The Problem with Using Sanctions as Human Rights Accountability

The case of US Sanctions in Response to Conflict in Ethiopia

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In November 2021, the United States unveiled a flurry of sanctions in response to human rights and humanitarian law violations in the year-long armed conflict in northern Ethiopia. The conflict started in November 2020 between the Ethiopian Federal government and the Tigray People's Liberation Front (TPLF), a political party that has been ruling the country for 27 years until it was overthrown through popular movement in 2018. Although a TPLF attack on Federal military bases located in Tigray region triggered the conflict, during the course of the war all parties in the conflict have been implicated in large scale violations of human rights and humanitarian law. The US sanctions – involving targeted assets freeze and travel ban (Executive Order 14046), defence export prohibition (under ITAR regime), expulsion from the AGOA preferential trade regime, and possible denial of access to international financing and loans (Senate Bill S.3075) – mainly target the Ethiopian government, while some of them also apply to the Eritrean government and the TPLF. In this piece I argue that the deployment of these sanctions undermines multilateral human rights investigations and reveals a deeper dilemma involved in adopting sanctions in response to human rights violations in general.

The legality of unilateral economic sanctions by powerful states to solve political crisis in other states is a contested matter. African and black nations in particular, while having a strong track-record of opposing unilateral coercive measures as unlawful under international law, have also historically been at the forefront demanding the adoption of sanctions by all states against colonial regimes, apartheid South Africa and other instances (Barber, 2021; Jensen, 2016). But let us put the controversy on legality of unilateral sanctions aside and consider how the US sanctions intersect with accountability processes for violations of human rights.

Undermining International Investigation

In the context of intense conflict that is especially marked by months-long media blackout, restriction on reporters, and allegations of media bias, investigations undertaken by an independent (preferably international) body with direct field access is an indispensable basis of ascertaining facts. So far, the only such investigation of human rights violations during the Tigray conflict is the one undertaken jointly by the UN Office of High Commissioner for Human Rights (OHCHR) and the Ethiopian Human Rights Commission (EHCR). Another inquiry by the African Union Commission on Human and Peoples' Rights is also currently ongoing, although it has not yet undertaken on-site investigation.

Three of the four US sanctions (with exception of the travel ban and assets freeze per Executive Order 14046) were adopted just prior to the release of the OHCHR/ECHR joint report on 3 November 2021. This move undercuts the multilateral human rights protection system, and even incentivize the targets of sanctions to not take the human rights investigation seriously as their designation seems to be done with indifference to the outcome of the investigation. Although the joint report has been criticized by all parties to the conflict, it has been well received by the US itself and several other states. In fact, the US has been the leading voice demanding UN involvement in human rights investigation in Tigray. Therefore, it is an elementary requirement that a sanctions regime designed for human rights protection should complement, and not

undermine, the only independent human right investigation the sanctioning government spurred. The European Union has followed that path, indicating that its possible sanctions would follow, and not precede, the conclusion of the investigation. The US, on the other hand, adopted sanctions against culprits it pre-selected just one day before the release of the investigation report, which communicates that the US government did not have the intention of taking the UN investigation seriously.

But this could also be reflective of a bigger puzzle involving human rights sanctions. On the one hand, as the existence of grave human rights violations (such as crimes against humanity and war crimes in Tigray) is a serious legal determination, a credible, and preferably multilateral/international investigation is required to identify responsible parties to hold accountable. This investigation could be led by human rights monitors at the global (United Nations) or regional (African Union) level, referencing customary international norms and global and regional human rights treaties the territorial state has entered into. In the case of Ethiopia, as mentioned above, both the UN and the AU have launched investigations. The need for such investigations is especially true in devising human rights sanctions which are adopted as a form of 'third-party countermeasures' (Dawidowicz, 2017) in defence of obligations erga omnes, as opposed to, for example, counter-terrorism sanctions that are grounded on national security interests of states (Tilahun, 2021). Sanctions adopted prior to such investigations and without a basis in some equivalent, credible investigation can be popularly perceived as prejudicial and lose their political justification as collective responses 'in pursuit of a common good' (Douhan, 2020, para 29).

On the other hand, the logic of sanctions is responding to wrongful acts with a view to inducing their cessation or reversal, and not retribution after the wrongful act has ceased (Draft Articles of State Responsibility, art. 52(3)(a)), see also, Ruys, 2017; White and Abass, 2018) Where the human rights investigation takes long and concludes after the cessation of the rights violations, subsequent sanctions might be too late, lose their legal rationale as tools of inducing international law-compliant behaviour, and simply become punitive measures. Due to this dilemma, the timing and coordination involved in imposing human rights sanction needs more thoughtful consideration. In other words, striking a balance between not undermining human rights investigations and responding too late/punitively is a delicate task.

One possibility of solving the dilemma paradox is focusing international efforts on operationalizing credible and timely investigations, and utilizing sanctions with respect to actors that frustrate such investigation or subsequent accountability processes. This requires resetting mindsets, particularly in Western capitals, away from perceiving sanctions in themselves as a form of justice or price tag for human rights violations, as opposed to mere vehicles for bringing about justice. Designing a sanctions regime that catalyses human rights investigation and accountability processes – by selectively targeting actors that hold leverage over these processes – is a delicate task that requires self-restraint on the part of the sanctioning state (Eckes, 2021).

Absence of Pathway for Termination

Failing to interlink the termination of human rights-related sanctions with human rights accountability processes is another frequent problem, which the US sanctions also reproduce. The assets freeze and travel ban measures adopted under Executive Order 14046 targeted six Eritrean entities and individuals, including the Eritrean Defence Force and the ruling party People's Front for Democracy and Justice (PFDJ). These actors are designated for having 'engaged in, or whose members have engaged in, activities that have contributed to the crisis in

northern Ethiopia or have obstructed a ceasefire or peace process to resolve such crisis'. Given that Eritrea is not a party to discussion of ceasefire or peace process in the conflict, the only applicable clause from the statement of reason is that of having 'contributed to the crisis in northern Ethiopia'. In listing the Eritrean actors, the State Department explained that similar measures against the Ethiopian government and the Tigray Peoples Liberation Front (TPLF) were deliberately withheld in order to provide those parties opportunity to demonstrate progress in arriving at a ceasefire. In various statements of the European Union and other actors as well, the ceasefire and peace process is construed as an intra-Ethiopia process that excludes Eritrea. The designation of the Eritrean actors is, therefore, for their role in human rights violations and crimes committed during their presence in Tigray, which was not ongoing by the time of adoption of the sanctions as Eritrean troops had pulled out of Ethiopia in June 2021. The charges of 'obstructing ceasefire or peace process' seem to be thrown-in to give the sanctions a current or ongoing basis, while holding a contradictory policy of excluding Eritrea from future ceasefire or peace processes.

Sanctioning alleged perpetrators of human rights violations after the cessation of the violations makes the sanctions merely punitive measures, not incentives for a change of behaviour, unless those measures are accompanied by a clear path for termination. The proposed Senate Bill S.3075 provides some benchmarks for termination of the sanctions but frames them vaguely. It states that the sanctions could be lifted, among others, if the Ethiopian government implements "measures to protect human rights and ensure adherence to international humanitarian law and international refugee law." This is an indeterminate precondition that the US government can arguably always deem unfulfilled. Under Executive Order 14046, it is altogether not clear precisely what benchmarks need to be reached by the Eritrean government and affiliated entities to obtain sanctions termination. For sanctions to serve as credible incentive for a change of behaviour by the target, termination benchmarks should be provided in concrete terms – e.g. fulfilling recommendations of the OHCHR/EHRC joint investigation regarding accountability meeting internationally acceptable standards – and not left unarticulated or vague so the sanctioning state could keep shifting the goalpost. Sanctions without such clear path for termination can create a scenario of semi-permanent punishment, similar to the one Eritrea itself endured for a decade just until 2019.

The above-discussed shortcomings of US sanctions concerning complementarity with investigations, retroactivity, and exit pathway are reflective of a broader challenge in using sanctions as a human rights accountability tool. As sanctions are devised under international law to be used as self-help measures for injury states suffer, they are largely unsuited to be wielded as accountability mechanisms to deal with human rights violations, particularly violations that have ceased and do not involve the sanctioning state. As the use of sanctions for human rights violations increases, it is important that sanctioning states' considerations not be overshadowed by the simple need for signalling, and instead be actively guided by the goal of using sanctions to support legitimate investigative processes at the international and/or domestic level within the target country – and not simply transmitting determinations of guilt and punishment by the political organs of the sanctioning state.