Legality of Economic Sanctions as a Means of International Obligations Enforcement

by Nihreieva Olena

Abstract: *La legalità delle sanzioni economiche come mezzo per far rispettare gli obblighi internazionali* - In the article the sanctions applied against Russia in response to the war of aggression against Ukraine is considered through the prism of general international law, international economic and international human rights law. Consequently, several important characteristics of sanctions, among which are their purposes, legal nature and types, are studied with regard to the issue of their legality. The ways in which the latter can be challenged are described. The role of the main judicial organs used for this purpose is investigated as well. Particular attention is paid to the practice of the WTO Dispute Settlement Body and the Court of Justice of the EU that recently have presented new significant developments that sanctioning states and organizations should take into account.

Keywords: Economic sanctions; Enforcement; International obligations; Russia-Ukraine war; Legality.

1. Introduction

It is well known that international law was conceived as a horizontal system with no structured enforcement mechanism. In fact, being similar to civil law, public international law has given to its subjects, who are sovereign and, thus, equal states, a power to apply self-help measures in the case of their rights being violated by other states. In this context sanctions[1] and other restrictive measures have always played an important role.

Interestingly, the 432 BC decree of Athenian leader, Pericles, is referred to as the first case of sanctions imposition that took place against another Greek polis, Megara, in response to its territorial expansion[2]. Restrictive measures were often used in later times. Their institutionalization took place in the Covenant of the League of Nations[3], whose foundation represented an endeavor of the international community

[1] The term "sanctions", in the broadest meaning, is used in relation to different restrictive measures: economic, diplomatic, and military ones. In the present publication it will be applied exclusively regarding economic measures.

[2] B. Carter, *Economic Sanctions*, in *Max Planck Encyclopedia of Public International Law*, April 2011, para. 7.

[3] D. Nutt, *Economic Sanctions Evolved into Tool of Modern War*, in *Cornell Chronicle*, 11 January 2022, available at: https://news.cornell.edu/stories/2022/01/economic-sanctions-evolved-tool-modern-war

DPCE online
ISSN: 2037-6677

to prevent further world wars. In this regard sanctions became a supplement to the use of armed force, which remained an allowed and broadly applied tool of national policy till its final prohibition by the UN Charter in 1945. From that moment the practice of sanctions application has been rapidly growing to such an extent that for now some scholars have been speaking about the "weaponization" of international trade[4] and economic sanctions[5] or even mentioning them as a tool of modern war[6].

The sanctions extensive application is explained by the fact that many states consider them to be lawful measures that can be imposed in compliance with modern international law. Obviously, nowadays they play a significant role in the present Russia-Ukraine war as a tool for Russia's deterrence from an aggressive invasion of Ukraine.

At the same time sanctions are highly criticized by many states, especially from the so-called Global South that consider their application to be haphazard and harmful[7]. In addition, their lawfulness is often challenged from several legal perspectives that potentially can lead to interstate disputes or judicial human rights review cases. However, there are several approaches that can be used to justify sanctions imposition within the international legal framework.

One can find numerous studies dedicated to the issue of sanctions application that expose and develop different lines of reasoning about the legality of restrictive measures and their possible justification in international law[8]. Consequently, this publication aims at providing a brief overview of approaches elaborated in legal science and practice structuring them. Having done it, the author will try to consider the lawfulness of the sanctions imposed on the Russian Federation from 2022 through the prism of a provided framework.

Thus, Chapter 2 of the paper will be dedicated to the presentation of several important characteristics of sanctions needed for a deeper

[4] Y.-S. Lee, *Weaponizing International Trade in Political Disputes: Issues under International Economic Law and Systemic Risks*, in 56 *Journal of World Trade* 3, 405-428 (2022).

[5] T. Ruys, C. Ryngaert, *Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions*, in *British Yearbook of International Law*, 2020, available at: www.bybil.oxfordjournals.org

[6] D. Nutt, *cit.*

[7] N. Iftikhar, M. Rizvi, *Charting Sanctions: Legality, Efficacy and Impact*, in *Research Society of International Law blogs*, 6 April 2022, available at: https://rsilpak.org/2022/charting-sanctions-legality-efficacy-and-impact/

[8] Among recent ones, see I. Bogdanova, *Unilateral Sanctions in International Law and the Enforcement of Human Rights: The Impact of the Principle of Common Concern of Humankind*, Leiden, Boston, 2022; C. Martin, *Economic Sanctions under International Law: A Guide for Canadian Policy*, in *SSRN Electronic Journal*, 2021, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3973142; B. Firrincieli, *La crisi Russia-Ucraina: misure restrittive e panorama sanzionatorio*, in *Giurisprudenza penale web*, 4, 2022, available at: https://www.giurisprudenzapenale.com/wp-content/uploads/2022/04/firrincieli_gp_2022_4.pdf; M. Sossai, *Sanctioning Russia: Questions on the Legality and the Legitimacy of the Measures Imposed Against the Invasion of Ukraine*, in *Roma Tre Law Review*, 8, 2022, 157; N. Zelyova, *Restrictive Measures – Sanctions Compliance, Implementation and Judicial Review Challenges in the Common Foreign and Security Policy of the European Union*, in *European Research Area Forum*, 22, 2021, 159–181, etc.

understanding of their legality, such as purposes, terminology, legal nature, definitions and types. Chapter 3 will explore possible lines of reasoning that can challenge or instead prove sanctions legality both under general international law and *lex specialis*, making emphasis on the so-called "gray zone" that embraces measures whose legality raises doubts. In Chapter 4 the sanctions regimes introduced against the Russian Federation will be briefly analyzed in the context of the above general legal framework. The final part of the article contains concluding remarks.

2.Mapping the Field

In this chapter we are going to stop only at some main characteristics of sanctions that are important for our research. In fact, restrictive measures are heterogeneous in their legal nature and, consequently, in their regime under international law. Due to the fact there is no single treaty or other binding legal act that would provide a congruent regulation, even definitions and terminology used in this sphere of legal knowledge are diverse. Regarding the latter, several terms are used: from "sanctions"[9], which are the most broadly mentioned, to "unilateral coercive measures"[10], which hint at a negative connotation of the measures under consideration. In national law the terms "special measures" or "restrictive measures" can also be met[11].

Regarding the notion of these measures, the same broad palette of definitions based on sanctions objectives, their author's identity or types of applied measures[12] is present both in legal acts and scientific publications. Mostly it is due to a heterogeneous understanding of the very nature and scope of measures that are imposed under the term of sanctions. In fact, according to a narrow approach the term "sanctions" is related only to state countermeasures or exclusively to measures taken within the framework of international organizations, e.g., the UN Security Council (hereinafter – UNSC) sanctions[13]. In its wide sense it embraces all coercive measures taken by states or other international law subjects[14]. It's important to take it into

[9] The term "sanctions" is used both at the international level in discourse of international organizations, e.g. within the UN system, and at the national level, e.g. it is mentioned in the legislation of the US, Australia, New Zealand, Ukraine, etc.
[10] Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights, Human Rights Council, UN Doc. A/HRC/30/45, 2015.
[11] The term "special economic measures" is applied in Canada. In the EU the term "restrictive measures" is used in parallel with the term "sanctions". For more denominations see M. 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*, in *British Yearbook of International Law*, 77 (1), 2006, 333–418.
[12] T. Ruys, *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, in Larissa van den Herik (ed.), *Research Handbook on UN Sanctions and International Law*, 2017, 19.
[13] A. Pellet, A. Miron, *Sanctions*, in *Max Planck Encyclopedia of Public International Law*, 2013, available at: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e984.
[14] *Ibid.*

DPCE online
ISSN: 2037-6677

account when we speak about the legality of sanctions, because the sanctions defined in a narrow sense raise less questions about their consistency with international law than a wide diversity of measures covered by the broad definition.

Another difference between the above concepts, which is significant in terms of their legality, lies within the purposes of sanctions application. While the UN sanctions are conceived to maintain or restore international peace and security, restrictive measures in their broad definition are used for a wider spectrum of objectives: from human rights protection, terrorism and corruption suppression to a general purpose of international law enforcement. In addition, sometimes legal definitions include results expected from sanctions impositions, among which changes in internal policy of targeted states[15]. It is worth mentioning that whereas the maintenance of peace and security according to the UN Charter is a completely legal goal, the achievement of changes in state internal policies at first glance goes contrary to one of the fundamental principles of international law, the principle of non-intervention in a state's internal affairs, which is established by Art. 2(7) of the UN Charter. So, in order not to be considered internationally unlawful such measures should be justified by other norms of international law to which we turn in the next section.

Finally, for the analysis of sanctions legality it is very important to distinguish between their types. Sanctions can be classified by many criteria, among which their nature/character (financial prohibitions, travel restrictions etc.), targeting subjects (states, international organizations), targeted subjects (states, governments, entities, groups, organizations, individuals), scope of action within targeted states (full/comprehensive sanctions, sectoral sanctions, targeted/individual/ smart sanctions), etc. Within the sanctions categories identified on the base of a targeting subject, we distinguish multilateral sanctions, which are imposed by decisions of international organizations, unilateral (or autonomous) sanctions, which are imposed by single states on their own initiative, and hybrid/mixed sanctions, which are primarily introduced by decisions of an international organization (e.g., the UNSC) and after are implemented or incremented by a state sanction regime. Within the group of unilateral sanctions measures imposed by an injured state and by a non-injured state (so-called third-state sanctions[16]) are to be differentiated as well. In terms of their legality, for sure, multilateral sanctions raise less doubts, whereas autonomous sanctions, especially third-state sanctions, and hybrid ones, when they exceed the scope of sanctions previously imposed by organizations[17], are

[15] For example, as defined on the official site of the Council of the EU, sanctions are an essential tool of the EU's Common Foreign and Security Policy that seek to bring about a change in the policy or conduct of those targeted, with a view to promoting the objectives of the EU policy. See in *How and When the EU Adopts Sanctions*, the official site of the European Council, Council of the EU, available at: https://www.consilium.europa.eu/en/policies/sanctions/.

[16] Sometimes they are also called third-party countermeasures, solidarity measures or countermeasures in the collective interest. For more see in I. Bogdanova, *op.cit.*, 65.

[17] For example, the EU can impose the so-called mixed sanction regime to reinforce UN sanctions by applying measures in addition to those imposed by the UNSC. See in

more questionable. According to the criterion of targeted subjects or, it might be better to say, subjects embraced by a sanctions regime, they individuate primary sanctions, which prohibit or limit economic transactions between a targeting state (including its economic agents) and a targeted state (including its economic agents), and secondary sanctions, which are applied to relations between a targeted state (including its economic agents) and a third state (including its economic agents), which is not directly covered by primary sanctions. The last group of sanctions due to its obvious extraterritorial effect is potentially suspect under international law[18]. Other categories and characteristics of sanctions are definitely worth more attention, but given a limited scope of our research, for the moment we prefer to turn to the issue of sanctions legality.

3. Sanctions Legality through the Prism of International Law

In this paper we will base on the broad definition of sanctions that embraces not only measures taken by international organizations, but autonomous sanctions as well, first of all, because in the current situation sanctions imposed on Russia are of this kind. Indeed, in the situation where the UNSC is blocked by Russia's veto, states have no choice, but to resort to unilateral coercive actions, which mostly have an economic nature. Even though the restrictive measures of the EU are in fact imposed by the international organization, given that they are applied against a non-member-state, they can be considered within the group of unilateral/autonomous measures.

Exploring the sanctions legality landscape, we begin with less contradictory ones. The sanctions imposed by the UNSC resolutions are of this kind. In fact, their legal base consists of Art. 25, 39, 41 of the UN Charter[19], which make them mandatory for all the UN member-states.

But even these sanctions have limitations in terms of human rights protection. The problem emerged when numerous decisions imposing sanctions on natural persons regarding their alleged participation in terrorist activities were adopted. Being imposed according to the resolutions of the UNSC these sanctions did not display an institutional mechanism of their revision, which, consequently, could result in suspected persons delisting. Only in 2009 the UNSC created the office of an independent Ombudsperson to assist Sanctions Committees in considering delisting requests[20] in order to provide better procedural guarantees for people requiring to be removed from the UN's terrorist list. In parallel the European Court of Justice (hereinafter – CJEU) took a decision in the famous

Different Types of Sanctions, the official site of the European Council, Council of the EU, available at: https://www.consilium.europa.eu/en/policies/sanctions/different-types/

[18] T. Ruys, *op.cit.*, 27.

[19] Art. 41 of the UN Charter: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations".

[20] UN Security Council Res. 1904 (2009), par. 20.

DPCE online
ISSN: 2037-6677

Kadi case I[21] in which the EU Council regulations blacklisting Mr. Kadi and others and freezing their assets based on the UNSC decision regarding their possible involvement in terrorist activities were reviewed under the EU human rights standards and as a result annulled[22]. Such an approach has been supported by further General Court and CJEU decisions, in particular, in another case relating to the situation in Ukraine, the so-called *Azarov case*[23].

The type of sanctions whose legality raises almost no questions is the sanctions applied by international organizations against their member-states according to institutional treaties. In fact, in this case the lawfulness of imposed measures emanates from states' consent expressed by them through the accession to a treaty. At the same time, sanctions of international organizations, e.g. the EU, against non-member-states do not fall in this category and raise the same questions about their legality as unilateral sanctions.

Moving to the latter, amidst the group of unilateral sanctions two different categories of measures should be distinguished: measures having character of retorsions and measures having character of countermeasures. Being in fact a response to actions of another state, these sanctions are very different because the former are a response to an unfriendly, but lawful behavior, while the latter constitute a response to an unlawful act of another state. Accordingly, retorsions are lawful actions, but countermeasures would be unlawful if they were not a reaction to an unlawful act of another state. Thus, measures that can be considered as retorsions are lawful *per se*. At the

[21] CJEU, C-402/05P & C-415/05P, *Kadi and Al Barakaat v. Council* [2008] ECR I-6351 (Kadi I); CJEU, T-85/09, *Kadi v Commission* [2010] ECR II-5177 (Kadi II).

[22] In this case sanctions judicial revision was asked under the pretext of the violation of claimants' rights to property, the right to be heard and judicial redress. The plaintiff was forced to refer to the CJEU, exactly because of the impossibility of appealing to the UN Sanctions Committee directly, as it does not accept direct representations from individuals. Moreover, Mr.Kadi did not receive access to all evidence, besides the summary, giving reasons to accuse him of terrorism, which was considered by him and correspondingly by the court to be a violation of his fundamental rights under European human rights law, e.g. the EU Charter of Fundamental Rights.

[23] Mykola Azarov is a former prime minister of Ukraine, who held office from 2010 to 2014. After the change of government and his escape from Ukraine in March 2014 the EU blacklisted him, imposed on him a travel ban and froze his assets. It was done in relation to criminal charges he has been facing in Ukraine over the misappropriation of public funds under the pro-Russian presidency of Viktor Yanukovych. He appealed to the General Court of the EU. Due to the fact that the investigation wasn't finished at the moment of sanctions imposition, the court decided to annul assets freezing, since "a person cannot be treated as being responsible for misappropriation of funds solely on the ground that he is the subject of a preliminary investigation in a third country, without the Council being aware of the matters alleged against that person in that investigation" (General Court of the EU Press Release n. 7/16 of 28 January 2016). After several legal procedures Azarov was finally delisted in the EU by the decision of the General Court of the EU in 2019 (ECLI:EU:T:2018:931), first, because his procedural rights were violated, second, because the investigation in Ukraine had not been finished yet and the court concluded that the applicant's right to a decision within reasonable time was a fundamental component of a right to an effective judicial procedure (see more N. Zelyova, *op.cit.*, 175). As of 2023 Azarov's case has never been brought before a Ukrainian court.

same time, measures presented by a state or an international organization as countermeasures are illegal by their nature. So, in order to be justified a targeting state should prove that they are a response to an unlawful act of a targeted state. Moreover, in accordance with the Draft Articles on State Responsibility for Internationally Unlawful Acts adopted by the International Law Commission in 2001, to be justified countermeasures should correspond to a range of material and procedural conditions[24].

If a unilateral restrictive measure cannot be justified under the aforementioned pretexts, the doubtfulness of its legality grows due to the fact that it can be perceived, e.g., as a violation of the principle of non-intervention in the domestic affairs of states. Really, many states interpret such sanctions as an expression of economic force and pretend that such interventions are to be limited according to Art. 2(7) of the UN Charter. At the same time, it is not clear which measures constitute interventions and which ones are mere interference not reaching the threshold of the principle's violation[25].

Moreover, even if a sanction is qualified as an unlawful measure under general international law, it still can be justified by recourse to a *lex specialis*, first of all, international trade law. In fact, while the WTO law prohibits different types of restrictive trade measures, it contains the so-called exceptions under which some of such measures can be still considered as consistent with the GATT, GATS and other WTO agreements. In the case of the General Agreement on Tariffs and Trade (hereinafter – GATT), Art. XX and XXI are often referred to with such a purpose. Art. XXI of the GATT[26] is of utmost importance due to the fact that till recently its provisions were estimated as self-judging and non-justiciable[27]. It means that states supposed that they could impose measures considered by them to be necessary in the context of, e.g., emergency in international relations, to protect their essential security interests and the Dispute Settlement Body (hereinafter – the DSB) of the WTO couldn't assess and contest their

[24] Material conditions are proportionality, unilaterality, reversibility, non-forcible character, non-violation of several groups of obligations, among which the obligation to refrain from threat or use of force; obligations regarding fundamental human rights protection; obligations of a humanitarian character prohibiting reprisals; other obligations under peremptory norms of general international law. There are some procedural conditions that should be met, like time limits, notifications, justiciability, etc. For more see Art. 49–54 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001.

[25] For more see C. Martin, *op.cit.*, 22-23.

[26] Art. XXI of the GATT "Security Exceptions": "Nothing in this Agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations; or (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security".

[27] A. Mitchell, *Sanctions and the World Trade Organization*, in Larissa van den Herik (ed.), *Research Handbook on UN Sanctions and International Law*, Leiden, 2017, 292.

DPCE online
ISSN: 2037-6677

application. Meanwhile, in 2019 the situation changed drastically when in *Russia – Traffic in Transit* case the DSB panel for the first time in the history of the GATT not only used, but interpreted the provisions of Art. XXI in such a way that its construction can be seen as significantly limiting state discretion in their application[28]. This approach was supported and the interpretation of the DSB was detailed and consolidated in the panel report in *Saudi Arabia – Intellectual Property Rights* in 2020[29]. Hence, the possibility of justifying trade measures against another WTO member state under Art. XXI of the GATT and analogous articles of other WTO agreements[30] has been decreasing, but these articles still can be used for this purpose, in particular, in the context of the sanctions imposed on the Russian Federation to which we will turn in the next section.

It can be supposed that a restrictive interpretation of the above article is among the reasons that explain the US decision to block the Appellate Body of the DSB[31]. Interestingly, in this context the EU adopted a regulation allowing it to impose sanctions that are in fact countermeasures against states that avoid the fulfillment of the WTO panel reports or blocking them appealing "in the void"[32]. Another reason to adopt the regulation was an improvement of compliance with other EU international trade agreements, regional and bilateral agreements included, in the situations where other parties to such agreements try to avoid dispute settlement cooperation by, e.g., non-appointing an arbitrator. In the situation of the WTO dispute settlement blockage the possibility of recourse to alternative dispute settlement mechanisms is increasing which makes their enforcement mechanisms more important.

In this connection the question about the consistency of countermeasures that are imposed to enforce other than WTO obligations with WTO rules arises. It seems that a negative answer was given by the

[28] For more see P. Crivelli, M. Pinchis-Paulsen, *Separating the Political and the Economic: the Russia – Traffic in Transit Panel Report*, in *World Trade Review*, 2021, 1–24, available at: https://ssrn.com/abstract=3760680; V. Lapa, *The WTO Panel Report in Russia – Traffic in Transit: Cutting the Gordian Knot of the GATT Security Exception?*, in *Questions of International Law Zoom-in*, 69, 2020, 5–27; L. Magi, *The Effect of the WTO Dispute Settlement Crisis on the Development of Case Law on National Security Exceptions: a Critical Scenario*, in *Questions of International Law Zoom-in*, 69, 2020, 29–47, etc.

[29] *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights*, Report of the Panel of 16 June 2020, WT/DS567/R.

[30] Art. XIV of the General Agreement on Trade in Services (GATS) and Art. 73 of the Agreement on Trade- Related Aspects of Intellectual Property Rights (TRIPS Agreement).

[31] In 2019 the US suspended the work of the Appeal Body of the DSB by its policy to hold up adjudicators appointments. In order to give a way to the consideration of pending and new cases in March 2020, the EU and 15 other WTO members agreed to a *Multiparty Interim Appeal Arbitration Arrangement* to which as of June 2023 53 of 164 WTO members are parties. For more see MPIA, official website, available at https://wtoplurilaterals.info/plural_initiative/the-mpia/.

[32] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) n. 654/2014 of the European Parliament and of the Council concerning the exercise of the Union's rights for the application and enforcement of international trade rules, COM (2019) 623 final, 12 December 2019.

Appellate Body in *Mexico – Soft Drinks* (2006)[33]. At the same time a contrary position can be met according to which trade countermeasures for breaches of non-WTO law, if they are subject to WTO adjudication and customary international law requirements, may support multilateral obligations outside the WTO[34].

Turning to the measures of the "gray zone", i.e., those whose legality is highly doubtful, third-state and secondary sanctions should be mentioned. The former can't be easily justified due to the absence of a clear link between the targeting and the targeted state, because the first one is not an injured state. Consequently, targeted states pretend that such measures violate the principle of non-intervention. Secondary sanctions are even more controversial[35] because states that apply them have no obvious jurisdiction over companies and individuals of other (non-targeted) states, which would allow them to impose penalties in the case of violations of their sanctions' regimes against targeted states. So, such measures are considered to have the so-called extraterritorial effect or to be a manifestation of extraterritorial jurisdiction. Mostly sanctioning states don't use secondary sanctions[36]. Instead, the US secondary sanctions are well-known because of their effectiveness to combat sanctions evasion. It is out of the scope of the present publication to explore this issue, but it is to be said that the US has a special argument that lets it justify secondary sanctions imposition. In fact, the major part of world financial transactions is processed through the American bank system or are paid in American dollars, which allows the US to pretend that it has a jurisdiction over them[37]. Other states that don't have such an advantage should be very careful if they decide to apply secondary sanctions.

Thus, many autonomous sanctions applied by non-injured states are doubtful in the regard of their legality. Meanwhile, being applied in the cases of aggression, serious human rights violations, such measures may be

[33] *Mexico – Tax Measures on Soft Drinks and Other Beverages*, Appellate Body Report of 24 March 2006, WT/DS308/AB/R.
[34] D. Azaria, *Trade Countermeasures for Breaches of International Law outside the WTO*, in 71 *Int'l & Comp. L.Q.* 2, 395 (2022).
[35] For a detailed analysis of the legality of secondary sanctions see T. Ruys, C. Ryngaert, *op.cit.*
[36] The EU, Canada, and Ukraine don't apply secondary sanctions yet, even though the proposal to include into the 11th package of the EU sanctions against Russia restrictive measures against states that help the latter evade the European sanctions regime has been accepted. In this package approved on 23 June 2023 the adoption of two kinds of secondary sanctions is envisaged: individual ones that are described as a "rapid, proportionate and targeted action" against third-country operators and "last resort measures" against a third-state in the case of a "substantial and systemic" circumvention of EU sanctions by its economic operators (*EU adopts 11th Package of Sanctions against Russia for Its Continued Illegal War against Ukraine*, European Commission, Press Release of 23 June 2023, available at: https://www.consilium.europa.eu/en/press/press-releases/2023/06/23/russia-s-war-of-aggression-against-ukraine-eu-adopts-11th-package-of-economic-and-individual-sanctions/). See more in J. Barigazzi, B. Moens, L. Kijewski, *Sanctions-Busting States Could Be Next in Brussels' Crosshairs*, in *Politico*, 28 April 2023, available at: https://www.politico.eu/article/russia-sanctions-circumvention-eu-mulls-sanctioning-third-countries/
[37] C. Martin, *op.cit*, 26.

DPCE online
ISSN: 2037-6677

considered through the prism of the enforcement of obligations *erga omnes*[38]. Being *per se* controversial, these obligations could provide an explanation of third-state sanctions against states that commit serious breaches of the peremptory norms of international law and other obligations of this kind.

4. Sanctions against the Russian Federation: a Brief Analysis of Lawfulness

The Russian invasion of Ukraine has been answered with an unprecedented quantity of sanctions against Russia, its government, legal and natural persons related to it, which were imposed by several states and the EU. The limited scope of this paper doesn't allow us to describe the full sanctions panorama. Obviously, the analysis of their legality can be carried out only on the case-by-case basis, because all sanctions characteristics mentioned in Chapter 2 should be taken into consideration against the background of a targeting subject, its national legislation and international legal framework under which it is connected with a targeted state. Thus, if we consider the sanctions against Russia, first of all, it is to say that unfortunately they are not approved by the decision of the UNSC[39]. Consequently, their legality must still be justified by other legal reasons.

If we consider the sanctions applied by Ukraine as a directly injured state, it is highly probable to suppose that they can be fully covered by the concept of countermeasures, even though it should still be analyzed whether all material and procedural conditions of their application are met. At the same time, the scale and aggressiveness of invasion by themself constitute an obvious proof of the proportionality of measures adopted by Ukraine. Anyway, they can still be challenged through the prism of human rights procedural guarantees, since some provisions of the Law of Ukraine "On Sanctions" pose questions[40].

If we proceed with the consideration of the EU sanctions packages, their legality raises more doubts, first of all, because they can be categorized as "third"[41] supranational organization's autonomous measures. Many of them have a very trade restrictive character, therefore it is possible that they can be challenged by Russia within the WTO framework. It is worth saying that in spring 2022 the Russian parliament considered the possibility of withdrawing from the WTO, but in the very end it was stated that Russia

[38] *Ivi*, 39; M. Buccarella, A. Ligustro, *L'Organizzazione Mondiale del Commercio (OMC) condanna i dazi di Trump su acciaio e alluminio, ma Biden condanna l'OMC*, in *Diritto publico comparato ed europeo online*, 1/2023, 1534 ss., available at: https://www.dpceonline.it/index.php/dpceonline/article/view/1862.

[39] Some suggest to justify sanctions by the resolutions of the UN General Assembly, but this proposal has no legal basis in the UN Charter. For more see A. Mitchell, *op. cit.*, 289-290; L. Gruszczynski, M. Menkes, *Legality of the EU Trade Sanctions Imposed on the Russian Federation under WTO Law*, in W. Czaplinski et al. (eds.), *The Case of Crimea's Annexation under International Law*, Warsaw, 2017, available at: https://ssrn.com/abstract=3098744246.

[40] For more see O. Nihreieva, *Sanctions as a Tool to Achieve Compliance with International Law: Some Issues of National Implementation and Enforcement*, in *Odesa National University Herald, Series: Jurisprudence*, 1/2023, 32–38.

[41] In the meaning that Russia is not a member of the EU.

was not going to leave this organization since it would be "a gift for enemies"[42], in particular because of losing the opportunity of challenging foreign sanctions in the DSB. Even though for the moment the WTO DSB is paralyzed, in the future it can be used by Russia with this purpose. If it happens, supposedly the EU sanctions can be justified under Art. XXI of the GATT due to the fact that the current military aggression against Ukraine constitutes an emergency in international relations for the EU[43], mostly, because of the geographical proximity of the full-scale international armed conflict to the EU border[44].

On the other hand, it is less probable that such an explanation can be used, for example, by the US for its sanctions' justification. At the same time the US has more legal arguments that could help to establish its jurisdiction to apply sanctions against targeted subjects due to its bank system and currency involvement into international economic transactions. Nevertheless, such arguments should be analyzed carefully for each individual case of sanctions impositions. Moreover, even the case of *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, which has been under consideration of the International Court of Justice (hereinafter – ICJ) since 2018, shows that targeted states can find more legal basis to contest sanctions against them, stemming, e.g., from bilateral friendship, commerce, navigation treaties. Particular attention should also be paid to state obligations under international investment and financial agreements.

Obviously, both the EU and US restrictive measures can be challenged under human rights standards in their internal courts that in the case of the EU often gives reasons to review sanctions imposition in favor of complainants or to stop their listing[45].

5. Concluding remarks

[42] *The Ministry of Foreign Affairs Called Russia's Withdrawal from the WTO "a Gift for Enemies"* (in Russian), in *RBC*, 15 February 2023, available at: https://www.rbc.ru/politics/15/02/2023/63ed046a9a79479be9740b65?from=article_body

[43] M. Sossai, *op.cit.*, 163; L. Gruszczynski, M. Menkes, *op.cit.*, 255.

[44] The condition of emergency is an element of Art. XXI that was recognized by the DSB in the recent cases cited above as an objective element that can be established within the proceedings. It means states claiming that their restrictive measures were applied according to Art. XXI (b) (III) should prove that they really have an emergency in international relations. Even though this term is not fully defined, the DSB practice shows that as an emergency can be considered (i) "armed conflict", (ii) "latent armed conflict", (iii) "heightened tension or crisis", or (iv) "general instability engulfing or surrounding a state" (*Russia – Measures Concerning Traffic in Transit*, Panel Report of 5 April 2019, para 7.76). The closer to the border of a targeting state they take place, the easier it would be for it to show the existence of an emergency in its international relations (L. Gruszczynski, M. Menkes, *op.cit.*, 254).

[45] Recently the EU has excluded three important Russian businessmen close to Putin's regime from sanctions list. For more see *EU Removes Three Russian Business Leaders from Sanctions List*, in *Reuters*, 14 September 2023, available at: https://www.reuters.com/world/europe/eu-removes-three-russian-business-leaders-sanctions-list-2023-09-14/.

DPCE online
ISSN: 2037-6677

Nowadays in the context of increasing violations of international law, sanctions have become a tool or a weapon to restore international legality and maintain international peace and security. Despite that, their legality raises questions that can be answered only through the case-by-case analysis, because every targeting subject has its own specific legislation and international legal interaction with targeted subjects that can condition lawfulness of imposed restrictive measures. Even in the case of such a serious breach of international law as the Russian invasion of Ukraine, the legality of sanctions applied by different states can vary significantly.

As the research has shown, different types of sanctions can be considered as lawful with a higher or a lower probability and, consequently, can be challenged through two distinct channels, namely from the perspectives of international and national law. In this connection, states should be very careful both establishing them in national legal acts and applying them to targeted subjects. Taking into consideration the prospect of international law, sanctions legality can be addressed through international judicial (the ICJ, the European Court of Human Rights and the CJEU), quasi-judicial (the WTO DSB) and arbitration organs by states, individuals and in particular cases by other targeted subjects. Against the background of national law, sanctions regimes can be objected to through national courts in the cases of fundamental human rights violations and procedural issues relating to measures imposition[46]. Thus, applying sanctions targeting subjects should pay special attention not only to their interstate obligations, but to the human rights framework as well.

Olena Nihreieva
Odesa I. I. Mechnikov National University
nihreieva@onu.edu.ua

[46] N. Zelyova, *op.cit.*, 161.