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A Legal Examination of the Sanctions against North Korea & Iran for their Nuclear Program:

A Comparative & Critical Perspective

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Arefeh Rastgooafkham

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Examiner: Professor Keun-Gwan Lee

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Confirming the Ph.D. Dissertation written by

Arefeh Rastgooafkham

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Chair_____(인)

Vice Chair _____(인)

Examiner _____ (인)

Examiner _____ (인)

Examiner _____ (인)

Abstract

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Name: Arefeh Rastgooafkham*

International Law

Graduate School of Law

Seoul National University

The United Nations was established in 1945 to maintain international peace and security, following the failure of the League of Nations to prevent World War II. However, the subsequent Cold War presented significant security challenges, particularly on the Korean Peninsula. The Korean War outbreak in 1950 heightened North Korea's concerns for its survival. Furthermore, the presence of US nuclear weapons in the region played a pivotal role in motivating North Korea to pursue its own nuclear program. Despite facing sanctions resolutions from the Security Council in response to its nuclear tests, North Korea's nuclear program continues to advance. In contrast, the Iranian nuclear case, which was concurrently addressed by the Security Council, produced different outcomes. Iran, facing international criticism and sanctions against its nuclear program, engaged in negotiations that ultimately led to the adoption of the Iran Nuclear Deal in 2015. This stark contrast raises questions about legal obstacles that prevented the UN sanctions regime from

** The author of this thesis is a Global Korea Scholarship (GKS) scholar sponsored by the Korean government.*

achieving similar results in the North Korean case. It also prompts the question of whether the UN sanctions imposed on North Korea can be deemed an unsuccessful experience. When considering the effectiveness and success of UN sanctions, it is important to distinguish between their design and implementation stages. The focus of the present thesis is on the legal challenges that emerge during the implementation phase. In this regard, I analyze those factors that impede the success of UN sanctions in two key aspects: i) ensuring the humanitarian rights of the population in the target state, and ii) exerting sufficient pressure on the target state. Given their relevance to the field of international legal studies, this research will primarily concentrate only on three factors that negatively impact the potential success of UN sanctions: i. unilateral/autonomous sanctions; ii. sanctions evasion by the target state and, iii. third state's role in sanctions evasion. Other factors that will briefly be introduced in chapter 3 are not analyzed in this thesis because they are more related to research studies in constitutional law, politics, or international relations. Following an analysis on the illegality of individual states' unilateral sanctions in response to violations of international peace and security, the focus shifts to discussing whether these unilateral measures can be considered lawful countermeasures according to international law. The main contention put forth in this thesis is that the unilateral sanctions imposed by the United States (US) and the European Union (EU) in relation to the nuclear issues concerning North Korea and Iran failed to meet the essential legal criteria to qualify as lawful countermeasures. The argument posits that these sanctions divert countries from fully complying with UNSC sanctions, resulting in detrimental humanitarian effects on the population in the target state.

Next, I delve into the magnitude of pressure applied to target states and evaluate the impact of sanctions evasion techniques to reduce this pressure. As the target state cannot circumvent sanctions on its own and there are third entities to assist it, I examine how third countries can provide escape routes for the target state in this way. The continuous advancements in DPRK's nuclear program and its defiance of international pressure indicate its refusal to comply with UNSC resolutions. This raises questions regarding the legal grounds for UN resolutions following North Korea's withdrawal from the Treaty on the Non-proliferation of Nuclear Weapons (NPT). Since it is no longer a Member State, it is crucial to examine whether it has violated any other legal rule beyond those stipulated in the NPT. Consequently, a comprehensive analysis of DPRK's nuclear activities through the lens of the ICJ in its 1996 advisory opinion on nuclear weapons becomes necessary.

This paper focuses in particular on economic sanctions that can cause humanitarian suffering to the population of the target country. In the context of unilateral sanctions, the thesis examines the economic measures imposed by the US and the EU. Their economic measures have a broader impact compared to sanctions imposed by other countries. This is because the US and the EU are major economic powers with substantial influence on international trade.

The thesis is structured into different sections based on the foregoing. In Chapter 1, an introduction to the thesis is provided, delineating its framework, research objectives, significance, legal literature, etc. Chapter 2 conducts a historical study on nuclear cases in North Korea and Iran to identify similarities and differences in the

historical procedure of their nuclear programs. Chapter 3 examines the legal status of unilateral/autonomous sanctions of individual states and their negative impact on the potential success of UN sanctions with particular attention to humanitarian concerns. Chapter 4 analyzes the ICJ's advisory opinion as an insight for legal assessment of North Korea's nuclear activities, acting as a vital link between chapters 3 and 5. Chapter 5 examines the pressure of sanctions on target states, and sanctions evasion techniques. Furthermore, the involvement of third countries in facilitating or participating in these evasion activities is also scrutinized. Chapter 6 which is the final chapter in the thesis presents conclusion, highlighting implementation problems of the UN sanctions on North Korea and offering solutions to mitigate their effects. My suggestion emphasizes the proactive involvement of legal bodies within the UN system in the decision-making process concerning the interpretation of its sanctions. The primary aim of the suggestion is to enhance the legal comprehension of the sanctions' scope and precise implications, thereby fostering coordinated implementation among the Member States. By doing so, it aims to significantly reduce the legal loopholes or discrepancies that could be exploited by the target state to evade the impact of the sanctions.

Keywords: Economic Sanctions, Unilateral Sanctions, Security Council, Nuclear Program, Security Crisis, Humanitarian Exception, Sanctions Evasion, Non-proliferation Law

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Chapter One: Introduction

Over the past few decades, the Democratic People's Republic of Korea (DPRK)[1] has gradually made significant advancements in its nuclear weapons and missile program that, in terms of international peace and security, particularly on the Korean Peninsula, have attracted global attention. The two major powers of the Cold War era, the US and the Union of Soviet Socialist Republics (USSR), were involved in supporting the two belligerent states on the Korean Peninsula during the 1950–1953 Korean War, which marked the beginning of the DPRK's inclination to develop a nuclear program.[2] The US first introduced nuclear weapons into the Korean Peninsula in 1958 to deter further threats of aggression from the DPRK.[3] This move looked quite provocative to North Korea, making it assert a right to take self-help measures by advancing a nuclear program that would ensure its survival.[4] North Korea made every attempt to improve its nuclear program prior to the 1970s.[5] It greatly benefited in this regard from collaboration with experts from the Soviet

[1] In order to minimize repetition in the following pages, 'DPRK' and 'North Korea' will be used interchangeably in lieu of 'Democratic People's Republic of Korea'.

[2] Denny Roy, *Strategic Ramification Of The North Korea Nuclear Weapons Crisis, in* THE NORTH KOREA CRISIS AND REGIONAL RESPONSES 54 (UTPAL VYAS ET AL. EDS., 2015).

[3] See Hans M. Kristensen & Robert S. Norris, *A History Of US Nuclear Weapons In South Korea*, 73(6) Bulletin Of The Atomic Scientists 349 (2017), <https://www.tandfonline.com/doi/pdf/10.1080/00963402.2017.1388656?needAccess=true>

[4] For more details on the North Korean nuclear history, see James Martin, *North Korea Nuclear Chronology*, Nuclear Threat Initiative (2011), https://media.nti.org/pdfs/north_korea_nuclear.pdf; see also Il-Young Kim & Singh Lakhvinder, *The North Korean Nuclear Program And External Connections*, 16(1) Korea Institute For Defense Analyses 73 (2004), <https://www.kida.re.kr/images/skin/doc.html?fn=787f43e938d663da6e3682bb864a7fedandrs=/images/convert>

[5] "In September 1974, the DPRK officially joined the International Atomic Energy Agency (IAEA), although it had not yet acceded to the nuclear Non-Proliferation Treaty (NPT). On 20 July, 1977, the DPRK signed an INFCIRC/66-type agreement with the IAEA, which provided a mechanism by which its two MWt research reactor and 0.1 MWt critical assembly could be monitored". Alexandre Y. Mansourov, *The Origins, Evolution, And Current Politics Of The North Korean Nuclear Program*, 2(3) The Nonproliferation Review 25, 26 (1995), https://www.nonproliferation.org/wpcontent/uploads/npr/mansou23.pdf

Union, particularly in the area of technical know-how. For instance, a bilateral 1959 agreement between the DPRK and USSR resulted in the creation of a peaceful nuclear research center in the Yongbyon (영변) area.[6] Accordingly, the DPRK's industrial growth throughout the 1960s and 1970s was centered on developing its nuclear program. However, it later was forced under international pressure to collaborate with the IAEA in a safeguard agreement, putting the Yongbyon Complex under IAEA's supervision.[7] Moreover, North Korea joined the Nuclear Non-Proliferation Treaty (NPT) in December 1985, after learning that it was a prerequisite for receiving assistance and support for nuclear research.[8]

The Soviet Union collapsed in 1991, depriving the DPRK of political support on the Korean Peninsula.[9] In the following years, the IAEA inspectors requested investigations into the DPRK's nuclear facilities, including two suspicious nuclear sites in February 1993, which was rejected by the North due to their military usage.[10] In subsequent years, various efforts were made to address the nuclear issue in North Korea. These efforts included the establishment of the 1994 US/North Korea Agreed Framework,[11] which came about after North Korea expressed its intention to

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[6] See Walter C. Clemens, *North Korea's Quest For Nuclear Weapons: New Historical Evidence*, 10(1) Journal Of East Asian Studies 127 (2010), https://www.jstor.org/stable/23418882

[7] See Torrey Froscher, *North Korea's Nuclear Program: The Early Days, 1984–2002*, 63(4) Studies In Intelligence 17 (2019), <https://www.cia.gov/static/9d8505eadcf31fab35ae292971c3d658/NK-Nuclear-Program-Early.pdf>; see also Int'l Atomic Energy Agency [IAEA], *Application Of Safeguards In The Democratic People's Republic Of Korea*, GOV/2021/40-GC (65)/22 (Aug.27 2021), <https://www.iaea.org/sites/default/files/gc/gc65-22.pdf>

[8] Froscher, id., at19.

[9] Michael J. Deane, *The Collapse Of North Korea: A Prospect To Celebrate Or Fear?*, Johns Hopkins University (2005), https://citeseerx.ist.psu.edu/document?repid=rep1andtype=pdfanddoi=63d87c75938aaacb882d97d6b330b5e5b747a105

[10] See Int'l Atomic Energy Agency [IAEA], *Fact Sheet On DPRK Nuclear Safeguards*, https://www.iaea.org/newscenter/focus/dprk/fact-sheet-on-dprk-nuclear-safeguards.

[11] In exchange for US support for the development of peaceful nuclear energy and oil supplies, North Korea agreed to stop building two 50 MW(e) and 200 MW (2) nuclear power stations, a 5 MW (2)

withdraw from the NPT in 1993.[12] Additionally, negotiations took place regarding missiles in Berlin in 1996, in New York in 1997 and 1998, in Pyongyang in 1999, and in Kuala Lumpur in 2000.[13] Despite the ongoing missile talks, North Korea continued its activities related to missile technology. As a response, the US imposed sanctions on entities involved in these activities and the transfer of technology.[14] After President George W. Bush took power in 2001, he initially employed aggressive language against North Korea, denouncing it as a member of the axis of evil[15] and expressed concerns about its possible acquisition of nuclear weapons.[16] In response, North Korea proclaimed the existence of its nuclear weapons program in 2002 and announced in 2003 that it would withdraw from the NPT.[18] Political tensions between the US and North Korea resulted in the latter's determination to persist with its nuclear and missile activities despite the existence of agreements such as the Joint Declaration of the Denuclearization of the Korean Peninsula in 1992,[19]

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reactor, and uranium enrichment facilities. See id.; Peter Hayes, *Should The United States Supply Light-Water Reactors To Pyongyang?*, 6 (2) The Korean Journal Of Defense Analysis 179, 184 (1994), https://doi.org/10.1080/10163279409464606.

[12] *North Korean Nuclear Negotiations:1985-2022*, Council On Foreign Relations, https://www.cfr.org/timeline/north-korean-nuclear-negotiations; For more details, see ER-WIN TAN, THE US VERSUS THE NORTH KOREAN NUCLEAR THREAT: MITIGATING THE NUCLEAR SECURITY DILEMMA (Routledge 2013).

[13] See Kelsey Davenport, *Chronology Of U.S.-North Korean Nuclear And Missile Diplomacy:1985-2022*, Arms Control Association (2020), https://www.armscontrol.org/factsheets/dprkchron; Jung Hoon Lee & Ii Hyun Cho, *The North Korean Missiles: A Military Threat Or A Survival Kit?* 12 The Korean Journal Of Defense Analysis 131(2000), https://kisskstudycom.libproxy.snu.ac.kr/Detail/Ar?key=3213899; Haksoon Paik, *The Berlin Agreement And The Perry Report: Opening A New Era In US-North Korea Relations*, 8 International Journal Of Korean Unification Studies 49, 50 (1999), https://repo.kinu.or.kr/bitstream/2015.oak/8877/4/0001477177.pdf

[14] Davenport, id.

[15] See James I. Matray, *The Failure Of The Bush Administration's North Korea Policy: A Critical Analysis*, 17(1) International Journal Of Korean Studies 140 (2013), https://ciaotest.cc.columbia.edu/journals/ijoks/v17i1/f_0029410_23860.pdf

[16] Edward A. Olsen, *"Axis Of Evil": Impact On U.S.-Korean Relations*, The NPS Institutional Archive 1, 184 (2002), https://core.ac.uk/download/pdf/36740109.pdf.

[18] U.N. Doc., S/2003/91(Jan.27, 2003).

[19] In this agreement, the South and the North committed not to test, manufacture, produce, receive, possess, store, deploy or use nuclear weapons. See *Joint Declaration On The Denuclearization Of The Korean Peninsula* (Feb.14,2008), https://www.mofa.go.kr/eng/brd/m_5476/view.do?seq=305870ands

the Agreed Framework,[20]the Six-Party Talks,[21] and the NPT. As will be discussed later, North Korea made a dramatic shift in its foreign policy following the dissolution of the USSR, choosing to engage in negotiations rather than enter into political alliances. However, it kept advancing the nuclear program throughout the negotiations to place itself in a position of strength.

i. Significance, Purpose & Scope Of The Problem

The introduction and proliferation of nuclear weapons has been one of the gravest and most imminent threats to international peace and security. Due to North Korea's long-running efforts to obtain nuclear technology, the international community has expressed alarm over the spread of WMD. North Korea's nuclear issue poses challenges that extend beyond the Korean Peninsula. The sale of some items, such as ballistic missiles that are prohibited under the UNSC resolutions, would supply the money that the North Korean government needs as a result of economic difficulties. In this context, nuclear technology outside the realm of international supervision could be transferred to non-state actors, such as terrorist organizations, as well as states that are determined to acquire nuclear weapons covertly.

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[20] For the text of the framework, see *Agreed Framework Between The United States Of America And The Democratic People's Republic Of Korea* (Oct.21, 1994), https://peacemaker.un.org/node/1129

[21] The Six-Party Talks were a series of meetings with six participating states (North Korea, South Korea, Japan, Russia, China, and the United States) that aimed to find a peaceful resolution to the security concerns as a result of the North Korean nuclear weapons program. The Six-Party Talks were held in 6 rounds altogether from 2003 until 2009. For more details, see LESZEK BUSZYNSKI, NEGOTIATING WITH NORTH KOREA: THE SIX PARTY TALKS AND THE NUCLEAR ISSUE (Routledge 2015); see also Jong-chul Park, *North Korea's Nuclear Crisis And The Six-Party Talks: Issues And Prospect*, 13(1) International Journal Of Korean Unification Studies 85(2004), https://repo.kinu.or.kr/bitstream/2015.oak/8885/5/0001477252.pdf; Eun-sook Chung, *Long-Stalled Six-Party Talks On North Korea's Nuclear Program: Positions Of Countries Involved*, 25(1) Korean Journal Of Defense Analysis 1 (2013), https://www.kida.re.kr/data/kjda/01_Chung%20Eun-sook.pdf

The UN has imposed numerous sanctions on North Korea, yet, unlike the situation with Iran, its measures have not persuaded the country to abandon its nuclear aspirations. This has sparked debates about the success and effectiveness of UN sanctions. Accordingly, the purpose of my research is to prove that the success of UN sanctions is not solely dependent on their design; rather, it can be under the negative impact of other factors outside of the design stage of sanctions that emerge during their implementation. Furthermore, because there is no specific prohibition in international law against states adopting unilateral sanctions, the legality of unilateral sanctions is still up for debate, keeping this area of international law underdeveloped.[22] This thesis explores the concept of unilateral sanctions implemented by individual states, with particular emphasis on those imposed by the US and the EU. The study approaches the topic from two aspects. Firstly, it examines the role of unilateral/autonomous sanctions as substitutes or complements to UN sanctions, aiming to exert greater pressure on the target states. Secondly, the thesis investigates these unilateral sanctions as a comprehensive set of 'countermeasures' in response to violations of international law, analyzing whether they adhere to the necessary conditions specified for countermeasures under international law, as outlined in the Draft Articles on States' responsibility.

I found it both interesting and essential to concentrate my study on the nuclear situation of North Korea in a comparative analysis with Iran's nuclear case. After

[22] N. D. White & A. Abass, *Countermeasures And Sanctions, in* INTERNATIONAL LAW 537 (M. D. EVANS ED., 2014); reiterated *in* D. Hovell, *Unfinished Business of International Law: The Questionable Legality Of Autonomous Sanctions*, 113 American Journal Of International Law 140 (2019), file:///C:/Users/82102/Downloads/unfinished-business-of-international-law-the-questionable-legality-of-autonomous-sanctions.pdf

being subjected to years of sanctions, Iran started a serious process of nuclear negotiations that resulted in the conclusion of a nuclear agreement and the removal of all international restrictions. I was interested in learning why and how the sanctions regimes on the DPRK did not lead to positive results. This study will be focused on the nuclearization process of these two countries and global attempts to put an end to nuclear threats, such as through adopting international as well as unilateral sanctions. I, while highlighting the components of an effective sanctions regime, discuss some existing factors in the North Korean nuclear case, in order to understand how this country managed to preclude the sanctions regime from functioning as intended.

It is important to state clearly that I refrain from using the terms 'North Korean regime', 'DPRK regime', or 'Iranian regime' in this work, because they are mostly used in international relations with a political bias and have no place in a legal study.

Since the province of sanctions is extensive, my reasonings and analyses are focused on those types of economic sanction that were adopted *in response to the violation of international peace and security*. Most frequently, several states apply unilateral sanctions, including the US, Australia, Canada, New Zealand, the UK and the EU. Yet, because they are broader than other regimes and therefore greater in significance, I should limit the scope of my studies to the unilateral sanction regimes of the US and the EU. Specifically, the thesis focuses on those sanctions that are either imposed upon their initiative separate from the UN sanctions' regimes or surpass the latter's scope. Furthermore, the terms 'unilateral' and 'autonomous' will be used interchangeably in relation to sanctions in this paper.

ii. Methodology & Contributions

The methodology is mostly based on a comparative study. Comparative research will be conducted on the sanction regimes of North Korea and Iran, which provides the opportunity to bring together some aspects of sanctions that have not been previously examined. This, in my opinion, is the contribution of this study. The methodology includes transposing some consequences of a particular situation to another through comparison. The research focuses on the similarities and differences that exist in the situations of North Korea and Iran, allowing us to ponder whether the model of the Iranian nuclear deal could be applicable for the North Korean case. North Korea was selected as the study's subject because, at the time this thesis was written, it was the only state to have withdrawn from the NPT. Iran is used as a case of comparison. This grants originality to my study, since I can compare the sanctions regimes through an Iranian experience as a target country. The reason why I chose economic sanctions is due to two important factors. First, economic sanctions have the potential to inflict severe injuries on people living inside or outside the target state. In this sense, their sensitiveness and significance to the studies of sanction regimes becomes bold. Second, because most UN studies have concentrated on the humanitarian aspects of economic sanctions, more precise numerical and statistical data are available. This provided me the chance to more accurately compare the effects of sanctions on the lives of people in North Korea and Iran.

Throughout this study, I had the opportunity to access various Persian materials and verify the accuracy of their translations into English in other resources. Also, the fact that Iran's nuclear negotiations resulted in the lifting of international sanctions

helps me comprehend how much the severity of sanctions and the introduction of unilateral sanctions regimes could influence the outcomes of negotiations. Studying the Korean nuclear case with an eye to the experience of Iran in dealing with UN sanctions, with all of its similarities and differences, provides insights into how to deal with North Korea in order to put an end to, or at least stabilize, its increasing threat.

Since the best methodology for my study on sanctions is the comparative one, I needed to have access to many domestic and international instruments, such as tribunal decisions, international conventions, statutes, policy documents, and UNSC resolutions. For this reason, I based my research on a library-based method that was available through both offline and online resources. Furthermore, a doctrinal framework was the most useful to my research as descriptive-analytical work because the existing instruments as mentioned above, were crucial to my analysis. Therefore, a positivist view of law is utilized to present the majority of legal arguments.

iii. Legal Literature

There are discussions in the existing literature on sanctions and non-proliferation law about whether and to what extent sanctions had an impact on North Korea's behavior. I am unable to list all of the pertinent resources here due to space constraint.[23] To date, the legal literature lacks an in-depth study about the interrelated

[23] . I tend to cite some of the most important leading materials on sanction studies (especially with a focus on their effectiveness) that were of particular assistance in undertaking an in-depth comparative study. They are as follows: GARY C. HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED; MASAHIKO ASADA ED, ECONOMIC SANCTIONS IN INTERNATIONAL LAW AND PRACTICE; MATHEW HAPPOLD AND PAUL EDEN EDS., ECONOMIC SANCTIONS AND INTERNATIONAL LAW; GOLNOOSH HAKIMDAVAR ED., A STRATEGIC UNDERSTANDING OF UN ECONOMIC SANCTIONS; GORDON S. CORNELL, SANCTIONS LAW. These materials helped me analyze the regime of sanctions precisely by comparing

negative impacts of unilateral sanctions, sanction evasion and third states' cooperation on the UN sanctions regimes, and the possibility that the these factors may neutralize or diminish the UN sanctions' potential success and effectiveness in two aspects: i. sanctions' success in protecting the humanitarian rights of people; ii. sanctions' success in imposing sufficient pressure on the target state.[24] The primary objective here is to investigate whether the imposition of unilateral measures has compromised the effectiveness of smart sanctions implemented by the UN. Additionally, the study aims to assess the negative influence of third countries on the success of UN sanctions. This influence, in my opinion, has manifested through fragmented implementation of the sanctions and the provision of legal loopholes (intentional or unintentional) that enable the target state to evade the intended impact of the sanctions. The effectiveness and success of UN smart sanctions rely heavily on the alignment between their design and implementation stages. When there is a close match between the original intent behind the sanctions and how they are actually put into practice, they are more likely to achieve their desired outcomes. On the other hand, if there is a considerable disparity between the design and implementation, the likelihood of the sanctions working as intended decreases, potentially undermining their effectiveness. There is almost no legal material analyzing to what extent the

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the numerical data they provided, as well as some domestic sanction policies of the US and the EU, which were not easily accessible through the Internet. They also gave me some useful information about the North Korean economic situation, part of which is not accessible on the internet without using VPNs. Regarding the law on non-proliferation, there were also some useful resources, such as DANIEL H. JOYNER & MARCO ROSCINI, NON-PROLIFERATION LAW AS A SPECIAL REGIME & JAMES D. FRY, LEGAL RESOLUTION OF NUCLEAR NON-PROLIFERATION DISPUTES (All of the aforementioned resources are fully cited throughout the thesis)

[24] See Andrew Mack & Asif Khan, *The Efficacy Of UN Sanctions*, 31 Security Dialogue 279 (2000), https://www.jstor.org/stable/pdf/26296655.pdf?refreqid=excelsior%3A1fe17ebd6c9d342ccc32be4e1784f89aandab_segments=andorigin=andinitiator=; see also WILLEM V. GENUGTEN, UNITED NATIONS SANCTIONS: EFFECTIVENESS AND EFFECTS, ESPECIALLY IN THE FIELD OF HUMAN RIGHTS: A MULTI-DISCIPLINARY APPROACH (Intersentia 1999).

absence of unilateral sanctions and third states' fragmented implementation of sanctions can contribute to more effective implementation of UN sanction regimes. The present study will explore how unilateral sanctions play a negative role in influencing the success of UN sanctions in both the cases of North Korea and Iran from humanitarian perspective. However, it's important to highlight a distinctive factor exists in the North Korean context (sanction evasion) that is made possible through the exploitation of legal loopholes facilitated by third-party entities in other countries. While there have been allegations of Iran employing tactics to evade sanctions, I cannot address these allegations in the context of the Iran nuclear issue. They lack legal validity as they have not been confirmed in official UN documents, especially the reports of the Panel of Experts (POE).[25] Therefore, sanction evasion remains a distinctive factor specific to the North Korean case. After identifying the key challenge(s) that have hindered the success of sanctions regimes, particularly in the North Korean case, the final chapter of the study will focus on addressing these obstacles. The chapter will propose suggestions aimed at minimizing the negative impact of these challenges and enhancing the overall efficacy of the sanctions. By providing practical measures, the study aims to contribute to the improvement of

[25] When examining the allegations regarding Iran's sanction evasion and considering the evidence verified by the POE in the North Korean case, it becomes evident that there is a notable contrast in the ability of the two countries to withstand the pressure of sanctions. The panel, through its findings, emphasizes that North Korea's methods of evading sanctions pose a significant challenge to enforcing effective sanctions, whereas such evasion techniques have not been conclusively shown to hinder the implementation of sanctions in the case of Iran. For more information on the POE's reports, see *UN Documents For Iran:Sanctions Committee Documents*, https://www.securitycouncilreport.org/un_documents_type/sanctionscommitteedocuments/?ctype=Iranandcbtype=iran; *UN Documents For DPRK (North Korea):Sanctions Committee Documents*, <https://www.securitycouncilreport.org/un_documents_type/sanctionscommitteedocuments/?ctype=DPRK%20%28North%20Korea%29andcbtype=dprk-north-korea>

sanctions implementation, ultimately increasing the potential for achieving the desired outcomes in dealing with North Korea's situation and other similar cases.

iv. Questions Of The Study

Main Question: What are the legal challenges that negatively affect the potential success of UN smart sanctions in both humanitarian aspect and exerting pressure on the target states in the North Korea and Iranian nuclear cases?

Subsidiary Questions:

1. What are the legal deficiencies in unilateral/autonomous sanction regimes on North Korea and Iran? To what extent are unilateral sanctions regimes in compliance with international law? Can unilateral economic sanctions be recognized as lawful countermeasures under the Draft Articles on States' Responsibility (2001)?

2. Are North Korea's nuclear activities prohibited from a positivist viewpoint of international law in accordance with international conventions and customary rules of law? What legal insights could be achieved in this regard from the ICJ's Advisory Opinion on Nuclear Weapons (1996) concerning the nuclear activities of the DPRK?

3. If the answer to the above question is negative and I find that there is no legal rule or principle of law to prohibit North Korea from manufacturing, testing, producing, threatening to use or using nuclear weapons, I then need to investigate how the adoption of the UNSC resolution could legally be justified under international law?

4. What modifications are necessary within the UN system to encourage third states' collaboration in implementing sanctions effectively, thereby preventing the target state from exploiting legal loopholes for sanction evasion?

Chapter Two: History of DPRK's Nuclearization & Lessons For The Iranian Nuclear Deal

The current chapter presents a summary of the historical development of North Korea's nuclear program and the Iranian nuclear case, from their inception to the present. I investigate how the two nuclear cases were connected to and had an impact on one another by looking at the nuclearization process as a consequence of the two states' diplomatic relations with the international community. This chapter is important because it can contribute to a historical insight for understanding why the nuclear programs of North Korea and Iran have drawn attention throughout the world. In light of this, the chapter is divided into two sections: part one covers the nuclearization process of North Korea and part two expounds the historical roots of the Iranian nuclear program.

I. Korea's Geopolitical Value During The Cold War Era

Shortly after the surrender of Japan at the end of WWII, the Korean Peninsula was split in two halves along the 38th parallel by the victorious powers of the war.[26] Consequently, the Allied powers of WWII sought to place Korea under the trusteeship system of the UN after the League of Nations and its system of mandate disappeared, concluding that Korea was not prepared to implement a self-governing political system.[27] This decision was based on the UN Charter, which states that:

> "The trusteeship system shall apply to territories which may be detached from enemy states as a result of the Second World War…"[28]

The US and the Soviet Union later decided to form a Joint Commission to assist Korea with self-governance, to begin in 1946, but it was unsuccessful due to disagreement over the composition of the commission's membership.[29] The Korean Peninsula had a chance to be reunified if the plan of the UN Temporary Commission on Korea (UNTCOK) for conducting elections on the Peninsula was implemented successfully.[30] But due to the continued infiltration by foreign powers

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[26] JONGSOO LEE, THE DIVISION OF KOREA AND THE RISE OF TWO KOREAS 1945–1948 298 (Routledge 2016); see also WADA HARUKI, THE KOREAN WAR: AN INTERNATIONAL HISTORY (Rowman & Littlefield 2018).

[27] This plan was abandoned after the United States and the Soviet Union could not agree on the terms of the trusteeship. See *Memorandum Of Conversation, By The Secretary Of State* (Mar.27, 1943), https://history.state.gov/historicaldocuments/frus1943v03/d22; Mark E. Caprio, *(Mis)-Interpretations of the 1943 Cairo Conference: The Cairo Communiqué And Its Legacy Among Koreans During And After World War II*, 27(1) International Journal Of Korean History 137, 138, 157-158 (Feb. 2022), https://ijkh.khistory.org/journal/view.php?number=559; II CORDELL HULL, THE MEMOIRS (THE MACMILLAN CO., 1948); ROBERT E. SHERWOOD ET AL., AN INTIMATE HISTORY (Harper & Brothers 1948); MICHAEL C. SANDUSKY, AMERICA'S PARALLEL (Old Dominion Press 1983).

[28] UN Charter, art.77.

[29] See William Stueck, *The United States, The Soviet Union, And The Division Of Korea: A Comparative Approach*, 4(1) Journal Of American East-Asian Relations 1, 22-26 (1995), https://www.jstor.org/stable/pdf/23612581; Charles Kraus, *Failed Diplomacy:Soviet-American Relations And The Division Of Korea*, Wilson Center (May.18, 2020), https://www.wilsoncenter.org/blog-post/failed-diplomacy-soviet-american-relations-anddivisionkorea

[30] U.N. Doc., A564 (Jul.14, 1948).

in the region, the plan became impossible. In 1947, the UN proposed holding elections in Korea to unify the country, but the Soviet Union refused to allow UN teams into the northern part of the peninsula. As a result, separate elections were held in the north and south in 1948. Three years after the Conference of Allied Foreign Ministers held in Moscow in 1945, an election was held in the South, leading to the announcement of Syngman Rhee (이승만) as the first president of South Korea in 1948.[32] In the North, an unrealistic show election was also held in 1948, consolidating Kim Il Sung's leadership under Soviet support.[33]

II. Nuclear Proliferation & The Initiation Of Negotiations

The division of the Korean Peninsula was a prelude to the rise of the two rival Korean states in 1948 and the outbreak of the Korean War in the 1950s. This competition made it possible for the DPRK to develop and enhance its nuclear arsenal in order to ensure survival on the Korean Peninsula. Accordingly, in the pages that follow, I will cover key events in the Peninsula's political history.

[32] See Myong-sob Kim & Seok-Won Kim, *The Geopolitical Perceptions Of Kim Ku And Syngman Rhee: Focusing On The Period Of Japanese Occupation*, 1(1) Korean Social Sciences Review 105 (2011), https://sspace.snu.ac.kr/bitstream/10371/75199/1/03Kim%20Myongsob%20%26%20Kim_4%EA%B5%90.pdf.

[33] See Mitsuhiko Kimura et al., *An Interpretation Of The North Korean Regime*, 2(1) The Journal Of The Korean Economy 183(2001), http://www.akes.or.kr/wp-content/uploads/2018/03/2-1-8.pdf; see also *History Of The United States Army Forces In Korea: The Moscow Conference and Korea*, National Institute Of Korean History, http://db.history.go.kr/item/level.do?itemId=husaandlevelId=husa_002_0030_0080_0020andtypes=o

i. The Period 1950-1985

The atomic bombings carried out by the US on Hiroshima and Nagasaki in WWII, which took place prior to the formation of North Korea as an independent state, had a profound influence on future events in the region. These catastrophic incidents provided North Korea with a historical lesson. The immense destructive force exhibited by the nuclear weapons in Japan played a crucial role in shaping North Korea's perspective on pursuing a nuclear program. The accumulation of threats instigated the North Korean Army[34] to concentrate—before the conclusion of the Korean War Armistice—on conducting operations on an atomic battlefield and re-establishing chemical defense units.[35] Additionally, the threats also motivated North Korea to establish a research center and deploy scientists to the Soviet Union to be trained under nuclear-related research programs.[36] Likewise, in the late 1950s, several agreements were concluded between North Korea and the Soviet Union, including the Chosen-USSR Atomic Agreement of September 1959, as well as the addition of nuclear-related curriculums at Kim Il Sung University and Kim Chaek College of Science and Technology.[37] Following the Korean War, tensions between North Korea and the US increased continuously.[38] As a result, DPRK decided to

[34] Korean People's Army or KPA.
[35] Joseph S.B Jr., *North Korea's Development Of A Nuclear Weapons Strategy*, US-Korea Institute 1, 9 (2015), https://www.38north.org/wpcontent/uploads/2015/08/NKNF_NuclearWeaponsStrategy_Bermudez.pdf
[36] In-Bum Chun, *North Korea's Military Strategy,* 29 Joint US-Korea Academic Studies 344, 249 (2018), https://keia.org/wp-content/uploads/2020/05/kei_jointuskorea_2018_180801_final_digital.pdf
[37] Id.
[38] Bruce Cumings, *Spring Thaw for Korea's Cold War*, 48(3) Bulletin Of The Atomic Scientists 14 (Apr.1992), https://www.tandfonline.com/doi/abs/10.1080/00963402.1992.11460077?journalCode=rbul20

implement the '*Four Military Lines*' strategy[39] of 1962, under which all of its military potential in nuclear, biological, and chemical fields was to be elevated.[40] Having witnessed the political tensions between Iran and Iraq in their war, in the 1980s North Korea focused on the introduction of new reactors, a radiochemical separation plant, additional research centers, and the production of plutonium for nuclear weapons and warheads.[41]

ii. The Period 1985-1992

DPRK came under international pressure in the latter half of the 1980s to join the NPT in exchange for nuclear-related assistance. This resulted in North Korea concluding a safeguard agreement with the IAEA.[42] The attention towards IAEA inspections was a result of concerns over North Korea's clandestine nuclear weapons development.[43] Additionally, in 1992, the DPRK submitted a declaration to the IAEA regarding its nuclear facilities for evaluation. Also in the same year, the *Joint Declaration of the Denuclearization of the Korean Peninsula* was concluded, according to which:

[39] The four strategies were arming the whole people (including People's Army, the Red Militia, workers, peasants and others), the fortification of the entire country, the training of soldiers as a cadre force and the modernization of arms. See Yong-Soon Yim, *Maoism And North Korean Strategic Doctrine*, 3(2) The Journal Of East Asian Affairs 335, 343 & 344 (1983), https://www.jstor.org/stable/pdf/23253519.pdf?refreqid=excelsior%3Abcc03d2121ddac7e5a9a73b6c0b3e450andab_segments=andorigin=

[40] For instance, in 1962, two atomic energy research centers were established at Pakchon and Yongbyon where the first nuclear research reactor and a critical facility were installed for the production of medical and industrial isotopes as well as basic research. FU-LAI T. YU AND DIANA S. KWAN, CONTEMPORARY ISSUES IN INTERNATIONAL POLITICAL ECONOMY 116 (Springer 2019).

[41] See SUNG-CHULL KIM & MICHAEL D. COHEN EDS., NORTH KOREA AND NUCLEAR WEAPONS: ENTERING THE NEW ERA OF DETERRENCE (Georgetown University Press 2017); Daniel Wertz, *The U.S., North Korea, And Nuclear Diplomacy*, National Committee On North Korea (last updated in Oct. 2018), https://www.ncnk.org/resources/briefing-papers/all-briefing-papers/history-u.s.-dprk-relations

[42] See Davenport, supra note 13; Wade L. Huntley, *Rebels Without A Cause: North Korea, Iran And The NPT*, 82(4) International Affairs 723 (2006), http://www.jstor.org/stable/3874155

[43] Mark E. Manyin et al., *Nuclear Negotiations With North Korea*, CRS Report (R45033; May.4, 2021), https://fas.org/sgp/crs/nuke/R45033.pdf

> *[the two sides] shall not test, manufacture, produce, receive, possess, store, deploy or use nuclear weapons and would create the conditions for peaceful reunification.*[44]

The 1990s started with the collapse of the Soviet Union and easing tensions between the Eastern and the Western bloc, followed by the South Korea's tendency under President Roh Tae-woo's '*Nordpolitik*' (northern policy)[45] to enter into relations with both Russia and China. After the Cold War ended, the US also announced that it would withdraw nuclear weapons from the Peninsula.[46] Against the backdrop of mounting economic pressure caused by the end of economic tutelage from China and the Soviet Union, culminating in famine, North Korea deemed it necessary to enter into negotiations with South Korea.[47]

iii. The Period 1993-2002; The First Nuclear Activities & Conclusion Of The Framework Agreement

The years 1993-2002 were marked by mistrust and pessimism about the DPRK. North Korea refused further inspections from the IAEA in early 1993, after it was accused of concealing two undeclared nuclear sites that were used for nuclear waste storage.[48] Consequently, the Board of Governors of the IAEA on 1 April 1993

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[44] *Joint Declaration Of The Denuclearization Of The Korean Peninsula* (Jan. 20, 1992), https://2001-2009.state.gov/t/ac/rls/or/2004/31011.htm

[45] For more information about this policy, see Tae Dong Chung, *Korea's Nordpolitik: Achievements And Prospects*,15(2) Asian Perspective 149 (1991), https://www.jstor.org/stable/pdf/42703974.pdf?refreqid=excelsior%3A5a325b9e376204e85f807b90ec28aa5candab_segments=andorigin=

[46] See Kristensen & Norris, supra note 3.

[47] See William J. Moon, *The Origins Of The Great North Korean Famine: Its Dynamics And Normative Implications*, 5(1) North Korean Review 105 (2009), http://www.jstor.org/stable/43910265

[48] See Matthias Dembinski, *North Korea, IAEA Special Inspections, And The Future Of The Nonproliferation Regime*, 2(2) The Nonproliferation Review 31 (1995), https://www.nonproliferation.org/wp-content/uploads/npr/dembin22.pdf.

referred DPRK's non-compliance issue to the Security Council.[49] It was during this period that the Clinton administration declared its policy against North Korea, as well as the possibility of military attacks on the Yongbyon nuclear site.[50]

The US and North Korea resumed nuclear negotiations in 1993, through which the US agreed to help install a light-water nuclear power plant reactor in exchange for North Korea's freeze on plutonium production.[51] Kim Il-sung died in July 1994, but mutual negotiations continued under Kim Jong-Il's leadership, which finally resulted in the *1994 Agreed Framework*.[52] In the agreement, North Korea committed to remain a NPT non-nuclear state, freeze and dismantle its plutonium production under IAEA inspections, and accept installation of verification tools for permanent remote monitoring, in return for receiving two nuclear power light-water reactors (LWRs) from the US.[53] Furthermore, the US committed to provide security guarantees and sanctions reductions.[54] Likewise, the two states committed to normalize political and economic relations. The Agreed Framework called for

[49] The Security Council resolution that followed the referral was on 11 May 1993. See Int'l Atomic Energy Agency [IAEA], *The DPRK's Violation of Its NPT Safeguards Agreement With The IAEA* (1997), https://www.iaea.org/sites/default/files/dprk.pdf. On 12 March 1993, the DPRK announced its decision to withdraw from the NPT, but in June 1993 suspended the effectuation of that withdrawal. See *Fact Sheet On DPRK Nuclear Safeguards*, supra note 10.

[50] See James M. Minnich, *Resolving The North Korean Nuclear Crisis: Challenges And Opportunities In Readjusting The U.S.-ROK Alliance*, Asia Pacific Center For Security Studies(2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3040843

[51] *Factsheet On North Korea Nuclear Overview*, Nuclear Threat Initiative (Oct.11, 2018), https://www.nti.org/analysis/articles/north-korea-nuclear/.

[52] For more information about the Framework, see JOEL S. WIT ET AL., GOING CRITICAL: THE FIRST NORTH KOREAN NUCLEAR CRISIS (Brookings Institution Press 2005).

[53] Larry A. Niksch, *North Korea's Nuclear Weapons Development And Diplomacy*, CRS Report (RL33590; Jan.5, 2010), https://sgp.fas.org/crs/nuke/RL33590.pdf; See also Mark E. Manyin & Mary B.D. Nikitin, *Foreign Assistance To North Korea*, CRS Report (R40095; Apr.2, 2014), https://sgp.fas.org/crs/row/R40095.pdf

[54] *Agreed Framework Between The United States Of America And The Democratic People's Republic Of Korea*, US Department Of State (Oct.21, 1994), https://20012009.state.gov/t/ac/rls/or/2004/31009.htm.

500,000 metric tons of heavy fuel oil (HFO) to be provided to North Korea annually while the two LWRs were constructed through the Korean Peninsula Energy Development Organization (KEDO) [55], a consortium formed by the US, Japan, and South Korea.[56] The US continued bilateral talks despite the failure of the Agreed Framework, after North Korea's first long-range ballistic test over Japan in 1998.[57] A moratorium on long-range missile testing was agreed upon by the US and the DPRK in September 1999, in exchange for a partial removal of US sanctions and the restart of KEDO's North Korean production projects.[58]

iv. The Period 2003-2009 & The Six Party Talks

The Six Party Talks since 2003 was the second significant attempt to negotiate on North Korea's proliferation program.[59] After President George W. Bush took office in 2001, a general modification was made in US policies about the North Korean nuclear program. The US did not further accept implementation of the Agreed Framework, instead implementing more restrictions on the DPRK, including constraints on its missile program.[60] In spite of the President's speech in January

[55] For the full text of the KEDO-DPRK Supply Agreement, see, *Agreement On Supply Of A Light-Water Reactor Project To The Democratic People's Republic Of Korea Between The Korean Peninsula Energy Development Organization And The Government Of The Democratic People's Republic Of Korea*,The Korean Peninsula Energy Development Organization, http://www.kedo.org/pdfs/SupplyAgreement.pdf.
[56] Manyin & Nikitin, supra note 53, at1.
[57] See Bartholomees, J. Boone ed., *U.S. Relations With North Korea, 1991-2000*, Strategic Studies Institute 370 (2012), https://www.jstor.org/stable/pdf/resrep12027.28.pdf?refreqid=excelsior%3A702732acdf4a596895a0ba431fc5f35bandab_segments=andorigin=andinitiator=andacceptTC=1
[58] Manyin & Nikitin, supra note 53.
[59] The negotiations included the US, Russia, China, Japan, North and South Korea. See LESZEK BUSZYNSKI, NEGOTIATING WITH NORTH KOREA: THE SIX PARTY TALKS AND THE NUCLEAR ISSUE (Taylor and Francis 2013).
[60] See *Statement On The Completion Of The North Korea Policy Review*, University Of California (Jun.6, 2001), https://www.presidency.ucsb.edu/documents/statementcompletionthenorthkoreapolicyreview.

2002 including North Korea in the 'Axis of Evil',[61] the US resumed negotiations with the North in the same year.[62] Nevertheless, after a naval incident on 29 June 2002, in which 19 South Korean troops were killed, negotiations were postponed again.[63] In October 2002 the US, South Korea, and Japan argued that all previously agreed obligations were violated by North Korea, including the Agreed Framework, the NPT, North Korea's safeguards agreement with the IAEA, and the Joint North-South Declaration on the Denuclearization of the Korean Peninsula, due to its development of a program for highly enriched uranium (HEU) or plutonium, which was a fossil fuel for nuclear bombs.[64] The IAEA Board of Governors passed a resolution on 29 November 2002, calling on North Korea to clarify reports of a uranium enrichment program and come into compliance with its safeguards agreement.[65] According to the resolution, any other covert nuclear activities would constitute a violation of the DPRK's international commitments, including the DPRK's safeguards agreement with the Agency pursuant to the NPT.[66] After suspension of the KEDO construction project, North Korea expelled IAEA

[61] C. Kenneth Quinones, *Dualism In The Bush Administration's North Korea Policy*, 27(1) Asian Perspective 197 (2003), https://www.jstor.org/stable/pdf/42704402.pdf?refreqid=excelsior%3A7bb3efe2ea222e042f8b232e299929caandab_segments=andorigin=andinitiator=

[62] See Victor D. Cha & David C. Kang, *The Debate Over North Korea*, 119(2) Political Science Quarterly 229, 233 (2004), https://www.jstor.org/stable/pdf/20202344.pdf?refreqid=excelsior%3A6a9755d2d099f795e9f9e073f5e15e09andab_segments=andorigin=andinitiator=andacceptTC=1

[63] See J.M Van Dyke et al., *The North/South Korea Boundary Dispute In The Yellow (West) Sea*, 27(2) Marine Policy 143, 158(2003), https://www.sciencedirect.com/science/article/pii/S0308597X0200088X?casa_token=FWktNTZi01IAAAAA:m6p4XvKolw5OkmDAc4QhdC4TxBD4MJl4fLOf_NsRy9jEHO7VL7fXU2LHPqbgRt0Vs8oGghUi5uU; *South, North Korea Clash At Sea*, CNN (Jun. 29, 2002), http://edition.cnn.com/2002/WORLD/asiapcf/east/06/29/korea.warships/

[64] See Jonathan D. Pollack, *The United States, North Korea, And The End Of The Agreed Framework*, 56(3) Naval War College Review 1 (2003), https://digital-commons.usnwc.edu/nwc-review/vol56/iss3/2

[65] Int'l Atomic Energy Agency [IAEA], *Report By The Director General On The Implementation Of The NPT Safeguards Agreement Between The Agency And The Democratic People's Republic Of Korea*, GOV/2002/60(Nov.29, 2002), https://www.iaea.org/sites/default/files/gov2002-60.pdf.

[66] Id.

inspectors from the Yongbyon nuclear site on 27 December 2002.[67] It finally announced its withdrawal from the NPT, effective from 10 January 2003.[68]

In 2005, the Six Party Talks resumed and some developments were made, in that North Korea committed to abandon all nuclear weapons and existing nuclear programs and return to the NPT.[69] In 2007, the parties agreed on a series of steps to implement the 2005 agreement, despite the fact that North Korea once again provided proof of its advancement of a non-peaceful program through its first nuclear test in 2006.[70]

During the Obama administration, North Korea shifted its policy from diplomacy towards provocative measures, such as launching a long-range rocket in April 2009, while declaring that it had no intention to come back to negotiations in the future.[71] At this time, what made the resumption of the Six Party Talks more complicated and almost impossible was the occurrence of two naval incidents attributed to North Korea in 2010, in which a number of South Koreans were killed.[72] Having

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[67] See Int'l Atomic Energy Agency [IAEA], *Visit To The Yongbyon Nuclear Facilities In North Korea*, (Feb. 2004), https://inis.iaea.org/search/search.aspx?orig_q=RN:41073066.

[68] *KCNA Detailed Report Explains NPT Withdrawal*, Korea Central News Agency (Jan. 22, 2003), https://nuke.fas.org/guide/dprk/nuke/dprk012203.html; *The Worldwide Threat In 2003: Evolving Dangers In A Complex World*, Federation Of American Scientists (Feb.11, 2003), https://irp.fas.org/congress/2003_hr/021103tenet.html

[69] The biggest achievement of the Six-Party Talks was the signing of the 'Joint Statement of the Fourth Round of the Six-Party Talks' on 19 September 2005. MI-YEON HUR, THE SIX-PARTY TALKS ON NORTH KOREA: DYNAMIC INTERACTIONS AMONG PRINCIPAL STATES 89 (Springer 2018); Ki-Moon Ban, *Six-Party Talks: The Best Option for Resolving The North Korean Nuclear Issue*, Korea Policy Review 1, 8 (Jul. 2005), file:///C:/Users/82102/Downloads/%EA%B8%B0%EA%B3%A0%EB%AC%B8.pdf

[70] Davenport, supra note 13.

[71] Joanna C. Cooper, *A New North Korean Policy Under The Obama Administration*, 5(2) North Korean Review 72, 76 (2009), https://www.jstor.org/stable/43908718

[72] In March, an explosion sank a South Korean navy corvette, the Cheonan, killing 46 sailors. Also in November 2010, a North Korea artillery attack against South Korea's Yeonpyeong Island killed two South Korean marines and two civilians, and wounded dozens. See *The Korean Peninsula:Rising Military Tensions And The ROK's Changing Foreign And Defense Policy*, East Asian Strategic Review 87 (2011), https://warp.da.ndl.go.jp/info:ndljp/pid/10325246/www.nids.mod.go.jp//english/publication/eastasian/pdf/2011/east-asian_e2011_03.pdf

acknowledged the findings of the Investigation Group, the Security Council condemned the attack by a North Korean torpedo,[73] which was deemed to have destabilized security on the Korean Peninsula.[74]

v. The Leap Day Deal Of 2012

Despite these tensions, bilateral negotiations reached another important milestone in February 2012 known as the *Leap Day Agreement*, in which North Korea committed to a moratorium on its long-range missile testing; a nuclear testing moratorium; a moratorium on nuclear activities, including uranium enrichment at Yongbyon; and return of IAEA inspectors to the Yongbyon nuclear facilities, in return for US nutritional assistance based on continued need.[75] The alleged launch of an earth observation satellite by North Korea in April 2012 was considered a violation of Security Council Resolutions and as a result, the Leap Day agreement fell apart.[76] Despite North Korea's protestations to the contrary, the US was of the belief that satellite launches were within the scope of the Deal under moratorium.[77]

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[73] U.N. Doc., SC/9975 (Jul. 9, 2010).
[74] For a detailed information about the incident, see Blocking Property of Certain Persons With Respect To North Korea, Executive Order 1355175 (F.R. 53837: Sep.1 2010).
[75] *US/DPRK Bilateral Discussions* (Feb.29,2012), https://20092017.state.gov/r/pa/prs/ps/2012/02/184869.htm
[76] Anthony H. Cordesman & Charles Ayers, *The Military Balance In The Koreas And Northeast Asia: Korean WMD Forces*, Center For Strategic & International Studies 228, 260-261(2017), https://www.jstor.org/stable/resrep23142.7
[77] Andrea Berger, *A House Without Foundations: The North Korea Sanctions Regime And Its Implementation*, Royal United Service Institute 1, 159 (2017), https://theasiadialogue.com/wp-content/uploads/2017/08/201706_whr_a_house_without_foundations_web.pdf.

vi. 2018 Talks With The US & South Korea

The darkest, most belligerent phase of US-North Korea relations started in 2016 and 2017, after the North conducted a series of missile and nuclear weapons tests.[78] In January 2016, for example, North Korea conducted its fourth nuclear test.[79] It also conducted another test in 2017 that it claimed to be a hydrogen bomb.[80] President Trump delivered provocative remarks[81] about US preparation for preventive military action.[82] Furthermore, DPRK ignored invitations by the South Korean President, Moon Jae-in, in May 2017 for additional talks on restoring a military hotline, humanitarian assistance, and preparations for reuniting families who were separated since the Korean War.[83] Although it is argued that negotiations were, *to some extent*, effective to lessen provocative measures by North Korea between 1990 and 2017, this does not necessarily mean that North Korea indicated intentions to cease its nuclear proliferation program.[84]

On 1 January 2018, Kim Jong-un used his annual New Year's speech to accept an invitation from ROK President Moon Jae-in to participate in the 2018 Winter

[78] See Mark E. Manyin et al., *North Korea: A Chronology of Events From 2016 To 2020*, CRS Report (R46349; May. 5, 2020).
[79] See Wang Junsheng et al., *The DPRK's Fourth Nuclear Test And The Situation On The Korean Peninsula, Chinese Perspectives: Towards The Korean Peninsula In The Aftermath Of North Korea's Fourth Nuclear Test*, Stimson Center 47 (2016), http://www.jstor.org/stable/resrep10996.
[80] Alon Levkowitz, *President Moon Jae-in's Dilemma*, Begin-Sadat Center For Strategic Studies (Oct. 25, 2017), https://www.jstor.org/stable/pdf/resrep04532.pdf?refreqid=fastlydefault%3A6e8c44400b63bc32bc810876e1af446bandab_segments=0%2Fbasic_search_gsv2%2Fcontrolandorigin=andinitiator=search-results
[81] *Remarks By President Trump Before A Briefing On The Opioid Crisis* (Aug.8, 2017, 3:12 P.M), https://trumpwhitehouse.archives.gov/briefingsstatements/remarkspresidenttrumpbriefingopioidcrisis/.
[82] For more information, see Kathleen J. Mcinnis et al., *The North Korean Nuclear Challenge: Military Options And Issues For Congress*, CRS Report (R44994; Nov.6, 2017).
[83] Manyin et al., supra note 43, at 11.
[84] *US-DPRK Negotiations And North Korean Provocations*, Center For Strategic & International Studies (Oct. 2, 2017), https://beyondparallel.csis.org/dprk-provocations-and-us-negotiations/.

Olympics in Pyeongchang.[85] The two Koreas also issued the "Panmunjom Declaration," in which they pledged to realize "through complete denuclearization, a nuclear-free Korean Peninsula," to issue a declaration ending the Korean War by the end of 2018, and to open a range of inter-Korean dialogues and cooperation projects.[86] The two Koreas and the US agreed upon building a "peace regime," through signing a military confidence-building agreement particularly at the demilitarized zone, while President Trump committed to unilaterally cancelling major U.S.-South Korea military drills.[87] Meanwhile, Moon and Kim held their third summit in Pyongyang in September 2018, issuing the Pyongyang Joint Declaration to denuclearize of the Korean Peninsula, improve inter-Korean relations, and adopt confidence-building measures to soothe military tensions.[88] They signed another agreement known as the 'Comprehensive Military Agreement,' in which they committed to prevent accidental military clashes, create a no-fly zone along the DMZ, withdraw many of their guard posts within the DMZ, and create, in effect, a "no military drills zone" and a joint fishing zone in the Yellow Sea.[89]

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[85] See Aidan F. Carter, *An Unprecedented Year, But Will Progress Continue?*, 20(3) Comparative Connections 71 (2019); *Kim Jong UN's 2018 New Year's Address*, The National Committee On North Korea (Jan.1, 2018), https://www.ncnk.org/node/1427; see also *Moon Renews Wish For N. Korea's Participation In 2018 Pyeong Chang Olympics*, Yonhap News Agency (Jul. 3 2017), https://en.yna.co.kr/view/AEN20170703005600315.

[86] *Panmunjeom Declaration For Peace, Prosperity And Unification Of the Korean Peninsula*(Apr. 27, 2018),hhttps://www.mofa.go.kr/eng/brd/m_5478/view.do?seq=319130andsrchFr=andamp%3BsrchTo=andamp%3BsrchWord=andamp%3BsrchTp=andamp%3Bmulti_itm_seq=0andamp%3Bitm_seq_1=0andamp%3Bitm_seq_2=0andamp%3Bcompany_cd=andamp%3Bcompany_nm=andpage=1andtitleNm; U.N. Doc., A/72/109–S/2018/820 (Sep.10, 2018).

[87] *Chronology Of US-North Korean Nuclear And Missile Diplomacy*, Arm Control Association (2020), https://www.armscontrol.org/factsheets/dprkchron.

[88] Han-sook Paik, *Inter-Korean Path To Peace: Jump Started But Stalled, in* NORTH KOREA'S FOREIGN POLICY: THE KIM JONG-UN REGIME IN A HOSTILE WORLD 65 (SCOTT A. SNYDER & KYUNG-AE PARK EDS., 2022).

[89] Daniel P. Connolly, *The Comprehensive Military Agreement And South Korea's Maritime Security*, The National Bureau Of Asian Research (May.28, 2020), https://www.nbr.org/publication/the-comprehensive-military-agreement-and-south-koreas-maritime-security/.

At the US-North Korea Singapore Summit on 12 June 2018, Trump and Kim issued a brief joint statement in which Trump "committed to provide security guarantees to the DPRK," and Kim "reaffirmed his firm and unwavering commitment to complete denuclearization of the Korean Peninsula." [90] The document, *however*, remained silent on North Korea's missile program, the definition of denuclearization, and the timeframe for implementation.[91]

vii. The Hanoi Summit Of February 2019

The US-North Korea Summit of February 27 and 28, 2019, took place in Vietnam without any distinguishable outcome, the principal reason of which was disagreement over the timing and sequencing of concessions, specifically DPRK denuclearization measures, on the one hand, and sanctions relief, on the other.[92] The US did not consent to the relief of imposed sanctions that had targeted major sectors of the North Korean economy, including imports of petroleum.[93] In response, North Korea resumed testing short-range ballistic missiles (SRBM) from May 2019 until 2021.[94] Besides a meeting between Trump and Kim in Panmunjom in June 2019, the February 2019 Hanoi Summit was the last meeting between the US and the DPRK

[90] *Joint Statement Of President Donald J. Trump Of The United States Of America And Chairman Kim Jong UN Of The Democratic People's Republic Of Korea At The Singapore Summit* (Jun. 12, 2018), https://trumpwhitehouse.archives.gov/briefingsstatements/jointstatementpresidentdonaldjtrumpunited-states-america-chairman-kim-jong-un-democratic-peoples-republic-korea-singapore-summit/.
[91] Id.
[92] See Dianne E. Rennack, *North Korea: Legislative Basis For U.S. Economic Sanctions* (R41438; Jun.16, 2022), https://sgp.fas.org/crs/row/R41438.pdf.
[93] Joseph Dempsey, *North Korea Tests New SRBM*, International Institute For Strategic Studies (Apr.18, 2021), https://www.iiss.org/blogs/analysis/2021/04/mdi-north-korea-srbm.
[94] Id.

at the time of writing in winter 2023, because North Korea declined to participate in further talks.[95]

III. History Of Iranian Nuclear Program

One of the most difficult diplomatic issues between the West and Iran has been the Iranian nuclear case. A contrasting perspective of Western powers, primarily the US, concerning nuclear cooperation with Iran may be seen from a historical comparison of Iran's nuclear program in the two periods before and after the Islamic Revolution. After the Revolution, the US, which had previously assisted Iran in acquiring nuclear technology, emerged as the main opponent of the nuclear program.[96]

i. Before the Islamic Revolution

In the midst of the Cold War, a major US strategy was to prevent political penetration by the Soviet Union and the spread of the Communist bloc throughout the world.[97] It was during this time that US President Eisenhower delivered his momentous speech of 1953, "Atoms for Peace," to emphasize the advantages of the civil usage of nuclear energy in various fields, including agriculture, medicine, and power generation.[98] The speech indeed provided an appropriate atmosphere for the

[95] See Mark Tokola, *The Hanoi Summit: A Point On A Long North Korean Foreign Policy Line*, The National Bureau Of Adian Research (Mar. 2019), https://www.nbr.org/publication/the-hanoi-summit-a-point-on-a-long-north-korean-policy-line/

[96] See Hassan Hassani, *Iran And USA Nuclear Relations Before And After Revolution*, 4(1) Arabian Journal Of Business & Management Review 46 (2014), https://www.arabianjbmr.com/pdfs/OM_VOL_4_(1)/5.pdf; Habibollah A. Shirazi & Ghafar Zarei, *The US And Iran's Nuclear Case*, 78 Scientific Information Database 105 (2011), https://daneshnameh.srbiau.ac.ir/article_4018_a654217b407d636ff62aacb31cf65d0d.pdf

[97] See JEREMY BLACK, THE COLD WAR: A MILITARY HISTORY (1st ed. 2015).

[98] See Int'l Atomic Energy Agency [IAEA], *Eisenhower's Atoms For Peace: The Speech That Inspired The Creation Of The IAEA* (Dec.2013), https://www.iaea.org/sites/default/files/publications/magazines/bulletin/bull54-4/54401210304.pdf

establishment of IAEA, which would promote the peaceful uses of nuclear energy "*for the benefit of all mankind*."[99] Nevertheless, this speech seemed to be a US Cold War maneuver against Russia. Immediately after, the US launched the 'Atoms for Peace Project,' through which the necessary know-how and equipment were shared with universities, hospitals, and research centers in and outside US territory.[100] The first nuclear reactors in Iran, as well as in Pakistan and Israel, were established by the US.[101] The US intentionally chose countries that were geographically located between Russia and the West as participants in the Atoms for Peace Project. Accordingly, TNRC[102] was established at Tehran University as the first research foundation.[103] Iran and the US also signed an agreement in 1957 for the establishment of light-water research reactors.[104] In 1958, Iran became a member of the International Atomic Energy Agency, and in 1968, it signed the NPT.[107] From that time, Iran granted IAEA the right to verify Iran's nuclear activities.[108] After some negotiations with the US, Iran managed to establish a small 5-MW reactor, the

[99] Id., at 3.
[100] Zahra Nowparast, *Atoms For Peace Initiative: The Results And Achievements,* 38(3) Politics Quarterly 379, 381(2008), https://jpq.ut.ac.ir/article_27342_b1b464e31b6d93cfb1931bec37fe668b.pdf?lang=en
[101] See Ali Vaez & Karim Sadjadpour, *Iran's Nuclear Odyssey, Carnegie Endowment For International Peace* (2013), https://carnegieendowment.org/files/iran_nuclear_odyssey.pdf
[102] Short for "Tehran Nuclear Research Center"
[103] Mustafa Kıbaroğlu, *Iran's Nuclear Ambitions From A Historical Perspective And The Attitude Of The West,* 2 Middle East Studies 223, 225 (2007), http://www.jstor.org/stable/4284538.
[104] DANIEL H. JOYNER, IRAN'S NUCLEAR PROGRAM AND INTERNATIONAL LAW: FROM CONFRONTATION TO ACCORD 5 (Oxford University Press, 2016).
[107] When the NPT was opened for signature, Iran joined the Treaty as a NNWP after the Iranian Parliament ratified it in February 1970. See Semira N. Nikou, *Timeline Of Iran's Nuclear Activities,* United States Institute Of Peace (Aug.17, 2021), https://iranprimer.usip.org/resource/timeline-irans-nuclear-activities.
[108] "Iran signed a comprehensive safeguards agreement with the International Atomic Energy Agency (INFCIRC/ 214), which came into force on May 15, 1974. See JOYNER, supra note 104, at 6; Robert Reardon, *Containing Iran: Strategies For Addressing The Iranian Nuclear Challenge,* RAND Corporation 1, 10 (2012), https://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1180.pdf.

fuel of which was also provided by the US in September 1967.[109] The Shah of Iran had plans for establishing 23 more nuclear plants of 23000 MW capacity until 2000, which was seriously taken into account by the US and Europe for cooperation in energy sectors.[110] Iran's nuclear program, which began in the 1950s, became more serious in 1974 with the establishment of the Atomic Energy Organization of Iran[111] and the signing of a contract to build the Bushehr nuclear power plant.[112] Before the Islamic Revolution, Iran had the potential to achieve a high level of nuclear development with the assistance of the US and European states, through the establishment of Iran's first nuclear plant in Bushehr. This plant was erected by the German company, Kraftwerk, to provide nuclear energy in Shiraz, as well as a pressurized water reactor, and was to be fully completed in 1981.[115] Another positive

[109] Id.

[110] Mustafa Kibaroglu, *Good For The Shah, Banned For The Mullahs: The West And Iran's Quest For Nuclear Power*, 2 Middle East Journal 207 (2006), http://www.jstor.org/stable/4330247

[111] The Atomic Energy Organization of Iran (AEOI) is a governmental organization whose main function is the development of nuclear technology and all related affairs. This organization, whose preparatory establishment work was accomplished in early 1974, emerged as a legal person after adoption of the Atomic Energy Agency Act of Iran (7 July 1953). The organization was established for the purposes of promoting the use of nuclear energy in industries, agriculture, and services; the establishment of nuclear power plants and desalination plants; production of raw materials required by the nuclear industry; creation of scientific and technical infrastructure for the implementation of projects; and coordination and supervision of all atomic energy issues. For the details, see Atomic Energy Organization of Iran, https://aeoi.org.ir/en/portal/home/?47317/%D8%B5%D9%81%D8%AD%D9%87-about-us; see also Iran's Atomic Energy Agency Act, art. 1.

[112] See Katherine Malus, *From "Atoms For Peace" To "JCPOA": History Of Iranian Nuclear Development*,Columbia University Center For Nuclear Studies (Sep.9, 2018), https://k1project.columbia.edu/content/atoms-peace-jcpoa-history-iranian-nuclear-development.

[115] Haleh Vaziri, *Iran's Nuclear Quest: Motivations And Consequences*, *in* THE NUCLEAR NON-PROLIFERATION REGIME 311 (R.G.C. THOMAS ED., 1986); Bahram Ghiassee, *The Vulnerability Of Iran's Nuclear Facilities To Drone Strikes*, The Henry Jackson Society (Dec. 2021), https://henryjacksonsociety.org/wp-content/uploads/2022/01/HJS-The-Vulnerability-of-IransNuclear-Facilities-to-Drone-Strikes-Report-web-1-1.pdf; *Iran Nuclear Sites: Bushehr Nuclear Power Plant*, PublicIntelligence (Feb.9,2010), https://publicintelligence.net/iran-nuclear-sites-bushehr-nuclear-power-plant/

step was taken when Iranian nuclear experts were dispatched to the US for training, after Iran signed a contract with the Massachusetts Institute of Technology.[116]

ii. After The Islamic Revolution

After the Islamic Revolution of Iran in 1979, due to the annulment of all existing nuclear cooperation agreements with foreign countries announced by the head of the transitional government, Prime Minister Mehdi Bazargan, construction of the Bushehr power plant came to a halt.[117] In a further step, the US refused to provide the 20% enriched uranium that it previously supplied to the Tehran Nuclear Research Center, resulting in the shutdown of the reactor and research center. Moreover, a freeze appeal on Iran's 10% stake in Eurodif[118] was upheld by a commercial court in France.[119]

Given that a large part of Iran's nuclear activities in the following years was conducted in secret, accurate information about them is not available. Nevertheless, there were speculations in this regard. In fact, many of the speculations are related to the 'Abdul Qadir Khan Network' that also provided the technology of centrifuges

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[116] Kıbaroğlu, supra note 103, at 230.

[117] "Relations between the United States and Iran significantly worsened with the Hostage Crisis of 1979. In response, the United States froze Iranian assets, imposed financial sanctions, and ended all nuclear cooperation with Iran". JOYNER, supra note 104; DAVID PATRIKARAKOS, NUCLEAR IRAN: THE BIRTH OF AN ATOMIC STATE 92-93 (2nd ed. 2012); Nihat A. Özcan & Özgür Özdamar, *Iran's Nuclear Program And The Future Of U.S.-Iranian Relations*, 16(1) Middle East Policy 121 (2009), http://ozgur.bilkent.edu.tr/download/03Irans%20Nuclear%20Program%20and%20Future%20of%20US-Iranian%20Relations.pdf; *Bushehr Nuclear Power Plant (BNPP)*, Nuclear Threat Initiative, https://www.nti.org/education-center/facilities/bushehr-nuclear-power-plant-bnpp/

[118] At the time of freezing, European Gaseous Diffusion Uranium Enrichment Consortium (Eurodif) was the world's largest manufacturer of enriched uranium fuel for nuclear power reactors. See Jan Paulsson, *Sovereign Immunity From Jurisdiction: French Caselaw Revisited*, 19(1) The International Lawyer 277(1985), http://www.jstor.org/stable/40706768; Mohammad J. Zarif, *Tackling The Iran- US Crisis:The Need For A Paradigm Shift*, 60(2) Journal Of International Affairs 73, 80 (2007), https://www.jstor.org/stable/pdf/24357971.pdf?refreqid=excelsior%3A1482b026290c9260416b84ba39e5c357andab_segments=andorigin=andinitiator=

[119] See Eurodif v. Islamic Republic of Iran, 1984 La Semaine Juridique (May. 23, 1984) 20205.

and nuclear fuel cycles to countries such as North Korea.[120] Countries that were aided by this network later began cooperation in areas that Abdul Qadir Khan could not provide, including cooperation in nuclear technology between North Korea and Iran since 1992.[121] During the Iran-Iraq War, Iran received assistance from North Korea as an intermediary to buy weapons from the Eastern Bloc countries.[122] One of the highlights of such cooperation was the sale of Scud B ballistic missiles to Iran in the middle of the war, which was used to counter Saddam's missile strikes on Iranian cities.[123] Although Iran and the DPRK pursue completely different objectives, their hostile relations with the US has been a remarkable common ground that has strengthened bilateral relations and increased security, military, and economic cooperation to counter pressure from the US sanctions. Both Iran and North Korea were designated members of the 'axis of evil' after the 9/11 terrorist attacks by former US President George W. Bush.[124] Similarly, Pyongyang and Tehran had significant exchanges and cooperation in the field of ballistic missile production and the construction of military submarines. For example, some sources have suggested striking similarities between Iran's Emad missile and North Korea's 'Rodong missile'.[125] The Islamic Republic's Qadir submarine is also said to have much in

[120] Molly M. Calman, *A.Q. Khan Nuclear Smuggling Network*, 9(1) Journal Of Strategic Security 104, 111(2016), https://digitalcommons.usf.edu/jss/vol9/iss1/9.
[121] Paul K. Kerr et al., *Iran-North Korea-Syria Ballistic Missile And Nuclear Cooperation*, CRS Report (R43480; Feb. 26, 2016), https://sgp.fas.org/crs/nuke/R43480.pdf.
[122] Alon Levkowitz, *North Korea And The Middle East*, 127 Begin-Sadat Center For Strategic Studies 9, 19-23 (2017), https://besacenter.org/wp-content/uploads/2017/01/MSPS-Levkowitz-Web-.pdf
[123] See Bryon E. Greenwald, *Scud Alert! The History, Development And Military Significance Of Ballistic Missiles On Tactical Operations*, 22 The Institute Of Land Warfare (Oct. 1995), https://www.ausa.org/sites/default/files/LWP-22-Scud-Alert-The-History-Development-and-Military-Significance-of-Ballistic-Missiles-on-Tactical-Operations.pdf.
[124] Quinones, supra note 61.
[125] See for example, J.R. Haines, *Foreseeable, Foreseen, Ignored: Is Iran Advancing Its Missile Program At Home While Offshoring Its Nuclear Program To North Korea?*, Foreign Policy Research

common with North Korea's Yono submarine, which was used in 2010 to target South Korea's naval vessel 'Cheonan'.[126]

Another country that is said to have cooperated with Iran is China.[127] Several agreements were signed between Iran and China for the construction of various reactors and related laboratory facilities, particularly at Isfahan nuclear center,[128] which were later terminated due to US sanctions pressure.[129]

It should also be noted that significant cooperation occurred between Iran and Russia. This commenced in the early 1990s, when the two countries operated a joint research organization called 'Persepolis,' aiding Iran with nuclear technology and expert assistance.[130] Also in January 1995, an agreement was concluded between Iran and Russia, which stipulated that the abandoned Bushehr nuclear power plant be reconstructed.[131]

Institute (Jan.11, 2016); see also Jose V. Ciprut, *All Quiet On The Middle Eastern Front*, 586 Begine-Sadat Center For Strategic Studies (Sep.13, 2017), http://www.jstor.com/stable/resrep04486

[126] See Behnam B. Taleblu, *Assessing The Islamic Republic Of Iran's Ballistic Missile Program*, Foundation For Defense Of Democracies (Feb, 2023), https://www.fdd.org/wpcontent/uploads/2023/02/fdd-monographarsenalassessingiranballisticmissile-program.pdf; Brad Lendon, *S. Korea's Final Report Affirms Cheonan Was Sunk By N. Korean Torpedo*, CNN (Sep.14, 2010), https://edition.cnn.com/2010/WORLD/asiapcf/09/13/south.korea.cheonan.report/index.html

[127] See Andrew Koch & Jeanette Wolf, *Iran's Nuclear Procurement Program: How Close To The Bomb?*, 5(1) The NonProliferation Review 123 (1997), https://www.tandfonline.com/doi/abs/10.1080/10736709708436700.

[128] Greg J. Gerardi & Maryam Aharinejad, *An Assessment Of Iran's Nuclear Facilities*, 2(3) The Nonproliferation Review 207 (1995), https://www.tandfonline.com/doi/abs/10.1080/10736709508436600; see also, Int'l Atomic Energy Agency [IAEA], *Research Reactor Details -ENTC HWZPR* (Mar.13, 2000), http://wwwnaweb.iaea.org/napc/physics/research_reactors/database/rr%20data%20base/datasets/report/Iran,%20Islamic%20Republic%20of%20%20Research%20Reactor%20Details%20-%20ENTC%20HWZPR.htm.

[129] Marybeth Davis et al., *China-Iran: A Limited Partnership*, 1 US-China Economic & Security Review Commission 1, 34 (Apr. 2013), https://www.uscc.gov/sites/default/files/Research/China-Iran-A%20Limited%20Partnership.pdf.

[130] Thowhidul Islam, *The Nuclearization Of Iran And The Policy Of Russia*, 22(2) Asian & African Studies 248, 253 (2013), https://www.sav.sk/journals/uploads/112612414_Islam.pdf

[131] *Timeline Of Iran's Nuclear Activities*, United States Institute Of Peace (Aug.17, 2021), https://iranprimer.usip.org/resource/timeline-irans-nuclear-activities.

iii. Nuclear Negotiations & Conclusion Of The JCPOA

In August 2002, the locations of two secret nuclear facilities in Iran, which were later confirmed by the IAEA, were disclosed by an opposition group called 'Mojahedin Khalq'.[132] After Iran's facilities at Natanz and Arak were publicly revealed in the fall of 2002, the IAEA stated that Iran did not comply with its international obligations under the Non-Proliferation Treaty by not reporting its construction activities at nuclear facilities.[133] On 9 February 2003, President Mohammad Khatami announced that Iranian experts managed to provide nuclear fuel for Iran's nuclear power plant in Natanz.[134] The ongoing concerns about Iran's nuclear program, including its compliance with its NPT obligations and progress in uranium enrichment, were among the factors that continued to drive negotiations between Iran and the EU3 during Ahmadinejad's presidency.[135] From 2005, however, Iran was largely unwilling to make any further concessions regarding its nuclear program and began producing uranium hexafluoride at Isfahan's nuclear facility.

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[132] Violet B. Eneyo et al., *Iran's Nuclear Policy: Nature, Ambition, And Strategy*, 8 Journal Of Liberty & International Affairs 202 (2022), https://heinonline.org/HOL/Page?handle=hein.journals/jlia8anddiv=39andg_sent=1andcasa_token=yoTH52cPVDgAAAAA:MZyQ9LPFYpFU2dXcD1zmy7cUrqa9122DiJa55eM1VPNzMVkQqQgNrC3chNJY8bIklAoaqpSz21Yandcollection=journals; Satyabrat Sinha, *The Paris Agreement And Iranian Nuclear Case*, Institute Of Peace & Conflict Studies (Jan.4, 2005), http://www.ipcs.org/comm_select.php?articleNo=1606; see also *Footprints Of Mujahedeen's Espionage In The Iranian Nuclear Case*, Islamic Revolution Document Center (Apr.9, 2017), shorturl.at/LT258

[133] See Int'l Atomic Energy Agency [IAEA], *Implementation of the NPT Safeguards Agreement In The Islamic Republic Of Iran*, GOV/2003/75 (Nov.10, 2003), <https://www.iaea.org/sites/default/files/gov2003-75.pdf>

[134] JOYNER, supra note 104, at 22; FARHAD REZAEI, IRAN'S NUCLEAR PROGRAM: A STUDY IN PROLIFERATION AND ROLLBACK 99-102 (Palgrave Macmillan 2017).

[135] The ambiguities claimed by the E3 were based upon the Paris agreement of 2004, in which Iran committed to suspend its enrichment and reprocessing and adhere to the IAEA Additional Protocol, in exchange for not referring the Iranian nuclear case to the Security Council and EU assistance in providing nuclear technology for peaceful purposes. See Int'l Atomic Energy Agency [IAEA], *Communication Dated 26 November 2004 Received From The Permanent Representatives Of France, Germany, The Islamic Republic Of Iran And The United Kingdom Concerning The Agreement Signed In Paris On 15 November 2004*, INFCIRC/637 (Nov.26, 2004), https://www.iaea.org/sites/default/files/publications/documents/infcircs/2004/infcirc637.pdf; see also, REZAEI, id., at 123-128 & 133-163.

Accordingly, negotiations between Iran and the EU3 halted.[136] Subsequently, IAEA inspections discovered traces of highly enriched uranium in some nuclear facilities, putting Iran under more pressure.[137] The IAEA, on 4 February 2006, recommended that Iran suspend its enrichment-related activities, reconsider construction of the Arak heavy-water reactor, ratify the additional protocol to its safeguards agreement, and fully cooperate with the agency's investigation.[138] In response, Iran announced that it would temporarily stop implementation of the additional protocol.[139] In April 2006, President Ahmadinejad announced that Iran had succeeded in low-grade uranium enrichment to a percentage of 3.5.[140] Following advancements in Iran's nuclear activities, the UN Security Council adopted several resolutions against Iran's nuclear program. July 31, 2006, was an important milestone because the Security Council adopted Resolution 1696, applying the first round of sanctions against Iran.[141] Further rounds followed, as Iran kept enriching uranium in breach of previously adopted sanctions. On 14 June 2008, a package deal proposed by P5+1

[136] Richard Stone, *Iran's Plans For Research Reactor Fuel Imperil Revival Of Nuclear Deal: Government Says Uranium Fuel Will Be Made To Produce Medical Isotopes,* Science (Jul.15, 2021), https://www.science.org/content/article/iransplansresearchreactorfuelimperilrevivalnucleardeal#:~:text=The%20TRR%20has%20a%20complex,%2Denriched%20uranium%20(LEU)

[137] Int'l Atomic Energy Agency [IAEA], *Implementation of the NPT Safeguards Agreement of the Socialist People's Libyan Arab Jamahiriya*, GOV/2004/18 (Mar.10, 2004), at3, ¶11, http://www.iaea.org/Publications/Documents/Board/2004/gov2004-18.pdf; Int'l Atomic Energy Agency [IAEA], *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, GOV/2005/77 (Sep. 24, 2005), http://www.iaea.org/Publications/Documents/Board/2005/gov2005-77.pdf; Int'l Atomic Energy Agency [IAEA], Implementation Of the NPT Safeguards Agreement In The Islamic Republic Of Iran, GOV/2006/14(Feb.4, 2006), https://www.iaea.org/sites/default/files/gov2006-14.pdf

[138] GOV/2006/14(Feb.4, 2006), id., at 2, ¶ 2.

[139] See DENNIS C. JETT, THE IRAN NUCLEAR DEAL: BOMBS, BUREAUCRATS, AND BILLIONAIRES 349 (Palgrave MacMillan 2018).

[140] President Ahmadinejad declared in a speech: "I officially announce that Iran has joined countries with nuclear technology. Our nation is a peaceful nation and today we are interested in operating under IAEA supervision." See Brendan Taylor, *Sanctioning Iran*, 49(411) The Adelphi Papers 59 (2009); *Iran Says It Joins 'Countries With Nuclear Technology'*, CNN (Apr.12,2006), http://edition.cnn.com/2006/WORLD/meast/04/11/iran.nuclear/

[141] U.N. Doc., S/Res/1696 (Jul.31, 2006).

countries[142] on a freeze-for-freeze basis suggested that Iran halt its enrichment program in exchange for the lifting of UN sanctions.[143] Nuclear negotiations entered a new chapter after Iran announced that it had successfully launched a satellite, which contributed to international concern about the increasing potential of Iran's ballistic missile technology.[144] The Obama Administration subsequently chose to negotiate diplomatically on the Iranian nuclear issue though the P5+1 talks and, accordingly, on 1 October 2009 the parties agreed that in exchange for a US-initiated, IAEA-backed proposal to fuel the TRR[145] with 20% enriched uranium, Iran had to export the majority of its 3.5% enriched uranium.[146] On 17 May 2010, Iran, Brazil, and Turkey jointly announced a trilateral declaration in which Iran agreed to ship out 1,200 kilograms of its 3.5% enriched uranium to Turkey, in return for the provision of fuel for the TRR from France and Russia.[147] The arrangement was subsequently rejected by France, Russia, and the US, claiming that Iran's measures to stockpile

[142] United States, United Kingdom, France, Russia & China.
[143] See Asli U. Bali, *Negotiating Nonproliferation: International Law And Delegation In The Iranian Nuclear Crisis*, 61 UCLA Law Review 232 (2014), https://heinonline.org/HOL/Page?public=trueandhandle=hein.journals/uclalr61anddiv=8andstart_page=232andcollection=journalsandset_as_cursor=0andmen_tab=srchresults#; *Iran Nuclear Overview Fact Sheet*, Nuclear Threat Initiative (Jun.25, 2020), https://www.nti.org/analysis/articles/iran-nuclear/
[144] The launch was powered by a two-stage rocket called the Safir-1B, a variant of the Safir-2 system Iran used in February 2009 for its first successful launch. See *Iran Missile Milestones:1985-2021*, Iran Watch (Jul. 29, 2021), https://www.iranwatch.org/our-publications/weapon-program-background-report/iran-missile-milestones-1985-2021.
[145] The TRR has a complex history. The United States provided the reactor to Iran in 1967 under the Atoms for Peace program—along with bomb-grade, highly enriched uranium to fuel it. HEU shipments ceased after Iran's revolution in 1979, forcing Iran to convert the reactor to run on low-enriched uranium (LEU). See Stone, supra note 136; Int'l Atomic Energy Agency[IAEA], *Verification And Monitoring In The Islamic Republic of Iran In Light of United Nations Security Council Resolution 2231 (2015)*, GOV/2022/62 (Nov.10, 2022), https://www.iaea.org/sites/default/files/22/11/gov2022-62.pdf.
[146] Sahar Nowrouzzadeh & Daniel Poneman, *The Deal That Got Away: The 2009 Nuclear Fuel Swap With Iran*, Belfer Center For Science & International Affairs 1, 8 (Jan. 2021), https://www.belfercenter.org/sites/default/files/202101/DealThatGotAway/TheDealThatGotAway.pdf.
[147] *Joint Declaration Of The Ministers Of Foreign Affairs Of Turkey, Iran And Brazil*, https://www.mfa.gov.tr/17_05_2010-joint-declaration-of-the-ministers-of-foreign-affairs-of-turkey_-iran-and-brazil_.en.mfa.

larger amounts of enriched uranium was a violation of UN Security Council resolutions.[148] Following UN sanctions, more strict autonomous measures by the US[149] and the EU[150] were adopted. On 10 February 2013, Iran announced that it produced 129.9 kg of UF6 enriched to 20% U-235 at the Fordow nuclear site.[151] In a further step, Iran and the IAEA issued a Joint Statement on a Framework of Cooperation, aimed at strengthening their cooperation and dialogue and ensuring the exclusively peaceful nature of Iran's nuclear program, on 11 November 2013.[152] This statement provided a political atmosphere conducive to negotiations, as well as signs of Iran's good faith, which finally resulted in the conclusion of the Joint Plan of Action (JCPOA)[153] on 24 November 2013 between Iran and the P5+1.

[148] Kelsey Davenport, *Timeline of Nuclear Diplomacy With Iran*, Arms Control Association (Last Reviewed in Jan. 2023), https://www.armscontrol.org/factsheets/Timeline-of-Nuclear-Diplomacy-With-Iran.

[149] The US adopted the Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA) to target Iran's energy sector and extended it until 2016. It furthermore imposed new sanctions on companies that sold refined petroleum to Iran. See *Public Papers Of The Presidents Of The United States: Barack Obama* (2011), https://www.govinfo.gov/app/details/PPP-2011-book1/PPP-2011-book1-doc-pg580/summary

[150] See Dina Esfandiary & Mark Fitzpatrick, *Sanctions On Iran: Defining And Enabling 'Success'*, 53(5) Survival 143; Michael Jacobson, *Sanctions Against Iran: A Promising Struggle*, 31(3) Washington Quarterly 69 (2008), https://www.tandfonline.com/doi/pdf/10.1162/wash.2008.31.3.69?casa_token=inXbkbfPH3cAAAA:RfCN4yCUn7j1k6CDxaB3q07Tw85IEGOz6T4KvuhUZ4i4cYhUTRgFaR9wjVJK5KsWkb64BXuOnoiQ>

[151] Int'l Atomic Energy Agency [IAEA], *Implementation Of The NPT Safeguards Agreement And Relevant Provisions Of Security Council Resolutions In The Islamic Republic Of Iran*, ¶9, GOV/2013/6 (Feb.21, 2013), https://www.iaea.org/sites/default/files/gov2013-6.pdf

[152] For the full text of the Framework, see Int'l Atomic Energy Agency [IAEA], *Joint Statement On A Framework For Cooperation* (Nov. 11, 2013), https://www.iaea.org/sites/default/files/gov-inf-2013-14.pdf

[153] See Alireza Delkhosh, *JCPOA: The Participants And International Law*, 15(1) International Studies Journal 29 (2018), <https://heinonline.org/HOL/Page?public=trueandhandle=hein.journals/isudijo15anddiv=7andstart_page=29andcollection=journalsandset_as_cursor=0andmen_tab=srchresults#.>

iv. Limitations On Iran's Nuclear Program In The JCPOA

The JCPOA was endorsed by the UNSC and was meant to guarantee the peaceful nature of Iran's nuclear program.[154]According to UN Security Council Resolution 2231, previous resolutions imposing sanctions on Iran were lifted and all parties to the JCPOA committed to fully implement their obligations.[155] However, the path of cooperation between the signatory countries was not easy from the outset. Iran undertook various international obligations under the JCPOA, which imposed extensive limitations on its nuclear program. According to the deal, all Iranian R &D activities were permitted only in the Natanz nuclear site, with a limitation of up to eight and a half years.[156] Iran agreed to limit its uranium enrichment level up to 3.67% for 15 years, which was the lowest level for the peaceful usage of nuclear energy.[157] Iran also accepted to phase out IR-1 centrifuges in 10 years, during which period excess centrifuges and enrichment-related infrastructure at Natanz would be stored under continuous IAEA monitoring.[158] In turn, it was declared that all nuclear-

[154] On 20 July 2015, the UN Security Council unanimously passed Resolution 2231 that endorsed the JCPOA, lifting UN sanctions on Iran once the IAEA verified that Iran had met its commitments under the deal. UN. Doc., S/RES/2231 (Jul.20, 2015).

[155] Id; In this regard, see Alireza Ranjbar, *Legal Implications Of The U.S. Withdrawal From The JCPOA And Re-Imposition of Secondary Sanctions Under International Litigation And Arbitration Proceedings*, 3(2) Iranian Review For UN Studies 75 (2020), https://www.iruns.ir/andurl=http://www.iruns.ir/article_143617_cd941297ad008f271e05368370dc81a6.pdf?lang=fa; Yordan Gunawan et al., *Should The JCPOA Be Revived? An Analysis Of The Iran Nuclear Deal*, 5(2) Nurani Hukum93 (2022), https://heinonline.org/HOL/Page?public=trueandhandle=hein.journals/nurhk5anddiv=19andstart_page=93andcollection=journalsandset_as_cursor=3andmen_tab=srchresults#.

[156] "Iran will continue to conduct enrichment R & D in a manner that does not accumulate enriched uranium. Iran's enrichment R &D with uranium for 10 years will only include IR-4, IR-5, IR-6 and IR-8 centrifuges as laid out in Annex I, and Iran will not engage in other isotope separation technologies for enrichment of uranium as specified in Annex I. Iran will continue testing IR-6 and IR-8 centrifuges, and will commence testing of up to 30 IR-6 and IR-8 centrifuges after eight and a half years, as detailed in Annex I". JCPOA, ¶1.

[157] Id., ¶5.

[158] See Annex I of the JCPOA.

related sanctions adopted previously by the UNSC, the US, and the EU were to be lifted.[159]

Following the inauguration of President Trump in 2017, Iran and P5+1 countries entered a new chapter of political tensions. On 8 May 2018, Trump announced the reimposition of sanctions, as well as his intention to withdraw from the JCPOA.[160] Despite the attempts of P4+1 countries (excluding the US) to revive JCPOA and conduct financial transactions through a channel called INSTEX,[161] US unilateral sanctions prevented any opportunity to normalize relations with Iran, especially in the economic sector. I will discuss INSTEX and the attempt of the EU to neutralize US sanctions in the third chapter.

[159] Id., ¶18-33.
[160] See Joseph M. Isanga, *The U.S. Withdraws: Impact On The U.S. And International Rule Of Law*, 32 FLA Journal Of International Law, 215 (2020), https://heinonline.org/HOL/Page?public=trueandhandle=hein.journals/fjil32anddiv=12andstart_page=215andcollection=journalsandset_as_cursor=5andmen_tab=srchresults#.
[161] Short for "Instrument In Support Of Trade Exchanges".

Summary Of The Chapter

Notwithstanding fundamentally different goals, North Korea and Iran's nuclear programs, as discussed in this chapter, both brought about similar concerns relating to international peace and security. This was the justification for the sanctions regimes that the UNSC imposed on both states.

The debate in this chapter provided some ideas for subsequent discussion. Iran, despite having not launched any nuclear test, was subject to UN sanctions and was finally induced to collaborate closely with the international community for the settlement of its nuclear issue. However, North Korea to date has not given up its nuclear development, despite the UN sanctions regime. This is a key issue that will be covered in the thesis, prompting consideration of potential factors that might have impacted the sanctions' function. Overall, it is clear that the nuclear programs of Iran and North Korea are closely linked, and the experiences of negotiating with one country have had an impact on the approach to the other. In particular, the perceived failure of past negotiations with North Korea to prevent its nuclear program from advancing has led to a more cautious and stringent approach to Iran. The challenges and frustrations of dealing with North Korea's nuclear program have made negotiators more cautious and skeptical about Iran's intentions.

Chapter Three: Implementation Of UN Sanctions: Exploring The Negative Impacts Of Unilateral Sanctions In The North Korean & Iranian Nuclear Cases

The first step in analyzing the sanctions on North Korea and Iran is to introduce the general structure of UNSC sanctions. After that, it is important to examine the design of unilateral sanction regimes and determine how they may negatively affect the successful implementation of UN sanctions. While there are numerous unilateral sanctions regimes to consider, this chapter will primarily focus on the sanction regimes of the US and the EU, for the following reasons. The US and the EU are two of the world's largest economic powers, and their sanctions regimes have a significant impact on global trade and international relations, rendering them the most complex and far-reaching in the world, covering a wide range of sectors and activities. The US and the EU have been claimed to be at the forefront of developing targeted sanctions, which aim to impose penalties on specific entities. However, their sanction regimes have faced numerous legal challenges and controversies, both domestically and internationally. For instance, these include issues related to extraterritoriality and human rights violations. A study on unilateral sanctions has significant legal implications, and studying it can be a valuable contribution to the field of international law. That being said, the discussions in the chapter will be separated in two sections: i) structure of UNSC smart sanctions; ii) structure of the US and the EU's sanctions and their negative impacts on UNSC resolutions.

I. The Security Council & The Legal Basis Of Sanctions

There is no universally agreed definition of sanctions in international law.[162] However, there are similar definitions, according to which sanctions are adopted to guarantee the implementation of law.[163] Kelsen defined sanctions as a reaction to illegality.[164] According to Joyner, "sanctions…generally refer to coercive measures, taken by one state or in concert by several states, which are intended to convince or compel another state to desist from engaging in acts violating international law."[165] Pellet and Miron contend that sanctions do not include unilateral measures that are taken by individual states.[166] Today, sanctions are no longer viewed solely[167] as a

[162] White & Abass, supra note 22, at 227; IRYNA BOGDANOVA, UNILATERAL SANCTIONS IN INTERNATIONAL LAW AND THE ENFORCEMENT OF HUMAN RIGHTS 60 (Brill Nijhoff 2022); Alexandra Hofer, *The Proportionality Of Unilateral Targeted Sanctions: Whose Interests Should Count?* 89(3-4) Nordic Journal Of International Law 399, 400(2020), https://brill.com/view/journals/nord/89/3-4/article-p399_399.xml; Tom Ruys, *Sanctions, Retortions And Countermeasures: Concepts And International Legal Framework, in* RESEARCH HANDBOOK ON UN SANCTIONS AND INTERNATIONAL LAW 19-51(LARISSA V.D HERIK 2017).

[163] "Sanction is a penalty or punishment imposed as a means of enforcing obedience to a law." RICHARD GORDON ET AL., SANCTIONS LAW 1 (Hart Publishing 2019).

[164]. HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 706 (Praeger 1950).

[165] Christopher C. Joyner, *Collective Sanctions As Peaceful Coercion: Lessons From The United Nations Experience*, 16 Australian Year Book Of International Law 241, 242(1995), http://classic.austlii.edu.au/au/journals/AUYrBkIntLaw/1995/5.pdf; For a similar definition, see M.A. Maday, *Economic Sanctions In Cases Of Violation Of International Law*, 75(11) The Advocate of Peace 257(1913), https://www.jstor.org/stable/20666846; see also Andreas F. Lowenfeld, *Trade Controls For Political Ends: Four Perspectives*, 4 Chicago Journal Of International Law 355(2003), https://heinonline.org/holcgibin/get_pdf.cgi?handle=hein.journals/cjil4andsection=28andcasa_token=bXuan2th1qUAAAAA:5s4_Pp0AfchqGkOe3ZX63uHtuTw084ZqYlzcEJtvFJLx8hM_vJGrrUcTzNG10KuyCoaUhi_u1w; According to Damrosch, "many economic sanctions are imposed for reasons of foreign diplomacy rather than as instruments of law enforcement." Lori F. Damrosch, *The Legitimacy Of Economic Sanctions As Countermeasure For Wrongful Acts*, 37 Berkeley Journal Of International law 249, 254 (2019), <https://heinonline.org/HOL/Page?handle=hein.journals/berkjintlw37anddiv=20andg_sent=1andcasa_token=fIZzqBWsMOsAAAAA:BUO_ef4Kee0P5bo3P8HGqmmbwTTTq3h6OqnFQo9rOr60bltizHoMzzaANbHfDXjQIKdWAyA>

[166] Alain Pellet & Alina Miron, *Sanctions, in* THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 1, 2 & 9 (RÜDIGER WOLFRUM ED., 2012); For a similar view, see Georges Abi-Saab, *The Concept Of Sanction In International Law, in* UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 29-41 (VERA G. DEBBAS ED., 2001).

[167] Jerzy Menk & Anna K. Pęksa, *Heterogeneity, Compliance And Enforcement Of Public International Law Remarks On Sanctions And Countermeasures: Legal Theory And The Sociology Of Law Approach,* 63 Politeja 7, 12 (2019), https://www.ceeol.com/search/article-detail?id=981675

means of punishment; rather, they are intended to give incentives for the wrongdoer to obey the law. The debates on sanctions in the twentieth century have their origins, *in particular*, in Theodore Roosevelt's Peace Prize address in 1910,[168] which later became an impetus for the inclusion of sanctions in the Covenant of the League of Nations.[169] According to McNair, the Covenant was the beginning of a new era in which the governing system of law moved away from a purely private to public law.[170] Following the establishment of the United Nations, the concept of self-help measures underwent significant changes, which led to the prohibition of the use of forcible measures[171] and the regulation of state relations through a centralized system for sanctioning unlawful acts.[172] The Charter entrusted the Security Council with a broad authority[173] to adopt sanctions in cases where international peace and security are

[168] "He encouraged the Great Powers to make a union for keeping peace even by force if necessary." D. F. Fleming, *The League of Nations And Sanctions*, 8 Proceedings of the Annual Session (Southern Political Science Association 20 (1935), https://www.jstor.org/stable/43945783#metadata_info_tab_contents

[169] See the Covenant of the League of Nations, Art. 16. In 1935, the League of Nations adopted sanctions against Italy following its aggression towards Ethiopia. The sanctions were enforced on November 18th, but were largely ineffective due to German support for the Fascist regime of Italy. For more details, see Cristiano A. Ristuccia, *The 1935 Sanctions Against Italy: Would Coal And Oil Have Made A Difference?*, 4(1) European Review Of Economic History 85, 87 (2000), https://www.cambridge.org/core/journals/europeanreviewofeconomichistory/article/abs/1935sanctionsagainstitalywouldcoalandoilhavemadeadifference/5BA3F7ED8DFD839B43BDDFF27A39D016; Bruce G. Strang, *"The Worst Of All Worlds:" Oil Sanctions And Italy's Invasion Of Abyssinia, 1935/1936*,19(2) Diplomacy & Statecraft 210, 212 (2008), https://www.tandfonline.com/doi/epdf/10.1080/09592290802096257?needAccess=trueandrole=button

[170] Arnold D. McNair, *The Functions And Differing Legal Character Of Treaties*, 11 British Yearbook Of International Law 112 (1930), <https://heinonline.org/HOL/Page?handle=hein.journals/byrint11anddiv=8andg_sent=1andcasa_token=andcollection=journals>; "The League's hopes were severely damaged by its weakness in response to Italy's invasion of Ethiopia in October 1935." BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME, 10 (Cambridge University Press 1988); GARY C. HUFBAUER AND JEFFERY J. SCHOTTE, ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY 124-131(1985).

[171] YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 81 (Cambridge University Press 2001).

[172] White & Abass, supra note 22, at 507.

[173] Ian Brownlie, *The Decision Of Political Organs Of The United Nations And The Rules Of Law*, *in* ESSAY IN HONORS OF WANG TIEYA 95 (RONALD J. MACDONALD ED., 1994).

threatened or endangered.[174] The Council may provide recommendations pursuant to Chapter VI or issue mandatory decisions pursuant to Chapter VII of the UN Charter, as it deems appropriate. Article 39 of the Charter provides that:

> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security".[175]

Smart (specific, measurable, achievable, realistic, time-bound) or targeted sanctions have been adopted by the UNSC since the second half of the 1990s in response to the deficiencies of the comprehensive sanction regimes against Iraq, Haiti and the Former Yugoslavia.[176] They were designed to limit unintended harm to people who were not connected to the governing power in the target states.[177] In the subsequent section, I will provide a concise overview of the essential prerequisites that must be considered when designing smart sanction regimes.

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[174] Robert Ago (Special Rapporteur), *Eighth Report on State Responsibility*, U.N. Doc., A/CN.4/318/Add.5-7(Feb.29, Jun.10 and 19, 1980), ¶91.
[175] UN Charter, art. 39.
[176] Clara Portela, *National Implementation Of United Nations Sanctions: Towards Fragmentation*, 65(1) International Journal 13, 15(2009), https://www.jstor.org/stable/25681083; see also Mack & Khan, supra note 24; David Cortright & George A. Lopez, *Are Sanctions Just? The Problematic Case Of Iraq*, 52(2) Journal Of International Affairs 735 (1999), <https://www.jstor.org/stable/24358062?casa_token=9mxMA6iqNkAAAAA%3AOsjVIFouGFQyMsN37RoRfks65FggKU0MlRxeFQGjk3OZQYTYzzq9cBT1iJlAUmrDyL65M5Lv530sxPwv8Xc8iiG9fDNupcp1BzIGDgNDwJqyRIeK-g>; *Sanctions Against Iraq And Human Rights: A Devastating, Misguided, Intolerable Method*, International Federation For Human Rights, Report, No. 321/2 (2002), https://www.refworld.org/pdfid/46f146610.pdf; MATTHEW HAPPOLD & PAUL EDEN EDS., ECONOMIC SANCTIONS AND INTERNATIONAL LAW 32 (Hart Publishing 2016); see also Mary E. O'Connell, *Debating The Law Of Sanctions*, 13(1) European Journal Of International Law 63 (2002), https://academic.oup.com/ejil/article/13/1/63/417876
[177] See Michael Brzoska & George Lopez, *Security Council Dynamics And Sanctions Design*, *in* TARGETED SANCTIONS (THOMAS BIERSTEKER ET AL. EDS., 2016).

II. Legal Requirements For Smart Sanction Regimes

Various elements must be taken into consideration when analyzing the success of a smart sanction regime. The theory of success/failure assesses the sanctions system based on its capability to achieve its designed goals.[178] In this regard, we must distinguish between: i) sanctions' success in imposing pressure on the target state(s); and ii) sanctions' success in the protection of humanitarian right of the population in the target state.[179] In my view, smart sanctions, customized to suit the specific circumstances of each target, should incorporate various prerequisites, outlined as follows.

i .Legitimacy: Given that the UN was founded upon the rule of law,[180] it is incumbent upon both its Member States and its organs to adhere to the organization's fundamental principles and purposes. Compliance of a UNSC decision with the rule of law would be one of the most significant prerequisites that encourage states to

[178] It should be emphasized that although the DPRK continues its nuclear activities after a number of sanctions were adopted, this is not a persuasive reason to claim that the UN sanctions regime was ineffective. See David Lektzian & Mark Souva, *An Institutional Theory Of Sanctions Onset And Success,* 51(6) Journal Of Conflict Resolution 848 (2007); GARY C. HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED (Columbia University Press 2008); Robert A. Pape, *Why Economic Sanctions Still Do Not Work,* 23(1) International Security 66 (1998), https://muse.jhu.edu/pub/6/article/446920/summary?casa_token=AMhoXwJuMAAAAA:sl341dkZ3URXjOfd_Ba7TVaPi6jKRxiwFHJjdE1dgKSgDaueVzLl3Xws8ie-_GKYjX_fTCvYyE

[179] See Stuart Elden, *Spaces Of Humanitarian Exception*, 88(4) Geografiska Annaler: Series B, Human Geography 477, 485 (2006), <https://www.tandfonline.com/doi/pdf/10.1111/j.04353684.2006.00234.x?casa_token=4niZBP2RCCwAAAAA:nJa9xvOAHQ1oWdZE031JZv9h_wv7BPFvJlN8B0a52avZSpsG3YHArnpCZKNJCGoXOuoFF8HAceA>; see also U.N. Doc., A/50/60-S/1995/1(Jan.3, 1995), ¶ 75 (c); *Note From The Department Of Humanitarian Affairs Concerning The Possible Humanitarian Impact Of The International Flight Ban Decided In Security Council Resolution 1070(1996),* UN Department Of Humanitarian Affairs, (20 Feb. 1997); Janelle Driller, *Human Rights And the Rule Of Law As Applicable To The UNSC: Implications For The Right To A Fair Hearing: A Comment Of Erika D. Wet, in* THE RULE OF LAW AND ITS APPLICATION TO THE UNITED NATIONS 201(C. FEINAUGLE ED., 2016).

[180] See HEIKE KRIEGER, THE INTERNATIONAL RULE OF LAW: RISE OR DECLINE? (Oxford University Press 2019).

cooperate with the UN in implementing the sanctions. According to Farrall,[181] in order for sanctions to be deemed legitimate, they should encompass criteria such as consistency,[182] equality, transparency,[183] due process and proportionality.[184]

ii. Goal Of The Sanctions Regime: The purpose of the sanction's regime should not be focused on the punishment of the wrongdoer; rather, it should provide incentives to comply with international law. The UNSC should refrain from using the criminal law model of punishment since, as was evident during the early 1990s sanctions against Iraq, their punitive nature causes major humanitarian catastrophes.[185]

iii. Duration: The Security Council adopts sanctions in three ways: i) sanctions with a sunset clause;[186] ii) sanctions without a sunset clause iii) sanctions without sunset clause but with a commitment to review.[187] Since the goal of sanctions is to induce

[181] JEREMY M. FARRAL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW 185 (Cambridge University Press 2007).
[182] UNSC decisions are implemented in a consistent, predictable manner, as if the Council specifies a standard of behavior to be followed equally in all sanctions regimes. Id.
[183] It is vital to justify decisions by transparency and openness to all. Id.
[184] Id., at 40 & 41; "Sanctions inhibiting a nation's economy from sustaining the basic food and related humanitarian needs of the given population extends to all sectors of the society. Thus, no member of the society is exempted when a nation's economy is paralyzed". David A. Balswin, *UN/Unilateral Sanctions Regimes, in* A STRATEGIC UNDERSTANDING OF UN ECONOMIC SANCTIONS (HAKIMDAVAR 2014); "The Fragile States Index (FSI) produced by the Fund for Peace (FFP), is a critical tool in highlighting not only the normal pressures that all states experience, but also in identifying when those pressures are outweighing a states' capacity to manage those pressures." For more information, see *Fragile States Index* (last updated in 2022), https://fragilestatesindex.org/excel/
[185] ROGER FISHER, POINTS OF CHOICE, INTERNATIONAL CRISIS AND THE ROLE OF THE LAW 22-37 (Oxford University Press 1978); see also Hervé Ascensio & Dixneuf Marc, *Sanctions Against Iraq And Human Rights: A Devastating, Misguided, Intolerable Method*, No. 321/2, International Federation For Human Rights 2002 (Mar. 2002), https://www.refworld.org/pdfid/46f146610.pdf.
[186] "It is crucial to regard the duration of sanctions because once they are imposed, they tend to stick". See Kristen E. Boon, *For More Effective Sanctions, Time To Examine Question Of Termination*, Global Observatory (Apr.14, 2014), https://theglobalobservatory.org/2014/04/for-more-effective-sanctions-time-to-examine-question-of-termination/
[187] "There is no standard policy about when each model is used. However, the pattern that has emerged is that sunset clauses of 12–18 months are used in conflict management situations, whereas indefinite sanctions are more likely to be applied where the focus is international security, terrorism, and non-proliferation." See id; Kristen E. Boon, *Timing Matters: Termination Policies For UN Sanctions, in*

the wrongdoer resume its international obligations, they must be temporary.[188] A sanctions regime without a termination clause discourages the wrongdoer to resume its duties under international law. At the same time, applying sanctions for a limited time may provide an incentive for the target to withstand the pressure and continue to violate the law.[189] If sanctions are imposed temporarily with the possibility of being extended, the fear of their subsequent renewal or even strengthening may have an effect on the wrongdoer's behavior. So, I believe the third model (implementation momentarily with an extension clause if necessary) can better help the UN in achieving the goals of the sanctions' regimes.

III. UN Sanctions Implementation & Their Practical Challenges

When the desired results of a sanctions regime do not materialize, it is inadequate to solely attribute the failure to the design of the sanctions. Instead, it becomes crucial to examine the impact of other factors that arise during the implementation phase, which can affect the success of the sanctions. Several such factors may include:

i. Political System: Sanctions can be effective in prompting citizens to revolt against their government and forcing it to change its behavior. But totalitarian governments may suppress human rights and manipulate media to instill nationalist sentiment,

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RESEARCH HANDBOOK ON UN SANCTIONS AND INTERNATIONAL LAW, 236 (LARISSA V.D. HERIK ED., 2017); Kristen E. Boon, *The Termination Of Sanctions Regimes*, International Peace Institute 1, 5 (2014), https://www.jstor.org/stable/resrep09626.7#metadata_info_tab_contents

[188] The Security Council has adopted time-limited sanctions against Eritrea and Ethiopia (U.N. Doc., S/RES/1298 (2000), ¶16); Sierra Leone(U.N. Doc., S/RES/1306 (2000), ¶1, 5 & 6); Afghanistan, the Taliban and Al-Qaida (U.N. Doc., S/RES/1333 (2000), ¶15(d) & 23); Liberia (U.N. Doc., S/RES/1343 (2001), ¶23); For more details see, Arne Tostensen & Beate Bull, *Are Smart Sanctions Feasible?*, 54(3) World politics 373, 374 (2002), https://www.cambridge.org/core/journals/worldpolitics/article/abs/are-smart-sanctions-feasible/8E18824DE0FCF13AADC3B39A5B1965CA

[189] HAKIMDAVAR, supra note 184, at 23.

delaying or preventing political change.[190] In the case of North Korea, inter-Korean engagement has not produced the desired effects on the promotion of human rights[191] and natural disasters have also worsened the situation in the aftermath of the country's isolation during the Covid-19 pandemic.[192] Unless there is a fulfillment of basic human rights, the emergence of anti-government movements that apply domestic pressure is unlikely.

ii. Scope Of International Relations: Sanctions can have a wider effect on a state that is heavily reliant on international relations, as any harm to its reputation could threaten future diplomatic and economic ties. The greater a state's exposure to the global economic market, the more cautiously it behaves. Iran's trade volume is substantially larger than North Korea's, with Iran's economy heavily reliant on energy exports.[193] Any deterioration in foreign relations could severely harm the

[190] See Michael Brzoska, *From Dumb To Smart? Recent Reforms of UN Sanctions,* 9(4) Global Governance 519, 522 (2003), <https://www.jstor.org/stable/pdf/27800500.pdf?refreqid=excelsior%3A54ad709ed773ae533ed82a3b7225257dandab_segments=andorigin=andinitiator=andacceptTC=1>; Sebastian Hellmeier, *How Foreign Pressure Affects Mass Mobilization In Favor of Authoritarian Regimes,* 27(2) European Journal Of International Relations 450 (2021), <https://journals.sagepub.com/doi/pdf/10.1177/1354066120934527>

[191] See Soo-am Kim, *Trends In the International Community's North Korean Rights Approach And Policy Directions*, CO22-19 Korea Institute For National Unification 9 (2022), https://www.kinu.or.kr/pyxis-api/1/digital-files/2cb95950-92e1-45d9-98d4-199db032fed9

[192] For the report of the Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea, see U.N. Doc. A/HRC/49/74 (Mar. 2022), file:///C:/Users/82102/Downloads/EN.pdf

[193] According to an analysis by Trading Economics, Iran's trade volume is substantially bigger than that of North Korea.The latter's imports were estimated to be 558.07 US million dollars in December 2020, compared to Iran's exports of 15,010 US million dollars. The same situation exists for the two countries' export volumes, with North Korea's volume accounting for only 156.87 million US dollars, in comparison to 18,850 million US dollars' worth of volume for Iran. For the latest reports on countries balance of trade, see *Trading Economies,* https://tradingeconomics.com/iran/balance-of-trade; see also ETEL SOLINGEN, REGIONAL ORDERS AT CENTURY'S DAWN: GLOBAL AND DOMESTIC INFLUENCES ON GRAND STRATEGY (Princeton University Press 1998); JINA KIM, THE NORTH KOREAN NUCLEAR WEAPONS CRISIS: THE NUCLEAR TABOO REVISITED? 8 (Palgrave Macmillan 2014).

country's economic and social structure, which, in my view, was decisive on why Iran indicated more political will than North Korea to resolve the nuclear issue.

iii. Sanctions Evasion: A wrongdoer is expected to continue its violating behavior as long as it discovers methods and tactics to circumvent sanctions, making their costs less than the benefits it gains from violating its obligations. This is evident in the case of North Korean sanctions evasion. To summarize, North Korea is engaged in actions aimed at generating hard currency income in order to purchase commodities prohibited by UNSC resolutions, such as raw materials and dual-use technologies, as well as smuggling and money-laundering.[194] This will be discussed more deeply in chapter 5.

iv. Political Coalition: A targeted state finds incentives in enduring sanctions pressure as long as it maintains political and economic ties with like-minded states, particularly if those states are Permanent Members of the UNSC[195] that can block the adoption of further sanction resolutions, or at least negotiate on the adoption of limited sanctions.[196] In the case of North Korea, China and Russia have upheld bilateral ties with the country. China, as North Korea's primary trading partner, has

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[194] Andrea Berger, *From Paper To Practice: The Significance Of New UN Sanctions On North Korea*, 46(4) Arms Control Today 8, 10 (2016), <file:///C:/Users/82102/Downloads/From_Paper_to_Practice_The_Si.pdf>; *North Korean Sanctions Evasion Techniques*, RAND Corporation (2021), https://www.rand.org/pubs/research_reports/RRA1537-1.html

[195] See Oliver Diggelman, *The Creation Of The United Nations: Break With The Past Or Continuation Of Wartime Power Politics?*, 93(3-4) Journal Of International Peace & Organization 371 (2020), https://biblioscout.net/journal/fw/93/3-4#page=133; Fakiha Mahmood, *Power Versus The Sovereign Equality Of States: The Veto, The P-5 And United Nations Security Council Reforms*, 18(4) Perceptions: Journal Of International Affairs 117 (2013), http://sam.gov.tr/pdf/perceptions/Volume-XVIII/winter-2013/Winter_2013.pdf#page=121; see also Medine Çağlayan, The United Nations Security Council Reforms In A Changing World Order(2007)(Unpublished Master Dissertation, Marmara University).

[196] For instance, Russia alone utilized its veto power 80 times in the first nine years of the UN's existence. See *Vetoes Since 1946 For Authoritative UN Veto Dataset*, Security Council, https://research.un.org/en/docs/sc/quick/veto

played a significant role in its economic support. Both China and Russia have collaborated at times to implement sanctions that incorporate more lenient language to address specific aspects. This aspect will be further discussed in Chapter 5. [197]

v. Third States' Cooperation With The UNSC: In order for sanctions to be effective, there needs to be a coordinated effort among member states of the international community. The ambiguous language in the UNSC's sanctions can create confusion and make it difficult for states to fully comply with them.[198] Additionally, some states may lack the legal capacity to implement sanctions domestically, or may have strong economic ties with the targeted state that make it difficult for them to fully implement the sanctions regime. Finally, there may be states that attempt to evade sanctions by continuing to do business with the targeted state.[199] All of these factors can affect the success of sanctions' regimes and highlight the need for unified cooperation and coordination among states in order to maximize their impact.

vi. Unilateral/Autonomous Sanction Regimes: Beyond the framework of the United Nations, individual states may adopt unilateral sanctions or restrictive measures. I believe it is crucial to conduct a thorough examination of unilateral sanctions regimes, as they exert a substantial influence on the efficacy of UN Security Council

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[197] Paul Conlon, *Implementation: Strength of Sanctions and Domestic Policy*, *in* HAKIMDAVAR, supra note 184, at 65; see also Yong-suk Lee, *International Isolation And Regional Inequality: Evidence From Sanctions On North Korea*, 103 Journal Of Urban Economics 34 (2018), <https://www.sciencedirect.com/science/article/pii/S0094119017300852>;
Peter A.G. Bergeijk, *Sanctions Against The Russian War On Ukraine: Lessons From History And Current Prospects*, 56(4) Journal Of World Trade 571 (2022), <https://kluwerlawonline.com/journalarticle/Journal+of+World+Trade/56.4/TRAD2022023>

[198] FRANCK P.R TRIMBLE, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 230 (Oxford University Press 1995).

[199] For instance, after the adoption of UNSC sanctions on the Iraqi government in the 1990s, five African states (Comoros, Mauritius, Seychelles, Zambia and Zimbabwe) wrote to the UN commission requesting that oil imports from Aden continue. See U.N. Doc. S/AC.25/1990/COMM.50, *in* 1990 Comms Log. 27; also quoted *in* HAKIMDAVAR, supra note 184, at 177.

sanctions. The authors of unilateral sanctions aim to supplement UN sanctions by imposing additional restrictive measures on a target state. They hope that these measures will exert more pressure on the target state while also safeguarding the humanitarian rights of its population. However, I argue that despite being intended as targeted regimes, these measures still have negative consequences on the humanitarian rights of the people.

The upcoming section of this analysis will delve into the study of unilateral regimes, with particular attention paid to the two most significant regimes: the US unilateral sanctions and the EU restrictive measures. Before discussing those regimes, I need to analyze the relationship between countermeasures and economic sanctions in international law. As the UNSC is the only competent body to impose sanctions in relation to the violation of international peace and security, unilateral sanctions can be permitted in legal terms only if they could be categorized as non-forcible countermeasures as set out in the Draft Articles on State Responsibility (2001).[200] The following discussion will give us an insight for further analysis on the legal aspects of unilateral regimes.

[200] I will not discuss the relationship between economic sanctions and non-forcible retorsion as well as reprisal because these terms are ambiguous and do not assist in understanding the legal status of unilateral sanctions. I believe the term 'countermeasure' used in the Draft Articles is broad enough, and specific conditions regulated for countermeasures can cover the other two terms. For a similar view, see Abi-Saab, supra note 166, at 38; David J. Bederman, *Counterintuiting Countermeasures*, 96(4) American Journal Of International Law 817, 827 (2002), https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/counterintuiting-countermeasures/0743E455A9EEB89F1C896279FB7B5A54; see also JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 573 (9th ed. 2014).

IV. Unilateral/Autonomous Sanctions: Countermeasures Under International law?[201]

This section begins by examining the legality of unilateral sanctions within the larger framework of international law, before delving into a discussion on the specific sanctions imposed by the US and the EU. It is crucial to evaluate the legal status of unilateral sanction regimes, especially considering the growing trend of states such as the UK, Canada, New Zealand, and Australia implementing such measures in recent years. This analysis becomes even more significant as the UN system has previously considered the implementation of sanctions through its Security Council. To initiate the analysis, I establish a link between 'sanctions' in the UN Charter and 'countermeasures' as outlined in Articles 49 to 54 in the Draft Articles on Responsibility of States (2001). The question that arises is whether states possess the authority to enforce unilateral/autonomous measures (sanctions) when there is no established UN sanction regime in place, or even when such regimes do exist but states opt to implement additional supplementary sanctions in response to threats or violations of international peace and security. Unilateral sanctioning measures have become increasingly common as a means for some states to respond to violations of legal obligations under international law. Nevertheless, their legal justification and compatibility with legal norms continue to be subjects of debate.[202] During the 18th and 19th centuries, in cases where a state violated its legal obligations, injured states were allowed to utilize either forcible or non-forcible measures to

[201] For an in-depth analysis about countermeasures, see BOGDANOVA, supra note 162, at 65; ANTONIO CASSESE, INTERNATIONAL LAW 234 (Oxford University Press 2001); White & Abass, supra note 22, at 506; ELISABETH ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES 75 (Transnational Publishers 1984).
[202] Hofer, supra note 162, at 410.

rectify or penalize the wrongful acts.[203] After the establishment of the UN and the subsequent major transformations in international law, non-forcible measures (countermeasures) did not become subject to an absolute prohibition, unlike the use of forceful measures.[204] In fact, the utilization of non-forcible measures allows for greater flexibility and discretion in their application compared to the use of forceful measures. However, it is important to recognize that the flexibility and discretion afforded to non-forcible measures, such as unilateral sanctioning measures, do not automatically render their adoption lawful in all situations.[205] An initial examination should focus on the adoption of unilateral sanctioning measures by states and whether they should be perceived as imposing 'sanctions' comparable to those imposed by the Security Council or as a form of 'countermeasure'. The concepts of sanctions and countermeasures are indeed closely intertwined, to the extent that this field is often regarded as legally ambiguous, leading to diverse interpretations and analyses. Crawford points out that the ambiguity originated from the title in Article 54 in the Draft Articles (2001), wherein it mentions 'measures taken by states other than an injured state.' He continues that the absence of the term 'countermeasure' in this article creates a lack of clarity regarding its connection with Chapter VII of the UN charter.[206] The intricate interplay between sanctions and countermeasures adds to the complexity in defining and comprehending their exact legal nature and

[203] White & Abass, supra note 22, at 506.
[204] CASSESE, supra note 201, at 234; White & Abass, id., at 506; For the definition of countermeasure, see ZOLLER, supra note 201, at 75
[205] ZOLLER, id.
[206] JAMES CRAWFORD ET AL., THE LAW ON INTERNATIONAL RESPONSIBILITY 1145(Oxford University Press, 2010); JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 706 (Cambridge University Press, 2013); For more information about third-part countermeasures, see also UN General Assembly, Report Of The Secretary-General, *In Larger Freedom: Towards Development, Security And Human Rights For All* (U.N. Doc., A/59/2005), ¶109.

implications. [207] The confusion arises from the fact that the concept of countermeasures is acknowledged as a right for states to respond individually or collectively to internationally wrongful acts in the Draft Articles. This right is not only recognized for the state directly affected by the wrongful act but is also considered for other states that have not directly suffered injuries as a result of the wrongdoing.[208]

Some scholars argue that international law does not preclude or limit third-party countermeasures, even if they are adopted concurrently with UN sanctions.[209] These scholars assert that third-party countermeasures remain unrestricted because there is no concrete evidence to suggest that their adoption interferes with or undermines the effectiveness of Security Council' measures.[210] Continuing with the same line of argument, it is also contended that the absence of prohibition against third-party countermeasures in the Draft Articles (2001) and the growing trend of states resorting to such measures support the idea that the use of countermeasures in response to violations of erga omnes obligations has potentially become a customary practice, or is evolving into a customary rule of law.[211] These claims are supported

[207] N.DWhite,*Shades Of Grey: Autonomous Sanctions In The International Legal Order*, *in* UNILATERAL SANCTIONS IN INTERNATIONAL LAW 61 (SURYA P. SUBEDI KC., 2021)

[208] See ARSIWA, arts. 49-54.

[209] Amanda Bills, *The Relationship Between Third-Party Countermeasures And The Security Councils Chapter VII Powers:Enforcing Obligations Erga Omnes In International Law*, 89(1) Nordic Journal Of International Law 117, 117-118, 129 (2020), https://brill.com/view/journals/nord/89/1/article-p117_117.xml?alreadyAuthRedirecting&casa_token=eQOyfwlXxmEAAAAA:kY9VMeUgPENxqOdKARQiRyA83SlJ0XEkBsQSNB3hd-jHqd5w54FMK7C05YIEQl5EmOjaNQXTR_aX

[210] Id.

[211] See MARTIN DAWIDOWICZ, THIRD-PARTY COUNTERMEASURES IN INTERNATIONAL LAW 282-284 & 11-238 (Cambridge University Press, 2017); see also C.J TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW (Cambridge University Press, 2005); E. KATSELLI PROUKAKI, THE PROBLEM OF ENFORCEMENT IN INTERNATIONAL LAW: COUNTERMEASURES, THE NON-INJURED STATE AND THE IDEA OF INTERNATIONAL COMMUNITY (Routledge, 2010).

by some examples of state practices where third-country countermeasures were adopted alongside UNSC sanctions.[212] The scholars further reinforce their argument by highlighting the lack of evidence from the Security Council indicating any explicit prohibition against third-party countermeasures. Based on this observation, they propose that the relationship between third-party countermeasures and Security Council's Chapter VII measures can be best characterized as parallel legal systems, both aimed at addressing the legal consequences arising from a breach of an erga omnes obligation.[213] Thus, according to their perspective, neither the Security Council's actions nor the absence of explicit restrictions on third-party countermeasures suggest that the two types of measures adopted by the Council and third states are incompatible. Instead, they exist side by side, each offering its own means of addressing violations of obligations owed to the international community. The scholars also argue that resorting to third-party countermeasures in conjunction with UNSC measures becomes necessary in cases where the Council faces political challenges and fails to adopt sufficient measures to address the issues on its agenda.[214] For the reasons stated earlier, it is claimed that while the Security Council bears the primary responsibility for maintaining international peace and security, the adoption of necessary measures in response to violations of legal obligations erga omnes is not limited to the Council alone.[215]

[212] One such instance is the case of sanctions imposed against South Africa in 1985 due to its illegal Apartheid regime. The US adopted countermeasures that went beyond the scope of UN sanctions. Similarly, when sanctions were imposed on the Former Yugoslavia in response to severe human rights violations and humanitarian law breaches in Kosovo in 1998, the EU also exceeded the scope of UN sanctions. Bills, supra note 209; DAWIDOWICZ, id., at 255-262.
[213] Bills, id., at 120.
[214] CRAWFORD, supra note 206, at 703.
[215] Id., at 706.

What I intend to argue in this section diverges from the aforementioned lines of reasoning. Third-party countermeasures (here economic sanctions) may overlap with Security Council's measures in extensive areas, but this resemblance alone does not guarantee their legality. To establish legality, the presence of a legal basis is necessary. Upon examining unilateral sanctions laws adopted by states, it becomes evident to us that the justifications for imposing such sanctions are not solely based on legal grounds.[216] This circumstance gives rise to heightened skepticism surrounding their legality. In essence, it fosters the perception that unilateral sanctions are not primarily driven by concerns for international peace and security, but rather by the pursuit of national security and the interests of the states involved. As an example, section 2(1) of the UK's Sanctions & Anti-Money Laundering Act of 2018, expands the Act's purposes to wider foreign policy and national goals.[217] Similar justifications can be observed among other states that adopt unilateral sanction regimes, and I will delve into this matter further in the upcoming section concerning the sanctions of the US and the EU. A common argument stemming from these justifications is that the UN sanctions regime alone is insufficient to guarantee international peace and security. It must be acknowledged that while this type of justification may appear legal on the surface, it does not have legality under

[216] White, supra note 207, at 62-63.

[217] "An appropriate minister may make sanctions regulations where that minister considers it appropriate to make the regulations for… (d) foreign policy objective of the government of the United Kingdom". Sanctions & Anti-Money Laundering Act of 2018, Section 2(1)(d); "In introducing the *Autonomous Sanctions Bill* for a second reading to the Australian Parliament in 2010, the Australian minister of foreign affairs explained that they are autonomous sanctions to distinguish them from sanctions applied under the international obligations arising from the UNSC decisions. The purpose of the Bill is to strengthen Australia's autonomous sanctions regime by allowing greater flexibility in the range of measures Australia can implement… thus ensuring that Australia's autonomous sanctions can match the scope and extent of measures implemented by like-minded states." White, supra note 207, at 63; Alexander Chapman & Sam Kealey, *Australian Practice In International Law*, *in* 31(1) THE AUSTRALIAN YEAR BOOK OF INTERNATIONAL LAW ONLINE 219 (Brill 2010).

international law. I hold that, according to Article 24 and 25 of the UN Charter, the authority to determine whether international peace and security are threatened or breached, as well as the decision on whether sanctions or other measures such as recommendations for negotiations should be imposed, exclusively rests with the Security Council. Member States have indeed expressed their consent in the Charter that the Council by acting on their behalf, is the sole authoritative body to determine matters related to international peace and security.[218] The challenges faced by the Council in adopting sanctions are an internal organizational issue that can be addressed through the amendment of the UN Charter and the empowerment of other UN organs in this regard. However, the existence of these challenges does not provide individual states with the necessary legal basis and authority to take measures beyond the UN sanctions and unilaterally assess the state of international peace and security. Labeling such unilateral measures as 'sanctions' cannot serve as a substitute for, or complement to UN sanctions. One of the challenges in third states' unilateral sanctioning measures is that if all members of the international community react to violations related to international peace and security, it will create a degree of instability in the international legal order. The crucial issue here is the high number of states resorting to countermeasures. When the decision is made among 193 states, not only does the general international order face more crises, but it also disregards the centralized approach that the UN system sought since its very first day of establishment. Moreover, the actions of countries without international and central supervision go beyond what is necessary and bring the issue of proportionality and

[218] For a similar view, see L.A Sicilianos, *Countermeasures In Response To Grave Violations Of Obligations Owed To The International Community*, *in* CRAWFORD ET AL., supra note 206, at 1138-1142.

necessity of their countermeasures into question. There is no doubt that the reaction to the violation of the most important goals, namely international peace and security, should be under centralized supervision. It is this centralized system that makes evaluations of existing situations more precise, concrete, and objective, determines the necessary actions to be adopted, and establishes the required proportionality. In this regard, it shall be noted that in the first reading of the Draft Articles (2001), Crawford suggested creating a separate regime for third-party countermeasures, which was rejected due to the dangerous effects it could have for the legal system.[219] This rejection can be seen as a sign of disagreement with the idea that a separate regime for individual states' actions threatens the existing UN system. The involvement of individual state(s) in the adoption of unilateral sanction regimes along with the Security Council's sanctions does not necessarily contribute to improving the situation concerning international peace and security. In some instances, the imposition of sanctions against a state involved in wrongdoing can serve as an excuse for that state to engage in retaliatory actions or implement counter-countermeasures.[220] Additionally, unilateral sanctions can undermine the process of trust-building necessary for future peace negotiations. They can escalate the security situation to a point where the wrongdoing state may feel compelled to resort to the use of force in response. This escalation can hinder diplomatic efforts and make peaceful resolution of conflicts more challenging. For the reasons stated above, the determination of necessary and essential actions in crisis situations should only be

[219] CRAWFORD, supra note 206, at 703-706.
[220] This can be observed in Russia's adoption of countermeasures against the sanctions imposed by the EU following Russia's attack on Ukraine. White, supra note 207, at 80.

carried out by a competent body. The involvement of individual states in assessing the appropriate measures often reflects their subjective evaluation of the situation, rather than the objective assessment that can be provided by the Security Council.[221]

In light of the points discussed, I hold that a distinction should be drawn between sanctions of the kind adopted by the Security Council in response to threats to or violations of international peace and security, and other measures that individual state(s) can take in response to breaches of legal obligations, commonly known as countermeasures. In line with the discussion, among the various scholarly definitions of sanctions that were mentioned earlier in the thesis, I believe Abi-Saab's definition offers a more accurate reflection of their true meaning. According to Abi-Saab, sanctions are "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 the community that is governed by the legal system".[222] Based on this definition, it is necessary to further examine the distinctive characteristics that differentiate countermeasures from sanctions.[223] What distinguishes countermeasures from sanctions is the requirement that there must be an actual violation of legal obligations

[221] Crawford refers to this one-sided evaluation as "private justice". CRAWFORD, supra note 200, at 527; Abi-Saab, supra note 166, at 38; see also Denis Alland, *Countermeasures Of General Interest*, 13(5) European Journal of International Law 1221, 1239 (2002), https://academic.oup.com/ejil/article/13/5/1221/419883; Mickael W. Reisman & Douglas L. Stevick, *The Applicability Of International Law Standards To United Nations Economic Sanctions Programmes*, 9(1) European Journal Of International Law 86, 88 (1998), http://www.ejil.org/pdfs/9/1/1485.pdf

[222] Abi-Saab, id.

[223] See ZOLLER, supra note 201, at 75; ARSIWA, art.49(2&3); James Crawford, *The Relationship Between Sanctions And Countermeasures*, *in* DEBBAS, supra note 166, at 282; The term 'countermeasures' was introduced in the air service agreement case of 1978. Air Service Agreement of 27 March 1946. U.S./ Fr., Ad Hoc Arbitration, ¶80-81, Rep.417(1978); United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, ¶53, 1980 I.C.J. Rep.451(May 24); BOGDANOVA, supra note 162, at 63.

by the responsible state.[224] The Draft Articles are limited to the actual violations of law and for this reason attribution of the wrongful act to the wrongdoing states is necessary.[225] In contrast, UN sanctions can be imposed in two scenarios: when an actual violation of international legal rules has occurred, and when there is a potential threat to international peace and security posed by the target state. In other words, UN sanctions are not solely reactive to past violations but can also include preventative measures.

Another aspect that distinguishes sanctions from countermeasures, based on the explanations provided earlier, is that countermeasures must be taken in cases other than the violation of international peace and security. In the Draft Articles, as mentioned earlier, the term 'countermeasure' is used instead of 'sanction,' and some define it as a bilateral means of law enforcement in a decentralized system.[226] In Hart's words, sanctions remain as a form of punishment or response to breaches of those rules that become more centralized as the legal system develops from a primitive set of primary rules.[227] The UN embodies this centralized system which specifically clarified the Security Council's responsibility to adopt sanctions relating

[224] See Crawford, supra note 200, at 281; Federica I. Paddeu, *Countermeasures*, *in Max Planck Encyclopedia Of Public International Law* (Sep. 2015), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690e1020>; The term 'sanction' was initially used by the International Law Commission in the Draft Articles, but was later substituted by countermeasures. JAMES CRAWFORD ED., THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES, 168 (Cambridge University Press 2002); Martin Dawidowicz, *Public Law Enforcement Without Public Law Safeguards? An Analysis Of State Practice On Third-Party Countermeasures And Their Relationship To The UN Security Council*, 77(1) The British Yearbook Of International Law 333 (2007), https://academic.oup.com/bybil/article-abstract/77/1/333/330465

[225] ARSIWA, art.2.

[226] J Alland, *The Definition Of Countermeasures*, *in* CRAWFORD ET AL EDS., supra note 206, at 1223-35.

[227] HART KELSON, CONCEPT OF LAW (2012), quoted *in* White, supra note 207, at 67.

to threats to or violations of international peace and security.[228] Thus, we should not conflate sanctions within the UN system with countermeasures. Based on the foregoing, I hold that countermeasures have limitations in that their application should be limited to areas of international law that have not yet been fully developed. However, this matter remains ambiguous and requires further extensive discussions and research. This ambiguity arises from situations where breaches of legal obligations give rise to significant concerns such as environmental damages. The key question then becomes whether the Security Council should intervene in these areas and consider implementing sanctions. In such a scenario, a pertinent question arises regarding the delineation between a violation or threat to international peace and security and a breach of legal obligations erga omnes in other areas. Another issue that requires additional research is whether non-Member States of the UN have the authority to impose sanctions in response to a breach of international peace and security. These states have not provided their consent to the Security Council to take necessary measures. However, I argue, based on the following two points, that only countermeasures, rather than sanctions, would be permissible for this group of states. The first reason, as previously mentioned, is that UN law, as an integral part of the international legal system, differentiates between sanctions, which are exclusive to the Security Council, and countermeasures. Consequently, what is available to both Member and non-Member States is the option of utilizing countermeasures. The second reason to be considered is the practice of the Security Council, which requires further scrutiny. As will be discussed in chapter 5 regarding the sanctions imposed

[228] Bruno Simma, *From Bilateralism To Community Interest In International Law:Bilateralism And Community Interest Confronted*, 250 Recueil des Cours 217, 331(1994).

on North Korea and Iran, the Security Council at times addresses *all states* in its resolutions, thereby imposing legal obligations on all members of the international community. This underscores the crucial significance of the responsibilities entrusted to the Security Council.[229] The maintenance of international peace and security is considered the paramount objective within the international legal system to such an extent that the Charter itself explicitly states:

> "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security".[230]

Now that it is established that the unilateral measures of states in response to violations of legal obligations fall under the category of countermeasures, the next step is to examine whether these countermeasures fulfill the necessary conditions outlined in the Draft Articles. Providing a definitive answer to this question cannot be achieved through a general and abstract approach. Instead, it necessitates a comprehensive analysis on a case-by-case basis. As a result, the upcoming sections will concentrate on specific case studies, namely the nuclear-related sanctions imposed by the US and the EU on North Korea and Iran. However, there are also some broader considerations that need to be taken into account beforehand. There might be arguments suggesting that the presence of unilateral regimes by the US and the EU, which involve a substantial number of states, blurs the distinction between sanctions imposed by the Security Council and countermeasures outlined in the Draft

[229] "Arguments that the UN Charter is the constitution of the international community may help overcome this limitation". White, supra note 207, at 71; see also B FASSBENDER, THE UNITED NATIONS CHARTER AS THE CONSTITUTION OF THE INTERNATIONAL COMMUNITY 78 (Nijhoff 2009).
[230] UN Charter, art. 2(6).

Articles. Some may even assert that the measures taken by multiple states can be regarded as sanctions due to their collective nature. However, it is crucial to recognize that these sanction regimes are implemented independently, without being based on or going beyond existing UN sanctions. Furthermore, they lack authorization from the Security Council in those particular cases. As a result, they cannot be accurately referred to as 'sanctions' in the strict legal sense. Instead, they should be regarded as countermeasures adopted *collectively* by multiple states. These regimes sometimes take on a more centralized structure, as evident in the EU's autonomous regimes.[231] Unilateral measures of the US and the EU adopted against North Korea and Iran, are related to the nuclear programs of these countries and in response to threats or violations of international peace and security. These actions can be seen as a form of interference in the work of the Security Council. From my perspective, the unilateral regimes implemented by the US and the EU are subject to criticism[232] as follows:

i. Primacy of the Security Council: Article 25 of the UN Charter establishes the binding nature of decisions made by the Security Council. By taking unilateral actions without the explicit authorization of the Security Council, the US and the EU undermine the primary responsibility of the Security Council in maintaining international peace and security. In this regard, states should refrain from taking unilateral measures regardless of whether the measures are of a positive or negative nature. Thus, I believe that the aforementioned unilateral regimes, from the aspect

[231] White, supra note 207, at 69.
[232] In this regard, to condemn the imposition of unilateral measures as sanctions, some resolutions were adopted including by the General Assembly as well as the UN Human Rights Council in 2002 and 2014, respectively. U.N. Doc., A/RES/57/5(Nov.1, 2002); U.N. Doc., A/HRC/RES/27/21 (Oct.3, 2014).

of the strict sense of the term ‘sanction’, violate Article 25 of the UN Charter. It is important to highlight that the Security Council has not outrightly forbidden the use of unilateral sanctions. Meanwhile, it is essential to recognize that declaring such a prohibition is within the Council’s authority and not a mandatory obligation. Merely the Council’s failure to declare the legal status of unilateral measures does not justify resorting to them. As will be mentioned in the subsequent pages, numerous states, including in the General Assembly, have demonstrated contrasting practices, explicitly voicing their disapproval of unilateral sanctions.

ii. Collective Security v. Self-help: The UN Charter promotes the concept of collective security, wherein threats to international peace and security are addressed collectively through the Security Council. Unilateral sanctions, even if driven by legitimate concerns, undermine this principle by bypassing the established international mechanisms designed to address such issues collaboratively.

iii. Sovereign Equality of states & Regional/Global Stability: The adoption of unilateral measures by states lead to repercussions on regional and global stability. Other states could perceive such actions as an infringement on their sovereignty or a precedent for similar unilateral actions in the future, potentially leading to increased tensions and conflicts.

Another significant point to consider is that even if we assume that the unilateral regimes are regarded as countermeasures and not sanctions, they need to fulfill the necessary legal requirements to be considered lawful. [233] Nowadays, many legal

[233] See Article 50 of the Draft Articles.

obligations, such as the preservation of human rights and humanitarian concerns, are considered obligations that encompass the interests of the entire international community and are known as obligations erga omnes. In this regard, countermeasures taken to safeguard these rights should not be employed in a way that undermines these obligations. If such a situation occurs, it would no longer serve the interests of the international community and would diminish the objective characteristic of states' assessment. As will be examined in the subsequent sections regarding the US and the EU sanctions, the basic legal requirement for countermeasures are not established by those regimes in practice. One of the key reasons is the violation of human rights specially the right to health and a standard of living, and the lack of proportionality and necessity. In the subsequent section, I will present several examples to illustrate the humanitarian impact caused by these regimes in the cases of North Korea and Iran. It is important to highlight that the interdependence of human rights is a topic that requires thorough and ongoing scrutiny. For example, when individuals are deprived of adequate access to healthcare services, including prevention, treatment, and health education, their overall well-being is compromised. This will have a cascading effect on their ability to enjoy other rights, such as the right to a standard of living.[234] People's health is closely intertwined with their ability to pursue education, work, and participate fully in society. Inadequate health care leads to decreased productivity, limited economic opportunities, and hindered social integration. Furthermore, in extreme cases, the violation of the right to health can even result in the violation of

[234] See Majid Abbasi & Hamed Azimi, *Right To Health And US Sanctions Under Trump Against Islamic Republic Of Iran (Sanctions On Drugs And Medical Equipment)*, 18(4) International Studies Journal 277 (2022), https://www.isjq.ir/article_157591_12cad7ac5bec6c8e02c958ff8cc45516.pdf?lang=en

the right to life.[235] When individuals are denied essential medical treatment or face barriers in accessing life-saving interventions, their lives may be put at risk. This can occur due to various factors, including systemic issues, lack of healthcare infrastructure, unaffordable healthcare services, discrimination, and unequal distribution of resources.[236] States have an obligation to ensure the realization of human rights of their citizens and take preventive measures to address any systemic barriers that impede individuals' human rights. However, unilateral measures imposed on states can impede access to crucial medical supplies, equipment, and technologies, thereby posing substantial health risks to the population. The restriction of financial transactions and trade barriers in this regard, impede the importation of medicines, vaccines, and medical equipment, causing shortages and affecting healthcare systems. As a result, people face limited access to life-saving treatments, increasing the likelihood of preventable diseases, disabilities, and mortality rates.[237] It is a fact that the imposition of sanctions, especially economic sanctions, by the Security Council can have an impact on the population of the targeted country. However, the specific aim of smart sanctions is to minimize these effects to the greatest extent possible. The issue here is that unilateral sanctions exacerbate these minimum damages and also result in unnecessary and excessive pressure on the target country and its population. This undermines the principle of proportionality and necessity. For this reason, merely adopting legal regimes of unilateral sanctions

[235] Id; Universal Declaration Of Human Rights, art.3; International Covenant On Civil & Political Rights, art.6.
[236] For the effects of unilateral sanctioning measures on the enjoyment of human rights, see for example U.N. Doc., A/HRC/AC/13/CRP.2 (Jul.30, 2014).
[237] Abbasi & Azimi, supra note 234, at 289-290.

alongside the UN sanction regimes is not sufficient to justify their legality. Sanctions often take years to show their real effects, as seen in the cases of the sanctions against Iran and North Korea. Notably, the unilateral sanction regimes imposed by the US and the EU have included actions that not only put undue pressure on the population but have also imposed measures without a legal necessity (prohibition of trade in precious metals in the Iranian sanctions regime which were not relevant to the country's nuclear program) and beyond proportionality (measures taken to cut off energy trade in total while the UN did not put a total ban in both sanctions on North Korea and Iran).

It is worth noting that while the EU's autonomous regimes encounter humanitarian concerns and issues of proportionality,[238] the legal challenges posed by the measures implemented by the US extend beyond those faced by the EU. The main reason for this is that even if the countermeasures are taken collectively, they require the will and consent of each individual state. No state can impose the enforcement of its countermeasures on other states. In the EU, the unilateral regimes are binding only on EU Members. However, in the US regimes, we encounter the concepts of *primary* and *secondary* sanctions. As will be elaborated further, primary sanctions refer to measures that restrict the activities of US nationals, prohibiting them from engaging in certain activities as outlined in US regulations. On the other hand, secondary sanctions have an extraterritorial effect, extending the enforcement

[238] See Article 51 of the Draft Articles on States Responsibility concerning proportionality; Hofer, supra note162, at 419; U.N. Doc., A/CN.4/507(Mar.15, 2015), at 91; CASSESE, supra note 201, at 238-289; see also Roger O. Keefe, *Proportionality, in* CRAWFORD ET AL EDS., supra note 206, at 1168.

of US sanction laws to other states.[239] This very issue leads to the US sanction regime facing challenges in violating basic principles of international law, such as the principle of sovereign equality of states.[240] The concept of sovereign equality means that all states, regardless of their size, population, economy or military, possess equal rights and are entitled to be treated with respect and dignity. Unilateral sanctioning measures, however, infringe upon this principle by allowing a single state to exert undue influence and impose measures on another sovereign state. In other words, the sanctioning state is imposing a position of superiority over other states. It is important to remember that UN member states have expressed their opposition to sanctions unilaterally imposed on other states during the General Assembly's sessions. A striking example of this can be observed in resolution 73/8 pertaining to the US' sanctions against Cuba, wherein 189 Member States expressed their objection.[241] The resolution urges states that have enacted and persist in enforcing such laws and measures to promptly undertake the necessary actions to repeal or nullify them in alignment with their legal framework.[242] While this resolution focuses on the particular issue of the embargo imposed on Cuba, it also reflects a growing global tendency to discourage the use of unilateral sanctions in general. This is because it urges *all states* to avoid enacting and implementing unilateral measures. Resolution 73/8 of the General Assembly serves as a compelling testament, in my opinion, to the international community's commitment of not recognizing extra-

[239] See for example, Title III of the US Helms-Burton Act of 1996.
[240] UN Charter, art.2(2); see also Julia Schmidt, *The Legality Of Unilateral Extra-territorial Sanctions Under InternationalLaw*, 27(1) Journal Of Conflict& Security Law 54, 60 (2022), <https://academic.oup.com/jcsl/article/27/1/53/6528963>
[241] U.N. Doc., A/RES/73/8(Nov.5, 2018).
[242] Id., ¶3.

territorial measures as lawful. While it is true that many third states choose to comply with unilateral sanctions laws imposed by other states, such compliance should not be interpreted as an acceptance or endorsement of the legality of those unilateral measures under international law. The decision of third states to comply with such measures is often driven by various factors, including political considerations, economic interests, or the desire to avoid potential consequences or penalties. States should exercise careful consideration of the potential impacts of their unilateral measures on the populations affected by them, as well as on third states. The relationship between human rights, sanctions, and state sovereignty is indeed complex and delicate. While the primary responsibility for safeguarding human rights lies with the state in which individuals reside, the imposition of sanctions restricts the target state from fulfilling its human rights obligations, thereby undermining its sovereignty. When a group of states collectively imposes unilateral measures, it is expected that the punitive nature of these measures becomes intensified, as the cumulative impact of multiple states exerting pressure can be significant.[243] In systems such as the EU, the situation becomes even more complex due to the presence of individual states' discretion, often referred to as a margin of appreciation. This means that within the framework of a single sanctions' regime, individual member states may have some degree of flexibility in implementing and interpreting the measures.

[243] See White & Abass, supra note 22, at 515.

V. Legal Basis of US Sanctions & Their Types

The US has been implementing sanctions since the 1800s, when President Thomas Jefferson pushed for a trade embargo to prevent a potential conflict with England or France. [244] This initiated the use of sanctions as a frequent practice in the US, which has continued ever since.[245] The classification of US sanctions into 'primary' and 'secondary' is well-established.[246] In order for a transaction to infringe upon primary sanctions imposed by the US, two key elements are typically required. Firstly, there must be a connection to the US, referred to as a 'US nexus.' Secondly, the transaction must involve either a sanctioned individual, entity, or jurisdiction. The US nexus can be established if the transaction involves a US person, US-origin products, software, or technology, or if it results in or involves activity within the US territory.[247] Soon after WWI and a period of economic recession, the US became a central economic hub for goods and raw materials.[248] The US achieved a strong position in the global banking system as a result of its place in the global economy and the dollar's standing

[244] See Meredith Rathbone *et al*., *Sanctions, Sanctions Everywhere: Forging a Path through Complex Transnational Sanctions Laws*, 44 Georgetown Journal Of International Law 1055 (2013), https://docplayer.net/33616737Sanctionssanctionseverywhereforgingapaththroughcomplextransnational-sanctions-laws.html; GARY C. HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY 9 (Peterson Institute 1990); ANDREWS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 925 (2nd ed. 2008).

[245] CARTER, supra note 170, at 8.

[246] John J. Forrer, *Secondary Economic Sanctions: Effective Policy Or Risky Business?*, Economic Sanctions Initiative 1, 2 (May. 2018), <https://www.atlanticcouncil.org/wpcontent/uploads/2018/05/Secondary_Sanctions_WEB.pdf>; see also CHARLOTTE BEAUCILLON, RESEARCH HANDBOOK ON UNILATERAL AND EXTRATERRITORIAL SANCTIONS (Edward Elgar Publishing 2021).

[247] BEAUCILLON, id., at 258; Roberto J. Gonzalez & Joshua R. Thompson, *Practical Cross-border Insights Into Sanctions Law*, International Comparative Legal Guide 1, 3 (2023), <https://www.paulweiss.com/media/3982726/san23_chapter-21_usa.pdf>

[248] See Kalim Siddiqui, *The U.S. Dollar And The World Economy: A Critical Review*, 6(1) Athens Journal Of Business and Economics 21, 24(2020), https://www.athensjournals.gr/business/2020-6-1-2-Siddiqui.pdf; Carlos Lozada, *The Economics Of World War I*, National Bureau Of Economic research (Jan.1, 2005), https://www.nber.org/digest/jan05/economics-world-war-i

as the most significant global reserve currency.[249] Due to its significant economic power, the US had the ability to impose secondary sanctions on third states.[250] Secondary sanctions are employed as a means to dissuade non-US entities from engaging in specific activities, even if there is no connection to the US. These sanctions serve as a warning that a non-US person may be added to the Specially Designated Nationals (SDN) List or face other sanctions if they partake in the designated activities specified by the US government.[251] These sanctions increase the effectiveness of US sanctions policy, thereby exerting pressure on a broader range of actors. In the case of Iran's sanctions, for example, BNP Paribas settled with the US federal and state governments for US$8.9 billion in 2014 for apparent violations of US sanctions regulations specifically the International Emergency Economic Powers Act and the Trading with the Enemy Act.[252] Since 2018, Airbus has lost an estimated €17 billion due to the cancellation of a contract with Iran Air.[253] Daimler has been

[249] See Rachel Barnes, *United Sates Sanctions: Delisting Applications, Judicial Review And Secret Evidence, in* HAPPOLD & EDEN EDS., supra note 176.
[250] Baran Han, *The Role And Welfare Rationale Of Secondary Sanctions: A Theory And A Case Study Of The US Sanctions Targeting Iran*, 35(5) Conflict Management & Peace Science 474, 477(2018), https://journals.sagepub.com/doi/pdf/10.1177/0738894216650836?casa_token=FlER5lujz0AAAAA:Ws4ssgG3z-nORJ4riYBAY90Uqejga0KtYyZQ0CIFiPP7_9is4fAM14zs4b5CakhNC3AdPZ7Biy_uA
[251] Gonzalez & Thompson, supra note 247, at 6.
[252] See Tom Ruys & Cedric Ryngaert, *Secondary Sanctions: A Weapon Out of Control? Part I: Permissibility Of The Sanctions Under The Law Of Jurisdiction*, EJIL:TALK! (2020), https://www.ejiltalk.org/secondary-sanctions-a-weapon-outofcontrolpartipermissibilityofthesanctions-under-the-law-of-jurisdiction/; Bryan R. Early & Keith A. Preble, *Enforcing US Economic Sanctions: Why Whale Hunting Works*, 43(1) The Washington Quarterly 159 (2020), https://www.tandfonline.com/doi/full/10.1080/0163660X.2020.1736881?casa_token=mtZVnQEOMAAAAA:KZuvXP8MNgumHPpjR4RmGZeQDZiKpe_u5v8bJiYAWQTZA4wBfWmxOdykOsIye0SziQ3QAoJOjbMlYQ; *BNP Paribas Sentenced For Conspiring To Violate The International Emergency Economic Powers Act And The Trading With The Enemy Act*, US department of Justice (May.1, 2015), https://www.justice.gov/opa/pr/bnpparibassentencedconspiringviolateinternationalemergencyeconomic-powers-act-and
[253] Tobias Stoll et al., *Extraterritorial Sanctions On Trade And Investment And European Responses*, Policy Department For External Relations Of The European Parliament (Nov. 2020), https://www.europarl.europa.eu/RegData/etudes/STUD/2020/653618/EXPO_STU(2020)653618_EN.pdf

forced to terminate its joint venture with an Iranian car manufacturer.[254] PSA and Renault have lost approximately €850 million due to a cancelled deal,[255] and Total has had to abandon a €4.25 billion development project in the Iranian South Pars gas field.[256] The extra-territorial application of US sanctions was facilitated in various acts, including the Iran and Libya Sanctions Act of 1996 (ISA) [257] and the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA).[258] Under these Acts, foreign entities that engage in specified sectors, including the trade of oil and gas, may be subject to prohibitions or limitations on conducting business with the target states.[259] This is while none of the UN sanctions adopted measures against Iran's energy sector. [260] Banks and other financial institutions that violate sanction policies may be subject to severe penalties, as well as requirements to provide assurances of non-repetition through a bilateral agreement

[254] Luciano Zaccara & Mehran Haghirian, *Rouhani, The Nuclear Deal, And New Horizons For Iran–US Relations, in* FOREIGN POLICY OF IRAN UNDER PRESIDENT HASSAN ROUHANI'S FIRST TERM (2013–2017) 57-86 (LUCIANO ZACCARA ED., 2020); see also Jon Truby, *Legality Of Using Blockchain To Support INSTEX And Other Special Purpose Vehicles To Enable Humanitarian Trade With Sanctioned States*, 17(9) Global Trade & Customs Journal 397 (2022), https://kluwerlawonline.com/journalarticle/Global+Trade+and+Customs+Journal/17.9/GTCJ2022055

[255] E.N. Rózsa, & T. Szigetvári, *The Resistance Economy: Iranian Patriotism And Economic Liberalisation, in* MARKET LIBERALISM AND ECONOMIC PATRIOTISM IN THE CAPITALIST WORLD-SYSTEM 169-182 (TAMÁS GERŐCS & MIKLÓS SZANYI 2019).

[256] Akbar E. Torbat, *Impacts Of The US Trade And Financial Sanctions On Iran*, 28(3) World Economy 407 (2005), <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.14679701.2005.00671.x?casa_token=pWq9QOWcRYUAAAAA:9KjH23tovd1DI9B09hzU_rWJz0yBY8PvqK7uGZR_c9QulpK2YcpzisRz2AL62CZvNRnUnF5xAsUNn8>; see also David Adesnik & Saeed Ghasseminejad, *Foreign Investment In Iran: Multinational Firms' Compliance With U.S. Sanctions, Foundation For Defense Of Democracies* (Sep.10,2018), https://www.fdd.org/wpcontent/uploads/2018/09/MEMO_CompaniesinIran.pdf

[257] See Kenneth Katzman, *Iran Sanctions*, CRS Report (Feb. 2, 2022), https://crsreports.congress.gov/product/pdf/RS/RS20871; To access the full content of the Act, see PublicLaw-104-172, 110STAT.1541(Aug.5, 1996) 50 USC S 1701, <https://www.govinfo.gov/content/pkg/STATUTE-110/pdf/STATUTE-110-Pg1541.pdf>

[258] M. Majd, *The Cost Of A SWIFT Kick: Estimating The Cost Of Financial Sanctions On Iran, in* THE POLITICAL ECONOMY OF INTERNATIONAL FINANCE IN AN AGE OF INEQUALITY (GERALD A. EPSTEIN ED., 2018); To access the full content of the Act, see Public Law 111–195,124 STAT. 1312(Jul.1,2010), 22 USC 8501, https://www.govinfo.gov/content/pkg/PLAW-111publ195/pdf/PLAW-111publ195.pdf

[259] See for example, Pub Law 104-172, 50 USC S 1701(1996 and Supp III 1997), s 5(a).

[260] See for example, U.N. Doc., S/RES/1929(2010), at 3.

with the Office of Foreign Assets Control (OFAC).[261] In 2006, the US expanded the scope of the Iran and Syria Nonproliferation Act of 2005 by adding North Korea to its provisions, thereby renaming the law the Iran, North Korea, and Syria Nonproliferation Act.[262] It authorized the US to impose sanctions on foreign individuals, private entities, and governments that engage in proliferation activities. There are some other acts adopted. For example, the North Korea Sanctions & Policy Enhancement Act (NKSPEA) of 2016 sanction entities found to have contributed to North Korea's WMD program, arms trade, other illicit activities. Upon this Act, sanctioned entities face civil or criminal penalties, as well as loss of access to the US financial system.[263] Another act is the Otto Warmbier North Korea Nuclear Act of 2019 which cut off DPRK's access to the global financial system and aims to ban entities conducting business in North Korea from dealing with the US firms.[264] In addition, President Obama signed Executive Order 13722 under the Act to block property of the government of North Korea and the Workers' Party, and prohibit certain transactions with respect to North Korea.[265] Financial institutions that are found to be on the SDN List may be prohibited from establishing brokerage partnerships with American banks and opening accounts with them.[266] Secondary sanctions can exert significant economic pressure on foreign governments and their

[261] Id.
[262] Public Law 109-353, 120 STAT.2015(Oct.13, 2006), 50 USC S 1701.
[263] Public Law 114–122, 130 STAT. 93 (Feb. 18, 2016), 22 USC S 9201.
[264] Division F, Title LXXI, Sections 7101-7155, National Defense Authorization Act for FY2020) (P.L. 116-92)
[265] Executive Order 13722(Mar. 15, 2016).
[266] See Specially Designated Nationals and Blocked Persons List (updated on Apr.14, 2023), https://home.treasury.gov/policyissues/financialsanctions/speciallydesignatednationalsandblockedpersons-list-sdn-human-readable-lists

businesses, as they are faced with the difficult decision of either losing access to the lucrative US market or halting their business with the sanctioned enterprises.[267]

Following the US withdrawal from the JCPOA in 2018, the Trump administration launched the Maximum Pressure campaign against Iran.[268] This campaign involved a range of diplomatic, military, and sanctions measures,[269] and was aimed at pressuring Iran to change its behavior. The Trump administration also criticized the UN Security Council for what it perceived as a failure to maintain a strict policy towards Iran.[270] During the Trump administration, the US sanctions regime against North Korea also became more stringent, with the aim of pressuring North Korea to denuclearize and cease its aggressive behavior.[271] As part of the efforts to increase pressure on entities involved in the US sanctions laws violations, the US designated Banco Delta Asia SARL in 2005 as a primary concern for money laundering under Section 311 of the US Patriot Act. It was claimed to be assisting the North Korean government in engaging in corrupt financial activities, primarily through Macau.[272] The US also designated China's Bank of Dandong as a primary money laundering concern in June

[267] Stephan Haggard, *Negotiating A Korean Settlement: The Role Of Sanctions*, 47(4) Korea Observer 939, 941(2016),file:///C:/Users/82102/Documents/My%20theisi%20resources/Chapters/secondary.pdf
[268] For more information, see Hamidreza Azizi et al., *Trump's "Maximum Pressure" And Anti-Containment In Iran's Regional Policy*, 29(2) Digest Of Middle East Studies 150 (2020), https://onlinelibrary.wiley.com/doi/epdf/10.1111/dome.12219
[269] Bradley Bowman & David Maxwell, *Maximum Pressure 2.0:A Plan for North Korea*, Foundation For Defense of Democracies 1, 6 & 7(2019), http://www.fdd.org/wp-content/uploads/2019/11/fdd-report-maximum-pressure-2-a-plan-for-north-korea.pdf
[270] See Richard Nephew, *Implementation Of Sanctions: United States, in* ECONOMIC SANCTIONS IN: INTERNATIONAL LAW AND PRACTICE 102 & 106 (MASAHIKO ASADA ED., Routledge 2020).
[271] Id.
[272] *Treasury Designates Banco Delta Asia As Primary Money Laundering Concern Under USA PATRIOT Act*, US Department Of The Treasury (Sep.15, 2005), https://home.treasury.gov/news/press-releases/js2720

2017, for its alleged role in aiding North Korea's access to the US financial system.[273] Subsequently, the bank was removed from the US market in November 2017.[274] After that, the US Department of Justice announced its intention to seek civil asset forfeitures from several Singapore and Chinese corporations for their alleged connections to North Korea.[275] This was followed by the Treasury sanctions against China and Russia aimed at limiting North Korea's access to the international financial system.[276] Following the 9/11 disaster and the Bush administration's War on Terror, the US established the Terrorist Finance Tracking Program (TFTP) to gain access to date concerning financial transactions on SWIFT.[277] SWIFT has assisted the US in identifying all financial flows of target states, such as North Korea and Iran, to impose sanctions on these countries through the identified routes.[278] SWIFT has also been used as a tool to cut off access to financial transactions, in order to further restrict these countries' access to the international financial system.[279]

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[273] Aaron Arnold, *A Financial Sanctions Dilemma*, 42(2) The Washington Quarterly 57 (2019), https://www.tandfonline.com/doi/epdf/10.1080/0163660X.2019.1693098?needAccess=trueandrole=button

[274] *US Bars Chinese Bank Linked To North Korean Weapons Program*, Financial Times (Nov.2, 2017), www.ft.com/content/c6c2d0fa-c0511-11e7-9836-b25f8adaa111

[275] For more details, see Justin V. Hastings, *United Nations Sanctions And North Korean Diplomatic Engagement With The International Community, in* NORTH KOREA'S FOREIGN POLICY: THE KIM JONG-UN REGIME IN A HOSTILE WORLD: ASIA IN WORLD POLITICS 149 (SCOTT A. SNYDER AND KYUNG-AE PARK EDS., 2022).

[276] Id.

[277] *Terrorist Finance Tracking Program*, US Department Of The Treasury, https://home.treasury.gov/system/files/246/TerroristFinanceTrackingProgramQuestionsandAnswers.pdf

[278] See John Park and Jim Walsh, *Stopping North Korea, Inc.: Sanctions Effectiveness And Unintended Consequences*, MIT Security Studies Program (Aug. 2016), https://www.belfercenter.org/sites/default/files/legacy/files/Stopping%20North%20Korea%20Inc%20Park%20and%20Walsh%20.pdf; Katherine Kirkpatrick et al., *Virtual Currency In Sanctioned Jurisdictions: Stepping Outside Of SWIFT*, 20(2) Journal Of Investment compliance 39, 40(2019), https://www.emerald.com/insight/content/doi/10.1108/JOIC0420190019/full/html?casa_token=EfkFbKkkfPoAAAAA:XG4HY_tTttKglw8zUrwUY9WvllrLim9mXSbixN8QC0G6fqekgCMPRzcoUtGBjbx4opzyb-C6zPLOrq_ZEaCOznap8YkosSt4BupTIRfbFyXjypu4dX0

[279] Id.

In the US, the main authority to administer and enforce economic sanctions is the OFAC that acts upon the president's executive orders.[280] OFAC is in charge of updating the SDN List, which is used to freeze the assets of blocked entities.[281] The major source of congressional authority for the imposition of sanctions is the IEEPA(International Emergency Economic Powers Act), which permits the president to issue executive orders in the event of a national emergency, defined as any unusual or extraordinary threat to the US.[282] Prior to the adoption of the IEEPA, the President had the power to issue executive orders based on TWEA(Trading with the Enemy Act). For example, on 16 December 1950, President Truman declared a national emergency in response to the threat posed by North Korea and began adopting

[280] Anna S. Nage, *Unilateral Extraterritorial Sanctions: The Search For A Jurisdictional Justification Under International Law*, 8(3) LSE Law Review 368 (2023), <https://lawreview.lse.ac.uk/articles/abstract/478/>; *Sanctions Program And Information*, US Department Of The Treasury, https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information; The legal foundation for executive orders that impose sanctions is the TWEA of 1917 and the IEEPA of 1977. Before the enactment of the IEEPA, the President of the United States utilized executive orders under the TWEA of 1917, which allowed the President to declare emergencies without any limitations on their scope or duration, without specifying the relevant laws, and without oversight from Congress. The National Emergency Act of 1976 was introduced to terminate all previous national emergencies and formalize the emergency powers of the President. Subsequently, the IEEPA was passed in 1977, which necessitates annual renewal of an emergency declaration made under the act to maintain its effectiveness. The IEEPA was designed to restrict the President's power for instance by requiring oversight and limiting their duration. Christopher A. Casey, *The International Emergency Economic Powers Act: Origins, Evolution, And Use*, CRS Report (R45618; Mar.25, 2022), <https://www.everycrsreport.com/files/20220325_R45618_3afce155faef408cfa7ede37e6f764208e884e69.pdf>; Benjamin A. Coates, *The Secret Life Of Statutes: A Century Of The Trading With The Enemy Act*, 1(2) Modern American History 151(2018), https://www.cambridge.org/core/journals/modern-americanhistory/article/secretlifeofstatutesacenturyofthetradingwiththeenemyact/77DD7CF528D3190CFC8CF8FF6DDAACB0; *Trading With The Enemy Act Of 1917(*codified as 12 U.S.C. § 95 & 50 U.S.C. § 4301 et seq.), https://www.govinfo.gov/app/details/USCODE-2011-title50/USCODE-2011-title50-app-tradingwi; Michael P. Malloy, *U.S. International Banking And Treasury's Foreign Assets Controls: Springing Traps For The Unwary*, 8 Annual Review of Banking Law 181, 188(1989), https://heinonline.org/HOL/Page?handle=hein.journals/annrbfl8anddiv=7andg_sent=1andcasa_token=cWGbesbdTs4AAAAA:680G4_d28Bjdlc2GsOuQZR8aEq0e3jvKxc0UIrOWbEt6dvuUK6Lr2q7k5b2ZhXaqUfIgnp0A

[281] To access the full list, see Specially Designated Nationals And Blocked Persons List (SDN) Human Readable Lists (last updated on May.27, 2023), https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists

[282] Pub. L. 95–223, title II, §202, Dec. 28, 1977, 91 Stat. 1626 (codified at 50 U.S.C. § 1701-6(1982)); GORDON, supra note 163, at 111.

economic sanctions by blocking all assets belonging to the North Korean government that were within its jurisdiction.[283] In this sense, while many sanctions imposed on North Korea under the TWEA were lifted in 2000,[284] President George W. Bush issued Executive Order 13466 in 2008 in response to the risk of nuclear proliferation on the Korean Peninsula, to freeze assets belonging to North Korea.[285] Regarding the Iranian nuclear program as well, some Executive Orders were adopted such as 13574, 13590, 13622, 13645, and sections 5-7 and 15 of Executive Order 13628. These Executive Orders were codified under national emergency authorities and they had imposed sanctions on Iran's automotive sector, trading in the rial and precious stones, and sales to Iran of energy sector equipment.[286]

The Department of the Treasury is legally authorized to establish regulations for the implementation of sanctions in response to executive orders. In this regard, for example, the Treasury issued the North Korean Sanctions Regulations following executive order 13466.[287] In the US, Congress also holds the power to supplement the sanctions statute by enacting laws that address specific cases.[288] The Department

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[283] *Fact Sheet* (Jun.26, 2008), US Department Of State, <https://2001-2009.state.gov/r/pa/prs/ps/2008/jun/106281.htm>

[284] See Remy Jurenas, *Exempting Food And Agricultural Products From US Sanctions: Status On Implementation*, CRS Report (updated on Apr.18, 2006), https://sgp.fas.org/crs/misc/IB10061.pdf

[285] *Continuing Certain Restrictions With Respect To North Korea And North Korean Nationals*: *Executive Order 13466*, Federal Register 36787 (2008), https://www.federalregister.gov/documents/2008/06/27/08-1399/continuing-certain-restrictions-with-respect-to-north-korea-and-north-korean-nationals

[286] See the legal basis of the Executive Orders(50 U.S.C. §1701 notes); see also Paul K. Kerr, *Possible U.S. Return To Iran Nuclear Agreement: Frequently Asked Questions*, CRS Report (R46663; Jan.29,2021), https://crsreports.congress.gov/product/pdf/R/R46663

[287] For more information about sanctions programs, see Chapter V of 31 CFR Part 510.

[288] In 2017, *for example*, the Congress passed the Countering America's Adversaries Through Sanctions Act(CAATSA) to modify the President's discretion regarding sanctions adoption in the case of Iran, North Korea and Russia. See *Countering America's Adversaries Through Sanctions Act*, https://www.dhs.gov/news/2021/02/11/countering-america-s-adversaries-through-sanctions-act-faqs; see also Nephew, supra note 270, at 103.

of State, which is in charge of developing national policies, may also have some leeway in selecting entities to be sanctioned.[289] Prior to the 1990s, US laws included comprehensive sanctions, which were later replaced by target regimes.[290] The US Congress also passed the United Nations Participation Act (UNPA) in December 1945, upon which the US president is legally authorized to carry out decisions of the Security Council.[291]

VI. Legality Of US Economic Sanctions Under International Law

The concept of territoriality is a fundamental principle in customary international law. [292] It establishes that a state has the right to exercise its authority and jurisdiction within its recognized territory, which includes its land, airspace, and territorial waters. This principle forms the basis for a state's sovereignty and the legal framework for its governance. While the principle of territoriality generally governs jurisdictional matters, there are certain circumstances in international law under which states may exercise jurisdiction beyond their territorial boundaries. Accordingly, the active personality (nationality) principle allows a state to exercise jurisdiction over its nationals for acts committed outside its territory. In this respect, the US government has been arguing its right to invoke the principle as a justification, to apply sanctions

[289] *North Korea's Fact Sheet*, US Department Of States, https://www.state.gov/countries-areas/north-korea/
[290] CARTER, supra note 170, at 2; Joanna Weschler, *The Evolution of Security Council Innovations In Sanctions*, 65(1) International Journal 31, 32 (2010), <https://journals.sagepub.com/doi/pdf/10.1177/002070201006500103?casa_token=qZGCaWrwjV4AAAAA:iybm5c5jZRbR7GB7T_khYJeMTF9JvxllXCtnCoYD5Rm6YZzztMk9XjhRSG6aPxgc7jDV-eEquBcXCQ>
[291] 22 U.S. Code § 287c.
[292] Cedric Ryngaert, *Extraterritorial Export Controls (Secondary Boycotts)*, 7(3) Chinese Journal of International Law 625, 629 & 631(2008), https://academic.oup.com/chinesejil/article-abstract/7/3/625/499176; Lowe *in* EVANS, supra note 22, at 351.

to foreign businesses[293] that are mainly owned or controlled by US citizens. According to this argument, US sanctions can restrict a foreign company that is owned or controlled by US citizens from knowingly engaging in any transaction, either directly or indirectly, with the sanctioned entities.[294] Nonetheless, this assertion goes against the principle of international law that regulate international corporations, which state that their nationality is determined solely by the place of incorporation, rather than the nationalities of the owners.[295] This means that a company's legal status and obligations are primarily tied to the jurisdiction where it is incorporated, rather than the citizenship or nationality of its shareholders or controlling individuals. Consequently, from a legal perspective, the active personality principle lacks a solid basis for justifying the extraterritorial application of American laws to foreign companies. Another principle that may be used to justify the extraterritorial application of US laws pertains to the passive personality principle. This principle allows a state to exercise jurisdiction over a foreign entity whose actions have caused harm to nationals of the asserting state. For instance, the Helms-Burton Act of 1996 imposes secondary sanctions on non-US individuals who engage in transactions with Cuba[296] and grants US citizens the right to sue anyone who trades in confiscated property in US courts.[297] The passive personality principle is utilized in specific cases

[293] Id*; Extraterritorial Application Of United States Law: The Case Of Export Controls*, 132 University of Pennsylvania. Law Review 355 (1984), <https://scholarship.law.upenn.edu/penn_law_review/vol132/iss2/4/>
[294] 31 CFR § 510.201 (2010).
[295] See Barcelona Traction, Light, and Power Company Ltd. (Belg. v. Spain), Judgement 1962 I.C.J. Rep.284, 42(July 24); CRAWFORD, supra note 200, at 512-513.
[296] Public Law 104–114, 110 Stat. 785(Mar. 12, 1996).
[297] 22 USC §§ 6021–91.

typically criminal legal ones such as terrorism.[298] Moreover, the plaintiff's nationality is not generally used to establish jurisdiction for adjudication purposes under principles of private international law.[299] Invoking the passive personality principle to justify secondary sanctions raise concerns about the extraterritorial application of a country's laws, violations of sovereignty, and interference in the internal affairs of other states. As a result, I hold that the use of passive personality principle as a basis for the enforcement of secondary sanctions lacks legal justification and is viewed as contrary to established principles of international law (territoriality & sovereignty of states). Under the protective principle, the US seeks to safeguard itself against acts committed outside its borders and enables the exercise of jurisdiction over acts that impact US territory.[300] US sanctions may be temporarily applied to non-US persons exclusively within its borders during times of war, or when the country's national security is at stake.[301] In this case, some sort of justification, such as an act of terrorism, must exist in order to apply US sanctions laws. As stated in previous sections, in order to assess threats to international peace and security other than those arising from a direct and immediate national security threat, the primary responsibility to adopt

[298] ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 66 (Oxford University Press 1994); see also Ryngaert, supra note 292, at111.
[299] See arts.17–23 of Regulation (EU) No 1215/2012 Of The European Parliament And Of The Council Of 12 December 2012 On Jurisdiction And The Recognition And Enforcement Of Judgments In Civil And Commercial Matters [2012] OJ L351/1; see also John N. Drobak, *Personal Jurisdiction In A Global World: A Comment On The Supreme Court's Recent Decisions In Goodyear Dunlop Tires And Nicastro*, 90(6) Washington University Law Review 1707 (2013), https://openscholarship.wustl.edu/law_lawreview/vol90/iss6/4
[300] Christopher L. Blakesley, *United States Jurisdiction Over Extraterritorial Crime*, 73(3) Journal Of Criminal Law & Criminology 1109, 1111 (1982), https://heinonline.org/HOL/Page?handle=hein.journals/jclc73anddiv=54andg_sent=1andcasa_token=K48MbR8IUAAAAA:EGxa3955pgVcyWxPN5VweLoNSMavH9a1O0z6Wvc8hv6u2Tw1R69kmAMfMsDiVLsiHYkKYyZNCgandcollection=journals
[301] J.L. Snyder & S. Agostini, *New U.S. Legislation To Deter Investment In Cuba*, 30 Journal Of World Trade 43, 37 & 38 (1996).

sanctions rests only with the Security Council, not individual states.[302] As a result, I hold that the use of secondary sanctions expanding the reach of US law beyond its borders, infringes on the sovereignty of other states.

As for the final argument, the universal jurisdiction principle cannot be utilized to apply US sanctions extraterritorially, since it is reserved for a limited range of international crimes, traditionally piracy and slavery.[303] The Final Report of the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences presented to the International Law Association describes that:

> "Under the principle of universal jurisdiction, a state is entitled, or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of nationality of the perpetrator or the victim".[304]

The universal jurisdiction principle states that a state has the authority to exercise jurisdiction over crimes that violate international law, even if such offences did not occur within its territory and neither the perpetrator nor the victim is a national of that state.[305] Some anti-terrorism conventions, in particular, include provisions for

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[302] The application of the protective principle in cases regarding threats to global security was also rejected by some major states, including Russia, China, and India. See Ryngaert, supra note 292, at 119.
[303] Douglass Cassel, *Universal Criminal Jurisdiction*, American Bar Association (Jan. 1, 2004), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol31_2004/winter2004/irr_hr_winter04_universal/.
[304] *2000 ILA London Conference, Committee On International Human Rights Law And Practice, Final Report On The Exercise Of Universal Jurisdiction In Respect Of Gross Human Rights Offences: Conclusions And Recommendations, in* U.N. Doc., A/73/10(Apr.30-Jun.1 & Jul.2-Aug.10, 2018), at 317.
[305] MITSUE INAZUMI, UNIVERSAL JURISDICTION IN MODERN INTERNATIONAL LAW: EXPANSION OF NATIONAL JURISDICTION FOR PROSECUTING SERIOUS CRIMES UNDER INTERNATIONAL LAW 25, 107 & 125 (Antwerp: Intersentia 2005); see also, Xavier Philippe, *The Principles Of Universal Jurisdiction And Complementarity: How Do The Two Principles Intermesh?*, 88(862) International Review Of The Red Cross 375, 376 (2006), <https://www.cambridge.org/core/services/aopcambridgecore/content/view/B075DF0F689148E344882651C7255B00/S1816383106000580a.pdf/theprinciplesofuniversaljurisdictionandcomplementarity-how-do-the-two-principles-intermesh.pdf>

universal jurisdiction.[306] State practice also proves the application of this principle to specific cases of sexual offences,[307] immigration offences,[308] distribution of narcotics,[309] and so on. Thus, the universal jurisdiction principle does not provide a legal basis for the extraterritorial application of US sanctions.

The earlier analysis presented a succinct evaluation of the legal challenges confronted by the US sanctions regimes within the realm of international law. In the following, I will examine the humanitarian concerns associated with the US sanctions, which share resemblances with the legal issues encountered in the EU autonomous regimes.

In the US sanctions regime, humanitarian exceptions are anticipated. Accordingly, exemptions in trade could be granted by OFAC in two forms: i) general licenses given to a specific class or group of entities—no need to apply for exemptions; and, ii) specific licenses to specific entities, authorizing transactions.[310] The primary issue with the sanction's regime is that OFAC has unrestricted discretion to create new requirements for licenses, which present a barrier to businesses seeking authorization. Furthermore, while general licenses are granted to specific groups, it is essential to go through a long application process to ensure that the applicant is recognized as part

[306] Art. 12 *bis* PT Belgian CCP (referring to treaty law, customary international law, and EU law); § 6, 9° StGB; art. 689 *et seq* French CCP.
[307] Article 10 *ter*, 1°–2° PT Belgian CCP.
[308] Article 10 *ter*, 3° PT Belgian CCP.
[309] 8 § 6, 4° StGB.
[310] For nearly all supplies of aid, US-based NGOs operating in the DPRK, for example, must seek special authorization from OFAC. See *North Korea Sanctions Regulations*, US Department Of State (Mar.5, 2018), www.federalregister.gov/documents/2018/03/05/201804113/northkoreasanctionsregulations#sectno-reference-510.501; see also *OFAC Licenses*, US Department Of The Treasury, https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/1506.

of the intended group.[311] It is challenging to take advantage of the exemptions because OFAC only issues authorizations after a case-by-case investigation.[312] Companies and other entities seeking to be exempted need to prove that they fall under the category for which general licenses are granted.[313] Attorneys can represent sanctioned entities in filing lawsuits to challenge decisions made by the US government regarding licensing. But there may be yet another procedural difficulty. Fundamentally, licenses demand that initial and periodic reports be submitted to OFAC for clarification regarding follow-up payments for legal actions.[314] The purpose of this is to show that the applicant's funds and assets are only being used to cover the costs of legal actions in which they might be exempted from the US' asset freeze.[315] If the cost of legal action is not covered by the general licenses, this requirement adds another layer to the licensing process for OFAC and calls for an advisory opinion from OFAC or an OFAC-specific license. Apart from this difficulty, the ultimate determination of whether to grant licenses is driven by concerns about US foreign policy and national security. Such criteria cannot be objective, calling into doubt the legality of US sanctions because non-legal elements will also influence whether or not authorization should be granted.[316] Simply put, if decisions regarding

[311] 31 C.F.R. Part 560 (General License J).
[312] See *Basic Information On OFAC And Sanctions*, US Department Of The Treasury, <https://home.treasury.gov/policyissues/financialsanctions/frequentlyaskedquestions/ofacconsolidatedty-asked-questions>
[313] 31 CFR S 595.308(b)(2); see also *OFAC License Application*, US Department Of The Treasury, <www.treasury.gov/resource-center/sanctions/Pages/licensing.aspx.>
[314] 31 C.F.R. §541.508.
[315] 31 C.F.R. §510.507(d).
[316] The same objection holds for other autonomous sanctions regimes, as well. In his analysis of EU sanctions against Iran adopted in 2012, Dupont argued that "the existence of a wrongful act on the part of Iran is dubious in this case". Pierre E. Dupont, *Countermeasures And Collective Security: The Case Of The EU Sanctions Against Iran*, 17(3) Journal Of Conflict & Security Law 301, 325 (2012), https://academic.oup.com/jcsl/article-abstract/17/3/301/826394

authorizations are influenced by US national security, this means that the main concern of US sanctions regimes is not necessarily the global concerns of the international community (here international peace and security). It is worth noting that there is no agreed definition of national security. One suggested definition, in the US context, is that:

> "US national security is the ability of national institutions to prevent adversaries from using force to harm Americans or their national interests and the confidence of Americans in this capability".[317]

One aspect of US national security relates to efforts to provide security guarantees (such as economic sanctions), as part of its foreign policy directed toward preventing WMD proliferation. The OFAC licensing system is founded on US foreign policy, which primarily entails the country's political course in relation to other states, and aims to protect national interests through political and economic means. It should not be forgotten that the US sanctions regime anticipates the humanitarian needs of a target state's civilian population and, as a result, permits applicants to file a lawsuit against the US government for an OFAC license exemption. Yet, not all entities are eligible to take advantage of this opportunity, since they must first clarify whether they are subject to US jurisdiction.[318] In this regard, all US persons (including all US

[317] SAM C. SARKESIAN ET AL., US NATIONAL SECURITY: POLICYMAKERS, PROCESSES AND POLITICS 4 (4th ed. 2008).

[318] To challenge the US listing, the person shall be either a US citizen or among a small class of non-US persons. In contrast, EU law permits objections by citizens of non-member states. For example, in *Bank Mellat* & *Bank Saderat Iran cases*, the European General Court submitted that legal persons who were incorporated in non-member states could not rely upon the fundamental rights protection and guarantees of EU law. Later, this decision was rejected by the General Court, the Advocate General and the Court of Justice in the Bank Mellat cases. See for example, Case T-496/10, Bank Mellat v Council, ECLI:EU:T:2013:39, ¶35-46; Case T-494/10, Bank Saderat Iran v Council, ECLI:EU:T:2013:59, ¶ 33-43; Case C-200/13 P, Council v Bank Saderat Iran,ECLI:EU:C:2016:284 ¶ 43-44.

citizens and permanent resident aliens, regardless of their residency), all persons or entities within the US, and all US incorporated entities and their foreign branches must comply with OFAC regulations.[319] This means that non-US targeted entities that are outside of its territory, are not provided with an opportunity for legal action in US domestic courts to challenge OFAC's decisions.[320] In addition, sanctioned entities must prove that the decision was arbitrary, capricious, an abuse of discretion,[321] or not in accordance with law.[322] Not only does this provision place the burden of proof on sanctioned entities, but it also cannot be of use in practice, since a listed person under OFAC regulations has no right to be informed of the reasons [323] for a listing decision.[324] Additionally, OFAC may make changes to its rules without notice to entities applying for authorization. National security is the decisive criteria for the implementation of legal modifications. As a result, if OFAC regulations are changed, the status of some entities that were previously allowed to do transactions might change. Such a circumstance makes it more difficult, unclear, and unstable to work with businesses that may be sanctioned in the future. Against this backdrop, both US and non-US persons will be totally discouraged from engaging in humanitarian-related transactions in the target state. As a concrete case of study in the sanctions against Iran, the shortage of essential medications in Iran, have not only led to a

[319] 31 CFR § 560.314.
[320] See Kadi v Geithner 2012 WL 898778 *21-22(D DC), app dis 2012 WL 3243996(DC Cir) 2012 ('Kadi' (2012)'); see also Ibrahin v Dept of Homeland Security 669 F 3rd 983 (9th Cir 2012); Barnes, supra note 249, at 203.
[321] 5 USC § 706(2) (A) (IEEPA).
[322] See CV 13-0390(RC), Zevallos v Obama, 2014 WL 197864 (DDC Jan. 17, 2014).
[323] OFAC is under no statutory obligation to inform the listed person of the basis for the designation and there is no right to request such information during the administrative reconsideration process. See 31 CFR 501.807.
[324] See Al Haramain Islamic Foundation v US Treasury Dept 686 F 3rd 965, 988-89 (9th Cir 2012) ('Al Haramain (2012)').

scarcity of specialized imported medicines but have also hindered the functioning of Iran's pharmaceutical industry. Consequently, the production of generic drugs has been disrupted, compelling the country to rely on imported medications and lower-quality or questionable raw materials, thereby jeopardizing the health of Iranians.[325] In order to offset the decrease in medication imports from other states specifically the US, Iran has significantly increased its procurement of drugs and medical equipment from China and India, approximately two-fold and five-fold respectively. However, it is important to note that these alternative medications generally exhibit lower quality and limited effectiveness when compared to their American counterparts.[326] International pharmaceutical companies and banks are reluctant to conduct trade with Iran due to secondary sanctions and challenges in receiving payments. As a result of Iran's disconnection from the international banking network, the Iranian government has been compelled to make cash prepayments. This situation has significantly complicated the process of importing a substantial quantity of drugs, rendering it highly challenging and, in certain instances, even impossible.[327] Furthermore, alongside the aforementioned challenges, the scarcity of foreign currency and the devaluation of Iran's currency have contributed to an escalation in the prices of medications and raw materials used in pharmaceutical production.[328] Despite

[325] Sogol Setayesh & Tim K. Mackey, *Addressing The Impact Of Economic Sanctions On Iranian Drug Shortages In The Joint Comprehensive Plan Of Action: Promoting Access To Medicines And Health Diplomacy*, 12(31) Globalization & Health 1, 2 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4897941/pdf/12992_2016_Article_168.pdf>

[326] Roxanne L. Massoumi & Sumana Koduri, *Adverse Effects Of Political Sanctions On The Health Care System In Iran*, 5(2) Journal of Glob Health 1 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4512265/pdf/jogh-05-020302.pdf>

[327] Abbasi & Azimi, supra note 234, at 289.

[328] Elizabeth Rosenberg et al., *The New Tools Of Economic Warfare Effects And Effectiveness Of Contemporary U.S. Financial Sanctions*, Center For A New American Security (2016), https://www.cnas.org/publications/reports/the-new-tools-of-economicwarfareeffectsandeffectiveness-of-contemporary-u-s-financial-sanctions

medications and medical equipment being categorized as humanitarian items, the practical implementation of trade restrictions with Iranian banks, and the reduced issuance of export licenses by OFAC, have posed significant challenges for Iran. This has resulted in difficulties, such as a shortage of essential spare parts for specialized medical equipment. These spare parts are crucial for the repair and maintenance of dual-use equipment used in pharmaceutical production.[329] Multiple studies have shown that access to medications for patients with life-threatening diseases such as asthma, thalassemia, hemophilia, chronic illnesses, blood disorders, multiple sclerosis, and HIV/AIDS has been limited.[330] Similarly, humanitarian exceptions in the DPRK sanctions program are insufficient to meet the needs of the population. Although goods recognized as necessary for humanitarian purposes were exempted, companies no longer have the inclination to trade with partners in the target state due to trade barriers. US unilateral sanctions on North Korea have been imposed while the country is suffering from a severe economic situation. The Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea has expressed concerns about the effect of sanctions on the North Korean people, who are unduly affected by food insecurity and insufficient distribution of medicines, especially after the Covid 19 pandemic.[331] In such a situation, it appears difficult for the US sanctions regime to

[329] Abbasi & Azimi, supra note 234.

[330] Ali Gorji, *Sanctions Against Iran: The Impact On Health Services*, 43(3) Iran Journal Of Public Health 381, 382 (2014), file:///C:/Users/82102/Downloads/86320140317%20(2).pdf

[331] According to a report presented to the General Assembly: "The sanctions imposed on the country make it difficult to enjoy the basic human right to an adequate standard of living. The negative impact of the sanctions on the people is particularly worrying when the country is further isolating itself and information received from within the country is further limited with the reduced presence of the international community and only a trickle of escapees arriving in the Republic of Korea". For more information about the situation of human rights in the Democratic People's Republic of Korea, see U.N. Doc., A/75/388 (Oct.14,2020),¶20, https://digitallibrary.un.org/record/3888725?ln=en; The Rapporteur further requested an ease of UN sanctions from the Security Council Sanctions Committee. Id.

adhere to both humanitarian requirements and the proportionality criteria in the Draft Articles(2001) that was previously expounded. Given that the country's economic infrastructure has become more vulnerable as a result of years of sanctions, the DPRK's economic predicament attests to the significance of faster UN sanctions review processes, as well.[332] Due to the obstacles listed above and the inflated expenses associated with humanitarian work, multinational organizations, including NGOs, are also reluctant to engage in humanitarian assistance.[333] By refusing to provide financial service to clients who are dealing with North Korea, regardless of the objective of the transactions, the issue of overcompliance by many financial institutions and banks, which is based on a zero-risk policy, exacerbates the situation. Due to the fact that cash is the sole method remaining for conducting transactions, difficulties in access to financial services paralyzes many NGOs working in the DPRK. Sanctions have made it more difficult for North Korea to meet its humanitarian needs, including by delaying or stopping the supply of medicine and medical equipment, preparation of nutritious food products for children, manufacture of educational equipment for students, and in general reducing the amount of aid that humanitarian organizations provide.[334] According to the UN Special Rapporteur on

[332] An estimated 40% of North Korea's population is food insecure, while 33% lack access to safe drinking water. See *Democratic People's Republic of Korea (DPRK) Mid-Year Humanitarian Situation Report* (Aug.9, 2019), UNICEF, https://www.unicef.org/media/73701/file/DPRK-MidYear-SitRep-August-2019.pdf.

[333] Certain sanction regimes offer exemptions for humanitarian actors to operate without the risk of breaching sanctions. While these exemptions are intended to facilitate unobstructed humanitarian operations, in practice, humanitarian organizations have to dedicate significant time and resources to comprehend and properly navigate the application process. Moreover, the implementation of this system can lead to delays in the humanitarian response, as the entity responsible for approving a request may take time to do so. For instance, under the UN DPRK sanctions regime, humanitarian organizations still encounter difficulties in requesting exemptions, and there are delays in receiving them. See U.N. Doc., S/2019/171 (Mar.5, 2019).

[334] Kyung-Ok Do & Sangme Baek, *The Impact of Sanctions on the Enjoyment of Human Rights*, Study Series 19-02, Korea Institute For National Unification 1, 11(2019), https://www.kinu.or.kr/pyxis-

the negative impact of unilateral coercive measures on the enjoyment of human rights, the overwhelming majority of persons affected by comprehensive embargoes are not blacklisted individuals, but civilians who bear no legal responsibility for the violation of international law.[335] Unilateral sanctions, as exemplified by the US unilateral sanctions, fail to safeguard fundamental human rights, including the right to life, health, adequate living standards, and fair trials. In addition, acquiring an OFAC license is a difficult and time-consuming procedure, making it more convenient for third countries to comply with US sanctions instead of seeking exemptions. These challenges worsen the human rights situation in the targeted state and lead to the punishment of the entire population.

VII. Legal Basis Of The EU Restrictive Measures & Their Types[336]

The EU has been recognized as having extensive experience in applying sanctions since the 1980s,[337] and it has commonly been regarded as the second largest implementer of sanctions—accounting for 36% globally.[338] The number of EU sanctions has increased over time, from 6 in 1991 to more than 40 today.[339] Over the

api/1/digital-files/e109958c-d00b-4255-a212-9e5ec56ad47d; For the effects of US secondary sanctions on Iran, see Alleged Violations Of The 1955 Treaty Of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, 2018 I.C.J. Rep. 1151(October 3).

[335] The UN General Assembly has also condemned the adoption of unilateral sanctions. See U.N. Doc., A/73/175 (Jul.17, 2018), ¶38; A/C.3/73/L.32 (Oct. 31, 2018), ¶1.

[336] 'The term "restrictive measures" is more commonly utilized in the European Union, compared to "sanctions". However, in this thesis, both terms are used interchangeably.

[337] See ¶31 & 32 of *CEU 5664/18 Sanctions Guidelines*, Council of the European Union (May 4, 2018), https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf.

[338] Inken V. Borzyskowski & Clara Portela, *Sanctions Cooperation And Regional Oganizations, in* INTER-ORGANIZATIONAL RELATIONS IN INTERNATIONAL SECURITY: COOPERATION AND COMPETITION 280-294 (STEPHEN ARIS ET AL. EDS., 2018).

[339] See *EU Sanctions Map*, https://www.sanctionsmap.eu/#/main; Katharina Meissner, *How To Sanction International Wrongdoing? The Design Of EU Restrictive Measures*, 18(1) The Review Of International Organizations 61, 73 & 80 (2023), https://link.springer.com/article/10.1007/s11558-022-09458-0

years, there have been notable alterations to the legal grounds allowing the EU to implement restrictive measures.[340] Initially, the EU's authority to impose economic sanctions was not explicitly conferred by the EEC treaty and member states appeared to retain exclusive competence in this regard.[341] The primary legal framework for Member States' authority in adopting sanctions was Article 224 of the EEC Treaty.[342] Consequently, the implementation of sanctions varied among member states due to this decentralized approach.[343] Thus, there were subsequently debates regarding the EU's ability to impose sanctions based on its commercial competence, which was outlined in Article 113 of the EEC Treaty.[344] Subsequently, with the introduction of the Maastricht Treaty, Article 301 of the EC Treaty was introduced, which acted as a precursor to the current Article 215 of the Treaty on the Functioning of the European Union (TFEU). [345] This evolution in the treaty framework bestowed the EU with the ability to impose sanctions under Article 215 of the TFEU. This particular provision brought clarity and officially established the EU's authority to implement such measures, thereby providing a solid legal basis for the EU to adopt various restrictive economic measures in different situations. The Common Foreign & Security Policy (CFSP), established in 1993 through the Maastricht Treaty, serves as a system for collectively establishing shared foreign policy stances and as a

[340] KERN ALEXANDER, ECONOMIC SANCTIONS-LAW AND PUBLIC POLICY 128-132(Palgrave Macmillan, 2009).
[341] Treaty Establishing the European Economic Community 1957; see also TAMAS SZABADOS, ECONOMIC SANCTIONS IN EU PRIVATE INTERNATIONAL LAW19(Hart Publishing 2020).
[342] Current Article 347 of the Treaty on the Functioning of the European Union.
[343] See CLARA PORTELA, EUROPEAN UNION SANCTIONS AND FOREIGN POLICY 19 (Routledge 2010).
[344] Id., at 19.
[345] Id.

prerequisite for implementing economic measures.[346] This indicates that the authority to determine the necessity of imposing sanctions remains with the individual member states.[347]

At present, there exist three main categories of EU sanctions that are implemented alongside other sanction regimes. The first category entails the EU acting as an executor of UN sanctions.[348] The EU's measures are integrated into universally applicable UN sanctions.[349] Its intention for cooperation with the UN was declared in the framework of the Treaty of Lisbon.[350] In this respect, the EU incorporates UN sanctions into European law through two pieces of legislation: i) council decisions under the Common Foreign and Security Policy (CFSP)[351]; ii) regulations following the CFSP decisions.[352] These two pieces of legislation are subject to revision from time to time.[353] Despite the EU not being a member of the

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[346] EILEEN DENZA, THE INTERGOVERNMENTAL PILLARS OF THE EUROPEAN UNION 85-122 (Oxford University Press 2012).

[347] Id.

[348] THOMAS J. BIERSTEKER ET AL., TARGETED SANCTIONS: THE IMPACTS AND EFFECTIVENESS OF UNITED NATIONS ACTION 30 (Cambridge University Press 2016); Clara Portela, *Where And Why Does The EU Impose Sanctions?*, 17(3) Politique Européenne 83 (2005), <file:///C:/Users/82102/Downloads/E_POEU_017_0083.pdf>; *Restrictive Measures (Sanctions), An Essential Tool Through Which The EU Can Intervene Where Necessary To Prevent Conflict Or Respond To Emerging Or Current Crises*, European Commission, https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/overview-sanctions-and-related-resources_en

[349] Thomas Biersteker & Clara Portela, *EU Sanctions In Context: Three Types*, 26 European Union Institute For Security Studies 1 (2015), <https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief_26_EU_sanctions.pdf>

[350] See Articles 3(5) & 21(1) of the TEU.

[351] The objectives are preserving peace, strengthening international security and consolidating and supporting democracy, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. See Treaty on European Union, art. 21.

[352] Pursuant to Article 215 of the TFEU, Regulations are adopted, when necessary, along with the Decisions. For precedents in EU/ EC practice, see Sicilianos, supra note 218, at 1137 & 1141; see also MARCUS KLAMERT ET AL., COMMENTARY ON THE EU: TREATIES AND THE CHARTER OF FUNDAMENTAL RIGHTS 1634 (Oxford University Press 2019); *Sanctions Policy*, European Union (Aug.3, 2016), www.eeas.europa.eu/headquartershomepage_en/423/Sanctions%20policy.

[353] Regulation No 881/2002 against Al-Qaida and ISIL, for instance, has been amended 244 times since its adoption in 2016. See Commission Implementing Regulation (EU) 2016/473 Of 31 March 2016

UN, and thus not directly subject to UN-imposed economic sanctions, individual member states of the EU hold membership within the UN and are required to comply with its sanctions. This obligation stems from Article 48(2) of the UN Charter, which states:

> "Such decisions(sanctions) shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members."[354]

Hence, the EU ensures alignment with UN sanctions by integrating them into its own policies and enacting corresponding measures. [355] Since these measures are solely intended to implement decisions of the UNSC, the EU does not demonstrate an independent role or initiative within this framework.[356] Examples of this type of EU sanction include measures imposed on Libya[357], Congo[358], Montenegro[359], Mali[360], South Sudan,[361]etc.

The second category of EU sanctions is often referred to as 'supplementary' measures, which are autonomous sanctions that extend beyond those imposed by the

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Amending For The 244th Time Council Regulation (EC) No 881/2002 Imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated With the ISIL (Da'esh) and Al-Qaeda Organisations [2016] L85/30; *Adoption And Review Procedure For EU Sanctions*, European Council, https://www.consilium.europa.eu/en/policies/sanctions/adoption-reviewprocedure/

[354] UN Charter, art.48, ¶2.

[355] SZABADOS, supra note 341, at 17-18.

[356] Borzyskowski & Portela, supra note 338.

[357] Council Decision (CFSP) 2015/1333 of 31 July 2015 Concerning Restrictive Measures In View Of The Situation In Libya, And Repealing Decision 2011/137/CFSP [2015] OJ L 206.

[358] Council Decision 2010/788/CFSP of 20 December 2010 Concerning Restrictive Measures In View Of The Situation In The Democratic Republic Of The Congo [2010] OJL 336.

[359] Council Decision of 13 June 1994 On The Common Position Defined By The Council On The Basis Of Article J.2 Of The Treaty On European Union Concerning Prohibition Of The Satisfaction Of The Claims Referred To In Paragraph 9 Of United Nations Security Council Resolution No 757 (1992) (94/366/CFSP).

[360] Council Decision (CFSP) 2017/1775 of 28 September 2017 Concerning Restrictive Measures In View Of The Situation In Mali [2017] OJL 251.

[361] Council Decision (CFSP) 2015/740 of 7 May 2015 Concerning Restrictive Measures In View Of The Situation In South Sudan And Repealing Decision 2014/449/CFSP [2015] OJ L 117.

UN. This practice is commonly known as 'gold-plating,' indicating that the EU goes beyond the minimum requirements set by the UN and introduces additional measures on its own accord.[362] These supplementary EU sanctions primarily focus on non-proliferation objectives and are implemented to strengthen UN sanctions regimes, particularly when the UN calls for heightened vigilance regarding the activities of targeted states.[363] A notable example of this type of EU sanction is the measures imposed on Iran since 2010.[364] Similarly, the EU has also implemented sanctions on North Korea since 2006, which serves as the focal point of the thesis in this section.[365]

The EU utilizes a third category of sanctions known as autonomous measures, which are implemented in cases where there are no corresponding UN sanctions in effect. These autonomous sanctions come into play when the Security Council faces obstacles in reaching a consensus due to opposition from its Permanent Members. They serve as a mechanism for the EU to express its concerns regarding threatening and unacceptable behaviors, effectively functioning as a tool of EU foreign policy.[366] The EU's sanctions imposed on countries such as Russia,[367] Bosnia and

[362] Eric J. Ballbach, *Moving Beyond Targeted Sanctions: The Sanctions Regime of the European Union Against North Korea*, 4 German Institute For International & Security Affairs 1, 10 (2022), https://www.swpberlin.org/publications/products/research_papers/2022RP04_SanctionsEUNorthKorea_Web.pdf; *'Gold-Plating' In the EAFRD to What Extent Do National Rules Unnecessarily Add To Complexity And, As A Result, Increase The Risk Of Errors?*, European Parliament (2014), http://publications.europa.eu/resource/cellar/876b3228-02f4-474295e4b83eddfced65.0001.02/DOC_1; see also Taylor, supra note 140, at 75-76, 103 & 109.
[363] See for example, U.N. Doc., S/RES/1696 (Jul.31, 2006), ¶5.
[364] Council Decision of 26 July 2010 Concerning Restrictive Measures Against Iran And Repealing Common Position 2007/140/CFSP [2010] OJL 195.
[365] Council Common Position 2006/795/CFSP of 20 November 2006 Concerning Restrictive Measures Against The Democratic People's Republic Of Korea [2006] OJL 322/32.
[366] Biersteker & Portela, supra note 338.
[367] Council Decision 2014/512/CFSP of 31 July 2014 Concerning Restrictive Measures In View Of Russia's Actions Destabilising The Situation In Ukraine [2014] OJL 229.

Herzegovina,[368] Myanmar[369] and Belarus[370] are examples of this specific type of EU sanction. The EU adopts its own sanctions to promote and enforce its values, such as democracy and the rule of law.[371] By implementing these sanctions, the EU aims to address and discourage behaviors or actions that are inconsistent with its core values. However, it is worth noting that this category of sanctions has faced criticism at the UN Human Rights Council. In September 2014 for example, the Council adopted a resolution highlighting the adverse effects of unilateral coercive measures on the enjoyment of human rights.[372] It is worth mentioning that at the time of writing the present thesis, the EU has independently included 65 individuals on its sanctions list, in addition to incorporating 80 individuals and 75 entities currently subject to UN sanctions. Furthermore, the EU has frozen the assets of 13 entities beyond those targeted by the UN sanctions.[373]

In examining various types of EU sanctions and emphasizing the significance of the sanctions imposed on Iran and North Korea within the scope of this thesis, the subsequent section will provide an examination of the EU's restrictive measures targeting these two countries. The purpose of this analysis is to illuminate situations

[368] Council Decision 2011/173/CFSP of 21 March 2011 Concerning Restrictive Measures In View Of The Situation In Bosnia And Herzegovina [2011] OJL76.
[369] Council Decision (CFSP) 2023/887 of 28 April 2023 Amending Decision 2013/184/CFSP Concerning Restrictive Measures In View Of The Situation In Myanmar/Burma [2023] OJL113I.
[370] Council Decision 2012/642/CFSP of 15 October 2012 Concerning Restrictive Measures In View Of The Situation In Belarus And The Involvement Of Belarus In The Russian Aggression Against Ukraine [2012] OJL 285.
[371] SZABADOS, supra note 341, at18.
[372] See U.N. Doc., A/HRC/27/L.2 (Sep18, 2014).
[373] Council Decision (CFSP) 2022/661 of 21 April 2022 Amending Decision (CFSP) 2016/849 Concerning Restrictive Measures Against The Democratic People's Republic Of Korea [2016] OJL120.

where the EU has exceeded the limitations imposed by the UN, thereby impinging on the human rights of individuals who are impacted by the EU's sanctions.

VIII. Legality Of EU Restrictive Measures Under International Law

Upon evaluating the contrast between the sanctions systems of the EU and the US, it becomes apparent that the EU's sanctions framework possesses a higher level of sophistication and places greater emphasis on safeguarding the human rights of the entities subjected to its measures.[374] Several notable characteristics of the EU's sanctions regime are worth mentioning in this context. The restrictive measures imposed by the EU are purported to exclusively affect those entities that pose a threat to its values, particularly with regard to adherence to international humanitarian law.[375] Furthermore, all individuals or entities that have been wrongly subjected to sanctions under the EU's regulations and decisions have the right to file compensation claims upon Article 268 of the TFEU.[376] In general, legal action can be taken against any individual or entity for instances of abuse of power, errors in assessment, [377] violations of due process—such as the right to be informed of the reasons for sanctions or the right to a fair hearing—the right to a defense, and any violation of

[374] See Luigi Lonardo & Elisabet R. Cairó, *The European Court Of Justice Allows Third Countries To Challenge EU Restrictive Measures: Case C-872/19 P Venezuela V Council*, 18(1) European Constitutional Law Review 114 (2022), <https://www.cambridge.org/core/journals/europeanconstitutionallawreview/article/europeancourtofjusticeallowsthirdcountriestochallengeeurestrictivemeasures/9C211F541CA42D934BC46672217E4D9F>

[375] *Basic Principles On The Use Of Restrictive Measures (Sanctions)*, Council Of The European Union, (Jun. 7, 2004); *(EC) C(2021) 5944 Commission Guidance Note On The Provision Of Humanitarian Aid To Fight The Covid-19 Pandemic In Certain Environments Subject To EU Restrictive Measures* (Aug. 13, 2021), <https://finance.ec.europa.eu/system/files/2021-08/210813-humanitarianaidguidancenote_en.pdf>

[376] Allan Rosas, *Counter-Terrorism And The Rule Of Law: Issues Of Judicial Control*, *in* COUNTER-TERRORISM, INTERNATIONAL LAW AND PRACTICE 83-110 (ANA M. S. FRIAS ET AL. EDS., 2012).

[377] See (EU)T-384/11, Safa Nicu Sepahan v Council, ECLI:EU:T:2014:986.

the EU's regulations that leads to the imposition of sanctions.[378] Additionally, when European entities implement restrictive measures, they are obligated to provide a statement of reasons, thereby ensuring that the right to be informed of the imposition of sanctions is upheld.[379] The EU's sanctions undergo regular review to ensure their effectiveness and adaptability to the continuously evolving conditions.[380] The EU's sanctions regime frequently revises its guidelines, such as those applied in response to humanitarian needs during the Covid-19 outbreak.[381] The EU has established procedures to promptly enact sanctions authorized by the UNSC. Upon the passage of UN resolutions, the EU is required to implement these sanctions within a period of 30 days. In instances where updates to the list of sanctioned entities are necessary subsequent to the UN's publication of the revised list, the EU is allotted a timeframe of only three days to take action.[382] The EU has also taken a firm stance against the extraterritorial application of sanctions by individual states targeting entities or individuals falling under the jurisdiction of the EU member states. The EU has voiced its opposition to this practice, emphasizing that it poses a significant threat to the EU itself.[383] The EU's concern lies in the fact that such extraterritorial sanctions can

[378] See Marise Cremona, *EC Competences, 'Smart Sanctions' And The Cadi Case, in* YEARBOOK OF EUROPEAN LAW 559-592(PIET EECKHOUT & TAKIS TRIDIMAS EDS., 2009).
[379] See Case C-539/10 P, Al-Aqsa v Council and Pays Bas, 2012, ECLI:EU:C:2012:711, ¶140-142.
[380] *Adoption And Review Procedure For EU Sanctions*, European Council, <https://www.consilium.europa.eu/en/policies/sanctions/adoption-review-procedure/>
[381] For the latest updates, see *Commission Guidance Note On The Provision Of Humanitarian Aid To Fight The Covid-19 Pandemic In Certain Environments Subject To EU Restrictive Measures, Financial Stability, Financial Services And Capital Markets Union*, European Commission (Jun.30, 2022), https://ec.europa.eu/info/publications/220630-humanitarian-aid-guidance-note_en.
[382] *Guidelines On Implementation And Evaluation Of Restrictive Measures (Sanctions) In The Framework Of The EU Common Foreign And Security Policy*, ¶33, <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf>
[383] Stoll et al., supra note 253; *European Commission Acts To Protect The Interests Of EU Companies Investing In Iran As Part Of The EU's Continued Commitment To The Joint Comprehensive Plan Of Action*, European Commission (May. 18, 2018), <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3861>

undermine the political independence and sovereignty of its member states. By questioning the autonomy and sovereignty of its member, the EU perceives this practice as a challenge to its overall integrity and functioning.[384] In response to the concerns regarding extraterritorial sanctions, the European Commission, on 19 January 2021, approved a strategy to address this issue. The EU Commission's strategy aimed to provide a framework for effectively managing and mitigating the impact of extraterritorial sanctions. The strategy encompassed various measures and actions to safeguard the EU's economic interests, protect the rights of EU citizens and businesses, and uphold the principles of international law and multilateralism. By adopting this strategy, the EU Commission sought to strengthen the EU's ability to respond to and counteract the adverse effects of extraterritorial sanctions on its member states and the EU as a whole.[385] This strategy entails a number of key measures, including enhancing the prominence and influence of the euro, establishing an environment conducive to the European market being less reliant on transactions denominated in US dollar, and fostering greater collaboration among the EU's member states. The utilization of the Blocking Statute, *in particular*, is emphasized as a means to bolster cooperation.[386]

Overall, the EU's measures are implemented within a legal framework, which primarily aims to achieve two objectives: i) the protection of international peace and

[384] Id.
[385] *COM/2021/32 Final Communication From The Commission To The European Parliament, The Council, The European Central Bank, The European Economic And Social Committee And The Committee Of The Regions*, European Union (Jan.1, 2021), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021DC0032.
[386] Council Regulation (EC) No 2271/96 of 22 November 1996 Protecting Against The Effects Of The Extra-Territorial Application Of Legislation Adopted By A Third Country, And Actions Based Thereon Or Resulting Therefrom [1996] OJL309.

security, and ii) the promotion of human rights standards, good governance, and respect for the rule of law.[387]

The EU has consistently shown its commitment to safeguarding human rights in its longstanding engagements including with North Korea. Starting in 1994, the EU initiated endeavors to foster peace on the Korean Peninsula, leading to diplomatic ties with the DPRK.[388] In 1996, the European Community Humanitarian Office (ECHO) was established by the EU in Pyongyang with the objective of delivering humanitarian aid.[389] Following the imposition of UN sanctions on North Korea in 2006,[390] the EU encountered challenges in providing targeted humanitarian assistance. Despite a temporary disruption, the EU promptly resumed its aid efforts in collaboration with the UN World Food Program. [391]

Despite the EU's ongoing endeavors to safeguard human rights in targeted states, there have been cases where its restrictive measures lacked sector-specific targeting. In certain areas, these measures were comprehensive and exerted direct pressure on the population. In other words, the EU extended the scope of UN's sanctions including those adopted on North Korea and Iran, to sectors that were not subjected

[387] Éric A. Martin, *The Sanctions Policy Of The European Union: Multilateral Ambitions Versus Power Politics*, French Institute Of International Relations, (Oct. 2019), <https://www.ifri.org/sites/default/files/atoms/files/martin_sanctions_policy_eu_2019.pdf>

[388] See TEU, art. 2; see also Iordanka Alexandrova, *The European Union's Policy Toward North Korea: Abandoning Engagement* 28(1) International Journal Of Korean Unification Studies 33 (2019), http://unibook.unikorea.go.kr/libeka/elec/20191000000000034.pdf#page=39

[389] Alexandrova, id.

[390] According to UNSC sanctions, all Member States had to immediately freeze funds and financial assets, as well as economic resources on their territories that were used to support the nuclear program of North Korea. See U.N. Doc., S/RES/1267(2006), ¶8(d); *Fact Sheet On DPRK Nuclear Safeguards*, supra note 10.

[391] See Gyubin Choi, *The Provision Of Humanitarian Assistance To North Korea Through Multilateral Cooperation*, No. CO22-21, Korea Institute For National Unification (2022), https://www.kinu.or.kr/2022/eng/0708/co22-21e.pdf; see also NICOLA CASARINI ET AL., THE ROUTLEDGE HANDBOOK OF EUROPE-KOREA RELATIONS (Routledge 2021).

to sanctions or were exempted for humanitarian purposes.[392] Additionally, the EU's restrictive measures are somewhat ambiguous,[393] allowing it to interpret them more unilaterally.[394] In this regard, the UK Administrative Court stated in *R (OJSC Rosneft Oil Company) v. HM Treasury and Others*:

> *"It is in our view a characteristic of these measures that terms are broadly defined and there may therefore be scope for multiple interpretations…in our view the ambiguities…extend to a number of other important expressions found elsewhere within the legislation."*[395]

This concern regarding the expansion of UN's sanctions has also been the subject of debates among various states, including the Permanent Members of the UNSC. Known as the '*floor versus ceiling*' debate, it revolves around whether UN sanctions should be viewed as the minimum threshold for additional measures or as the maximum limit of legitimacy.[396] While certain Western states, such as the US, France, and the UK, view supplementary measures as a means of reinforcing UN sanctions, other states such as Russia and China express caution towards this practice, as it broadens the scope of the UN sanctions.[397] They also argue that supplementary

[392] See ORAN R. YOUNG, COMPLIANCE AND PUBLIC AUTHORITY 104 (Johns Hopkins University Press 1979); Ballbach, supra note 362, at13.
[393] "… this ambiguity has an important implication that scholars have not yet recognized: compliance becomes almost impossible to evaluate. The undefined nature of the EU's fundamental values gives politicians ample room for maneuver…", quoted *in* Martijn Mos, *Ambiguity And Interpretive Politics In The Crisis Of European Values: Evidence From Hungary*, 36(2) East European Politics 267, 268 (2020), https://www.tandfonline.com/doi/full/10.1080/21599165.2020.1724965
[394] See GORDON ET AL., supra note 163, at 69.
[395] See *R (OJSC Rosneft Oil Company) v Her Majesty's Treasury and Others* [2015] EWHC 248.
[396] Thomas Biersteker & Erica Moret, *Rising Powers And Reform Of The Practices Of International Security Institutions*, *in* RISING POWERS, GLOBAL GOVERNANCE AND GLOBAL ETHICS: GLOBAL INSTITUTIONS 69 (JAMIE GASKARTH ED., 2015).
[397] Biersteker & Portela, supra note 338.

sanctions undermine the legitimacy of UN measures, since states often do not differentiate sanctions by their source. [398]

The concerns mentioned above also present challenges when imposing sanctions on states involved in proliferation activities. Different Member States have varying interpretations when deciding which sensitive goods and technology related to nuclear programs should be prohibited. They need to determine which items should be included in the ban and which should be exempted. Nevertheless, when individual states choose to implement more stringent actions compared to the UN's sanctions, the combined impact of these countries' measures on the target states leads to an adverse effect on its economic structures, creating undue pressure on the population. This situation also causes the EU's restrictive measures to deviate from the principle of proportionality outlined earlier, which specifies the necessary requirements for countermeasures to be recognized as lawful under international law. In relation to the UNSC's sanctions imposed on Iran, the EU implemented a comprehensive set of restrictions on Iran's energy sector, specifically targeting the oil and gas industry.[399] According to the EU's decision on 26 July 2010,

> "In accordance with the European Council Declaration, Member States should prohibit the sale, supply or transfer to Iran of key equipment and technology as well as related technical and financial assistance, which could be used in key sectors in the oil and natural gas industries. Moreover, Member States should prohibit any new investment in these sectors in Iran."[400]

The EU also declared that:

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[398] Id.

[399] A. Kitous et al., *Analysis Of The Iran Oil Embargo*, Institute For Prospective Technological Studies 1,7 (2013), file:///C:/Users/82102/Downloads/lfna25691enn.pdf

[400] Council Decision of 26 July 2010 Concerning Restrictive Measures Against Iran And Repealing Common Position 2007/140/CFSP [2010] OJ L 195, ¶23.

> "Those restrictive measures comprise, in particular, additional restrictions on trade in dual-use goods and technology, as well as on key equipment and technology which could be used in the petrochemical industry, a ban on the import of Iranian crude oil, petroleum products and petrochemical products, as well as a prohibition of investment in the petrochemical industry. Moreover, trade in gold, precious metals and diamonds with the Government of Iran, as well as the delivery of newly printed banknotes and coinage to or for the benefit of the Central Bank of Iran, should be prohibited."[401]

As per the provisions outlined in the UNSC Resolution 1929, Iran was prohibited from engaging in investments in foreign countries related to uranium mining, the production or utilization of nuclear materials and technology, and other activities explicitly prohibited in paragraph 7 of the resolution. However, it is important to note that none of the UN resolutions addressing Iran's nuclear program implemented a comprehensive ban on investments specifically targeting the energy sector and importation of energy,[402] nor did they impose restrictions on the trade of precious metals such as gold or diamonds. The ambiguous language used in resolution 1929, which suggested a potential link between Iran's energy sector and the financing of proliferation activities, provided the EU with some loopholes in interpreting UN resolutions independently. Going beyond the boundaries set by the UNSC's resolution, the EU implemented supplementary sanctions that increased the level of pressure on population in Iran. These measures included imposing limitations on investments in sectors that were not originally prohibited by the UNSC resolution, as well as placing constraints on trade in areas that were not explicitly restricted. The

[401] Council Regulation (EU) No 267/2012 of 23 March 2012 Concerning Restrictive Measures Against Iran And Repealing Regulation (EU) No 961/2010[2012] OJ L 88 ¶3.

[402] "Recognizing that access to diverse, reliable energy is critical for sustainable growth and development, while noting the potential connection between Iran's revenues derived from its energy sector and the funding of Iran's proliferation sensitive nuclear activities." U.N. Doc., S/RES/1929 (Jun.9,2010), at 3.

EU's sanctions on Iran have posed significant challenges for the Iranian government in procuring essential medicines. These sanctions have hindered international payments, making it increasingly difficult for Iran to access the necessary medications for its citizens. As a consequence, the scarcity of imported medicines has led to a surge in prices within the medical and healthcare sector, exacerbating the burden on those seeking treatment for illnesses and ailments.[403] Given their heavy reliance on the income generated from this sector, the negative repercussions are particularly impactful. It is essential to acknowledge that energy trade serves both military and civilian purposes, and it plays a vital role in fulfilling the humanitarian needs of the people. Therefore, imposing a complete ban on energy trade lacks a justifiable rationale.

The humanitarian consequences resulting from the imposition of EU sanctions on North Korea are alike. For instance, the enforcement of UNSC resolution 1718 resulted in the imposition of restrictions on certain military equipment, machinery, as well as specific weapon systems such as combat aircraft, battle tanks, and missile systems. Additionally, the resolution included a prohibition on the trade of luxury goods.[404] Notably, while the authorization of individual sanctions measures, such as asset freezes and travel bans, was granted, no designations of individuals or entities were made during the initial phase of the sanctions in 2006. Subsequently, on 20 November 2006, the EU introduced its initial restrictive measures against North

[403] For a detailed report on the effect of EU sanctions on Iran, see Shohreh Shahabi et al., *The Impact Of International Economic Sanctions On Iranian Cancer Healthcare*, 119(10) Health Policy 1309 (2015), https://www.sciencedirect.com/science/article/pii/S016885101500216X?casa_token=CJujWpuxoCEAAAAA:hsmlROWyscc0RXBBbyQK01voYsgCMx5knmG8V0Wb6uIaKq8Vhnjj4yLONsgFEGdfKXu9aEhJGc

[404] The UNSC sanctions will be analyzed in chapter five.

Korea through the adoption of Common Position 2006/795/CFSP.[405] In this regard, the EU implemented additional autonomous measures that surpassed the restrictions imposed by the UNSC resolutions, particularly pertaining to the sale of arms and military technology to the DPRK. While UNSC resolution 1718 specifically prohibited certain military equipment and machinery, as well as specific weapon systems including combat aircraft, battle tanks, and missile systems, the EU made the decision to prohibit all types of 'arms and related materiel'. In December 2009, the EU introduced a complete ban on dual-use goods as part of its first autonomous measures.[406] Dual-use items are goods, technologies, or materials that have both civilian and military applications. Imposing restrictions on critical technologies and materials hinder industrial development, affecting production capabilities and employment opportunities. It is important to note that from 2006 to 2009, the resolutions passed by the UNSC did not contain any restrictions on the transfer of dual-use items. However, when the Council eventually imposed bans on these items, they were subject to specific limitations and restrictions.[407] Specifically, the Council focused on dual-use items associated with some conventional arms and WMD. The EU continually updates its list of prohibited dual-use items, indicating that it goes beyond the limits set by the Security Council for sanctions on North Korea.[408] Additionally, the EU actively revises its list of individuals and entities subject to

[405] Council Common Position 2006/795/CFSP of 20 November 2006 Concerning Restrictive Measures Against The Democratic People's Republic Of Korea [2006] OJ L 322.
[406] Council Regulation (EU) No 1283/2009 Of 22 December 2009 Amending Council Regulation (EC) No 329/2007 Concerning Restrictive Measures Against The Democratic People's Republic Of Korea [2009] OJ L 346.
[407] See for example, U.N. Doc., S/RES/2375(Sep.11, 2017), ¶ 3 & U.N. Doc., S/RES/2321(Nov.30, 2016), ¶7.
[408] Council Regulation (EU) 2016/841 of 27 May 2016 Amending Regulation (EC) No 329/2007 Concerning Restrictive Measures Against The Democratic People's Republic Of Korea [2016] OJ L 141.

sanctions, which can lead to EU member states erroneously targeting certain parties.[409] Currently, the UNSC and its sanctions committee are legally the sole authorities responsible for designating new individuals and entities for sanctions. The use of different criteria and standards for designation result in fragmented implementation of sanctions on North Korea, causing further humanitarian harm.[410] According to available reports on the human rights situation in DPRK, although the EU regulations are binding for all members and require them to provide legal frameworks for the application of humanitarian exceptions in specific areas, the practices of EU member states indicate that their performance in dealing with humanitarian exceptions is not consistent. In many cases, banks in numerous European countries have refrained from providing services to humanitarian organizations and from facilitating money transfers to DPRK in this regard.[411] The existence of such an issue highlights a general weakness in the supervisory system of the EU, indicating its inability to achieve a coordinated approach towards humanitarian exceptions. It leads us to the conclusion that despite the efforts made by the EU to design and implement a targeted sanction system, the practical realization of such a system in a harmonized manner among all members is not feasible, resulting in the infliction of humanitarian harm on people. Despite the fact

[409] Council Decision (CFSP) 2022/661 of 21 April 2022 Amending Decision (CFSP) 2016/849 Concerning Restrictive Measures Against The Democratic People's Republic Of Korea [2022] OJ L 120.

[410] Kolja Brockmann, *European Union Sanctions On North Korea: Balancing Non-Proliferation With The Humanitarian Impact*, Stockholm International Peace Research Institute (2020), https://www.sipri.org/commentary/topical-backgrounder/2020/european-union-sanctions-north-korea-balancing-non-proliferation-humanitarian-impact

[411] See for example, Paul Hausmann et al., *Assessing The Impact Of Sanctions On Humanitarian Work*, Geneva Graduate Institute 1, 26 (Dec. 2022), https://voiceeu.org/publications/assessing-the-impact-of-sanctions-on-humanitarian-work.pdf

that new target individuals and entities have the option to challenge EU decisions in court, once sanctions are imposed, they tend to persist, and the long-term effects cannot be fully compensated even if the EU's decision is overturned. This issue highlights the fact that EU measures categorized as countermeasures under international law lack the temporal characteristic outlined in the Draft Articles (2001).

After the removal of UN sanctions on Iran, the EU's restrictive measures proved their irreversible consequences. The European Commission's Directorate-General for Trade stated that the US holds the primary position as the EU's largest trade and investment partner. [412] The far-reaching implications of US secondary sanctions have significantly affected the private sector in Europe, instilling concerns about potential secondary sanctions. [413] In response to this situation, the EU took measures to neutralize the impact of US secondary sanctions by utilizing its Blocking Statute.[414] In this sense, in 2019, INSTEX was established by the E3 countries (United Kingdom, France, and Germany) as a 'Business-to-Business' mechanism to offer European banks transparent risk-based strategies and avoid direct payments by transferring financial credits.[415] INSTEX was designed to dwindle the costs of non-

[412] *EU Trade Relations With The United States: Facts, Figures And Latest Developments*, European Commission, https://policy.trade.ec.europa.eu/eutraderelationshipscountryandregion/countriesandregions/united-states_en.
[413] *Over-Compliance With US Sanctions Hurting Iran's 'Butterfly Kids'*, United Nations (Oct. 19, 2021), https://news.un.org/en/story/2021/10/1103392; see also Ali Omidi, *The United States' Breaching Of The Iranian People's Right To Health And Its Legal Liability In Donald Trump's Administration*, 27(2) Australian Journal Of Human Rights 249 (2021), <https://www.tandfonline.com/doi/full/10.1080/1323238X.2021.2004693>
[414] See Council Regulation (EC) No 2271/96 of 22 November 1996 Protecting Against the Effects of the Extra-Territorial Application of Legislation Adopted By A Third Country, And Actions Based Thereon or Resulting Therefrom [1996] OJ L 309.
[415] See Jean D. Ruyt, *Secondary Sanctions And Multilateralism_The Way Ahead*, 70 European Policy Brief (2021), https://www.egmontinstitute.be/content/uploads/2021/05/EPB70.pdf?type=pdf;

compliance with US sanctions. However, it transformed ordinary trade activities into a complex process that necessitated extensive collaboration between Iranian and European businesses.[416] If European companies wished to engage in direct business with Iran, they still had to undergo the additional step of submitting their application to OFAC.[417] Moreover, INSTEX was not designed to include transactions that were previously prohibited under the EU's autonomous measures, such as trade in the energy sector.[418] Non-state actors, including banks and financial institutions, play a crucial role in implementing US unilateral sanctions through the adoption of financial measures, and have been involved in transnational governance for years alongside states. The failure of INSTEX to begin operations as intended highlights the significant role played by European banks and their reluctance to engage in business transactions with Iran.[419] The concern experienced by the private sector and

INSTEX; *Joint Statement On The Creation Of INSTEX, The Special Purpose Vehicle Aimed At Facilitating Legitimate Trade With Iran In The Framework Of The Efforts To Preserve The Joint Comprehensive Plan Of Action*, Ministry For Europe & Foreign Affairs (2019), https://www.diplomatie.gouv.fr/en/country-files/iran/events/article/joint-statement-on-the-creation-of-instex-the-special-purpose-vehicle-aimedat

[416] *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism*, The World Bank (2003), <https://documents1.worldbank.org/curated/en/982541468340180508/pdf/634980WP0Refer00Box0361517B0PUBLIC0.pdf>; The Society to Support Children Suffering from Cancer (MAHAK) conducted an analysis of the scarcity of drugs and significant price hikes for oncology medications in Iran. These factors ultimately resulted in reduced cancer survival rates, to the extent that MAHAK may no longer have the capacity to provide treatment to the 3,500 children with leukemia they treat annually. See Mehrnaz Kheirandish et al., *Impact Of Economic Sanctions On Access To Noncommunicable Diseases Medicines In The Islamic Republic Of Iran*, 24(1) Eastern Mediterranean Health Journal 42 (2018), https://applications.emro.who.int/emhj/v24/01/EMHJ_2018_24_01_42_51.pdf?ua=1andua=1; Mallard Grégoire et al., *The Humanitarian Gap In The Global Sanctions Regime: Assessing Causes, Effects, And Solutions*, 26(1) Global Governance 121, 123 (2020), <https://brill.com/view/journals/gg/26/1/article-p121_6.xml?language%3Den>

[417] See Client Alert, *INSTEX And Europe's "Legitimate Trade" With Iran - Skepticism Prevails As Instrument For Supporting Trade Exchanges (INSTEX) Is Created But Still Not Operational Yet*, Morrison and Foerster LLP (Feb. 21, 2019), https://www.mofo.com/resources/insights/190221-instex-trade.

[418] Id.

[419] Edward Knudsen, *The Weaponisation Of The US Financial System: How Can Europe Respond?*, Jacques Delors Center 1, 9 (Jun.4, 2020), https://opus4.kobv.de/opus4hsog/frontdoor/deliver/index/docId/3558/file/20200604_US_Sanctions_Knudsen.pdf.

their reluctance to engage in relations with Iran even exacerbated due to the unpredictable nature of US sanctions policy and the ambiguity surrounding the identity of the next entity or entities to be targeted by sanctions. This situation was witnessed during the Trump administration. The Central Bank of Iran, along with seven other Iranian banks (institutions not designated under the SDN List), on 24 September 2018 started negotiations with the EU to establish the Iranian mirror SPV(special purpose vehicle) mechanism for transactions.[420] However, the Central Bank was subsequently targeted by US sanctions.[421] The reluctance of European partners to engage in trade with Iran highlights their overcompliance with the US sanctions regime.[422] Despite the EU's efforts to normalize relations with Iran through INSTEX, it did not yield the desired results due to trade imbalance. Moreover, from a humanitarian perspective, INSTEX did not align with STFI (Special Trade and Finance Instrument) when it comes to the trade of medicine.[423] Although

[420] Krisztina Binder, *Special Purpose Vehicle For Trade With Iran*, European Parliamentary Research Service (EPRS) (Nov.2018), <https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/630273/EPRS_ATA(2018)630273_EN.pdf>

[421] *Treasury Sanctions Iran's Central Bank and National Development Fund*, US Department Of Treasury (Sep. 29, 2019), https://home.treasury.gov/news/press-releases/sm780.

[422] Vaughan Lowe, *Jurisdiction, in* EVANS, supra note 22, at 350; *INSTEX Shareholders Considering Dealing With Iran Oil:Mogherini*, Iran Chamber Of Commerce (2019), <https://en.otaghiranonline.ir/news/22109>; Grégoire et al., supra note 416, at 132; Steven Terner, *A China-Russia SWIFT Alternative Will Not Undermine Iran Sanctions*, The Washington Institute For Near East Policy (Feb. 25, 2022), https://www.washingtoninstitute.org/policy-analysis/china-russia-swift-alternative-will-not-undermine-iran-sanctions

[423] Ellie Geranmayeh & Esfandyar Batmanghelidj, *Trading With Iran Via The Special Purpose Vehicle: How It Can Work*, European Council On Foreign Relations (2019), https://www.ecfr.eu/article/commentary_trading_with_iran_special_purpose_vehicle_how_it_can_work; During the first 11 months of 2017, Europe exported medicine worth €851 million to Iran, while imports from Iran were only €27 million. This significant trade imbalance suggests that there is likely to be a higher demand for humanitarian goods to flow from Iran to Europe through the INSTEX mechanism than the other way around. Consequently, more money should be paid into STFI than INSTEX, which means that INSTEX will not receive sufficient funds to pay all European exporters what they are owed. Marie Aftalion, *INSTEX, A Game Changer?*, 6 Vienna Center For Nuclear Disarmament & Non-Proliferation (2019), https://www.nonproliferation.eu/wp-content/uploads/2020/04/Marie-Aftalion-INSTEX-Paper_Final-1.pdf

international sanctions against Iran have been lifted and many security concerns have been resolved, there are still challenges in conducting international transactions. In the case of North Korea, all Security Council sanctions are still in place. This implies that other businesses are expected not to take the risk of engaging in trade with North Korea in the future, even for humanitarian purposes. Prior to 2017, American non-governmental organizations (NGOs) that were involved in humanitarian work in North Korea could operate under a general license issued by the US Treasury Department, without having to obtain separate authorization. However, after the license requirements changed, NGOs faced challenges, as they were restricted to providing only food and medicine. Obtaining updated authorization was also a difficult process, which typically took several months to complete.[424]

To summarize, the implementation of EU's restrictive measures in the cases of Iran and North Korea extended beyond the scope of UNSC's sanctions, resulting in heightened humanitarian consequences for the affected populations. While the original purpose of these measures may have been to address the nuclear ambitions of these countries, it is important to acknowledge the wide-ranging impact on civilians who are already struggling to meet their basic needs. Consequently, the adoption of autonomous measures by the EU, as seen in the context of unilateral sanctions imposed by the US, lacks legality as sanctions and legitimacy as countermeasures under international law because they do not adhere to the necessary legal prerequisites. UN sanctions were designed to be imposed on the target state in

[424] Nazanin Z. Cummings & Lauren Harris, *The Impact Of Sanctions Against North Korea On Humanitarian Aid*, 2(1) Journal Of Humanitarian Affairs 44, 48 (2020), <https://www.manchesteropenhive.com/view/journals/jha/2/1/article-p44.xml>

a situation where no unilateral sanction exists. Thus, when unilateral measures are enforced, particularly several years before the implementation of UN's sanctions, they disrupt the delicate balance between the severity of the sanctions and the required pressure to be excreted on the target state.[425]

Summary Of The Chapter

The issue of unilateral sanctions and their conformity with international law is a complex and debated topic. Unilateral sanctions, which are imposed by individual countries outside of the framework of the United Nations, can have significant impacts on the targeted country and its people. In some cases, these sanctions may be viewed as a violation of international law. As explained in the chapter, the US and EU have imposed their own sanctions regimes on countries such as Iran and North Korea. These sanctions were claimed to provide humanitarian exceptions, but in practice, they did not adequately address the needs of the civilian population. Consequently, they had negative consequences on the effectiveness of the UN's smart sanctions, which were designed to target specific individuals or entities while minimizing the impact on the civilian population. Unilateral sanctions create confusion and uncertainty about the scope and impact of the sanctions regime, and can make it more difficult for countries to comply with their obligations under international law.

[425] Brockmann, supra note 410.

Chapter Four: Analysis Of The ICJ's Advisory Opinion On The Legality Of Nuclear Weapons

In response to a request from the UN General Assembly, the ICJ issued its 1996 advisory opinion (hereinafter the 'opinion') on the issue of whether the threat or use of nuclear weapons is permitted under international law in any circumstance. The Court recognized the destructive potential of nuclear weapons, which puts the vast majority of the military and civilian population in danger. It argued, however, that the justifications put forth by states to support the legality or illegality of nuclear weapons were insufficient to sway the Court's decision in either direction.

In this chapter, I present both my concurring and dissenting viewpoints on the Court's opinion in three sections. In the section, devoted to an overview of the opinion, I will quote the Court's arguments and elaborate on them, to provide support for why I agree with the Court in some particular aspects. On the other hand, in the two subsequent sections—discussions of the non-liquet and non-ultra-petita principles, two very contentious issues—I will express my differing opinions from those of the judges in the Court. I examine the possible existence of a legal gap and address the reasons for the Court's confusing response to the General Assembly's question. I also intend to ascertain if the Court fairly reflected the law as it is, or if it exceeded its judicial authority by establishing new legal norms. Since the applicability of the Court's opinion to the North Korean nuclear problem and its relevance to the adoption of international sanctions is a key issue in this analysis, only those aspects of the opinion that are relevant to this discussion will be addressed. Thus, analyzing the prohibition of nuclear weapons in, for example, international

environmental law, international human rights law, and the Genocide Convention of 1949 will not be the focus of this chapter. A legal discussion enables us to comprehend which legal principles the DPRK might have broken, given that it has already withdrawn from the NPT. For my discussion regarding North Korean sanctions, the analysis in this chapter will serve as a substantial starting point.

I. Relevance Of The ICJ's Advisory Opinion & Analysis Of Sanctions Regimes Against North Korea & Iran

In chapter three, I previously discussed a significant factor that impact the implementation of UN sanctions from a humanitarian perspective. In chapter five, I intend to explore other factors that influence the success of sanctions in terms of exerting adequate pressure on the target state. Before delving into that, it is advantageous to examine the advisory opinion of the ICJ for two specific reasons. Firstly, there is a distinction between Iran's nuclear case and that of North Korea in terms of the adoption of sanction resolutions. Iran, being a member state of the NPT, was found to be in violation of its obligations under the Treaty.[426] Consequently, the imposition of sanction resolutions did not give rise to significant uncertainties as they were based on Iran's non-compliance with its treaty-based commitments. Conversely, in the case of North Korea, the initial sanction resolutions were passed in 2006, after the country had withdrawn from the NPT. Hence, the legal grounds for imposing sanctions against North Korea differ from those in the Iranian case. Although there are some arguments regarding North Korea's continuous

[426] See JOYNER, supra note 104.

membership in the NPT, as will be discussed in chapter five, I believe there are more compelling reasons to suggest that North Korea had withdrawn from the Treaty three years prior to the adoption of sanction resolutions. Therefore, it is crucial for us to thoroughly investigate, in the present chapter, the corpus of international law to ascertain whether there are other conventional or customary rules that are applicable to North Korea, to prove its ongoing violation of international obligations. The advisory opinion holds immense significance in international law as it serves as a crucial milestone for legal debates concerning the legality of nuclear weapons. It aids in our comprehension of the legal status surrounding North Korea's nuclear activities. By addressing this question, we can acquire a more comprehensive understanding of the rationale behind the UNSC's adoption of sanction resolutions as a response to the nuclear activities of states. Additionally, by revisiting the ICJ's opinion, we can gain a better understanding of the limitations of the current international legal system in preventing the proliferation of nuclear weapons. This examination also provides valuable insights into the crucial role played by the UNSC's sanction resolutions in deterring states from engaging in non-peaceful nuclear activities.

Secondly, in my perspective, the advisory opinion had a certain degree of positive impact on the improvement of UNSC's sanction regimes on North Kore and Iran. The Court extensively examined the legal aspects related to nuclear advancements and highlighted the importance of negotiations leading to non-proliferation and disarmament. The opinion played a significant role in convincing the international community that the resolution of nuclear crises requires more robust diplomatic efforts. Upon analyzing the various resolutions adopted by the UNSC regarding North Korea and Iran since 2006, it becomes evident that the Council has

consistently emphasized the explicit importance of negotiation. The implementation of sanctions against North Korea[427] and Iran[428] represents the very first instances, following the 1996 advisory opinion, where the Security Council explicitly recognizes negotiation as a means to resolve nuclear crises.[429] Consequently, in the case of Iran, negotiation ultimately led to the adoption of the nuclear deal in 2015 which was annexed in the UNSC's resolution 2231[430] as a diplomatic success. It is worth noting that negotiations with North Korea and Iran were already underway prior to the adoption of UNSC's sanctions' regimes, and they played a crucial role in their inclusion within the resolutions. However, the willingness of states to engage in meaningful negotiations with these two countries and their subsequent incorporation into the UNSC's resolutions is partially attributed to the influence of the ICJ's advisory opinion.

II. Background Of The Advisory Opinion

In 1939, US President Franklin D. Roosevelt, with the help of a group of well-known nuclear physicists, including Albert Einstein and Enrico Fermi (winner of the

[427] See for example, U.N. Doc., S/RES/1718(Oct.14, 2006), ¶13 & 14; U.N. Doc., S/RES/1695(Jul.15,2006), ¶ 4; U.N. Doc., S/RES/1874 (June 12, 2009), ¶ 31; U.N. Doc., S/RES/2270(Mar.2,2016), ¶ 50; U.N. Doc., S/RES/2371(2017), ¶ 49 & 50; U.N. Doc., S/RES/2371(Aug.5, 2017), ¶ 28.

[428] See for example, U.N. Doc., S/RES/1696 (Jul.31, 2006), ¶3; U.N. Doc., S/RES/1737 (Dec.23, 2006), ¶ 21; U.N. Doc., S/RES/1747(Mar. 24, 2007), ¶ 9; S/RES/1803 (Mar.3, 2008), ¶15; U.N. Doc. S/RES/1929 (Jun.9, 2010), ¶ 32,33 & 37; U.N. Doc., S/RES/2231(Jul.20, 2015), ¶ 34(i).

[429] In contrast, resolutions against Iraq did not make any reference to negotiation. There have been several UNSC's resolutions regarding Iraq and its proliferation of nuclear weapons. The most notable resolution in this regard is resolution 687, which was adopted in April 1991.It demanded that Iraq eliminate its weapons of mass destruction and related infrastructure under the supervision of the United Nations Special Commission (UNSCOM) and IAEA. Subsequent resolutions, such as resolution 707 and 715, reinforced the obligations on Iraq to cooperate fully with the Special Commission, IAEA and their inspection teams and provide them with access to suspected weapons sites. See U.N. Doc., S/RES/687(Apr.8, 1991); U.N. Doc., S/RES/715(Oct.11, 1991); U.N. Doc., S/RES/707(Aug.15, 1991).

[430] The resolution was unanimously adopted to endorse and support the JCPOA, which was a landmark agreement reached between Iran and the P5+1 countries. U.N. Doc., S/RES/2231(Jul.20,2015)

Nobel Prize for Physics in 1938), initiated an atomic weapons program, the Manhattan Project.[431] The first nuclear weapon was detonated in New Mexico on 16 July 1945.[432] Subsequently, on the orders of President Truman, two atomic bombs were used on Hiroshima and Nagasaki on 6 and 9 August of the same year.[433] Since the atomic bombs were dropped on Japan, as a result of the humanitarian catastrophes they caused, there have been continuing global attempts to create a world free of nuclear weapons, reflected in the first UN resolution calling for nuclear disarmament on 24 January 1946.[434] The atomic bombings prompted both states (especially non-nuclear weapon states(NNWSs)) and non-governmental organizations (NGOs) to respond to the threat of nuclear weapons.[435] However, public awareness did not spread immediately because people were preoccupied with

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[431] See Masao Tomonaga, *The Atomic Bombings Of Hiroshima And Nagasaki: A Summary Of The Human Consequences, 1945-2018, And Lessons For Homo Sapiens To End The Nuclear Weapon Age*, 2(2)Journal For Peace & Nuclear Disarmament 491, 491-492 (2019), <https://www.tandfonline.com/doi/epdf/10.1080/25751654.2019.1681226?needAccess=trueandrole=button>

[432] *The Manhattan Project: An Interactive History*, US Department Of Energy https://www.osti.gov/opennet/manhattan-project-history/Events/1945/trinity.htm; see also ROBERT C. WILLIAMS AND PHILIP L. CANTELON, THE AMERICAN ATOM: A DOCUMENTARY HISTORY OF NUCLEAR POLICIES FROM THE DISCOVERY OF FISSION TO THE PRESENT 1939-1984 (University of Pennsylvania Press 1984); RICHARD RHODES, THE MAKING OF THE ATOMIC BOMB (Simon & Schuster 2012).

[433] RHODES, id., at 747.

[434] U.N. Doc., A/RES/1(I) (Jan.24, 1946); Peter Buijs, *How Physicians Influenced Dutch Nuclear Weapon Policies: A Civil Society Case Study*, 14 Vestnik of Saint Petersburg University.International Relations 475, 476 (2022), https://irjournal.spbu.ru/article/view/13029/8964; The UN spearheaded numerous important diplomatic efforts to advance nuclear disarmament. For example, in 1959, the GA included nuclear disarmament as part of the broader goal of general and complete disarmament under effective international control in its resolution 1378 (XIV), which was supported by all UN member states. The first special session of the GA devoted to disarmament was convened in 1978, recognizing that nuclear disarmament should be the primary objective of disarmament. In 2009, the GA declared 29 August as the International Day against Nuclear Tests. It further declared 26 September as the International Day for the Total Elimination of Nuclear Weapons in Resolution 68/32, adopted in December 2013 as a follow-up to the meeting of the General Assembly on nuclear disarmament. The GA repeated its position in subsequent years in Resolutions 70/34, 71/71, 72/251, 73/40, 74/54, 75/45, and 76/36. *International Day For The Total Elimination Of Nuclear Weapons*, United Nations https://www.un.org/en/observances/nuclear-weapons-elimination-day

[435] Lili Chin et al., *Japanese Non-State Actors' Under-Recognized Contributions To The International Anti-Nuclear Weapons Movement*, 11(2) All Azimuth: A Journal of Foreign Policy & Peace 93, 194 (2022), https://dergipark.org.tr/en/download/article-file/2569177

their own survival after WWII. Therefore, it took some time for the anti-nuclear movement, led mainly by civil society, to emerge, especially because more countries sought to possess those weapons.[436] Above all, the peril of nuclear weapons prompted Japanese civil society to launch an anti-nuclear weapons campaign.[437] The concern that nuclear weapons would be used again on the battlefield was one of the main factors in the growth of the peace movement for the eradication of nuclear weapons. The international community took further steps to limit nuclear weapons, including the adoption of the NPT. The medical community, as well, was actively involved in this process. The organization of International Physicians for the Prevention of Nuclear War (IPPNW), for instance, was awarded the Nobel Peace Prize in 1985, in recognition of its ability to speak on the subject of nuclear warfare.[438] Soon after, a group of lawyers in the US established the Lawyers' Committee on Nuclear Policy, which merged with anti-nuclear legal organizations in 1988 to form the International Association of Lawyers Against Nuclear Arms (IALANA).[439] The coalition of non-governmental organizations eventually became a driving force behind efforts to have the ICJ address the legal status of nuclear

[436] BEATRICE HEUSER, THE BOMB: NUCLEAR WEAPONS IN THEIR HISTORICAL, STRATEGIC AND ETHICAL CONTEXT 157 (Routledge 2000).
[437] See Mutti Anggitta, *Understanding Strategies Of Anti-Nuclear Movement: A Study Of ICAN*, 12(1) Jurnal Politica Dinamika Masalah Politik Dalam Negeri dan Hubungan Internasional 1, 6 (2021), https://jurnal.dpr.go.id/index.php/politica/article/view/1924/941
[438] Ian Maddocks, *Evolution Of The Physicians' Peace Movement:A Historical Perspective*, 2(1) Health & Human Rights 88, 96 (1996), https://www.jstor.org/stable/4065237?origin=crossref
[439] Peter Weiss et al., *Introduction To The Draft Memorial In Support Of The Application Of The World Health Organization For An Advisory Opinion By The International Court Of Justice On The Legality Of The Use Of Nuclear Weapons Under International Law, Including The WHO Constitution*, 4 Transnational Law & Contemporary Problems 709, 714-715 (1994), <https://heinonline.org/HOL/LandingPage?handle=hein.journals/tlcp4anddiv=32andid=andpage=;h> see also Chin et al, supra note 435, at 201.

weapons.[440] These organizations attempted to pursue their request in the Court through the World Health Organization (WHO) in 1993 and the General Assembly in 1994, respectively.[441] After the issue was raised before the WHO's Assembly in May 1992, its legal counsel responded by stating that the matter did not fall within the Organization's competence.[442] Simultaneously, non-governmental organizations used their lobbying power to persuade states for the passage of a resolution in the GA to request an advisory opinion from the ICJ.[443] In both cases, the majority of the pro-advisory opinion group consisted of developing countries indicating their objection to nuclear proliferation.[444] While the General Assembly is authorized to ask 'any legal question' under Article 96(2) of the UN Charter, the WHO should ask questions related to the province of its functions. WHO submitted a narrow question in relation to the responsibility of states for the protection of the environment. In

[440] Their requests stemmed from the IALANA, IPPNW, and the International Peace Bureau's World Court Project on Nuclear Weapons and International Law. Michael N. Schmitt, *The International Court Of Justice And The Use Of Nuclear Weapons*, 51(2) Naval War College Review 91, 92 (1998), https://www.jstor.org/stable/pdf/44638140.pdf?refreqid=excelsior%3A8be72ab044e11efdf7c1b4264b3d53aaandab_segments=andorigin=andinitiator=andacceptTC=1; Manfred Mohr, *Advisory Opinion Of The International Court Of Justice On The Legality Of The Use Of Nuclear Weapons Under International Law - A Few Thoughts On Its Strengths And Weaknesses*, 316 International Review of the Red Cross (1997), https://www.icrc.org/en/doc/resources/documents/article/other/57jnfs.htm; see also NICHOLAS GRIEF, THE WORLD COURT PROJECT ON NUCLEAR WEAPONS AND INTERNATIONAL LAW (Aletheia Printing 1993); Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Rep.226, 287, ¶2 (July 8)(Separate Opinion by Judge Guillaume).

[441] See the preface to GRIEF, id; see also Mike Moore, *World Court Says Mostly No To Nuclear Weapons*, 52(5) Bulletin Of The Atomic Scientists 39, 40 (1996), https://www.tandfonline.com/doi/abs/10.1080/00963402.1996.11456659.

[442] Legality Of The Use By A State Of Nuclear Weapons In Armed Conflict, Advisory Opinion, 1996 I.C.J. Rep.678, 17, ¶25 (July 8); For more details, see Martin M. Strahan, *Nuclear Weapons, The World Health Organization, And The International Court Of Justice: Should An Advisory Opinion Bring Them Together*, 2(2) Tulsa Journal Of Comparative & International Law 395 (1994), <http://digitalcommons.law.utulsa.edu/tjcil/vol2/iss2/11>

[443] See Nichols Rostow, *The World Health Organization, The International Court Of Justice And Nuclear Weapons*, 20 Yale Journal Of International Law 151, 157-161 (1995), http://hdl.handle.net/20.500.13051/6340; see also Robert F. Turner, *Nuclear Weapons And The World Court, The ICJ's Advisory Opinion And Its Significance For US Strategic Doctrine*, 72(1) International Law Studies 309, 311 (1998), <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1457andcontext=ils>

[444] Advisory Opinion (Dissenting Opinion of Judge Oda), at 334, ¶6-7.

contrast, the GA's question was more comprehensive than that of the WHO, because the latter only inquired about the use of nuclear weapons, and not the threat to use them. The questions that were asked are as follows:

> **WHO**: In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?[445]
>
> **GA**: Is the threat or use of nuclear weapons in any circumstance permitted under international law?[446]

The Court decided not to accept the WHO's request by a vote of 11 to 3,[447] on the grounds that the Organization did not meet all of the requirements set out in Article 65(1) of its Statute and Article 96(2) of the UN Charter.[448] The WHO, according to the Court, could only investigate the effects of nuclear weapons on health and the environment, not their legality. In contrast, in response to the GA's question, the ICJ accepted the request by 14 votes to 1.[449] It is important to discuss the issue from different legal perspectives, because it represents a turning point in jurisprudence[450]

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[445] A46/B/Conf.Paper no. 2 (May.8, 1993), <https://apps.who.int/iris/bitstream/handle/10665/176364/WHA46_BConf.Paper4_eng.pdf?sequence=1andisAllowed=y>

[446] U.N. Doc., 49/75 K (Dec. 15, 1994); Advisory Opinion, at 228 & 238-239.

[447] Legality Of The Use By A State Of Nuclear Weapons In Armed Conflict, at 84, ¶32. This was the first time that the Court declined a request from an organ (the WHO) for an opinion. As Georges Abi-Saab well describes: "The Court takes great trouble to recall that it has never exercised its discretion to decline to render an Opinion…Eastern Carelia [is] the only case which the PCIJ refused to give a requested Opinion by highlighting and enumerating 'the very particular circumstances of the case', which are in fact grounds of incompetence, rather than merely in terms of an exercise of discretion". Georges Abi-Saab, *On Discretion: Reflections On The Nature Of The Consultative Function Of The International Court Of Justice, in* INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 48-49 (LAURENCE B.D. CHAZOURNES & PHILLIPPE SANDS 1999). See Status of Eastern Carelia, Advisory Opinion (Fin/Rus.), 1923 AT.C.I.J. (ser. B) No.5.

[448] "Three conditions must be satisfied in order to found the jurisdiction of the Court…: (1) the agency requesting the opinion must be duly authorized, under the Charter; (2) the opinion requested must be on a legal question; and (3) this question must be one arising within the scope of the activities of the requesting agency." Legality of the Use by a State of Nuclear Weapons in Armed Conflict, at 66, ¶10.

[449] See Advisory Opinion, at 265, ¶105(1).

[450] The only tribunal that previously dealt with the use of nuclear weapons was the Tokyo District Court in *Ryuichi Shimoda et al. v The State*, decided in 1963. See the summarized and analyzed Decisions of the Tokyo District Court, *in* Richard A. Falk, *The Shimoda Case: A Legal Appraisal Of The Atomic*

on the legality of nuclear weapons. The legally and politically sensitive question that the GA asked reflected complex, wide-ranging, and divergent perspectives of states, judges, and legal experts. The importance of the issue and the interest it generated in the international community [451] is reflected in the high number of states that participated in the proceedings. It is important to highlight that the sensitiveness of the case resulted in all the judges of the Court articulating their individual viewpoints in declarations, separate, and dissenting opinions.

III. An Overview Of The Advisory Opinion On Nuclear Weapons

Having established its jurisdiction, the Court engaged in the merits of the request. It rephrased the question as to the issue of legality/illegality rather than permission/prohibition. By doing so, the Court endeavored to reconcile the differing perspectives of states on whether the matter should be seen from the viewpoint of authorization or permission.[452] It also sought to avoid opining on the possible legal permissiveness of the use of nuclear weapons. I believe if the Court had not changed the question, the following conclusion could have been drawn:

Attacks Upon Hiroshima And Nagasaki, 59(4) American Journal Of International Law 759 (1965), https://www.cambridge.org/core/journals/americanjournalofinternationallaw/article/abs/shimodacaseallegalappraisaloftheatomicattacksuponhiroshimaandnagasaki/8AAFA14625A5279E1C20D6949C0FFFD0

[451] Dapo Akande, *Nuclear Weapons, Unclear Law? Deciphering The Nuclear Weapons Advisory Opinion Of The International Court*, 68(1) The British Year Book Of International Law 165, 171(1997), https://academic.oup.com/bybil/article-abstract/68/1/165/340775?redirectedFrom=fulltext; "The Court invited states to submit written statements on these requests, and held oral proceedings from 30 October to 15 November 1995, at which states were invited to make further comments. A total of forty-one states (including all of the nuclear weapon states but China) submitted oral or written statements." Michael J. Matheson, *The Opinions Of The International Court Of Justice On The Threat Or Use Of Nuclear Weapons*, 91(3) American Journal Of International Law 417 (1997), https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/opinions-oftheinternationalcourtofjusticeonthethreatoruseofnuclearweapons/2162A77AD597D81E400BEA60B392D320

[452] See Advisory Opinion, at 238 & 247.

> The threat or use of nuclear weapons would generally be prohibited under the rules of international law. However, under the conditions set forth in Article 51 and for the purpose of self-defense as well as conditions provided in the law on armed conflict, use or threat to use nuclear weapons could be permitted under international law in an extreme circumstance of self-defence.

After the Court determined the scope of the question, it sought to ascertain the applicable law. It was criticized for not being comprehensive in this endeavor because it failed, for example, to deeply analyze some legal aspects of the question, in whole or in part, including the legal status of nuclear testing[453] and potential violations of international environmental law, the Genocide Convention, and the ICCPR entailed in the use of nuclear weapons. However, the advisory opinions of the ICJ are not comprehensive courses on international law. The Court, as a judicial body, has discretion to specify the most relevant and necessary aspects of the issue. In this line, it makes use of the written statements of states to determine which aspects of the questions are more disputed. In this regard, the Court did not dedicate many pages of the opinion to discussions concerning international environmental conventions, since they were not very helpful to answer the question; they neither contained a direct prohibition on nuclear weapons, nor did they forbid their use in self-defense.[454] The ICCPR (Article VI),[455] as well as the Genocide Convention of 1949, were also not recognized to be directly relevant to the matter as applicable law. Although application of the ICCPR does not cease in times of war, it is the law on

[453] Nuclear testing, in my view, is an act consistent with the policy of nuclear deterrence. When a state conducts a nuclear test, it is not responding to an armed conflict; rather, it is evaluating its readiness to respond to a potential threat to its national interests. Depending on the situation, a nuclear test can be interpreted as a threat to use nuclear weapons: for example, if A responds to B's violating action with a series of nuclear tests that are understood as a threat to use force.
[454] See Advisory Opinion, at 241-243, ¶27-33; see also Akande, supra note 451, at 185-186.
[455] Paragraph one provides that: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

armed conflict that determines when an arbitrary killing occurs.[456] For the Genocide Convention to be applicable, intent to commit the crime must be established on a case-by-case basis.[457] In other words, its application is relevant only when there is a concrete case of nuclear use.[458]

The Court found the law of the use of force applicable in the present case, which was provided in articles 2(4), 42[459] and 51 of the UN Charter (*jus ad bellum*).[460] It added that a proportionate and necessary use of force must meet also the requirements of the law on armed conflict,[461] including the principles and rules of humanitarian law (*jus in bello*).[462] In other words, creating a balance between *jus ad bellum* and *jus in bello* was necessary in the Court's view.[463] According to the Court, the provisions in the UN Charter and the law on armed conflict do not refer to

[456] Advisory Opinion, at 240, ¶24 & 25; For a different view, see UN Human Rights Committee (HRC), *CCPR General Comment No. 14: Art. 6 (Right To Life) Nuclear Weapons And The Right To Life*, ¶4 (Nov.9, 1984), https://www.refworld.org/docid/453883f911.html [accessed Apr.30, 2023]. I agree with the Court that the law of armed conflict is a sufficient basis for analysis. This is because the loss of life does not always involve a violation of the right to life. In armed conflict, there may be collateral injuries to civilians that could be justified by military necessity, regardless of the type of weapons used at war. Additionally, if nuclear weapons are established to be violating international humanitarian law in wartime, human rights law could also be deemed to be violated, including the right not to be subjected to inhumane treatment, which might be tantamount to 'unnecessary suffering' in wartime.

[457] Advisory Opinion, at 240, ¶26.

[458] See Simon Chesterman, *The International Court Of Justice, Nuclear Weapons And The Law*, 44(2) Netherlands International Law Review 149, 152 (1997), <https://www.cambridge.org/core/journals/netherlandsinternationallawreview/article/abs/international-court-of-justice-nuclear-weapons-and-the-law/D47B7A3E65A3A22A9B3B2CD922D2A618>

[459] The Court did not focus on Article 42 in its analysis. In my view, it might have been influenced by both the statements submitted to it, in which Article 51 was emphasized most, as well as the Court's belief that the Security Council might not authorize the use of nuclear weapons in collective self-defense, due to their catastrophic consequences.

[460] UN Charter, art.2, ¶4 & 51; Advisory Opinion, at 243-247 & 266, ¶35-50 & 105(2)(C).

[461] Advisory Opinion, at 239, ¶22.

[462] These principles include, for example, the principle of distinction between combatants and non-combatants, according to which state are not allowed to use weapons that cannot distinguish between objects (blind weapons); and the principle of the prohibition of unnecessary suffering to combatants. Id., 244-245, 40, 42-43 & 254; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Reat.520, 94, ¶176 (June 27).

[463] Advisory Opinion (Dissenting Opinion of Judge Shahabuddeen), at 375.

specific weapons,[464] making them applicable to nuclear weapons as well. There were profound disputes over the consequences of the use of nuclear weapons, and the Court therefore could not conclude with certainty the legality or illegality of nuclear weapons. In regards to instruments such as the Second Hague Declaration of 1899, the regulations annexed to the Hague Convention IV of 1907, or the 1925 Geneva Protocol, the use of nuclear weapons was not regarded as specifically prohibited in international law.[465] The Court stated that if an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.[466] As for tactical nuclear weapons, from one hand, some nuclear-weapon states(NWSs) argued that not all instances of the use of nuclear weapons would result in significant civilian injuries; rather, it was claimed to be possible to imagine a nuclear attack resulting in relatively few civilian casualties.[467] On the other hand, the majority of NNWS claimed that nuclear weapons' effects could not be limited, either in time or space, to legitimate military targets.[468] In addition, without specifically addressing the threat or use of nuclear weapons, the existence of specific treaties, including the Treaty of Tlatelolco and Rarotonga, evinced growing concern about the effects of nuclear weapons and the possibility of subsequent complete ban on them.[469] The Court ultimately stated[470] that there were

[464] Advisory Opinion, at 244, ¶39.
[465] Id., at 248, ¶56.
[466] For this reason, the Court declared that: "A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law…". Id., at 266, ¶105(2)(D); see also id., at 257-259, ¶85&78.
[467] United Kingdom, Written Statement, at 53, ¶ 3.70; United States of America, CR95134, at 89-90.
[468] Advisory Opinion, at 262, ¶92.
[469] Id, at 253, ¶62. For a list of international conventions investigated by the Court, see id., at 248-253.
[470] Id., ¶95.

not enough factors present to allow it to draw the firm conclusion that using nuclear weapons would always be in contravention of the legal principles and regulations that apply to armed conflict.[471] Against this backdrop, the Court's conclusions in 2A and 2B convey a neutral position when read together.[472]

The advisory opinion highlights an important aspect in this context, which is evident in the fact that the Court did not make a distinction between strategic and tactical nuclear weapons. There could be several explanations for this decision. One might argue that the Court acknowledged possible subsequent advancements in nuclear weapon's technology and contemplated a potential future scenario where a complete separation between military and civilian targets could be achieved, aligning with international legal principles. Therefore, the Court chose not to differentiate between those weapons or provide a specific legal opinion regarding the status of tactical nuclear weapons. In contrast to this explanation, I believe the Court placed greater emphasis on the following justification. Due to the Court's consistent emphasis on the destructive nature of nuclear weapons and their impact on human life, I argue that the ICJ made a deliberate decision to prevent the creation of a loophole that could potentially allow for the use of tactical nuclear weapons. If the Court had declared these weapons as legal, it would have provided an opportunity for NWSs to argue that they could employ tactical nuclear weapons in a limited capacity without violating international law. The Court's decision to refrain from

[471] Id., at 263, ¶97.
[472] "There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons". Id., at 266, ¶105(2)(A); "There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such". Id., ¶105(2)(B).

providing a specific ruling on the legality of tactical nuclear weapons was motivated by its objective to discourage the use of all types of nuclear weapons. This approach was aimed at reducing the threats posed by these weapons, which could jeopardize the non-proliferation regime and potentially escalate conflicts from small-scale to large-scale nuclear warfare.[473] Furthermore, the Court faced an abstract question that necessitated a general response. In light of the multiple potential scenarios associated with the question from the GA, the Court chose not to differentiate between weapons to offer a comprehensive answer. This approach was justified by acknowledging that tactical nuclear weapons could potentially be utilized against illegal targets, including civilians. Therefore, the Court recognized that the presence of a tactical nuclear weapon alone does not automatically make its use legal under international law. One question that arises is whether the decision not to distinguish between tactical and strategic nuclear weapons remains justified in light of the technological advancements that have occurred since the advisory opinion was rendered. maintain that the absence of differentiation between tactical and strategic nuclear weapons remains valid today. Any distinction between these weapons should be justified by clear and compelling reasons. It is widely debated that strategic nuclear weapons are designed for long-range warfare, while tactical nuclear weapons are lower-yield weapons intended for use in specific battlefield or operational situations on a smaller scale. However, it is important to note that there is no universally accepted definition

[473] William C. Potter et al., *Tactical Nuclear Weapons Options for Control*, United Nations Institute For Disarmament Research 1, 40 (2000), https://unidir.org/sites/default/files/publication/pdfs//tactical-nuclear-weapons-options-for-control-102.pdf

of tactical nuclear weapons.[474] Moreover, there is a lack of consensus regarding their precise impact on both civilians and the military. Scientifically, while some argue that the dangers associated with new tactical nuclear weapons can be controlled,[475] others argue that the inherent threat of radiation makes it difficult to fully control its effects.[476] For instance, in the presence of wind or air flow, radiation can disperse to distant areas, potentially affecting civilian populations.[477] Additionally, even if tactical nuclear weapons were able to adhere to the principle of discrimination, there are concerns about their potential to prevent unnecessary suffering for the military and future generations, such as the risk of cancer or other diseases. Due to the lack of scientific evidence demonstrating the compatibility of tactical nuclear weapons with the principles of international law, there is no justification to support the necessity of differentiating between these weapons. This approach is consistent with the recent practice of states. From a treaty-based perspective, most states have demonstrated that condemnation and prohibition of nuclear weapons are not contingent on a separation between strategic and tactical weapons. For instance, the

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[474] See *What Are Tactical Nuclear Weapons?* Union Of Concerned Scientists (Jun.1, 2022), https://www.ucsusa.org/resources/tactical-nuclear-weapons; Potter et al., id., at 21 (2000).

[475] Nikolai Sokov, *Tactical Nuclear Weapons (TNW)*, Nuclear Threat Initiative (Apr.30,2022), https://www.nti.org/analysis/articles/tactical-nuclear-weapons/

[476] *Catastrophic Harm*, International Campaign To Abolish Nuclear Weapons, https://www.icanw.org/catastrophic_harm [https://perma.cc/UZ52-KBBN] (last visited Dec. 6, 2020); Nina Tannenwald, *'Limited' Tactical Nuclear Weapons Would Be Catastrophic* (Mar.10, 2022), https://www.scientificamerican.com/article/limited-tactical-nuclear-weapons-would-be-catastrophic/; *The ICRC's Legal And Policy Position On Nuclear Weapons*, 104 (9191) International Review Of The Red Cross 1477 (2022), https://international-review.icrc.org/sites/default/files/reviews-pdf/2022-06/the-icrcs-legal-and-policy-position-on-nuclear-weapons-919.pdf; Scientific evidence does not support the claim that tactical nuclear weapons have limited impact. See Susan Breau, *Low-Yield Tactical Nuclear Weapons And The Rule Of Distinction*, 15 Flinders Law Journal 219 (2013), http://classic.austlii.edu.au/au/journals/FlinLawJl/2013/8.pdf

[477] Evan Richardson, *Tactical Nuclear Weapons Cannot Comply With The Law Of Armed Conflict*, 45 Fordham International Law Journal 429, 431 (2021), <https://heinonline.org/HOL/Page?handle=hein.journals/frdint45anddiv=16andg_sent=1andcasa_token=Lfd3UwikuwoAAAAA:nx7Kd56VK99V0Rja6o7jyjIMa38qN6wDBnhSgJ1QsyOz_vIwQUBUgzbj2KS7PgVJdiOT7gx2Jwandcollection=journals>

Treaty on the Prohibition of Nuclear Weapons (TPNW) does not make such a distinction.[478] From a standpoint of customary international law as well, it can be observed that states that have ratified this treaty have demonstrated through their practice that their legal stance on nuclear weapons is towards the prohibition of all types, despite the opposing view held by NWSs. The presence of divergent opinions and the examination of various states' practices emphasize that, similar to the absence of a customary rule establishing a comprehensive prohibition of nuclear weapons, there is significant opposition from (NNWSs indicating that there is no legal rule (conventional or customary) to demonstrate that the use of tactical nuclear weapons for self-defense purposes is permitted. In the subsequent section, it is emphasized that the practice of all states within the international community concerning nuclear weapons is of utmost importance.[479]

The Court argued that a customary rule does not exist, due to the fact that continuing tensions between the *opinio juris* (as claimed by some states) and strong adherence to a deterrence policy of nuclear states do not attest to its emergence.[480] By considering that the members of the international community are profoundly

[478] This Treaty will be further elaborated in the following pages.

[479] Based on the aforementioned reasons, the arguments presented in the chapter 5 will be based on the premise that the separation between tactical and strategic nuclear weapons is not justified under the current international law.

[480] The Court thus concluded in sub-paragraph 2E that: "the threat or use of nuclear weapons would generally be contrary to the rules of international law…However, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense." Advisory opinion, at 266, ¶105(2)(E); see also id., at 227 & 256; The Court does not underestimate law in favor of policy; it evaluates political behavior of states from a legal standpoint. The deterrence policy, although based on political and security reasons, has legal consequences on the formation of new legal norms. While Judge Oda believed that the policy has become customary, Judge Shi contended that it had no legal significance in evaluating whether a customary rule has emerged. See Advisory Opinion (Dissenting Opinion of Judge Oda), at 368, ¶45 & Declaration of Judge Shi, at 277.

divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constituted an *opinio juris*, the Court did not find that such an *opinio juris* exists.[481] Judges Shi and Weeramantry, in this regard, held that the Court should have not used the NWSs'[482] practice, particularly their deterrence policy, as a deciding element in the creation of custom.[483] The history of adherence to deterrence dates back to the Cold War era, when the NPT had not yet been adopted.[484] NWSs, while recognizing the devastating potential of nuclear weapons, relied on deterrence by producing, testing, and accumulating those weapons. Although they subsequently adopted limits on their nuclear activities, as codified in the NPT,[485] in my view, these were not aimed at abandoning their policy of deterrence. The lack of a policy shift, combined with the ongoing possession of nuclear weapons by these states, suggests the potential for their utilization against other countries.[486] I argue that if we hold the belief that nuclear weapons should be prohibited due to the inherent danger they pose to human life, then such a ban can only be justified if it encompasses every aspect of their manufacture, production, accumulation, testing, threat, and use. One cannot claim that refraining from using nuclear weapons for over 50 years serves as

[481] Advisory Opinion, at 254, ¶67; For an in-depth analysis on the elements of custom, see North Sea Continental Shelf (Ger./ Den.; Ger./ Neth.) Judgement, 1996 I.C.J. Rep.327, 41-41, ¶70-74 (February 20).
[482] Nuclear-Weapon States
[483] "It is to be remembered…that, of the 185 Member States of the United Nations, only five have nuclear weapons [whose] practice and policies seem to be an insufficient [for the] creation of custom, whatever [their] global influence [may be]. Advisory Opinion (Dissenting Opinion of Judge Weeramantry), at 533; see also Declaration of Judge Shi, at 277.
[484] See Gregory F. Giles, *Deterrence And The NPT: Mutually Compatible And Reinforcing*, Lawrence Livermore National Laboratory (Jan.15, 2020), https://www.osti.gov/servlets/purl/1860660.
[485] See Advisory Opinion (Dissenting Opinion of Judge Oda), at 235-236.
[486] "The concept of deterrence goes a step further than mere possession…It means the possession of weapons in a state of readiness for actual use…Deterrence becomes not the storage of weapons with intent to terrify, but a stockpiling with intent to use." Advisory Opinion (Dissenting Opinion of Judge Weeramantry), at 318, ¶6 & 7.

sufficient evidence to establish a widely held belief in the prohibition of their use (*opinio juris*). This is because the potential for their use remains as long as they are stockpiled and complete disarmament has not been achieved. Theorists such as Judges Shi and Weeramantry embraced only a pure theory of law[487] regarding the prohibition of nuclear weapons. We must recognize that deterrence, while being rooted in policy rather than law, undoubtedly influences the development of rules and the field of international law.[488]

The doctrine of Specially Affected States (SAS),[489] which proposes that custom emerges through the practice of the most affected states, has allegedly been weakened due to fundamental changes in the international community, including globalization and the co-dependence of states.[490] Thus, a revised doctrine of custom prescribes that every individual state is under the effect of customary rules and their practice must be regarded when investigating whether a customary rule has emerged. I believe the Court, in the advisory opinion, adopted a hybrid approach, in that the practice of all states were taken into account. We should acknowledge the diversity of states' actual contributions to the formation of customary law. Despite the legal presumption of equality among states, there are variations in the extent to which each state can influence the development of international law. We can distinguish between two situations. In the first scenario, the active involvement of SAS becomes crucial

[487] HANS KELSEN, PURE THEORY OF LAW 269 (University of California Press 1967).
[488] See also Advisory Opinion (Separate Opinion of Judge Guillaume), at 287, ¶1; For an opposite opinion, see id.; Declaration of Judge Vereshchetin, at 281.
[489] This doctrine emerged in the late 1960s and was grounded in the ICJ's 1969 judgment in the *North Sea Continental Shelf* cases. See Shelly A. Yeini, *The Specially-Affecting States Doctrine*, 112(2) American Journal Of International Law 244 (2018), <https://www.cambridge.org/core/journals/americanjournalofinternationallaw/article/abs/speciallyaffectingstatesdoctrine/A77B3C2A4BC4E8B632A3004B498DA10F>
[490] Id., at 248.

for the formation of custom, acting as a driving force, when there are no indications that other states are actively working towards its establishment. In the second scenario, if states have shown a tendency to establish a customary norm, it may come into existence if SAS do not exhibit behavior that contradicts that of other states. The second scenario was adopted in the context of nuclear weapons in the advisory opinion. The international community has exhibited continuous endeavors to establish a prohibitory rule regarding nuclear weapons, as evident in various resolutions adopted by the General Assembly.[491] Nevertheless, NWSs' increasing adherence to the policy of deterrence proved to be a significant obstacle in the course of creating a customary norm. That is why the Court refers to them as an "appreciable section of the international community."[492] In my opinion, the revised view that all states' practices contribute equally to the development of custom concerning nuclear weapons would bring about irreversible and dangerous legal ramifications. The upshot would be that NWSs may be labeled as persistent objectors if their practice is not seen as essential to the formation of custom. In such a scenario, not only would NWSs be exempt from potential customary rules, but they may also claim exemption from their obligations under Article VI of the NPT. The underlying reasoning for this argument is that a country that consistently opposes the establishment of a customary rule is more likely to withdraw from the NPT. This situation would render the achievement of nuclear disarmament an unrealistic or utopian goal. Therefore, it

[491] For a list of resolutions, see Advisory Opinion (Declaration of Judge Ferrari Bravo), at 282-283; Separate Opinion of Judge Guillaume, at 287, ¶1.
[492] Advisory Opinion, at 263, ¶96.

is advisable to proceed gradually and seek the support and direct involvement of NWSs in efforts to prohibit nuclear weapons in customary international law.

A question that arises here is: if the Court already recognized the humanitarian implications of nuclear weapons, why does it refer to 'extreme circumstances' of self-defense in the second clause of sub-paragraph 2E?[493] Is it legally acceptable for NWSs to deviate from the rules and principles of international humanitarian law in order to employ nuclear weapons?

The assertion that the notion of 'extreme circumstances' is a new concept introduced by the Court is a subject of debate.[494] Nonetheless, I hold a contrary opinion on this matter. Under Article 51 of the UN Charter, all States have the inherent right to self-defense to repel armed attacks and other imminent threats against their political sovereignty and territorial integrity.[495] The scale of the threat can vary depending on the specific circumstances. It might range from a localized armed incursion in a border region to a grave situation that jeopardizes a state's very existence, such as the complete occupation of its territory and the overthrow of its central government. Article 51 is generally interpreted to encompass all levels of armed attack threats. Consequently, I maintain that the term 'extreme circumstances' does not introduce a novel concept. It, *in my view*, merely denotes a high magnitude

[493] Id., at 266, ¶105(2)(E); The following section will go into greater detail on this sub-paragraph.
[494] CHAZOURNES & SANDS EDS., supra note 447, at 443.
[495] As noted by Judge Higgins, "it is not required that there be symmetry between the mode of initial attack and the mode of response, the latter must be limited to what is needed to reply to an attack." Advisory Opinion (Dissenting Opinion of Judge Higgins), ¶5; "The defending State cannot necessarily seek the annihilation or complete submission of the aggressor simply because it is the victim State." See LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 33 (Juris Publishing, Inc. 1993).

of aggression that seriously jeopardizes the survival of a state.[496] It is crucial for a victim state to attain the lawful objective of repelling aggression as stipulated by the principles of self-defense. In calculating an appropriate response, consideration must be given to the nature of the force used by the aggressor and the extent of its destructive impact. Article 2(4) of the UN Charter is of a *jus cogens* nature and the exception to it in Article 51 cannot be read so broadly as to result in the Court legislating new concepts. If one argues that the Court intended to recognize a special right of self-defense only for NWSs by using the term 'extreme', this would be inconsistent with the principle of equal sovereignty of states. When a nuclear state faces a high level of threat, this does not authorize it to use nuclear weapons *per se*. In each individual situation, the type of weapons needed to deter the threat must be analyzed separately under the law of armed conflict and the terms of Article 51 (proportionality and necessity).

The Court illustrates the ideal state of international law in the last section of its conclusion at sub-paragraph 2F, which is the long-promised total nuclear disarmament.[497] It recognizes the importance of the commitment and cooperation of states to negotiate nuclear disarmament in good faith.[498] The process of nuclear disarmament was so crucial in the Court's view that it stated in sub-paragraph F:

[496] Shigeta argues that: "extreme circumstance might be understood as a kind of military necessity to be taken into account in assessing compliance with the principle of discrimination and prohibition against causing unnecessary suffering." Yasuhiro Shigeta, *The Perspective Of Japanese International Lawyers, in* CHAZOURNES & SANDS, supra note 447, at 446.
[497] Advisory Opinion, ¶98; In this regard see also, Advisory Opinion (Dissenting Opinion of Vice-President Schwebel), at 317.
[498] Advisory Opinion, ¶99.

> "There exists an obligation to pursue in good faith and bring to a conclusion negotiation leading to nuclear disarmament in all its aspects under strict and effective international control."[499]

Based on the arguments presented above, the ICJ's opinion will be thoroughly examined with respect to the most disputed issues, in order to provide deeper insight for our analysis in the next chapter.

IV. Non-Liquet Situation Concerning The Legal Status Of Nuclear Weapons

The most contentious part of the Court's dispositif is sub-paragraph 105(2)(E), which was concluded in a 7-7 tie vote. Judges disagreed over whether the Court in this sub-paragraph declared *non-liquet* or not.[500] The Court was aware of the fact that there are circumstances in which some matters (the threat or use of nuclear weapons in the present case) are neither explicitly prohibited nor permitted under specific conventions or customary rules, and are therefore likely to be regarded as *gray areas*.[501] In my viewpoint, the Court employed a technique of transforming the General Assembly's question to avoid engaging in discussions regarding *non liquet* and the potential existence of gaps in international law concerning nuclear weapons.[502] Typically, discussions regarding non liquet involve the presence or absence of a legal rule that allows or prohibits a particular behavior. In essence,

[499] Id. at.267, ¶105(2)(F).
[500] While some judges didn't mention *non liquet* in their individual opinions, others did so explicitly or obliquely. See Declaration of Judge Bedjaoui, at 269 and 271, ¶ 8 & 14; Declaration of Judge Herczegh, at 275; Declaration of Judge Vereshchetin, at 279; Separate Opinion of Judge Ranjeva, at 301; Dissenting Opinion of Judge Higgins, at 2, 31 & 29, ¶583 & 590; Dissenting Opinion of Judge Shahabuddeen, at 389, ¶6; Dissenting Opinion of Judge Koroma, at 556; Dissenting Opinion of Vice-President Schwebel, at 322.
[501] The term 'gray area' was utilized by Judge Vereshchetin. Id.
[502] To see definitions for non liquet, see Steffen C. Neff, *In Search Of Clarity: Non Liquet And International Law*, *in* INTERNATIONAL LAW AND POWER: PERSPECTIVES ON LEGAL ORDER AND JUSTICE 63-64 (KAIYAN H. KAIKOBAD & MICHAEL BOHLANDER EDS., 2009).

unless the existence of such a rule is initially established, we cannot determine whether a specific behavior is lawful or unlawful. Nonetheless, some judges did address *non-liquet* in their respective opinions, indicating the need for further examination and deliberation. The Court concluded that:

> "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence..."[503]

There are those who argue that the Court's conclusion in the latter part suggests the existence of lacunae in international law, leading the Court to state that the conditions of *non liquet* prevented it from taking a definitive position on the matter.[504] Prior to delving into an analysis of the Court's conclusion, it is important to examine the concept of lacunae in international law as discussed by three prominent commentators: Hans Kelson, Sir Hersch Lauterpacht, and Julius Stone. Basically, the question whether a court can assert indecisiveness derives from the possibility of the existence of gaps (lacunae) in international law. Kelson believed[505] that if there is any gap in law, the judge will fill it by applying '*residual negative*

[503] Advisory Opinion, at 266, ¶105(2)(E).
[504] "What the Court has done is…effectively pronounce a *non liquet*…". See Dissenting Opinion of Judge Higgins; For detail discussions in this regard, see Stefaan Smis & Kim V.D Borght, *The Advisory Opinion On The Legality Of The Threat Or Use Of Nuclear Weapons*, 27 Georgia Journal Of International & Comparative Law 345, 384 (1999),
<https://heinonline.org/HOL/Page?handle=hein.journals/gjicl27anddiv=17andg_sent=1andcasa_token=1DAvYGKlIY8AAAAA:rDWHoM2eKeqYznow9z8rud4CkdtvZNq771Vik5L_nt2n9IibmA65husTdfzAMN6g5bxb3mCq4gandcollection=journals>
[505] "Law-creating organs have the power to create new law for a concrete case if they consider the application of existing law as unsatisfactory." HANS KELSEN & ROBERT W. TUCKER EDS., PRINCIPLES OF INTERNATIONAL LAW 438–39 (2nd ed., 1966).

principle'.[506] Lauterpacht, while asserting the completeness of the international legal order, argued that in cases where the judge feels that there is a gap in law, (s)he can fill it by using an apparatus furnished by law; that is the *law-creating role* of the judge. Because Lauterpacht believed in the theory of completeness of law, he held that the Court must avoid pronouncing *non liquet*.[507] Professor Stone,[508] by contrast, was of the view that the judge *voluntarily*, not mandatorily, avoids pronouncing *non liquet*, since (s)he can make use of supplementary tools of interpretation to fill the gap, including equity, analogy, and general principles of law.[509] According to him,

[506] This assertion is based on the maxim used by the PCIJ in the Lotus case in 1927, according to which whatever is not prohibited, is permitted: "restrictions upon the independence of States cannot be presumed" and that international law leaves to States "a wide measure of discretion which is only limited in certain cases by prohibitive rules". Case of the S.S "Lotus" (Fr. v. Turk.), Judgment, 1923 P.C.I.J. (ser. B) No. 9.,18-19; see also Military And Paramilitary Activities In And Against Nicaragua, supra note 462, at 135, ¶269; Asylum Case (Colum. v. Peru), Judgement, 1950 I.C.J. Rep.50, 274-275(November 20); Judge Bedjaoui disagreed on use of the Lotus case rationale in his declaration. See Advisory Opinion (Declaration of Judge Bedjaoui), at 271, ¶13; For a similar opinion, see Dissenting Opinion of Judge Weeramantry, at 494-496; For an in-depth study, see Mariano J.A Gomez, *The 1996 Nuclear Weapons Advisory Opinion And Non Liquet In International Law*, 48(1) International & Comparative Law Quaterly 3, 8 and 9 (1999), https://www.cambridge.org/core/journals/international-andcomparativelawquarterly/article/abs/1996nuclearweaponsadvisoryopinionandnonliquetininternational-law/FD166C0D3B5615968819AA9E260B8528; Kiyotaka Morita, *The Issue Of Lacunae In International Law And Non Liquet Revisited*, 45 Hi-totsubashi Journal Of Law & Politics 33, 43 (2017), http://hermes-ir.lib.hit-u.ac.jp/hermes/ir/re/28304/HJlaw0450000330.pdf

[507] "International Courts have the duty to never to refuse to give a decision on the ground that the law is non-existent, controversial or uncertain, or lacking in clarity." Hersch Lauterpacht, *Some Observations On The Prohibition Of Non-Liquet And The Completeness Of The Legal Order*, *in* F. M. VAN ASBECK *ET AL*. EDS., SYMBOLAE SYMBOLAE VERZIJL: PRÉSENTÉES AU PROF J.H.W. VERZIJL, À L'OCCASION DE SON LXXIÈME ANNIVERSAIRE 196 (The Hague: Nijhoff 1958).

[508] "…in the thousands of cases considered during the more than one hundred and fifty years of modern international arbitration a *non liquet* has not been squarely pronounced in a single case." Julius Stone, *Non Liquet And The Function Of Law In The International Community*, 35 The British Yearbook of International Law 124, 138 (1959), https://heinonline.org/HOL/Page?handle=hein.journals/byrint35anddiv=10andg_sent=1andcasa_token=andcollection=journals

[509] Amos O. Enabulele, *The Avoidance Of Non Liquet By The International Court Of Justice, The Completeness Of The Sources Of International Law In Article 38(1) Of The Statute Of The Court And The Role Of Judicial Decisions In Article 38(1)(D)*, 38(4) Commonwealth Law Bulletin 617 (2012), https://www.tandfonline.com/doi/full/10.1080/03050718.2012.722269?casa_token=sAHOgs0X7mgAAAAA%3AvEW5I8kcmFqeCWih5fv2QFtYvoKjXloDUORJIFuYyZxmPDbpgD7gGavtAnRL2ptr9hdR47LcJsrlA

"courts when faced with a provisional gap in the law, must either declare a non liquet or engage in the creation of law by a judicial act of choice."[510]

We must now examine whether the International Court of Justice (ICJ) has recognized the existence of lacunae in international law and to what extent. One initial inference that can be drawn regarding lacunae is the absence of a legal principle from which a rule can be derived and applied to a specific case. In this situation, if the court is burdened with the task of filling a legal gap, it would imply that judges take precedence over legislators in the process of lawmaking, which is not deemed acceptable. In such a scenario, any unforeseen matters that were not anticipated by the legislator need to be regulated by the judge. If a court determines that there is no general principle applicable to a specific area of law, it cannot establish an applicable rule since it would be faced with a genuine gap that should be filled by legislators (states), not the court. The second inference is that lacunae arise when there is no explicit legal rule that can be directly applied to a case. However, an applicable rule can be derived through the judge's interpretation of existing general principles of law.[511] Gomez asserts that, "real lacunae in international law can never be filled by the judge but only by those who create international legal rules".[512] This is how I see it; despite Lauterpacht and Stone, who regard judges as competent to create law if necessary, the Court is allowed only to

[510] Stone, supra note 508, at132.
[511] In this regard, Philip Allot contends that: "Interpretation reforms the semantic substance of the text. We purport to discover what is not said in what is said. We make the text say something that it does not say-the hermeneutic voice." Philip Allot, *Interpretation-An Exact Art, in* ANDREA BIANCHI ET AL. EDS., INTERPRETATION IN INTERNATIONAL LAW (online ed.)(Oxford University Press 2016).
[512] See Gomez, supra note 506, at16.

fill non-real gaps by adopting broad interpretations.[513] In other words, it is not the judicial business or the legal choice of the judge to create law if real lacunae exist; the Court must declare *non liquet* in such a situation. A judge is committed to his/her jurisdictional function without attempting to set new regulations.[514] In this regard, I hold that only if the second definition of the term 'lacuna' is adopted can the International Law Commission's explanation of general principles of law as 'gap-fillers' make sense.[515] Scholars have different ways of thinking in this regard, as in some legal systems declaring *non liquet* has been prohibited under the influence of the theory of the completeness of law, while some others have taken the position of 'avoidance' by the judge.[516] The term 'avoidance' at first sight is ambiguous, in that it does not state under which circumstances the court might not declare *non liquet* and whether it grants law-making authority to the judge in the face of real gaps. The first approach is also challenging to accept since it would essentially require the court to render a judgment even if it involves engaging in legislative functions.

In order to determine the existence of gaps in international law, as mentioned in the initial conclusion, it is vital to engage in ongoing discussions and analysis in the future. However, it is important to bear in mind that if the law is deemed complete, it implies that further development is unnecessary. Yet, we understand that

[513] The distinction between the two meanings of lacuna was indirectly declared by the International Law Commission, when it refers to legal gaps that cannot be filled by general principles of law. According to the Commission, "… Not all lacunae can necessarily be remedied by a general principle of law". U.N. Doc., A/CN.4/753(Apr.18, 2022), at 27, ¶71. "The gap-filling role of general principles of law is aimed at, at least in part, at preventing [non liquet]." Id., ¶72.
[514] "…the Court must identify the existing principles and rules, interpret them and apply them to the threat or use of nuclear weapons, thus offering a reply to the question posed based on law. The Court…states the existing law and does not legislate." Advisory Opinion, at 234 & 237, ¶13 & 18.
[515] U.N. Doc., A/CN.4/753, at 43, ¶122.
[516] Enabulele, supra note 509, at 627.

international law is a dynamic and evolving framework of norms and principles that adapt to the changing demands of the international community. Thus, the need for evolution could be seen as a defense against any assertion that law is complete.[517] The completeness theory of the legal system argues that it possesses the ability to anticipate future needs. However, this assertion cannot be accepted since it is time itself that reveals those needs and allows for development. It is important to note, though, that this does not imply that a particular field of law cannot, *at least temporarily*, be adequate to address a problem within a specific timeframe. Considering the prevailing state practice,[518] the likelihood of armed conflict, and the dominant influence of the state-centered paradigm in governing international law, it is reasonable to argue that the current law on armed conflict suffices, at least for the present, to respond to the GA's question on nuclear weapons. The rules of the law on armed conflict resemble a container with filters at its entrance, which establish specific requirements for each type of weapon before permitting its use. Furthermore, as we will explore in the subsequent section, it is apparent that in international law, there isn't always a specific rule (*lex specialis*) designated to govern a particular situation or behavior. In such cases, general rules of law can be applied. My understanding of the Court's advisory opinion is that a real lacuna emerges when

[517] "The existence of … lacunae is nothing but natural: the conditions of society are ever-changing and it is difficult … to foresee all scenarios in which a rule of law will apply." U.N. Doc., A/CN.4/753, at 26, ¶69.

[518] "State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition." Advisory Opinion, at.247, ¶52; "Restrictions upon the independence of States cannot. . . be presumed and that international law leaves to States "a wide measure of discretion which is only limited in certain cases by prohibitive rules". Id., at 238, ¶21; For the opinion of the Judges, see (Advisory Opinion) Separate Opinion of Judge Guillaume, ¶3; Dissenting Opinion of Judge Shahabuddeen, at 426; Declaration of President Bedjaoui, at 271, ¶13 & 15.

there is neither a specific rule nor a general principle of law from which an applicable rule can be extracted.[519] Thus, the mere absence of a special rule is not tantamount to the existence of lacunae that compels the Court to declare a *non liquet* status. On the basis of the aforementioned arguments, I hold that the ICJ has taken a middle ground on the concept of lacuna in the theories of legal commentators expounded earlier. The Court has used equity,[520] analogy,[521] and general principles of law,[522] as well as negative residual principles,[523] to determine the applicable law. It has adopted the second definition of lacuna; otherwise, it would suggest that the Court considers itself to be a legislative body.[524]

The question that arises here revolves around whether the International Court of Justice (ICJ) rendered a non liquet determination in its Advisory Opinion. If it did not, then what approach did the ICJ employ to address the question?

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[519] "When certain acts are not totally and universally prohibited, the application of general rules of law makes it possible to regulate the behavior of subjects of the international legal order." Advisory Opinion (Declaration of Judge Herczegh), at 275.

[520] "… equity excludes the use of the equidistance method in the present instance…". North Sea Continental Shelf, Judgment, at 3; see also Wolfgang Friedmann, *The North Sea Continental Shelf Cases-A Critique*, 64(2) American Journal Of International Law 229 (1970), http://www.jstor.org/stable/2198663.

[521] "[I]t appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties". Military And Paramilitary Activities In And Against Nicaragua, supra note 462, at 420, ¶63; see also Sandesh Sivakumaran, *Techniques In International Law Making: Extrapolation, Analogy, Form And The Emergence Of An International Law Of Disaster Relief*, 28(4) European Journal Of International Law 1097, 1119 (2018), <https://academic.oup.com/ejil/article/28/4/1097/4866308>

[522] "According to a well-established and generally recognized principle of law, a judgment rendered by such a judicial body is *res judicata* and has binding force between the parties to the dispute." Effect of Awards of Compensation Made by the U.N. Administrative Tribunal, Advisory Opinion, 1954 I.C.J. Rep.120, 53(Jul7 13); see also MADS ANDENAS ET AL. EDS., GENERAL PRINCIPLES AND THE COHERENCE OF INTERNATIONAL LAW 35 (Brill 2019).

[523] See Lotus case, supra note 506, at18-19.

[524] "Even had the Court been asked to fill the gaps, it would have had to refuse to assume the burden of law-creation, which in general should not be the function of the Court. In advisory procedure, where the Court finds a lacuna in the law or finds the law to be imperfect, it ought merely to state this without trying to fill the lacuna or improve the law by way of judicial legislation". Advisory Opinion (Declaration of Judge Vereshchetin), at 280.

The Court simply found that there is no explicit rule regarding nuclear weapons, by utilizing terms such as 'specific', 'comprehensive', and 'universal' in sub-paragraphs A and B. However, this did not imply that the whole corpus of international law is silent on the issue. Although the terms 'principles' and 'rules' are sometimes used interchangeably, there is a subtle distinction between the two that must be grasped first in order to fully understand the Court's finding in sub-paragraph 2E. According to Dworkin:

> "Rules are applicable in an all-or-nothing fashion. [But principles,] even those which look most like rules do not set out legal consequences that follow automatically when conditions are met. [The latter] does not purport to set out conditions that makes its application necessary. It states a reason that argues in one direction, but does not necessitate a particular decision."[525]

Lepard also writes that:

> "A rule typically lays down a fairly specific binding obligation…[while]…a 'principle' is less specific and normally establishes a persuasive obligation to give some value or action great weight in decision making. A 'general principle' is a principle that is broad in scope and applies across a wide range of subject areas."[526]

I contend that Judge Higgins interprets subparagraph 2E as a declaration of *non liquet* by the Court that led it to pronounce its indecisiveness.[527] Nonetheless, I find it difficult to read the sub-paragraph in this way. Instead, I would suggest that the

[525] Ronald M. Dworkin, *The Model Of Rules*, 35(1) University Of Chicago Law Review 14, 25 (1967), https://www.jstor.org/stable/1598947?origin=crossref#metadata_info_tab_contents.
[526] BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 162 (Cambridge University Press 2010); The International Law Association contends that "principles operate at a higher level of generality than rules". *Statement of Principles*, sect.2(i), Commentary, International Law Association; Wolke also asserts that [general principles] "are certainly the most abstract norms, and hence the will of states is least objectified in them. KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 113 (Springer 1993).
[527] Advisory Opinion (Dissenting Opinion of Judge Higgins), at 583-584 & 590-592.

Court's conclusion was the natural and logical outcome of legal reasoning upon general principles of law. While the Court often refers to both 'principles' and 'rules' of humanitarian law together, it may give the impression that these terms are used interchangeably in the advisory opinion. Nevertheless, this interpretation is incorrect. The Court carefully distinguished between them. For example, when the Court enlists cardinal prescriptions in the law on armed conflict, it explicitly refers to 'principles'.[528] By reading the Court's opinion, I am convinced that whenever the Court uses 'rules of humanitarian law', it meant to refer to legal rules that are extracted from general principles and are identified by states in international conventions or customary law.[529]

The ICJ, after reviewing existing customary law and international treaties, concluded that the international community of states has not accepted a special rule to completely outlaw nuclear weapons.[530] This is because it could not prove with certainty that nuclear weapons are contrary to IHL in all circumstances. Nuclear weapons must be used in a concrete situation in practice in order to understand whether they violate IHL.[531] Unless applied to a particular circumstance, an extracted rule of law can only be assumed to provide a conditional response. Thus, it follows that if a specific use of nuclear weapons is proved in practice not to be in compliance with the law on armed conflict, it will be declared illegal only in that

[528] Advisory Opinion, at 257, ¶78.
[529] "In international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise…". Military and Paramilitary Activities in and Against Nicaragua, supra note 462, at 135, ¶269; Advisory Opinion, at 239, ¶21.
[530] Advisory Opinion, ¶2A & 2B.
[531] "Nothing in the body of international humanitarian law of armed conflict indicates that nuclear weapons are prohibited *per se*." United States of America, Written Statement, at 2.

specific case.[532] Supposing that states A and B are parties to a treaty that prohibits the use of nuclear weapon in all circumstances, any usage of nuclear weapons will violate both *jus ad bellum* (even if using nuclear weapons do not, by chance, bring about humanitarian consequences) and *jus in bello*. But in the absence of such a special prohibition, the court needs to evaluate the legality of their use in accordance with the objective conditions of the conflict between the two. While the Court can distinguish between *jus ad bellum* and *jus in bello* when there is a specific prohibitory rule, it cannot do so in cases where there is none, because *jus ad bellum* and *jus in bello* cannot be imagined separately in such a situation. Upon the aforementioned reasonings, the Court's challenge in making a definite decision in sub-paragraph 2E was not due to the lack of any relevant legal rule;[533] it was due to its uncertainty regarding the precise effects of nuclear weapons, the generality of the applicable laws, and the abstractness of the GA's question. Therefore, the Court should not be expected to reach a firm conclusion under these circumstances. It would continue to conclude in an abstract manner unless a specific case comes up.[534] Consequently, part of the critiques made by Judge Higgins about a structural weakness[535] in the Court's reasoning should be directed to the current legal system

[532] "The legality of the use of nuclear weapons must therefore be assessed in the light of the applicable principles of international law regarding the use of force and the conduct of hostilities, as is the case with other methods and means of warfare." United Kingdom, Written Statement, at 75, ¶4.2 (3); see also Russian Federation, CR 95129, at 52; United States of America, CR 95134, at 85.

[533] The Court indirectly denies the existence of a lacuna when it asserts that: "The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present corpus juris is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate." Advisory Opinion, at 237, ¶18.

[534] Gomez argues cogently that "international legal actors should not search only for a particular, explicit, precise rule which gives a solution also particular, explicit and precise to their legal query". Gomez, supra note 506, at16; see also Neff, supra note 502, at78.

[535] Advisory Opinion (Dissenting Opinion of Judge Higgins), at 591.

and not only to the Court's reasoning.[536] However, the Court's wording of sub-paragraph E could also be criticized for confusing *lex ferenda* in a developed legal system (one in which states prohibit nuclear weapons in all circumstances) with *lex lata* in the current one. I will delve into this matter further in the subsequent section

V. Observing Non-Ultra Petita Principle & The ICJ's Judicial Policy

In their respective individual opinions, only two judges of the ICJ explicitly referred to the principle of non-ultra petita.[537] Before determining whether the Court violated the principle, it is essential to have a thorough understanding of its meaning. While the principle is commonly associated with procedural aspects rather than substantive matters, it has a direct impact on the merits of the present case and subsequent discussions concerning the legal obligations of states(in this study DPRK) concerning nuclear activities. Non-ultra petita, originally derived from the Latin phrase '*Ne iudex ultra petita partium*,' is "a doctrine stating that a tribunal should not unnecessarily decide questions of law or fact not raised by the parties to a dispute, on the theory that the tribunals' jurisdiction is limited to deciding matters raised by

[536] See Hugh Thirlway, *The Law And The Procedure Of The International Court Of Justice 1960-1989*, 72 British Yearbook Of International Law 37, 39 (2001), https://academic.oup.com/bybil/article-abstract/72/1/37/285136?redirectedFrom=fulltext

[537] President Bedjaoui argues in his statement that: "owing to the…very close link between this question and the question of the legality or illegality of the threat or use of nuclear weapons, the Court cannot be reproached for having reached a finding *ultra petita*...": Advisory Opinion (Declaration of President Bedjaoui), at 273, ¶23; On the contrary, Judge Guillaume believed that "the Court… has taken hardly any account … of practice and of the opinio juris of states… this operative part, while ruling *ultra petita* with regard to nuclear disarmament, gives on certain points, only an implicit answer to the questions posed". Advisory Opinion (Separate Opinion of Judge Guillaume, at 287, ¶1; Judge Weeramantry criticized the Court indirectly as follows: "This paragraph [2F] is strictly outside the terms of the reference of the question". Advisory Opinion (Dissenting Opinion of Judge Weeramantry), at 437; see also similar assertion in the same case in the Dissenting Opinion of Judge Shahabuddeen, at 378 & the Dissenting Opinion of Vice-President Schwebel, at 329.

the parties."[538] According to Fitzmaurice, "The non-ultra petita rule is not only an inevitable corollary—indeed, virtually a part of the general principle of the consent of the parties[539] as the basis of international jurisdiction—it is also a necessary rule, for without it, the consent principle itself could constantly be circumvented."[540] An inflexible interpretation of the principle would imply that if a tribunal cannot raise issues that are not asked by the parties in their final submissions, it is also prohibited from addressing those issues in its reasoning. The ICJ's jurisprudence, however, makes clear that it is within the Court's discretion to decide whether and to what extent it should intervene in the parties' submissions.[541] According to Article 36 of the Court's Statute, the basis of the Court's jurisdiction in contentious cases is the consent of states, which is declared in special agreements, their declarations, or other treaties and agreements in which they have accepted the compulsory jurisdiction of the Court. In contrast, according to Articles 65 and 96 of the UN Charter, requests for advisory opinions are made by organs or specialized agencies. States' consent

[538] AARON X. FELLMETH AND MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW 200 (Oxford University Press 2009); see also IBRAHIM F.I SHIHATA, THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION. COMPÉTENCE DE LA COMPÉTENCE 219 (The Hague: Martinus Nijhoff 1965).

[539] For a similar definition, see Marcus Schnetter, *Remedies At The International Court Of Justice: A New Analytical Approach*, 84 Bucerius Law Journal 1 (2017), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3017837>; see also Fulvio M. Palombino, *Judicial Economy And Limitation Of The Scope Of The Decision In International Adjudication*, 23(4) Leiden Journal Of International Law 909 (2010), https://www.cambridge.org/core/journals/leiden-journalofinternationallaw/article/abs/judicialeconomyandlimitationofthescopeofthedecisioninternationaladjudication/B459164F0B131919B3331485F26FD668

[540] GERALD FITZMAURICE, THE LAW AND THE PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 529 (Grotius Publications 1986).

[541] "While the Court is… not entitled to decide upon questions not asked of it, the *non-ultra-petita* rule… cannot preclude the Court from addressing certain legal points in its reasoning": Arrest Warrant(Congo v. Belgium), 2002 I.C.J. Rep.837, 18-19, ¶43; For a similar argument, see Joint Separate Opinion of Judge Higgins, Koojimans & Buergenthal in the same case, at 66,¶12; Fitzmaurice adds that "… there is a danger that the *non-ultra petita* rule might hamper the tribunal in coming to a correct decision… by compelling it to neglect judicially relevant factors." FITZMAURICE, id., at 529-530; For more analysis, see Thirlway, supra note 536, at 16 & 23; see also H.E Abdulqawi A. Yusuf (President of the International Court of Justice), *Statement Before The Sixth Committee Of The General Assembly* (Nov. 1, 2019), at 7, ¶35, https://www.icj-cij.org/en/statements-by-the-president.

directly affects the Court's jurisdictional limits in contentious cases. In advisory proceedings, however, it has an indirect impact. In this sense—in accordance with the principle of consent of states—the Court must carry out its duties as a judge and not a legislator, and shall base its answers on *lex lata* rather than *lex ferenda*. While some claim that the Court cannot reflect what it was not asked in the decision's operative part,[542] in my opinion, it will be permitted to do so, at least in the advisory opinion's *dispositif*. The reason comes back to the silence of Article 65 of the Court's Statue regarding the addressees of the Court's advisory opinions.[543] Given that the Court is functioning as part of the UN system and providing an opinion that contributes to the evolution of international law, rather than resolving a specific dispute between state parties, the addressee in this context should be the entire international community. Consequently, the Court's jurisdiction is limited only in the sense that its main finding, directed at the question at hand, must be based on existing law, which is a result of states' consent.

In sub-paragraph 2E, the Court acknowledged the divergent perspectives of the judges regarding the legality of nuclear weapons. Some judges believed that nuclear weapons are prohibited under all circumstances, while others advocated for an evaluation of their legality based on the rules and principles of international law. The Court's utilization of the term 'generally' in the first clause of 2E, which describes its general stance on the illegality of nuclear weapons, is phrased in a manner that appears contradictory to the second clause in 2E. While the first clause is more

[542] See for example Kasikili/Sedudu Island (Botswana v Namibia), 1999 I.C.J. Rep.1045, 1117, ¶2 (Separate Opinion by Judge Oda).
[543] See I SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996 162-163 (The Hague: Martinus Nijhoff Publishers 1997).

oriented to *lex ferenda*, the second clause appears to be a conclusion based on existing legal rules. In simple terms, the Court expressed its vision for the future development of the international legal system by acknowledging norms that advocate for a general prohibition of nuclear weapons (*lex ferenda*), even though such a prohibition did not exist in *lex lata* at the time of the Court's opinion. Based on the assertion that sub-paragraph 2E is the central component of the dispositif, I hold that the Court has violated the principle of non-ultra petita.

Furthermore, the Court's conclusion in sub-paragraph 2F is formulated as if the obligation to engage in negotiations under the NPT is imposed on all states, regardless of whether or not they are party to the Treaty.[544] Indeed, the Court expanded the application of Article VI to states that are not parties to the NPT. This expansion can be seen as an act of law-making and thus contrary to the principle of the free consent of states. Consequently, it can be argued that the Court's opinion was rendered *ultra petita* not only in relation to sub-paragraph 2E but also regarding sub-paragraph 2F. My contention regarding the violation of *non-ultra petita* principle adds a different perspective to that of the Judges Guillaume and Weeramantry, because I hold that the *non-ultra petita* rule is not broken by merely discussing Article VI of the NPT.

The Court avoided explicitly stating in 2E[545] that, based on existing law, the threat or use of nuclear weapons can be permissible under certain circumstances.

[544] Article VI only binds Member States to the NPT. At the time the Court's opinion was issued, some states had not joined the NPT and the Court could not have anticipated that North Korea would one day withdraw from it.

[545] Judge Higgins criticized the Court for abstaining from replying to the GA's question and finds the behavior of the Court inconsistent with its decision to accepts the GA's request. Advisory Opinion

Such a straightforward response could have been conveyed to the GA if the Court had not applied its own judicial policy.[546] This policy prohibited the Court from making a declaration that would adversely affect or impede the prospective development of international law.[547] It is crucial to bear in mind that the ICJ does not resolve legal disputes in advisory opinions. Instead, it must fulfill its judicial role by considering all relevant legal and non-legal factors and evaluating whether its arguments align with the fundamental values and principles of the international community. The Court felt it necessary to address nuclear disarmament and to explain how states can contribute to the development of international law, in order to create a system in which nuclear weapons are eliminated in accordance with the ultimate goals and principles of the UN Charter. The Court's attempt to confirm the need for disarmament negotiations is deeply appreciated;[548] it does not, however,

(Dissenting Opinion of Judge Higgins), at 583; In this regard, the dissenting opinion of Judge Oda stands out among the various opinions proposed by the Court's judges. Judge Oda, in the author's view, found himself uncomfortably sandwiched between two opposing poles of a magnet. He attempted to make an equilibrium between two opposite paradigms of international law: humanity (human-centered paradigm) and state consent (state-centered paradigm). This seems to me why he opposed the Court for accepting the GA's request, which was most likely due to the fact that current international law cannot declare the absolute illegality of nuclear weapons. See his dissenting opinion in the same advisory opinion. See Kate Dewes, *Hiroshima And The World: Inspired By Hibakusha*, Hiroshima Peace Media Center (Feb. 23, 2009), http://www.hiroshimapeacemedia.jp/?p=19698; Nishimoto Masami, *My Life: Interview With Former Hiroshima Mayor Takashi Hiraoka* (Part 15), Hiroshima Peace Media Center (Nov. 5, 2009), http://www.hiroshimapeacemedia.jp/?p=23439.

[546] For an in-depth analysis of the ICJ's judicial politics, see Niels Petersen, *The International Court Of Justice And The Judicial Politics Of Identifying Customary International Law*, 28(2) European Journal Of International Law 357 (2017), https://academic.oup.com/ejil/article/28/2/357/3933331; see also Jamal Seifi & Vahid Rezadoost, *The Concept Of 'Legal Policy' In International Jurisprudence*, 23(91) Legal Research Quarterly 61, 78 (2020),
<https://lawresearchmagazine.sbu.ac.ir/article_94171.html?lang=en>

[547] See Mohammed Bedjaoui, *Expediency In The Decisions Of The International Court Of Justice*, 71(1) British Yearbook Of International Law 1(2001), https://academic.oup.com/bybil/articleabstract/71/1/1/362696?redirectedFrom=fulltext

[548] "The need to make [the] concession [regarding an obligation to pursue in good faith] to finalize the judicial compromise package must have been so important that the limitation posed by the question put to the Court was relegated to a consideration of secondary importance." CHRISTIAN J. TAMS AND JAMES SLOAN, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE 175 (Oxford University Press 2013); see also Advisory Opinion (Declaration of President Bedjaoui), at 269, ¶8.

overcome the existence of noticeable imperfections in law. Its policy of adopting ambiguous remarks in sub-paragraph 2E could be criticized as much as it is admired. The Court's ambiguous language[549] resulted in the violation of the *non-ultra petita* rule. At the same time, it helped balance various assertions made by NWSs and NNWSs, as well as the opinions of the judges, which were so different in some aspects that they were difficult to bring together.[550] By leaving room for subsequent scholarly discussions, the ICJ aimed in its opinion to not close the topic of the legal status of nuclear weapons. As far as I am able to judge, if the Court had ended its conclusion with sub-paragraph 2E, it could have conveyed formally the message that NWSs have a legitimate right to use nuclear weapons for self-defence. Such a conclusion would bring about serious hindrances to subsequent changes in international law,[551] especially the possibility for a prohibitory customary rule to emerge in the future. It is generally favored to dedicate a section in the Court's advisory opinion to *lex ferenda*, in order to facilitate prospective legal evolutions, provided that it is not included in the Court's main conclusion. The international legal system is dynamic and needs to adapt to changing circumstances. The same goes to the Court's advisory opinions, which must be reasoned with an eye toward the future, in order to account for potential questions that may arise in the future.[552]

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[549] "…the judges adopted precisely that strategy [judicial policy] to which diplomats resort to at moments of crisis: the search for constructive ambiguity." TAMS & SLOAN, id., at 293; "In holding that status of nuclear weapons is indeterminate, the Court attempted to negotiate a path between saying too much and saying too little": Chesterman, supra note 458, at161.

[550] "The diversity of these conceptions prevented the Court from finding a more complete solution and therefore a more satisfactory result." Advisory Opinion (Declaration of Judge Herczegh), at 275; see also Advisory Opinion (Declaration of Judge Vereshchetin), at 280; Separate Opinion of Judge Guillaume, at 287, ¶1.

[551] In my view, if the Court had terminated the Opinion at sub-paragraph 2E, it might have caused a stalemate and prevented the development of other accords, such as TPNW (2017).

[552] "…the Statute [of the ICJ] is not a straitjacket which leaves no room for an imaginative interpretation": Pieter Kooijmans, *The ICJ In The 21st Century: Judicial Restraint, Judicial Activism,*

The Court, in the present case, was faced with an abstract question, and in order to respond, it had to create a number of scenarios.[553] In one of them, nuclear weapons were presumed to be in accordance with Article 51 and the laws on armed conflict, but resulting in collateral humanitarian harm. If sub-paragraph F hadn't been included to provide comfort in such a situation, the international community might have questioned the Court's credibility. Based on its judicial policy, the Court modified this rigid approach, made proposals for the future of law, and attempted to shift the critiques towards states, who are ultimately responsible for the creation of a world without nuclear weapons.

This analysis of the ICJ's advisory opinion provided us with legal insight for the next chapter's discussion concerning sanctions on North Korea. When the ICJ rendered its opinion in 1996, North Korea was a Member State to the NPT. However, the Court's opinion could not prevent DPRK's withdrawal from the Treaty. Nuclear weapons pose a significant and immediate threat to international peace and security, requiring prompt action. The UNSC is better positioned to address these threats swiftly and effectively, serving as a deterrent against provocative actions by states. In the upcoming chapter, I review the legal grounds for UN sanctions imposed on North Korea and Iran, making a comparison between the two cases. I will particularly focus on analyzing the reasons behind the relatively weak effectiveness

Or Proactive Judicial Policy, 56(4) International & Comparative Law Quarterly 741, 742 (2007), http://www.jstor.org/stable/4498111.

[553] Judge Azevedo was in favor of giving abstract answers in advisory opinions, so that it could be applied to several de facto situations. Conditions of Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion, 1948 I.C.J. Rep.57, 74 (Separate Opinion of Judge Azevedo); For a similar view, see also MAHASEN M. ALJAGHOUB, THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT OF JUSTICE 1946−2005 63 (Springer 2006).

of UN sanctions in the case of North Korea. Based on the findings in chapter five, I intend to explore the legal solutions available to enhance the performance of sanctions, which will be the subject of the final chapter of the thesis.

Summary OF The Chapter

The Court's 1996 Advisory Opinion reveals a perpetual conflict between the state-centered and human-centered paradigms of international law. The outcome of this conflict would be, on one side, defending a state's inherent right to self-defense or, on the other, insisting on the absolute illegality of nuclear weapons. In such a situation, one could argue that the Court had no choice but to reach an ambiguous conclusion, leaving room for subsequent legal discussions.

The Court's dispositif can be admired as much as it can be criticized from different legal aspects. The conditions declared by the Court for nuclear weapons to be in accordance with international law have a high threshold, so that it is expected that they could not meet all the requirements. For this reason, the Court, while indicating its concerns regarding the catastrophic consequences of nuclear weapons, encouraged the international community to take serious steps towards their elimination, as set out in sub-paragraph F. However, it should not have confused *lex lata* with *lex ferenda* in this sub-paragraph. The Court attempted to indicate that its inability to declare a definite conclusion on the legal status of nuclear weapons was not due to the existence of lacunae; rather, it was related to the generality of general principles of law. I contend that the Court's key conclusion, sub-paragraph 2E, is not stated in a way that reveals the Court's true objective. A reader might infer by a quick reading of the Court's *dispositif* that a state may breach humanitarian principles in

the most extreme cases of self-defense. Given the lack of a specific prohibition on the threat or use of nuclear weapons and the fact that the Court was concerned about their humanitarian effects, it would have been better to touch upon the issue of state responsibility when dealing with the legality of using nuclear weapons. In that case, the Court could have implied that the likelihood of nuclear weapons being in compliance with international law is too weak to be relied upon by states for self-defense. A favorable conclusion would be one that reflects the current state of international law while offering motivations for prospective legal development and deterring states from utilizing nuclear weapons. Thus, with all due respect to the Court, I believe my following conclusion can more precisely reflect the current state of international law and serve to deter states from the use of nuclear weapons:

> Given the humanitarian consequences of the actual use of nuclear weapons in Hiroshima and Nagasaki and some scientific evidence regarding threats emanating from nuclear radiation, it was not possible for the Court to presume circumstances in which the use of nuclear weapons could be in compliance with international law, particularly the law of armed conflict and Article 51 of the UN Charter.
>
> However, according to the current state of international law, there is no express, general prohibition on the threat or use of nuclear weapons in either customary or conventional law. Based on the Court's arguments, if a state's use of nuclear weapons results in the violation of the rules and principles of international law, responsibility will be directly imposed on that state, and no extreme circumstances of self-defense preclude the wrongfulness of that behavior.

Chapter Five: Analysis Of UN Sanctions Pressure On DPRK & Iran: The Impact Of Sanctions Evasion & Third States' Role In Dwindling The Pressure

In chapter three, I discussed how unilateral sanctions affect the humanitarian aspect of UN sanctions. It was expounded how the uniformity and consistency of state cooperation in enforcing UN sanctions are impaired by unilateral measures.

In this chapter, my analysis will focus on another aspect of the UN sanctions, which involves exerting sufficient pressure on the targeted state. I will analyze the relationship between North Korea's sanction evasion and third state's cooperative role with the UNSC in implementing sanctions and their effect on decreasing the pressure on the target state. Before delving into the main discussion of this chapter, it is crucial to compare the legal grounds for the UNSC adoption of resolutions on North Korea and Iran upon the insights drawn from the ICJ's advisory opinion. Taking it into account, I revisit the opinion to determine whether there are any other conventional or customary rules that impose obligations on North Korea and whether the country has violated them. Understanding the rationale behind the UN resolutions is a key factor in understanding North Korea's resilience to UN sanctions and the objections it indicates in its constant violation of resolutions.

While comparing the two sanction regimes in terms of imposing pressure, I will explore why UN sanctions yielded positive outcomes in the Iranian case, but failed to achieve the expected results in the North Korean case. In this regard, sanction evasion by North Korea is the most important factor that enabled the country to

withstand the pressure of sanctions. It is important to acknowledge that North Korea did not act alone in sanctions circumvention; third-party entities in other countries- intentionally or unintentionally- help DPRK to find legal loopholes.

The insights gained from this chapter, along with the reasonings discussed in Chapter 3, shed light on the main challenges and obstacles in effectively implementing UN smart sanctions on North Korea. These insights will be instrumental in the final chapter, where I provide suggestion for mitigating the influence of unilateral sanctions as well as sanction evasion techniques and fostering states' coordinated cooperation for a more effective implementation of UN sanctions.

I. Revisiting The ICJ's Advisory Opinion & Current Status Of International Law On Nuclear Weapons

Beginning with the DPRK's first nuclear test in October 2006 and the UN Security Council response in Resolution 1695, the North Korean nuclear case has been on the agenda of the Council for close to 20 years. After Kim Jong-un assumed power in 2011, North Korea has not only continued its provocative behavior but also demonstrated its determination to make further nuclear advancements.[554] A new policy known as the '*simultaneous development of economy and nuclear weapons*' program, which intends to enhance the country's nuclear force so that it can be of strategic and tactical use, was adopted by the Workers' Party of Korea (KWP) in March 2013.[555] From a domestic legal aspect, DPRK also made constitutional

[554] In this regard, refer to chapter 2 of the present thesis.
[555] Han-bum Cho, *Changes To The National Strategy Of The Kim Jong-un Regime And The Limitations Of The Strategy Of Self-Reliance* (Co-2108)(Online Series), Korea Institute For National Unification (2021), https://www.kinu.or.kr/2021/eng/0308/co21-08e.pdf

modifications to establish North Korea as a *de facto* nuclear state, by passing a decree titled '*further consolidation of the self-defense nuclear power status*' on 1 April 2013.[556]

The nuclear proliferation activities of states directly undermine international peace and security. Despite this, certain states find it tempting to engage in nuclear proliferation as a means to maintain regional power equilibrium and act as a deterrent against potential adversaries. This condition undermines international cooperation and fosters a lack of confidence between states. One difficulty arising out of this situation will be that joining international agreements that prohibit nuclear weapons will become more complicated. This actually occurred with the DPRK's withdrawal from the NPT and the reluctance of P5 states, as well as nuclear-declared states, to join subsequent treaties specifically the TPNW.

One can wonder if the advisory opinion of the ICJ would still be valid if it were to be rendered in 2023. Can we still claim that there is no *opinio juris* regarding nuclear weapons whether in terms of their prohibition or an obligation to enter into negotiations for nuclear disarmament? I believe the answer is yes, because there is no clear evidence of the emergence of any *opinio juris* as well as consistent and uniform practice among states. To revisit the ICJ's advisory opinion and its arguments regarding customary rule of law in the present time, it would be beneficial first to examine the arguments put forth by the Marshall Islands before the ICJ. By analyzing

[556] ANTHONY H. CORDESMAN & AARON LIN, THE CHANGING MILITARY BALANCE IN THE KOREAS AND NORTHEAST ASIA 252 (Rowman & Littlefield 2015).

these arguments, we can determine whether they provide compelling evidence concerning the existence of a customary rule.

In an effort to challenge the current behavior of states possessing nuclear weapons, on 24 April 2014, the Marshall Islands, citing the influence of sub-paragraph F of the ICJ's advisory opinion, filed proceedings in the Court against the United Kingdom, China, North Korea, France, India, Israel, Pakistan, Russia, and the US.[557] What is important to us for analysis in these proceedings is the legal implication of the Marshall Islands' claims that can be used for arguments regarding the legal status of North Korea's nuclear activities. As the claims against North Korea were not admitted and also since it is not a Member State to the NPT, only the submissions of the Marshall Islands regarding customary obligations to negotiate under the NPT will be of legal value. The Marshall Islands alleged that the UK had violated its obligations to put an end to the nuclear arms race and disarmament.[558] It also argued against the UK that:

> "… the United Kingdom has violated and continues to violate its international obligations under customary international law, by failing to pursue in good faith and bring to a conclusion negotiation leading to nuclear disarmament in all its aspects under strict and effective international control…"[559]

[557] However, only the proceedings against the United Kingdom, Pakistan and India proceeded as they were the only three states that made optional declarations recognizing the compulsory jurisdiction of the Court pursuant to art.36, ¶2 of its Statute. Obligations Concerning Negotiations Relating To Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Judgement, 2016 I.C.J. Rep.1107(Oct. 5); Kim Skoog, *US Nuclear Testing On The Marshall Islands:1946To1958*, 3 Teaching Ethic 67 (2003), https://www.pdcnet.org/tej/content/tej_2003_0003_0002_0067_0081; U.N. Doc., A/HRC/21/48/Add.1(Sep.3, 2012), ¶30-31; Devesh Awmee, *Nuclear Weapons Before The International Court Of Justice: A Critique Of The Marshall Islands V United Kingdom Decision*, 49 Victoria University Of Wellington Law Review 53, 59 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3156083

[558] Marshall Islands v. United Kingdom. Id., ¶11(a).

[559] Id., ¶11(c).

The Marshall Islands claims are not legally sufficient to establish the existence of a customary rule regarding an obligation to engage in negotiations and bring them to conclusion.[560] I hold that the claims made by the Marshall Islands extend beyond the ordinary meaning of Article VI of the NPT. Article VI explicitly states the mere obligation to 'pursue negotiations in good faith,' but the Marshall Islands argues that this obligation encompasses not only the act of engaging in negotiations but also includes the responsibility to successfully conclude those negotiations. In addition, assessing states' practice do not give us solid evidence to prove that a customary rule of law emerged after ICJ's advisory opinion.

The TPNW, whose aim is to obtain general and complete disarmament, is one of the achievements of Article VI of the NPT. But in comparison to the latter, it was not ratified by any of NWSs.[561] This deliberate abstention, in my view, is a subsequent practice indicating that the original intent of NPT member states did not include an obligation to achieve specific results both in conventional and customary terms. In its advisory opinion, the ICJ highlighted that there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such. Additionally, when it reviewed Article VI of the NPT, it indirectly confirmed the absence of a customary rule regarding this article. The ICJ's assessment of Article VI was limited to its interpretation on the treaty itself, rather than an assessment of customary law. Therefore, the assertion

[560] The International Court of Justice (ICJ) concluded that it lacked jurisdiction to proceed with the case brought forth by the Marshall Islands, as the existence of a dispute with the respondents could not be sufficiently proven. Consequently, the ICJ did not enter into the merits phase and issued a judgment based on its lack of jurisdiction, precluding any opportunity for the Court to provide its reasoning on the matter. Id., ¶59.

[561] It will be discussed in the following pages.

made by the Marshall Islands regarding the customary nature of obligations related to Article VI not only contradicts the ICJ's advisory opinion, but also deviates from the current state of international law. In the following analysis, I will delve deeper into the existing legal framework to provide evidence supporting the continued validity of the ICJ's advisory opinion on customary law.

The existence of the TPNW, in my opinion, serves as proof that states are demonstrating good faith in their ongoing endeavors to fulfill their obligation of conduct. There are, however, various debates among states on the scope of obligations set out in Article VI of the NPT. Taking into account the different behavior of states in terms of their decision to join or not join the TPNW, I claim that there is no clear evidence to establish the customary nature of Article VI of the NPT or the emergence of any customary rule on the prohibition of nuclear weapons in all aspects (manufacture, production, testing, threat, or use of nuclear weapons). To prove this, we must examine the practice of three different states: i) Non-nuclear weapons states that are parties to the NPT; ii) Nuclear-declared states that did not join the NPT or withdrew from it; and iii) Nuclear-weapon states. The reason for the necessity of this distinction, as explained in Chapter Four, is to pay attention to the practice of all members of the international community, as the nuclear issue does not only affect states possessing nuclear weapons, but it impacts the interests of the entire international community. Thus, based on the modern doctrine of SAS, all states are affected by the nuclear issue.

Since 1996, when the ICJ issued its advisory opinion, the international community has taken steps to ban nuclear weapons. It suffices here to mention two

important conventions since 1996. One of them is the TPNW[562] that was adopted on 7 July 2017 and entered into force on 22 January 2021. Since September 2017, when the TPNW[563] opened for signature, out of 193 Member States of the UN, 65 states have ratified the Treaty, excluding NWSs and self-declared nuclear states.[564] NWSs and their allies did not even take part in the Treaty's negotiations.[565]

In another attempt, 174 states ratified the Comprehensive Test-Ban Treaty (CTBT), which opened for signature on 24 September 1996.[566] This Treaty, as the fundamental basis for nuclear disarmament and non-proliferation, only prohibits the testing of nuclear weapons.[567] In its preamble, the Treaty stresses the need for continued and progressive efforts to reduce nuclear weapons with the goal of eliminating them.[568] Among NWSs, China and the US only signed the Treaty, while

[562] The Treaty was adopted by a Conference upon UNGA Resolution 71/258 to negotiate a legally binding instrument to prohibit nuclear weapons. U.N. Doc., A/RES/71/258 (Jan.11, 2017).
[563] According to art.1(a and d) of the Treaty, each state party undertakes never under any circumstances to develop, test, produce, manufacture, otherwise acquire, possess, stockpile, use or threaten to use nuclear weapons or other nuclear explosive devices.
[564] Gabriela R. Hernández & Daryl G. Kimball, *States-Parties Meet On Nuclear Arms Ban Treaty*, 52(6) Arms Control Today 1, 24-25 (2022), https://www.proquest.com/docview/2687827046?pq-origsite=gscholarandfromopenview=true; *Treaty On the Prohibition of Nuclear Weapons*, Nuclear Threat Initiative (Jul.13, 2017), https://www.nti.org/education-center/treaties-and-regimes/treaty-on-the-prohibition-of-nuclear-weapons/; see also STUART C MASLEN, THE TREATY ON THE PROHIBITION OF NUCLEAR WEAPONS:A COMMENTARY (Oxford University Press 2019); See the latest updates about the ratification status of the TPNW at: https://treaties.unoda.org/t/tpnw
[565] Marco Pedrazzi, *The Treaty On The Prohibition Of Nuclear Weapons: A Promise, A Threat Or A Flop?* 27(1) The Italian Yearbook Of International Law Online 215, 216 (2018), https://brill.com/view/journals/iyio/27/1/articlep215_13.xml?casa_token=s1BWcGzeLdIAAAAA:VRQnUWgvl3ABxbhnSuEEnjQd70a2QBgn72VZfag1Z92wnci_z15QquD6kqeplyF9fbRNpG_yzIo
[566] This Treaty was adopted by the UNGA in U.N Doc., A/RES/50/245(Sep. 17, 1996).
[567] CTBT, art.1.
[568] The Soviet Union, the United Kingdom, and the United States signed the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water (PTBT), which went into effect on 10 October 1963, before the CTBT was concluded. They committed to prohibiting, preventing, and refraining from carrying out any nuclear explosion, including nuclear weapon test explosions, at any location under their jurisdiction or control, with the exception of underground. Currently, the Treaty has 125 State Parties. It was actually concluded in response to the international criticism on the US and the Soviet Union thermonuclear(hydrogen) weapon testing by the mid-1950s. The Treaty only reduced radioactive fallout. Although it was an attempt to slow down the speed of nuclear proliferation, it did not ban nuclear weapons testing underground and that was the reason why nuclear testing increased there. The practice of NWSs at that time give evidence to the fact that they did not hold an opinio juris

it has been ratified by Russia, the United Kingdom, and France. In addition, out of nuclear-declared states, India, Pakistan and North Korea never signed or ratified it. The intentional abstention of above-mentioned states from joining the TPNW, especially the US and China, proves that the current practice of states cannot be deemed uniform enough to prove the existence of an *opinio juris*.[569] The US was the first state to use nuclear weapons at war in 1945 and is the country with the most records of nuclear tests during the Cold War (1030 nuclear tests from 1945 to 1992).[570] Therefore, by refusing to ratify the CTBT or TPNW, it proves the US' objections to obligations regarding a complete nuclear ban or to engage in negotiations resulting in nuclear disarmament. Ratification by two-thirds of Member States of the UN does not necessarily mean that the international community as a whole has endorsed the content of the TPNW. Upon the aforementioned arguments, I assert that the international community's practice is not sufficiently general, uniform and consistent to draw the conclusion that a relevant *opinion juris* exists. Additionally, it is too early to argue that the TPNW has a customary character. It

regarding the outlawry of nuclear weapons. See United Nations Treaty Series 480, 43, art.1; see also Kazem Gharibabadi, *در «C.T.B.T» و «N.P.T» با مروری بر معاهده ها و کنفرانس های منع آزمایشهای هسته ای نقد ترازوی*, 34 The Scientific Journal Of Strategy 83, 84 (2004), https://rahbord.csr.ir/article_124066.html?lang=en

[569] "All the nuclear weapons states and their allies have stated repeatedly and clearly not only that they will not join the new instrument, but also that they do not agree with the idea of a nuclear weapons ban in the first place and that they feel there to be no legal obligation upon them in such respects thus undermining any basis for concluding that a norm of customary international law might be emerging. As a result, the TPNW changes precisely nothing with respect to the continuing validity of the ICJ's 1996 opinion." Christopher A. Ford, *Law And Its Limits "Left of Launch"*, 229 Military Law Review 451, 463 (2022), https://heinonline.org/HOL/Page?handle=hein.journals/milrv229anddiv=27andg_sent=1andcasa_token=NUUzBvWUw7gAAAAA:b65Oqs4oOud68L3EJS5QtCe5aRUlJa2hNDl8mmTvEZ9qsevb07V5AyrUAs6H24beyKLD7qmxAandcollection=journals; Christopher A. Ford, *The Treaty On The Prohibition Of Nuclear Weapons: A Well-Intentioned Mistake*, US Department Of State (Oct.30, 2018), https://20172021.state.gov/remarksandreleasesbureauofinternationalsecurityandnonproliferation/the-treaty-on-the-prohibition-of-nuclear-weapons-a-well-intentioned-mistake/index.html

[570] Daryl Kimball, *The Nuclear Testing Tally*, Arms Control Association (Last Reviewed: Jul. 2020), https://www.armscontrol.org/factsheets/nucleartesttally; see also *Nuclear Testing Chronology*, Atomic Achieve, https://www.atomicarchive.com/almanac/test-sites/testing-chronology.html

might be argued that the prohibition on testing nuclear weapons has become customary, due to the abstention of states and, especially, because the DPRK was the only state to test them in the last 20 years.[571] This conclusion is erroneous since, as was discussed in the fourth chapter, international customary law does not forbid the threat or use of nuclear weapons, despite the fact that the latter's deadly danger extends far beyond testing.

The NWSs reaffirmed their commitment to pursuing nuclear negotiations toward disarmament in their *2022 joint declaration on preventing nuclear war and avoiding arms race*, although it will take a long time to achieve this goal.[572] They explicitly stated that the use of nuclear weapons for self-defense would be an option when they are available.[573] The fact that no NWSs have conducted nuclear tests in the past two decades does not necessarily establish a customary rule. Considering the extensive history of nuclearization and the prolonged time required to achieve comprehensive disarmament, a mere two decades cannot be considered sufficient for the development of a customary rule.

In light of the aforementioned, how should we interpret the intentional abstention of NNWSs from acquiring nuclear weapons? I believe they are only fulfilling their treaty-based obligations, including Article I of the TPNW, Article I of the CTBT, and Article VI of the NPT. In international law, there is no established customary

[571] See Lisa Tabassi, *The Nuclear Test Ban: 'Lex Lata Or De Lege Ferenda?'*, 14 Journal Of Conflict & Security Law 309 (2009), https://www.jstor.org/stable/26295329
[572] *Joint Statement Of The Leaders Of The Five Nuclear-Weapon States On Preventing Nuclear War And Avoiding Arms Races*, The White House (Jan.3, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/p5-statement-on-preventing-nuclear-warandavoidingarmsraces/
[573] Id.

rule that impose an absolute ban on nuclear weapons or compels states to engage in nuclear negotiations.[574] Claiming that a state has not acted in good faith lacks merit when there is no substantiated evidence of a customary duty to participate in negotiations. This is because legal obligations are established prior to evaluating their fulfillment in good faith. Based on the aforementioned arguments, one cannot contend that North Korea has breached its customary international law obligations. Furthermore, it did not contravene its obligation to negotiate as outlined in Article VI of the NPT until it was a Member State.[575] North Korea was engaged in various nuclear negotiations with other states, although they have not as of writing produced the desired effects. The negotiations are expected to continue for a longer period of time in the future.[576] It is important to remind that North Korea consistently pursued a policy of engaging in negotiations with other states while simultaneously engaging in provocative behaviors including launching various tests. This stance makes it

[574] "According to Article 2(3) of the Charter of the United Nations, "[a]ll Members shall settle their international disputes by peaceful means…This paragraph sets forth a general duty to settle disputes …but there is no indication …that the parties to a dispute are required to resort to a specific method of settlement, such as negotiation…Article 33 of the Charter…also leaves the choice of peaceful means of settlement to the parties … [and] the parties to a dispute will often resort to negotiation, but have no obligation to do so". Obligation To Negotiate Access To The Pacific Ocean (Bol. v. Chile), Judgment, 2018 I.C.J. Rep.1084, 507, ¶ 65(September 24); see also Nuclear Tests (Austl. v. Fr.), Judgment,1974, I.C.J. Rep.400, 253, ¶ 268 (December 20); North Sea Continental Shelf Cases, supra note 481, at 7 & 47, ¶ 2 & 85; Mostafa Fazaeli & Masoud Ahsannejad, *Obligation To Negotiate In International Law In The Precedence Of International Court Of Justice With Reference To The Case Of Bolivia V. Chili*, 12 Journal Of Legal Studies 219, 238-246 (2020), https://jls.shirazu.ac.ir/article_5914.html?lang=en; Martin A. Rogoff, *The Obligation To Negotiate In International Law: Rules And Realitie*s, 16 Michigan Journal Of International Law 141, 153 (1994),
<https://repository.law.umich.edu/mjil/vol16/iss1/2/?utm_source=repository.law.umich.edu%2Fmjil%2Fvol16%2Fiss1%2F2andutm_medium=PDFandutm_campaign=PDFCoverPages>

[575] DPRK participated in the 1995 Review Conference on the NPT. See *Letter Dated 25 January 1995 From The Permanent Representative Of The Democratic People's Republic Of Korea Addressed To The Chairman Of The Preparatory Committee* (NPT/CONF.1995/PC. IV/6).

[576] See Gloria M.T Rojas, *The North Korean Nuclear Crisis: An Assessment Of The Legal Justification Of The Use Of Force By The United States*, 5(1) Global Journal Of Politics & Law Research 15, 23 (2017),
<http://www.eajournals.org/wpcontent/uploads/TheNorthKoreanNuclearCrisisAnAssessmentoftheLegalJustificationoftheUseofForcebytheUnitedStates.pdf>

challenging from legal aspect to establish with certainty that North Korea violated the principle of good faith. Nuclear talks involve many political complexities that are influenced by various reactions of the parties and their political interests, as well as their security considerations. Thus, the refusal of North Korea or the NWSs to ratify the TPNW cannot be viewed as an unlawful action, either. Considering the aforementioned reasonings and the absence of any customary legal rule prohibiting North Korea from engaging in nuclear-related activities, it becomes necessary to assess whether the country can be held responsible from a conventional standpoint. In this regard, it is crucial to examine which treaty-based obligations are potentially applicable to North Korea.

Apart from TPNW, an examination of international treaties concerning nuclear weapons reveals the fragmented nature of conventional international law, as each treaty emphasizes a specific aspect.[577] The Antarctic Treaty of 1959[578] is the only multilateral treaty regarding nuclear non-proliferation to which the DPRK is a party. However, this treaty specifically prohibits nuclear testing and explosions in Antarctica, [579] rendering it irrelevant for the current discussion on nuclear non-proliferation obligations.

[577] There are many international treaties to which the DPRK is not a party, therefore it suffices here to mention their names: the Outer Space Treaty of 1967, the Treaty of Tlatelolco 1968(Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean); the Treaty of Rarotonga 1985 (South Pacific Nuclear Free Zone Treaty); the Treaty of Bangkok 1995 (Southeast Asia Nuclear-Weapon-Free Treaty), the Treaty of Pelindaba 1996 (African Nuclear Weapons Free Zone) & the Treaty of Semipalatinsk 2006 (Central Asian Nuclear Weapons Treaty).

[578] As of 11 August 2022, 55 states are parties to the Treaty. See *Antarctic Treaty*, US Department Of State (Aug.11, 2022), https://www.state.gov/antarctic-treaty/; For more information, see Joanne Yao, *An International Hierarchy Of Science: Conquest, Cooperation, And The 1959 Antarctic Treaty System*, 27(4) European Journal Of International Law 995 (2021), <https://journals.sagepub.com/doi/pdf/10.1177/13540661211033889>

[579] See art. 1 & 2 of the Treaty.

The NPT stands as the primary international treaty to be examined in this study. Scholars have engaged in debates regarding the legal consequences of North Korea's withdrawal from the treaty, and there are unresolved legal questions that require further examination. It is essential to ascertain whether North Korea's withdrawal was valid and, if so, why UNSC resolutions specifically reference the NPT and urge the DPRK to resume its obligations under the treaty.

II. The NPT & North Korea: From Ratification To Withdrawal

The NPT stands as the cornerstone of the international non-proliferation regime.[580] After the US first used the atomic bomb in Japan at the end of WWII, the great powers of that time started to acquire nuclear weapons as the result of the escalation of the arms race.[581] Nonetheless, due to the advantages of nuclear technology for purely peaceful purposes, both nuclear and non-nuclear countries devoted close attention to it. Nuclear reactor building technology made significant strides starting in the 1960s, and by the end of 1985, there were more than 300 nuclear power plants, up from just 5 in 1966.[582] The international community was concerned about how to regulate states' use of nuclear technology, because it is so

[580] DANIEL H. JOYNER, INTERNATIONAL LAW AND THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION 8 (Oxford University Press 2009); *2015 Review Conference Of The Parties To The Treaty On The NonProliferation Of Nuclear Weapons*, https://www.un.org/en/conf/npt/2015/pdf/background%20info.pdf; see also *The Nuclear Non-Proliferation Treaty (NPT) 1968*, US Department Of State, https://history.state.gov/milestones/1961-1968/npt; The original life span of the NPT was 25 years. However, in 1995, states agreed to extend its duration indefinitely. See *1995 Review And Extension Of The Parties To The Treaty On The Non-Proliferation Of Nuclear Weapons* (NPT/CONF.1995/32 (Part I) (1995)).

[581] Nuclear weapons were acquired by the former Soviet Union in 1949, the United Kingdom in 1952, the French Republic in 1960, and the People's Republic of China in 1964. THOMAS C. REED & DANNY B. STILLMAN, THE NUCLEAR EXPRESS: A POLITICAL HISTORY OF THE BOMB AND ITS PROLIFERATION 3-17 (Minneapolis: Zenith Press 2009).

[582] Alireza Niazmand, *Unfulfilled Promises Of The Nuclear Non-Proliferation Treaty And The Challenges Ahead: An Attempt To Survive Or Gradual Collapse?*, 61 International Studies Journal 83, 4 (2019), https://www.isjq.ir/article_93079.html

sensitive in security terms and should only be used for peaceful purposes. According to an estimation in 1985, large amounts of plutonium from nuclear power plant fuel were sufficient to produce 15 to 20 atomic bombs per day.[583] Following the proposal of the Atoms for Peace doctrine by US President Eisenhower, nuclear negotiations that began in 1965 eventually led to the signing of the NPT in 1968.[584] Israel, India, and Pakistan have so far declined to ratify the Treaty, and North Korea is the only country to have actually withdrawn from it.[585] Non-proliferation, disarmament, and the right to peaceful use of nuclear technology are the three important pillars of the NPT.[586] The stronger the link between the three, the better and more effectively the Treaty can achieve its purposes. According to the Treaty, nuclear powers were motivated to limit their nuclear arsenals.[587] Also, the Treaty provided a useful foundation for disarmament and denuclearization efforts in South Africa[588] and other regions.[589] As the cornerstone of the non-proliferation regime, the Treaty has a legal mechanism to control the nuclear activities of countries, namely the International Atomic Energy Agency safeguard system. The IAEA, which was established in 1957 to oversee the peaceful use of nuclear energy and prohibit the use of technical assistance for military purposes, is responsible for ensuring that the Treaty and its

[583] SARAH J. DIEHL AND JAMES C. MOLTZ, NUCLEAR WEAPONS AND NONPROLIFERATION 3-5 (Santa Barbara: ABC-CLIO Corporate 2007).
[584] See Leonard Weiss, *Atoms For Peace*, 59(6) Bulletin Of The Atomic Scientists 34 (2003), <https://www.tandfonline.com/doi/abs/10.1080/00963402.2003.11460728>
[585] See *Treaty On The Non-Proliferation Of Nuclear Weapons*, UN Office For Disarmament Affairs, https://treaties.unoda.org/t/npt
[586] Art. 1, 2, 4 & 6 of the Treaty.
[587] MATTHEW J. AMBROSE, THE CONTROL AGENDA: A HISTORY OF THE STRATEGIC ARMS LIMITATION TALKS 55-78 (Cornell University Press 2018).
[588] See Zondi Masiza, *A Chronology Of South Africa's Nuclear Program*, 1(1) The Nonproliferation Review 34 (1993), https://www.tandfonline.com/doi/abs/10.1080/10736709308436523
[589] See Treaties of Tlatelolco, Rarotonga, Bankok, & Pelindaba as previously explained.

supplementary protocol are carried out.[590] Yet as demonstrated by the North Korean nuclear issue, even the IAEA's safeguard system alone cannot meet all of today's security challenges, because states can conduct covert nuclear activities far from the supervision of the IAEA.

One of the most controversial issues regarding the NPT is how to interpret Article X(1), which is related to Member States' withdrawal.[591] Article X(1) provides that:

> "Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests."[592]

North Korea declared its intention to withdraw from the Treaty on 12 March 1993.[593] Following nuclear negotiations with the US, on 11 June 1993, the day before withdrawal would have officially taken effect, it announced that it would suspend its withdrawal from the NPT. However, on 10 January 2003, North Korea declared its

[590] See CARLTON STOIBER ET AL. EDS., HANDBOOK ON NUCLEAR LAW (IAEA 2003); U.N. Doc., S/RES/1887 (Sep.24, 2009).
[591] "Ever since the conclusion of the Partial Test Ban Treaty in1963, a withdrawal clause has become a common feature of all international arms control agreements concluded so far" and "this form of clause formed the basis of Article X(1) of the NPT". II MOHAMED I. SHAKER, THE NUCLEAR NON-PROLIFERATION TREATY: ORIGIN AND IMPLEMENTATION 1959-1979 883-884 (Ocean Publications 1980); Christopher P. Evans, *Going, Going, Gone? Assessing Iran's Possible Grounds For Withdrawal From The Treaty On The Non-Proliferation Of Nuclear Weapons*, 26(2) Journal Of Conflict & Security Law 309, 317 (2021), https://academic.oup.com/jcsl/article/26/2/309/6151709
[592] NPT, art.10, ¶1.
[593] Davenport, supra note 13; Jean D. Preez & William Potter, *North Korea's Withdrawal From The NPT:A Reality Check*, Middlebury Institute Of International Studies (Apr.8, 2003), https://nonproliferation.org/north-koreas-withdrawal-from-the-npt-a-reality-check/

intention to resume the withdrawal process, meaning that its withdrawal would become effective on the following day (11 January 2003).

One of the legal ambiguities about the legitimacy of withdrawal is the existence of temporal gaps between the first declaration of withdrawal in 1993 and its coming into force in 2003. It may be argued that the 89-day-period that passed before North Korea's suspension was rendered invalid once the country announced its suspension. Two months after it announced its intention for withdrawal, the Security Council adopted Resolution 825 on North Korea to reconsider its decision.[594] The questions that arise here are: did North Korea's withdrawal breach the NPT? What is the role of the Security Council in decisions regarding state's withdrawal? Let me address these questions in the following.

Similar clauses relating to withdrawal are typically included in the PTBT. Article IV of this treaty, which was actually the template for Article X of the NPT, provides that:

> "Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty three months in advance."

Although the right of withdrawal is expressly included in Article X of the NPT, the meaning of the Article is not as clear-cut as it first appears. This is because an

[594] U.N. Doc., S/RES/825 (May.11, 2003), ¶1.

additional term giving notice to the Security Council exists. From its wording, it is unclear whether the discretion of Member States to withdraw is absolute, or subject to the Security Council's approval. According to Shaker, during the NPT negotiations, a very limited number of states objected to the right of withdrawal and grounds for it.[595] However, proposals and arguments made by states concerning the extent of the right to withdrawal were quite contentious, and the *travaux préparatoires* of the Treaty is not helpful to determine the true intention of states.[596] In order to ascertain the meaning of the Article, in accordance with Article 31 of the Vienna convention on the law of treaties, we shall refer to the NPT's preamble, subsequent practice in the application of the treaty, and pertinent rules of international law. I contend that the PTBT's particular inclusion in the NPT's preamble[597] implies that Member States utilized it as a guide when drafting the NPT's Article X. This suggests that when they adopted the additional term (notice to the Security Council), they did not intend to impose restrictions on states' freedom to withdraw.[598] It must be noted that just because the Security Council is included in the Article, it does not automatically follow that the parties intended to grant the Security Council the power to accept or reject their withdrawal declarations. The inclusion of the additional term is a result of the NPT's primary concern being directly relevant to the Security Council's main mandate. The Security Council in

[595] SHAKER, supra note 591, at 887.
[596] *See* art.54 & 32 of the Vienna Convention on the Law of Treaties; SHAKER, id., at 893.
[597] "Recalling the determination expressed by the Parties to the 1963 Treaty banning nuclear weapons tests…".
[598] "…rather than containing an objective test for withdrawal, Article X(1) imposes an 'auto-interpretive', or subjective test to be determined by the withdrawing state itself as to whether the criteria needed to satisfy the justification posed for withdrawal have been met". Evans, supra note 591, at 320.

Resolution 1695[599] strongly urges North Korea to reconsider its withdrawal and rejoin the NPT. It further demands that the DPRK immediately retract its announcement of withdrawal in Resolution 1718.[600] Similar positions expressed by the Council in a number of resolutions suggest a relevant practice on which it discloses that it has previously proceeded on the implicit premise that the DPRK's withdrawal had occurred under the NPT.[601]

Article X further mandates that states notify the Security Council three months in advance. In my viewpoint, this timeframe presents an opportunity for the Council to assess the security circumstances related to the state that is withdrawing. It enables the Council to make a well-informed decision in accordance with its responsibilities, as outlined in the resolutions it issues under Chapter VII. It will also be of help to the Council to when it assesses whether withdrawal is made in good faith. Having said that, I believe the Security Council does not see itself as having the legal authority to approve or disapprove states' withdrawal from the Treaty.[602] Based on its practice regarding North Korean nuclear issue, its discretion should be considered limited to deciding whether the withdrawal jeopardizes international peace and security. As the primary organ responsible for maintaining international peace and security, the Security Council has the power to determine the existence of a threat to

[599] U.N. Doc., S/RES/1695 (Jul.15, 2006), ¶1.
[600] U.N. Doc., S/RES/1718 (Oct.14, 2006), ¶3, 4 & 6.
[601] Preparatory Work of the NPT did not show any disagreement of states concerning the subjective approach in the interpretation of Article 10. See SHAKER, supra note 591, at 889.
[602] "States have some discretion to decide whether to withdraw from the Treaty." See Guido D. Dekker & Tom Coppen, *Termination And Suspension Of, And Withdrawal From, WMD Arms Control Agreements In Light Of The General Law Of Treaties*, 17(1) Journal Of Conflict & Security Law 25 (2012), https://www.jstor.org/stable/26296216; "The UNSC has the right to review the grounds for withdrawal, and pass a judgement on them, though not to veto it." Jenny Nielsen & John Simpson, *The NPT Withdrawal Clause And Its Negotiating History*, Mountbatten Centre For International Studies 1, 7 (Jul. 2004), https://eprints.soton.ac.uk/39771/1/withdrawal_clause_NPT_nielsen%2526simpson_2004.pdf

or violation of peace and security, decide on appropriate measures to address them, and recommend or enforce relevant actions. In this sense, Article 25 of the UN Charter provides that the Members of the UN agree to accept and carry out the decisions of the Security Council in accordance with the Charter.[603] An important question arises here as to what constitutes the resolutions' legal justification for urging North Korea to rejoin the NPT? One might argue that resolution 1695 in which North Korea is urged to come back to the NPT is not obligatory.[604] Such a view cannot be accepted, because although the Security Council does not mention Chapter VII in resolution 1695, its content is endorsed in subsequent resolutions that were adopted under Chapter VII, such as resolution 1718.[605]

The resolutions passed by the UNSC under Chapter VII are not limited to condemning the actions of states that violate specific rules of international law. Instead, the extensive powers granted to the Council by Article 25 of the UN Charter allow it to address certain matters on its agenda through resolutions, particularly when states' actions involve sensitive or threatening behavior. Thus, the adoption of the UNSC resolutions in which the Council calls upon the DPRK to resume its previous obligations under the NPT should not necessarily be considered as deeming

[603] UN Charter, art.25.
[604] The United States and Japan view it as legally binding while China and Russia do not. Eric Y.J Lee, *Legal Analysis Of The 2006 U.N. Security Council Resolutions Against North Korea's WMD Development*, 31(1) Fordham International Law Journal 1, 17-18 (2007), <file:///C:/Users/82102/Downloads/31FordhamIntlLJ1.pdf>
[605] U.N. Doc., S/RES/1718(2006); see also Dan Joyner, *Legal Bindingness Of Security Council Resolutions Generally And Resolution 2334 On The Israeli Settlements In Particular*, EJIL:TALK! (Jan.9, 2017), <https://www.ejiltalk.org/legal-bindingness-ofsecuritycouncilresolutionsgenerallyandresolution-2334-on-the-israeli-settlementsinparticular/>; Patrik Johansson, *The Humdrum Use Of Ultimate Authority: Defining And Analysing Chapter VII Resolutions*, 78(3) Nordic Journal Of International Law 309, 335 (2009), file:///C:/Users/82102/Downloads/nord-article-p309_4.pdf

the withdrawal a 'violating act' in international law. According to the aforementioned analysis, I believe that the DPRK's withdrawal took place in accordance with Article X(1) of the NPT.[606]

Despite temporarily halting its withdrawal process by engaging in nuclear negotiations with the US in 1993 and subsequently with six countries in the Six-Party Talks in 2003, North Korea proved in practice that it did not have the intention of legally committing itself to the agreements reached during nuclear talks. This was evident from its subsequent behavior, as it continued to engage in provocative acts such as test launches. It began conducting nuclear tests in 2006, and it must have conducted nuclear research activities years in advance of its first test.[607] It, in my opinion, did not abandon its decision to withdraw from the NPT; rather, it paused temporarily the passage of the three-month period.

The Security Council has the legal authority to decide how to solve issues that jeopardize international peace and security. In my view, the Council's decision to urge North Korea to rejoin the NPT signifies its endorsement of the Treaty as a

[606] On the official website of the UN Office for Disarmament Affairs, Democratic Peoples' Republic of Korea is not clearly included in the list of Member States. See https://treaties.unoda.org/t/npt; Different arguments are also made by the US. For example, see Sally Horn, *'NPT Article X,' Statement To The 2005 Review Conference Of The Treaty On The Nonproliferation Of Nuclear Weapons*, US Department Of State (May.23, 2005), https://2001-2009.state.gov/t/vci/rls/rm/46644.htm; In this statement, it is not clearly argued whether North Korea remained a Member State to the Treaty; rather, it analyzed under which situations states can withdraw from.

[607] It must be remembered that North Korea did not uphold its international responsibilities under the NPT during its entire membership before 10 January 2003. Due to the international restrictions placed on North Korea, it was anticipated that the process of acquiring nuclear weapons would take a longer time than the period between the DPRK's 2003 withdrawal and its 2006 first nuclear test. For similar views, see Cheon Seongwhun & Tatsujiro Suzuki, *The Tripartite Nuclear-Weapon-Free Zone In Northeast Asia: A Long-Term Objective Of The Six-Party Talks*, 12(2) International Journal Of Korean Unification Studies 41(2003), https://www.dbpia.co.kr/Journal/articleDetail?nodeId=NODE08827078

suitable approach to address nuclear threats on the Korean Peninsula.[608] Given that international law falls short in effectively addressing all security threats associated with nuclear weapons, the significance of the Security Council has become increasingly prominent. It has the ability to mitigate, to a considerable extent, the deficiencies and limitations of international law when it comes to responding to the nuclear conduct of states. The withdrawal of countries from international treaties, such as North Korea's departure from the NPT, poses a significant challenge to global efforts in preventing the proliferation of nuclear weapons. However, the UNSC effectively addresses this problem by issuing timely and appropriate resolutions. By encouraging countries to reaffirm their commitment to international treaties, the Council can provide viable solutions for resolving nuclear-related concerns. Neglecting to address this matter may result in countries becoming subject to further resolutions of the Security Council. Based on the foregoing, the legal basis for the imposition of sanction resolutions against North Korea since 2006 does not arise from a violation of Article X of the NPT. Instead, it is based on the breach of the Security Council's resolutions as well as Article 25 of the UN Charter.

III. North Korean & Iranian Nuclear Cases: Similarities & Differences

As previously mentioned, both North Korea and Iran ratified the NPT. However, there is a notable difference between the two countries. While North Korea withdrew

[608] "There is a distinction between imposing the obligations of a treaty on a third state, and incorporating the substance of the treaty within its resolutions. In the latter situation, the source of the obligation is the resolution and not the treaty, and therefore does not violate the principle". Stefan Talmon, *Security Council Treaty Action*, 62 Hellenic Review Of International Law 65 (2009); Yuan-bing Mock, *The Legality Of North Korea's Nuclear Position: Lessons Regarding The State Of Nuclear Disarmament In International Law*, 50 New York University Journal Of International Law & Politic 1093, 1098 (2018), https://www.nyujilp.org/wp-content/uploads/2020/03/50-commentary-1-merged.pdf

from the Treaty, Iran chose to remain a member, all the while asserting that its nuclear program is intended for peaceful purposes.[609] The two countries' nuclearization was closely monitored by the international community,[610] and both countries were targeted in separate UNSC resolutions. From the beginning, the Council took a strict position toward Iran's nuclear program, out of concern that it may evolve into non-peaceful activities.[611] This concern was primarily sparked by the fact that the world was aware of the DPRK's nuclear capability for military purposes. Yet because Iran never conducted a test, it was uncertain what nuclear capabilities it possessed. Iran's nuclear program was deemed a threat to international peace and security after North Korea's cessation from the NPT and its nuclear tests. When it was revealed in 2009 that Iran had developed a covert uranium enrichment facility near Qom, the pessimism about its nuclear activities increased.[612] The IAEA's legal framework for safeguards, measures, and mechanisms in the non-proliferation regime was created because states could misuse nuclear materials for non-peaceful purposes at any time. If a state engages in a peaceful use of nuclear energy, then there is no compelling reason for clandestine activities, because the

[609] See Kang Choi, *The North Korean Nuclear Problem: Twenty Years Of Crisis*, 19 Asian Perspective 28, 30 (2015), https://www.jstor.org/stable/24905297; *Iran's Nuclear Program*, United States Institute Of Peace (Oct.6, 2010), https://iranprimer.usip.org/resource/irans-nuclear-program

[610] Emily B. Landau, *Decade Of Diplomacy: Negotiations With Iran And North Korea And The Future Of Nuclear Nonproliferation*, Memorandum no.115, Institute For National Security Studies 1, 87 (2012).

[611] Daniel Wertz & Ali Vaez, *Sanctions And Nonproliferation In North Korea And Iran: A Comparative Analysis*, Federation Of American Scientists 1, 6 (2012), <https://www.ncnk.org/sites/default/files/content/resources/publications/Comparative_Iran_North_Korea_Sanctions.pdf>

[612] [Int'l Atomic Energy Agency] IAEA, *Director General and Iranian Officials Discuss Enrichment Plant Visit* (Oct.5, 2009), https://www.iaea.org/newscenter/news/iaeadirectorgeneralandiranianofficialsdiscussenrichmentplant-visit; Ray Takeyh, *Excerpt: Iran: The Nuclear Challenge*, Council Of Foreign Relations, https://www.cfr.org/excerpt-iran-nuclear-challenge

IAEA's statute provides technical assistance to NNWSs through supply agreements between a supplier State, the recipient State,[613] and the IAEA, as well as projects between the IAEA and the recipient State.[614] Thus, the continuity of covert nuclear activities that are not revealed to the IAEA makes the international community wary about the real purpose behind nuclear programs. In light of this, against the fundamental difference in their purposes, the most striking similarity between DPRK and Iran's nuclear program was that the international community was concerned about them in the same way: one was verified to be a military nuclear program, while the other was deemed a potential non-peaceful program. Due to similarities in behavior, including their histories of cooperation with the international community through negotiations and IAEA inspections, high levels of uranium enrichment, clandestine nuclear activities, and mutual military cooperation, it was speculated that Iran might be on a trajectory similar to North Korea in acquiring nuclear weapons in the future.

Although the sanctions regime against Iran did not include prohibitions on chemical or biological weapons, it did include some identical or comparable responses to both states' nuclear activities.[615] The initial resolutions against the DPRK (resolution 1718 on 14 October 2006) and Iran (resolution 1737 on 23 December 2006) were enacted with the intention of laying the groundwork for more severe measures in the future. In resolution 1718, the Security Council established

[613] IAEA Statute, art. 3.A.5.
[614] IAEA Statute, art. 11.A.
[615] "Many analysts remarked that if North Korean nuclear activities especially its first test were to go unpunished, it would send a clear message to Iran that it could safely follow its nuclear advancements." See Landau, supra note 610, at 88.

the Sanctions Committee on the DPRK which was assisted by the POE in in resolution 1874 (2008).[616] Resolution 1737 also introduced the 1737 Committee with resolution 1929 (2010) establishing the POE. Committees are responsible for designating persons, groups, organizations, or businesses as entities targeted under the sanctions regimes.[617] The Security Council authorized third states in resolutions against North Korea[618] and Iran[619] to seize cargo if they have reasonable grounds for suspecting shipped items and report them if the sanctioned state do not cooperate. The two sanctions regimes also provide guidance on the disposal of such embargoed cargo. Additionally, they prohibit bunkering services except for vessels operating for humanitarian purposes. These sanctions explicitly ask states to monitor the activities of individuals, companies, and financial institutions on their territories.[620] In addition, the regimes contain admonishment for states to cooperate with the POE and to provide related information about noncompliance with sanction measures.[621] The UNSC's political, military and missile, nuclear, and economic sanctions against North Korea and Iran will be covered in more detail in the section below. It will be beyond the scope of this paper to cover the entirety of the sanctions. Nonetheless, it

[616] *Letter Dated 24 April 2009 From The Chairman Of The Security Council Committee Established Pursuant To Resolution 1718 (2006) Addressed To The President Of The Security Council*, U.N. Doc., S/2009/222 (Apr.24, 2009).
[617] Article 41 of the United Nations Charter gives the Security Council the authority to use a variety of measures to enforce its decisions. The Council adopts sanctions, which are generally supported by a committee, as well as Panels/Groups of Experts or other mechanisms to monitor their implementation. *Sanctions And Committees*, United Nations Security Council, https://www.un.org/securitycouncil/content/repertoire/sanctions-and-other-committees
[618] See for example, Resolutions 1874, 2094, 2270 & 2375. For a full list of prohibited items, see https://www.un.org/securitycouncil/sanctions/1718/prohibited-items
[619] See for example, Resolution 1803 & 1929. For a list of prohibited items, see Resolutions 1737, 1747, or 1803.
[620] For example, see Resolution 1929 (Jun.9, 2010), ¶22 & 24, Iran.
[621] Id., ¶13; Resolution 2094 (Mar.7, 2013), ¶26, DPRK.

is intended to compare the two states' programs based on the most significant constraints in the sanctions resolutions.

IV. Sanctions Resolutions Against The Nuclear Programs Of DPRK & Iran

Sanctions resolutions in response to the nuclear programs of North Korea and Iran were adopted in the following way:

i. Nuclear & Missile Sanctions: The UN sanctioned Iranian nuclear activities in resolution 1696 on 31 July 2006 in which it:

> "Calls upon Iran without further delay to take the steps required by the IAEA Board of Governors in its resolution GOV/2006/14, which are essential to build confidence in the exclusively peaceful purpose of its nuclear program and to resolve outstanding questions".

Two weeks before the adoption of this resolution, the UNSC adopted resolution 1695 against the DPRK on 15 July 2006. Article 6 of the resolution:

> "Strongly urges the DPRK to return immediately to the Six-Party Talks without precondition, to work towards the expeditious implementation of 19th September 2005 Joint Statement, in particular to abandon all nuclear weapons and existing nuclear programs, and to return at an early date to the Treaty on Non-Proliferation of Nuclear Weapons and International Atomic Energy Agency safeguards".

There were no more sanction resolutions passed immediately after the DPRK left the NPT; Resolution 1695 was passed around three years later. This abstention originated from the lack of authority for the Council to approve or reject DPRK's withdrawal, leaving a security challenge for the world. This challenge becomes

evident in the context of resolution 1695, when the Security Council restrains itself to referring only to '*urges,*' rather than '*decides,*' when it intends to persuade DPRK to return to the Treaty. The sanctions-related measures in resolution 1696 are fairly comparable to those adopted in resolution 1695, despite the fact that the wording of the two resolutions differs slightly ('*strongly urges*' conveys a more stringent sense than 'calls upon'[622]). The Council's identical response to the nuclear programs of both countries is logical, given its extensive experience dealing with the DPRK's nuclear development. The DPRK carried out clandestine nuclear activities outside of IAEA inspections, raising more concerns about its threatening program. Iran's nuclear program received a similar response from the Security Council because it also possessed numerous nuclear plants (Arak and Natanz) but did not inform the IAEA of their existence.[623]

North Korea's first nuclear test was followed by the adoption of resolution 1718, in which the Security Council decided that it shall abandon all nuclear weapons and existing nuclear programs in a complete, verifiable, and irreversible manner.[624] It was on 23 December 2006 when the UNSC adopted, *in a similar wording,*[625] its second resolution against Iran (resolution 1737) in an extensive manner, declaring Iran's obligation to suspend the proliferation of sensitive nuclear activities such as

[622] "Most scholarly commentary over the succeeding decades has categorized 'calls upon' language as well as 'reaffirms', 'underlines', and 'stresses' as legally non-binding". Joyner, supra note 605.
[623] *Chronology of Events: Iran*, Security Council Report (revised on Sep.2, 2020), https://www.securitycouncilreport.org/chronology/iran.php; Int'l Atomic Energy Agency [IAEA], *Implementation Of The NPT Safeguards Agreement In The Islamic Republic Of Iran, Report By The Director General*, GOV/2003/40 (Jun.6, 2003), at 7, ¶32, https://www.iaea.org/sites/default/files/gov2003-40.pdf; Daniel H. Joyner, *Iran's Nuclear Program And International Law*, 2 The Pennstate Journal Of Law & International Affairs 237 (2013).
[624] U.N Doc., S/RES/1718(Oct.14, 2006), ¶6.
[625] In both resolutions, the Security Council made use of 'decides' in various paragraphs. See for example, ¶2-9 & 12 of the Resolution above.

enrichment-related and reprocessing activities, research and development, working on all heavy water-related projects, etc.[626] The UNSC imposed specific prohibitions on Iran's nuclear program, targeting activities that could potentially facilitate the development of nuclear weapons. This decisive response from the Council reflects its preventive measures aimed at averting the emergence of another security crisis, drawing from the lessons learned through years of dealing with North Korea's nuclear situation.

Since 1984, what has given North Korea a deterrent capability against external threats has been its efforts to develop ballistic missile technology including short, medium,[627] and long-range missiles.[628] Ballistic missiles are one of the most important ways to deliver nuclear warheads in a short time.[629] The proliferation of ballistic missiles, particularly intercontinental ones (ICBM), has increased the global reach of nuclear threats and doubled their intensity. Because of this, the Security Council in resolution 1695:

[626] U.N Doc., S/RES/1737 (Dec.23, 2006), ¶2 & 3.
[627] In 2019, North Korea tested a range of new short-range, solid-fueled missiles such as the KN-23 and KN-25. See *Missiles Of North Korea*, Center For Strategic And International Studies (last modified on Jun.14, 2021), https://missilethreat.csis.org/country/dprk/
[628] North Korea has tested two other long-range missiles (Hwasong-14 and 15) in July and November 2017 which were two of the latest technology in their kind and were recorded as the first intercontinental missiles. See id.; A. Herciu & V. Ghinea, *Premises, Geostrategical Context And Nuclear Crisis Evolutive Issues Generated By North Korea*, Bucharest: "Carol I" National Defence University (2018), https://www.proquest.com/conference-papers-proceedings/premises-geostrategical-context-nuclear-crisis/docview/2043175455/se-2
[629] "Ballistic missiles make the nuclear balance more precarious, due to their short flight time and their consequent utility for pre-emptive attacks against an opponent's nuclear forces". Dean A. Wilkening, *Nuclear Zero And Ballistic-Missile Defence*, 52(6) Survival 107, 109 (2010), <https://www.tandfonline.com/doi/full/10.1080/00396338.2010.540785>

> "Demands that the DPRK suspend all activities related to its ballistic missile program… and re-establish its pre-existing commitments to a moratorium on missile launching…"[630]

In resolution 1747 against Iran in 2007 regarding its ballistic missile program, the Security Council:

> "Decides that Iran shall not supply, sell or transfer directly or indirectly… any arms or related material, and that all States shall prohibit the procurement of such items from Iran…."[631]

Compared to resolution 1747, resolution 1695 was passed with softer language. For instance, the latter includes terms such as 'urges', 'demand', and 'require,' while resolution 1747 uses 'must', 'decides', and other similar terms.[632] This strong language is also repeated in resolution 1803 (2008) against Iran, in which the Security Council reaffirmed its restrictive measures in the previously adopted sanctions.[633] Resolution 1929 (2010), which was the fourth sanctions resolution against Iran, reaffirmed in a strong language that Iran ***shall*** not enter into activities related to ballistic missiles.[634] In the same year, the Security Council adopted resolution 1874 against DPRK, the preliminary draft of which was suggested by the US but was later modified upon China and Russia's request to include softer language.[635] In this Resolution, China's negotiation with the Council's Member

[630] U.N Doc., S/RES/1695 (Jul.15, 2006), ¶1.
[631] U.N Doc., S/RES/1747 (Mar.24, 2007), ¶5.
[632] For more information, see Appiagyei A. Kwadwo, *United Nations Security Council Resolution 1325 On Women, Peace, And Security: Is It Binding?*, 18(3) The Human Rights Brief 1, 2-6 (2011), <https://digitalcommons.wcl.american.edu/hrbrief/vol18/iss3/1/>
[633] U.N. Doc., S/RES/1803 (Mar.3, 2008), ¶1, 5-8,14 &19.
[634] U.N. Doc., S/RES/1929 (Jun.9, 2010), ¶7.
[635] Suisheng Zhao, *China's Approaches Toward Regional Cooperation In East Asia: Motivations And Calculations*, 20(68) Journal Of Contemporary China 53, 63 (2011),

States was effective in substituting 'demand' for 'shall,' while China reaffirmed its position on not making use of force against North Korea.[636] The main reason for this strong support for the DPRK was the fear of a potential, future US regime of harsh sanctions that could cause even more economic ruin for the North Korean people, transform the North Korean government, and threats of a power imbalance in the region, all of which will be briefly discussed in the pages that follow.

The UNSC also, in resolution 1929, prohibited the export of heavy weapons, related material and services to Iran.[637] Although Iran sought to enhance its military capabilities domestically, the long-standing arms embargo was able to significantly degrade its overall military.[638] Likewise, resolution 1874 imposed arms embargoes on the export of most North Korean arms, except light arms, into the country.[639]

ii. Political Sanctions: Political sanctions were imposed unevenly on Iran and the DPRK, with sanctions against Iran being more severe and numerous. At a glance, resolution 1718[640] and 1874 against DPRK, in comparison with resolution 1737,[641] 1747, 1803,[642] and 1929 against Iran appeared to impose more delicate

<https://www.tandfonline.com/doi/epdf/10.1080/10670564.2011.520846?needAccess=trueandrole=button>

[636] See *Shades of Red: China's Debate Over North Korea* (Asia Report N°179), International Crisis Group Working To Prevent Conflict Worldwide (Nov.2, 2009), <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B6D274E9C8CD3CF6E4FF96FF9%7D/NKorea%20179_shades_of_red___chinas_debate_over_north_korea.pdf>

[637] U.N. Doc., S/RES/1929 (Jun.9, 2010), ¶8.

[638] Anthony H. Cordesman et al., *U.S. And Iranian Strategic Competition: The Sanctions Game: Energy, Arms Control, And Regime Change*, Center For Strategic & International Studies 1, 64-68 (Mar. 2012), https://csiswebsiteprod.s3.amazonaws.com/s3fspublic/legacy_files/files/publication/140122_Cordesman_IranSanctions_Web.pdf; Greg Thielmann & Matthew Sugrue, *The UN Sanctions' Impact On Iran's Military*, 1 Arms Control Association (Jun.11, 2010).

[639] U.N Doc., S/RES/1874 (Jun.12, 2009), ¶9 & 10.

[640] U.N Doc., S/RES/1718 (Oct. 14, 2006), ¶8.

[641] U.N Doc., S/RES/1737 (Dec.23, 2006), ¶10 & 11.

[642] U.N Doc., S/RES/1803 (Mar.3, 2008), ¶3,5,7 & 11.

inspections on imports and exports of various aspects of military and non-military goods or those related to nuclear activities and ballistic missiles, sanctioning human resources, fiscal restrictions, etc. Resolution 1718 was adopted in response to the DPRK's first nuclear test in 2006, while resolution 1803 was adopted in 2008 in response to Iran's non-compliance with the requirements set out by the IAEA Board of Governors and obligations under the NPT. North Korea posed a more threatening situation when it launched nuclear test in 2006, but political sanctions against its authorities were limited in comparison with the sanctions against Iran. As an example, by looking at the wording of paragraph 8(e) of resolution 1718, the Council entrusts a responsibility on states to implement sanctions by using '*All Member States shall…'*. The Security Council declares that:

> "All Member States shall take the necessary steps to prevent the entry into or transit through their territories of the persons designated…as being responsible for, including through supporting or promoting, DPRK policies in relation to the DPRK's nuclear-related, ballistic missile-related and other weapons of mass destruction-related programs, together with their family members, provided that nothing in this paragraph shall oblige a state to refuse its own nationals entry into its territory."[643]

In comparison, the Security Council in paragraph 5 of Resolution 1803:

> "Decides that all States shall take the necessary measures to prevent the entry into or transit through their territories of individuals designated…as being engaged in, directly associated with or providing support for Iran's proliferation sensitive nuclear activities or for the development of nuclear weapon delivery systems, including through the involvement in procurement of the prohibited items, goods, equipment, materials and technology specified by and under the measures in paragraphs 3 and 4 of resolution 1737 (2006), except where such entry or transit is for activities directly related to the items in subparagraphs 3 (b) (i) and (ii) of resolution 1737 (2006) and provided that nothing in this paragraph shall oblige a State to refuse its own nationals entry into its territory."

[643] U.N. Doc. S/RES/1718 (Oct.14, 2006), ¶8(e).

In contrast, the Council expands this responsibility in paragraph 5 of resolution 1803, to *All States*, indicating that its measures also apply to those that are not UN Members States. Additionally, whereas resolution 1718 imposed conditions for targeted entities, in that it only covered North Korean entities that were responsible for the advancement of the DPRK's nuclear program, political sanctions included any entity involved in Iran's nuclear program. It can therefore be claimed that sanctions against Iranian entities were more numerous, severe and broad than those against North Koreans.

iii. Economic & Fiscal Sanctions: A comparative analysis on economic and fiscal sanctions adopted reveals the pressure strict pressure on both countries.[644] In Resolution 1803, *for example*, the Security Council:

> "Decides that all States shall freeze the funds, other financial assets and economic resources which are on their territories… that are owned or controlled by the persons or entities designated in the Annex, as well as those of additional persons or entities designated by the Security Council or by the Committee as being engaged in, directly associated with or providing support for Iran's proliferation sensitive nuclear activities or the development of nuclear weapon delivery systems, or by persons or entities acting on their behalf or at their direction, or by entities owned or controlled by them… ."

Accordingly, the Security Council in paragraph 8(d) of Resolution 1718 states that:

> "All Member States shall, in accordance with their respective legal processes, freeze immediately the funds, other financial assets and economic resources which are on their territories at the date of the adoption of this resolution or at any time thereafter, that are owned or controlled, directly or indirectly, by the persons or entities designated by the Committee or by the Security Council as being engaged in or providing support for, including through other illicit means, DPRK's nuclear-related, other weapons of mass destruction-related and ballistic missile-related programs, or by persons or entities acting on their behalf or at their direction… ."

[644] Wertz & Vaez, supra note 611.

While there may be a perception that the measures imposed on both states were similar, a closer examination of the wording in two paragraphs reveals that the economic and fiscal sanctions imposed on Iran were slightly more severe, because of i) the usage of *All States* rather than *Member States* in Resolution 1803; ii) adding a condition to the freezing of North Korean assets (*in accordance with their respective legal processes)*, which can postpone the implementation of sanctions due to states' domestic legal procedures.

In the previous pages, I conducted a brief comparative analysis of the sanction regimes imposed on Iran and North Korea. Through an examination of the numerous similarities between the sanction's regimes imposed on Iran and North Korea, it can be concluded that the Security Council, considering the unique circumstances of each country, particularly their economic infrastructures, devised regimes that were expected to exert sufficient pressure on the target states.

After analyzing the ICJ's advisory opinion of 1996 and taking into account the nuclear cases of North Korea and Iran, several conclusions can be drawn. The advisory opinion provided an assessment of the status of international law regarding the concrete threat or use of nuclear weapons, whereas the North Korean and Iranian cases do not involve the actual use of such weapons. Although the advisory opinion faced criticism, it holds significant importance as it brings global attention to the shortcomings and challenges within international law concerning nuclear proliferation. Regarding Iran, the situation has been significantly different as it has maintained its membership in the NPT and, as a non-nuclear state, has cooperated

with the international community, as noted in sub-paragraph F of the advisory opinion. According to the Court, negotiation has a significant role in eliminating the serious threats of nuclear weapons. Likewise, it was the most important factor in reaching a nuclear deal (JCPOA) in the Iranian nuclear issue. It can be argued that the efforts highlighted in sub-paragraph F of the ICJ advisory opinion have not yielded significant results in the case of North Korea. This is primarily due to the fact that North Korea is not bound by any international treaty that explicitly prohibits it from developing nuclear weapons within its territory, and there is no established customary international rule specifically addressing this issue. As a result, the Court's efforts in promoting negotiation and diplomatic solutions have faced challenges in effectively addressing North Korea's nuclear program. As explained in the previous chapter, the Court's response reflected the weakness of the international legal system in addressing new security concerns. The Court attempted to a great extent to demonstrate this weakness and encouraged states to cooperate towards its resolution. The Court's emphasis should not be limited to negotiations surrounding nuclear disarmament under Article VI of the NPT. As I revisited the ICJ's advisory opinion, I believe it is crucial to consider sub-paragraph F within a broader framework. To bring about significant changes regarding the law on nuclear non-proliferation, it is necessary for states to go beyond mere negotiations within international treaties and instead emphasize their cooperation within a wider context. For instance, the collective efforts of states should be harnessed to establish peremptory norms that completely prohibit nuclear weapons. It is important to remember that the limitations of the state-centered approach in preventing the proliferation of nuclear weapons have resulted in certain states, like North Korea,

acquiring such weapons. While TPNW already prohibits nuclear weapons, it is essential to elevate this prohibition to the status of a *jus cogens* rule to enhance its universality and enforceability. This requires replacing the state-centered paradigm with a human-centered approach that prioritizes the protection of individuals' rights and interests, rather than solely focusing on states' right to survival. Given that fundamental changes, such as the emergence of peremptory rules in the realm of law, do not occur rapidly, and considering the seriousness of the nuclear proliferation issue and its imminent dangers, it is necessary for international law to effectively utilize the tools currently available to mitigate nuclear threats. Sanctions are currently the most effective tools in the hands of the Security Council, although their effectiveness may be dwindled through circumvention. Given the complexities surrounding North Korea's situation, it is crucial to show appropriate reaction to North Korea's evasion techniques. A significant disparity with Iran's behavior lies in North Korea's ability to withstand the pressure of sanctions through evasion techniques, which, in my opinion, is the primary reason why the intended pressure of the UN sanction's regimes for more than two decades could not be fully realized. Addressing the issue of North Korea's evasion requires the international community to focus on reducing the legal loopholes that enable such behavior. One approach to tackling these loopholes involves strengthening the uniform and consistent implementation of sanctions across states. It would be advantageous to explore the connection between North Korea's evasion of sanctions and the involvement of third countries in the following section.

V. DPRK's Evasion Techniques & Third States' Involvement

North Korea has not established itself as a free democratic state, despite the fact that it appears to be changing the fundamentals of its political system[645] in an effort to increase its global acceptance. It is an example of a totalitarian political system, where the government meddles in the personal lives of its citizens.[646] Since the state cracks down on anyone who disagrees with it and all civil and political liberties including freedom of expression, assembly, and association are suppressed, it appears difficult to fundamentally transform the North Korean Government through internal change.[647] North Korea's participation in international exchanges is crucial to resolving the country's human rights issues, according to the Special Rapporteur on the status of human rights in the country.[648] However, this engagement faces difficulties in practice. North Korea has consistently shown a long-standing determination to pursue its nuclear program, engaging in provocative actions that hinder productive negotiations. Despite multiple diplomatic efforts and offers of aid, North Korea has consistently displayed a lack of dedication to the process of denuclearization. Instead, it frequently has resorted to conducting nuclear and missile tests and using aggressive rhetoric. These actions not only undermine any

[645] See Andrew Scobell, *The Evolution Of North Korea's Political System And Pyongyang's Potential For Conflict Management*, 4(1) North Korean Review 91, 93 (2008), <https://www.jstor.org/stable/43908694>; It is argued that "totalitarianism in North Korea is fading, due to the deterioration of the central planning system". Benjamin K. Silberstein, *North Korea: Fading Totalitarianism In The 'Hermit Kingdom'*, 6(2) North Korean Review 40, 41 & 52 (2010), https://www.jstor.org/stable/pdf/43908811.pdf?refreqid=excelsior%3A6f00226d0adf47c3e7295fc506ce77e9andab_segments=andorigin=andinitiator=andacceptTC=1

[646] Han S. Park, *Juche' As Foreign Policy Constraint In North Korea*, 11(1) Asian Perspective 23 (1987), http://www.jstor.org/stable/42705279

[647] Kyu-chang Lee et al., *White Paper On Human Rights In North Korea 2020*, Korea Institute For National Unification 1, 18-20 (2021), https://www.kinu.or.kr/pyxis-api/1/digital-files/fccbf24a-5884-4ffb-8f95-86ceb4721a4e

[648] U.N. Doc., A/HRC/40/66 (May.30, 2019), at 4, ¶8.

progress in building trust but also diminish the credibility of negotiations. It is crucial to acknowledge that sanctions' complete enforcement by all states is vital to ensure their practical effectiveness. This guarantees that the sanctions imposed on North Korea yield tangible results as intended. Sanctions evasion by North Korea, however, presents a significant hurdle in this regard. North Korea has acquired knowledge in overcoming obstacles in its nuclear program and has become increasingly skilled at evading sanctions, especially through interactions with third entities in other countries. [649] North Korea's primary objective is to conceal any visible connections to it when engaging in international business endeavors. The country is aware that by obscuring its connections, it can evade scrutiny from relevant domestic and foreign authorities.[650] North Korea has employed diverse tactics for sanction evasion, as highlighted in numerous reports of the POE including its recent reports in March and September 2022. In the following, I will outline a few of these methods.

Some common ways of sanction evasion include ship-to-ship cargo transfers involving transfer of coal, refined oil, and other prohibited items, front or shell companies and illicit networks using false documentation or multiple intermediaries, cyberattacks targeting financial institutions to achieve monetary resources, etc.[651] According to the Panel, the use of cargo ship transfers within the territorial waters

[649] Paul Fraioli ed., *Strategic Comments: Russia And Sanctions Evasion*, 28(4) International Institute For Strategic Studies (2022),
<https://www.tandfonline.com/doi/full/10.1080/13567888.2022.2107283?scroll=topandneedAccess=trueandrole=tab>
[650] Andrea Berger, *North Korea: Design, Implementation And Evasion*, *in* ECONOMIC SANCTIONS IN INTERNATIONAL LAW AND PRACTICE 169 (MASAHIKO ASADA ED., 2020).
[651] See for example, U.N. Doc. S/2022/668 (Sep. 7, 2022); S/2022/132 (Mar.1, 2022); S/2021/777 (Sep.8, 2021) & S/2021/211 (Mar.4, 2021).

of North Korea has recently emerged as a new tactic to evade sanctions.[652] This particular method seems to be a direct response to factors that have shaped their decision-making process. For example, by conducting these transfers within the territorial waters, North Korea can effectively evade the surveillance of monitoring assets which enables it to operate with reduced risk of detection and intervention.[653] The Panel's monitoring efforts have focused on tracking the operations of specific vessels involved in oil transfers to North Korea, namely Sierra Leone's New Konk (International Maritime Organization (IMO) No. 9036387) and Unica (IMO No. 8514306).[654] These vessels are non-DPRK tankers that were previously engaged in delivering refined petroleum to DPRK ports before the onset of the Covid-19 pandemic. North Korea also continues to employ a multi-stage oil trans-shipment method to procure refined petroleum. This process involves several tankers that consistently utilize evasion tactics to avoid detection.[655] This methodology involves the utilization of various types of vessels, including motherships, intermediary tankers, and 'direct delivery' or DPRK-owned tankers. Notable locations where these vessels operate include China's Sansha Bay and Dongyin Island, Taiwan Strait, and North Korea's Exclusive Economic Zone (EEZ).[656] Among the identified vessels, Mongolia's Xiang Shun (IMO No. 9153800) and Palau's Hong Hu (IMO No. 9125293) were identified as motherships. In December 2021, they loaded refined petroleum cargo at Taiwan's Taichung port. Subsequently, they separately

[652] U.N. Doc., S/2022/668, at 36, ¶36.
[653] Id.
[654] Id., ¶37.
[655] U.N. Doc., S/RES/2397 (Dec.22, 2017), ¶5.
[656] U.N. Doc., S/2022/668 (Sep.7, 2022), at 43, ¶45

rendezvoused with the vessel Joffa (IMO No. 8513405), which was flagged under Sierra Leone at that time, in the Taiwan Strait.[657] The vessels New Konk and Unica, operating under fraudulent identities, were observed transmitting Automatic Identification system (AIS) signals in close proximity to these motherships before their AIS transmissions were intentionally ceased.[658] The Panel previously reported on the New Konk, which was involved in a ship-to-ship transfer with the Vifine (now known as North Korea flagged 'Un Hung').[659] The vessels had shared ownership and engaged in sanctions-related activities. The New Konk later delivered illicit cargo directly to Nampo in North Korea using different vessel identifiers on behalf of the F. Lonline. Investigations revealed a case of complex vessel identity laundering involving the Thailand-flagged Smooth Sea 3.[660] Similar entities and shipyards were also involved in the laundering of identities. However, they resumed AIS transmission when heading towards North Korea's EEZ before experiencing another period of interrupted transmission.[661] The Panel further looked into suspected evasion of sanctions involving Cheng Chiun Shipping Agency Co. Ltd., which is located in Kaohsiung, Taiwan Province of China. The company is reported to have been operating ships such as the Palau-flagged Sky Venus (IMO No. 9168257) and the previously Panama-flagged Sunward (IMO No. 8920115), which were involved in illicit ship-to-ship transfers of oil to tankers belonging to North Korea.[662] To

[657] Id.
[658] Id.
[659] U.N. Doc., S/2022/132, at 40, ¶45.
[660] Id.
[661] Id.
[662] Id., at 47, ¶64.

facilitate payments related to these transfers, Cheng Chiun Shipping Agency Co. Ltd. utilized a series of shell companies.[663]

North Korea employs front companies for sanctions evasion in diverse sectors for various purposes. For instance, the Panel reported that Pan Systems Pyongyang, operating under multiple front company names, procured military radio components from seven Chinese companies over the past few years.[664] In countries where North Korean nationality doesn't automatically raise suspicion within financial institutions, North Korean individuals can more easily open personal or corporate accounts with these institutions. These accounts are then utilized to facilitate the financial activities of a range of other North Korean companies.[665]

In addition to the strategies mentioned earlier, North Korea has also increased the frequency and sophistication of cyberattacks targeting cryptocurrency firms.[666] These attacks have made it increasingly difficult to trace the stolen funds. Compounding the issue is the absence of comprehensive global regulatory frameworks for cryptocurrencies, which exacerbates the situation. Furthermore, North Korean cyber actors are now leveraging Non-Fungible Tokens (NFTs) as a method to generate revenue and facilitate money laundering activities. Cryptocurrency analysts are concerned about the expanding use of NFTs by DPRK and have reported multiple incidents involving DPRK-generated NFTs in various locations since the end of 2021.[667] The Panel continued its examination of

[663] Id.
[664] U.N. Doc., S/2022/132, at 72, ¶138-138.
[665] Berger, supra note 650, at 170.
[666] U.N. Doc., S/2022/132, at 80, ¶182–184; U.N. Doc., S/2022/668, at 75, ¶146.
[667] U.N. Doc., S/2022/668, at 77, ¶151.

cyberattacks conducted by entities linked to the Reconnaissance General Bureau of the Democratic People's Republic of Korea. Prominent groups involved in these attacks include the Lazarus Group and Kimsuky. Throughout 2021, these North Korean cyber threat actors targeted various global organizations, including critical defense-related infrastructures, with the purpose of illicitly obtaining sensitive technology. Furthermore, the Panel also dedicated its efforts to gather information on cyberattacks aimed at the nuclear and defense sectors of the Republic of Korea. According to reports from cybersecurity firms and media outlets, a cyber threat group managed to breach the internal network of the Korea Atomic Energy Research Institute in May 2021. The attack was linked to Internet Protocol (IP) addresses connected to the attack infrastructure utilized by Kimsuky. It was further revealed to the Panel that the same group may have also attempted to hack into the virtual private network devices of Korea Aerospace Industries, aiming to obtain technological data from their internal network.[668] Based on the information provided to the Panel, Kimsuky demonstrated the capability to establish phishing infrastructure that replicated well-known websites and applications, such as Microsoft Outlook. This deceptive technique was designed to dupe unsuspecting individuals into divulging their login credentials by creating an illusion of interacting with legitimate platforms.[669] Cyber actors affiliated with Kimsuky have been observed employing fabricated email accounts that impersonate genuine individuals and entities from various countries, including the Republic of Korea, the US, and the Russian

[668] U.N. Doc., S/2022/132, at 74 & 75, ¶155.
[669] Id., ¶156.

Federation. These false email accounts are used as part of their cyber operations and deceptive tactics.[670]

Based on the reports from the Panel and analyses conducted by research institutes such as the Institute for Science and International Security, it has been alleged that from 2019 to 2020, a total of 62 countries have been implicated in violating UN sanctions on North Korea across various areas, including those related to the military sector. These allegations highlight the widespread nature of non-compliance with sanctions on North Korea by a significant number of countries.[671] The Institute mentioned above utilizes the Peddling Peril Index to continuously assess the effectiveness of countries' strategic trade control systems. According to the Index for the period of 2019-2020, it was found that out of the 62 countries implicated in violating UN sanctions on North Korea, only 30% of them possessed comprehensive export control legislations. This indicates that a significant majority of the countries involved lacked robust measures to effectively regulate and control their trade activities.[672] Apart from instances of sanction evasion, it is noteworthy that numerous states have failed to report their activities related to the enforcement of sanctions to the UNSC.[673] This lack of reporting indicates a significant gap in transparency and accountability among certain countries when it comes to fulfilling their obligations in implementing sanctions measures. Consequently, one could argue that there exists a profound fragmentation in the implementation of sanctions

[670] Id., ¶159.
[671] David Albright et al., *The Peddling Peril Index (Ppi) 2021/2022: Ranking National Strategic Trade Control Systems*, Institute For Science & International Security 1, 226 (2021), https://isisonline.org/uploads/isisreports/documents/ThePeddlingPerilIndex2021_POD_wCover.pdf
[672] Id., at 71-92 & 226-227.
[673] U.N. Doc., S/2022/132, at 81.

by third countries. The more fragmented the implementation, the weaker the impact of UN sanctions on the target state. This fragmentation undermines the collective pressure exerted by the international community and diminishes the effectiveness of the sanction's regime as a whole. The non-compliance of third countries with UN sanctions resolutions can be attributed to various reasons. Some countries may lack the political will to cooperate with the United Nations and adhere to the imposed sanctions. However, there are states that possess the political will but lack the necessary legal framework to effectively implement and enforce sanctions as discussed above regarding export control legislations. Regardless of the underlying reasons, it is crucial to recognize that successful implementation of sanctions relies on fostering the cooperation of states. This can be achieved by offering motivations and incentives for countries to actively participate in sanctions enforcement efforts. The active participation of states not only facilitates the implementation of sanctions but also contributes to achieving a collective understanding of the scope of those sanctions. It is well-known that sanctions resolutions are often adopted in language that can be ambiguous. As a result, the interpretation of these resolutions and the necessary recommendations in this regard are entrusted to subsidiary organs of the UNSC, particularly the POE. However, upon reviewing the reports of the Panel, it becomes apparent that the recommendations provided are sometimes unclear and do not effectively assist states in understanding the necessary measures to be adopted.[674] Furthermore, there are instances where the recommendations are directed towards specific groups of states, implying that not all UN member states are the addressees.

[674] Id., at 63, ¶86.

For example, recommendations may pertain to modifications required in the standards used by the IMO, thereby affecting only the member states of that organization.[675] It is important to highlight that not all states that submit reports on their enforcement of sanctions have effectively implemented them. As discussed in chapter 3, unilateral sanctions, especially when imposed collectively by third states, extend the scope of UN sanctions. This implies that the imposing country is reflecting its own individual interpretation of UN sanctions rather than a globally shared perspective.[676] This observation emphasizes the need for consistent and coordinated efforts among all states to ensure the proper implementation of UN sanctions. It is crucial for countries to align their actions with the agreed-upon international stance, rather than solely relying on their individual interpretations of sanctions measures. This collective approach will help maintain a unified front and enhance the effectiveness of the sanction's regime.

Although there are situations where certain countries may not fully demonstrate their political commitment to cooperation with the UNSC, the level of their collaboration varies across different areas of sanctions. It is clear that the private sector often plays a significant role in instances of evading sanctions, although the public sector may also be involved to some degree. Nevertheless, accurately determining the precise extent of the public sector's involvement and providing solid evidence can be a challenging task. For example, the Panel investigated North

[675] U.N. Doc., S/2022/668, at 63.
[676] In this regard, for example, the panel emphasized that: "Member States consider updating their export control lists to reflect their lists of prohibited luxury goods in a manner consistent with the objectives of Security Council resolutions…, but avoiding unnecessary broadening of their scope in order not to restrict the supply of unprohibited goods to the civilian population or have a negative humanitarian impact once trade restarts." U.N. Doc., S/2022/668, at 73, ¶149.

Korea's nationals working abroad (overseas workers) in 2021. These nationals were employed in different regions, including Africa (Algeria, Equatorial Guinea, Cambodia, Congo, Côte d'Ivoire, and Togo), Asia (China, Lao People's Democratic Republic and Vietnam), the Middle East (United Arab Emirates), and the Russian Federation. [677] They were engaged in various industries such as IT, medical cooperation, construction, and catering, which violates paragraph 8 of Security Council resolution 2397 (2017). [678] Typically, Member States have responded to the Panel by either asserting that they have no records of hiring North Korean workers or by denying any involvement in employing workers from overseas.[679] Furthermore, there have been notable instances of governmental responses to sanctions evasions including Chinese legal proceedings that involve the sentencing of individuals engaged in the illegal importation of coal originating from the DPRK. [680]

Upon reviewing the Panel reports, it becomes apparent that the reports do not explicitly assign responsibility for sanctions violations to specific states. Rather, violations are attributed to countries, which suggests that the involvement of the private sector is significant in the majority of cases involving sanction evasion. Accordingly, although China has been alleged to be involved in a significant number of North Korean sanction evasion cases, the Chinese government does not outright oppose the imposition of sanctions. [681] In fact, China itself has adopted unilateral

[677] U.N. Doc., S/2022/132, at 73, ¶132.
[678] Id.
[679] Id., at 73-75.
[680] Id., at 64-96.
[681] David Albright et al., *Alleged Sanctions Violations Of UNSC Resolutions On North Korea For 2019/2020: The Number Is Increasing*, Institute For Science & International Security (Jul.1, 2020), https://isisonline.org/uploads/isisreports/documents/North_Korea_PoE_sanctions_analysis_report_July_1_Final.pdf

sanctions targeting North Korea's nuclear program and has supported the maximum pressure campaign led by the Trump administration. [682] The extent of the responsibility of China as a state(not a country) for violations in North Korean sanction evasion cases is not explicitly clear to the Panel. This highlights the importance of engaging all states including China in a concerted cooperation with the UN if appropriate frameworks and motivations are established. By directly involving states in the implementation of sanctions and increasing the likelihood of holding them directly responsible for violations, there will be a greater chance of fostering their cooperation with the UN. Hence, it is feasible to garner the cooperation of the major part of the international community in implementing sanctions.

In the preceding chapter, I propose how the UN system, through certain amendments to its Charter, can incentivize states to establish a more effective and comprehensive monitoring system on sanctions enforcement against North Korea, while curtailing avenues for evasion.

[682] See Myong-hyun Go, *Not Under Pressure-Hoe Pressure Leaked Out Of North Korea's Sanctions*, The Asian Institute For Policy Studies 1 (2020), http://en.asaninst.org/contents/not-under-pressure-how-pressure-fizzled-out-of-north-koreasanctions/

Summary Of The Chapter

This chapter primarily focused on comparing the UN sanctions imposed on North Korea and Iran, highlighting both their similarities and differences. It also assessed the effectiveness of these sanctions in pressuring the two countries to engage in nuclear negotiations. Iran responded to the pressure of sanctions by engaging in serious nuclear negotiations. However, North Korea, in contrast, failed to demonstrate a genuine commitment to abide by the UN sanctions and instead evaded their impact through sanction evasion techniques.

In the final section of this chapter, the issue of sanction evasion was examined, particularly how third-party entities in other countries facilitate this problem. Sanction evasion poses a significant challenge to the successful implementation of UN sanctions against North Korea. Drawing upon the insights gained in Chapter 5, Chapter 6 will delve into potential solutions for addressing the issue of sanction evasion. These solutions encompass enhancing international cooperation, strengthening enforcement mechanisms, and targeting the third-party entities involved in facilitating sanction evasion. I believe that implementing these suggestions would significantly enhance the effectiveness of UN sanctions against North Korea. Furthermore, Chapter 6 proposes a potential solution by directly involving third-party states to close off escape routes. The chapter will outline how delegating authority to other UN organs, such as the GA, can foster improved coordination and effectiveness in exerting pressure on the targeted state.

Chapter Six: Concluding Remarks

The present thesis focused on examining the negative impacts of unilateral sanctions and sanctions evasion by target states along with third countries on the successful implementation of UN sanctions. To ensure objectivity in the research, I conducted a detailed comparative analysis of two case studies (North Korea and Iran's nuclear cases). These cases were selected due to their importance in relation to international peace and security, as well as their potential influence on the collective security system of the UN. Nuclear weapons are recognized as the deadliest and most dangerous weapons today, posing a threat not only to regional but also to global peace and security. Consequently, studies on international law concerning the proliferation of nuclear weapons remain prominent even after more than half a century since the emergence of nuclear weapons. In response to the nuclear crisis, the international community has implemented various measures aimed at resolving the issue, including the adoption of General Assembly resolutions, statements, and bilateral or multilateral treaties. While these measures have had some impact in slowing down nuclear proliferation and reducing its extensive scope, an examination of the historical path taken by countries like North Korea, which have pursued nuclear ambitions, reveals that the aforementioned actions have not been entirely successful in fully resolving the nuclear crisis. As a result, the international community recognized the necessity of imposing sanction resolutions on such countries to slow down their proliferation process.

The comparative analysis of two nuclear cases was aimed at gaining a deeper understanding of the challenges presented by the nuclear crisis to the international

community. The nuclear cases of North Korea and Iran share certain similarities in their nuclearization processes, yet they also exhibit significant differences that resulted in distinct outcomes. The case of Iran highlights a strong willingness to participate in nuclear negotiations, leading to the historic Iran Nuclear Deal (JCPOA), where Iran agreed to allow international supervision of its nuclear program in exchange for the lifting of international sanctions. On the other hand, despite engaging in long-standing negotiations with the West as expounded in chapter two, North Korea did not achieve a similar agreement. There are various factors contributing to these disparities. For instance, Iran's integration into the global economy played a crucial role, compelling the country to show greater willingness to engage in nuclear talks compared to North Korea. These realities emphasize the complexity and nuance inherent in nuclear talks, where economic considerations intertwine to shape the outcomes of negotiations. Understanding these intricacies is vital for crafting effective and sustainable solutions to global nuclear proliferation challenges in the future. These contrasting situations sparked the fundamental and initial question in the present thesis: Can it be asserted that UN sanctions achieved success in the case of Iran but encountered failure in the case of North Korea? What factors can have destructive impact on the successful implementation of UN sanctions? I sought to investigate the specific challenge(s) associated with implementing sanctions that were unique to the North Korean case, setting it apart from the situation in Iran. Upon reviewing a significant portion of the existing research on sanctions, I found that the legal literature primarily focuses on identifying the success or failure of UN sanctions within the sanctions regimes themselves. The legal literature basically explores whether the sanction regimes are

designed in such a way as to be capable of exerting effective pressure on the sanctioned state, thereby motivating it to re-engage in negotiations and resume its international legal obligations. What distinguishes this study from the existing legal literature is that I believe that the question posed above is not sufficiently comprehensive to assess the success or failure of UN sanctions regimes in the cases of North Korea and Iran. In this study, I have made a clear distinction between the design stage, on one hand, and the implementation stage of sanctions, on the other hand, in order to examine their success. Based on past experiences with sanctions on Iraq, former Yugoslavia, and Haiti, as well as the introduction of 'smart sanctions' as a new generation of UN sanctions, the assumption in the thesis is that UN sanctions generally are designed in such a way as to operate effectively and successfully. This is due in part to regular reviews of these sanctions, which involve assessing their strengths and weaknesses and implementing necessary adjustments. However, the full realization of their potential impact in the implementation phase can negatively be influenced by various factors independent from their design stage. Chapter 3 and 5 highlighted two main factors: unilateral sanctions imposed on the initiative of individual states, as well as the actions taken by the target and third countries to evade sanctions. These factors as observed in the case studies proved to have negative impacts on the potential success of UN sanctions. The research emphasized the significance of evaluating the success of sanctions regimes from two key perspectives: i) safeguarding the human rights of the population in the target country, and ii) imposing sufficient pressure on the target state. It is crucial to take both these aspects into account when determining the success of a sanction's regime.

Merely achieving positive behavioral changes in the target state is not tantamount to the success of the sanctions regimes if human rights are severely violated.

In Chapter 3, I analyzed how the expansion of UN sanctions' scope through the unilateral regimes of the US and the EU had humanitarian implications in the nuclear cases of North Korea and Iran. The conclusion drawn was that while UN smart sanctions alone had the potential to prevent humanitarian violations, their simultaneous implementation alongside unilateral sanctioning measures significantly weakened the target countries' economic foundations. Consequently, the burden of UN sanctions was felt disproportionately by the population. To effectively safeguard human rights through UN smart sanctions, it is crucial for the Security Council to assess the vulnerabilities of the sanctioned country in an objective way and take appropriate actions tailored to its specific circumstances. However, unilateral sanctions which involve national security of the imposing states as described earlier, disrupt this delicate balance, give subjective assessments and hamper the potential of UN sanctions to protect human rights. Chapter 3 also raised the question of whether states have the authority to enforce unilateral sanction regimes, in the absence of UN sanctions or as supplementary measures to existing UN sanctions. While there is no general prohibition on individual states adopting unilateral measures, their legality must be carefully examined from various perspectives. The answer to the foregoing question depends on whether we regard unilateral measures as 'sanctions' in its strict legal term or as 'countermeasures' under Article 54 of the Draft Articles on States' Responsibility (2001). Based on Articles 24 and 25 of the UN Charter, the authority to determine when threats or

violations against international peace and security occur lies exclusively with the Security Council. Although the Security Council faces challenges in adopting sanctions, they should be addressed through a UN Charter amendment. Thus, they do not provide legal basis for individual states to go beyond UN sanctions and adopt their own unilateral sanctions regimes. So, I am of the view that the term 'sanction' is specific to the measures taken by the Security Council. Unilateral sanction regimes disrupt the international legal order and undermine the centralized approach sought by the UN system. Additionally, they may hinder trust-building and peaceful conflict resolution efforts, potentially escalating security situations. Consequently, the study suggested distinguishing between UN sanctions responding to threats or violations of international peace and security and third-party countermeasures taken by individual states in response to breaches of legal obligations erga omnes (other than threats or violations of international peace and security). Based on the foregoing, I argued that the unilateral regimes of the US and the EU, which targeted North Korea and Iran's nuclear programs as a response to the violation of international peace and security, are criticized for undermining the Security Council's primacy in adopting sanctions. Even if considered as countermeasures under the Draft Articles (2001), these unilateral regimes must fulfill legal requirements to be considered lawful. Obligations erga omnes, such as the preservation of human rights and humanitarian concerns, should not be compromised by countermeasures. However, the unilateral sanctions of the US and the EU in the present study proved to exacerbate humanitarian damages and imposed unnecessary pressure on target countries, violating the principles of proportionality and necessity.

Another factor that was discussed in chapter 5 and found to have a negative impact on the success of the UN sanctions' regime was the issue of sanctions evasion. Chapter 5 specifically explored this aspect, highlighting the significance of third-party actors in other countries and the willingness of states to cooperate with the UN in enforcing sanctions. It is important to note that studying states' cooperation with the UN in this context presents complexities within international law due to the combined legal and political dimensions involved. The involvement of non-governmental and private entities, alongside states, in the implementation process creates challenges in accurately assessing the extent of states' political will. This challenge is evident in the reports produced by the subsidiary organs of the Security Council including the POE. Although it can be alleged that a specific country has violated the sanctions, it cannot be argued definitely that a specific state is responsible for the violation of sanctions on North Korea. As discussed in Chapter 5, the reports produced by the subsidiary organs of the Security Council do not provide definitive and conclusive evidence to establish deliberate violations of UN sanctions by states. A significant portion of these reports relies on allegations put forward by third states, and in many instances, third states failed to provide sufficient explanations so that the POE could establish the international responsibility of the suspect states. In this intricate scenario, accurately gauging the level of political will among states becomes problematic. The international legal system is fundamentally based on the principle of state's consent. Thus, it cannot compel states to cooperate with the UN and adhere to its directives. In this context, by identifying the main problems encountered in the implementation of sanctions against North Korea (here sanction evasion), international law can only address challenges where the element

of political will is less involved. While a significant portion of the difficulties in implementing sanctions could be attributed to states' lack of political will, it is undeniable that some of these challenges arise from the fragmented execution of sanctions by different states. One area where international law can provide a solution is addressing the weakness in the global monitoring system among countries. Despite notable advancements in the form of smart sanctions, the UN sanctions' regimes continue to pose specific complexities in terms of interpretation and understanding the appropriate measures to be adopted. Individual Member States could interpret the UNSC's resolutions differently. States' courts, as well as legal consultants in public and private firms, may also intervene to interpret. Moreover, legal frameworks differ among countries, with some possessing robust export control legislation while others may lack such regulations. This fragmentation creates legal loopholes that allow third countries to operate in a manner that provides escape routes for the sanctioned state. The fragmentation referred to can result in certain activities being excluded from the scope of sanctioning measures, even though they should actually be included. In such a scenario, the crucial factor for exerting adequate pressure on the target state lies in enhancing consistency in Member States' practice. Without a proper understanding of the precise boundaries of sanctions, states lack comprehension of the necessary legal frameworks for enforcing sanctions. The absence of these legal frameworks leads to insufficient monitoring of the activities of various entities[683] within a state's jurisdiction. As a result, these entities

[683] For the latest list of entities involved in sanction circumvention in the North Korean case, see the report of the panel of experts at: https://www.securitycouncilreport.org/un_documents_type/sanctions-committee-documents/?ctype=DPRK%20%28North%20Korea%29&cbtype=dprk-north-korea

can establish covert relationships with the sanctioned state, further undermining the effectiveness of the UN sanctions regimes.

I believe that relying solely on the authority of the Security Council, as well as its subsidiary organs, is not adequate for ensuring the effective monitoring of sanctions and shutting down escape routes for North Korea. The existing challenges necessitate fundamental changes within the UN system to enable it to effectively respond to emerging issues. The Council's subsidiary organs work behind closed doors,[684] the records of the Sanction Committees are marked '*restricted*', and most importantly, the members of the Committees and the POE are Security Council members—usually not lawyers—who can be prone to convey unilateral positions while interpreting the sanctions.[685] Furthermore, the implementation of sanctions can become even more complicated and ambiguous,[686] especially when they are followed by the subsidiary organs' recommendation. The language used in these recommendations lack clarity, which pose challenges for the Member States in comprehending and effectively executing the suggested measures. For example, according to the POE, "maritime authorities of Member States [should] be aware of the deceptive practice of [North Korea] of reconfiguring its cargo ships to carry refined petroleum and conduct the necessary ship inspections when [its] cargo ships call at their ports. Relevant maritime actors should also take appropriate preventive

[684] The necessity to work in more transparency by the Committees was declared in these terms: "Encouraging the subsidiary bodies to enhance the transparency of their activities, including by providing non-members of the Council with substantive interactive briefings". U.N. Doc., S/2013/515 (Aug.28, 2013).
[685] See Michael C. Wood, *The Interpretation Of Security Council Resolutions*, *in* MAX PLANCK YEARBOOK OF UNITED NATIONS LAW ONLINE 2.1.73, 81-84(1998); Helmut Freudenschuss, *Article 39 Of The UN Charter Revisited: Threats To The Peace And The Recent Practice Of The UN Security Council*, 46 Austrian Journal Of Public International Law 1(1993).
[686] See Portela, supra note 176, at 29.

measures to guard against potential illicit oil procurement in such a manner."[687] This recommendation could indeed be more specific about what appropriate measures are and who are relevant maritime actors. The lack of clear and unambiguous language creates confusion and uncertainty among states regarding the exact actions they need to take. This ambiguity leads to inconsistencies in the implementation of sanctions, as different interpretations may arise.

Having addressed the foregoing issue, taking further steps to tackle sanctions evasion facilitated by third parties is equally essential. This involves exploring ways to foster coordinated cooperation among states. Instead of relying solely on its own subsidiary organs, the Security Council should assign the task of interpretation to the legal bodies with the UN system, thereby providing clarity on the meaning and extent of sanctions measures to be adopted. This approach guarantees that interpretations are grounded in the principles and norms of international law rather than being swayed by political considerations. The discussions made in the legal bodies may encompass various methods and means of legal support, such as offering technical aid and facilitating information exchange to prevent sanctions evasion through modern approaches. Furthermore, the bodies can identify specific cases where humanitarian exceptions should be applied. This approach has a significant advantage as it reduces legal obstacles, making it harder for countries to use excuses for non-cooperation with the UN. If legal hindrances to sanction enforcement are eliminated, and yet sanctions are still not effectively enforced in a particular country, there would be sufficient legal grounds to hold that state responsible under

[687] U.N Doc., S/2022/668, at 63, ¶86.

international law. Through the implementation of this solution, the Security Council would be better equipped to identify states that lack the required good faith and political will to cooperate. Consequently, non-cooperative states could face direct adoption of Security Council resolutions against them and potential pressure through mechanisms such as naming and shaming.[688] Holding states responsible for their non-compliance can serve as a deterrent and promote adherence to sanctions obligations within the international community.

While achieving such transformations within the UN system along with politically complex realities might seem challenging, it must be noted that as long as the UN system fails to bring about fundamental changes in this regard, the problems faced by the UN sanctions regime, particularly in terms of evasion, will continue to persist. Unless the UN system is transformed, the UN smart sanction regimes cannot fully achieve the intended results originally envisioned when they were designed.

[688] For more information about the role of naming and shaming, see Wendy H. Qingli & Haridas Ramasamy, *Naming And Shaming China*, 42 Contemporary South East Asia 317, (2020), https://www.jstor.org/stable/26996199; Martha Finnemore & Duncan B. Hollis, *Beyond Naming And Shaming: Accusations And International Law In Cybersecurity*, 31(3) European Journal Of International Law 969 (2020), https://doi.org/10.1093/ejil/chaa056

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Appendix 1

UNSC Sanctions On DPRK

UN Sanctions Resolution	***Trigger***	***Date of Resolution***	***Sanctioning Measures***
Resolution 1718	*Nuclear test on October 2006*	*14 October 2006*	*Imposition of an arms embargo, assets freeze and travel ban on persons involved in the DPRK's nuclear program,* *A ban on a range of imports and exports, to prohibit the DPRK from conducting nuclear tests or launching ballistic missiles.*
Resolution 1874	*Nuclear test on 25 May 2009*	*12 June 2009*	*Expanding measures related to arms' exports and imports to all arms and related material (except import of small arms and light weapons and their related materiel)* *Calling upon Member States to prevent provision of financial services or transfer of financial resources that could contribute to prohibited programs or activities.* *States to report on inspections, seizures and disposals, as well as the sale, supply or transfer of small arms or light weapons, among others.* *Establishing a Panel of Experts, consisting of seven members to assist the 1718 Committee.*
Resolution 2087	*Ballistic missile launch on 12 December 2012*	*22 January 2013*	*Expanding measures related to Member States' rights to seize and destroy material suspected of being connected to the DPRK's weapons development or research;* *Expanding measures imposed on persons suspected of involvement with the DPRK's nuclear program.* *Clarifying methods of material disposal and measures related to the catch-all provision.* *Designating four individuals and 6 entities* *expanding designation criteria to include entities/individuals that have assisted in the evasion of sanctions or in violation of the resolutions.*
Resolution 2094	*Nuclear test on 12 February 2013*	*7 March 2013*	*Imposing sanctions on money transfers with the aim of shutting North Korea out of the international financial system.*
Resolution 2270	*Nuclear test on 6 January 2016*	*2 March 2016*	*Banning North Korea's exports of gold, vanadium, titanium, rare earth metals, coal and iron.*
Re0olution 2321	*Nuclear test on 9 September 2016*	*30 November 2016*	*Capping North Korea's coal exports; and banning its exports of copper, nickel, zinc, and silver.*
Resolution 2371	*Ballistic missile launches on 3 and 28 July 2017*	*5 August 2017*	*Banning North Korea's exports of coal, iron, lead, and seafood; imposing new restrictions on North Korea's Foreign Trade Bank; and prohibiting any increase in the number of North Koreans working abroad.*

Resolution 2375	*Nuclear test on 2 September 2017*	*11 September 2017*	*Limiting North Korea's imports of crude oil and refined petroleum product; banning joint ventures, North Korea's textile exports, natural gas condensate and liquid imports; and banning North Korean nationals from working abroad.*
Resolution 2397	*Ballistic missile launch on 28 November 2017*	*22 December 2017*	*Limiting North Korea's imports of crude oil and refined petroleum product;* *banning North Korea's exports of food and agricultural products, machinery and electrical equipment;* *calling for repatriation of all North Korean nationals earning income abroad within 24 months;* *authorizing member states to seize and inspect any vessel in their territorial waters found to be illicitly providing oil or other prohibited products to North Korea.*

Source: Security Council Report,
https://www.securitycouncilreport.org/un-documents/dprk-north-korea/

논문 요약

북한과 이란의 핵 프로그램에 대한 제재의 법적 분석: 비교적 및 비판적 관점

이름: Arefeh Rastgooafkham*
국제법
법과대학
서울대학교

제2차 세계 대전을 예방하지 못한 국제연맹의 실패한 계기로, 1945년에 국제평화와 국제안보 유지를 목적으로 유엔(UN)이 설립되었다. 그러나 그 이후 냉전으로 인하여 특히 한반도에서 중대한 국제안보 위기가 생겼다. 1950년에 반발한 한국 전쟁은 북한의 생존에 대한 우려를 불러일으켰다. 게다가 한반도 지역에 미국의 핵무기가 존재하는 것으로 북한이 핵 프로그램을 추진하도록 동기를 부여하는 데 중요한 역할을 했다. 북한의 핵실험에 대한 대응으로 유엔 안전보장 이사회(안보리)의 제재를 받았음에도 불구하고 북한의 핵 프로그램은 여전히 발전하고 있다. 이에 비해 유엔 안전보장 이사회(안보리)에서 동시에 다루어진 이란 핵문제는 다른 결과를 가져왔다. 핵 프로그램에 대한 국제사회의 비난과 제재에 직면한 이란은 협상에 참여하였고, 결국 2015년 이란 핵 협정을 채택하게 되었다. 이러한 극명한 대조는 유엔 제재 체제가 북한 사례에서 유사한 결과를 도출하는 데 법적 장애물이 있는지 의문을 제기한다. 또한 유엔이 북한에 가한 제재가 실패한 경험으로 간주 될 수 있는지에 대한 의문을 제기하고 있다.

제재의 효과와 성공을 고려할 때, 설계(design)와 실행(implementation) 단계

* 본 논문작성자는 한국정부초청장학금(Global Korea Scholarship)을 지원받은 장학생임.

를 구분하는 것이 중요하다. 본 논문의 초점은 실행 단계에서 발생하는 법적 문제가 있다. 이와 관련하여 두 가지 측면에서 제재의 성공에 대한 부정적인 영향을 미치는 요소를 분석하고자 한다: i) 대상국의 인도적 권리 보장, ii) 대상국가에 충분한 압력을 가하는것, 본 연구는 국제법 연구 분야의 관련성을 고려하여 i) 일방적 제재, ii) 제재된 국가에 의한 제재 회피, iii) 제3국의 의한 제재 회피 세 가지 요소에 중점을 둘 것이다. 헌법, 정치 또는 국제관계 연구와 관련된 다른 요소들은 자세히 다루지 않고, 3장에서 간단하게 소개될 것이다. 국제평화와 안보 위반에 대응으로 개별 국가들의 단독 제재의 합법성을 분석한 이후, 이러한 단독 제재들이 국제법상으로 합법적인 대응 조치(countermeasures)로 간주될 수 있는지에 대한 논의가 주목될 것이다. 본 논문의 주요 주장은 미국과 유럽 연합이 북한과 이란과 관련하여 시행한 일방적인 제재가 합법적인 대응 조치로 간주될 수 있는지 필수적인 법적 기준을 충족하지 못했다는 점이다. 이 주장은 이러한 일방적 제재들이 제 3국가들이 안보리의 제재를 완전히 준수하는 것부터 방향을 돌려 제재된 국가의 인구에 해로운 인도주의적 영향을 초래한다고 가정한다. 다음으로 제재된 국가에 적용되는 압력의 크기를 자세히 살펴보고 이러한 압력을 줄이기 위한 제재 회피 기술의 영향을 평가한다. 대상 국가가 스스로 제재를 우회할 수 없으며, 이를 돕기 위해 제3국가들이 대상 국가에게 제재 회피를 위한 탈출로를 제공하는 방식을 살펴본다. 북한의 핵 프로그램의 지속적인 진전과 국제 압력에 대한 저항은 UNSC 결의를 준수하기를 원하지 않는 의지를 보여준다. 북한은 더 이상 핵확산방지조약(NPT)의 회원국이 아니기 때문에 NPT에 기술된 것 이외 국제법상의 다른 법적 규정을 위반했는지 여부를 검토 하는 것이 필수적이다. 이 검토에는 유엔 제재를 채택하는데 충분한 근거와 이유를 확립하는데 중요하다고 본다. 따라서 1996년 핵무기 위협 또는 사용의 적법성에 관한 국제사법재판소(ICJ) 권고적 의견을 통해 북한의 핵 활동에 대한 포괄적인 분석이 필요하다.

본 논문은 특히 제재된 국가의 인구에게 인도적 고통을 줄 수 있는 경제제재

에 초점을 맞추고 있다. 본 논문은 일방적인 제재의 맥락에서 미국과 유럽연합이 취한 경제적 조치를 검토한다. 미국과 유럽 연합은 국제무역에 상당한 영향력을 가지고 있는 중요한 경제 시스템이 있기 때문에, 그들의 경제 조치는 다른 국가들이 가하는 제재와 비교하여 보다 넓은 영향을 미칠 것으로 예상된다.

논문은 앞서 언급한 내용을 바탕으로 다양한 부분으로 구성되어 있다. 제1장에서는 논문에 대한 소개가 제공되며, 또한 구조, 연구 목표, 중요성, 법률 문헌 등 개요로 설명된다. 제2장에서는 북한과 이란의 핵 프로그램의 역사적 연구를 수행하여, 그들의 핵 프로그램의 역사적 절차에서의 유사점과 차이점을 살펴본다. 제3장은 개별 국가의 일방적인 제재의 합법성을 검토 하고 그들이 유엔 제재에 미치는 부정적인 영향을 인도주의적 측면에서 검토한다. 제4장에서는 북한의 핵 활동을 법적으로 평가하기 위한 ICJ의 권고적 의견을 분석하며, 제3장과 제5장 사이의 연결고리 역할을 한다. 제5장에서는 제재된 국가에 대한 제재의 압력과 제재에대한 회피 기술을 살펴본다. 더 나아가 제3국가들이 이러한 회피 활동을 용이하게 하거나 참여하는 정도로 검토 될 것이다. 마지막 제6장에서는 북한의 유엔 제재 이행 문제를 강조하며 이러한 영향을 최대한 완화할 수 있는 해결책을 결론으로 제시하다. 제안은 유엔 시스템 안에 법적 기관들이 제재의 해석에 관한 의사 결정 과정에서 적극적으로 참여하는 것으로 강조된다. 제안의 주요 목표는 제재의 범위와 정확한 영향을 더 잘 이해하여 회원국가간의 조화된 시행을 촉진하는 것이다. 이를 통해 대상 국가가 제재의 영향을 회피하기 위해 이용할 수 있는 법적 허점이나 불일치를 크게 감소시키는 것을 목표로 한다.

주용어: 경제제재, 일방적 제제, 유엔 안전보장 이사회(안보리), 핵 프로그램, 안보위기, 인도적 지원 면제, 제재 회피, 비확산법

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