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« Legal limitations to the Security Council's sanctions under Chapter VII of the Charter of the United Nations: The case of North Korea »

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Abstract :

Les pouvoirs de sanction conférés au Conseil de sécurité des Nations unies en vertu du chapitre VII de la Charte sont considérés comme un outil essentiel pour garantir la paix et la sécurité internationales. Cependant, l'efficacité des régimes de sanctions est mise en cause, considérant que certains d'entre eux paraissent ne pas atteindre l'objectif fixé par le Conseil de sécurité. Cet article évalue les limites juridiques du système de sanctions du Conseil de sécurité en analysant le régime de sanctions adopté contre la Corée du Nord. Après avoir examiné le cadre théorique et juridique de l'adoption de sanctions, une évaluation de la mise en œuvre des sanctions actuelles contre la Corée du Nord révèle plusieurs limites juridiques à son efficacité. Premièrement, le Conseil de sécurité est limité par certaines normes générales de droit international lorsqu'il agit en vertu du chapitre VII. Deuxièmement, le contenu normatif des résolutions du Conseil de sécurité contre la Corée du Nord manque de spécificité. Ces sanctions peu claires et leur complexité limitent leur mise en œuvre. Enfin, le processus actuel de mise en œuvre est limité par l'asymétrie entre le pouvoir discrétionnaire des États Membres et le manque de pouvoir d'exécution du Comité des sanctions. Le régime de sanctions ne peut donc être considéré comme une réussite, dès lors que le Conseil de sécurité adopte des résolutions toujours plus strictes et que la Corée du Nord continue par divers moyens de s'y soustraire. Comme le chapitre VII ne semble pas pouvoir résoudre cette impasse, il pourrait être nécessaire d'envisager de nouvelles alternatives.

The United Nations Security Council's sanctions powers under Chapter VII of the Charter are regarded as an essential tool for ensuring international peace and security. However, it is also argued that sanctions regimes can be ineffective, as some do not seem to achieve the goal set by the Security Council. This paper assesses the legal limitations of the Security Council's sanctions system through the analysis of the sanctions regime against North Korea. After considering the theoretical and legal framework for adopting sanctions, an assessment of the implementation of the current sanctions against North Korea reveals several legal limitations to its effectiveness. Firstly, the Security Council is restricted by international law standards when acting under Chapter VII. Secondly, the normative content of the Security Council's resolutions against North Korea lacks specificity. These unclear sanctions and their complexity limit their proper implementation. Finally, the current implementation process is limited by the asymmetry between the Member States' discretion power and the Sanctions Committee's lack of enforcement power. The sanctions regime can therefore not be considered successful. The Security Council adopts ever stricter resolutions, and North Korea continues to find new ways to evade them. As Chapter VII does not seem to be able to resolve this stalemate, considering new alternatives might be necessary.

Keywords: International law – Security Council – North Korea – sanctions regime – legal limitations

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Projet de recherche en droit international

Sous la direction du Professeur Robert Kolb

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Acronyms

DPRK	Democratic People's Republic of Korea, North Korea
IAEA	International Atomic Energy Agency
ICTY	International Criminal Tribunal for the former Yugoslavia
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
ROK	Republic of Korea, South Korea
UNGA	United Nations General Assembly
UN	United Nations
UNSC	United Nations Security Council

I. Introduction

Sanctions are often considered as one of the UNSC's most valuable tools as they, according to former Secretary-General Kofi Annan, "constitute a necessary middle ground between war and words".[1] Along with allowing the Member States to respond to a threat to international peace and security without directly resorting to the use of force, they should, in theory, strengthen the respect for the UN Charter. However, they are also criticised for being ineffective and even counterproductive, as certain sanctions regimes do not seem to achieve their goal. "For, in order to succeed, sanctions must be capable of coercing their targets into adjusting the particular course of behaviour that, according to the Security Council, poses a threat to international peace and security".[2] When they are unable to coerce their target into respecting international peace and security as defined by the UNSC, the limitations of the sanctions system become visible.

This paper aims to evaluate the legal limitations of the UNSC's current sanctions system under Chapter VII of the Charter. More precisely, it focuses on the non-military sanctions allowed by Articles 39 and 41 of the Charter. To do so, it builds on the analysis of the UNSC's sanctions regime against the DPRK. The use of a case study allows the identification of shortcomings in the UNSC's sanctions system. The choice of this case study is motivated by several considerations. Firstly, the nature of the DPRK's threat to international peace and security makes this case study especially relevant for analysing the UNSC's non-military sanctions. The DPRK's nuclear and ballistic missile programme and apparent military aggressiveness de facto excludes the possibility for the UNSC to decide on military measures allowed by Article 42 of the Charter; moreover, China or Russia would presumably veto any resolution resorting to this article. Secondly, the sanctions regime against the DPRK is the most comprehensive sanctions regime ever applied by the UNSC.[3] However, it has shown very little progress in achieving its purpose, which is getting the DPRK to abandon its nuclear and ballistic missile programme and join and comply with international treaties on non-proliferation. The DPRK indeed continues to develop its nuclear abilities and regularly tests its ballistic missiles. Therefore, this case study highlights the limitations in the UNSC's sanctions system and allows to focus on the non-military sanctions and their legal limitations.

To assess the legal limitations of the UNSC's sanctions system, this paper begins with considering the theoretical and legal framework for the UNSC's sanctions system and its practice. It thereafter focuses on the sanctions regime against the DPRK by presenting the context in which it was established, considering the current sanctions, and assessing their implementation. Finally, it attempts to explain the legal limitations of the UNSC's sanctions regime against the DPRK. To do so, it considers the Charter-based limitations to the UNSC's

[1] United Nations, General Assembly, *In larger freedom: towards development, security and human rights for all*, A/59/2005, 21 March 2005, para. 109.
[2] Borlini, Leonardo. "The North Korea's gauntlet, international law and the new sanctions imposed by the Security Council". *The Italian Yearbook of International Law*, 26:1 (2016), 319. URL: https://heinonline.org/HOL/P?h=hein.intyb/iyrbk0026&i=337.
[3] UN Meetings Coverage and Presse Release. "SC/12603, UNSC 7821st Meeting (AM), 30 November 2016: Security Council Strengthens Sanctions on Democratic Republic of Korea, Unanimously Adopting Resolution 2321 (2016)". URL: https://www.un.org/press/en/2016/sc12603.doc.htm.

power, the normative content of the resolutions against the DPRK and the current implementation process.

II. The Security Council's non-military sanctions under the Charter of the United Nations

To assess the UNSC's sanctions regime against the DPRK and analyse the legal limitations of the sanctions system of the UN Charter, it is necessary to closely consider the nature of these sanctions and their implementation in practice. This chapter thus defines sanctions as understood in public international law, presents the legal framework under which the UNSC acts and finally considers the evolution of its practice.

A. Definition of sanctions in public international law

The understanding of the concept of 'sanctions' depends to a great extent on the context in which it is used. When focusing on the international legal order, the term has been redefined several times throughout the years. Sanctions refer until the 1990s to measures of constraint taken by a subject of international law to restore international legality.[4] While this definition encompasses both measures of self-help taken by individual States and measures decided by international institutions whose role is to ensure international legality, it only focuses on coercive measures taken in reaction to a *violation* of international law. In other words, it excludes acts of constraint taken to preserve or re-establish international peace and security. In the international legal order organised around the UN, the second objective of international peace and security is predominant[5] and is thus included in the current concept of sanctions. 'Sanctions' in the current international legal order can therefore be defined as:

> "Coercive measures taken in execution of a decision of a competent social organ, i.e., an organ legally empowered to act in the name of the society or community that is governed by the legal system."[6]

Besides being afflictive, sanctions are, according to this definition, coercive and based upon a collective decision.[7] In the context of the UN legal order, this excludes non-coercive and unilateral measures and encompasses both the objectives of ensuring the respect of the rule of law and the preservation of international peace and security.

[4] Pellet, Alain and Alina Miron. "Sanctions". *Oxford Public International Law, Max Planck Encyclopedia of International Public Law* (2013), para. 5. URL: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e984?prd=OPIL.
[5] Ibid., para. 8.
[6] Abi-Saab, Georges "De la sanction en droit international" in Jerzy Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century. Essays in Honor of Krzysztof Skubiszewski* (The Hague: Kluwer Law International, 1996), cited in Pellet / Miron, "Sanctions", 2013, para. 8.
[7] Pellet / Miron, "Sanctions", 2013, para. 8.

B. Sanctions under Chapter VII of the United Nations Charter: The UNSC's legal basis for imposing sanctions

Article 1 (1) of the UN Charter states that ensuring international peace and security is one of the primary purposes of the UN.[8] Article 24 (1) delegates this task to the UNSC, which is given the "primary responsibility for the maintenance of international peace and security".[9] It is in this regard invested with significant powers by Chapter VII of the Charter.

The concept of sanctions discussed above and the content of Chapter VII indicate that the UNSC's sanctions include both non-military and military measures, which are respectively allowed in Articles 41 and 42. As military sanctions are not relevant for the chosen case study, the following sub-sections focus on the two primary articles regarding the UNSC's non-military sanctions, namely Articles 39 and 41 of the Charter.

1. Article 39

According to Article 39 of the Charter, the UNSC must first "determine" the existence of a "threat to the peace", "breach of the peace" or "act of aggression"[10] to use its powers defined in Chapter VII. It can thereafter make recommendations and decide on measures based on Articles 41 and 42. Article 39 is, in this logic, the "trigger"[11] for adopting sanctions: it puts the use of Chapter VII powers under the condition of determining the existence of a threat to the peace, a breach of the peace or an act of aggression.

These three situations are intentionally not further defined in the Charter, leaving the requirements for the use of Chapter VII somewhat unclear. The UNSC has clarified these notions through practice to a certain extent. The concept of 'threat to the peace' is the broadest and the most imprecise one. This notion allows the UNSC to act in a preventative manner, before the peace is broken or the act of aggression is committed. Although debates have arisen about limits of the concept of threat to the peace, the practice has shown that the UNSC does not limit it to imminent armed conflict between States. For instance, internal situations and situations affecting other actors than States have been considered threats to the peace by the UNSC; as explained below, generalised risks such as terrorism or non-proliferation have also led to sanctions regimes based on the existence of a threat to the peace.[12] The other interest of the notion of threat to the peace is that it can be used for any situation that could be qualified as a breach of the peace or an act of aggression. A 'breach of the peace' theoretically arises when a threat has materialised, effectively breaking international peace. Traditionally, this is the case when an armed conflict between armed units of States breaks out.[13] An 'act of aggression' is a particular case of a breach of the peace, as it also supposes the use of force by a State against

[8] Charter of the United Nations. 24 October 1945, art. 1 (1).
[9] Ibid., art. 24 (1).
[10] Ibid., art. 39.
[11] Farrall, Jeremy Matam. *United Nations Sanctions and the Rule of Law* (Cambridge: Cambridge University Press, 2007), 82.
[12] Krisch, Nico. "Article 39". In *The Charter of the United Nations: A Commentary*, Volume II, eds. Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (Oxford: Oxford University Press, 3rd Edition, 2012), 1279.
[13] Ibid., 1293.

another State. The main difference between a breach of the peace and an act of aggression is the responsibility the latter establishes against a subject of international law. The UNSC has been reluctant to use these two notions and has qualified almost all situations as threats to the peace.[14] The lack of definition indeed gives the UNSC great discretion power in qualifying a given situation.

The objective of the measures in Chapter VII is "to maintain or restore international peace and security".[15] More precisely, the UNSC is given sanctions powers "not to maintain or restore the law, but to maintain, or restore peace, which is not necessarily identical with the law".[16] In this logic, sanctions under Chapter VII are measures taken to coerce the targeted subject to behave in a particular manner, whether because of a violation of international law or a threat to or breach of international peace and security. Although a threat to or breach of international peace and security in most cases also includes a violation of international law, the determination of such a violation is not a requirement for implementing sanctions.[17] Sanctions are not conditional upon a violation of international law. Therefore, the UNSC is not required to determine the existence of a violation of international law to use its sanctions powers. However, as it determines the existence of one of the three situations of Article 39 that are contrary to the principles of the Charter, it simultaneously creates an obligation for the targeted subject to abstain from creating such a situation.[18] In this sense, the UNSC applies sanctions in reaction to the violation of this specific obligation. According to Combacau,

> "le chapitre VII ne l'investit d'aucun 'rôle législatif' mais d'une fonction normative dérivée, quasi-juridictionnelle et apparemment rétroactive, qui consiste à concrétiser l'obligation, imprécise mais incluse dans la Charte, de s'abstenir de tout acte constitutif d'une menace pour la paix ou d'une rupture de la paix, et de tout acte d'agression."[19]

By qualifying a given situation, the UNSC does not determine the international responsibility of the Member States involved. As a result, the determination of a situation is not a legal finding but a political one,[20] although the qualification of an act of aggression is closer to a legal determination. Moreover, this qualification does not have any consequences unless the UNSC decides to intervene[21] by using its powers of Articles 41 and 42.

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[14] Farrall, *United Nations Sanctions and the Rule of Law*, 2007, 64.
[15] Charter of the United Nations, 1945, art. 39.
[16] Kelsen, Hans. *The Law of the United Nations* (London Institute of World Affairs, 1950). Cited in d'Argent, Pierre, Jean d'Aspremont Lynden, Frédéric Dopagne and Raphaël Van Steenberghe. "Article 39". In *La Charte Des Nations Unies: Commentaire Article Par Article*, Volume I, eds. Jean-Pierre Cot and Alain Pellet (Paris: Economica, 3rd Edition 2005), 1138.
[17] Farrall, *United Nations Sanctions and the Rule of Law*, 2007, 7.
[18] Lagrange, Evelyne and Pierre Michel Eisemann. "Article 41". In *La Charte Des Nations Unies: Commentaire Article Par Article*, Volume I, eds. Jean-Pierre Cot and Alain Pellet (Paris: Economica, 3rd Edition 2005), 1205-1207.
[19] Jean Combacau, *Le pouvoir de sanction de l'ONU. Etude théorique de la coercition non militaire* (Paris: Pedone, 1974), cited in Pellet / Miron, "Sanctions", 2013, para. 16.
[20] d'Argent / d'Aspremont Lynden / Dopagne / Van Steenberghe, "Article 39", 2005, 1139.
[21] Ibid., 1138.

2. Article 41

Article 41 of the Charter empowers the UNSC to decide on measures short of the use of force "to give effect to its decisions".[22] It also states that the UNSC can call upon the Member States to implement these measures.[23] In other words, the Charter empowers the UNSC to take decisions, binding in nature, but only allows it to *invite* the Member States to apply these measures. Despite this wording, the UNSC's decisions are mandatory on all Member States. Already in Resolution 232 (1966) regarding its first sanctions regime against Southern Rhodesia, the UNSC stresses that "the failure or refusal by any [Member State] to implement the present resolution shall constitute a violation of Article 25".[24] This article indeed stresses that the Member States "agree to accept and carry out the decisions of the Security Council".[25] By combining Articles 25 and 41, the UNSC makes its decisions binding for the Member States, including the targeted State.[26] The Member States are usually responsible for implementing the decided sanctions and are free to choose the means to conform to their obligations.[27] Besides binding decisions, the UNSC can make recommendations based solely on Article 39,[28] in which case the Member States are free to decide whether to adhere to them or not. In any case, the binding character of a particular measure or resolution is subject to interpretation. The choice of words is usually a vital aspect to consider. For instance, cases in which the UNSC "decides", "demands" and "order" are regarded as binding; on the contrary, when the UNSC "urges", "calls upon" or "requests", it only recommends the Member States to act.[29]

As the UNSC uses sanctions to enforce obligations already included in the Charter, these sanctions are not considered new legislation but "analogous to executive regulation".[30] Sanctions according to Chapter VII are temporary, ending when the qualified situation disappears. They thus have an objective and are effective if they can coerce the targeted entity to comply with this objective. The measures based on Article 41 aim to isolate the targeted entity[31] and can be economic, financial and diplomatic. The examples given in Article 41 are not exhaustive, favouring a broad interpretation of possible measures.[32] After giving the UNSC the discretion power in qualifying the situation and deciding whether it should intervene, the Charter empowers the UNSC to decide the sanctions it deems necessary in a given case. The use of economic sanctions is predominant: trade restrictions and embargoes are some of the

[22] Charter of the United Nations, 1945, art. 41.
[23] Ibid.
[24] United Nations, Security Council, Resolution 232 (1996) of 16 December 1996. S/RES/232 (1966), para. 3.
[25] Charter of the United Nations, 1945, art. 25.
[26] Daillier, Patrick, Mathias Forteau and Alain Pellet. *Droit international public*. 8th Edition (Paris: LGDJ, 2009), 1103.
[27] Krisch, Nico. "Article 41". In *The Charter of the United Nations: A Commentary*, Volume II, eds. Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (Oxford: Oxford University Press, 3rd Edition, 2012), 1324.
[28] d'Argent / d'Aspremont Lynden / Dopagne / Van Steenberghe, "Article 39", 2005, 1168.
[29] Ibid., 1167.
[30]Krisch, Nico. "Introduction to Chapter VII: The General Framework". In *The Charter of the United Nations: A Commentary*, Volume II, eds. Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (Oxford: Oxford University Press, 3rd Edition, 2012), 1252.
[31] d'Argent / d'Aspremont Lynden / Dopagne / Van Steenberghe, "Article 39", 2005, 1211.
[32] Krisch, "Article 41", 2012, 1311.

most frequently employed measures.[33] Financial sanctions, closely linked to economic sanctions, aim to prevent the targeted subject from maintaining financial relations abroad. They include freezing financial resources of targeted entities in the Member States.[34] Finally, diplomatic sanctions seek to suspend official relations between the targeted State and the Member States.[35] These three types of sanctions are usually used together to put more pressure on the targeted entity.

C. The evolution of the practice of the UNSC's sanctions

Since the end of the Cold War, the UNSC sanctions regimes have undergone a double evolution. This process is one of refinement and expansion. On the one hand, the UNSC has shifted from comprehensive sanctions to targeted sanctions; on the other hand, it has expanded its areas of activity, going beyond the traditional understanding of its police function under Chapter VII. These two developments are the consequence of an enlargement of the notion of peace and a greater focus on protecting individuals, which occur with the end of the Cold War and the revival of sanctions regimes. The UNSC starts considering peace as being more than the strict absence of armed conflict and, in 1992, it states that:

> "The absence of war and military conflicts among States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security."[36]

This enlargement of the notion of peace goes hand in hand with a shift in the concept of security. While security traditionally means State-security, the end of the Cold War marks a shift to a more individually-oriented understanding of security:[37] International peace and security is nowadays understood as including the protection of individuals and their rights.

1. The shift from global sanctions to smart sanctions

With its first sanctions regimes post-Cold War, the UNSC comes under significant criticism for the humanitarian consequences of its economic sanctions, especially in the case of Iraq's occupation of Kuwait.[38] In the mid-1990s, it thus turns to "smart" or "targeted" sanctions, focusing on the targeted entity's specific individuals and economic sectors.[39] The targeted individuals are usually decision-makers, members of the government of the targeted State.[40] The objective is to limit the collateral humanitarian damage of the sanctions regimes while increasing their effectiveness by targeting those responsible for the qualified situation and avoiding sanctions harming the general civilian population.[41] Financial sanctions target specific

[33] Ibid., 1312.
[34] Farrall, *United Nations Sanctions and the Rule of Law*, 2007, 120.
[35] Ibid., 123.
[36] United Nations, Security Council, *Note by the President of the Security Council*, S/23500, 31 January 1992, 3.
[37] Pellet / Miron, "Sanctions", 2013, para. 21.
[38] Daillier / Forteau / Pellet, *Droit international public*, 2009, 1106.
[39] Krisch, "Introduction to Chapter VII: The General Framework", 2012, 1242.
[40] Lagrange / Eisemann, "Article 41", 2005, 1215.
[41] Krisch, "Article 41", 2012, 1309.

persons by freezing their assets abroad and banning them from travelling internationally.[42] Comprehensive economic embargoes are replaced with selective embargo measures limited to arms, and selected goods,[43] allowing for humanitarian exceptions.[44] From the mid-1990s onwards, the UNSC also aims to develop broader and more effective measures, such as developing best practices, capacity-building and subsidiary structures to oversee sanctions management and identify targets and sanctions violators.[45]

2. Broadening the range of action

Even though the broader approach to peace might blur the distribution of competencies between the UNSC and the UNGA, it allows the UNSC to expand the range of actions it deems being within its competence under Chapter VII. By doing so, it goes beyond its traditional police function of maintaining or restoring international peace through non-military and military measures. More precisely, it has taken upon new functions such as quasi-legislation, broader prevention, territorial administration, law enforcement and dispute settlement.[46] Although its powers under Chapter VII are initially meant to respond to specific classical interstate armed conflicts cases,[47] the UNSC has developed new areas of activity. It has, among other things, tried to address generalised risks and take measures against threats such as terrorism or the proliferation of weapons of mass destruction.[48]

For instance, the UNSC stresses in 1992 that "[t]he proliferation of all weapons of mass destruction constitutes a threat to international peace and security".[49] By stating that the proliferation of such weapons constitutes a threat to the peace, the UNSC enables itself to act on this threat under Chapter VII, despite the lack of international obligation requiring that States limit their armament.[50] This view was reaffirmed in several instances, among others in Resolution 1540 (2004), in which the UNSC adopts binding rules on the non-proliferation of weapons of mass destruction to non-State actors.[51] This resolution illustrates the shift towards an extension of the UNSC's scope of action in two ways. Firstly, it creates a set of new obligations for all Member States; secondly, it takes *permanent* measures limiting armaments independently of a specific situation, which is not necessarily part of its competencies under Chapter VII.[52] Contrary to traditional non-military sanctions, this resolution is part of a broader process of generalised prevention and law-making measures beyond the wording of the Charter.

[42] Lagrange / Eisemann, "Article 41", 2005, 1215.
[43] Krisch, "Article 41", 2012, 1309.
[44] Farrall, *United Nations Sanctions and the Rule of Law*, 2007, 141.
[45] Krisch, "Article 41", 2012, 1309.
[46] Krisch, "Introduction to Chapter VII: The General Framework", 2012, 1248-1255.
[47] Krisch, "Article 39", 2012, 1277.
[48] d'Argent / d'Aspremont Lynden / Dopagne / Van Steenberghe, "Article 39", 2005, 1154-1165.
[49] S/23500 (1992), 4.
[50] ICJ. *Case concerning military and paramilitary activities in and against Nicaragua*. Judgment of 27 June 1986. ICJ Reports 1986, para. 269.
[51] United Nations, Security Council, Resolution 1540 of 28 April 2004, S/RES/1540 (2004).
[52] Krisch, "Article 39", 2012, 1280.

III. The case of North Korea

In order to assess the UNSC's sanctions regime against the DPRK, this chapter starts with considering the DPRK's recent history in nuclear energy. The following sub-sections examine thereafter the current obligations of the sanctions regime against the DPRK and assess their implementation.

A. The DPRK's background in nuclear energy: From joining the NPT to the 2006 nuclear test

The DPRK joins the NPT in 1985 and signs in 1992 its Safeguards Agreement with the IAEA,[53] conforming to Article III (1) of the NPT.[54] This safeguards system targets non-nuclear parties of the NPT. In short, it enables the IAEA to monitor their use of nuclear energy to ensure that they respect their obligations under the NPT. This control includes a system of records and reports, as well as on-site inspections.[55] In March 1993, the DPRK announces its intention to withdraw from the NPT, allowed by Article X (1) of the Treaty. This escape clause authorises a party to leave the NPT "if it decides that extraordinary events, related to the subject matter of [the] Treaty, have jeopardised the supreme interests of its country".[56] The cause of withdrawal is thus subjective, as it is up to the withdrawing party to "decide" which events are contrary to its highest interest. The DPRK considers that two events are threatening its supreme interests. Firstly, after finding inconsistencies between the DPRK's plutonium declaration and the findings of the Agency, the IAEA requests to conduct a special inspection of two sites.[57] The DPRK refuses, arguing that the Agency is interfering in its internal affairs and violating its state sovereignty. Secondly, the DPRK claims that the Team Spirit exercises, a joint military training between the USA and the ROK, also jeopardise its supreme interests. The USA convinces the DPRK to suspend its withdrawal the day before it takes effect, and the two countries find a compromise in an Agreed Framework signed in 1994. The same year, the DPRK withdraws from the IAEA, but its Safeguards Agreement with the Agency remains, and the IAEA continues visiting facilities in DPRK in the following years.

In 2002, the relationship between the IAEA, the USA, and the DPRK deteriorates. After acknowledging that it has a uranium enrichment programme, which violates the NPT, its Safeguards Agreement and the 1994 Agreed Framework, the DPRK begins disrupting the IAEA's surveillance equipment installed in several facilities covered by the Safeguards. It also demands the removal of the IAEA's inspectors. Although the IAEA calls upon the DPRK to fully comply with the Agency, the DPRK announces its withdrawal from the NPT on 10 January 2003. The IAEA Board sends the issue to the UNSC, which expresses its concern and declares

[53] IAEA. "IAEA and DPRK: Chronology of Key Events". URL: https://www.iaea.org/newscenter/focus/dprk/chronology-of-key-events.
[54] Treaty on the Non-Proliferation of Nuclear Weapons. 5 March 1970. 729 UNTS 161, art. III (1).
[55] IAEA. INFCIRC/66/Rev.2. *The Agency's Safeguards System (1965, as provisionally extended in 1966 and 1968)*. 16 September 1968. Available at https://www.iaea.org/publications/documents/infcircs/agencys-safeguards-system-1965.
[56] Treaty on the Non-Proliferation of Nuclear Weapons. 5 March 1970. 729 UNTS 161, art. X (1).
[57] IAEA. "Fact Sheet on DPRK Nuclear Safeguards". URL: https://www.iaea.org/newscenter/focus/dprk/fact-sheet-on-dprk-nuclear-safeguards.

that it will continue to follow its developments.[58] At this point, sanctions are not discussed. Instead, the ROK, the DPRK, the USA, China, Russia and Japan hold negotiation rounds; these Six-Party Talks aim to denuclearise the Korean Peninsula. Their Joint Statement of September 2005 is considered a breakthrough: the DPRK agrees to abandon its nuclear and ballistic missile programme and return to the NPT in exchange for security guarantees and economic assistance.[59] This Statement never becomes a reality, as the DPRK conducts ballistic missile launches on 5 July 2006. In consequence, the UNSC adopts Resolution 1695 (2006), in which it condemns the DPRK launches, reaffirms that the proliferation of nuclear weapons constitutes a threat to international peace and urges the DPRK to implement the September 2005 Joint Statement.[60] The DPRK ignores this resolution and carries out a nuclear test on 6 October 2006 and has since then continued its nuclear and ballistic testing, its latest test being in March 2021.[61]

B. Responding to the DPRK's nuclear programme: Resolution 1718 and the current sanctions regime against DPRK

In response to the DPRK's nuclear testing of October 2006, the UNSC adopts Resolution 1718 (2006). Although the DPRK is legally authorised to leave the NPT and develop a nuclear and ballistic missile programme, it is still bound to its obligations under the UN Charter, which include the obligation to refrain from acts threatening international peace and security. While the DPRK's missile tests were not illegal before the Resolutions 1695 (2006) and 1718 (2006), any future nuclear or ballistic missile testing become illegal with their adoption. As the UNSC requires the DPRK to refrain from developing its nuclear and ballistic missile programme, the DPRK violates Article 25 of the Charter by refusing to comply. As it fears that the DPRK's programme can lead to the use of nuclear weapons, the UNSC argues that the DPRK's testing has created regional and international tensions and "determin[es] therefore that there is a clear threat to international peace and security".[62] It thus qualifies the DPRK's actions as a threat to the peace according to Article 39 of the Charter and can, on this basis, use its powers of Chapter VII. The UNSC demands that the DPRK ceases its nuclear activities, abandons its nuclear and ballistic missile programme, returns to the NPT and complies with the NPT and the IAEA Safeguards Agreement. In short, it requires the DPRK to remain a non-nuclear-weapon State Party to the NPT. Resolution 1718 (2006) is the first resolution against the DPRK in which the UNSC resorts to Chapter VII of the Charter and its Article 41. Although the UNSC had previously adopted resolutions on the DPRK nuclear issue,[63] this resolution marks the beginning of the sanctions regime against the DPRK.

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[58] IAEA, "IAEA and DPRK: Chronology of Key Events".
[59] The National Committee on North Korea. "19 September, 2005 Joint Statement of the Six Party Talks". URL: https://www.ncnk.org/resources/publications/September_19_2005_Joint_Statement.doc.
[60] United Nations, Security Council, Resolution 1695 of 15 July 2006, S/RES/1695 (2006).
[61] Security Council Report. "DPRK (North Korea): May 2021 Monthly Forecast". URL: https://www.securitycouncilreport.org/monthly-forecast/2021-05/dprk-north-korea-11.php.
[62] United Nations, Security Council, Resolution 1718 of 14 October 2006, S/RES/1718 (2006).
[63] See Resolution 1695 (2006), in which the UNSC "requires" that all Member States prevent the DPRK to access missiles and related technology as well as financial resources that might be used in its nuclear and ballistic missile programme (S/RES/1695 (2006)).

Most of the measures in Resolution 1718 are binding upon the Member States and the DPRK, as the UNSC *decides* that they must be implemented. Member States are responsible for ensuring the enforcement of these sanctions on their territory and by their nationals; this also applies to their flagged vessels and aircrafts, whether or not they are on their territory. The resolution furthermore establishes the 1718 Sanctions Committee, supported by the Panel of Experts, and empowers it with the administration of the sanctions regime against the DPRK. This task includes reviewing and taking action on sanctions violations, reporting to the UNSC, deciding upon exception requests, and identifying other entities, individuals, goods and technology to be affected by the sanctions.[64] In other words, Resolution 1718 sets the foundation for a long-term sanctions system against the DPRK. In the following years, the UNSC strengthens these sanctions in pace with the DPRK's continued nuclear testing and its refusal to comply with the UNSC's demands.[65] In 2016, with the adoption of Resolution 2321, the sanctions regime against the DPRK becomes, according to the then Secretary-General Ban Ki-Moon, the "toughest and most comprehensive sanctions regime ever imposed by the Council".[66] The regime is again toughened in the UNSC's latest resolutions on the matter in 2017. Today, the binding measures of the sanctions regime include:

- The embargo on all arms and related material as well as a ban on financial transactions related to arms; the ban on the supply, sale or transfer to the DPRK of a list of items relevant to nuclear, ballistic missiles and other weapons of mass destruction-related programmes;
- The prohibition for the DPRK from selling coal, iron, earth and stone to the Member States;
- The ban on the importation, selling and supplying to the DPRK of refined petroleum products exceeding the aggregate amount of 500,000 barrels per year;
- The prohibition for Member States to lease or charter their flagged vessels and aircrafts to the DPRK and designated individuals and entities;
- The expelling from and the restriction of entry in the Member States of DPRK nationals and foreign nationals who are working in facilitating sanctions evasions or are violating the UNSC's resolutions;
- The travel ban and the freezing of assets, funds and other economic resources of entities and individuals of the DPRK that are associated with prohibited activities, as well as entities and individuals acting on their behalf;
- The prohibition for Member States to provide work authorisations for DPRK nationals and the obligation to repatriate to the DPRK all DPRK nationals working on their territory.[67]

[64] S/RES/1718 (2006), para. 12.
[65] See especially: United Nations, Security Council, Resolution 2270 of 2 March 2016, S/RES/2270 (2016); United Nations, Security Council, Resolution 2321 of 30 November 2016, S/RES/2321 (2016); United Nations, Security Council, Resolution 2371 of 5 August 2017, S/RES/2371 (2017); United Nations, Security Council, Resolution 2397 of 22 December 2017, S/RES/2397 (2017).
[66] UN Meetings Coverage and Presse Release. "SC/12603".
[67] UNSC. "Security Council Committee established pursuant to resolution 1718 (2006), Sanctions Measures". URL: https://www.un.org/securitycouncil/sanctions/1718#current%20sanction%20measures.

Most of these sanctions include exceptions set by the Sanctions Committee and the Panel of Experts. For example, paragraph 8 of Resolution 2371 (2017), banning the coal import from the DPRK, includes an exception regarding coal originating from outside the DPRK and transported through the DPRK only for exportation purposes.[68]

C. Assessing the enforcement of the sanctions regime against the DPRK

The Panel of Experts reports on the implementation and alleged violations of the UNSC's sanctions against the DPRK to the Sanctions Committee and the UNSC twice a year. These comprehensive reports are based on the Panel's findings as well as Member States' reports. The present assessment is based on the four last reports, covering the period of February 2019 to February 2021.[69] According to these reports, Member States have yet to achieve the complete implementation of the UNSC's sanctions. In addition, the DPRK uses various obfuscation techniques to access goods, technology and financial markets abroad and is thus able to evade sanctions.

For instance, the Panel of Experts shows that the DPRK uses shell and front companies to send workers abroad.[70] This activity violates paragraph 17 of Resolution 2375 (2017) and paragraph 8 of Resolution 2397 (2017):[71] these paragraphs prohibit the Member States from providing work authorisations for DPRK nationals and require them to repatriate those already earning income in their jurisdiction. Overseas workers are a valuable source of revenue for the DPRK, as a significant part of their income goes to the State. They thus contribute to the development of the DPRK's nuclear and ballistic missile programme. The Panel estimates that the DPRK earns about $20.4 million per year from its information technology workers dispatched abroad.[72]

The DPRK uses similar obfuscation techniques as well as offshore accounts and overseas banking representatives to access the international financial system. It targets the Member States that have limited financial oversight and regulations.[73] These methods allow the DPRK to trade with unaware companies worldwide and to have a relatively stable source of income to support its nuclear and ballistic missile programme. These activities violate several resolutions, such as paragraph 11 of Resolution 2094 (2013), paragraphs 33, 34, and 35 of Resolution 2270 (2016), paragraph 32 of Resolution 2321 (2016) and paragraph 12 of Resolution 2371 (2017).[74] These resolutions prohibit the DPRK from opening or maintaining branches, subsidiaries and

[68] S/RES/2371 (2017), para. 8.
[69] United Nations, Security Council, *Midterm report of the Panel of Experts submitted pursuant to resolution 2464 (2019)*, S/2020/691, 30 August 2019; United Nations, Security Council, *Final report of the Panel of Experts submitted pursuant to resolution 2464 (2019)*, S/2020/151, 2 March 2020; United Nations, Security Council, *Midterm report of the Panel of Experts submitted pursuant to resolution 2515 (2020)*, S/2020/840, 28 August 2020; United Nations, Security Council, *Final report of the Panel of Experts submitted pursuant to resolution 2515 (2020)*, S/2021/211, 4 March 2021.
[70] S/2021/211 (2021), para. 138.
[71] United Nations, Security Council, Resolution 2375 of 11 September 2017, S/RES/2375 (2017), para. 17; S/RES/2397 (2017), para. 8.
[72] S/2020/151 (2020), para. 121.
[73] S/2021/211 (2021), para. 138.
[74] United Nations, Security Council, Resolution 2094 of 7 March 2013, S/RES/2094 (2013), para. 11; S/RES/2270 (2016), para. 33-35; S/RES/2321 (2016), para. 32; S/RES/2371 (2017), para. 12.

representative offices of DPRK banks abroad and having joint ventures or cooperative entities abroad.

Moreover, the reports show evidence of the DPRK using DPRK-flagged and China-flagged barges and humanitarian cargoes to export coal, mainly to China.[75] The DPRK is also accused of engaging in ship-to-ship coal transfers in Chinese waters[76] and trans-shipment through Russian ports.[77] According to a Member State, these activities amount to the exportation of 3.7 million tons between January and August 2019.[78] The DPRK's exportation of coal violates paragraph 8 of Resolution 2371 (2017), in which the UNSC decides that the DPRK is prohibited to "supply, sell or transfer" coal, iron and ore and that all States must prevent the DPRK to access these materials.[79]

Similarly, the DPRK's importation of refined petroleum in quantities exceeding several times the barrel cap allowed by the UNSC violates paragraph 5 of Resolution 2397 (2017).[80] Vessel identity swaps and ship-to-ship transfers are two methods used by the DPRK in this case. Both involve the use of foreign-flagged or unknown-flagged vessels. In the given period, a China-flagged vessel and formerly Togo-flagged, Sierra Leone-flagged and Vietnam-flagged vessels are accused of violating the UNSC's sanctions by participating in the importation of petroleum to the DPRK.[81] According to a Member State, the direct deliveries of foreign-flagged vessels amount to the illicit importation of between 560,000 and 1.531 million barrels in the first ten months of 2019.[82]

Other sanction violations include the trade of fishing permits and the exportation of sand and other prohibited equipment.[83] Not less than 62 Member States are involved in alleged violations between February 2019 and February 2020,[84] and the DPRK does not show any sign of intending to cease its prohibited activities. On the contrary, the Panel of Experts finds that the DPRK "reaffirmed its commitment to retaining and developing its nuclear and ballistic missile programmes, in violation of Security Council resolutions".[85]

It should be noted that the Covid-19 pandemic did affect the DPRK's illegal activities. While they did not entirely stop, its registered trade drastically fell, as the DPRK decided to impose strict border control.[86] For example, the import of luxury goods, prohibited under paragraph 8 (a) (iii) of Resolution 1718 (2006), became rare.[87] On the other hand, these restrictions, limiting the movement of people, facilitated DPRK workers remaining and working in the other Member

[75] S/2020/151 (2020), para. 55.
[76] Ibid.
[77] S/2021/211 (2021), para. 73 as well as S/2020/151 (2020), para. 79.
[78] S/2020/151 (2020), para. 55.
[79] S/RES/2371 (2017), para. 8.
[80] S/RES/2397 (2017), para 5.
[81] S/2020/151 (2020), Annex 73.
[82] Ibid., para. 10.
[83] S/2021/211 (2021), para. 28.
[84] Albright, David, Sarah Burkhard and Spencer Faragasso. "Alleged Sanctions Violations of UNSC Resolutions on North Korea for 2019/2020: The Number is increasing". *Institute for Science and International Security*. 2020, available at: https://isis-online.org/isis-reports/detail/alleged-north-korea-sanctions-violations-2020/, 1.
[85] S/2020/151 (2020), para. 4.
[86] S/2021/211 (2021), para. 84.
[87] Ibid., para. 111.

States,[88] contrary to paragraph 17 of Resolution 2375 (2017) and paragraph 8 of Resolution 2397 (2017).[89]

This assessment demonstrates that the UNSC's sanctions against the DPRK are far from being fully implemented. Although the sanctions regime against the DPRK is the most comprehensive and legally binding regime ever imposed by the UNSC, this partial implementation makes it possible for the DPRK to evade sanctions and continue to fund its nuclear and ballistic missile programme. Were the sanctions fully implemented or implemented to a greater extent, like during the pandemic, the sanctions regime would arguably be more effective in coercing the DPRK into accepting the UNSC's decisions.

IV. Legal limitations to the sanctions regime against the DPRK

The weaknesses in the sanctions regime against the DPRK have several origins. On the one hand, the assessment above confirms that the limitations of the sanctions regime partly originate from a lack of implementation. This leads to the consideration of two aspects, namely the normative content of the UNSC's resolutions and the practical aspect of the sanctions' enforcement. On the other hand, the incomplete implementation cannot be the sole cause of an unsuccessful sanctions regime. Some limitations are inherent to the UNSC's sanctions system, originating from the UN Charter and *ius cogens*. Although these limitations are deliberate, their acknowledgement is helpful for a thorough understanding of the UNSC's current sanctions system.

Political considerations also have a role in the degree of success of a sanctions regime. This final explanation will not be analysed in this paper, although the legal and political aspects are to a certain degree related to each other.

This chapter thus begins by considering the Charter-based limitations to the UNSC's powers, as well as the limit of *ius cogens*. Secondly, it considers the normative content of the UNSC's resolutions. Finally, it assesses the current implementation process.

A. The question of the applicability of international law standards to the Security Council

The UNSC's great discretion power to act under Chapter VII of the Charter raises the question of whether this power is unlimited, placing the UNSC above international law. Some argue that its sanctions powers are limitless precisely because of its broad discretion power for ensuring the respect of international peace and security.[90] On the contrary, other commentators conclude that the UN Charter and *ius cogens* limit the UNSC's powers.

[88] Ibid., para. 130.
[89] S/RES/2375 (2017), para. 17; S/RES/2397 (2017), para. 8.
[90] Farrall, *United Nations Sanctions and the Rule of Law*, 2007, 68.

1. The purposes and principles of the Charter as a limit to the Security Council's powers

According to Article 24 (2) of the Charter, when ensuring the maintenance of international peace and security, the UNSC "shall act in accordance with the Purposes and Principles of the United Nations".[91] This article explicitly states that the UNSC is bound to respect the purposes and principles of the UN Charter when acting to preserve peace. In the same logic, Article 25 provides that the Member States agree to respect and implement "the decisions of the Security Council in accordance with the present Charter".[92] Although this second article is less clear, it can be interpreted as confirming that the Member States are to carry out the decisions that conform with the UN Charter.[93] Consequently, the Member States are not obligated to carry out the resolutions that do not comply with the Charter, as they should be considered invalid. Articles 24 and 25 of the Charter thus confirm that the Charter is the UNSC's constitutional framework in which it is limited to act.[94] The ICTY has confirmed this approach in the Tadić case. The Appeals Chamber of the ICTY confirms that when determining the existence of a threat to the peace, the UNSC "has to remain, at the very least, within the limits of the Purposes and Principles of the Charter".[95] Referring to Article 39, it argues that:

> "It is clear from this text that the Security Council plays a pivotal role and exercises a very wide discretion under this Article. But this does not mean that its powers are unlimited. […] Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)."[96]

The UNSC must therefore act according to the UNSC's object and purpose. This constitutional framework is however broad, and so are the purposes and principles of the Charter. Therefore, some argue that Articles 1 and 2 of the Charter, containing its principles and purposes, are more guidelines than clear limitations to the UNSC's powers.[97]

Some useful rules and limits can nonetheless be identified.[98] Firstly, Article 1 (2) provides that one of the purposes of the UN is the "respect for the principle of equal rights and self-determination of peoples".[99] This includes the right to determine its political, economic, social

[91] Charter of the United Nations, 1945, art. 24 (2).
[92] Ibid., Art. 25.
[93] Farrall, *United Nations Sanctions and the Rule of Law*, 2007, 69.
[94] Schweigman, David. *Authority of the Security Council Under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* (Boston: Kluwer Law International, 2001), 167.
[95] ICTY. *Prosecutor v. Tadić a/k/a "Dule"*. Appeals Chamber Decision of 2 October 1995 on the Defence Motion for Interlocutory Appeal on Jurisdiction. case No. IT-94-1-AR72, para. 29.
[96] Ibid., para. 28.
[97] Krisch, "Introduction to Chapter VII: The General Framework", 2012, 1256.
[98] For a complete analysis of the principles and purposes of the Charter as a limit to the UNSC's powers, see Schweigman, *Authority of the Security Council Under Chapter VII*, 2001; De Wet, Erika. *The Chapter VII Powers of the United Nations Security Council* (Oxford: Hart Publishing. 2004).
[99] Charter of the United Nations, 1945, art. 1 (2).

and cultural structure.[100] Consequently, the UNSC must respect the Member States' right to self-determination and cannot impose upon them a particular political structure.

Secondly, according to Article 1 (3), the UN must work towards "promoting and encouraging respect for human rights and for fundamental freedoms".[101] Consequently, the UNSC is bound to consider the respect of human rights when acting under Chapter VII. Even though sanctions can hardly avoid causing some degree of hardship, the UNSC is obligated to consider "the necessity and proportionality of its measures in relation to the threat to the peace".[102] Moreover, Article 55 (c) stresses that the UN is committed to promoting "universal respect for, and observance of, human rights and fundamental freedoms",[103] reaffirming that the UNSC must respect these principles as an organ of the UN. The purposes of the UN provided in Article 1 of the Charter thus set two limitations to the UNSC's powers: in ensuring international peace and security, the UNSC cannot disregard the Member States' right to self-determination and human rights.

Article 2 of the Charter, introducing the principles of the UN, also provides limitations to the UNSC's powers. Its paragraph 1 stresses that the UN is based on the principle of "sovereign equality of all its Members".[104] This principle can seem in contradiction with Chapter VII at first glance, as the UNSC's decisions under this chapter can collide with state sovereignty. For instance, territorial integrity can be violated under Article 42, and the right to free trade can be limited under Article 41. Article 2 (1) must thus be interpreted as prohibiting the UNSC from violating state sovereignty permanently but allowing it to take temporary measures infringing on the principle of sovereign equality.

Furthermore, according to Article 2 (2), the Member States must "fulfil in good faith the obligations assumed by them in accordance with the present Charter".[105] This principle extends to the UNSC as an organ of the UN comprised of Member States assuming obligations under the Charter.[106] According to Schweigman, this means that the UNSC must not abuse its powers nor act arbitrarily and that its decisions must be necessary and proportional.[107] Article 2 thus sets two additional limits to the UNSC's powers, as it prohibits the UNSC from violating violate state sovereignty severely and requires it to act in good faith.

The analysis of Articles 1 and 2 of the Charter demonstrates that the UNSC does not enjoy unlimited powers when acting under Chapter VII. Although there might be some tensions between the UNSC's powers under Chapter VII and Articles 1 and 2, the purposes and principles of the Charter must be interpreted as meaning that the UNSC may not use its powers under Chapter VII at their complete expense. On the contrary, it "has to balance the realisation of its primary goal with the realisation of the secondary goals contained in the Charter".[108]

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[100] Schweigman, *Authority of the Security Council Under Chapter VII*, 2001, 169.
[101] Charter of the United Nations, 1945, art. 1 (3).
[102] Schweigman, *Authority of the Security Council Under Chapter VII*, 2001, 171.
[103] Charter of the United Nations, 1945, art. 55 (c).
[104] Ibid., art. 2 (1).
[105] Ibid., art. 2 (2).
[106] De Wet, *The Chapter VII Powers of the United Nations Security Council*. 2004, 195.
[107] Schweigman, *Authority of the Security Council Under Chapter VII*, 2001, 174-175.
[108] De Wet, *The Chapter VII Powers of the United Nations Security Council*. 2004, 193.

2. *Ius cogens* as a limit to the Security Council's powers

The 1969 Vienna Convention on the Law of Treaties defines in its Article 53 the concept of *ius cogens* as being "a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted".[109] The international community recognises the norms of *ius cogens* as being so fundamental for all people that they must suffer no violation. Article 53 provides that if a treaty contravenes a peremptory norm of general international law, it must be considered null and void. Article 64 of the Treaty specifies that new peremptory norms also apply to already existing treaties: a treaty terminates if it is in conflict with a new norm of *ius cogens*.[110] As no treaty can derogate from these norms, neither can the Charter. Consequently, the powers delegated to the UNSC by the Charter must be limited by current and future norms of *ius cogens*. If the UNSC makes a decision violating *ius cogens*, it is void, and the Member States are not legally bound to respect it.

Although the specific content of peremptory norms is debated, it is generally accepted that the core of human rights and international humanitarian law, the prohibition of aggression and the right to self-determination are a part of it.[111] As a consequence, these standards should also apply to the UNSC's decisions under Chapter VII. However, some norms of *ius cogens* do not seem to apply to the UNSC, such as the right to self-determination and the prohibition of aggression, as provided by Articles 41 and 42 of the Charter. This can cast doubt on the relevance of peremptory norms as a limit to the UNSC's powers, but, as argued by Kirsch, "*[i]us cogens* is thus better seen to have developed within – and in the limits of – the UN system",[112] as they have emerged after the adoption of the UN Charter. In any case, these peremptory norms are also included in the purposes and principles as discussed above. The UNSC is thus bound to respect them under the UN Charter as well as under *ius cogens*. Peremptory norms of general international law constitute therefore a limitation for the UNSC's measures under Chapter VII.

3. Conclusion on the general limitations to the UNSC's powers

The analysis of the UN Charter's purposes and principles, as well as *ius cogens*, indicates that the UNSC's measures under Chapter VII are not limitless. When ensuring international peace and security, it is bound to respect several international law standards, including state sovereignty and the essence of human rights. There is indeed a "scholarly consensus that the non-derogable provisions of human rights law and provisions of international humanitarian law demarcate the limits of the permissibility of economic sanctions".[113] Chapter VII allows the UNSC to make exceptions to these limits as long as it respects the principles of necessity and proportionality.

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[109] *Vienna Convention on the Law of Treaties. 23 May 1969. 1155 UNTS 331*, art. 53.
[110] Ibid., art. 64.
[111] Farrall, *United Nations Sanctions and the Rule of Law*, 2007, 71-72.
[112] Krisch, "Introduction to Chapter VII: The General Framework", 2012, 1259-1260.
[113] Kondoch, Boris. "The Limits of Economic Sanctions under International Law: The Case of Iraq". *Journal of International Peacekeeping* 7:1 (2001): 283. doi: https://doi.org/10.1163/187541101X00093.

This balancing between the imperative of ensuring international peace and security and the respect of international law standards has been confirmed by the UNSC in practice. The UNSC's greater attention on respecting human rights is clear in its shift from global sanctions to targeted sanctions and in allowing exceptions in its sanctions measures. For instance, the UNSC provides several exceptions to the broad ban on import and export of goods, equipment and technology imposed *inter alia* in Resolution 1718 paragraphs 8 (a) and 8 (b): Resolution 2270 (2017) paragraph 8 allows exceptions for the importation of food and medicine, as well as importation "exclusively for humanitarian purposes or exclusively for livelihood purposes".[114] Resolution 2397 (2017) contains similar exceptions regarding the importation to the DPRK of crude oil and refined petroleum products.[115] These exceptions ensure that the basic human rights of the civilian population are not disproportionately infringed. The UNSC also expresses in its resolutions that its measures "are not intended to have adverse humanitarian consequences for the civilian population of the DPRK".[116]

B. The normative content of the resolutions against North Korea: A problem of complexity and lack of specificity

Besides the general limitations to the UNSC's powers, the content of the sanctions regime against the DPRK might limit its proper implementation and its overall success in convincing the DPRK to abandon its nuclear and ballistic missile programme. More precisely, the lack of specificity of certain sanctions measures constitutes a limitation to their proper implementation. As argued by Borlini, the resolutions must be "concrete enough to make them easily applicable, i.e. identifiable hence verifiable as prescribed behaviour".[117] However, ambiguous and unclear language and broad concepts give the Member States and the Sanctions Committee a great power of interpretation, leading to inconsistent implementation and an uncertain follow-up procedure.

The ban on the exportation of coal from the DPRK is an example where several resolutions have lacked precise language. Coal is one of the DPRK's most valuable export goods, supporting the development of its nuclear and ballistic missile programme: the 3.7 million tons of coal exported between January and August 2019 were, for example, estimated to be worth $370 million.[118] In Resolution 2270 (2016), the UNSC prohibits the DPRK from exporting coal to the Member States unless it is "exclusively for livelihood purposes".[119] However, it does not further define the notion of "livelihood purposes", leaving its interpretation to the Member States. China argued that as the coal was used for producing energy, thus for the livelihood of the Chinese population, its importation of coal from the DPRK was exempted from the restrictions.[120] The measure was changed in Resolution 2321 (2016): its paragraph 26 (b) states the ban on the exportation of coal from the DPRK does not apply if, among other conditions,

[114] S/RES/2270 (2016), para. 8 (a).
[115] S/RES/2397 (2017), para. 4-5.
[116] Ibid., para. 25.
[117] Borlini, "The North Korea's gauntlet", 2016, 337.
[118] S/2020/151 (2020), para. 55.
[119] S/RES/2270 (2016), para. 29 (b).
[120] Borlini, "The North Korea's gauntlet", 2016, 338.

the coal is "exclusively for livelihood purposes *of DPRK nationals* [emphasis added]".[121] Although the UNSC this time specifies whose livelihood it means, it still fails to define it.

Moreover, this paragraph in Resolution 2321 is considerably long and complex, introducing intricate exceptions to the ban on coal exportation, including quantitative caps of both the value and the volume of the coal that the DPRK is allowed to export to the Member States. After the adoption of this measure, China stated that the UNSC's measures against the DPRK were not aimed at "affecting normal economic and trade activities" with the DPRK.[122] However, this is the exact objective of the sanctions measures against the DPRK: economic sanctions such as a coal exportation ban specifically aim to isolate the target for coercing it to comply with the UNSC's decisions.

Finally, in Resolution 2397 (2017), reacting to the DPRK's continued exportation of coal and other prohibited goods, the UNSC decides that the Member States must inspect any vessel in their ports and territorial waters if they have "*reasonable grounds* [emphasis added] to believe that the vessel was involved in activities, or the transport of items",[123] prohibited by the sanctions regime. Neither the UNSC nor the Sanctions Committee defines what they consider to be "reasonable grounds".

Unclear language and the complexity of certain measures lead to varying interpretations. Some undermine the implementation by being too permissive, such as China's interpretation of Resolution 2270 (2016) and Resolution 2321 (2016). Other Member States might restrict the DPRK's right to trade more severely than the sanctions provide by interpreting the UNSC's resolutions differently. For instance, the Panel of Experts mentions in its last report the case of a Member State seizing medicine imported to the DPRK, although this is not prohibited.[124] In addition, it reports cases of Member States incorrectly determining whether certain items are affected by the sanctions against the DPRK. Some even show an "inaccurate understanding of relevant resolutions".[125] A final consequence of the lack of precision of certain measures is that it complicates the Sanctions Committee's monitoring role, as it does not have a clear definition of the directed behaviour.

C. Implementing sanctions in practice

As determined above, the DPRK's capacity of evading the UNSC's sanctions depends on the degree of implementation of the measures by the Member States. Although the sanctions are decided by the UNSC and thereafter specified by the Sanctions Committee, the implementation of the mandated measures ultimately depends on the Member States. This dependence on the Member States raises several challenges. Firstly, for the implementation of the sanctions to be successful, the Member States must be able and willing to allocate adequate resources.

[121] S/RES/2321 (2016), para. 26 (b).
[122] Statement by Lui Jeiyi, UNSC, 30 November 2016, quoted in Borlini, "The North Korea's gauntlet", 2016, 339.
[123] S/RES/2397 (2017), para. 9.
[124] S/2021/211 (2021), para. 89.
[125] Ibid.

Secondly, the Sanctions Committee is mandated to monitor this implementation, but its follow-up mechanism and its enforcement powers are limited.

1. The central role of the Member States in the implementation of the UNSC's measures

As discussed above, the Member States are bound to implement the UNSC's decisions. However, the binding sanctions measures cannot be directly implemented, as they are in most cases not self-executing. The resolutions do not explicitly state that the Member States can directly enforce their measures; they are aimed at the Member States and contain relatively general measures without specifying the means the Member States must use. As these general obligations cannot directly be implemented in their domestic law, the Member States must thus first adopt national legislation enabling them to implement the UNSC's decisions.[126] This additional step poses a limit to the proper implementation of the sanctions regime, as the ability of the respective Member States to adopt and implement relevant legislation depends on their "legal and administrative arsenal".[127]

For example, Resolution 2397 (2017) provides in paragraph 4 that "all Member States shall prohibit [the importation] to the DPRK, through their territories or by their nationals, or using their flag vessels, aircraft, pipelines, rail lines, or vehicles and whether or not originating in their territories, of all crude oil".[128] Although it specifies how the crude oil must *not* be imported to the DPRK, this measure does not indicate how the Member States must achieve this goal. It is only characterised by its intended result, which is the ban on the importation to the DPRK of crude oil. In order to implement this decision, the Member States must therefore transpose it into their domestic law. Even the measures that are directly taken by the Sanctions Committee in the form of listings[129] face the same limitation. Although the Committee identifies the individuals and entities to be affected by the sanctions, the Member States are still responsible for ensuring that these sanctions can be and are implemented in their jurisdiction. This "unavoidable and virtually complete reliance on domestic law"[130] means that the Member States enjoy a great discretion in the implementation, both in choosing the means and the degree of this implementation.

2. The Sanctions Committee's limits: An ambitious mandate without the appropriate enforcement power

In theory, the Sanctions Committee should be able to compensate for the Member States' important discretion in the implementation of the sanctions measures, as its mandate includes the monitoring and improvement of this implementation.[131] In practice, however, its follow-up mechanism is somewhat restricted. Although the UNSC delegates the day-to-day administration of the entire sanctions regime to the Sanctions Committee, it does not provide it

[126] Daillier / Forteau / Pellet, *Droit international public*, 2009, 254.
[127] Borlini, "The North Korea's gauntlet", 2016, 340.
[128] S/RES/2397 (2017), para. 4.
[129] Borlini, "The North Korea's gauntlet", 2016, 340.
[130] Ibid.
[131] S/RES/1718 (2006), para. 12 (a).

with any formal enforcement powers.[132] Consequently, the Sanctions Committee is empowered to "take appropriate action on information regarding alleged violations",[133] but cannot effectively act on these violations in practice. As discussed above, the lack of implementation goes hand in hand with the DPRK's sophisticated obfuscation techniques for evading the UNSC's sanctions. With its current enforcement powers, the Sanctions Committee is not able to monitor these violations and the varying implementation of the sanctions by each Member State. On a more practical note, the supervision of the implementation of the many complex measures and their corresponding exceptions across all Member States is very resource-intensive,[134] limiting the ability of the Sanctions Committee with its current resources to properly carrying out its mandate.

3. Conclusion on the Member States' discretion power and the Sanctions Committee's limits

The asymmetry between the Member States' great discretion power and the Sanctions Committee's lack of enforcement power is a significant limit to the implementation of the UNSC's measures and thus to the success of the sanctions regime against the DPRK. Improving this implementation would require a more effective follow-up mechanism able to put constant pressure on the Member States to comply with the UNSC's resolutions.[135]

V. Conclusion

The analysis of the UNSC's sanctions regime against the DPRK has shown that the sanctions under Chapter VII of the Charter have not been successful in coercing the DPRK into abandoning its nuclear and ballistic missile programme. It has, on the contrary, developed into a stalemate, where the DPRK continues to evade sanctions measures and the UNSC responds by adopting ever stricter resolutions. The DPRK takes advantage of a lack of transparency and domestic regulation, and is able to use the complexity of the sanctions regime at its advantage, severely limiting the success of the UNSC's resolutions.

Several limitations to the sanctions regime can explain its lack of success. Firstly, despite the UNSC's broad discretion power when acting under Chapter VII of the Charter, its decisions are limited by international law standards provided both in the Charter itself and in the peremptory norms of general international law. Secondly, the normative content of the UNSC's resolutions against the DPRK is itself limiting their success: as the sanctions system has developed into an extensive series of measures, it has become more complex to implement, a certain lack of specificity exacerbating the matter. Finally, the current implementation process is lacking effectiveness due to the Member States' discretion in the measures' implementation and the Sanctions Committee's missing enforcement power.

The UNSC's lack of success in the case of the DPRK might lead some to argue for the need to reinforce the sanctions regime. However, the impoverishment of the DPRK's civilian

[132] Borlini, "The North Korea's gauntlet", 2016, 341.
[133] S/RES/1718 (2006), para. 12 (b).
[134] Borlini, "The North Korea's gauntlet", 2016, 343.
[135] Ibid., 336.

population and the humanitarian costs of the current sanctions measures must be taken into consideration. The possibility of adopting ever more severe sanctions is, as established, limited by the UNSC's obligation to respect international law standards, such as human rights. Although the sanctions system aims at isolating the targeted State, its complete isolation would be in violation with the UNSC's legal limitations. In a contradictory manner, the strict implementation of a severe sanctions system would be violating international law standards. In this case, another alternative to the "necessary middle ground between war and words"[136] must be found.

[136] United Nations, General Assembly, *In larger freedom*, (2005), para. 109.

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