

UN Sanctions and Questions of Interplay

*Bonn Preparatory Seminar for ILA Annual Meeting J'Burg
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Organised by the ILA Study Group on UN Sanctions and International Law together with the Institute for Public International Law, University of Bonn in collaboration with the SARChI Professorship in International Constitutional Law, University of Pretoria.

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Host of the Seminar: Prof. Erika de Wet

Introduction

The ILA Study Group on UN Sanctions and International Law was launched at Leiden University in June 2015. Composed of 25 members and representing 13 national branches, the study group presents a truly international coalition of sanctions experts from around the world.

To date, members of the group have presented aspects of the Study Group's mandate at several international panels (e.g., ILA British Branch, Essex (29-30 May 2015), Law Faculty of Cheik Anta Diop University, Dakar (10 October 2015), Canadian Council on International Law, Ottawa (6 November, 2015) the ILA International Law Weekend, New York (7 November 2015), and ILA Italian Branch Conference on Sanctions, Rome (4 December, 2015).

The ILA Annual Meeting will take place in Johannesburg on 7-11 August 2016. In anticipation, a preparatory seminar of the Study Group will take place in Bonn from March 3-5 with a view to initiating the drafting of a first report that will identify the key themes and research questions for the group. The preparatory seminar is hosted by Prof. Erika de Wet at the Institute for Public International Law, University of Bonn (<https://www.jura.uni-bonn.de/institut-fuer-voelkerrecht/>) in collaboration with the SARChI Professorship in International Constitutional Law, University of Pretoria (<http://www.icla.up.ac.za/sarchi>).

The lens of interplay and four selected themes

The Study Group will examine selected themes regarding UN sanctions through the lens of interplay. Interplay can be institutionally oriented or subject-matter oriented. A further distinction can be made in light of the different levels on which international law operates, i.e. the international, the regional and the domestic level, while interplay may also occur between those levels. Questions regarding the legal basis of UN sanctions (particularly with regard to individuals and other non-state actors) and issues of interpretation and implementation cut across those orientations and levels.

At the Bonn Seminar, four themes will be presented and discussed for potential inclusion in the report to be presented in August. These themes are: (i) interplay with informal arrangements, (ii), interplay with regional organizations, (iii) implications of sanctions for private contracts (iv) interplay with the ICC and other (international) criminal courts.

(i) Interplay with informal arrangements

Informal arrangements increasingly inform the design, operation and implementation of UN sanctions regimes. This occurs prominently in the context of counter-terrorism regimes. Many of the new Security Council measures related to ISIS are the direct product of the interactions between the Council (or the Council's core) and the Global Counterterrorism Forum

(GCTF).¹ As an informal network, the GCTF might also be playing a key role in the re-design of the 1267/1989 Committee as a whole possibly transforming it into a general counter-terrorism sanctions committee. As regards implementation specifically, the Financial Action Task Force (FATF)² is dominant in suggesting concrete measures and standards for domestic implementation of obligations emanating from the counter-terrorism regimes. These suggestions and the FATF guidelines are endorsed and referred to by UN sanctions committees and have thus gained a certain authoritative status.

Civil conflict regimes display a different type of interaction with informal arrangements. In this context, informal actors operate in parallel with the Security Council, and informal structures may coincide with Security Council measures. The interplay occurs particularly as regards the components of civil conflict regimes that target natural resources. In its natural resource-sanctions regimes, the Council often relies on informal actors and structures for standard-setting purposes as well as to enhance protection of underlying interest and associated norms. These informal platforms include the Kimberly Process for the Certification of Rough Diamonds, the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, and the International Consortium on Combating Wildlife Crime.

National laws implementing UN sanctions regimes can also impose obligations on private actors, e.g., with obligations to report (Kimberly) or to have heightened scrutiny in place (FATF). In this way UN sanctions are used as a vehicle through which informal arrangements impose binding obligations on private actors.

The aim of the Bonn seminar is to determine the legal basis for UN sanctions, to map different instances of interplay between UN sanctions regimes and informal actors and structures and to identify the most relevant legal issues that arise therefrom.

(ii) Interplay with regional organizations

Regional organizations, particularly the EU and the AU, are relevant players in the sanctions arena. They can act as interface between the UN and the domestic level by centralizing implementation efforts at the regional level. In addition to a possible role in the implementation of UN sanctions, regional organizations may also be the creators of parallel, autonomous sanctions.³ These autonomous sanctions can exist in the absence of UN sanctions

¹ The GCTF is a new multilateral counterterrorism body with 30 founding members (29 States and the EU) and was launched on 22 September 2011 to serve as a platform for senior counterterrorism policymakers with a focus on identifying urgent needs and capacity building, for more see www.thegctf.org.

² The FATF is an intergovernmental policy-making body established in 1989 with the objective to develop standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. The FATF has 36 members, 34 so called member jurisdictions (including Hong Kong), and two regional organizations, as well as two observers.

³ It is proposed to refer to regional sanctions as such given that those sanctions may not all qualify as countermeasures in the technical sense. The concrete analysis of interplay will of course draw on the international law of state responsibility and the law on countermeasures more specifically for those measures within regional sanctions regimes that qualify as countermeasures.

(e.g., EU sanctions against Russia), or they can top up existing UN sanctions (e.g., EU sanctions against Iran). In the case of concurrent sanctions regimes, it may not always be easy to separate implemented UN sanctions from parallel autonomous sanctions and this touches on questions regarding the power of States and regional organizations to auto-interpret Security Council sanctions regimes and the limits thereof.

While it falls beyond the mandate of the Study Group to discuss questions regarding collective third-party/general interest countermeasures *per se*, the co-existence of UN and regional autonomous sanctions invites a host of questions. The Bonn seminar aims to explore:

- a) Questions of coordination and interrelationship.
- b) Questions regarding the permissibility of adopting regional autonomous sanctions in parallel with UN sanctions or after sanctions at UN level have been vetoed. Subsequent questions regarding parallel UN and autonomous sanctions include how, if at all, co-existing UN sanctions regimes should influence countermeasure proportionality assessments regarding the regional autonomous sanctions, and how to deal with potential conflicts arising from substantive incompatibilities between UN sanctions and regional autonomous sanctions (see also next theme).
- c) The different international legal framework governing UN sanctions versus regional autonomous sanctions, as particularly important in the area of WTO law, international investment law⁴ and consequences for private contracts (see also next theme).

(iii) *Implications of sanctions for private contracts: mapping differences in legal status and effects of UN and autonomous regional sanctions regimes / unilateral sanctions*

Sanctions may affect private contracts. If a contract has been concluded before the adoption of sanctions, the issue becomes whether the contract must still be performed in violation of the applicable sanction regime.⁵ Another scenario exists if private parties want to enter into a contract the subject matter of which concerns a transaction forbidden by an existing sanction regime. Furthermore, there may be questions regarding the revival of contracts upon the termination of sanctions regimes. In order to answer those questions, it must first be determined whether a given sanctions regime is applicable,⁶ i.e. whether the sanctions regime

⁴ See e.g., Anne van Aaken, *International Investment Law and Decentralized Targeted Sanctions: An Uneasy Relationship*, Columbia FDI Perspectives N.o. 164; available at: <http://ccsi.columbia.edu/files/2013/10/No-164-van-Aaken-FINAL.pdf>

⁵ A further distinction can be made between *application* of foreign overriding mandatory provisions and *taking* them *into account*, or, as some common lawyer put it, between *enforcing* and merely *recognizing* foreign overriding mandatory provisions. Even if a sanctions regimes is not applicable, it might still be taken into account because, for instance, it actually prevented (as a matter of fact) a party from performing its contractual obligations. The primary example is where performance of the obligations would be lawful under the law chosen by the parties, but unlawful under the law of the place of performance. The forum might want to rule, that while the law of the place of performance does not govern the contract, its (factual) existence was an admissible excuse for not performing.

⁶ In 2015, the Paris Court of Appeal ruled on the impact of U.S. sanctions on Libya on the performance of sales contract concluded by the French subsidiary of an American corporation with Iranian parties. After the adoption of the U.S. Sanctions, the French party had refused to perform its obligations on the ground that the contracts fell

forms part of or has been implemented in the national law governing the contract. If not, the question arises whether the relevant sanctions regimes may be applied on another ground.⁷

In light of the special legal status of the UN Charter, the foregoing questions may be answered differently for UN as opposed to autonomous regional or (foreign) unilateral sanctions. Moreover, legal issues may arise when UN sanctions regimes are not uniformly implemented in national legal systems and when autonomous sanctions regimes pose competing and different or even irreconcilable demands from concurrent UN sanctions regimes.⁸ The Bonn seminar aims to highlight implications of sanctions for private contracts with a focus on:

- (a) Differences in legal status of UN sanctions and foreign sanctions regimes.
- (b) Conflicts between UN sanctions regimes and autonomous sanctions regimes.
- (c) Legal issues arising out of uneven implementation of UN sanctions.

(iv) *Interplay with the ICC and other (international) criminal courts*

UN sanctions often operate in tandem with the ICC and other international criminal courts. While based on distinct *raison d'être* and governed by different rationales, the co-existence of UN sanctions and international criminal proceedings does result in *de facto* parallelism and/or jurisdictional overlap. UN sanctions can also be explicitly invited or used to reinforce international criminal proceedings (see e.g. Article 87 ICC Statute). Without necessarily advocating further synergy, the legal issues arising from the co-existence of the two systems merit further reflection. As also highlighted by the High Level Review,⁹ such questions can be highly technical in nature. They can regard parallel asset freeze and seizing orders,

within the scope of the U.S. sanctions. The court found that the relevant contracts were not governed by U.S. law, and that, as they were not to be performed in the U.S., U.S. sanctions could not be applied as overriding mandatory provisions under Art. 9.3 of the Rome I Regulation either. The court concluded that the French party was thus in breach of its contractual obligations, Paris Court of Appeal, 25 Feb 2015, case no 12/23757.

⁷ In the E.U., article 9.3 of the Rome I regulation provides that laws which are crucial to safeguard the public interest of foreign States (*overriding mandatory provisions*) may be applied and displace the applicable contract law, but only if 1) they belong to the law of the place of performance of the contract, and 2) they render the performance unlawful. Regulation (EC) 593/2008 on the Law Applicable to Contractual Obligations of 17 June 2008, OJ L. 177/6, 04/07/2008 (Rome I Regulation).

⁸ A case presently litigated in Luxembourg courts provides an interesting example of a private actor subjected to opposite demands from two different sanction regimes which might both be founded in the same UN Sanctions (possibly based on Resolution 1737). The English subsidiary of an Iranian bank is seeking payment of monies held by a financial institution incorporated in Luxembourg. The deposit contract is governed by Luxembourg law and contains a provision according to which the financial institution “is not obligated to execute any instruction of the customer if [the financial institution] believes that to do so would contravene any law or regulation (...)”. The English/Iranian customer demands performance of the contract. For that purpose, it has sought, and obtained authorization from the English and Luxembourg competent authorities under the EU sanction regime (in particular Regulation 423/2007) which is implementing a UN Resolution. However, the financial institution claims that by doing so, it would contravene to the US sanction regime (which I trust is at least in part the implementation of the same UN sanctions) which, it is argued, prohibits the relevant transaction. Under the Rome I Regulation, US law cannot be possibly applicable. But the financial institution claims that it is irrelevant, since a contractual provision allows it not to perform its obligation if this would contravene “any law”, which could be any law in the world. This argument was accepted by the Luxembourg first instance court. The client responds that the reference to the “law” in the contractual provision must be interpreted as a reference to a law which is applicable. The appeal is pending, Luxembourg District Court, 11 July 2014, case no 151140.

⁹ The High Level Review of United Nations Sanctions was conducted by the Watson Institute of Brown University together with Compliance and Capacity International sponsored by Sweden, Greece, Germany, Finland and Australia. The compendium can be found on their website: www.hlr-unsanctions.org.

disclosure requests and the evidentiary value of information gathered in sanctions regime context for court proceedings, as well as the need for humanitarian exemptions and the lifting of travel bans for persons involved in court proceedings. Those technical and practical issues connect on a deeper level with questions of international institutional law and international criminal procedure as applicable at the distinct international courts.

The interplay with UN sanctions regimes and criminal proceedings can also occur at the domestic level in the form of prosecution of sanctions busters. Particularly in the context of counter-terrorism regimes, UN sanctions listings and designations of organizations as terrorist organizations can instigate prosecutions or otherwise be used as evidence in domestic prosecution cases. This dimension of interplay invites a host of different questions and is initially left aside.

The aim of the Bonn seminar is to chart the institutional and procedural dimensions of the interplay between UN sanctions regimes and international criminal proceedings.