

OUTCASTING THE AGGRESSOR: THE DEPLOYMENT OF THE SANCTION OF “NON-PARTICIPATION”

By Martina Buscemi*

ABSTRACT

This Essay explores the sanction of “non-participation,” which has been used against Russia following the start of the war in Ukraine. After mapping out the multifaceted instances of Russia’s exclusion from international organizations, the analysis considers the legality of measures adopted that do not have an explicit basis in institutional rules. The Essay concludes with broad reflections on the use of international organizations as platforms to stigmatize and isolate the violator and outlines some consequences and functions that the sanction of “non-participation” has today.

I. INTRODUCTION

In his General Course of the Hague Academy (1969), Wolfgang Friedmann discussed the changing structure of international law from coexistence to cooperation. He maintained that “it is the privilege of membership and participation in the common activities which provides the essential sanction.”¹ In that sense, the sanction of “non-participation”—which consists of denying a lawbreaker the benefits of international cooperation—was considered an effective safeguard for compliance with the obligations undertaken by states. Exclusion, as a form of banishment, dates back to an archaic system of law,² and reminds us of the Ancient Greek custom of writing the name of potential tyrants in pottery shards (*ostraca*) to be expelled from Athens. In the current international community, ostracism takes the form of exclusion from institutionalized forms of cooperation in international organizations (IOs).³ A seminal study of measures that deprive states of the privileges and rights emanating from their membership in IOs concluded that, despite their infrequent use, these sanctions serve as a means of intimidation and pressure that ultimately contribute to the enhancement of the legal orders of IOs.⁴

* Assistant Professor of International Law, University of Milan, Milan, Italy.

¹ Wolfgang Friedmann, *General Course in Public International Law*, 127 RECUEIL DES COURS 39, 116 (1969).

² Georges Michel Abi-Saab, *Cours général de droit international public*, 207 RCADI 9, 301 (1987).

³ On exclusion as mode of enforcement of international law, see Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252 (2011).

⁴ CHARLES LEBEN, LES SANCTIONS PRIVATIVES DE DROITS OU DE QUALITÉ DANS LES ORGANISATIONS INTERNATIONALES SPÉCIALISÉES: RECHERCHES SUR LES SANCTIONS INTERNATIONALES ET L’ÉVOLUTION DU DROIT DES GENS 326 (1979).

Suspension or expulsion from universal IOs did not occur frequently. Notable examples date back to the 1960s and 1970s vis-à-vis defiant members who had placed themselves outside the institutional orders.⁵ Since then, provisions on institutional sanctions have lain dormant in the constituent instruments of several IOs for years, at least until very recently. The war in Ukraine seems to have turned back the clock in many respects, including a return to the sanction of “non-participation.” In fact, in the wide array of measures targeting Russia (and to a lesser extent Belarus), sanctions limiting the benefits of IO membership have almost literally blown up, bringing to the surface novel and old tensions in international relations, ones reminiscent of the Cold War and, before that, of the frictions existing in the League of Nations, which ultimately led to the expulsion of certain members, including Russia for its invasion of Finland.

The role of IOs not as fora to reconcile divergent views but instead as platforms to stigmatize and isolate a violator should be read in light of the current paralysis of the United Nations (UN) Security Council, which led Ukraine, with the support of several states, to appeal to all available international institutions to make its case. International courts and IOs have thus been used as a *continuum* of the military battlefield to score points and defeat the enemy in what appears to be an all-out war.⁶ While the academic debate has already highlighted the risks behind “judicializing” the military conflict, the challenges behind “institutionalizing” the battle within IOs have not received the same focus.

Against the backdrop of recurring cycles of history, this Essay examines the exclusion of Russia from IOs and tests the meaning of the sanction of “non-participation” today. In an age characterized by interdependence, in which governance is necessarily both supranational and technical, marginalizing states from institutionalized cooperation may be a powerful weapon, even if obsolete. Has the war in Ukraine revitalized the ostracizing power?

II. THE EXCLUSION OF RUSSIA FROM INTERNATIONAL ORGANIZATIONS

The “social reaction” unleashed by IOs against Russia is almost unprecedented in modern history, with apartheid-era South Africa serving as a somewhat comparable example. One may argue that exceptional circumstances—the blatant military aggression against Ukraine—call for unprecedented reactions, yet the current debarring of the aggressor is nonetheless remarkable in many aspects. For the first time since the creation of the UN, a

⁵ For example, sanctions against South Africa’s apartheid regime and Portugal’s colonialization policy. See KONSTANTINOS D. MAGLIVERAS, EXCLUSION FROM PARTICIPATION IN INTERNATIONAL ORGANIZATIONS. THE LAW AND PRACTICE BEHIND MEMBER STATES’ EXPULSION AND SUSPENSION OF MEMBERSHIP 69–75 (1999); DAVID RUIZÉ, ORGANISATIONS INTERNATIONALES ET SANCTIONS INTERNATIONALES 41–49 (1971); M. LAURA FORLATI PICCHIO, LA SANZIONE NEL DIRITTO INTERNAZIONALE 389–401 (1974). Yet, more recently, regional IOs have increasingly resorted to imposing institutional sanctions in response to unconstitutional governmental changes or gross human rights violations allegedly committed by members. See Silvia Steininger, *With or Without You: Suspension, Expulsion, and the Limits of Membership Sanctions in Regional Human Rights Regimes*, 81 ZAÖRV 533 (2021).

⁶ After Russia vetoed Security Council action, Ukraine opened up two new litigation fronts against Russia, one before the European Court of Human Rights and one before the International Court of Justice. In regard to the latter, forty-one states and the European Union issued a joint statement in support of Ukraine’s action. UK Government Press Release, *Ukraine’s Application Against Russia Before the International Court of Justice: Joint Statement* (May 20, 2022), at <https://www.gov.uk/government/news/ukraine-joint-statement-on-ukraines-application-against-russia-before-the-international-court-of-justice>. Lately, a large number of states have requested to intervene as a third party in both proceedings.

Security Council's permanent member has been denied the benefits of membership in a large number of political and technical IOs, ranging in size and membership level, which, for the most part, have never resorted to these kinds of sanctions before. Interestingly, the present scenario contradicts empirical studies in international relations that link the likelihood of suspension of membership to the violator's level of oil resources.⁷ Significant, too, is the wide variety of forms that sanctions against Russia have taken in practice.

Table 1 captures the specific measures adopted from February 24 to June 20, 2022, and orders them progressively according to the gravity of the restrictions on membership benefits enjoyed by Russia (and, in a few cases, Belarus) in various IOs.⁸ Sanctions include extreme (expulsion), severe (full suspension of rights and privileges), strict (interruption of services provided by IOs), and mild (suspension of only certain participatory rights and partial restriction of services) measures. IOs with political mandates, such as the Council of Europe (CoE) and the UN, adopted measures that resulted in the cessation of Russia's membership in the organization or in one of its organs. This occurred by decision of the IO or by unilateral withdrawal of the member following its suspension, respectively, in the CoE and in the Human Rights Council (HRC). Voluntary termination of membership also occurred in one IO having a technical mandate, the World Tourism Organization (UNWTO). Some IOs opted for the temporary suspension of all rights and benefits, including the International Council for the Exploration of the Sea (ICES), the OECD Nuclear Energy Agency (OECD NEA), and the European Conference of Postal and Telecommunications Administrations (CEPT). The Danube Commission declined the powers of all Russian representatives and excluded them from participating in meetings and working bodies, though without formally suspending membership. In a few instances, the IO restricted or suspended its technical and financial assistance to Russia. For example, sanctions adopted by financial IOs, in particular the World Bank Group (WBG) and the European Bank for Reconstruction and Development (EBRD), include the suspension of any new loans, investments, project financing, as well as the possibility of suspending or cancelling disbursements of funding on existing projects. The International Labour Organization (ILO) interrupted its non-humanitarian technical cooperation and assistance to Russia and also stopped inviting it to all discretionary meetings, conferences, and seminars whose composition is set by the Governing Body. Sanctions have also affected Russia's observer status, for example, in the Organization of American States (OAS) and the European Organization for Nuclear Research (CERN).

The foregoing measures have undoubtedly severed or limited Russia's full and regular participation in the IOs and have accordingly impaired its corresponding rights. This holds true for the suspension of (all or some) participatory rights but also for the interruption of services provided by the IOs: although their allocation is partly discretionary and depends on budget constraints, to the extent that the member becomes ineligible to receive assistance and use resources, this amounts to deprivation of elementary membership benefits.⁹ The table does not include more subtle forms of isolation aimed at cooling diplomatic relations with

⁷ Inken Von Borzyskowski & Felicity Vabulas, *Credible Commitments? Explaining IGO Suspensions to Sanction Political Backsliding*, 63 INT'L STUD. Q. 139 (2019).

⁸ Table 1 includes all IOs that, to the best of our knowledge, took action against Russia, making public the decision to formally suspend or terminate its membership benefits.

⁹ On whether these kinds of measures impair the member's rights and privileges, see FRÉDÉRIC DOPAGNE, *LES CONTRE-MESURES DES ORGANISATIONS INTERNATIONALES* 85–106 (2010).

TABLE 1.
INSTITUTIONAL SANCTIONS AGAINST RUSSIA

	Type of Sanction	Legal Ground	Voting Records
CoE	Expulsion	Art. 8 CoE Statute	NA
CoE	Suspension of membership (leading to withdrawal)	Art. 8 CoE Statute	NA
UNWTO	Suspension of membership (leading to withdrawal)	Art. 34 UNWTO Statutes	NA
UN	Suspension of membership in one organ (HRC) (leading to withdrawal)	UNGA Res. 60/251	93 in favor, 24 against, 58 abstentions
OECD	Suspension of membership in the OECD NEA	Art. 17(c) OECD NEA Statute	Unanimity
CEPT	Suspension of membership (+ Belarus)	No specific provision	34 in favor, 1 abstention, 11 absent
ICES	Suspension of membership	No specific provision	18 in favor, 1 against, 1 abstention
Danube Commission	Suspension of participatory rights	No specific provision	9 in favor, 1 against, 1 abstention
ILO	Suspension of services and certain participatory rights	No specific provision	42 in favor, 2 against, 8 abstentions
WBG	Suspension of services (+ Belarus)	NA	NA
EBRD	Suspension of services (+ Belarus)	Art. 8, para. 3 EBRD Agreement	NA
OAS	Suspension of observer status	CP Res. 52 (61/72)	25 in favor, 8 abstentions, 1 absent
CERN	Suspension of observer status	No specific provision	NA
INTERPOL	Restriction of services	Art. 131(1) INTERPOL Rules on the Processing of Data	Decision of the General Secretariat

Source: Data are taken from the material on IOs' websites and private correspondence with IOs if the official decisions or the voting results were unavailable online (as in the case of ICES, CEPT, Danube Commission, WBG, and CERN). When asked to provide information, some IOs did not respond. Others did so, either without disclosing the voting results or without breaking them down by members or by requiring not to disclose them publicly.

Russia,¹⁰ nor does it include reacting institutions that are not formal IOs¹¹ or the interruption of ongoing accession processes.¹² These forms of isolation are not categorized as sanctions in this Essay, but instead simply as unfriendly acts.

¹⁰ For example, the non-support of Russia's election in UN subsidiary bodies.

¹¹ For example, the suspension of Russia, and Belarus as an observer, from the Council of the Baltic Sea States.

¹² For example, the suspension of the accession process of Belarus to the World Trade Organization, and accession of Russia to the Organisation for Economic Co-operation and Development.

In terms of timing, IOs acted immediately after hostilities began. Unsurprisingly, when urgency drives political decisions, legal uncertainty is often the result.

III. POLITICAL URGENCY AND LEGAL CONSTRAINTS: THE LEGALITY OF SANCTIONS THAT LACK AN INSTITUTIONAL BASIS

Sanctions that an IO adopts against its members according to its own rules are lawful.¹³ However, as Table 1 shows, several IOs took measures that lack an explicit basis in institutional rules, either because the rules are completely silent on the measure, or because the rule envisages sanctions but for different types of violations (typically for failure to pay financial contributions). Take the case of the world's oldest intergovernmental science organization—the ICES—which suspended the full participation of Russia without a clear legal basis in its constituent instrument. That instrument allows for the deprivation of membership rights but only for defaults in payments.¹⁴ The suspension of Russia and Belarus from the CEPT was similar.¹⁵ The freezing of ties by CERN with Russia is not explicitly provided for in its constituent instrument, but is instead derived from the authority vested in the CERN Council to grant observer status.¹⁶ The Danube Commission's decision is not supported by the founding treaty, which lacks a provision that expressly permits the suspension of membership rights.¹⁷ Similarly, the ILO's interruption of technical assistance and the non-invitation of Russia to certain meetings do not have a precise foothold in the ILO Constitution, which stipulates a different (and unique) enforcement procedure in cases of non-compliance with ILO Conventions.¹⁸ Uncertainty also surrounds the halt of programs announced by the WBG.¹⁹ The exercise of sanctioning power by the CoE has been no less problematic. Article 8 of the CoE Statute empowers the Committee of Ministers to take three actions vis-à-vis a member who seriously violates the principles of the Organization set out in Article 3: suspension; invitation to withdraw; and, in case of refusal, expulsion. In the only precedent for cessation of membership, Greece left the CoE pending the procedure for suspension under Article 8. Russia, by contrast, was first suspended and then expelled, despite its explicit intention to voluntarily withdraw.²⁰

¹³ Int'l L. Comm'n, Draft Articles on the Responsibility of International Organizations, with Commentaries, 2 Y.B. INT'L L. COMM'N, pt. 2, at 46, 72 (2011).

¹⁴ Convention for the International Council for the Exploration of the Sea, Art. 14, Sept. 12, 1964, 652 UNTS 237.

¹⁵ Arrangement Establishing the European Conference of Postal and Telecommunications Administrations, Art. 10, para. 7, June 26, 1959.

¹⁶ Rule of Procedure 6(b) of the CERN Council, CERN/3388/Rev.2 (Sept. 10, 2019).

¹⁷ Convention Regarding the Regime of Navigation on the Danube, Aug. 18, 1948, 33 UNTS 181. The decision referred to, among others, the internal rules on credentials procedure (Règles de procédure de la Commission du Danube, ch. I, paras. 4–5, CD/SES 97/23 (July 2022)).

¹⁸ Constitution of the International Labour Organisation, Arts. 26–33, June 28, 1919, 49 Stat. 2712, 225 CTIA 373.

¹⁹ The statement rendered by WBG does not refer to any legal foothold which, hypothetically, may be found in the Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, 2 UNTS 134. In particular, Article VI provides for full suspension of membership in case of failure to fulfill any of its obligations.

²⁰ However, it is not clear whether the notice of withdrawal, submitted by Russia the day before the expulsion, was considered valid according to Article 7 of the Statute (Statute of the Council of Europe, May 5, 1949, 87 UNTS 103).

Against this backdrop, one may query the legality of the decisions that deviate from or are not based on the rules of IOs. In particular, questions arise as to whether “non-mandated” sanctions—meaning sanctions adopted without an express basis in institutional rules (as in the case of the CEPT, ICES, ILO, CERN, and the Danube Commission)—are nevertheless legally permissible. It is understood that IOs can only exercise those powers conferred upon them by members through the constituent instruments. When constituent instruments empower the IO to suspend the full membership, this may arguably imply the (lesser included) power to suspend only some of the member’s rights and privileges.²¹ In contrast, when constituent instruments are silent on the matter, it is difficult to imply the sanctioning power of IOs by way of interpretation.²²

However, looking beyond the institutional perimeter, one may wonder whether IOs are entitled to suspend Russia’s rights and privileges on the basis of customary international law. Firstly, by relying on the general rule *inadimplenti non est adimplendum*, as codified in Article 60 of the Vienna Convention on the Law of Treaties (VCLT), which entitles contracting parties to a treaty to suspend that treaty in response to its material breach. The majority of the reacting IOs—which pursue technical cooperation with nothing or little to do with peace and international security—have indeed tied the adoption of sanctions to Russia’s conduct in Ukraine and to the scope of the institutional mandate. In their relevant decisions, they seem to imply that Russia’s military aggression violated some primary rules incorporating the values, aims, purposes, and principles of the IOs’ mandates set out in their constitutive instruments—e.g., the peaceful pursuit of science, peace through social justice, etc.²³ Yet, anchoring the suspension of membership benefits to the rule enshrined in VCLT Article 60 may be problematic for a number of reasons, both substantive and procedural.²⁴ The sanctions in question were not directed at affecting, in whole or in part, the operation of the constituent treaty at stake, with a view to restoring the imbalance engendered by the material breach of that treaty. On the contrary, they appear characterized by a “coercive” feature and a compelling function (i.e., inducing the defaulting state to cease the violation and restore the

²¹ *E.g.*, note 19 *supra*.

²² In this context, the doctrine of implied powers has been considered inappropriate to fill the lacuna (see MAGLIVERAS, *supra* note 5, at 254–57). On the other hand, decisions taken by IOs can be hardly considered as “subsequent practice” in the application of the constituent treaty (Vienna Convention on the Law of Treaties, Art. 31 para. 3(b), May 23, 1969, 1155 UNTS 331, and UN Doc. A/73/10, 93–106 (Apr. 30–June 1, July 2–Aug. 10, 2018)), lacking a provision against which to evaluate the agreement of the parties and lacking a clear and common understanding on the interpretation of the treaty to that effect. Nor do the decisions themselves seem to amount to “established” or “general” practice of the organization. Obviously, it remains possible for the parties to formally amend the constituent instruments so as to include explicit provisions on sanctions, as occurred at the time of South Africa’s exclusion (see note 5 *supra*).

²³ This sort of claim has not been made without contestations, *in primis* by the targeted member. At the ILO, Belarus, China, Cuba, Iran, Brazil, and Indonesia also rejected the “politicization of technical issues,” arguing that the ILO was not the appropriate forum to discuss security matters (GB.344/INS/PV, 117–27 (Mar. 21–26, 2022)). Similar objections were raised at the UNWTO. During the discussion about whether to vote to suspend Russia, its delegate asserted that “issues of territorial integrity and sovereignty do not fall within its competence” (CE/URG-2/2 rev.1, 12 (Mar. 7, 2022)).

²⁴ Problematic aspects concern the existence of a material breach of the constituent treaty, the subject entitled to suspend, and the requirement of unanimous agreement of the parties. In this regard, different positions are held by MAGLIVERAS, *supra* note 5, at 231–40 and DOPAGNE, *supra* note 9, at 81–83. As known, VCLT Articles 5 and 60, paragraph 4 postulate that the general regime is “without prejudice” to any relevant rules of the IO.

situation), that may suggest looking at the issue with a different lens, namely the general rules governing resort to countermeasures.

The question becomes, then, whether sanctions lacking an institutional basis could be justified under general international law as countermeasures in response to violations of the defaulting member. Even assuming the invasion of Ukraine infringes not only the UN Charter and fundamental norms of customary law but also the constituent instruments of IOs and the values embodied therein, the use of countermeasures by IOs remains controversial.²⁵ In general, the centralized dimension that characterizes IOs' legal orders clashes with the typically decentralized nature of measures of private justice. More specifically, the problem lies at the intersection of the laws governing international responsibility and that governing the relationship between an IO and its members.²⁶ The Draft Articles on the Responsibility of IOs (DARIO) adopted by the International Law Commission (ILC) provided for the *faculté* to resort to countermeasures in a very narrow way. Article 22, paragraph 2 requires that the countermeasures taken by IOs against members not only meet the ordinary requirements prescribed by general international law, but also that they are consistent "with the rules of the organization," and that no other "appropriate means" are available.²⁷ Paragraph 3 tightens this further by adding that a breach of an IO's rules cannot justify countermeasures unless the latter are "provided for" by such rules. The provision has been criticized for conflating the notion of sanction with that of countermeasure.²⁸ Article 22 (and its counterpart in Article 52) resulted from a heated debate in the ILC—and in the International Law Association²⁹—between divergent positions on countermeasures in the relationship between IOs and members.³⁰ Opposing views expressed by states show that the *lex lata* nature of the provision was highly disputed, so that, according to some, the possibility for IOs to adopt countermeasures should have been totally barred from the final text of DARIO.³¹

Practice in this respect is inconclusive. Sanctions lacking an institutional basis are not unprecedented, but IOs do not justify them as "countermeasures" or other forms of self-help.³² In some cases the adoption of penalties outside the institutional perimeter has been explicitly rejected,³³ whereas in others it has met with no significant contestation.³⁴ In scholarship, while some admit only mandate-based sanctions regimes,³⁵ others argue that rules of

²⁵ Special Rapporteur Ago was one of the first to theoretically pose the question, answering it in the affirmative, without much difficulty. UN Doc. A/CN.4/SER.A/1979/Add.1 (Part 1), 44 (Feb. 24, 1979).

²⁶ See Christiane Ahlborn, *The Rules of International Organizations and the Law of International Responsibility*, 8 INT'L ORG. L. REV. 397 (2011).

²⁷ Draft Articles on the Responsibility of International Organizations, *supra* note 13, at 71–72.

²⁸ Yann Kerbrat, *Sanctions et contre-mesures: risques de confusion dans les articles de la CDI sur la responsabilité des organisations internationales*, 46 REVUE BELGE DE DROIT INTERNATIONAL 103, 108 (2013).

²⁹ Int'l L. Ass'n, *Responsibility of International Organizations*, 75 INT'L L. ASS'N REP. CONF. 880, 893 (2012).

³⁰ For a reconstruction of the debate, see FERNANDO L. BORDIN, *THE ANALOGY BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS* 230 (2018).

³¹ UN Doc. A/CN.4/636 and Add. 1–2, 119–20 (Feb. 14, Apr. 13, Aug. 8, 2011).

³² UN Doc. A/CN.4/637 and Add.1, 159–60 (Feb. 14, 17, 2011).

³³ For example, see the legal adviser opinion of the International Telecommunication Union, UN JURIDICAL Y.B. 214 (1982).

³⁴ See DOPAGNE, *supra* note 9.

³⁵ Christiane Ahlborn, Book Review: *Frédéric Dopagne, Les contre-mesures des organisations internationales*, *Louvain-la-Neuve*, 26 LEIDEN J. INT'L L. 223, 228 (2013).

IOs have priority but not exclusivity in regulating the subject.³⁶ According to this latter view, IOs can fall back to general international law, and hence adopt countermeasures upon a double determination: (1) that all available treaty-based sanctions have been exhausted; and (2) that their implementation failed to prompt the complete cessation of the initial wrongful act and full reparation of the injury.³⁷ This position assumes a conception of IOs not constructed in contractual terms, but instead based on analogy with states. Consequently, IOs, as subjects of law, would be entitled to partake fully in the general mechanism of international responsibility.³⁸

If one adopts this perspective, although the ILC's final stand on fall-back took a different direction,³⁹ reasons of consistency within the international legal order suggest that if the rules of the IO are silent or have failed to regulate in whole or in part the issue, and absent an explicit intent to derogate from customary law, the residual general regime for countermeasures should resurface.⁴⁰

In relation to non-mandated sanctions taken against Russia, the silence or incompleteness of IO rules does not exclude the application of general international law, especially in IOs with a highly technical mandate and ancient or rudimentary normative framework.⁴¹ At the same time, the test of the prior exhaustion of "appropriate means" may not always be satisfied, given the immediacy that, in some cases, has characterized the adoption of sanctions. Other conditions appear, instead, hypothetically met.⁴² Yet, the scarcity of legal objections from members, on the one side, and the absence of explicit qualification of sanctions as countermeasures by IOs, on the other side, do not help to clarify the picture, given the reluctance of some IOs to disclose the discussions and votes that accompanied the relevant decisions.⁴³ Whether sanctions without an institutional basis are *ultra vires* acts is a question courts are unlikely to answer because the sanctioning process is entirely in the hands of the *political* organs of the IOs and there are no formal procedures available to the member to challenge or appeal the measures.⁴⁴

Ultimately, the adoption of non-mandated sanctions against the lawbreaker seems to live in a normative space not regulated univocally. These sanctions magnify the transparency of the institutional veil of the IO, under which lies member states who, by making use of the

³⁶ See DOPAGNE, *supra* note 9.

³⁷ Frédéric Dopagne, *Sanctions and Countermeasures by International Organizations: Diverging Lessons for the Idea of Autonomy*, in INTERNATIONAL ORGANIZATIONS AND THE IDEA OF AUTONOMY: INSTITUTIONAL INDEPENDENCE IN THE INTERNATIONAL LEGAL ORDER 178, 182 (Richard Collins & Nigel D. White eds., 2011).

³⁸ *Id.* at 180–81.

³⁹ The DARIO adopted on first reading admitted the possibility for IOs to take countermeasures in broader terms. UN Doc. A/CN.4/SER.A/2009/Add.1, pt. 2, 6, 47 (May 4, June 5, July 6, Aug. 7, 2009). See also UN Doc. A/CN.4/564 and Add. 1–2, 109 (Feb. 28, Apr. 12, 20, 2006).

⁴⁰ Int'l L. Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682 (Apr. 13, 2006).

⁴¹ It is arduous to maintain that the institutional arrangements of IOs above mentioned have created self-contained regimes.

⁴² Measures seem proportionate and necessary, aimed at putting to an end the initial wrongful act, which is still undergoing, and in compliance with fundamental primary obligations. Suspension, in particular, permits the resumption of the performance of the obligations in question.

⁴³ At the ILO, opposing members did not mention the lack of a legal basis in the Constitution for the adoption of measures against Russia. See note 23 *supra*.

⁴⁴ If they exist, judicial settlements of disputes between members and the IO can fill this lacuna.

institutional apparatus, twist statutory provisions to collectively react against the filibustering member. One is left with the impression that the *extra ordinem* character of the sanctions has little to do with the breach of the rules of IOs, and much to do with the exceptional circumstances of the case and the serious breach of fundamental norms of international law.⁴⁵ In that sense, IOs seem to act on behalf of members to enforce the collective values of the international community.⁴⁶

IV. CONCLUSION

The use of IOs as a battlefield to penalize the aggressor raises legal but also political questions. Scholars have long highlighted possible side effects inherent in the imposition of sanctions, namely the risk of antagonizing the offending member and inducing it and others to cut ties with the IO.⁴⁷ The difficulty is to reconcile the need to keep recalcitrant members engaged in the IO, hoping that this will entail more social control, with the need to safeguard the reputation of the institutions by drawing red lines.⁴⁸ In striking a balance between influence and consistency within IOs, expulsion is often seen as a weapon of the politician rather than the statesman⁴⁹ and ultimately “a token of impotence.”⁵⁰ Full or partial suspension of membership benefits appears to be a more constructive measure,⁵¹ if only because it allows IOs to continue to exert pressure on the errant member inwardly.

However, practice shows that suspension can often lead to termination of membership by unilateral decision of the (to be) suspended member. Indeed, withdrawing from the IO enables the State to “save face,” reduce the reputational costs associated with the stigma of sanctions, and twist the narrative in its favour for domestic audiences.⁵² Russia’s response to suspension, in three cases, confirms this logic. For instance, at the UNWTO, during the discussion on the decision of whether to convene an extraordinary session to vote for the suspension of Russia, its national delegate pleaded for a continuation of close cooperation, while at the same time warning of long-term consequences of hasty decisions. In hindsight, this foreshadowed Russia’s later announcement to quit the institution entirely shortly before the deliberation of the suspension. A similar script unfolded at the HRC and the CoE. The discussions about suspension can also contribute to polarization. Evidence of

⁴⁵ The discussion that took place, e.g., among ILO members seems to confirm this impression. See note 23 *supra*, note 61 *infra*.

⁴⁶ See, *ex multis*, CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS *ERGA OMNES* IN INTERNATIONAL LAW (2005).

⁴⁷ HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW. UNITY WITHIN DIVERSITY 913 (6th ed. 2018). As for the “domino effect,” see Kanstantsin Dzehtsiarou & Donal K. Coffey, *Suspension and Expulsion of Members of the Council of Europe: Difficult Decisions in Troubled Times*, 68 INT’L & COMP. L. Q. 443, 470 (2019).

⁴⁸ Steininger, *supra* note 5, at 565.

⁴⁹ Louis B. Sohn, *Expulsion or Forced Withdrawal from an International Organization*, 77 HARV. L. REV. 1381, 1424 (1964).

⁵⁰ SCHERMERS & BLOKKER, *supra* note 47, at 111–12.

⁵¹ Jerzy Makarczyk, *Legal Basis for Suspension and Expulsion of a State from an International Organization*, 25 GER. Y.B. INT’L L. 476, 483 (1982).

⁵² MAGLIVERAS, *supra* note 5, at 260; Steininger, *supra* note 5, at 548.

polarization includes the composition of the votes through which the sanctioning decisions were taken, especially in IOs with universal membership.⁵³

This prompts some final, necessarily broad, impressions about the functions and limits of the sanction of “non-participation” today.⁵⁴ Although the academic debate focuses mostly on constraint measures of economic nature (following the “decentralized” logic), social reactions unleashed by IOs (according to the “centralized” scheme) play a significant role. The two regimes of measures share the same aims: first and foremost, to exert pressure on the offending state to coerce or change its behavior, and secondly, to signal and stigmatize its conduct. Institutional sanctions, in particular, have a more pronounced “moral” character that consists of shunning and branding the ostracized member as a “pariah” in the eyes of the community.⁵⁵ This unveils a “ceremonial” aspect underlying the sanctioning process administered by IOs, which consists of the restating of principles and values on which the community is founded, while, at the same time, rallying the ranks around these strongholds.⁵⁶ This solemnity should not be overlooked. It may have considerable impact on the assessment of the costs to the violator—those costs may exceed the costs of the loss of the membership benefit itself.⁵⁷ On the other hand, the significance of that solemnity can be devalued where the IO is seen as applying a “double standard.” After all, the risk of selectivity is rather unavoidable, as the reacting subject is a supranational entity but not impartial nor third-party: IOs do reflect the egos, forces, power dynamics, and convergences existing outside the institutional order.⁵⁸ This points to an inherent limit of the sanction of “non-participation,” namely that it is the result of a process handled solely by political bodies. This may appear peculiar as the assessment of the infractions committed by the member, on which the sanctions are approved, entails an evaluation of the conduct against certain legal standards. Unlike states which are *judex in causa sua* when resorting to countermeasures, IOs—created to surmount the horizontal and anarchic dimension of international affairs with institutionalized architectures aiming to community goals—would be expected to offer more structured procedural guarantees in the enforcement stage to avoid risk of possible abuses.

By responding boldly and immediately after the start of the military conflict, IOs appear to be competing to shape international political discourse, helping to restore the legal order while the sheriff (the Security Council) is out of town.⁵⁹ This occurred both in the

⁵³ See Table 1. At the UNWTO, the decision to suspend membership requires a majority of two-thirds of members present and voting. The Organization did not disclose the voting results, yet news sources report that the resolution deliberating Russia’s suspension passed with forty votes in favor, eleven against, and forty abstentions. *UNWTO Extraordinary General Assembly Suspends Russia’s Membership*, DIPLOMAT (Apr. 28, 2022), at <https://thediplomatinspain.com/en/2022/04/unwto-extraordinary-general-assembly-suspends-russias-membership>. Interestingly, at the UN and OAS, members voted rather unitedly to condemn the military aggression in Ukraine. Yet, when it came to suspending Russia, they were more fractured.

⁵⁴ On functions and limits of institutional sanctions see, more widely, LEBEN, *supra* note 4.

⁵⁵ *Id.* at 354.

⁵⁶ On the “ceremonial” aspect in the adoption of economic measures, see Alessandro Colombo, *Il Ricorso alle Sanzioni nella Parabola di Ascesa e Declino dell’ordine Internazionale Liberale*, 8 QUADERNI DI SIDILOG (2021).

⁵⁷ On the social mechanisms whereby international institutions change state behaviour, see Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 645 (2004).

⁵⁸ LEBEN, *supra* note 4, at 356.

⁵⁹ The sheriff’s metaphor is taken from W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AJIL 642, 643 (1984).

Ukrainian conflict and the Syrian one.⁶⁰ Indeed, IOs, even the more technical ones, are today concerned about their reputation in the eyes of the public opinion and more aware of the coercive means at their disposal (institutional or extra-institutional), so they can no longer “stay silent” or “remain indifferent”⁶¹ in the face of serious violations of international law. An earlier commentator on the ever-growing number of IOs and their role in the sanctioning dynamic observed that “although [IOs] have not yet changed the basic structure of the international community, [they] may contain the germs of such change.”⁶² Indeed, IOs have taken center stage in the international arena and in the enforcement of the law. The present era of global governance led by international institutions, after being sorely tested by the voluntarily “disengagement,”⁶³ is now entering a new phase in which IOs have become more hard-liners and interventionists, firing back against the outlawed member, by making use of the powers laid down in, implied by, or beyond, their own rules. By doing so, IOs abdicate their natural function as mediators and choose to be actively engaged in the conflict, thus accepting the risk of undermining the current multilateral (*rectius* multi-polarized) cooperation, while at the same time contributing to the reaffirmation of the legality. The jury is still out on which results this development will eventually bring.

⁶⁰ In this latter regard, see the landmark decision adopted by the Organization for the Prohibition of Chemical Weapons in April 2021, which suspended certain rights and privileges of the Arab Republic of Syria as a member. Conference of the States Parties to the Chemical Weapons Convention at Its 25th Session.

⁶¹ Words are from the representative of Canada, supported by fifty-four states, during the debate at ILO on measures against Russia. See note 23 *supra*.

⁶² Josef L. Kunz, *Sanctions in International Law*, 54 AJIL 324, 345 (1960).

⁶³ James Crawford, *The Current Political Discourse Concerning International Law*, 81 MOD. L. REV. 1 (2018).