Speech by SJ at 2020 Colloquium on International Law (English only) (with photo)
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Following is the keynote speech by the Secretary for Justice, Ms Teresa Cheng, SC, at the 2020 Colloquium on International Law - Sanctions: Principles of Non-Interference today (December 3):

Good afternoon Chief Executive, Commissioner Xie (Commissioner of the Ministry of Foreign Affairs of the People's Republic of China (PRC) in the Hong Kong Special Administrative Region (HKSAR), Mr Xie Feng), Dr Neoh (Chairman of the Asian Academy of International Law, Dr Anthony Neoh), Professor Huang (President of the Chinese Society of International Law, Professor Huang Jin), ladies and gentlemen,

I. Introduction

Let me first express my appreciation to the Asian Academy of International Law and Chinese Society of International Law for holding this Colloquium notwithstanding the onset of COVID-19. Indeed, I learnt that it has utilised technology and has reached out to more by conducting this event online. As always, the theme for the annual Colloquium is always topical. This year it is particularly so not just because of what is happening in Hong Kong but also the fact that just a week ago, the United Nations (UN) urged to end unilateral coercive measures now.

I propose to approach the theme of the discussion from an international law perspective so as to set the scene for understanding the proprietary and legality (or lack thereof) of the multilateral and unilateral sanctions. No doubt we will learn more from the panel of experts to follow.

II. The Principle of Non-intervention under International Law

The principle of non-intervention has been reaffirmed internationally in different fora on different occasions. Article 2(7) of the Charter of the United Nations (UN Charter) states that "(n)othing contained in the (UN Charter) shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state ...".

After World War II, the International Law Commission in 1949 set out non-intervention as one of the duties of a State in Article 3 of its Draft Declaration on

Rights and Duties of States. The United Nations General Assembly has also reiterated in numerous resolutions the importance of this principle. To name but a few examples:

(1) In the resolution on the "Essentials of peace" in 1949, the General Assembly called upon every State to "refrain from any threats or acts, direct or indirect, aimed at impairing the freedom, independence or integrity of any State, or at fomenting civil strife and subverting the will of the people in any State";

(2) Similarly, the Declaration on the Inadmissibility of Intervention in the "Domestic Affairs of States and the Protection of their Independence and Sovereignty" as adopted by a Resolution of the General Assembly in 1965 declared:

"No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State ... No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind. Also, no State shall organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State";

(3) The "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations" unanimously passed by the General Assembly of the United Nations in 1970 provides that every State has the duty to refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

The above principles are re-affirmed by the International Court of Justice (ICJ) in 1986 in the case of Military and Paramilitary Activities in and against Nicaragua. The ICJ recognised that the principle of non-intervention is a principle of customary international law, and goes as far as to say that it is also a jus cogens norm, a fundamental or cardinal principle of public international law. In that case, the ICJ explained the non-intervention principle as follows:

"The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference ... the Court considers that it is part

and parcel of customary international law ... the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones."

It is undeniable that the principle of non-intervention is a recognised principle in public international law and a duty of a State to refrain from intervening in the affairs of any other State.

III. Permissible Intervention under the United Nations Framework

Interventions may take various forms, such as economic, military, subversive, etc. Whilst such interventions are impermissible, the international community recognised that there may be a need for administering lawful intervention under international law in light of ongoing issues such as terrorism or nuclear proliferation to further the objects of the UN Charter, that is "(t)o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace ...". Yet, as these interventions necessarily infringe on the sovereignty of a state, its administration should only be effected under the auspices of the United Nations, with actions taken being subject to its strict oversight and approval. The sanctions system under the United Nations Security Council is an established mechanism to implement this.

A. The Sanctions System under the United Nations Security Council

Chapter VII of the UN Charter allows the UN Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression", and to "make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42 (of the UN Charter) to maintain or restore international peace and security." Articles 41 and 42 of the UN Charter then lists out a non-exhaustive list of the actions that the UN Security Council may take, including the severance of diplomatic relations, the imposition of sanctions, and, if required, the use of military force.

Two things should be noted here. The first is that any action taken has to be subject to the determination of the UN Security Council that there has been a "threat to the peace, breach of the peace or act of aggression". It is plainly right that it is not up to any particular State to decide on such issues. The second is that the Security Council has a wide array of actions and tools which may deal with such a threat to international peace and security. These actions and tools must nonetheless be within the ambit provided under the UN Charter and the relevant Security Council resolution.

B. Responsibility to Protect

Another emerging concept which has been developed relatively recently is the notion of the responsibility to protect. Following the atrocities committed in the 1990s in the Balkans and Rwanda, which the international community failed to prevent, the then United Nations Secretary General Kofi Annan challenged Member States to "find common ground in upholding the principles of the Charter, and acting in defence of common humanity". This resulted in a study conducted by the International Commission on Intervention and State Sovereignty in 2001 regarding the relationship between state sovereignty and the protection of individuals from mass atrocities and various other UN reports. This then culminated in Member States committing to the concept of the responsibility to protect at the 2005 high-level UN World Summit meeting.

In gist, the responsibility to protect involves the state responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity, and the responsibility of the international community, through the United Nations, to use appropriate diplomatic, humanitarian and other peaceful means, to help to protect populations from these atrocities.

The principle of sovereignty cannot be fully realised unless the international legal norm of the principle of non-intervention is respected. The ICJ has provided a definition of intervention beyond the traditional form of direct military intervention but also included indirect interference by economic, political or other means that have an element of coercion intended to influence the conduct of consequences on a sovereign State. Whilst State intervention may not be permitted in the international community, the United Nations nonetheless plays an important role in ensuring that the objects of the United Nations and hence the peaceful coexistence of all States can be maintained. UN backed sanctions are the only legitimate sanction that can be

administered on States.

IV. The Impact of Unilateral Coercive Measures on the World Order

Regrettably, there are examples where States unilaterally impose so-called "sanctions" on other States or even individuals with a view to exert coercion or achieve implicit subjugation. These "unilateral coercive measures" do not have the necessary legitimacy discussed above. These actions undermine the world order, violate established principles of international law, and disrupt international peace and stability.

A. Unilateral Coercive Measures by the United States towards the PRC and the HKSAR

The recent "unilateral coercive measures" taken against certain government officials in the HKSAR and the PRC brought about by the United States in response to China's enactment of the National Security Law in Hong Kong is such an example.

It is trite to say that safeguarding national security is a matter of national sovereignty, which every State should enjoy under international law. Each State enjoys the rights inherent in full sovereignty and the territorial integrity and political independence of the State are inviolable. It follows, then, that enacting national security legislation is without a doubt an inherent right of every sovereign State.

Since enacting national security legislation is an inherent right of every sovereign State and falls within the internal affairs of a sovereign State, the enactment and implementation of the National Security Law in Hong Kong by the PRC should be free from intervention by other States.

The use of these "unilateral coercive measures" are at odds with the international law principle of non-intervention, unbecoming of any civilised nation, and is a hindrance to international peace and stability. In such circumstances, the PRC is wholly justified in deploying any countermeasures as a response to a breach of the principle of non-intervention against itself.

All States should respect the sovereign rights of other States, aim to achieve peaceful co-existence and strive to uphold international rule of law, and refrain from imposing these so-called "unilateral sanctions".

B. Economic Coercion as Interference

Economic coercion is one of the most commonly found unilateral coercive measures. They at times represent legitimate measures that a State can pursue in its own economic interests whilst it may also amount to illegal pressure put upon another State. However, in this context it should be noted that a State's conduct in the international arena should also conform to their treaty obligations. As the ICJ notes in the abovementioned case of Nicaragua v United States:

"A State is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific legal obligations; but where there exists such a commitment ... an abrupt act of termination of commercial intercourse ... will normally constitute a violation of the obligation not to defeat the object and purpose of the treaty."

The World Trade Organization, in the realm of international trade and commerce, imposes treaty obligations which may limit or prohibit the use of certain economic "unilateral coercive measures".

At times, it is patently obvious that economic measures are introduced not for the legitimate pursuance of a State's economic interests, but aim to influence the internal or domestic affairs of another State. There can be no doubt as to a State's intentions if, in the course of applying such unilateral coercive measures, they explicitly state to the international community that such measures are not for economic reasons, but that there are other motives at play.

V. The Impact of Unilateral Coercive Measures on COVID-19

Finally, I wish to highlight the impact that unilateral coercive measures have on the pandemic. Our discussion of this topic today is highly relevant in the context of the COVID-19 pandemic. On November 25 this year, the Security Council Arria Meeting titled "End Unilateral Coercive Measures Now" was held, discussing unilateral coercive measures in the context of the COVID-19 pandemic.

At the same meeting, the Special Rapporteur on the negative impact of the unilateral coercive measures on the enjoyment of human rights, Ms Alena Douhan, expressed the following regarding unilateral coercive measures, noting:

"The humanitarian impact of unilateral sanctions is enormous. They affect all categories of civil, economic, social and collective rights, including the right to development. In the longer term, unilateral sanctions undermine existing regional and bilateral integration mechanisms, and impede targeted countries from developing or restoring critical infrastructure to guarantee the basic needs and well-being of their people ... (A)ny unilateral measures are only legal if they do not breach any international obligation of states; are taken with authorisation of the UN Security Council, or their illegality is excluded in the course of countermeasures taken in accordance with the standards of international responsibility. Measures directly affecting fundamental human rights shall not be used as the means of influencing any government".

Similarly, Ambassador Zhang Jun at the meeting noted this:

"(Unilateral coercive measures) undermine the affected countries' health capacity and their ability to mobilise resources to fight against (the) COVID-19 pandemic. (Unilateral coercive measures) limit and block the access to medical technologies and supplies, jeopardise global solidarity and international co-operation, and must be lifted to ensure the full, effective and efficient response of all member states to COVID-19".

The international community would be well informed to take heed of these statements and end all unilateral coercive measures now.

VI. Conclusion

Ladies and gentlemen, when discussing sanctions, the international community should bear the following in mind. First, any discussion should have regard to the principle of non-intervention. Secondly, there is an appropriate forum to discuss whether, when, and how to interfere with the internal and external affairs of a State, and that is through the United Nations. Finally, "unilateral coercive measures" are not legitimate sanctions at all, at odds with the international law principle of non-intervention, and a major barrier to international peace and stability. To fight the COVID-19 pandemic, and to maintain the international world order, we must join in solidarity and unity, and putting an end to unilateral coercive measures now is an important step.

With that, I look forward to the insightful and fruitful discussions that follow, and wish everyone good health. Thank you.

Ends/Thursday, December 3, 2020