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STRIKING A BALANCE IN THE UNITED NATIONS: THE NEED
FOR SAFEGUARDING HUMAN RIGHTS AGAINST ECONOMIC
SANCTIONS

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Introduction

The UN collective security system is based on two fundamental structural criteria, well-enshrined in Article 24 of the UN Charter, pursuant to which the UN Member States confer on the Security Council the primary responsibility for the maintenance of international peace and security, and Article 43, according to which the same members “make available to the Security Council (...) armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security”. To date, the criteria have been not completely implemented, but the Security Council has interpreted its delegated powers in a very active way, above all in relation to measures not involving the use of armed force governed by Article 41 of the UN Charter. The Council may decide or recommend the imposition of sanctions on the basis of two conditions declared in Article 39, namely “the existence of any threat to the peace, breach to the peace, or act of aggression” and the measures imposed must aim at maintaining or restoring international peace and security. According to Article 41,

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.

The 1990s were distinguished as the sanctions decade. After the end of the Cold War, the United Nations intensified the use of sanctions as privileged tools for the maintenance of international peace and security. The revitalization of the Security Council, after 45 years of the UN history when sanctions were imposed just on Southern Rhodesia and South Africa,

was demonstrated by the dramatic imposition of a comprehensive sanctions regime against Iraq in 1990. After a decade of sanctions that caused death to over one million Iraqis¹, sanctions proved to be, as foreseen by President Wilson in 1919, “both a substitute for war and something more tremendous than war”. Since then, sanctions underwent severe criticism insofar as they contributed to the violation of several fundamental human rights in most of target states and their neighbouring countries. Among the others, the right to life, described by the UN Human Rights Committee as “the supreme right from which no derogation is permitted even in time of public emergency²”. Moreover, the rights to health and to an adequate standard of living, set forth by a number of international treaties, such as the Universal Declaration of Human Rights (Article 25) and the International Covenant on Economic, Social and Cultural Rights (Articles 11 and 12) have been dramatically imperilled. Not only the right to food and the right to an adequate health care were disregarded, but also the right to travel freely, the right to property and the right to work; rights that are at the basis of a civil society. Significantly, the rights of the child, their inherent right to life as guaranteed by the correspondent Convention, have been disproportionately breached.

The offense left after the various UN-imposed sanctions regimes led to extensively question their inherent compatibility with human rights, their effectiveness as measures of foreign policy. The reached consensus agreed in the need for a more sophisticated and less harmful type of sanctions, leading to the introduction of “smart” or targeted sanctions, aimed at exercising their pressure directly on alleged wrongdoers. This new, more advanced, tool has been mostly used in relation to international terrorism, its underlying idea being to sanction terrorists by adopting measures, such as the freezing of assets, likely to prevent acts of terror or any breach of the peace. However, even targeted sanctions present some flaws in their relationship with human rights, becoming again the battleground between the need for maintaining international peace and security and the protection of human rights. The difficulty, when dealing with targeted sanctions, resides in their controversial nature as measures aimed at significantly reducing humanitarian consequences of sanctions, but at the same time persisting in creating problems in relation to targeted individuals’ rights. Indeed, the addition of an alleged terrorist to the list occurs through discretionary procedures and secret

¹ Golnoosh Hakimdavar, *A Strategic Understanding of UN Economic Sanctions: International relations, law and development*, 2013, p. 1.

² UN Human Rights Committee, General Comment 6/16, 27 July 1982.

information, without a possibility for involved individuals to defend themselves bringing an action. In this way, a number of fundamental rights, primarily linked to the right to effective judicial protection, end up being violated. A “robust implementation” of sanctions alongside compliance with international law and human rights, humanitarian and refugee law, has been advocated by the UN General Assembly and Secretary-General, which called upon the Security Council to secure the existence of “fair and clear procedures” in listing and delisting as well as to grant humanitarian exceptions. Certainly, “the task is not to find alternatives to the Security Council as a source of authority but to make it work better³”, with a view to render sanctions instruments more compatible with protection and respect for human rights.

In these regards, the present work investigates the controversial relation existing between UN-imposed sanctions and human rights. It intends to assess the compatibility of sanctions with human rights by focusing on how the former affects the free enjoyment of the latter. The work will firstly deal with sanctions’ general understanding (Chapter I). In particular, sanctions and their ultimate objectives will be defined and categorized, even presenting their structural and theoretical flaws in relation to the set of rights most likely to be affected by their adoption. This will lay the foundations for investigating, in details, the major cases of UN-imposed sanctions regimes (Iraq and Haiti), gone down in history precisely because of the disproportionate harm inflicted on civilian populations and the humanitarian concerns generated (Chapter II). It will allow to build a proper “just sanctions theory”, as first instrument here used to assess the compatibility of sanctions with human rights, through which economic measures are evaluated as tools of foreign policy *per se* and thus released from their characterization as “measures alternative to war”.

Sanctions, however, usually affect also the rights and the standard of living of countries which are neighbours to or have trade relationships with the target state (Chapter III). In these regards, the present work will highlight the success and failure of the UN and the Security Council in this field, namely in the application of Article 50 procedure which endows Member States with a right of consultation aimed at solving special economic problems arisen from the adoption and implementation of preventive or enforcement measures against any state. Finally, the work will define the limits that the Security Council encounters, and must respect, when exercising its powers in the maintenance of international peace and security (Chapter

³ Doc. A/59/2005 of 21 March 2005, para. 126.

IV). These limits, ranging from the respect of the UN Charter provisions to the compliance with general international law, constitute the second instrument through which the compatibility with human rights will be evaluated. In the same chapter, the shift to targeted sanctions realized in the last century by the Organization, as more advanced instruments likely to mitigate the adverse humanitarian effects on target countries' populations, will be described. At the same time, targeted sanctions will be presented considering their adverse effects on *individual* and *procedural rights* making it difficult, again, to strike a precise balance between the importance of maintaining international peace and security and the fundamental relevance of human rights. And, of course, casting another shadow on the compatibility of sanctions with human rights.

CHAPTER I

THE INSTRUMENTALITY OF SANCTIONS

1.1 SANCTIONS AS A BLUNT INSTRUMENT

During the Special Session of the UN on the occasion of its 50th anniversary, Mr. Fidel Castro, the former Cuban President, stated:

The United Nations was created half a century ago after a monstrous war during which [...] ten million lives were lost. Today, 20 million men, women and children die every year from hunger and curable diseases. People in the rich countries have a life expectancy of up 80 years and other people barely 40 years. The lives of billions of people are curtailed. How long do we have to wait for this killing to ease?⁴

These words fully express President Castro's bitterness in relation to the effects of the embargo on Cuban population, and harshly condemn "cruel blockades which kill men, women and children, young people and old, like silent atom bomb". One could think that President's choice to compare the economic embargo to an atom bomb to be a mere overstatement. Well, it is time to change idea: the two atom bombs dropped on Japan, indeed,

⁴ Castro's speech at the 9th Non-Aligned Summit, Colombia, 26 October 1995.

have killed less people than economic sanctions in Iraq, the latter above all among undefended children. Even though the effects of sanctions cannot be easily measured because of diversification of cases in qualification, purpose and scope, complaints by countries confronted with all types of economic sanctions (whether unilateral or multilateral) arrive until today. However, before to address the specific issue, namely the compatibility of economic sanctions with human rights, it is necessary to firstly deal with sanctions and, in particular, which rights are usually affected by their adoption and, then, with economic sanctions' general understandings.

1.2 SANCTIONS AND HUMAN RIGHTS

The scope of the present work is to assess the compatibility of sanctions with human rights. Indeed, over time, sanctions have proved to be detrimental to the enjoyment of fundamental rights in target countries and their neighbours. A number of rights have been systematically breached as a consequence of the economic and social hardship caused by sanctions regimes. At the same time, in the past fifty years, a growing body of human rights law, ranging from the Universal Declaration on Human Rights (Assembly Res. 217-III of December 10, 1948) to multilateral draft conventions such as the International Covenant on Civil and Political Rights and the one on Economic, Social and Cultural Rights (Assembly Res. 2200-XXI of December 16, 1966), has been nearly universally accepted and ratified by many countries belonging to different geo-political areas (even those which notoriously used to have a bad reputation in the field of human rights' protection and respect). The issue concerning sanctions' compatibility with human rights cannot be ignored when considering the close bond that links the two Covenants, as legal instruments constituting the international standard in this field of inquiry, to the United Nations system. The negative effects that sanctions may have are part of their rationale, but it is crucial to examine these effects from a human rights stand and then to assess their acceptability⁵.

The ESC (economic, social and cultural) rights, guaranteed by the correspondent International Covenant ratified and accepted by 156 countries, turned out to be the most vulnerable set of

⁵ Fons Coomans, Application of the International Covenant on Economic, Social and Cultural Rights in the Framework of International Organizations, *Max Planck YUNL* 11, 2007, p. 378.

rights to the effects of UN-imposed economic sanctions. Indeed, sanctions often deprive the target states of their vital resources and goods, resulting in the strangulation of the whole economy which, consequently, becomes unable to provide for basic food and related humanitarian needs. And since economic and social collapse involves all societal sectors, it is usually translated in a significant and massive violation of human rights. Collapsed economy, increasing mortality rate, malnutrition, destroyed infrastructure are all the sanctions' negative repercussions on vulnerable social groups, which put the enjoyment of ESC rights by populations of target states under a constant strain. In particular, the increase in unemployment as a consequence of many companies' closure, resulting in shortages of raw materials, equipment and loss of usual markets, impairs the possibility for population to afford the costs of living. It directly affects civilians' right to work, as "the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts" (Art. 6 of the ICESCR) and the right to an adequate standard of living "for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions" (Art. 11.1). Paragraph 2 of the latter Article, instead, deals with the right to food, proclaiming the right of everyone "to be free from hunger". Despite the provision of various clauses aimed at excluding food and other humanitarian needs from sanctions regimes, they have not saved the population and, in particular, innocent children from starvation and disease. Moreover, malnutrition and curable disease usually triplicates infant mortality rate, imperilling the enjoyment of children's inherent right to life, as guaranteed in Article 6 of the Convention on the Rights of the Child. The lack of gasoline and of public transportation prevents children from going school, while parents become more and more unable to pay tuition. Children and their families are thus progressively deprived of their right to education (Art. 13 of the ICESCR) and to family life (Art. 10). What is more, economic hardship caused by sanctions indiscriminately hits national infrastructure, first and foremost the target states' public health system. The absence of supplies and spare parts, alongside the lack of basic medicines, puts "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" (Art. 12) under a heavy strain, making it difficult to prevent, treat and control "epidemic, endemic, occupational and other diseases" (Para. 2.c) and to create the conditions likely "to assure to all medical services and medical attention in the event of sickness" (Para. 2.d). Populations gradually become wholly dependent on the government rationing system, because of the steady increase in inflation and decrease in public-sector wage, so that former

professionals and high-skilled labourers are forced to desert their jobs. The government rationing system, on the other hand, although trying at best to be adequate and efficient, is still not enough to cover all caloric needs, leading families to sell household and personal possessions to buy more food. In this context, not only economic sanctions impinge on the right to an adequate standard of living and related rights (such as the right to an adequate food), but also on rights that are at the basis of a civil society, such as the right to work, to property and to travel freely.

In 1997, the CESCR adopted a General Comment recommending the UN Security Council to take into duly account ESC rights when designing a sanctions regime and to rapidly respond to disproportionate suffering of vulnerable groups in the target country⁶. And the potential compatibility of sanctions with human rights would pass through this two components: the construction of a sanction regime respectful of human rights *ex ante*, and the rapidity of the sanctioning body in remedying its faults. However, it does not always work in this way.

1.3 DEFINITION OF SANCTIONS

Around the term “sanctions” revolves a huge constellation of definitions and concepts. Being one of the greatest dilemma of legal theory, the term possesses, on the one hand, a positive connotation when used to connote the “legal sanction” of a title or a normative proposition, thus conferring on it the legitimacy and dignity of law⁷. On the other hand, the term is commonly used in its negative acceptance as penalty or punishment of illegal behaviours. The specificity of international sanctions resides in the impossibility to relate them to a centralized power structure, because of their dependence on the individual or collective reaction of States, which become “supervisors” of the international law and act in response to violations of the latter⁸.

Stricto sensu, international sanctions have been defined as “coercive measures taken in execution of a decision of a competent social organ, *i.e.* an organ legally empowered to act in

⁶ *Id.*, p. 379.

⁷ Francesco Francioni, voce “Sanzione”, Sanzioni Internazionali, *Enciclopedia Giuridica Treccani*, Vol. XXVIII, 1991, p. 1.

⁸ *Id.*

the name of the society or community that is governed by the legal system⁹”. In this definition, three different, but essential, elements stand out: the undertaking of *coercive measures*, involving thus different types of coercion whether military or economic, moral or merely legal, without the will of the target state and, therefore, aimed at restoring a conduct legally acceptable; the coercive measures are *taken against* a target state, provoking it a material deprivation or a moral loss as compared with its prior situation; finally, they are taken *in execution of a decision of a competent organ*, since these measures are the results of international law’s institutionalisation and rely on the existence of a conventional framework providing for such organs¹⁰. The definition seems to refer to a competent social organ acting on behalf of a collective interest, such as, to say, the UN Security Council¹¹, whose international sanctions have been constantly in the news in the recent years. Even though sanctions can be also unilaterally imposed by a single sanctioning state and thus governed by domestic law, analogies between the domestic and international systems can be highly deceptive. Indeed, part of the difficulty in defining sanctions resides in the very nature of the international system, which is often decentralized and anarchical, lacking law-making and law-enforcement procedures usually connected to sanctions and sanctioning mechanisms in the nation-state¹².

Another common definition of “sanctions” refers to unarmed methods of political, economic and social coercion for bringing about a policy change in the target state or to penalize the latter for having violated international law¹³. Moreover, sanctions increase the costs for non-compliance not only with general international law but also with self-imposed treaties signed by states, thus securing that states meet their international obligations¹⁴. The term “economic sanctions” is usually referred to measures imposed by the United Nations or individual states in order to achieve the compliance with their specific demands. The United Nations, as intergovernmental organization devoted to the maintenance of international peace and

⁹ Georges Abi-Saab, *The Concept of Sanction in International Law*, in Vera Gowlland-Debbas and Mariano G. Rubio (eds), *United Nations Sanctions and International Law* (The Hague: Kluwer Law International, 2001), p. 32.

¹⁰ *Id.*, p. 39.

¹¹ James Crawford, *The Relationship Between Sanctions and Countermeasures*, in Vera Gowlland-Debbas and Mariano G. Rubio (eds), *United Nations Sanctions and International Law* (The Hague: Kluwer Law International, 2001), p. 57.

¹² Margaret P. Doxey, *International Sanctions in Contemporary Perspective* (Houndmills: Macmillan, 1996, 2nd ed), p. 7.

¹³ Glenn Greenwald, “Iran Sanctions Now Causing Food Insecurity, Mass Suffering”, cited in Golnoosh Hakimdavar, *A Strategic Understanding of UN Economic Sanctions: International relations, law and development*, 2013, p. 20.

¹⁴ David M. Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (Boulder: Lynne Rienner Publishers, 2004), p. 174.

security, has its well-known predecessor in the League of Nations, which envisaged its own collective security system. As laid down in the 1919 Treaty of Versailles, the term “sanctions” seems to allude to *effective collective measures* (Article 1(1)) and *preventive or enforcement measures* (Article 2(5)), whose application would have required the assistance of all members of the then League of Nations. In the Treaty of Versailles, the term refers to sanctions as a means to exercise pressure (Article 16), and to punish acts of war. Article 16 addressed all the members of the League violating the commitments undertaken and provided for by the Covenant. The League’s founders usually interpreted the latter Article in such a way that the military sanctions provided for in the Treaty had an optional character. Instead, economic and financial sanctions were considered as compulsory¹⁵. What is more, under the Covenant of the League, the organization could impose economic measures only when another state had resorted to war in violation of Articles 12, 13 or 15, while the United Nations Security Council’s opportunities to act are much more broadly defined. Another important difference is that UN members, called upon, must carry out the measures specifically decided by the Council, whereas League members themselves carried out the commitment to adopt measures¹⁶.

Although neither the Covenant of the League nor the UN Charter uses the term “sanctions”, the enforcement measures provided for by both documents have been always so defined. The Charter of the United Nations entrusts the Security Council with the primary role of ensuring the maintenance of international peace and security through either dispute settlement or the imposition of measures, involving or not involving the use of force. Article 39 of the Charter reads

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

The article confers enforcement powers to the Security Council. Afterwards, once recognized the existence of any threat to or breach of the peace, or any act of aggression, Article 41

¹⁵ *Encyclopedia of the United Nations and International Agreements*, 1985. The best evidence is furnished by the exemption of Switzerland from partaking of military sanctions that could have been applied by the League in the light of its perpetual neutrality, but keeping in force its commitment to participate in potential economic and financial sanctions.

¹⁶ Willem J.M. van Genugten and Gerard A. de Groot (eds), *United Nations Sanctions: Effectiveness and Effects, Especially in the Field of Human Rights. A Multi-disciplinary Approach* (Intersentia: Antwerpen, Groningen, Oxford, 1999), p. 3.

provides for an illustrative and non-exhaustive list of measures, not involving the use of force, the Council may apply:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

As already stated, the Security Council enjoys broad discretionary powers in defining the reasons why to adopt economic measures. The broader reason is, undoubtedly, constituted by the existence of any threat to the peace, implying that sanctions may be imposed on states which have not resorted to war, or have not used force in threatening the territorial integrity and independence of another sovereign state. For example, between 1966 and 1997, only in the Iraqi case, out of fourteen, war has been the reason for applying economic measures on a state. On the other hand, sanctions were usually imposed on countries, such as Yugoslavia, Haiti, Somalia, Liberia, Rwanda and so on, in which situations of internal disorders or repressive regimes were considered as constituting a threat to international peace and security. The problem arises when it is difficult to make a proper and precise distinction between “a threat to the peace” (Art. 39, Chapter VII) and “a situation the continuance of which is likely to endanger the maintenance of international peace and security” (Art. 34, Chapter VI), making the Council jumping from a chapter to another, from a role to another, thus giving up its function of impartial third party in favour of binding enforcement action against one state¹⁷.

For all these reasons, and above all for their unintended effects, sanctions “as is generally recognized, are a blunt instrument. They raise the ethical question of whether suffering inflicted on vulnerable groups in the target country is a legitimate means of exerting pressure on political leaders whose behaviour is unlikely to be affected by the plight of their subject¹⁸”.

Even though United Nations sanctions have become, nowadays, quite common, it is unadvisable to limit sanctions “label” to UN measures, thus making breaches of international law or the use of organized enforcement mechanisms possible but not essential elements of

¹⁷ Willem J.M. van Genugten and Gerard A. de Groot (eds), *United Nations Sanctions: Effectiveness and Effects, Especially in the Field of Human Rights. A Multi-disciplinary Approach* (Intersentia: Antwerpen, Groningen, Oxford, 1999), p. 7.

¹⁸ Boutros Boutros-Ghali (1995), p. 26.

sanctioning¹⁹. The definition, according to which sanctions are direct consequences of target's inability and unwillingness to comply with international standards and obligations, is compatible with recent practice and helps to distinguish sanctions applied in response to illegal conducts in violation of internationally agreed norms and unfounded forms of economic warfare²⁰.

1.4 TYPES OF SANCTIONS

Measures not involving the use of force imply diplomatic, political, cultural and communicational sanctions, including a wide array of economic measures, having commercial, financial or technological nature. Since contemporary sanctions regimes have mostly an international character, where the modern nation state is either the sanctioning party or the target state, the first useful distinction is that between *unilateral* or *multilateral* sanctions regimes.

Unilateral sanctions are those adopted by a single sanctioning party against a target which could be a state, a group or organization within that state, or even individuals. These types of sanctions are governed by domestic law and, usually, rely on a legislation strictly shaped to restrict trade in given sectors²¹. Moreover, the sanctioning state sometimes tries to involve the international community in its sanctioning efforts, in the name of cooperation and internationally accepted norms²². It happens, above all, when sanctions adopted by a single sanctioning party take the form of unilateral countermeasures against a state that has allegedly violated international obligations owed to the sanctioning state. Multilateral sanctions, on the other hand, may be applied by two or more states, with equal levels of involvement and interest in imposing sanctions against a target. In this case, indeed, sanctions are very similar to unilateral ones. Multilateral sanctions, however, include also measures decided upon by either the United Nations or regional intergovernmental organizations (i.e. European Union), which work in a quite different way: the UN is a third party that requires all its member states

¹⁹ Margaret P. Doxey, *International Sanctions in Contemporary Perspective* (Houndmills: Macmillan, 1996, 2nd ed), p. 9.

²⁰ *Id.*

²¹ Golnoosh Hakimdavar, *A Strategic Understanding of UN Economic Sanctions: International relations, law and development*, 2013, p. 15.

²² Preston Brown, *the Kuwait/Iraq Sanctions: US Regulations in an International Setting* (New York: Practising Law Institute, 1991), p. 34.

to adopt sanctions against a given target when sanctions are adopted pursuant to Chapter VII. The complexity and intensity of UN economic measures reside in the fact that the implementation of sanctions is compulsory for each member state, the latter being unavoidably affected by sanctions, without the possibility for each member state to participate in the deliberative process. Measures to be adopted are selected by the Permanent Members and the other ten members currently representative of the UN Security Council, and explicate their effects on all the international community through UN Resolutions.

Sanctions can be also broken down into further categories, which can be combined or made hybrid: collective sanctions, usually implemented by more than ten states and concerning a broad array of goods and services; punitive sanctions, specifically aimed at inflicting losses and creating hardship for target state's economy; mutual sanctions, typical of the Cold War era; and, finally, targeted sanctions, the term implying either the restriction of exports and imports of a specific good or type of goods, or the adoption of specific sanctions against an individual or a group of individuals, or corporate entity considered as direct wrongdoers²³. As already said, these constitute broad categories, so that sanctions falling in one category may be combined with others. In order to furnish a clearer and more pragmatic picture of which types of measures may be applied, the most important types of non-violent sanctions will be sorted out in the following table*:

Table 1 – Typology of Sanctions

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1. DIPLOMATIC AND POLITICAL MEASURES
 - (a) Public protest, censure, condemnation
 - (b) Postponement, cancellation of official visits, meetings, negotiations for treaties and agreements
 - (c) Reduction, limitation of scale of diplomatic representation affecting status of post, diplomatic personnel, consular offices
 - (d) Severance of diplomatic relations
 - (e) Withholding recognition of new governments or new states
 - (f) Vote against, veto admission to international organization; vote for denial of credentials, suspension or expulsion; removal of headquarters, regional offices of international organizations from target.
 2. CULTURAL AND COMMUNICATIONS MEASURES**

²³ Goolnosh Hakimdavar, p. 24.

- (a) Curtailment, cancellation of cultural exchanges, scientific cooperation, educational ties, sports contracts, tourism
- (b) Restriction, withdrawal of visa privileges for target nationals
- (c) Restriction, cancellation of telephone, cable, postal links
- (d) Restriction, suspension, cancellation of landing and overflight privileges; water transit, docking and port privileges; land transit privileges.

3. ECONOMIC MEASURES

- (i) Financial
 - (a) Reduction, suspension, cancellation of development assistance, military assistance
 - (b) Reduction, suspension, cancellation of credit facilities at concessionary or market rates
 - (c) Freeze, confiscation of bank assets of target government, target nationals
 - (d) Confiscation, expropriation of other target assets
 - (e) Freeze interest, other transfer payments
 - (f) Refusal to refinance, reschedule debt repayments (interest, principal)
 - (g) Vote against loans, grants, subsidies, funding for technical or other assistance from international organizations
- (ii) Commercial and Technical
 - (a) Import, export quotas
 - (b) Restrictive licensing of imports, exports
 - (c) Limited, total embargo on imports, exports (Note: arms embargoes)
 - (d) Discriminatory tariff policy, including denial of most favoured nation (MFN) status, access to General Preferential Tariff
 - (e) Restriction, cancellation of fishing rights
 - (f) Suspension, cancellation of joint projects
 - (g) Suspension, cancellation of trade agreements
 - (h) Ban on technology exports
 - (i) "Blacklisting" those doing business with the target
 - (j) Curtailment, suspension, cancellation of technical assistance, training programmes
 - (k) Ban on insurance and other financial services
 - (l) Tax on target's exports to compensate its victims

4. TARGETED SANCTIONS

- i. Individual sanctions
 - (a) Travel ban
 - (b) Asset freeze
 - (c) Asset freeze and transfer
- ii. Diplomatic Sanctions
 - (a) Revision of visa policy
 - (b) Limiting travel of diplomatic personnel
 - (c) Limiting diplomatic representation
 - (d) Limiting number of diplomatic personnel
- iii. Sectoral sanctions
 - (a) Arms imports embargo
 - (b) Aviation ban
 - (c) Arms exports ban

- (d) Proliferation-sensitive material
- (e) Shipping
- (f) Oil service equipment
- iv. Commodity sanctions
 - (a) Diamonds exports ban
 - (b) Petroleum exports ban
 - (c) Timber exports ban
 - (d) Luxury goods
 - (e) Charcoal exports ban
 - (f) Other
- v. Financial sector sanctions
 - (a) Investment ban
 - (b) Diaspora tax
 - (c) Central bank asset freeze
 - (d) Financial services
 - (e) Sovereign wealth funds

*The present table has been built by Margaret P. Doxey, in *International Sanctions in Contemporary Perspective* (Houndmills: Macmillan, 1996, 2nd ed), pp. 14-15.

**These measures usually have also economic effects

Therefore, measures usually located under the label “sanctions” may take many shapes and have many nuisances. Nonetheless, most international sanctions regimes have been built by heavily relying on economic measures, such as the restriction of the flow of goods, services, money, capital, securities, credits or the strict control of markets in order to prevent the target state from accessing them. Among the other measures, it is possible to include also *monetary sanctions*, intended to “destabilize currency values (inducing inflation and deflation) in order to upset economic planning and cause psychological distress²⁴”. When a cumulative set of embargoes, boycotts, financial and monetary measures have been combined, a *comprehensive sanctions regime* has been just implemented. Economic sanctions are generally considered the best way to exert pressure, since they are non-lethal but likely to have a strong impact on the target. They have both coercive as well as demonstrative and punitive effects²⁵.

Recently, growing concern of humanitarian impact of comprehensive sanctions has led many scholars to believe economic sanctions are not the best choice, after all. Experiences in Iraq,

²⁴ Jonathan Kirsher, “The Microfoundations of Economic Sanctions” *Security Studies* 6, no. 3 (1997): 36-40, quoted in Golnoosh Hakimdavar, *A Strategic Understanding of UN Economic Sanctions: International relations, law and development*, 2013, p. 25.

²⁵ Margaret P. Doxey, p. 12.

Haiti and in the former Yugoslavia have raised many perplexities about their efficacy, impact on human rights and all related drawbacks linked to hardship and harm caused not only to innocent populations but also to some sender states themselves.

1.4.1 Embargo or Boycott?

When dealing with economic sanctions, it is important to distinguish between boycott actions and embargo measures. The former impedes the import of goods from the country against which the boycott is imposed; the latter impedes the export of goods to the country against which the embargo is directed. Both measures have implications in terms of fundamental social, economic and cultural rights for societal groups unavoidably affected by sanctions. Certainly, the sanctioning international community should strive to respond sensitively to these groups' fundamental demands, trying to harm them as little as possible. Otherwise, excessive civilian harm and suffering would be highly counterproductive, rallying population behind their governments in a nationalistic way²⁶.

Embargoes broadly violate social and economic human rights in a more serious way than under boycotts and other single economic measures. Indeed, they deprive the whole population of those necessary imported goods, not locally produced in sufficient amounts or prevent the opportunity of exporting goods or services essential or at least relevant to the subsistence of the same population. Under a *boycott*, losses would firstly fall on exporters. However, even though in certain cases domestic demands can be met anyway, even better than before²⁷, a boycott could sooner or later lead to a sharp decline in employment, putting the right of work at risk, whose result would be a general impoverishment of society. Nevertheless, when a boycott is established, essential goods can still be imported from abroad, leaving the most of civilian population largely unaffected by sanctions. The exporters, usually having close ties with government leaders, belong to the upper-middle and upper classes of society, which is also strongly sensitive to shortages of foreign currencies²⁸. For these reasons, their pressure may be much more effective than that exerted by the indistinct civilian population.

²⁶ Boutros Boutros-Ghali (1995), para. 70.

²⁷ Fred Grünfeld, *The Effectiveness of United Nations Economic Sanctions*, in Willem J.M. van Genugten and Gerard A. de Groot (eds), *United Nations Sanctions: Effectiveness and Effects, Especially in the Field of Human Rights. A Multi-disciplinary Approach* (Intersentia: Antwerpen, Groningen, Oxford, 1999), p. 124.

²⁸ Fred Grünfeld, p. 126.

In these regards, financial sanctions, both as single economic measures and as direct consequences of the boycott, may be particularly effective, because of the subsequent huge unrest among foreign investors as a result of withholding foreign currencies or as a result of lower exports²⁹.

Apart from effectiveness, the choice and the employment of sanctions should absolutely rely on the potential damage to civilian population. Fred Grünfeld has defined this issue as having to do not with ethics, but with a matter of consistency of the total UN policy, in which socio-economic rights, laid down in the International Covenant on Economic, Social and Cultural Rights (ICESCR), play a role of utmost importance. The enjoyment of these rights by populations of target countries have often been put under a strain. In target countries, sanctions have often increased unemployment after the closure of many companies, which in turn has been the outcome of dramatic shortages of raw materials, equipment and the loss of usual markets. Sanctions have also a sharp social impact, making it impossible for civilian population to afford former costs of living. In this context, the right to work (Art. 6 of the ICESCR) and the right to an adequate standard of living (Art. 11.1) are both likely to be affected. It has been maintained that

The people of Iraq are today facing veritable destruction by a weapon that is just as dangerous as weapons of mass destruction; this has so far led to the death of 1 million persons, half of whom were children. This destruction, which is a form of genocide inflicted on the Iraqi people, is a crime punishable under international law regardless of whether it is committed in time of war or peace³⁰.

The embargo thus constituting

A flagrant violation of human rights in Iraq and is totally incompatible with the provisions of Article 1 of the International Covenants of Human Rights (...) which states that “in no case may a people be deprived of its own means of subsistence³¹”.

Therefore, under an embargo the whole population suffers, because of the substantial violation of their social and economic rights. All these effects should be considered when choosing a form of economic pressure, and the evaluation of the pro’s and contra’s should serve in avoiding useless suffering on the part of who, rather, should defend civilian

²⁹ *Id.*

³⁰ E/CN.4/1996/140, Impact of the economic embargo on the economic, social and cultural situation in Iraq, no. 19.

³¹ *Id.*, no. 20.

population. On the grounds laid down before, a boycott should always be preferred to an embargo, as the most effective and humane way of economic pressure.

1.5 THE SANCTIONS PARADIGM AND CONVENTIONAL THEORY

Regardless of the number of actors involved and the types of sanctions applied, the current sanctions paradigm is characterized by a dual-agent model composed of a “sender”, the sanctioning body, and a “target”, the sanctioned country³². The sanctioning body, whether in the form of the United Nations or a specific state, is the proponent of the measures, while the sanctioned state is further defined as the intended addressee of the sanctions regime³³. When the UN Security Council acts as the sender of sanctions, other participating states assume the role of direct executors³⁴. The sanctions paradigm, furthermore, entails a set of questions to which policy-makers are called to ask when deciding whether to impose sanctions, in order to unmask ambiguous policy goals: are sanctions aimed at weakening target’s economy? Can they work in either weakening the economy or bringing a policy change in the target state? If economic sanctions are intended to restrict market possibilities or exports of goods, to which extent sanctions are going to harm the rights and interests of the target state and other participating parties? Has the sanctioning body other means to protect the latter’s fundamental and basic humanitarian needs³⁵? Finally, in the light of these questions, under what circumstances economic sanctions are likely to be successful, effective?

All these questions, therefore, recall the old problem of sanctions’ purposes and effectiveness. Even though the legal justification of sanctions imposition is certainly to be sought in the impugned conduct, their aims is mostly “to impose costs on the objectionable policies of another state, without attempting to unseat its regime, occupy its territory, or destroy its infrastructure³⁶”. In other words, preventing the outbreak of a war. The conventional sanctions theory maintains that sanctions effectiveness relies on their instrumentality in changing the

³² Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge: Cambridge University Press, 2007), p. 10.

³³ Golnoosh Hakimdavar, p. 29.

³⁴ *Id.*

³⁵ Thomas George Weiss, David Cortright, George A. Lopez, and Larry Minear, *Political Gain and Civilian Pain: Humanitarian Impacts of Economic Sanctions* (Lanham: Rowman & Littlefield, 1997), p. 58.

³⁶ James M. Murphy, *Sanctions in Transition* (London: The David Davies Memorial Institute of International Studies, 2000), p. 8.

disputed conduct in the target state, since economic pressures on populations would turn into pressure on the government. However, this theory seems to be plausible only on a descriptive and analytical level. Indeed, many leaders have kept on violating international law and using all the means necessary to stay in power, despite civilian suffering and pressuring. The strangulation on large scale of a national economy is usually not accompanied with economic torment on the part of leaders, responsible for the objectionable policies that the international community has denounced and condemned through sanctions. The lack of vital resources and goods of which the target state used to live inhibits a national economy from providing for and maintaining basic food and related humanitarian needs. Economic and social collapse hides itself around the corner and involves all societal sectors, because of the government's inability to protect basic infrastructure and because "no member of the population is exempted when a nation's economy is paralyzed"³⁷. In these regards, it is important to recall the former Secretary-General Boutros-Ghali's line of reasoning, according to which "the purpose of sanctions is to modify the behaviour of a party that is threatening international peace and security and not to punish or otherwise exact retribution"³⁸. Moreover, if sanctions are aimed at changing a given conduct, all parties involved must absolutely recognize and expressly mention the moment in which they can be lifted³⁹. However, their duration is not easy to precisely define and, while sanctions are usually imposed, on average, for terms of five years, they can last from 0 to 21 years⁴⁰. This unknown variable, together with the type of sanctions and the internal economic situation of the target state, enhances the odds of producing significant unintended consequences. The length of measures can become extended to the point of making their goals to disappear. Among the unintended consequences, scholars have highlighted numerous cases in which economic measures have strengthened the position of sanctioned national governments instead of weakening them as a result of domestic pressures. Iran and Iraq constitute emblematic examples (the work will largely deal with the Iraqi case in the next chapter). The Iranian government, fully supported by national media (they are, after all, controlled by the state itself), has constantly shown sanctions as an attempt by Western world to weaken Iranian economy, thus masterfully driving social opinion against

³⁷ Golnoosh Hakimdavar, p. 42.

³⁸ Boutros Boutros-Ghali (1995), para. 66.

³⁹ Fred Grünfeld, *The Effectiveness of United Nations Economic Sanctions*, in Willem J.M. van Genugten and Gerard A. de Groot (eds), *United Nations Sanctions: Effectiveness and Effects, Especially in the Field of Human Rights. A Multi-disciplinary Approach* (Intersentia: Antwerpen, Groningen, Oxford, 1999), p. 118.

⁴⁰ Golnoosh Hakimdavar, p. 40.

sanctioning countries. Moreover, during the celebration of the last day of Ramadan in which many Muslim countries held protests in support of Palestine in September 2009, the Islamic Republic of Iran witnessed some popular uprisings against the internal regime. Iranian news again distorted reality, by reporting these protests as a sign of solidarity with Palestinian people and as a means of discrediting Western sanctions. Therefore, economic sanctions did not lead to their intended outcomes, namely producing political pressures for leaders through civilian resentment due to social and economic hardship, but have unintentionally provoked significant humanitarian concerns in Iran and contributed to the emergence of black markets.

1.6 THE PARADOX OF “HUMANITARIAN SANCTIONS”

Among the most controversial types of sanctions, the humanitarian sanctions are UN-imposed measures against a country whose leaders constantly dispossess their own citizens of fundamental human rights and other humanitarian needs. The defect in their circular logic underlying their justification has been well expressed by the former Iranian foreign minister Ali Akbar Salehi who, with regards to a new round of sanctions imposed on Iran, maintained in an interview with *Times* magazine that “you cannot claim your eagerness for democracy, human rights and all of these things and through unilateral sanctions, try to put all sorts of suffering and hardship to other people. This is a contradiction⁴¹”. Indeed, the imposition of sanctions aimed at coercing leaders to protect and respect human rights by violating human rights through sanctions themselves is disturbing. Meanwhile, definitions of genocide, human rights, crimes against humanity and threats to the peace have gradually expanded, in turn expanding the conditions under which sanctions apply. However, the expansion of these definitions has not always served the cause of peace, so that sanctions proponents may just aggravate the existing situation in the target country. Sanctions against Darfur constitute an emblematic case. The conflict in Darfur began in 2003 when rebel groups, the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM) blamed the government of favouring black Africans over Arabs⁴². As reported by the Coalition for International Justice, the conflict resulted in the death of 400,000 people, so that the UN Human Rights Council asked the Security Council to take an urgent and fast decision to

⁴¹ Ali Akbar Salehi, quoted in Golnoosh Hakimdavar, p. 44.

⁴² Golnoosh Hakimdavar, p. 59.

protect Darfur innocent civilians. The legal justification for sanctions was the ongoing genocide in the country. With the imposition of sanctions, hindering the enjoyment of necessary supplies and goods, a situation started as genocide may easily turn into a more tragic civil war or a much greater humanitarian disaster than it originally was.

Regardless of the specific type, sanctions often create infrastructural, economic and humanitarian negative effects, which are interchangeable: once infrastructures are irreversibly damaged, so economic and humanitarian problems unfold. Of course, the latter type constitutes the most controversial and paradoxical kind of analysed sanctions, because of their intended goal and their absolutely unintended and opposite outcomes. However, as already introduced, the present work will largely, and in details, deal with sanctions' set of problems, in the humanitarian and related fields with a view to find whether sanctions can be considered compatible, or not, to human rights standards. In particular, the following chapter will focus on the birth and development of comprehensive sanctions regimes in Iraq and Haiti, largely concentrating on the adverse consequences of sanctions in the light of the "just sanctions theory".

CHAPTER II

RETHINKING UN SANCTIONS AS TOOLS OF FOREIGN POLICY: HUMANITARIAN CONCERNS AND THE CASES OF IRAQ AND HAITI

2.1 TOWARD A JUST SANCTIONS THEORY

After having introduced the sanctions instrument, it is time to evaluate its compatibility with internationally accepted human rights standards. Economic sanctions have been studied in terms of desired and obtained political and economic effects, as well as in terms of their effectiveness. It has been stated that for an economic sanctions regime to be effective, it must possess two components: causing economic hardship and having a political impact.

Historically, sanctions achieve their economic goal (i.e. they have an impact that damages the target economy) when: the cost of the sanctions to the target economy exceeds 2 percent of the GNP; there is a large economic size differential between the primary sender and the target (a GNP ratio of ten to one); there exists a high total trade concentration for the target with the sender (greater than 25 percent of target's total trade); they are imposed quickly, with maximum harshness and with the full

cooperation of those trading partners who otherwise might circumvent such restrictions; the ongoing cost of sanctions to the sender is low⁴³.

Hufbauer, Schott and Elliott (1990) consider sanctions successful when their stated goals have been partly achieved, by ranking sanctions on a scale from 1 to 4 in relation to their contribution to the final outcome. By contrast, Kaempfer and Lowenberg (1988, p. 786) show that political change can be reached also by minimal economic damage, altering the interest of the ruling elite in perpetrating the misconduct. In other words, sanctions regimes are aimed at producing a policy change in the target country.

However, while scholars have always questioned the efficacy and effectiveness of sanctions, they have scarcely investigated, at least before the Iraqi case, about the costs that the population of the target state must pay. Collapsed economy, increasing mortality rate, malnutrition, destroyed infrastructure are all the sanctions' negative repercussions on vulnerable social groups. Their effects are, therefore, directly felt by those sectors most far from wrongdoers and least able to produce a policy change. Furthermore, economic sanctions proved to be extremely weak in bringing about a policy change; rather, significant political and psychological factors come into play. In these cases, domestic support highly mobilizes around the government of the target state which, employing powerful political arms, becomes under external pressure even less compliant. Defiance has been the most typical and common response to economic sanctions. Milosevic was re-elected to the Serbian Presidency in 1992, the Haitian junta only left after being threatened of military force and Saddam Hussein was overthrown only through a US military attack. Their image as defenders of the country has been crucially preserved by showing themselves as the strong men the country needed. Neither of them was disposed to show weakness or to compromise. In this context, a peaceful solution of the crisis becomes more and more difficult to be attained because "once engendered, a siege psychosis can be a powerful factor in sustaining public morale and will enable the government to take unpopular measures, such as rationing consumer goods⁴⁴". A controversial relation between the sender and the target unfolds: the former, committed to a policy of coercion, will ask for unrealistic changes to justify the lifting of sanctions, while the latter will be unwilling to compromise for the fear of losing its face by betraying what it has

⁴³ Lopez, 1995, p. 9

⁴⁴ Margaret P. Doxey, *International Sanctions in Contemporary Perspective* (Houndmills: Macmillan, 1996, 2nd ed), p. 104.

been presented as national value. Sanctions, however, appear firstly and foremost unsuccessful if considering the humanitarian harm caused, in the light of which they should be strongly and as soon as possible reconsidered as tools of foreign policy. They end up in an irreducible paradox since their primary goal is that of enforcing foreign policy goals, among the others compliance with and respect for human rights. The biggest problem, indeed, is that the frustrated population will never rise up against its own regime demanding compliance with UN requests, because population has not real choice. The impact of sanctions on everyday life generates a social division between *them* and *us*, the former being the sanctions imposers to whom is possible to attribute the economic and social hardship, the latter being the defenders of the native government⁴⁵.

Sanctions have been conceived as an alternative to war and its deadly weapons, seen as trade measures to be considered in a continuum of different types of economic relations among countries⁴⁶. Therefore, they are anything but an interference in the economic realm of a given country. Hadewych Hazelzet has developed an insightful scheme of comparison between the just war theory (Walzer, 1977) and a *just sanctions theory*, discussing the sanction instrument in its own terms, not just as an alternative to war⁴⁷. By depriving sanctions of their etiquette as “methods alternative to warfare”, the scholar has stripped them of their intrinsic benevolent nature characterized by the eternal assumption according to which, all else equal, sanctions are always more efficient and less harmful than war in pursuing their goals. This is the first way to assess sanctions compatibility with human rights. Moral limits exist also with regard to economic interference within the domestic jurisdiction of a state, even though Article 41 of the UN Charter is not covered by such a limit. Indeed, Article 2, para. 7, enshrines the limit of domestic jurisdiction, the only general *ratione materiae* limit on the Organization’s activity, and states that “nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State (...)”. In 1923, the Permanent Court of International Justice (PCIJ) issued an Advisory Opinion on the *Nationality Decrees in Tunisia and Morocco*, maintaining that the state is the

⁴⁵ Golnoosh Hakimdavar, *A Strategic Understanding of UN Economic Sanctions: International relations, law and development*, 2013, p. 2.

⁴⁶ Hadewych Hazelzet, Assessing the Suffering From “Successful” Sanctions: An Ethical Approach, in Willem J.M. van Genugten and Gerard A. de Groot (eds), *United Nations Sanctions: Effectiveness and Effects, Especially in the Field of Human Rights. A Multi-Disciplinary Approach* (Intersentia: Antwerpen – Groningen – Oxford, 1999), p. 75.

⁴⁷ This argument has been already debated by Christiansen and Powers (1995, pp. 97-98) who, on the contrary, tried to apply the just war arguments in relation to war time sieges and blockades to sanctions, arriving to a negative conclusion.

exclusive “*maitre de ses decisions*” only in matters in which it is *free from international obligations* of any kind. Therefore, in matters of domestic jurisdiction, the UN organs are prohibited from exercising the normal powers conferred them by the Charter. However, this limit cannot be invoked when the Security Council adopts “enforcement measures” under Chapter VII, thus referring also to the measures not involving the use of armed force governed by Article 41.

The author, moreover, wonders how to distinguish damage and losses provoked by a military attack from those caused by economic means and reminds, citing Elshtain (1992), that “just war is not *just* about war: it is an account of politics that aims to be non-utopian yet to place the political within a set of moral concerns and considerations, within an ethically shaped framework”.

In relation to the so-called *jus ad sanctionem*, Hazelzet applied to the economic realm several criteria deriving from the just war conditions: 1) last resort; 2) comparative justice; 3) competent authority; 4) just cause; 5) right intention; 6) probability of success; 7) proportionality. These criteria will be applied to UN-imposed sanctions against Iraq, Haiti, Serbia-Montenegro, the cases described in detail in the following paragraphs and chapters. It is important to remember that in these three cases, military action was taken sooner or later alongside economic sanctions, making it difficult to unravel their specific effects.

(1) *Penultimate resort:*

While war can be justified only when all peaceful measures have been exhausted, being thus a last resort alternative, economic sanctions are a *penultimate resort*. Nonetheless, they cannot be pursued as “another form of war” (Christiansen and Powers, 1995), since less coercive and harmful methods have to be used whenever possible. Moreover, economic sanctions must be an integral part of a bigger scheme aimed at finding a political solution to the crisis likely to justify the imposition of economic measures.

(2) *Comparative justice:*

This condition is a strong reminder of moral and ethics relativity. Cultural views can be disparate and some justice may be acknowledged in each party to a conflict’s line of reasoning, generating inherent limits to our own “just cause”. As a consequence, each party is required to use limited methods in the pursuit of its goal. This warning works so as to

respond to severe injustices through international law and morality in a consistent way⁴⁸. As explained by Hazelzet, serious hurdles to the judgement of a sanctions regime's justness can be found when economic measures are imposed against an autocracy, since the government is not representative of people's opinions. It has been argued that sanctions are justifiable insofar as the "very leaders" of the population consent to tolerate hardship in order to overthrow their own regime⁴⁹. However, it remains particularly difficult to understand when people and their leaders consent and, at the same time, whether they are completely aware of sanctions negative effects.

(3) *Competent authority*:

As warfare must be waged by competent authorities, responsible for the maintenance of public order, also economic measures must follow this condition. This is particularly true for serious cases of economic interference, such as blockades, sieges and sanctions, even because in trade more actors (firms, producers and consumers) are involved⁵⁰. What is more, this category is further modified by adding the legitimacy of the sanctioning country, which increases when sanctions are embraced by more countries.

(4) *Just cause*:

This condition is of utmost importance. According to its correspondent in the just war theory "war is permissible only to confront a real and certain danger, i.e., to protect innocent life, to preserve conditions necessary for decent human existence, and to secure basic human rights⁵¹". Consequently, a target country deserves to be subject to sanctions whenever it has committed a grave offence. As originally defined by Walzer (1977), the international community is justified or, better, it ought to act, intervening militarily, in "cases of massacre or of politically induced famine and epidemic, when the costs are unbearable". If these conditions limiting the intervention in a state sovereignty are accepted, economic sanctions would be just in the same three circumstances formulated by Walzer:

States can be invaded and wars justly begun to [1] assist secessionist movements (once they have demonstrated their representative character), [2] to balance the prior interventions of other powers,

⁴⁸ Hadewych Hazelzet, p. 82.

⁴⁹ Damrosch, Lori Fisler. "The collective enforcement of international norms through economic sanctions." *Ethics & International Affairs* 8.1 (1994).

⁵⁰ Hadewyck Hezelzet, p. 83.

⁵¹ NCCB (1992), pp. 98-103, quoted in Hadewick Hezelzet, p. 83.

and [3] to rescue peoples threatened with massacre. In each of these cases we permit or, after the fact, we praise or do not condemn these violations of the formal rules of sovereignty, because they uphold the values of the formal rules of individual life and communal liberty of which sovereignty itself is merely an expression⁵².

(5) *Right intention*:

Once recognized the *just cause* to act, sanctions must aim at redressing the injustice without any self-interest underlying them. A helpful distinction, whose use has been also advocated by Lopez and Cortright (1995), may be that between “positive” and “negative intervention”. They, indeed, appeal for “the use of carrots rather than sticks, positive rather than negative ones (...) [they are] less well understood than sanctions but may be more effective as means of compliance with international norms and standards of behaviour⁵³”.

(6) *Probability of success*:

As alternative to “reasonable expectations of victory”, this proviso implies that the suffering of the population in the state target would be more and more unacceptable if the sanctions regime is unlikely to achieve the desired purposes. Therefore, as neatly designed sanctions serve to advise the wrongdoers not to act like this again, so they can be used as a warning for the whole international community to evidence the intolerability of a given practice. This condition carries an intrinsic human dimension, because the probability of success is calculated balancing the impact of sanctions on people’s wellbeing. Fidler Damrosch has held that, in case of violation of norms prohibiting aggression or genocide, it would be necessary for population to endure economic and social hardship so as to avoid a repetition of the violation⁵⁴. However, it raises a serious moral dilemma: would dying from starvation and disease be more “favourable” than dying because of a genocide or aggression? After all, since genocide is a crime perpetrated against a given political and cultural community, so long as the government controls where food arrives, it can starve the same community using other ways⁵⁵.

⁵² Michael Walzer, *Just and unjust wars: A moral argument with historical illustrations*, Basic Books, 2015, p. 108.

⁵³ Cortright, David, and George A. Lopez, eds. *Economic sanctions: panacea or peacebuilding in a post-cold war world?*. Westview Press, 1995, p. 14.

⁵⁴ Damrosch, Lori Fisler, p. 67.

⁵⁵ Hadewych Hazelzet, p. 88.

(7) *Proportionality*:

This [consequential] criterion ensures that there always be a relationship between the objectives of sanctions and the kinds of sanctions imposed (...) The proportionality principle, which is firmly rooted in both moral and legal frameworks, places an important limit on what can be done in the name of sanctions (...) Proportionality provides a check against imposing sanctions for interminable periods of time⁵⁶.

The seventh condition, consequently, requires sanctions to be proportionate to the objective willing to be achieved. The human dimension is once again balanced against sanctions' purposes: in general, sanctions are considered not proportionate when their negative impacts on the country's social and economic life exceed the extent of the injustice committed by the same country, and when they are used as a permanent characteristic of policy against the target state⁵⁷.

After having introduced the criteria and conditions that an economic sanctions regime has to follow in order to be justifiably imposed, Hazelzet addresses the conditions under which senders can decide to continue sanctions or not. He adds the "discrimination and the humanitarian proviso" to the criteria of proportionality and of probability of success. The latter need to be continuously monitored, since while initially proportionality and success are assessed in very optimistic terms, sanctions can easily turn into disproportionality⁵⁸.

As stated by the principle of *non-combatant immunity*, "lives of innocent people may never be taken directly, regardless of the purpose alleged for doing so (...) Just response to aggression must be (...) directed against unjust aggressors, not against innocent people caught up in a war not of their making⁵⁹". Civilians, who unlike soldiers do not choose to fight losing their immunity, do not constitute a threat and should be immune from attack. When dealing with economic sanctions, it means that they should be imposed against the wrongdoers, to say, the regime and its direct supporters, without harming civilian populations. Acknowledging the hardship and the suffering to which civilian populations of target states are subject, the international community generally provides for clauses aimed at excluding

⁵⁶ Christiansen, Drew, and Gerard F. Powers. "Economic Sanctions and the Just-War Doctrine." *Economic Sanctions: Panacea or Peacebuilding in a Post-Cold War World*, Westview, Boulder (1995), p. 113.

⁵⁷ Ngobi (1995), p. 23, cited in Hadewych Hazelzet, p. 87.

⁵⁸ Hadewych Hazelzet, p. 89.

⁵⁹ NCCB (1992), pp. 98-103, cited in Hadewych Hazelzet, p. 89.

humanitarian aid from sanctions regimes. Food is, of course, one of the humanitarian necessities to be satisfied anyway. Even though food exemptions do not necessarily mean to save the population from starvation, a sanctions regime including food in its embargo would be more outrageous and inhuman than an act of war because its effects would be directly felt by vulnerable social sectors and not by the government or the army. In these regards, it is important to remind the obligations incumbent on Parties to the UN Covenant on Economic, Social and Cultural Rights, which in Article 11.2 proclaims the right of everyone “to be free from hunger”, and calls upon the States Parties, which are also UN Member States, to take all necessary measures to “ensure the realization of this right”. As happened in Iraq, before the Oil for Food Programme establishment, the government may use its population’s hardship as a political weapon by refusing to accept exemptions of any type. The international community, therefore, can be easily blamed and for any given reason the statement according to which the responsibility to provide population basic needs is up *only* to its government will remain valid. Recalling the probability of success proviso, the incapability of its government or of the sanctioning parties to avoid the population suffering constitutes a good moral argument not to impose economic sanctions.

The moral dilemma concerning “discrimination” becomes more and more clear when considering sieges. Walzer writes that “in the direness of a siege, people have a right to be refugees. And then (...) the besieging army has a responsibility to open, if it possibly can, a path for their flight⁶⁰”. It equates to say that sanctioning countries must open their boundary for political refugees who have not consented to be located where the boycott works. However, their flight can be extremely dangerous, taking into account the regime’s austerity, so that they are left without a real option. Even when motivations for sanctions are said, in theory, to be a “necessary evil”, practice has rapidly showed their inability to outweigh civilian suffering.

In conclusion, sanctions should be designed as to avoid their potential success to be overshadowed by civilian suffering. Indeed, several and various reviews of multilateral sanctions in Iraq, former Yugoslavia and Haiti (just to mention the three cases addressed in the present work) emphasized their inability to bring about the desired policy changes. As it will be explained in detail, in these three cases an almost irrelevant outcome was reached at

⁶⁰ Walzer, p. 168.

unacceptable human costs. The construction of a *just sanctions theory* scheme permits to evaluate sanctions as instruments of foreign policy *per se*, depriving them of their eternal connotation as “methods alternative to war”. In this way, it is possible to evaluate their effectiveness and compatibility with human rights by ensuring their compliance with conditions that any other instruments, and above all war, must meet to be considered “just” and to embrace the fullest respect for human rights. The following cases will highlight that assumption as “sanctions are always better than war” can be easily falsified.

2.2 THE IRAQI CASE

2.2.1 Building a Sanctions Regime in Iraq

The wide range of economic sanctions imposed on Iraq was multidimensional in scope and comprehensive in nature. The legal mandate through which international economic sanctions were prosecuted against Iraq was sanctioned by at least 16 resolutions aimed at compelling the country to cease, desist and correct its transgressions and, later, human rights violations against its own citizens⁶¹. Absolutely paradoxical is that, in response to violations of international law and human rights, the UN sanctions regime violated social and economic rights in appalling ways.

On August 1, 1990, the small but oil rich Kuwait was invaded and annexed by Saddam Hussein’s Iraq, bringing a strong reaction from the rest of the world. Just the day after, in response to the urgent request of Kuwait, the UN Security Council cited its authority under articles 39 and 40 and declared a *breach to the peace*, taking immediate action under Chapter VII of the Charter and, through the first resolution of a long series (Resolution 660), demanded *that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990*⁶².

In response to Iraqi non-compliance, the Council issued its first order for comprehensive mandatory sanctions since the Rhodesian case and, thus, the second in the UN history:

⁶¹ Christopher C. Joyner, “Sanctions, Compliance and International Law: Reflections on the UN Experience Against Iraq”, 32 *VajTL* (1991), p. 8.

⁶² UN Doc. S/RES/660 (1990), para. 2.

The Security Council [...] acting under Chapter VII of the Charter of the United Nations, determines that Iraq so far has failed to comply with paragraph 2 of Resolution 660 (1990) and has usurped the authority of the legitimate government of Kuwait; (The Security Council) decides, as a consequence, to take the following measures to secure compliance with paragraph 2 of the Resolution 660 (1990) and to restore the authority of the legitimate Government of Kuwait⁶³.

Resolution 661 was adopted by the Council on August 6, 1990, putting firstly in place a boycott operation. Trying to halt Iraq's petroleum sales, the Council prohibited the import of "all commodities and products originating in Iraq or Kuwait⁶⁴", the prohibition covering their shipment as well, and Kuwaiti exports because of Iraqi continued occupation of its territory. The boycott operation was then reinforced by the introduction of an embargo on exports of goods and services, prohibiting "the sale or supply (...) of any commodities or products (...) to any person or body in Iraq and Kuwait⁶⁵", extended to any activities aimed at facilitating the sale or supply of these items⁶⁶. The embargo was intended to be a total one (weapons and any other military materiel were, indeed, included), while exceptions in *humanitarian circumstances* were provided for by specific provisions. Furthermore, in order to completely isolate Iraq, a ban on financial transactions and transfers of funds to the Iraqi government or any other entities in Iraq or Kuwait was imposed⁶⁷. Paragraph 9 of the Resolution required members to take all necessary actions to prevent Iraqi access to Kuwaiti legitimate government's assets⁶⁸, protected through asset freezes and blocking mechanism. Even in this case, provisions concerning transfers for humanitarian and medical needs have been inserted. Anti-Iraqi sanctions hit contracts in process of execution as well, "notwithstanding any contract entered into or license granted before the date of the present resolution⁶⁹". The Council also established, *in accordance with rule 28 of the provisional rules of procedure of the Security Council, a Committee of the Security Council consisting of all the members of the Council, [...] to report on its work to the Council with its observations and recommendations*⁷⁰ while monitoring implementation and compliance with the mandatory

⁶³ UN Doc. S/RES/661 (1990).

⁶⁴ UN Doc. S/RES/661 (1990), para. 3(b).

⁶⁵ Id. at para 3(c).

⁶⁶ Id.

⁶⁷ UN DOC. S/RES/661 (1990), para. 4.

⁶⁸ Id. at para. 9.

⁶⁹ Id. at para 5.

⁷⁰ UN Doc. S/RES/661 (1990), para. 6.

sanctions. As a subsidiary organ of the Council, it followed the same rules and procedures, holding closed meetings and keeping no formal minutes⁷¹.

Despite the comprehensive and multifaceted scope of UN sanctions effort, however, the crisis sharpened and new resolutions followed. After having unanimously declared the annexation of Kuwait as “null and void⁷²”, the Council adopted Resolution 662. In response to the Iraqi decision of moving United States citizens to strategic positions within its territory so as to form a “human shield” against a potential US military offensive, Resolution 664 of August 18 demanded that:

Iraq permit and facilitate the immediate departure from Kuwait and Iraq of third-State nationals and grant immediate and continuing access of consular officials to such nationals⁷³.

In the sanctions context, it is necessary to consider resolutions which helped to build the whole sanctions regime, such as Resolution 665 (25 August), which tightened the enforcement of economic sanctions with the establishment of a naval blockade, authorizing “measures commensurate to the specific circumstances as may be necessary (...) to halt all inward and outward maritime shipping⁷⁴”, and recommended the use of the Military Staff Committee, a body charged by article 46 of the UN Charter with the task of advising the Council on military matters, to coordinate states’ naval activities⁷⁵; the latter was complemented by Resolution 670 of September 25, which forbade states the take-off from their territory of any aircraft from their territory carrying any cargo to or from Iraq and Kuwait, other than shipment with authorized humanitarian or medical goods⁷⁶. The Sanctions Committee was entrusted with the task of monitoring and supervising the compliance with the conditions imposed by the air embargo. The Rubicon was, finally, crossed with the adoption of Resolution 678 of November 19, through which the Security Council

⁷¹ Margaret P. Doxey, *International Sanctions in Contemporary Perspective* (Houndmills: Macmillan, 1996, 2nd ed), p. 89.

⁷² UN Doc. S/RES/662 (1990).

⁷³ UN Doc. S/RES/662 (1990), para. 1.

⁷⁴ UN Doc. S/RES/665 (1990).

⁷⁵ UN Doc. S/RES/665 (1990), para. 4.

⁷⁶ UN Doc. S/RES/670 (1990).

Demands that Iraq comply fully with Resolution 660 (1990) and all subsequent relevant resolutions, and decides, while maintaining all its decisions, to allow Iraq one final opportunity, as a pause of good will, to do so⁷⁷.

Otherwise, the Council

Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, to use all necessary means to uphold and implement Security Council Resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area⁷⁸.

However, since the beginning, it was clear that sanctions should be given time to work, while the Bush Administration, strongly supported by the British conservative Government, was not willing to sit tight waiting for them to have the desired effect. Therefore, the *pause of good will* conceded to Iraq did not bring to fruition and the Kuwaiti independence was restored by the armed intervention of a military coalition under US command. The 100-day hostilities started on 17 January 1991 and ended on 2 March, leading to the adoption of Resolution 686, demanding Iraq to cease hostilities toward coalition members, to release detainees and prisoners, to accept liability for Kuwaiti damages and to implement all 12 previous resolutions⁷⁹. While sanctions on Kuwait were immediately removed, the lifting of sanctions on Iraq was subject to a detailed list of conditions to be met set out by the so-called “mother of all resolutions”, Resolution 687. The latter can be considered as a cease-fire resolution, whose objectives are more comparable to a peace treaty’s terms imposed on a defeated aggressor, rather than to the objectives of a sanction regime⁸⁰. Indeed, while maintaining the sanctions provided for by Resolutions 661, 665 and 670, Resolution 687 aimed at compelling Iraq to comply with the following terms⁸¹:

- (a) *Border*. Formal recognition and respect for the inviolability of international boundary with the State of Kuwait as established with the assistance of the Un Secretary-General;

⁷⁷ UN Doc. S/RES/678 (1990), para. 1.

⁷⁸ UN Doc. S/RES/678 (1990), para. 2.

⁷⁹ UN Doc. S/RES/686.

⁸⁰ Frans A.M. Alting von Geusau, Recent and Problematic: The Imposition of Sanctions by the UN Security Council, in Willem J.M. van Genugten and Gerard A. de Groot (eds), *United Nations Sanctions: Effectiveness and Effects, Especially in the Field of Human Rights. A Multi-Disciplinary Approach* (Intersentia: Antwerpen – Groningen – Oxford, 1999), p. 12.

⁸¹ Frans A.M. Alting von Geusau, p. 11-12.

- (b) *Demilitarised Zone*. The Resolution also provided for the stationing of a United Nations observer unit to monitor the Khor Abdullah and the establishment of a demilitarised zone;
- (c) *Disarmament*. This point is anything but a verified destruction of Iraqi deadly weapons capability and thus a request for its unconditional confirmation of its obligations under the Geneva Protocol for the prohibition of chemical weapons, ratification of the Convention on the prohibition of “the development, production, stockpiling and use of chemical weapons and on their destruction”, and unconditional reaffirmation of its obligations under the Treaty on the non-proliferation of nuclear weapons;
- (d) *Return of All Kuwait Property*;
- (e) *Payments of Claims*. Reparations for losses, damages and injuries to foreign governments, nationals and organizations as a result of Iraq’s illegal invasion of Kuwait to be paid into a Compensation Fund administered by the UN, and repayment of outstanding foreign debt;
- (f) *Repatriation of all Kuwaiti and Third Country Nationals*, to be achieved cooperating with the Red Cross.

Paragraph 21 of Resolution 687 provided, moreover, that the Security Council would have reviewed every sixty days “policies and practices of the Government of Iraq, including the implementation of all relevant resolutions of the Security Council, for the purpose of determining whether to reduce or lift the prohibitions referred to therein⁸²”. Together with Resolution 688, calling for an end of internal repression against Iraqi civilian population (above all with reference to Kurdish) and asking for the immediate access of international humanitarian organizations to all parts of the country, Resolution 687 represents an absolute and unprecedented case of international jurisdiction’s interference in the domestic sphere of a sovereign state, so that it has been described as a *functional occupation and invasion of Iraq*⁸³. Someone has also noted that the unusual level of agreement within the Security Council on the Iraqi case was just in part due to the apparent illegality of Kuwait’s invasion and annexation, as well as of other impudent policies, while fully reflecting the fact that Iraq

⁸² UN Doc. S/RES/687, para. 21.

⁸³ Paul Taylor and A. J. R. Groom, *The United Nations and the Gulf War, 1990-91: Back to the Future?*, (London: The Royal Institute of International Affairs, Discussion Paper No. 38, 1992), p. 7.

did not possess protection by any permanent member⁸⁴. Consequently, the rapidly adopted, comprehensive and mandatory sanctions regime, even supported by all the leading powers and neighbouring states, seemed to fulfil all the theoretical conditions for being truly effective. What is more, Iraq seemed to be the best candidate for sanctions, what has been called an “ideal target”: it used to depend on oil exports for 95 percent of its foreign exchange earnings (in 1988 oil exports were worth \$15.4 billion), oil accounting for more than 60 percent of its GDP, while heavily relying on imports of food from Europe, North America, Australia and Japan (\$3 billion) and having a high level of foreign debt. Furthermore, the debilitating eight-year war against Iran in the 1980s strongly weakened the country’s economy. Considering all these features, the 1990 analysts considered the possibilities of sanctions’ success higher than in the previous cases.

But, to which extent can the strangling of Iraqi economy and the disastrous results of sanctions on civil population and infrastructure be considered successful? Shortly after the conflict, the UN envoy Martii Ahtisaari reported on humanitarian needs while conducting a fact-finding mission and described the “near-apocalyptic results upon the infrastructure of what had been, until January 1991, a rather urbanized and mechanized society” where “most means of modern life support have been destroyed or rendered tenuous⁸⁵”. Although infrastructure was hurriedly repaired after the war, sanctions brought a progressive and strong decline in both economic and social life since, as written before, they have been renewed every sixty days by the Council. In overall, considerably progresses have been recorded, in the course of time, in fulfilment of Resolution 687 conditions: in November 1994, Iraq formally recognized Kuwait’s sovereignty and borders and in July 1995, consented the examination of its programme of biological weapons’ development. Shortly after, the chairman of the UN Special Commission for Weapons Inspection, Rolf Ekeus, confirmed the elimination of Iraq’s chemical and ballistic missile capacity⁸⁶. The removal of the current leader was undoubtedly an unstated goal of sanctions imposed against Iraq. However, more than ten years of the most comprehensive and harsh Security Council sanctions in history did not weaken Saddam Hussein’s control over Iraq. On the contrary, he survived a military defeat, as well as several

⁸⁴ Margaret P. Doxey, p. 37.

⁸⁵ *Report to the Secretary-General on Humanitarian Needs in Iraq in the Immediate Post-Crisis Environment*, S/22366, 20 March 1991.

⁸⁶ Margaret P. Doxey, p. 39.

coups and defections. As a result not only of unscrupulous repression but also of the continuation of sanctions which have bent most sectors of the population, internal opposition has even loosened. Saddam Hussein presented the defeat against the coalition forces during the first Gulf War as David defying the imperial Goliath⁸⁷. As Alan Dowty notes, “a strong sense of Iraqi nationalism, a visceral distrust of the West and a culture strong on notions of shame and honour all contribute to the regime’s effort to turn the sting of sanctions back on their executors⁸⁸”. Indeed, psychological and political effects of sanctions may play a significant role in determining the achievement of senders’ goals.

2.2.2 “Political Gain, Civilian Pain”: Softening of Hardship

Sanctions had a catastrophic impact on the most vulnerable sectors of Iraqi society, particularly children. Before sanctions, funds scraped together from oil revenues, which accounted for over 90 percent of the country’s foreign earnings, were used to import food, medicine and modern health infrastructure’s equipment. Since sanctions have been imposed in 1990, Iraq’s efficient public health system drastically suffered and, as reported by studies carried out by UN agencies, infant mortality rates have tripled due to malnutrition and curable disease. Without oil or hard currency, Iraq has been thrown in a long-lasting crisis and, deprived of the necessary means to come out from it, has witnessed the progressive collapse of its economy: galloping inflation provoked the decrease in the average public-sector wage to less than \$5 per month, pushing former professionals and high-skilled labourers to desert their jobs and to become wholly dependent on the government rationing system. The latter, although trying to be equitable and efficient, provided just for one-third of caloric needs, so that household and personal possessions were likely to be sold by families to buy more food. The absence of supplies and spare parts has led to a strong paralysis of the former modern health infrastructure, and the lack of basic medicines forced doctors “to play God on a daily

⁸⁷ Margaret P. Doxey, p. 105.

⁸⁸ Alan Dowty, “Sanctioning Iraq: The Limits of the New World Order”, *The Washington Quarterly*, vol. 17, 3 (1994), p. 184.

basis, deciding who must die and who would have got a chance to live” among thousands starving and sick children in a country where child obesity used to be a common problem⁸⁹.

Massive violations of human rights, and especially of the rights of the child, have been, therefore, progressively perpetrated by the Security Council’s sanctions policy, accompanied with an unbelievable lack of public debate over the subject. What is more, studies and reports carried out by UN agencies have mostly remained in the organization’s sphere and development circles. The former Secretary-General, Boutros Boutros-Ghali, gave voice to this thunderous silence by pointing out, in 1995, that

Sanctions, as is generally recognized, are a blunt instrument. They raise the ethical question of whether suffering inflicted on vulnerable groups in the target country is a legitimate means of exerting pressure on political leaders whose behaviour is unlikely to be affected by the plight of their subjects⁹⁰.

This failure is still more shocking if considering the Post-Cold War indiscriminate and recurring use of sanctions as privileged instruments to exert pressure on states and to maintain international peace and security. At the same time, it would be useless to expect that hardship for the population would not exist and it is foreseeable that elites would suffer less than weaker sectors of society. After all, whether used as an alternative to military force or in situation where the latter would be fully unsuitable, coercive economic sanctions are intended to bring economic discomfort which, in turn, could cause political change. The vulnerability of given societal sectors could be, thus, used as an argument to not impose sanctions, or at least as a motive to lift or ease them. Otherwise, they could be easily used by target states to turn their sting back on senders. As explained before, international sanctions are justified when a clear and serious violation of an international norm has occurred but, when the decision has been made, a new question arises: to which extent is advisable – and possible – to limit the scale of economic hardship by providing for humanitarian exemptions⁹¹? Using a telling metaphor to highlight that extensive exemptions can undermine sanctions’ effectiveness, a 1930s reporter wrote that “the acid of exemptions will eat the very heart out

⁸⁹ Roger Normand, A Human Rights Assessment of Sanctions: The Case of Iraq, 1990-1997, in Willem J.M. van Genugten and Gerard A. de Groot (eds), *United Nations Sanctions: Effectiveness and Effects, Especially in the Field of Human Rights. A Multi-Disciplinary Approach* (Intersentia: Antwerpen – Groningen – Oxford, 1999), p. 20.

⁹⁰ Boutros Boutros-Ghali, *An Agenda for Peace*, 1995, p. 26.

⁹¹ Margaret P. Doxey, p. 106.

of a sanctions regime⁹²". The controversial relation between economic sanctions and humanitarian principles was already recognized from the earliest days of the League of Nations and it was generally accepted that sanctions should have exempted food and medicines. After all,

The purpose of sanctions is to modify the behaviour of a party that is threatening international peace and security and not to punish or otherwise exact retribution⁹³.

That is equally to say that insofar sanctions are thought as alternative to war and to its deadly weapons, they are not entitled to cause death by starvation or disease.

In Iraq, media supported by non-governmental sources have stressed the negative impact of sanctions on health, education and social stability, while the dogged efforts by relief agencies to mitigate the hardship evidenced the irreconcilable contradiction between simultaneous help and infliction. Before to deal with the Oil for Food Programme (OFFP), considered the most comprehensive humanitarian operation set out by the United Nations, it would be useful to explore the previous procedures through which the Organization has addressed the humanitarian problem in Iraq.

Since the beginning, sanctions appeared to Iraqis ambiguous and inhuman. Indeed, the country used to import 75 percent of its food needs, while Resolution 661 exempted food only in humanitarian circumstances. In the west, food sanctions were considered "as a good catalyst for political change", based on the rationale that the embargo on food would have had a hard impact on morale. While a western diplomat described sanctions as a way "to make the man in the street understand the strength of the international reaction to the invasion of Kuwait⁹⁴", an American congressman even believed it was "clearly far too early to consider any foodstuffs as being in a humanitarian category⁹⁵". At the end of the conflict, Resolution 687 clarified that, on notification of the Sanctions Committee, commercial and financial transactions linked to foodstuffs had to be exempted, while other humanitarian supplies should have been exported under Committee's permission. Even though Secretary-General Boutros-Ghali recommended a "fast track" for exemptions, the consequent workload made it

⁹² A. E. Highley, *The First Sanctions Experiment: A Study of League Procedures*, Geneva Special Studies, 1938, p. 125.

⁹³ Boutros Boutros-Ghali, p. 25.

⁹⁴ *The Globe and Mail*, 14 September 1990.

⁹⁵ *The New York Times*, 14 August 1990.

difficult to achieve the goal. Indeed, the Committee was initially given the double task of examining Secretary-General reports on sanctions' implementation and of looking for further information on states' actions in these regards. However, once resolutions proliferated, Committee's tasks grew as well: in the humanitarian field, the organ received and acknowledged notification of medical and food cargo, approving essential civilian provisions and issuing certifications valid for 120 days. In 1994, more than 4000 requests were evaluated. What is more, the Committee was composed of 15 members perfectly mirroring the Security Council's membership and, despite operating on the no-objection principle, each member has a veto power, so that discussions often focused on political rather than technical or humanitarian line of reasoning⁹⁶. Another problem related to exemptions has been properly pointed out by Robert Paarlberg, who wrote that "the shortages caused by food sanctions can usually be allocated to politically powerless citizens living in the country side" while the "politically active urban elites are unaffected⁹⁷". In other words, once the exempted food reaches the target country, it is firstly and foremost distributed to elites. The Security Council tried to solve the aforementioned problem by proposing an arrangement, enshrined in Resolutions 706 and 712 (1991), authorizing "all states to permit the import, during a period of sixth months from the date of adoption of the resolution, of a quantity of petroleum and petroleum products originating in Iraq sufficient to produce a sum (...) not to exceed 1.6 billion United States dollars⁹⁸". The deal was, nonetheless, subject to some conditions: each purchase of Iraqi petroleum and petroleum products should have been approved by the Sanctions Committee, the incomes would have been placed in an escrow account administered by the Secretary-General and, finally, the thirty percent of its total sum would have been used "for appropriate payments to the United Nations Compensation Fund and to cover the full costs of carrying out the tasks authorized by Resolution 687, the full costs incurred by the United Nations in facilitating the return of all Kuwaiti property seized by Iraq, and half the cost of the Iraq-Kuwait Boundary Demarcation Commission⁹⁹". The remaining seventy percent would have been utilized to cover the costs related to UN activities and

⁹⁶ Margaret P. Doxey, p. 108.

⁹⁷ Robert Paarlberg, "Food, Oil and Coercive Resource Diplomacy", *International Security*, vol. 3,2 (1978), p. 5.

⁹⁸ UN Doc. S/RES/706.

⁹⁹ *Id.*, at para. 3.

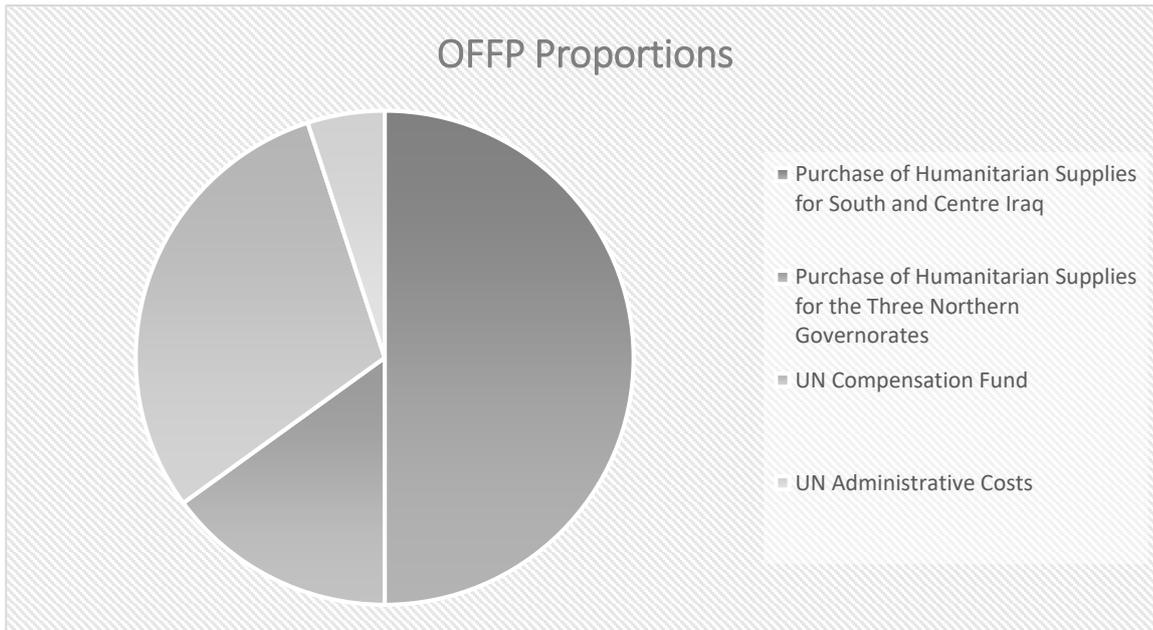
operations in Iraq. Saddam Hussein refused the offer. The Iraqi President, indeed, never tenderised; rather, the suffering of the Iraqi population served as a strong anti-UN propaganda.

A Memorandum of Understanding between the United Nations Secretariat and Iraq was finally signed on May 20, 1996 permitting the country to sell a limited amount of petroleum and petroleum products, and to use the proceeds to buy humanitarian goods. Certainly, while the deal only decreased rather than ending the suffering of the population, it was a positive achievement after six years of political deadlock¹⁰⁰. In December, Security Council Resolution 986, better-known as the Oil for Food Programme (OFFP), was officially inaugurated. Secretary-General Boutros Ghali has described the programme as “a victory for the poorest of the poor in Iraq, for the women, the children, the sick and the disabled”. The programme provided for the sale of \$2billion worth of petroleum every six months, whose proceeds, collected in an escrow account in an international bank chosen by the Secretary-General, would have been used for several purposes in the following proportions (Chart 1):

1. The fifty percent of the total sum was destined to the Iraqi government for the procurement of humanitarian supplies for the whole country, except for the three Kurdish governorates of Arbil, Dahouk and Suleimaniyeh. It should have covered essential needs of about 19 million people. While the Iraqi government implemented the programme by entering contracts and submitting them for the approval by the 611 Committee, the UN mandate consisted in the monitoring of its implementation. Relations between the Iraqi government and the Security Council only occurred when the Sanctions Committee put the approval of the aforementioned contracts on hold;
2. The fifteen percent was up to humanitarian supplies in the three Kurdish governorates, hosting 3.5 million people. In this case, the UN agencies implemented the programme, submitting to the 661 Committee applications for the approval to import products and supplies and delivering them¹⁰¹;
3. The thirty percent for payment into the Kuwait Compensation Fund managed by the UN;
4. The five percent for UN administrative expenses.

¹⁰⁰ Roger Normand, p. 20.

¹⁰¹ Jean Dupraz, UNICEF and the Sanctions Committee – Lessons Learned From Iraq, in Vera Gowlland-Debbas and Mariano G. Rubio (eds), *United Nations Sanctions and International Law* (The Hague: Kluwer Law International, 2001), p. 159.



The suffering of civilian population would have been alleviated in two different ways. The appreciation of Iraqi dinar against the US dollar had an immediate effect and the market price of humanitarian goods closely tracked movements in the exchange rate¹⁰². Secondly, the increase in resources for the import not only of humanitarian goods, but also of inputs for the renovation of infrastructure such as sewage works and water purification plants, knew a less fast implementation. The OFFP has been the only existing mechanism used to mitigate the economic and social hardship due to sanctions and it contributed to the relative macro-economic stabilisation programme initiated in 1995 by the Iraqi government¹⁰³. Its substantial positive impact was actually a proof of how deep the economic crisis was. The agreement, moreover, failed to cover all the expenses necessary to a complete and comprehensive renovation of preventive and curative health system, as well as the inclusion of essential food. Indeed, it has been calculated that, assuming 4 percent inflation, repair of facilities and the replacement of medical tools did not receive coverage by the programme¹⁰⁴.

¹⁰² Id., p. 21.

¹⁰³ Peter Boone, Haris Gazdar and Athar Hussain, *Sanctions Against Iraq: The Costs of Failure* (New York: Center for Economic and Social Rights, 1997), p. 41

¹⁰⁴ Roger Normand, p. 21.

Two and a half years later, in April 1999, the Secretary-General justified the programme's flaws and shortcoming with the following words, making it easier to understand that realistic views had finally overcome great expectations:

Regardless of the improvements that might be brought about in the implementation of the current humanitarian programme – in terms of approval procedures, better performance by the Iraqi Government, or funding levels – the magnitude of the humanitarian needs is such that they cannot be met within the context of the parameters set forth in resolution 986. Nor was the programme intended to meet all the needs of the Iraqi people.

Problems existed also in relation to the interactions between humanitarian agencies and the Sanctions Committee, the latter being charged with the task of approving goods imported by the former. Among the others, UNICEF has faced many difficulties in adapting its activity to the requirements of the 661 Committee, particularly in processing of contracts¹⁰⁵. A huge gap between the estimates prepared by the several UN agencies and the sum stipulated under the Food for Oil Programme persisted. According to the final report of the Aga Khan mission¹⁰⁶, the total sum Iraq needed in one-year period was \$6.8 billion, and respectively \$1.62 billion for essential feeding, \$53 million for additional and supplemental nutrition, \$500 million for health services, and finally \$180 million for sanitation services (including potable water). Furthermore, the renovation of the petroleum and the energy sectors was worth \$4.2 billion, without taking into account the necessary import of agricultural inputs, which needed \$300 million.

As mentioned, the Sanctions Committee could put contracts on hold. It commonly happened because of lack of clarity on technical specification, price and use of a given item. Jean Dupraz, a UNICEF monitoring and evaluation officer, has described how the Sanction Committee could easily put a contract on hold when dealing with a “dual use” item. The term is usually employed to describe products and technologies used for civilian purposes but which may have military application. Dupraz used as example the import by the Iraqi government of liquid chlorine gas, an extremely needed chemical used to purify water. During the first phase of the OFFP, started in December 1996 and ended in June 1997, the Iraqi government ordered 2,750 tons of liquid chlorine to be imported in 2,750 cylinders of 1 tonne

¹⁰⁵ Jean Dupraz, p. 156.

¹⁰⁶ *Report to the Secretary-General on Humanitarian Needs in Iraq*, by a mission led by Sadruddin Aga Khan, UN Doc. S/2279 (1991).

each¹⁰⁷. The UNICEF officer explained that, despite chlorine was desperately needed in Iraq, the first cylinder reached the country after 8 months from the formal request since the chemical was considered by the Committee as a dual-use item. The example, moreover, sheds light on the several difficulties faced by UN humanitarian agencies in their relations with the Sanctions Committee. UNICEF, that was indeed concerned with the monitoring of sanitation and water sector, developed a time-wasting and majestic tracking system for about 2,750 cylinders taking place in 15 governorates¹⁰⁸. A serial number was given to each cylinder, and from this number it was possible to ascertain its exact weight, the date and the port of entry into Iraq, the date of arrival in Baghdad, the place of storage, the date of the transport from Baghdad to the water site, the name and the location of the latter, the date of the first use of chlorine together with the date of the last use and the location where the empty cylinder had been stored¹⁰⁹. From this tracking system put in place by UNICEF benefited about 13 million people, most of them located in south and centre Iraq.

Heaviness and lack of flexibility seemed to be the passwords for contracts processing and approval. Ways to improve the work of the Sanctions Committee were advanced by the relief agencies' unanimous chorus. The Note¹¹⁰ presented by the President of the Security Council, Ambassador Amorim, asked the Committee to monitor the humanitarian impact of the sanctions regime on vulnerable sectors and to make adjustments by improving the flexibility of the mechanism, while facilitating exemption procedures. Moreover, educational items would have been included in a list of fundamental humanitarian goods not subject to Committee's approval.

The Oil for Food Programme was, then, enhanced in December 1999 when the Security Council adopted Resolution 1284, which extended the agreement for 180 days and included four improvements¹¹¹: first at all, the Special Commission was replaced by the UN Monitoring, Verification and Inspection Commission (UNMOVIC) and the limit on oil sales' proceeds was lifted; in order to accelerate procedures, the approval of the necessary goods' lists imported was up to the Executive Director of the Office of Iraq Programme (OIP) and,

¹⁰⁷ Jean Dupraz, p. 160.

¹⁰⁸ Ibidem.

¹⁰⁹ Ibidem.

¹¹⁰ UN Doc. S/1999/100.

¹¹¹ UN Doc. S/RES/1284 (1999).

finally, the Committee was asked to take decisions concerning humanitarian and essential needs within two working days. The programme was further extended for another 180 days through Resolution 1302 of June 9, 2000, which also directed the Secretary-General to appoint independent experts charged with the task of analysing and reporting the humanitarian situation in the country.

Notwithstanding various technical improvements to the programme, the modalities of this agreement still raise many doubts and questions. Roger Normand, indeed, has questioned, even before that the programme was renamed “the Oil-for-Food Scandal”, the rationale of limiting the petroleum exports to an amount which would have not covered all the essential humanitarian needs of the population. He found incredible to understand “why the monitoring mechanism would not be able to cope with an import bill exceeding \$1 billion per six months” and gave two insightful explanations¹¹²: first at all, restricting oil purchase could have either permitted other oil exporters to increase their sales or to hinder a fall in oil prices. Of course, this activity would have nothing to do with the maintenance of international peace and security. Secondly, imports controls could have been easily eluded if Iraq had had greater resources at its disposal. Normand’s second explanation assumes that Iraq could have rearmed itself because of arms exporting countries’ negligence, the latter being the permanent members of the Security Council. In other words, finding it particularly difficult in practical and economical terms to control its permanent members’ arms exports, the Security Council “has resorted to a virtual shutdown of the Iraqi economy”. It is useless to remember that the costs of this distrust dramatically fell on Iraqi civilians and that the Oil for Food Programme was nothing more than a palliative.

2.2.3 Sanctions’ Effectiveness and Psychological Effects

On 22 May 2003, after the US led a military attack on Iraq, the sanctions regime imposed on the country more than a decade before came to a partial end. In overall, the sanctions program relentlessly killed over 1 million Iraqis¹¹³. An astounded audience suddenly acknowledged that Iraqi sanctions as coercive measure did not work, that new measures likely not to harm

¹¹² Roger Normand, p. 22.

¹¹³ Golnoosh Hakimdavar, *A Strategic Understanding of UN Economic Sanctions: International relations, law and development*, 2013, p. 1.

the population were extremely needed. Here begins the long-lasting debate over “targeted sanctions”, which in Iran have followed the same footsteps as the Iraqi sanctions.

Since the establishment of the United Nations, the Iraqi sanctions have been the most comprehensive and far-reaching sanctions regime, whose results and effectiveness are difficult to be noticed, unlike the huge and evident humanitarian problems caused. Their end has been sanctioned by a US military attack which overthrew Saddam Hussein’s government and their story has been further tarnished by the investigations carried out over the Oil for Food Programme, from then on known as the Oil for Food Scandal. The management or, better, the mismanagement of these sanctions led to extensive inquiries related to the use of funds and the way in which food has been distributed to the population¹¹⁴.

By applying the *just sanctions theory* analogy operated by Hadewych Hazelzet, sanctions in Iraq resulted in concessions and outcomes achieved not through sanctions but through a dual military attack and in an appalling civilian suffering. Recalling Hazelzet’s work, the Iraqi case will be analysed in the light of the seven *jus ad sanctionem* conditions (penultimate resort and commitment and prospect for a political solution, comparative justice, competent authority and legitimacy, just cause, right intention, probability of success and proportionality) accompanied with the last *jus in sanctione* condition, namely discrimination and the humanitarian proviso.

The first proviso requires the use of sanctions as penultimate resort and as a method to take time while a sound political solution is found. Trade measures were initially imposed on Iraq after its invasion and undue annexation of Kuwait and, then, officially maintained as a response to the genocide perpetrated against Kurds. The research for a political solution was soon abandoned after that the Ba’ath regime clearly showed to be not willing to cooperate. Sanctions were effectively measures of penultimate resort. With regard to the second condition, justice resided in the international community, basing its intervention in the country upon the UN Charter. In the same field, the problem of autocracies has been raised, governments not representative of opinions of their own people’s majority, who may be willing to endure economic and social hardship in order to overthrow the ruling government. This analysis, as well as that concerning the failure of the same majority to rectify the

¹¹⁴ Golnoosh Hakimdavar, *A Strategic Understanding of UN Economic Sanctions: International relations, law and development*, 2013, p. 4.

government's behaviour, cannot be easily assessed. In the Iraqi case, however, its Kurdish population constituted a minority threatened with genocide, a crime against humanity that justifies international intervention. As for the competent authority, economic sanctions against the country were not imposed by private group or individuals; rather, they were imposed by the United Nations Security Council, the executive organ of the organizations that counts almost all the nations of the world. Of course, resentment and scepticism are fostered by the lack of representativeness and the dominance by the Permanent Five¹¹⁵ but, nevertheless, Member States of the United Nations have conferred on the Council the primary responsibility for the maintenance of international peace and security (Art. 24) and have agreed to accept and carry out its decisions (Art. 25).

Moreover, the Iraqi sanctions had a just cause since they were aimed at several objectives: at confirming the prohibition on aggression and at preventing Iraq from committing further violations of international law. Furthermore, the sanctions regime was imposed to deter the country from renewing genocide against its Kurdish minority, pay back Kuwait and to dismantle its deadly weapon capability. More controversial – the economic sanctions unofficially strove for overthrowing Saddam Hussein. While, at least initially, right intentions equate just causes set forward, problems begin to arise when considering proportionality and continuance of the sanctions regime. As already explained, proportionality can easily turn into disproportionality once sanctions are maintained for a long time. Christiansen and Powers argued that

The continuance of comprehensive sanctions (as opposed to lesser ones) against Iraq, however, long after Kuwait has been freed, to gain compliance with the few remaining unmet conditions of the cease-fire resolution seems disproportionate¹¹⁶.

Hazelzet has maintained that this judgement may result altered if taking into duly account Kurds' genocide and the threat constituted by Iraqi chemical and biological weapons arsenal. However, shortly after having admitted its intentions and consented the examination of its programme of biological weapons' development (1995), the chairman of the UN Special Commission for Weapons Inspection, Rolf Ekeus, confirmed the elimination of Iraq's

¹¹⁵ Weiss, Thomas G. "Sanctions as a foreign policy tool: Weighing humanitarian impulses." *Journal of Peace Research* 36.5 (1999), p. 501.

¹¹⁶ Christiansen, Drew, and Gerard F. Powers. "Economic Sanctions and the Just-War Doctrine." *Economic Sanctions: Panacea or Peacebuilding in a Post-Cold War World*, Westview, Boulder (1995), p. 113.

chemical and ballistic missile capacity, but non-military sanctions were lifted only in 2003; whereas, genocide is a crime against humanity and must be fought and punished, but who decides which lives are worthier? Kurdish children dying by hand of its own government, or Iraqi children dying from starvation and disease because of economic sanctions imposed “in a war not of their making¹¹⁷”? Here stays the moral dilemma. Discrimination and humanitarian proviso seems impossible – or at least unlikely – to respect when economic sanctions are at stake.

In conclusion, despite military measures taken alongside economic sanctions can hinder the precise assessment of sanctions’ effects, the suffering of the population due to trade measures has been apparent and outrageous. Before that the Oil for Food Deal was struck, hundreds of thousand Iraqis suffered for malnourishment or illness; and even after its installation, it proved soon to be just a palliative. *Jus ad sanctionem* has been justified and rightly applied, but *jus in sanctione* has gone beyond any justifications because of the scarce expectations of success and of the appalling effects on social vulnerable sectors. Sanctions have raised a moral dilemma linked not only to the discrimination and humanitarian provisos, but also in relation to the paradoxical stand that sanctions assume when imposed to enforce respect of human rights. On the one hand, sanctions have acted in violation of the principle requiring making a distinction between military objectives (in our case, it refers to direct wrongdoers) and civilian ones, and targeting just the former. As already stated, sanctions have rather proved to be adequate in enhancing the internal power of sanctioned national governments, while harming the poor of the poorest, the women and children, the sick and disabled, namely those societal sectors incapable to underpin a policy change; on the other hand, the imposition of “humanitarian sanctions” aimed at coercing leaders to protect and respect human rights which in turn end up in violating human rights themselves is morally and theoretically upsetting.

Sanctions have not passed the test of compatibility with human rights. The most apparent reason why is that the suffering inflicted on a population involved in “a war not of its making” is not a legitimate way to exert pressure on political leaders, above all when the latter are expression of an authoritative regime. After all, the protection and respect for human rights are enshrined by the UN Charter itself and by *jus cogens* norms, not likely to be derogated in any situation and binding also the UN Security Council. Considering this, a kind of proper

¹¹⁷ NCCB (1992), pp. 98-103, cited in Hadewych Hazelzet, p. 89.

“sanctions impact assessment” is needed, through which their compatibility may be enhanced. Sanctions should be assessed *ex ante*, giving them an evolving human rights interpretation and considering their long-term effects alongside their immediate coercive impact. In this way, it is possible to determine which sanctions are more appropriate to provoke the least damage, collateral costs and drawbacks to civilian populations of target states. A reliable assessment, undertaken before the imposition of sanctions, could have determined the causes of adverse effects on humanitarian conditions, and could have therefore helped in minimising the unintentional bad consequences of sanctions. In this way, it could have been possible to surely foresee whether and how sanctions can provoke harm, to anticipate potential negative effects and “to get maximum humanitarian benefit from available resources¹¹⁸”.

The Haitian case, in the following paragraph, will have the same features.

2.3 THE HAITIAN CASE

2.3.1 Just Sanctions Theory Applied to Haiti

In the case of Haiti, sanctions were initially requested by the Organization of American States (OAS) in September 1991 as a reaction to the coup d'état that overturned the democratically elected president. The UN commitment followed one week later. The penultimate resort and commitment for a political solution clauses were fulfilled since comprehensive sanctions were imposed only in 1994 when joined UN and OAS diplomatic efforts turned to be inconclusive. Even in this example, justice can be assumed to be on the side of the international community¹¹⁹ because its intervention occurred on the basis of the UN charter, thus fulfilling the *competent authority and legitimacy* proviso as well. What is more, President Aristide in exile had been elected by 67 percent of the Haitian population. However, while this argument could corroborate Damrosch's thesis¹²⁰ (prolongation of sanctions is justified when supported by the majority of the population who wants to bring down the illegitimate government), on

¹¹⁸ *Id.*, p. 276.

¹¹⁹ Hadewych Hazelzet, Assessing the Suffering From “Successful” Sanctions: An Ethical Approach, in Willem J.M. van Genugten and Gerard A. de Groot (eds), *United Nations Sanctions: Effectiveness and Effects, Especially in the Field of Human Rights. A Multi-Disciplinary Approach* (Intersentia: Antwerpen – Groningen – Oxford, 1999), p. 81.

¹²⁰ Damrosch, Lori Fisler. "The collective enforcement of international norms through economic sanctions." *Ethics & International Affairs* 8.1 (1994).

the other hand it is not possible to take absolutely for granted people's knowledge about sanctions' devastating effect.

Any kind of economic interest underlay the imposition of sanctions, and the punishment of a brutal repression after an undue coup d'état together with the restoration of the democratic elected president can be said to be just causes. As in the Iraqi case, however, problems arise in relation to the threefold link between a proportionate harm, a modest probability of success and the humanitarian proviso. Here some insightful data (Gibbons, 1999): unemployment have increased due to sanctions from 50 percent to 74 percent in 1994 and per capita income has decreased from \$370 to \$260 in 1997. Children's malnourishment increased and the infant mortality rate rocketed to 61 per 1000 live births. Primary school enrolments dropped, while the amount of street children doubled. What is more, democratic life suffered a strong setback: participation in democratic elections dropped from 70 percent in 1990/91 to 10 percent in 1997. Dramatic consequences of sanctions have been thus recorded also in Haiti, rendering the *jus in sanctione* quite impossible to be defended and justified. In these regards, there are serious issues to be addressed.

2.3.2 Building a Sanctions Regime in Haiti

The coup d'état represented nearly two centuries of domestic political, social and economic quagmire¹²¹. The expulsion of President Jean-Bertrand Aristide by the coup, nine months after he won the UN-sponsored election by 67 percent of votes, led the members of the Organization of American States (OAS) to impose a trade embargo on Haiti in September 1991. However, the military junta guided by Raoul Cedras remained in power, prompting the United Nations Security Council to impose Resolution 841 starting the establishment of a comprehensive sanctions regime on 16 June 1993. Sanctions appeared as the only tool available to United Nations, other than military intervention, to resolve the Haitian crisis after that all diplomatic solutions proved to be inadequate. These measures, though, worsened problems endemic to Haiti. By 1991, indeed, Haiti boasted the record in being the poorest nation of the Western hemisphere: the sixty-six percent of the country's resources were controlled by the four percent of households, while GDP per capita was worth less than \$400.

¹²¹ Swindells, Felicia. "UN Sanctions in Haiti: A Contradiction under Articles 41 and 55 of the UN Charter." *Fordham Int'l LJ* 20 (1996): 1878, p. 1880.

Sidney Mintz has traced Haiti's national and international crisis back to the country's foundation as an independent sovereign state in 1804. What had been the crown-jewel of the French empire, was now economically and politically isolated because of Western powers' refusal to recognize Haiti's independence¹²². The independent country, however, inherited a devastated economy, further destroyed by the US invasion of 1915. Politically, while the Catholic Church influence increased over time, uprisings and coup d'état became the most common and easiest ways to seize the power or to remove governments, and the army came to play a fundamental role in the political life¹²³. In March 1990, the then-provisional government asked for electoral assistance from the United Nations to elect a new president¹²⁴. Jean-Bertrand Aristide's government was inaugurated in February 1991. Advocating for comprehensive social and economic reforms and for a decrease in the economic and political influence of the elite and of the army¹²⁵, he implemented a range of social welfare and agrarian reform policies. After nine months, Aristide was overthrown by a military triumvirate led by the army's Commander-in-Chief, Raoul Cédras, with the financial support of the Haitian elite.

The OAS reaction was immediate. Its Permanent Council issued Resolution 567, condemning the coup and demanded for the restoration of Aristide's legitimate government. The same resolution also convened an Ad Hoc Meeting of Ministers of Foreign Affairs, which resulted in the diplomatic isolation of the military regime and in the suspension of all economic, financial and commercial relations with the country. The second resolution, issued five days later, tried to communicate to the military junta that there was no alternative to a negotiated resolution of the dispute¹²⁶. Two additional resolutions were adopted in 1992. However, since the OAS is a regional organization, pursuant to article 53 of the UN Charter, no enforcement action can be taken without the consent of the Security Council, so that sanctions imposed on Haiti were not mandatory and were partially applied by OAS members. The United States, for example, partially lifted sanctions imposed by the regional organizations' resolutions.

¹²² Sidney W. Mintz, *Can Haiti Change?*, 74 FOREIGN AFF. 1, 1995, p. 73.

¹²³ Felicia Swindells, p. 1910.

¹²⁴ United Nations Department of Public Information, *United Nations Electoral Assistance to Haiti*, UN Doc. DPI/1120 (1991), p. 2.

¹²⁵ Thomas W. Lippman, *Haiti's Tortured History Provided Little on Which to "Rebuild"*, WASH. POST, Sept.19, 1994, p. 19.

¹²⁶ Felicia Swindells, p. 1913.

The United Nations sanctions regime on Haiti consisted of voluntary and mandatory, selective and comprehensive measures¹²⁷, ranging from resolutions falling under Chapter VI of the Charter (dealing with the pacific settlement of disputes) to coercive measures under Chapter VII. After the *de jure* government consented to the imposition of sanctions, removing thus any potential problems related to illegal intervention under Article 2(7) of the Charter¹²⁸, the unanimous Security Council adopted Resolution 841. The Resolution, “recalling the statement (...) in which the Council noted with concern the incidence of humanitarian crises, including mass displacements of population, becoming or aggravating threats to international peace and security¹²⁹”, imposed a mandatory arms and oil embargo consistent with the trade embargo previously recommended by the OAS. Among the selective measures, the Resolution also froze the assets of the Haitian government as well as of the *de facto* authorities¹³⁰. A Sanctions Committee was established to monitor the implementation of sanctions and a humanitarian exemption clause included to face population’s needs. The long-term goal of the United Nations’ regime was to restore democracy through negotiations, so that all parties to the Haitian dispute were requested to accept the outcome of negotiations conducted by the UN Special Envoy, Dante Caputo, representing both the UN and the OAS. On June 27, 1993, Raoul Cédras agreed to meet President Aristide in New York where, on July 3, they signed the Governors Island Agreement. The Agreement would have allowed the return of Aristide to Power, but the military junta went back on its promises. Sanctions, suspended on 27 August¹³¹, were re-established on 13 October¹³². Three days later, the Security Council issued Resolution 875 in which, “reaffirming its determination that, in these unique and exceptional circumstances, the failure of the military authorities in Haiti to fulfil their obligations under the Agreement constitutes a threat to peace and security in the region¹³³”, not only modified the wording and the meaning of what constitutes a threat to international peace and security, but also attributed the whole Haitian crisis to the military

¹²⁷ *Id.*

¹²⁸ Felicia Swindells, p. 1917. Article 2(7) of the UN Charter, indeed, enshrines that “nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII”.

¹²⁹ UN Doc. S/RES/841 (1993).

¹³⁰ Felicia Swindells, p. 1919.

¹³¹ Measures were suspended through Res. 861, which maintained the possibility of re-adopting sanctions whether any party would have failed to meet its obligations. The suspension was then reversed by Res. 873.

¹³² Margaret P. Doxey, *International Sanctions in Contemporary Perspective* (Houndmills: Macmillan, 1996, 2nd ed), p. 45.

¹³³ UN Doc. S/RES/875 (1993).

junta¹³⁴. The resolution at stake, moreover, called upon member states to examine inward maritime shipping in order to obligate their compliance with sanctions. Resolution 875 remained in effect until May 6, 1994, when the Council adopted Resolution 917 finally imposing comprehensive mandatory sanctions on all the Haitian territory. It banned all trade and flights to the country, enabled the Sanctions Committee to verify compliance with the latest measures. Despite exemptions for food, medicine and cooking fuel have been included, the scarce attention paid in relation to civilian harm is witnessed by the absence, among the other Sanctions Committee duties, of monitoring the impact of trade measures on the population¹³⁵. In conclusion, Resolution 940 was adopted, through which the Security Council,

Acting under Chapter VII of the Charter of the United Nations, authorizes Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership (...) and the restoration of the legitimate authorities of the Government of Haiti¹³⁶.

The Haitian crisis finally ended in September 1994; while US planes were ready to intervene, the junta reacted to the threat of military force and rapidly decided to negotiate an agreement ably mediated by the former US President Jimmy Carter and his Chief of Staff Powell. Once Aristide came back to power, the Security Council voted for rescinding sanctions through Resolution 944.

2.3.3 Assessing the Effects of Sanctions in Haiti

As regard to their effectiveness, UN sanctions on Haiti proved to be hardly adequate. The departure of the military *de facto* government was attained only through the threat of military force. Some material incentives helped in securing their leaving, such as the unfreezing of their foreign assets¹³⁷. Theretofore, the Cédras' military junta showed little reaction to economic and political pressure, unlike the civilian population. Sanctions had widespread and severe effects on the most vulnerable sectors of the Haitian society. Ineffectiveness of

¹³⁴ Felicia Swindells, p. 1922.

¹³⁵ *Id.*, p. 1923.

¹³⁶ UN Doc. S/RES/940 (1994).

¹³⁷ Margaret P. Doxey, p. 46.

sanctions is, therefore, witnessed by the intentional depletion and impoverishment of “the poorest country in the western hemisphere”, which was already unable to supply its population’s essential needs. Even though the OAS embargo was very mild, considering Dominican Republic’s porous boundary offering a sure supply for Haitian elite¹³⁸, its effects were devastating on the civilian population. Prices increased disproportionately, unemployment rocketed with the loss of thousands of jobs, and desperate people boarded on boat looking for a better future for their children. Resolutions 841 and 917 respectively exempted from trade embargo the sale of limited quantities of oil to be used for humanitarian purposes as well as for food and medicine, but these items soon became unaffordable for the civilian population given the exaggerated costs of transportation. The Resolutions, therefore, involuntarily created an additional embargo on essential needs¹³⁹, while fundamental health system infrastructure lacked energy, equipment and supplies. What is more, Resolution 917 gave carte blanche to exporting countries in determining what constituted foodstuffs and medical supplies: The United States, for example, devised a very limited conception of foodstuffs, with some companies even refusing to deliver supplies in order to avoid legal inconveniences¹⁴⁰. An article of The Guardian was entitled “Sanctions killed 1,000 children a month” and reported a Harvard study concluding that “the human toll from the silent strategy of humanitarian neglect has been far greater than either the violence or the human rights abuse¹⁴¹”.

As in the Iraqi case, it is difficult to specifically assess the effects of sanctions on Haiti because of the incidence of other factors, such as the pre-existence of a rather unstable economic, political and social scenario. However, sanctions have undoubtedly exacerbated previous problematic issues. Humanitarian assistance was, therefore, extremely needed, whose primary task was that of dealing with food and feeding programs. Specialized Agencies and NGOs, though, were prevented from working alongside the *de facto* government because of the diplomatic isolation in which it was relegated, leading not only to the elimination of whatever support the government had previously furnished, but also permitting the illegal government to exert whatever pressure on the international community¹⁴². The military junta, indeed, tried

¹³⁸ *Id.*, p. 109.

¹³⁹ Felicia Swindells, p. 1931.

¹⁴⁰ *Id.*, p. 1932.

¹⁴¹ The Guardian, 10 November 1993, cited in Margaret P. Doxey, p. 109.

¹⁴² Felicia Swindells, p. 1933.

to hinder the delivering of supplies, especially of oil, by withholding them. Meanwhile, more than three hundred NGOs and specialized agencies' humanitarian programs depended on the distribution of fuel whose shipments were, theoretically, allowed for humanitarian purposes by Resolution 917. The same resolution, moreover, imposed a ban also on spare parts for trucks. The overall result was that the transportation of essential items to rural areas and to the most distant parts of the country had been further limited by the lack of fuel. Hospitals were short of electricity, while patients were practically unable to reach health clinics. An appalling decline in health of vulnerable groups due to curtailed distribution of food and vaccination led epidemics and malnutrition to be the predominant problems in Haiti.

In the economic field, while sanctions constituted anything than an inconvenience for the Haitian elite, these measures meant poverty and hardship for those people already living at subsistence levels¹⁴³. UN sanctions costed to Haiti \$41 million in exports of agricultural goods, as reported by some UN and EU studies. Here some macro-economic data well-explaining the hardships caused by the UN sanctions regime¹⁴⁴: unemployment rose to eighty percent in 1994 and fifty thousand inhabitants of Port-au-Prince lost their jobs. A galloping inflation due to the devaluation of Gourde by forty percent, after an expansion of the money supply without no hard currency to support it, brought about a general dollarization of the country. Consumer prices rocketed and real employment opportunities decreased, leading real wages to dramatically fall. At the border with the Dominican Republic, black marketers of fuel used sanctions as a business opportunity, profiting on popular adversity. Socially, UN comprehensive sanctions exacerbated disparities, with their crushing effects damaging, in particular, the Haitian middle class and peasantry, the former forced to close factories because of the too costly fuel on black market and the latter sent to ruin by the drastic lowering in price of their products due to food distribution programs. What is more, education was one of the most affected field of social life: the lack of gasoline and of public transportation prevented children from going school, while parents became more and more unable to pay tuition¹⁴⁵.

¹⁴³ Felicia Swindells, p. 1939.

¹⁴⁴ *Id.*, p. 1940.

¹⁴⁵ *Id.*, pp. 1944-1945.

2.4 PULLING THE THREADS TOGETHER

Sanctions can last a decade or just one year and, in any case, they can produce irreversible damages to the economic and social life of the target state. It is witnessed by the Haitian case, where sanctions' relatively short time had been anyway too long, given the already impoverished state of Haiti. This argument, thus, runs against the conviction that damages can be remedied after the lifting of measures. Indeed, damage, such as the erosion of entire social classes or the development of a consolidated black market, can be hardly reversed¹⁴⁶. Consequently, the social and humanitarian dimension of sanctions cannot be ignored, particularly when they are imposed by an international or regional organization which is aimed at promoting social and economic development¹⁴⁷ and, of course, at defending human rights.

Both in the Iraqi and in the Haitian cases, the real impact of sanctions on their populations has been testified by disparate NGOs, officials of international organizations, doctors and other field officers, having a little effect of Security Council resolutions extending embargoes and other trade measures. What is more, while the UN Charter furnishes a certain degree of protection for the sender states under Article 50 (even though neighbouring countries usually feel the same hardship as the target state, as it will explain in the following chapter), it does not forecast potential or detrimental impacts on the target states. Felicia Swindells believes that Article 55 of the UN charter is to target countries what Article 50 is to sender states, and that the Security Council should consider it when imposing a sanctions regime¹⁴⁸. The article, indeed, states that the organization shall promote

- a. Higher standards of living, full employment, and conditions of economic and social progress and development;
- b. Solutions of international economic, social, health, and related problems, and international cultural and educational cooperation; and
- c. Universal respect for, and observance for, human rights and fundamental freedoms (...) ¹⁴⁹.

Rather, UN comprehensive sanctions on Iraq and Haiti haltered the conditions of economic and social development, prompted lower standards of living and fostered unemployment.

¹⁴⁶ Margaret P. Doxey, p. 109.

¹⁴⁷ Felicia Swindells, p. 1946.

¹⁴⁸ *Id.*, p. 1951.

¹⁴⁹ Charter of the United Nations, Art. 55.

They worsened, rather than to find a solution to, “economic, social, health and related problems”, and contributed to inestimable losses for the educational sector. Finally, they violated a substantial sum of fundamental human rights, including the right to life.

The aforementioned article can furnish useful guidelines for the United Nations when considering the possibility of applying sanctions. If the country at stake is a developing country trying to reach the goals set out in the article, the Security Council would be less likely to adopt careless economic measures. The organization should go through a sort of “sanctions impact assessment”, prior to their practical application, in order to establish which kind of measures would cause the least damage, collateral costs and drawbacks to the target’s economic and social life¹⁵⁰.

Article 55, therefore, can be considered a sort of legal limitation, deriving from the Charter itself, to the Security Council action. Indeed, since the end of the Cold War, the Security Council has adopted sanctions against several states, occasionally authorising the use of military force. Although these measures have often contributed to consistent hardship for civilian populations, the Security Council still do not seem to respect its obligations to take action in compliance with humanitarian and human rights principles, nor it has been developed a valid legal framework in which the Council must act in accordance with the latter¹⁵¹. Being a direct outcome of the United Nations Charter, the Security Council has been defined as a *law unto itself*, thus always able to act above the law. However, it is possible to derive a set of minimum legal obligations the Council should respect, in order to make sanctions undergo a second test of compatibility with human rights.

¹⁵⁰ Felicia Swindells, p. 1955

¹⁵¹ Roger Normand, p. 24.

CHAPTER III

COLLATERAL DAMAGE, COSTS FOR SENDERS AND NEIGHBOURING COUNTRIES: IMPLEMENTATION OF ARTICLE 50 OF THE UN CHARTER

3.1 THE COSTS OF SANCTIONS FOR SENDERS

In all sanctioning decisions, whether they are made in concert or unilaterally, inside or outside an international organization, cost-benefit analysis play a role of utmost importance. The reception of foreign aid, the entrance or the capture of those market areas left empty by the target states, and several forms of “rewards” from allies definitely constitute economic benefits produced by sanctions. However, considerations about costs are even more essential if considering the role they play in multilateral sanctioning and the impact they have on the level of cooperation¹⁵². Indeed, the application of sanctions implies political and economic

¹⁵² Lisa Martin, *Coercive Cooperation: Explaining Multilateral Economic Sanctions* (Princeton, NJ: Princeton University Press, 1992), p. 144.

consequences, so that their “utility” and their capacity to achieve intended objectives should be always weighed against any drawbacks due to the enmity or countermeasures on the part of the target, as well as in more quantifiable terms, such as the loss of markets or of essential imports¹⁵³. Willingness to sustain expenses and costs is “widely regarded as a standard indicator of one’s resolve¹⁵⁴” and a potential failure in assessing the costs of sanctions may undermine the government’s reputation at home and abroad. Therefore, governments will always favour diplomatic, cultural and political sanctions to economic ones, that could easily reveal themselves a double-edged sword. For example, export embargoes, as very expensive measures, would be easily opposed by governments aspiring to increase employment and to foster economic growth; governments which seek, as well, to not antagonize politically influential domestic groups likely to be badly hit by sanctions. Willingness to partake in costly sanctions is usually found when leading senders are aimed at inflicting severe and coercive punishment on the target¹⁵⁵.

When “coincidence of interests, coerced participation or co-adjustment through bargaining” exist, a clear threat to the peace will produce a unanimous multilateral response, as it was the case of Iraqi invasion and annexation of Kuwait¹⁵⁶. If not, by contrast, a stronger divergence of views about affordable and unaffordable costs would unfold¹⁵⁷: leading senders were not convinced of their willingness to sustain costs for bringing about a policy change in South Africa, where non-compliance with UN sanctions against Rhodesia, apartheid and several attempts of destabilizing neighbouring countries were still alive.

Nonetheless, application of sanctions entails some inescapable costs, all having short- and long-term effects on the sender economy and social life. The following table, adapted by Margaret P. Doxey from *UN Document A/48/573/S/26705*, provides an analysis into parts of different categories of costs:

¹⁵³ Margaret P. Doxey, *International Sanctions in Contemporary Perspective* (Houndmills: Macmillan, 1996, 2nd ed), p. 66.

¹⁵⁴ David A. Baldwin, *Economic Statecraft* (Princeton, NJ: Princeton University Press, 1985), p. 107.

¹⁵⁵ Margaret P. Doxey, p. 66.

¹⁵⁶ Lisa Martin, p. 150.

¹⁵⁷ Margaret P. Doxey, p. 67.

Costs for senders

1. Trade

(a) Exports:

- Undelivered regular exports – no alternative market
- Loss of outstanding orders for future exports – production already under way
- Suspended sale of services in engineering or construction projects in target state
- Loss of transportation, communication services including shipping, aircraft, trucking, pipelines, packaging

(b) Imports:

- Undelivered imports – no alternative supplier
- Loss of imports on concessionary terms
- Loss of outstanding orders for future imports for which payment has already been made
- Loss of imported services

2. Financial

(a) Lost profits or other income (e.g. remittances from migrant workers)

(b) Confiscation, seizure of savings and assets by the target

(c) Loss of loans, credits on concessionary terms

(d) Loss of grants

3. Special or ad hoc in nature

These will depend on (i) the nature of the sanctions and their duration and (ii) the structure and intensity of links between senders and targets.

Examples are:

(a) Repatriation of migrant workers from the target

(b) Providing for refugees

(c) Termination, suspension of joint ventures

(d) Re-routing of passenger, goods traffic

Of course, the table does not take into account intangible data, such as deterioration of relationships or the target's potential responses and countermeasures.

Precise calculations of costs on the part of senders can be expected when they have close ties with the target state: the British government refused to adopt the Commonwealth measures package against South Africa because of an amount of British exports to South Africa worth £1300 million per year; if Great Britain had accepted the sanctions package almost 70 000 British jobs would have been lost¹⁵⁸. Sender governments, moreover, usually bend to wishes of specific social sectors, whose activities are likely to be particularly affected by the imposition of sanctions¹⁵⁹. In these cases, sanctions come to be seen as unfair and discriminatory levies, underlining thus the importance of implementing an unequal distribution of sanctions' costs.

3.2 THE COSTS FOR NEIGHBOURING COUNTRIES: THE ARTICLE 50 PROCEDURE

Sanctions are undoubtedly designed to harm or to bring about a policy change in countries that have committed a threat to the peace, breach of the peace or act of aggression, or other breaches of international law. However, comprehensive economic sanctions, which modify well-established patterns of economic relationship, can hit as heavily or even more heavily on innocent neighbours and others as on the wrongdoers¹⁶⁰. Permanent members of the UN Security Council, indeed, can easily bypass expensive sanctions by using their veto power, while other UN countries have not this opportunity. This substantial inequality in sacrifice has given birth to several complaints advocating for the establishment of burden-sharing strategies.

Article 50 of the UN Charter can be considered one of them, in theory. The San Francisco drafters forecasted problems and injuries likely to be encountered by countries committed with the implementation and enforcement of sanctions imposed by the Security Council under Chapter VII of the Charter. It states that

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a member of the United Nations or not, which finds itself confronted with special

¹⁵⁸ Margaret P. Doxey, p. 69.

¹⁵⁹ Hufbauer, Gary Clyde, Jeffrey J. Schott, and Kimberly Ann Elliott. *Economic sanctions reconsidered: History and current policy*. Vol. 1. Peterson Institute, 1990, p. 76.

¹⁶⁰ Margaret P. Doxey, p. 70.

economic problems arising from the carrying out of these measures shall have a right to consult the Security Council with regard to the solution of these problems¹⁶¹.

It is understood that the aforementioned article entitles third party states to consult the Council when facing special economic problems in implementing economic sanctions. The article, moreover, extends these rights also to non-member states, such an extension being the evidence of real harms that can be provoked by United Nations measures. What is more, the extension helps inducing non-member states to participate in sanctions regime, as happened with the Federal Republic of Germany when sanctions were imposed against Rhodesia and as did Switzerland in the case of sanctions against Iraq¹⁶².

However, the article does not clarify what kind of measures may be utilized by the Council to solve problems arisen from the implementation of sanctions, nor has it provided more than a room for complaints, thus resulting in a total dead-end. Indeed, the article does not entail a corresponding duty on the part of the Security Council to provide a specific remedy¹⁶³: it establishes a mere “right of consultation¹⁶⁴”. The usual practice of the Council, when dealing with countries which have invoked Article 50, has been limited to requests of assistance to other countries and specialized agencies¹⁶⁵, so that countries are left with a choice between the “lesser of two evils”, namely the choice between the suffering from measures imposed on a trade partner or their violation¹⁶⁶.

This notwithstanding, Article 50 has been invoked several times, by two governments in the Rhodesian case, by 21 in the Iraqi case and eight in the Serbian one. It is worth analysing these cases in detail.

¹⁶¹ Art. 50 of the Charter of the United Nations.

¹⁶² Vera Gowlland-Debbas (ed.), *National Implementation of United Nations Sanctions. A Comparative Study* (Leiden: Nijhoff, 2004), p. 333.

¹⁶³ B. Simma (ed.), *The Charter of The United Nations: A Commentary* (Oxford University Press, 1994), pp. 659-661.

¹⁶⁴ Art. 50 of the Charter of the United Nations.

¹⁶⁵ Vera Gowlland-Debbas (ed.), p. 334.

¹⁶⁶ Laurence Boisson de Chazournes, “Collective Security and the Economic Interventionism of the UN – the Need for a Coherent and Integrated Approach”, *Journal of International Economic Law* 10, no. 1, 2007: 51, cited in Golnoosh Hakimdavar, *A Strategic Understanding of UN Economic Sanctions: International relations, law and development*, 2013, p. 98.

3.2.1 Rhodesia

Sanctions against Rhodesia were the Council's first order for economic measures and were imposed in November 1965 when the white minority regime led by Ian Smith unilaterally and illegally declared the country's independence. Sanctions imposed a total ban on trade with Rhodesia and a ban on air links; the monitoring of their implementation was up to a Committee set up by the Security Council. Almost fifteen years later, in December 1979, sanctions were finally removed. Their economic effects seemed to be much stronger on neighbouring countries than on Rhodesia itself, whose economy proved to be very resilient and which benefited from South Africa's ignoring of its obligations under the UN Charter. Therefore, excepting for South Africa, a heavy burden was placed on all neighbouring countries, mostly Zambia, Tanzania, Mozambique and Botswana¹⁶⁷. Zambia, part of the Central African Federation, was particularly affected by sanctions since its trade links were mostly oriented southwards to Rhodesia, Mozambique and South Africa. For example, Zambian copper mines, providing more than 90 percent of foreign earnings, heavily relied on Rhodesian coal carried by Rhodesian railways which, in turn, constituted the most important Zambian links with outside world since the same railways carried copper to the coast for shipment¹⁶⁸. Until June 1967, Zambia and Rhodesia jointly owned rail and air services, and the jointly owned Kariba hydroelectric project was located in Rhodesia, while the Beira-Umtali oil pipeline provided for both countries' needs¹⁶⁹. After having closed its borders with Rhodesia in 1973, Zambia soon found itself in between an uncomfortable choice: to see its economy to totally collapse or to reopen its borders, as it happened in 1978. Problems were increased by the dramatic fall in copper prices, due to Zambian efforts to develop self-sufficiency and alternative, but costlier, routes.

Already in 1968, the Security Council issued Resolution 253, requesting UN members, specialized agencies and other international organizations to "extend assistance to Zambia as a matter of priority with a view to helping it solve such special economic problems as it may be confronted with arising from the carrying out of these decisions of the Security Council¹⁷⁰". The critical situation faced by Zambia, because of its consistent economic as well as political

¹⁶⁷ Margaret P. Doxey, p. 70.

¹⁶⁸ Margaret P. Doxey, p. 71.

¹⁶⁹ *Id.*

¹⁷⁰ UN Doc. S/RES/253 (1968), para. 15.

links with Rhodesia, had already been acknowledged by the Secretary-General one year before when the country was asked, as all the others, to comply with sanctions imposed by Resolution 232 against Rhodesia. Difficulties and hardships related to transportation, communication, storage of fuel and other supplies were identified, so that the call for a technical mission aimed at finding practical solutions was issued¹⁷¹. In 1970, however, the Zambian government expressed its “deep regret that no Member States, specialized agencies or other international organizations [had] given Zambia effective assistance as a result of these Resolutions¹⁷²”, referring to the effects of Resolutions 232 (1966), 253 (1968) and 277 (1970), all dealing with requests of assistance while tightening sanctions regime in Rhodesia. Moreover, the Government stated that imports had decreased from 31 percent to below 2,5 percent and that exports had even fallen by 96 percent¹⁷³. Mozambique advanced similar appeals to the Security Council without reaching a practical solution.

The Government of Malawi fully complied with Resolution 232 (the ban of imports of tobacco, asbestos, hides and skins, leather, chromium ore, iron ore, copper and pig-iron¹⁷⁴), but, in its report on the measures adopted, the government specifically referred to Article 50 of the Charter and highlighted the impossibility for the country to prohibit altogether the imports of certain products, such as sugar and meat, because of its complete dependence on Rhodesia for the enjoyment of these commodities¹⁷⁵. When sanctions were extended by the issuance of Resolution 253 (1968), the Secretary-General was informed that Malawi would have not been “able to effect significant new measures above what has already been done¹⁷⁶”, and that implementation of new sanctions could have taken place “only at the cost of severely imperilling its own economy, if not breaking it¹⁷⁷”.

Another country, that proved to be extremely vulnerable to the sanctions regime in Rhodesia, is Botswana. The latter can be considered, at the time of sanctions’ imposition, the poorest African country, with a heavily grant-aided economy fully dependent on the cattle industry. Vital import requirements as well as exports of meat and related products passed through

¹⁷¹ Vera Gowlland-Debbas, p. 414.

¹⁷² S/9853/Add. 1, Annex 1 (1 October 1970) 5 at 6.

¹⁷³ *Id.*

¹⁷⁴ Vera Gowlland-Debbas, p. 414.

¹⁷⁵ S/7781, Annex 2 (21 February 1967) 36.

¹⁷⁶ S/8786, Annex II (28 August 1968) 48.

¹⁷⁷ *Id.*

Rhodesia, crossing both countries through Rhodesian Railways. The Botswanan government declared the country not able to survive without the railway, posing “in the terms of Article 50 of the Charter special economic problems for Botswana¹⁷⁸”.

Sanctions-induced costs cannot be, furthermore, separated from the costs due to their implementation: for example, in Zambia UN missions estimated an expenditure of \$100 million in the period 1965-8, and \$744 million between 1972 and 1977¹⁷⁹.

All these newly independent states, already struggling against problems of underdevelopment, illiteracy, economic and social hardships, not to mention vulnerability to natural disasters, found themselves fighting against new heavy burdens. Their acceptance to carry out the Security Council’s resolutions, despite appealing to Article 50 of the Charter, has been sharply in contrast with the “extreme reluctance of some of the wealthiest members of the international community to take action in defence of human rights demands which could threaten economic interests at home¹⁸⁰”. A mere right to consult the Security Council by States facing major disruption of trading patterns has proved to be inadequate. Article 50 raises, therefore, a fundamental problem of international burden-sharing and demands the establishment of an institutionalised approach to deal with the difficulties of such States, rather than neglecting them or dealing with them through unilateral action.

3.2.2 Iraq

As already largely explained, the sanctions regime imposed in Iraq proved to be disastrous to Iraqi civil population, which saw its fundamental rights outrageously violated. However, the Iraqi case is constituted of many key players: sanctions, indeed, had a strong impact also on neighbouring countries. 21 countries applied for assistance under Article 50 of the UN Charter: Egypt, Jordan and Turkey, plus Lebanon and Yemen, followed by Bulgaria, Czechoslovakia, Poland, Romania and Yugoslavia. These four East European countries, all restlessly trying to renovate their economic and political structures and fighting with consistent debts, faced a total loss of circa \$14 billion as a consequence of lucrative contracts’

¹⁷⁸ S/7781/Add. 2, Annex 6 (9 March 1967).

¹⁷⁹ Margaret P. Doxey, p. 73.

¹⁸⁰ *The Front-Line States: The Burden of the Liberation Struggle* (London: Commonwealth Secretariat, 1978), p. 9.

cancellation and the suspension of oil shipments. Very distant states, such as Bangladesh, India, the Philippines, Tunisia and Vietnam reported serious economic problems as well. The latter, namely Third World countries, suffered above all for the significant loss of remittances due to the reabsorption and repatriation of migrant workers. The Indian government, in particular, pointed out that “sanctions against Iraq and Kuwait will seriously affect not only India’s resource management, but will constitute a setback to its developmental efforts (...) India cannot, by itself, find short-term solutions¹⁸¹”. The total estimated economic loss of countries advocating for a burden-sharing procedure under Article 50 of the UN Charter would be worth \$30 billion¹⁸². And that is not all.

Egypt, already suffering for an impressive external debt, forecasted a drop in foreign exchange earnings of \$4.5 billion in 1990-1 and an expense of \$4.7 billion for the reabsorption of circa 600 000 former migrant workers¹⁸³. Turkey was dependent on Iraq for 60 per cent of oil import, while Yemen and Lebanon witnessed the exacerbation of their already precarious economic conditions¹⁸⁴. Jordan was, however, the most seriously affected: the burden that the country was forced to bear is equal just to the Kuwaiti one. Moreover, the country is geographically surrounded by Iraq and Israel and, at the same time, strategically sensitive to both, politically divided between its Palestinian population’s support for Hussein and torn by its dependence on Western aid and on Iraqi commercial and transport links¹⁸⁵. A huge flow of refugees poured out in the country, while Jordan witnessed a net loss in its exports of \$115 million per annum. Transit trade also decreased significantly, and additional expenses were sustained on any imports entering the country through the port of Aqaba¹⁸⁶.

Jordan asked the United Nations an emergency help to offset the losses, that is grants and long-term soft loans as well as oil and its derivatives at concessionary rates¹⁸⁷. However, the role of the UN seemed to have been limited to requests of assistance to other countries or specialized agencies. Indeed, in this context, the Security Council charged the Committee

¹⁸¹ UN Document S/21711, 5 September 1990.

¹⁸² UN Document S/26705, pp. 11-13.

¹⁸³ Margaret P. Doxey, p. 75.

¹⁸⁴ UN Document S/21737, 10 September 1990.

¹⁸⁵ Margaret P. Doxey, p. 75.

¹⁸⁶ Vera Gowlland-Debbas, p. 331.

¹⁸⁷ Margaret P. Doxey, p. 75.

established by Resolution 661 with the task of evaluating assistance requests under Article 50. In the Jordan case, the Committee formulated the following recommendations¹⁸⁸:

4. Requests the Secretary-General to undertake expeditiously, in cooperation with the Government of Jordan, appropriate remedies to the problems resulting from measures it has undertaken to comply with Resolution 661(1990), including especially the question of supply of petroleum and its derivatives”.
5. Appeals, based on this assessment, to all States on an urgent basis, to provide immediate technical, financial, and material assistance to Jordan to mitigate the consequences of the difficulties faced by Jordan as a result of this crisis.
6. Requests the Secretary-General to develop methods for the purpose of receiving information from States about the contribution which they have or are prepared to make to alleviate the longer term hardships confronting Jordan as a result of its application of economic sanctions against Iraq.
7. Calls upon the Agencies, organs, organizations and bodies of the United Nations system to intensify their programmes of assistance in response to the pressing needs of Jordan and to report to the Secretary-General what they are doing or are prepared to do.
8. Requests the Secretary-General to appoint a special representative to coordinate assistance being given to Jordan by agencies in the United Nations system, humanitarian organizations and States which are prepared to participate in this effort, taking into account bilateral assistance being provided by States to Jordan.

Despite these promising recommendations, practical and short-term solutions to special economic problems revealed to be more difficult to find than expected. Therefore, the twenty-one countries group wrote a letter to the President of the Security Council on 25 March 1991:

4. The problems affecting these countries persist, and in certain respects have been aggravated, while the appeals launched pursuant to the recommendations of the Security Council Committee and addressed to all concerned by the Secretary-General, have not evoked response commensurate to with the urgent needs of the affected countries.
5. Assistance to the affected countries in accordance with Article 50 of the Charter would reaffirm international solidarity and unity.
6. The 21 States launch a collective appeal, particularly to all donor States, to respond urgently and effectively in providing assistance to the affected countries by allocating additional

¹⁸⁸ UN Doc. S/Res/669 (1990), cited in Vera Gowlland-Debbas, p. 334.

financial resources both through bilateral channels and by supporting the actions of the competent organs and specialized agencies of the United Nations system.

7. The 21 States most seriously affected believe that it is essential that all member States, as well as the United Nations, the specialized agencies and other international organizations of the United Nations system, take all appropriate action to cooperate with them in the field of trade, employment, economic assistance and other areas, in order to alleviate the difficult economic problems facing them.
8. The affected countries believe that, given the magnitude of the difficulties they face, the Security Council should give renewed attention to these problems with a view to finding quick and effective solutions¹⁸⁹.

This letter shows the limited nature of the Sanctions Committee's recommendations, which practically failed to provide *quick and effective solutions* to the special economic problems faced by the group of countries. Again, it has been proved that the right of consultation with the Council enshrined in Article 50 does not correspond to a duty, on the part of the Council, to provide practical solutions and effective remedies. What is more, recommendations issued by the Committee were not part of an explicit Security Council resolution, rather they were expressions of an organ created by the Council, and nothing more. As a consequence, the serious hardship encountered by countries badly affected by economic sanctions on Iraq were not ultimately mitigated. In conclusion, it has been maintained that the Sanctions Committee would have methodically conceded permission to export to Iraq to more political weighed countries (permanent members of the Security Council which made application to the Committee for the export of industrial goods to Iraq), instead of those suffering from severe economic problems¹⁹⁰.

A part of the aid received by those countries has been originated by the Gulf Crisis Financial Coordination Group, established by the Bush Administration and headed by the US Treasury, receiving different amounts of funds. However, the harm suffered by these countries was addressed to a large extent by the United Nations Compensation Commission, created to give some justice to individuals, governments, corporations and other entities directly injured by the Iraqi invasion of Kuwait and its consequences. Against those scholars believing that the Compensation Commission should be viewed as a part of the system of international

¹⁸⁹ S/22382, 25 March 1991, cited in Vera Gowlland-Debbas, p. 335.

¹⁹⁰ Bisher Al-Khasawneh and Adnan Amkhan, in Vera Gowlland-Debbas (ed.), p. 337.

economic sanctions, thus exacting retribution rather than offering compensation¹⁹¹, the UNCC provided a measure of practical justice to those injured, being one of the most underreported success of the United Nations in the field of sanctions.

Resolution 687 (1991) reaffirmed Iraq's liability under international law "for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign governments, nationals, and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait". Security Council Resolution 692 (1991) established the United Nations Compensation Fund to pay compensation falling within these categories, and the Commission to administer it. Back then, various observers estimated that more than 100 states would have filed over two million claims¹⁹². The Commission concluded claims-processing in 2005: it filed about 2.7 million claims, worth of \$352.5 billion, paying out about \$47.8 billion in compensation awards to claimants¹⁹³.

The UNCC was a "fact-finding" organ of the UN Security Council, with a political or administrative mission¹⁹⁴, that can be broken down into further entities¹⁹⁵: the Governing Council, composed of fifteen members representing the SC composition and responsible for (1) managing the compensation fund, and (2) establishing the procedure for claims-processing; the Committee on Administrative Matters, created by the former, was charged with the task of advising the Executive Secretary and Governing Council on administrative matters, such as the annual budget; the Executive Secretary (and Secretariat) administered the compensation fund "under the policy guidance of the Governing Council¹⁹⁶", and prepared the Governing Council's sessions and the documents for the panels; finally, the Commissioners and Panels reviewed and evaluated the claims submitted and reported their recommendations to the Governing Council for approval.

In 1991, the UNCC evaluated all its dockets and established the procedure to be used to adequately handle the various categories of claims. The claims were divided into six

¹⁹¹ Caron, David D., and Brian Morris. "The UN compensation commission: practical justice, not retribution." *European Journal of International Law* 13.1 (2002), p. 183.

¹⁹² Townsend, Gregory. "The Iraq Claims Process: A Progress Report on the United Nations Compensation Commission & (and) US Remedies." *Loy. LA Int'l & Comp. LJ* 17 (1994), p. 974.

¹⁹³ The data are available at <http://www.uncc.ch/>, consulted on 15 May 2017.

¹⁹⁴ Charles N. Brower, *Lessons to be Drawn from the Iran-US Claims Tribunal*, 9 J. INT'L ARB. 51, 1992, p. 57.

¹⁹⁵ Townsend G., pp. 982-985.

¹⁹⁶ UN Doc. S/24589, Annex I, para. 18, 1991.

categories designated by the letters “A” through “F”¹⁹⁷. Categories “A”, “B” and “C” were deemed to be of an urgent humanitarian character, being these claims presented respectively by individuals who were forced to leave Kuwait or Iraq (“A”), individuals personally injured or whose relatives lost their lives (the Commission gave “B” claims priority for “humane” purposes) and individuals who suffered material losses. Under this first prog, the Commission adopted a “mass claims processing” technique. Since the summer of 1996, the UNCC and its panels focused on “D”, “E” and “F” larger and more complex claims. The “D” category included individuals who have losses over \$100.000¹⁹⁸, while “E” claims allowed corporations and other entities to file claims. Finally, “F” claims were filed by governments and international organizations, exceeding \$50 billion. Under this second prog, the Commission has examined individually the claims.

The UNCC, therefore, is entitled to calculate the amounts of compensation and to distribute, when authorized by the Governing Council, the monies to claimants in satisfaction of the amounts previously recommended by Panels of Commissioners and subsequently approved by the Governing Council¹⁹⁹. Under both progs, Iraq was notified through the “Article 16 Reports”, describing the type of claims to be heard, with the possibility of expressing its view. These reports were then sent to all governments which have filed a claim before the Commission.

In conclusion, the problem of neighbouring countries affected by the Iraqi sanctions regime has been largely addressed by the UN Compensation Commission and its organs. The Commission has succeeded in its task by completing all the work before the end of 2005. The successful mechanism, however, has been not replicated in other disastrous sanctions regimes.

¹⁹⁷ Caron, David D., and Brian Morris, p. 187.

¹⁹⁸ Townsend G., p. 991.

¹⁹⁹ Caron, David D., and Brian Morris, p. 189.

3.3 BUILDING A SANCTIONS REGIME IN FORMER YUGOSLAVIA (SERBIA/MONTENEGRO)

Before assessing the serious effects that economic measures had on neighbouring countries, it could be useful to briefly retrace the construction of the sanctions regime against Serbia/Montenegro since, from its outset, this case has been characterized by confusion and difficulty. Yugoslavia began to disintegrate in the summer of 1991, followed by a high confrontational and conflicting internal situation. Internal conflicts led, thus, the Security Council to adopt Resolution 713 of 25 September 1991, which determined the situation as a threat to the peace and security and imposed an arms embargo on all newly constituent republics, which were officially recognized only in 1992. Efforts to bring about a peaceful settlement of the conflict by the United Nations and European Government reached a dead-end, and confusion persisted. On 21 February 1992, the Security Council issued Resolution 743 establishing a UN Protection Force (UNPROFOR), described as “an interim arrangement to create the conditions of peace and security required for an overall settlement of the Yugoslav crisis”. Its mandate had, however, a consensual and non-enforcement nature, with limited and scarce resources. After that the Bosnian territory fell apart because of Bosnian Croats and Bosnian Serbs’ appropriations, the Security Council tightened sanctions against Serbia/Montenegro by adopting Resolution 757. The latter Resolution, of May 1992, asked neighbouring countries to dismantle and disarm all the irregular forces inside Bosnia and to recognize and respect its territorial integrity. Implicitly attributing all the responsibility to Serbia/Montenegro, the Security Council condemned ethnic cleansing and imposed a total ban on financial and commercial transactions as well as an air embargo²⁰⁰. The ban was also extended to diplomatic, cultural and sporting relations.

Other resolutions followed, prohibiting military flight on Bosnia (Res. 781, October 1992), the transshipment of oil and related products, coal, energy-related products, iron, steels and others (Res. 787, November 1992). In 1993, the stubbornness of Bosnian Serbs and their refusal to accept the peaceful settlement advanced by international mediators led to the embitterment of economic sanctions. Resolution 820 (April 1993) provided for the sequestration of all Serbian means of transportation, froze all Serbian nationals’ foreign assets

²⁰⁰ Margaret P. Doxey, p. 40.

and forbade the entrance and the exit of all goods (except for humanitarian ones and other categories so defined by the Yugoslav Sanctions Committee).

Sanctions, again, proved to be highly inadequate and so did the incessant efforts to reach a peaceful settlement of the conflict. “Safe areas” in Bosnia were constantly attacked by Bosnian Serbs, the conflict between Croats and Serbs reawakened and the refugee problem assumed dramatical proportions²⁰¹. On its part, the UN, which was now fully involved in the conflict, showed vacillation and inconsistency in its policy, so that UNOPROFOR became to be defined as the textbook case on “how not to do peacekeeping²⁰²”. It was charged, even without adequate means, with useless and conflicting tasks, such as the monitoring of dubious cease-fires or the protection of the so-called “safe areas”, hosting at the same time innocent civilians and military units.

The effects of sanctions regime in the former Yugoslavia have been largely evaluated not only on Serbia but also on all the neighbouring countries, showing that, when assessing the proportionality of the sanctions instrument²⁰³, the UN and the Security Council should also take into account the disrupting effects that economic measures may have on countries which have committed the only error of being the wrongdoer’s neighbours. These countries, indeed, have faced a disastrous fall in GDP due to mass unemployment and decrease in industrial output. In Serbia and all neighbouring countries, sanctions have been blamed for galloping inflation and industrial collapse, not to mention the development of black market. In conclusion, undernourishment hit one child in seven accompanied with a serious shortage in drugs, highlighting again that sanctions often disregard the moral dilemma of human suffering as a result of their implementation.

3.3.1 Effects of “Yugo-Sanctions” on Neighbouring Countries

The “Yugo-sanctions”, as they have been called, lasted about five years (1991-1996), even though they left a longer and trenchant dragging trail of problems in the whole area. Eight

²⁰¹ Margaret P. Doxey, p. 41.

²⁰² *Id.*

²⁰³ Hadewych Hazelzet, Assessing the Suffering From “Successful” Sanctions: An Ethical Approach, in Willem J.M. van Genugten and Gerard A. de Groot (eds), *United Nations Sanctions: Effectiveness and Effects, Especially in the Field of Human Rights. A Multi-Disciplinary Approach* (Intersentia: Antwerpen – Groningen – Oxford, 1999), p. 88.

countries (Albania, Bulgaria, Hungary, Romania, Slovakia, Macedonia, Uganda and Ukraine) asked for receiving international assistance and for consulting the Security Council under Article 50 of the UN Charter. They blamed sanctions for putting into risk their transition into market economy by interfering with transportation and communication links²⁰⁴ and complained about their costly national implementation. All these countries, moreover, presented a list of losses and of estimated costs due to sanctions, the total amounting to about \$10 billion.

A working-group was established by the Yugoslav Sanctions Committee through Resolution 724 (December 1991) in order to deal with applications on a case-by-case basis and make recommendations on the course of action the Security Council should have taken. The Secretary-General wrote then a letter to make a request for help to governments, specialized agencies, other international organizations, financial institutions and development banks, to which 19 states and 27 international bodies replied²⁰⁵. Even though a proper mechanism of implementation of the Article still does not exist, leaving space just to policy and assistance advices, a rather positive answer was reached at the regional level, where the Conference on Security and Cooperation in Europe (CSCE), now OSCE, organized a special meeting to determine proper mechanisms to help affected states.

One of the most seriously affected country was Bulgaria, in which sanctions had a strong impact on the rights of individuals and on Bulgarian democracy-building process. Indeed, as pointed out by Professor Stoyanov, democratic changes were imperilled by sanctions. He stated that

If world history is made by the world's democratic community, then it should not send accountants to evaluate the losses resulting from its own decisions. It should rather send specialists in Strategic Planning and Macroeconomics or experts in Geopolitics. Then the sums for loss compensation requested by Bulgaria would prove to be a trifle, compared to the real value of the losses caused to our country by the adopted resolutions with the possible outcome of a return to communism and political destabilisation of the country²⁰⁶.

²⁰⁴ Margaret P. Doxey, p. 78.

²⁰⁵ Margaret P. Doxey, p. 79.

²⁰⁶ In *Pari*, Issue 161, 19 August 1993, cited in Petar Butchkov, Nadejda Kovatcheva and Rossitza Raytcheva, The Economic and Political Effects of the "Yugo-Sanctions" on Neighbouring Bulgaria, in Willem J.M. van Genugten and Gerard A. de Groot (eds), *United Nations Sanctions: Effectiveness and Effects, Especially in the Field of Human Rights. A Multi-Disciplinary Approach* (Intersentia: Antwerpen – Groningen – Oxford, 1999), p. 37.

The devastating effects of “Yugo-sanctions” in Bulgaria found expression not only in violations of fundamental rights, such as the right to food or the right to adequate health care, but they also entail the violation of rights playing a fundamental role in building an upright democratic society, namely the right to participate in the social and political life, the right to travel freely and establish civil relations²⁰⁷. The Bulgarian economy, whose most important trade route crossed Serbia/Montenegro, faced a loss amounting to about \$8 billion, with an increasing development of means of “shadow” economy mechanisms and criminalization of the society. Psychological effects and changes in living habits due to sanctions had an even greater impact: livestock and agricultural, traditional Bulgarian means of subsistence, were gradually destroyed and substituted with smuggling; Bulgaria became the official soil on which to violate sanctions by the Serbs themselves accompanied with the gradual infiltration of Serb criminal groups. Suspicion and diffidence spread around the country in relation to Bulgarian politicians, ever more connected to crime, and to the international community, which seemed ever less interested in Bulgarian problems. The latter’s program for compensation of losses, indeed, fell short of Bulgarian needs and requests, both economically and politically²⁰⁸.

The simultaneous disintegration of Yugoslavia and the incessant conflict rendered more difficult to precisely assess the effects of economic sanctions, even though it is certain that they have caused consistent losses and hardship to countries in the region, above all in terms of modification of classic and traditional economic routes.

3.4 SOME CONCLUSIONS ON THE CONSEQUENCES OF SANCTIONS ON NEIGHBOURING COUNTRIES

When assessing the effects of economic sanctions on counties bordering the target state, it is unavoidable, although in an implicit way, to consider rights of populations living off of those economies. Human rights are, indeed, strictly connected to all the spheres of political, economic and social life. These spheres could be easily affected by the imposition of sanctions

²⁰⁷ Petar Butchkov, Nadejda Kovatcheva and Rossitza Raytcheva, The Economic and Political Effects of the “Yugo-Sanctions” on Neighbouring Bulgaria, in Willem J.M. van Genugten and Gerard A. de Groot (eds), *United Nations Sanctions: Effectiveness and Effects, Especially in the Field of Human Rights. A Multi-Disciplinary Approach* (Intersentia: Antwerpen – Groningen – Oxford, 1999), p. 38.

²⁰⁸ Petar Butchkov, Nadejda Kovatcheva and Rossitza Raytcheva, p. 39.

not only in the target states but also on countries which find in the target a vital economic partner or use its territory as an essential economic trade route. These cases of UN sanctions all showed the destructive impacts that sanctions can have on economies in a phase of restructuring or just not enough strong to bear all the burdens coming from the hindrance to transport links and the block of usual economic relations. In the meanwhile, populations undergo a process of sharp impoverishment. In Bulgaria, Jordan, Zambia and all the others, the brake putted to the free exchange of goods created a huge deficit which, in turn, encouraged the establishment and the development of organised crime, benefiting from newly originated opportunities of making illegal quick money²⁰⁹.

Article 50 of the United Nations Charter originated from the drafters' awareness of potential hardship to countries not directly involved in the sanctions regimes. However, the right of consultation enshrined in the article clearly does not correspond to a right of compensation or, at least, of effective remedy. Even when the "Charter Committee²¹⁰", between 1992 and 1993, submitted its working papers and the two draft resolutions presented by the Third World group advocating for the establishment of a compensation fund financed by a combination of voluntary and assessed contributions, most governments lined up with flexibility and case-by-case approach, thus leaving alone international financial institutions to carry out the whole work²¹¹. Indeed, the UN Compensation Commission in Iraq is, to date, the only successful program through which the Organization itself has provided a measure of practical justice to those injured both by the sanctioned wrongdoer and by sanctions themselves.

The obvious result to collateral damages is, in this context, the weakening of countries' willingness to apply and implement UN economic sanctions. Price of sanctions is, indeed, paid not only by people living the target country, but by all other people living in countries having economic, political and social relations with the former and which, undoubtedly, have nothing to do with its violations. It seems incredible that countries and citizens, completely extraneous to the circumstances that led to the imposition of sanctions and that diligently implement UN sanctions, must passively witness the destruction and destabilization of their

²⁰⁹ Petar Butchkov, Nadejda Kovatcheva and Rossitza Raytcheva, p. 44.

²¹⁰ Whose full name is "The Special Committee on the Charter of the UN and the Strengthening of the Role of the General Assembly".

²¹¹ Margaret P. Doxey, p. 81.

own economic, political and social lives²¹². This outcome works so as to reinforce the assumption according to which multilateral sanctions are not human rights' friends.

Secretary-General Boutros-Ghali, in its report *Agenda for Peace* (1992), pointed out that countries facing special economic problems should “not only have the right to consult the Security Council regarding such problems, as Article 50 provides, but also have a realistic possibility of having their difficulties addressed”. In 1995, as supplement to *Agenda for Peace*, he also asked to recognize sanctions as collective measures and, because of their very nature, their effects likely to be “born equitably by all Member States and not exclusively from the few who have the misfortune to be neighbours or major economic partners of the target country”. Suffice to say that no progresses have been made in this field and collateral damages, with damage to civilian population of target states, constitute a huge hurdle in future sanctions' enforcement.

²¹² Petar Butchkov, Nadejda Kovatcheva and Rossitza Raytcheva, pp. 44-45.

CHAPTER IV

LEGAL LIMITS TO THE SECURITY COUNCIL ACTION AND THE SHIFT TO TARGETED SANCTIONS

3.1 DEFINING LEGAL LIMITS

The Security Council derives its authority through the United Nations Charter, its powers being specifically defined in Chapter V of the Charter. Of all the UN organs, the Charter endows *only* the Security Council with powers related to enforcement actions to maintain international peace and security. Chapter VII, in particular, bestows upon the Council the authority to adopt measures not involving the use of force i.e. economic sanctions, and even to authorize the use of military force, in response to a threat to the peace, a breach of the peace or an act of aggression. Now, it has been largely proved that economic sanctions can provoke substantial harm to civilian populations, so that a question arises: can the Security Council deliberately curtail a set of rights because of its peace-maintenance mandate? If the answer is yes, do limits beyond which the organ's conduct against innocent civilian could no longer be

tolerated exist? The existence, or not, of such limits can help in assessing sanctions compatibility with human rights.

In its Advisory Opinion on the *UN expenses* case, the International Court of Justice (ICJ) defined the Security Council as a “subject of international law”, by virtue of which it is “capable of possessing both rights and duties²¹³”. This argument, of course, runs against the view according to which the Council action is not constrained by any rules when acting for the maintenance of international peace and security. This view has been justified by referring to the necessity to confer upon one institution boundless powers in order to efficaciously confront any potential threat to humanity²¹⁴. However, given the last evidences, it seems far from indisputable that endowing the Security Council with powers able to neglect the law would contribute to the maintenance of international peace and security; rather, a defined legal framework may strengthen the effectivity of the Security Council actions.

The Security Council and the General Assembly of the United Nations are, among others, institutions of the international legal system, which has the same characteristics and is subject to the same conditions of any other legal system. What are the features of a “legal system”? Hart states that

There are (...) two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system’s ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials (...) and appraise critically their own and each other’s deviations as lapses (...)²¹⁵.

In Hart’s words, thus, the Security Council is an *official of the international legal system*, a status that renders the UN organ bound by “common public standards of official behaviour”. Together with other institutions of the international legal system, the Council is expected to “appraise critically” its conduct in order to avoid deviations. The argument is enough strong to hush up views according to which the Security Council stands above or beyond the law.

²¹³ Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949, ICJ Rep. 174, p. 179.

²¹⁴ Elias Davidsson, “Legal Boundaries to UN Sanctions”, 7 *IJHR* (2003), p. 2.

²¹⁵ H. L. A. Hart, cited in Elias Davidsson, p. 3.

Therefore, it is subject to a range of principles and rules finding application in the international legal system²¹⁶.

When Libya asked the International Court of Justice to judge the legality of some resolutions issued by the Security Council, in the *Libya v. US case*, Judge Shahabuddeen raised a number of relevant issues. Indeed, Libya challenged Resolution 748 (1992) by blaming the Council of having overridden its legal rights and asked the Court to recognize any limitations on the power of the organ. The Judge, then in his separate opinion, asked

Are there any limits to the Council's powers of appreciation? In the equilibrium of forces underpinning the structure of the United Nations within the evolving international order, is there any conceivable point beyond which a legal issue may properly arise as to the competence of the Security Council to produce such overriding results? If there are any limits, what are those limits and what body, if other than the Security Council, is competent to say what those limits are?²¹⁷

In the same case, then, majority and dissenting opinions within the ICJ agreed that such limits exist. Limits that cannot be exclusively inferred by the Security Council itself. Moreover, the legality of the Council actions "must be judged by reference to the Charter as a constitution of *delegated* powers²¹⁸". On the same footing, Judge Bedjaoui went further in arguing that "all the principal organs of the United Nations must respect not only the Charter but international law itself, if only because the founding States did not invest them with any function as international legislators or creators of new rules²¹⁹". In other words, the existence of an international organization is primarily due to the sovereign will of its signatories. Article 24(1) of the UN Charter enshrines that Member States "confer on the Security Council primary responsibility for the maintenance of international peace and security", being the organ a grantee of rights in this hierarchical relation²²⁰. Consequently, the organ cannot exceed these rights without express consent of the grantors²²¹. And because states cannot

²¹⁶ Elias Davidsson, p. 4.

²¹⁷ *Libya v. US case*, Separate Opinion by Judge Shahabuddeen, 1992, at 2-3, cited in Thomas M. Franck, *The "Powers of Appreciation": Who is the Ultimate Guardian of UN Legality?* 86 American Journal of International Law (1992), p. 522.

²¹⁸ Thomas M. Franck, *The "Powers of Appreciation": Who is the Ultimate Guardian of UN Legality?* 86 American Journal of International Law (1992), p. 522-23.

²¹⁹ Mohammed Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts*, Martinus Nijhoff Publ., Dordrecht (1994), p. 32.

²²⁰ T. D. Gill, *Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers Under Chapter VII of the Charter*, XXVI Netherlands Yearbook of International Law (1995), p. 68.

²²¹ Elias Davidsson, p. 6.

concede to an international organization rights they do not possess, on the basis of the legal principle *nemo plus juris transferre potest quam ipse habet*, and they carry duties and responsibilities towards the human person, the Security Council acting on the behalf of these states' community bears the same duties and responsibility as the single state²²². It even seems that, when it comes to human rights, Security Council obligations and commitments should follow higher standards because of its moral authority²²³.

Paragraph 2 of Article 24 declares that in “discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations (...)”. One listed purpose of the UN is to “achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character and *in promoting and encouraging respect for human rights and for fundamental freedoms (...)*”²²⁴ (emphasis added). Thus, do economic sanctions promote and encourage respect for human rights and fundamental freedoms?

Economic sanctions, however, can be assessed not only on the basis of the UN Charter dispositions. Indeed, as mentioned earlier, the United Nations Organization is an integral part of the international legal system, making it and its organs bound also by general principles of international law and by human rights norms. Among the other principles concerning respect for human rights, the most relevant are²²⁵:

- the principle of humanity, deriving from the inherent dignity of every human person. The principle is, moreover, enshrined in the Charter as well. It is a general principle of law that can be applied to Security Council's measures not involving the use of force. In light of this principle, sanctions should not be so harsh as to force people to live in sub-human conditions, suffering from disease or starvation;
- the principle of necessity, which applies to any public authority to which discretionary powers have been bestowed. It entails that the Security Council should act in good faith when imposing measures that are *necessary* to achieve its purposes. As a consequence, the curtailment of derogable human rights as a result of sanctions must be considered as necessary for the attainment of their legitimate purposes. Even

²²² *Id.*

²²³ Roger Normand, p. 25.

²²⁴ Article 1(3) of the Charter of the United Nations.

²²⁵ Elias Davidsson, pp. 8-13.

granting the necessity of the sanctions at stake, the Council have still to demonstrate that these measures will not have a disproportionate impact on civilians²²⁶.

- The principle of proportionality, linked to the previous one, according to which “the extent of any limitation should be strictly proportionate to the need or the higher interest protected by the limitation²²⁷”. It thus implies the existence of a reasonable relation between sanctions and the goal that sanctions want to achieve. However, it has been already explained that proportionality can easily turn into its contrary when dealing with economic sanctions.

With regard to human rights norms, in the past fifty years a growing body of human rights law, ranging from the 1948 Universal Declaration of Human Rights to the 1989 Convention on the Rights of the Child, has been nearly universally accepted. The applicability of human rights, including economic, social and cultural ones, to UN-imposed economic sanctions has been asserted by several scholars, authors and institutions. Among the others, also the UN Committee on Economic, Social and Cultural Rights has developed a Comment concerning the relation between sanctions and respect for this range of rights²²⁸, in which it has been stated that “the inhabitants of a given country do not forfeit their basic economic, social and cultural rights by virtue of any determination that their leaders have violated norms relating to international peace and security” (para. 16). Of course, this opinion in no way can bind the Security Council; however, it fosters a growing awareness and witnesses an increasing agreement that the UN executive organ has to be considered bound not only by non-derogable human rights, but also by economic, social and cultural ones, in so far as its sanctions can severely affect civilian populations and because an indissoluble bond ties these two sets of rights.

The Security Council, therefore, has both *procedural* and *substantive duties*, the former requiring a formal recognition of its obligations and principles related to human rights, and the latter requiring their practical respect when the organ performs its activities²²⁹. In particular, procedural duties require the organ to acknowledge, take in consideration and be

²²⁶ Roger Normand, p. 31.

²²⁷ Subrata Roy Chowdhury, *Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, Pinter Publishers, London, 1989, p. 102.

²²⁸ See ECOSOC, UN Committee on Economic, Social and Cultural Rights, General Comment No. 8 (1997), “The Relationship Between Sanctions and Respect for Economic, Social and Cultural Rights”, UN Doc. E/C.12/1997/8.

²²⁹ Roger Normand, p. 25.

responsible for the impact of its decisions on human rights, in a sort of self-regulating effort given the absence of any other institution capable to review its decisions. The sanctions regimes imposed by the Security Council have, nonetheless, unintentionally disregarded these minimum procedural duties in both cases of sanctions against Iraq and Haiti. In the former case, in particular, many statements concerning the appalling humanitarian situation have led to the substantial failure of the Council to admit its own legal duty in protecting the rights of the civilian population or in preventing its suffering²³⁰. It is witnessed by the *Report on the situation of human rights in Iraq* submitted by Special Rapporteur, Mr. Max van der Stoel, which blames Iraq for violating the human rights of its own people, including the right to food, even disclaiming any existent responsibility on the part of the Security Council²³¹.

Furthermore, the UN has spent significant resources and professional personnel in monitoring the exact implementation of resolutions through five newly-originated commissions (dealing with the dismantling of Iraqi weapons programs, the establishment of boundary with Kuwait and the location of Kuwaiti prisoners of war), whose activities have been accompanied with actual or threatened military action²³². However, no commission or funding program have been destined to the monitoring of sanctions' effects on human rights, further disregarding its procedural duties. After that the Iraqi government refused the application of Resolutions 706 and 712, the first deal regarding a limited purchase of oil to face population's humanitarian needs, the Council blamed Saddam Hussein trying to avoid any legal responsibility on its part²³³. The then-President of the Council, indeed, stated

The Government of Iraq, by acting in this way, is foregoing the possibility of meeting the essential needs of its civilian population and therefore bears the full responsibility for their humanitarian problems²³⁴.

The Security Council has blamed Iraq for having refused to comply with the aforementioned resolutions and for having spent a huge amount of resources to buy luxury items for Saddam Hussein rather than for essential items²³⁵. While it is true that immediate compliance would have brought to the lifting of sanctions and, therefore, to a limited civilian suffering. But, as

²³⁰ Roger Normand, p. 26.

²³¹ E/CN.4/1996/61, 4 March, 1996.

²³² Roger Normand, p. 27.

²³³ *Id.*

²³⁴ Statement by the President of the Council, S/23517 (5 February 1992).

²³⁵ Security Council Resolutions 706, 712 and 986.

already pointed out, the Security Council carries human rights duties regardless of target government's conduct. In a study for the UN Sub-commission on the Promotion and Protection of Human Rights, Mr. Bossuyt has concluded stating that "sanctions regime that clearly violate international law, especially human rights and humanitarian law, need not to be respected. This is especially true when the imposers are clearly on notice of those violations and have undertaken no effective modification²³⁶".

However, it is important to recognize some steps through which the Security Council has faced its responsibility and acknowledged its international obligations with regard to human rights. Indeed, being the grantee of delegated powers, the Security Council is bound to the same human rights commitments as the Member States. Using the same typology of obligations developed in the academic debate on human rights, it is possible to conclude that the Security Council must *protect*, *respect* and *fulfil* human rights when imposing measures not involving the use of armed force. Once proved that UN sanctions regimes may have severe and deleterious effects on human rights, in particular after the Iraqi experience, it seems that the Security Council has become more aware and sensitive to the effects that its policies and decisions may have on the enjoyment of fundamental rights in target and third countries. And it is largely proved by the recognition of its commitments through the establishment of more structured and beneficial humanitarian exceptions, the most important example being the Oil-for-Food program in Iraq, or through the shift to targeted sanctions, which have greatly minimised the harm inflicted on civilian populations. Despite there is still a long road ahead even with regard to targeted measures, the Security Council seems to have become aware of the irreducible incompatibility of traditional sanctions with human rights; an incompatibility that can be gradually reduced through the adequate use of targeted instruments.

3.2 THE SHIFT TO TARGETED SANCTIONS

When the Security Council orders sanctions pursuant to Article 41, it appoints a Committee to monitor that sanctions to be adopted by States are enforced in practice. The Committees perform all other functions related to the management of sanctions and, among the most

²³⁶ Mr. M. Bossuyt, Doc. E/CN.4/Sub.2/2000/3, para. 109, cited in F. Coomans, Application of the International Covenant on Economic, Social and Cultural Rights in the Framework of International Organizations, *Max Planck YUNL* 11, 2007, p. 379.

controversial tasks, administer the “lists” of people against whom the Security Council has adopted sanctions. The monitoring of sanctions’ implementation is important also to assure that no useless pain is inflicted on civil population of target states, a requirement which has assumed a role of utmost necessity given the result of economic sanctions against Iraq during and after the Gulf war. Derogations for food and medicines had been already authorized by the Council in several resolutions, showing the willingness of the UN organ to comply with general international law, in particular international humanitarian law, when adopting economic sanctions. The problem, however, still relies on the nature of the limits to the discretion of the Security Council: is self-restraint guided by the Council’s awareness of being bound by the Charter or general international law, including *jus cogens*, or is it a freely felt unilateral manifestation of compliance with the former²³⁷? Certainly, when imposing measures governed by Chapter VII, the Security Council is entitled to distance itself from both general and treaty international law. Article 41, in particular, should be understood as empowering the Council to recommend or decide actions which may not be compliant with international law (for example, trade embargoes imply the violation of trade treaties). However, as already mentioned, limits to the discretion of the Security Council exists and they are constituted by norms of international law from which the Council cannot depart. First and foremost, the mandatory nature of “peremptory” international law, well-known as *jus cogens*, was sanctioned in Article 53 of the 1969 Vienna Convention on the Law of Treaties, then extended to all other fields of international law, and it can be considered as a proper limit to the Security Council’s action. The aforementioned article, indeed, ratifies that an entire treaty has to be declared invalid when its provisions conflict with *jus cogens*. At the same time, resolutions conflicting with peremptory norms would not have effects, being invalid, and would not create any obligations on the part of implementing States. Although *jus cogens* presents a whole set of problems, first and foremost because of the impossibility to determine in an accurate and objective way which rules fall under it, the Security Council must respect a *minimum and insurmountable* humanitarian limit of survival, regardless of “the security need to be safeguarded²³⁸”, born as a customary norm.

²³⁷ Benedetto Conforti and Carlo Focarelli, *The Law and Practice of the United Nations*, Nijhoff, 2010, p. 247.

²³⁸ *Id.*, p. 249.

In these regards, after that the comprehensive sanctions regime imposed on Iraq had a devastating effect on the country's economy and its citizens, showing the terrible toll that economic sanctions can exact from innocent civilians, the UN Security Council decided to use targeted or "smart" sanctions as main tool to deal with challenges to international peace and security. Since 1994, no new sanctions imposed by the Organization have established comprehensive sanctions regimes, but the Security Council made structural changes to sanctions themselves by targeting individuals and entities directly responsible for the impugned behaviour or by focusing on economic sectors which may contribute to the wrongdoing. Targeted sanctions have been used by the Council as an alternative to traditional sanctions to address a myriad of challenges to international peace and security, namely armed conflict and terrorism, as well as to consolidate peace agreements, to enhance peacebuilding processes, to decrease the proliferation of nuclear weapons and, recently, to safeguard civilians under the Responsibility to Protect²³⁹. In order to limit humanitarian impacts, this type of sanctions is not indiscriminately directed to the whole population but it targets leaders, decision-makers and their supporters as well as economic sectors or geographic regions.

Targeted sanctions, furthermore, differ from comprehensive measures because of their flexible and agile nature as policy instruments. They represent a more adaptable alternative that can be reshaped on the basis of the degree of influence they want to exert, the rationale they want to serve and in response to changing target behaviours. However, targeted sanctions can be considered far more complex instruments than traditional sanctions, since their design and implementation imply an accurate and precise knowledge of a country's economy and internal politics, in order to ensure that sanctions will effectively affect the political leadership. Notwithstanding this, targeted sanctions have become over the last twenty years the ordinary, if not usual, instrument used by the Security Council in its efforts to maintain international peace and security. Their success is, undoubtedly, due to three fundamental reasons: unlike comprehensive measures, targeted sanctions can be easily, speedily and subtly coordinated with other policy measures (diplomacy, mediation, legal referrals, etc.); they can

²³⁹ Biersteker, Thomas J., Sue E. Eckert, and Marcos Tourinho. *Targeted sanctions*. Cambridge University Press, 2016, p. 2.

be employed in an incremental way and be adjusted in response to target actions and, last but not least, they do not produce those wide, indiscriminate and dramatic humanitarian effects²⁴⁰.

Nowadays, the United Nations often uses targeted sanctions to deal with different types of threats to international peace and security, ranging from the extradition of criminal suspects to opposing terrorism and proliferation of nuclear weapons, to supporting peace-making processes. Among the most frequent objectives of Security Council targeted sanctions, 59 percent of targeted sanctions have been used to deal with threats associated with armed conflicts. Since 1992, 12 percent of targeted sanctions episodes focused on countering terrorism, while 10 percent of sanctions found their basic goal in the support and restauration of democracy. Since 2006, 11 percent of targeted sanctions have also been employed to halt the proliferation of nuclear weapons, as in their imposition against the DPRK and Iran. Finally, 7 percent of cases refer to the imposition of targeted sanctions for three main goals: support of judicial process (Lebanon after the Hariri assassination, 2005); support for improving governance of natural resources (Liberia, 2006); protection of civilians under R2P (Libya, 2011)²⁴¹.

Targeted sanctions can be broken down into six broad categories. In these regards, a part of the table built in chapter 1 will be here represented:

TARGETED SANCTIONS

- vi. Individual sanctions
 - (d) Travel ban
 - (e) Asset freeze
 - (f) Asset freeze and transfer
- vii. Diplomatic Sanctions
 - (e) Revision of visa policy
 - (f) Limiting travel of diplomatic personnel
 - (g) Limiting diplomatic representation
 - (h) Limiting number of diplomatic personnel
- viii. Sectoral sanctions
 - (g) Arms imports embargo
 - (h) Aviation ban
 - (i) Arms exports ban
 - (j) Proliferation-sensitive material
 - (k) Shipping

²⁴⁰ *Id.*, p. 17.

²⁴¹ *Id.*, p. 25.

- ix. (l) Oil service equipment
Commodity sanctions
 - (g) Diamonds exports ban
 - (h) Petroleum exports ban
 - (i) Timber exports ban
 - (j) Luxury goods
 - (k) Charcoal exports ban
 - (l) Wildlife
 - (m) Other
 - x. Transportation sanctions
 - (a) Aviation ban
 - (b) Shipping ban
 - (c) Other
 - xi. Financial sector sanctions
 - (f) Investment ban
 - (g) Diaspora tax
 - (h) Central bank asset freeze
 - (i) Financial services
 - (j) Sovereign wealth funds
-

Individual/entity sanctions, such as travel bans and asset freezes, are adopted against individuals and corporate entities, e.g. companies or political parties. Diplomatic sanctions refer to measures such as limitation of diplomatic representation, travel, revision of visa policy and suspension from intergovernmental organizations. In other words, diplomatic sanctions aim at reducing the diplomatic activity of a government. Sectoral sanctions usually correspond to arms embargoes, the most applied UN measure, implying the suspension of international arms or dual-use items in a country or region. Commodity sanctions, instead, entail the limitation of trade in specific resources, usually valuable natural resources (e.g. diamond, petroleum, timber, charcoal, etc.), in a given country or region. Financial sanctions, finally, hit core economic sectors and have a stronger impact on the economy.

All these types of targeted sanctions can be interpreted as part of a continuum, starting from the most targeted measure on one end to the relatively more “comprehensive” sanctions on the other end²⁴². Indeed, while individual/entity targeted sanctions are the most discriminating measures, diplomatic sanctions directly apply to only one sector of the governing body, sectoral sanctions with arms and related goods embargoes usually target the security sector.

²⁴² *Id.*, p. 26.

It is possible to go ahead by describing commodity sanctions as measures likely to affect some regions disproportionately, transportation sanctions affecting much of the population and, at the end of the continuum, financial sanctions which are the least discriminating measures having some effects on the population at large. It should be noted that even targeted sanctions may provoke collateral or unintended effects. Even though targeted sanctions do not produce the same range of unintended effects as comprehensive sanctions do, they may result in the increase in corruption or criminality, the strengthening of authoritarian rule and the diversion of resources. More importantly, humanitarian consequences have been recorded in many episodes, contributing in turn to the harm of the Security Council legitimacy and authority.

The real problem, however, resides in the need for targeted individuals' rights to be protected. Indeed, "smart" sanctions have proved to be very controversial when assessing their capacity to prevent violations of the rights of those against whom they are imposed. In particular, the entry in the "lists" of suspected terrorists is done through secret information and discretionary processes, as well as without the possibility for individuals involved to defend themselves bringing an action. Thus, different individual rights are at stake, primarily related to the right to effective judicial protection: e.g. the right to be informed of the reasons underlying listing, the right to defence, to be heard, to have access to evidence, freedom of movement, the right to respect for personal life and family life, the right to personal freedom, the right to property and proportionality²⁴³. In many official texts about counterterrorism targeted sanctions, the issue concerning the relation between targeted sanctions and individual rights is addressed by advocating for a "robust implementation" of sanctions alongside compliance with international law and human rights, humanitarian and refugee law²⁴⁴. However, it seems there is a long road ahead.

3.2.1 Enhancing the Compatibility of Sanctions with Human Rights: The European Contribution

The appeal for the recognition of some procedural protection against the Security Council action has particularly increased with the growth of the Council's involvement in the struggle

²⁴³ Monica Lugato, Sanctions and Individual Rights, in Ronzitti Natalino, ed. *Coercive Diplomacy, Sanctions and International Law*. Martinus Nijhoff Publishers, 2016, p. 172.

²⁴⁴ *Id.*, p. 174.

against international terrorism. The whole international community is, indeed, involved in this struggle, so that the Security Council, executive organ of the most representative Organization, can be considered its main character. The Security Council already imposed, with Resolution 1267/1999, a whole range of measures aimed at restraining the various assistance offered by the Afghan Taliban to international terrorism, by freezing funds and other financial resources, “including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban²⁴⁵”. The Council, moreover, ensured “that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the ground of humanitarian need²⁴⁶”.

On 19 December 2000, the Security Council confirmed the hard line taken to combat terrorism and, after having reiterated that terrorism constitutes an impressive and massive threats to international peace and security, adopted Resolution 1333. The Resolution strengthened the measures previously adopted, namely an air embargo and a funds and financial assets embargo, and urged the Sanctions Committee to comply with its tasks through the establishment and maintenance of “updated lists, based on information provided by States and regional organizations, of individuals and entities designated as being associated with Usama bin Laden²⁴⁷”. Over few years, many other resolutions followed, all aimed at strengthening the sanctions regime: Res. 1390/2002 enlarged the reach of sanctions to citizens of any nationality residing anywhere in the world, therefore interrupting the direct territorial link between sanctions and Afghanistan (then, Res. 1452/2002, Res. 1455/2003, Res. 1526/2004 and Res. 1617/2005 were adopted).

Even though not confined to the present case, the problem of wrong listings and the evident incapability to be delisted emerged in the context of targeted sanctions against the Taliban and al Qaeda. Indeed, the *modus operandi* of the Security Council works so as to impose measures on individuals without providing them any recourse to complain or to be heard. The

²⁴⁵ UN Doc. S/RES/1267 (1999).

²⁴⁶ *Id.*

²⁴⁷ UN Doc. S/RES/1333 (2000).

problem here is that individuals are deprived of their right to be heard at any point, either before or after listing, and once listed individuals cannot complain about their listing or about consequent sanctions, having not standing neither before the Security Council nor before the Sanctions Committee²⁴⁸. As a consequence, many individuals have brought a complaint before European courts, especially the Court of First Instance (CFI). Nine complaints related to the Taliban/al Qaeda listing have been brought before the CFI, while 16 challenges have been lodged at the national level. This has led to the judgements of September 2005 in the cases of *Yusuf and Kadi*²⁴⁹, smoothing the way toward the recognition of the need for better protection of targeted individuals.

Amongst other claims, Yusuf, the organization of Al Barakaat, and Kadi complained their wrongful entry in the list and the consequent jeopardy of their fundamental rights to property and to defence, without any possibilities to be heard. The Court of First Instance of the European Communities had, in other words, to check whether EU regulations, transposing and implementing in the European Union the Security Council resolutions concerning the entry of suspected terrorists in the list, were compliant with the fundamental rights safeguarded by EU law. In these two judgements, the European Court firstly held that it could not rule on the issue because, in respect of the special priority status conceded to the UN Charter and the binding resolutions adopted under Chapter VII, it lacked the authority to review whether Security Council resolutions were compatible with fundamental rights. What claimants asked, however, was not the annulment of UN resolutions, but rather the annulment of European acts through which resolutions have been carried out, inasmuch they are sources of derived law in conflict with European fundamental rights, posing their claims at the European level. Hereafter, with a remarkable U-turn, the European Court of Justice clearly outlined the existing relationship between the Community regulation and the international legal order, in particular dealing with the effects that UNSC Resolutions have on the former. The European Judge, reaffirming the nature of the European Community as a Community of Law, and thus restating the subjection of its Members and Institutions' acts to a constant check of compliance with the Treaty, has confirmed the impossibility for an international treaty to

²⁴⁸ Van den Herik, Larissa. "The Security Council's targeted sanctions regimes: in need of better protection of the individual." *Leiden Journal of International Law* 20.04 (2007), p. 799.

²⁴⁹ CFI, *Ahmed Ali Yusuf and al Barakaat International Foundation v. Council and Commission*, Case T. 306/01; *Yassin Abdullah Kadi v. Council and Commission*, Case T. 315/01, 21 September 2005.

jeopardize the competences ratified by the EU Treaty or the autonomy of the European legal system. In the light of this, the obligations deriving from the Charter of the United Nations cannot in any way compromise or impinge on EU Treaty principles, among which fundamental human rights are surely present. Consequently, having noticed that the UN regulation at stake did not ensure any effective legal protection and, rather, interfered with the free enjoyment of the claimant's right of property, the Court has concluded by agreeing upon the effective violation of fundamental rights. This judgement offers different causes of reflection: first at all, the European judge threw light on the longstanding contradiction (often) characterizing the UN-imposed counterterrorism sanctions, and secondly raised again the issue pertaining to the relation and interaction between European regulation and the UN legal system²⁵⁰. The issue of legal protection of individuals' fundamental rights, in relation to coercive actions aimed at maintaining international peace and security, vigorously emerged, in addition to the old question of which limits the Security Council should consider when acting under Chapter VII. After all, fundamental European principles prevail over Treaty and derived law, while Security Council's decisions are carried out at the European level through EU regulation which, being a source of secondary law, cannot waive neither Treaty law nor fundamental principles, including *jus cogens*²⁵¹.

Certainly, the statement that the Security Council must abide by *jus cogens* is not a news. In the *Application of the Genocide Convention (Provisional Measures)*, Judge ad hoc Sir Elihu Lauterpacht stated:

The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and *jus cogens*²⁵².

Jus cogens represents a juridical limit the Security Council cannot overcome, alongside with limits enshrined by Article 24 of the UN Charter, according to which the Council must “act in accordance with the Purposes and Principle of the United Nations”, amongst which there

²⁵⁰ Atteritano, Andrea. "Il congelamento dei beni quale strumento di lotta al terrorismo: il mantenimento della pace e della sicurezza internazionale e il rispetto dei diritti dell'uomo nell'ottica del Tribunale di I grado CE, tra *jus cogens*, risoluzioni vincolanti del CdS e principi comunitari fondamentali." *Giurisprudenza costituzionale* 2 (2006), p. 1703.

²⁵¹ *Id.*, p. 1718.

²⁵² Separate Opinion of Judge Lauterpacht, *Case Concerning the Application of the Genocide Convention (Bosnia and Herzegovina v. Yugoslavia)*, 13 September 1993, ICJ Rep., para. 100.

is the promotion and respect of “human rights and fundamental freedoms for all without any distinction as to race, sex, language and religion” (Art 1.3). It is important to notice, however, that among the Purposes and Principle enlisted in Article 1, there is also the maintenance of international peace and security and, consequently, the necessity to carry out actions in this field sometimes entails the sacrifice of some fundamental human rights. The Security Council, therefore, is called to conduct a balancing task, choosing the most effective course of action which, at the same time, would be the least erosive in terms of human rights and fundamental freedoms.

Once assessed that the Security Council is bound by *jus cogens*, Judge ad hoc Dugard had noted that “it is a short step to finding that the Court is the appropriate body to determine whether the Council has exceeded its powers²⁵³”. The Judge referred to the International Court of Justice (ICJ), adding that national or regional courts are not the appropriate place for the review of Security Council decisions. However, when it comes to targeted sanctions, the ICJ cannot act in this sense because targeted individuals have no standing before it²⁵⁴. Getting to the point, Yusuf and Kadi petitions raised the need for a better protection of individual rights because no legal paths are present at the UN level, and led the European Court to step in, smoothing the way towards the inclusion of a procedural reform on the Security Council’s agenda.

Among other relevant European proceedings, it is worthy to mention the decision of the EU CFI in the 2006 *People’s Mujahedin Organization of Iran* case. The difference here is that the Mujahedin had been listed pursuant to counterterrorism Resolution 1373, rather than Security Council Resolution 1267. The former, indeed, binds states to apply a range of measures against individuals, such as the freezing of assets, leaving them free to draw their own lists of people to be targeted²⁵⁵. The Council of the European Union is the organ charged with the task of establishing the lists. Individuals were to be listed on the basis of

Precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate,

²⁵³ J. Dugard, “Judicial Review of Sanctions”, cited in Van den Herik, Larissa. “The Security Council’s targeted sanctions regimes: in need of better protection of the individual.” *Leiden Journal of International Law* 20.04 (2007), p. 801.

²⁵⁴ Van den Herik, Larissa, p. 802.

²⁵⁵ *Id.*

participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds²⁵⁶.

For the first time, in the Mujahedin case, the EU judge annulled an EU decision not only because the process of listing had violated applicants' fundamental defence rights, namely the right to a fair hearing, but also because not sufficient reasons for listing had been provided by the Council. The annulment was justified on the assumption that human rights were to be safeguarded by the EC institutions, since it was up to the Community to place individuals and entities on the list. In 2008, moreover, the Human Rights Committee in the *Sayadi* case ruled against Belgium for its delays and flaws in delisting applicants after that the Belgian court commanded the State to initiate the delisting process.

The listing and delisting procedures' shortcomings, as evidenced by the European judgements as well as by reports and observations of international organizations and scholars, clearly highlighted the need for improvement.

3.3.2 The Need for Change: A Greater Respect for Human Rights

In order to truly assess the compatibility of targeted sanctions with human rights, it is fundamental to examine in depth which types of rights are infringed, and whether they could be considered derogable under exceptional conditions. The freedom of movement, limited by Security Council travel bans, is generally guaranteed by Article 12 ICCPR and by Article 2 of Protocol 4 to the European Convention on Human Rights (ECHR). The former article foresees exceptional circumstances, such as protection of national security, public order, public health or morals, under which the right may be restricted. In other words, such a restriction must be provided by law and be useful for the protection of a democratic society. Of course, when dealing with a restriction of a right, the essence of the latter must be respected and the permissible purposes protected. At the same time, the restriction must conform with the principle of proportionality, thus being adequate, proportionate and the least intrusive in achieving its purposes. Some waivers to travel bans have been provided by the various Committee guidelines to make restrictions well defined and limited. When sanctions were imposed in Sierra Leone, a listed individual, Sankoh, requested to the Committee the lifting

²⁵⁶ 2001/931/CFSP, L 344/93, Art. 4.

of the travel ban for humanitarian purposes, since he needed to receive a medical treatment in Ghana. The man died while the Committee was deliberating, for months, over his request, requiring a whole range of information²⁵⁷. It seems that permissible restrictions do not always conform with the other rights guaranteed in the Covenant, e.g. the right to life or the right to respect family life. The same rationale underlies restrictions to property rights.

Among the most pressing concerns in this context, targeted sanctions may have undesirable effects on individuals' rights to a fair trial and an effective remedy. The whole set of procedural rights is mostly affected by targeted sanctions. The violation of one of these rights produces a chain reaction: when an individual is stripped of its rights to be heard or to challenge measures decided against him, his right to a fair trial is consequently violated; when it happens, the individual must be granted access to effective remedy which in turn, if not granted, results in a violation of the right to an effective remedy itself. Now, many scholars, endorsed by the UN Human Rights Committee, believe that "fundamental principles of fair trial" can be considered part of *jus cogens*. By virtue of this characterization, potential reservations to the right to a fair trial would not be compliant with the purposes and the objective of the UN International Covenant on civil and political rights²⁵⁸. Moreover, in order to oppose sanctions, targeted individuals would have access to an organ carrying out a review mechanism to consider listing and delisting procedures. Article 14 ICCPR and Article 6 ECHR regulates the right to a fair trial, adding the possibility to restrict it in exceptional circumstances. However, these restrictions are permitted insofar as the right to access to a court is disciplined and regulated by States. Since such regulation does not exist at the international level, one cannot conclude that the Security Council, when performing its powers in the maintenance of international peace and security, could regulate some exceptional limitations²⁵⁹, because some access to court should always be granted. Indeed, in this hard time, throughout which the war on terror has led to the restriction of many rights for the sake of security, it would be desirable to highlight that there are a set of fundamental rights, such as those pertaining to effective judicial protection, not likely to be impinged upon, regardless of the degree of emergency at stake. The European jurisprudence, above all after

²⁵⁷ Eugenia Lòpez-Jacoiste, The UN Collective Security System and its Relationship with Economic Sanctions and Human Rights, *Max Planck UNYB* 14, 2010, p. 324.

²⁵⁸ *Id.*, p. 326.

²⁵⁹ *Id.*, p. 327.

the *Yusuf* and *Kadi* cases, has embraced this line of reasoning and has emphasized that the right “to a fair and public hearing within a reasonable time and by an independent tribunal established by law” unavoidably implies judicial review of sanctions.

Nevertheless, over years, many procedural improvements, aimed at enhancing the transparency and respect for individual rights, have been initiated by the UN Security Council and its subsidiary organs.

On 30 January 2005, the Security Council issued Resolution 1526 through, which it exhorted states to provide as much information as possible to demonstrate the link with Osama bin Laden, al Qaeda, or the Taliban, when proposing a new individual or entity to be listed. Anno 2005, Resolution 1617 explained the term “associated with” by furnishing some criteria. Among the others, the criteria included acts such as

- the participation “in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of²⁶⁰”;
- the supply, sale or transfer of arms and related material to;
- the recruitment for; or
- otherwise the support of acts or activities of
Al Qaeda, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof²⁶¹.

Notwithstanding this, criteria have been provided after that many individuals and entities had already been listed, leaving, moreover, still too much discretion on the part of states²⁶².

The Security Council, hereafter, established a Focal Point within the UN Secretariat through the issuance of Resolution 1730 of December 19, 2006. The Focal Point deals with delisting requests from individuals or entities, present on the Sanctions Committee’s lists, and addressed to the Secretary-General (either directly or through the State of citizenship or residence). The introduction of the Focal Point represents a big step forward in the respect of procedural protection of individuals, who now enjoy a facilitate access for delisting

²⁶⁰ UN Doc. S/RES/1617 (2005), para. 2.

²⁶¹ *Id.*

²⁶² Van den Herik Larissa, p. 805.

procedures. Indeed, the individual who wants to present a request for delisting is no longer reliant on his state of nationality (or residence), which instead is directly consulted by the Focal Point for the recommendation or the rejection of the petition, informing the Committee for it. What remains unseen is whether the said individual, when not backed by a state, has any chance of success in a political procedure before the Committee, subsidiary organ of the Security Council, where decisions are taken by consensus²⁶³. These developments, consequently, followed intense criticism because of the mere political nature of potential delisting decisions. Indeed, it seems that, although the work of the Focal Point, listed individuals still lack the direct access to the Sanctions Committee, thus not disposing of a true right to a fair hearing²⁶⁴.

In the same year, the Security Council issued Resolution 1735, which tried to further optimize the listing and delisting processes. It called upon States to provide as much information as possible for the listing, information consonant with the criteria set up in Resolution 1617. Moreover, states were asked to indicate the source of the information as well as to present evidence in support for the listing²⁶⁵. The proposing state should also indicate those parts of the statement of case which may be made public to notify the listed individual or entity²⁶⁶. With regard to the delisting procedure, the Resolution envisages that the Committee, when reflecting on the removal from the Consolidated List, should consider “(i) whether the individual or entity was placed on the Consolidated List due to a mistake of identity, or (ii) whether the individual or entity no longer meets the criteria²⁶⁷” that initially justified inclusion.

Resolution 1904 of December 17, 2009 further streamlined the listing procedure by introducing a third-party review through the establishment of the Office of the Ombudsperson, whose role was then strengthened by Resolution 1989 (2011)²⁶⁸. The independent and impartial Ombudsperson is appointed by the UN Secretary-General and is

²⁶³ Van den Herik Larissa, p. 805.

²⁶⁴ Annalisa Ciampi, Individual Remedies Against Security Council Targeted Sanctions, *The Italian Yearbook of International Law* 17, 2008, p. 59.

²⁶⁵ UN Doc. S/RES/1735 (2006), para. 5.

²⁶⁶ *Id.*, para. 6.

²⁶⁷ *Id.*, para. 14.

²⁶⁸ T. Marauhn and I. Stegmüller, Sanctions and the Protection of Human Rights: The Role of Sanctions Committees, in Ronzitti Natalino, ed. *Coercive Diplomacy, Sanctions and International Law*. Martinus Nijhoff Publishers, 2016, p. 168.

charged with the task of collecting information and material with a view to start a discussion with the individual or entity subject to sanctions on the 1267 Consolidated List, whose request has been submitted directly to his office. The state of nationality (or residence) may be possibly involved in such discussion. Finally, the Ombudsperson writes a report and presents its recommendation on the request for delisting to the Sanctions Committee²⁶⁹. Such recommendation is not binding; however, if the Committee does not take the recommendation into account, the case may be referred to the Security Council²⁷⁰.

The listing and delisting procedures have generated a whole set of problems, above all in democratic countries where concerns have been raised in relation to the severe interference in matter of individual rights, without providing an adequate right to judicial protection. Indeed, while it seems impossible to recall and use effective national law on the matter without favouring the so-called Rough States²⁷¹ (since measures imposed by the UN must be carried out at a global level), the aforementioned improvements have been introduced to enhance the current situation. Now, once admitted that *jus cogens* has been respected and that the UN Security Council has *bona fide* intervened, by introducing criteria for the listing and creating organs such as the Focal Point and the Ombudsperson Office, a proper balance between the imposition of sanctions and the respect of human rights standards has not been struck yet. It is apparent when considering two different, but strictly related elements, namely the role played by the Sanctions Committee and the enduring inadequacy of the delisting procedure. It is true that an “adequate listing reduces to some extent the need for a delisting procedure²⁷²”, but the Sanctions Committee started to work, listing individuals and entities, as early as 2001 when proper criteria were yet to be introduced. Moreover, Sanctions Committees implement sanctions regimes through (delegated) law-making elements and administrative elements, and using the latter to address human rights implications of targeted sanctions is highly controversial both for the ultimate effectiveness of sanctions and for the protection of human rights²⁷³. In these regards, there are two “human rights setting procedural standards²⁷⁴” at stake: the *rights to a fair trial* and the *right to an effective remedy*. The former

²⁶⁹ *Id.*

²⁷⁰ G. Sullivan and M. de Goede, *Between Law and the Exception. The UN 1267 Ombudsperson as a Hybrid Model of Legal Expertise*, 26 *Leiden Journal of International Law*, 2013, p. 833.

²⁷¹ Andrea Atteritano, p. 1730.

²⁷² Van den Herik Larissa, p. 805.

²⁷³ T. Marauhn and I. Stegmiller, p. 170.

²⁷⁴ Van den Herik Larissa, p. 806.

applies only to criminal or civil cases and not to administrative ones, while the 1267 Sanctions Committee described sanctions as being administrative in nature. In addition, the 1526 Monitoring Group stated that “the List is not a criminal list²⁷⁵” and that “sanctions do not impose a criminal punishment or procedure (...) but instead apply administrative measures²⁷⁶”. Nevertheless, listing and delisting procedures are strictly related to a criminal offence – terrorism and then proliferation of nuclear weapons – thus bearing a criminal connotation. Furthermore, given the impact that some measures, e.g. the freezing of assets, have on individuals’ lives, the characterization of sanctions as criminal-law measures does not seem a hasty choice²⁷⁷.

The second right, the right to an effective remedy, is a fundamental right of the international order, being relevant in any event. The full respect of this right entails that the organ empowered to review a decision must (i) have a minimum level of independence and impartiality, (ii) be accessible to the individual, and (iii) have the power to indicate measures²⁷⁸. On the basis of these requirements, changes and improvements made are still not sufficient. Indeed, individuals have access (although not directly) to the Focal Point and to the Ombudsperson, the latter enjoying some degrees of independence, but neither of them have the power to substantively review requests for delisting, not constituting a substitute for judicial review²⁷⁹. Whether the Ombudsperson recommends maintaining the individual or entity on the list, the assessment is final; on the other hand, delisting’s recommendations can be always overturned by the Committee by *consensus*. The last word always belongs to the Sanctions Committee, and ultimately to the Security Council.

In conclusion, while the Security Council commitments to improve due process guarantees for individuals are undeniable, the mechanisms for listing and delisting set up by the organ appear still not in line with internationally accepted human rights standards.

²⁷⁵ UN Doc. S/2005/572 (2005), para. 39.

²⁷⁶ *Id.*

²⁷⁷ Van den Herik Larissa, p. 806.

²⁷⁸ UN Doc. S/PV.5474 (2006), para. 5, cited in Van den Herik Larissa, p. 807.

²⁷⁹ Monica Lugato, p. 177.

CHAPTER V

CONCLUSIONS

Once the Security Council determines that a given situation constitutes a threat to or a breach of the peace, or that there exists an act of aggression, it has a wide margin of appreciation in opting for the course of action. The Council, indeed, can exercise its exceptional powers enshrined in Chapter VII of the UN Charter to decide which particular measure to adopt. The 1990s were distinguished as the sanctions decade, throughout which several countries witnessed the firm grip of sanctions. Over time, the Council has acted, by virtue of its broad discretion, against states, non-state actors (e.g. mercenaries or rebel groups), and specific individuals. Despite sanctions have been harshly criticized in the last two decades, above all with regard to the humanitarian problems caused, they are still an important tool in the maintenance of international peace and security. The most frequently imposed sanctions entail prohibitions of import and export, arms and oil embargoes, freezing of funds and assets, severance of air, sea and land communication, as well as of diplomatic relations, restriction on movement and prohibition of services²⁸⁰. Sanctions are usually aimed at modifying the

²⁸⁰ Eugenia Lòpez-Jacoiste, The UN Collective Security System and its Relationship with Economic Sanctions and Human Rights, *Max Planck UNYB* 14, 2010, p. 287.

behaviour of the target actor, without punishing or otherwise exacting retribution. Scholars have often lingered on how to assess sanctions' effectiveness, in terms of desired political or economic outcomes, and often agreed that sanctions, to be effective, must possess two components, namely causing economic hardship and having a political impact. However, little attention has been paid, at least before the Iraqi case, to the toll that sanctions exacts from civilian population. Indeed, the Iraqi case, shown up on global news reports, emphasized the adverse impacts that economic sanctions can have on population of target and neighbouring states, raising a question of compatibility of sanctions with human rights.

Traditional sanctions have unintentionally contributed to economic collapse, increase in mortality rate, malnutrition, destruction of fundamental infrastructure and emergence of black market in target countries, not only in targeted countries. Their effects then are usually felt by those sectors most far from wrongdoers and least able to yield the desired policy change. In the two major cases reported here, nothing came from the establishment and maintenance of sanctions, rather international crises were solved by threatening the use of force (Haiti) or intervening military (Iraq). What is more, comprehensive economic sanctions, which modify well-established patterns of economic relationship, can hit as heavily or even more heavily on innocent neighbours and others as on the wrongdoers. Their irreducible paradox ends up clouding their nature as measures alternative to war and its deadly weapon, and led the UN General Assembly, UN agencies, NGOs and several scholars to advocate for a reconsideration of sanctions as tools of foreign policy. Or, at least, to refine them with a view to reduce, as much as possible, the harm inflicted on civilian populations. Populations, indeed, are often more affected by sanctions than by their governments' policies or regimes, being this the first lesson learned from the UN experience in Iraq.

The compatibility of UN sanctions with human rights is not an easy issue to assess. In the course of the present work, many issues have been presented as little tiles likely to contribute to the creation of this big mosaic. What is most controversial and problematic is the juxtaposition of the reasons why sanctions are, and were, imposed with the effects they produce on their targets and on their neighbours. In other words, there exists a struggle between two branches of the complex international law, the one seeking to overseeing the *jus inter gentes*, maintaining international peace and security through its most representative Organization, and the other requesting the respect of humanitarian and human rights law, as

part of *customary law* thought to be held by all *gentes*. Pulling the threads together, it is important to keep separate “traditional” sanctions and targeted sanctions, because of their different impact on human rights and because of the shift from “common” justice to “individual” justice, realized with the later imposition of targeted measures. The compatibility of traditional sanctions with human rights can be evaluated by reflecting, on the one hand, on the so-called *just sanctions theory* and, on the other, on the limits that the Security Council encounters on the path towards the full exercise of its powers.

The *just sanctions theory* is built on the assumption that, as sanctions are employed as instruments alternative to war and its deadly weapons, they must meet the same conditions that a war meets to be considered just. Such a mechanism permits to strip sanctions of their eternal benevolent nature according to which, all else equal, they are always more efficient and less harmful than war. Applying the *jus ad bellum* and *jus in bello* conditions to sanctions imposed in Iraq and Haiti, it has been shown that this assumption is often falsified. It is sufficient to remember that the two atom bombs dropped on Japan have killed less people than economic sanctions in Iraq. In particular, in both cases, sanctions have been adopted as a method of penultimate resort, after that it became apparent that a political, diplomatic or negotiated solution was impossible to be found. At the same time, regardless of doubts and concerns related to the “tyranny” of Permanent Members within the Security Council, sanctions were adopted by a competent authority (the UNSC) to which Member States have conferred the primary responsibility for the maintenance of international peace and security (Art. 24). The legality of sanctions, therefore, resided directly in the UN Charter, constitution of the Organization counting almost all the nations of the world. Even conditions of just causes and right intentions have been respected insofar as the international community has intervened after severe violations of international law likely to threaten the international peace and security. However, if sanctions have met all these first conditions, their soundness begins to creak when considering the principle of proportionality and the so-called *jus ad sanctionem* conditions. Indeed, it has been proved that proportionality can easily turn into disproportionality when sanctions are maintained for a long time, or when they are brief but imposed on a country already living at subsistence level. It has been also sustained that this judgement may result altered when taking into duly account the Kurds’ genocide or the threat constituted by Iraqi nuclear arsenal. It is true, however, that shortly after having admitted its

intentions and consented the examination of its programme of biological weapons' development (1995), the chairman of the UN Special Commission for Weapons Inspection, Rolf Ekeus, confirmed the elimination of Iraq's chemical and ballistic missile capacity, but non-military sanctions were lifted only in 2003; in addition, the issue of Kurds' genocide, certainly inadmissible and worthy of international intervention, raises a moral dilemma that is strictly related not only to the discrimination and humanitarian provisos, but also to the paradoxical stand that sanctions assume when imposed to enforce respect of human rights. On the one hand, sanctions have been not respectful of the principle requiring making a distinction between military objectives (in our case, it refers to direct wrongdoers) and civilian ones, and targeting just the former. As already stated, sanctions have proved to be successful in strengthening sanctioned national governments, while harming the poor of the poorest, the women and children, the sick and disabled, namely those societal sectors least able to produce a policy change; on the other hand, the imposition of sanctions aimed at coercing leaders to protect and respect human rights by violating human rights through sanctions themselves is morally and theoretically disturbing.

The suffering inflicted on a population involved in "a war not of their making" is not a legitimate way to exert pressure on political leaders, above all when the latter are expression of an authoritative regime. In the light of this, sanctions have not passed the test of compatibility with human rights, whose protection and respect are enshrined by *jus cogens* norms, not likely to be derogated in any situation and binding also the UN Security Council. In order to enhance their compatibility, sanctions should be assessed *ex ante*, through a proper "sanctions impact assessment", giving them an evolving human rights interpretation and considering their long-term effects alongside their immediate coercive impact. In this way, it is possible to decide which sanctions are more suitable to cause the least damage, collateral costs and drawbacks to civilian populations of target states. A trustworthy assessment, carried out before the imposition of sanctions, could have individuated the causes of adverse effects on humanitarian conditions, and could have therefore helped in mitigating the unintentional bad consequences of sanctions. In this way, it could have been possible to determine whether and how sanctions can cause harm, to anticipate potential negative effects and "to get maximum humanitarian benefit from available resources²⁸¹". It is true that multilateral

²⁸¹ *Id.*, p. 276.

sanctions are more effective than unilateral measures, but multilateral action cannot prevail over the principle of proportionality and the respect of human rights.

In these regards, another issue of utmost importance when evaluating the compatibility of traditional sanctions with human rights is the existence of limits to the exercise of the Security Council powers in the maintenance of international peace and security. Certainly, the UN Charter itself sets out limits to the Organization and its organs, such as those enshrined by Article 1 on the Purposes and Principles of the United Nations; among the others, the promotion and respect for human rights and fundamental freedoms. The question here, however, pertains to whether the Security Council should be considered bound by general international law as well. Indeed, the presence of Article 103, ratifying the prevalence of the UN Charter over any other international treaty obligations, confuses a bit the puzzle, since many scholars believe it could be advocated to allow states to disregard e.g. human rights treaty obligations. Such a statement can be easily discarded. Article 103 could never overrule peremptory norms of which core human rights are an integral part. What is more, being the United Nations an organization of the international legal system, its organs are bound by general principles of international law, in particular by humanitarian and human rights norms. Indeed, when resorting to enforcement measures of any kind, the Security Council is bound by the principle of proportionality, requiring that the measures adopted are necessary, and that they provide a proper response to the target's impugned behaviour. The principle of proportionality constitutes a part of the positive law of the Charter and any other measures imposed under Chapter VII. Thus, according to this principle, the Security Council should adopt sanctions as extreme measures (as already said, as measures of penultimate resort), after having exhausted all other solutions. Moreover, as the threat of a sanctions regime may already alter the target behaviour, the Security Council should always notify the imposition of sanctions to the state at stake.

To comply with the principle of necessity, a sanctions regime should be designed so as to allow it to reach its objectives: changing the target behaviour and realizing a policy change. Of course, sanctions must create an adequate degree of coercion, but undeniably the latter should be directed towards direct wrongdoers and not to innocent civilians. Regardless of the broad discretion the Security Council enjoys in securing the adequacy of the sanctions regime, if this regime lacks humanitarian safeguards, the principle of proportionality obliges the

Council to include them and demonstrate that the curtailment of derogable human rights, as a result of sanctions, must be considered necessary for the attainment of their legitimate purposes. Even granting the necessity of the sanctions at stake, the Council have still to demonstrate that these measures will not have a disproportionate impact on civilians.

But, first and foremost, by virtue of its nature as grantee of delegated powers, the Security Council must comply with the principle of humanity, deriving from the inherent dignity of every human person. The principle is, moreover, enshrined in the Charter as well. It is a general principle of law that can be applied to Security Council's measures not involving the use of force. In light of this principle, sanctions should not be so harsh as to force people to live in sub-human conditions, suffering from disease or starvation.

In these regards, comprehensive sanctions regimes imposed by the Security Council unavoidably and unintentionally disregarded the aforementioned limitations, both those inferred by the UN Charter and those deriving from general international law, including *jus cogens*. It seems that the compatibility of sanctions with human rights should absolutely pass through the acknowledgment by the Security Council of its *procedural* and *substantial* duties with regard to human rights. Indeed, as long as the Security Council will not consider itself as bound, or fettered, by law, jealously retaining its *Kompetenz-Kompetenz* in decisional and compliance matters, the compatibility with human rights cannot be reached.

It is possible to dare that the shift to targeted sanctions is an implicit recognition of traditional sanctions' incompatibility with protection and respect for human rights. It is reasonable to believe that targeted sanctions have been implemented to minimize negative humanitarian effects. As compared to traditional sanctions, "smart" sanctions reduce collateral damage on civilians and are more effective in reaching their goals. They have been developed, above all, in the field of counter-terrorism, imposing measures (such as assets freezing) against individuals, entities, groups or undertakings thought to be in any ways linked to international terrorism. However, also targeted sanctions can impinge on individuals' rights. Despite the several improvements made to the listing and delisting procedures, the new sanctions system is still characterized by a kind of "democratic deficit"²⁸², where listing and delisting regulations do not conform with human rights standards, above all those in relation to

²⁸² *Id.*, p. 334.

procedural protections to be granted to listed individuals (e.g. the right to a fair trial and an effective remedy, the right to be heard, the right to defence, and so on). A kind of review mechanism is, indeed, necessary when considering listing and delisting requests. Certainly, given the role of the Security Council in the maintenance of international peace and security, a certain margin of manoeuvre in interpreting what constitutes an effective remedy can be accorded to the organ. What is sure now is that existing mechanisms are not adequate. With the rejection of the *Kadi* judgement, the European Court of Justice has unambiguously emphasized that core fundamental rights values prevail over any other international obligations, including UN resolutions and Charter. Consequently, individuals are entitled to access to full judicial review in order to make their fundamental and procedural rights respected, regardless of how important may be the struggle against international terrorism.

In conclusion, the implementation of UN targeted sanctions implies the fullest respect for human rights, demanding thus to strike a delicate balance between the necessity of keeping on maintaining international peace and security and the respect for the rule of law and human rights. The re-adaptation of the UN collective security system to new international community's demands and realities is still *in fieri*, leaving UN targeted sanctions (as their predecessors) still lacking adequate protection for target individuals' rights, ultimately rendering them incompatible with human rights standards – at least in comparison to European ones.

On the United Nations Security Council is conferred the primary responsibility for the maintenance of international peace and security. For this reason, the Organ is endowed with a whole set of powers, including the possibility to recommend or to decide the adoption of measures not involving the use of armed force. These measures have gone down in history as “sanctions”, even though neither the UN Charter nor the Covenant of the League of Nations explicitly use the term. *Stricto sensu*, international sanctions have been defined as “coercive measures taken in execution of a decision of a competent social organ, *i.e.* an organ legally empowered to act in the name of the society or community that is governed by the legal system”. The present definition can be broken down into three interconnected elements: the undertaking of *coercive measures* aimed at restoring a legally accepted conduct, *taken against* a given target and *in execution of a decision of a competent organ*. The definition seems to refer to a competent social organ acting on behalf of a collective interest, such as, to say, the UN Security Council, whose international sanctions have been constantly in the news in the recent years.

Sanctions can be adopted by the Security Council, in compliance with the UN Charter, when two conditions are met, namely the “existence of any threat to the peace, breach of the peace, or act of aggression” and the necessity to preserve or restore international peace and security. Measures not involving the use of armed force imply diplomatic, political, cultural and communicational sanctions, including a wide array of economic measures, having

commercial, financial or technological nature. Sanctions, having both coercive as well as demonstrative and punitive effects, have been considered so far the best way to exert pressure. However, the growth of humanitarian concerns, related to unintended effects of sanctions on civilian populations of target states, has led to their reevaluation as tools of foreign policy, making raise the issue of their compatibility with human rights. Various scholars have defined this issue as having to do not with ethics, but with a matter of consistency of the total UN policy, in which socio-economic rights, laid down in the International Covenant on Economic, Social and Cultural Rights (ICESCR), play a role of utmost importance. Indeed, the enjoyment of these rights has been constantly put under a strain wherever economic sanctions have been adopted and implemented. Sanctions often deprive target states of their basic resources and goods, resulting in the inability of the national economy to provide for essential goods and humanitarian needs. And since economic and social collapse involves all societal sectors, it is usually translated in a significant and massive violation of human rights. In particular, populations can no longer afford the costs of living due to the increase in unemployment as a consequence of many companies' closure, in turn resulting in shortages of raw materials, equipment and loss of usual markets. Therefore, a whole set of rights is totally impaired, such as the right to work, to an adequate standard of living, the right to food, to education and to family life. Not to mention the violation of the rights of children, the most vulnerable societal sector to starvation and disease. In these regards, public health infrastructure may be highly damaged by sanctions, so as to imperil also the right to the enjoyment of the highest attainable standard of physical and mental health.

Sanctions impose an unbearable cost on civilian population, most far from wrongdoers and least able to produce a policy change. Furthermore, economic sanctions proved to be extremely unsuccessful in provoking a policy change; rather, significant political and psychological factors come into play. In these cases, domestic support highly mobilizes around the government of the target state which, employing powerful political arms, becomes under external pressure even less compliant. A controversial relation between the sender and the target unfolds: the former, committed to a coercive policy, will ask for unrealistic changes to justify the lifting of sanctions, while the latter will be unwilling to agree to a compromise because of what has been presented as national value. The impact of sanctions on everyday life generates a social division between *them* and *us*, the former being the sanctions imposers

to whom is possible and desirable to attribute the economic and social hardship, the latter being the defenders of the unduly condemned native government.

Sanctions have been conceived as alternative to war and its deadly weapons, thus considered as part of a continuum of different economic relations among countries. Starting from the latter characterization, a comparison between the just war theory (Walzer, 1977) and a *just sanctions theory* has been presented as a first assessment of sanctions compatibility with human rights. This method discusses the sanction instrument in its own terms, depriving it of its etiquette as “method alternative to warfare”, and in turn nullifying the eternal assumption according to which, all else equal, sanctions are always more efficient and less harmful than war in pursuing their goals. The criteria deriving from the just war conditions have been applied to UN-imposed sanctions regimes in Iraq and Haiti.

To sum up, the wide range of economic sanctions imposed on Iraq was multidimensional in scope and comprehensive in nature. The legal mandate through which international economic sanctions were prosecuted against Iraq was sanctioned by at least 16 resolutions aimed at compelling the country to cease, desist and correct its transgressions and, later, human rights violations against its own citizens. Absolutely paradoxical is that, in response to violations of international law and human rights, the UN sanctions regime violated social and economic rights in appalling ways. Shortly after the Gulf War, a UN envoy reported on humanitarian needs while conducting a fact-finding mission and described the “near-apocalyptic results upon the infrastructure of what had been, until January 1991, a rather urbanized and mechanized society” where “most means of modern life support have been destroyed or rendered tenuous”. Although infrastructure was hurriedly repaired after the war, sanctions brought a progressive and strong decline in both economic and social life and had a catastrophic impact on the most vulnerable sectors of Iraqi society, particularly children. Before sanctions, funds scraped together from oil revenues, which accounted for over 90 percent of the country’s foreign earnings, were used to import food, medicine and modern health infrastructure’s equipment. Since sanctions have been imposed in 1990, Iraq’s efficient public health system drastically suffered and, as reported by studies carried out by UN agencies, infant mortality rates have tripled due to malnutrition and curable disease. Without oil or hard currency, Iraq has been thrown in a long-lasting crisis and, deprived of the necessary means to come out from it, has witnessed the progressive collapse of its economy: galloping inflation provoked the decrease in the average public-sector wage to less than \$5

per month, pushing former professionals and high-skilled labourers to desert their jobs and to become wholly dependent on the government rationing system. The latter, although trying to be equitable and efficient, provided just for one-third of caloric needs, so that household and personal possessions were likely to be sold by families to buy more food. The absence of supplies and spare parts has led to a strong paralysis of the former modern health infrastructure, and the lack of basic medicines forced doctors “to play God on a daily basis, deciding who must die and who would have got a chance to live” among thousands starving and sick children in a country where child obesity used to be a common problem.

A Memorandum of Understanding between the United Nations Secretariat and Iraq was finally signed on May 20, 1996 permitting the country to sell a limited amount of petroleum and petroleum products, and to use the proceeds to buy humanitarian goods. In December, Security Council Resolution 986, better-known as the Oil for Food Programme (OFFP), was officially inaugurated. Secretary-General Boutros Ghali has described the programme as “a victory for the poorest of the poor in Iraq, for the women, the children, the sick and the disabled”. The programme provided for the sale of \$2billion worth of petroleum every six months, whose proceeds, collected in an escrow account in an international bank chosen by the Secretary-General, would have been used for several purposes in different proportions. The OFFP has been the only existing mechanism used to mitigate the economic and social hardship due to sanctions and it contributed to the relative macro-economic stabilisation programme initiated in 1995 by the Iraqi government. Its substantial positive impact was actually a proof of how deep the economic crisis was. The agreement, moreover, failed to cover all the expenses necessary to a complete and comprehensive renovation of preventive and curative health system, as well as the inclusion of essential food.

By applying the *just sanctions theory* analogy, the Iraqi case has been analysed in the light of the seven *jus ad sanctionem* conditions (penultimate resort and commitment and prospect for a political solution, comparative justice, competent authority and legitimacy, just cause, right intention, probability of success and proportionality) accompanied with the last *jus in sanctione* condition, namely discrimination and the humanitarian proviso. While *Jus ad sanctionem* has been justified and rightly applied, *jus in sanctione* has gone beyond any justifications because of the scarce expectations of success and of the appalling effects on social vulnerable sectors. Sanctions have raised a moral dilemma linked not only to the discrimination and humanitarian provisos, but also in relation to the paradoxical stand that

sanctions assume when imposed to enforce respect of human rights. On the one hand, sanctions have acted in violation of the principle requiring making a distinction between military objectives (in our case, it refers to direct wrongdoers) and civilian ones, and targeting just the former; on the other hand, the imposition of “humanitarian sanctions” aimed at coercing leaders to protect and respect human rights which in turn end up in violating human rights themselves is morally and theoretically upsetting.

In Haiti, the expulsion of President Jean-Bertrand Aristide by a military coup, nine months after he won the UN-sponsored election by 67 percent of votes, led the members of the Organization of American States (OAS) to impose a trade embargo on the country in September 1991. When it was clear that the military junta guided by Raoul Cedras was not willing to negotiate, the United Nations Security Council imposed Resolution 841 starting the establishment of a comprehensive sanctions regime on 16 June 1993. Sanctions had widespread and severe effects on the most vulnerable sectors of the Haitian society. Ineffectiveness of sanctions is, therefore, witnessed by the intentional depletion and impoverishment of “the poorest country in the western hemisphere”, which was already unable to supply its population’s essential needs. Even though the OAS embargo was very mild, considering Dominican Republic’s porous boundary offering a sure supply for Haitian elite, its effects were devastating on the civilian population. Prices increased disproportionately, unemployment rocketed with the loss of thousands of jobs, and desperate people boarded on boat looking for a better future for their children. It is difficult to specifically assess the effects of sanctions on Haiti because of the incidence of other factors, such as the pre-existence of a rather unstable economic, political and social scenario but, as in the Iraqi case, serious problems arise in relation to the threefold link between a proportionate harm, a modest probability of success and the humanitarian proviso. Here some insightful data (Gibbons, 1999): unemployment have increased due to sanctions from 50 percent to 74 percent in 1994 and per capita income has decreased from \$370 to \$260 in 1997. Children’s malnourishment increased and the infant mortality rate rocketed to 61 per 1000 live births. Primary school enrolments dropped, while the amount of street children doubled. What is more, democratic life suffered a strong setback: participation in democratic elections dropped from 70 percent in 1990/91 to 10 percent in 1997. Dramatic consequences of

sanctions have been thus recorded also in Haiti, rendering the *jus in sanctione* quite impossible to be defended and justified.

In other words, sanctions have not passed the test of compatibility with human rights. The most apparent reason why is that the suffering inflicted on a population involved in “a war not of its making” is not a legitimate way to exert pressure on political leaders, above all when the latter are expression of an authoritative regime. After all, the protection and respect for human rights are enshrined by the UN Charter itself and by *jus cogens* norms, not likely to be derogated in any situation and binding also the UN Security Council. Considering this, a kind of proper “sanctions impact assessment” is needed, through which their compatibility may be enhanced. Sanctions should be assessed *ex ante*, giving them an evolving human rights interpretation and considering their long-term effects alongside their immediate coercive impact. In this way, it is possible to determine which sanctions are more appropriate to provoke the least damage, collateral costs and drawbacks to civilian populations of target states. A reliable assessment, undertaken before the imposition of sanctions, could have determined the causes of adverse effects on humanitarian conditions, and could have therefore helped in minimising the unintentional bad consequences of sanctions. In this way, it could have been possible to surely foresee whether and how sanctions can provoke harm, to anticipate potential negative effects and “to get maximum humanitarian benefit from available resources”.

The problem with traditional sanctions, however, relies also on the adverse effects that sanctions can have on neighbouring countries. Indeed, comprehensive economic sanctions, which modify well-established patterns of economic relationship, can hit as heavily or even more heavily on innocent neighbours and others as on the wrongdoers. Article 50 of the UN Charter can be considered one burden-sharing strategy. It is understood that the aforementioned article entitles third party states to consult the Council when facing special economic problems in implementing economic sanctions. The article, moreover, extends these rights also to non-member states, such an extension being the evidence of real harms that can be provoked by United Nations measures. What is more, the extension helps inducing non-member states to participate in sanctions regime, as happened with the Federal Republic of Germany when sanctions were imposed against Rhodesia and as did Switzerland in the case of sanctions against Iraq.

However, the article does not clarify what kind of measures may be utilized by the Council to solve problems arisen from the implementation of sanctions, nor has it provided more than a room for complaints, thus resulting in a total dead-end. Indeed, the article does not entail a corresponding duty on the part of the Security Council to provide a specific remedy: it establishes a mere “right of consultation”. The usual practice of the Council, when dealing with countries which have invoked Article 50, has been limited to requests of assistance to other countries and specialized agencies, so that countries are left with a choice between the “lesser of two evils”, namely the choice between the suffering from measures imposed on a trade partner or their violation. This notwithstanding, Article 50 has been invoked several times, by two governments in the Rhodesian case, by 21 in the Iraqi case and eight in the Serbian one.

When assessing the effects of economic sanctions on countries bordering the target state, it is unavoidable, although in an implicit way, to consider rights of populations living off of those economies. Human rights are, indeed, strictly connected to all the spheres of political, economic and social life. These spheres could be easily affected by the imposition of sanctions not only in the target states but also on countries which find in the target a vital economic partner or use its territory as an essential economic trade route. These cases of UN sanctions all showed the destructive impacts that sanctions can have on economies in a phase of restructuring or just not enough strong to bear all the burdens coming from the hindrance to transport links and the block of usual economic relations. In the meanwhile, populations undergo a process of sharp impoverishment. In Bulgaria, Jordan, Zambia and all the others, the brake putted to the free exchange of goods created a huge deficit which, in turn, encouraged the establishment and the development of organised crime, benefiting from newly originated opportunities of making illegal quick money.

Another way to assess the ultimate compatibility of sanctions with human rights is to define the legal limits encountered by the Security Council when exercising its powers. the Security Council is an *official of the international legal system*, a status that renders the UN organ bound by “common public standards of official behaviour”. Together with other institutions of the international legal system, the Council is expected to “appraise critically” its conduct in order to avoid deviations. Therefore, it is subject to a range of principles and rules finding application in the international legal system. First at all, Paragraph 2 of Article 24 of the UN

Charter declares that in “discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations (...)”. One listed purpose of the UN is to “achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character and *in promoting and encouraging respect for human rights and for fundamental freedoms (...)*”. Economic sanctions, however, can be assessed not only on the basis of the UN Charter dispositions. Indeed, as mentioned earlier, the United Nations Organization is an integral part of the international legal system, making it and its organs bound also by general principles of international law and by human rights norms; principles as the principle of humanity, necessity and proportionality. The Security Council, therefore, has both *procedural* and *substantive duties*, the former requiring a formal recognition of its obligations and principles related to human rights, and the latter requiring their practical respect when the organ performs its activities. In particular, procedural duties require the organ to acknowledge, take in consideration and be responsible for the impact of its decisions on human rights, in a sort of self-regulating effort given the absence of any other institution capable to review its decisions. The sanctions regimes imposed by the Security Council have, nonetheless, unintentionally disregarded these minimum procedural duties in both cases of sanctions against Iraq and Haiti. In the former case, in particular, many statements concerning the appalling humanitarian situation have led to the substantial failure of the Council to admit its own legal duty in protecting the rights of the civilian population or in preventing its suffering.

However, it is important to recognize some steps through which the Security Council has faced its responsibility and acknowledged its international obligations with regard to human rights. Once proved that UN sanctions regimes may have severe and deleterious effects on human rights, in particular after the Iraqi experience, it seems that the Security Council has become more aware and sensitive to the effects that its policies and decisions may have on the enjoyment of fundamental rights in target and third countries. And it is largely proved by the recognition of its commitments through the establishment of more structured and beneficial humanitarian exceptions, the most important example being the Oil-for-Food program in Iraq, or through the shift to targeted sanctions, which have greatly minimised the harm inflicted on civilian populations. Targeted sanctions have been used by the Council as an alternative to traditional sanctions to address a myriad of challenges to international peace

and security, namely armed conflict and terrorism, as well as to consolidate peace agreements, to enhance peacebuilding processes, to decrease the proliferation of nuclear weapons and, recently, to safeguard civilians under the Responsibility to Protect. In order to limit humanitarian impacts, this type of sanctions is not indiscriminately directed to the whole population but it targets leaders, decision-makers and their supporters as well as economic sectors or geographic regions. The real problem, however, resides in the need for targeted individuals' rights to be protected. Indeed, "smart" sanctions have proved to be very controversial when assessing their capacity to prevent violations of the rights of those against whom they are imposed. In particular, the entry in the "lists" of suspected terrorists is done through secret information and discretionary processes, as well as without the possibility for individuals involved to defend themselves bringing an action. Thus, different individual rights are at stake, primarily related to the right to effective judicial protection: e.g. the right to be informed of the reasons underlying listing, the right to defence, to be heard, to have access to evidence, freedom of movement, the right to respect for personal life and family life, the right to personal freedom, the right to property and proportionality. Individuals are deprived of their right to be heard at any point, either before or after listing, and once listed individuals cannot complain about their listing or about consequent sanctions, having no standing neither before the Security Council nor before the Sanctions Committee. As a consequence, many individuals have brought a complaint before European courts, especially the Court of First Instance (CFI). Nine complaints related to the Taliban/al Qaeda listing have been brought before the CFI, while 16 challenges have been lodged at the national level. This has led to the judgements of September 2005 in the cases of *Yusuf* and *Kadi*, smoothing the way toward the recognition of the need for better protection of targeted individuals. Despite the several improvements made to the listing and delisting procedures, the new sanctions system is still characterized by a kind of "democratic deficit", where listing and delisting regulations do not conform with human rights standards, above all those in relation to procedural protections to be granted to listed individuals (e.g. the right to a fair trial and an effective remedy, the right to be heard, the right to defence, and so on). A kind of review mechanism is, indeed, necessary when considering listing and delisting requests. With the rejection of the *Kadi* judgement, the European Court of Justice has unambiguously emphasized that core fundamental rights values prevail over any other international obligations, including UN resolutions and Charter. Consequently, individuals are entitled to access to full judicial review in order to make their

fundamental and procedural rights respected, regardless of how important may be the struggle against international terrorism.

In conclusion, the implementation of UN targeted sanctions implies the fullest respect for human rights, demanding thus to strike a delicate balance between the necessity of keeping on maintaining international peace and security and the respect for the rule of law and human rights. The re-adaptation of the UN collective security system to new international community's demands and realities is still *in fieri*, leaving UN targeted sanctions (as their predecessors) still lacking adequate protection for target individuals' rights, ultimately rendering them incompatible with human rights standards – at least in comparison to European ones.

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