrating the probable consequences or cost of misbehavior".[182] A classic example for this is the trade ban and a complete embargo against Cuban Financial institutions by the US.[183] The aim was to "demonstrate a prompt reaction in order to deter and intimidate those states throughout Latin America that supported the Castro policy."[184] This strategy, however, has faced lots of criticisms due to low success rate in achieving desired outcomes.[185]

Contrary to the use of deterrence, coercion aims to prevent any unwanted military escalation by seeking the target state's behavioural change due to some actions that are already in process.[186] Similar to deterrence, this approach cannot be considered "a successful tool of democracy", since it has led to implementing more drastic measures (such as the threat of military force) in some cases.[187] The failure of coercive diplomacy can be observed in the First Persian Gulf War, in 1990, after the invasion of Kuwait by Iraqi forces.[188]

Another major strategy of sanctions is destabilization that is based on the assumption that the economic pressure would trigger the civilians in the target country to rise up against their

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[181] These rationales are extensively discussed by Jeremy Matam Farrall, *Strengthening the Rule of Law or Serving as a Tool of War? a Critical Analysis of United Nations Sanctions,* (PhD thesis, University of Tasmania, 2004) [Published]. Also See A. Cooper Drury, *Economic sanctions and presidential decisions: models of political rationality* (Hampshire, New York: Palgrave Macmillan,2005). Also see Jack S. Levy, "Deterrence and Coercive Diplomacy: The Contributions of Alexander George" (2008) 29:4 Political Psychology 537.
[182] Lumen, *supra* note 179, at 12 para 2.
[183] *Ibid.*
[184] *Ibid.*
[185] *Ibid,* Lumen, at 12 para 3. Also see Richard Lebow & Janet Stein. "Rational Deterrence Theory: I Think, Therefore I Deter" (1989) 41:2 World Politics 208. This initiative faced a lot of criticisms for further reasons other than its lack of success. For example, see Boris Kondoch, "The Limits of Economic Sanctions under International Law: The Case of Iraq" (2001) 7 J Intl Peacekeeping 267.
[186] *Ibid,* Lumen, at 13 para 2. also see Jack Levy, "Deterrence and Coercive Diplomacy: The Contributions of Alexander George" (2008) 29:4 Political Psychology 537, at 539.
[187] *Ibid,* Lumen, at 14 para 2.
[188] *Ibid.*

government and this could result in leaders losing their office.[189] A successful example of application of this strategy is the downfall of Allende's administration after public frustrations resulted from the financial hardship caused by US economic sanctions against Chile in 1970.[190] Similarly, the recent coercive measures imposed against Iran by the US is partly following this strategy (regime change), according to US officials.[191]

As discussed, it can be concluded that economic sanctions follow different objectives (or a combination of objectives) in that achieving them usually involves third parties. Also, while many factors could impact achieving the favorable outcome, in most cases the application of sanctions affects civilians negatively. The next section will investigate the legal limitation of sanctions.

3.3. UNSC Economic Sanctions: Critiques

The legal limitations upon sanctions regimes,[192] the relationship between sanctions and human rights law,[193] the legal problems concerning the implementation of sanctions under domestic laws,[194] and the legality of countermeasures against wrongful sanctions, are among the

[189] *Ibid,* Lumen, at 15 para 1.
[190] *Ibid.* See further William Leo Grande "A Policy Long Past Its Expiration Date: US Economic Sanctions Against Cuba" (2015) 82:4 *Social Research* 939. Kondoch critiques this agenda and argue against it. See Boris Kondoch, "The Limits of Economic Sanctions under International Law: The Case of Iraq" (2001) 7 J Intl Peacekeeping 267.
[191] See Jason Rezaian, "Call your Iran Policy By its True Name", *Washington Post* (30July 2019), online:< https://www.washingtonpost.com/opinions/2019/07/30/call-your-iran-policy-by-its-true-name/?noredirect=on&utm_term=.c4354edfaa99>. Also see Michael Gordon & Felicia Schwartz, "World News: U.S. Weighs New Sanctions on Iran --- Trump Officials Urge Support for Protests amid Concerns over Intensifying Crackdown." *Wall Street Journal* (1 January 2018) online:< https://www.wsj.com/articles/on-iran-trump-administration-encourages-support-for-protestors-1514848920>.
[192] Generally, see Susan Emmenegger, "Extraterritorial Economic Sanctions and Their Foundation in International Law" (2016) 33 Arizona J Intl & Comparative L 631.
[193] Generally, see Eugenia López-Jacoiste, "The UN Collective Security System and its Relationship with Economic Sanctions and Human Rights" (2010) 14:1 Max Planck YB United Nations L 273.
[194] Generally, see Edward McWhinney "Extraterritorial sanctions and legality under international and domestic law" (2000) 94:1 Proceedings of the Annual Meeting-American Society Intl L *94*, 82.

issues considered by scholars in the context of sanctions.[195] For the purpose of this thesis, the controversial issue of the exact scope of the substantive legal limits of sanctions will be considered, followed by briefly analyzing the principle of proportionality and the nature of *jus cogens* obligations.

As discussed in Chapter II, one of the major characteristics of UNSC sanctions is their binding nature that stems from Article 41 of the UN Charter that supersedes states obligations under any other international agreements as part of a UNSC resolution based on Article 103.[196] However, "the supremacy of the UN obligations over that of states in respect to their domestic or other international commitments" is widely disputed.[197] Some argue that the principle of reasonableness of international norms is in contrast with supremacy of such international norms over domestic norms..[198]

Another important issue for the purpose of this thesis is the collateral damages of economic sanctions on civilian populations and businesses. The authorization of the humanitarian exemptions to mitigate the impacts of sanctions seems to be ineffective.[199] Moreover, economic sanctions are suspected to be politically motivated due to the way in which the resolutions are

[195] For comprehensive information regarding economic sanctions see Hufbauer et al, *Economic sanctions reconsidered*, 3rd ed (Washington, D.C.: Institute for International Economics, 2007).
[196] This position has also been accepted and adopted by the International Court of Justice (ICJ).
[197] Ogbonna, *supra* note 127, at 79.
[198]See Iain Cameron, "UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights" (2003) 72:2 Nordic J Intl L 159, at 171.
[199] Ogbonna, *supra* note 127, at 97-98. When sanctions are imposed, certain measures allowing humanitarian exemptions for essential needs such as food and medicine are put in place. However, in most cases, financial means to do the transactions are not available. (case of Iran). The impracticality of humanitarian exemptions considered by the Security Council is also discussed in General Comment No.8. There, this is attributed to the limited scope of such exemptions and their failure to address key issues that derive from violation of rights enshrined in ICESCR. As an example, the humanitarian exemptions do not address the question of access to primary education, nor do they provide for repairs to infrastructures which are essential to provide clean water, adequate health care, etc.

passed by the UNSC.[200] In addition, another criticism of UNSC resolutions is their "self-serving nature" and their "ambiguity".[201]

Former UN Secretary General, Boutros Boutros-Ghali, refers to sanctions as "blunt instruments" that might carry catastrophic results by harming the civilian population of target states.[202] Similarly, Boris Kondoch mentions that the UNSC's sanctions are believed to be rooted in double standards since they mostly target underprivileged and poor countries of the south.[203] As an example, the UNSC rightfully imposed economic sanctions against Iraq after it invaded Kuwait in 1990. However, no such measures were taken in similar cases such as cases of Israel-Palestine, Turkey-Cyprus, or China-Tibet.

3.3.1. Missing Legal and Constitutional Concept

One critical point in analyzing the legality of economic sanctions is their incompatibility with international human rights law due to their adverse impacts on human rights of the target state's civilians while they spare the political leaders.[204] The humanitarian exemptions are also

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[200] Please see chapter 1 on the role of veto and the structure of the UNSC.

[201] see Ogbonna, *supra* note 127, at 83 para 3 & 87 para 2. For example, tthe Resolutions of the UNSC are considered ambiguous as well as the UNSC's interpretation of the wording of the UN Charter Chapter VII.

[202] Gary Wilson, *The United Nations and Collective Security,* 1st ed (U.K: Routledge Publishing, 2015), at 102.

[203] Kondoch 2001, *supra* note 171, at 272 para 3. Also see Marjorie A. Browne "The United Nations Security Council - Its Role in the Iraq Crisis: A Brief Overview" *CRS Report for Congress*, 2003, at 3.

[204] General Comment No.8 also, discusses the missing "human rights dimension" that needs to be injected into deliberations on the issue of sanctions regime. See ECOSOC, UN Doc. E/C.12/1997/8. Also see Michael Bothe et al, *International Peacekeeping: The Yearbook of International Peace Operations* (The Hague: Kluwer Law International, 2002). While targeting state base the imposition of the sanctions on the assumption that the target state has violated international norms, in most cases the sanctions will result in violation of the human rights of the individuals residing in target states. This, as well, is in contrast with principles of international law since punishing civilians for the wrongdoings of the officials is not in accordance with IHRL. Please note that the Humanitarian consequences of sanctions must be differentiated from their Human Rights impacts. For example, the unintended consequences of sanctions can have many Humanitarian implications, such as shortage of essential drugs that could indirectly increase the rate of death among ill patients. As to the Human Rights impacts of sanctions, UN Special Rapporteur on the Negative impacts of Unilateral Coercive Measures on Human Rights states that "The resort by a major power of its dominant position in the international financial arena against its own allies to cause economic hardship to the economy of sovereign States is contrary to international law, and inevitably undermines the human rights of their citizens,". For further information see Jerg Gutmann et al. "Economic Sanctions and Human Rights: Quantifying the Legal Proportionality Principle." *IDEAS Working Paper Series from RePEc*, 2018. Also see United Nations, United Nations

usually insufficient and major studies have showed that the impact of unilateral measures fall most heavily on the poor.[205] Establishing proper monitoring mechanisms on the application of sanctions is considered to be a solution to this critical issue.

Lack of transparency is another common criticism when talking about UN sanctions regime. The imposition of sanctions is supervised by the UNSC's sanction committee "which operates secretly and cannot be monitored or held publicly accountable".[206] As is also mentioned by UN Special Rapporteur on the Negative Impacts of Unilateral Coercive Measures on Human Rights, an impact assessment on the humanitarian impacts of the sanctions would revise the current missing legal concept.

Sanctions, additionally, have devastating unintended effects on third parties including neighbors and major trading partners. For example, as Boris Kondoch explains in the case of the sanctions imposed on Iraq, "21 countries have claimed losses in their revenues as a result of damage to their economic links with Iraq".[207]

However, perhaps the most disputable issue stems from the wording of Articles 103 and 25 of the UN Charter that put UNSC's act above international law and as a result of which, collective sanctions imposed under Chapter VII are associated with no legal limitations. Many, however, disregard this interpretation since they believe such disregard for the rule of law is in contrast with the role of UNSC to maintain international peace and security and believe that this

Office for the Coordination of Humanitarian Affairs (OCHA) "Sanctions Assessment Handbook" 2004, online:< https://www.unicef.org/emerg/files/Sanctions_assess_handbook_IASC_nov_2004.pdf>.

[205] See Dursun Peksen, "Better or Worse? The Effect of Economic Sanctions on Human Rights." (2009) 49:1 J Peace Research 59. Also see Cristiane Lucena Carneiro & Laerte Apolinário "Targeted Versus Conventional Economic Sanctions: What Is at Stake for Human Rights?" (2016) 42:4 Intl Interactions 565.

[206] Kondoch 2001, *supra* note 171, at 272 para 2.

[207] Kondoch 2001, *supra* note 171, at 273-74. Also see Paul Conlon, "Lessons from Iraq: The Functions of the Iraq Sanctions Committee as a Source of Sanctions Implementation Authority and Practice" (1995) 35:3 Virginia J Intl L 633.

objective cannot be achieved through disrespect for rule of law.[208] To support this argument, Kondoch refers to the doctrine of *jus cogens*[209], as the hard core of human rights and international humanitarian law that are non-derogable and will apply to enforcement measures taken by the UNSC under Chapter VII as well.[210] Furthermore, he argues since "promoting and encouraging respect for human rights and fundamental freedoms" are among basic objectives and principles of the UN, and Articles 1 and 2 of the UN Charter oblige the UNSC to work in accordance with the principles and purposes of the UN, doing otherwise is violating such principles.[211] The next section will investigate this issue in more details.

3.3.2. The Applicability of International Legal Standards to Economic Sanctions

Unfortunately, the common assumption is that only military intervention can lead to destruction, while other instruments of enforcement such as economic sanctions also carry serious long-term and short-term collateral damages.[212] Thus, this false speculation that excludes sanctions from destructive means also insulates them from being subjected to International Humanitarian Law (IHL) principles that include military instruments. As the principles of necessity, proportionality and distinction are considered to be "the legal yardsticks for determining the extent

[208] Kondoch 2001, *supra* note 171, at 282. Also See H.-P. Gasser, 'Collective Economic Sanctions and International Humanitarian Law - An Enforcement Measure under the United Nations Charter and the Right of Civilians to Immunity: An Unavoidable Clash of Policy Goals' (1996) 56 ZaöRV 880- 881.
[209] *Jus cogens* or peremptory norms of general international law are recognized and well-established norms that are peremptory in nature and from which no derogation is allowed. These norms are also mentioned in Article 53 of the Vienna Convention on the Law of Treaties which states that any treaty in conflict with *jus cogens* is considered void. Jus cogens are also reaffirmed in many ICJ rulings including the Nicaragua Case in which jus cogens are named as accepted doctrine in international law. See Military and Paramilitary Activities in and against Nicaragua (Nicar. v. US), 1986 I.C.J. 14 (Jun. 27). Also see Kamul Hossain, "The concept of Jus Cogens and the obligation under the UN Charter" (2005) 3:1 Santa Clara J Intl L 71 at 77.
[210] Kondoch 2001, *supra* note 171, at 282.
[211] *Ibid* at 282 para 2.
[212] Robin Geiss, "Humanitarian Safeguards in Economic Sanctions Regimes: A Call for Automatic Suspension Clauses, Periodic Monitoring, and Follow-up Assessment of Long-Term Effects" (2005) 18 Harv Hum Rts J 167, at 169 para 3.

of permissible collateral damage", it is suggested that establishing a legal framework based on IHL could enable an effective and lawful implementation of sanctions, based on which sanctions will be necessary and proportionate, periodically assessed, and relief could be provided to injured third parties.[213]

To conclude, considering sanctions as inherently non-destructive instruments is a false perception and analyzing the actual consequences of applying non-military coercive measures would actually illustrate "how aggressively applied sanctions can be analogous to the military instrument and objectionable on the same grounds".[214] Nevertheless, as far-reaching as it looks, perhaps regulating sanctions in the light of IHL principles of necessity, proportionality and discrimination could help to mitigate the negative consequences of sanctions slightly.[215]

3.4. United Nations and its Recent Approach Towards the Use of UCM:

Unilateral sanctions are vastly criticized as being "contrary to international law" as well as "in breach of the rights of the states targeted by such measures" by the UN General Assembly and the Human Rights Council.[216] The lawfulness or unlawfulness of UCM has also been the subject

[213] Mallory Owen, "The Limits of Economic Sanctions Under International Humanitarian Law: The case of the Congo", (2012) 48:1 Tex Intl L J 103, at 117 para 4. Also see Micheal W. Reisman & Stevick L. Stevick, "The Applicability of International Law Standards to United Nations Economic Sanctions Programmes" (1998) 9:1 European J Intl L 86, at 128-129. The legal basis of the principle of necessity is article 57(3) of Additional Protocol. Also, article 51(5)(b) codifies the concept of indiscriminate attacks that is closely connected to the principle of proportionality that "requires that the losses resulting from military action should not exceed the expected military advantage". See International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3.
[214] Owen, *Ibid* at 123 para 4.
[215] Geiss, *supra* note 212 at 183.
[216]Mathew Happold, "Economic Sanctions and International Law: An Introduction" in Matthew Happold and Paul Eden (eds), *Economic Sanctions and International Law*, (Hart Publishing, 2016), at 1.

of the discussion by the International Court of Justice in the "Nicaragua case".[217] As Happold explains,[218] ICJ decisions do not bind states to continue their trade relations, beyond the existence of a treaty commitment or other legal obligations.[219] As can be seen, the ICJ does not consider sanctions in contrast with states' customary obligations and give them the freedom to maintain or interrupt trade relationship with other states.

However, Happold refers to the 1970 Friendly Relations Declaration[220] and Article 32 of the 1974 Charter of Economic Rights and Duties of States[221] that prohibits states from "use or encourage the use of economic, political or any other types of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights".[222] Resolutions adopted by the General Assembly are also recent examples of considering UCM contrary to international law, international humanitarian law, the UN Charter and the norms and principles governing peaceful relations among states.[223] Resolution 68/180, and resolution 68/200 reiterate the same position. [224]

Resolution 68/200 also urges adoption of urgent and effective measures against the use of coercive measures against developing countries since use of such measures are in contrast with the basic principles of the multilateral trading system.[225] A similar position is held by the Human

[217] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14. At para 178.
[218] *Ibid*, at 3 para 2.
[219] *Ibid*, at 3 para 2.
[220] UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, UN Doc A/RES/2625(XXV), (24 October 1970).
[221]UN General Assembly, *Charter of Economic Rights and Duties of States*, UN Doc A/RES/3281, (6 November 1974).
[222] *Ibid* at Article 32. Also see UN General Assembly, *Resolution adopted by the General Assembly at its 107th plenary meeting.*, UN Doc A/RES/32/174 19 (December 1977).
[223] Happold 2016, *supra note* 216 at 4 para 2.
[224] UN General Assembly, *Unilateral economic measures as a means of political and economic coercion against developing countries: resolution / adopted by the General Assembly*, UN Doc A/RES/68/200 (15 January 2014).
[225] *Ibid.* Also see Happold 2016, *supra* note 216 at 2.

Rights Council through passing similar resolutions, which was followed by appointing a Special Rapporteur on the Negative Impacts of the Unilateral Coercive Measures on the Enjoyment of Human Rights in 2014.[226]

Additionally, numerous resolutions and declarations outline the legal limitations as to the imposition of UCM with regards to rights essential for dignity and_survival, while drawing attention to the need for special measures to alleviate the negative impact of such measures on women and children.[227] For example, resolution 27/21 and Corr.1adopted by the Human Rights Council stresses that UCM and related legislations are contrary to International Law, IHL, the Charter and the norms and principles governing peaceful relations among States.[228] The Vienna Declaration and Programme of Action,[229] adopted by the World Conference on Human Rights in 1993, also calls upon States to refrain from imposing coercive measures that create obstacles to trade relations among States and impedes the full realization of the human rights set forth in the UDHR and other human rights instruments.[230]

The office of the High Commissioner on Human Rights, also, refers to the numerous UN studies that have been carried out and have discussed the issue of legality of such measures from a human rights perspective.[231] Among those reports are: the background paper prepared by

[226] E.g. see UN Doc UNHRC Res 6/7 (30 September 2007). Also see UN Doc UNHRC Res 27/21 (26 September 2014) at para 22.
[227] Almost all reports of the Special Rapporteur on the Negative Impacts of Unilateral Coercive Measures refer to this fact. ECOSOC, UN Doc. E/C.12/1997/8. No. 12 on the right to adequate food (Art. 11) ,UN Doc E/C.12/1999/5, paragraph 37, No. 14 on the right to the highest attainable standard of health UN Doc E/C.12/2000/4, paragraph 41, and No. 15 on the right to water UN Doc E/C.12/2002/11, paragraph 32; *The Adverse consequences of economic sanctions on the enjoyment of human rights: Working paper prepared by Mr. Marc Bossuyt* (E/CN.4/Sub.2/2000/33); Thematic study of the Office of the United Nations High Commissioner for Human Rights on the impact of unilateral coercive measures on the enjoyment of human rights, including recommendations on actions aimed at ending such measures, 11 January 2012 (A/HRC/19/33). Also see UNGA Resolution 60/1, UN Doc A/RES/60/1 (24 October 2005) at paras 106-110.
[228] United Nations General Assembly, Human Rights Council, Sess27,2014. UN Doc A/HRC/RES/27/21/Corr.1.
[229] UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23 at 31.
[230] World Conference on Human Rights, UN Doc A/CONF.157/23 (12 July 1993), at para 31.
[231]See e.g. UN Doc A/67/327 at 41-42, UN Doc A/67/181, UN Doc A/67/118, UN Doc A/66/138 and the Sub-Commission study UN Doc E/CN.4/Sub.2/2000/33). Also, the workshop held in April 2013 on the issue of unilateral

OHCHR on September 2000, that investigated the human rights impacts of sanctions on Iraq;[232] CESCR General Comment No. 8 adopted in 1997 that considered the relationship between economic sanctions and Economic, Social and Cultural Rights (ESCR),[233] and the Working Paper "the adverse consequences of economic sanctions on the enjoyment of human rights".[234] OHCHR also, carried a "thematic study on the impact of UCM on the enjoyment of human rights" in 2012 that included recommendations aiming at terminating such actions.

All these report and studies confirm the existence of divergent and complex view around this topic and stress the need to further examining the linkage between UCM and human rights. Therefore, as a practical step to solve the issues and grievances within the international system, the Human Rights Council created the mandate of the Special Rapporteur on the Negative Impacts of UCM on the Enjoyment of Human Rights in order to ensure the existence of multilateralism, mutual respect and the peaceful settlement of disputes.[235] The mandate includes a number of key responsibilities, including making guidelines and recommendations on ways and means to prevent, minimize and redress the adverse impact of UCM on human rights, and also to make an overall review of independent mechanisms to assess UCM in order to promote accountability. [236]

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coercive measures that was pursuant to the Human Rights Council Resolution 19/32 is among those. The workshop drew to close by including that "a set of guidelines to prevent, minimize and redress the adverse effects of unilateral coercive measures, as well as identifying an appropriate mechanism to assess the impact of these measures on vulnerable groups, should be considered." See UNGA UN Doc A/HRC/24/14, *Workshop on the impact of the application of unilateral coercive measures on the enjoyment of human rights by the affected populations, in particular their socioeconomic impact on women and children, in the States targeted* (23 May 2014).

[232] *Thematic Study of the Office of the United Nations High Commissioner for the Human Rights on the Impacts of Unilateral Coercive Measures on the Enjoyment of Human Rights, Including Recommendations on actions aimed at ending such measures*, UNGA 19th Sess UN Doc A/HRC/19/33 (11 January 2012).

[233] *Implementation of the International Covenant on Economic, Social and Cultural Rights,* UN Doc ECOSOC E/C.12/1997/8 Sess 17th (12 December 1997).

[234]*The adverse consequences of economic sanctions on the enjoyment of human rights Working paper prepared by Mr. Marc Bossuyt* UN Doc E/CN.4/Sub.2/2000/33 (21 June 2000).

[235]*Human Rights and Unilateral Coercive Measures,* Human Rights Council, UN Doc A/HRC/RES/27/21 (26 September 2014). Mr. Idriss Jazairy was appointed as the first Special Rapporteur on the Negative Impact of the Unilateral Coercive Measures on the Enjoyment of Human Rights.

[236] *Human Rights and Unilateral Coercive Measures,* UNGA Sess 27th UN Doc A/HRC/27/L.2 (18 September 2018).

The term "Unilateral Coercive Measures" has almost the same definition in UN documents as the term "sanctions", discussed earlier in this chapter. They are mostly understood as "economic, trade or other measures taken by one State outside the auspices of the UNSC to compel a change of policy of another Sate".[237] Examples of such measures include trade sanctions in the form of embargoes and the interruption of financial and investment flows between sender and target countries. More recently, so-called "smart" or "targeted" sanctions such as asset freezing, and travel bans have been employed by individual states in order to influence persons who are perceived to have political influence in another State.[238]

3.4.1. Economic Sanctions and Respect for ESCR: GC No. 8 (1997)

General Comment No.8 was issued in late 90s after the committee was informed about the impact of the sanctions upon the enjoyment of economic, social and cultural rights in various cases that involved state parties to the covenant.[239] Given the frequent imposition of economic sanctions at international and regional levels, General Comment No. 8 emphasized the full applicability of provisions related to human rights (Articles 1, 55 and 56) in cases of imposition of sanctions.[240] The committee examined the dramatic impacts of the sanctions on the rights enshrined in the Covenant, and referred to a number of situations in which the unintended consequences of the

[237] *Proceedings of the workshop on the impact of the application of unilateral coercive measures on the enjoyment of human rights by the affected populations, in particular their socioeconomic impact on women and children, in the States targeted,* UNGA Sess 27th UN Doc A/HRC/27/32 (10 July 2014) at para 1.
[238] See Annual report of the United Nations High Commissioner UNGA Sess 19th UN Doc A/HRC/19/33 11 (January 2012). Also see UNGA Sess 27th UN Doc A/HRC/27/32 (10 July 2014).
[239] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights*, ECOSOC UN Doc E/C.12/1997/8 (12 December 1997).
[240] The purpose of this general comment is "to emphasize that, whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights"., *General Comment No.8,* UN Doc E/C.12/1997/8, at para 1.

coercive measures have violated multiple human rights including right to work, right to clean water, right to health and free trade.[241]

Article 2, para 1 of the ICESCR obliges states to take steps to achieving progressively the full realization of the rights recognized in the Covenant by all appropriate means. Even if the sanctioned country is not a state party to the Covenant, the same principles will be applied to protect the rights and core contents protected by the Covenant and also to protect the vulnerable groups.[242]Also, the imposition of sanctions shouldn't lead to an excuse for the affected party to "nullify or diminish the relevant obligation of that state party".[243]

Thus, it is important for the imposing entity (whether it be the international community , an international or regional organization , or a state or group of states), to take fully into account the recognition of economic, social and cultural human rights when designing sanction regimes.[244] This requires an effective monitoring throughout the period that sanctions are enforced to make sure economic, social and cultural rights are protected.[245]Also, any "disproportionate suffering experienced by vulnerable groups within the targeted countries" must be repented through international assistance and cooperation.[246]

All in all, the purpose of this General Comment is to draw attention to the economic, social and cultural rights of inhabitants of sanctioned countries that should not be disregarded by virtue

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[241] *Ibid,* at para 3.
[242] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, ECOSOC, UN Doc E/1991/23 (14 December 1990) at para 10.
[243] General Comment No.8, *supra* note 240 at 10.
[244] *Ibid,* at para 12.
[245] *Ibid,* at para 13.
[246] *Ibid* at para 14. Economic Sanctions that are imposed by the purpose of "forcing the government of target state to adjust new policies" are defined as "coordinated restrictions on trade and financial transactions intended to impair economic life within a given territory. according to the GC, the restrictions are defined as follows: "It consists of export and/or import bans, trade sanctions which may apply to specific products such as oil, timber or diamonds, also bans on the provision of specific services brokering, financial services, technical assistance, flight bans, prohibitions on investment, payments and capital movements or the withdrawal of tariff preferences."

of any determination that their leaders have violated norms relating to international peace and security. The provisions of the UN Charter and the General Principles of International Law must be respected by international community in any situation, and this includes respecting the rights of civilians in sanctioned countries: "...it is to insist that lawlessness of one kind should not be met by lawlessness of another kind which pays no heed to the fundamental rights that underlie and give legitimacy to any such collective action".[247]

3.5. Negative Impacts of Sanctions on Businesses and Conflict in Compliance

The important point with regard to coercive measures is that they "are not simply directed at states but at corporations and individuals within countries".[248] Smart or targeted sanctions , that are designed to avoid or decrease the collateral damages caused by sanctions, oblige states to implement sanctions against "individuals suspected of involvement in international terrorism and other threats to security".[249] This could lead to a conflict , as White explains, between "the obligations of the implementing state on the international plane and those found in the national legal order (including existing human rights protections which may or may not be a product of international obligations)."[250]

The UNSC sanction committee is the deciding organ regarding non-state actors and individuals that ought to be sanctioned. The problem is that their meetings are held behind closed doors and as a result they rarely provide any justification to the public, and on occasions even to

[247] *Ibid,* at16.
[248]Nigel D White, "UN Sanctions: Where Public Law Meets Public International Law" (2011) 74:3 Modern L Rev 456, at 457 Para 2.
[249] *Ibid*. Also see Helen Keller & Andreas Fischer, "The UN Anti-Terror Sanctions Regime under Pressure" (2009) 9:2 Human Rights L Rev 257.
[250]White, *ibid,* at 457 para 2.

the affected parties.[251] Nevertheless, the committee could enhance the legitimacy and compliance pull of its decision by holding closed-door meetings only when confidential matters are been discussed.[252]

There are also a number of studies that confirm the drawbacks of economic sanctions on business entities.[253] They suggest "aggressive foreign policy can generate uncertainty that affects actors' attitudes toward economic risk, reducing consumption and demand for capital".[254]

The basis for the argument that concludes "sanctions are costly for firms with commercial interests in targeted states" could be founded on two simple assumptions.[255] First, the limiting nature of economic sanctions will result in a decrease in "commercial exchange between senders and targets" in different forms such as "import restrictions, export restrictions, [and] partial economic embargoes".[256] Also, the primary objective of firms, including corporations, limited liability companies, partnerships and any other business entities is trying to profit from their commercial exchanges, while sanctions practically threaten corporations' revenue streams through negatively impacting investment behavior.[257] Due to this, as long as the sanctions are in place, the companies have to decline to take any form of profitable commercial activities otherwise they will lose money instead of earning money. Another important point that must be taken into considerations is the effect of *threats of sanctions* and *the actual imposition of sanctions.* There is

[251] *Ibid,* at 464 para 3. Also see Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law*, (Cambridge: Cambridge University Press, 2007), at 213. This is in contrast with the right of access to information, as a general principle of international law.
[252] White, *ibid* at 464-465. Also see Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press,2002) at 46 & 189-190.
[253] See Glen Biglaiser & David Lektzian, "The Effect of Sanctions on U.S. Foreign Direct Investment" (2011) 65:3 Intl Organization 531.
[254]Clayton McLaughlin Webb, *Domestic Consequences of Economic Sanctions* (Doctoral dissertation: Texas A & M University, 2015), at 26 para 1. Also see Reed M. Wood, "A Hand upon the Throat of the Nation: Economic Sanctions and State Repression, 1976–2001" (2008) 25:3 Intl Studies Q 489.
[255] McLaughlin, *ibid* at 26 para 3.
[256] *Ibid.*
[257] *Ibid*, at 49 para 3.

a wrong assumption that only "imposition is costly" and "threats are relatively costless", while studies suggest otherwise.[258]

3.6. Conclusion:

The final months of the World War II was followed by the emergence of the UN in order to increase international peace and security. Sanctions were introduced to help maintaining the peace and security as alternatives to military measures in response to violation of international law or international moral norms. While the ultimate purpose of imposing sanctions is punishment for the target state's wrongdoing, the precise scope and the duration of sanctions, however, have not been discussed neither by international treaties nor by others. Some, nevertheless, believe the permissibility of economic sanctions is limited by non-derogable provisions of human rights and international humanitarian law.[259]

All in all, the issue of implementation and mechanisms of implementations of sanctions in international law is a sensitive matter that must be enhanced. Many, including Jeremy Farrall, emphasize the mechanisms that are "free from state domination".[260] He, for example, refers to the important role of (and use of) experts in monitoring, strengthening and improvement of sanctions regimes and keeping this process away from state's representatives' political motivations. Some also suggest that internal accountability mechanisms at the UN level should be accompanied by

[258] *Ibid,* at 50 para 3. The threat of economic sanctions is enough to impose costs on TNCs operating in the target state.
[259]Kondoch, *supra* note 171 at 283 para 3. Also see August Reinisch, "Developing Human Rights and Humanitarian Accountability of the Security Council for the Imposition of Economic Sanctions" (2001) 95:4 American J Intl L 851.
[260] Jeremy Matam Farrall & Kim Rubenstein, *Sanctions, Accountability and Governance in a Globalised World* (Cambridge: Cambridge University Press, 2009), at 214.

external mechanisms (including judicial ones) at the national and international level given the severe harms that could be resulted from general or targeted sanctions.[261]

Furthermore, it was discussed that the imposition of sanctions in general and UCM in particular, would threaten a number of rights and freedoms enshrined in IHRL treaties.[262] But my argument is not limited to coercive measures imposed unilaterally. Sanctions are often harmful, even if imposed under Chapter VII by the UNSC. The argument is that UCM are more harmful in comparison to UNSC sanctions and perhaps this is the reason why the Special Rapporteur has mostly concentrated on adverse effects of UCM. Specifically, the Special Rapporteur underlines the discriminating effects of all unilateral sanctions on the basis of the country of residence, or nationality of the targeted populations. The impacts of wide-ranging embargoes in conjunction with secondary sanctions and the consequent economic isolation of the individuals associated with the target state is what amount to enormous discrimination based on nationality. A current example of this is the UCM imposed on Iran by the US which have practically deprived Iranian people of the opportunity of conducting normal business and other relations with foreign counterparts.

The adverse effects of sanctions upon innocent civilian populations and third States should thus be minimized. The next chapter will analyze the impact of the UCM on business entities and the issue of extra-jurisdictional and transnational sanctions.

[261]White, *supra* note 248, at 471 para 2.

[262] As such, the most important one is the right to life that is incorporated in various IHR instruments, such as Art. 6 of the International Covenant on Civil and Political Rights, 1966; Art. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950; and Art. 4 of the African Charter of Human Rights, 1981. These articles should be read together with the right to food and the right to be free from hunger and the right to free trade.

Chapter IV Business and Human Rights in the Context of Sanctions

4.1. Introduction

The previous chapters provided a comprehensive overview of the definition and purpose of imposing sanctions on states, entities or individuals whether through UNSC resolutions or unilaterally by states. As of today, the fully updated list of countries subject to UNSC sanction measures contains a rather considerable number of countries.[263] This list does not cover unilateral sanctions imposed by the US or the EU. This significant increase in the number of active sanctions when compared to the maximum of 8 sanctions regimes in the 1990s and 12 in the 2000s is by no means a sign of effectiveness of this practice.[264] In fact, as Kofi Annan the former Secretary General of the UN explains, much academic research has identified that sanctions are of limited effectiveness in coercing changes in behavior of target states. In particular, one study by Thomas Biersteker of the Graduate Institute in Geneva shows that not only the success rate of sanctions is as low as 22 percent, but also, they mostly result in a considerable increase in human rights violations within targeted countries.[265] This is apart from the counterproductive effect of sanctions in, among others, controlling the black markets of prohibited goods or totally damaging the targeted states industries and economy that will lead to hurting the civilians.[266] In another study by

[263] The Consolidated United Nations Security Council Sanctions list is being updated on a regular basis and includes the list of individuals, entities and states that are subjected to the sanction measures. "Sanctions List Materials | United Nations Security Council", (2019), online: *United Nations* <https://www.un.org/securitycouncil/sanctions/1518/materials>.

[264] See Kofi Annan and Kishore Mahbubani, "A rethink on sanctions" *Project Syndicate* (11 January 2016) online: <https://www.project-syndicate.org/onpoint/rethinking-economic-sanctions-by-kofi-a-annan-and-kishore-mahbubani-2016-01>. Also see Joy Gordon, *Invisible War: The United States and the Iraq Sanctions* ed (Cambridge, Massachusetts: Harvard University Press, 2012). Information on the number of sanctions and sanctioned countries could be found at the United Nations Security Council online database. "Sanctions List Search | United Nations Security Council", (2019), online: United Nations Security Council <https://scsanctions.un.org/search/>.

[265]Thomas J. Biersteker et al, "UN Targeted Sanctions Datasets (1991–2013)" (2018) 55:3 J Peace Research 404, at 408, Para 2.

[266]See Geiss, *supra* note 212 at 197 para 1. Also see E Gibbons & R Garfield, "The Impact of Economic Sanctions on Health and Human Rights in Haiti, 1991-1994" (1999) 89:10 American J Public Health 1499. The US-led sanctions against Haiti between 1991-1994 led to the further deterioration of civil and political rights. See further Ernesto

Oxford University's Adam Roberts, sanctions are declared to be only slightly effective when combined with other factors.[267] Not even the use of targeted sanctions instead of comprehensive ones as discussed in the previous chapter has rendered any obvious change in this trend and as Professor John Ruggie has stated "sanctions are an instrument of coercive diplomacy except that policy makers have forgotten about the policy part".[268]

A wide range of human rights are impacted by the imposition of sanctions. This includes various economic, social and cultural rights as well as civil and political rights. But mostly, it is the detrimental effects of "economic sanctions" that have extensive severe impacts on many human rights predominantly through discouraging of trade and investment in the target state.[269] This discouragement mainly occurs through the "isolation of repressive regimes from the international community", as a consequence preventing the target state from "economic integration through trade and foreign investment" that is considered to be a crucial factor by many in "the promotion of governmental respect for human rights".[270] Thus, as Peksen suggests, the unilateral economic

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Sagas, *An Aparent Contradiction? Popular Perceptions of Haiti and the Foreign Policy of the Dominican Republic,* ed (Boston, 1994).

[267] Kofi Annan refers to the case of Myanmar while the EU and US sanctions accompanied Myanmar's government decision to "open up its economy and engage in gradual political reform and fear of becoming overly reliant on China". See Kofi Annan, "The UN Has More Sanctions in Place Than Ever- But Are They Working?", *World Economic Forum (*12 January 2016) online:<https://www.weforum.org/agenda/2016/01/the-un-has-more-sanctions-in-place-than-ever-but-are-they-working-595c8cb4-5cc5-4065-9be7-dd4a7e6cfa07>. Also see Jonathan Marcus, "Analysis: Do Economic Sanctions Work?", *BBC* (26 July 2010) online:< https://www.bbc.com/news/world-middle-east-10742109>.

[268] Annan, *ibid.*

[269]See Gary Clyde Hufbauer et al, *Economic sanctions reconsidered*, 3rd ed (Washington, D.C.: Institute for International Economics, 2007). Also see Gary Hufbauer & Barbara Oegg, "Economic Sanctions: Public Goals and Private Compensation" (2003) 4:2 Chicago J Intl L 305. See further Raul Caruso, "The Impact of International Economic Sanctions on Trade: An Empirical Analysis." (2003) 1.

[270] Dursun Peksen, "Better or Worse? The Effect of Economic Sanctions on Human Rights" (2009) 46:1 J Peace *Research* 59 at 63 para 2. Many academic writings discuss this issue and the relationship between foreign economic capital and the level of government respect for human rights, especially in developing countries. See for example, Neil J. Mitchell & James M. Mccormick, "Economic and Political Explanations of Human Rights Violations." (1988) 40:4 World Politics 476. Also see Emilie M Hafner-Burton, "Trading Human Rights: How Preferential Trade Agreements Influence Government Repression", (2005) 59:3 Intl Organization 593. David L Richards et al, "Money with a Mean Streak? Foreign Economic Penetration and Government Respect for Human Rights in Developing Countries" (2001) 45:2 *Intl Studies Q* 219. However, there are some who argue against this theory and consider foreign

coercion will ultimately result in worsened human rights practices in sanctioned countries while the multilateral sanctions may even cause more harm to human rights conditions.[271]

The purpose of this chapter is to investigate the impact of coercive measures in general and unilateral economic sanctions in particular on international normative BHR standards, notably the UNGPs and OECD MNE Guidelines, in order to assess whether the sanctions regimes are in conflict with these BHR instruments. In order to do so, an overview of the UN and OECD BHR instruments will be provided (this will be discussed in the current and the next chapter respectively), to determine whether sanctions have been considered within these instruments and mechanisms. This will be followed by an investigation of whether the state duty to protect human rights as found in the UNGPs is relevant when a home state imposes sanctions either on its own companies operating internationally, or on other TNCs, and whether the corporation can comply with its responsibility to respect human rights in light of these sanctions.

4.2. Business and Human Rights

The field of BHR is about "preventing and addressing human rights violations by the business sector".[272] A number of soft law initiatives on BHR exist that have been promoted by international authoritative sources such as the UN or the Organization for Economic Cooperation and Development (OECD) and includes the UN Global Compact[273] that was launched by Kofi

investments in developing countries an incentive to repress and to violate human rights (The Dependency Theory). This theory is extensively discussed in Hafner-Burton 2005.

[271] Peksen, *ibid*, at 74-75.

[272] Nadia Bernaz, *Business and human rights: history, law and policy: bridging the accountability gap*, 1st ed (Routledge, 2017) at 296.

[273] "What is the UN Global Compact" *United Nations Global Compact* online:<http://www.unglobalcompact.org/>.

Annan in 2000, the UNGPs[274] and also the human rights chapter in the OECD MNE Guidelines,[275] that was added in 2011 in order to fully align the work of the OECD with the UNGPs.[276] These normative standards are clear benchmarks for businesses to re-evaluate "their conformity to the international human rights legal regime" especially with regards to their transnational business activities and also for states to promote BHR, with a clear requirement that businesses identify, prevent, address and mitigate potential and actual human rights violations.[277] In the following section, the two fundamental normative standards, the UNGPs and OECD MNE Guidelines will be discussed in more details.

The central questions for my thesis are whether the state duty to protect human rights as clarified in the UNGPs is relevant when a home state imposes sanctions either on its own companies operating internationally, or on other TNCs, and whether the corporation can comply with its own responsibility to respect human rights in light of the sanctions. Due to the importance of defining the state duty to protect human rights and the business responsibility to respect human rights, I will first focus on the UNGPs.

In June 2011, the UN Human Rights Council unanimously endorsed the UNGPs, and they have remained the only guidance issued by the Council for states and business enterprises on their

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[274] John Ruggie, Report of the Special Representative of the Secretary-General on the Issues of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UNHRC, 17th Sess, UN Doc A/HRC/17/31 (2011) [Guiding Principles]; Alternatively, the UN HRC also makes the UNGPs available in the following form: United Nations, Office of the High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011), online: *OHCHR*<http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

[275]Organisation for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises* (Paris: OECD Publishing, 2000).

[276] Elisa Giuliani, "Nadia Bernaz, Business and Human Rights. History, Law and Policy – Bridging the Accountability Gap" (2017) 2:2 Business & Human Rights J 379 at 380, para 1.

[277]See Scott Martin, Wayne Jordash & Léa Kulinowski, "Business and Human Rights in Conflict-Affected Areas - Steps That States and Business Enterprises Can Take to Identify, Prevent, and Mitigate the Adverse Human Rights Impacts of Certain Business Activities" (2014) España Y La Implementación De Los Principios Rectores De Las Naciones Unidas Sobre Empresas Y Derechos Humanos: Oportunidades Y Desafíos.

respective obligations in relation to BHR.[278] The UNGPs are described as "the global authoritative standard, providing a blueprint for the steps all states and businesses should take to uphold human rights."[279] by UN High Commissioner for Human Rights.

The UNGPs are not in themselves legally binding but "derive their normative force through their endorsement by states and support from other stakeholders and businesses itself".[280] They are comprised of 31 principles and encompass "all internationally recognized rights and apply to all states and all business enterprises".[281] The three pillars that frame the UNGPs are Protect, Respect and Remedy and were developed by John Ruggie, the Special Representative of the Secretary General (SRSG). The framework was requested by the UN Commission on Human Rights' adoption of the resolution E/CN.4/RES/2005/69 seeking to identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights.[282]

Ruggie himself considers the three pillars of the Protect, Respect and Remedy framework as interrelated.[283]An advantage of norms and standards over hard law, as Ruggie states, is that they would "spread much faster and more widely than they would otherwise".[284] However, while the

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[278] John Gerard Ruggie, "The Social Construction of the UN Guiding Principles on Business and Human Rights" (2017) IDEAS Working Paper Series from RePEc, online:< https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper_67_0.pdf>, at 1 para 1.

[279]*Ibid*. Also see Zeid Ra'ad Al Hussein, "Ethical pursuit of prosperity" (23 March 2015) *Law Society Gazette* online:< https://www.lawgazette.co.uk/commentary-and-opinion/ethical-pursuit-of-prosperity/5047796.article>.

[280] Ruggie 2017, *ibid,* at 1.

[281]*Ibid,* at 1-2. Also see Jolyon Ford, "Business and Human Rights: From Principles to Practice Edited by Dorothee Baumann-Pauly and Justine Nolan." (2016) 22:2 Australian J Human Rights 185.

[282]UN Commission on Human Rights, *Human Rights Resolution 2005/69: Human Rights and Transnational Corporations and Other Business Enterprises*, 20 April 2005, UN Doc E/CN.4/RES/2005/69. Also see United Nations Human Rights, Office of the High Commissioner, "Business and Human Rights" (12August, 2019), online: *OHCHR* <https://www.ohchr.org/en/issues/business/pages/businessindex.aspx>.

[283]Ruggie 2017, *supra* note 278 at 16, para 2.

[284] *Ibid*, at 21 para3.

UNGPs may not be binding, the state duty reflects existing binding international law as stated by the UNGPs themselves:

> "Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights."[285]

It is noteworthy that before the UNGPs were introduced in 2011, the UN had been actively engaged in addressing corporate conduct through another UN initiative in 1999 when Kofi Annan introduced the Global Compact in order to "promote business support for UN norms in the area of human rights, labour standards and the environment" by reflecting a broadly "social constructivist approach".[286] Ruggie contributed to that process as well.

4.2.1. Guiding Principles on Business and Human Rights: The Principles

The UNGPs apply to all countries and business enterprises including TNCs and others, and are designed to enhance standards and practices with regard to BHR in order to have a "socially sustainable globalization" by "achieving tangible results for affected individuals and communities".[287] To achieve this aim, these principles have to be considered both individually and collectively and must be implemented "in a non-discriminatory manner".[288] The state duty to protect against human rights abuses by business enterprises, the corporate responsibility to respect human rights and the need for greater access to effective remedies by victims are recognized to be the three "differentiated but complementary responsibilities" that ground the UNGPs.[289]

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[285] UNGPs, *supra* note 274 at 1, para 4.
[286] Ruggie 2017, *supra* note 278 at 10 para 4 & 9 para 3.
[287] UNGPs, *supra* note 274 at 1.
[288] *Ibid.*
[289] Sara L Seck, "Canadian Mining Internationally and the UN Guiding Principles for Business and Human Rights" (2011) 49 Can YB Intl L 51 at 90 para 2.

In order to facilitate implementation of the UNGPs, the UN Human Rights Council appointed a working group on the issue of human rights and transnational corporations and other business enterprises in 2011. The working group also makes recommendations and provides support for the use of the UNGPs, as well as enhancing access to effective remedies for victims of corporate activities, including those in conflict areas.[290]

4.2.1.1 First Pillar: State Duty to Protect Human Rights

In this section, an attempt will be made to unpack the state duty to protect based on the first pillar of the UNGPs that focuses on preventive measures, together with the third pillar that outlines remedial measures. Consisting of 10 sub-principles, the first pillar provides requirements and explanation for the effective protection of human rights by states. In other words, these principles break down what exactly needs to be done by states to protect individuals against human rights abuses by third actors (including businesses) through efficient policies, regulations, legislation and adjudication.[291] The first pillar is described as "a smart mix of measures- national and international, mandatory and voluntary" to make the state duty to protect effective.[292] The failure of the state to "enable and maintain such a mix" is often related to the "legal gap in the state governance" as explained by the UNGPs.[293]

The governance gap that allows for the continued impunity of TNCs involved in or benefiting from human rights violations is discussed at length by Simons and Macklin through an

[290] United Nations Human Rights Office of the High Commissioner, "Working Group on the issue of human rights and transnational corporations and other business enterprises" (12 July 2019), online: OHCHR - Business <https://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx>
[291] UNGPs*, supra* note 274 at 3, Principle 1.
[292] *Ibid* at 5, Commentary to Principle 3.
[293] *Ibid.*

evaluation of the UN Global Compact, the OECD MNE Guidelines and also the UNGPs.[294] Interestingly, while the authors highlight the ability of home states to closing the governance gap by regulating the TNCs, they do not consider it an adequate response and argue that "a multi-pronged approached" in various jurisdictional levels is needed to tackle this issue.[295]

The state duty to protect defined by Pillar 1 of the UNGPs is a reflection of the "traditional role of states in safeguarding individuals' human rights against abuses committed by non-state actors (NSAs)".[296] The human rights obligation of states with regard to business activities, includes ensuring that businesses do not indirectly infringe upon human rights. However, in case any state fails to protect individuals against human rights related abuses due to its inability or unwillingness, it would then be the responsibility of the home state (in the case of transnational business activities) or the business enterprise itself to take necessary measures.[297]

The state obligation to protect "lies at the very core of the international human rights regime."[298] Stephanie Lagoutte argues that "the UNGPs do not create new international law obligations, but reiterate two pre-existing international human rights law obligations" mainly through Guiding Principles 1 and 25 (Guiding Principle 25 which focuses on access to remedy will be discussed in detail below).[299]

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[294] Penelope Simons & Aubrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (London: Routledge, 2014).
[295] *Ibid.* Also see Chilenye Nwapi, "The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage. By Penelope Simons and Audrey Macklin" (2015) 52 Can YB Intl L 641, at 648. Also see Steven Bittle, "The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage by Penelope Simons, Audrey Macklin (Review)." (2016) 31:3 Can J Law & Society 502.
[296] Stéphanie Lagoutte, "New Challenges Facing States within the Field of Human Rights and Business" (2015) 33:2 Nordic J Human Rights 158 at 160, para 2.
[297] *Ibid.*
[298] Sara L. Seck, "Conceptualizing the Home State Duty to Protect Human Rights" in Karin Buhmann, Lynn Roseberry & Mette Morsing eds in *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives* (UK: Macmillan, 2010) at 27, para 2. This is also reflected in the UNGPs themselves.
[299] Stephanie Lagoutte, "The Sate Duty to Protect against Business-Related Human Rights Abuses (Unpacking pillar 1 and 3 of the UN Guiding Principles and Human Rights and Business)" (2014) 2014:1 Danish Institute for Human Rights at 11 para 2.

The first two principles of the first pillar explain the foundational principles of the state duty to protect and are rooted in fundamental norms of international human rights law that demand states "respect, protect and fulfill their human rights obligations" regarding every single individual within their territory or jurisdiction.[300] Ever since the adoption of the Universal Declaration of Human Rights[301] in 1948, the first Guiding Principle has been widely reflected in almost all international treaties or guidelines, including the International Covenant on Civil and Political Rights[302] and its sister covenant, on Economic, Social and Cultural Rights.[303] The commentary section of the first principle further explains that the state duty to protect is a "standard of conduct" and also covers human rights abuses committed by third parties, including business enterprises. While the state is considered to be the main duty holder in international law, the violation of human rights resulting from actions of the private actors cannot necessarily be attributed to them, although states breach their own international human rights law obligations by failing to take "appropriate steps to prevent, investigate, punish and redress private actors' abuse".[304] Furthermore, this part also highlights the state duty to "protect and promote the rule of law" by taking measures to "ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency".[305]

Lagoutte refers to the already well-established case law of the European Court of Human Rights (ECtHR) to better illustrate how the nature and content of the state positive and negative

[300] UNGPs, *supra* note 274 at 1.The difference between principle 1 and Principle 2 will be unpacked in the next section.
[301] *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, *3rd Sess*, Supp No 13, UN Doc A/810 (1948) [*UDHR*].
[302] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) [*ICCPR*].
[303] *International Covenant on Economic, Social and Cultural Rights,* 16 December 1966, 993 UNTS 3, Can TS 1976 No 47 (entered into force 3 January 1976) [*ICESCR*].
[304]UNGPs*, supra* note 274 at 3, Principle 1.
[305] *Ibid* at 3, Commentary to principle 1.

obligations in the field of BHR have been exemplified. Similarly, she mentions to the work of the Inter-American Court and Commission for Human rights based on Articles 1.1 and 2 of the American Convention on Human Rights[306] that discuss the overall obligation of states to act with due diligence to prevent human rights violations resulting from the activities the non-state actors including business enterprises.[307]

As discussed, many human rights treaty bodies are participating in defining the state duty to protect in the field of BHR.[308] However, apart from the hard law, a series of reports on behalf of the SRSG also mapped "the obligations of states to regulate and adjudicate corporate activities under the UN core human rights treaties".[309] In one report, for instance, a trend towards increasing pressure on states to fulfil their duty to protect in relation to corporate activities is identified.[310] Likewise, the UNGPs underline the particular attention that has to be placed on states that take a narrow approach to their duty to protect and require states to adopt a corporate culture respectful of human rights domestically and internationally to meet their duty to protect.[311]

Guiding principle 2 encompasses various approaches adopted by states to ensure all businesses domiciled in their territory or jurisdiction respect human rights while operating.[312] As explained by commentary to Principle 2, these approaches include "domestic measures with extraterritorial implications and direct extraterritorial legislations and enforcement".[313]

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[306] Organization of American States (OAS), *American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32)*, 22 January 1969.
[307] Lagoutte 2015, *supra* note 296, at 162, para 1. Also see Inter-American Court of Human Rights, *Sarayaku v Ecuador*, Judgment of 25 July 2012.
[308] *Ibid.*
[309] Human Rights Council, "Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie - State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries, UNHRC, 4th Sess, UN Doc A/HRC/4/35/Add.1 (2007) at 2, para 1.
[310] *Ibid* at 2 para 2.
[311] See UNGPs, *supra* note 274 at Principle 8 & 9.
[312] UNGPS, *supra* note 274 at 3, Principle 2.
[313] UNGPS, *supra* note 274 at 4, Commentary to Principle 2. Also see Sara L Seck, "Canadian Mining Internationally and the UN Guiding Principles for Business and Human Rights" (2011) 49 Can YB Intl Law 51 at 95-96.

Guiding Principles 3 to 10 are operational principles that elaborate on Principle 1 and 2. Guiding Principle 3 specifies a number of criteria for states' compliance with their duty to protect.[314] These include the enforcement of laws that require businesses to respect human rights by enabling them instead of constraining them, providing effective guidance on the responsibility to respect, and requiring them to prepare impact assessments.[315] Thus, while Principle 3 refers to "general state regulatory and policy functions" by emphasizing the enforcement and assessment of existing laws, Principles 4-6 covers "the state-business nexus" and the additional steps that states must take in order to protect individuals specifically against state-owned enterprises.[316] These extra measures include requiring human rights due diligence to meet their international human rights obligations that is of great importance in the context of sanctions as well.[317] Relevant to the topic of this thesis and the explanation that sanctioned countries should be considered as high-risk areas (rather similar to conflict-affected areas), Guiding Principle 7 elaborates on the heightened risk of "gross human rights violations" in conflict-affected areas and the possible inability of host state to "protect human rights adequately due to lack of effective control".[318] The role of home state in ensuring that businesses are not involved in human rights abuse in such situation is reiterated by this principle and its commentary.[319]

The last three Principles of Pillar 1 address "ensuring policy coherence" through taking a broad approach in managing the BHR agenda by states, as explained in Guiding Principle 8. This approach includes having laws and policies in place in line with their international human rights law obligations while "supporting and equipping" their national and subnational departments to

[314]UNGPs*, supra* note 274 at 4, Principle 3.
[315] *Ibid.*
[316] UNGPs, *supra note* 274 at 4-8. Also see Seck 2011, *supra* note 313 at 96 para 2.
[317] UNGPs, *supra note* 274 at 6, Principle 4.
[318] UNGPs, *supra note* 274 at 9, Commentary to Principle 7.
[319] *Ibid.*

"act in a manner compatible" with state's human rights obligations.[320] Additionally, the importance of cooperation among states, as members of multilateral institutions, is highlighted in Principle 10 that refers to business-related policy coherence at international level. Such international cooperation and the resulting collective action can assist states as members of the international community to fulfil their duty to protect in a more effective way.[321]

Subsection (c) of Principle 10 highlights the importance of the promotion of "International Cooperation" along with state duty to protect.[322] However, what the UNGPs fail to mention are the factors that influence this cooperation. For example, the geopolitical situation of developing states, conflict affected areas, or the presence of sanctions appear to be factors that would negatively affect the ability of states in order to establish an independent and effective duty to protect. It is troubling that despite the emphasis on the problematic governance gap in BHR, the UNGPs fail to bridge a main part of this gap, by ignoring critical issues such as sanctions.

Despite wide endorsement of the UNGPs and the protect principles, the aims set within the framework have not been fully achieved yet. Some argue that the unwillingness and incapability of states to pass and enforce laws to protect human rights is a result of the continuing governance gap that was identified by Ruggie and the UNGPs.[323] Others suggest that it is rather naive to suggest that countries will find the resources or be encouraged by the UN members with "no compulsory, legally enforceable provisions to force companies to comply".[324]

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[320] UNGPs, *supra note* 274 at 10, Commentary to Principle 8.
[321] UNGPs, *supra note* 274 at 12, Commentary to Principle 10.
[322] UNGPs, *supra note* 274 at 11, Principle 10.
[323]See Jeffrey Ian Ross, "Reinventing Controlling State Crime and Varieties of State Crime and Its Control: What I Would Have Done Differently" in Dawn Rothe et al *State Crime: Current Perspectives* (US: Rutgers University Press, 2011).
[324] Steven Bittle & Laureen Snider. "Examining the Ruggie Report: Can Voluntary Guidelines Tame Global Capitalism?" (2013) 21:2 Critical Criminology 177 at 187 para 1.

Nevertheless, in order to depict a practical approach to implementing the protect principles, some refer to the adoption of the new law in France in February 2017, that requires human rights due diligence by large French companies in their operations and supply chain.[325] This approach was welcomed by the OHCHR and the Working Group referred to the important role of parliamentarians in adopting new legislation aimed to implement the state duty to protect human rights in a business context.[326]

In general, the obligation to protect against human rights abuses by third parties implies a substantive obligation to ensure human rights protection through legislation in order to ensure the protection of vulnerable groups or individuals; a procedural obligation to investigate, punish and redress potential human rights abuses; and an obligation to inform about and monitor high-risk activities (extractive industries, chemical industries).[327] In the context of sanctions, not only all these steps seem absolutely necessary to protect rights of individuals residing within the sanctioned territory, but also extra steps must be taken to ensure the comprehensive implementation of the state duty to protect human rights.

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[325] The law adopted by the National Assembly of France on 21 February 2017 online:<www.assemblee-nationale.fr/14/ta/ta0924.asp>. The last chapter of the thesis investigates the case of Iran to realize how state duty to protect and business responsibility to respect are being implemented in the context of sanctions. Among the companies invested in Iran are a number of French companies including Total (invested 5m in oil industry) and Renault. The chapter will refer to this domestic law to realize how far companies and the home state are willing to abide by their national law. An assessment report published by the Government of France in June 2019 shows that Total's vigilance report is too vague, with a fairly weak risk mapping which is not applied to the actual activities and countries in which the company operates. See Juliette Renaud et al eds, *The Law on Duty of Vigilance of Parent and Outsourcing Companies: Year 1- Companies Must Do Better* (Paris: Friends of the Earth France, 2019), online: Les Amis de la Terre <https://www.amisdelaterre.org/IMG/pdf/2019_collective_report_-_duty_of_vigilance_year_1.pdf>.

[326] See Human Rights Council, UN Doc A/HRC/38/49 *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises on the Sixth Session of the Forum on Business and Human Rights (*23 April 2018*)*. Also see Barnali Choudhury, "Balancing Soft and Hard Law for Business and Human Rights" (2018) 67:4 Intl & Comparative L Q 961. Also see Corinne Vercher-Chaptal, "Limitations and Perspectives of Responsible Management of Global Value Chains: From Codes of Conduct to the French Law on the Duty of Vigilance." (Paper delivered at the EURAM Conference, Reykjavik, June 2018) [unpublished].

[327]Lagoutte 2014 *supra* note 299 at 13, para 1. Also see Stephanie Lagoutte, "New Challenges Facing States within the Field of Human Rights and Business" (2015) 33:2 Nordic J Human Rights 158.

4.2.1.2 Third Pillar: Access to Remedy

Principles 25-31 of the UNGPs scrutinize remedial measures that states must undertake to ensure those affected have access to effective remedy in case of violation of human rights resulting from business activities. Guiding Principle 31 refers to a number of criteria that provide a benchmark for designing, revising and assessing a non-judicial grievance mechanism in order to ensure its effectiveness. These criteria include legitimacy, accessibility, predictability, equitability, transparency, rights-compatibility, continuous learning and engagement in dialogue.[328]

In case of occurrence of business-related human rights abuses, Principle 25 clarifies that taking appropriate measures to investigate, punish, and redress those violations is a part of the state duty to protect that has both procedural and substantive aspects.[329] The states' obligation to provide all potential victims access to remedy for human rights abuses is extensively discussed in international human rights law and Principle 25 restates this obligation.[330] For example, Article 8 of the Universal Declaration of Human Rights declares that everyone has the right to an effective remedy for acts violating the fundamental rights granted by law. The accessibility and effectiveness of the both state-based and non-state-based mechanisms is further elaborated on Guiding Principles 26-28 through a wide range of remedies at its disposal.

In order to address the practical and legal challenges faced by victims of human rights abuses by business enterprises to access remedy, the Office of the High Commissioner for Human Rights (OHCHR) launched the Accountability and Remedy Project in 2014.[331] This project has

[328]UNGPs*, supra* note 274, at 33 Principle 31.
[329] *Ibid* at 27, Commentary to Principle 25.
[330] Lagoutte, (2015) *supra* note 296 at 169, para 4.
[331]"OHCHR | Initiative on enhancing accountability and access to remedy", (2019), online: *Ohchr*<https://www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx>.

received multiple mandates so far, and aims to contribute to the development of more effective and fairer state-based and non-state-based remedy mechanisms (including non-state-based grievance mechanisms and state-based non-judicial mechanisms) to address human rights violationss resulting from the involvement of businesses.[332]

Similarly, Guiding Principle 26 that covers state-based judicial mechanisms, explains that states must ensure that no legal barrier prevents legitimate cases from being brought before courts.[333] These barriers might exist at the domestic level and could be related to the "attribution of criminal or civil liability to business enterprises".[334] Lifting these barriers may require states to fundamentally change some parts of their domestic legislation.[335] This is apart from the existing adaptations among different domestic jurisdiction that could in part lead to actual impunity for businesses due to legal uncertainty.[336] As Zerk argues, states have to start taking into consideration and possibly harmonising the great range of issues and elements of civil and criminal liability relevant to business operations.[337]

As a supplement to judicial mechanisms, "state-based non-judicial grievance mechanisms" are introduced by Guiding Principle 27 mainly to fill in the remedial gaps of the business-related human rights violations where judicial remedy is either ineffective or insufficient. This is followed by Principles 28-30 that describe "non-state-based grievance mechanisms" that are administrated by the business itself, the stakeholders, an industry association or a multi-stakeholder group.[338]

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[332] *Ibid.* Effective State-based judicial mechanisms are "at the core of ensuring access to remedy". See UNGPs, *supra* note 274, Principle 26.
[333] UNGPs*, supra* note 274 at 28, Commentary to Principle 26.
[334]Lagoutte 2014, *supra* note 299 at 36, para 1.
[335] *Ibid.*
[336] *Ibid.*
[337] Jennifer Zerk, "Corporate liability for gross human rights abuses. Towards a fairer and more effective system of domestic law remedies". A study prepared for the Office of the UN High Commissioner for Human Rights, 2014. online:<https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf> at 110, para 2.
[338] UNGPs*, supra* note 274 at 31, Commentary to Principle 28.

Finally, the jurisdictional questions that arise with regard to the home state duty to protect and access to remedy through the exercise of transnational jurisdiction is a critical issue that is touched on in the commentaries of the UNGPs as well as the OHCHR Accountability and Remedy Project.[339]

4.2.1.3 Second Pillar: The Business Responsibility to Respect Human Rights

According to the "Protect, Respect and Remedy" framework, while states have a duty to protect against human rights abuses by third parties through ensuring non-infringement on human rights of others, corporations have the responsibility to respect human rights through "managing the risk of harm and by trying to avoid harm".[340] The framework also highlights that the corporate responsibility to respect has been reaffirmed in many international human rights instruments including the UDHR, ICCPR, ICESCR and also ILO Declaration[341] on Fundamental Principles and Rights at Work.[342] Thus, the second pillar is grounded on the belief that corporations have a responsibility to conform to international standards.[343] Nevertheless, the OHCHR interprets that the purpose of Guiding Principles is to "take these standards one step further and apply them globally to all businesses in all situations, making it exist independently of an enterprise's own commitment to human rights".[344]

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[339] See United Nations Office of the High Commissioner, OHCHR Accountability and Remedy Project, Draft Paper September 2018 online:< https://www.ohchr.org/Documents/Issues/Business/ARP/ARPIII-DraftScopingPaper.pdf>
[340]UNGPs, *supra* note 274 at 17 Principle 17. Noura Barakat, "The U.N. Guiding Principles: Beyond Soft Law" (2016) 12:3 Hastings Bus L J 591 at 598 para 1.
[341] International Labour Organization (ILO), *ILO Declaration on Fundamental Principles and Rights at Work*, June 1988.
[342] UNGPs, *supra* note 274, at 14, Commentary to Principle 12.
[343] Larry Cata Backer, "From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations Protect, Respect and Remedy and the Construction of Inter-Systemic Global Governance" (2012) 25:1 Pacific McGeorgeGlobal Bus & Development LJ 69 at 76 para 1.
[344] Barakat, *supra* note 340, at 599 para 3. Also see United Nations Human Rights Office of the High Commissioner, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, 2012, UN Doc HR/PUB/12/02. Online:<http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf>.

The second pillar encompasses principles 11-25, and elaborates the contents of the independent responsibility of business entities to respect human rights as a global standard. The UNGPs explicitly declare that the business responsibility to respect human rights "exists over and above compliance with national laws and regulations protecting human rights".[345] This has also been made clear by leading business associations and the International Chamber of Commerce, by stating that the standards identified in the second pillar exist "even if national laws are poorly enforced or not at all".[346] According to Guiding Principle 13, in order to respect human rights throughout their entire operation, businesses should take adequate measures to prevent, mitigate and when required, provide remediation. A number of scholars argue that business entities should take advantage of their sphere of influence in order to increase Corporate Social Responsibility because where there is power, there is accountability and the businesses owe the greatest duties to their circle of contact, including workers, consumers, and member of local communities.[347]

Nevertheless, involvement of an enterprise in an alleged contribution to a human rights violation or harm could be avoided if the business could prove they have taken every reasonable step by "conducting appropriate human rights due diligence".[348] Yet, it should not be assumed that conducting due diligence is solely sufficient to fully absolve the business enterprise from liability for contributing to or causing human rights violations.[349] Principle 13 of the UNGPs, also, recommends business enterprises respect human rights by urging them to avoid any involvement in activities that may result in causing or contributing to adverse human rights impacts, and seek to prevent and to mitigate any negative impact that is linked to their operations even if they have

[345]UNGPs, *supra* note 274 at 13, Commentary to Principle 11.
[346] Barakat, *supra* note 340 at 600 para 2. Also see United Nations Interpretive Guide, *supra* note 344, at 10.
[347]David Kinley & Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law" (2004) 44:4 *Virginia J Intl L* 931 at 933-934 & 1022.
[348]UNGPs, *supra* note 274, at 18-19, Commentary to Principle 17.
[349] *Ibid.*

not contributed to those impacts.[350] Principle 15 of the UNGPs proposes three mechanisms to accomplish the above-mentioned requirements. These include a policy commitment to meet their responsibility to respect, a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights, and lastly enabling a remediation process for any adverse human rights impacts they cause or to which they contribute.[351]

Principles 17-21 are related to the due-diligence mechanism. Guiding Principle 17 that describes the parameters for human rights due diligence, obliges business enterprises to carry out human rights due diligence to "identify, prevent, mitigate and account for" their adverse human rights impacts.[352] What is most relevant to the topic of this thesis, is the scope of due diligence process that not only includes assessment of the actual human rights impacts, but also the potential impacts. In the context of sanctions, some human rights violations might appear over the time or potentially. Thus, the wording of the UNGPs in this principle is remarkably useful to justify the extra measures that must be taken in sanctioned states.

Principles 18 through 21 elaborate the essential components of the due diligence mechanism.[353] While Principle 18 describes identification and assessment of the "nature of the actual and potential adverse human rights impacts with which a business may be involved" as the initial steps in conducting due diligence, Principle 19 clarifies that in order for the human rights impact assessments to be effective, businesses should incorporate their human rights policy commitments into all their relevant functions.[354] It must be emphasized, again, that both actual and potential adverse impacts must be considered when assessing human rights impacts by

[350] *Ibid* at 14, Principle 13.
[351] *Ibid* at 15, Principle 15.
[352] *Ibid,* at 17, Principle 17.
[353] *Ibid* at 18, Commentary to Principle 17.
[354] *Ibid* at 19, Commentary to Principle 18.

enterprises.[355] This is also reflected in the last two principles of pillar two, Principles 23 and 24 prior to which the issue of remediation for the actual -not potential- adverse human rights impacts of the businesses' activities is covered by Principle 22.

The due diligence mechanism has invited some criticisms. For instance, Vincent Chetail considers the regime of due diligence to be the most solid method to oblige businesses to the rules of international law but he also criticizes the UNGPs as being too ambiguous.[356] Bonnitcha put forwards the same argument and even though he considers constructive ambiguity a "useful tool in building consensus on contested issue", he emphasizes the difference between the legal and business meaning of due diligence that could create conceptual confusion about the scope of corporate responsibility to respect human rights.[357]

4.3. Exterritoriality, Transnationality, and The State Duty to Protect

This part explores the nature of extraterritorial and transnational state obligation and the significance of such differentiation. This will be followed by further investigating states extraterritorial obligations to respect, protect, and fulfil human rights in 2017 General Comment No.24. Later, the home state duty to protect in the context of unilateral sanctions (where the home state is not the targeting state and host state is unable to protect human rights) will be discussed to realize how TNCs respect human rights of the individuals residing in the targeted state. The

[355]UNGPs*, supra* note 274 at 21, Commentary to Principle 19.
[356]Vincent Chetail, "The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward" in Denis Alland et al *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy* (Leiden, Martinus Nijhoff: 2014) 1007, at 105-130.
[357]Jonathan Bonnitcha & Robert McCorquodale "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights" (2017) 28:3 European J Intl L899 at 900,901, 910 para 1 & 919. Interestingly, John Ruggie & John F Sherman have published a reply to the confusion and uncertainties Bonnitcha attributed to UNGPs. Ruggie considers Bonnitcha's arguments inconsistent with the reality of UNGPs and defines due diligence as "how risks and impacts are identifies and mitigates" both in legal and business concept. See John Gerard Ruggie & John F Sherman, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale" (2017) 28:3 *European J Intl L* 921.

similarities between conflict-affected or high-risk areas with sanctioned country will help to pave the way for this discussion.

4.3.1. Extraterritorial vs Transnational Jurisdiction and Obligation in BHR

For the purpose of this thesis and in order to remain as precise as possible in the context of business human rights, I will be cautious in use of the world "extraterritorial". As Sara Seck explains: "Extraterritorial is not only difficult to define but is often associated with notions of illegality".[358]

To exemplify, if Canada is regulating a Canadian-based company in relation to what it is doing in Iran, it will be described here as transnational regulation. But if the US is passing a law that requires Canadian companies operating in Iran to comply with it, then this will be described as extraterritorial regulation. The focus of the research in this thesis will be on both extraterritorial and transnational regulation, with an emphasis on the importance of transnational application of domestic laws in the context of extraterritorial sanctions.

Seck argues that unsuccessful transnational human rights corporate accountability litigation could reinforce the sense that "corporate violations of human right can evade justice and leave victims without effective remedy".[359] She further discusses that "the promise of the UNGPs and the premise of the Global Compact" have proven that states are not the only "regulators of public goods" and todays globalized world requires a "polycentric mode of governance" that "preserves a key role for the state in accordance with international law, yet also embrace a social responsibility of non-state private transnational business actors, and the key watchdog

[358] Seck 2010 *supra* note 298 at 28, Para 2. Also see Sara L Seck, "Home State Responsibility and Local Communities: The Case of Global Mining" (2008) 11 Yale Human Rts & Dev L J 177.
[359] Sara L.Seck, "Moving beyond the e-word in the Anthropocene", in Daniel S. Margolies, Umut Özsu, Maïa Pal, Ntina Tzouvala (eds.) *The Extraterritoriality of Law: History, Theory, Politics* (London:Routledge,2019),at 52 para3.

contributions of non-state transnational civil society actors".[360] This is exactly the case in sanctions context; polycentric governance could fill in the existing gap in the business human rights materials to some extent. Where states can't uphold their duties, businesses respect their responsibility to protect and civil society actors could get involved when neither of those two are upholding their commitments.

Seck refers to the movement of exercising extraterritorial (transnational) jurisdiction that started with "concerns over the negative impacts of transnational corporate conduct" and endorsed the extended extraterritorial obligations of states, despite "their territorially bounded nature".[361] She believes that the terminology of "extraterritorial jurisdiction and extraterritorial obligations" commonly used in the BHR context, places too much emphasis on the "territoriality bounded sovereign state" while undermining "the reality of our ecological interdependence".[362] She further reiterates this perception by referring to Mark Gibney's thoughts and his suggestion that instead of focusing on the extraterritorial terminology, it is more meaningful to emphasize on the term "human rights". This term conveys the understanding that "all people have human rights and all states have the responsibility to protect those rights-for all people."[363]

Unpacking the difference between the two foundational principles of the UNGPs, Guiding Principle 1 and Guiding Principle 2, is of great importance to the distinction between transnationality and extraterritoriality.[364] The jurisdictional scope of the state duty to protect, is

[360] *Ibid* at 53 para 2.
[361] *Ibid* at 57 para 2.
[362] Seck 2019, *supra* note 359 at 58, para 1. John Knox argues that "extra jurisdictional" is the proper wording that should be used instead of "extraterritoriality". He questions whether the territorial jurisdiction of one country -in this case, US-, only includes territory within the national boundaries, or it also extends to territory outside those boundaries but within US control. See: John H. Knox, "A Presumption Against Extra-jurisdictionality" (2010) 104:3 *American J Intl L* 351.
[363] *Ibid*, Seck 2019, at 57, para 2.
[364] See Sara L Seck, "Canadian Mining Internationally and the UN Guiding Principles for Business and Human Rights" (2011) 49 Can YB Intl Law 51 at 94-95.

highly contested, even though states are required by international law, "to protect against human rights abuses by businesses affecting persons within their territory or jurisdiction".[365] Nevertheless, while Guiding Principle 2 is often associated with home state regulation, Guiding Principle1 should also be understood as including home state transnational regulation (when it is read together with Principle 25 on access to remedy).[366] Other than Principle 1, 2 and 25, the issue of home state jurisdiction is also discussed in Principle 7 on conflict affected areas, as it considers the home state's role central in ensuring the non-involvement of TNCs in human rights violations while host states lacks effective control.[367]

4.3.2. UNGPs and Conflict-affected Areas

The UNGPs provide detailed guidance for states and business entities on how to prevent, address and redress business related human rights harms. Given this, an attempt will be made to investigate whether or not the state duty to protect against human rights abuses by third parties including businesses, as it is defined by UNGPs, is relevant when a state imposes sanctions on its own companies operating internationally (transnational sanctions) and also extraterritorially on other corporations with home states based in other jurisdictions.

Except for the reference in Principle 7 to businesses human rights violations in conflict-affected areas, there is no explicit consideration in the UNGPs to situations where sanctions may be imposed. This includes UNSC sanctions imposed based on chapter VII, or UCM imposed by individual states. It has been reiterated by scholars that the reason Ruggie discussed the particular issue of conflict-affected areas during the development of the UNGPs was probably due to the

[365]Seck 2011, *Supra* note 313 at 90 para 3. Also see, Sara L Seck, "Remarks by Sara L. Seck." *Proceedings of the Annual Meeting (American Society of International Law)* 108 (2014) 11 at 13.
[366] *Ibid* at 111 para 2.
[367]*Ibid* at 109 para 2. Also see UNGPs*, supra* note 274 at 8, Commentary to Principle 7.

significant "governance gap" existing at the international level and the rather acute challenges resulted from this gap in conflicted areas.[368] The same justification should exists in the context of sanctions regimes. There is an obvious and harmful "governance gap" when it comes to the home state duty to protect where sanctions are in place but the BHR instruments and UNGPs in particular fail to recognize it.

As discussed, when it comes to the first pillar and the state duty to protect, the UNGPs do not "articulate new legal obligations" and they are intended to place particular stress "on the need for greater policy coherence between states' human rights obligations and their regulatory and other actions with respect to business".[369] This is because they mostly spell out the policy implications of states' existing duties under international human rights law when it comes to protecting against business-related human rights harms.[370] Thus, given the content of the first pillar of the UN framework, states should create a conductive environment by fostering and developing business respect for human rights at home and abroad, which includes where there is a state-business nexus.[371]

Also, Guiding Principle 7 on the state duty to protect in conflict affected areas, argues that since the risk of gross human rights abuses is heightened in such areas, states hold the duty to ensure that any business entity operating in those contexts is not involved with such abuses. Later, this Principle proposes a number of measures states should take to identify, prevent and mitigate the human rights risks associated with their operations. This raises the question of whether it would be fundamentally wrong to compare a conflict situation with a situation where sanctions are being

[368] Rachel Davis, "The UN Guiding Principles on Business and Human Rights and conflict-affected areas: state obligations and business responsibilities" (2012) 94:887 Intl Rev Red Cross 961 at 963 para 4.
[369] *Ibid,* at 963 para 2.
[370] *Ibid.*
[371]UNGPs*, supra* note 274, at 5-6, Commentary to Principle 3.

imposed unilaterally by states on companies? If this is the case, the same rule should be applied in the context of target states where sanctions are being imposed on by foreign states, who should take the required steps to protects individuals from potential indirect and direct abuses.

In an addenda to the UNGPs that reports on a workshop on conflict-affected areas, it is argued that the gravity of widespread business-related human rights abuses that occur in conflict zones requires states to take action as a matter of urgency since the IHR regime cannot be expected to function as intended in such situations.[372] However, the lack of clarity among states as to "what innovative, proactive and, above all, practical policies and tools have the greatest potential for preventing or mitigating business-related abuses in situations of conflict" prevent them from taking effective measures.[373] In fact, the lack of reference to the context of sanctions is also of concern and causes a lot of chaos since both states and companies are not provided with any BHR guidance on how to behave.

In one of his early notes on BHR in conflict affected areas, Ruggie discussed that it is important to address not "actual conflicts but hypothetical scenarios that draw out typical or emblematic challenges confronting businesses when they operate in conflict zones".[374] He indicated that it is important to "explore a wide range of policy approaches and tools" that states can and should do in responding to "actual and potential human rights harms" caused by corporate actors in the context of each scenario.[375] I believe the same argument can be used in the context of sanctions. Whether a country is under UN sanctions regimes or a set of unilateral sanctions by

[372]Business and Human Rights in Conflict-Affected Regions: Challenges and Options for State Responses, UN Doc. A/HRC/17/32, 27 May 2011. The report on the workshops was included as one of the four addenda to the report containing the Guiding Principles in 2011.
[373]*Ibid* at para 8.
[374] United Nations SRSG, John Ruggie. *Mandate of the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises*, (October 2009) at 3. online:<https://www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-conflict-project-note-Oct-2009.pdf>.
[375] *Ibid.*

another states, the international community including states, TNCs, academia and civil society should evaluate the actual and potential harms of sanctions on innocent individuals and environment to mitigate the enormous negative impacts of coercive measures to the greatest possible extent.

To support this argument, we could refer to Guiding Principle 7 that covers supporting business respect for human rights in conflict-affected areas and the commentary to Guiding Principle 23 on issues of contexts that singles out conflict affected areas as "an operating environment that may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors".[376] Therefore, the legal compliance raised from the risk of causing or contributing to human rights violations as a result of operating in a complex context (such as a conflict-affected area or a sanctioned country), must be taken seriously. Similarly, other instruments such as OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas[377] and its Supplement on Gold and the UN Global Compact Guidance on Responsible Business in Conflict-Affected and High-Risk Areas[378] also highlight the heightened risk for corporations operate in such context.[379] Conflict-affected areas are known to requires special due diligence process that would help the businesses to support their efforts to implement the UNGPs. It could be argued that sanctioned countries are also among the high-risk areas that also require special due diligence on business and state end.

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[376] UNGPs*, supra* note 274 at 25, Commentary to Principle 23.
[377] OECD (2016), *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition*, OECD Publishing, Paris,
[378] United Nations Global Compact, *United Nations Global Compact Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: A resource For Companies and Investors (*UN: New York, 2010). Some of these Guidance tools will be examined later in the thesis.
[379]See Geneva Academy of International Humanitarian Law and Human Rights, "Due Diligence: Defining 'Conflict-Affected' and 'High-Risk Areas'" (Concept Note for a Side Event delivered at the United Nations Forum on Business and Human Rights, Geneva, 2-4 December 2013), online:<https://www.ohchr.org/Documents/Issues/Business/ForumSession2/Events/3Dec.1.SideEventProposal_GenevaAcademy.pdf>.

In order to ensure the effective implementation of the UNGPs clarifying the human rights responsibilities of businesses, OHCHR published the Interpretive Guide in full collaboration with the former Special Representative, Mr. John Ruggie.[380] This guide is meant to provide "additional background explanation to the Guiding Principles to support a full understanding of their meaning and intent".[381] To be able to find an answer to the question of compliance of corporations when the home state is imposing sanctions transnationally, or when a third state imposes extraterritorial sanctions, I referred to this interpretive guideline after realizing that similar to the first and third pillar, the second pillar of the UNGPs also has no refence to sanctions regimes and their effect on the operation of business entities, let alone to the situation where home state is imposing transnational and extraterritorial sanctions on target states. However, no solution or even reference to sanctions was found in the interpretive guide either and the question of enforcement and compliance in the context of sanctions remains unanswered.

As explained in earlier chapters, a common reason for imposition of sanctions is declared to be the threatening wrongdoings of the target state that has resulted in violation of international norms. If the coercive measures lead to violation of human rights of citizens of the sanctioned state by restricting trade, placing embargos or cutting the TNCs from operating with or in the targeted states, then the actions of the targeting state is definitely in contrast with international law and international human rights norms. Every individual, apart from their nationality, must be able to equally enjoy human rights and should not be punished for wrongful acts of their origin country.

[380] United Nations, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*. (United Nations: New York, 2012).
[381] *Ibid* at 3.

4.3.3. General Comment No. 24

In 2011, in reaction to the growing impact of business activities on the enjoyment of specific covenant rights, the Committee on Economic, Social and Cultural Rights *(*CESCR*)* in its 46th session, adopted a statement on "the obligations of States parties regarding the corporate sector and economic, social and cultural rights".[382] The statement highlights "the state obligation to respect, protect and fulfil the covenant rights of all persons under their jurisdiction in the context of corporate activities undertaken by state-owned or private enterprises" based on article 2(1) of the ICESCR.[383] This article defines "the nature of the obligations of the state parties" and refers to necessary implementation measures including legislative, administrative, financial, educational and social measures along with domestic and global needs assessments.[384]

To complement the previous contribution, in August 2017 the CESCR released its General Comment No. 24 on state obligations under the ICESCR in the context of business activities.[385] This document is considered to be "the most impactful document released by CESCR" mainly due to the fact that it "elaborates on the role of the ICESCR as a legal constraint on state regulation of business activities, especially in the area of investment treaty making".[386] Rapporteurs Olivier De Schutter and Zdzislaw Kedzia prepared the first draft of the General Comment that was followed by several discussions and written contributions by different

[382] CESCR Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights, UN Doc E/C.12/2011/1 (12 July 2011).
[383] *Ibid* at 3.
[384] *Ibid.*
[385] UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN Doc E/C.12/GC/24 10 (August 2017).
[386] Diane Desierto, "The ICESCR as a Legal Constraint on State Regulation of Business, Trade, and Investment: Notes from CESCR General Comment No. 24" (August 2017), *online:*<https://www.ejiltalk.org/the-icescr-as-a-legal-constraint-on-state-regulation-of-business-trade-and-investment-notes-from-cescr-general-comment-no-24-august-2017/>.

stakeholders and states.[387] Regardless of whether the business entity operates nationally or transnationally or whether it is state-owned or privately-owned, and regardless of its size, sector and location, the General Comment applies to all business activities equally.[388]

Undoubtedly, one of the most relevant parts of the General Comment is the section on obligation to protect. The CESCR definition of this obligation requires states to take necessary measures to prevent third parties from interfering with the enjoyment of individuals' rights. The Maastricht Guidelines on violations of economic, social and cultural rights (1997)[389], similarly, affirms that "the obligation to protect requires states to prevent violations of such rights by third parties".[390] In this regard, it is of utmost importance to clarify that states could be also responsible "to the extent its organs have been made possible the violations, by omitting to adopt the necessary measures to prevent the violations".[391] As De Shutter explains: "the State must accept responsibility not only for the acts its organs have adopted […], but also for the omissions of these organs, in situations where such omissions result in an insufficient protection of private persons whose rights or freedoms are violated by the acts of other non-State actors."[392]

Clarifying the dual content of the state duty to protect is also of great importance: an ex-ante and ex-poste nature or the obligation to prevent violations of private actors and the obligation to assure the victim access to an effective remedy in the event of a violation.[393] It is also noted by some human rights bodies that the obligation to protect "must be defined according to the due

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[387] Marcella Ferri, "The General Comment No. 24 on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of business activities" (2017) 3:1 Federalismi, Focus Human Rights 1, at 5 para 3.
[388] General Comment No.24, *supra* note 385, at para 3.
[389]International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (26 January 1997), at para 6.
[390] Ferri, *supra* note 387 at 8 para 2.
[391] *Ibid* at 9 para 1.
[392]Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary,* 2nd ed (Cambridge: Cambridge University Press, 2014) 441.
[393]Ferri, *supra* note 387 at 10 para 2.

diligence principle".[394] For example, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, affirms that "states are responsible for violations arising from their lack of due diligence in monitoring the non-state actors' behavior".[395]

General Comment 24 defines "states extraterritorial obligations to respect, protect, and fulfil the covenant rights" and also the types of remedies and measures of implementation.[396] While the General Comment uses the language of both extraterritoriality and transnationality, it does not distinguish between transnational jurisdiction and extraterritorial jurisdiction. Previously, the Committee in its 2011 statement reiterated that the obligations of the ICESCR state parties do not stop at their territorial borders.[397] In other words, the required steps must be taken by states to prevent human rights violations abroad by corporations domiciled in their territory or jurisdiction: "whether they are incorporated under their laws, or have their statutory seat, central administration or principal place of business on the national territory, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant".[398] Prior to this, specific extraterritorial obligations of state parties concerning business activities have been also addressed by General Comments relating to the right to water,[399] the right to work,[400] the right to social

[394] *Ibid.*
[395] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997, para. 18: «The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behavior of such non-State actors».
[396] General Comment No.24, *supra* note 385, section C, para 25-37.
[397] CESCR Statement 2011, *supra* note 382 para 5.
[398] *Ibid* at para 5.
[399] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, UN Doc E/C.12/2002/11 (20 January 2003), paras 31-33.
[400] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, UN Doc E/C.12/GC/18 (6 February 2006), para 52.

security,[401] the right to just and favorable conditions of work,[402] as well as in its examination of States' periodic reports.

In the context of sanctions, General Comment No. 8 regarding "the relationship between economic sanctions and respect for economic, social and cultural rights" also refers to the extraterritorial obligation to respect that requires state parties to refrain from interfering directly or indirectly with the enjoyment of the Covenant rights by persons outside their territories. This obligation also requires states parties to ensure that they do not "obstruct another state from complying with its obligations under the Covenant".[403] General Comment No.24 touches upon the issue of sanctions by referring to the General Comment No.8 by reiterating that as part of the extraterritorial obligation to respect, state must refrain from obstructing another state's compliance with its treaty obligations.[404]Additionally, it refers to Article 50 of Draft Articles on the Responsibility of States for Internationally Wrongful Acts[405] that also underlines the state obligation to respect by asserting that countermeasures by a state or group of states in response to an internationally wrongful act by another state may not affect obligations for the protection of fundamental human rights.[406]

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[401]UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The right to social security (Art. 9 of the Covenant)*, UN Doc E/C.12/GC/194 (February 2008), para 54.
[402]UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/237 (April 2016), para 70.
[403] General Comment No.24, *supra* note 385, para 29. Also see UN Doc E/C.12/1997/8 (General Comment No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights) (1997). General Comment 24 also refers to Articles on Responsibility of States for Internationally Wrongful Acts, art. 50 (counter-measures by a State or group of States in response to an internationally wrongful act by another State may not affect "obligations for the protection of fundamental human rights").
[404]General Comment No.24, *supra* note 385, at 9 para 29.
[405] UN General Assembly, Draft Articles on *Responsibility of States for internationally wrongful act,* UN Doc A/56/10 chp.IV.E.1, (November 2001).
[406] *Ibid,* at art 50.

The 2017 General Comment No.24, all in all, is believed to be deeply influenced by and reflective of UNGPs.[407] The clear recognition of states' transnational human rights obligations is also considered to be innovative and revolutionary even though the strong opposition expressed by some states over the course of the General Comment discussions and the open-ended intergovernmental working group reveals states' reluctance to "recognize the extraterritorial dimension of their human rights obligations".[408] The General Comment contributes to a growing acknowledgement of the rights abuses that arise from business activities and the need to protect against those violations.

4.3.3.1. Home State, Host State and Extra-jurisdictional Sanctions

In the context of unilateral sanctions, since the targeting state imposes and enforces them unilaterally, the home state (where the home state is not the targeting state) is responsible to ensure that TNCs respect human rights of the individuals residing in targeted state at all costs.[409] Where there is doubt with regard to the home state nationality, Seck explains that "determining corporate nationality is a state practice but that state practice diverges, with common law countries tending to accord nationality on the basis of incorporation within their territory regardless of where the business management is carried out, while civil law countries confer nationality on the basis of where the company has its seat of management."[410]

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[407] Ferri, *supra* note 387, at 19 para 3.
[408] *Ibid,* at 6 para 2 & 34 para 3. Also see *Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights,* Draft Report on the Third Session (23-27 October 2017), online:*OHCHR*<https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx>.
[409] For information on the impact of UNSC sanctions on TNCs *see* Justine Nolan, "The Nexus between Human Rights and Business: Defining the Sphere of Corporate Responsibility" in Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* (Cambridge: Cambridge University Press, 2009), at 222 para 1.
[410] Sara Seck, Home State Obligations for the Prevention and Remediation of Transnational Harm: Canada, Global Mining and Local Communities (Doctorate of Philosophy dissertation, York University, 2007) at 103. Also see Sara

Thus, TNCs are obliged to respect human rights and the UN has acknowledged the "nexus and necessity of engaging business in the task of protecting human rights" in the UNSC sanctions context.[411] In the context of extraterritorial sanctions that are unilateral and imposed on the target state by the targeting country, the issue is more complex. Seck explains "while a state may apply its law directly to a corporate national with a branch or office in another state, it may not as a rule (under doctrines of international law) apply its law directly to a foreign affiliate set up as a separate legal entity under the laws of the host state."[412]

If applying domestic regulations -in this case unilateral economic sanctions- to corporation with different nationalities as that of home state is not allowed under the principles of international law, then how come in reality this happens and what could be done by the home state to prevent this? Perhaps incorporating policies and laws covering this issue at the national level could pave the way for a further step at the international level.

4.3.3.2. Extraterritoriality and Transnationality in the Context of UCM on TNCs

Among the few instances where sanctions with extraterritorial effects have actually received consideration in international law, one could refer to reports of the Special Rapporteur on the negative impacts of the UCM on human rights. For example, his Oct 2017 report to the General

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L Seck, "Home State Responsibility and Local Communities: The Case of Global Mining" (2008) 11 Yale Human Rts &Dev LJ 177. And see Jennifer A Zerk, *Multinationals and Corporate Social Responsibility* (Cambridge: Cambridge University Press, 2006).

[411]Vivien Holmes, "What is the Right Thing to Do? Reflections on the AWB Scandal and Legal Ethics" in Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* (Cambridge: Cambridge University Press, 2006) at 222 para1. The author explains that both the UN General Assembly and the Security Council have "recognized the need for the cooperation of business in ensuring the efficacy of sanctions". She refers to the case of sanctions violations in Sudan, in which the UNSC "recognized the need for states to engage with all non-governmental entities in order to prevent them obtaining or supplying weapons to the conflict". A different example is related to the "the pleas of the General Assembly to business during the South African Apartheid era" in order to respect its recommended sanctions.

[412] Sara L Seck, "Transnational Judicial and Non-Judicial Remedies for Corporate Human Rights Harms: Challenges of and for Law" (2013) 31:1 Windsor YB Access Just177 at 180 para 4.

Assembly, is concentrated on the issue of extraterritoriality in relation to UCM. The Special Rapporteur does not explicitly differentiate between exterritorial and transnational sanctions and he uses the term *extraterritorial* to talk about both. He does, however, distinguish "the issue of extraterritorial sanctions in the meaning of extraterritorial enforcement of domestic sanctions measures" and "the issue of extraterritoriality of human rights obligations, which refers to the existence and extent of extraterritorial obligations of targeting States under human rights law."[413] Based on this, he identifies extraterritorial sanctions as unlawful under international law.[414] This insight towards extraterritorial sanctions and their unlawfulness under international law, has been also displayed in some UN body resolutions and has been embraced by a great number of states and by regional organizations,[415] and is particularly coming to fore in developments concerning UCM targeting the Russian Federation or Iran.[416]

The Special Rapporteur, however, does not discuss transnational sanctions in his reports. When a home state imposes sanctions transnationally on his own companies abroad, the host state could still bear economic or social damages leading to certain human rights violations. Thus, even though the state duty to protect as explained in the UNGPs requires states to ensure TNCs

[413]United Nations Human Rights Office of the High Commissioner, *Statement by Idriss Jazairy, Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights* (2019), online: *OHCHR – News* <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22328&LangID=E>.
[414] *Ibid.*
[415] "The EU for instance took this position in its "Blocking Statute" of 1996, which is still in force, and have again recently voiced their intention to resist an initiative to enforce multilaterally a newly adopted domestic sanctions policy" see Human Rights Council, *Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights* UNHRC Sess 39, UN Doc A/HRC/39/54 (2018).
[416]United Nations General Assembly, Third Committee, *73rd Sess*, 21st and 22nd meetings, "Experts in Third Committee Discuss Harmful Impacts of Coercive Measures, Right to Development as Delegates Urge Respect for Human Rights", UN Doc GA/SHC/4237 (2018). Also see United Nations General Assembly, 72nd *sess*, Third Committee, Item 73 (b&c):18 October 2017 New York, *Statement by Idriss Jazairy, Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights*. online "Ohchrorg<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22328&LangID=E>.

domiciled in their jurisdiction respect human rights, the sanctions set up by home state could negate their duty to protect.[417]

Extraterritorial sanctions and the human rights accountability of the targeting state for harms caused abroad by their sanctions is the critical issue that has been investigated by the Special Rapporteur. He calls for "a clear recognition of both the obligations and the accountability incumbent upon targeting states"[418] since the recent jurisprudence of international courts and tribunals features recent cases where human rights treaties have been found applicable "irrespective of a finding of jurisdiction or control *stricto sensu* in situations where a state's actions had entailed consequences abroad."[419] This is precisely the case for targets of unilateral sanctions and as also emphasized by ESCR General Comment No. 8, the targeting state remains responsible to protect individuals within the target state's territory to the best of its ability.[420]

4.4. Conclusion

In this core chapter of the thesis, I investigated some BHR instruments, with a focus on the UNGPs, to discover whether sanctions have received attention. This was followed by discussing the issue of transnationality and extraterritoriality and the home state duty in the context of sanctions. The distinction between transnational and extraterritorial was maintained throughout this chapter. The main focus remained on the existing gap in BHR international normative standards, UNGPs and OECD Guidelines that will be discussed in the next chapter.

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[417]UNGPs*, supra* note 274 at Principle 2. Guiding Principle 2 states that "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations".

[418] Human Rights Council, *Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights* UNHRC Sess 72nd UN Doc A/72/370 (29 August 2017), at para 45.

[419] *Ibid,* at para 41. Also see International Court of Justice, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) available online: <https://www.icj-cij.org/files/case-related/140/140-20091211-ORD-01-00-EN.pdf >.

[420] See *Ibid* at paras 11 & 46.

The reason why transnationality was discussed is due to the pre-existence of such transnational relationship between the home state and host state. In sanction's context two scenarios exist: First, the situation where the home state is also the targeting state and second the situation in which home state and targeting states are two separate states (extraterritorial sanctions) in which case, the targeting state could be targeting a company in another home state. So, the targeting state could be both acting extraterritorially and acting transnationally. This distinction is of great importance in order to understand what the nature of the relationship is. The question from the human rights perspective is whether the targeting state clearly has responsibilities that are transnational if we argue that human rights protection should be understood as extending transnationality? Similarly, the targeting state may also have extraterritorial obligations. In the context of extraterritorial sanctions, the possibility of passing a blocking legislation by the home state is most likely in order to protect its own internal self-interest but also by doing that, it may be able to act more in accordance with its own transnational human rights obligations as a home state. In other words, the home state has certain human rights obligations; and it should consider those obligations when it is considering becoming a targeting state. However, those obligations may also arise when its companies are being targeted by some other state and it has an obligation to block these, as was the case in a recent example of an EU Blocking Statute regarding US sanctions against Iran).[421]

The resemblance between conflict-affected and high-risk areas and sanctioned countries was also discussed to argue that sanctioned countries should be considered among the high-risk

[421] See R Edward Price, "Foreign Blocking Statutes and the GATT: State Sovereignty and the Enforcement of the U.S. Economic Laws Abroad" (1995) 28:2 Geo Wash Intl L Rev 315. Also see Ross Denton, Sunny Mann "EU Blocking Regulation in Support of Iran Nuclear Deal Enters into Force" (2018) available online:<http://sanctionsnews.bakermckenzie.com/eu-blocking-regulation-in-support-of-iran-nuclear-deal-enters-into-force/>.

areas that also require special human rights due diligence. This would assist businesses to support their efforts to implement the UNGPs in the context of sanctions, similar to other high-risk areas.

To sum, extraterritorial and transnational sanctions and their impacts on TNCs is an overlooked subject in BHR that require considerable attentions by international instruments, home states, targeting states and corporations in order to mitigate their negative impacts on human rights and the environment.

Chapter V: Insights from the OECD: OECD Guidance Materials for Businesses

This chapter will examine whether the business responsibility as embedded in other guidance tools on business conduct, like the OECD MNE Guidelines, currently offer any assistance to help companies to understand what they should do in the sanctions context.

5.1. Introduction to OECD MNE Guidelines and Guidance

The OECD Guidelines for Multinational Enterprises (GLs) date back to 1976, and have been revised multiple times without including a human rights chapter up until 2011.[422] In that year, the corporate responsibility to respect human rights section was added based on the second pillar of the UNGPs.[423] These guidelines are the first international mechanism that was established by governments to enable individuals, communities or states' representatives "to bring complaints against multinational corporations".[424] The OECD MNE Guidelines are regarded as recommendations, addressed by governments to Multinational Enterprises (MNEs) and encompass "voluntary principles and standards that stimulates responsible business conduct".[425] They include guidance on a number of areas such as bribery and corruption, human rights, environment, and other areas none of which contains any reference to sanctions.

[422] Manfred Schekulin, "Shaping Global Business Conduct: The 2011 Update of the OECD Guidelines on Multinational Corporations" (2011) 3:4 Transnational Corporations Rev 1 at 1 para 4.
[423]John Ruggie & Tamaryn Nelson, "Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges" (2015) 22:1 Brown J World Affairs 99, at 123 para 2.
[424]*Ibid,* at 100 para 3.
[425]Sander Van't Foort, "The History of National Contact Points and the OECD Guidelines for Multinational Enterprises" (2017) 25:1 Rechtsgeschichte Leg History 195 at 195 para1. With regards to the voluntary nature of the OECD MNEs Guidelines, it is interesting to know that the Netherlands and Sweden opted for binding guidelines; However, the majority supported the US in keeping the MNE Guidelines voluntary, See Henri Schwamm et al. *Codes of Conduct for Multinational Companies: Issues and Positions*. (European Centre for Study and Information on Multinational Corporations, 1977) at 36.

In 1984, in order to contribute to the solutions for the possible problems in complying with the guidelines, National Contact Points (NCPs), which are basically a complaints mechanism, were established within each government.[426] As of today, a total of 47 NCPs support the effective implementation of the MNE Guidelines, promote them and also offer "their good offices to help resolve disputes that arise within the ambit of the guidelines".[427]

The 2011 OECD MNE Guidelines contains another central segment borrowed from UNGPs and that is a system stipulation that companies need to put in place "in order to meet their responsibility to respect human rights, centering on human rights due diligence processes."[428] This change has expanded the guidelines coverage over most of the multinational enterprises and extended the due diligence requirements to their business relationships.[429]

The legal status of the state duty under MNE Guidelines and NCPs has been a central issue since their inception. Some consider the guidelines to be merely morally binding and they believe that attempts must be made to move away from such status.[430] On the other hand, some consider their legal status to be more compelling as they are partly grounded in international law.[431]

Robinson, is among those who dispute the OECD Guidelines as being soft.[432]He argues that states promote MNE Guidelines to companies as voluntary instruments, but states are mandated to promote them as voluntary. As to the background of this issue, he explains that the

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[426] Ruggie & Nelson 2015, *supra* note 423, at 118. *Declaration on International Investment and Multinational Enterprise* (1976) 15:4 ILM 967, at 28.
[427] Foort*, supra* note 425, at 195 para 1. Also see Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary,* 2nd ed (Cambridge: Cambridge University Press, 2014) 441. Also see Organisation for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises* 2011, at 67-74
[428] Ruggie & Nelson 2015, *supra* note 423, at 105 para 3.
[429] *Ibid* at 104 para 2.
[430] Foort *supra* note 425, at 195 para 2. Also see Eyk, SylvieVan The OECD Declaration and Decisions Concerning Multinational Enterprises. An Attempt to Tame the Shrew, Nijmegen (1995), at121-122. also see: Roger Blanpain, (2004), The Globalisation of Labour Standards. The Soft Law Track, OECD Global Forum on International Investment, Paris, at 9.
[431] Foort, *ibid.*
[432] Scott Robinson, "International Obligations, State Responsibility and Judicial Review Under the OECD Guidelines for Multinational Enterprises Regime" (2014) 30:78 Utrecht J Intl & European L 68.

MNE Guidelines used to be considered as not legally binding commitments, being of a voluntary nature for states and corporations.[433] However, by virtue of the OECD Council's decision of the Council on the OECD Guidelines for Multinational Enterprises, the relationship between OECD member states and the MNE Guidelines regime has fundamentally been altered.[434] The establishment and operation of a NCP is the core obligation imposed upon OECD member states. As explained earlier, NCP is a dispute resolution mechanism "for the handling of complaints submitted to it concerning corporations operating from or within their respective jurisdiction".[435]

The above mentioned Council decision on the MNE Guidelines is legally binding on all OECD members according to Article 5 of the OECD Charter that considers OECD Council's decisions binding on all members.[436] Thus, according to the 2000 Council decision, the state parties have to set up a NCP implementation mechanism within their domestic system in order to promote the MNE Guidelines and also to help resolve issues that arise under the guidelines.[437] The fact that the Council decision on the MNE Guidelines holds OECD members accountable with regard to their international obligations, clarifies what proper NCP administration is and that states must refrain from considering NCPs "merely inspirational" or that they can just be "progressively realized".[438] Given this, the National Contact Point dispute resolution mechanism with its mandatory implementation nature, could be viewed as "a unique method for addressing corporate misconduct".[439]

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[433] *Ibid,* at 69 para 1. Also see Nicola Bonucci, "The Legal Status of an OECD Act and the Procedure for its adoption", (OECD, Legal Status of an OECD act 2004), online:<http://www.oecd.org/education/skills-beyond-school/31691605.pdf>.

[434] See OECD, 'Decision of the Council on the OECD Guidelines for Multinational Enterprises', (OECD Decision C (2000)96/FINAL as amended by OECD Decision C/MIN (2011)11/FINAL, 27 June 2000).

[435] Robinson, *supra* note 432, at 69 para1.

[436] See OECD 'Convention on the Organisation for Economic Co-operation and Development' (14 December 1960, entered into force 30 September 1961) art 5.

[437] Robinson, *supra* note 432, at 70-71.

[438] *Ibid* at 80, para 1.

[439] *Ibid* at 71 para 5.

This unique legal status of the OECD MNE Guidelines is of great importance. The important question in the context of sanctions regimes is whether the OECD MNE Guidelines offer any assistance to businesses in order to understand sanctions or not. If they do, then they are legally binding on member states and this might help bridge the governance gap in the sanction context. To find a relevant answer to this question, I will investigate the new "OECD Due Diligence Guidance for Responsible Business Conduct (Guidance)" in order to realize whether coercive measures have received any consideration or not.

5.1.1. OECD Due Diligence Guidance for Responsible Business Conduct

In order to provide practical support to enterprises on the implementation of the OECD MNE Guidelines, the first draft of this guidance was developed in May 2016 and was approved on April 2018 by the OECD Working Party on Responsible Business conduct and the OECD Investment Committee.[440] Similar to the UNGPs as well as the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy[441] that contain due diligence recommendations, this guidance could assist enterprises by promoting a common "understanding among governments and stakeholders on due diligence for responsible business conduct".[442]

With regard to how corporations will manage the impacts of their activities, the Due Diligence Guidance has been built around 6 core process expectations that expects companies to "Embed responsible business conduct into policies and management systems", "Identify and assess actual and potential adverse impacts associated with the enterprise's operations, products

[440] See Catie Shavin, "Unlocking the Potential of the New OECD Due Diligence Guidance on Responsible Business Conduct" (2019) 4:1 Bus & Human Rights J 139.
[441] The International Labour Organization (ILO) *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*. (1977) last revised in 2017.
[442] OECD, OECD Due Diligence Guidance for Responsible Business Conduct (Paris: OECD Publishing, 2018), at 3.

or services", Cease, prevent and mitigate adverse impacts", "Track implementation and results", "Communicate how impacts are addressed", "Provide for or cooperate in remediation when appropriate".[443] Each process expectation entails detailed suggestions as to "practical actions that companies may choose to undertake in order to align their activities with OECD Guidelines".[444] As was the case with the UNGPs, there is no reference as to what companies are expected to do in the sanctions context and how they could deliver due diligence in such situation.

However, the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas ("the Guidance"),[445] that is a collaborative government-backed multi-stakeholder initiative on responsible supply chain management of minerals from conflict affected areas, provides multiple references to the operation of companies where UN sanctions are in place. The objective of these set of Guidelines is "to help companies respect human rights and avoid contributing to conflict through their mineral sourcing practices".[446]

For example, in defining due diligence and its necessity, the Guidance explains that due diligence will help a company to comply with international and domestic laws "including those governing the illicit trade in minerals and United Nations sanctions".[447] This is called risk-based due diligence and refers to steps that could mitigate or prevent potential risks that could cause harm to people or legal liability for the company. This is why identifying factual circumstances and evaluating facts against relevant standards provided under national and international law is of great importance.

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[443] OECD, *ibid*, at 20-37.
[444] *Ibid.*
[445] OECD, OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas 3rd Ed (Paris: OECD Publishing, 2016).
[446] *Ibid,* at 3 para 1.
[447] *Ibid,* at 13 para 1.

What seems to be confusing is that economic sanctions, unilateral sanctions and sanctions with an extra-jurisdictional nature, even those that are basically not in conflict with international law (e.g. UNSC sanctions), are considered to be preventive and could lead to corporations either seizing or terminating their operations.[448] While, in fact, the sanctions would lead to violations of international human rights law in the target state. So, in reality the priority in conducting due diligence is to stay away from a situation where legal liability may be imposed on companies and causing harm to civilians is of much less importance which is basically in contrast with the OECD Due Diligence Guidance tools.

As explained, throughout the guidelines it is declared that businesses should "commit to comply with relevant UN sanctions resolutions or, where applicable, domestic laws implementing such resolutions."[449] Also, the Guidelines emphasizes the importance of "know your counterparty" due diligence in order to ensure that "the trade in grandfathered stocks is not carried out in violation of international sanctions or does not enable money-laundering resulting from … the sale of gold reserves in conflict affected and high-risk areas".[450] Given this, companies are asked to regularly check government watchlist information that includes the UN sanctions list – but not unilateral economic sanctions - to ensure their operations are in line with international law.[451]

This, also is explained in the "Recommendation of the Council on OECD Legal Instruments Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas" where they say acknowledge their commitment "to refraining from any action which contributes to the financing of conflict and we commit to comply with

[448] *Ibid,* at 20.
[449] *Ibid,* at 20 para 1.
[450] *Ibid,* at 62 para 3 & 63.
[451] *Ibid,* at 83.

relevant United Nations sanctions resolutions or, where applicable, domestic laws implementing such resolutions."[452]

To conclude, the guidelines only state that companies must comply with the UN sanctions and they do not mention unilateral sanctions and their collateral damages at all. Similarly, the OECD guidelines do not differentiate between home-state sanctions and others and they do not provide any guidance for situation in which economic sanctions indirectly violate human rights by preventing companies from operating or trading with the target sate. Consequently, to cover the existing gap in the laws and regulations and the company's compliance in the context of sanctions, the differentiation between the UN sanctions and the unilateral sanctions as well as an elaborations on company's responsibilities in the sanction context could be considered enlightening and helpful in order to better implementation of the responsibility to respect principle.

5.2. OECD Approaches to Conflict-affected Areas and Supply Chains

The purpose of this section is to consider the OECD guidance tools for businesses that focus on conflict-affected areas and related human rights due diligence guidance to address human rights issues in supply chains. Other instruments such as OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas[453] and its Supplement on Gold and the UN Global Compact Guidance on Responsible Business in Conflict-Affected and High-Risk Areas[454] also highlight the heightened risk for corporations operate in

[452] OECD, Recommendation of the Council on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High -Risk Areas, OECD/LEGAL/0386, ANNEX II.
[453] OECD (2016), *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition*, OECD Publishing, Paris,
[454] United Nations Global Compact, *United Nations Global Compact Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: A resource For Companies and Investors (*UN: New York, 2010). Some of these Guidance tools will be examined later in the thesis.

such context.[455] Conflict affected areas are known to requires special due diligence processes that would help the businesses to support their efforts to implement the UNGPs. It could be argued that sanctioned countries are also among the high-risk areas that also require special due diligence on business and state end.

In a report on the recommendation of the Council on due diligence guidance for responsible supply chains of minerals from conflict affected and high risk areas, there is a reference to several UNSC Resolutions in the context of DRC[456] and Cote d'Ivoire[457] that call for "due diligence in mineral supply chains to avoid financing sanctioned entities and illegal armed groups".[458] These resolutions, are the first and only UNSC Chapter VII Resolutions in history to reference and support work of the OECD, understanding the value of guidance as a tool that can support peace and security.[459] The same strategy was followed through endorsement and support for responsible mineral sourcing and Guidance by EU Commissioners in the EU's CSR and raw materials strategies, as well as in the introduction of the EU initiative on responsible mineral supply chains.[460]

As explained in the previous section, this point is also reiterated in the OECD Model Supply Chain Policy for a Responsible Global Supply Chain of Minerals From Conflict-Affected and high Risk Areas[461] by committing to refrain from "any action which contributes to the

[455] See Geneva Academy of International Humanitarian Law and Human Rights, "Due Diligence: Defining 'Conflict-Affected' and 'High-Risk Areas'" (Concept Note for a Side Event delivered at the United Nations Forum on Business and Human Rights, Geneva, 2-4 December 2013), online:<https://www.ohchr.org/Documents/Issues/Business/ForumSession2/Events/3Dec.1.SideEventProposal_GenevaAcademy.pdf>.
[456] United Nations Security Council, UN Doc UNSCOR S/2010/596 (29 November 2010).
[457] United Nations Security Council, UN Doc SC/11877, 7436th Mtg, (28 April 2015).
[458] Report on the Implementation of the Recommendation on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict Affected and High-Risk Areas [C/MIN (2011)12/FINAL].
[459] *Ibid,* at 62. Resolution 1952(2010) was adopted with the support of France, the United Kingdom, the US as well as Austria, Brazil, Japan, Mexico and Turkey. Resolution 2219 (2015) was likewise unanimously adopted.
[460] *Ibid,* at 224.
[461] This Model Supply Chain Policy for a Responsible Global Supply Chain of Minerals from Conflict-Affected and High-Risk Areas is intended to provide a common reference for all actors throughout the entire mineral supply chain.

financing of conflict" and also by committing "to comply with relevant United Nations sanctions resolutions or , where applicable, domestic laws implementing such resolutions".[462] In this regard, the OECD Due Diligence Guidance provides detailed recommendations to help corporations respect human rights and avoid contributing to conflict through their mineral purchasing decisions and practices, especially for any company that is potentially sourcing minerals or metals from conflict affected and high-risk areas. In order to do so, they have provided corporations with a list of sanctions - including US, UN and EU sanctions - in order to identify blacklisted companies and individuals.[463]

All these measures are taken to ensure business entities will not get involved with any sanctioned country without paying attention to the devastating impacts of these restrictions on the economy, life and environment of targeted states. This shows how international instruments are merely focused on keeping TNCs away from trouble without considering the impacts on people in the target state. This is not a fair equation and the rights of the individuals and entities connected to sanctioned country must be equally respected and be considered by establishing norms and laws that include guidance on business and human rights in the context of sanctions.

5.3. OECD Treaty Approach

While the OECD has taken a soft law responsible guidance approach in the human rights context, it is important to note that in other areas it has adopted a hard law approach including the

Companies are encouraged to incorporate the model policy into their existing policies on corporate social responsibility, sustainability, or other alternative equivalent.

[462] OECD, *Recommendation of the Council on Due Diligence Guidance for Responsible Supply Changes of Minerals from Conflict-Affected and High-Risk Areas,* OECD/LEGAL/0386, C (16 July 2012) 93, annex II, at 20 para 1. Online:< https://www.oecd.org/corporate/mne/GuidanceEdition2.pdf>.

[463]OECD and EU Guidance, Sanctions List, online:<http://www.responsiblemineralsinitiative.org/emerging-risks/conflict-affected-and-high-risk-areas/>.

adoption of a treaty. For example, the OECD Bribery Convention was adopted in 1997 and came into force in 1999 following Canada's ratification.[464]

The OECD Convention aims to stop the flow of bribes and to remove bribery as a non-tariff barrier to trade, producing a level playing field in international business through establishing "legally binding standards to criminalize bribery of foreign public officials in international business transactions".[465] In 2009, an OECD recommendation was adopted in order to further the combatting of bribery of foreign officials in international business transactions; the purpose of the recommendation was to establish new measures to reinforce parties efforts "to prevent, detect and investigate foreign bribery".[466]

The OECD Bribery Convention is modelled on the "Foreign Corrupt Practices Act" (FCPA).[467] The FCPA, is considered to be a great example to prove the importance of unilateral regulation as a "necessary first step to multilateral agreement" that could later "come to be an accepted international policy goal".[468] As Seck explains, in order to "more aggressively address foreign bribery", the FCPA was amended in 1998 to assert "jurisdiction over foreign nationals where a nexus exists between activity within the territory of the US and the furtherance of a

[464] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, (Paris: OECD Publishing ,1997. Also see James Salzman, "The Organization for Economic Cooperation and Development's Role in International Law" (2011) 43:2 Geo Wash Intl L Rev 255.
[465] OECD Bribery Convention, online:<http://www.oecd.org/corruption/oecdantibriberyconvention.htm>.
[466] *Ibid* at 23.
[467] Foreign Corrupt Practices Act, 15 U.S.C. § 78dd (1977) [FCPA]. See Sara L Seck, "Unilateral Home State Regulation;' Imperialism or Tool for Subaltern Resistance" (2008) 46:3 Osgoode Hall LJ 565 at 571, para 2.
[468] Seck 2008, *ibid* at 567, para 2. In this paper, Seck examines two US Legislations to decide whether "unilateral home state action could play an important role as international norm creator contributing to the process of customary international law". She further concludes that this is "indeed possible" according to the history of the FCPA. (while opposite is also possible).

violation of the statute".[469] Seck highlights the assistance of the FCPA to enforcing "the national anti-corruption laws of foreign countries in furtherance of international policy goals".[470]

In order to address international bribery, the OECD bribery convention requires states "to aggressively assert both territorial and nationality jurisdiction".[471] Modelled on the OECD anti-bribery Convention, UN adopted the Convention Against Corruption in 2003.[472] The question arises as to whether a treaty in the area of BHR might be useful.

5.3.1. The Working Group on BHR and The Zero Draft Treaty Initiative

We discussed the soft law approach which was followed by the OECD treaty approach in the previous section, to better realizing the distinguished impacts of such distinction.[473] In international relations, soft law has always been considered a beneficial solution to practical problems.[474] It is even suggested that soft law norms could be more efficient than hard law in coping with delicate issue of international arena which might result in extraterritoriality disputes.[475] However, legitimizing extraterritorial application of national laws is still disputed. It is proposed that if two states endorse a particular soft law instrument, and the national law that is being extraterritorially applied reflects those soft law norms, then the second state cannot object

[469] *Ibid,* at 570, para 1. Also see H. Lowell Brown, "Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed its Grasp?" (2001) 26 N.C.J. Int'l L. & Com. Reg 239.
[470] Seck 2008, *ibid,* at 572, para 2.
[471] *Ibid,* at 571, para 2.
[472] *Ibid,* at 572. See *United Nations Convention Against Corruption*, 31 October 2003, GA res. 58/4, UNGAOR, UN Doc. A/58/422.
43 ILM 37 (entered into force 14 December 2005).
[473] The disputed nature of the UNGPs was discussed in the previous chapter. Even though these principles are described as "soft law", for instance, the state duty to protect discussed in the first pillar of UNGPs reflects binding international human rights treaty and customary law. Thus, the contested understanding of soft law instruments' status in BHR context must be considered before engaging in such discussions.
[474] Tadeusz Gruchalla-Wesierski, "A Framework for Understanding 'Soft Law" (1984) 30:1 McGill L J 37 at 88 para 3.
[475] *Ibid.*

to this application of national laws.[476] Nonetheless, it is unclear whether this is also the case where just one state endorses the soft law norm or where the national law partly reflects the international soft law.[477]

Nevertheless, it used to be the case that compliance with soft law was different from compliance with treaties or customary international law and the legally binding effect of treaties and customary international law has always been considered the main difference between them and soft law.[478] But if soft law has no binding effect, why does international human rights constantly use it in international standard setting? Dinah Shelton differentiates between declaratory or preliminary soft law and secondary soft law. She argues the latter is "the ultimate expression on a legal question" and in this way, the content of international obligations is shaped by the interaction of soft law with hard law. She argues that "soft law formulates and reformulates the hard law of human rights treaties in the application of this law to specific states and cases".[479]

In recent years, more often than ever before, the negative impacts of business activities on human rights has been a reasonable reason to regulate their conducts mostly through soft law mechanisms, both to prevent and monitor corporate rights violations and to clarify the state duty to protect.[480] Justine Nolan believes that soft law can result in incremental changes but she argues in order for the soft law to become the "more effective and sustainable rights protection mechanism", a more intimate connection to hard law is required.[481]

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[476] *Ibid* at 40-42.
[477] *Ibid,* at 88.
[478]Dinah Shelton, "Compliance with International Human Rights Soft Law" [1997] 29 Studies in Transnational Leg Policy119 at 119, para 2.
[479] *Ibid* at 141.
[480] Justine Nolan, "The Corporate Responsibility to Respect Rights: Soft Law or Not Law?" in Surya Deva & David Bilchitz (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (UK: Cambridge University Press, Nov. 2013) 72.
[481] *Ibid.*

Perhaps similar conflicting ideas regarding the importance of soft law has contributed to establishing a draft treaty on Business and Human Rights law. But it did not happen until 2014, following OHCHR collaboration with the Working Group on Business and Human Rights, in order to accomplish its mandate.[482] In 2014, an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights was established under resolution A/HRC/RES/26/9[483], with a mandate "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[484]

In July 2018, the working group released the first official draft of the legally binding instrument that is known as Zero Draft. Zero Draft consisted of 15 articles, covering different issues. While some critical and fundamental issues are covered by Zero Draft, none of the articles, however, cover the issue of sanctions (whether UN sanctions, economic sanctions or unilateral sanctions). Whereas some provisions of the Zero Draft Treaty focus on imposing criminal sanctions on companies, no reference has been made to transnational or extraterritorial sanctions. For example, Article 10 highlights the legal liability of transnational corporations for violations of human rights and that such liability may be subject to "effective, proportionate, and dissuasive criminal and non-criminal sanctions".

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[482] See *Contribution of the United Nations system as a whole to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles on Business and Human Rights*, UNHRC, 21st Session, Agenda Item 3, 2012, UN Doc A/HRC/RES/21/5. As discussed earlier in this chapter, the mandate requires the working group to "develop guidance and training relating to the dissemination and implementation of the UN Guiding Principles on Business and Human Rights" by "providing advice, tools and guidance; supporting capacity building on Business and Human Rights to all stakeholders at the national level, including through OHCHR's field operations and across the UN system; and providing technical support to human rights mechanisms.

[483] *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, UNHRC, 26th Session, 2014, UN Doc A/HRC/RES/26/9.

[484] United Nations Human Rights Council, Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (26 June 2014) Online: *OHCHR* <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspxs>.

Many TNCs and states are struggling with sanctions as current prominent issue of international law without having any guideline or reference as to how protect and respect human rights in sanctions contexts. Given this and in a world where states resort to economic war as a form of modern confrontation, the subject of coercive measures must be taken into deliberation in such an important draft treaty in BHR.

In a joint business response to the Zero Draft treaty, it is argued that the draft and its optional protocol "incorporate inconsistent provisions that would greatly undermine countries' development opportunities and they would create a lopsided global governance system that would result in significant gaps in human rights protection".[485] Likewise, as stated, I believe the treaty fails to cover the issue of sanctions regimes and even though it covers a wide range of issues - mostly already addressed by other BHR instruments like UNGPs and OECD MNE- they do not make a helpful contribution to the field of BHR in the context of sanctions. Due to the complex human rights issues that has proven to arise from the operation of TNCs in target states, addressing the subject of sanctions and providing businesses with credible and workable solutions is of great priority and importance.

It should be mentioned that on 16 July 2019, a revised version of the BHR draft treaty was released that is considered to be more coherent and better constructed with compare to the zero draft.[486] Nevertheless, the revised draft also falls short of covering the issue of sanctions. The

[485] International Organization of Employers et al, *Business Response to the Zero Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises ("Zero Draft Treaty") and the Draft Optional Protocol to the Legally Binding Instrument ("Draft Optional Protocol") Annex*, October 2018, online: International Chamber of Commerce – Publications < https://iccwbo.org/>.
[486] Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights (IGWG). *Revised draft of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*, (2019). Retrieved from https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf [" Revised draft"]. See further Larry Cata Backer, "Shaping a Global Law for Business Enterprises: Framing Principles and the Promise of a Comprehensive Treaty on Business and Human Rights" (2017) 42:2 NCJ Intl L & Com Reg 417.

continuous negligence regarding the troubling, devastating and vital issue of sanctions in the context of BHR proves the draft is not yet sufficiently comprehensive and this subject should be addressed during the process of the negotiations.

5.4. Conclusion

In this Chapter, I investigated the OECD guidance materials to discover whether sanctions have received any considerations or not. I then considered the OECD anti-bribery treaty, and the BHR treaty initiative.

The BHR response to impose special duties on states could either take a treaty approach or a soft law approach. In the anti-corruption context, there is the OECD Convention, and subsequent to that there is a UN Convention in which states have committed to passing laws to address a problem with impacts in other countries. But if we look in the responsible business conduct, including the OECD MNE guidelines, what states are required to do is to promote soft guidance that is implemented through the OECD NCP mechanism. If the BHR instruments addressed the governance gap in the context of sanctions, even though they are soft law, states would have an obligation to promote them to prevent the negative human rights impacts of transnational and extraterritorial sanctions.

The BHR draft (Zero Draft) also doesn't provide any reference to unilateral economic sanctions that violate human rights, and this is where the governance gap in the existing international instrument becomes much clearer! On the other hand, businesses could also be seen as having independent responsibilities under the UNGPs and international law (direct obligations of MNEs), and so even if the home state is not regulating to prevent harms arising from sanctions, it could be argued that the corporation has a responsibility to respect human rights and that this would mean something different in the context of sanctions. Nevertheless, as concluded in the

previous chapter on the UNGPs, unilateral and multilateral sanctions and their influence on TNCs is an overlooked issue in BHR materials and innocent civilians and the environment are paying for the current governance gap, not the states that are conducting the wrongful acts.

Chapter VI Iran: Business and Human Rights in the Context of Sanctions

6.1. Introduction

Having been targeted with more than 32 different sets of sanctions by the US, the EU and the UN between 1979-2012, Iran could be considered one of the world's most sanctioned countries.[487] While the UNSC (Chapter VII sanctions), and the EU are each responsible for just 4 rounds of these sanctions against Iran, the remaining are economic sanctions imposed unilaterally by the US. The main purpose of imposition of sanctions -whether comprehensive or unilateral economic sanctions- is to change the target state's behavior in the international arena and to force it to comply with the international law and set rules. In the case of Iran, the main purpose of the sanctions regimes has been stopping the country's nuclear program after the International Atomic Energy Agency (IAEA) in its 2005 report concluded that "Iran's nuclear program had not complied with its safeguard agreement".[488]

At least the last two presidents of the US have boasted of the severity of the sanctions against Iran and their devastating impacts on Iran's economy.[489] The undeniable damages that sanctions have caused the Iranian economy by the dramatic drop in oil export and the consequent collapse in the value of Iranian currency has been the focus of many studies in recent years.[490]

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[487] See Ari Kattan, "Fact Sheet: Iran Sanctions," Centre for Arms Control and Non-Proliferation, (2013) online: < https://armscontrolcenter.org/fact-sheet-iran-sanctions/>. Please note that as of July 2019, new sets of unilateral sanctions are being imposed on Iran almost on a monthly basis. For the purpose of this thesis, as far as the common practice of imposing unilateral coercive measures by powerful states is clarified, the exact number of active sanctions is not of priority.

[488] Rauf Tariq and Robert Kelley, "Nuclear Verification in Iran" (2014) 44:7 Arms Control Today 1 at 8.

[489] See US Department of the Treasury, "Iran Sanctions" (July 8, 2019), online: *US Department of the Treasury - Resource Center* <https://www.treasury.gov/resource-center/sanctions/programs/pages/iran.aspx>. See further Marik Von Rennenkampff "Maximum Pressure on Iran has failed- Here's What Should Come Next" (07 July 2019), online: *The Hill* < https://thehill.com/opinion/national-security/454980-maximum-pressure-on-iran-has-failed-heres-what-should-come-next>.

[490] See Paul Kerr & Kenneth Katzman, *Iran nuclear agreement and U.S. exit*. (Washington, DC: Library of Congress. Congressional Research Service, 2018), online: CRS Reports: <https://purl.fdlp.gov/GPO/gpo109986>. And Dianne E Rennack, *Iran: U.S. economic sanctions and the authority to lift restrictions*. (Washington, DC: Library of Congress. Congressional Research Service, 2018), online: CRS Reports <https://purl.fdlp.gov/GPO/gpo111342>.

Some empirical analysis has been conducted in order to contribute to both academic and policy debates on the merits of sanctions against Iran.[491] However, some of this research is unreliable since the unintended (and intended) consequences of sanctions on human rights of individuals residing in or associated with the sanctioned country are completely ignored. Furthermore, even the UNSC sanctions regime, as discussed earlier in this thesis (Chapter 2 and 3), contributes to the violation of human rights in the targeted state, and so contradicts the UN's role as a human rights safeguard.

The purpose of this chapter is not to examine the issue of illegitimacy of sanctions even with regard to a state with wrongful acts like Iran.[492] Instead, my focus will remain on the impacts of sanctions on the operation of TNCs in a sanctioned country such as Iran. Therefore, I will investigate how business enterprises can respect human rights and how home states can deliver on their duty to protect human rights in the context of sanctions against Iran. To achieve this purpose, first, I will provide a brief history of the imposition of multilateral and UCM against Iran, and their impacts and consequences for the country. This will be followed by drawing upon UNSR reports and recommendations to mitigate the negative impacts of sanctions, and Iranians responses to being the constant target of multilateral and unilateral sanctions. I will then consider the impacts of these measures on TNCs and the role of home state and the targeting state, which will be followed by investigating the Business Responsibility to Respect Human Rights in the context of sanctions in Iran.

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[491] E.g. See Peter van Bergeijk, "Sanctions Against Iran - A Preliminary Economic Assessment" in Iana Dreyer, José Luengo-cabrera, eds, *On Target? EU Sanctions as Security Policy Tools* (Paris, France: EU Institute for Security Studies, 2015) 49; See further Elena V McLean, "Busted Sanctions: Explaining Why Economic Sanctions Fail" (2017) 15:1 Perspectives on Politics 288; Also see Sophie Arie, "Unintended Consequences of Sanctions against Iran." (2013) 347: 7919 BMJ: British Medical Journal 18.

[492] See Chapter3 of the thesis. The reports of the Human Rights Council's Special Rapporteur on the Negative Impact of the Unilateral Coercive Measures on the Enjoyment of Human Rights encompass many references to unconformity of sanctions with principles of international law.

6.2. A Brief History of the Imposition of Sanctions Against Iran

6.2.1 Unilateral Sanctions: US

The history of sanctions against Iran dates as far back as 1979.[493] This is when the Islamic revolution happened and Iran, once one of the most significant US allies during the Pahlavi era, entered into a diplomatic rupture with the US, after some revolutionaries held US embassy employees hostages in Tehran.[494] The hostage crisis is considered as a benchmark for the sanctions. Since then, US governments have instituted vast sanctions in an effort to change Iran's behaviour.[495] This is apart from the sanctions approved by the EU and the UN against Iran.

1980s US sanctions were mostly set up to "compel Iran to cease supporting acts of terrorism" and to "limit Iran's strategic power in the middle east" more generally.[496] Whereas in 1990s, limiting the scope of Iran's Nuclear program was the main focus of sanctions. Most of these coercive measures targeted Iran's key energy sector (oil and gas) and also its access to the international financial system.[497]

Several other executive orders including E.O. 13224 (sanctioning Terrorism-supporting entities and also Ban on US Trade and investment with Iran), 13382 (among others, any foreign bank that is determined to have trade relationship with National Iranian Oil and Gas Company is

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[493] Between 1979-1981, Carter Administration Executive orders blocked Iranian assets in the US. As of today, some Iranian assets are still being held at the US.

[494]Hisae Nakanishi, "The construction of the Sanctions Regime Against Iran: Political Dimensions of Unilateralism" in Ali Z. Marrosi & Marisa R. Bassett (eds), *Economic Sanctions Under International Law* (The Hague, Netherlands: Asser Press, 2015) 23 at 26 para 1. See further Catherine V Scott, "Bound for Glory: The Hostage Crisis as Captivity Narrative in Iran" (2000) 44:1 Intl Studies Q 177.

[495] In order to discuss achievements and outlook for sanctions on Iran, Kenneth Katzman prepared a report for the US congress. This report encompasses some useful information with regard to US sanctions against Iran. See: Kenneth Katzman, "Iran Sanctions" (2014) 5:1 Current Politics & Economics Middle East 41. (Multiple versions of this report is available and the latest was updated and released in November 2019). Online:<https://crsreports.congress.gov/product/pdf/RS/RS20871/300>.

[496] Kenneth Katzman, "Iran Sanctions" (2015) 6:4 *Current Politics and Economics of the Middle East* 653 at 653.

[497] *Ibid.*

banned from opening a US based account) , 13599 (impose sanctions on Central Bank and any other state owned entity in Iran) were issued to "direct the blockings of assets of Iranian entities.[498]

6.2.2. Multilateral Sanctions: UN Sanctions

The UN multilateral sanctions against Iran are considered to be a rather recent development (Post-2006), when the Iranian Nuclear enrichment issue was considered to fall within the remit of Chapter VII of the UN Charter.[499] Thus, among others, resolutions 1737(2006), 1747(2007), 1803(2008), and 1929(2010) were issued by UNSC and imposed multiple mostly targeted sanctions against those that allegedly were engaged in the Iranian nuclear enrichment program and arms embargo.[500] This happened when after more than three years, IAEA was unable to confirm that Iran was not engaging in undisclosed nuclear activity and did not hold undeclared nuclear materials.[501] As a result, the IAEA demanded Iran to suspend its uranium enrichment activities or face economic and diplomatic sanctions, if it failed to do so.[502]

The first of the seven UNSC resolutions, resolution 1696, which ordered Iran to suspend all its uranium enrichment activities, was issued on the assumption that "Iran has an intention to make nuclear weapon".[503] It is considered to be "the cornerstone of the international sanctions regime Iran" and subsequent resolutions followed the same assumption.[504] However, according to some scholars, the authority of the UNSC to order suspension of uranium enrichment is

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[498] *Ibid* at 656 para 4. (This information can also be found on page 4 of the 2019 updated version, mentioned above).
[499] Alexander Orakhelashvili, "The Impact of Unilateral EU Economic Sanctions on the UN Collective Security Framework: The Case of Iran and Syria" in Ali Z. Marrosi & Marisa R. Bassett (eds), *Economic Sanctions Under International Law* (The Hague, Netherlands: Asser Press, 2015)3, at 4, para 3
[500] *Ibid.* Seven UNSC Resolutions were issued between 2006 and 2011, but the four Resolutions that are mentioned instituted new sanctions regimes against Iran.
[501] *Ibid* at 9.
[502] Nakanishi, *supra* note 494, at 29 para 4. See UN Security Council, *Resolution 1696 (2006) Non-proliferation*, 31 July 2006, UN Doc S/RES/1696 (2006).
[503] Nakanishi, *ibid,* at 30 para 3.
[504] *Ibid.*

questionable.[505] As Nakanishi explains, the UNSC has acted as if it is the superior of IAEA while in fact monitoring the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) is the IAEA'S mandate, and in this case, "UNSC overrode the NPT regime".[506]

6.2.3. European Union Sanctions

EU sanctions against Iran began by operating on "the premise of parallelism" between the EU and the UN.[507] EU coercive measures were initiated following the sanctions policy embodied in UNSC Resolution 1737(2006) in order to give effect to that resolution by adopting Council Common Position 2007/140/CFSP.[508] The Council Common Position prohibited EU countries from, among others, directly or indirectly the supply, sale or transfer of many items including equipment, goods, technology and software to Iran.[509]

In 2010 through resolution 1737, however, the EU introduced additional new restrictive measures against Iran with regard to trade between EU states and Iran that went beyond the measures taken by UNSC resolutions.[510] The emphasis on an overall restricted trade and economic relations between the EU and Iran then become the focal point of the later EU Council decisions to the extent that under Article 1 of the decision 012/35/CFSP member states are prohibited from entering into financial commitments with Iran:

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[505] Asli Ü Bâli, "The US and the Iranian Nuclear Impasse." (2006) 241 Middle East Report 12.
[506] Nakanishi, *supra* note 494, at 30 Para 4. Also see Aslı Bâli, "International Law and the Iran Impasse," *Middle East Research & Information Project* (16 December 2012) online:< https://merip.org/2012/12/international-law-and-the-iran-impasse/>.
[507] Orakhelashvili, *supra* note 499, at 5 para 3.
[508] *Restrictive Measures against Iran*, EU Council Common Position 2007/140/CFSP (27 February 2007). See further Pierre-Emmanuel Dupont, "Countermeasures and Collective Security: The Case of the EU Sanctions Against Iran" (2012) 17:3 J Conflict & Security L 301.
[509] *Ibid* at article 1.
[510]Orakhelashvili, *supra* note 499 at 5 para 5. See EU Council Decision 2010/413/CFSP (26 July 2010) *Restrictive Measures against Iran* and Repealing Common Position 2007/140/CFSP.

> "Member States shall not enter into any new short-, medium- or long-term commitments to provide financial support for trade with Iran, including the granting of export credits, guarantees or insurance, to their nationals or entities involved in such trade."[511]

The authority of a regional Organization such as the EU in adopting coercive measures against other states in a situation where the UNSC is already involved by taking coercive measures under Chapter IIV is questionable.[512] However, some suggest that this EU policy is premised on authorities that would support the imposition of sanctions independently even without a UN resolution.[513] For example, in a statement the European Council suggests that autonomous sanctions adopted by the EU are beyond the ones imposed by the UNSC to urge the Iranian government to "engage constructively, negotiate seriously and address the concerns of the international community" with regard to its Nuclear program.[514]

6.3. JCPOA (Joint Comprehensive Plan of Actions)

After years of being subject of unilateral and multilateral sanctions, finally in November 2013, Iran and the P5+1 (the US , the United Kingdom, France, Russia, China, and Germany) met in Geneva and signed the Joint Plan of Action that spells out the steps that Iran must take in exchange for receiving limited sanctions relief. Those measures included halting enrichment of uranium to 20 percent and providing the IAEA access to monitoring Iranian Nuclear sites.[515] The Sanction

[511] Council Decision 2010/413/CFSP, *ibid,* at art 10 . Also see EU Council Decision 2012/35/CFSP (23 January 2012), Amending Decision 2010/413/CFSP Concerning *Restrictive Measures against Iran*.
[512] Orakhelashvili *supra* note 499, at 7 para 4. It is noteworthy that the Iranian nuclear enrichment issue was referred to the UNSC by the IAEA.
[513] *Ibid* at 7-8.
[514] EU Statement, *Common Messages Regarding EU Sanctions against the Iranian Nuclear Programme* (June 2013), online:<https://www.mzv.cz/file/996135/Common_messages_regarding_EU_sanctions_against_the_Iranian_nuclear_programme.doc>.
[515] Hojjatollah Moradianfar, & Mohammad Mehdi Hooshmand & Omid fateh, "Studying the Impact of Joint Plan of Action (November 2013) on Iran Economic Sanctions" (2015) 3:2 Intl J Resistive Economics 70 at 71.

relief also included lifting the threat of sanctions by the US, on foreign companies dealing with Iran's auto sector or purchasing Iranian petrochemicals.[516]

After IAEA confirmation of Iran's compliance with the terms of JPOA, in July 2015 Iran and the P5+1 signed the Joint Comprehensive Plan of Action (JCPOA)[517], a deal under which Iran agreed to take every measure to curb its nuclear program in return for a significant easing of US, UN and EU sanctions. This agreement was then formally adopted by the UNSC and Resolution 2231 was unanimously passed.[518] This resolution endorsed the nuclear deal and the lifting of the UNSC nuclear-related sanctions on Iran. Ever since adopting this resolution, the IAEA has regularly verified that Iran has been complying with this agreement and its commitments are met.

The nuclear-related sanctions on Iran were waived until November 5, 2018 when the US left the nuclear deal and re-imposed the UCM to deny Iran's access to oil revenue.[519] Due to this, more than 100 corporations have exited the Iranian market and more than 70 financial institutions with links to Iran have been sanctioned by the US.[520] The Trump administration has indicated that it takes pride in this "maximum pressure campaign" which "designat[es] over 970 Iranian entities and individuals in more than 26 rounds of sanctions - more than any other Administration in US history."[521]

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[516] See *ibid* at 84.
[517] UN Security Council, UN Doc UNSCOR 2231 *on Joint Comprehensive Plan of Action (JCPOA) on the Islamic Republic of Iran's nuclear programme* (20 July 2015).
[518] *Ibid.*
[519]See Catherine Amirfar & Ashika Singh, "The Trump Administration and the 'Unmaking' of International Agreements" (2018) 59:2 Harvard IntL L J 443. Also see Harold Hongju Koh, "The Trump Administration and International Law" (2017) 56:3 Washburn L J 413 at 469.
[520] US Department of State, "Fact Sheet: Maximum Pressure Campaign on the Regime in Iran." *Targeted News Service (*4 April 2019) online:< https://www.state.gov/maximum-pressure-campaign-on-the-regime-in-iran/>.
[521] *Ibid.* Also see Afshon Ostovar "The US and Iran Are Marching Toward War" *Foreign Affairs* (28 June 2019) online:< https://www.foreignaffairs.com/articles/iran/2019-06-28/us-and-iran-are-marching-toward-war>. "Trump's administration has pursued a "maximum pressure" campaign against Iran built on suffocating economic sanctions and a de facto oil and gas embargo. Iran has pursued a maximum resistance strategy". Also see Kenneth Katzman, "Iran Sanctions" (2015) 6:4 Current Politics & Economics Middle East, 653.

6.3.1. The Impacts of UCM on Iran in the Context of the JCPOA

In his many reports, the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights has identified an increasing and systematic trend in using UCM as a foreign policy tool by certain countries. In his August 2018 report, he provided rather extensive information regarding recent developments related to the impacts of the UCM, specifically the re-imposition of the comprehensive embargo by US on Iran.[522]

US termination of its participation in the JCPOA on May 2018 and subsequent re-imposition of previously lifted "drastic, comprehensive unilateral sanctions regime", had the Special Rapporteur questioning the lawfulness of US withdrawal from such "multilateral agreement enumerating a series of reciprocal commitments of the parties" under international law.[523] He considered this withdrawal a breach or violation of the JCPOA since this agreement is "covered by the fundamental rule of international law *pacta sunt servanda*, as acknowledged by several participants" and is endorsed by the UNSC in resolution 2231(2015).[524]

He then called upon all other member states, regional and also international organizations to take required actions in order to support implementation of the JCPOA, based on UN Charter Article 25 that obligates states to accept and carry out the decisions of the UNSC. To make his point clear, Special Rapporteur also referred to one International Court of Justice Advisory Opinion that affirms member states must comply with UNSC's decision adopted under article 25

[522]UN Human Rights Council, 39th Sess, UN Doc A/HRC/39/54, *Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights* (30 August 2018).
[523]UN Doc A/HRC/39/54, *ibid*, at para 31. Also see, Amirfar, Catherine, and Singh, Ashika. "The Trump Administration and the 'Unmaking' of International Agreements" (2018) 59:2 Harvard Intl L J 443. See further Koh, Harold Hongju. "The Trump Administration and International Law." *Washburn Law Journal*, vol. 56, no. 3, 2017, p. 469.
[524]UN Doc A/HRC/39/54, *ibid*, at para 31.

of the UN Charter: "when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision. ... To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter." [525]

6.3.1.1. Intended Consequences of the UCM on Iran:

The ultimate intention of the US by re-establishing the comprehensive trade embargo in 2018, has been declared to be harming Iran through "unprecedented financial pressure".[526] To achieve this objective, the US officials demand companies not to do business in or with Iran so that the economic isolation would finally change Iran's behavior regardless of the adverse effect of the sanctions on ordinary people and third parties.[527] The Special Rapporteur describes this threat of "adverse consequences for corporations also doing business in the United States" as a significant step backward.[528]

As argued in earlier chapters of the thesis, the implications of such sanctions could be as catastrophic as a wartime blockade except for the fact that "the imperatives of necessity, proportionality and discrimination" corresponding to international protection under international humanitarian law will be disregarded in peace time blockades.[529] The Special Rapporteur further aligns "the combination of comprehensive unilateral coercive measures and of the imposition of

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[525] *Ibid* at para 32. Also see *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep 16. at 53.

[526] Louis Nelson, "Pompeo Threatens Iran with the Strongest Sanctions in History" Politico (05 May 2018) online:<https://www.politico.eu/article/mike-pompeo-threatens-iran-with-strongest-sanctions-in-history/>.

[527] UN Doc A/HRC/39/54, *supra* note 522, at para 33. US officials argue that "IRGC's penetration in the Iranian economy and Iran's behavior in the region" is the reason for this economy isolations. E.g. see Katzman 2019, *supra* note 560 at 18 & 30.

[528] UN Doc A/HRC/39/54, *ibid*, at para 34.

[529] *Ibid* at paras 34 & 18. The Special Rapporteur refers to "the catastrophic consequences for human rights of broad trade embargoes imposed under the authority of the United Nations in the 1990s, especially with respect to Iraq that caused a shift away from comprehensive sanctions to so-called smart sanctions.

secondary sanctions on third parties unrelated to the dispute" to a peacetime blockade.[530] He also highlights the general understanding surrounding extraterritorial sanctions and their unlawful nature that "disregard commonly accepted rules governing the jurisdiction of States under international law".[531] The Special Rapporteur also considers the recent example of application of such wide-scale secondary sanctions to third parties not concerned with the dispute, as a violation of the international law.[532]

6.3.1.2. Recommendations of The Special Rapporteur on the Negative Impacts of the UCM on the Enjoyment of Human Rights

The objective of the mandate of the Special Rapporteur is "to promote the rule of law to the international community with a view to eliminating economic coercion as a tool of international diplomacy".[533] Consequently, he has regularly stressed the importance of "renewal of the work of the International Law Commission on extraterritorial jurisdiction that was initiated in 2006" to "elaborate on the legal status and consequences of sanctions involving the unlawful assertion of jurisdiction by a source State or group of States over target States and a fortiori on third States".[534]

Appointing one or more representatives to restrain and ultimately abolish the use of UCM and ensuring that sanctions exclusively be applied through the UNSC in accordance with Chapter VII of the UN Charter are among the recommendations of the Special Rapporteur. Eventually, adopting a draft Declaration on UCM and the rule of law and establishing an international

[530] *Ibid* at para 34.
[531] *Ibid*, also see UN Doc A/HRC/36/44 (26 July 2017), at paras. 22–24.
[532] *Ibid.*
[533] UNGAOR, Human Rights Council, 27th Sess, UN Doc A/HRC/27/L.2 (18 September 2014).
[534] UN Doc A/HRC/39/54, *supra* note 522 at para 51.

consensus on the use of the UCM are his final conclusions in his latest report to the Human Rights Council.[535]

The Special Rapporteur indicates that upon the transition period and sanctions termination, a number of universally accepted rules of behaviors must be applied.[536] Firstly, mitigating the harmful consequences of UCM upon their total removal or termination is of great importance.[537] Secondly, the transitional period (the period between renunciation of sanctions use and their removal) should be shortened to the greatest extend possible. Also, targeting states must conduct a transparent human rights impact assessment before sanction are applied during the transition period and monitor the effects of the implementations of the sanctions.[538] An effective mechanism at the national level in order to prevent human rights violations must be considered as well.[539]

6.3.2. EU's Response to UCM: Blocking Statute

The impacts of unilateral sanctions on third parties cause many obstacles for TNCs as well. As mentioned, extraterritorial or secondary sanctions are "domestic sanctions that one State requires other State(s) to also enforce against a targeted State" and their chilling effect on international businesses has been extensively discussed by the Special Rapporteur.[540] The risk of being exposed to onerous penalties by the targeting state, leads to the devastating practice of "over-compliance by third parties" as a result of their unwillingness to entertain relations with the targeted state.[541] Thus, it is more likely that additional adverse consequences for human rights arise

[535] *Ibid,* paras 50-53.
[536] *Ibid* para 13.
[537] *Ibid.*
[538] *Ibid* at para 14.
[539] *Ibid* at paras 14-19.
[540] United Nations General Assembly, 72nd Sess, UN Doc A/72/370, *Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights* (29 August 2017) at paras 33 & 59.
[541] *Ibid* at para 59.

by extraterritorial application of unilateral sanctions in comparison to other multilateral or unilateral international sanctions.[542]

To fight against the imposition of UCM, in November 1996, the EU adopted regulation No. 2271/96 in response to US implemented restrictive measures concerning Cuba, Lybia and Iran.[543] The US unilateral measures against aforementioned countries, negatively affected the interests of natural and legal persons in the EU engaging in business with those countries. Thus, when the US left the JCPOA, the European Commission launched a process to expand the scope of this regulation on May 2018 by adding to it the extraterritorial measures taken by US against Iran, in order to mitigate "the impact of these sanctions on EU operators doing legitimate business in and with Iran".[544] This regulation will provide protection against the extraterritorial application of the sanctions where they negatively affect "the interests of persons… engaging in international trade and /or the movement of capital and related commercial activities between the Community and third countries"[545]. As a result of which, individuals and entities are not to comply with any requirement or prohibition resulting from the sanctions according to article 11 of the Council regulation No. 2271/96. Likewise, judgments or decision of courts or tribunal located outside the community giving effect to the sanctions is not enforceable.[546]

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[542] *Ibid* at paras 59-60.

[543] Council Regulation (EC) No 2271/96, *protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom,* (22 November 1996).

[544]Commission Regulation (EU) 2018/1100 *amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom* (6 June 2018).

[545]European Council Regulation (EC) No 2271/96, "Blocking Regulation", requires that those affected by the US sanctions are entitled to claim damages from the US Joint Action 96/668 CFSP.

[546] See 2018/C 277 I/03 *Guidance Note on the Adoption of Update of the Blocking Statute* (7 August 2018*),* online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.CI.2018.277.01.0004.01.ENG&toc=OJ:C:2018:277I:TOC>.

However, as Special Rapporteur explains, this legislation is seemingly underutilized in practice since "the strategic importance of continued access to the US market for most affected European Union businesses" make the TNCs unwilling to risk continuing or initiating their business with the sanctioned country.[547] Thus, the protection granted under this instrument has remained to a large extent theoretical.[548] Nevertheless, many European countries including Germany, Austria and France have expressed a principled rejection of the threats of extraterritorial measures and have considered them illegal under international law on different occasions.[549]

6.3.3. Iran's Response to Sanctions

Iran has responded to the sanctions in its official communications at the UN level and has expressed its main concerns with regard to UCM. For instance, in 2014 in response to a questionnaire prepared in line with Human Rights Council Resolution 24/14[550], Iran mentioned that by negatively affecting the multilateral trading system, UCM have caused extensive human rights violations, including that of civil, political, economic, social and cultural nature, as well as the right to development.[551] They based their argument on the illegality of such measures according to UN Charter and the Vienna Declaration and Program of Action, that obliges states to

[547] UN Doc A/72/370, *supra* note 540 at para 54.
[548] *Ibid.*
[549] See Ministry of Foreign Affairs of France, "United States — adoption of sanctions (26 July 2017)". Online:<http://www.diplomatie.gouv.fr/en/country-files/united-states/ events/article/united-states-adoption-of-sanctions-26-07-17>.
[550] UN Human Rights Council, *Human rights and unilateral coercive measures: resolution / adopted by the Human Rights Council*, UN Doc A/HRC/RES/24/14 (8 October 2013). The questionnaires were prepared and disseminated to governments, special procedures of the human rights council, national human rights institutions and non-governmental organizations in line with council resolution 24/14.*online:*<https://www.ohchr.org/EN/HRBodies/HRC/AdvisoryCommittee/Pages/UnilateralCoerciveMeasures.aspx>.
[551] Iran's response to UNHRC questionnaire on the impacts of sanctions, (16 April 2014), online<https://www.ohchr.org/Documents/HRBodies/HRCouncil/AdvisoryCom/CoerciveMeasures/Iran.pdf> at 1. The rights to life, the right to an adequate standard of living, including food, clothing, housing and medical care, the

> "refrain from any unilateral measure not in accordance with international law and the charter of the UN that creates obstacles to trade relations among states and impedes the full realization of the human rights set forth in the universal declaration of human rights and international human rights instruments"[552].

Furthermore, amongst others, representatives of Iran to the UN reiterated how the principle of non-discrimination and non-interference in internal affairs of the members of the UN, as enshrined in its Charter, is undermined (UNDHR art. 3; ICCPR art. 6, para. 1; UDHR art. 25, para1; ICESCR art.11). Their response also emphasized the adverse effects of coercive measures on the job market, and rights governed by Article 6 of the ICESCR.[553] They also discussed that the primary victims of these measures in Iran are often the most vulnerable classes including women, children, the infirm and older persons as well as the poor. In questions concerning the adverse impacts of sanctions on citizens in non-targeted third states, Iran highlighted the extraterritorial effects of "trade sanctions, embargoes, boycotts and the interruption of financial flows" that is extended to third parties.[554]

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right to freedom from hunger, and the right to health are among the rights that are being violated, according to representatives of Iran.

[552] UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, article 31. *See Further* UN General Assembly, *Human rights and unilateral coercive measures*, UN Doc A/53/293 (28 August 1998).

[553] Iran's response to UNHRC questionnaire on the impacts of sanctions, *supra* note 551 at 2. To further clarify the situation, a number of examples was provided by Iran as to how sanctions have negatively affected human rights:"…sanctions often cause significant disruption in the distribution of food, pharmaceuticals and sanitation supplies, jeopardize the quality of food and the availability of clean drinking water, severely interfere with the functioning of basic health and education systems, and undermine the right to work. In addition, their consequences can include the emergence, almost invariably, of a black market and the generation of huge windfall profits for the privileges for those who manage it. while the phenomena are essentially political in nature, they also have a major additional impact on the enjoyment of economic, social, and cultural right."

[554]Iran's response to UNHRC questionnaire on the impacts of sanctions, *ibid,* at 3. "what is clear is that unilateral coercive measures encompass a range of actions, including trade embargoes, financial restrictions, acquisition of property, freezing of asset, visa restrictions, and withholding of vital medical supplies and spare parts for various machineries. The measures in question often extend extraterritorial application of domestic rules, adversely affecting the interests of third states and their nationals".

As a constant target of sanctions, Iran considers the current mechanisms of the UN ineffective and incapable in curbing the inhumane consequences of the UCM on the civilian population. They insist on a more specific and effective assessment mechanism at the UN and the Human Rights Council to ultimately prevent imposition or maintaining of UCM and proposed establishment of an independent body under the General Assembly to "consider the issue in depth from the perspective of human rights, security and the rule of law".[555] They also suggested a monitoring mechanism within the UN "to examine the legality of security Council sanctions which are issued and maintained based on chapter seven".[556] Also, the right of the victims to reparation must be guaranteed by establishment of a mechanism.

Based on responses provided by Iran, other states, inter-governmental organizations and national human rights institutions to this questionnaire that was prepared in line with HRC Resolution 24/14, a progress report (A/HRC/28/74) was finalized and submitted to the council.[557] The progress report contains a number of well-documented case studies, which include Cuba, Zimbabwe, Iran and Gaza strip, in order to highlight the foremost adverse effects of UCM on the enjoyment of human rights in target and non-targeted states.

6.3.4. Section Conclusion

To sum up, based on what we discussed in this part and the previous chapters of the thesis, whereas even the UNSC sanctions are problematic and so may create BHR issues, the imposition

[555] *Ibid*.
[556] *Ibid* at 4-5. I did not find any evidence to show this proposal has been implemented ever since.
[557] United Nations General Assembly, 28th Sess, UN Doc A/HRC/28/74, *Research-based progress report of the Human Rights Council Advisory Committee containing recommendations on mechanisms to assess the negative impact of unilateral coercive measures on the enjoyment of human rights and to promote accountability* (10 February 2015).

of UCM are even more problematic when they are imposed in violation of existing UN sanctions and so violates international law.

One way in which UCM are problematic is by applying to third states (extraterritorially) and attempts to block their applications (such as the EU Blocking Statute) are not effective. This creates many BHR issues (see previous chapter and the section below for BHR issues in the context of sanctions against Iran). But even if they are not applied to third parties, their transnational application can still create BHR issues. Nevertheless, BHR issues are worse and more complex when their unilateral application is to third parties (extraterritorially).

The responsibility for the arisen BHR issues in the context of sanctions (mostly unilateral but also multilateral) cannot be determined because of the governance gap in the existing international instruments. Nevertheless, as argued before, the human rights protection should be understood as extending transnationally and extraterritorially (UNGPs, Principles 1&2). In other words, the home state and the targeting state have respectively transnational and extraterritorial responsibilities from the human rights perspective. Businesses in turn, must be understood as having direct and independent obligations under international law instruments and the UNGPs. Thus, in the context of the sanctions against Iran, even if the targeting state (US) or the home state fails to protect BHR issues arising from the imposition of sanctions, a direct responsibility to respect human rights can be attributed to the TNCs. This can mitigate the negative impacts of the coercive measures on target state in general, and civilians and third parties in particular. Having this conclusion in mind, the section bellow will discuss the BHR applications in the context of sanctions against Iran, in more detail.

6.4. Business and Human Rights in Iran

Iran is a country with substantial oil reserves and potential for fast growth. Signing the JCPOA in 2015 and receiving sanctions relief led to investment of many TNCs in the Iranian market. Many of these corporations were western companies including automakers such as Daimler and Peugeot, locomotives maker such as Siemens and, France's Total to explore offshore natural gas.[558] Nevertheless, even though some TNCs such as General Electric and Boeing "lined up orders", other American corporations such as Chevron and Exxon Mobile were still "effectively blocked" by US sanctions.[559] The European based corporations didn't face the same restriction because of the sanction relief granted by the JCPOA.

After US departure of the JCPOA and despite EU's efforts, the serious pressure imposed by the US as well as companies fear to face penalties and secondary sanctions, led to TNCs departure to comply with the US sanctions.[560] The lack of enforcement and effectiveness of the blocking legislation by the European Corporations is noticeable in the context of UCM against Iran.[561]

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[558] Kenneth Katzman, "Iran Sanctions" CRS Report for Congress, RS20871 (Library of Congress. Congressional Research Service, 2019). Online:< https://www.hsdl.org/?view&did=827159>, at 51.

[559] Jack Ewig & Stanley Reed, "European Companies Rushed to Invest in Iran. What Now?" *New York Times* (9 May 2918) online:< https://www.nytimes.com/2018/05/09/business/iran-nuclear-trump-business-europe.html>. Targeting state may provide temporary waivers for some companies while others may remain blocked.

[560] Most of these corporations have business relations with the US and they didn't want to risk their business with it. See C/2018/5344, Section 1.5 of the Blocking Legislation's Guidance Note states that "EU operators are free to conduct their business as they see fit in accordance with EU law and national applicable laws. This means that they are free to choose whether to start working, continue, or cease business operations in Iran or Cuba, and whether to engage or not in an economic sector on the basis of their assessment of the economic situation. The purpose of the Blocking Statute is exactly to ensure that that such business decisions remain free, i.e., are not forced upon EU operators by the listed extra-territorial legislation, which the Union law does not recognize as applicable to them." *Online*:< https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:OJ.CI.2018.277.01.0004.01.ENG>.

[561] John Grayston, Founder of Grayston & Company believes: "The blocking statute is as much a political statement as a legal document. It records the fact that the EU objects to US laws being applied to actions taken in the EU". See Neil Hodge, "Dealing with US Sanctions on Iran", *International Bar Association* (29 November 2018), online: <www.ibanet.org/Article/NewDetail.aspx?ArticleUid=8E695B89-2B89-4681-A5AE-11C92B7EF008>.

Many major (non-US) TNCs operating in oil and gas industry to car manufacturers and consumer goods firms concluded that "the challenges of doing business in Iran overcome the potential business opportunities they see there".[562] Among those are Boeing, Airbus, General Electric, German state-owned rail operator Deutsche Bahn and French Oil firm Total that has exited a nearly $5 billion energy investment in South Pars gas field.[563]

6.4.1. Home State Duty to Protect in Iran: Scenarios

It was extensively discussed in the previous chapter that, as one of the fundamental pillars of the UNGPs identified by the Special Representative to the UN Secretary General on Business and Human Rights, the state duty to protect is not territorially limited, and under the international legal system, the exercise of transnational obligations is not subject to any legal constraints.[564] The state duty to protect also requires states to prevent third parties from interfering with the enjoyment of human rights. Likewise, this duty obligates home states to ensure their national companies do not infringe human rights in other countries in which they operate (host states).[565] Home-state

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[562] Hodge, *ibid.*

[563] Airbus started delivering planes to Iran before the reinstatement of US Sanctions. Almost 10% of the parts used in Airbus planes are made in the US. See Ellen Wald "8 Major Companies Still in Iran as US Sanctions Inch Closer" Forbes (07 June 2018) *online*:<https://www.forbes.com/sites/ellenrwald/2018/06/07/8-major-companies-still-in-iran-as-us-sanctions-inch-closer/#a6030db1385a>. Also, France tried to engage in dialogue with the US to press for waivers for its Companies unsuccessfully. See Jack Ewing and Stanley Reed "European Companies Rushed to Invest in Iran. Now What?" The New York Times (09 May 2018) *online:*<https://www.nytimes.com/2018/05/09/business/iran-nuclear-trump-business-europe.html>.
Understanding the cost of sanctions not only for the target states, but also for the targeting states is critical. The cost of Iran Sanctions to the US economy is estimated to be approximately $135 billion, between 1995-2012. EU, likewise, lost twice as much as the US in trade revenue as a result of sanctions, see National Iranian American Council, *Report: Iran Sanctions Cost US Economy up to $175 Billion* (Niac Press Release, 2014). Online:< https://www.niacouncil.org/report-iran-sanctions-cost-us-economy-175-billion/>.

[564] Casajuna Artacho, "Extraterritorial Dimension of the State Duty to Protect Human Rights in Relation to Business Activities" (Paper delivered at The Implementation of the UN Guiding Principles on Business and Human Rights in Spain, Seville, 4-6 November 2013), online: <www.business-humanrights.org/sites/default/files/media/documents/extraterritorial-dimension-of-state-duty-protect-human-rights-e-casajuna.pdf> at 7. Also see Sara L Seck, "Canadian Mining Internationally and the UN Guiding Principles for Business and Human Rights" (2011) 49 Can YB Intl Law 51.

[565]See Sigrun Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (Antwerpen: Intersentia-Oxford, 2006)222.

domestic measures with transnational application, perhaps is the best way to ensure duty to protect is carried out effectively.[566] This enable states to efficiently regulate the human rights standards of their TNCs. The adoption of the new law in France in 2017 to implement the duty to protect principle is the best example for a practical approach towards this issue.[567] This law that is based on the UNGPs, imposes a "duty of care" as it sets "an obligation of vigilance" on French companies.[568] Such measures will improve corporate respect for human rights and the environment by creating legally binding obligation for parent companies to "identify and prevent human rights abuses and damages to the environment resulting not only from their own activities but also from that of companies that they directly or indirectly control as well as activities of the subcontractors and suppliers with which they have an established commercial relationship both in France and in the world".[569] The established obligation of prudent and diligent conduct requires companies to submit an annual vigilance plan and an implementation report of this plan.[570]

However, the effectiveness and implementation of such domestic laws by major corporations is contested. An assessment report published by the Government of France in June 2019 shows that Total's vigilance report is too vague, with a fairly weak risk mapping which is not applied to the actual activities and countries in which the company operates.[571]

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[566] Artacho, *supra* note 564 at 7 &15.
[567] Décision no. 2017-750 DC du 23 Mars 2017 du Conseil Constitutionnel, online:<https://www.conseil-constitutionnel.fr/en/decision/2017/2017750DC.htm>. Article 1(3) states that "companies that have their registered office in France … and branches both in France and abroad are subject to an obligation to draw up an oversight plan. The oversight plan entails "reasonable oversight measures that are capable of identifying risks and preventing serious harm to rights and fundamental freedoms, the health and safety of individuals and the environment" as a result of the operations of the company". Similar legislative developments are currently being discussed in the Netherlands, Switzerland and the EU. See Swiss Responsible Business Initiative's legislative proposal online:< https://www.business-humanrights.org/en/switzerland-ngo-coalition-launches-responsible-business-initiative>.
[568]Sandra Cossart, Jerome Chaplier & Tiphaine Beau De Lomenie "The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All" (2017) 2:2 Bus & Hum Rts J 317 at 320 & 323.
[569] Les Amis de la Terre, *The Law on Duty of Vigilance of Parent and Outsourcing Companies* (Year 1: Companies Must Do Better), ed by Juliette Renaud et al (Paris: Les Amis de la Terre, 2019), online: <https://www.amisdelaterre.org/IMG/pdf/2019_collective_report_-_duty_of_vigilance_year_1.pdf> at 4.
[570] *Ibid* at 4-5.
[571] *Ibid* at 19.

As mentioned, French companies like Total and Renault are among TNCs which invested in the Iranian market post-JCPOA. Yet, irrespective of their obligation of vigilance established under their domestic laws, and the consequent direct and indirect outcomes on human rights and the environment, they left the Iranian market regardless of the negative impacts their exit left on the country. Nevertheless, given that domestic laws and regulations are unclear as to what legal risks companies may face and what economic sanctions means for them, providing businesses with more details and instruction could improve their performance in sanctions context. Thus, having such laws and regulations at the national level is just the first step and the implementation is just as important. And perhaps as stated before, an international binding treaty that comprehensively covers the issue of sanctions could better hold companies accountable for their actions.

In the context of sanctions, enhanced due diligence must be carried out to ensure business activities in sanctioned countries will not contribute or facilitate human rights abuses. Earlier in the thesis, it was argued that sanctioned states should be among the high-risk areas and UNGPs recognize the heightened risk of violating human rights in conflict-affected and high-risk areas. Even though the UNGPs do not refer to coercive measures and do not propose any specific definition for conflict-affected and high-risk areas, the Geneva Academy developed a number of criteria and indicators to identify such areas.[572] Among others, areas with "widespread and serious human rights violations" and "political/social instability or repression"[573] can be considered a high-risk and conflict -affected zone. The previous chapters of the thesis extensively discussed the negative and disastrous impacts of sanctions on target states and it can be argued that both these

[572] Geneva Academy of International Humanitarian Law and Human Rights, "Due Diligence: Defining 'Conflict-Affected' and 'High-Risk Areas'" (Concept Note for a Side Event delivered at the United Nations Forum on Business and Human Rights, Geneva, 2-4 December 2013),online:<https://www.ohchr.org/Documents/Issues/Business/ForumSession2/Events/3Dec.1.SideEventProposal_GenevaAcademy.pdf>.
[573] *Ibid.*

two indicators match the situation of sanctioned country. As a result, the importance of due diligence is the context of sanctions to fully implement UNGPs must be taken into account.

Imposing unilateral sanctions is a violation of international law. Yet, powerful states such as US maintain this habit to reach to their desired policies and objectives. Nevertheless, the classification of target states like Iran as conflict-affected areas can and should change the way in which the US determines whether or not and how to impose sanctions; Perhaps, considering effective channels that can facilitate protecting economic, social and cultural rights of the individuals and entities within or in association with the target state, and the environment, can be a decent first step by the US to meet its obligation of promoting and protecting the enjoyment and full realization of all human rights by all people under international law.

6.4.2. Business Responsibility to Respect Human Rights in Iran

"The international Campaign for Human Rights in Iran" launched the "Iran Business Responsibility Project" (IBR) in June 2017.[574] This non-profit initiative encourages and guides companies to act responsibly when doing business in Iran. The IBR aims to "foster business practices that respect people and the environment, enhancing the benefits business can bring and reducing risks for companies".[575] To achieve this purpose, the organization works closely and collaboratively with companies, governments and other stakeholders. The work of IBR is of great importance since existence of an entity that would facilitate adherence to international responsible business standards sounds quite necessary.

The organization promotes responsible business conduct through several measures. According to their mandate, they provide "in-depth expertise on business conditions and practices

[574] *Iran Business Responsibility Project,* online:<https://ibrproject.org>.
[575] *Ibid.*

in Iran", and in order to avoid adverse impacts on individuals and the environment, they engage with stakeholders to "catalyst discussion, identify salient issues, and share good practices".[576] Furthermore, to ensure corporations are not being involved in harmful impacts, they provide guidance on "specific measures and strategies companies can take in the Iranian context".[577]

So far, IBR has carried out multiple sessions and workshops with companies, industrial associations, export credit agencies, financial institutions, multilateral development organizations and also governments. Almost in all their briefings, the importance of an ongoing due diligence process for responsible business to avoid and mitigate negative impacts on people and the environment is highlighted. However, the first step of such due diligence process that is "identifying actual and potential adverse impacts from any business activity" is rather challenging due to difficulties in obtaining the necessary information to identify and assess such impacts.[578]

In one of their latest report, published on November 2018, they investigated the impact of the current political landscape -including the return of US-imposed unilateral economic sanctions- on foreign investment in Iran. As mentioned, after the return of economic sanctions, many corporations decided to exit the country while some small to medium-sized enterprises maintained their investment in Iran. This prompt exit has caused many challenges for corporations (mainly

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[576] *Ibid.* Environment is regarded as the "invisible victim of sanctions against Iran" by environmental activists and experts. Severe air pollution, water scarcity and desertification in Iran endanger people's lives as well as companies' long-term operations. See Sina Khatami, "Environment: the Invisible Victim of Sanctions against Iran." *Etemad Daily Newspaper, No. 3115*, 2014, at 13. See further, Kave Madani & Nazanin Soroush "Every breath You Take: The Environmental Consequences of Iran Sanctions" *The Guardian* (21 November 2014), *online*:<https://www.theguardian.com/world/iran-blog/2014/nov/21/iran-environmental-consequences-of-sanctions.>

[577] *Iran Business Responsibility Project, ibid.*

[578] Iran Business Responsibility, "Due Diligence for Responsible Business in Iran: Challenges and Recommendations", Briefing, January 2017, online: <https://ibrproject.org/wp-content/uploads/2018/12/briefing-2-en.pdf> at 1. For example, while many multilateral sanctions related to Iran's nuclear program is lifted, certain UN, EU and US sanctions remain (although US unilateral sanctions are also increasing on a daily basis). But the problem is that there are many obstacles to obtain information needed to know your partner and to identify whether the partner is enlisted as a sanctioned entity or not , information regarding company's ownership -whether state-owned or private- is limited or distorted and not available to public in many cases.

TNCs) as to what international responsible business standards implies. Thus, due to these numerous issues, the IBR provided some suggestions based on company practice to address the challenges that exit poses in Iran.[579] They stress that responsibly exiting the sanctioned state's market is of great importance and companies should identify, mitigate or remediate the potential adverse impact on people and the environment of their exit.[580] Apart from the major economic impacts, leaving Iran could have potential impacts on workers employed by the company, on other stakeholders and also potential environmental and social impacts "related to handing over the project or business to companies with lower internal standards".[581] To tackle these serious issues, companies can provide support for impacted workers to mitigate the impact of severance. They also should regularly communicate with relevant stakeholders to ensure timely closure. Also, by employing social and environmental expertise identifying potential social and environmental impact of leaving they could plan a safe exit strategy.[582] In geographies like Iran, where there may be "uncertainty regarding the company's ability to do business long-term in the market, planning for a responsible exit is part of a responsible entry into the market".[583]

According to international normative standards such as the UNGPs and also the OECD MNE Guidelines, business responsibility to respect human rights entails a corporation's responsibility for the adverse impacts of business activities on people and the environment. According to these instruments, corporations can contribute to adverse human rights impacts through three types of involvements: they can either cause an adverse impact through their own

[579] Iran Business Responsibility, "Conducting Responsible Business in Iran: Beyond Sanctions: Managing Risks from Business Relationships in Iran", Practice Note, November 2018, online:<https://ibrproject.org/practicenote/files/IBR_Practice_Note_Report.pdf?x60674>.
[580] Iran Business Responsibility, "Special Issue: Responsible Exit", Briefings, June 2018, online:<https://ibrproject.org/wp-content/uploads/2018/12/briefing-6-en.pdf> , at1.
[581] *Ibid* at 2.
[582] *Ibid* at 3.
[583] *Ibid* at 4.

activity or contribute to adverse impact. Or, a company can be "directly linked to an adverse impact through their operations, products or services via business relationships". This indicates that "the scope of company responsibility is broad" and it also shows that even indirect and even remote adverse human rights impacts is included in business responsibility.[584] But there is also the issue of climate change and its link to sanctions; for instance, the National Iranian Oil Company is one of top carbon majors. But how can Iran transition its economy to renewable energy when it is constantly under sanctions? As a transboundary issue, climate change is threatening the whole world and sanctions are directly contributing to it.

6.5. Conclusion

Sanctions are considered to be "economic in purpose" yet "political in intent".[585] An issue as such that is politically charged, often creates substantial legal, operational and financial risks for corporations, through imposing unjust regulatory and compliance requirements. The undeniable and disastrous impacts of coercive measures on economy and industry have been confirmed by many studies and reports.[586] The studies refer to the wide range of sanctions and measures, that have been established thorough UNSC, regional and national authorities, relating to the nuclear, missile, energy, shipping, transportation and financial sectors of Iran, by different countries.[587] Imposition of both multilateral and unilateral sanctions on Iran has caused major

[584] *Ibid*, Annex 2.
[585] Neil Hodge, "Dealing with US Sanctions on Iran", *International Bar Association* (29 November 2018), online: < www.ibanet.org/Article/NewDetail.aspx?ArticleUid=8E695B89-2B89-4681-A5AE-11C92B7EF008>.
[586] See UN Human Rights Council, UN Doc A/HRC/28/74 (10 February 2015) *Research-based progress report of the Human Rights Council Advisory Committee containing recommendations on mechanisms to assess the negative impact of unilateral coercive measures on the enjoyment of human rights and to promote accountability*, also see International Civil Society Network, "What the Women Say: Killing Them Softly: the Stark Impact of Sanctions on the Lives of Ordinary Iranians", Brief 3, July 2012.
[587] In particular, depriving Iran of SWIFT services has made international payments to Western companies almost impossible. See International Crisis Group, *supra* note 20 at 34 & 52.

issues, and even though the US and the EU claim "that the sanctions do not apply to humanitarian items", in actual fact they have major impacts on e.g. delivery and availability of medical supplies that often leads to the death of the patient, because of complications to perform financial transactions due to blockades.[588]

In order to discuss the BHR in Iran, it is important to analyse the impact of coercive measures (mostly economic sanctions) on foreign business entities and laws and regulation that influence these foreign relations. The many embargoes that have been placed on Iran or the many TNCs that are barred from doing business with Iran, certainly must be considered before investigating BHR in Iran. Even though the sanction relief for a short time after setting up JCPOA brought about economic growth, various restrictions still remain in place that are of greatly destructive. Iran has a considerable natural and human resources and doing business with a country with these characteristics, could definitely be mutually beneficial for both Iran and international enterprises. Whether or not it is still possible to enter into business relationship with Iran despite the current sanctions' regimes, does not sound that likely given the fact that the risks of such business relation overweigh its advantages, given the penalties corporations will encounter by the US.

All in all, after investigating the home state duty to protect and business responsibility to respect in the context of a sanctioned country like Iran, perhaps the best way to curb the negative impacts of sanctions on BHR is modelling on the 2017 French law and establishment of the obligation of care, prudent and diligent conduct with transnational applicational. Naturally, an

[588] See Tamara Qiblawi, Fredrik Pleitgen & Claudia Otto, "Iranians Are Paying for US Sanctions with their Health", (22 February 2019) *CNN, online:*<https://www.cnn.com/2019/02/22/middleeast/iran-medical-shortages-intl/index.html>. Also see CBS News, "U.S. Sanctions Leave Iranians Without Life-saving Medicines as Their Economy Tumbles" *CBS* (July 30, 2019), online:< https://www.cbsnews.com/news/iran-iranian-people-hurt-by-united-states-donald-trump-sanctions-citizens-struggle-afford-medical-care/>.

effective implementation of such laws could mitigate the impacts of extraterritorial sanctions on BHR of the target state. Likewise, the targeting state's extraterritorial human rights obligations should not be overlooked. In case both home state and the targeting state fail to protect BHR, based on UNGPs, businesses have direct obligations to respect human rights. All this being said, in the context of sanctions, evidently politics and power prevails over international law!

Chapter VII Conclusion

In recent years, many academics and politicians are inclined to refer to sanctions as tools of "economic warfare" rather than tools of "foreign policy".[589] The widespread use of sanctions is not limited to the multilateral level (UN); Regional (in particular, EU) and unilateral imposition of sanctions has also been practiced widely. There has also been a drastic change in the nature of the imposed measures: "Comprehensive" sanctions have mostly turned to "targeted" or "smart" sanctions that encompass asset freezes or travel bans with regard to individuals and prohibit particular activities such as arm embargoes and export bans when directed at entities.[590]

The continuing challenges and criticisms encountered by the imposition of sanctions, have not been limited to certain type of UNSC sanctions or the UCM. Sanctions' legal basis and their conformity with international law has always been contested. The UNSC, for example, imposes sanctions based on undisclosed evidence and no judicial review is available for those measures. Furthermore, the entities and individuals subject to the UN sanctions are said to be reduced to "conditions of indigency".[591] Thus, even though UN Charter VII authorizes the imposition of sanctions, the process of such measures is deeply criticized. Similarly, unilateral sanctions and their extraterritorial application are not only unlawful, but also violate the rights of the sanctioned state including their sovereign rights.

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[589] Iran's Foreign Minister has repeatedly referred to economic sanctions as economic warfare. For e.g. see David Cortright "Risk of Shooting War with Iran Grows After Decades of Economic Warfare by the US" *PRI* (24 June 2019) online:<https://www.pri.org/stories/2019-06-24/risk-shooting-war-iran-grows-after-decades-economic-warfare-us>. See generally V Lowe and A Tzanakopoulos, 'Economic Warfare' in *Max Planck Encyclopedia of Public International Law* online edn (last updated March 2013). Also see S Neff, "Boycott and the Law of Nations: Economic Warfare and Modern International law in Historical Perspective" (1988) 59 *British Yearbook of International Law* 113. Also see Matthew Happold, "Economic Sanctions and International Law: An Introduction" in Matthew Happold and Paul Eden (eds), *Economic Sanctions and International Law*, (Hart Publishing, 2016), at 1.

[590] Happold, *ibid.*

[591] *Ibid.*

Perhaps as discussed earlier in the thesis, the prominent problem with the economic sanctions, in particular, is the lack of a universally accepted mechanism or an authoritative international body in international law to investigate the lawfulness of these types of sanctions specially when they are derived from a unilateral act of a state.[592] Additionally, in most cases, the collateral damages they leave on innocent civilians, the environment and third parties are costly, long-lasting and irreversible. In other words, as "means of political and economic coercion against developing countries",they not only target vulnerable economies, but also the burden of the sanctions are to be bear by the most vulnerable group of people, the environment and the uninvolved states.[593] With regard to the collateral damages of the coercive measures on the environment, in an article written by Kaveh Madani, he refers to the negative impacts of the sanctions on the environment due to the alternative survival means targeted country has to find, that will ultimately have devastating environmental consequences.[594] The impact of sanctions on the environment, a critical yet overlooked issue with transnational impacts beyond borders, is a subject that must be investigated in future by academics.

The main focus of this thesis remained on BHR in the context of sanctions. In order to answer the central question of the thesis as whether the state duty to protect human rights as found in the international normative standards is relevant when a home state impose sanctions either transnationally or extraterritorially on TNCs with a different home state. We also investigated whether the corporation can comply with its responsibility to respect human rights in light of the

[592] *Ibid,* Also see Jana Ilieva,et al. "Economic Sanctions in International Law" (2018) 9:2 UTMS J Economics 201.
[593]UN General Assembly, *Unilateral economic measures as a means of political and economic coercion against developing countries: resolution / adopted by the General Assembly*, UN Doc A/RES/68/200 (15 January 2014).
[594] Kave Madani & Nazanin Soroush "Every breath You Take: The Environmental Consequences of Iran Sanctions" *The Guardian* (21 November 2014) *online*:<https://www.theguardian.com/world/iran-blog/2014/nov/21/iran-environmental-consequences-of-sanctions>. Also see Sophie Arie, "Unintended Consequences of Sanctions against Iran" (2013) 347:7919 BMJ: British Medical J 18. And see Sina Khatami, "Environment: the Invisible Victim of Sanctions against Iran" 3115 Etemad Daily Newspaper (2014) at 13.

sanctions. To answer these questions, we examined BHR international normative standards such as UNGPs and OECD MNEs Guidelines to realize whether coercive measures have received any consideration.

This thesis identified a considerable gap in international law materials covering BHR in the context of sanctions. Unfortunately, no reference is made to the UCM or even UNSC sanctions in BHR normative standards and those materials that discuss multilateral economic sanctions, mostly concentrate on the compliance of businesses while the negative impacts of multilateral and unilateral sanctions on the corporations and the resulting human rights violations is rarely discussed.

With regard to state duty to protect and its jurisdictional scope, throughout the thesis we distinguished between "transnational" and "extraterritorial" obligations of states. As the human rights protections should be understood as extending transnationally, it was concluded that home state and the targeting state have respectively transnational and extraterritorial responsibilities from the human rights perspective grounded on UNGPs Guiding Principle 1 and Guiding Principle 2. Thus, while applying domestic regulations to corporations with different nationalities as that of home states is extraterritorial and is not allowed under the principles of international law, states can apply their laws transnationally to a corporate national with a branch in another state. The recent example of France's vigilance law imposed transnationally on all its corporation was proposed as a good example of application of such laws.

It was also argued that given the disastrous impacts of sanctions and ineffectiveness of exemptions provided under the sanctions regime for necessities such as food, medicine and medical technology, categorizing the sanctioned country among the conflict-affected and high-risk areas (as reflected in Guiding Principle 7 and Commentary to Guiding Principle 23) could mitigate

the devastating negative impacts of sanctions through the special due diligence process required in such complex contexts.

Chapter 4 and 5 concluded that addressing sanctions in BHR can fill in the existing governance gap. Promoting soft guidance tools that can be promoted through OECD National Contact Point mechanism is a good first step, given the fact that Zero Draft does not include any reference to this issue (and it has not become a treaty yet). The unique nature of OECD mechanisms obliges states to promote them in order to prevent the negative impacts of transnational and extraterritorial sanctions. Also, it was recommended that given that sanctions issues aren't closely addressed in home state materials, maybe by allocating direct obligation for TNCs, the issue can become less challenging. Similarly, it was concluded that in order to cover the existing gap in the laws and regulations and the company's compliance in the context of sanctions, the differentiation between the UNSC sanctions and the unilateral sanctions as well as an elaborations on company's responsibilities in the sanction context could be considered enlightening and helpful in better implementing the responsibility to respect principle.

We further discussed the importance of promotion of international cooperation that needs to go hand in hand with state duty to protect as highlighted in Principle 10/c to solve this issue. Unfortunately, the UNGPs fail to mention that factors such as the geopolitical situation of the developing states, conflict-affected areas, or the mere presence of sanctions could diminish the ability of states to establish an effective duty to protect.

The last chapter of the thesis examined the case of Iran and the complications arising from exiting TNCs and resulting human rights violations and hardships inflicted upon Iranians as a result of years of being targeted by multilateral and unilateral sanctions. The ultimate purpose of this section of the thesis was to realize what lessons could be learned and what policy

considerations must be taken into account in the context of sanctions and BHR in order to fill in the governance gap in BHR materials to protect people, environment and the businesses. Studying the case of Iran enlightened us that the lack of relevant regulations, policies and laws could cost people violation of their basic rights. With the absence of a caring domestic government and silence of the international law, what should people resort to?

Finally, international arena is not a one man show. All parts of the equation including the international community, home states, the targeting states and the TNCs must cooperate to protect human rights by filling the current gap in BHR in the context of sanctions.

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