

What legal responsibility do international organizations have for the effects on human rights of the sanctions regimes they authorize?

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Global interactions increasingly rely on law to govern them. Today, numerous rules dominate the interactions between states and non-state parties. International courts and dispute settlement mechanisms are in place to ensure compliance with commonly agreed norms.

International Law, however, is complex and often lacks universal acceptance. Worse, its influence is disproportionately strong on the poorest countries and countries in crisis. It is in situations of poverty and conflict where international law has the most impact - for better or worse. International legal structures can provide security, stability and access to economic support, but they can just as easily prevent timely and adequate assistance. Development and humanitarian actors must increasingly be aware of their potential as well as their pitfalls.

Good Governance is easily prescribed, but must become a mindset of all involved to make the system work. Less and least developed countries are often governed by constitutions that are complex and inaccessible for their citizens. Without acceptance by their subjects, they weaken and cease to safeguard the nation state against failure. Development assistance must provide more than just models and institutions to move these countries forward.

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Introduction

The end of the Cold War marked the beginning of a new era for the United Nations. As the ideological conflict which had significantly hampered the actions of the organization came to a close, the UN found itself with greater freedom than it had ever possessed. In particular, ability to carry out its role in the maintenance of international peace and security was significantly enhanced. What was to follow became known as the ‘decade of sanctions’¹.

Whereas prior to 1990, the Security Council imposed sanctions in only two cases (Southern Rhodesia 1965, South Africa 1977), between 1990 and 2000 in no less than eleven situations were they been ordered. As the effects of sanctions became increasingly clear many began to question not only the ethical basis of those regimes but also the legal limitations thereof. Significantly, lawyers, human rights activists and political figures alike directed their inquiries at the UN.

This essay investigates the extent to which the UN, as an international organization, is responsible for the effects on human rights of the sanctions regimes it authorizes. Specifically, it explores the idea of legal responsibility vis-à-vis the Security Council. It begins by looking at the extent to which the Council is considered to be bound by international law. Then, having argued that at present there is no clear consensus on that matter it looks at the areas of law which could arguably restrict the way in which the Council exercises its powers under Chapter VII. Finally, it will discuss why the UN, and its organs, should be bound by international law.

Economic Sanctions

The primary responsibility of the Security Council is the maintenance of international peace and security². To this end it may, under Chapter VII, take action in situations where there is a threat to the peace, breach of the peace or act of aggression³. It alone decides whether such a situation exists⁴ and, upon such a determination, what measures shall be taken⁵. Article 41 states that the Council may call upon Members to take measures to give effect to its decisions including, “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communications, and the severance of diplomatic relations.” If sanctions fail, the Council can then decide to use force⁶.

Whereas Article 2(7) reads, ‘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’, the Council has generally been quite free in

¹ Cortright and Lopez

² Charter of the United Nations, Art. 24(1).

³ *ibid*, Art. 39

⁴ *ibid*, Art. 12 reads, “while the Security Council is exercising in respect of any dispute or situation the functions assigned to it... the General Assembly shall not make any recommendation ... unless the Security Council so requests.”

⁵ *ibid*, see Arts. 12 and 39 respectively.

⁶ *ibid*, Art. 42

exercising its powers. In particular economic sanctions, defined as ‘the imposition of economic penalties in an attempt to change the political behaviour of a ‘target’ state,’⁷ or ‘diplomatic tools of global governance’⁸, were increasingly used by the Council after 1990. The underlying assumption was not only a strong relationship between economic activity and political behaviour but, as a consequence, that economic pressure (on civilians) would translate into pressure on a government for change⁹.

In fact, the ramifications of economic sanctions were recognized even by the founders of the Organisation. Under Article 50, where preventative and enforcement measures impose economic difficulties on Members carrying out measures in accordance to orders made by the Security Council, those Members have the right to consult the Security Council with regard to solutions to those problems. However, attention of such complications tended to focus on third parties and rarely on the populations of the countries being sanctioned.

In 1995, then Secretary General of the UN Boutros Boutros Ghali wrote: “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 subjects. Sanctions also always have unintended or unwanted effects¹⁰” Perhaps the most controversial sanctions regime has been that authorized by the Security Council against Iraq after its invasion of Kuwait in 1991. Under Resolution 687, the Security Council ordered a comprehensive ...

In 1999 damning reports emerged regarding the negative effects sanctions were having on the people of Iraq. This led to proposals for the reform of sanctions regimes, for example through the development of ‘smarter’ or ‘targeted’ sanctions as well as the introduction of time-limits. However, the question of who should be held responsible for those situations still lingered.

The Security Council: Responsibility and Accountability

A Textual Approach

Article 24(2) states that the Security Council must act in accordance with the Purposes and Principles of the UN which under Article 1 lists the maintenance of peace and security ‘in conformity with the principles of justice and international law’, the development of friendly relations among nations and the achievement of cooperation in solving international problems.

Looking chiefly at the Charter, commentators remain divided on the question of the extent to which the UN is bound by international law. Reinisch for example holds that because there are no express provisions in the Charter requiring the Council to respect international law it is not bound by general international law. Like Wolfrum¹¹, he highlights that the Security Council is only required to act in accordance with the *principles* of justice and international law.¹²

⁷ Economides and Wilson, p. . This definition is also supported by Reinisch.

⁸ Kim Richard Nossal in Cooper, English and Thakur, p.248

⁹ Reinisch,

¹⁰ Supplement to an Agenda for Peace, para. 70.

¹¹ O’Connell

¹² Lack of explicit oblig to respect reflection of framers’ no anticipating that UN would violate HR?

An alternative view however, has been that the Security Council is indeed bound by international law, even if only implicitly. As Reinisch also points out, the preamble of the Charter reads, ‘we the people of the United Nations determined.... to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained’. Hence an organization that violates international law would fail to establish those conditions. Similarly, it has been said that the UN and its organs, being ‘established by treaty which serves as a constitutional framework for the organization... [in consequence should be] subjected to certain constitutional limitations¹³’. In this way, it is claimed that nothing in the text or spirit of the Charter conceives of the Council as unbound by law¹⁴. Thirdly, some have suggested that the authority of the Council is not totally unlimited because, logically, the UN should not have greater powers than States. It follows, as an organization made up of states, the authority and powers of UN and its organs are only derivative and secondary. As such, it should be subject to the standards and rules of international law. In other words, ‘if an individual acting alone would be in breach of international law, the fact that he is acting in concert with others will not legalise his acts.¹⁵’ This claim is much less convincing. As Lennon suggests, the question is whether the UN is considered ‘so unique in nature... as to positively accord it rights that no other entity enjoys.’ It is arguable that the UN is unique and hence does enjoy rights that other entities do not. First, it is solely responsible for the maintenance of international peace and security and accordingly it, and it alone, holds a monopoly over the legitimate use of force¹⁶. Second, while its authority is derivative, the position of the UN is not a result not of a random grouping of States, as Lennon seems to suggest, but arguably because it is held to be the closest equivalent to a world government. The fact that states have agreed to confer certain powers and authority in the UN should not be so fleetingly dismissed; the decisions of the Council, even if only in theory, reflect the will of the international community.

Critics have also argued that, given the vital role of the UN in maintaining international peace and security, it should not be restricted especially in its attempts to carry out this responsibility. This would suggest a hierarchy between the different purposes and principles of the UN, with the solving of problems of economic, social, cultural or humanitarian character appearing to take a backset to matters of peace and security. If measures are imposed in situations not authorized by Art 39, acting ultra vires, unlawfully. At the same time, as Craven points out, the scope of issues over which the Council can exercise its authority depends on the breadth with which the ideas of a threat to the peace, breach to the peace or act of aggression are interpreted and likewise understandings of the substance of human rights would affect the supposed limitations of the Security Council’s action. Notably, the flexible approach taken by the Council in determining the existence of a threat to international peace and security since the 1990s has only enlivened this debate. While Higgins proposes that the human rights violations

¹³ Prosecutor of Tadic, Appeal on Jurisdiction, as cited by Reinisch, p. . see also Bedjaoui, Ch.2: The San Francisco Legacy and its Management Hitherto

¹⁴ ; see also, Georg Nolte, Ch.15: The Limits of the Security Council’s powers and its functions in the international legal system, in Byers

¹⁵ Lennon,

¹⁶ Art. With exception to Art whereby States may use force for self defence.

do not give rise to collective action, she also acknowledges that the Security Council has typically exercised a wide discretion in determining such threat. At the same time, it has been said that while the Security Council has tended to exercise significant freedom in its actions under the banner of Chapter 7, it has not in its practice suggested that it conceives its powers as entirely unlimited either¹⁷. Interestingly, Nolte observes that the ICJ has been careful not to declare the Council as the authentic or excl interpreter of its powers. Thus Simma, in his commentary of the UN Charter, suggests that the responsibility of striking a balance between the objectives of maintaining international peace and security and respecting international law or promoting the respect of human rights lies in the Security Council. (which actually does little answer the question of the extent to which the SC is bound by IL in the charter?)

Of course one might ask: are states, in acting in accordance with obligations under Art 25, immune from the breaches of international that result for their actions? It could be argued that the Security Council, having no means to use force itself, can only carry out its responsibility to maintain international peace and security through its members. As such, the question seems to contribute little to the debate of who should be responsible for the effects on human rights as a result of sanctions, and how.

Notwithstanding, if one was to believe that the Security Council is in some way bound by international law, even if only implicitly, and accordingly obliged to adhere to certain rules in exercising its authority what would those rules be? In other words, what areas of international law would be engaged?

International Human Rights Law

Article 1(3) also lists the respect for human rights as one of the purposes and principles of the UN; ‘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.’

In fact, the promotion of human rights is not unconnected with the idea of international peace and security. Article 55(c) continues, the UN shall, ‘with a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations....promote universal respect for, and observance of, human rights and fundamental freedoms for all.’

As a result of the sanctions on Iraq, many human rights activists and even organs within the UN began to criticize the regimes authorized by the Security Council. In 1995 the UN World Food Programme issued an update noting that 2.4 million Iraqi children under five were at severe nutritional risk. The following year, the World Health Organisation reported that economic sanctions had caused a six fold increase in the mortality rate of children under five. As a result, some have even gone so far as to accuse the UN of complicity in crimes of genocide¹⁸. Thus quite the opposite of creating conditions for the promotion and respect for human rights, internationally mandated sanctions are said to have resulted in the contrary¹⁹.

¹⁷ Oette

¹⁸ Ramsey Clark, ‘a crime against humanity, in the Nuremburg sense.’

¹⁹ Dr. Eric Hoskins, ‘Children, War and Sanctions: report on the effects of sanctions on Iraqi women and children,’ commissioned by UNICEF, as cited by Simons, p. 107

If one is to assume that the Council is indeed bound by international human rights law, it is clear simply from the above that in imposing sanctions on Iraq, it has breached a number of provisions including Article 3 of the Universal Declaration of Human Rights relating to the right to life, liberty and security, as well as many provisions in the Declaration of the Rights of the Child.²⁰ It could even be said that the imposition of sanctions amounts to the cruel and inhuman treatment of the citizens of Iraq engaging the Convention against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment.²¹

However, as Craven explains, the lack of attention to such issues has typically been a result of the fact that human rights concerns to be addressed in territorial or jurisdictional terms. In effect the ‘practice and operational philosophy of human rights treaties ... remain largely compartmentalized²²’. One way to circumvent such problems would obviously be to hold the Security Council accountable to the Covenant on Economic, Social and Cultural Rights (ICESCR) which by contrast includes no such clauses on limitation. However, as Reinisch points out, the accountability of the Council remains far from clear. Does the ICESCR prohibit the deprivation of such rights completely or does it merely prohibit the arbitrary deprivation thereof? In other words, is it necessary to demonstrate intent? Furthermore, does the failure to prevent such suffering also make the Council liable? Most would agree that in imposing sanctions the Council, even if not positively obligated to, should abstain from deliberately depriving populations of their rights. Finally, the content of such rights are debatable as they can be widely interpreted. Indeed, this was recognized by the Committee on Economic, Social and Cultural Rights in its General Comment 8 adopted in 1997. However as it went on to explain, the obligations of the international community entail only that it try to ‘reduce to a minimum the negative impact upon the rights of vulnerable groups within the society.’ Similarly, in ?? 1999 Presidential Statement, noted that in imposing sanctions it would in future ‘pay special attention to their likely effectiveness in achieving clearly defined objectives while avoiding negative humanitarian consequences as much as possible²³’.

For this reason, a number of commentators have expressed the view that the Council, the UN and to some extent the international community, have come to accept these effects to be unavoidable. In other words, that the suffering cause by sanctions has been incidental and ‘collateral’. To this, one is tempted to ask exactly who the UN is supposed to protect. If its purpose it to safeguard the interests of individuals, by bringing about such hardship, it would appear to do the very opposite. However, if its objective is to maintain international peace and security for the sake of its constituent states, perhaps in doing so allow those states to be responsible for the promotion of the well being of individuals, then perhaps one could say that the price paid by the citizens of Iraq are justified. This is the human rights paradox: while using the cause for human rights as a reason for imposing sanctions, the UN- in adopting such sanctions- more and more disregards these same principles²⁴.

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²² Craven, p. 49

²³ as quoted by George A. Lopez, ‘More Ethical than Not: Sanctions as Surgical Tools’, as extracted in Steiner and Alston

²⁴ Reinisch,

International Humanitarian Law~ Jus in bellum

A further area of international law which is said to limit the actions of the Council is that relating to the laws of war, more specifically the conduct thereof. The Four Geneva Conventions signed in 1947, address the relationship between on the one hand concepts of military necessity, and on the other the demands of humanity. As O'Connell elaborates, they were designed to provide some guidance in how the effect of means to accomplish specific military objectives could be balanced with the prohibition of force, especially when such force is expected to lead to, albeit incidental, loss of life or cause injury to civilians. Accordingly, Article 48 of the Fourth Convention requires that Parties to a conflict 'shall at all times distinguish between the civilian population and combatants and between civilians objects and military objectives.' Article 51 similarly states the civilian populations should not be the object of attack and as such indiscriminate attacks are prohibited. Finally, Article 54 prohibits the starvation of civilians as a method of warfare and Article 57 states that 'when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.'

Reinisch notes, in respect to the UN and its use of sanctions, the applicable norms of the said Conventions must be deduced from the general rules established therein. Correspondingly, the degree to which humanitarian law is seen as applicable to sanctions regimes authorized by the Security Council, hinges upon how the international and non-international are defined (i.e. whether a conflict is internal in which case the rules may differ) as well as what is considered to amount to an armed conflict. In other words, the critical question seems to be: does the application of sanctions amount to war? If so, as Gordon explains, the regimes authorized by the Security Council would be inconsistent with the principles of discrimination as cited above and elaborated in just war doctrine. He goes on to write that by using individuals as means to an end, as objects rather than subjects, sanctions are morally indefensible. However if not, humanitarian law as well as principles of proportionality do not come into play²⁵.

In some ways, the advent of targeted or smarter sanctions as well as the inclusion of humanitarian exemptions, has been a reaction to growing demands for sanctions to be subject to certain standards of humanitarianism.²⁶ The International Committee of the Red Cross has long been urging the UN to become a party to the said Conventions. However, the UN has generally refrained from doing so. Thus despite the convergence of human rights and humanitarian law, as the latter is generally understood to be limited to situations constituting a sort of armed conflict, the applicability of either to the actions of the UN and the Security Council specifically, cannot be judged equally²⁷.

²⁵ Lennon, argues that the blockade/sanctions regime is equivalent to a siege and as such amounts to war and hence subject to the law of war.

²⁶ the Fourth Geneva Convention stipulates that there should be no restrictions on provisions of humanitarian relief with exception to...

²⁷ Reinisch

Conclusions

Needless to say, there remains so much that has not yet been explored in this short study. However, it remains that regardless of the extent to which the Security Council is or should be subject to the rules and standards of international law, for the effects on human rights of the sanctions regimes it imposes, “lawlessness of one kind should not be met with lawlessness of another”²⁸.

Ultimately whether or not one believes the UN and its organs, especially and most importantly the Security Council, to be bound by international law either by human rights or humanitarian law, hinges on the way in which Article 1 is interpreted. Kelson for example indicates, *‘the purpose of enforcement action under Art 39 is not: to maintain or restore the law, but to maintain, or restore, peace, which is not necessarily identical with the law.’*²⁹

The existence and survival of any organization or institution depends on its ability to remain relevant to its supporters or members, but also its ability to maintain its legitimacy in the eyes thereof. Hence, it is often said that the effectiveness of sanctions regimes relies on compliance by states in applying and enforcing them. The same could arguably be said of the effectiveness and authority of the UN and its organs.

In some ways, the smartening and targeting of sanctions and introduction of humanitarian exemptions, has been a result of recognition that the UN must conform to certain standards in its actions. In the same way, the application of sanctions, in conformity with certain principles and procedures, could also serve to enhance the degree to which actions of the UN are perceived to be legitimate and justified and in turn the degree to which it, as an organization, is perceived to be legitimate. Contradictions should not be neglected as they can be used to undermine the UN. By setting certain standards the UN also reduces the extent to which it can, as it has been, be accused of being used as a tool of foreign policy.

Just as targeted sanctions may be but a policy maker’s dream³⁰, finding a way to add a human face to sanctions may also be but a dream. Many debate the effectiveness of ‘smarter’ and more ‘targeted’ sanctions. However, if the UN is to continue to exist and to that continue in its efforts to maintain international peace and security, it should not ignore these concerns indefinitely, nor should it brush aside debates on the limitations of its freedom in respect thereof. The increasing normalization of sanctions over the past decade³¹ only makes the investigation of such issues all the more imperative.

‘The state of the human condition in today’s Iraq must be seen as a powerful reminder of the urgency of legal and procedural reform of sanctions as an international tool to combat abuse without abusing.’³²

²⁸ General Comment 8.

²⁹ Hans Kelson, referred to in Reinisch

³⁰ Craven, p.

³¹ Craven,

³² Sponeck,

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