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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

EXTRATERRITORIAL APPLICATION OF NATIONAL LEGISLATION: SANCTIONS IMPOSED AGAINST THIRD PARTIES

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CONTENTS

I. Introduction

1. The item "Extraterritorial Application of National Legislation: Sanctions Imposed Against Third Parties" was placed on the agenda of the Thirty-Sixth Session (Tehran, 1997) of the Asian-African Legal Consultative Organization (hereinafter called the AALCO) following reference made by the Islamic Republic of Iran in accordance with Article 4 (c) of the Statutes and sub-Rule 2of Rule 11 of the Statutory Rules of the Organization.

2. While certain AALCO Member States and some UN Member States not party to AALCO are still under multi-faceted sanctions, the significance of the issue in the present day is far from clear. As such, the Islamic Republic of Iran, once again, has requested the AALCO Secretariat as per the Statutory Rules[1] of AALCO to place this topic on the provisional agenda of the Fifty-Eighth Annual Session, scheduled to be held in Dar es Salaam, United Republic of Tanzania, from 21 to 25 October 2019.

3. At the same time, the United Republic of Tanzania as the host, intimated her desire to the Secretariat to include the topic on Extraterritorial Application of National Legislation: Sanctions imposed Against Third parties, and more so in the context of "lifting sanctions against the Republic of Zimbabwe".

II. Overview of the AALCO's Work on the Exterritorial Application of National Legislation: Sanctions Imposed against Third Parties

4. The item "Extraterritorial Application of National Legislation: Sanctions against Third Parties" has been considered at the successive sessions of the Organization.[2] It was considered as a deliberated agenda item at the Forty-Third Session of the Organization (Bali, 2004) and RES/42/6[3]. Upon adopting the topic, the Session directed the Secretariat "to continue study of the legal implications related to the Extraterritorial Application of National Legislation: Sanctions Imposed against Third Parties and the executive orders imposing sanctions against target States." The Resolution also urged Member States to provide relevant

[1] Rule 11(2) of the Statutory Rules of AALCO
[2] It was considered at the Forty-Second Session (Seoul, 2002) of the Organization as a non-deliberated item.
[3] For text of the Resolution see AALCO, *Report of the Forty-Third Session* (21-25 June 2004, Bali, Republic of Indonesia), p. 205.

information and materials to the Secretariat relating to national legislation and related information on this topic.

5. The Secretariat in preparation of the study on this agenda item relies largely upon the materials and other relevant information furnished by the AALCO Member States. Such information provides useful inputs and facilitates the Secretariat's endeavor towards examining and drawing appropriate conclusions on the impact and legality of such extraterritorial application of national legislation, with special reference to sanctions imposed against third parties. In this regard, the Secretariat reiterates its request to the Member States to provide it with relevant legislation and other related information on this topic.

6. The Government of the Islamic Republic of Iran while referring the item during the 36th Annual Session, held in Tehran in 1997 submitted an Explanatory Note that enumerated four major reasons for the inclusion of this item on the agenda of the AALCO, namely: (i) that the limits of the exception to the principles of extraterritorial jurisdiction was not well established; (ii) that the practice of States indicates that they oppose the extraterritorial application of national legislation; (iii) that extraterritorial measures violate a number of principles of international law; and (iv) that extraterritorial measures affect trade and economic co-operation among developing countries. The Explanatory Note had furthermore *inter alia* requested the AALCO "to carry out an in-depth study concerning the legality of such unilateral measures, taking into consideration the positions and reactions of various governments, including the position of its Member States".

7. Accordingly, a preliminary study prepared by the Secretariat was considered at the Thirty-Sixth Session (Teheran, 1997) of the AALCO which had pointed out that in the claims and counterclaims that arose in exercise of extraterritorial jurisdiction; (i) sovereignty – in particular economic sovereignty – (ii) non-interference in internal affairs of a State; (iii) genuine or substantial link between the State and the activity regulated; (iv) public policy and national interest; (v) lack of agreed prohibitions restricting State's right to extend its jurisdiction; (vi) reciprocity or retaliation; and (vii) promoting respect for rule of law. Notwithstanding the national interests of the enacting State, grave concern had been expressed on the promulgation and application of national legislation whose extraterritorial aspects affect the sovereignty of other States.

8. The preliminary study pointed out that while a growing number of other States had applied their national laws and regulations on extraterritorial basis, fora such as the General Assembly of the United Nations, the Group of 77, the Organization of Islamic Conference, the Inter-American Juridical Organization and the European Economic Community, in various ways expressed concern about promulgation and application of laws with extraterritorial effects, as they affect sovereignty of other States, the legitimate interests of entities and persons under their jurisdiction and the freedom of trade and navigation.

9. Further, the preliminary study apart from referring to some recent instances of extraterritorial application of national laws (without resolving the other questions, including the question of economic countermeasures), furnished an overview of the limits imposed by international law on the extraterritorial application of national laws, and *inter alia* spelt out the response of the international community to such actions. The study also drew attention to the opinion of such bodies, as the Inter-American Juridical Organization, the judicial body of the Organization of American States[4] and the International Chamber of Commerce.[5]

10. The Secretariat's study also demonstrated that the topic touches upon the political, legal, economic and trade aspects of inter-State relations. It recalled in this regard that the AALCO Secretariat study on the "Elements of Legal Instruments on Friendly and Good-Neighbourly Relations between the States of Asia, Africa and the Pacific" had *inter alia* listed 34 norms and principles of international law, conducive to the promotion of friendly and good neighbourly relations. Some of those principles enumerated *inter alia* were: (i) independence and State sovereignty; (ii) territorial integrity and inviolability of frontiers; (iii) legal equality of States; (iv) non-intervention, overt or covert; (v) non-use of force; (vi) peaceful settlement of disputes; (vii) peaceful coexistence; and (vii) mutual cooperation.[6]

11. The Secretariat's study pointed out that the Declaration[7] and Programme of Action[8] adopted by the Sixth Special Session of the General Assembly, the Charter of Economic

[4] For details see *International Legal Materials, Vol. 35* (1996), p. 1322.
[5] Dieter Lange and Gary Borne (eds.), *The Extraterritorial Application of National Laws* (ICC Publishing S.A. 1987).
[6] The Secretariat Study in "Elements of a Legal Instrument on Friendly and Good Neighbourly Relations Between States of Asia, Africa and the Pacific" was prepared in 1987 and is reprinted in *AALCC Combined Reports of the Twenty-sixth to Thirtieth Sessions* (New Delhi, 1992), p. 192.
[7] Resolution 3201 of May 1, 1974, Sixth Special Session.
[8] Resolution 3202 of May 1, 1974, Sixth Special Session.

Rights and Duties of States, 1974[9], the United Nations Convention on the Law of the Sea, 1982 and several other international instruments retain many of the traditional aspects of sovereignty. These instruments also reaffirmed principles of economic sovereignty wherein rights and interests of States in the permanent sovereignty of their natural resources would be protected.

12. The study submitted that it may, perhaps, be necessary to delimit the scope of inquiry into the issue of extraterritorial application of national legislation in determining the parameters of the future work of the Organization on this item. It asked for consideration to be given to the question as to whether it should be a broad survey of questions of extraterritorial application of municipal legislation examining the relationship and limits between the public and private international law on the one hand, and the interplay between international law and municipal law on the other. It recalled in this regard that, at the 44th Session of the International Law Commission (1992), the Planning Group of the Enlarged Bureau of the Commission established a working group on the long-term programme of work of the Commission and one of the topics included in the open-selected lists was the Extraterritorial Application of National Legislation.

13. An outline on the topic "Extraterritorial Application of National Legislation" prepared by a Member of the Commission had *inter alia* suggested that "it appears quite clear that a study of the subject of Extraterritorial Application if National Laws by the International Law Commission would be important and timely. There is an ample body of State practice, case law, national study on international treaties, and a variety of scholarly studies and suggestions. Such a study could be free of any ideological overtones and may be welcomed by States of all persuasions.

14. The Secretariat's study proposed that in determining the scope of the future work on this subject, the Organization should bear in mind the request of the Government of the Islamic Republic of Iran to carry out a comprehensive study concerning the legality of such unilateral measures i.e. sanctions imposed against third parties, "taking into consideration the position and reactions of various governments, including the position of its Member States".

[9] Resolution 3281, 29th Session.

The study also proposed that in considering the future work of the Secretariat on the item, Member States could consider sharing their experiences with the Secretariat on this matter.

15. The agenda item been considered at the Thirty-Sixth (Teheran, 1997), Thirty-Seventh (New Delhi, 1998) , Thirty-Eighth (Accra, 1999) , Thirty-Ninth (Cairo, 2000) , Fortieth (HQ, 2001) , Forty-First (Abuja, 2002) , Forty-Third (Bali, 2004) , Forty-Fourth (Nairobi, 2005) , Forty-Fifth (New Delhi (HQ) 2006) , Forty-Sixth (Cape Town 2007) , Forty-Seventh (2008 New Delhi HQ) , Forty-Eighth (Putrajaya 2009) , Forty-Ninth (Dar es Salaam 2010) , Fiftieth (Colombo 2011) , Fifty-First (Abuja 2012) , Fifty-Third (Tehran 2014) and Fifty-Fourth (Beijing 2015).

III. AALCO Secretariat's Special Study on "Unilateral and Secondary Sanctions: An International law Perspective"

16. At the Fifty-First Annual Session of AALCO (Abuja, Nigeria) held in 2012, the AALCO Secretariat was mandated by its Member States to undertake a Special Study on the "legal implications of the application of unilateral sanctions on third parties" vide resolution AALCO/RES/51/S 6. At the Fifty-Second Annual Session held in New Delhi (HQ) in 2013 an abstract of the study was released and thereafter the study was successfully completed and entitled "Unilateral and Secondary Sanctions: An International law Perspective". It was released on 24 February 2014.[10]

17. In order to understand the illegality of extraterritorial application of national legislation: sanctions imposed against third parties, it would be helpful to draw upon the main violations of international law relevant thereto, as also depicted in the abovementioned Study namely: (1) Exterritorial Application of National Legislation and Violation of Principles of the United Nations Charter; and (2) Exterritorial Application of National Legislation and Violation of Human Rights Obligations.

1. Exterritorial Application of National Legislation and Violation of Principles of the United Nations Charter

[10] For more information on the Study, please refer to document AALCO/53/ TEHRAN/2014/SD/S6, page 2 onwards.

18. The United Nations Charter enshrines foundational principles that regulate and govern international relations. Extraterritorial application of national legislation (unilateral and secondary sanctions, in particular) violates certain core principles of the Charter of the United Nations, namely principle of sovereign equality and territorial integrity, principle of non-intervention, and duty to cooperate, as briefly discussed below.

a. Principle of Sovereign Equality and Territorial Integrity

19. The principle of sovereign equality of States is one of the most crucial principles of international law, which is recognized through Article 2 (1) of the UN Charter. This is better understood via the 1970 Declaration on Friendly Relations, which is now considered part of customary international law as per judgments of the International Court of Justice (ICJ) in *Kosovo case,*[11] *Legality of Nuclear Weapons Case*[12], and *Military and Paramilitary Activities in and against Nicaragua* [13], according to which "All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding the differences of an economic, social, political or other nature." While the purpose of imposing unilateral and secondary sanctions is political rather than a legitimate interest, it does not respect the legitimate interests of the targeted country and third State.

20. In addition, even resort to sanctions as countermeasures cannot justify violation of a 'principle of international law'. Article 50 of the primary draft articles on States

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[11] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, *I.C.J. Reports 2010, p. 403*, at pp: 437, para 80.

[12] On the principle of good faith and reciprocity, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *I.C.J. Reports 1996*, p. 226 states that: "It is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969, according to which "every treaty in force is binding upon the parties to it and must be performed by them in good faith"." Pp: 42, para 102. Nor has the Court omitted to draw attention to it, as follows: "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international Co-operation, in particular in an age when this Co-operation in many fields is becoming increasingly essential." See *Nuclear Tests (Australia v. France), Judgment, I. C.J. Reports 1974, p. 268, para. 46.*

[13] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, pp. 101-103, paras. 191-193. In this ICJ Decision, the court held that: " the General Assembly reiterated "[t]he principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State". The decision further states that: "In determining the legal rule which applies to these latter forms, the Court can again draw on the formulations contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), referred to above). As already observed, the adoption by States of this text affords an indication of their opinio juris as to customary international law on the question." (para 191).

Responsibility prepared by the International Law Commission in 1996[14] stated that "an injured State shall not resort by way of countermeasures *to extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State"*.[15] The commentary of this draft article explains the reason for these restrictions by illuminating that "extreme economic or political measures may have consequences as serious as those arising from the use of armed force".[16] Accordingly, some authors uphold that Article 2, paragraph 4 of the United Nation Charter applies not only to armed retaliation but also to economic coercive measures.

b. Principle of Non-Intervention

21. Article 2 (7) of the Charter of the UN implicitly refers to the principle of non-intervention.[17] The principle is embodied more robustly in the Friendly Relations Declaration of 1970 and prohibits extraterritorial application of national legislation as a violation thereof: "No 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 its subordination of the exercise of its sovereign rights and to secure from its advantage of any kind."

22. Laws and regulations intended to enforce national legislations extraterritorially are designed to coerce third countries to apply those measures[18] and as such adopt a specific policy or course of action whether internally or internationally. As an instance, comprehensive unilateral economic sanctions regimes which are intended to apply extraterritorially coerce third parties not involved in the dispute to refrain from having economic or financial dealings with the targeted State (so-called "secondary sanctions"), the

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[14] See A/51/10, Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996, Official Records of the General Assembly, Fifty-first session, Supplement No.10, available at: http://legal.un.org/ilc/documentation/english/A_51_10.pdf

[15] The *Article 50* of the draft articles of states responsibility of 1996 provide that:
"An injured State shall not resort by way of countermeasures to:
(a) The threat or use of force as prohibited by the Charter of the United Nations;
(b) Extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act;
(c) Any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;
(d) Any conduct which derogates from basic human rights; or
(e) Any other conduct in contravention of a peremptory norm of general international law.

[16] See A/51/10, supra note 50 at p. 68.

[17] "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

[18] A/HRC/RES/30/2, 12 October 2015

effects of which are almost equivalent to those of a blockade on a foreign country, and this obviously qualifies as economic warfare.[19] The ICJ stated in the prominent case of *Military and Paramilitary Activities* extraterritorial measures are in contradiction with the non-intervention principle. "Per generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion regarding such choices, which must remain free ones."[20]

c. Duty to Cooperate

23. In accordance with the Charter[21], the duty to cooperate is a well-established rule of conduct for States. The Friendly Relations Declaration of 1970 stipulates that "States have the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain peace and security and to promote international economic stability and progress, the general welfare of nations and international cooperation free from discrimination based on such differences."

24. The Declaration further extends the 'duty to cooperate' to diverse areas by stating that "States have the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain peace and security and to promote international economic stability and progress, the general welfare of nations and international cooperation free from discrimination based on such differences."

25. International economic cooperation is vital to the economic development of all countries of the world, and particularly of developing countries.

[19] A/74/165, 15 July 2019, para.9
[20] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (judgement, 1986) para. 205
[21] See Preamble, Article 1, 11, 13 and Chapter IX of the United Nations Charter.

26. Unilateral and Secondary sanctions affect adversely the development both socially and economically of the citizens collectively as many of the economic relations with imposing State would be affected. Further, such State has a duty to cooperate with other countries especially developing countries as an adherence to this principle. Therefore, sanctions violate this principle because it deprives the targeted State of many of the economic benefits which it could have enjoyed through bilateral and international cooperation.

2. Extraterritorial Application of National Legislation and Violation of Human Rights Obligations

27. Extraterritorial application of national legislation may result in unilateral coercive measures that create obstacles to trade relations among States, impeding the full realization of the rights set forth in the Universal Declaration of Human Rights and other international human rights instruments, in particular the right of individuals and peoples to development. Extraterritorial effects of any unilateral legislative, administrative and economic measures, policies and practices of a coercive nature are against the development process and the enhancement of human rights in developing countries. In addition, it highlights the possibilities of long- term social problems and humanitarian issues in the targeted States occurring because of unilateral coercive measures.

28. In this regard, the United Nations General Assembly has continually considered the issue through agenda item "Human Rights and Unilateral Coercive Measures", annually from its 51st session.[22] Presently, the Human Rights Council addresses this issue with the concern that unilateral coercive measures continue to be promulgated, implemented and enforced by, *inter alia*, resorting to war and militarism, with all their negative implications for the social-humanitarian activities and economic and social development of developing countries, including their extraterritorial effects, thereby creating additional obstacles to the full enjoyment of all human rights by peoples and individuals under the jurisdiction of other States.[23]

29. Extraterritorial application of national legislation (sanctions imposed against third parties) violates a wide range of fundamental human rights accepted by the UN Member States

[22] A/RES/51/103, 3 March 1997
[23] G1729392

through various international instruments. These include right to self-determination, right to development and right to food and other humanitarian needs.

a. The Right to Self-Determination

30. The right to self-determination has its roots to colonialism but after the adoption of the UN Charter it was also enshrined in the 1970 Declaration.[24] The latter states that by virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all people have the right freely to determine their political status and all other states are under the duty to respect this right-in accordance with the Charter.

31. Moreover, the UN General Assembly has repeatedly denounced economic coercion as a means to achieve political goals. The resolution titled "Economic Measures as a Means of Political and Economic Coercion against Developing Countries" has strongly urged the industrial nations to reject the use of their superior position as a means of applying economic pressure "with the purpose of inducing changes in the economic, political, commercial and social policies of other countries".[25] Thus, economic sanctions that seek to achieve regime changes in the targeted State or infringe upon its political independence violate the right to self-determination of the people of that state and their right to choose their government.

b. The Right to Development

32. The United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights make implicit reference to the right to economic development.[26]

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24 *Ibid.* p. 228.

25 General Assembly Resolution 210 of December 1991. See also, *Report and Selected Documents of the 36th Session of the Asian-African Legal Consultative Committee, Tehran, Islamic Republic of Iran (3 – 7 May 1997).*

26 *See* U.N. Charter, Arts. 55–56; Universal Declaration of Human Rights (n 6) Art. 28; International Covenant on Civil and Political Rights (n 14), Art. 1; International Covenant on Economic, Social and Cultural Rights (n 13), Art. 1.

33. In 1986, the UN General Assembly passed the Declaration of the Right to Development, thereby certifying the right to development as a human right in resolution 41/128. Article 1 of the Declaration on the Right to Development states:

> "1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
>
> 2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources."[27]

34. The right to development has since also been recognized in the African Charter on Human and Peoples' Rights[28] and reaffirmed in several instruments including the 1992 Rio Declaration on Environment and Development[29], the 1993 Vienna Declaration and Programme of Action[30], the Millennium Declaration[31], the 2002 Monterrey Consensus[32], the 2005 World Summit Outcome Document[33] and the 2007 Declaration on the Rights of Indigenous Peoples.[34]

35. Under the Declaration, "States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to

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27 Declaration on the Right to Development, Article 1 Clause 1-2.

28 African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, 21 I.L.M. 58 (1982) (entered into force 21 October 1986).

29 1992 *Rio Declaration on Environment and Development*, 14 June 1992, 31 ILM 874 (1992)

30 UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, available at: <http://www.refworld.org/docid/3ae6b39ec.html>

31 UN General Assembly, *United Nations Millennium Declaration, Resolution Adopted by the General Assembly*, 18 September 2000, A/RES/55/2, available at: <http://www.refworld.org/docid/3b00f4ea3.html>

32 Report Of The International Conference On Financing For Development, Monterrey Mexico, 18-22 March 2002, UN Doc A/CONF.l98/ll, U.N. Sales No. 02.ll.A.7 (2002), available at <http://www.un.org/esa/ffd/aconfl98-ll.doc>

33 UN General Assembly, *2005 World Summit Outcome: resolution / adopted by the General Assembly*, 24 October 2005, A/RES/60/1, available at: <http://www.refworld.org/docid/44168a910.html>

34 UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, available at: <http://www.refworld.org/docid/471355a82.html>

development."[35] The responsibility for the creation of this enabling environment encompasses three main levels: *Firstly*, States acting collectively in global and regional partnerships,[36] *Secondly*, States acting individually as they adopt and implement policies that affect persons not strictly within their jurisdiction;[37] and *Thirdly*, States acting individually as they formulate national development policies and programmes affecting persons within their jurisdiction.[38]

36. Imposition of unilateral sanctions via extraterritorial application of national legislation could have adverse effects on the enjoyment, by the targeted and third countries, of the right to development. Efforts, though not enough, have been made at the international level to counter attempts to that effect. For instance, the United Nations General Assembly called upon the international community to adopt urgent and effective measures to eliminate the use of unilateral coercive economic measures against developing countries that are not authorized by relevant organs of the United Nations or are inconsistent with the principles of international law as set forth in the Charter of the United Nations and that contravene the basic principles of the multilateral trading system.[39] Also, the UN General assembly reaffirmed that unilateral coercive measures are a major obstacle to the implementation of the Declaration on the Right to Development.[40] The Human Rights Council also decided, via its resolution A/HRC/RES/34/13 of 7 April 2019, to give due consideration to the issue of the negative impact of unilateral coercive measures on human rights in its task concerning the implementation of the right to development.

37. In the same vein, the UN General Assembly, in a recent resolution on the topic "Human Rights and Unilateral Coercive Measures", has urged all States to cease adopting or implementing any unilateral measures not in accordance with international law, international humanitarian law, the Charter of the United Nations and the norms and principles governing peaceful relations among States, in particular those of a coercive nature, with all their extraterritorial effects, which create obstacles to trade relations among States, thus impeding the full realization of the rights set forth in the Universal Declaration of Human Rights and

[35] *Ibid*. Article 3.
[36] *See* Declaration on the Right to Development, Preamble paragraph 2 and Article 3.
[37] *Ibid*. Article 4.
[38] *Id.,* Article 2.
[39] A/RES/66/186, 6 February 2012
[40] A/RES/67/170, 20 March 2013

other international human rights instruments, in particular the right of individuals and peoples to development;"[41]

c. The Right to Life and Associated Rights

38. The basic outline of the protection of the right to life is contained in Article 3 of the UDHR, Article 6 of the ICCPR, Article 2 of the European Convention on Human Rights, and Article 4 of both the American Convention on Human Rights as well as the African Charter on Human And People's Rights where it is framed as the "respect for life".

39. The Universal Declaration of Human Rights (UDHR) proclaims that "Everyone has the right to life, liberty and security of person."[42] The Human Rights Committee (HRC) has recognized the right to life as an extremely important human right, which cannot be derogated even in a declared state of public emergency.[43] Similarly, the European Convention, the American Convention and the African Charter have all unanimously denounced the arbitrary or intentional deprivation of life, indicating the gravity of the right to life and the importance of its protection. The International Court of Justice has also stated in the *Gabčikovo-Nagymaros Project* case as well as the *Nicaragua* case that there are human rights constraints even in the context of countermeasures.[44] Article 50 Paragraph 1(b) of the Draft Articles on State Responsibility also states that countermeasures shall not affect obligations for the protection of fundamental human rights.[45]

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[41] A/Res/71/193 of 20 January 2017

[42] Universal Declaration of Human Rights (n 6), article 3.

[43] Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

[44] "In order to be justifiable, a countermeasure must meet certain conditions [...] In the first place it must be taken in response to a previous international wrongful act of another state and must be directed against that state [...] Secondly, the injured state must have called upon the state committing the wrongful act to discontinue its wrongful conduct or to make reparation for it [...] In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question [...][and] its purpose must be to induce the wrongdoing state to comply with its obligations under international law, and [...] the measure must therefore be reversible." ICJ Reports, 1997, pp. 7,55-7; 116 ILR, p. 1. See also the Nicaragua case, ICJ Reports, 1986, pp. 14, 102; 76 ILR, p. 1.

[45] The commentary to the Draft Articles extends these considerations to the rights afforded by the ICESCR by citing General Comment No. 8 of the Committee on Economic, Social and Cultural Rights, which stated that:

> "it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country"

40. All these indicate that imposition of sanctions, under any justifications, cannot occur at the cost of human life. Deterioration of economic situation due to sanctions and lack of medicine or humanitarian relief could lead to loss of human life and therefore, entail a grave breach of fundamental human right. It is noteworthy that the right to life is jurisprudentially a very broad and difficult right to accurately identify; however, the Human Rights Committee of the United Nations has articulated that "the expression 'inherent right to life' cannot properly be understood in a restrictive manner and the protection of this right requires that States adopt positive measures."[46] The right to life is thus deeply intertwined with various other rights that are indicators of the quality of life, and that the right to life has been exercised. In a broad sense, the right to life can be said to include the rights to food and housing, health medicine, a clean environment, child and women's rights and so on.[47]

d. Right to Food

41. The right to food is one of the most fundamental of human rights. The right to food was first enunciated in the Universal Declaration of Human Rights where it was stated:

> "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."[48]

42. The most important binding statement of the right to food is provided in Article 11 of the International Covenant on Economic, Social and Cultural Rights, which provides that:

2001 Commentary to the Draft Articles on State Responsibility, available at <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>

46 The Right to Life, U.N. GAOR Human Rights Comm., 37th Sess., Supp. No. 40, at Gen. Comment No. 6, para. 5, U.N. Doc. A/37/40 (1982).

47 The 'Brandt Report' was one of the first to explicitly make this connection in the international sphere in 1980 when it articulated that people dying due to the effects of war and of starvation.

48 Universal Declaration of Human Rights (n 6), Article 25, paragraph 1.

"1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The State Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international cooperation, the measures, including specific programmes, which are needed:

a. To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

b. Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need."[49]

43. Several international human rights instruments also include norms dealing with the right to food including, Article 6 of the ICCPR, Article 12 of the CEDAW[50], Article 24(2) and Article 27 of the CRC[51], and Paragraph 19 of the UN Millennium Declaration of 2000.

44. The Committee on Economic, Social and Cultural Rights made general comments on food in several aspects: food obtained must meet individual needs both in terms of quantity and quality; food should be free of deleterious substance and people should have long-term and sustainable access to food.[52] Moreover, Article 2 of ICESCR confirms "the fundamental right of everyone to be free from hunger".

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49 International Covenant on Economic, Social and Cultural Rights (n 13) article 11.
50 Convention for the Elimination of Discrimination Against Women (1979).
51 Convention on the Rights of the Child (1989).
52 *The Right to Adequate Food*, Human Rights Fact Sheet No. 34, United Nations Office of the High Commissioner for Human Rights (2010).

e. Right to Health and Medicine

45. The international community has recognized the right to the highest attainable standard of health as a fundamental right since the adoption of the Constitution of the World Health Organization in 1946. The notion of the right to health is also contained within Article 25 of the UDHR and solidified by the ICESCR. Article 12 of the ICESCR defines steps that states should take to "realize progressively" "to the maximum available resources" the "highest attainable standard of health," including "the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child"; "the improvement of all aspects of environmental and industrial hygiene"; "the prevention, treatment and control of epidemic, endemic, occupational and other diseases"; and "the creation of conditions which would assure to all medical service and medical attention in the event of sickness." Access to medicine is naturally a critical component of the right. Medicines are a necessary and intuitive aspect of the right to health both as treatment for epidemic and endemic diseases and as part of medical attention in the event of any kind of sickness.[53]

46. It is now widely agreed that the right to health entails both positive freedoms as well as negative freedoms. [54] Similar to the right to food, State parties to the ICESCR have three levels of obligations. *First,* they must respect the right to health by refraining from direct violations, such as systemic discrimination within the health system; *Secondly*, they must protect the right from interference by third parties, through such measures as environmental regulation of third parties; And, *thirdly*, they must fulfill the right by adopting deliberate measures aimed at achieving universal access to care, as well as to preconditions for health.[55]

47. A reasonableness standard of "highest attainable standard of health", which is derived from the WHO's Constitution, also creates a responsibility for states to level the "social playing field with respect to health."[56] The highest attainable standard will also continue to evolve as medical science continues to grow and improve and due to economic and demographical shifts.[57]

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53 Yamin (n 85), p. 336.

54 Yamin, A.E., "The Right to Health Under International Law and Its Relevance to the United States", Am J Public Health. 2005 July; vol. 95 issue 7, p. 1156-1161.

55 *Ibid.*

56 *Id.*

57 *Id.*

IV. Recent developments

48. Recently, a number of AALCO Member States have been under unilateral sanctions that hamper their economic development and adversely affect full enjoyment of a wide range of rights by them and their people. At the same time, efforts have been made at the international level, especially through the UN General Assembly and the Human Rights Council to address the diverse aspects of unilateral and secondary sanctions. The International Court of Justice, too, for its part, is dealing for the first time with extraterritorial application of national legislation; in this section, we briefly touch upon the recent developments and the new literature being developed on this topic.

a. Human Rights and Unilateral Coercive Measures

49. The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993 called upon States to "refrain from any unilateral measure not in accordance with international law and the Charter of the United Nations that creates obstacles to trade relations among States and impede the full realization of the human rights set forth in the Universal Declaration of Human Rights and in international human rights instruments." Ever since, the topic has been given more attention and the UN General Assembly, and the Human Rights Council have adopted important instruments related thereto, some of them most pertinent to the present topic.

50. In 2014, the General Assembly adopted resolution A/RES/58/200 whereby it condemned the continuing unilateral application and enforcement by certain States of unilateral coercive measures, and also considered those measures, with all their extraterritorial effects, as being tools for political or economic pressure against any country.[58]

51. Further, as Human Rights Council stated in resolution 30/2 of 2015, that Member States that have initiated measures with extraterritorial character should commit themselves to their obligations and responsibilities arising from relevant provisions of international law and human rights instruments to which they are parties by putting an immediate end to such measures.[59]

[58] See A/RES/68/200, 15 January 2014, para.3
[59] A/HRC/RES/30/2, 12 October 2015, para.6

52. Illegality of such unilateral measures has also been stressed in another resolution by the Human Rights Council of 2017 which expressly states that unilateral measures are contrary to international law, international humanitarian law, the Charter and the norms and principles governing peaceful relations among States.[60]

53. Further, The Human Rights Council declared, via resolution A/HRC/39/54, that "sanctions, especially those purporting to have extraterritorial effect, are used as a routine foreign policy tool against each and every State, Government or entity that the most prolific sanctions user unilaterally determines, on the basis of questionable "evidence" or mere suspicions or allegations that a corrupt regime engaged in malign activities is attempting to subvert Western democracies, the very architecture of the international system based on the Charter of the United Nations and the International Bill of Human Rights is at risk".[61]

54. More recently, during the Seventy-third session of the General Assembly, resolution A/RES/73/167 of 17 December 2018 was passed which recalled the General Assemply's resolution 70/1 of 25 September 2015, entitled "Transforming our world: the 2030 Agenda for Sustainable Development", in which States are strongly urged to "refrain from promulgating and applying any unilateral economic, financial or trade measures not in accordance with international law and the Charter of the United Nations that impede the full achievement of economic and social development, particularly in developing countries". Being the latest General Assembly resolution on the topic, it reaffirms that unilateral coercive measures are a major obstacle to the implementation of the Declaration on the Right to Development and further condemns the inclusion of Member States in unilateral lists under false pretexts, which are contrary to international law and the Charter, including false allegations of terrorism sponsorship, considering such lists as instruments for political or economic pressure against Member States, particularly developing countries. The resolution, in the end, declares the decision of the UN General Assembly to examine the question on a priority basis at its seventy-fourth session under the sub-item entitled "Human rights questions, including alternative approaches for improving the effective enjoyment of human

[60] See A/HRC/RES/34/13, 7 April 2017
[61] A/HRC/RES/39/54, 30 August 2018, para. 3.

rights and fundamental freedoms" of the item entitled "Promotion and protection of human rights".[62]

55. The recent developments on the topic 'Unilateral Coercive Measures' at the United Nations, in tandem with extraterritorial application of national legislation, refer to three general obligations incumbent upon user, target and third States under international law as follows: (a) not to recognize those measures nor ally them, and (b) to counteract the extraterritorial application or effects of unilateral coercive measures in this context. (c) to avoid imposition of such measures.

56. The obligation not to recognize as lawful situations resulting from a violation of international law includes refraining, by States, from giving any effect to, recognizing or enforcing in any manner, in their respective jurisdictions, extraterritorial secondary sanctions.[63] Such an obligation, which emanates from the general legal principle *ex injuria jus non oritur*, meaning that legal rights cannot derive from an illegal act, is set out to the largest extent possible in article 41 (2) of the articles on responsibility of States for internationally wrongful acts. It is plausible that breaches of peremptory norms of international law, such as the right to self-determination, the prohibition of racial discrimination, and basic principles of international humanitarian law, could give rise to the obligation of non-recognition.[64]

b. Appointment of the first Special Rapporteur by the Human Rights Council

57. The Human Rights Council appointed Mr. Idriss Jazairy of Algeria, as the first Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, at its 28th Session, who took office on 1 May 2015. The mandate of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights was created to highlight the importance of multilateralism, peaceful settlement of disputes and mutual respect for each other. The appointment of the Special Rapporteur took place through the adoption of Human Rights Council resolution 27/21 and a corrigendum on human rights and unilateral coercive measures. The resolution emphasizes

[62] See A/RES/73/167, 17 December 2018
[63] G1920624
[64] A-74-165_E

that unilateral coercive measures and legislation are contrary to international law, international humanitarian law, the UN Charter and the principles governing peaceful relations among States. In addition, it highlights the possibilities of long-term social problems and humanitarian issues in the targeted States occurring because of unilateral coercive measures.

58. Reports of the Special Rapporteur on the negative impact of unilateral measures on the enjoyment of human rights confirm that unilateral sanctions affect various social and economic rights including the right of everyone to a standard of living adequate for his or her health, right to food, medical care and education and the necessary social services. Thus, it is emphasized that essential goods such as food and medicines should not be used as tools for political coercion and that under no circumstances should people be deprived of their own means of subsistence and development.[65]

59. The results of the reports of the Special Rapporteur which have also been reflected in the relevant UN General Assembly resolutions demonstrate that unilateral measures impede the full achievement of economic and social development by the population of the affected countries, in particular children and women and that these create obstacles to the full enjoyment of their human rights.[66] It has been added that in some countries, the situation of children is adversely affected by unilateral coercive measures that create obstacles to trade relations among States, impede the full realization of social and economic development and hinder the well-being of the population in the affected countries, with particular consequences for women, children, including adolescents, the elderly and persons with disabilities.[67] As such, this fact has been endorsed also by Human Rights Council stating that most of the current unilateral coercive measures have been imposed, at great cost, in terms of the human rights of the poorest and most vulnerable groups, on developing countries by developed countries.[68]

60. It has also been reported and confirmed that unilateral coercive measures make considerable barriers for the work of humanitarian organizations. As an instance, unilateral

[65] A/RES/71/193, 20 January 2017, paras.4 & 8, A/RES/70/151, 7 March 2016
[66] A/RES/71/193, 20 January 2017, para.4
[67] *Ibid*, para.7
[68] A/HRC/RES/30/2, 12 October 2015

coercive measures have prevented humanitarian organizations from making financial transfers to States where they work.[69]

c. Recent ruling of the International Court of Justice

61. The Islamic Republic of Iran has been targeted by unilateral sanctions by the United States on different occasions and under diverse pretexts. Although following extensive negotiations between Iran and the so-called P5+1 (China, France, the Russian Federation, the United Kingdom, the United States and Germany) and the High Representative of the European Union, a common understanding was reached in 2015 to adopt the Joint Comprehensive Plan of Action (JCPOA) via Security Council resolution 2231 and a large majority of sanctions-related laws and regulations applied extraterritorially were lifted and waived by the United States. On 8 May 2018, the United States announced the end of its participation the JCPOA and reimposition of "sanctions lifted or waived in connection with the JCPOA".[70]

62. The Islamic Republic of Iran filed an application together with a request for Provisional Measures to the International Court of Justice, on 16 July 2018, in a case entitled "*Alleged Violations Of The 1955 Treaty Of Amity"* so as to protect its rights under the existing applicable bilateral treaty (Treaty of Amity) between the two countries.[71]

63. While the sanctions reimposed by the United States covered a wide array of goods and services raning from the energy sector and petroleum through to financial transactions, Iran requested the Court, *inter alia*, that "the USA shall immediately take all measures at its disposal to ensure the suspension of the implementation and enforcement of all of the 8 May sanctions, including the extraterritorial sanctions."[72] This included the sale or leasing of passenger aircraft, aircraft spare parts and equipment and free trade by Iranian, US and non-US nationals and companies.[73]

[69] A/HRC/RES/34/13, 7 April 2017
[70] *Alleged Violations Of The 1955 Treaty Of Amity*, ICJ, Islamic Republic of Iran v. the United States of America, Request for Provisional Measures, paras. 16-20.
[71] *Ibid*, para. 1.
[72] *Ibid*, 5.
[73] *Id*.

64. The International Court of Justice, after scrutinizing submission by the Parties, in its order of 3 October 2018 recognized the linkage between extraterritorial application of laws and regulations on enjoyment of some protected rights.[74] According to the Court, the United States' unilateral sanctions on Iran deprived Iran from basic humanitarian needs including (i) medicines and medical devices; and (ii) foodstuffs and agricultural commodities; as well as goods and services required for the safety of civil aviation, such as (iii) spare parts, equipment and associated services (including warranty, maintenance, repair services and safety-related inspections) necessary for civil aircraft.[75] The ruling of the Court emphasizes the long-standing exception to any application of extraterritorial national legislation under whatsoever justification: humanitarian considerations. It can be argued that extraterritorial application of national legislation even with legislative exceptions in place cannot spare civilians and humanitarian needs of people of the targeted country due to the overarching ramifications of sanctions against third parties.

65. From the scrutiny of the recent efforts at the international level, State practice and international jurisprudence, it is quite evident that the majority of UN Member States firmly reject the imposition of laws and regulations with extraterritorial impact and all other forms of coercive economic measures, including unilateral sanctions against developing countries, and have in the past reiterated the urgent need to eliminate them immediately. Moreover, such unilateral sanctions imposed on a particular country for more than a decade deprives the citizens of that country from their overall development, be it social, economic or political. The path to progress and development that situates in freedom of trade, navigation and movement of capital, which has a significant role to play in human development has been negated to whole a society for many years.

V. Comments and Observations of the AALCO Secretariat

66. The unilateral sanctions have a particularly adverse effect on the sovereignty of other nations owing to its extraterritorial nature. Unfortunately, the target of extraterritorial sanctions happens to be developing countries, particularly from Asia and Africa. Some of AALCO Member States, and other States have been and were prime targets of such unilateral imposition of sanctions having extraterritorial effects in the past and present times.

[74] *Ibid*, para.76
[75] *Ibid*, para.75

67. The discussions at the UN General Assembly annual Sessions, specifically referring to Economic sanctions against certain countries, pertaining to the economic, commercial and financial embargo, depicts the overwhelming majority of 188 States rejecting the imposition of unilateral sanctions against certain States for more than decades. AALCO Member States have also voiced their concerns and condemned such imposition through extraterritorial application of national legislation.

68. It is time, once again, that AALCO Member States deliberate on the adverse effects of extraterritorial application of legislation especially through imposition of sanctions against third parties without due respect for fundamental principles of international law, rule of law and humanitarian needs.