The Impact of Sanctions upon Civil Aviation Safety

By

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To the loving memory of my father, Abbas

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to my mother, Zinat

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my wife, Niloofar,

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my children, Salar and Saman

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Abstract

Located between diplomacy and military action on a scale of intervention, economic sanctions are assumed to be an effective tool to influence global politics. However, assessments of the success of economic sanctions generally indicate that, in most cases, they fail to bring about the desired outcome. Rather, economic sanctions usually hit the wrong targets with innocent civilians often paying the price instead of the ruling elites and their collaborators.

Among sectors targeted by economic sanctions, measures taken against civil aviation may place people, airlines, and cities inside and outside the sanctioned country at risk, and consequently may have ramifications on a global basis. In other words, the coercive embargo of sales of commercial aircraft and parts against a target State constitutes a danger to public safety not only to the territory and citizens of that State, but also to other States over which the target State's aircraft fly, including, in some instances, sanctioning States. Hence, the implications for civil aviation safety must be seen as a matter of global concern.

From different views and perspectives, this thesis reviews the rationales, objectives and outcomes of the employment of economic sanctions, and will specifically study the consequences of sanctions against civil aviation. However, the overarching objective of this thesis is to examine the legitimacy and subsequent effect, within the normative system of international law, of the imposition of safety-threatening sanctions against international civil aviation, a unique sector which by its very definition crosses State borders.

Résumé

Sur l'échelle des interventions, à mi-chemin entre diplomatie et action militaire, les sanctions économiques peuvent être un outil efficace pour influencer la politique internationale. Cependant, les évaluations du succès des sanctions économiques montrent que, dans la plupart des cas, elles ne parviennent pas à atteindre le but souhaité. Au contraire, les sanctions économiques affectent généralement les mauvaises cibles ; les civils innocents payent souvent le prix, à la place des dirigeants et de leurs collaborateurs.

Parmi les secteurs visés par les sanctions économiques, les mesures prises à l'encontre de l'aviation civile peuvent représenter un risque, pour les personnes, lignes aériennes et villes, à l'intérieur ou à l'extérieur du pays sanctionné, et ainsi avoir des ramifications au plan international. En d'autres termes, l'embargo coercitif sur les ventes d'aéronefs et de pièces détachées, à l'encontre d'un État déterminé, constitue un danger en matière de sécurité publique, non seulement sur le territoire et pour les citoyens de cet État, mais également pour les autres États au dessus desquels les aéronefs de l'État ciblé volent, y compris dans certains cas, les États à l'initiative des sanctions. C'est pour cette raison, que les conséquences pour la sécurité de l'aviation civile, doivent être envisagées de manière globale.

Par divers angles et perspectives, ce mémoire étudiera les raisonnements, objectifs et résultats, de l'usage des sanctions économiques, et plus précisément, les conséquences de ces sanctions sur l'aviation civile. Toutefois, l'objectif ultime de cette étude est d'examiner la légitimité et les effets substantiels – dans le cadre du système normatif du droit international – de l'imposition de sanctions menaçant la sécurité de l'aviation civile

internationale, un secteur unique, qui de par son caractère intrinsèque, dépasse les frontières des États.

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Introduction:

Over recent centuries, given the improvement of destructive weapons, the international community has been witness to several catastrophic events both in war and in the use of military force in settling disputes between States. The passage of time has persuaded States to look for amicable substitutes for inhuman actions against each other.

In the immediate aftermath of World War I, the freedom for sovereign States to pursue their aims by means of war as the ultimate instrument of national policy was limited. The international community took a new approach to international relations by establishing international organizations and supporting multilateral treaties in accord with their collective will to prevent wars and substitute peaceful means for use of force. In all areas of human life, from environmental protection and human rights to taxation and corporate investment, international laws and treaties have been formed, and subsequently, the relevant international organizations have acquired existence and personality, rights and duties. By joining these international organizations and treaties, States, with different power and influence at the global stage, agree to take all measures to act in compliance with the peace-seeking spirit of the treaties and to behave within the relevant framework. Although most States usually comply with their international legal obligations, the basic criticism of these international agreements is their limitations with respect to enforcement. Louis Henkin[1] expresses his concern by pointing out that "[a]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time".[2] The desire for superiority or even protection of

[1] Former President of the American Society of International Law (1992-1994)
[2] Louis Henkin, *How Nations Behave,* 2d ed. (New York: Columbia University Press, 1979) at 47.

narrow self-interest in political disputes between States sometimes leads States to forget their individual and collective obligations under international law and even their general ethical humanitarian obligations. Disburdening the international obligations, due to their predominant position, global powers have developed a sense of "exceptionalism". As a case in point, Madeleine Albright[3] introduces the US as the "indispensible nation" in her famous statement as: "[A]nd what we are doing is serving the role of the indispensible nation to see what we can do to make the world safer for our children and grandchildren and for those people around the world who follow the rules".[4] This is the argument of Godfrey Hodgson who proclaims that "[i]t is dangerous, for oneself and for others, to create a myth that seems to justify, even demand, domination, whether it is called empire or not".[5]

In the present global unipolarity - or the absence of a balance of power -,[6] the most powerful global actors should resist the temptation to dominate, and look with a sceptical and humble eye at the many and subtle dangers of self- glorification. Such an approach would help the international community to create a climate of global peace, and would even prevents mistrust and misunderstanding between nations as well as any perceived threat against public order in the international arena. In this regard, the Preamble to the United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States provides that, "[t]he subjection of peoples to

[3] The United States Secretary of State (In office: January 23, 1997 – January 20, 2001)
[4] Remarks by the US Secretary of State Madeleine K. Albright (18 February 1998) at Town Hall Meeting on Iraq, Ohio State University, Columbus, Ohio.
[5] Godfrey Hodgson, *The Myth of American Exceptionalism* (Michigan: Yale University Press, 2009) at xvii.
[6] On the notion of the "balance of power", see e.g. Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 3d ed. (New York: Columbia University Press, 2002) at 97.

alien subjugation, domination, and exploitation constitutes a major obstacle to the promotion of international peace and security...".[7]

Moreover, the world community, in accordance with the Charter of the United Nations (UN), underscores the foundational principle of non-intervention by stipulating that "[N]o State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind".[8]

In the first section of this paper, it will be demonstrated that the responses of less-developed and vulnerable States to the dominant States' objective of global economic empire could endanger global peace.

It is the premise of this paper that justice and equal treatment at the global level and global peace are two sides of the same coin. In this regard, Mohammad Khatami[9] is of the view that "[I]n today's global circumstances, unilateral policies and unjust double standards in tackling global issues and resorting to force to resolve such issues will only bear a misunderstanding, violence and a lack of security. One should rise to those (policies) that will lead to extremism and violence".[10]

[7] *United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States*, GA Res. 2625(XXV), UNGAOR, (1970) 121 at 122.
[8] *Ibid.* at 123.
[9] Former President of Iran (In office: August 1997 – August 2005)
[10] Mohammad Khatami, Address to the Sarajevo Inter Cultural Conference (Sarajevo University, Bosnia & Herzegovina, 21 October 2010)

Refraining from a policy of "double standards"[11] on the international stage, along with the adoption of more consistent foreign policy by all governments worldwide would better provide a fair opportunity for all States to develop socially, economically and politically; and ultimately serve common interests at the international level. Put simply, if the needs of the international community for justice, peace and development, which rest upon a foundation of equality of nations, prevail over narrow national interests, the world will be a less confused and therefore more secure place. By criticizing the supremacy of "national interest" and of the prevalent inequality in international relations, Professor Hans Köchler[12] has the following viewpoint on the issue:

> In this sense, a power-centered system of international relations that is perpetuated, first and foremost, by the era's global powers constitutes the most serious threat to international security. Ironically, the United Nations Charter entrusts those very actors with the principal responsibility for international peace and security. The world organization is indeed caught in a "fox-in-the-henhouse" dilemma. Unless this structural problem is addressed and the veto privilege in the UN Charter is abolished, all proclamations of a just new world order will be mere lip service.[13]

Seen from this perspective, in times of hegemony, and in absence of sovereign equality in the international relations, some dominant States, inattentive to their international obligations, may choose coercive measures such as imposing economic sanctions as a response to real, perceived or presumed threats to their national interest.

[11] A set of principles permitting greater opportunity or liberty to one than to another.

[12] Professor of Philosophy with special emphasis on Political Philosophy and Philosophical Anthropology at the University of Innsbruck, Austria. His publication list contains more than 400 books, reports and scholarly articles in several languages (Albanian, Arabic, Armenian, Chinese, English, French, German, Italian, Japanese, Korean, Persian, Spanish, Serbo-Croat, Turkish)

[13] Hans Köchler, "The Politics of Global Powers" at 41, online: HANS KÖCHLER <http://www.hanskoechler.com/Koechler-Politics_of_Global_Powers-YILJ-2009-I.pdf>.

Outwardly, these sanctions are intended to punish other States in order to force them to change their alleged outlawed behaviour, but inwardly, to attempt to achieve a variety of political objectives.

The unilateral sanctions imposed by the United States (US) against Cuba would be a case in point. Since 1992, the United Nations General Assembly has annually passed a Resolution concerning "the need to put an end to the economic, commercial, and financial embargo imposed by the US against Cuba" by an overwhelming majority of votes.[14] Despite the concerns of the international community and the adoption of 19 consecutive yearly resolutions calling for an end to the embargo, the US continues to promulgate and apply such sanctions.

In this regard, Nico Krich[15] has distinguished between international law and international politics by expressing that "international law is widely assumed to depend on a balance of power and to be eschewed by hegemons in favour of political tools. This corresponds to an often idealized contrast between international law and international politics, one reflecting reason and justice, the other brute power".[16]

[14] At the last session of the UN General Assembly on Oct. 26, 2010, a Resolution calling on the United States to immediately end its decades-long trade embargo against Cuba passed with 187 votes in favour and 2 votes against, with 3 abstentions. It was the 19th consecutive year that the General Assembly has adopted a Resolution condemning the Cuba trade embargo by an overwhelming majority of votes. See *Necessity of Ending the Economic, Commercial and Financial embargo imposed by the United States of America against Cuba,* GA Res.65/6, UNGAOR, UN Doc. A/65/L.3 (2010)

[15] Lecturer in Law at London School of Economics and Political Science, where he primarily teaches public international law; prior to his appointment, he was a Junior Research Fellow at Merton College, Oxford, a Hauser Research Scholar at New York University Law School, and a Research Fellow at the Max Planck Institute for Comparative Public and International Law in Heidelberg, Germany.

[16] Nico Krisch, "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order" (2005) 16:3 E.J.I.L. 369 at 369 [*Nico Krisch*].

Concerning the use of economic sanction in international relations, in Oscar Schachter's view, the issue arises when "an otherwise permissible action is taken for an illegal objective".[17] Seen from this perspective, he argues:

> ... a State discontinuing trade with an offending country but imposing as a condition for resumption of such trade change in the internal or foreign policy of the target State. In that case, an otherwise discretionary act, the retorsion, is used as a means of coercing the object of that retorsion to give up its sovereign right, quite apart from the alleged violation of law that gave rise to the retorsion. There is good reason to consider such use of retorsion as illegal because of its improper objective. One may characterize it as an abuse of rights, but it is more precise to refer to a primary rule that precludes such coercion. The rule is expressed in the unanimously agreed Declaration of Principles of International Law Concerning Friendly Relations (adopted by the United Nations General Assembly in 1970).[18]

From another perspective, the question arises of whether some world economic powers are trying to establish a global economic system of domination, and are aspiring to rule others by superior force. For example, with regard to the "global sheriff"[19] role that the US has sometimes fostered for itself, and the US interests in preservation of the current global distribution of political and economic power, Godfrey Hodgson is of the view that:

> Over the course of the twentieth century the United States acquired incontestable military and economic superiority over its former rivals, the European powers and Japan. American business and American civilization came to influence the world more and more. At the same time, Americans

[17] Oscar Schachter, *International Law in Theory and Practice* (Dordrecht: Kluwer Academic Publishers, 1991) at 199.
[18] *Ibid.*
[19] Janie A. Chuang, "The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking" (2006) 27:437 Mich. J. Int'l L. 437 at 439.

> were increasingly attracted to a national ideology that cast them as redeemers of a sinful world.[20]

Hence, a combination of reasons might have been behind economic sanctions policy. For example, they might be seen as a process through which the sanctioning States seek to deprive other States of technological improvement, and ultimately, weaken their self-confidence and even identity. It has even been seen that some States define their identities through the act of dissociating themselves from the target State, "the troublesome or evil other".[21]

Despite that cynical view, this thesis will simply assume that the basic reason for sanctions against the target State(s) is the intention of the sanctioning State(s) to modify the unacceptable behaviour of the regime of the target State(s).

The use of unilateral economic sanctions, by some economic powers to force the regime of the target State to alter its policy or to modify its behaviour, has been described as a different kind of war.[22] Although it has been found that "sanctions succeeded in achieving foreign policy objectives (only) in about a third of the cases"[23], the powerful global actors impose sanctions in the hope that economic pressure on civilians will result in pressure on the target government to change its policies or conduct.[24]

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[20] *Supra* note 5 at 21-22.
[21] Adeno Addis, "Economic Sanctions and the Problem of Evil" (2003) 25:3 Hum. Rts. Q. 573 at 573.
[22] Hans C. Sponeck, *A Different Kind of War: The UN Sanctions Regime in Iraq* (New York: Berghahn Books, 2006).
[23] Gary Clyde Hufbauer et al., *Economic Sanctions Reconsidered,* 3d ed. (Washington, DC: Peterson Institute for International Economics, 2007) at ix.
[24] August Reinisch, "Developing human rights and humanitarian law accountability of the Security Council for the Imposition of Economic Sanctions" (2001) 95 A.J.I.L. 851 at 851.

Among different targets of economic sanctions, imposing sanctions against civil aviation has gained global attention in the international community. Having played a major role in globalization of the world economy and having been one of the fastest growing global economic sectors for many years, the air transport industry became a suitable vehicle for industrialized States to impose their political will on vulnerable States. As technology has advanced, and as increasingly stringent safety regulations have been adopted in related sectors, air transport is long-established as the safest mode of transport.[25] Undoubtedly, proper technical operation of an aircraft is one of the highest priority requirements to maintain safe air navigation; any potential lack of oversight and maintenance, such as using non-standard or worn-out parts, increases the risk of accident and may result in air crashes. Rrefraining from selling civil aviation technology and services to a country would be an action against the safety of international civil aviation.

There are several agreements including treaties,[26] conventions,[27] and resolutions[28] at the international level for the suppression of any acts (or even omissions) against the safety of civil air transport. Sanctions policy against civil aviation runs counter to many of these, a number of examples will be highlighted by this thesis. Despite the obligations

[25] For example, considering the United States as a giant in aviation industry, the US National Transportation Statistics of 2010 supports the proposition; see generally U.S., Department of Transportation, *National Transportation Statistics 2010* (Washington, D.C.: Research and Innovative Technology Administration, Bureau of Transportation Statistics, 2010) at 131, online: U.S. Bureau of Transportation Statistics <http://www.bts.gov/publications/national_transportation_statistics/>. Also a comparative table has been provided in the 2011 Statistical Abstract of the US Transportation Accidents, Death, and Injuries by Mode: 1990 to 2008; see especially U.S., Census Bureau, *Statistical Abstract of the United States: 2011* (130th Edition) (Washington, D.C.: United States Census Bureau, 2010) at table 1071, online: U.S. Census Bureau <http://www.census.gov/compendia/statab/>.

[26] See e.g. *Convention on International Civil Aviation,* 7 December 1944, 15 U.N.T.S. 295, (entered into force 4 April 1947) [*Chicago Convention*]

[27] See e.g. *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,* 23 September 1971, 974 U.N.T.S. 177 [*Montreal Convention*].

[28] See e.g. ICAO, Assembly, 35th Sess., *Unified strategy to resolve safety-related deficiencies*, ICAO Assembly Resolution A35-7 (2004).

of Contracting Parties to these international agreements, the international aviation community has witnessed violations of undertakings by certain States. Under the pretext of preventing threat to national security, economic powers take a position of "global sheriff" by adopting unilateral policies and self-affirming extra-territorial measures against the civil aviation of other States. As a case in point, the US, as a giant in the aviation industry, has repeatedly suspended or cut off trading in the aviation sphere in instances where other States, such as Cuba, Iran and Syria, have done something perceived as offensive to US interests.[29]

Since 1944, the Convention on International Civil Aviation (commonly referred to as the Chicago Convention)[30] has been the authoritative Charter of international air law and the Constitution of International Civil Aviation Organization (ICAO). One of the main objectives of ICAO as a world body setting and supervising the implementation of rules by Contracting States, and as a multilateral technical agency of the United Nations, is to maintain safety, orderly and viable global civil aviation system. Besides, ICAO has powers under its mandate to ensure equal treatment and equal opportunity for all States without discrimination to host safe international civil aviation.

With regard to ICAO, Professor Michael Milde[31] is of the view that "[I]t is a unique feature in the system of UN-related international specialized agencies that the Council of

[29] Gary E. Davidson, "United States' Use of Economic Sanctions, Treaty Bending, and Treaty Breaking in International Aviation" (1994) 59 J. Air L. & Com. 291 at 292.
[30] *Chicago Convention, supra* note 26.
[31] Former director of McGill University's Institute of Air & Space Law for almost a decade (1989-1998); he also served for 25 years (1966-1991) in senior legal positions at ICAO, including as its Principal Legal Officer, and Director of the ICAO Legal Bureau.

ICAO is vested with a law-making function to adopt International Standards and Recommended Practices and Procedures for all aspects of international air aviation".[32]

Therefore, from ICAO's perspective, it is essential to analyze how technical (including aircrafts, spare parts, CNS equipment[33] and pertinent post-sale-services) sanctions against civil aviation jeopardize the safety and security of international air transportation. The US has, for example, often used technical sanctions against civil aviation as a regular feature of its foreign policy.[34] Since the US and other countries which have mirrored the US trade embargo are members of ICAO, a question arises as to whether the sanction policy of one member against other members is conforming to the Chicago Convention.

This study attempts, firstly, to contribute to a general understanding of how the imposition of sanctions against civil aviation has adverse effects on global civil aviation activities, including the operation of the aircraft, aeronautical communications and air traffic control.

Secondly, by examining the effectiveness of the policy of sanctions against civil aviation, it will be evaluated whether the said policy achieves the purpose of behaviour modification of the regime of the target State for which it is adopted, or whether the policy improperly targets the innocent and defenceless population with almost no role in political decision making.

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[32] Michael Milde, "Aviation Safety and Security - Legal Management" in ed., *Annals of Air and Space Law: Vol. XXIX* (Montreal: Institute of Air and Space Law, 2004) 1 at 3 [*Milde*].
[33] Communication, Navigation and Surveillance equipments.
[34] *Supra* note 29.

Finally, the legitimacy of the policy of sanctions against civil aviation (i.e. the international legal basis for the embargo) will be evaluated.

At the international level, the US was one the principal founder of the Chicago Convention through which a significant role was granted for safety of civil aviation. Yet, as a great global economy and protagonist within the international aviation community, the US has always used sanctions against allegedly unfriendly States. In this regard, the unilateral and extraterritorial dimensions of the US behaviour at the international stage will be examined and the legality of sanctions against civil aviation for purposes of modern international law and multilateral treaties will be evaluated.

The results of this thesis, firstly, may lead to policy recommendations for ICAO that might help prevent the future adoption of improper decisions by one contracting State affecting the civil aviation industry of another contracting State. Even though, in accordance with the Chicago Convention, each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulation, standards, procedures and organization in relation to aircraft, personnel, airports, airways and auxiliary services in all matters in which uniformity will facilitate and improve air navigation,[35] and also ICAO constantly and explicitly invites all members to imagine themselves as part of a unit to achieve international co-operation in maintaining safety, depriving one member of access to appropriate technology can be seen as obvious discrimination.

[35] *Chicago Convention, supra* note 30, art. 37.

Secondly, this thesis may lead to policy recommendations for governments considering such unilateral sanctions in order to avoid unintended and unwanted effects by clarifying the significance of safe civil aviation as an issue of international concern and its peremptory priority over political disputes.

Economic Sanctions:

In settling disputes between States, some governments and policymakers prefer to use coercive measures as opposed to amicable means.[36] Using forcible forms of economic power and inflicting costs on another State's economy is considered to be a coercive measure in international relations.

When a State, group of States or even international institutions apply economic measures, such as boycotts and embargoes, on one or more other State(s) the measures are simply identified as "Economic Coercion".

Daniel W. Drezner defines "Economic Coercion" as "[t]he threat or act by a nation-State or coalition of nation-States, called the *sender*, to disrupt economic exchange with another nation-State, called the *target*, unless the targeted country acquiesces to an articulated political demand".[37]

Generally, the "Economic Sanctions" theory tries to force the regime of the target State to alter its policy or to modify its behaviour by wreaking havoc on its economy. In other words, the plain objective is that economic pressure on civilians will convert into pressure on the government for change.[38]

The term "Economic Sanction" is being used in this essay to define: "[M]easures of an economic - as contrasted with diplomatic or military – character taken by States (or

[36] Paul Stephen Dempsey, *Law and Foreign Policy in International Aviation* (New York: Transnational Publishers, 1987) at 305.
[37] Daniel W. Drezner, *The Sanction Paradox* (Cambridge: Cambridge University Press, 1999) at 2 [*Sanction Paradox*].
[38] *Supra* note 24.

international organizations) to express disapproval of the acts (of the regime) of target State or to induce that State to change some policy or practice or even its governmental structure".[39]

After World War I, widespread attention was given to the notion that economic sanctions might take the place of armed hostilities. In response to the dreadfulness of the war, US President Woodrow Wilson initiated a discussion over the utility of economic sanctions in 1919: "[A] nation that is boycotted is a nation that is in sight of surrender. Apply this economic, peaceful, silent, deadly remedy and there will be no need for force. It is a terrible remedy. It does not cost a life outside the nation boycotted but it brings a pressure upon the nation which, in my judgement, no modern nation could resist...".[40]

In line with the pro-economic sanctions idea, in 1989, Professor Lori F. Damrosch[41] presented her view on the legitimacy of use of economic coercion against developing States as below:

> Target State responses to negative economic leverage frequently invoke various norms of international law, including the norm against non-intervention in internal affairs. Often these responses have been part of broader claims made in the context of the North-South dialogue…These broad claims have been rejected by developed countries and thus cannot be said to have produced any new normative consensus. Nor does there seem to be any disposition on the part of influencing States to accept more narrowly formulated claims that they are legally bound by the non-intervention norm to refrain from resorting to economic pressure to effect political developments in another State.[42]

[39] Andreas F. Lowenfeld, *International Economic Law* (New York: Oxford University Press, 2002) at 698.
[40] *Supra* note 23 at 1.
[41] Professor of Law at Columbia University, and currently, editor-in-chief of the American Journal of International Law.
[42] Lori F. Damrosch, "Politics Across Borders: Non-Intervention and Non-Forcible Influence over Domestic Affairs" (1989) 83 A.J.I.L. 1.

Regarding the importance of economic coercion, and why it matters, Daniel W. Derzner provides two premises: "[T]he practical reason is that the incidence of economic sanctions has multiplied since the end of the cold war, without a similar increase in policy analysis. The esoteric reason is that an examination of economic statecraft can illuminate the nature of power in international relations".[43]

Concerning the typical objectives of economic coercions, Gary Clyde Hufbauer and his colleagues simply listed five types, namely: "[T]o effect relatively modest changes in the target country's policy, to change the target country's regime, to disrupt a relatively minor military adventure, to impair the military potential of an important adversary, and to change the target country's policies or behaviour in other major ways".[44]

Attempting to achieve a broad array of objectives, the US as the most noticeable actor employing economic sanctions, has been utilizing its economic hegemony in the world community since World War I. As the foremost enthusiast of this "peaceful" yet "deadly" instrument, the US has not been afraid to impose its will on many States through the use of economic sanctions, whereas, in most cases, vulnerability rather than the degree of culpability often determines whether or not a State is an appropriate target of economic sanctions.[45] During the past three decades, the US's role in creating international economic hegemony has noticeably diminished, yet the US remains the major user of economic sanctions against target States, sometimes in coalition with its allies or international institutions. In this regard, Professor Damrosch remarks that:

[43] *Supra* note 37 at 6.
[44] *Supra* note 23 at 65.
[45] *Supra* note 21 at 577.

> By all accounts, the popularity of both unilateral and collective economic sanctions is increasing: the United States continues to pursue the most activist approach, both by relying on economic sanctions to advance various objectives and by seeking (either co-operatively or coercively) to induce others to join in the efforts. A 1997 study of United States practice enumerates more than 60 new economic sanctions programmes, affecting some 35 different countries, which were put into effect in the period1993-1996 alone.[46]

In this paper, the term "Target State" is used to describe the State that is the immediate object of sanctions. The term "Sanctioning State(s)" is used to describe a State[47]or a group of States that are the principal source of the sanctions enforced.

Economic Sanctions against Unaccountable Regimes

The United Nations Development Program (UNDP) has defined the term "Accountability" as "[T]he requirement that officials answer to stakeholders on the disposal of their powers and duties, act on criticisms or requirements made of them and accept (some) responsibility for failure, incompetence or deceit".[48] In other words, "holding individuals and organizations responsible for performance measured as objectively as possible"[49] is construed as accountability. According to the UNDP, the term *Governance* is:

[46] Lori F. Damrosch, "Enforcing International Law through Non-Forcible Measures" in The Hague Academy of International Law, ed., *Recueil De Cours/Collected Courses: Recueil Des Cours* vol. 269 (Hague: Martinus Nijhoff, 1997) 19 at 41.

[47] Usually a single State takes the lead and encourages other States to engage in the campaign.

[48] UNDP Bureau for Policy and Programme Support, *Governance for Sustainable Human Development: A UNDP Policy Document-Glossary of Key Terms* (1997), online: BPPS <http://mirror.undp.org/magnet/policy/glossary.htm>

[49] UNDP Arab States, *Anti-Corruption: A UNDP Practice Note* (2004), at 19, online: Programme on Governance in the Arab Region <http://www.pogar.org/publications/finances/anticor/undp-ati04e.pdf>.

> The exercise of political, economic and administrative authority in the management of a country's affairs at all levels. Governance is a neutral concept comprising the complex mechanisms, processes, relationships and institutions through which citizens and groups articulate their interests, exercise their rights and obligations and mediate their differences.[50]

Correspondingly, *Good Governance* addresses "[t]he allocation and management of resources to respond to collective problems; it is characterised by participation, transparency, accountability, rule of law, effectiveness and equity".[51] Hence, accountability is an element of good governance.

In the case of economic sanctions against nations, an unaccountable regime will usually externalize the cost of such sanctions from itself and its supporters to ordinary citizens.[52] This shifting of the cost to powerless citizens was accomplished in Panama under Manuel Noriega and in Serbia under Slobodan Milosevic by "[c]ontrolling the flow of scarce commodities and selling them at ransom prices."[53] On one hand, unaccountable governments try to insulate themselves from the harsh impact of sanctions, and on the other hand, they often attempt to retranslate the message of sanctions into retribution against the country in order to enhance popular support for itself in "rally round the flag" fashion.[54] With respect to the US unilateral and interventional policies, Dr. Herman T. Franssen, Director of Petroleum Economics Ltd, believes that:

> Sanctions have often led to nationalistic backlash against the US, strengthening the regimes whose policies the US opposes. Populations, which

[50] *Ibid.*
[51] *Ibid*.
[52] *Supra* note 21.
[53] *Supra* note 23 at 138.
[54] *Supra* note 24 at 851.

> are not the intended target of sanctions, have suffered the most adverse effects and in particular the young, sick and aged and the professional and business class that have a stake in the international economy. At times, actions against groups that sanctions are supposed to have protected, have worsened as a result of sanctions. Unilateral sanctions are often more the result of domestic pressure by vocal US pressures groups than the result of carefully crafted national policies.[55]

In what follows, it will be demonstrated that utilization of all known forms of economic sanctions comprising limiting exports, restricting imports, or impeding the flow of finance against an unaccountable regime by other State(s) or Organization(s) frequently has been rather ineffective, and oftentimes counterproductive.

On the one hand, under a sanction that bars exports to the target State, for example, the induced scarcity leads to price increases that, in turn, put the civilian consumers under economic pressure. Instead, sanctions encourage smugglers to evade them. On the other hand, prohibitions on exporting, re-exporting, selling or supplying goods, technology, and services to a country almost invariably contribute to the emergence of black markets, creating windfall gains and lucrative opportunities for ruling elites and their collaborators in the political regime, those who were the intended targets of such sanctions.

In other words, on its face, the sole justification for imposing economic sanctions against a State is behaviour modification of its political regime, oblivious to the fact that, for unaccountable regimes, such sanctions usually hit the wrong target (vulnerable people) without modifying the behaviour of target State regime.

[55] Herman T. Franssen, "US Sanctions against Libya" (Speech delivered at the First CEN-SAD Energy and Natural Resources Investment Conference in Casablanca, Morocco, 7-8 February 2002), online: Mafhoum <http://www.mafhoum.com/press3/87E11.htm>.

Vicious Cycle: The Outcomes of Economic Sanctions against Unaccountable Regimes

As a part of international diplomacy, packages of economic sanctions are now a tool in the hand of super powers for interfering in the decision making process of target governments, irrespective of their effect on the people of target States. Much has been written about the consequences and costs of economic sanctions to both target and sanctioning States. The economic impact of sanctions may be evident, especially on the target State, but other factors often overshadow the impact of sanctions in determining the political outcome.

The sanctioning States typically "[u]se economic sanctions precisely because they are big and can seek to influence events on a global scale";[56] however, the unique circumstances of the target States should be taken into account. In this regard, Gary C. Hufbauer and his colleagues express the view that "[t]he sanction chosen must be appropriate to the circumstances".[57] They try to explain why the uniqueness of circumstances should be taken into account by stating that "[I]n contrast to the conventional wisdom, the authors found that sanctions succeeded in achieving foreign policy objectives in about a third of the cases- but that success depended importantly on the type of goal sought, the economic and political environment in the target country, and the way that the sanctions policy was implemented". [58]

[56] *Supra* note 23 at 5.
[57] *Ibid*. at 178.
[58] *Ibid.* at ix.

Within the economic and political realms, dominant States look at the issues from their own views of the world. They often fail to take into account the fact that the target States may have different worldviews, world perceptions and accordingly, different principles, values and criteria. In the event that sanctioning States, mistakenly, presume that the target State has the same worldview and values, they will take inappropriate and useless measures. In other words, by using their own criteria, they expect to obtain a desirable response due to the external pressure on the target State.

The question still remains as to why there is no general sanction policy that works for all target States. As a case in point, the sanction policy that was evaluated successful against apartheid South Africa had negligible effect in bringing about regime change when applied against Iraq under Saddam Hussein.[59]

In most cases, sanctioning States merely attempt to find and hit the sensitive sector in the target State's economy, whereas, in the author's view, the extent of accountability of the target regime should be taken into account as a significant indicator of effectiveness of the economic sanction in theory and reality. In other words, conditions in the target State shape sanction outcomes. To examine the effectiveness of economic sanctions against target States, the crucial question is to what extent the target regimes are accountable to their people.

Accountable regimes are those which are responsible to their people. The power distribution in their political structure is designed so that through periodic elections and control mechanisms, elected and appointed officials are held accountable for their actions

[59] *Supra* note 23, at 78, 80 (table 3A.2, cases: 62-2 & 90-1).

as well as the consequences of their action while holding public office. In theory, in the next election the electorate will change their governments if the incumbent is deemed unproductive in both national and international dimensions. Hence, accountability is an essential condition for good governance. In an accountable regime, one element of good governance is to have a policy to establish a strong and developed economy. In a non-accountable regime, for example Afghanistan under the Taliban's extremely strict rule, economic development was not on their agenda. Taliban government called themselves "pious warriors of God." The Taliban's anti-modern ideology and their explanation of the world was completely different from Western and materialistic perspectives. They did not hold themselves responsible or accountable to their people but rather to their faith and to God. Ahmed Rashid is of the view that "[T]oday's Taliban is only the latest in a line long of conquerors, warlords, preachers, saints, and philosophers who have swept through the Afghan corridor destroying older civilizations and religions and introducing new ones".[60] They did not have any goal or plan to achieve economic development for their people or country but fought to death for their belief. In such cases, sanctioning States barely noticed that the more backwardness results from the economic sanction, the greater chance such a regime has to deceive its people. In fact, to such an unaccountable regime, any action resulting in backwardness for their nation would have been a welcome action to better rule in darkness and ignorance.

The argument here is that more often than not general sanctions against an unaccountable regime would not lead to the desired behaviour modification, but rather impose a cost to the vulnerable sectors of the target State that is often unacceptably high.

[60] Ahmed Rashid, *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia* (New Haven, CT: Yale University Press, 2010) at 7.

Economic coercive measures deprive citizens of the target State of many of the basic rights and necessities of life. This deprivation in turn leads to massive disruption and even destruction of life. It goes without saying that in this situation, economic sanctions "[d]oubly victimize(s) citizens of the target State: they become not only victims of their own (repressive) governments, but that of the international community as well".[61] Put simply, sanction policies against unaccountable regimes usually achieves nothing except to exacerbate the miserable living conditions of the large disenfranchised majority under a non-elected and therefore, unaccountable regime.

As an example, consider Iraq under Saddam Hussein. In Iraq, if sanctions had worked as designed and had had the desired impact of moving the Iraqi populace against its leaders and established government, Saddam Hussein would not have had absolute power for almost 14 years without making significant changes to domestic and international policies in areas under dispute with the world community. The stated objective of the US-led policy toward Iraq was to modify the Iraqi government's behaviour. In other words, by isolating Iraq economically, the sanctioning States sought to pressure the Baghdad regime into making the necessary political reforms and changes. The aim of such a measure seems unsound since it is to influence the government's course of action by deliberately assaulting the civilian population. Many target regimes "[a]re in fact not accountable to those whom they rule and for whom they are supposed to be forced to alter their conduct and policies".[62] On the other hand, it should not be thought that the negative consequences of economic sanctions against Iraq were unintended. After years of implementing these sanctions, the UN Security Council could

[61] *Supra* note 21 at 618.
[62] *Ibid.* at 610.

not plead innocence since it was fully aware of the consequences of its policies against Iraq. Anyhow, this policy against Saddam Hussein's regime, when analyzed carefully, despite the most potent sanctions in history, produced no favourable outcome for the sanctioning States.[63]

Beyond being unsound, economic sanctions may lead to a vicious cycle and counterproductive results. As a matter of fact, in the case of unaccountable regimes, the punishment of people not responsible for political decisions is most similar to a terrorist measure. Therefore, it would be unwise and even dangerous to create such a vicious cycle as described below:

Economic sanctions make the people of the target State poor. The poorer people become, the weaker and less able they will be to mount any real resistance to an oppressive government. It goes without saying that the very people the advocates of sanctions are trying to help, suffer in the end. The power of these poor and weak citizens to punish the regime for the consequences of the sanction is rather negligible, if nonexistent. In other words, it should not be expected that economic sanctions will bring about changes in the behaviour or policy of such a target regime, for there are no economic or political costs to the leaders of those regimes. Instead, imposing economic sanctions against unaccountable regimes exacerbates the situation in the above mentioned vicious circle so that the leaders of the target regime can easily continue to pursue their policies and stay in power. As development is "[A] comprehensive economic, social,

[63] *Supra* note 37 at 1.

cultural, and political process",[64] all components of this process are inextricably intertwined in many aspects. In simple words, preventing a nation from achieving economic development negatively affects the level of social consciousness. Subsequently, lack of social consciousness results in backwardness in political awareness which, in turn, affords a suitable context for unaccountable regimes and their politicians to manipulate their people. As the final result, they would be able to continue to remain in power and make political decisions far removed from rationality and the interests of their State and civilians.

In the second half of the 20th century, some States of comparable size of economy successfully used economic leverage against each other through their control of strategic commodities or finance.[65] However, in the case that the parties' have unequal bargaining power in the economic sphere, this deed frequently worsens the seriousness of the situation between sanctioning States which usually have far larger economies (with higher GDPs) than the target (vulnerable) States.[66] Utilizing coercive measures noncompliant with international law and comity, and even treaty obligations, violation of the dignity of a sovereign State, or any other means of abuse of power and supremacy in international relations may lead to unexpected and irrational multidimensional countermeasures taken by the injured nation or even non-state actors. These economic coercive measures closely resemble Isaac Newton's third law of motion - for every action

[64] *Declaration on the Right to Development*, GA Res. 41/128, UN GAOR, 41st Sess., UN Doc. A/RES/41/128 (1986) at 1.
[65] See *supra* note 23, at 90, where in the Suez crisis, "the US threatened to provoke a sterling crisis by denying the UK access to temporary credits from the International Monetary Fund (IMF), as well as dollar credits from US banks".
[66] *Ibid.* at 89.

there is an equal and opposite reaction.[67] High-intensity sanctions impose a lethal economic burden on the GDP of the target-State and assault its whole civilian population. In this situation, the target (injured) nation interprets the applied coercive measures against innocent people as an act which is most akin to a terrorist measure. When the vulnerable (injured) nation has no choice in the economic realm to respond to this act, it looks forward to creating an even playing field. It may adopt other hostile approaches towards the sanctioning States by changing the field of challenge and attempting to inflict damages by any other possible (lawful or unlawful) means.

In this author's view, the oppression of vulnerable nations and international terrorism are two sides of the same coin. As some recent studies show, the occurrence of international terrorism measures against a State is positively related to the GDP of that State,[68] which means that the greater the GDP of a nation, the greater its chance of being the target of terrorist measures. Accordingly, big powers need to re-evaluate their foreign policies that implant such passionate opposition against them.

Smart *vs.* Blind Sanctions

To determine whether a policy decision actually procures the intended outcomes, it is necessary to trace the actions and reactions of both, the sanctioning and the target States. To take a deep look at the issue, the decision-making process in each side should be taken into account. Sanctioning States or international institutions should give careful attention to who is targeted and how the target regime is determined. Oftentimes, substantial collateral damage to the general population is the cost of economic sanctions

[67] *Ibid.* at 101.
[68] Alan B. Krueger, *What Makes a Terrorist?* (New Jersey: Princeton University Press, 2007) at 104.

against the target State. There is no doubt that in defining targets for sanctions, innocent civilians should be distinguished conceptually and practically from the target regime. From the moral standpoint, Professor Köchler is of the view that "[T]he sacrifice of a whole people for the sake of the strategic interests of a superpower or of a coalition of States (as may be formed within the Security Council) would appear to be in no way ethically justifiable".[69]

An alternative option to such "aimless" or "blind" sanctions, with negative consequences to the populace at large, is the use of more targeted and selective forms of economic coercion, so-called "smart"[70]or "targeted"[71] sanctions. The directed sanction is the diametric opposite of the comprehensive sanction. Under a smart sanction action, particular products and legal and natural persons are targeted rather than the general economy and population. In other words, smart sanctions can be employed so that they aim at "[s]pecific officials or government functions (of target States) without damaging the overall economy and imposing exceptional hardship on the general public".[72]

However, from Human Rights standpoint, the extent to which even this political action of one State against another, or of international institutions, such as the UN, against particular States is consistent with international norms and laws remains controversial. In an evaluation of the sanctions policy, some authors have illustrated that

[69] Hans Köchler, "Ethical Aspect of Sanctions in International Law: The Practice of the Sanctions Policy and Human Rights" at 4, online: HANS KÖCHLER <http://www.hanskoechler.com/SANCTP.HTM>.
[70] *Supra* note 24, at 852.
[71] *Supra* note 21, at 617.
[72] *Supra* note 23, at 138.

"[I]n the wake of the Persian Gulf War, economic sanctions cause the civilian population to be held hostage in its own country".[73]

Economic Coercion and the Global Response:

Usually, a sanction-based approach has three messages: "[T]o the target State it says the sanctioning State doesn't tolerate the target State's action; to allies it says that words will be supported with deeds; and to domestic audiences it says the sanctioning State will act to safeguard the nation's vital interest".[74]

Generally, through the first and foremost signal, sanctioning States have frequently threatened or deployed economic coercion to achieve political goals.[75]As a global concern, international community has always cautioned against impeding the economic, social, cultural and political development of all States through international laws. In what follows, several examples will be cited of global discontent with economic coercion:

The Declaration on the Right to Development has clearly expressed the concern of the United Nations General Assembly regarding the right to development as an inalienable individual and collective human right. According to Art.1 of the Declaration, "[T]he right to development is an in alienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy

[73] *Supra* note 69 at 4.
[74] *Supra* note 23, at 7.
[75] *Ibid.* at 66.

economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized".[76]

By criticizing the application of economic coercion against any States and especially developing countries, the United Nations Conference on Trade and Development clearly mentioned the fact that such measures "[d]o not help to create the climate of peace needed for development". [77] In rejecting coercive economic measures, the conference specified that "[a]ll developed countries shall refrain from applying trade restrictions, blockades, embargoes and other economic sanctions incompatible with the provisions of the Charter of the UN...against developing countries as a form of political coercion which affects their economic, political and social development".[78]

Also, the UN General Assembly has frequently criticized economic coercion as a means of achieving political goals, most sharply in the Resolution entitled "[E]conomic Measures as a Means of Political and Economic Coercion against Developing Countries".[79] The resolution includes a list of measures and demands that industrial States not use their supremacy as a means of applying economic pressure against other countries with vulnerable economies. Specifically, point 3 on the list of measures rejects the adoption of coercive measures "[w]ith the purpose of inducing changes in the economic, political, commercial and social policies of other countries".[80]

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[76] *Supra* note 64.
[77] *Rejection of Coercive Economic Measures, UNCTAD* Res. 152(VI), UNCTADOR, 6th Sess., (1983).
[78] *Ibid.*
[79] *Economic Measures as a Means of Political and Economic Coercion against Developing Countries,* GA Res. 46/210, UN GAOR, 46th Sess., UN Doc. A/RES/46/210 (1991).
[80] *Ibid.*

It goes without saying that the spirit of the mentioned resolutions underscores the international community's disapproval of economic coercion. Besides, a "[f]ascinating international legal question raised by the imposition of sanctions, in particular the definition and proper limitation of extraterritorial measures, whereby one State attempts to extend its law to persons and firms overseas".[81]

Extraterritorial Aspects of Unilateral Measures against Other States

After the end of superpower rivalry in the bipolar world, and in the absence of a global power balance, some economic powers have found themselves in a uniquely privileged position. In this context, big powers, most particularly the United States, have frequently used their dominance to assert their leadership in world affairs by essentially proclaiming themselves the global sheriff under the banner of deterring a threat to either national or international security or as a response to foreign policy concerns. In this regard, the idea that "[t]he US is not just the richest and most powerful of the world's more than two hundred States but is also politically and morally exceptional"[82] became alive. In his book, Godfrey Hodgson states that:

> Since Woodrow Wilson, exceptionalists have proclaimed that the US has a destiny and a duty to expand its power and the influence of its institutions and its beliefs until they dominate the world. In recent decades an economic dimension has been added to this traditional faith in the American Constitutions and in the principle of government with the consent of the governed.[83]

[81] *Supra* note 23 at 4.
[82] *Supra* note 5 at 10.
[83] *Ibid.*

In this economic and politically dominant system, the powerful States pursue their own interests by insisting on unilateral measures. One of the most extreme forms of such unilateral measures is adopting self-affirming extraterritorial application of national legislation in order to manage the conduct of transnational actors. In other words, one State attempts to extend its law to persons and firms overseas without respecting the principle of sovereignty of other States.

The essentially anarchic character of extraterritorial measures on the international stage has become patently obvious. In this regard, and in order to avoid anarchy in the international community, the S. S. Lotus Case clearly provides the limits of State jurisdiction. The court was of the view that:

The first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense, jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.[84]

In the absence of a global power balance, the adoption of a policy of using unilateral extraterritorial measures has become an instrument to advance economic powers' national agendas in the form of imposing economic sanctions against vulnerable States.

Ostensibly, the motives for coercive measures against allegedly "unruly" regimes have parallels with the three basic tenets of criminal law - to punish, deter, and

[84] *The Case of the S.S. Lotus (France v. Turkey)* (1927), P.C.I.J. (Ser. A) No.10 at 18.

rehabilitate.[85] However, in most cases, it is more than apparent that the adoption of unilateral economic sanction policies reflects the attempt of some States to impose their will on other States through their economic hegemony. In other words, sanctioning States pursue a broad array of objectives in either the political or economic realms, such that "[v]ulnerability rather than the degree of culpability often determines whether or not a State is an appropriate target of economic sanctions".[86] Thus this author is led to conclude that the individual weaknesses of target States are exploited by sanctioning States to increase the severity of the sanction.

Since extraterritorial measures have long been criticized as inconsistent with universally-accepted international law, the international community has been strongly discontent with these types of unilateral measures;[87] measures which in fact have largely failed to meet the purpose for which they were implemented.[88]

For example, by adopting a series of resolutions, the UN General Assembly has repeatedly condemned the use of "unilateral extraterritorial coercive measures or legislative acts" as a means of political and economic compulsion.[89] The resolutions request global powers for "[t]he immediate repeal of unilateral extraterritorial laws that impose sanctions on corporations and nationals of other States"[90] and urge "[a]ll States

[85] *Supra* note 23, at 7.
[86] *Supra* note 21 at 577.
[87] Harry L. Clark & Lisa W. Wang, *Foreign Sanctions Countermeasures and Other Responses to U.S. Extraterritorrial Sanctions* at 6, online: Dewey & LeBoeuf LLP <http://www.deweyleboeuf.com/en/Ideas/Publications/AttorneyArticles/2007/08/ForeignSanctionsCountermeasuresandOtherResponsestoUSExtraterritorialSanctions.aspx> [*Clark & Wang*].
[88] *Supra* note 23, at ix.
[89] See e.g. *Elimination of Coercive Economic Measures as a Means of Political and Economic Compulsion,* GA Res. 51/22, UN GAOR, 51st Sess., UN Doc. A/RES/51/22 (1996).
[90] See e.g. *Elimination of Coercive Economic Measures as a Means of Political and Economic Compulsion,* GA Res. 53/10, UN GAOR, 53d Sess., UN Doc. A/RES/53/10 (1998).

not to recognize or apply unilateral extraterritorial coercive economic measures imposed by any State, which are contrary to recognized principles of international law".[91]

The United Nation General Assembly has also shown especial concern about:

> The negative impact of unilaterally imposed extraterritorial coercive economic measures on trade and financial and economic cooperation, including at the regional level, because they are contrary to recognized principles of international law and pose serious obstacles to the freedom of trade and the free flow of capital at the regional and international levels.[92]

In February 2007, by reaffirming the rejection of unilateral extraterritorial sanctions through the Resolution entitled "Human Rights and Unilateral Coercive Measures", the UN General Assembly demonstrated concern over the extraterritorial effects of national legislation. At the time, all States were invited "[t]o consider adopting administrative or legislative measures, as appropriate, to counteract the extraterritorial applications or effects of unilateral coercive measures".[93]

In their study of August 2007 prepared for Dewey& LeBoeuf LLP[94], Clark and Wang remarked that:

> There are two principal extraterritorial aspects of US embargoes. First, sometimes, as with the Cuba sanctions, the regulations on their face apply to foreign companies if they are US owned or controlled. Second, they often purport to impose license requirements on re-exports by foreign persons of

[91] See e.g. *Elimination of Unilateral Extraterritorial Coercive Economic Measures as a Means of Political and Economic Compulsion,* GA Res. 55/6, UN GAOR, 55th Sess., UN Doc. A/RES/55/6 (2000).
[92] *Elimination of Unilateral Extraterritorial Coercive Economic Measures as a Means of Political and Economic Compulsion,* GA Res. 57/5, UN GAOR, 57th Sess., UN Doc. A/RES/57/5 (2002).
[93] *Human Rights and Unilateral Coercive Measures*, GA Res. 61/170, UN GAOR, 61t Sess., UN Doc. A/RES/61/170 (2007).
[94] A global law firm with 1,100 lawyers in 15 countries and 26 offices, nine of which are located in United States including the headquarters in New York.

> items that are of US origin or that contain more than a specified level of US-origin content (e.g., parts and components).[95]

Generally, the US applies the mentioned policy through export control regulations which mostly deal with:

- Defence related commodities and technology[96]
- Commercial and dual-use commodities and technology[97]
- Economic sanctions imposed against various countries and entities[98]

Consequently, a range of trade and investment embargoes against other States became examples of applying the said policy or, in the author's view, of the post-cold war trend to use US economic power to achieve political goals. Having increasingly expanded the enforcement of national export control law beyond its territorial border, the US placed even non-US companies at risk of getting trapped in US criminal and other government enforcement proceedings. In this regard, Clark and Wang are of the view that:

> [t]he US Congress has enacted legislation directed specifically at sanctioning foreign companies that do business with or in certain sanctioned States in particular circumstances. These statutes authorize and sometimes direct the executive branch to impose sanctions in response to the objectionable business activity. These statutes are sometimes referenced as "secondary boycott" provisions.[99]

[95] *Supra* note 87 at 4.
[96] The International Traffic in Arms Regulations (ITAR)
[97] The Export Administration Regulations (EAR)
[98] Regulation administered by the US Department of Treasury's Office of Foreign Assets Control (OFAC)
[99] *Supra* note 87 at 4.

In other words, to different extents, either "comprehensive"[100] or "limited"[101] sanctions set rules of conduct for every foreign persons in the world - even those acting outside the United States - through extraterritorial legislations.[102] Regarding coercive measures against Cuba, Iran and, until recently, Libya, the international community and even the US trading partners took a firm stand against the decisions of the US which had extraterritorial effects.[103]

In the case of Cuba, since 1992, the UN General Assembly has criticized the US extraterritorial measures against Cuba by passing a specific resolution concerning the issue, every year.[104] In this regard, in 2006, South Africa on behalf of the Group of 77 and China stated that:

> The need to respect international law in the conduct of international relations has been recognized by most members of this body, as has been evidenced by the growing support for the draft resolution that we are to adopt today. The States Members of the United Nations have been considering this item and support has grown steadily from 59 Member States opposing the United States embargo of Cuba in 1992 to 182 last year. [105]

[100] Such as sanctions against Cuba, Iran and Sudan: see *Cuban Assets Control Regulations*, 31 C.F.R. pt. 515 (2006); *Iranian Transactions Regulations,* 31 C.F.R. pt. 560 (2006); *Sudanese Sanctions Regulations,* 31 C.F.R. pt. 538 (2006).
[101] Such as sanctions against Burma (Myanmar), North Korea and Syria: see *Burmese Sanctions Regulations*, 31 C.F.R. pt. 537 (2006); *Foreign Assets Control Regulations* (as they relate to North Korea), 31 C.F.R. pt. 500 (2006) ; *Syrian Sanctions Regulations*, 31 C.F.R. pt. 542 (2006).
[102] Concerning some US-embargoes' export-related prohibitions see 15 C.F.R. § 746.2 (2006) (Cuba); 15 C.F.R. § 746.7 (2006) (Iran); 15 C.F.R. § 746.4 (2006) (North Korea); 15 C.F.R. § 746.9 (2006) (Syria).
[103] See *supra* note 89 at 4.
[104] See *Necessity of Ending the Economic, Commercial, and Financial Embargo Imposed by the United States of America Against Cuba*, GA Res. 47/19, UN GAOR, 47th Sess., UN Doc. A/RES/47/19 (1992); and see also *Necessity of Ending the Economic, Commercial, and Financial Embargo Imposed by the United States of America Against Cuba*, GA Res. 61/11, UN GAOR, 61st Sess., UN Doc. A/RES/61/11 (2006).
[105] UN GAOR, 61st Sess., 50th Plen. Mtg., UN Doc. A/61/PV.50 (2006) at 2.

Having criticized the rigorous imposed sanctions against Cuba by the US,[106] some US allies such as the EU, Canada and Mexico attempted to employ countermeasures specifically to obstruct enforcement of such sanctions within their jurisdiction and to nullify the ability of US authorities to assess liability against domestic companies for US embargo violations.

In November 1996, the EU expressed its forceful opposition to the Helms-Burton Act by issuing Regulation 2271/96.[107] In this regard, Clark and Wang stated that "[t]he blocking provisions of Regulation 2271/96 forbid EU persons, actively or by deliberate omission, to comply with requirements based on or resulting, directly or indirectly, from the Covered Sanctions whether directly or through a subsidiary or other intermediary person".[108]

In Canada, according to Foreign Extraterritorial Measures Act (FEMA),[109] the Canadian Attorney General has been authorized to employ appropriate measures with a view to blocking the negative consequences of any exterritorial decisions on Canadian trade interests. The Canadian Attorney General may issue orders to block compliance by Canadian citizens or residents in Canada with non-Canadian trade laws that adversely affect "[C]anadian interests in relation to international trade or commerce involving a

[106] Popularly known as Helms-Burton Act, see *Cuban Liberty and Democratic Solidarity Act of 1996,* Pub. L. No. 104-114, 110 Stat. 785 (codified at 22 U.S.C. §§ 6021-6091 (2000)).
[107] EC, *Council Regulation (EC) 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] O.J. L 309/1.
[108] *Supra* note 87 at 8.
[109] *Foreign Extraterritorial Measures Act*, R.S.C. 1985, c. F-29.

business carried on in whole or in part in Canada or that otherwise has infringed or is likely to infringe Canadian sovereignty".[110]

In October 1996, even the US's southern neighbour, Mexico, attempted to neutralize the Helms-Burton Act and other US sanctions against Cuba by passing the Law to Protect Trade and Investment from Foreign Laws that Contravene International Law.[111] According to the Mexican statute, Mexican citizens as well as foreign persons are prohibited to take any action that would "[a]ffect trade and investment when such acts are the consequence of the extraterritorial effects of foreign statutes".[112] In simple words, the Mexican statute tried to block the extraterritorial application of the US federal law.

In the sphere of civil aviation, as a case in point, several examples concerning the impact of the extraterritorial nature of the US economic sanctions against Cuban civil aviation have been examined in ICAO Assembly sessions.[113] Having repeatedly insisted that the US embargo against the civil aviation of another State "is not a bilateral affair",[114] Cuba touched upon the extraterritorial application of the sanctions by focusing on the instance where,

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[110] *Ibid*. s. 3(1).

[111] *Ley de Protección al Comercio y la Inversión de Normas Extranjeras que Contravengan el Derecho Internacional,* D.O., October 23, 1996. , reprinted in *Clark & Wang*, *supra* note 89, at 11.

[112] *Ibid.* Art.1. See also *supra* note 89, at 13, n. 49, where Article 1 of Mexican Law to Protect Trade and Investment from Foreign Laws that Contravene International Law is expressed as below:

> A foreign statute is deemed to have "extraterritorial effects" if its objectives include: (1) blocking trade with or investment in a country to encourage political change in that country; (2) allowing "claiming payments from individuals derived from expropriation" made in such country: or (3) restricting entry into the country that enacted the statute to further the goals of (1) or (2).

[113] See e.g. ICAO, Assembly 37th Sess., *Impact of the United States Economic, Commercial and Financial Embargo against Cuba in the Civil Aviation Sector* (Presented by Cuba) ICAO A37-WP/312 EC/27, 29 Sep. 2010.

[114] ICAO, Assembly 36th Sess., *Impact in the Sphere of Civil Aviation of the U.S. Economic Trade and Financial Embargo on Cuba* (Presented by Cuba) ICAO A36-WP/28 EC/35, 21 Sep. 2007, s.2(1).

> The US Company ARINC warned that the Air Transat airline could not continue providing check-in service to Cubana using ARINC's iMUSE system, since this implied an indirect benefit to Cuba - a country subject to U.S. sanctions. It clarified that any "improper use" of the system in the future would result in "termination of service to Air Transat.[115]

Each of the embargoed States and the pre-designed sanctions programs is governed by its own set of regulations that differ in terms of scope and substance. The related restrictions of sanctions against target States are designed by the US Department of Treasury's Office of Foreign Assets Control (OFAC). It also maintains a list of Specially Designated Nationals (SDNs)[116] with whom US citizens are prohibited from having any dealings.

The extraterritorial decisions do not end at this point. There are some regulations[117] which have also prohibited other States from exporting any technology where more than 10% of the total value of the origin parts is US-sourced.[118] Surprisingly, non-US companies are subject to the US laws and have to obey the US export administration regulations; otherwise, any company not complying with the sanctions will be subject to

[115] *Ibid.* s. 2(1)(14).

[116] According to OFAC's website, "[a] list of individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries" is published and frequently updated. "[C]ollectively, such individuals and companies are called "Specially Designated Nationals" or "SDNs." Their assets are blocked and U.S. persons are generally prohibited from dealing with them."See e.g. 31 C.F.R. 560.304 (2006) and the accompanied list of SDNs.

[117] They purport to apply to foreign persons acting outside the US territory.

[118] See *Iranian Transactions Regulations,* 31 C.F.R. pt. 560.205(b) (2006) where states that this prohibition shall not apply to those goods or that technology subject to export license application requirements if such goods or technology have been:
(A) substantially transformed into a foreign-made product outside the United States or
(B) incorporated into a foreign-made product outside the United States if the aggregate value of such controlled United States goods and technology constitutes less than 10 percent of the total value of the foreign-made product to be exported from a third country.

punishment.[119] These punishments include financial fines, debarment from US Government contracts and, recently, criminal charges for serious violations of US export laws and regulations. According to the US Department of Justice, in 2008, more than 145 defendants, including both legal and natural persons were charged with criminal violations of US export laws.[120]

In June 2010, Foley and Lardner LLP pointed out that:

> Penalties for violations of many of the OFAC Regulations can be harsh and can include: (1) civil penalties of up to the greater of $250,000 or twice the value of the transaction; and/or (2) criminal penalties of up to $1,000,000 for each violation, imprisonment for up to 20 years, or both. In addition, under various other regulations administered by OFAC, civil penalties may be up to $1,000,000 per violation, and criminal penalties per violation may range up to $10,000,000 against companies and $5,000,000 against individuals. Individuals also may be imprisoned up to 30 years.[121]

Multilateral vs. Unilateral Coercive Measures

There is no doubt that multilateral, as opposed to unilateral, measures, generally are more successful in meeting their objectives. In imposing coercive measures unilaterally, the sanctioning State may be pursuing any one of a range of objectives, from the protection of narrow self-interest to the defence of international norms, however;

[119] See *Iranian Transactions Regulations,* 31 C.F.R. pt. 560.205(a) (2006) where states that the re-exportation from a third country, directly or indirectly, by a person other than a United States person of any goods, technology, or services that have previously been exported from the United States.
[120] The United States Department of Justice, News Release, "More Than 145 Defendants Charged in National Export Enforcement Initiative during Past Fiscal Year" (28 October 2008), online: The US Department of Justice <http://www.justice.gov/opa/pr/2008/October/08-nsd-958.html>.
[121] Foley & Lardner LLP, Legal News Alert, "Compliance with U.S. Export Laws is Essential for International Start-up Success" (11 June 2010), online: Foley <http://www.foley.com/publications/pub_detail.aspx?pubid=7194>.

multilateral measures, at the very least, show a collective will against undesirable behaviour on the international stage.

In this regard, reviewing the US conduct, as the most noticeable international actor employing unilateral measures, would clarify the impact of such measures. By noting that "[u]nilateral sanctions are rarely effective", Bill Reinisch, the President of National Foreign Trade Council (NFST)[122] cautioned against the unilateral approach to sanctions.[123] He also provides a pro-sanctioning State view concerning the effectiveness of unilateral measures:

> The reality is that sanctions are only effective if they're widely applied. Unilateral sanctions by far represent the most ineffective means to impact a foreign government or persons whose policies and behaviour we disagree with or want to change...
> The same is true for unilateral sanctions that extend beyond our borders and attempt to affect the behaviour of entities, companies or persons overseas. These measures put companies in the impossible position of violating someone's law no matter what they do.[124]

On another occasion, General Brent Scrowcroft[125] expressed his point of view that "[U]nilateral sanctions have an unblemished record of failure".[126]

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[122] Founded in 1914 by a broad-based group of American companies, the NFTC is a business organization advocating an open, rules-based global trading system.

[123]The United States National Foreign Trade Council, News Release, "NFTC President Testifies That Unilateral Iran Sanctions Legislation Would Come at a Heavy Price" (8 April 2008), online: NFTC <http://www.nftc.org/newsflash/newsflash.asp?Mode=View&articleid=1942&Category=All>.

[124] USA Engage Coalition, Press Release, "New Report Underscores Ineffectiveness of Unilateral Sanctions with Extraterritorial Reach" (3 August 2007), online: USA*ENGAGE <http://www.usaengage.org/index.php?option=com_content&task=view&id=107&Itemid=61>.

[125] He was the 9th & 17th United States National Security Advisor (In office: November 3, 1975 – January 20, 1977 & January 20, 1989 – January 20, 1993), and also served as Chairman of the President's Foreign Intelligence Advisory Board under President George W. Bush from 2001 to 2005.

[126] U.S., *Use and Effect of Unilateral Trade Sanctions: Hearing Before the Subcommittee on Trade of the House Committee on Ways and Means,* 106th Cong. (Washington, D.C.: United States Government Printing Office, 2000) at 65.

Undoubtedly, unilateral measures cannot be confirmed by the international community. Although as part of its sovereign authority, a State is inherently free to select those States with which it will have normal commercial relations, by accepting a treaty the contracting State of unilateral and multilateral treaties has consented to be bound by the treaty.[127] As a UN Contracting State, "[N]o State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it subordination of the exercise of its sovereign rights and to secure from it advantages of any kind".[128]

Even multilateral institutions such as the UN Security Council are assumed not to have the power to impose economic sanctions on a State or States unless a specific and clear authority is granted to them.[129] In accordance with Article 41 of the UN Charter, the authority to impose sanctions lies exclusively within the UN Security Council,[130] and multilateral actions - consistent with the provisions of the UN Charter - are supposed to maintain or restore international peace and security through collective measures. In such a case, a decision of the Security Council within the *jus cogens* framework, and pursuant to Article 39 and 41 of the UN Charter,[131] along with consideration of Article 103 of the Charter,[132] would prevail over any international agreement that might be applicable.[133]

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[127] *Vienna Convention on the Law of Treaties,* 23 May 1969, 1155 U.N.T.S. 331, art. 2(f) [*Vienna Convention*].
[128] *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States,* GA Res. 2625 (XXV), UN GAOR, 25th Sess., UN Doc. A/RES/2625 (XXV) (1970).
[129] *Supra* note 21 at 579.
[130] *Ibid.* at 600.
[131] Article 39:"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"; Article 41:"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

To sum up this chapter, two contrasting views on economic sanctions merit review. One view provides some recommendations and comments for sanctioning States to take appropriate and effective measures. Gary Clyde Hufbauer and his colleagues urge that:

> The sanction chosen must be appropriate to the circumstances. Sanctioning States usually have multiple goals in mind when they impose sanctions, and coercion is not always at the top of the list. Prudent leaders will carefully analyze the unintended costs and consequences before choosing a particular measure. Like a fine suit, sanctions should be carefully tailored to the shape of the objective. Equally important, prudent leaders should consider, in advance, how they or their successors will discard or refashion the old suit when it no longer serves its original purpose.[134]

The other view looks at the issue from Human Rights standpoint. In this regard, the Sub-Commission of the UN Commission on Human Rights is of the view that:

> The "theory" behind economic sanctions is that economic pressure on civilians will translate into pressure on the Government for change. This "theory" is bankrupt both legally and practically, as more and more evidence testifies to the in efficiency of comprehensive economic sanctions as a coercive tool. The traditional calculation of balancing civilian suffering against the desired political effects is giving way to the realization that the efficacy of a sanctions regime is in inverse proportion to its impact on civilians.[135]

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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".

[132] Article 103:"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

[133] *Supra* note 39 at 859.

[134] *Supra* note 23 at 178.

[135] *Supra* note 21 at 606.

Safety of Flight:

The safety of flight has always been the dominant theme of discussion in the aviation realm. At the very beginning of aviation history, due to the unreliable technology of flight, flying (by balloon) was considered an inherently dangerous undertaking.[136] Over the course of time, older technology has been phased out and given way to more advanced techniques. The realm of aviation has not been an exception to that evolution, and at the earliest developmental stage, the first generation heavier-than-air aircraft superseded the balloon. Subsequently, as a new means of transportation, aviation has gradually been subjected to great changes. Larger and safer aircrafts were built so that the wing span of today's wide-bodied long distance aircraft cannot be comparable to the Wright Brothers' aircraft which was constructed from bamboo sticks and canvas, and covered only 136 feet of sustained flight.[137] Through all of these changes and developments, safety has been the main concern of flight. Interestingly enough, with the advances of modern technology, not only is flying no longer considered inherently dangerous, but rather there is a global and statistical consensus that it is the safest way to travel.[138]

It goes without saying that the development of any technology must be accompanied by new laws and regulations governing the new situations and related issues. To deal with the general aspects of aviation, particularly in the form of

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136 See Harold F. Mook, "Review works: *Aviation Law* by Henry G. Hotchkiss, *U. S. Aviation Reports. 1928* by Arnold W. Knauth, Henry G. Hotchkiss & Emory H. Niles" in *University of Pennsylvania Law Review and American Law Register*, vol.78, No.3 (Philadelphia: The University of Pennsylvania Law Review, 1930) 447 at 448.

137 106 years ago

138 See *supra* note 25; see also *Milde, supra* note 32 at 2.

commercial or civil transportation, the need for new laws and regulations has always been at the forefront of the aviation community's concerns. Besides, due to the important role of air transportation in international relations, civil aviation and its' related issues have assumed a global dimension.

The history of regulation of aerial navigation at an international level dates back to the Paris Convention of 1919 which had 33 signatory State and a permanent Secretariat under the International Commission for Air Navigation (ICNA) banner. In the final years of World War II, having looked for an international delineated structure to govern every aspect of international civil aviation, the United States, the United Kingdom and Canada, as the pioneers of the aviation industry, contemplated the establishment of a League of Nations type agency for civil aviation. In 1944, the United States extended invitations to fifty five States for a conference on international civil aviation[139] to "[d]iscuss the principles and methods to be followed in the adoption of a new aviation convention."[140] It is needless to say that the main result of this conference was the Convention on International Civil Aviation (Chicago Convention) of 1944, which today has 190 Contracting States.

Safety and its related issues are an integral part of the Chicago Convention, its Preamble, Annexes, and related Protocols and Amendments, which together constitute the comprehensive legal framework of international civil aviation.

[139] Representatives of States met at Chicago from November 1 to December 7, 1944.
[140] See U.S., United States Department of State, *Proceedings of the International Civil Aviation Conference, Chicago, 1944* (Washington, D.C.: United States Government Printing Office, 1948).

The Convention is not only pertinent to the safe and orderly development of international civil aviation, but also to general considerations of friendship among States and more generally to safety and security, as well as to the prevention of any friction between nations. Moreover, the Chicago Convention deals with most issues in the sphere of international civil aviation, including instances of consequences of political disputes between States.

Since the first days of the Chicago Convention, the authorities dealing with different aspects of international civil aviation have been expressing their points of view concerning the Convention. In support of the Chicago Convention before the US Senate Foreign Relations Committee in 1945, Louis Welch Pogue[141] stated that "[I]n order to secure the establishment of minimum safety requirements in international operations, international cooperation is essential. The world organization established by the proposed treaty, which is before you, is an attempt to provide that international cooperation so absolutely essential to safety".[142]

In this regard, at the Institute of Air and Space Law, Professor Paul Stephen Dempsey is of the view that:

> The Chicago Convention of 1944 has two principal functions:
> The Chicago Convention is a source of international air law
> (Articles 1-42)
> The Chicago Convention is the Constitution of an international organization - ICAO (Articles 43-96) [143]

[141] The then Chairman of the US Civil Aeronautics Board.
[142] U.S., *Statement of Chairman Louis W. Pogue: Before the House Committee on Foreign Relations,* 79th Cong. (1945).
[143] Paul S. Dempsey, *Public International Air Law Lecture Notes* (Faculty of Law, McGill University, 2008) at 2, online: McGill University <http://www.mcgill.ca/files/iasl/ASPL633-ICAO.pdf>.

Within this context, and in accordance with Articles 54 and 37 of Chicago Convention, the Council of ICAO has quasi-legislative authority to promulgate Standards and Recommended Practices (SARPs) as Annexes to the Chicago Convention concerning the safety, regularity and efficiency of air navigation.[144] The specifications contained in the Standards are considered necessary for, and the specifications in Recommended Practices are recognized as desirable in the interests of safety, regularity and efficiency in international air navigation.

At first glance, the Chicago Convention may appear as a simple commercial treaty pursuing the development of international air navigation, but in fact, together with its technical annexes, it represents "[a] kind of Code of the air".[145]

Safety, Modern Technology & Regulation

No doubt today's high level of safety in civil aviation is indebted to two significant factors: modern technology and stringent regulations which combine to minimize the danger to which civilians are exposed in the air. On one hand, modern technology has played a great role in the attainment of safe air navigation and in improvements to flight efficiency, such that any potential lack of maintenance such as using non-standard or worn-out parts increases the risk of accident. On the other hand, international stringent regulations governing every aspect of aviation have great weight in resolving safety-related issues. The significance of the safety of civil aviation is continuously reaffirmed by conventional international law, quasi-legal standards promulgated by international

[144] *Chicago Convention, supra* note 26 arts. 54, 37.
[145] Nicholas M. Poulantzas, *The Right of Hot Pursuit in International Law,* 2d ed. (Boston: Martinus Nijhoff Publishers, 2002) at 305.

organizations, and national laws, regulations and procedures.[146]That is because, as Professor Milde states, "[C]ivil aviation is possibly the most highly regulated human activity and due to its international nature requires extensive international standardization of the safety and security requirements".[147]

Safety and Security in Civil Aviation

The notion of safe air-navigation comprises two distinct concepts with the same overarching goal: "Safety" and "Security" in aviation. In the aviation sphere, safety specifically refers to issues concerning unintentional accidents. Security covers instances of intentional harm against civil aviation. Despite the difference, safety and security have a common goal, to protect defenceless passengers, crew, cargo, aircraft and property from harm. As Dr. Dempsey states:

> Safety and security are two sides of the same coin…Safety regulation focuses on preventing accidental harm. Security regulation focuses on preventing intentional harm. Like the common law difference between fault-based negligence and intentional torts, the latter involves more culpability than the former, and is deterred by more serious penalties.[148]

These days, commercial aviation disasters, intentional or accidental, capture worldwide attention as singular and spectacular events. Dr. Milde is of the view that "[A]viation is an easily vulnerable target and with minor means, large damage and wide

[146] Paul S. Dempsey, *Public International Air Law* (Montreal, Canada: McGill University, 2008) at 67 [*Air Law*].
[147] *Milde, supra* note 32 at 2.
[148] *Air Law, supra* note 146.

publicity can be achieved against this vital international service".[149] Therefore, the international aviation community always requests that States consider safety and security among the highest priorities in commercial aviation and require them to conform to their international obligations in this regard. ICAO, as the specialized arm of UN in the international aviation sphere, is entrusted with a quasi-legislative power to, generally, govern international civil aviation and to, particularly, ensure "[t]he safety of international civil aviation worldwide"[150] as its principal objective. Since its establishment, ICAO has constantly prescribed "[s]tandards and recommended practices and procedures for all aspects of international air navigation",[151] and particularly has been expending the majority of its efforts to promoting, advancing and achieving the highest levels of safety and security in international flights. In this regard, ICAO has always played an influential role on the world stage through its law-making function to prevent harm to commercial aviation be it caused intentionally or negligently.

Concerning the intentional harm, although the term "Terrorism" is widely used to refer to a brutal act against innocent targets and social order, there is not a universally collective agreement on the phenomenon of terrorism and the definition of terrorist. In disputes between States, sometimes, one side might have been justified its resort to force and violence as an incarnation of self-defence, however, there has been no exception made to the principle against using intentional harm against civil aviation in the international community.

[149] *Milde, supra* note 32 at 9.
[150] ICAO, Assembly 32d Sess., *Establishment of an ICAO Universal Safety Oversight Audit Programme,* ICAO Assembly Resolution A32-11 (1998).
[151] *Milde, supra* note 32 at 3.

"Aerial Terrorism" is the term used to describe intentional violence or other harmful acts committed (or threatened) against civilians in navigational operation by groups or persons for different purposes. In the civil aviation sphere and particularly among ICAO Member States, there is a collective belief that intentionally endangering the safety of a vulnerable and helpless aircraft in the air is not only never justifiable, but moreover constitutes a criminal act. In this regard, the world community constantly provides regulatory responses to this cruel action to subdue intentional threats against international civil aviation. Besides the Chicago Convention of 1944, the regulatory responses include several multilateral conventions such as: the Tokyo Convention of 1963, the Hague Convention of 1970, the Montreal Convention of 1971, Annex17 to the Chicago Convention, the Montreal Protocol of 1988, the Montreal Convention of 1991and recently the Beijing Convention of 2010.

Aerial terrorism, without recognizing any international boundaries, can take different forms: hijacking, bombing and attempted bombing, attacks against civil aviation aircrafts, airports or off-airport facilities, shooting at in-flight aircraft from the ground or assaulting the aircraft from on board, and recently, "[t]urning aircraft into guided missiles aimed at financial and governmental institutions".[152] Since the first crash of a commercial aircraft caused by hijacking in 1948, assaults against civil aviation have been driven by the goal of attracting publicity to the underlying cause for the action.[153] After 9/11 tragedy, when aircraft were used as guided missiles aimed at targets on the ground, the issues of aerial terrorism and its prevention were the focus of global attention. In this

[152] See *Air Law, supra* note 146 at 226, where Professor Dempsey refers to tragic events of September 11, 2001.
[153] *Air Law, supra* note 146 at 226.

regard, Mr. Renato Claudio Costa Pereira,[154] recommended prevention as the long-term strategy for dealing with the terrorist attacks:

> Ultimately, we should consider a new global security culture, which adapts to and builds on the best practices of the past and which includes: the judicious use of new technologies like biometrics and machine readable travel documents (MRTDs); seamless communication channels between the air transport industry, immigration, and law enforcement authorities; better hiring and training methods for security personnel at airports; flexible and fool-proof operating standards that keep pace with the tactics of terrorists; a mindset that takes nothing for granted and that places the protection of human life above all other considerations.[155]

Subsequently, in 2002, having given supranational authority to ICAO through the Universal Security Audit Program (USAP), 188 Member States took united measures to empower ICAO to conduct audits of their compliance with security standards.[156]

Intentional harm against civil aviation has attracted paramount public attention within the international aviation community; however, a question remains as to whether intentional or unintentional accidents account for a larger percentage of all tragic incidents in the aviation arena. Surprisingly, in the recent past, statistical studies reveal that "[a] passenger is ten times more likely to lose his life in an aviation safety-related accident than in an aviation terrorist event".[157] The message of the studies is clear and precise, civil aviation is far more vulnerable to safety-related accidents than intentional harmful attacks. Even in reviewing the air accident news and incident reports, the most highlighted point that catches the attention of reader is the fact that "[o]ften before the

[154] Secretary General of ICAO between 1997 and 2003.
[155] ICAO, News Release, PIO 16/01, "Flight Between Nations - Dialogue Between Peoples" (5 December 2001), online: ICAO <http://www.icao.int/icao/en/nr/2001/pio200116_e.pdf>.
[156] *Milde, supra* note 30 at 14.
[157] John Saba, "Worldwide Safe Flight: Will the International Financial Facility for Aviation Safety Help It Happen?" (2003) 68 J. Air L. & Com. 537 at 538.

accident occurs, a number of incidents and numerous other deficiencies have shown the existence of safety hazards". [158]

In fulfilling their obligations under the Chicago Convention, contracting States are supposed to expend all their efforts to ensure safe and secure civil aviation at the global level. In this regard, the majority of ICAO's concern has been focused on the practical importance of safety.[159]

Concerning the significance of safety of flight, Professor Milde states:

> Safety of air navigation requires strict and detailed regulation of many aspects- from the training and licensing of the flight personnel to rules of the air, operation of the aircraft, aircraft airworthiness, aeronautical communications, air traffic control, airport design, accident investigation, carriage of dangerous substances, etc. It is essential to implement and enforce such rules not only on the domestic level of each State but they must be uniformly applied on the international level as a common standard.[160]

Safety and Global Strategy

Since the emergence of aviation, the international community has expressed concern over safety issues in different shapes. In this regard, Louis Welch Pogue, the delegate of the United States at the Chicago Conference,[161] voiced concern over the safety

[158] EC, *Directive 2003/42/EC of the European Parliament and of the Council of 13 June 2003 on occurrence reporting in civil aviation,* [2003] O.J. L 167/23.
[159] *Air Law, supra* note 146 at 68.
[160] *Milde, supra* note 32 at 2.
[161] In 1944, arguably even more so than today, the United States served as the protagonist of the global civil aviation community.

of flights by indicating that "[s]afety should be the preoccupation of everyone involved in the operation of an airline...".[162]

Having sought to achieve safety in international aviation by securing global harmony in law, the international community considered the Chicago Convention of 1944 as the skeleton of its response to the safety concerns. The Chicago Convention laid the foundation of an international organization which would become a specialized branch of the United Nations, namely ICAO. Comprising an Assembly, a Council and a Secretariat, ICAO has always followed its' objectives articulated in Article 44 of the Convention.[163]

Having sought to achieve a harmonized, safe and efficient international civil aviation order, ICAO has also been looking for a global framework for the coordination of safety policies and initiatives. Moreover, as one of the fastest growing sectors of the world economy,[164] the air transport industry has an essential interest in upholding the safety of aviation. Therefore, common interests required that ICAO and global air

[162] *Air Law, supra* note 146 at 68, n. 7.
[163] *Supra* note 146, at 5 where ICAO's objectives under Article 44 of Chicago Convention is listed as:

- Ensure the safe and orderly growth of international civil aviation throughout the world.
- Encourage the arts of aircraft design and operation for peaceful purposes
- Encourage the development of airways, airports and air navigation facilities for international civil aviation
- Meet the needs of the people of the world for safe, regular, efficient and economical air transport
- Prevent economic waste caused by unreasonable competition
- Ensure that the rights of the Contracting States are fully respected and that every Contracting State has a fair opportunity to operate international airlines
- Avoid discrimination between Contracting States
- Promote safety of flight in international air navigation
- Promote generally the development of all aspects of international civil aeronautics

[164] See Foreword of the amended Global Aviation Safety Plan (GASP) accepted by the ICAO Council on 18 July 2007, and subsequently recognized by ICAO Assembly in: ICAO, Assembly 36th Sess., *ICAO Global Planning for Safety and Efficiency,* ICAO Assembly Resolution A36-7, Appendix A (2007).

transport industry cooperate closely to attain a harmonized, safe, and efficient civil aviation system.[165] Accordingly, two strategic plans have been developed to coordinate regional, sub-regional, national and individual initiatives: Global Air Navigation Plan (GANP) and Global Aviation Safety Plan (GASP). The former deals with strategies and a methodology for global harmonization and optimum use of enhanced capabilities in air navigation provided by technical advances,[166] and the latter has been considered as the current ICAO strategy "[t]o provide the planning methodology that will lead to global harmonization in the area of safety".[167]

In May 2005, a need for a common framework for all stakeholders in the aviation sphere - including States, regulators, aircraft and airport operators, air traffic service providers, aircraft manufacturers, international organizations and safety organizations - was identified by both the air transport industry and ICAO.[168] Subsequently, industry - represented by the Industry Safety Strategic Group (ISSG) - together with ICAO assemble the previously mentioned focus areas in to the Global Aviation Safety Roadmap (GASR)[169] which has been the basis for the Global Aviation Safety Plan.

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[165] *Ibid.* at 3.

[166] See amended Global Air Navigation Plan (GANP) at 3, accepted by the ICAO Council on 30 November 2006, and subsequently recognized by ICAO Assembly in: ICAO, Assembly 36th Sess., *ICAO Global Planning for Safety and Efficiency,* ICAO Assembly Resolution A36-7 Appendix B (2007).

[167] *Supra* note 164 at 3.

[168] *Ibid.* at 4.

[169] See s*upra* note 164 at 5, where Global Aviation Safety Roadmap identifies the following focus areas:

- States
    1. Consistent implementation of international Standards
    2. Consistent regulatory oversight
    3. Effective errors / incidents reporting
    4. Effective incident and accident investigation
- Regions
    5. Consistent coordination of regional programmes
- Industry
    6. Effective reporting and analysis of errors and incidents

Contrary to ICAO's objectives, functions and efforts including strategies and plans to achieve global safety in international aviation, some Contracting States have ignored their international obligations to comply with ICAO policy. Having imposed sanctions against civil aviation, influential States in air transport industry thwarted all official efforts to improve on or even to maintain aviation technology and aviation infrastructures in vulnerable States. Sanctions against the international civil aviation of an ICAO Member State are actions against international commitments undertaken.

In seeking the source of the failure of international organizations to attain the anticipated outcomes of their policies, Professor Dempsey is of the view that "[T]he greatest weakness of the contemporary international system is not the absence of authoritative norms, or underlying intellectual understanding about the need for such norms, but rather the all-too-frequent absence of compliance."[170] In line with this idea, Professor Hans Köchler argues that "[I]t is indeed the predicament of the United Nations Organization and of most other intergovernmental organizations that there exists no mechanism to enforce the norms of international law in a unified and non-discriminatory manner".[171]

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7. Consistent use of Safety Management Systems
8. Consistent compliance with regulatory requirements
9. Consistent adoption of industry best practices
10. Alignment of global industry safety strategies
11. Sufficient number of qualified personnel
12. Effective use of technology to enhance safety

[170] *Air Law, supra* note 146 at 66, n. 1.
[171] *Supra* note 13 at 4.

Sanctions against Civil Aviation, Objectives and Outcomes

Shifts in the distribution of international power sometimes substitute discord and conflict for cooperation and mutual trust on security and other issues between States. As was discussed in the previous chapters, political wrestling between States can lead to a test of strength in other areas, such as economy. Disrupting economic exchange with another State by a State or by a coalition of States is the definition of economic coercion. Also, as has been mentioned, the main objective of economic coercion, in most cases, is to use it as leverage to achieve political goals. In other words, sanctioning State(s) threaten or act to impose economic coercion against a target State unless the target State consents to a specific political demand.[172]

In the aviation realm, due to the fact that air transportation has a major role in global economic activities, many States consider commercial aviation services as an indicator of economic development. Given that the manufacture of modern aircrafts, engines, and different avionics industries are concentrated in a limited number of global economic powers, and due to the inability of less-developed States to provide for such industries, the industrialized States take advantage of their domination in the field of aviation by employing sanctions against the civil aviation of vulnerable States as a foreign policy tool. As a case in point, Syrian Arab Republic has voiced its concern over the issue as follows:

> A number of the developed countries are exploiting the current situation, the prevention of sales or leases of aircraft to certain countries or companies and the imposition of restrictions on such countries' ability to obtain spare parts for aircraft previously purchased in addition to several kinds of political and

[172] *Sanction Paradox, supra* note 37 at 2.

> economic pressures placed on such countries to achieve economic and political objectives.[173]

According to this thesis, any barriers for States to access safe passenger aircraft, modern communication and navigation equipments, pertinent spare parts and post-sale-services represent technical sanctions against civil aviation.

Contrary to the political expectation of sanctioning States, the most common outcome of the policy of using technical sanctions against civil aviation is jeopardizing the life of innocent people in the air and also on the ground. As a case in point, on December 6, 2005, the crash of a poorly-maintained Iranian aircraft inflicted casualties on the ground. Having attempted to approach and emergency landing at Mehrabad airport,[174] the aircraft with 94 people on board crashed into the first floor of a 10-storey apartment block in a residential area of Tehran. All passengers and crew, as well as 34 civilians on the ground were killed.[175] In this regard, during the Directors General of Civil Aviation Conference on establishing a Global Strategy for aviation safety held on March 2006 in Montreal, Iran urged that:

> The Civil Aviation Organization of Iran needs avionic equipment for their Falcon 20 aircraft, which are used to calibrate landing systems. This required equipment is of American origin and cannot be obtained because of the

[173] ICAO, Assembly 36th Sess., *Restrictions on the Purchase or Lease of Aircraft and Spare Parts by Certain States in Violation of the Chicago Convention* (Presented by the Syrian Arab republic) ICAO A36-WP/283 EC/38, 21 Sep. 2007 at 3 [*Syria*].
[174] The oldest airport in the capital of Iran (Tehran) handles both domestic and military flights.
[175] "Iran air safety hit by sanctions" *BBC News* (6 December 2005), online: BBC News <http://news.bbc.co.uk/2/hi/middle_east/4504434.stm>.

> sanctions. These landing systems are being used by twenty three foreign airliners as well as Iranian airlines.[176]

Since the consequence of technical sanctions against civil aviation is to jeopardize innocent lives, technical sanctions have grabbed a noticeable attention on the international stage; this should awaken sanctioning nations' consciences. Without doubt, technical sanctions against civil aviation undermine safety standards within the target State's civil aviation fleets, airports and navigation systems, increasing the likelihood of an accident including a major disaster. Hence, the international community should oppose any action that jeopardizes civilian lives through fault-based or intentional action or even inaction in the aviation realm.

Harmful action and inaction

In criminal law, the term *actus reus*[177] comprises all the elements of a criminal behaviour save those to do with defendant's state of mind.[178] Usually, a positive action or "doing something" is needed so as to label behaviour as criminal conduct. For example, any physical motion, whether voluntarily or involuntarily, is considered a positive action versus standing immobile. As opposed to positive action, "[t]here are circumstances in which doing nothing can constitute prohibited conduct but that is understood as an

[176] ICAO, Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety, *Continuity of the United Sates Trade Embargo on the Civil Aviation of the Islamic Republic of Iran and the Safety Deficiencies Arising out of It* (Presented by Iran) ICAO DGCA/06-IP/31, 15 March 2006 at 5.
[177] The Latin for "Guilty Act".
[178] Catherine Elliot & Frances Quinn, *Criminal Law,* 6th ed. (New York: Pearson/Longman, 2006) at 7.

omission".[179] In other words, "[g]enerally a positive action is the objective element of a crime; however, there are some situations either in statutes or under common law that omission or inaction is considered as guilty act".[180]

In their book, *Criminal Law*, Catherine Elliot and Frances Quinn bring up the fact that "[E]nglish law places no general duty on people to help each other out, or save each other from harm; such a duty will only be imposed where there is a relationship between two people, and the closer the relationship the more likely it is that they will owe a duty to act, and be liable if they fail to do so".[181] In contrast with the English view of the world, in some countries, special offences are defined to "[i]mpose liability on those who fail to take steps which could be taken without any personal risk to themselves in order to save another from death or serious personal injury".[182] As an example, the provincial Quebec Charter of Human Rights and Freedoms not only attributes the right to assistance to every person in danger but also imposes a duty on others to assist the person in danger.[183] In the event that there is a causal link between inaction and reasonably foreseeable damage, the consequences of doing nothing is sufficiently similar to the case of positive action to warrant criminal reprehension.

In this author's view, according to the above-mentioned points, by analogy, when the result of an inaction or consequence of doing nothing is deadly or incredibly harmful

[179] Kent Roach *et al.*, *Criminal Law and Procedure, Cases and Materials*, 9th ed. (Toronto: Edmond Montgomery Publications, 2004) at 299.
[180] *Supra* note 178 at 9.
[181] *Ibid.* at 11.
[182] *Ibid.* at 12.
[183] *Charter of Human Rights and Freedoms,* R.S.Q. c. C-12, art. 2.

in itself, international comity should impose a duty of positive action on States to prevent the consequences of such inaction.

Imposing sanctions against civil aviation as an intentional harmful inaction

Without doubt, any unlawful and intentional act against the safety and security of civil aviation is considered intentional harmful action and is undeniably prohibited. Throughout the history of aviation, States have repeatedly expressed their concern about any intentional harmful action against civil aviation. As a case in point, the Montreal Convention of 1971 specifies that:

> Unlawfully and intentionally performing an act of violence against a person on board a civilian aircraft in flight if it is likely to endanger the safety of that aircraft; destroying an aircraft in service or causing damage to an aircraft that renders it incapable of flight or is likely to endanger its safety in flight; placing or causing to be placed devices or substances likely to destroy the aircraft, render it incapable of flight, or endanger its safety in flight; destroying or damaging air navigation facilities or interfering with their operation; and communicating false information that would endanger the safety of an aircraft in flight.[184]

As it appears from the Montreal Convention of 1971, the Contracting States intended to take an appropriate decision with a view to preventing any intentional harm against safety of flight. No doubt, the most important point is the safety of flight, regardless of whether the risk results from actions or an omission. As well as any positive unlawful acts against safety and security of civil aviation, refusal to sell goods, services and technology (including commercial passenger aircrafts, spare parts, CNS equipment[185]

[184] *Montreal Convention, supra* note 27.
[185] Communication, Navigation and Surveillance equipment.

and pertinent post-sale-services) is a form of disregarding the safety and lives of innocent people. Therefore, imposing sanctions against civil aviation should be seen as intentional harmful inaction with adverse effects on safe civil aviation activities. In the case of jeopardizing the safety of civil aviation, there is no difference between action and inaction as the cause of the event. In other words, endangering the safety of a civilian aircraft and placing civilian lives in danger is not justifiable, regardless of whether the result flows from an action or inaction. In this author's view, intentional harmful action is obviously tangible to a hard-war on security of civil aviation. As opposed to hard-war, the intentional harmful inaction of depriving a State's aviation industry of necessary spare parts and technical services for safe operation can be regarded as a soft-war against the safety of civil aviation which is also deadly but silent.

It is an inescapable fact that both hard-war and soft-war measures against civil aviation of target States impact adversely their national and international air safety. The point is clear and precise and does not require further clarification: just as unlawful and intentional harmful actions against the safety of civil aviation are universally denounced, any preventable and foreseeable air-crashes resulting from technical deficiencies fallout from sanction policies or intentional harmful inactions cannot be justified.

Sanctions against Civil Aviation at the International Stage

The Vienna Convention on the Law of Treaties[186] has, since its 1969 inception, applied to all treaties which in general are governed by international law.[187] It also applies to "any treaty which is the constitutional instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization".[188]

As an international organization in the aviation realm, ICAO was established to govern all aspects of international civil aviation and all Member States have consented to be bound by its Charter, the Chicago Convention of 1944. Thus, as for all other international conventions and organizations, the Vienna Convention not only governs ICAO but also applies to different civil aviation safety and security-related international treaties and to the respective rules which all members of the international community - both individually and collectively - are supposed to uphold and respect.

On the other hand, irrespective of power and privilege enjoyed by States on the international stage, legal norms are supposed to be respected at the international level. Article 26 of the Vienna Convention of 1969 provides that "[E]very treaty in force is binding upon the parties to it and must be performed by them in good faith".[189] This equity before international law can be considered as the "Rule of Law" in international relations. As its role in internal affairs of States, the Rule of Law is considered the form of international social organization that "[d]istinguishes a polity from nature's state of

[186] *Vienna Convention, supra* note 127.
[187] *Ibid.* art. 1.
[188] *Ibid.* art. 5.
[189] *Ibid.* art. 26.

anarchy".[190] Therefore, any inattention to international obligations by the parties to international treaties and conventions will make the principle *pacta sunt servanda*[191] totally meaningless and, finally, may lead to anarchism in international relations. In this regard, Professor Köchler is of the view that certain protagonists in international disputes benefit from immunity when exercising their power. He states that:

> Unlike weaker countries, global powers feel that they are not obliged to subject the exercise of their vital interests to commonly accepted norms; they only concede that they have to make their behaviour *appear* to conform to internationally agreed upon norms and values. The lack of the will to co-operate on the basis of (normative) *equality* and the self-righteousness resulting from it have often led global powers to resort to elaborate legitimization strategies when the assertion of their national interests, as defined by them, has involved measures that are clear-cut violations of international law.[192]

In our discussion, the civil aviation community has always been faced with the polemic of whether parties to Chicago Convention are authorized to utilize their power and influence in the aviation industry to pursue political goals by imposing technical sanctions upon other State parties. While all parties to the Chicago Convention have always highlighted their concern for the safety of civil aviation by consenting to be bound by safety-related rules, the imposition of technical sanctions against civil aviation has had deadly consequences worldwide. The lamentable outcomes of technical sanctions have been manifest in some States which suffer from a poor air safety record with a string of crashes in recent years due to their aged fleet of aircraft and aviation technology resulting from technical sanctions.

[190] *Supra* note 13 at 175.
[191] Latin for "Agreement must be kept",
[192] *Supra* note 13, at 182-183.

As a case in point, decades of sanctions by the US against Iran's civil aviation industry have left Iranian airlines with a fleet of mainly old aircrafts, often fitted with worn out or unofficial spare parts.[193] This trade embargo by the US has forced the Iranian government to seek to nullify, or at least, minimize the problems caused by these sanctions by purchasing parts on the black and counterfeit markets. Iranian airlines have also switched to mainly Russian-made airplanes, such as Tupolev models, with no US components, to supplement their existing fleets of Boeing and other US and European models.

The Iranian government has also recently attempted to acquire a Ukrainian passenger aircraft manufacturing plant to develop a new model, known as IRAN -140,[194] to obviate the shortcomings of the country's air transportation.

Nevertheless, this transformation has been less than successful for two reasons. First, the Iranian aviation industry had previously been based almost entirely on US air technology, for which it's technical and service staff had been trained. Second, Eastern-

[193] The beginnings of US trade and economic sanctions against Iran date back to Iran's revolution of 1979 against the pro-US regime of Shah and the taking of American diplomats as hostages in Iran. Since then, the US has imposed comprehensive sanctions against Iran with Executive Orders which prohibited the exportation, re-exportation, sale or supply, directly or indirectly, of any goods, technology or services to Iran. In 1995, the ongoing dispute between Iran and the US reached a new level. On March 15, 1995, by Executive Order 12957 (Prohibiting Certain Transactions with Respect to Iran 60 Fed. Reg. 14615 (1995)), US President Bill Clinton declared a national emergency prohibiting US involvement with petroleum development in Iran. This Presidential Executive Order was followed less than two months later (May 6, 1995) by Executive Order 12959 (60 Fed. Reg. 24757 (1995)) imposing even more comprehensive sanctions to further retaliate to the behaviour of the Iranian government. Finally, on August 19, 1997, the US President issued Executive Order 13059 (62 Fed. Reg. 44531 (1997)) consolidating and clarifying the previous orders and confirming that virtually all trade and investment activities with Iran were prohibited. The orders have also prohibited other States from exporting any technology with more than 10% of the total value from US-origin parts, and non-US companies have had to obey the US export administration regulations; otherwise, any company not complying with the sanctions is itself subject to punishment. These Executive Orders are still in effect and are renewed each year.

[194] A license-produced version of the Antonov An-140.

bloc commercial aircrafts have a significantly worse safety performance history compared to US and European aircraft.[195]

In Iran, many civilian aircraft currently in use are either ancient US jets or Soviet-era relics, which have resulted in suffering a number of high-profile aircraft crashes in recent years. Since 1991, there have been more than 35 air crashes involving civilian, military and training aircraft. Among these, Iranian commercial airlines have suffered 18 accidents, 10 of which involved Eastern-bloc commercial aircrafts including Yak, Tupolev, Ilyushin, and Antonov.[196] In the summer of 2009 alone, 187 civilians were killed in air crashes.[197] In October 2009, an American public television station, Frontier, reported from Iran (Tehran) that:

> Sanctions have hurt Iranian aviation on many different levels, forcing a fleet of aging commercial airplanes into service beyond their retirement age. First, new planes are not available because of sanctions; second, foreign investment is denied for the same reason; third, it is impossible to have necessary parts and services for maintenance of the existing fleet because of US-led sanctions. Iranian airlines are therefore forced to rely on Russian-made airplanes because nothing else is available. Sanctions have increased Iranian airlines' expenses and risks of operation.[198]

According to ICAO, the safety of flights in target States will be hit due to the comprehensive sanctions against the civil aviation industry of concerned States. Through the Information Paper of the Directors General of Civil Aviation Conference of March

[195] See generally Aircraft Crashes Record Office "Accidents Statistics" online: BAAA/ACRO <http://www.baaa-acro.com>.

[196] The last air-crash of IRAN-140 (Antonov) was on Sunday Feb. 15, 2009, and the last fatal air-crash of Iranian Tupolev aircraft was on Wednesday July15, 2009.

[197] "DC and Tehran Agree: Don't Blame Us!" *Public Broadcasting Service* (22 October 2009), online: PBS News Release <http://www.pbs.org/wgbh/pages/frontline/tehranbureau/2009/10/dc-and-tehran-agree-dont-blame-us.html>.

[198] *Ibid.*

2006, Iran invited the Conference to note that "[t]he imposed trade embargo by the US on Iran, which, as per the findings of ICAO mission, is detrimental to the safety of civil aviation and does originate safety deficiencies".[199]

Other than the international aviation treaties and conventions, sanctions against civil aviation can be examined from a human rights standpoint. By disrespecting human life and putting innocent and defenceless civilian lives at risk, the sanctioning States contravene both the letter and spirit of international conventions on human rights.[200]

In this Chapter, we will first discuss the place of sanction policy against civil aviation within the normative system of modern international law. In other words, it will be explored whether the said policy of targeting sanctions against the aviation industry of a State is consistent with human rights as the *jus cogens of* general international law. Subsequently, other legal aspects of sanction policy against civil aviation and its consistency with regard to specific instruments of international law, such as conventions, treaties and other international instruments will be analysed.

Modern International Law and Peremptory Norms:

Since the creation of the nation-state order in the 17th century, the system of international law has sought mechanisms for the enforcement of international norms. The current doctrine of international law presupposes that there are some peremptory and binding norms which are fundamental to the international community as "cogent/compelling law" or *jus cogen.* A peremptory norm of general international law is

[199] *Supra* note 176 para. 4.(4)(a).
[200] See generally *Universal Declaration of Human Rights,* GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948).

defined as "[a] norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".[201] Reaffirming the principal characteristics of the concept of *jus cogen* as normative superiority and universality, the international community is of the view that "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates".[202] In other words, the new peremptory norms of general international law affect nearly every facet of international affairs, including customary international law as well as the international conduct of States.

Human Rights as a Peremptory Norm:

In recent decades, *inter alia*, global attention has been drawn to human rights as a result of collective wisdom, and represents one of the great human achievements in the field of the social sciences. Focusing our attention on fundamental human rights, respecting human dignity, has in turn been considered to be one of the major achievements of western civilization. Due to the dominant position of western technological and political power in the globalization era, western values, such as human rights and dignity, have grasped the opportunity to be set forth worldwide.

In addition to western States, some non-western nations validate human rights as a moral value.In this regard, underscoring its concern for human rights and destiny, the

[201] *Vienna Convention*, *Supra* note 127 art. 53.
[202] *Ibid.* art. 64.

United Nations used an Iranian poem of eight centuries ago as a motto on the entrance of the United Nations building:

> *Human beings are members of a whole,*
> *In creation of one essence and soul.*
> *If one member is afflicted with pain,*
> *Other members uneasy will remain.*
> *If you've no sympathy for human pain,*
> *The name of human you cannot retain!*

Accordingly, as a global common perception, human rights have emerged as a new peremptory norm of general international law, the *jus cogens* of modern international law.[203] International law, then, clearly permits no derogation from the norms which are accepted and recognized by the international community of States as a whole.[204]

The subject at hand, the safety of civil aviation, concerns the most essential right for human beings which is the right to life. Accordingly, the safety of civil aviation is deemed to be a normative international standard, *jus cogens.*[205] Given the fact that sanctioning States violate *jus cogens* by placing the lives of many civilians at risk, modern international law may succor the injured States. In this author's view, there can be no exceptions to the imposition of liability for applying technical sanctions; in light of modern international law, injured parties can seek compensation where damage flows from such sanctions.

[203] *Supra* note 69 at 4.
[204] *Vienna Convention*, s*upra* note 127 art. 53.
[205] Marjorie M. Whiteman, "Jus Cogens in International Law, with a Projected List," (1977) 7 Ga. J. Int'l. & Comp. L. 609 at 625.

Western Perspective on Human Rights: Theory and Practice

The notion of "human rights" is defined by the meaning it has acquired in Western civilization.[206] Due to the prevalent modern unipolarity of the world and the Western world's predominant power, human rights have found a specific place on the global stage. As a protagonist within an international balance of power, the US viewpoint has an influential role in international relations. Accordingly, the former US President Jimmy Carter's 1976 election victory provided renewed strength to the priority of human rights.[207] At his inauguration, President Carter proclaimed: "[O]ur commitment to human rights must be absolute". [208]In this manner, in December 1978, Carter proclaimed, "[H]uman Rights is the soul of our foreign policy". As opposed to US President Woodrow Wilson's initiative in utilizing "silent but deadly weapon" to achieving political goals, Carter was of the view that "[T]he respect for human rights is one of the most significant advantages of a free and democratic nation in the peaceful struggle for influence, and we should use this good weapon as effectively as possible".[209] Since the end of Carter's presidency, the importance of human rights in US policy has faded. As a case in point, in May 1996, when then United States Ambassador to the UN,[210] Madeleine Albright, was asked whether the death of a reported half a million people was an acceptable price for US-led economic sanctions against Iraq, she responded: "[w]e think

[206] Hans Köchler, "Civilization as Instrument of World Order? The Role of the Civilizational Paradigm in the Absence of a Balance of Power" at 13, online: HANS KÖCHLER <http://i-p-o.org/Koechler-Civilization_as_Instrument_of_World_Order-2006-ad….pdf>.
[207] *Sanction Paradox, supra* note 37 at 88.
[208] *Ibid.* at 90.
[209] *Ibid.* at 91.
[210] In office: January 27, 1993 – January 21, 1997.

the price is worth it".[211] In January the following year, Ms. Albright affirmed her support for severe sanctions as President Clinton's nominee for the Secretary of State post before the Senate Foreign Relations Committee by stating: "[W]e will insist on maintaining tough UN sanctions against Iraq unless and until that regime complies with relevant Security Council resolutions".[212] This response was not compliant with the thesis of human rights as the *jus cogens* of modern international law.

In this regard, international law clearly permits no derogation from the norms which are accepted and recognized by the international community. As opposed to the sphere of politics, international law often "[a]ppears as the sphere of equality, in which reason and justice prevail",[213] and all States are supposed to "[b]ehave by the rules".[214] In other words, disregarding the accepted norms may lead to the "law of the jungle" reigning in the asymmetrical distribution of power in the sphere of politics.[215] In addressing the problematic situation under the global hegemon, Miguel d'Escoto Brockmann, in his valedictory speech as President of the United Nations General Assembly, has mentioned

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[211] Interview of Madeleine Albright by Leslie Stahl (12 May 1996) on *60 Minutes*, CBS Television Network, New York, CBS Television News Magazine.

[212] U.S., *Madeleine Albright Statement: Hearing Before the House Committee on Foreign Relation,* 105th Cong. (1997-1998). Ms. Albright was subsequently confirmed to the post of Secretary of State which she held from 23 January 1997 through 20 January 2001. It should be noted that Ms. Albright eventually retracted her statement in 2003. See Madeleine Albright, *Madam Secretary: A Memoir* (Norwalk: Easton Press, 2003) at 275, where she states:

> "I must have been crazy; I should have answered the question by reframing it and pointing out the inherent flaws in the premise behind it. Saddam Hussein could have prevented any child from suffering simply by meeting his obligations.... As soon as I had spoken, I wished for the power to freeze time and take back those words. My reply had been a terrible mistake, hasty, clumsy and wrong. Nothing matters more than the lives of innocent people. I had fallen into the trap and said something I simply did not mean. That was no one's fault but my own."

However, it should be noted that during her period in office, Ms. Albright never issued any apology, amendment or retraction of her inflammatory statement.

[213] *Nico Krisch*, *supra* note 16 at 370.

[214] *Supra* note 13 at 4.

[215] *Nico Krisch*, *supra* note 16 at 369-370.

that: "[C]ertain Member States think that they can act according to the law of the jungle, and defend the right of the strongest to do whatever they feel like with total and absolute impunity, and remain accountable to no one".[216]

Nowadays, it is expected that human rights should be construed as the foundation of validity not only of modern international law but also of the internal legal systems of States.[217] Even the measures of the UN Security Council should comply with peremptory norms such as human rights.[218] Nevertheless, Professor Köchler is of the view that "[a] remarkable disparity remains between the rules of modern international law conforming to human rights and relics of old international law motivated by the principles of power and national interest". [219] Among controversial issues, utilizing economic superiority as leverage to intervene in the political decision-making process in target States is a case in point. By instrumentalizing modern technology and imposing any kind of economic sanctions upon the civilian population and using them as hostages, politicians of a State with a larger economy and access to modern technology seek to achieve political goals in vulnerable States.

In civil aviation, the safety of international transportation is the first and foremost priority which is deemed to be a normative international standard (*jus cogens*), thus, there can be no exceptions to the imposition of responsibility and ultimately liability for endangering safe flight. The risk of flying will be increased by not providing necessary

[216] *Supra* note 13 at 7.
[217] *Supra* note 69 at 5, n. 33.
[218] Hans Köchler, "The Principles of International Law and Human Rights" in Hans Köchler, ed., *Democracy and the International Rule of Law Prepositions for an Alternative World Order* (Vienna/New York: Springer, 1998) 63.
[219] *Supra* note 69 at 5.

and appropriate services to the civil aviation industry in need. It is patent that all permanent members of the United Nations Security Council - the United States of America, the Russian Federation, China, France and the United Kingdom - have the ability to effectively project their power over almost the entire globe at their discretion. In this regard, Professor Köchler is of the view that:

> The rules outlining the voting procedure in the Security Council privilege five countries, the victors of the Second World War, who, due to their status as "permanent members," are *de facto* exempt from the strict legal regime (meant to ensure the enforcement of international law) that is set out in Chapter VII of the Charter.[220]

In short, these States are powerful enough to impose their will upon medium and smaller powers. Among them, the US, as a civil aviation giant, has been the leading actor employing sanctions against civil aviation.

In the author's view, it should be noted that in the case of innocent civilians paying the price by losing their lives, no measure may be used as a means of exerting political pressure in defiance of the basic human rights. In what follows, it is shown that such a policy of sanctions against innocent people, in civil aviation, runs counter to many aspects of human rights.

Right to Life and Sanction against Civil Aviation:

It is manifest that the most essential right of human beings is the right to life. Article 3 of the United Nations' Universal Declaration of Human Rights stipulates that

[220] *Supra* note 13 at 6.

"[E]veryone has the right to life", which is preserved for all human beings without distinction of any kind.[221] It also set out in Article 6 of the International Covenant on Civil and Political Rights according to which every UN Contracting State is obliged to respect the fact that: "[E]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".[222]

As it was mentioned in Chapter 3, in the nascent stage of civil aviation, flying in the air was an inherently dangerous practice. With the advances of modern technology, it has become the safest way to travel.[223] Therefore, the high level safety of today's aviation is indebted to modern technology. Denying the target States' aviation sectors the necessary spare parts and aircraft repair which results in passengers on target States' commercial airlines being at increased risk of harm - this including thousands of people from other States and potentially citizens of the sanctioning State - represents a devaluation of the very lives of civilians. In other words, it violates the most fundamental right of human beings, the right to life. It is even comparable (in its effects) to hijacking or any other terrorist measures against safety and security of civil aviation.

Right to Development and Sanction against Civil Aviation:

Due to its nature, "[t]he right to development has been upheld as an element of the *jus cogens*".[224] In this regard, Mohammed Bedjaoui,[225] is of the view that "[T]he right to

[221] *Supra* note 200, art. 3.
[222] *International Covenant on Civil and Political Rights,* 19 December 1966, 999 U.N.T.S. 171, art. 6(1), (entered into force 23 March 1976, ratification by United States 8 June, 1992) [ICCPR].
[223] See *supra* note 25; see also *Milde, supra* note 32 at 2.
[224] Mohammed Bedjaoui, "The Right to Development" in Mohammed Bedjaoui, ed., *International Law: Achievements and Prospects,* (Paris: Martinus Nijhoff Publishers for UNESCO, 1991) 1177 at 1193.
[225]Former President of the International Court of Justice of the Hague (from 1994 to 1997).

development is a fundamental right, the precondition of liberty, progress, justice and creativity. It is the alpha and omega of human rights, the first and last human rights, the beginning and the end, the means and the goal of human rights, in short it is the core right from which all others stem".[226] He also points out the international dimension of the right to development as "the right to an equitable share in the economic and social well-being of the world. It reflects an essential demand of our time since four fifths of the world's population no longer accept that the remaining fifth should continue to build its wealth on their poverty".[227]

In Chapter 2, several international instruments were discussed concerning the prohibition against coercive economic measures targeting developing States by developed States. Furthermore, in February 2000, the UN General Assembly reaffirmed that "the right to development, as established in the Declaration on the Right to Development, is universal and inalienable, and re-emphasizing that its promotion, protection and realization are an integral part of the promotion and protection of all human rights".[228]

With respect to civil aviation, the theme of the 2007 International Civil Aviation Day was "Global Air Transport – a Driver of Sustainable Economic, Social and Cultural Development" to establish and reinforce worldwide awareness of the importance of international civil aviation in the social and economic development of States.[229] Due to

[226] *Supra* note 224 at 1182.
[227] *Ibid.*
[228] *The Right of Development,* GA Res. 54/175, UNGAOR, 54th Sess., UN Doc. A/RES/54/175 (2000) at 1.
[229] ICAO, News Release, PIO 12/07, "2007 International Civil Aviation Day Focuses on Benefits of Air Transport around the World" (30 November 2007), online: ICAO <http://www.icao.int/icao/en/nr/2007/pio200712_e.pdf>.

the key role played by civil aviation in global development and economic growth, ICAO states that:

> Although growth in world air traffic has been much greater than world economic growth, there is a high correlation between the two. Statistical analyses have shown that growth in GDP now explains about two-thirds of air travel growth, reflecting increasing commercial and business activity and increasing personal income and propensity to travel. Demand for air freight service is also primarily a function of economic growth and international trade.[230]

In short, due to the significant role of civil aviation in the development of States, denying the civil aviation industry of any State modern technology can be considered a violation of the right to development, and ultimately of human rights as a whole.

Right to Frontier and Sanction against Civil Aviation:

Human rights guarantees create a higher norm which supersedes political decisions motivated by self-interest. Among other aspects of human rights, the right to travel, and the desire for the free and safe movement of people across frontiers should be respected for all nations. In1958, the US Supreme Court ruled that "[t]he right to travel is a part of the liberty of which the citizen cannot be deprived without due process of law under the Fifth Amendment (of the US Bill of Rights)".[231] In other words, the majority of

[230] In 2001, ICAO prepared an information paper at the request of the United Nations Department of Economic and Social Affairs; see UNDESAOR Commission on Sustainable Development, *Aviation and Sustainable Development,* UN DESAOR, 2000, UN Doc. DESA/DSD/2001/9, para. 2(1)(3).
[231] *Kent v. Dulles*, 357 U.S. 116 (1958) at 1.

the court was of the view that "[F]reedom to travel is, indeed, an important aspect of the citizen's liberty". [232]

In this author's view, the right to travel must be interpreted to imply safe movement, because one who is exposed to an elevated risk while travelling is not truly free to travel. Having imposed sanctions against civil aviation, sanctioning States undermine the right to safe and free travel and violate this aspect of human rights.

Chicago Convention and its Preamble

The socio-economic gap between exploiting countries and exploited nations dates back to the era of colonialism. Over time, the gap has resulted in an ever more intense polarization of the globe along the lines of the developed (or industrialized) countries and developing (or less developed) countries. In the global competition for economic advantage, global powers have been trying to create international rules or even "[n]orms that are conducive to their interests".[233]

At this juncture, the main motive behind the allied States' institution-building post World War II is still an issue in this author's mind. In his book, John Ikenberry asks the question, "What do States that have just won major wars do with their newly acquired power?"[234] He summarizes his answer that victorious States seek to maintain their

[232] *Ibid.*
[233] *Supra* note 13 at 9.
[234] G. John Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars* (Princeton: Princeton University Press, 2001) at xi.

newfound power and craft a new durable distribution of power by finding "[w]ays to set limits on their power and make it acceptable to other States".[235]

There are some ways of understanding the importance of institutions for dominant States at the global level. Nico Krisch unfolds one approach by introducing three primary functions of multilateral institutions in situations of hegemony as: Regulation, Pacification and Stabilization:

> First, by avoiding repeated negotiations with other States and by creating greater predictability, multilateral norms can significantly reduce the transaction costs of regulation. Second, negotiating international rules in multilateral fora gives weaker states greater influence, and this provides them with an incentive to follow the resulting agreements, leads to quasi-voluntary compliance, and thus lowers the costs of enforcement (pacification). And third, multilateral norms and institutions are less vulnerable to later shifts in power than ad hoc political relations; they will thus be relatively stable even if the hegemon declines, and will for some time preserve an order that reflects the hegemon's preferences (stabilization).[236]

With regard to civil aviation, as mentioned in Chapter 3, in the final years of World War II, the United States, the United Kingdom and Canada prepared to establish an international organization to govern aspects international civil aviation. Having assumed that, in international affairs, State conduct can only be based on coercion or self-interest, the super powers believed that the weak States would follow either because they felt forced to do so by threats or because they hoped to derive overall benefits from following.

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[235] *Ibid.*
[236] *Nico Krisch*, *supra* note 16 at 372-373.

As the pioneers of the aviation industry, the three above-mentioned States made their best efforts to gather other States and "[d]iscuss the principles and methods to be followed in the adoption of a new aviation convention".[237] No doubt, the main result of this undertaking was the Chicago Convention of 1944 which today had 190 Contracting States. In sum, the founders of the Chicago Convention successfully reached an agreement with other interested States on certain principles in international civil aviation.

Due to the irreconcilability of international law and political dominance,[238] whatever the power of the State at the international stage, the equality of States must have been assumed in the theories of international institutions. To be acceptable to the States other than its architects, the Chicago Convention references the imperative of respecting the equality of States in accessing the opportunities offered by civil aviation. Accordingly, it is clearly established in the Preamble to the Chicago Convention that:

The undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically.[239]

In this manner, the principles that are binding upon all Contracting States are supposed to be respected, particularly by their creators. In a system that is based on the normative equality of States, there is no place for any State to be "above the law". Having a monopoly over the manufacture of leading commercial aircraft and components, spare

[237] See *supra* note 140.
[238] *Nico Krich*, *supra* note 16 at 370.
[239] See *Chicago Convention*, *supra* note 26.

parts and other aviation technologies, the developed States enjoy the associated powers in the aviation sphere and have disregarded the principles that they themselves set out in Chicago Convention. In this regard, Syria voiced its' concern over the issue by expressing that:

> The concentration of aircraft, engines, and the different avionics industries in the developed countries, the inability of the developing countries to provide for such industries led to the reliance of the latter on the developed countries, which in turn controlled these industries and their market, which is located mostly in the third-world countries.[240]

In addition to the Preamble, there are several articles in the Chicago Convention that have repeatedly been disregarded by the main protagonists. Article 4 of the Chicago Convention states: "Each Contracting State agrees not to use aviation for any purpose inconsistent with the aims of this Convention." Having been founded under Article 43, ICAO has been supposed to carry out the aims and objectives of the Chicago Convention, which are set forth in Article 44, to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport.[241]

These provisions of the Chicago Convention seek to affirm that aviation safety, which affects human life and human rights internationally, should stand above political differences. In opposition, the use of economic and technological superiority in civil aviation by one Member State against another Member State such as to adversely impact the vulnerable State's aviation development constitutes a clear violation of the obligations

[240] *Syria, supra* note 173 para. 5.
[241] *Chicago Convention*, *supra* note 26 art. 44.

to respect the rights of Contracting States, avoid discrimination, and promote safety and development of all aspects of international civil aeronautics, as required by Article 44.

Professor Köchler is of the view that "[A] State, acting as a global power, will never accept to be the <object> of the actions of other States, but will always aim at preserving the position of subject, i.e. of keeping the position of sovereign agent in all potential scenarios".[242] In other words, having relied on their own strength and not on the respect of norms binding upon all States, global powers supervise the respect of international obligations by weaker States, yet they disregard these same standards when acting selectively and arbitrarily in pursuit of their own interests. As a case in point, in addition to Cuba and the other previously studied cases, the Directors General of ICAO has found that "[t]he US sanctions against Iran have adversely affected the safety of civil aviation".[243] Accordingly, Iran repeats its request annually that the US honor its commitments to the Chicago Convention.

In this regard, Syria articulates the issue as:

> A ban on the sales of commercial aircrafts and spare parts as well the lease of such aircrafts and the attempts to prevent the transfer of modern technologies related to airport facilities and air navigation services as well as technical support services are considered as policies that contain discriminatory measures and violate the standards and principles of the Chicago Convention, in particular the paragraphs of article 44. Such discriminatory policies cause a threat to the safety and security of air operations and inflict huge losses for the companies of the countries that are under such curfew. They also limit the development of the air transport sector of such countries and directly threaten the safety of both aircraft and individuals.[244]

[242] *Supra* note 5 at 12.
[243] *Supra* note 176 para. 3(2).
[244] *Syria, supra* note 173 para. 6.

Annexes of the Chicago Convention and Safety

Generally, Chapter VI of the Chicago Convention deals with Standards and Recommended Practices in air navigation, and particularly, Article 37 has focused on a wide range of matters concerned with the safety, regularity and efficiency of civil aviation. In pursuit of the goal of uniformity in air navigation, Article 37 requires that:

> Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.[245]

To implement an operational framework, Standards and Recommended Practices (SARPs) have been issued by ICAO as Annexes to the Chicago Convention. In this regard, Professor Paul Stephen Dempsey is of the view that "[A]rticle 37 gives ICAO the authority to promulgate Annexes to the Chicago Convention, and Member States must comply with the Annex standards and procedures unless they promptly object under Article 38".[246] Concerning the failure of States to comply with their obligation under the Chicago Convention Annexes, Dr. John Saba provided four reasons as follows:

- Primary aviation legislation and regulations may be either non-existent or inadequate (for example, a failure to provide adequate enforcement powers).
- Institutional structures that regulate and supervise aviation safety often do not have the authority and/or autonomy to effectively satisfy their regulatory duties.
- Human resources in many States may be plagued by a lack of appropriate expertise largely due to inadequate funding and training

[245] *Chicago Convention*, *supra* note 26.
[246] *Air Law, supra* note 146 at 78.

(and trained staff may leave government jobs for better-paying jobs in the aviation industry.

- Financial resources allocated to civil aviation safety are insufficient since many developing States to not consider this high priority compare to other demands such as health care, education, irrigation and poverty.[247]

In this author's view, another major reason should be added to the aforesaid causes. The sanctions - to the extent that they bar the acquisition of requisite parts and support for safe civil aviation - have a great role in reduced safety of flights in some Member States. They clearly affect the target States' aviation development and deprive the target States of the opportunity to follow the Standards and Recommended Practices in the Annexes to Chicago Convention.

The ICAO Assembly and Safety:

ICAO consists of two bodies: the Assembly and the Council. Under Article 48 0f the Chicago Convention, the Assembly of ICAO "shall meet not less than once in three years and shall be convened by the Council at a suitable time and place." In addition to all Contracting States to the Chicago Convention, a large number of international organizations are invited to the ICAO Assembly sessions to examine the consequences of past policies. Participants at the sessions discuss different issues in legal, economic and technical areas leading to new advice that subsequently are given to the other bodies of ICAO for their future work as prescribed by Article 49. The outcomes of the discussions are usually in the format of Information and Working Papers as well as Resolutions which adhere to underlying direction of the Chicago Convention. In other words, based on new advice, the direction of ICAO decisions and policies for the ensuing three years is

[247] *Ibid.* at 84, n. 85.

outlined. The adopted policies and decisions are in the format of Resolutions which are taken by a majority of votes cast except when otherwise provided for in the Convention.[248]

The Resolutions usually remind and request the Contracting States to honour their responsibilities and commitments under the Chicago Convention. With regard to the safety of civil aviation worldwide, whereas one of the strategic objectives of ICAO is to maintain safety, and Contracting States are individually and collectively responsible for worldwide air transport safety, imposing technical sanctions can conflict with this development objective of the organization; it certainly does not advance safety but rather impedes it. Having drawn the attention of Contracting States to the operation of all aircrafts, including foreign aircrafts within their territory, the ICAO Assembly has by way of Resolution required that they "[t]ake appropriate action when necessary to preserve safety".[249]

As discussed in Chapter 3, it may be argued that imposing anti-safety-related sanctions represents an intentional harmful omission, which could be assimilated to an intentional harmful action.[250] Therefore, in order to avoid future preventable and foreseeable air-crashes, and especially those resulting from technical deficiencies such as worn-out spare parts, it is essential to keep the civil aviation industry independent from political issues, and require the implementation and enforcement of strict and detailed

[248] *Chicago Convention*, *supra* note 26 art. 48(c).
[249] *Supra* note 28.
[250] See *Montreal Convention*, *supra* note 27.

regulations, as indicated in the Global Aviation Safety Plan[251] as well as in the Global Aviation Safety Roadmap.[252]

In this regard, during the most recent 37th session of the Assembly held in September 2010, the implementation of ICAO Safety Framework was presented by Nancy Graham, Director of the Air Navigation Bureau with focus on Policy & Standardization, Safety Monitoring, Safety Analysis, Implementation, and finally Collaboration with States, Regional Organizations, International Organizations and Learning Institutions. Guiding ICAO's work in establishing and coordinating global safety strategies, she addressed three safety targets contained in ICAO's Global Aviation Safety Plan to be achieved by 2011. The targets were firstly to reduce the number of fatal accidents and related fatalities worldwide, secondly to significantly reduce global accident rates. Finally, having been concerned with the discrepancy in accident rates among the ICAO regions, the third safety target stated clearly that "[n]o region shall have an accident rate exceeding twice the global average".[253]

The accident rate in Iran is affirmative evidence of the effects of the embargo imposed by the United States. Iran hosts less than 0.1% of global civil aviation, yet human casualties resulting from air crashes in Iran between 2001 and 2010 represented more than 7.4% of the total fatalities worldwide. According to the Aircraft Crashes

[251] ICAO, Assembly 33d Sess., *ICAO Global Aviation Safety Plan (GASP*), ICAO Assembly Resolution A33-16 (2001); see also *supra* note 166.
[252] See *supra* note 169.
[253] Nancy Graham, "The Safety Framework TC Item 23, 24, 25, 26, 27, 28 and 29" (Presented to ICAO Assembly 37th Sess., 30 September 2010), online: ICAO <http://www.icao.int/icao/en/assembl/a37/docs/presentations/20100930_a37_te1_the_safety_framework.pdf>.

Record Office located in Geneva,[254] over the past 10 years, 875 people were killed in air crashes in Iran, while the total fatalities were 11,788 people worldwide. In that period of time, there were around 21,600 flights monthly in Iran,[255] while the total flights worldwide reached to 2.3 million flights monthly.[256]

Working Papers of ICAO

Working Papers for ICAO Assembly sessions may be submitted by all Member States, and also by a select number of non-governmental observers such as IATA, EUROCONTROL and the International Business Aviation Council. A number of Working Papers – as well as multiple ICAO Assembly Resolutions - have expressed that a primary objective of ICAO is the improvement of the safety of international civil aviation worldwide.[257] In the author's view, specifically, the main goal is maintaining the safety of aircraft and anything that can jeopardize this safety is condemned, whether it results from a positive action such as an aeronautics terrorist attack or inaction such as failure to supply parts as a result of technical sanctions.

Regarding the adverse effects of the embargo on civil aviation, Cuba voiced its concern over the unilateral measures imposed by one Member State against another Member State in several Working Papers. At the 2010 ICAO Assembly, Cuba urged that:

[254] See Aircraft Crashes Record Office "Accidents Statistics" online: BAAA/ACRO <http://www.baaa-acro.com/Pays/I/Iran.htm>.
[255] See Iran, Civil Aviation Organization, "سالنامه آماری حمل و نقل هوایی کشور ایران در سال 1388", online: I.R. Iran Civil Aviation Organization <http://www.cao.ir/Portal/File/ShowFile.aspx?ID=c2bbc4ed-3928-4adc-83f3-8985f9135be5>.
[256] OAG Aviation, News Release, "OAG Reports Air Travel Growth, Over 285 Million Seats Offered Worldwide" (9 February 2011), online: OAG Aviation <http://www.oagaviation.com/News/Press-Room/OAG-Reports-Air-Travel-Growth-Over-285-Million-Seats-Offered-Worldwide>.
[257] See e.g. *supra* note 253.

> For more than 15 years, Cuba has provided the ICAO Assembly with documents outlining the impact on its civil aviation industry of the effects of the United States economic, commercial and financial embargo against Cuba. This new working paper outlines some of the latest events and economic effects caused by this unlawful embargo. We should point out there has been no reduction in these effects, and that they have actually increased. The evidence which is set out herein shows the obsessive persecution by the United States Government in applying the embargo, hindering the development of Cuban civil aviation, including in terms of points of detail.[258]

In other words, despite the US claims that: "ICAO is an organization devoted to the interests of the Contracting States that have obligated themselves by ratifying and abiding by the provisions of the Chicago Convention",[259] it has wilfully violated its respective obligations under the Chicago Convention by imposing sanctions against civil aviation.

In the case of Iran, since a comprehensive sanction has been imposed on Iran's civil aviation by the US since 1995, ICAO sent a fact-finding mission to Iran in April 2005 to review and audit the effects of the US sanctions and their impact upon civil aviation safety. In their report, the independent experts urged ICAO to put an end to the sanctions as they are applied to aircraft equipment, spare parts and technical supports. It was stated that: "[a]ny continuation of severe sanctions must be construed to be very detrimental to aviation safety, and immediate action must be taken to avoid a regrettable occurrence. Whatever the justification of economic sanctions is there must be safeguards to protect the minimum level of safety".[260] Having independently assessed the charges of

[258] *Supra* note 113 at para. 1(4).
[259] ICAO, Assembly 36th Sess., *ICAO Safety Evaluations/Audits of International Air Operators* (Presented by the United States) ICAO A36-WP/89 TE/17, 29 Aug. 2007 at para. 2(3).
[260] *The Report on Safety: The Effects of Economic Sanctions on the I.R. of Iran Civil Aviation, May 9, 2005* ICAO Mission Report on the Audit of the Civil Aviation and Air Carriers of Iran (July 17, 2005), TC4/3.33-13, cited in *supra* note 176 para. 3(2)(f).

Iran against the US embargo, ICAO recommended that "[t]he United States should recommit to the Chicago Convention".[261] Thus, ICAO deplored the endangerment of innocent civilians in target States, in which civil aviation is suffocating because of sanctions, and that these people are paying the price of political differences with their lives.

In short, in theory, all States are supposed to be equal under international law. However, in practice, having been able to establish a hegemonial position, the global powers have coerced vulnerable States to fulfill their international obligations, while in several cases fundamentally failing to respect the same undertakings themselves. In international organizations, by signing the conventions and undertaking the related commitments, the Member States committed themselves to act consistently with their mandates. In ICAO, like many other specialized UN agencies, there is a lack of enforcement power to enforce the Member States to fulfill their mandates, notably global powers. In this regard, this author is of the view that ICAO needs a substantial reform to be updated and accountable to the world community. The contradiction between the simultaneously existing norms of equality (of all States) and inequality with regard to the strength of global powers nullifies the efficiency of all of the resolutions. Accordingly, most of the resolutions have just recommendation aspects (*de jure* attributes); while the world community presume that they be influential in practice (and have *de facto* attributes).

In this author's view, when the output of an international organization has been judged to be inefficient, a series of reforms should be implemented to improve

[261] *Ibid.* para. 1(7).

productivity and relevance through reengineering. At the moment, ICAO is supervising the respect of international obligations by weaker States, yet it has no leverage to prevent global powers from acting selectively and arbitrarily in pursuit of their own interests. International organizations should be able to respond to expressed concerns about their perceived lack of accountability and inefficiency.

Conclusion:

The material examined in this thesis leads to the conclusion that the endangerment of innocent people cannot be justified by any international peremptory norms, *jus cogens*. At the global level, it could be argued that by imposing technical sanctions against civil aviation, civilian passengers on board are being held hostage in aircraft. With such a view of global public order and human dignity, depriving a nation of a safe aviation sector not only contravenes several international treaties and conventions, but also violates fundamental human rights.

This author believes that the unconditional supremacy of the "national interest" and seeing the world from a unilateral perspective may lead to "global anarchy". In today's world, even sovereignty "[n]o longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life". [262]

For global peace and stability to prevail, comprehensive development[263] for all nations should be seen as a part of global justice. In this way, the developed and powerful States have a major responsibility in undertaking their policies to ensure that the interdependency of justice and global peace are always taken into account. On the international stage, in most cases, there is no need to rely on coercive measures; to the contrary, all States - irrespective of their power and enjoyed privilege - should endeavour to promote dialogue and peaceful interaction among nations. In this regard, it is worth

[262] See Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Mass.: Harvard University Press, 1995) at 27.
[263] Development in all dimensions: Social, Political, Economic...

noting Mohammad Khatami's idea that "[I]f well-wishers and peace-seeking people (at the global level) take an effort to institutionalize dialog and replace conflict and confrontation with understanding, they will have a precious achievement to offer to the next generation".[264]

In the civil aviation sphere, Professor Milde gives his last word that "[A]n open dialogue between the States involved in any international misunderstanding could relieve the existing tensions and make sure that the safety and security of international civil aviation will not be held hostage to such political differences".[265]

The perspective of the international civil aviation community with respect to the importance of civil aviation to global relations and peace is best captured by the theme of the 2001 International Civil Aviation Day: "Flight Between Nations - Dialogue Between Peoples".[266] In his 2001 message, Dr. Assad Kotaite, President of the Council of ICAO stated that "[D]ialogue is the basis for understanding and friendship among individuals and peoples of the world. When combined with face to face exchanges, its full potential is realized".[267] In explaining the role of civil aviation in line with this idea, he added, "[I]n our modern, fast-paced world, civil aviation is the only mode of mass transportation that permits such personal communications amongst all of us, wherever we may be around the world".[268]

[264] *Supra* note 10.
[265] *Milde, supra* note 32 at 6.
[266] *Supra* note 155.
[267] *Ibid.*
[268] *Ibid.*

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