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SIDESTEPPING THE SECURITY COUNCIL: THE USE OF NON-UN SANCTIONS FOR UN PURPOSES

BY

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ABSTRACT

States display an increased tendency to impose unilateral measures, also called non-UN sanctions. This could be seen as circumventing the Security Council. This article analyses this practice and inquires how it relates to other instances where the Security Council could be regarded as being sidestepped. Differentiating between various institutional and substantive settings in which sidestepping possibly takes place, the article offers a broader lens to appreciate the use of non-UN sanctions. The article subsequently distinguishes between different scenarios in which non-UN sanctions are applied. It finds that discussions on the legality of non-UN sanctions may have different accents in the different scenarios and it explores the frontiers between UN sanctions and non-UN sanctions. The article concludes with an outlook on future uses of non-UN sanctions and suggests the introduction of a reporting requirement for non-UN sanctions analogous to the requirement of Article 51 of the UN Charter in the context of self-defence.

RÉSUMÉ

Les États font preuve d'une tendance croissante à imposer des sanctions unilatérales, également appelées des « sanctions non-ONUsiennes ». Une telle pratique pourrait être perçue comme contournant le Conseil de sécurité. L'article présent analyse cette pratique et demande comment elle peut être comparée à d'autres pratiques qui pourraient contourner le Conseil de sécurité. L'article fait la distinction entre divers cadres institutionnels et substantiels dans lesquels des pratiques de contournement peuvent avoir lieu et ce faisant propose une perspective plus vaste afin d'évaluer l'adoption de « sanctions non-ONUsiennes ». L'article met également en avant les différents scénarios dans lesquels les « sanctions non-ONUsiennes » sont adoptées. Il semblerait que les discussions sur la légalité des « sanctions non-ONUsiennes » peuvent être plus ou moins précises en fonctions des

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scénarios et analysent les frontières entre les sanctions de l'ONU et les « sanctions non-ONUsiennes ». L'article conclut avec une perspective d'utilisations futures des « sanctions non-ONUsiennes » et propose la mise en œuvre d'un critère de reportage pour les « sanctions non-ONUsiennes » qui serait analogue à la prescription de l'article 51 de la Charte des NU dans le cadre de la légitime défense.

I. — INTRODUCTION

Non-UN sanctions are unilateral or autonomous measures that are not authorized by the UN Security Council. These measures may include both economic sanctions of a general nature as well as targeted sanctions against specific natural and legal persons. The adoption of unilateral or autonomous measures has increased significantly since the beginning of this century. The US and the EU in particular are very active players in the sanctions scene with great keenness for the imposition of sanctions. Such unilateral sanctions are foreign policy tools and as such they can also be used to further goals that align with the UN purposes articulated in Article 1 of the UN Charter. (1) Examples abound, and among the most notable are the sanctions imposed by a great number of countries as well as the EU against Russia following Moscow's annexation of Crimea in 2014 and its destabilizing role in Ukraine more generally, (2) and sanctions by the US, Canada and the EU, *inter alia*, against Syrian leadership, also in response to the use of chemical weapons. (3) In addition, various States are adopting "Magnitsky-style" sanctions laws modeled on the US Global Magnitsky sanctions. (4) These laws enable visa

(1) Article 1 of the UN Charter reads: "The Purposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; 3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and 4. To be a center for harmonizing the actions of nations in the attainment of these common ends."

(2) Council Decision 2014/145/CFSP, 17 March 2014, *OJ* 2014 L 78/16, 17 March 2014, Council Regulation (EU) No. 269/2014, 17 March 2014 and Council Decision 2014/512/CFSP, 31 July 2014, *OJ* 2014 L 229/13, 31 July 2014, Council Regulation (EU) No. 883/2014, *OJ* 2014 L 229/1, 31 July 2014. Most recently extended on 21 December 2017.

(3) See for concrete references and more generally on the International Working Group on Sanctions that aimed at achieving greater effectiveness of the combined unilateral restrictive measures in force, M. DAWIDOWICZ, *Third-Party Countermeasures in International Law*, Cambridge, Cambridge University Press, 2017, pp. 220-231.

(4) Sergei Magnitsky Rule of Law Accountability Act of 2012, Public Law 112-208, extended to have global reach with the Global Magnitsky Human Rights Accountability Act, Public Law 114-328. See for an analysis, the contribution of Tom RUYs in this issue.

bans and asset freezes against foreign persons involved in corruption, money laundering or human rights violations. (5)

As appetite for new UN sanctions is not always shared by all Security Council members, and as the use of the veto is on the rise again, recourse to unilateral sanctions is bound to further increase. This article examines the use of non-UN sanctions and inquires how this practice relates to other instances where the Security Council could be said to be sidestepped, beyond the sanctions domain. Such differentiation between various institutional and substantive settings in which sidestepping takes place may offer a broader lens to appreciate the use of non-UN sanctions and how it affects the position of the Security Council.

In this vein, Section 1 contrasts the notion of sidestepping with the concept of “institutional bypass” and proposes a loose notion of sidestepping. Section 2 maps some examples of “sidestepping” the Security Council. This mapping exercise differentiates between the various institutional settings in which sidestepping takes place and it sets out different visions on how this affects the position of Security Council. As such, the mapping may offer a broader lens to appreciate the use of non-UN sanctions. Subsequently, section 3 distinguishes between different scenarios in which non-UN sanctions are applied. It finds that discussions on the legality of non-UN sanctions may have different accents in the different scenarios and explores the frontiers between UN sanctions and non-UN sanctions. Section 4 concludes with an appreciation of the distinct examples of sidestepping and it offers an outlook on future uses of non-UN sanctions. It also suggests the introduction of a reporting requirement for non-UN sanctions analogous to the requirement of Article 51 of the UN Charter in the context of self-defence.

II. — THE NOTION OF SIDESTEPPING

The notion of sidestepping could be said to have synergies with the concept of “institutional bypass”. (6) Institutional bypassing concerns the creation of a “parallel institution that performs exactly the same function as the

(5) States and organizations that have passed similar bills include European Parliament Recommendation to the Council of 2 April 2014 on establishing common visa restrictions for Russian officials involved in the *Sergey Magnitsky* case (2014/2016(INI)), OJ C 408, 30 November 2017, p. 43-45, Notice No. 2017/C 408/06; Estonia, Act on Amendments to the Obligation to Leave and Prohibition on Entry Act, 262 SE, 8 December 2016; Lithuania, LIETUVOS RESPUBLIKOS ĮSTATYMO DĖL UŽSIENIEČIŲ TEISINĖS PADĖTIES NR. IX-2206, 133 STRAIPSNIŲ PAKEITIMO ĮSTATYMAS, 14 April 2017; Canada with the Justice for Victims of Corrupt Foreign Officials Act (Sergey Magnitsky Law), S.C. 2017, c. 21, assented to 18 October 2017; UK Magnitsky Asset Freezing Legislation approved by UK House of Lords in second reading on 28 March 2017.

(6) M. MOTA PRADO and S. J. HOFFMAN, “The Concept of International Institutional Bypass”, *American Journal of International Law Unbound*, Vol. 111, 2017, pp. 231-235.

dysfunctional institution". (7) This concept has been used as an analytical tool for looking at institutional reform at the domestic level. While transposing the concept to the international level, it has been observed that in the international institutional scene bypassing may well be the norm rather than the exception given the organic way in which international life became institutionalized, resulting in considerable institutional overlap. (8) Being specifically designed to confront questions of institutional proliferation and duplication, the concept of international institutional bypassing thus complements existing notions of fragmentation, pluralism, regime shifting, forum shopping and regime complexity. (9) The specific feature of institutional bypassing is that it aims to understand institutional change through a focus on the relationship between a deficient dominant institution and the bypasser, thus assuming dysfunction. (10) The notion of sidestepping corresponds to the logic of bypassing in its relational focus between institutions and regimes. Yet, it is used in this article in a less linear and directional fashion. While bypassing implies a shared focal point between the respective institutions, the dynamics of sidestepping may be more haphazard in nature. Moreover, the concept of institutional bypass hinges on the perceived dysfunction of the dominant institution, while sidestepping, as used here, is more neutral in its appreciation of the performance of each institution or actor and less focused on reform as outcome.

Against the background of such a looser notion, the next section explores various examples of in a Chapter VII context in which the Security Council could be said to be sidestepped. As is well known, the Security Council bears *primary* responsibility for the maintenance of international peace and security pursuant to Article 24 of the UN Charter, but obviously other actors complement the Security Council and they may also take competing or corrective action. All exercises — those of complementary as well as competing and corrective nature — can potentially be seen as a form of sidestepping. While definitely not a new phenomenon, Section 2 presents some more recent examples of sidestepping the Security Council, which occur on an *ad hoc* basis (Syria Investigative Mechanism) as well as through institutional arrangements (ICC Kampala Amendments) and are witnessed in the context of forcible and non-forcible measures.

(7) M. MOTA PRADO and S. J. HOFFMAN, "Introduction to Symposium on International Institutional Bypass", *American Journal of International Law Unbound*, Vol. 111, 2017, pp. 229-230.

(8) *Ibid.*

(9) *Ibid.*

(10) MOTA PRADO and HOFFMAN, *supra* note 6, p. 232.

III. — DISTINCT EXAMPLES OF SIDESTEPPING THE SECURITY COUNCIL

The Security Council has the authority to impose forcible and non-forcible coercive measures with a view to addressing threats to peace, and to thus exercise its primary responsibility to maintain peace and security. The Council does not have across-the-board enforcement authority for any violation of international law. (11) While foreseeing a central role for the Security Council in matters of peace and security, the UN Charter does not foreclose sidestepping per se. The International Court of Justice and the General Assembly have their own responsibilities under the UN Charter, even if Article 12 of the UN Charter institutes a hierarchy of responsibilities between the Security Council and the General Assembly. In addition, the legal institution of state responsibility also offers grounds for states to react to violations of international law, and thus to sidestep unilaterally. (12) Hence, possibilities for sidestepping emerge in the dynamic between the Security Council prerogatives *versus* other primary organs, between Security Council prerogatives under the system of collective security *versus* the rights of States to take measures under general international law, and between the Security Council and other international organizations.

The dynamics of sidestepping may differ in case of forcible *versus* non-forcible coercive measures, given dissimilarities in the legal architecture. In relation to the authorization of military measures, the primacy of the Security Council's responsibility to maintain peace has been translated in unique powers, meant to reduce the space for sidestepping. Nonetheless, discussions on how special the position of the Security Council precisely is, even in this context, are as old as the UN Charter. In any event, while the Security Council has the exclusive power to authorize the use of force, there is much less exclusivity in the realm of non-forcible measures, thus leaving more room for sidestepping. (13) Coercive non-forcible measures can be imposed by the Security Council on the basis of Article 41 of the UN Charter. This provision grants the Security Council the power to decide what measures not involving the use of armed force are to be employed to give effect to its decisions. Some examples of non-forcible measures are given in Article 41 through a non-exhaustive list, yet the types of non-forcible measures that the

(11) L. F. DAMROSCH, *Enforcing international law through non-forcible measures*, Recueil des Cours, Martinus Nijhoff, 1998, p. 105.

(12) The system of collective security and the institution of state responsibility may interact and overlap, but they respond to a different logic. V. GOWLLAND-DEBBAS, "UN Sanctions and International Law — An Overview", in V. GOWLLAND-DEBBAS (ed.), *United Nations Sanctions and International Law*, Kluwer, 2001, pp. 1-28.

(13) M. SOSSAI, "UN sanctions and regional organizations: an analytical framework", in L. VAN DEN HERIK, *Research Handbook on UN Sanctions and International Law*, Elgar, 2017, p. 413 and further references there.

Security Council imposes under Chapter VII have diversified over time. (14) Newer types include accountability measures, such as the establishment of *ad hoc* Tribunals and ICC referrals. The more traditional Article 41-measures are UN sanctions, although these have also been modernized through the advent of targeted sanctions. Concrete instances of sidestepping non-forcible Chapter VII-measures may regard both newer as well as the more traditional non-forcible measures. In the sub-sections below, three recent examples of sidestepping the Council's powers under Chapter VII are explored in turn.

1. — *Inter-institutional sidestepping: The ICC legal framework on aggression*

The first example concerns inter-institutional sidestepping by the ICC, specifically in relation to the authority to make a determination of aggression.

The Security Council's generic mandate to maintain and restore international peace and security has been translated in Article 39 of the UN Charter into a specific power to determine acts of aggression. The concept of aggression was not defined in the UN Charter so as not to encroach upon the Council's discretion. In 1974, the General Assembly adopted the famous Resolution 3314 which offers a definition of aggression, while also underscoring the Security Council's powers and prerogatives. (15) The International Court of Justice has autonomous responsibilities, but as is well known, it has generally displayed reservation vis-à-vis the Security Council as well as towards use of the word "aggression". (16) In this setting, discussions on the crime of aggression in the context of negotiations for an International Criminal Court first led to only *conditional* inclusion of this crime in the Statute. Article 5, para. 2 subjected the exercise of jurisdiction over aggression to future provisions on definition and trigger mechanisms, while explicitly stating that such future provisions ought to be consistent with the UN Charter. In a Special Working Group of the ICC Assembly of State Parties negotiations were continued and eventually consensus was reached at the Kampala Review Conference in 2010. The complicated architecture that was the outcome of the consensus

(14) N. KRISCH, "Article 41", in B. SIMMA *et al.*, *The Charter of the United Nations, A Commentary*, 3rd ed., Vol. II, Oxford University Press, 2012, pp. 1305-1329.

(15) Article 2 reads, "The First use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity." And Article 4 reads, "The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter."

(16) As also noted here, ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgement of 19 December 2005, Separate Opinion of Judge Simma, paras. 2 and 3.

is laid down in Article 8*bis* concerning the definition, and Articles 15*bis* and *ter* regulating exercise of jurisdiction. The latter provisions are specifically relevant for discussions on sidestepping and broader dynamics between the Security Council and the ICC.

One of the most crucial outcomes of Kampala concerned the role of the Security Council in determining aggression. While paying tribute to the Security Council's prerogatives, the Kampala scheme interferes with the idea, entertained by some, of Security Council monopoly on aggression proceedings.⁽¹⁷⁾ Although Article 15*ter* of the ICC Statute subjects the exercise of jurisdiction to a Security Council referral, thus largely respecting Security Council prerogatives, Article 15*bis* opens up the possibility that also state referral and *proprio motu* action by the Prosecutor can trigger aggression proceedings. The reach of Article 15*bis* is limited through the exclusion of non-State parties in para. 5, and an opt-out clause for State parties in para. 4. Furthermore, Article 15*bis*, para. 6 stipulates that when the ICC Prosecutor concludes that there is reasonable basis to proceed with an investigation in respect of a crime of aggression, she or he shall first ascertain whether the Security Council has made a determination and shall also notify the UN Secretary-General. When no Security Council determination is made before or within six months of the notification, the Prosecutor needs authorization for the commencement of investigation in respect of a crime of aggression, as per Article 15*bis*, paras. 7 and 8. Final counterbalancing elements that were added to make the proposal as such palatable, specifically for the P5, included an explicit reference to the Security Council's powers under Article 16 of the ICC Statute to defer proceedings, the requirement that the entire Pre-Trial Division grants authorization to proceed with aggression investigations rather than only a Pre-Trial Chamber,⁽¹⁸⁾ and delaying of the exercise of jurisdiction over aggression until at least 2017, while also subjecting it to another explicit activation decision by the Assembly of States Parties.⁽¹⁹⁾ Despite these counterbalancing elements, the permanent members of the Security Council were united in their position that the Kampala arrangements contravened the UN Charter and the Security Council's powers in relation to the maintenance of peace and security, and specifically the authority

(17) See for a short discussion (and rejection) and further references, T. RUYS, "Office of the Prosecutor (OTP) investigations into crimes of aggression should not depend on a green light from the UN Security Council. The OTP should, however, be careful not to exercise its competence in such a way as to undermine the legal framework governing the use of force", Invited Experts on Aggression Question, ICC Forum.

(18) The implications of attributing judicial functions to the Pre-Trial Division, which was effectively an administrative unit, are analysed in E. CHAITIDOU, F. ECKELMANS and B. ROCHE, "The Judicial Function of the Pre-Trial Division", in C. KRESS and S. BARRIGA (eds), *Crime of Aggression Library *** The Crime of Aggression: A Commentary*, Vol. 1 & 2, Cambridge University Press, 2017, Chapter 22.

(19) S. BARRIGA and N. BLOKKER, "Entry into Force and Conditions for the Exercise of Jurisdiction: Cross-Cutting Issue", in KRESS and BARRIGA (eds), *supra* note 18, pp. 626-627.

to make a determination on the existence of an act of aggression. (20) This P5 position was eventually a minority view, and as such the Kampala outcome tones down ideas of Security Council monopoly and it could thus be seen as offering further possibilities for sidestepping. On 14 December 2017, it was decided by the ICC Assembly of States Parties that the ICC's jurisdiction over aggression would be activated as per 17 July 2018. (21)

The extent and modalities of sidestepping and whether this will occur at all remains to be seen. The potential dynamic between the Security Council and the ICC is on the one hand animated by Article 2 of the Relationship Agreement which prescribes that the United Nations and the ICC will respect each other's status and mandate and that they shall cooperate closely whenever appropriate. (22) On the other hand, the so-called "without prejudice"-clause of Article 15*bis* and *ter* demarcates the terrain of each institution as it stipulates that "a determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute." This provision underscores the Security Council's discretion to make findings of aggression that go beyond the ICC definition, while also protecting the rights of the accused before the ICC as laid down in Articles 66 and 67 of the Statute ensuring that accused persons cannot be confronted with determinations that they cannot contest. As each institution operates in accordance with its own mandate and institutional framework, there is a host of scenarios that can be envisaged where the respective institutions may hold divergent views. The exact dynamics of this interplay will differ per situation, but the general possibility of ICC jurisdiction over aggression now looms over the Security Council and this in itself might have a certain disciplining effect, or, as has been argued elsewhere, it may engender a more "articulate approach" by the Security Council to avoid unintended interpretations allowing ICC intervention. (23)

(20) 2010 Resolution on the Crime of Aggression, RC/Res.6, 11 June 2010, in *Review Conference Official Records*, RC/11, at 122-127.

(21) ICC-ASP/16/L-10, 14 December 2017. Importantly, para. 2 delineated the scope of the decision, stating, "that, in accordance with the Rome Statute, the amendments to the Statute regarding the crime of aggression adopted at the Kampala Review Conference enter into force for those States Parties which have accepted the amendments one year after the deposit of their instruments of ratification or acceptance and that in the case of a State referral or *proprio motu* investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments;" See further D. AKANDE, "The International Criminal Court Gets Jurisdiction Over the Crime of Aggression", *EJIL:Talk!*, 15 December 2017.

(22) Articles 2 and 3 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations.

(23) N. STRAPATSAS, "The Practice of the Security Council Regarding the Concept of Aggression", in KRESS and BARRIGA (eds), *supra* note 18, pp. 178-213.

2. — *Decentralized sidestepping: the exercise of self-defence*

Article 51 of the UN Charter can also be said to constitute an inroad into the system of collective security as it preserves the inherent right of self-defence for individual states or a group of states. The second example thus concerns a form of decentralized sidestepping by individual states, exercising their inherent right to self-defence. Together with Security Council authorization, the right to self-defence is the only Charter-based exception to the prohibition on the use of force. As per Article 51, States have the inherent right to defend themselves, “until the Security Council has taken measures necessary to maintain international peace and security”. Article 51 also adds that “measures taken by Members in the exercise of this right of self-defence shall [...] not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.” The interrelationship between the two grounds justifying the use of force — Security Council authorization and the inherent right to self-defence — is also regulated by the reporting requirement in Article 51. Article 51 prescribes that states acting in self-defence must report their actions immediately to the Security Council. In theory therefore, the reporting requirement fully preserves Security Council prerogatives and it could be argued that the right to self-defence is to some extent “subjected” to Security Council action in a procedural and substantive sense. (24) The reporting requirement enables the Security Council to assess the legality of the self-defence action. Yet, the prevailing view is also that failure to report does not invalidate the inherent right to self-defence as such. (25)

The balance between the two Charter-based justifications in practice deviates from the Charter theory. While self-defence could be considered as the exception that is to some extent “subjected” to Security Council action in theory, in practice the invocation of self-defence is more prevalent than Security Council authorization. (26) Moreover, even though the reporting require-

(24) The exact relationship between the inherent right to self-defence and Security Council measures under Chapter VII remains disputed, particularly the question whether the Security Council can abrogate an inherent right, see further N. KRISCH, *Selbstverteidigung und kollektive Sicherheit*, Springer, 2001. Also see C. KRESS, “The State Conduct Element”, in KRESS and BARRIGA (eds), *supra* note 18, Chapter 14.

(25) For an analysis on the status of the reporting obligation, see further Y. DINSTEIN, *War, Aggression and Self-Defence*, 5th ed., Cambridge University Press, 2011, pp. 239-241, with reference also to the ICJ’s statement in the *Nicaragua Judgement* that, “the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence.” ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua, Nicaragua versus United States of America*, Judgement of 27 June 1986, para. 200. Also see J.A. GREEN, “The Article 51 Reporting Requirement for Self-Defense Actions”, *Virginia Journal of International Law*, Vol. 55, 2015, pp. 563-624.

(26) C. TAMS, “The Use of Force Against Terrorists”, *European Journal of International Law*, Vol. 20, 2009, pp. 359-397, pp. 365-367.

ment is nominally adhered to, Article 51-reports are generally framed as mere notifications thereby limiting any outside scrutiny over lawfulness and in particular respect of the principles of proportionality and necessity. Self-defence as such can thus also be seen as an opportunity in itself to sidestep the system of collective security and to avoid any outside scrutiny. In principle, the Security Council could thwart this escape route by adopting a resolution under Chapter VII either explicitly endorsing the action or putting it to halt, (27) but it may not always have an interest in doing so. Resolution 2249, through which the Security Council legitimized but did not authorize the use of force against IS, is the perfect example of the Council's ambivalence in this regard. (28) Hence, from a systemic perspective, the more important question is to what extent sidestepping the system of collective security can still be governed by a rule of law paradigm and/or some form of monitoring. In this respect, it has been suggested that the reporting requirement offers some openings. (29) Indeed, there may be merit in insisting that the reporting requirement goes beyond demanding mere notification and that States are also expected to make formal articulations on the scope of self-defence in concrete situations of a more substantive nature. In this vein, States should be encouraged more explicitly to make an effort to substantiate claims of self-defence, both legally and factually, so as to demarcate boundaries. Somewhat analogous to the sophisticated architecture that has been designed in past decades in UN sanctions and in a counter-terrorism context, some thinking may go into the creation of platforms at Security Council level that offer a more elaborate institutional environment to evaluate claims of self-defence and monitor its execution, thereby controlling the sidestepping exercise.

3. — *Intra-institutional sidestepping: The Syria Investigative Mechanism*

The third and final example concerns a case of intra-institutional sidestepping by the General Assembly, specifically through the creation of the Syria Investigative Mechanism.

The Mechanism was established by the General Assembly (GA) on 21 December 2016 against the backdrop of a divided Security Council. Several draft resolutions proposing a variety of measures had been vetoed over the years by Russia occasionally joined by China. Among those drafts was

(27) The position that the Security Council can do so is not undisputed given that self-defence is an inherent right, see for references C. KRESS, "The State Conduct Element", in KRESS and BARRIGA (eds), *supra* note 18, Chapter 14.

(28) *UN Doc. S/RES/2249*, 20 November 2015. See further D. AKANDE and M. MILANOVIC, "The Constructive Ambiguity of the Security Council's ISIS Resolution", *EJIL: Talk!*, 21 November 2015.

(29) L. VAN DEN HERIK, "Proceduralizing Article 51", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 77, 2017, pp. 65-67.

also a French proposal in 2014 calling for a referral of the situation in Syria to the ICC. (30) Subsequently, it was submitted that the General Assembly had to take ownership in light of the Security Council's failure to act. (31) Indeed, GA Resolution 71/248 establishing the Mechanism noted "the repeated encouragement by the Secretary-General and the High Commissioner for Human Rights for the Security Council to refer the situation in the Syrian Arab Republic to the International Criminal Court". (32) It thus also hinted at the absence of accountability measures taken by the Security Council. In this sense, the General Assembly's creation can be seen as a corrective, or, as has also been suggested, a temporary Band-aid to preserve the possibility of future trials. (33) However, acknowledging that the General Assembly did not have the power to enact an ICC referral or establish an *ad hoc* Tribunal, a different path was pursued in the form of the Mechanism. (34)

The full name of the Syria Investigative Mechanism is: International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011. The tasks assigned to the Mechanism are twofold, namely (i) to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses in Syria, and (ii) to prepare files in order to facilitate and expedite fair and independent criminal proceedings. (35) To some extent replicating the UNWCC, (36) at its core the Syria Mechanism is supposed to function as a crossroads, collecting information and documentation from different fact-finders on the one hand while storing and preparing it with a view to passing it on to criminal jurisdictions on the other. It is thus a fundamentally different creature than the *ad hoc* Tribunals or the ICC.

States voting against or abstaining from the vote on the GA resolution presented a variety of reasons for the absence of their support. Some states countered the suggestion that the Resolution was the product of open consultations and critiqued what they viewed as a hasty and non-transparent procedure. (37) Arguments of a more political and strategic character concerned the potentially negative impact of the Resolution on the peace pro-

(30) *UN Doc. S/2014/348, S/PV.7180*, 22 May 2014.

(31) *UN Doc. A/71/PV.66*, at 19.

(32) *UN Doc. A/RES/71/248*, 11 January 2017, 9th preambular paragraph.

(33) Cf. A. WHITING, "An Investigation Mechanism for Syria; The General Assembly Steps into the Breach", *Journal of International Criminal Justice*, Vol. 15, 2017, pp. 231-237, p. 236.

(34) *UN Doc. A/71/PV.66*, at 19.

(35) *UN Doc. A/RES/71/248*, 11 January 2017, para. 4.

(36) "Special Symposium on the United Nations War Crimes Commission and the Origins of International Criminal Justice", *Criminal Law Forum*, Vol. 25, Issue 1-2, 2014.

(37) For instance, Syria, Russia, Vietnam, Egypt, and Kyrgyzstan, *UN Doc. A/71/PV.66*, at 22, 23, 32, 33 and 34.

cess. (38) Practical questions that were raised regarded the exact parameters of the Mechanism and its relationship with the Syria Commission of Inquiry. (39) The objections of a legal nature struck at the legal basis of the Resolution arguing that the resolution violated Articles 2(7), 12 and 22 of the UN Charter. These three objections were replicated by Russia in a separate *note verbale*. (40) Firstly, Russia, along with other States argued that, given the absence of Syrian consent, the Mechanism encroached upon Syria's sovereignty thus violating Article 2(7) of the UN Charter which prohibits the intervention in matters essentially within the domestic jurisdiction. (41) The counterargument to this, as also presented by the Liechtenstein ambassador, is that the creation of the Mechanism does not entail the expansion of jurisdiction in any way. It is rather meant to facilitate and assist States to exercise their pre-existing jurisdiction. This may include both Syria as well as third States who may wish to exercise universal jurisdiction. (42) The facilitating character of the Mechanism thus undermines the 'intervention' critique. The second argument brought forward related to Article 12 of the UN Charter, and more specifically para. 1 of this provision which bars the General Assembly from acting when the Security Council is exercising its functions. (43) Syria even requested a legal ruling from the GA President on this matter. The President referred to accepted practice that the General Assembly could consider the same matter in parallel with the Security Council. (44) Syria did not pursue the argument. The essence of the third set of arguments was that the General Assembly did not have the power to create a mechanism with powers that it did not itself possess. (45) This set of arguments emphasized the prosecutorial nature of the Mechanism. Yet, as has been pointed out, the Mechanism is actually not a judicial body or an organ in any other way vested with prosecutorial powers. (46) As a Mechanism with a more facilitative nature, it fits within a broader pattern of General Assembly accountability efforts. (47)

(38) E.g., Syria, Russia, Ecuador, South Africa, Egypt, Singapore, *UN Doc. A/71/PV.66*, at 21, 23, 25, 26, 33, 34.

(39) Such as Indonesia, Kyrgyzstan, Singapore, *UN Doc. A/71/PV.66*, at 32, 33, 34. Thailand also expressed such concerns but these did not influence its positive vote, p. 35.

(40) Note verbale dated 8 February 2017 from the Permanent Mission of the Russian Federation to the United Nations addressed to the Secretary-General, *UN Doc. A/71/793*, 14 February 2017.

(41) *Ibid.*, p. 2.

(42) C. WENAWESER and J. COCKAYNE, "Justice for Syria? The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice", *Journal of International Criminal Justice*, Vol. 15, 2017, pp. 211-230, pp. 218-220.

(43) *Russian Note Verbale*, *op. cit.*, p. 1. It is interesting to note in this context that the drafters did not invoke *Uniting for Peace* in conformity with views that Resolution 377A(V) has become largely obsolete. L. JOHNSON, "'Uniting for Peace': Does It Still Serve Any Useful Purpose?", *American Journal of International Law Unbound*, 15 July 2014.

(44) *UN Doc. A/71/PV.66*, at 28/29.

(45) E.g., *Russian Note Verbale*, *op. cit.*, pp. 1-3.

(46) WHITING, *supra* note 33.

(47) B. VAN SCHAAK, "The General Assembly and Accountability for International Crimes", *Just Security* blogpost, 27 February 2017, available online: <https://www.justsecurity.org/38145/general->

The manner in which the General Assembly sidestepped was therefore not by taking the precise action that, in its view, the Security Council should have taken. Rather, the General Assembly respected its own mandate and powers and moved accordingly towards the more generic goal of accountability that also underlied the vetoed Security Council resolutions. This goal would clearly have been better met by a Security Council referral. In that sense the sidestepping could be regarded a second-best maneuver. Alternatively, the sidestepping could also be understood as a new momentum, exploring new accountability routes. Indeed, after the General Assembly's establishment of the Syria Mechanism, the Security Council followed suit creating a very similar mechanism for holding ISIL/Daesh accountable in the form of an Independent Investigative Team, headed by a Special Advisor. (48) In this sense, the General Assembly may have paved the way for new international modalities meant to reinforce domestic jurisdictions and thus the sidestepping may effectively have initiated a new trend.

IV. — NON-UN SANCTIONS FOR UN PURPOSES AS A FORM OF SIDESTEPPING THE SECURITY COUNCIL

The more traditional measures that the Security Council can take under Chapter VII of the UN Charter include the imposition of UN sanctions. As has been observed, the 25 years that followed the end of the Cold War were a peak moment for UN sanctions, (49) and over 30 sanctions regimes were designed to address different kinds of threats including nuclear proliferation, terrorism and civil conflict. (50) These regimes involve different types of sanctions, ranging from comprehensive economic sector sanctions against States to targeted sanctions such as travel bans and the freezing of assets directly imposed on selected individuals. (51) The effect and working of such sanctions depends on their implementation by States or regional organizations.

Individual States or regional organizations, as in particular the EU, can also autonomously impose restrictive measures of a similar type as UN sanctions as part of their foreign policy. Autonomous measures do not implement UN sanctions, but are in fact taken in the absence of, or on top of, Security

assembly-accountability-international-crimes/. Also see M. RAMSDEN and T. HAMILTON, "Uniting against Impunity: The UN General Assembly as a Catalyst for Action at the ICC", *International and Comparative Law Quarterly*, Vol. 66, 2017, pp. 893-921.

(48) UN Doc. S/RES/2379, 21 September 2017.

(49) L. VAN DEN HERIK, "The individualization and formalization of UN sanctions", in VAN DEN HERIK (ed.), *supra* note 13, p. 1.

(50) R. CARISCH and L. RICKARD-MARTIN, *The Evolution of UN Sanctions: From a Tool of Warfare to a Tool of Peace, Security and Human Rights*, Springer, 2017.

(51) S. ECKERT, "The evolution and effectiveness of UN targeted sanctions", in VAN DEN HERIK (ed.), *supra* note 13, pp. 52-69.

Council sanctions and as such they can be conceptualized as another form of decentralized sidestepping. As indicated, the US and the EU are particularly sanctions-eager. (52) Situations in which Western measures supplemented UN sanctions are Iraq (1990), the former Yugoslavia, and Iran. (53) In these situations, the US and the EU were willing to adopt further-reaching measures, which the Security Council could not agree on. In general, such topping up autonomous measures support the overall aim that animates the UN sanctions and they can thus be seen as reinforcing and acting in tandem. The scenario of reinforcing autonomous measures is to be differentiated from unilateral measures that operate in parallel with UN sanctions but that are designed for a different purpose. (54) In the latter scenario, there is no sidestepping at all, but rather parallel action that happens to target the same State. Finally, an entirely different scenario concerns cases where states or regional organizations adopt decentralized measures in the absence of Security Council sanctions because the Council could not agree or is blocked by (the threat of) veto. (55) Absence of Security Council action may also be the result of lack of specific interest. A sub-variation of the scenario in which unilateral measures are adopted in the absence of Security Council sanctions concerns unilateral measures imposed against a P5 member, with the restrictive measures against Russia as the prime example.

From an international law perspective, unilateral measures going beyond unfriendly acts, either topping up Security Council sanctions or adopted in the absence thereof, are principally regulated by general international law, specifically the rules on state responsibility which allow, under certain circumstances, for recourse to ‘countermeasures’. It is, however, notoriously difficult to ascertain whether certain non-UN sanctions entail mere retorsions or actual countermeasures. Moreover, as is well known, the use of unilateral measures imposed to promote respect for basic norms of international law, including the UN purposes, also called third-party countermeasures,

(52) See for analysis on an emerging transatlantic sanctions policy, S. DE GALBERT, “Transatlantic Economic Statecraft; The Challenge to Building a Balanced Transatlantic Sanctions Policy between the United States and the European Union”, Economic Statecraft Series, Center for Strategic International Studies, Center for a New American Security, 2016. It remains to be seen what the effect of Trump and Brexit are on this.

(53) N. RONZITTI, “Sanctions as instrument of coercive diplomacy: an international law perspective”, in N. RONZITTI (ed.), *Coercive diplomacy, sanctions and international law*, Brill/Nijhoff, 2016, p. 18.

(54) E.g., Iran human rights sanctions, Council implementing regulation (EU) 2017/685 of 11 April 2017 implementing Regulation (EU) No. 359/2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation of Iran and US Executive Order 13553 implementing Section 105 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA) (Public Law 111-195) and Iran Threat Reduction and Syria Human Right Act 2012.

(55) See for a similar differentiation, T. BIERSTEKER and C. PORTELA, “EU Sanctions In Context: Three Types”, EUISS Brief 26, July 2015.

remains contested. (56) From a collective security perspective, the essential question is whether States may still adopt unilateral measures when the Security Council acts or has explicitly decided not to act. A question that has some similarities with the logic of Article 12 of the UN Charter, and ultimately inquires into the exclusivity of Security Council powers. As discussed above, in the *jus ad bellum* realm, the unilateral exercise of self-defence could in a certain way be seen as “subjected” to Security Council action, specifically in the form of the reporting requirement. A similar precondition has not been spelled out in the Charter for non-forcible coercive measures, and generally the Security Council enjoys less exclusivity in this realm.

Nonetheless, in open debates on the thematic issue of sanctions, States such as China and Russia have submitted that the imposition of unilateral measures undermines the authority of Security Council sanctions. (57) Also non-permanent members, such as Argentina, have condemned the use of unilateral coercive measures and the extraterritorial application of domestic trade laws, recalling that the United Nations has the primary responsibility for the maintenance of peace and security as the cornerstone of the multilateral system. (58) In addition, the matter is the subject of regular discussion at the General Assembly, where the Non-Aligned Movement has annually submitted resolutions on “Human rights and unilateral coercive measures”. (59) Resolutions on “Unilateral economic measures as a means of political and economic coercion against developing countries” are introduced on a bi-annual basis by the G77 and China. (60) The voting record of these Resolutions shows a North-South divide, with the US and EU member states generally casting negative votes. (61) Contrasting these normative statements is a sustained practice of developed States including three of the P5 adopting unilateral measures as part of their foreign policy. There is thus an overall divide in views on the legality of sidestepping which ultimately hinges on different appreciations of state practice and *opinio juris* and custom-formation more generally. (62) Nonetheless, the exact positions

(56) See generally M. DAWIDOWICZ, *Third-Party Countermeasures in International Law*, Cambridge University Press, 2017.

(57) *UN Doc. S/PV.7323*, pp. 14, 19. Also outside Security Council setting, Russia and China have voiced their views that unilateral coercive measures defeat the objects and purposes of measures imposed by the Security Council and are not based on international law, The Declaration of the Russian Federation and the People’s Republic of China on the Promotion of International Law, 25 June 2016, para. 6.

(58) *UN Doc. S/PV.7323*, p. 13.

(59) GA Res 71/193, 20 January 2017, op. para. 1.

(60) GA Res 70/185, 22 December 2015, op. para. 2.

(61) For an analysis of the voting, see A. HOFER, “The developed/developing divide on unilateral coercive measures: legitimate enforcement or illegitimate intervention?”, *Chinese Journal of International Law*, Vol. 16, 2017, pp. 175–214.

(62) The debate thus has certain parallels with discussions on the scope of Article 2(4) and its exceptions in the sense that they ultimately concern methodological positions more than substantive outcomes, see for this argument O. CORTEN, “The Controversies Over the Customary Prohi-

regarding legality may differ per situation and specifically they may also depend on whether the unilateral measures top up or substitute Security Council action as the inroad on Security Council prerogatives differs per sidestepping-scenario.

In the scenario where non-UN sanctions are imposed in addition to existing UN sanctions, these topping up autonomous measures support the overall aim that animates the UN sanctions and they can thus be seen as reinforcing and acting in tandem. Nonetheless, in these situations, the additional measures could render the international sanctions imposed by the international community in its entirety disproportional. (63) The question of how to measure proportionality in case of cumulative measures originating from different sources remains open and may also invite reflections on shared responsibility. In this context, delineating the frontiers between UN sanctions and non-UN sanctions is also essential. Ultimately, differentiating between measures *implementing* UN sanctions and autonomous measures *supplementing* UN sanctions is also a matter of interpretation and design of UN resolution. States do not tend to always specify in detail whether they consider a certain measures taken to be a countermeasure, an unfriendly act or actually an implementing measure. Nonetheless, some recent practice shows instances where State do in fact indicate that their autonomous measures are supplementary to UN Security Council measures. (64) In addition to this hybrid practice, UN sanctions resolutions have become more multilayered. In addition to clear and direct proscriptions requiring that all states shall freeze assets and prevent entry, certain sanctions regimes, in particular in the non-proliferation domain, also include recommendations of more ambiguous nature by *calling upon* States to exercise vigilance (65) or by deciding that States shall act if they have credible information that provides reasonable grounds to believe that a certain situation exists. (66) Such

bition on the Use of Force: A Methodological Debate", *European Journal of International Law*, Vol. 16, 2005, pp. 803-822.

(63) See e.g., the findings of the Commission of Inquiry for North Korea, *UN Doc. A/HRC/25/63*, 7 February 2014, para. 94 (a). For similar concerns expressed in the context of the Iran sanctions, see D. JOYNER, "UN counter-proliferation sanctions and international law", in VAN DEN HERIK (ed.), *supra* note 13, pp. 105-124. See further Dawidowicz, who also argues that there does not appear to be a legal requirement to ensure "overall proportionality", DAWIDOWICZ, *supra* note 56, pp. 360-364.

(64) E.g., Australia, the Replacement Explanatory Memorandum to the Autonomous Sanctions Act 2011. The Australian website even refers to hybrid sanctions regimes (<http://dfat.gov.au/international-relations/security/sanctions/sanctions-regimes/Pages/sanctions-regimes.aspx>). Canada is another illustration. In 2011 Canada adopted supplementary measures against Libya which it recognized as going beyond what was provided for in UNSC Resolution 1970, Regulations Implementing the United Nations Resolution on Libya and Taking Special Economic Measures, SOR/2011-51, 27 February, 2011, under "Description and Rationale", *Canada Gazette*, Vol. 145, No. 6, 16 March 2011. China and Russia have expressed discontent with this practice and it might impact their willingness to support future UN sanctions.

(65) See e.g., *UN Doc. S/RES/1803* (2008), para. 3, and *UN Doc. S/RES/1737* (2006), para. 17.

(66) See e.g., *UN Doc. S/RES/2094* (2013), para. 16 and *UN Doc. A/RES/1929* (2010), para. 14.

recommendations leave considerable discretion. If states act upon a Security Council invitation rather than a mandatory direction, are they then implementing or supplementing? Should measures in this context be characterised as enforcement measures adopted on the basis of a binding Security Council resolution under Chapter VII, or are these rather unilateral restrictive measures governed by general international law? The characterization is not only important to determine which legal regime governs the sanctions, (67) but also in connection with termination of UN sanctions. (68) EU measures that solely implement UN sanctions must allegedly be lifted when the Security Council terminates the sanctions, whereas supplementary measures may possibly remain in place. (69) As for the language of “calling upon”, the general view is that this does not intend to indicate a legally binding decision. (70) Nonetheless, it has also been argued that the text of Security Council resolutions cannot be understood without recourse to records of the preceding debates. (71)

The frontiers between UN and non-UN sanctions are thus not always clear-cut, and as a consequence it is unclear when a State is sidestepping. Moreover, in the concrete domain of non-UN sanctions, States do not only sidestep, but when they supplement UN sanctions with autonomous measures, they are rather stepping up. This adds to the complexity of the picture of different forms and dynamics of sidestepping the Security Council.

V. — GENERAL REFLECTIONS ON SIDESTEPPING TECHNIQUES AND STRATEGIES AND AN OUTLOOK FOR FUTURE USES OF NON-UN SANCTIONS

In a very general fashion, it can be said that sidestepping effectively tests the notion of Security Council monopoly or exclusivity and the extent of Security Council prerogatives. Yet, the different examples of sidestepping offer a very mixed picture in terms of the sidestepping-alliances, the avenues chosen to do so, also contrasting incidental *versus* more structural sidestepping, as well as differences in terms of the nature of sidestep measures taken

(67) See e.g., for an analysis on how international investment law applies to non-UN sanctions, A. VAN AAKEN, “International Investment Law and Targeted Sanctions: An Uneasy Relationship”, *Bucerius Law Journal* 2015, pp. 1-2.

(68) See generally on termination of UN sanctions, K. E. BOON, “Timing matters: termination policies for UN policies”, in VAN DEN HERIK, *supra* note 13, pp. 236-262.

(69) See for a discussion on this M. SOSSAI, *supra* note 13, p. 409 and further references there.

(70) M. WOOD, “The Interpretation of Security Council Resolutions Revisited”, *Max Planck Yearbook of United Nations Law Online*, Vol. 20, 2017, pp. 1-35.

(71) C. GREENWOOD, “New World Order or Old? The Invasion of Iraq and the Rule of Law”, *Modern Law Review*, Vol. 55, 1992, p. 153. Also see J. D. FRY, “Dionysian Disarmament: Security Council WMD Coercive Disarmament Measures and Their Legal Implications”, *Michigan Journal of International Law*, Vol. 29, 2008, pp. 229-232, for an argument that the words “call upon” in the Iranian UN sanctions regime were meant to create binding obligations.

and the underlying motives that steer sidestepping actions. The examples analysed illustrate that sidestepping is not necessarily an E10 *versus* P5, or Security Council members *versus* non-members-exercise. The partnerships spurring action in the context of the Syria Investigative Mechanism and those underlying the imposition of non-UN sanctions for UN purposes are better understood as Active Coalitions — including permanent members — confronting a Blocking Group — including other permanent members — (the Ax *versus* the Bx with differing numbers per situation). Whereas the Investigative Mechanism was unique in its sort, the imposition of unilateral measures is part of a broader practice that divides the larger international community, even beyond the Security Council, along the fault lines of developed/developing states. The North-South divide is not necessarily to the same extent present in the different groups supporting or rejecting the Syria Investigative Mechanism. The sidestepping in both scenarios thus occurred with different alliances although the P2/P3 divide was the same in both. The sidestepping in the aggression domain through the ICC architecture is the only example where the P5 were united in their position against a watering down of its exclusive powers. Yet, the institutional bias of the P5 *in abstracto* does not necessarily need to be replicated in practice and the exact positions of the P5 regarding ICC aggression investigations may differ in practice per situation. In contrast, in the context of self-defence, some of the permanent members are among those using “sidestep” possibilities through extended interpretations of the right to self-defence.

From a rule of law perspective, the effects of sidestepping differ. Sidestepping may remedy Security Council paralysis or in a best-case scenario even incentivize the Security Council to act. Additionally, more institutional sidestepping structures, such as Kampala can have disciplinary effects. Yet, sidestepping can also have undermining effects, in particular if expressly used to circumvent the Security Council. Therefore, there may be merit in exploring reporting requirements in situations of decentralized sidestepping, so as to monitor and discuss the sidestepping-exercise as much as possible in a collective setting. In a *jus ad bellum* context, this concerns reinforcing Article 51’s reporting requirement. In case of the application of non-UN sanctions, a similar reporting requirement could be envisaged. Reflections of such more procedural nature could break the current stalemate regarding legality-discussions and preserve the system of collective security while also upholding measures imposed with a view to further UN purposes.