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Abstracts

On April 1, 2021, the U.S. President, Joseph R. Biden, revoked Executive Order (E.O.) 13928, which was issued by the then-U.S. President, Donald J. Trump, on June 11, 2020, to target and sanction non-U.S. staff of the International Criminal Court (ICC), after the ICC Appeals Chamber authorized the ICC Prosecutor and her team to commence an investigation of alleged war crimes and crimes against humanity committed by, inter alia, U.S. personnel in Afghanistan. Moving from an analysis of the legal theory underlying the concept of unilateral (or "autonomous") sanctions, the article will analyse to which extent the measures envisaged in E.O. 13298 were in violation of U.S. international law obligations, including human rights obligations; and further examine whether E.O. 13928 was just an aberration attributable to a now-defunct, populist "regime", or if it is indeed a harbinger of what is to come.

Il 1° Aprile 2021, il Presidente degli Stati Uniti, Joseph R. Biden, ha revocato l'Executive Order (E.O.) 13928, che era stato adottato dal suo predecessore, Donald J. Trump, l'11 giugno 2020 per sanzionare quei funzionari non statunitensi della Corte penale internazionale coinvolti nell'indagine sui presunti crimini di guerra commessi, tra gli altri, dal personale militare statunitense presente in Afghanistan. Muovendo dall'analisi del concetto di sanzione unilaterale (o autonoma) nel diritto internazionale contemporaneo, l'articolo si propone innanzi tutto di esaminare in che misura le sanzioni adottate in forza dell'E.O. 13928 abbiano violato gli obblighi internazionali assunti dagli Stati Uniti, inclusi quelli sul rispetto delle norme sui diritti umani. In secondo luogo, ci si chiederà se l'ordine esecutivo statunitense possa essere considerato un "semplice" atto, per quanto aberrante, comunque attribuibile ad un "regime" populista ormai defunto, o se invece rappresenti il preludio di future, possibili azioni simili.

El 1 de abril de 2021, el Presidente de Estados Unidos, Joseph R. Biden, revocó la Orden Ejecutiva (OE) 13928, emitida por el entonces Presidente de Estados Unidos Donald J. Trump, el 11 de junio de 2020, con el objetivo de sancionar el personal no estadounidense de la Corte Penal Internacional, luego de que la Corte de Apelaciones de la ICC autorizara al Fiscal de la ICC para comenzar una investigación por supuestos crímenes de guerra y crímenes en contra de la humanidad cometidos, entre otros, por personal estadounidense en Afganistán. Partiendo de un análisis de la teoría jurídica que subyace al concepto de sanciones unilaterales (o "autónomas"), el artículo analizará hasta qué punto las medidas previstas en la OE ejecutiva 13298 violaban las obligaciones de derecho internacional de Estados Unidos, incluidas las de derechos humanos; y examinará, además, si la OE 13928 fue sólo una aberración atribuible a un "régimen" populista ya desaparecido, o si es realmente un presagio de lo que está por venir.

Sommario

1. Introduction.

On April 1, 2021, U.S. President, Joseph R. Biden, revoked Executive Order (E.O.) 13928 on *Blocking Property of Certain Persons Associated with the International Criminal Court (ICC)*.[1] The E.O. was issued by the then-U.S. President, Donald J. Trump, on June 11, 2020,[2] after a ruling by the ICC Appeals Chamber authorizing the Chief Prosecutor and her office to commence an investigation into the situation in Afghanistan, which might implicate, *inter alia*, the U.S. armed forces and the CIA for war crimes.

During the ten months of its life, under E.O. 13928 two persons were designated: the Chief Prosecutor, Fatou Bensouda, for having directly engaged in investigations of U.S. personnel; and Phaksio Mochochoko, the Head of Jurisdiction, Complementarity and Cooperation Division, for having materially assisted the Prosecutor in these efforts.[3] These sanctions have been lifted as a result of the E.O. 13928 revocation, and the Department of State has also terminated the separate 2019 policy on visa restrictions on certain ICC personnel.

The issuance of E.O. 13928 and the related designations have encountered criticism from the beginning. It is (*rectius*, was), indeed, an incredibly troubling piece of legislation in many ways, most of which of which have already been tackled in several erudite pieces of (primarily online) commentary.[4] Further, the sanctions against the ICC represent one of the most significant examples of the Trump administration's openly hostile approach versus international organizations (IOs) and the international community. Under that perspective, the decision of President Biden to revoke the E.O. clearly reflects the change from its predecessor's "America first" approach to a more cooperative approach based on the engagement of "Restoring America's place in the world".[5] In the short term, it has thus been welcomed as a positive development for both U.S. foreign policy and U.S. human rights policy.[6]

The aim of this article is to put E.O. 13928 and the sanctions thereunder in the context of unilateral (or "autonomous") sanctions. Section 2 will analyse the legal basis and the structure of E.O. 13928. Then, moving from an analysis of the legal theory underlying the concept of unilateral sanctions in contemporary international law, the article will tackle its two main research questions, which have not yet been sufficiently analysed: 1) were the measures envisaged in E.O. 13298 in violation of U.S. international law obligations?; and 2) is it possible to assert that E.O. 13928 was just an aberration attributable to a now-defunct, populist regime? Or it is a harbinger of what is to come?

2. The legal basis and structure of Executive Order (E.O.) 13928.

The main legal basis, under U.S. law, of E.O. 13928 is the *International Emergency Economic Powers Act* (IEEPA).[7] Under IEEPA the President is authorised to declare a national emer-

[1] See The White House *Executive Order on the Termination of Emergency With Respect to the International Criminal Court*, 1 Apri 2021.
[2] Executive Order 13928 of June 11, 2020, 85 FR 36139.
[3] See at this link. See also U.S. Department of State, Press Statement, 2 September 2020.
[4] See, *ex multis*, BOYLE (2020); AKRAM and RONA (2020); BERSCHINSKY (2020); SCHEFFER (2020); FALK (2020).
[5] See The White House, *Remarks by President Biden on America's Place in the World*, 4 February 2021.
[6] See VAN SCHAAK (2021).
[7] *International Emergency Economic Powers Act (IEEPA)*, 50 U.S.C. §§ 1701-1706. The other sources identified in the Executive Order are the *National Emergencies Act (NEA)*, 50 U.S.C. 1601-1651; and the *Immigration and Nationality Act (INA)*, 8 U.S.C. 1201. For a complete list of the 34 active U.S. sanctions programs (both autonomous and implementing United Nations Security Council resolutions), see US Department of the Treasury, *Sanctions Programs and Country Information*. See also CRS Report R45618, *The International Emergency Economic Act: Origins, Evolution, and Use*, 14 July 2020, at 21 ff. According to the study, Presidents have invoked IEEPA in 59 of the 67 declarations of national emergency issued under the National Emergencies Act. As of July 1, 2020, there were 37 on-going national emergencies; all but

gency with respect to «any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States».[8] Following that declaration, the President is granted powers to regulate trade in relation to that situation. In particular, the President may «block ..., regulate, ... prevent or prohibit, any acquisition, ... use, transfer, ... dealing in, or exercising any right, power or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States».[9]

This authority may be exercised by issuing an E.O. forbidding the dealing in property or interests in property of certain persons, and by authorizing federal agencies to "designate" those persons subject to such sanction measures. Designated persons are included on the Specially Designated Nationals List (SDN List) maintained by the Office of Foreign Assets Control (OFAC) in the Department of the Treasury.[10] For those who violate an order issued under IEEPA, a civil penalty up to $250,000 (or twice the value of the blocked transaction) may be applied.[11] Further, those who commit, attempt to commit, or conspire to commit a wilful violation are subject to criminal fines of up to $1,000,000 and, if a natural person, up to 20 years' imprisonment.[12]

2.1. *The concept of "national emergency" under IEEPA and its relationship with the ICC-Related action into the situation in Afghanistan.*

E.O. 13928 declared that «any attempt by the ICC to investigate, arrest, detain, or prosecute any United States personnel… or personnel of countries that are Unites States allies» constitutes «an unusual and extraordinary threat to the national security and foreign policy of the United States».[13]

The reference here is to the decision of the ICC Prosecutor, Fatou Bensouda, on November 20, 2017, to request authorization from the Pre-Trial Chamber to initiate a formal investigation into alleged war crimes and crimes against humanity committed in Afghanistan.[14] But in investigating that situation, she inquired not just into the acts committed by the Taliban and by Afghan security forces, but also into the conduct of U.S. personnel. In her request, the Prosecutor specifically suggested that there was a «reasonable basis» to believe that U.S. armed forces and Central Intelligence Agency (CIA) personnel had committed «[w]ar crimes of torture, outrages upon personal dignity and rape and other forms of sexual violence» on the territory of Afghanistan or in «secret detention facilities» in ICC Member States Poland, Lithuania and Romania «primarily in the period 2003-2004».

The request was rejected on April 12, 2019, on the basis that although «all the relevant requirements are met as regards both jurisdiction and admissibility», any investigation was unlikely to be successful and thus the Prosecutor should desist «in the interests of justice».[15]

four involved IEEPA.

[8] *IEEPA*, cit., §§ 1701(a).

[9] *Id.*, § 1702(a)(1)(B).

[10] See GORDON, SMITH, CORNELL (2019), pp. 108-115; BARNES (2016), p. 201 ff.

[11] See 50 U.S.C. § 1705(a)-(b); 31 C.F.R. § 520.701; 85 Fed. Reg. 19884-02 (2020).

[12] 50 U.S.C. § 1705(c).

[13] EO 13928, cit., preamble. With regard to the notion of U.S. allies, as the E.O. clearly points out, this includes any current or former military personnel, current or former elected or appointed official, or other person currently or formerly employed by or working on behalf of a government of a North Atlantic Treaty Organization (NATO) member country or a major non-NATO ally (MNNA). With regard to NATO member countries, only Turkey (a part from the U.S.) is not a member of the ICC. With regard to MNNA, there are currently 17 countries (plus Taiwan) designated as such under U.S. law, and 8 of them (plus Taiwan) are non-ICC members and thus could be considered an "ally of the United States" in that specific situation. These are: Bahrain, Egypt, Israel, Kuwait, Morocco, Pakistan, Philippines, Thailand.

[14] Request for authorisation of an investigation pursuant to Article 15, *Situation in the Islamic Republic of Afghanistan* (Case No ICC-02/17-7-RED), Office of the Prosecutor, 20 November 2017. Because she was proceeding *proprio motu* (that is, in the absence of a state or Security Council referral), the Prosecutor needed, according to Article 15(3) of the Rome Statute, to secure the permission of a Pre-Trial Chamber of the ICC.

[15] See also Pre-Trial Chamber II, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan* (ICC 02/17-33), 12 April 2019, § 87 ff. U.S. President Trump framed that decision as «a major international victory, not only for these patriots, but for the rule of law». See The White House, *Statement form the President*, 12 April 2019. On the Pre-Trial Chamber's decision and the bullying tactics adopted by the U.S. in the period of time that led to its adoption, see AKANDE and DE SOUZA DIAS (2019).

The ICC Prosecutor then asked judges for permission to appeal aspects of that rejection, and on September 17, 2019, the Court partially granted the Prosecutor's request allowing a limited appeal to proceed.

On March 5, 2020, the Appeals Chamber unanimously overturned the impugned decision and authorized the Prosecutor and her team to commence an investigation. According to the Appeals Chamber, the Pre-trial Chamber was simply not entitled to assess the "interests of justice" set out in Article 53(1) of the Rome Statute, which remained, according to Article 15(3), an exclusive assessment of the independent prosecutor. Instead, the Pre-Trial Chamber's decision should have addressed only whether there was a reasonable factual basis for the Prosecutor to proceed with an investigation, in the sense of whether crimes had been committed and whether the potential case(s) arising from such investigation appeared to fall within the Court's jurisdiction. 16

The ICC investigation concerning the situation in Afghanistan thus impinges upon one of the most sensible issues in the indeed complicated and uneasy history of the relationship between the U.S. and the ICC. 17 As is well known, the Court is designed to have jurisdiction not only over nationals of States parties (like Afghanistan, which is a State party since 2003) but also over nationals of States not parties to the Statute (like the U.S.) if the alleged crimes were committed on the territory of a State party (art. 12 ICC Statute). But the U.S. has continuously reiterated its refusal to accept the ICC exercise of jurisdiction over nationals of States non-parties, because in contrast with the fundamental principle of the law of treaties according to which *pacta tertiis neque nocent neque prosunt*.

That said, one can easily assume that it is certainly surprising and to some extent even shocking to have a U.S. President declare the existence of such a kind of national emergency. But at least under U.S. law that determination is not, in truth, groundless. Over the last 30 years the concept of "national emergency" under IEEPA has, indeed, strongly expanded its application, 18 and also the stated rationales for imposing sanctions have expanded in length and subject matter. In the most recent practice, determinations of national emergency have included situations that clearly threaten the U.S. (such as, for example, terrorism or weapons of mass destruction proliferation), but also situations that are unlikely to pose an imminent threat to the U.S. as the IEEPA's drafters were concerned about (for instance, declarations concerning the instability in Mali,[19] human rights abuses,[20] denial of religious freedom,[21] or political repression and public corruption[22]). Moreover, neither the IEEPA, nor its umbrella statute, the National Emergency Act (NEA),[23] define what constitutes a "national emergency." On the contrary, the IEEPA, as we have seen above, adopts a very unspecific language, to the point that it has been described as «a kind of blanket authorization for any sanctions program the President wants to create».[24] Thus the Trump administration's argument that since the U.S. is not party to the ICC Statute any exercise of jurisdiction by the Court over U.S. personnel represents a "national emergency" cannot be considered, to the extent permitted by U.S. law, as an illegal determination *per se*.

[16] The Appeals Chamber, *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan* (ICC-02/17 OA4), 5 March 2020, § 23 ff. Secretary of State Pompeo condemned that decision as « a truly breathtaking action by an unaccountable political institution, masquerading as a legal body», and promised «to identify those responsible for this partisan investigation and their family members who may want to travel to the United States or engage in activity that's inconsistent with making sure we protect Americans». U.S. Department of State, *Secretary Michael R. Pompeo's Remarks to the Press*, 17 March 2020.

[17] The complicated and uneasy history of the relationship between the U.S. and the ICC is well-known, and this is not the place for addressing it. Amongst others, see SCHEFFER (2001) pp. 47-100; and, more recently, JORGENSEN (2020), p. 123; and CORMIER (2020), p. 19.

[18] If targets were initially delimited by geography or nationality, since the 1990 Presidents have expanded the scope of their declaration under IEEPA: on the one hand, invoking that instrument with regard to geographically non-specific emergencies (that is to say, orders that included provisions global in scope); on the other hand, by including groups and individual persons, regardless of nationality or geographic location, who are engaged in specific activities, such as political parties, corporations, terrorist organizations, supporters of terrorism, or suspected narcotics traffickers See *CRS Report R45618*, cit.

[19] E.O. 13882, Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation In Mali (26 July 2019).

[20] E.O. 13692, Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela (8 March 2015).

[21] E.O. 13067, Blocking Sudanese Government Property and Prohibiting Transactions With Sudan (3 November 1997).

[22] E.O. 13405, Blocking Property of Certain Persons Undermining Democratic Processes or Institutions in Belarus (16 Jun. 2006).

[23] Pub. L. No. 94-412, 90 Stat. 1255 (1976).

[24] See FISHMAN (2020).

2.2. *The designation criteria under E.O. 13928*

The bases upon which a designation of foreign persons in the SDN List could have been made were listed in sub-sections A to D of Section 1. These were persons determined by the Secretary of State to: A) have directly engaged in any effort «to investigate, arrest, detain, or prosecute any United States personnel without the consent of the United States»; B) have directly engaged in such activities targeting personnel of a U.S. ally without consent of that person's government; C) have «materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of» any ICC efforts described above; or D) be «owned or controlled by, or [to have] acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order».

Designations in parts (A) and (B) would most obviously be ICC staff itself (or the ICC as an institution), but they may well be even cooperating national police or military forces.[25] Instead, designations in parts (C) and (D) expanded significantly the category of those who could have been sanctioned. But on this issue, which is one of the most contentious in now-defunct E.O. 13928 and implementing regulations,[26] we will come back when discussing the relationship between E.O. 13928 and human rights (see *infra*, Section 3).

With regard to the designations made on September 2, 2020, technically the Chief Prosecutor of the ICC was sanctioned on the ground of part (A), and the ICC's Head of the Jurisdiction, Complementarity and Cooperation Division was sanctioned under part (C).

2.3. *Measures that could have been adopted under E.O. 13928*

Section 1 of E.O. 13928 stated that all properties (both tangible and intangible) of persons (or entities) determined to meet one or more of the above-mentioned designation criteria and that fall under U.S. jurisdiction become blocked, that is to say that they «may not be transferred, paid, exported, withdrawn, or otherwise dealt in»[27] by U.S. persons. Also, because of the ability to transfer funds or other assets instantaneously, for blocking measures to be effective in addressing the declared national emergency there need be no prior notice of a listing, or prior notice of a determination concerning the freezing of properties. [28] The broad meaning attached to the concept of "U.S. persons" is also relevant,[29] because one of the fundamental consequences of the prominence of U.S. financial markets in the global economy means that U.S. unilateral sanctions often become *de facto* secondary sanctions (see *infra*, Section 3).

Sections 2 and 3 of the E.O. barred any contribution or provision of funds, goods, or services to, or for the benefit of, designated persons, including the donation of food, clothing, or medicine.

Finally, according to Section 4, non-U.S. listed persons, as well as their «immediate family members» and any ICC employee or agent who the Secretary of State determines «would be detrimental to the interests of the United States», were banned from entry into the U.S.[30]

3. The legality of E.O. 13928 under international law.

Whilst a few supporters of the action against the ICC did emerge both within and out-

[25] See BOYLE (2020).

[26] See OFAC, *International Criminal Court-Related Sanctions Regulations (Regulations)*, 31 CFR part 520, §520.304. OFAC stated that it intends to supplement these regulations with a more comprehensive set of regulations, which may include additional interpretive and definitional guidance, general licenses, and statements of licensing policy. However, at today they have not been adopted.

[27] EO 13928, cit., Section 1 (a). See also *Sanctions Regulations*, cit., §520.301, defining the concept of property, and §520.303, according to which «The term entity means a government or instrumentality of such government, partnership, association, trust, joint venture, corporation, group, subgroup, or other organization, including an international organization».

[28] *Ibid*., Section 8.

[29] *Ibid*., Section 7(c), «the term "United States person" means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States».

[30] EO 13928, cit., Section 7 (e). cit., Section 4 and Section 7(f).

side the U.S. (amongst these, in particular, some Israeli organizations and the Prime Minister, Benjamin Netanyahu)[31], both the announcement of the sanctions regime and the designations on the OFAC's SDN List have provoked an overwhelmingly negative reaction from States and IOs, diplomats, jurists, and members of the civil society[32]. The vast majority of reported negative reactions have focused on the U.S. sanctions being unconstitutional under U.S. Law and contrary to American values, in particular to the long-standing U.S. commitment to human rights, the rule of law, and accountability for those who commit atrocities. 33 Some commentators have also argued that the measures could undermine both U.S. national security and legitimate U.S. foreign policy objectives.[34] And some point to the fact that the E.O. «regrettably now serves as a precedent of sovereign prerogative that non-State Parties with horrendous records on atrocity crimes will gladly run with»[35].

As regards the ICC's reaction, immediately after the enactment of E.O. 13928, the President of the Assembly of States Parties issued a statement pledging «to preserve [the Court's] integrity undeterred by any measures and threats against the Court and its officials, staff and their families».[36] Likewise, the President of the Court, Judge Chile Eboe-Osuji, accused the U.S. of acting unlawfully, stating that the threat of coercion against a court of law «doesn't happen … in any country we know».[37] On her part, the Chief Prosecutor indicated the intention to continue her work «without fear or favour».[38]

Aside from specific issues arising from the compatibility of the measures with U.S. law guarantees or values, and not taking into account the very generic assumption that the use of coercion against a court doesn't happen anywhere in the world, under international law the problem with now-defunct E.O. 13928 is twofold: first, were the purported blocking measures and immigration restrictions consistent with human rights law, i.e., did they violate, when concretely applied, some human rights of targeted individuals that are internationally protected? And second, were these measures lawful according to international law as such, i.e., did they violate a number of core principles that governs international law nowadays?

3.1. *Unilateral sanctions and international law.*

International sanctions are first and foremost political act(ion)s,[39] and they can be collective or unilateral.

Collective sanctions are measures imposed by the Security Council (SC) acting under the authority of Chapter VII of the UN Charter, imposing the legal obligation of their implementation on UN Member States. These measures are the result of a negotiation between the members of the SC, with five of them holding a particularly strong position by virtue of their *veto* power; following their adoption, targeted States (or targeted individuals or groups) are cut off from financial and trade activities with the entire international community. Thus, they are in a position of absolute weakness.

Unilateral (or "autonomous") sanctions are measures imposed by single States or IOs without a prior authorization by the SC, or measures that go ahead with what the Council has decided.[40] In this case it is the will of the sanctioning State that is at issue, and targeted States are faced only with the authority of the targeting State. Thus, they are in a position of relative weakness vis-à-vis that State. Therefore, the main consequence of unilateral sanctions is that the greater the economic strength of the targeting State the harder it is for targeted States to face the sanctions program and its impact. This is the reason why the U.S. and the European

[31] "Netanyahu lauds Trump's ICC announcement, says int'l court politicized, obsessed with Israel", 12 June 2020. See also YOO and STRADNER (2020).
[32] For a comprehensive overview, see VAN SCHAAK (2020).
[33] See AKRAM and RONA (2020). See also *Statement of lawyers and legal scholars against U.S. sanctions on ICC investigators of atrocities*, June 2020.
[34] See BERSCHINSKY (2020).
[35] See SCHEFFER (2020).
[36] See, *ASP President O-Gon Kwon rejects measures taken against ICC*, 11 June 2020.
[37] See, *10 Questions of ICC Chief Chile Eboe-Osuji*, Time, 26 June 2020.
[38] See, *Facing US Sanctions, ICC Prosecutor Pledges to Continue 'Without Fear or Favor*, 17 June 2020; *International Criminal Court Condemns US Economic Sanctions*, 2 September 2020.
[39] See LOWENFELD (2008), p. v.
[40] See recently HOVELL (2019), p. 141; JOYNER (2015), p. 84.

Union (EU) are the main users of unilateral sanctions worldwide,[41] and this is also the reason that stands behind certain forms of (ab)use of these measures. I'm referring specifically to the U.S. practice of extraterritorial sanctions (or "secondary sanctions"), in the sense that these measures seek to affect the conduct of foreign persons outside the United States.[42] While "primary sanctions" are intended to restrict only U.S. companies and citizens (or people who are in the U.S), extraterritorial sanctions (or "secondary sanctions") are intended to govern conduct by persons located outside the bounds of jurisdiction that are allowed by international law,[43] in particular through an aggressive interpretation of the jurisdictional criteria of the *protective principle* and the *effects doctrine*.[44]

According to the *protective principle* (or *competénce réelle*, or *in rem*) a State can lawfully assert jurisdiction over certain conduct outside its territory by persons other than its nationals when such actions constitute a threat to the security of the State or against a limited class of other fundamental national interests of the State. The main issue here is the uncertainty about the crimes that may give rise to protective jurisdiction, and, in cases of unilateral sanctions, the need for the targeting State to provide sufficient evidence of a direct threat to national security.

According to the *effects doctrine* a State can exercise its jurisdiction asserted with respect to any conduct (even of foreign nationals occurring outside its territory) that has a substantial effect within its territory.

Examples of that practice[45] include the recent measures under the *Helms-Burton Act*,[46] and the sanction programs enacted against Russia, North Korea and Iran under the *Countering America's Adversaries through Sanctions Act (CAATSA)* of 2017.[47]

Extraterritorial measures have been considered to be illegal by States, IOs, and academic literature, as they undermine core principles of international law such as the duty of non-interference in the domestic affairs of other States, territorial integrity, and principles of sovereign equality of States. 48 Also, the vast majority of States have reacted unilaterally against them through retaliatory actions[49] or even countermeasures.[50]

But apart from the single case of extraterritorial (or "secondary") sanctions, the legality/illegality of unilateral sanctions remains a highly controversial issue. These measures have the potential to violate a fundamental principle of international law, that is the principle of non-intervention – which is traditionally considered the «corollary of every state's right to

[41] For the U.S., see *supra*, note 7. The EU has actually 45 sanctions regime in force, 26 of which are adopted without a UN mandate. See at this link.

[42] See, *ex multis*, MEYER (2009), p. 926 ff.

[43] See MANN (1964), p. 9. On "extraterritoriality" and the limits on jurisdiction in international customary law, see, among others, AKEHURST (1972-73), p. 156 ff; RYNGAERTS (2015) p. 101 ff. On the concept of jurisdiction in the U.S., see also *Restatement of the Law Fourth, The Foreign Relations Law of the United States: Selected Topics in Treaties, Jurisdiction, and Sovereign Immunity, §§ 301 to 313; 401 to 464; 481 to 490*, American Law Institute Publishers, 2019, § 401. See also Institute de Droit International, *The extraterritorial jurisdiction of States*, Deliberations of the Institute during Plenary Meetings (Session of Milan, 1993), arts 5-8; e UN Doc. A/61/10, November 3, 2006, *Annex E — Extraterritorial Jurisdiction, Report of the International Law Commission to the United Nations General Assembly*, 521 ff.

[44] See AKEHURST (1972-73), p. 154. See also BEAUCILLON (2016), p. 123.

[45] Extraterritorial sanctions arguably constitute the most powerful tool in the US's sanctions arsenal, due to the critical role of the U.S. financial market in the world and the U.S. dollar's un-precedent dominance in the global economy and global financial transactions. See ZOFFER (2019), pp. 152-157; RUYS and RYNGAERTS (2020), p. 34. According to ZARATE (2013), p. 7, the inclusion in the SDN list is "a virtual financial death" for designated persons (or entities). See also S. LOHMANN (2019).

[46] *Cuban Liberty and Democratic Solidarity (Libertad)*, Public Law 104-114, 110 Stat. 785, Act 22 U.S.C. § 6021– 91, March 12, 1996. On April 17, 2019, the Trump Administration announced that the U.S. would have no longer suspended Title III of that Act, which authorizes U.S. nationals to file suit in U.S. courts against persons (including non-US companies) that may be "trafficking" in property they owned and expropriated by the Cuban Government after the country's 1959 communist revolution. See White House, *President Donald J. Trump Is Taking A Stand For Democracy and Human Rights In the Western Hemisphere*, Fact Sheet, 17 April 2019.

[47] Congress of the United States of America, *Countering America's Adversaries Through Sanctions Act (CAATSA)* (Public Law 115-44), 2 August 2017. For details, see DAUGIRDAS and MORTENSON (2017), p. 1015 ff.

[48] Extraterritorial sanctions have proven highly controversial under international law, and literature on them is extensive; so, this is not the place to discuss that issue. I refer to extraterritorial sanctions in SILINGARDI (2020), pp. 125-174.

[49] See *Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom*, OJ L 309, 29 November 1996, 1. It was updated on June 6, 2018, see *Commission Delegated Regulation (EU) 2018/1100, with entry into force on 7 August 2018, to extend its scope of application to the reactivated U.S. sanctions in relation to Iran*. For similar instruments adopted by Canada and Mexico, as well as on the weak deterrence efficacy of these instruments, see RUYS and RYNGAERTS (2020), pp. 92-93. As early as 1980, the United Kingdom acted to prevent the U.S. from exerting extraterritorial jurisdiction over international trade by U.K. entities, see *Protection of Trading Interests Act 1980, c. 11 (United Kingdom)*.

[50] See *The US-China trade war: the war of the lists and how it could affect your company*, MWE China Law Offices, 28 October 2019. On September 19, 2020, the Ministry of Commerce of the People's Republic of China published the *Regulations on Unreliable Entity List*, which became effective the same day. See at this link: https://www.lexology.com/ library/detail.aspx?g=642bcfc5-f17b-4852-bb39-f2bd48785fd2.

sovereignty, territorial integrity and political independence»[51] – but to which extent they may ever be considered a breach of that principle, or if a specific threshold would need to be applied in order to positively affirm that they are illegal because coercive is still unclear. 52 For the purpose of our analysis, suffice it to say that unilateral sanctions largely operate in a legal *vacuum*.

From that point of view, it is therefore difficult to sustain that the measures envisaged in E.O. are internationally illegal *sic et simpliciter*. This is so because international law acknowledges a wide range of actions as falling under a State's sovereignty. Provided that U.S. sanctions against ICC personnel take place (i.e., are enforced) within the U.S., from an international law standpoint there is in fact almost no restriction on the right of the U.S. to refuse entry visas to ICC foreign officials, and even to prosecute those persons who, based on the protective principle of jurisdiction, may constitute a threat to U.S. security. If such acts are not inconsistent with contrary obligations under international law, the U.S. can also sanction (i.e., freeze) funds of those persons in the U.S..

A more specific consideration should be added, however, concerning the compatibility with international law rules of the immigration restrictions provided for in Section 4 of E.O. 13928. Although the U.S. is not a party to the ICC, certain ICC officials are required to enter the U.S. in the exercise of their functions. For instance, the ICC Prosecutor is required to go to New York to report to the Security Council on the situations referred by that body to the Court, and the President of the ICC is required to submit a report on the work of the Court to the UN General Assembly on a yearly basis. Further, the United Nations Headquarters in New York hosts the annual meetings of the ICC Assembly of States Parties. Yet the issue has been raised that by implementing the imposition of these measures the U.S. could have violated some of the privileges and immunities accorded to the ICC under the 1947 Headquarters Agreement between the UN and the United States.[53]

3.2. *The relationship with human rights law.*

Unilateral sanctions have frequently been criticized for violating human rights law. 54 However, this argument is as serious as it is curious. It is serious because we are dealing with measures (for the most part of financial and economic nature, but also concerning the freedom of movement) that clearly impinge upon a great range of human rights of targeted individuals. But it is also a curious argument because the vast majority of unilateral sanctions are adopted with a view to promoting human rights and responding to human rights violations worldwide.[55] The landmark case of "human rights-oriented sanctions" comes from the U.S., and is represented by the so-called "Magnitsky laws".[56] Taking inspiration from the U.S. experience, over the last few years a number of countries have adopted,[57] or are discussing to adopt,[58] analogous legislations. Most eventful, the EU adopted, on 7 December 2020, the Council

[51] See JENNINGS and WATTS (2009), p. 428; JAMNEJAD and WOOD (2009), p. 347.
[52] For more on this, see SILINGARDI (2020), pp. 208-224. Recently, see HOVELL (2019), who echoed a common view when she said that «the precise line between lawful and unlawful autonomous measures remains a matter of debate rather than law», and that «the issue is clearly ripe for some sort of comprehensive resolution». See also Barber (2021), p. 343; PELLET (2016), pp. 723-736.
[53] See GALBRAITH (2019), pp. 625-630.
[54] For instance, see GA Resolution, UN Doc. A/70/345, 28 August 2015, § 18-23, 34-46; UN Doc. A/HRC/40/3, 21 March 2019, § 2, 4 and 16; UN Doc. A/HRC/39/54, 30 August 2018, § 14. See also JAZAIRY (2019), pp. 291-302. The author served as the first UN Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on Human Rights (until March 2020).
[55] For the EU, see Council of the European Union, *Basic Principles on the Use of Restrictive Measures (Sanctions)*, 2004, par. 3; and European Commission, *EU Guidelines on Implementation and Evaluation of Restrictive Measures*, 2008. For the U.S., see *Statement by the U.S. Representative to the UN Economic and Social Council on 'Unilateral economic measures as a means of political & economic coercion against developing countries'*, 21 November 2019. Recent examples of these measures are, among others, the EU and U.S. sanctions against Venezuela and Nicaragua, and the U.S. measures related to the situation in Hong Kong. For an overview of these measures see SILINGARDI (2020), pp. 84-104.
[56] See Congress of the United States of America, *Sergei Magnitsky Rule of Law Accountability Act* (Public Law 112-208), 14 December 2012; and Congress of the United States of America, *Global Magnitsky Human Rights Accountability Act* 22 U.S.C. §§2656 (Public Law 114-328), December 23, 2016. The "Magnitsky laws" also point to target individuals responsible of act of «significant corruption». On this, for more see RUYS (2017), pp. 492-512.
[57] See Canada, *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*, S.C. 2017, c. 21, 18 October 2017; and United Kingdom, *UK Criminal Finances Act 2017, Ch. 22*, 27 April 2017, and *Sanctions and Anti-Money Laundering Act 2018, Ch. 13*, 23 May 2018.
[58] For instance, see Italy, Senato della Repubblica, XVIII LEGISLATURA, N. 1126, Disegno di legge, Comunicato alla Presidenza il 6 marzo 2019, *Disposizioni per il contrasto alle violazioni internazionali dei diritti umani*. A similar proposal has been recently advanced in the German Parliament, see at this link.

Regulation (EU) 2020/1998 concerning measures against serious human rights violations and abuses.[59] Under that perspective it is quite clear that human rights are both an aim and a constraint for unilateral coercive sanctions.

First, in E.O. 13928 there were certain aspects that were questionable with regard to their *ratione personarum* scope of application. As we have already observed, under the terms used in parts (C) and (D), and in particular with regard to the terms "financial, material, or technological support", the E.O. had the potential to reach well beyond the employees and agents of the ICC. It has been noted that *pro bono* consultants and attorneys, lawyers who file *amicus briefs* with the ICC, and even victims, could have been covered by that expression,[60] and it is rather difficult to argue that the activities of these persons may actually constitute an emergency situation posing a real threat to U.S. national security, even under the generous formulation of IEEPA.

Further, there was the risk that the measures envisaged in E.O. 13928 encroached excessively with the judicial independence of the ICC and victims' access to justice, and resulted in the violation of targeted individuals' privileges and immunities, and of a broad spectrum of human rights including, among others, the right to a fair trial, the right to freedom of movement, and the right to privacy and family life.[61] In particular, the right to a fair trial, which appears in all the major human rights instruments concluded by the UN and regional organisations, represents one of the fundamental pillars of international law to protect individuals against arbitrary treatment.[62] Its violation is therefore particularly regrettable.

Another point of issue concerns the possibility to challenge the measures envisaged in E.O. 13928 before national courts. Should the EU target ICC staff members, that action could be challenged at the EU Court of Justice or at the European Court of Human Rights. And should the EU sanctions regime be conceived in such broad terms as E.O. 13928 did, it would likely be assessed as a disproportionate violation of fundamental human rights (such as Article 5 and 6 of the ECHR, and Article 1 of Protocol 1 ECHR), and thus as illegal. But the U.S. is significantly more selective than the EU in its ratification of international human rights treaties, and it still refuses to submit itself to the scrutiny of the Inter-American Court of Human Rights. Even if progress has been made since the beginning of the 1990s, when the enforceability of human rights treaties in U.S. courts was described as «a complex and sometimes opaque matter»,[63] U.S. compliance with these treaties is however still blocked by their characterization as non-self-executing, and by the corresponding lack of domestic legislation that incorporates them into U.S. law.[64] Further, we must not forget that U.S. courts have historically been very deferential to sanctions determinations.

A very recent example, pertaining to E.O. 13928, is helpful to outline some of the aspects of this relationship. On October 1, 2020, four individual plaintiffs – all professors at law engaging with the ICC by educating, training, or advising the Chief Prosecutor and members of her Office – together with the Open Society Justice Initiative, a non-for-profit organization dedicated to upholding human rights and the rule of law, brought an action before a District Court in New York to challenge the lawfulness of E.O. 13928.[65] Plaintiffs were concerned, at first, to be fined or prosecuted under IEEPA if their interactions with the ICC and the Office of the Prosecutor had been considered prohibited transactions. Further, they were concerned that, due to the potentially very wide scope of application of the "material support" require-

[59] See *Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses*, OJ L 410I , 7 December 2020.
[60] See AKRAM and RONA (2020).
[61] See Statement by thirty-four UN experts, *US attacks against the International Criminal Court a threat to judicial independence*, 25 June 2020.
[62] It is worth noting that an international court has described that right «as a peremptory norm of international law in the case in which the substantive rights violated were also granted by jus cogens». See Inter-American Court of Human Rights, *Goiburú et al. v. Uruguay*, Judgment of 22 September 2006 (Merits, Restitutions and Costs). For more in international legal literature on the fundamental right of a fair trial, see FRANCIONI (2007), pp. 1-55; PISILLO MAZZESCHI (2020); CLOONEY and WEBB (2021); BOSCHIERO (2021), p. 107 ff.
[63] See BAYEFSKY and FITZPATRICK (1992), p. 40.
[64] See *Sei Fuji v. State*, 242 P.2d 617 (Cal. 1952). This is obviously a very delicate issue that would deserve an in-depth analysis well beyond the limits allowed by the focus of this article. Among others, see ÇALI (2015), pp. 901–922; JANIS and WIENER (2017), p. 53; SOSS (2019), p. 388.
[65] United States District Court, Southern District of New York, *Open Society Justice Initiative et al. v. Donald J. Trump et. al*, 1:20-cv-08121. They thus named President Trump and other members of U.S. Administration for violating freedom of speech protections and due process protections under the First and Fifth Amendments to the U.S. Constitution, and because the E.O. would be ultra vires under IEEPA because it covers activities and communication exported to the Netherlands.

ment, they could be designated for sanctions themselves[66]. On January 4, 2021, a federal district judge granted a preliminary injunction barring the implementation of the Order.[67] It is important to highlight that the court found no reason to believe that Plaintiffs faced a credible threat that the Order would be imminently enforced against them, and it also found no reason to question the government's stated interest in protecting the personnel of the United States and its allies from investigation, arrest, detention, and prosecution by the ICC without the consent of the United States or its allies. However, the court held that the restrictions on speech under the sanctions program were not narrowly tailored to this interest, as they prohibited speech that had nothing to do with that stated interest. Thus, the Court concluded that Plaintiffs were likely to succeed on the merits of their First Amendment free speech claim.[68]

4. What next for the ICC-Related Action into the situation in Afghanistan?

The decision to end the threat and imposition of economic sanctions and visa restrictions in connection to the ICC is undoubtedly a selling point for multilateralism and the rule of law, that is the core values upon which international law is based. But to which extent it also marks a point in favour of international criminal law and the prosecution of the ICC investigation into the situation in Afghanistan is yet to be seen.

In revoking E.O. 13928, President Biden indicated that

> [t]he United States continues to object to the International Criminal Court's (ICC) assertions of jurisdiction over personnel of such non-States Parties as the United States and its allies absent their consent or referral by the United Nations Security Council and will vigorously protect current and former United States personnel from any attempts to exercise such jurisdiction.[69]

Yet the ICC is a court of *last resort*, thus it can prosecute only if competent national courts of the alleged perpetrators are unwilling or unable to do so. In the specific case in which the Prosecutor initiates an investigation under authorization of a Pre-Trial Chamber (such as in the case of the Afghan investigation), Article 18 of the ICC Statute provides that the Prosecutor shall notify all States Parties and those States which, considering the information available, would normally exercise jurisdiction over the crimes concerned, of his/her intention to proceed with an investigation. States have one month from receipt of the notice to inform the Prosecutor that they are investigating or have investigated the crimes in question, and upon receipt of such notice the Prosecutor cannot proceed further until authorization from the Pre-Trial Chamber has been obtained.[70] In practice, this provision has been invoked for the first time in the ICC history only very recently. In March 2020 the Government of Afghanistan informed the Prosecutor that it «is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts allegedly committed within the authorised parameters of the Situation in Afghanistan», and formally requested, pursuant to Article 18(2) of the Statute, that within the 30-day time limit the Prosecutor defer the investigation to Afghanistan's national investigations and proceedings.[71]

As several commentators have already pointed out, if the U.S. were to start a criminal or

[66] E.O. 13928 limits, as we have already discussed, targets to "foreign persons". But under some sanction's regimes, U.S. citizens who are dual nationals are considered "foreign persons" and are thus subject to designation. In their discussion of their Fifth Amendment vagueness claim, plaintiffs, who are all four dual-citizens, emphasize that it is not clear whether any or all of them qualify as "foreign persons" subject to designation.

[67] See United States District Court, *S.D. New York, Open Society Justice Initiative v. Trump*, Opinion and Order, April 1, 2021, 2021 WL 22013.

[68] *Id.*, par. 7 ff. It is worth noting that the Biden administration had declined to appeal the preliminary injunction and that the revocation of E.O. 13928 comes just a couple of days before the court-imposed deadline for the administration to answer to the complaint.

[69] See *Executive Order on the Termination of Emergency…*, cit *supra* note 1.

[70] According to SCHABAS (2016), p. 293, « At the Rome Conference, Article 18 was one of the more controversial provisions. Its presence was reassuring to some States who were nervous about the operation of the complementarity regime, and troubling to others who saw it as a further impediment to an effective institution».

[71] The text of the request is at this link. However, as today no further notice has been given with regard to the formal beginning of such an investigation, perhaps also because of the unprecedented effects of the global pandemic of the corona-virus (known as COVID-19).

military investigation on alleged crimes committed in Afghanistan by its armed forces and CIA personnel, this would be sufficient to immediately preclude the ICC from investigating further.[72] But this seems in truth unrealistic.

First because, as quite rightly illustrated, a deferral request under Article 18 would require the U.S. administration to acknowledge the procedures written into the ICC Statute, even those benefitting a non-State Party, «and that could be a hard sell» for the U.S.[73] Second, considering so many years have passed since most of the alleged crimes were committed, it is to be determined whether the ICC Prosecutor will actually consider the deferral to a State's investigation of any use. Finally, it is worth noting that neither the President's letter to the Senate accompanying the E.O. that revoked the sanctions program authorized by Trump, nor the press statement of the Secretary of State announcing this move[74] seem to open the door to an assessment of the evidence involving potential abuses by U.S. nationals that forms the basis of the application by the ICC Prosecutor to investigate, *inter alia*, U.S. nationals in the situation in Afghanistan.

A second consideration in discussing the future of the ICC investigation is of fundamental importance. As it is based on the central pillar of "complementarity", the Court necessarily depends on the States' support to operate. But if we consider that a certain number of States parties to the ICC Statute participated, in a more or less effective way, in crimes of torture allegedly perpetrated in Afghanistan, it is yet to be seen how many countries (*in primis*, Afghanistan) will actually decide to cooperate with the Court if this means jeopardizing their relations with the U.S. For this reason, and also because of the general tendency of the ICC to exclude *in absentia* proceedings, the risk of U.S. citizens being concretely convicted is not null but very low.[75]

5. Concluding remarks.

The U.S. has repeatedly tried to obstruct the ICC since the beginning of the Court's life. It happened in particular during the Bush administration, when the Senate enacted the *American Service-Members Protection Act* of 2002 (still in force), which shields American military personnel from ICC jurisdiction and prohibits any agency of the Government from cooperating with the ICC.[76] The Bush administration also negotiated (*rectius*, pressured) so-called "bilateral non-surrender agreements" with a number of States, both parties and non-parties to the ICC Statute, in order to obtain legal safeguards against the transfer of American service-members to the ICC.[77] But none of those actions met the (almost uniformly) negative international reaction that Trump's decision to impose a program of financial sanctions and visa restrictions against ICC personnel indeed met. So, why did the former U.S. administration decide to react against the ICC through an action that is so unilateral (*rectius*, (alleged as) aggressive) that it could not only be considered abominable and hideous from an international lawyer's perspective, but even capable, more broadly, of potentially jeopardizing U.S. long-standing relationships with allies?

States have always closely guarded the possibility of intervening through the instrument of economic or commercial sanctions in international relations. However, for a long time, unilateral sanctions have been used mainly in order to respond to serious breaches of international obligations. In cases of failure by the Council to carry out its task *ex* Chapter VII, unilateral sanctions indeed become the only path to prevent the unacceptable consequence that serious violations of peremptory norms of international law remain unpunished.[78] But in recent times unilateral sanctions have become one of the preferred tools in the foreign policy of many States, even in pursuit of different agendas.[79] The U.S. sanctions against the ICC

[72] See STERIO (2019), p. 209.
[73] See SCHEFFER (2020).
[74] See Press Statement by the U.S. Secretary of State, Anthony J. Blinken, *Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court*, 2 April 2021.
[75] It is also worth noting that the ICC, on February 12, 2021, elected Karim Khan, a UK citizen, as its new Chief Prosecutor. He will take office on June 16, 2021.
[76] See *American Service-Members Protection Act of 2002*, Public Law 107-206, 2 August 2002, 116 Stat. 899, 22 USC 7401.
[77] See, among others, AKANDE (2003), pp. 618–650.
[78] See SILINGARDI (2020), p. 84 ff.
[79] See recently TZANAKOPOULOS (2021), p. 786.

added something to that picture. It is the first time that a country, which is a full-fledged member of the international community playing an active role in international relations, has imposed a sanctions program to compel an international organization to change its behaviour. And even if the U.S. has no legal obligation to cooperate with the Court, not being a party to the ICC Statute, it is also true that we are facing an institution whose aim and values are not only undeniably common to the entire international community, but also directed to improve security for individuals and among states. In that perspective, what was first and foremost targeted by E.O. 13928 is a central pillar of the international community: i.e., multilateralism and respect for the rule of law.

President Biden's decision to revoke the sanctions program against the ICC is unquestionably excellent news for the U.S. human rights foreign policy. But there are no guarantees that a future U.S. administration will not once again decide to adopt, depending on the political climate of the day, a policy of open hostility against the ICC. In that scenario, one cannot therefore exclude that a new program of unilateral sanctions will be adopted. That is because international law has until now proved to be unable to set a sufficiently clear and exhaustive legal regulation of this instrument. It would therefore be desirable that during the period of the Biden administration, which has clearly shown its intention to approach the ICC from a rule-of-law perspective, the ICC, in turn, conduct a serious and in-depth reflection over its inefficiencies, cumbersome procedures, management failures and slow progress. The alternative is that powerful States will, soon or later, activate new unilateral sanctions to set the ICC agenda, whilst weaker States will likely continue to leave the Court.

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