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USE OF ECONOMIC SANCTIONS UNDER INTERNATIONAL LAW:
A CONTEMPORARY ASSESSMENT

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Abstract

The growth in the use of collective and unilateral economic sanctions in the post-Cold-War epoch calls for a re-examination of the legal basis and constraints on the implementation of sanctions. This thesis is an attempt to explore, from a legal point of view, the problems and restrictions associated with sanctions, and suggest ways in which economic sanctions can be rendered more legitimate in terms of international legal requirements.

Unilateral and collective economic sanctions are based on different legal premises: the traditional theory of retaliation and treaty principles respectively. It will be argued that a breach of an *erga omnes* obligation is also a legitimate legal basis for economic sanctions.

Key cases in which sanctions have been used will be reviewed and it will be contended that, in addition to traditional economic considerations, sanctions should be subject to other limitations such as respect for principles of international humanitarian law. Issues regarding the legitimacy of the Security Council's actions and authority will also be addressed and possible ways of controlling the actions of the Security Council will be put forth.

After determining the restrictions on implementation of sanctions, proposals for refining current practices of imposing economic sanctions are submitted. In conclusion, it is submitted that unilateral sanctions are subject to serious legal constraints and that collective sanctions have the potential of being used in a more humane and institutionally coherent way.

Résumé

L'augmentation du recours aux sanctions économiques collectives et unilatérales dans la période de l'après guerre froide ordonne de reconsidérer les fondements juridiques ainsi que les contraintes pesant sur la mise en œuvre de ces sanctions. Cette thèse consiste en une étude juridique des problèmes et restrictions associés à ces sanctions. Elle propose certains moyens à travers lesquels ces sanctions pourraient être rendues plus légitimes en termes d'exigences juridiques internationales.

Les sanctions économiques collectives et unilatérales reposent sur des prémisses différentes. Les sanctions unilatérales sont fondées sur la théorie des contre-mesures tandis que les sanctions collectives obéissent aux principes issus des Traités internationaux. Il sera soutenu que la rupture d'une obligation *erga omnes* constitue également une base légitime en vue de sanctions économiques.

Une revue de jurisprudence permettra de réexaminer les affaires dans lesquelles des sanctions collectives et individuelles sont intervenues. Cette revue nous autorisera à avancer que les sanctions devraient également respecter des principes tels que ceux édictés par le droit international humanitaire. Des questions telles que la légitimité du Conseil de Sécurité et la pertinence de moyens de contrôle sur ses actions seront aussi soulevées.

Une fois déterminées les restrictions nécessaires à la mise en œuvre des sanctions internationales, il sera proposé certaines voies pour redéfinir les pratiques courantes de sanctions économiques.

En conclusion, il sera avancé d'une part que les sanctions unilatérales sont soumises à d'importantes contraintes juridiques et d'autre part, que les sanctions collectives sont susceptibles d'être utilisées de manière plus humaine et dans un souci de plus grande cohérence institutionnelle.

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Table of Abbreviations

A.J.I.L.	American Journal of International Law
Am. Econ. Rev.	American Economic Review
Am. J. Pol. Sci.	American Journal of Political Science
Am. Soc. Int'l L. Proc.	American Society of International Law Proceedings
Am. U. J. Int'l. L. & Pol'y	American University Journal of International Law and Policy
Ann. fran. dr. int.	Annuaire français de droit international
Ann. inst. dr. int.	Annuaire de l'Institut de droit international
Aus. Y.B. Int'l L.	Australian Yearbook of International Law
Boston College Int'l & Comp. L. Rev.	Boston College International and Comparative Law Review
Boston U. L. Rev.	Boston University Law Review
Brooklyn J. Int'l L.	Brooklyn Journal of International Law
C1	First Committee
Cal. L. Rev.	California Law Review
Cambridge L.J.	Cambridge Law Journal
Can. Council Int'l L. Proc.	Canadian Council on International Law: Proceedings
Can. T.S.	Canada Treaty Series
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
Conn. J. Int'l L.	Connecticut Journal of International Law
Cornell Int'l L. J.	Cornell International Law Journal
Covenant of the League	*Covenant of the League of Nations*
Doc.	Document
ESC	Economic and Social Council
Ethics & Int'l Affairs	Ethics and International Affairs
Eur. J. Int'l L.	European Journal of International Law
Fordham Int'l L.J.	Fordham International Law Journal
GA	General Assembly
GATT	*General Agreement on Tariffs and Trade*
Ga J. Int'l & Comp. L.	Georgia Journal of International and Comparative Law
Grot. Soc.	Grotius Society Transactions
Harv. Int'l. L. J.	Harvard International Law Journal
I.C.J. Rep.	International Court of Justice: Reports of Judgements, Advisory Opinions and Orders
ILC Draft Articles	*International Law Commission Draft Articles on State Responsibility*
I.L.M.	International Legal Materials
I.L.R.	International Law Reports
Indiana L. J.	Indiana Law Journal
Int. Org.	International Organizations
I.C.L.Q.	International and Comparative Law Quarterly
Int'l Bus. Lawyer	International Business Lawyer
J. Peace Research	Journal of Peace Research
J. Transnat'l L. & Pol'y	Journal of Transnational Law and Policy
Jerusalem J. Int'l Relations	Jerusalem Journal of International Relations
L.N.T.S.	League of Nations Treaty Series

L. & Pol'y Int'l Bus.	Law and Policy in International Business
Leiden J. Int'l L.	Leiden Journal of International Law
Mich. J. Int'l L.	Michigan Journal of International Law
Mich. L. Rev.	Michigan Law Review
Mtg.	Meeting
Netherlands Int'l L. Rev.	Netherlands International Law Review
New England J. Med.	New England Journal of Medicine
North Carolina J. Int'l L. Comm. Reg.	North Carolina Journal of international Law and Commercial Regulation
N.Y.U. J. Int'l L. & Pol'y	New York University Journal of International Law and Policy
O.A.S.	Organization of American States
OR	Official Records
P.C.I.J. (Ser. A)	Publications of the Permanent Court of International Justice: Series A, Collection of Judgments
Rec. des Cours	Recueil des Cours de l'Académie de droit international
Rep. Int'l L. Assoc.	Reports of the International Law Association
Res.	Resolution
R.I.A.A.	Report of International Arbitral Awards
SC	Security Council
Sess.	Session
Statute of the I.C.J.	*Statute of the International Court of Justice*
Supp.	Supplement
Texas Int'l L. J.	Texas International Law Journal
U.N. Charter	*Charter of the United Nations*
U.N.T.S.	United Nations Treaty Series
U.S.	United States Reports
U.S. Dist. Ct.	United States District Court
U.S.B.C.	Treaties and other International Agreements of the United States of America 1776-1949
U.S.T.	United States Treaties and Other International Agreements
U.T. Fac. L. Rev.	University of Toronto Faculty of Law Review
UDI	Unilateral Declaration of Independence
UN Doc.	United Nations Document
U. Pa. J. Int'l Econ. L.	University of Pennsylvania Journal of International Economic Law
Va. J. Int'l L.	Virginia Journal of International Law
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
Vienna Convention	*Vienna Convention on the Law of Treaties*
W.T.O.	World Trade Organization
Yale J. Int'l L.	Yale Journal of International Law
Yale L. J.	Yale Law Journal
Y.B.U.N.	Yearbook of the United Nations

And as the law of humanity prescribes to nations no less than to individuals, the mildest measures, when they are sufficient to obtain justice ; whenever a sovereign can, by the way of reprisals, procure a just recompence, or a proper satisfaction, he ought to make use of this method, which is less violent, and less fatal than war.[1]
Emerich de Vattel (1714-1767)

INTRODUCTION

In the past few years economic sanctions have been in the international news almost every day. From Haiti to Iraq and from South Africa to Norway, countries have been subjected to economic sanctions by other states or groups of states. The common feature of all the cases of economic sanction is that they all have been controversial.

The controversy surrounding the use of economic sanctions has traditionally focused on three main issues: the economic impact of sanctions on the sanctioned and sanctioning countries, the effectiveness of such sanctions, and their legality. In studying economic sanction, the political scientist's aim is to measure the effectiveness of sanctions in compelling compliance; the economist is concerned with the economic consequences of sanctions; while the lawyer's quest is to determine whether sanctions are legal and whether they conform to the framework of international relations. The present thesis will examine the issue from the lawyer's perspective.[2]

In 1931 J.L. Brierly noted, on the subject of sanctions: "[t]he true problem for consideration is ... not whether we should try to *create* sanctions for international law, but whether we should try to organize them in a system."[3] Today the problem remains the same. There is no doubt about importance of sanctions as means of enforcing international law. But the question is whether they should be *reorganized* systematically.

---

[1] *The Law of Nations; or Principles of the Law of Nature: Applied to the Conduct and Affairs of Nations and Sovereigns, a work tending to display the true interest of powers*, A new ed., corrected, trans. from French (London: G.C.J & J. Robinson, and Whieldon & Butterworth, 1793) at 267 § 354.

[2] Such a study will necessarily take into account the economic and political implications of imposing sanctions.

[3] J.L. Brierly, "Sanctions" in H. Lauterpacht, & C.H.M. Waldock, eds., *The Basis of Obligation in International Law and Other Papers by the Late James Leslie Brierly* (Oxford: Clarendon Press, 1958) 201 at 202 [emphasis in original].

To answer this question, the traditional theories of sanctions will be scrutinized and reassessed, taking into account the developments of international law in the past decades.

In the first chapter, economic sanctions will be defined, and their different types, objectives and forms will be examined. A systematic legal study of economic sanctions must first deal with the different types of sanctions. Sanctions may be categorized on the basis of the reasons for which they are imposed or on the basis of the means by which they are implemented (*unilateral* and *collective*). In the context of this study, a means-based categorization is of primary importance, as unilateral and collective sanctions are based on different legal premises.

The second chapter presents an analysis of the traditional theories of unilateral and collective economic sanctions. The key questions in this regard are the conditions of legality and justifications for sanctions in international law. Traditionally, unilateral sanctions, based on the theory of retaliation, should meet the conditions of prior breach, prior demand for redress and proportionality. Collective sanctions, on the other hand, are treaty-based and should meet the conditions set out by the treaties in question. Study of collective sanctions in this thesis will focus on the United Nations enforcement actions. Thus, relevant provisions of the *Charter of the United Nations*[4] will be analyzed. In the case of collective and unilateral sanctions, a new category of sanctions for breach of *erga omnes* obligations, which can be justified on the basis of the theory of retaliation, will be proposed.

In the third chapter, a variety of cases of application of economic sanctions will be examined. In the light of these case-studies, I demonstrate how the legal requirements for the implementation of sanctions, which were set out in chapter 2, have been applied in practice. Different cases of implementation of collective sanctions will be categorized and the main problems raised by application of sanctions will be recognized. The analysis of the cases will pave the way for an analysis of restraints on the use of economic sanctions in the following chapter.

Drawing on the case-studies in chapter 3 and developments of international law since drafting of the *U.N. Charter*, further limitations on use of economic sanctions will

[4] 26 June 1945, Can. T.S. 1945 No. 7 [hereinafter the *U.N. Charter*].

be examined in chapter 4. Here, important questions include: the limits to imposing sanctions and the definition of a target state's valid objections. Inevitably, in this chapter, I will address the question of economic coercion (sanctions amounting to use of force) and the debate over the Security Council's decisions under Chapter VII of the *U.N. Charter* in the case of collective sanctions. The main conclusion of this chapter is that the *lex lata* in the field of sanctions does not correspond to international law developments in the last 50 years. Moreover, traditional conditions for the legality of sanctions and the lawful use of enforcement actions should be subject to additional norms of international humanitarian law.

In the final chapter, an attempt is made to determine the position of sanctions in contemporary international law and proposals for legitimate use of economic sanctions under international law are suggested.

Finally in the conclusion, it is submitted that international law has become more humane over the course of the last five decades. While, at the dawn of 20th century, resort to war was not prohibited but subject to certain modalities, use of armed force is permissible only in exceptional circumstances today. The increasing popularity of economic sanctions is, in part, the result of states' being deprived of other important means of enforcement. Still, if economic sanctions result in pain and suffering which are comparable to the pain and suffering which resulted from the use of force they should be subject to similar restrictions. It is not suggested that use of economic sanctions should be banned, in fact sanctions are one of the only means of enforcement in international level. However, they should be applied in a more refined manner, which would avoid severe consequences for innocent civilians.

This thesis, thus, supports a more institutionalized application of collective sanctions, as well as restrictions on the use of unilateral sanctions.

In the search for a *lex ferenda* in the field of sanctions this thesis will touch on other important issues. These include: morality and international law and their relationship with one and other; constitutional questions within the United Nations; proposals for reform in that Organization and extrateritoriality. Each of these issues is a thesis topic in its own right, and will only be discussed briefly.[5]

[5] The information in this thesis is up to date as of December 1999.

CHAPTER 1- GENERAL BACKGROUND

Some general background information is necessary before examining the central issues of this thesis. The present section consists of the following: definition and clarification of the term *sanction*; an examination of the various types, objectives and forms of sanctions; and a final conclusion which will set out the central theme of this chapter.

I- Definition

The terms *boycott*, *embargo* and *sanctions* are often used interchangeably;[6] thus, they must be carefully defined.

Boycott: A boycott is a non-coercive act of individuals, groups or organizations, which has no force of law.

Embargo: An embargo is a prohibition on trade due to a government order. It has force of law and is, thus, legally stronger than a boycott.[7]

Sanction: Generally, sanctions are defined as "negative measures which seek to influence conduct by threatening and, if necessary, imposing penalties for non-conformity with law."[8] From the perspective of international law, a sanction may be more specifically defined as a collective action taken against a state considered to be violating international law in order to compel that state to conform to such law; the sanction may involve diplomatic, economic or military measures.[9]

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[6] See M.S. Daoudi & M.S. Dajani, *Economic Sanctions* (Routledge: London, 1983) at 2.

[7] However, in older texts, embargo usually refers to "the closing of one's ports to the exit of ships," and is studies under steps short of war (see T.M. Holland, *Lectures on International Law*, T.A. Walker & W.L. Walker, eds. (London: Sweet & Maxwell Ltd., 1933) at 239).

[8] M.P. Doxey, "International Sanctions: A Framework for Analysis with Special Reference to the UN and South Africa" (1972) 26 Int. Org. 527 at 528 cited in P.J. Kuyper, *The Implementation of International Sanctions* (Alphen aan den Rijn: Sijthoff & Noordhoff International Publishers, 1978) at 1 [hereinafter *The Implementation of International Sanctions*].

[9] Daoudi & Dajani, *supra* note 6 at 4-5. A more precise definition is given by Georges Scelle, who also underlines the difference between sanctions in international law with sanctions in general. According to Scelle:

> *[l]a sanction, du point de vue de la technique juridique, c'est une décision de l'autorité exécutive compétente qui applique à l'auteur d'une action ou omission illégales une situation prévue pour le cas de violatioin de la règle de Droit. L'application de la sanction est précédée, dans une organisation juridique institutionelle, par la constatation de l'acte illégal et l'identification de son auteur ou sujet de Droit responsible [...] Mais dans des systèmes juridiques institutionellement imparfaits, les deux fonctions sont souvent accomplies par les mêmes agents ou gouvernants,*

[continues on the next page]

For *unilateral* actions the term *embargo* is appropriate. As this thesis addresses unilateral and collective economic sanctions, both *embargoes* and *sanctions* are studied and the two terms are used interchangeably.

Countermeasures: Countermeasure is a broader term (in the sense that it includes a range of actions from unilateral economic sanctions to the use of force) used by the International Law Commission in *Draft Articles on State Responsibility*.[10] Article 47 of the *ILC Draft Articles* provisionally adopted by the International Law Commission on first reading states that:

> [f]or the purposes of the present articles, the taking of countermeasures means that an injured State does not comply with one or more of its obligations towards a State which has committed an internationally wrongful act in order to induce it to comply with its obligations under articles 41 to 46, as long as it has not complied with those obligations and as necessary in the light of its response to the demands of the injured State that it do so."[11]

Such countermeasures include unilateral economic sanctions, and thus, in some parts of this thesis, *countermeasure* is used instead of *unilateral economic sanction*.[12]

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parfois concomitantes et même inverties. Il en est ainsi en Droit international (G. Scelles, *Manuel de droit international public* (Paris: Éditions Domat-Moncherstien, 1948) at 865 [emphasis in original]).

[10] [hereinafter the *ILC Draft Articles*] in *Report of the International Law Commission on the work of its forty-eight session*, UN GAOR, 51st Sess., Supp. No. 10, UN Doc. A/51/10 (1996) at 125.

[11] *Ibid.* at 144.

[12] The International Law Commission's commentary on Article 30 of the *ILC Draft Articles* (the text of that article can be found at 20, below) gives the following explanation for the use of the term "countermeasure" rather than other terms:

> [t]he term "countermeasures" which appears in the title of the article and the term "measure" used in the text have been preferred to others, and particularly to the term "sanction", as a means of preventing any misunderstanding, in view of the two distinct cases universally covered by the rule set forth in the article, namely: *(a)* the case in which the "act of a State" in question is a reactive measure applied directly and independently by the injured State against the State which has committed an internationally wrongful act against it; and *(b)* the case in which the "act of a State" is a reactive measure applied on the basis of a decision taken by a competent international organization which has entrusted the application of that measure to the injured State itself, to another State, to a number of States or to all the member States of the organization. *The Commission has thus made allowance for the trend in modern international law to reserve the term "sanction" for reactive measure applied by virtue of a decision taken by an international organization following a breach of an international obligation having serious consequences for the international community as a whole, and in particular for certain measures which the United Nations is empowered to adopt, under the system established by the Charter, with a view to the maintenance of international peace and security* ("Report of the Commission to the General Assembly on the work of its thirty-first session" (UN Doc. A/34/10) in *Yearbook of the International Law Commission 1979*, vol. II, Part 2 (New York, UN, 1979) UNDoc. A/CN.4 /SER.A/1979/Add. 1(Part 2) at 121, para. 21 [emphasis added]).

According to some writers,[13] the above-mentioned sanctions and embargoes are *negative sanctions*, as opposed to *positive sanctions* or incentives.[14] This thesis is only concerned with *negative sanctions*.[15]

II- History

There are a myriad of historical examples of situations in which sanctions have been used. The ancient Mediterranean city-states used reprisals as pressure techniques[16] and some treaties regulated the application of such measures between different cities and/or Empires.[17] Wartime blockades in antiquity and the Middle Ages may also be considered as a form of economic sanction.[18] According to Doxey, the first example of a blockade on a significant scale occurred during the Napoleonic Wars. Then, Britain blocked the Continent and adopted countermeasures in order to bring about "commercial ruin and shortage of food by dislocating trade."[19]

Economic sanctions have only been used in order to achieve larger, political goals in more recent times. Before the turn of the 20th century, sanctions were imposed unilaterally or by a group of states to supplement the use of force in war.[20] In other words,

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[13] P.J. Kuyper, "International Legal Aspects of Economic Sanctions" in P. vic, H. van Houtte, eds., *Legal Issues in International Trade*, (London: Graham and Trotman Ltd., 1990) 145 at 145 [hereinafter "International Legal Aspects"].

[14] These types of measures are beyond the scope of this thesis and I have only examined negative sanctions here.

[15] Taking into consideration the contemporary approach which accounts for the role of the individual in international scene, some writers have chosen to give an alternative definition of sanctions. According to this definition, sanction are "non-military measures used to influence the leaders of a nation to conform to some desired behavior or to punish the leaders of a nation for directing that nation in certain way contrary to international human rights law" (See J.K. Fausey, "Does the United Nations' Use of Collective Sanctions to Protect Human Rights Violate its Own Human Rights Standards?" (1994) 10 Conn. J. Int'l L. 193 at 196). Although in some instances sanctions have been directed towards the leaders (*e.g.* in Serbia) in the form of freezing assets of individuals, in general, this definition does not seem to conform with the reality.

[16] See E.S. Colbert, *Retaliation in International Law* (New York: King's Crown Press, 1948) at 10.

[17] *E.g.* a treaty between Oeantheia and Chalaeum in 431 B.C. and a treaty between Rome and Cartage in 306 B.C. (see *Ibid.* at 10-11); another example in ancient times is the Pericles' decree of 432 B.C. which limited the entry of products from Megara into the markets of Athens in response to Megara's territorial expansion and its kidnapping of three women (see B.E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime* (Cambridge: Cambridge University Press, 1988) at 8 note 2).

[18] C. Phillipson, *The International Law and Custom of Ancient Greece and Rome*, vol. 2 (London: McMillan and Co., 1911) at 383.

[19] M.P. Doxey, *Economic Sanctions and International Enforcement*, 2nd ed.(New York: Oxford University Press, 1980) at 10 [hereinafter: *International Enforcement*].

[20] Phillipson also states that "[u]pon declaration of war, and not infrequently even before making any public proclamation, an embargo was laid upon all enemy vessels which happened to be in the harbours of the other belligerent" (*supra* note 18 at 380). On history of economic sanctions in modern times see generally

[continues on the next page] ▸

economic sanctions were part of the arsenal of war. In modern times, in addition to this traditional use, centralized sanctions have been used as measures by international bodies to uphold "standards of behaviour expected by custom or required by law"[21] or even for the "effective prevention of war."[22]

In this latter sense, the League of Nations allowed coercive measures, which included non-military measures, as an alternative to the use of force.[23] According to the *Covenant of the League*, in some cases, all members could subject aggressor members to "severance of all trade or financial relations."[24] The sanctions applied against Italy in 1935, following its invasion of Ethiopia, may be the first example of a modern sanction.[25] The measures did not work in that case, and therefore, in July 1936, the League decided to lift them.[26] There was no other case of collective sanctions under the League of Nations.[27]

After World War II, taking into account the experience of the League of Nations, more power was bestowed on the Security Council of the United Nations than had been the case with its predecessor, the League's Council. There are some provisions in the

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T.E. Førland, "The History of Economic Warfare: International Law, Effectiveness, Strategies" (1993) 30:2 J. Peace Research 151.

[21] *International Enforcement, supra* note 19 at 3.

[22] E. Clark, ed., *Boycotts and Peace, a Report by the Committee on Economic Sanctions* (New York and London: Harper and Brothers Publication, 1932) at xiii. See also C.C. Joyner, "Sanctions and International Law" in D. Cortright & G.A. Lopez , eds., *Economic Sanctions, Panacea or Peacebuilding in a Post-Cold War World* (Boulder: Westview Press, 1995) 73 at 80 [hereinafter "Sanctions and International Law"].

[23] Carter, *supra* note 17 at 9.

[24] Article XVI of the *Covenant of the League of Nations. Treaty of Peace between the Allied and Associated Powers and Germany (Part I, The Covenant of the League of Nations)*, 28 June 1919, 2 U.S.B.C. 48 (entered into force 10 January 1920) [hereinafter the *Covenant of the League*].

[25] It should be mentioned that before the case of sanctions against Italy, the League of Nations considered the possibility of imposing sanctions in two other instances. First, in November 1921, after Yugoslavian troops advanced into Albanian territory, the mere consideration of implementation of economic sanctions against Yugoslavia, forced that government to withdrew its troops from Albania (see Daoudi & Dajani, *supra* note 6 at 59). Second, in 1928, during the Chaco war between Bolivia and Paraguay, the possibility of imposing sanctions and arms embargo was considered by the League. Even though no sanction was imposed imposing arms embargo was recommended. However, the war did not end until 1938 (see *International Enforcement, supra* note 19 at 45). In the case of Japan's invasion of Manchuria, in 1931, the League of Nations did not take any action (*International Enforcement, ibid.*).

[26] See R. Renwick, *Economic Sanctions* (Cambridge, Mass.: Center for International Affairs, Harvard University,1981) at 16.

[27] It should be mentioned, however, that in two cases before the sanctions against Italy, the League of Nations threat of sanctions against smaller powers proved to be successful. In 1921, Yugoslavia gave up attempts to seize territory from Albania, partly because of League's threat to impose sanctions. Similarly, in 1925, Greece withdrew from its occupation of Bulgarian territory because of League's sanctions (see G.C. Hufbauer, J.J. Schott & K.A. Elliott, *Economic Sanctions Reconsidered: History and Current Policy*, vol. 1,

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U.N. Charter that give substantial enforcement powers to the Security Council in the cases of "a breach of the peace" or "committing an act of aggression."[28] These powers have been used several times since 1945, the best known cases being those of Southern Rhodesia from 1966 to 1977 and Iraq since 1990.[29]

III- Types of Sanctions

A distinction must be made between *unilateral* sanctions and *collective* sanctions (or *centralized* sanctions) because they have different legal bases and different statuses under international law

A- Unilateral Sanctions

Unilateral sanctions are usually imposed by an individual state. In rare cases, they may be implemented by international organizations (as is the case when an international organization with limited membership imposes sanctions against a non-member state)[30] or by a group of states through intergovernmental cooperation. These two latter types may be called "organized unilateral sanctions."[31] Sanctions imposed by the European Economic Communities (EEC) on non-member states and the Arab oil embargo in 1973 are examples of unilateral sanctions.

Unilateral sanctions are further divided into *reprisals* and *retorsions*.

Reprisals: These are acts illegal under international law which are justified when imposed in response to a preceding illegal act.[32] They are also known as "non-forcible countermeasures."[33] Examples of non-forcible reprisals or countermeasures include termination or suspension of treaty obligations and seizure of the offending state's assets.[34]

2d ed. (Washington D.C.: Institute for International Economics, 1990) at 124-31 [hereinafter: *Economic Sanctions Reconsidered: History*]).

[28] Article 39 of the *U.N. Charter*.

[29] These cases will be discussed in detail in chapter 3 at 55 and 61, below.

[30] "International Legal Aspects", *supra* note 13 at 145.

[31] *Ibid.* at 155.

[32] D.W. Bowett, "Economic Coercion and Reprisals by States", in R.B. Lillich, ed., *Economic Coercion and the New International Economic Order* (Charlottesville: The Michie Company, 1976) 7 at 14-15.

[33] See O.Y. Elagab, *The Legality of Non-forcible Countermeasures in International Law* (New York: Oxford University Press, 1988).

[34] O. Schachter, *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff Publishers, 1991) at 185.

Retorsions: These are unfriendly but legal acts taken in response to previous unfriendly acts.[35] In general, international law is not concerned with unfriendly acts as such; however, in some cases, retorsions may be imposed in response to illegal acts. The most recent example of a retorsion occurred in May 1998. Then, the U.S. threatened to suspend financial aid to India and Pakistan due to the nuclear tests conducted by the two countries.[36]

From a legal point of view, it may be said that reprisals are more important than retorsions. However, from a practical and political point of view, retorsions are usually more effective. Retorsions are often financial; they include withholding aid and reducing aid. In many cases, states prefer not to have recourse to reprisals, because reprisals are only considered legal in certain, strictly defined circumstances. Further, a state which uses reprisals may be weakening a "functioning legal regime" of the international community: the act that constitutes the reprisal would, under normal circumstances, constitute an illegal act. Retorsions, on the other hand, comprise actions within the sovereign rights of the state and have no such weakening effect.[37]

The above represents the traditional analysis of reprisals and retorsions. In certain circumstances, there are legal limits to when retorsions can be used. This is the case when an "otherwise permissible action is taken for an illegal objective."[38] For instance, when one state subjects resumption of trade relations with another state to change in the internal or foreign policy of that state, the retorsion is objectionable. According to Schachter, this exception can be characterized as "an abuse of rights, but it is more precise to refer to a primary rule that precludes such coercion."[39] The United Nations General Assembly has expressed this rule in an unanimously adopted resolution, the *Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in*

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[35] The International Law Commission's commentary on the *ILC Draft Articles* states that "[c]ountermeasures are to be distinguished from acts which, although they may be seen as "unfriendly", are not actually unlawful – for example, rupture of diplomatic relations" (*Report of the International Law Commission on the work of its forty-eight session, supra* note 10 at 153 footnote 251).

[36] "US imposes sanctions on India" online: CNN <http://www.cnn.com/world/asiapcf/9805/13/india.us> (date accessed: May 13, 1998).

[37] Schachter, *supra* note 34 at 186.

[38] *Ibid.* at 199.

[39] *Ibid.*

accordance with the Charter of United Nations,[40] which states that "[n]o State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind."[41]

It should be noted that the reasons for which sanctions are now applied have changed. In the past, states used countermeasures in response to breaches of obligations which directly affected them. Today, states impose sanctions in response to breaches which do not necessarily affect them directly. In examining the legal basis of sanctions for breaches of *erga omnes* obligations, the new ways in which sanctions are now used will be studied.[42]

B- Collective or Centralized Sanctions

Centralized sanctions are those decided upon by the competent organ of an international organization. They are "concerned fundamentally with matters pertaining to international peace."[43] Other criteria suggested for this category of sanctions—which distinguish them from other types of sanctions imposed by a group of states—are:[44]

(i) The decision making body must be universally or regionally international;

(ii) Its membership should normally encompass all states within the universal or regional system;

(iii) The organization must have a formally constituted body with expressed powers to make mandatory decisions;

(iv) The organization must have a procedure for formally reaching an obligatory decision; and,

(v) The organization must be considered as definitive or authoritative in its sphere of international activity.

Applying such criteria, sanctions imposed by the EEC (which serves the economic and political interests of its European members), the activities of NATO and the Arab

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[40] 24 October 1970, GA Res. 2625 (XXV), UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028 (1970) 121[hereinafter *Declaration on Friendly Relations*].

[41] I will return to this question in chapter 4:I, "Countermeasures Amounting to Use of Force and the Legality of Economic Coercion", at 79 below.

[42] See 27 and 45 below.

[43] C.L. Brown-John, *Multilateral Sanctions in International Law: A Comparative Analysis* (New York: Praeger Publishers, 1975) at 45.

[44] *Ibid.* at 46.

League are unilateral sanctions. Sanctions imposed under the auspices of the Security Council, the Organization of American States (O.A.S.), and the U.N. specialized agencies—if they are oriented towards international peace through legal processes—are collective sanctions.

Sanctions decided upon by the U.N. Security Council and executed by all member states are the best example of collective sanctions. Article 39 of the *U.N. Charter* provides that, "[t]he 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 Article 41 and 42, to maintain or restore international peace and security."

There are few instances of actions taken under Article 39 since 1945. However, the end of the Cold War provided the Security Council with the opportunity to play the role that the *U.N. Charter* envisioned for it. There were only two cases of centralized sanctions in the first 45 years of the U.N.'s existence, South Africa and Rhodesia; since the 1990's there has been a dramatic increase in the number of such sanctions.[45] Conversely, it is becoming more difficult for states to impose unilateral economic sanctions due to the regulation of trade and new state obligations which have resulted from the *General Agreement on Tariffs and Trade*[46] and agreements in the framework of the World Trade Organization (W.T.O.).[47]

IV- Objectives

Implementation of economic sanctions may have different objectives; these objectives have an impact on their legality. It is important to determine the objectives of sanctions. The reason is that any evaluation of the effectiveness of sanctions as well as the decision to terminate their application depends on the attainment of their objectives.[48]

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[45] Multilateral sanctions may also be defined as sanctions used to enforce decisions of multilateral international agencies (see Brown-John, *supra* note 43).

[46] 30 October 1947, 58 U.N.T.S. 187, Can. T.S. 1947 No.27 (entered into force 1 January 1948) [hereinafter GATT].

[47] Established according to *Agreement Establishing the Multilateral Trade Organization*, 15 December 1993, 33 I.L.M. 13.

[48] Daoudi and Dajani have enumerated the following seven functions for economic sanctions:

1. Maintaining the perception that sanctions are inflicting damage on the target;
2. Expressing morality and justice;
3. Dignifying disapproval and justice;
4. Satisfying the emotional needs of the sanctioners;

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States implementing the sanctions usually proclaim their objectives. In most cases, they are "far from simple or straightforward."[49] It is submitted that states usually have hidden goals which are distinct from the states' declared reasons for imposing sanctions.[50]

As mentioned in section II, "History," the reasons for which sanctions are imposed have changed over the course of the last few decades. Sanctions are sometimes punitive, the objective being condemning a violation of international law. The violation may be in the field of human rights, international environmental law or any other area of international law. For example, in the case of the League of Nations sanctions against Italy, Italy had used military force against a fellow member (Ethiopia) of the League. This use of force was in violation of Italy's obligations under Article XII of the *Covenant of the League*.[51] Similarly, in the case of Rhodesia, the illegal nature of the Unilateral Declaration of Independence (UDI) and the repressive domestic policies with regard to the black population were in contravention of the *U.N. Charter*.[52]

In some cases, unilateral sanctions are imposed by states because appropriate compensation has not been paid when target states expropriated foreign-owned property in pursuing nationalistic policies. Britain's sanctions against Iran in 1951, the U.S.' sanctions against Cuba in 1960 and France's sanctions against Algeria in 1971 were all justified in this way.

It is submitted that, at times, sanctions are imposed in response to breach of a political principle.[53] It is very likely, however, that such sanctions will be in the form of retorsions. If they are not, they will be illegal under international law. In imposing sanctions on Yugoslavia (1948), China (1960) and Albania (1961) the Soviet Union

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5. Maintaining the sanctioner's positive image and reputation;
6. Relieving domestic pressure on the sanctioner;
7. Inflicting symbolic vengeance.

(see Daoudi and Dajani,*supra* note 6 at 161).

[49] M. Miyagawa, *Do Economic Sanctions Work?* (New York: St. Martin's Press, 1992) at 89.

[50] *Ibid.*

[51] Article XII(I) of the *Covenant of the League* reads as follows:

> The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture they will submit the matter to arbitration or judicial settlement or to inquiry by the Council and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council.

[52] However, Southern Rhodesia was not explicitly declared to be committing apartheid (which is an international crime).

[53] See Miyagawa, *supra* note 49 at 90.

invoked "the rule of friendship," which was merely a political principle and was not held to be a rule by many other states.[54]

In certain cases, sanctions are preventive, the aim being preventing the target state from infringing a rule of international law.[55]

Sanctions can also have a rule-making effect. By imposing sanctions, the sanctioning state can proclaim which principles it considers to be rules of international law.[56] The U.S.' sanction against Cuba in 1960 is often cited as an example of this type of sanction. The sanctions were imposed after the nationalization of the American oil companies which refused to process the Soviet crude oil. However, according to Miyagawa, the U.S. Secretary of State later made it clear that the real objective was, "to reduce Castro's will and ability to export subversion and violence to other American states."[57]

The implementation of sanctions can simply be an indication of the international community's disapproval of a certain act. Sanctions tend to be more effective than diplomatic protests. The objective is to force the target state to change its behaviour or shift its policy.[58] The sanctioning state seeks "to mobilize world opinion to put pressure on the target."[59] For example, in the case of the Arab oil embargo against the Western industrial powers in 1973, the oil ministers of the sanctioning states announced that the basic objective of their measures was, "to draw world attention to the Arab question in order to create an atmosphere conducive to the implementation of U.N. Security Council Resolution 242 calling for total withdrawal from occupied Arab territories and the restoration of the legitimate rights of the Palestinian people."[60]

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[54] *Ibid.* at 90.

[55] See "Sanctions and International Law", *supra* note 22 at 74. Doxey refers to this goal as "deterrence," and states that "sanctions once imposed might deter the target from further wrongdoing, and there could also be a deterrent effect on third states contemplating similar action" (M.P. Doxey, *International Sanctions in Contemporary Perspective* (New York: St. Martin's Press, 1996) at 55 [hereinafter: *Sanctions in Contemporary Perspective*]).

[56] Miyagawa, *supra* note 49 at 91-93, Miyagawa calls this functions of sanctions, 'rule-making effect', 'rule declaring effect' or 'rule-implying effect'.

[57] *Ibid.* at 91. Other examples of such sanctions include the Soviet Union's economic sanctions against Yugoslavia, in order to bring Yugoslavia back as one of the satellite states.

[58] C.C. Joyner, "Sanctions, Compliance and International Law: Reflections on the United Nations' Experience Against Iraq" (1991) 32 Va. J. Int'l L. 1 at 3 [hereinafter "Sanctions, Compliance and International Law"].

[59] Miyagawa, *supra* note 49 at 93.

[60] *Middle East Economic Digest*, 22 March 1974 cited in Miyagawa, *supra* note 49 at 93.

Another example is the sanctions that Western countries imposed on China after the Tiananmen fiasco. Then, the main objective was to condemn the violent repression of demonstrations. The Western economic sanctions were far from full-scale and it was obvious that they would not lead to China's refraining from violent repression of opposition. The American sanctions against the Soviet Union following invasion of Afghanistan in 1980 had the same objective as mentioned above.[61]

Especially at election time, sanctions may be imposed in response to the pressure of domestic or international public opinion. In extreme cases, mere condemnation of an internationally wrongful act will not satisfy public opinion and concrete measures are required. The sanctions which the U.S. imposed on the Soviet Union, following the declaration of martial law in Poland in 1981, are an illustration of the effect which public pressure can have.

Sanctions may also be imposed in order to gain bargaining power.[62] Again, in the case of the American sanctions against Poland in 1981, the U.S. attempted to induce Poland to abandon its repressive policy, by reducing the severity of sanctions whenever relaxation of repressive control occurred in Poland.[63]

Sanctions may have hidden objectives. States may not proclaim the objectives of their sanctions, because so doing would weaken the justification for the sanctions.[64]

In the case of collective sanctions, it is submitted that the effectiveness of such sanctions will be greater if the objectives and goals of the group of imposing states coincide.[65] For instance, in the case of the League of Nations sanctions against Italy in 1936, France and Britain "followed the ambivalent policy of making a gesture towards a fulfillment of international obligations," while smaller members of the League hoped that sanctions would coerce Italy in ceasing the invasion of Ethiopia.[66] This diversity of objectives partly explains why the sanctions were not effective.

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[61] *Economic Sanctions Reconsidered: History, supra* note 27 at 163.
[62] Miyagawa, *supra* note 49 at 99.
[63] *Ibid.* at 99.
[64] *Ibid.* at 106.
[65] *International Enforcement, supra* note 19 at 82.
[66] *Ibid.* at 83.

Both in the assessment of legality of sanctions and their effectiveness, it is essential to take their objectives into account.[67]

V- Forms of Implementation

Economic sanctions may be implemented in different ways. The *Covenant of the League* only provided for total boycotts.[68] However, in practice, it was impossible to implement that provision. Thus, it was abandoned by the members in favour of "selected and graduated penalties."[69]

The *U.N. Charter* details "an illustrative, non-exhaustive enumeration" of forms of implementation of sanctions (not only economic[70]) and gives the Security Council the discretion to apply any combination of the measures that it considers appropriate.[71] Article 41 of the *U.N. Charter* states that:

> [t]he Security Council may decide what measures not involving 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 measures enumerated in Article 41 are only by way of example and the Security Council can take measures which are not mentioned in Article 41.[72] Forms for the implementation of economic sanctions can be categorized as follows:[73]

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[67] The objectives are labeled differently by different authors. Doxey refers to "goals in theory" and "goals in practice" and enumerates, "deterrence," "compliance," "punishment," "destabilization," "limitation of conflict," "solidarity," and "symbolism and signaling" as goals of sanctions (see *Sanctions in Contemporary Perspective*, *supra* note 55 at 54-65).

[68] For the complete text of Article XVI of the *Covenant of the League* see *infra* note 159.

[69] *International Enforcement*, *supra* note 19 at 87. In the only case of sanctions under the League of Nations system, the coordinating committee for the sanctions gradually recommended embargo in different sectors (see B. Simma *et al.*, eds., *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 1994) at 623).

[70] Non-violent sanctions, in general, include: diplomatic and political measures (*e.g.* public protest, cancellation of official visits, meetings, negotiations for treaties and agreements, limitation of scale of diplomatic representation, severance of diplomatic relations, and etc.), cultural and communications measures (*e.g.* cancellation of cultural exchanges, scientific cooperation, educational ties, sports contacts, tourism, restriction of visa privileges for target nationals, restriction of telephone, cable, postal links, and etc.), and economic measures which are subject of the current thesis (see *Sanctions in Contemporary Perspective*, *supra* note 55 at 11-15).

[71] Simma *et al.*, eds., *supra* note 69 at 624.

[72] According to Simma *et al.*'s commentary on the *U.N. Charter*, "[t]he most far-reaching use of Art. 41 ordering measures not listed was made by Resolution 827 (1993) of May 25 1993 setting up the international tribunal for prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia" (*Ibid.* at 626).

[73] Miyagawa, *supra* note 49 at 16-23; from another perspective economic sanctions can be categorized as "financial" and "commercial and technical" (see *Sanctions in Contemporary Perspective*, *supra* note 55 at 15).

Restrictions on the flow of goods: These restrictions may be export or import restrictions.

Export restrictions can be selective or total, in terms of depriving the target state of its ability to import certain essential goods. Examples of this type of sanction include: Arab OPEC countries' sanctions against the United States, the Western European states and Japan in 1973, [74] and the United States' grain embargo against the Soviet Union in 1981 following the declaration of martial law in Poland.[75]

Import restrictions affect the economy of the target state less directly than export restrictions. Import restrictions may cause economic hardship and reduce foreign exchange earnings. Examples of this form of sanctions include: the U.S. embargo on imports of Cuban sugar which began in 1960, [76] the U.S. ban on imports of Iranian oil in 1979 following the Hostage crisis,[77] and the U.N.'s mandatory sanctions against Rhodesia in 1966 which began as a selective import embargo, and were then upgraded to a comprehensive trade boycott. [78]

Restrictions on the flow of services: Flow of services' restrictions include restrictions on telecommunication, postal services and sea, land and air transportation. Embargoes on communications can produce a psychological sense of isolation, as well as economic hardship.[79] An instance of this form of sanctions occurred in 1983, following the Korean Airliner incident, when some NATO members, Japan, New Zealand, and

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[74] A few pages in Doxey's book are dedicated to Arab Boycotts and Embargoes (see *International Enforcement, supra* note 19 at 20-28).

[75] *Economic Sanctions Reconsidered: History, supra* note 27 at 205-220. Other examples include: League of Nations economic sanctions against Italy in 1936; U.S. oil export ban on Japan following advancement of Japanese forces into Indo-China, in 1941; Britain's embargoes on the export of Malayan rubber and Indian chrome to Japan at the same period. U.S. embargo on the export of strategic goods and advanced technology to the Communist bloc before the end of the Cold War; U.N. economic sanctions against South Africa in 1977; U.S. grain embargo against Soviet Union after Moscow's intervention in Afghanistan, 1980 (see Miyagawa, *supra* note 49 at 17).

[76] See G.C. Hufbauer, J.J. Schott & K.A. Elliott, *Economic Sanctions Reconsidered: Supplemental Case Histories*, vol. 2, 2[d] ed. (Washington D.C.: Institute for International Economics, 1990) [hereinafter *Economic Sanctions Reconsidered: Supplement*] at 194-204.

[77] See *infra* footnote 146.

[78] This case is studied in more detail in chapter 3 at 55, below. The suspension of material economic aid (or "aid in kind") should be added to this category: in 1948, the Netherlands refused to grant independence to Dutch East Indies. U.S. threatened to withhold aid in kind under the Marshal Plan from Netherlands and some shipments were suspended (see Miyagawa, *supra* note 49 at 19).

[79] See *International Enforcement, supra* note 19 at 87.

Switzerland announced suspension of all flights to and from the Soviet Union for 14 to 60 days.[80]

Restrictions on the flow of money: These are, in fact, financial sanctions. Their aim is analogous to that of import embargoes, because it is directed against the target state's purchasing power. They may include measures taken for the purpose of preventing loans to the target state, hindering banking or preventing the transfer of the target state's assets. For example, Britain froze the assets of Rhodesia in 1966; and, following the 1982 Argentinean invasion of the Falklands, Britain froze all assets of Argentina in Britain.[81]

Control of the markets in order to reduce the target state's opportunity to gain access to them: This type of control is aimed at creating artificial scarcity and higher prices in markets for commodities essential to the target state. An example of this type of sanction was Britain's action during World War I, when it bought up Balkan grain in order to prevent the enemy from having access to it.[82]

Choosing the right form of sanction is important in terms of the effectiveness of sanctions.[83] Different types of states should be treated differently. A predominantly agricultural state, a state which relies on foreign aid, and an industrialized state will not be affected by sanctions in the same way. In some cases, the imposing state(s) may

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[80] See *Economic Sanctions Reconsidered: Supplement, supra* note 76 at 563-567. Other examples include: the ban on landing of all Aeroflot aircraft at American airports following the 1981 Polish crisis (Russian ships were also not permitted to enter the U.S. ports); sanction imposed mutually by Britain and Argentina after the Falkland crisis in 1982. In the case of sanctions against Rhodesia, some African states urged for a ban on telecommunication links, but Britain and the U.S. opposed it in the Security Council (see Miyagawa, *supra* note 49 at 19-20).

[81] See *Economic Sanctions Reconsidered: Supplement, ibid.* at 537-545. The following cases are also illustrations of such sanctions: In 1935, the League of Nations sanctions against Italy included financial measures except freezing of the target state's assets; during the Suez crisis, in 1956, the U.S. blocked approval of the International Monetary Fund (IMF) loans to Britain and France; in the case of the U.S. sanctions against Cuba, in 1960, the U.S. froze about $33 million worth of Cuban assets in American banks; in the case of the U.S. sanctions against Iran, in 1979, all assets of the Iranian Government in the U.S. and in the foreign branches or subsidiaries of American banks were blocked (see *infra* note 146 for more details); In the case of the Polish crisis, in 1981, Western countries agreed not to grant any new credits or to reschedule the accumulated debts of Poland (see Miyagawa, *Ibid.* at 21-22).

[82] Miyagawa, *ibid.* at 22. Following cases can be cited as other examples of such sanctions: during World War II the Allies bought Portuguese and Spanish wolframite (used in anti-tank ammunition) to keep this substance out of the hands of the Germans; the case of sanctions against Rhodesia is also an example of money market controls. Britain expelled Rhodesia from the Sterling Area and closed the London capital market to Rhodesian dealing. In the case of the U.S. sanctions against Cuba, the U.S. prohibited Cuban dollar transactions in all banks in the U.S. (see *ibid.* at 22).

[83] See *International Enforcement, supra* note 19 at 87-90.

choose to employ all mentioned means to cause hardship to the target state, or they may choose a single means which is considered to be most effective.[84]

VI- Conclusion

The following chapters will examine "economic sanctions" as opposed to other types of non-violent sanctions. The term "economic sanction" as used in this thesis will refer to "boycott", "embargo" and "countermeasure." These terms are often used interchangeably, however, in most cases they refer to unilateral sanctions.

In this introduction, the distinction between unilateral and collective was emphasized and it was noted that non-centralized sanctions imposed by a group of states are considered as unilateral sanctions. The distinction between unilateral and collective sanctions will be the core of the analysis of legal basis for economic sanctions in the next chapter. Even though unilateral sanctions will be referred to and studied throughout the thesis, the focus will be on collective or centralized sanctions.

Recognizing the objectives of sanctions is important in analyzing legality as well as assessing their effectiveness. As will be discussed in the next chapter, sanctions are only legal when they are imposed in response to a breach of international law, a breach of peace, or a threat to the peace. Economic sanctions that pursue other objectives are, thus, illegal.

Finally, while different forms of sanctions are subjects of this study, a discussion of the control of markets (as well as retorsion) is beyond the scope of this thesis. It should simply be noted that, under normal circumstances, they would not be in breach of international law.

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[84] In the case of U.S. sanctions against Iran (the Hostage crisis), on April 17, 1980, the U.S. upgraded its sanctions and all forms of sanctions enumerated in this section were employed against Iran (see Miyagawa, *supra* note 49 at 140).

CHAPTER 2- LEGAL BASIS OF SANCTIONS

Due to the distinction between unilateral and collective sanctions, this chapter will examine the legal basis of each type of sanction separately. While collective sanctions derive their legality from international agreements, unilateral sanctions are based on the theory of retaliation.

I- The Legal Basis of Unilateral Sanctions

Traditionally unilateral sanctions were implemented under the theory of retaliation. When a state breached one of its international obligations the aggrieved party could impose unilateral sanctions subject to the conditions enumerated below. It is argued that the theory of retaliation can be extended to encompass the cases of breaches of *erga omnes* obligations. Since this interpretation enlarges the classical scope of the traditional theory it will be studied under a different heading.

A- Retaliation Theory: Conditions for the Legality of Unilateral Sanctions

According to the theory of retaliation, every rule of international law is *a priori* equipped with a legal sanction.[85] If a state violates a rule, "the victim States are entitled in principle to suspend the performance of any other international law norm in their relation with the violator."[86] This general principle, although not contested, is subject to certain conditions.

Under the general principles of international law, there is no rule that requires a state to trade with other states.[87] This principle is the result of the traditional doctrine of state sovereignty according to which a state's sovereign right includes the right to control the flow of goods into and out of its national territory.[88] In practice, however, states often enter international trade arrangements in order to facilitate their foreign trade, to have access to foreign markets and to be able to satisfy their needs. Consequently, very often, states are bound by bilateral or multilateral trade treaties which are binding and which

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[85] Schachter, *supra* note 34 at 185.
[86] *Ibid.*
[87] S. Williams and A. de Mestral, *An Introduction to International Law* (Toronto: Butterworths, 1979) 291-92.
[88] A. Rosen, "Canada's Use of Economic Sanctions for Political Purposes" (1993) 51 U.T. Fac. L. R. 1 at 28.

create legal obstacles to the use of economic sanctions. Due to this limitation, a state violates international law if it breaks treaty norms which are binding upon the state imposing the sanction.[89] The most significant example of a multilateral arrangement that limits the application of unilateral economic sanctions is the W.T.O. which now has 135 members.[90] Notwithstanding this practical restriction on the application of sanctions, the theory of retaliation is still valid under international law.

In preparing the *ILC Draft Articles*, the International Law Commission examined the legality of unilateral sanctions and affirmed their validity under international law as one of the circumstances precluding wrongfulness of the act.[91] Article 30 of the *ILC Draft Articles*,[92] under the title of "countermeasures in respect of an internationally wrongful act," anticipates that:

> [t]he wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.[93]

In addition, according to customary international law, the following conditions are enumerated for testing the legality of non-forcible countermeasures in general and unilateral economic sanctions in particular: prior breach, prior demand for redress, and proportionality. [94]

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[89] "International Legal Aspects", *supra* note 13 at 148.

[90] WTO members as of December 1999. See "Members", online: WTO <http://www.wto.org/wto/about/organsn6.htm> (last modified 21 Dec 1999).

[91] See debates on Draft Article 30 concerning "Legitimate application of a Sanction" ("Summary records of the meetings of the thirty-first session" in *Yearbook of the International Law Commission 1979*, vol. I (New York, UN, 1979) (UNDOC. A/CN.4 /SER.A/1979) at 55-63).

[92] *Report of the International Law Commission on the work of its forty-eight session*, *supra* note 10 at 136.

[93] It is interesting to compare this text with the first draft of Article 30 which, under the title of "Legitimate application of a sanction," read as follows:

> [t]he international wrongfulness of an act not in conformity with what would otherwise be required of a State by virtue of an international obligation towards another State is precluded if the act was committed as the legitimate application of a sanction against that other State, in consequence of an internationally wrongful act committed by that other State (see "Summary records of the meetings of the thirty-first session," *supra* note 91 at 55).

[94] These requirements are enumerated by prominent scholars like Bowett in the following words: "a prior international delinquency against the claimant State [must have occured]," "redress by other means must be either exhausted or unavailable" and "the economic measures taken must be limited to the necessities of the case and be proportionate to the wrong done" (see D.W. Bowett, "International Law and Economic Coercion" (1976) 16:2 Va. J. Int'l L. 245 at 252 [hereinafter "International Law and Economic Coercion"]).

i- Prior Breach

First, there should be a **prior breach** of an obligation. The correlation between prior breach of obligations under international law and state responsibility is very well established in international law.[95]

In international law, like domestic law, legal obligations may have different origins. An international obligation may be established by a customary rule of international law, by a treaty provision or by a general principle of law applicable within the international legal order.[96] According to the International Law Commission two questions may be raised regarding the different origins of international obligations:

> [t]he first, and by far the simplest, is whether the breach by a State of an international obligation always constitutes an internationally wrongful act, regardless of the origin of the obligation. The second is whether the origin, customary, conventional or other, of the obligation breached, or the fact that, for example, the obligation derives from a general normative treaty or from a treaty intended only to establish specific legal relationships, has or has not any effect, on the characterization as internationally wrongful of the act breaching the obligation, but on the kind and forms of international responsibility engaged by the act.[97]

The Commission's answer to these two questions is contained in Article 17 of the *ILC Draft Articles*,[98] which reads as follows: "[a]n act of a State which constitutes a

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[95] See I. Brownlie, *System of the Law of Nations: State Responsibility*, Part I (Oxford: Clarendon Press, 1983) at 60 [hereinafter *State Responsibility*]; and the following cases: *S.S. Wimbledon Case* (1923), P.C.I.J. (Ser. A) No. 1, 15 at 30 and 33; *The Spanish Zone of Morocco Claims (Great Britain* v. *Spain)* (1925) II R.I.A.A. 615 at 641; *Case Concerning the Factory at Chorzów (Claim for Indemnity. Merits) (Germany* v. *Poland)* (1928), P.C.I.J. (Ser. A) No. 17, 3 at 29; *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] I.C.J. Rep. 174 at 184; *Corfu Channel Case (United Kingdom* v. *Albania)* [1949] I.C.J. Rep. 4 at 23.

[96] This last source of obligation will be discussed in the next section on *erga omnes* obligations.

[97] "Report of the Commission to the General Assembly on the work of its twenty-eight session" (UN Doc. A/31/10) in *Yearbook of the International Law Commission 1976*, vol. 2, Part 2 (New York, UN, 1977) (UNDOC. A/CN.4/SER.4/1976/Add.1(Part 2)) at 80.

[98] For the Commentary of Article 17 see *ibid.* at 80-87; According to this commentary:

> [I]nternational jurisprudence has not often had occasion to consider explicitly the question whether the formal origin of the international obligation breached by an act of the State has a bearing on the characterization of that act as "internationally wrongful." However, an examination of the enormous number of international decisions which recognize the existence of an internationally wrongful act ... is sufficient to show that the wrong attributed to the State in these decisions is in some cases the breach of an obligation established by a treaty, in others the breach of an obligation of customary origin, and more rarely the breach of an obligation arising from some other source of international law (*ibid.* at 81).

According to this commentary, in the following cases, the adjudicators and arbitrators have stated explicitly the principle that breach of an international obligation is always an internationally wrongful act regardless of the origin of the obligation in question: *Germany-Romania (Goldenberg Case)* (1928) II R.I.A.A. 908-909; *Italy- United States (Armstrong Cork Company Case)* (1953) XIV R.I.A.A 163; *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain)*, [1970] I.C.J. Rep.3 at 46

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breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary or other, of the obligation."[99]

According to the International Law Commission's commentary on Draft Article 30, anticipatory non-forcible countermeasures[100] are unlawful since they precede actual occurrence of the breach.[101] This view is indirectly confirmed by jurisprudence (*e.g.* the Tribunal in the *Air Services Agreement Dispute (United States-France)*[102]), as well as state practice (*e.g.* clear indication by the United States government, in the case of the American sanctions against Iran in 1980, that the sanctions were imposed in response to a breach of an international obligation).[103]

Also related to this subject is Article 60 of the *Vienna Convention on the Law of Treaties*[104] ("suspension or termination of treaties") according to which, "[a] material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part." It is submitted that the provisions of the *Vienna Convention* have not superseded the right of reprisal under customary law. Thus, in the case of treaty breaches, the victim state may be entitled to take proportionate measures against the offending state other than the suspension of treaty obligations.[105]

[hereinafter *Barcelona Traction Case*]; *Mexico-United States* (*Dickson Car Wheel Company Case*) (1931) IV R.I.A.A. 678; *Mexico-United States* (*International Fisheries Company Case*) (1931) IV R.I.A.A. 701.

[99] *Report of the International Law Commission on the work of its forty-eight session, supra* note 10 at 130.

[100] This notion is parallel to the notion of "anticipatory use of force" which is surrounded by much controversy. While, according to some writers, Article 51 of the *U.N. Charter* confines the use of force in self-defence to situations in which an armed attack has already taken place, some other writers advocate a different interpretation of Article 51 which allows anticipatory self-defence (see Elagab, *supra* note 33 at 53; *contra* D.W. Bowett, *Self-Defense in International Law* (Manchester: Manchester University Press, 1958) at 189).

[101] Paragraph 2 of the commentary states that,

> [t]he circumstances precluding wrongfulness with which this article is concerned is thus one of those "countermeasures" which international law regards as legitimate following an internationally wrongful act committed *previously* ("Report of the Commission to the General Assembly on the work of its thirty-first session" *supra* note 12 at 115 [emphasis added]).

[102] (1979) 54 I.L.R. 304 at 733, para. 81 [hereinafter *Air Services Agreement Dispute*].

[103] See Elagab, *supra* note 33 at 54-55. Elegab adds that contrary to that case, "the freezing by the U.S. of all Libyan Government assets in the U.S. banks which was a measure taken to help assure the orderly management of the dissolution of the unlawful Libyan actions which adversely affect[ed] American interests" was an anticipatory action and could not be regarded as a lawful countermeasure (*ibid.* at 55).

[104] 23 May 1969, 1155 U.N.T.S. 311 (entered into force 27 January 1988) [hereinafter the *Vienna Convention*].

[105] Schachter, *supra* note 34 at 190-191.

ii- Prior Demand for Redress

The second condition dictates that there should be an unfulfilled **prior demand for redress.**

In the *Naulilaa Case (Portugal-Germany)*,[106] the Arbitral Tribunal stated that "[r]eprisals are illegal if they are not preceded by a request to remedy the alleged wrong."[107]

Conversely, the Arbitral Tribunal in the *Air Services Agreement Dispute*[108] did not make any explicit reference to the question of whether a prior demand is a prerequisite of lawful countermeasures.[109] However, the Tribunal stated that the implementation of countermeasures should be subject to the limits prescribed by international law on the use of armed forces.[110] Similarly, according to Professor Bowett, "[a] State's resort to economic reprisals must still be subject to the accepted, traditional preconditions for armed reprisals," and one of these preconditions is that "redress by other means must be either exhausted or unavailable."[111]

In the case of American economic sanctions against Iran following the hostage crisis,[112] the U.S. only imposed sanctions after it tried to solve the crisis through negotiation and diplomatic efforts.[113] In dealing with that case—even though the legality of sanctions was not an issue—the I.C.J. noticed that, before imposing the sanctions, the U.S. made an effort to settle the issue by other means.[114]

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[106] For further discussion of this case see *infra* note 128.
[107] (1928) II R.I.A.A. 1013 at 1025-26 [hereinafter *Naulilaa Case*].
[108] *Air Services Agreement Dispute, supra* note 102.
[109] Elagab, *supra* note 33 at 67.
[110] *Air Services Agreement Dispute, supra* note 102 at 337 para. 81.
[111] "International Law and Economic Coercion" *supra* note 94 at 252.
[112] On November 4, 1979—some months after the 1978 Revolution in Iran—the U.S. Embassy in Tehran was attacked and occupied by a group of armed Iranian students. They took the Embassy staff as hostages and demanded that the U.S. government extradite the deposed former Shah, who was then in the U.S. The crisis lasted until 21 January 1981, when all 52 remaining hostages were released. For a complete study of the crisis, and the effects of sanctions in this case see Miyagawa, *supra* note 49 at 107-215.
[113] On November 7, 1980, a Special Emissary of the United States was sent to Tehran to negotiate the release of the hostages. Even though Iranian officials were prohibited from making any contact with him, he managed to convey his Government's protests over the seizure of the hostages and the diplomatic premises (see Elagab, *supra* note 33 at 75).
[114] The Court implied that the countermeasures were lawful. Regarding prior demand for redress, it took into account, "[t]he total inaction of the Iranian authorities [...] in the face of urgent and repeated requests for help" (*Case Concerning United States Diplomatic and Consular Staff in Tehran (United States* v. *Iran)* [1980] I.C.J. Rep. 3 at 31, para. 64 [hereinafter the *Hostage Case*]).

Instances of state practice can also be cited to support the existence of this condition for legality of countermeasures. Reaction of the United States in the hostage crisis is one such instance.[115]

There are other questions regarding the details of prior demand, for example, the interval between demand and resort to countermeasures and the content of the demand. These issues are beyond the scope of this thesis.[116]

The last important issue regarding the prior demand for redress condition is whether the aggrieved state should first seek a remedy through third party settlement. Those in favor of such a requirement invoke Article 2(3) of the *U.N. Charter*[117] and the general principle of international law that requires states to settle disputes by peaceful means.[118] The International Law Commission has also adopted this view in Article 48 of the *ILC Draft Articles*.[119] In fact, this article was the most controversial and debated of the articles on countermeasures.[120] Those against this requirement argue that negotiation or other forms of dispute settlement can be lengthy, that countermeasures can only be effective if taken promptly, and that recourse to non-violent reprisals would be an effective means to bring about negotiation and peaceful settlement.[121] In the *Hostage*

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[115] Other examples include: the demands made by the U.S. in 1946, for the release of American planes, their crew and passengers from Yugoslavia (following the shooting down by Yugoslavia of two American aircraft); the demand made by Yugoslavia in 1948 for the release of her gold and dollar reserve from the U.S. (the U.S. claimed that she had frozen the gold as compensation for the two aircraft); reaction of the British, French and the United States governments following the Egyptian nationalization of the Suez Canal in 1956 (in that case these states protested and presented notes to the Egyptian government); also in *Air Services Agreement Dispute*, France cited the *Naulilaa Case* as an authority confirming this view (see Elagab, *supra* note 33 at 69-74).

[116] See Elagab, *supra* note 33 at 64-79.

[117] Article 2(3) of the *U.N. Charter* reads as follows, "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

[118] See "Economic Coercion and Reprisals by States" *supra* note 32.

[119] Article 48, "conditions relating to resort to countermeasures," of the *ILC Draft Articles* states that:

> 1. Prior to taking countermeasures, an injured State shall fulfil its obligation to negotiate provided for in Article 54.
>
> ...
>
> 2. An injured State taking countermeasures shall fulfil the obligation in relation to dispute settlement arising under Part Three or any other binding dispute settlement procedure in force between the injured State and the State which has committed the internationally wrongful act.
>
> 3. Provided that the internationally wrongful act has ceased, the injured State shall suspend countermeasures when and to the extent that the dispute settlement procedure referred to in paragraph 2 is being implemented in good faith by the State which has committed the internationally wrongful act ... (*Report of the International Law Commission on the work of its forty-eight session*, *supra* note 10 at 144).

[120] See the International Law Commission's commentary on that article in *ibid.* at 159-64.

[121] See Schachter, *supra* note 34 at 188.

Case, two Judges, in dissenting opinions, hold the first view.[122] However, it is submitted that the silence of majority of the Court impliedly "constituted a rejection of the position of the two dissenting judges on the illegality of the economic countermeasures during the pendency of the litigation."[123]

Prevailing state practice (*e.g.* position of the U.S. in the Hostage crisis) affirms the second view, and in practice, states do use countermeasures before arriving at a peaceful settlement.[124]

iii- Proportionality

The last condition is **proportionality**. The concept of proportionality is a general principle of law which is used in many spheres of international relationships. The relevance of proportionality is recognized in both doctrine[125] and jurisprudence. It is a very important element in "determining the lawfulness of a countermeasure in the light of the inherent risk of abuse as a result of the factual inequality of States."[126]

In the 1928 *Naulilaa Case*,[127] Portugal claimed that certain forcible reprisals taken by Germany against Portugal were unjustified and Germany should be responsible for

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[122] *Hostage Case*, *supra* note 114, at 53-54 (separate opinion of Judge Morozov) and 63-65 (separate opinion of Judge Tarazi).

[123] See Schachter, *supra* note 34 at 189.

[124] The following comment of the Court in the *Hostage Case* is also in support of this view:

> The point has also been raised whether, having regard to certain countermeasures taken by the United States vis-à-vis Iran, it is open to the United States to rely on the Treaty of Amity, Economic Relations, and Consular Rights in the present proceedings. However, all the measures in question were taken by the United States after the seizure of its Embassy by an armed group and subsequent detention of its diplomatic and consular staff as hostages, they were measures taken in response to what the United States believed to be grave and manifest violations of international law by Iran, including violations of the 1955 Treaty itself. In any event, any alleged violation of the Treaty by either party could not have the effect of precluding the party from invoking the provisions of the Treaty concerning pacific settlement of disputes (*Hostage Case*, *supra* note 114 at para. 53).

[125] See H. Kelsen, *Principles of International Law*, 2nd ed. (New York: Rinehart and Winston, 1966) at 21; Schachter, *supra* note 34 at 193; P. Reuter, *Droit international public*, 6th ed. (Paris: Presse universitaire de France, 1983) at 463; I. Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963) at 219 [hereinafter *International Law and Use of Force*]; "Economic Coercion and Reprisals by States" *supra* note 118 at 10.

[126] "Report of the Commission to the General Assembly on the work of its forty-seventh session" (UN Doc. A/50/10) in *Yearbook of the International Law Commission 1995*, vol. II, Part 2 (New York: UN, 1996) (UNDOC. A/CN.4/SER. A/1995/Add.1(Part 2)) at 64-65.

[127] *Naulila Case*, *supra* note 107.

making reparation.[128] After an examination of the circumstances, the Arbitral Tribunal held that Germany was responsible. The Tribunal noted that:

> [r]eprisals which are altogether out of proportion with the act which prompted them, are excessive and therefore illegal. This is so even if it is not admitted that international law requires that reprisals should be approximately of the same degree as the injury to which they are meant to answer.[129]

The principle of proportionality has been discussed in many international arbitration awards and court judgements.[130] More specifically, regarding sanctions or reprisals, the International Law Commission considered the relevance of proportionality during the debates on legitimate countermeasures. Article 49 of the *ILC Draft Articles* states that, "[c]ountermeasures taken by an injured States shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State."[131] Accordingly, if the reprisal is manifestly disproportionate it will be unlawful.

The problem, however, is to define proportionality: what is the criterion for determining proportionality? Put simply, the principal criteria are: the purposes for resorting to countermeasures; the probable effects of the breach and of the countermeasures; and, the factors of dependence and reliance (*i.e.*, how important is the subject of reprisal for the economy of the target state).[132] The aforementioned article of

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[128] In October 1914, during the World War I, a misunderstanding caused a clash between a group of German officials and Portuguese officials (Portugal was neutral in the war) in Portuguese Angola. As a result, three Germans were killed. Later on, without German Government ever demanding satisfaction, German troops destroyed some Portuguese facilities in Angola as reprisal (see A. D'Amato, *International Law: Process and Prospect* (Irvington, NY: Transnational Publishers, 1995) at 43).

[129] *Naulila Case*, *supra* note 107 cited in Elagab, *supra* note 33 at 34.

[130] See *e.g. North Sea Continental Shelf Cases (Federal Republic of Germany* v. *Denmark; Federal Republic of Germany* v. *Netherlands)* [1969] I.C.J. Rep. 3; in which the Court referred to proportionality as one of the factors to be taken into account; *Cases Concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and French Republic* (1977) XVIII R.I.A.A. 3; in which France invoked the principle of proportionality as a specific rule of customary international law; and *Case Concerning the Continental Shelf (Tunisia* v. *Libyan Arab Jamahiria)* [1982] I.C.J. Rep. 18; in which the I.C.J. used the concept of proportionality as a means of testing whether its method of delimitation had produced an equitable solution (Elagab, *supra* note 33 at 81-83).

[131] *Report of the International Law Commission on the work of its forty-eight session*, *supra* note 92 at 145.

[132] See Elagab, *supra* note 33 at 86-95. According to the International Law Commission, "proportionality should be assessed taking into account not only the purely "quantitative" element of damage caused, but also "qualitative" factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach. Therefore, the degree of gravity and the effects of the wrongful act should be taken into account in determining the type and the intensity of the countermeasure to be applied" ("Report

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the Draft Articles, takes into account both the "degree of gravity" and the "effects" of the wrongful act.[133] It is always important to appraise the proportionality of the countermeasure taken. It is sufficient that the action taken "be not grossly disproportionate in gravity and magnitude" for it to be legal. [134]

B- Expanding the Concept of Injured States: Breaches of *Erga Omnes* Obligations

A significant problem with the theory of retaliation is that use of economic sanctions for implementing *jus cogens* and *erga omnes* obligations cannot be justified through the classical version of that theory. It is, therefore, important to define these obligations before explaining the legal basis for the use of countermeasures aimed at upholding such obligations.

As Kamminga has stated, "[p]artly as a consequence of the proliferation of international rules, particularly in the field of human rights, the need for a certain hierarchy in these rules made itself felt."[135] As a result, important rights and obligations of international law have been distinguished from less important ones.[136] *Jus cogens* and *erga omnes* obligations are rules of international law which are of "overriding value and importance" to all the subjects of international law, and as a consequence, breach of such rules is considered to be very serious.[137] It is not clear how these norms should be enforced internationally, but from the words of the International Court of Justice, it may be concluded that all states have an interest in the protection of these rights. The Court stated that:

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of the Commission to the General Assembly on the work of its forty-seventh session" *supra* note 126 at 65-66 [footnote omitted]).

[133] *Ibid.*; This problem has been noted by some tribunals too. In *Air Services Agreement Dispute* the Tribunal stated that, "it is generally agreed that all countermeasures must, in the first instance, have some degree of equivalence with the alleged breach [and] it has been observed, generally, that judging the 'proportionality' of countermeasures is not an easy task and can at best be accomplished by approximation" (*Air Services Agreement Dispute, supra* note 102 at 417).

[134] A. Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1986) at 243-44.

[135] M.T. Kamminga, *Inter-State Accountability for Violations of Human Rights* (Philadelphia: University of Pennsylvania Press, 1992) at 157.

[136] Obligations thus distinguished are recognized under a number of different labels. In addition to *jus cogens* and *erga omnes* obligations, other labels mentioned by Kamminga are, "nonderogable rights," and "international crimes." It should be mentioned that, "the exact scope of each of these categories has not always been clearly defined, and the categories partly overlap, though no two are identical" (*ibid*). For more on relationship between the concept of obligations *erga omnes* and the concept of *jus cogens* see M. Ragazzi, *The Concept of International Obligations* Erga Omnes (Oxford: Clarendon Press, 1997).

[137] See I. Brownlie, *Principles of Public International Law*, 4th ed. (New York: Oxford University Press, 1995) at 512-515 [hereinafter *Principles of Public International Law*].

> an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature *the former are the concern of all States*. In view of the importance of the rights involved all States can be held to have a legal interest in their protection.[138]

That general obligation of all states to enforce these norms could be a justification for the application of both collective and unilateral sanctions in some cases. If sanctions are not used, how can these norms be upheld? This justification is especially useful in cases involving certain human rights violations (which are—under certain circumstances—examples of violation of *jus cogens* norms).

According to the commentary of the International Law Commission, "it would seem contradictory if, in the case of a breach of a rule so important to the entire international community as to be described as a "peremptory" rule, the relationship of responsibility was established solely between the state which committed the breach and the State directly injured by it."[139]

Conversely, in the same commentary, the Commission stated that, "every State must be considered justified in invoking—probably through *judicial* channels—the responsibility of the State committing the international wrongful act."[140] Apparently, the Commission, while not expressly outlawing the imposition of economic sanction in response to breaches of *erga omens* obligations, gives preference to judicial action against such acts. This is caused by the apprehension that implementing enforcement actions in response to breaches of *erga omnes* obligations (without going through judicial proceeding) might contribute to international anarchy.[141]

It is also difficult to enumerate the obligations that are *erga omnes*. The International Court of Justice, in the *Barcelona Traction Case*, has given examples of such obligations. The prohibition of aggression and genocide, the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination, are among those obligations. Furthermore, Article 19(2) of the *ILC Draft Articles* provides that the breach of an international obligation so essential for the

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[138] *Barcelona Traction Case, supra* note 98 at 33 [emphasis added].
[139] "Report of the Commission to the General Assembly on the work of its twenty-eight session" *supra* note 97 at 102 para. 17.
[140] *Ibid.* at 99 [emphasis added].
[141] E. Zoller, "Quelques réflexions sur les contre-mesures en droit international public" in *Droit et libertés à la fin du XX^e siècle: Etudes offertes à Colliard* (Paris: Éditions A. Pedone, 1984) 361 at 381 cited in *ibid.*

protection of fundamental interests of the international community constitutes an international crime. The next paragraph of the article gives a non-exhaustive list of categories of such crimes. The article provides that the following, *inter alia*, constitute international crimes:

> (a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
>
> (b) a serious breach of an international obligation of essential importance for safeguarding the right of self determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
>
> (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;
>
> (d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or the seas.[142]

Even though the ILC has not yet decided the consequences which flow from the distinction between international crime and international *delict*,[143] "it is evident that the obligation not to commit international crimes constitutes an obligation *erga omnes*."[144] I will not enter into the debate over the scope of *erga omnes* obligations. There is much controversy surrounding the question of scope of such obligations.[145]

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[142] The next paragraph of this Article defines "international delict" as, "[a]ny internationally wrongful act which is not an international crime in accordance with paragraph 2 ..."

[143] However, two broad categories of consequences which are applicable only in case of international crimes are: the imposition upon a state which has committed an international crime of more severe consequences than applicable in case of international delicts; and the broadening of the category of subjects of international law entitled to invoke the responsibility of a state in case an internationally wrongful act constitutes an international crime (A. de Hoogh, *Obligations* Erga Omnes *and International Crimes* (The Hague: Kluwer Law International, 1996) at 63-64). For more on distinction between international crime and international delict see *ibid.* at 114-124 and also *Report of the International Law Commission on the work of its fiftieth session*, UN GAOR, 53rd Sess., Supp. No.10, UN Doc. A/53/10 and Corr.1(1998) paras. 241-331.

[144] Kamminga, *supra* note 135 at 160. See also M. Mohr, "The ILC's Distinction between "International Crimes" and "International Delicts" and its Implications" in M. Spinedi & B. Simma, eds., *United Nations Codification of State Responsibility* (New York: Oceana Publications, 1987) 115.

[145] See generally Ragazzi, *supra* note 136 at 132-188. The uncertainty regarding the scope of the notions of *erga omnes* obligations, international crimes and the consequences to flow from these notions is reflected in the interim conclusions of the International Law Commission on Article 19 of the *ILC Draft Articles*:

> Following the debate, and taking into account the comments of the Special Rapporteur, it was noted that no consensus existed on the issue of the treatment of "crimes" and "delicts" in the draft articles, and that more work needed to be done on possible ways of dealing with the substantial questions raised. It was accordingly agreed that: (a) without prejudice to the views of any member of the Commission, draft article 19 would be put to one side for the time being while the

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In some instances, states not directly affected by a violation of *erga omnes* obligations have imposed unilateral economic sanctions. However, the likelihood of such intervention is less. For example, in the Tehran hostage crisis,[146] after a draft resolution introduced by the United States for the imposition of sanctions by the Security Council failed because of the Soviet veto, the member states of the European Community imposed economic sanctions against Iran. The imposition of sanctions was justified "by stressing both the importance of the obligations concerned to the international community as a whole and the seriousness of the breaches themselves."[147] However, most of the measures taken, in this case, were merely acts of retorsion, as few states were prepared to take reprisals. As a result, it is difficult to cite the case as evidence of a general state practice. At the same time, this case is "evidence of a growing inclination of states to consider themselves injured by serious breaches of international obligations of humanitarian character and consequently as entitled to take a modest action of requiring the offending state to halt the breach."[148]

Applying the three conditions for legality of unilateral economic sanctions to the cases of sanctions for breaches of *erga omnes* obligations causes two problems:

First, since the scope of such obligations is not clear, it is possible for states to justify imposition of unilateral sanctions by interpreting acts as a violation of *erga omnes* obligations, which may not be violations of *erga omnes* obligations at all.

Second, it is difficult to extend the condition of proportionality to cases of breaches of *erga omnes* obligations. States which violate the human rights of their nationals can claim that they have not caused any material damage to the states imposing

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Commission proceeded to consider other aspects of Part One; (b) consideration should be given to whether the systematic development in the draft articles of key notions such as obligations (erga omnes), peremptory norms (jus cogens) and a possible category of the most serious breaches of international obligation could be sufficient to resolve the issues raised by article 19; (c) this consideration would occur, in the first instance, in the Working Group established on this topic and also in the Special Rapporteur's second report; and (d) in the event that no consensus was achieved through this process of further consideration and debate, the Commission would return to the questions raised in the first report as to draft article 19, with a view to taking a decision thereon.

Report of the International Law Commission on the work of its fiftieth session, *supra* note 143 para 331.

[146] See *supra* note 112 for more information on that crisis.

[147] Kamminga, *supra* note 135 at 161-2.

[148] *Ibid.* at 163. U.S. sanctions against the U.S.S.R. following invasion of Afghanistan and the EEC sanctions against Argentina following invasion of Falkland/Malvinas fall under the same category (see Cassese, *supra* note 134 at 244).

countermeasures against them. However, in its commentary on the former Article 13 of the *ILC Draft Articles*,[149] the International Law Commission has stated that:

> [t]he requirement that a countermeasure should also be proportionate to the effects of the wrongful act on the injured State should not be restrictively interpreted to rule out the taking of countermeasures against a State violating its international obligations relating to the human rights of its nationals on the ground that such violation did not entail material damage to the injured State. *Such an interpretation could have a negative effect on the development and enforcement of human rights law ...*[150]

The Commission continues:

> [t]he concluding phrase "on the injured State" is not intended to narrow the scope of the article and unduly restrict a State's ability to take effective countermeasures in respect of certain wrongful acts involving obligations *erga omnes*, for example violations of human rights. At the same time, a legally injured State, could be more limited in its choice of the type and the intensity of measures that would be proportional to the legal injury it has suffered.[151]

It can be concluded that, based on a modern interpretation of the theory of retaliation, a breach of an *erga omnes* obligation is a ground for the imposition of sanctions by all other states, since an obligation towards all states has been breached.[152] Or, using the terms of the International Law Commission, all the states can impose unilateral sanctions in response to "international crimes" committed by a state,[153] but only the state which is the victim of an "international delict" committed by another state has the right to make a reprisal.[154]

Under the theory of retaliation, there are some limitations on the application of countermeasures. These will be discussed in the chapter 4.

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[149] Former Article 13, "Proportionality," is Article 49 of the latest version of the *ILC Draft Articles*.

[150] "Report of the Commission to the General Assembly on the work of its forty-seventh session" *supra* note 126 at 66 para. 8 [emphasis added].

[151] *Ibid.* para. 9.

[152] This conclusion is confirmed by different authors (See Elagab, *supra* note 33 at 58-59 and 63; Mohr, *supra* note 144 at 129-131).

[153] Mohr states that, "another characteristic feature of those international crimes ... is that they allow for the application of certain unilateral, mandatory reactions (sanctions)" (*ibid.* at 129).

[154] There are some concerns over the accommodation of the concept of crimes of state by Article 19 of the *ILC Draft Articles*. Among others the question is raised as to whether the crimes are adequately defined? Who decides when a crime has been committed? Should it be a court and hence a legal decision? If so, which court, and how does it acquire jurisdiction? (See especially: D. W. Bowett, "Crimes of State and the 1996 Report of the International Law Commission on State Responsibility" (1998) 9 Eur. J. Int'l L. 163 [hereinafter "Crimes of State and the 1996 Report of the ILC"]).

II- The Legal Basis of Collective Sanctions

Collective sanctions are centralized sanctions that are decided upon within the institutional framework of the organization which implements them. Therefore, the legal basis for this category of sanctions must be sought within the legal framework of those organizations. In fact, the international organizations which can implement collective sanctions are not numerous.[155] Among them, undoubtedly, the U.N. is the most important as it has the largest membership of any one organization.[156] In view of the dominant role that the U.N. plays on the international scene and the importance of sanctions in the U.N. system, the focus of my study of collective sanctions will be the U.N.'s economic sanctions.

In the first section of this part, I will examine the relevant provisions of the *U.N. Charter* (*i.e.* Chapter VII of the *U.N. Charter*) as the legal basis of implementation of collective economic sanctions. As the existing provisions of the *U.N. Charter* are not sufficient to justify all the potential impositions of collective sanctions, in the second section, I will propose an alternative legal basis for collective economic sanctions under the general rules of international law.

A- Treaty Basis of Collective Sanctions: Chapter VII of the *U.N. Charter*

It is clear that, "in framing the Charter of the United Nations, special attention was given to the use of economic sanctions as part of a more sophisticated system of

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[155] International organizations should meet the criteria mentioned at 10, above, for their actions to be considered to be collective sanctions.

[156] Another important example of collective sanctions is those imposed by the Organization of American States on its member-states. However, in the case of the O.A.S., it is doubtful whether the Organization is entitled to determine that the economic sanctions are compulsory or recommendatory. According to Article 8 of the *Inter-American Treaty of Reciprocal Assistance*:

> For the purposes of this Treaty, [in case of a conflict between two or more American States] the measure on which the Organ of Consultation may agree will comprise one or more of the following:... partial or complete interruption of economic relations or of rail, sea, air, postal, telegraphic, telephonic, and radiotelephonic or radiotelegraphic communications; and use of armed force. (*Inter-American Treaty of Reciprocal Assistance (Rio Treaty)*, 2 September 1947, 21 U.N.T.S. 77 (Dominican Republic, Guatemala, Costa Rica, Peru, El Salvador, etc.)).

In the case of the Dominican Republic, in 1960, the Organization applied compulsory economic measures against that state, but in the case of Haiti, the action was recommendatory (see D.E. Acevedo, "The Haitian Crisis and the OAS Response: A Test of Effectiveness in Protecting Democracy" in L.F. Damrosch, ed., *Enforcing Restraint: Collective Intervention in Internal Conflicts* (New York: Council on Foreign Relations Press, 1993) 119 at 135-37 [hereinafter *Enforcing Restraint*]).

collective security."[157] The key article in Chapter VII of the *U.N. Charter* (the chapter which is dedicated to the system of collective security) is Article 39.[158]

To better understand the scope of Article 39 and to properly analyze the underlying principles of this article, the following must be understood: historical origins of the article, the intent of its drafters, the ways in which it has been applied over the course of the last 50 years.

Under the League of Nations system, the prerequisite for the use of economic and military sanctions (as stipulated at Article XVI of the *Covenant of the League*[159]) was that a member of the League of Nations had gone to war in violation of Articles XII, XIII and XV of the *Covenant of the League*.[160] Unlike the *U.N. Charter*, the *Covenant of the League* did not provide for binding decisions of the League's organs in this area. It was up to each member to decide whether or not to apply sanctions.[161] Implementation of economic sanctions was the only instance in which the implementation of sanctions was

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[157] C.C. Joyner, "Collective Sanctions as Peaceful Coercion: Lessons from the United Nations Experience" (1995) 16 Aus. Y.B. Int'l L. 241.

[158] The text of Article 39 of the *U.N. Charter* can be found at 11, above.

[159] Article X of the *Covenant of the League* states that:

> [t]he Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

And Article XVI reads as follows:

> [s]hould any member of the League resort to war in disregard of its Covenants under Articles XII, XIII, or XV, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial, or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.
>
> It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.
>
> The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this article, in order to minimize the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League.
>
> Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon.

[160] See Simma *et al*, eds., *supra* note 69 at 606.

[161] See L.M. Goodrich, E. Hambro & A.P. Simons, *Charter of the United Nations: Commentary and Documents*, 3[d] rev. ed. (New York: Columbia University Press, 1969) at 311.

not considered to be a collective decision of the League of Nations. Rather, economic sanctions were deemed to reflect, "the coexistence of corresponding but independently taken decisions of the member states."[162]

Contrary to the *Covenant of the League*, the Security Council has been vested with a broad competence to impose economic sanctions. This is made manifest by the *travaux préparatoires* for Article 39 of the *U.N. Charter* and the text of the article. Wide discretion was given to the Council "to avoid, on the one hand, the possibility that the aggressor might turn any detailed definition to his advantage, and on the other, the danger of premature action." [163] The Dumbarton Oaks Proposals were finally adopted. Other proposals which attempted to enlarge the competence of the General Assembly, limit the freedom of choice of the Security Council and restrict the discretion of the Security Council, were turned down.[164] Consequently, Chapter VII of the *U.N. Charter* enables the Security Council to employ military force and economic measures against any member-state that is breaking the "peace" or committing an "act of aggression."

Article 41 of the *U.N. Charter* entitles the Security Council to impose mandatory economic sanctions.[165] The *U.N. Charter* has further anticipated the possible conflict between the obligations imposed by the *U.N. Charter* and other obligations of member-states, by providing that the obligations under the *U.N. Charter* prevail over any other international agreement.[166] Considering these provisions and the obligation of states to

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[162] Simma *et al*, eds., *supra* note 69 at 607; "This is also confirmed by the fact that the Italian government protested directly to the various states involved in the imposition of sanctions rather than to the organs of the League of Nations" (*ibid.*).

[163] L.M. Goodrich and A.P. Simons, *the United Nations and the Maintenance of International Peace and Security* (Washington D.C.: The Brookings Institution, 1955) at 352.

[164] Smaller states intended to give a more important role in maintaining world peace to the General Assembly as the main organ of the U.N. Proposals were made for common action of the General Assembly and the Security Council (New Zealand and Bolivia), independent competence of the General Assembly (Mexico), and presentation of the Security Council decisions to the General Assembly for approval (Egypt). In addition to that, some other States supported the idea of regulating the intervention by the Security Council by inclusion of a definition of aggression in the Charter (Bolivia, Colombia, Egypt, Ethiopia, Guatemala, Honduras, Iran, Mexico, New Zealand, and Uruguay). On the other hand, the great powers resisted these proposals, arguing that "a strong executive organ would be necessary for the maintenance of world peace" and that "an exhaustive list of acts of aggression would not be possible, and that binding the Security Council so rigidly could lead to a premature imposition of sanctions" (*ibid.* at 607-8).

[165] Text of Article 41 of the *U.N. Charter* can be found at 15, above. However, no resolution of the Security Council has expressly referred to Article 40 of the Charter (Goodrich, Hambro & Simons, *supra* note 161 at 313).

[166] Article 103 of the *U.N. Charter* stipulates that, "[I]n the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter prevail."

carry out the decisions of the Security Council, it is obvious that the Security Council is competent to impose sanctions on states, and that its decisions are binding on all the members of the United Nations.[167]

The Security Council's decision to impose sanctions, which is usually in the form of a resolution based on a draft submitted by one or more members, "rests on a factual finding, as well as on an interpretation of Charter provisions and a weighing of political considerations, procedures for clarifying the facts have assumed special importance."[168] It is generally accepted that the responsibility for the decision, "is solely that of the Council, that no commission could receive authority to make the finding or to bind the Council, and that the determination had to be made with respect to an actual situation."[169] The *U.N. Charter* also provides that decisions of the Council in such matters, "shall be made by an affirmative vote of nine members including the concurring votes of the permanent members."[170]

Accordingly, it is suggested that there is a *procedural* and a *substantive* standard which the Council should observe when applying enforcement measures under Chapter VII of the *U.N. Charter*.[171] There is little controversy and debate over the procedural requirement (*i.e.* the Council's decision by concurrence of nine members including the votes of the permanent members to enforce its will against a state); therefore, the substantive standard (*i.e.* determining "breach of the peace," "threat to the peace" or "act of aggression") is of importance for the purposes of this thesis.[172] According to Goodrich and Simmons, "[t]he determination of the existence of a threat to the peace, breach of the peace, or act of aggression is a decision of great significance because it is a condition to

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[167] See J L. Kunz, "Sanctions in International Law" (1960) 54 A.J.I.L. 324.
[168] Goodrich & Simons, *supra* note 163 at 351.
[169] *Ibid.* at 348.
[170] Article 27(3) of the *U.N. Charter*.
[171] T.M. Franck, *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995) [hereinafter *Fairness in International Law*] at 220.
[172] The only debatable question regarding the "concurring votes" of the permanent members is that of abstaining from voting. There has been a uniform practice in the Council, according to which abstentions by permanent members of the Security Council are interpreted as not preventing a non-procedural decision. Only during the early years of the U.N. some doubts were expressed regarding the legality of this procedure. According to two different views, this practice can be considered as an interpretation of Article 27(3) of the Charter, or a progressive modification of the Charter (see B. Simma *et al*, eds., *supra* note 69 at 447).

the exercise by the Security Council of power of an exceptional nature under Article 41 and 42 of the Charter."[173]

During the past 50 years the Security Council and the General Assembly, as well as complainant states, have used the terms "threat to the peace," "breach of the peace," and "act of aggression" on different occasions, sometimes "loosely" and often "exaggeratedly."[174] "Nevertheless, there have been some serious and thoughtful efforts to define the meaning of these terms so as to provide useful guidance to action."[175] In an attempt to define the meaning of the terms used in Article 39 of the *U.N. Charter* in the light of the Council's practice, I will now examine the provisions that the Council must interpret in deciding whether or not it should act.

i- Threat to the Peace

The concept of *peace* can be defined narrowly—as the absence of an organized use of force between states—or widely—requiring the existence of friendly relations.[176] Apparently, *peace* in the *U.N. Charter* means the absence of organized use of force.[177] However, "the express incorporation of the threat to the peace shows that Article 39 can come into play long before a breach of the peace occurs."[178]

"Threat to the peace" is the broadest and most vague concept in Article 39.[179] It is submitted that the legitimate assertion of the Council's Article 39 jurisdiction requires a threat to *international* peace.[180] The Security Council's practice, however, demonstrates

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[173] Goodrich & Simons, *supra* note 163 at 346.
[174] *Ibid.* at 354.
[175] *Ibid.*
[176] Simma *et al*, eds., *supra* note 69 at 608.
[177] At the same time the statement read at the conclusion of the meeting of the Security Council held at the level of heads of State and Government on 21 January 1992 stated that, "[t]he absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security" (*Note by the President of the Security Council*, UN Doc. S/23500 (1992), reprinted in 31 I.L.M. 759).
[178] Simma *et al*, eds., *supra* note 69 at 608.
[179] *Ibid.* at 610.
[180] The reason is that Article 2(4) of the *U.N. Charter* which prohibits the use of force applies only to the international relations of states and not internal situations which belong to states' domestic jurisdiction. As a result the first part of Article 39 does not refer to the use of force in the international realm of states either. However, a civil war can lead to a threat to international peace (*ibid.* at 608-609). It should also be mentioned that:

[continues on the next page]

that it has not accepted this limitation: it has read the article in a much wider manner.[181]

In one case, in 1946, the representative of Poland in the Security Council, raised the issue of the existence of the fascist regime in Spain before the Council.[182] He submitted a draft resolution, which asked the Council to take measures under Article 39 and 41 because the situation in Spain had, "endangered international peace and security."

A subcommittee appointed by the Council concluded that the situation in Spain "constitutes a situation likely to endanger the maintenance of international peace and security, [and does not] constitute an existing threat to international peace and security."[183] The Polish representative criticized this conclusion, arguing that, "[a]ny threat to the peace is potential by nature. It may mature tomorrow, after tomorrow, or in five years. It is a question of time ..."[184]

The French representative, to the contrary, defended the report of the subcommittee. While agreeing that "threat to the peace" clearly implied a state of affairs in which there was a situation of potential danger, "he asserted the steps to be taken by the Council, whether under Article 39 or Article 34 [of the *U.N. Charter*], might depend on whether the threat to the peace was immediate or remote."[185]

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[w]hen the Palestine question first came before the Council, the United States representative expressed the view that armed incursions or internal disorder could constitute a threat to the peace. The United Kingdom representative argued, however, that "any threat to the peace" must be a threat to international peace and supported this view by reference to the concluding words of Article 39, "international peace and security." The United States representative took issue with the United Kingdom representative and called attention to the fact that the significant word "any" was used. Syrian representative thought the word "any" qualified "threat," not "peace." The French representative was of the opinion that, once the regular forces of several countries crossed a frontier, it was a question of international peace being threatened or breached, although this might not be the case if the struggle were between two parts of a population or if armed bands invaded a country (Goodrich & Simons, *supra* note 163 at 355-6).

[181] D.J. Harris, *Cases and Materials on International Law*, 4th ed. (London: Sweet & Maxwell, 1991) at 876. See also P.H. Kooijmans, "The Enlargement of the Concept 'Threat to the Peace'" in R.-J. Dupuy, ed., *The Development of the Role of the Security Council; Workshop of the Hague Academy of International Law, 21-23 July 1992* (Dordrecht: Martinus Nijhoff Publishers, 1993) 111.

[182] Poland invoked Articles 2(6) (ensuring that non-member states act in accordance with the UN principles), 34 (Security Council's investigation of situation which may give rise to dispute) and 35 (bringing matters to the attention of the Security Council) of the *U.N. Charter* regarding the activities of the Franco regime.

[183] *Report of the Sub-Committee on the Spanish Question*, UN SCOR, 1st Year, 1st Series, Spec. Supp. (1946) at 5, cited in Harris, *supra* note 181 at 874.

[184] *Report of the Sub-Committee on the Spanish Question, ibid.* at 10, cited in E. Jimenez de Arecahga, *Voting and the Handling of Disputes in the Security Council* (New York: Carnegie Endowment for International Peace, 1950) at 163.

[185] Goodrich & Simons, *supra* note 163 at 355; on Article 34 of the *U.N. Charter* see *infra* note 191.

In the case of the Greek complaint of December 1946,[186]

> [t]he majority of the members of the commission, appointed by the Security Council to investigate and to report [on the issue], were of the opinion that support of armed bands, formed in the territory of one state and crossing into the territory of another, or the refusal of a government, in spite of the demands of the state concerned, to take all possible measures in its own territory to deprive such bands of any aid or protection should be considered by the Council as the threat to the peace within the meaning of the Charter. All the members of the Council except Poland[187] and the Soviet Union were prepared to accept this view.[188]

In another instance, in 1950, the Soviet government argued that the Korean conflict was a civil war. The United Kingdom representative, in response, claimed that:

> a civil war in certain circumstances might well, under Article 39 of the Charter, constitute a 'threat to the peace,' or even a 'breach of the peace,' and if the Security Council so decided, there would be nothing whatever to prevent its taking any action it liked in order to put an end to the incident, *even if it should involve two or more portions of the same international entity.*[189]

The United States' representative, in another case, defined "threat to the peace" with the following words:

> [w]hat constitutes a "threat to the peace" as that term is used in Article 39 of the Charter? A threat to the peace is created when a State uses force or the threat of force to secure compliance with its demands. The acts of the Government of the USSR in illegally obstructing by threat of force the access of the three Western Powers to Berlin creates a threat to the peace ...[190]

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[186] Greek's complaint following the frontier accidents in which Greek guerrillas were supported by Albania, Bulgaria and Yugoslavia.

[187] Compare Poland's position on this issue with her position on the Spanish case. This change of position in a few months shows how political considerations have an impact on the interpretation of the Charter by members.

[188] Goodrich & Simons, *supra* note 163 at 355; It is interesting to note the similarity of the view of this Commission to that of the I.C.J. in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States)* in which the Court stated that:

> [i]n particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also the 'sending by or on behalf of a State of armed bands groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to (*inter alia*) an actual armed attack conducted by regular forces, or its substantial involvement therein' ([1986] I.C.J. Rep. 14 at 103, para. 195 [hereinafter *Nicaragua Case*]).

[189] UN SCOR, 5th Year, No. 28, 486th Mtg. (1950) at 6 cited in Goodrich & Simons, *supra* note 163 at 356 [emphasis added].

[190] That was when the Berlin situation was being discussed in the Council. UN SCOR, 3rd Year, No. 115, 363rd Mtg. (1948) at 4. cited in Goodrich & Simons, *supra* note 163 at 356.

In many resolutions, the Security Council has spoken of a threat to the peace,[191] and in some cases "the Council has adopted measures of the kind expressly authorized by Article 40 without any previous determination under Article 39."[192]

In 1965, following the Unilateral Declaration of Independence by the racist minority regime of Rhodesia from the United Kingdom, the Security Council in Resolution 217 determined that the continuation of the regime "in time constitutes a threat to the peace."[193] Later, in 1966, the Council expressly "determine[d] that the resulting situation constitutes a threat to the peace."[194] However, there is no explanation as to why such a situation constitutes a threat to the peace.[195] According to Simma *et al*, "[t]he members of the Security Council were apparently convinced that the danger of armed conflicts in southern Africa would be brought about by the racist minority regime."[196] Although it is assumed, on the basis of this case, that the internal conditions of a state alone can be considered as a threat to the peace, "one may not overlook the particular situation in southern Africa, including the danger of violent involvement with neighboring states."[197]

In 1991, in the aftermath of the Persian Gulf War, the Security Council decided that the Iraqi government's repression of the Kurdish population threatened international

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[191] Another issue in this regard is the distinction between threat to the peace and endangering of peace. The relationship between the concept of endangering the maintenance of international peace and security, as expressed in Articles 34 and 37 of the *U.N. Charter*, with the concept of threat to the peace is not clear. Article 34 of the *U.N. Charter* states that, "[t]he Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security;" and, according to Article 37:2 of the *U.N. Charter*, "[i]f the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate."
In some cases the Security Council, in its resolution, has spoken of a threat to the peace or a danger to peace without a clear differentiation between them. For instance, in Resolution 567 (SC Res. 567, 20 June 1985, UN Doc. S/RES/567 in (1985) 39 Y.B.U.N. 182), South Africa was condemned because of an act of aggression against Angola, and it was determined that international peace and security were seriously 'endangered' (see Simma *et al*, eds., *supra* note 69 at 611).

[192] Goodrich & Simons, *supra* note 163 at 346.

[193] SC Res. 217, 20 November 1965, UN Doc. S/RES/217 in (1965) Y.B.U.N. 133.

[194] SC Res. 221, 9 April 1966, UN Doc. S/RES/221 in (1966) Y.B.U.N. 112.

[195] For a criticism of designation of that situation as a threat to the peace see C.G. Fenwick, "When is There a Threat to the Peace?—Rhodesia" Editorial Comment (1967) 61 A.J.I.L. 753.

[196] Simma *et al*, eds., *supra* note 69 at 612.

[197] *Ibid.*

peace and security in the region, because it resulted in the movement of refugees across international boarders.[198]

In Resolution 713,[199] the Security Council determined that the situation in the former Yugoslavia, where war had broken out between forces of the Federal Government and the states of Slovenia and Croatia (which had declared themselves independent) constituted a threat to the peace.

A few months later, due to fighting between Somalia's different factions in the absence of a central government, the Security Council decided that the situation constituted a threat to international peace.[200] In November 1993, the Security Council decided that the civil war in Liberia was a threat to the peace in West Africa.[201] In another resolution,[202] in 1993, the Security Council decided that the refugee problem in Haiti, caused by the overthrowing of the legitimate government by a military government, constituted a threat to the international peace.

"The most far-reaching use of the notion of threat to the peace was made in Resolution 748 of March 31, 1992[203] concerning Libya."[204] In that case, after Libya refused to comply with Resolution 731[205] of the Council—asking for two Libyans accused of placing a bomb on Pan American flight 103 to be handed over to the United States and United Kingdom—the Council, in Resolution 748, deemed the situation to be a threat to the peace.

In the light of the practice of the Security Council, it can be concluded that the following situations, under certain circumstances, are considered to be threats to international peace: massive violations of human rights in specific situations or serious violations of international law that may provoke armed countermeasures; extreme

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[198] SC Res. 688, 5 April 1991, UN Doc. S/RES/688 in (1991) 30 Y.B.U.N. 658.
[199] SC Res. 713, 25 September 1991, UN Doc. S/RES/713 reprinted in 31 I.L.M. 1431.
[200] SC Res. 733, 23 January 1992, UN Doc. S/RES/733 in (1992) 46 Y.B.U.N. 199.
[201] SC Res. 788, 19 November 1992, UN Doc. S/RES/788 in (1992) 46 Y.B.U.N. 192.
[202] SC Res. 841, 16 June 1993, UN Doc. S/RES/842 (1993) reprinted in 32 I.L.M. 1206.
[203] SC Res. 748, 31 March 1992, UN Doc. S/RES/748 reprinted in 31 I.L.M. 750.
[204] Simma *et al*, eds., *supra* note 69 at 611.
[205] SC Res. 731, 21 January 1992, UN Doc. S/RES/731 reprinted in 31 I.L.M. 732.

violence within a state; measures with regard to armament;[206] and massive flow of refugees across international borders.[207]

ii- Breach of the Peace

Goodrich, Hambro & Simons, assert that:

> [f]rom the Council's discussion, it would appear to be generally accepted that a determination of a breach of the peace is less serious than a finding of aggression, in so far as the positioins of the parties are concerned, but more serious than a determination of a "threat to the peace" in terms of implications for further Council action.[208]

Breach of the peace should include any use of armed force.[209] Conversely, only a few of many armed conflicts that have occurred since World War II have been considered to be breaches of the peace by the Council.[210] In 1982, following Argentina's invasion of the Falklands/Malvinas, the Security Council considered the situation there a breach of the peace.[211] It is submitted, that a breach of the peace also exists when armed forces "are applied by or against an effective independent *de facto* regime which is not recognized as a state."[212] In the Korean case, after North Korean forces attacked South Korea, the Security Council considered the situation to be a breach of the peace.[213] In the cases of the Iran-Iraq war,[214] Kuwait[215] and the former Yugoslavia crisis,[216] the Security Council also found breaches of the peace existed.

In some cases the Council refrained from defining a situation as a breach of the peace. It was proposed that South Africa's continued illegal occupation of Namibia be considered a breach of the peace. The resolution was vetoed. Simma's commentary on the *U.N. Charter* states that, "the situation involving an illegal occupation of territory through

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[206] See Resolution 825 concerning North Korea (SC Res. 825, 11 May 1993, UN Doc. S/RES/825 in (1993) 47 Y.B.U.N. 358.).
[207] A more detailed examination of key cases of sanctions confirms this conclusion. See chapter 3, below.
[208] Goodrich, Hambro & Simons, *supra* note 161 at 297.
[209] *Ibid.* at 298.
[210] Harris, *supra* note 181 at 876-77.
[211] SC Res. 502, 3 April 1982, UN Doc. S/RES/502 reprinted in 21 I.L.M. 679.
[212] Simma *et al*, eds., *supra* note 69 at 609.
[213] SC Res. 82, 25 June 1950, UN Doc. S/RES/82 in (1950) Y.B.U.N 222.
[214] SC Res. 598, 20 July 1987, UN Doc. S/RES/598 reprinted in 26 I.L.M. 1479.
[215] SC Res. 660, 2 August 1990, UN Doc. S/RES/660 reprinted in 29 I.L.M. 1325.
[216] SC Res. 713, *supra* note 199.

the continuation of an originally legal administration must be distinguished from a breach of the peace in the sense of Article 39."[217]

The hostilities between India and Pakistan in 1971 were deemed to be a threat to international peace. The American draft resolution on this subject reflected this interpretation of the situation.[218]

iii- Act of Aggression

"Aggression presumes the direct or indirect application of the use of force." [219] Eventhough the term "breach of the peace" was broad enough to cover aggression the latter was included upon a proposal by the Soviet Union.[220]

The attempt to define aggression has a long histoy[221] and there are two useful sources regarding acts of aggression: A General Assembly resolution and the *Nicaragua Case*.[222]

The defintion of acts of aggression has been the subject of debate at the U.N. for many years,[223] and the General Assembly passed a resolution on the definition of agression in 1974.[224] The latter contained seven articles which define agression, according to which, "[a]ggression is the use of armed forces by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."[225]

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[217] Simma *et al*, eds., *supra* note 69 at 610.
[218] *Ibid.* at 611; The draft resolution read in part: "[g]ravely concerned that hostilities continue between India and Pakistan which constitute an immediate threat to international peace and security" (*ibid.*).
[219] *Ibid.* at 610.
[220] Goodrich, Hambro & Simons, *supra* note 161 at 298.
[221] Much scholarly work has been devoted to the subject of definition of aggression. The quest dates back to the era of League of Nations. The *Covenant of the League* only in Article X expressly referred to aggression (see J. Stone, *Aggression and World Order* (Berkeley: University of California Press, 1958) at 27-40). For more information on history of attempts to define "aggression" see generally A.V.W. Thomas & A.J. Thomas, Jr. *The Concept of Aggression in International Law* (Dallas: Southern Methodist University Press, 1972) at 14-45; and generally on aggression see E. Aroneanu, *La Définition de l'agression* (Paris: Les éditions internationales, 1958).
[222] *Supra* note 188.
[223] Harris, *supra* note 181 at 879.
[224] *Resolution on the Definition of Aggression*, 14 January 1975, GA Res. 3314 (XXIX), UN GAOR, 29th Sess., Supp. No. 31, UN Doc. A/RES/3314(XXIX) 142.
[225] *Definition of Aggression*, *ibid.* Article 1.

Further, the use of armed force by a state in contravention of the *U.N. Charter* shall constitute *prima facie* evidence of an act of aggression.[226] However, in the light of other relevant circumstances, the Security Council may conclude that an act of aggression has not been committed.[227] A list of acts which are considered acts of aggression is given in the resolution,[228] but, according to Article 4 this list is not exhaustive.

Of course, a General Assembly resolution is not binding upon the Security Council. But, this definition of aggression by the General Assembly has influenced the Council's practice and it has been referred to in drafting Security Council's resolutions.[229]

The second relevant source which defines aggression is the *Nicaragua Case*[230] in which the International Court of Justice examined the questions of the use of force and acts of aggression. The case presented an exceptional opportunity for the Court to explore the customary law governing the use of armed forces in detail. The decision is especially significant, as it recognizes that, an "act of aggression" includes cases of indirect military intervention of one state in another state. In this sense, the decision of the Court affirms

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[226] "Act of aggression" should be distinguished from "war of aggression." According to Dinstein, "[a]n act of aggression may trigger war. However, this is not a foregone conclusion, since aggression may also take the form of an act short of war. When an aggressive act short of war is committed, although a violation of international law occurs, no crime against peace is perpetrated" (Y. Dinstein, *War, Aggression and Self-Defence*, 2nd ed. (Cambridge: Grotius Publications, 1994) at 125).

[227] *Definition of Aggression*, *supra* note 224, Article; according to this article such circumstances includes lack of sufficient gravity.

[228] Article 3 of the *Definition of Aggression* states that

> Any of the following acts, regardless of a declaration of war, shall subject to and in accordance with the provisions of Article 2, qualify as an act of aggression:
> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or an annexation by the use of force of the territory of another State or part thereof.;
> (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
> (c) The blockage of the ports or coasts of a State by the armed forces of another State; ...
> (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the aggression;
> (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against third State;
> (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein (*Definition of Aggression*, *supra* note 224).

[229] Harris, *supra* note 181 at 880.

[230] *Supra* note 188.

that Article 3(g) of Resolution 3314[231] reflects customary international law on the use of force. The Court stated that:

> This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, ...[232]

South Africa's aggression against Angola in 1976 was the first time that the Council found that "aggression" had occurred.[233] In many cases, military actions by South Africa or Israel are seen as acts of aggression by the Council.[234] Examples include: Resolution 407 (1977)[235] condemning act of armed aggression perpetrated against the People's Republic of Benin on 16 January 1977, Resolution 573 (1985)[236] condemning Israel's act of aggression following the Israeli air raid on Palestinian Liberation Organization targets in Tunisia, and Resolution 577 (1985)[237] which demanded that South Africa cease all acts of aggression against Angola.[238]

iv- Article 39 Enforcement Measures: "Political" or "Legal" Decision?

The question of enforcement measures under Article 39 of the *U.N. Charter* can be examined from another perspective. According to Kelsen the main question in this regard is whether these measures are "sanctions" or "political measures."[239] The Answer to this question has serious repercussions on the debate over legality of actions of the Security Council.

In his discussion of this issue, Kelsen concludes that these measures are political ones, and that the Council, "is not bound, it is only authorized to take enforcement action under the conditions determined in Article 39. It may for political reasons, not be willing,

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[231] See *supra* note 228.
[232] *Nicaragua Case*, *ibid.*, at 103, para. 195.
[233] SC Res. 387, 31 March 1976, UN Doc. S/RES/387 in (1976) 30 Y.B.U.N. 178.
[234] Simma *et al*, eds., *supra* note 69 at 610.
[235] SC Res. 405, 14 April 1977, UN. Doc. S/RES/405 in (1977) 31 Y.B.U.N. 215.
[236] SC Res. 573, 4 October 1985, UN Doc. S/RES/573 reprinted in 24 I.L.M. 1740.
[237] SC Res. 577, 6 December 1985, UN Doc. S/RES/577 in (1985) 39 Y.B.U.N. 188.
[238] Following Israel's raid on Iraq's nuclear installations on June 7th 1981, Resolution 487 (1981) of the Security Council condemned the military attack by Israel as a clear violation of the *U.N. Charter* and the norms of international conduct, and expressed its concern about the danger to international peace and security created by the Israeli air attack. However, the Council did not designate Israel's act as an act of aggression (see SC Res. 487, 19 June 1981, UN Doc. S/RES/487 in (1981) 35 Y.B.U.N. 282).
[239] See H. Kelsen, *The Law of the United Nations* (New York: Frederick A. Praeger Inc., 1951) [hereinafter *The Law of the United Nations*] at 732-737.

or due to its voting procedure not be able to act."[240] This view is shared by other prominent scholars. According to Goodrich and Simons:

> [a]n important consideration always is whether the facts justify a finding that a threat to the peace, breach of the peace, or act of aggression exists. If this were accepted as the decisive consideration, and if there were agreement that the concepts employed in Article 39 were legal in nature, then it might be possible to treat the problem of determination as basically a legal one. The fact that there has been little inclination to do so, or to envisage any use of the International Court of Justice by the Council or the Assembly in the making of this determination, demonstrates that adequacy of factual basis is only one consideration entering into the making of a determination.[241]

Accordingly, the determination of the existence of a threat to the peace, a breach of the peace, or an act of aggression by the Security Council has, in the practice of the United Nations, been a political act; however, "a variety of considerations, legal and political, psychological and material, have influenced the Security Council in making its formal determination."[242]

In chapter 4, "Constraints on Use of Economic Sanctions," while discussing legitimacy of the Council's actions under Chapter VII of the *U.N. Charter*, I will return to this subject, at which time other views on this subject will be examined.

B- Collective Sanctions in Response to Breaches of *Erga Omnes* Obligations

Although the Security Council has, in the past few years, extended its definition of threat to the peace to include events within a state, in my view, Article 39 of the *U.N. Charter* is not capable of supporting such broad interpretations. Even if we accept that Council's decisions under Chapter VII of the *U.N. Charter* have been justifiable under the *Charter*,[243] situations may arise in the future which will not justify enforcement actions under Chapter VII, despite the international community's concerns.[244]

In my opinion, in such cases the collective actions can be legitimized on a different legal basis. In the extreme case of breaches of *erga omnes* obligations (including international crimes), there is an alternative legal justification for collective action. If, as I argued in chapter 2, breach of an *erga omnes* obligation is a ground for imposition of

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[240] *Ibid.* at 737.
[241] Goodrich & Simons, *supra* note 163 at 363.
[242] *Ibid.* at 362.
[243] Arguing that in all the cases of Security Council enforcement actions, there has been some international effects.
[244] The very recent example of Kosovo crisis was one such situation.

unilateral the sanctions by all other states (because an obligation towards all states have been breached[245]), then it can be a ground for collective sanction in the framework of an international organization.

This view is reinforced by Article 53 of the *ILC Draft Articles*, according to which, when an international crime is committed by one state, other states are under the obligation:

> a) not to recognise as lawful the situation created by the crime;
>
> b) not to render aid or assistance to the State which has committed the crime in maintaining the situation so created;
>
> c) to cooperate with other States in carrying out the obligations under subparagraphs (a) and (b); and
>
> d) to cooperate with other States in the application of measures designed to eliminate the consequences of the crime.

According to the International Law Commission's commentary, this Article imposes a positive obligation on *all* the states to "counteract the effects of an international crime. In practice it is likely that this collective response will be coordinated through the competent organs of the United Nations ..."[246] It can be argued, therefore, that even if the breach of *erga omnes* obligations does not amount to a "threat to the peace", "breach of the peace" or "act of aggression," collective sanctions can be imposed or at least recommended by the Security Council.[247] No provision of the *U.N. Charter* stops the Security Council from administering and harmonizing collective actions in the case of breach of *erga omnes* obligations.[248] Whether this decision will be binding to the same

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[245] See chapter 2:I:B,"Expanding the Concept of Injured States: Breaches of *Erga Omnes* Obligations", :at 27, above.

[246] *Report of the International Law Commission on the work of its forty-eight session*, *supra* note 10 at 169-170.

[247] As D.W. Bowett states, "although in principle these obligations rest on states whenever a crime is committed, and the decision that a crime has been committed is for each state to reach, in practice it is likely that the Security Council will both take the decision and coordinate the sanctions" ("Crimes of State and the 1996 Report of the ILC" *supra* note 154 at 173).

[248] According to a report prepared by a Committee of the American Branch of the International Law Association,

> it is unclear whether the imposition of mandatory economic sanctions requires a determination by the United Nations Security Council, under Chapter VII of the Charter, of a threat to the peace. The uniform practice of the Council, however, has been to make such a determination before imposing mandatory economic sanctions. The authority of the Council, as well as that of such other UN organs as the General Assembly, to recommend economic sanctions is much broader. ("Report of the Committee on Economic Sanctions: Economic Sanctions and Internal Armed Conflict, Some Salient Problems" (1993-94) Proceedings of the American Branch of the International Law Association 45. at 62).

degree as enforcement measures under Article 39 is, however, arguable. It should be noted that in these cases, the legal basis for sanctions would be different from the first category of collective sanctions. The theory of retaliation will be the basis of sanctions. As a result, these sanctions will be subject to same limitations as unilateral sanctions.

So far, the Security Council has never attempted to impose sanctions on this basis.[249] It has always used Article 39 to justify collective actions. As mentioned in the last part, in the case of the Tehran hostage Crisis,[250] the United States attempted to impose sanctions through a Security Council resolution, but failed to do so because of the Soviet veto. The draft resolution would have provided for mandatory sanctions against Iran in accordance with Articles 39 and 41 of the *U.N. Charter*.[251] In my view, in that case, an alternative justification for imposition of sanctions could have been the breach of an *erga omnes* obligation by Iran.

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[249] The International Law Commission during its fiftieth session discussed the nature of the Security Council actions in the recent years:

> [t]here were different views as to whether the sanctions imposed by the Security Council with increasing frequency in recent years constituted a criminal penalty or measures taken to restore international peace and security. Some members were of the view that Chapter VII of the Charter of the United Nations had definitively fractured the classical bilateral relationship in the law of responsibility and its traditional unity by authorizing the Security Council, on behalf of the international community as a whole, to apply preventive and repressive measures of a collective nature, including armed force, against a State that had threatened or violated the peace or committed an act of aggression. The authority of the Security Council to take measures it deemed necessary against Member States under the Charter of the United Nations was based squarely on relations of responsibility, since the Security Council was empowered to take action only in the event of the violation by a State of particularly important norms of international law. In the event of a serious breach by a State of international obligations, which posed a threat to international peace and security, the Security Council was authorized to take preventive measures or to use force. The Security Council's authorization of the bombardment of Iraq was cited as an example of a criminal penalty rather than a civil sanction.
>
> In contrast, other members were of the view that international responsibility for particularly serious illicit acts, its content and its consequences, must be distinguished from the powers conferred by the Charter on the Security Council to restore or maintain international peace and security. The Security Council did not act in terms of State responsibility and did not impose sanctions or penalties. When confronted with a situation that posed a threat to international peace and security, it was enabled to take appropriate military or non-military measures to redress the situation. Those measures might be contrary to the interests of a State which had not committed [a] wrongful act or might affect a State that had committed an act viewed as contrary to international law. United Nations sanctions under Chapter VII of the Charter as well as war reparations and so-called "punitive damages" were sui generis and had nothing to do with criminal responsibility.

Report of the International Law Commission on the work of its fiftieth session, *supra* note 143 paras. 270-271 [emphasis in original].

[250] See30, above.

[251] *United States of America: Draft Resolution*, UN SCOR, 35th year, Supp. For Jan, Feb., Mar., 1982, UN Doc. S/13735 at 10.

Another problem is the binding force of Security Council decision on this basis. The question of binding force of non-Chapter VII decisions of the Security Council turns around different interpretations of Article 25 of the *U.N. Charter*. It can be argued that under Article 25 of the *U.N. Charter*—regarding obligation to carry out decisions of the Council[252]—resolutions that are not issued on the basis of Chapter VII are also binding. According to Simma *et al.*'s commentary on the *U.N. Charter*:

> [a] closer analysis reveals that the opinion according to which Article 25 declares only those decision to be binding which are taken by the Security Council under Chapter VII, i.e. decisions on enforcement measures, is not tenable. If one followed such a narrow interpretation of Article 25, the whole system set up for the maintenance of peace and within it the position of the Security Council as the organ charged with the primary responsibility for the maintenance of peace ... would be weakened, which would clearly run counter to the overall concept of the Charter.[253]

This view is supported by Kelsen[254] and the I.C.J.'s advisory opinion on *Namibia*.[255] However, this majority opinion of the I.C.J. judges was not shared by several leading I.C.J. judges,[256] and, in the view of some, this approach does not appear appropriate in the light of the overall structure of the *U.N. Charter*.[257] Notwithstanding this opposing view, I find the majority opinion of the Court persuasive.

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[252] According to this article, "[t]he members of the United Nations agree to accept and carry out the decision of the Security Council in accordance with the present Charter."

[253] Simma *et al*, eds., *supra* note 69 at 410.

[254] *The Law of the United Nations*, *supra* note 239 at 97-98; see also S.D. Bailey, *The Procedure of the UN Security Council* (Oxford: Clarendon Press, 1975) at 206-210.

[255] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, [1971] I.C.J. Rep. 16 at 53-4, paras. 114-16 [hereinafter the *Namibia Case*]. The Court states that, "[i]f Article 25 had reference solely to decisions of the Security Council concerning enforcement action under Article 41 and 42 of the Charter, that is to say, if it were only such decisions that had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter" (*ibid.* at 53).
The Court has reached the same conclusion as Kelsen, and has stated its conclusion using the exact same words as him (only 3 words differ), however, the Court has authoritatively omitted any citation!

[256] Dissenting opinions by Judges Fitzmaurice, *ibid.* at 292-5, and Gros, *ibid.* at 340-1, and separate opinions by Judges Petrén, *ibid.* at 136, and Dillard, *ibid.* at 165-6. Judge Fitzmaurice states that:

> [i]f the effect of [Article 25] were automatically to make *all* decisions of the Security Council binding, then the words "in accordance with the present Charter" would be quite superfluous. They would add nothing to the preceding and only other phrase in the Article, namely "The Members of the United Nations agree to accept and carry out the decisions of the Security Council", which they are clearly intended to qualify (*ibid.* at 292 [emphasis in original]).

[257] See Simma *et al*, eds., *supra* note 69 at 613-14; the view of the majority of the Court has not found support in practice. During the discussion of the advisory opinion in the Security Council many permanent members rejected that view (UN SCOR, 26th Year, 1588th Mtg., UN Doc. S/PV.1588 (1971) para. 18 (Mr. Koscinsko-Morizet, France); UN SCOR, 26th Year, 1589th Mtg., UN Doc. S/PV.1589 (1971) para. 50-53. (Sir Colin Crowe, United Kingdom)).

Even if we accept that such collective action under the present *U.N. Charter* will not have the binding force of a determination by the Security Council under Article 39, it may have extensive moral authority, and may receive wide support from members.[258]

III- Conclusion

After examining the legal basis for the use of economic sanctions, it is now possible to formulate the results of this chapter in a few phrases describing the conditions for legality of sanctions.

As far as unilateral sanctions are concerned, three requirements should be met: there should exist a prior breach of an obligation; the imposing state should demand redress before implementing sanctions; and, there should exist proportionality between the countermeasure and the breach. I have also argued that countermeasures can be imposed for breaches of *erga omnes* obligations. In such a case, the condition of proportionality should be interpreted differently.

Regarding collective measures, the legality of these measures depends on the decision of the competent organ of the international organization imposing sanctions. In this thesis, we have focused on the sanctions imposed by the U.N., for which the competent decision-making organ is the Security Council. The Council is vested with the right to implement sanctions in certain cases, and it can interpret whether the situation is serious enough for the implementation of sanctions or not. According to the *U.N. Charter*, the implementation of sanctions should be limited to the cases of "threat to the peace," "breach of the peace" or "act of aggression," but the Security Council itself decides on existence of these circumstances.[259]

In the next chapter, in the light of the aforementioned conditions for the legality of sanctions, I will examine the key cases of imposition of sanctions. That analysis will let us decide how these conditions are applied in practice; determine whether the conditions for the legality of sanctions cited by the scholars are sufficient for the legality of sanctions; and, determine other legal problems arising from application of sanctions.

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[258] Judge Petrén in his separate opinion has stated that, "it is quite out of question that in this case the Court is confronted with Security Council decisions invested with binding force for States. They cannot be anything other than recommendations which, as such, obviously have great moral force but which cannot be regarded as embodying legal obligations" (*Namibia Case, supra* note 255 at 136).

[259] This interpretation was challenged in *Lockerbie Case* which will be examined later in chapter 4 of this thesis.

CHAPTER 3- KEY CASES

In this chapter, key cases in which unilateral and collective economic sanctions have been used will be examined in greater detail. Since the cases of unilateral economic sanctions are numerous it is impossible to examine all of them in a thesis of this scope.[260] However, throughout this thesis, other cases of unilateral sanctions have been mentioned and briefly explained in footnotes. Only one case of unilateral sanctions will be studied in this chapter: that of American sanctions against Cuba. This example has been chosen because the sanctions have been in place for many years; it "is considered a 'model embargo' in its thoroughness;"[261] and, at times, it has caused controversy both in the U.S. and abroad. A study of the Cuban situation will enable us to recognize the problems of unilateral sanctions.

Conversely, cases of collective sanctions under the U.N. system are not numerous. Each of these cases has its own significance. I will explain the circumstances in which the sanctions were imposed, review the Security Council resolutions relating to each case, examine the consequences of the sanctions, and analyze each case in the light of the conditions for legality of sanctions set out in the last chapter. At the end of the chapter, it will be possible to determine the problems associated with sanctions and the legal limits to which they are subject.

I- A Case-Study of Unilateral Sanctions: Cuba

The U.S. sanctions against Cuba were imposed in 1960. They are the second oldest ongoing American embargo.[262] In 1960, after the American oil firms in Cuba stopped refining oil purchased from the U.S.S.R., Cuba nationalized refineries. The U.S. reduced its Cuban sugar quota and, in response, Cuba expropriated all the U.S. property (valued about $1 billion).[263] In August 1960, a partial embargo on exports to Cuba was imposed by the U.S. This, later, became a total embargo on all exports to Cuba (except

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[260] Furthermore, as will be shown in the conclusion of this thesis application of unilateral sanction will become more and more difficult in the future. Throughout this thesis more emphasis has been put on collective sanctions.

[261] D.R. Kaplowitz, *Anatomy of a Failed Embargo; U.S. Sanctions against Cuba* (London: Lynne Reinner Publishers, 1998) at 1.

[262] The U.S. embargo against North Korea began in 1950.

[263] A.P. Schreiber, "Economic Coercion as an instrument of Foreign Policy: U.S. Economic Measures Against Cuba and the Dominican Republic" (1973) 25 World Politics 387 at 396.

medicine and food). In 1962, the U.S. banned all imports from Cuba. Later the same year, the O.A.S. voted to suspend trade in military goods with Cuba. Cuba's call to the U.N. Security Council to suspend O.A.S. measures remained unanswered.[264] In 1963, invoking the Trading with the Enemy Act of 1917, the U.S. froze all the Cuban assets. In 1964, following discovery of arms cache of Cuban origin in Venezuela, the O.A.S. called for mandatory sanctions covering all trade except food and medicine.[265] In 1975, the O.A.S. lifted collective sanctions and the U.S. eased the embargo by permitting overseas subsidiaries of American companies to trade with Cuba.[266] However, during the Reagan administration, a tighter economic embargo was implemented. In 1982, business and tourist travel to Cuba was banned. In 1986, the American government attempted to "plug holes in embargo by cracking down on circumvention through front companies in third countries."[267] In 1992, the U.S. Congress passed the *Cuban Democracy Act*. The purpose of the legislation was to further isolate Cuba. Then, in 1996, the *Cuban Liberty and Democratic Solidarity (Libertad) Act*[268] (commonly known as *Helms-Burton Act*) was passed. [269] It gave statutory authority to the embargo regulations in effect as of March 1st, 1996, and expanded the effect of sanctions.[270]

This latest piece of legislation has grouped the sanctions under 4 titles. Title I reaffirms and reinforces the economic embargo against Cuba. *Inter alia*, it contains a prohibition on the indirect financing of any Cuban enterprise.[271] Title II includes

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[264] *International Enforcement, supra* note 19 at 35.
[265] Schreiber, *supra* note 263 at 388-89.
[266] D. Losman, *International Economic Sanctions: The Cases of Cuba, Israel, and Rhodesia* (Albuquerque: University of New Mexico Press, 1979) at 44.
[267] *Economic Sanctions Reconsidered: Supplement, supra* note 76 at 196.
[268] Pub. L. No. 104-114, 110 Stat. 785, Mar. 12, 1996 (codified as amended at 22 U.S.C.A. § 6021-6091 (West Supp. 1997) [hereinafter *the Helms-Burton Act*].
[269] See *e.g.* S.E. Benson, "Dramatic Expansion of US Sanctions Against Cuba: Impact on US and Foreign Companies" (1996) 24:6 Int'l Bus. Lawyer 275; J. Brett Busby, "Jurisdiction to Limit Third-Country Interaction with Sanctioned States: The Iran and Libya Sanctions and Helms-Burton Acts" (1998) 36 Colum. J Transnat'l L. 621; H.L. Clark, "Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures" (1999) 20:1 U. Pa. J. Int'l Econ. L. 61. This Act will be examined more thoroughly in chapter 4, below, under "extra-territoriality."
[270] V. Lowe, "US Extraterritorial Jurisdiction: The Helms-Burton and D'Amato Acts" (1997) 46 I.C.L.Q. 378 at 379; this law was adopted following the shooting down in February 1996 by the Cuban Air Force of two civilian aircraft belonging to a Miami-based organization ("Brothers to Rescue"). The aircraft were allegedly on humanitarian mission (*ibid.*).
[271] *Ibid.* U.S. representatives in the International Monetary Fund, the International Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Multilateral Investment Guaranty Agency and the Inter-American Development Bank are obliged to oppose Cuban admission to the institution.

provisions regarding "assistance to a free and independent Cuba" by the United States. "Title III gives the US citizens the right to recover damages from persons who "traffic," after 1 November 1996, in property in which the claimant has an interest, if the property was "confiscated" by the Cuban government at any time after 1 January 1959."[272] Title IV disallows the following people from entering the U.S.: corporate officer or controlling shareholder in an entity involved in trafficking, and, non-U.S. nationals who have confiscated property or have since March 12th, 1996, trafficked in confiscated property. Accordingly, those who were responsible for the Cuban expropriations and those deemed to have benefited from them are targeted by Title IV.[273]

During the past 39 years, in imposing the embargo on Cuba, the U.S. was pursuing a wide variety of goals. In early 1960, the government was reacting to widespread demands for retaliation against Cuba following expropriation of American property there.[274] Later that year, during the Presidential election, both candidates supported the sanctions to " destabilize the Castro regime, causing its overthrow, or, at a minimum, to make an example of the regime by inflicting as much damage on it as possible."[275] In 1963, the U.S. Secretary of State[276] reformulated the purpose of sanctions, indicating that the purpose of the embargo was to reduce Cuba's ability to export subversion, show Cubans that the Castro regime cannot serve their interest, demonstrate to the people of the American Republics that communism has no future in the Western Hemisphere, and to increase the cost of maintaining a Communist outpost for the U.S.S.R.[277] In 1981, American authorities announced that the tightening of the economic embargo against Cuba was in response to Cuban promotion of leftist revolution in Central America.[278] Thus, there was yet another shift in the declared purpose of the embargo. In 1989, the Assistant Secretary of State for Inter-American Affairs stated that the main reasons for concern about the state of affairs in Cuba were: Cuba's relationship with the Soviet Union, the country's support of terrorism and its efforts to destabilize democratic

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[272] *Ibid.*
[273] *Ibid.* at 380-81.
[274] Schreiber, *supra* note 263 at 389.
[275] *Economic Sanctions Reconsidered: Supplement, supra* note 76 at 197-98.
[276] U.S. Secretary of State at that time (April 23,1964) was George Ball.
[277] *International Enforcement, supra* note 19 at 37.
[278] *Economic Sanctions Reconsidered: Supplement, supra* note 76 at 198.

governments, as well as widespread human rights abuses and political repression within Cuba.[279]

For the purposes of the present thesis, it is important to evaluate the sanctions by reference to the criteria set out in chapter 2, *i.e.* "prior breach," "prior demand for redress" and "proportionality." Establishing the existence of the first two conditions is not problematic: acts of expropriation, intervention in the internal affairs of other states and human rights abuse clearly constitute breaches of international obligations (arguably including *erga omnes* obligations). The second condition also has been fulfilled properly. The Americans government has asked for compensation for the expropriations, and has constantly reminded the Cuban government of its human rights abuses. The key question is whether a 36-year embargo, which had devastating effects on the Cuban economy, is proportionate to those breaches. It is submitted that even the initial decrease on the sugar quota for Cuba in 1960 can be deemed as disproportionate because of "the heavy dependence of the Cuban economy on the revenue derived from the sale of the sugar to the US."[280] Cuba recently claimed that the embargo has caused more than one-hundred-and-eighty million dollars in damages.[281] In the aftermath of the Cold War and in the absence of aid from the Soviet block this negative effect on economy of Cuba is even reinforced.[282] In 1993, the impact of the embargo was felt throughout the nation. It was claimed that many factories in Cuba only operate for three hours a day because of the fuel shortage on the island, and much of the population suffers from malnutrition, a malady also blamed on the embargo.[283]

The Cuban embargo in general and the *Helms-Burton Act* in particular (for its extraterritorial effects), have been the subject of immense criticism.[284] Furthermore, the

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[279] *Ibid.*

[280] Elagab, *supra* note 33 at 92; see *contra* Schreiber, *supra* note 263 at 395.

[281] "Cuba Condemns US Embargo as Genocide," online: BBC <http://news2.thls.bbc.co.uk/hi/english/world/americas/newsid_446000/446761.stm> (date accessed: 14 September 1999).

[282] Between 1990 and 1993, the Cuban economy shrank by 34 percent. "Cuba's Two Nations" *The Economist* (6 April 1996) at S10.

[283] J.W. Cain, Jr., "Extraterritorial Application of the United States' Trade Embargo Against Cuba: The United Nations General Assembly's Call for an End to the U.S. Trade Embargo" Recent Developments (1994) Ga. J. Int'l & Comp. L. 379 at 390.

[284] The U.S. trading partners have raised strong objections to the extraterritorial effect of this act. Canada, the European Union and Mexico have stated that the statute violates provisions of North American Free Trade Agreement (NAFTA) and the W.T.O. and adopted certain measures (see *e.g.* Benson, *supra* note 269 at 278; Clark, *supra* note 269 at 81-87 and 96); see also chapter 4:IV:B, "Extraterritoriality", at 111, below.

General Assembly of the U.N. has voted overwhelmingly to condemn the U.S. action.[285] Sanctions have prevented Cuba's economic development and, arguably, have made the export of revolutionary ideas very difficult.[286] In spite of these repercussions of the embargo in Cuba—ironically—the declared purposes of the American sanctions have not been achieved.[287]

II- Cases of Collective Sanctions[288]

The practice of the Security Council regarding economic sanctions has changed drastically in the post-cold war era. Under the *U.N. Charter*, subject to unanimity of the permanent members, the Council can proclaim any situation to be a "threat to international peace and security" and impose economic sanctions. In the period immediately following the end of the Cold War, unanimity was easier to obtain. In the past, the intervention of the Council was restricted to cases which had clear international effects. Now, the concept of a threat to the peace has practically been enlarged to encompass situations in which there are significant human rights violations within a country. In fact, human rights concerns are now as important as the direct effects of an act on the international community.

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[285] See the following General Assembly Resolutions: *Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America Against Cuba*, GA Res. 47/19, UN GAOR, 47th Sess., Agenda Item 39, UN Doc. A/RES/47/19 (1993); GA Res. 48/16, UN GAOR, 48th Sess., Agenda Item 30, UN Doc. A/RES/48/16 (1993); GA Res. 49/9, UN GAOR, 49th Sess., Agenda Item 24, UN Doc. A/RES/49/9 (1994); GA Res. 50/10, UN GAOR, 50th Sess., Agenda Item 27, UN Doc. A/RES/50/10 (1995); GA Res. 51/17, UN GAOR, 51st Sess., Agenda Item 27, UN Doc. A/RES/51/17 (1996); GA Res. 52/10, UN GAOR, 52nd Sess., Agenda Item 30, UN Doc. A/RES/51/10 (1997); GA Res. 53/4, UN GAOR, 53rd Sess., Agenda Item 29, UN Doc. A/RES/53/4 (1998).
In 1998, a record 157 countries favored an end to the sanctions, only the United States and Israel objected, 12 countries abstained (see Y.M. Ibrahim, "U.N. Votes, 157-2, in Referendum to End U.S. Embargo of Cuba" *The New York Times* (15 October 1998) A9).

[286] See *International Enforcement*, *supra* note 19 at 40.

[287] See Lowe, *supra* note 270 at 385.

[288] The study of collective sanctions in this thesis focuses on the U.N. sanctions. However as mentioned in chapter 1:II, "Types of Sanctions," collective sanctions are not restricted to those implemented by the U.N. Sanctions by the O.A.S. are among important examples of collective sanctions. A famous example of such sanctions is the trade embargo imposed by the O.A.S. on Dominican Republic in August 1960. After unsuccessful attempt by Trujillo—former president of Dominican Republic who still maintained control of government—to have President Betancourt of Venezuela assassinated, the O.A.S., acting under Articles 6 and 8 of Rio Treaty recommended, among others, the partial interruption of economic relations and an arms embargo. The embargo was extended in 1961. The sanctions were to be terminated when the government of Dominican Republic ceased to constitute a danger to the peace and security of the hemisphere. The sanctions were in fact removed in January 1962 when a more democratic regime was installed (see generally *International Enforcement*, *supra* note 19 at 33-34; Brown-John, *supra* note 43.at 160-272; *Economic Sanctions Reconsidered: Supplement*, *supra* note 76 at 182-187).

What follows is a chronological examination of the major cases in which collective economic sanctions have been implemented. Such an examination will enable us to evaluate the application of the conditions for legality of these sanctions and pave the way for the next chapter which will focus on the problems associated with sanctions. An attempt will be made to understand the situation in Southern Rhodesia, South Africa, Iraq, Former Yugoslavia, Haiti, and Libya in the following way: a very brief chronology of events will be given; the justifications given for imposition of sanctions will be explored; the humanitarian impact of sanctions and the considerations given to such concerns will be examined; and, finally, the way in which sanctions were terminated in each case will be delineated.

A- Southern Rhodesia

In 1966, for the first time ever,[289] the U.N. imposed sanctions against Rhodesia, following the Unilateral Declaration of Independence (UDI) made by the white minority government in November 1965. In response, the United Kingdom—the constitutionally responsible power—imposed a series of economic sanctions to pressure the Rhodesian Government to denounce the UDI and guarantee political participation of the black majority.

It was argued that, "the continuation of a situation in which a racially suppressed majority was dominated by a minority constituted a threat, over time to international peace."[290] The goal of the sanctions was to force Ian Smith's government to establish majority representation rule. After several condemnations by the General Assembly, the matter was brought to the attention of the Security Council. Following Resolutions 202

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[289] It should be mentioned that the first application of collective measures under the *U.N. Charter* followed the North Korean attack on South Korea in June 1950. After the initial recommendation of the military action by the Security Council (which was decided in absence of the U.S.S.R.) and further intervention of the Communist China in favor of North Korea, further action of the Council was blocked by the Soviet vetoes. Later, the General Assembly recommended additional economic measures (*Additional Measures to be Employed to Meet the Aggression in Korea*, 18 May 1951, GA Res. 500 (V), 330th Plen. Mtg., UN Doc. A/1805) which included embargo on shipment to areas controlled by communist China and North Korea of arms, ammunition and implements of war, atomic energy materials, petroleum, transportation materials of strategic value and items useful for producing military materials. Naturally, this resolution was not supported by the Soviet bloc and this first attempt by the U.N. to impose sanctions failed. Accordingly, as this case does not represent a typical Security Council measure taken under Chapter VII of the *U.N. Charter*, it is not considered as the first example of the collective sanctions here (see *International Enforcement*, *supra* note 19 at 58-59).

[290] Brown-John, *supra* note 43 at 272.

(1965)[291], 216 (1965)[292], 217 (1965)[293] and 221 (1966),[294] which condemned the situation in Southern Rhodesia, under Resolution 232,[295] the Security Council characterized the situation in Southern Rhodesia as "a threat to international peace and security" and imposed mandatory sanctions under Article 39 of the *U.N. Charter*.[296] As selective mandatory sanctions failed to bring about the desired changes, in 1968, the sanctions were strengthened by further Security Council Resolutions.[297]

It should be noted that the fact that economic sanctions were imposed in response to the unilateral declaration of independence in the hope of protecting human rights (in this case to impose majority rule in the country) and preventing armed conflicts in southern Africa, was not mentioned in any of the resolutions. Usually, the Security Council's resolutions state the legal basis of the decision and explains the reasons for which the decision was taken. However, Resolution 232 simply states that:

> The Security Council ...[a]cting in accordance with Article 39 and 41 of the United Nations Charter,
>
> 1. Determines that the present situation in Southern Rhodesia constitutes a threat to international peace and Security;
>
> 2. Decides that all States Members of the United Nations shall prevent...

Thus, the text of the resolution does not help us to understand why the situation in Southern Rhodesia was deemed to constitute a threat to international peace and security. Later resolutions of the Security Council simply reaffirmed the Council's determination "that the ... situation in Southern Rhodesia constitute[d] a threat to international peace and security."[298]

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[291] SC Res. 202, 6 May 1965, UN Doc. S/RES/202 in (1965) Y.B.U.N. 128.
[292] SC Res. 216, 12 November 1965, UN Doc. S/RES/216 in (1965) Y.B.U.N. 132.
[293] SC Res. 217, *supra* note 193.
[294] SC Res. 221, *supra* note 194.
[295] SC Res. 232, 16 December 1966, UN Doc. S/RES/232 reprinted in 6 I.L.M. 141.
[296] This last resolution implemented selective mandatory sanctions against Rhodesia, including a prohibition on exports to Rhodesia of petroleum, armaments, vehicles, and aircraft, and a ban on imports of Rhodesian agricultural products and minerals.
[297] Resolution 253 of the Security Council imposed a ban on all exports to and imports from Rhodesia, prohibited the transfer of funds to Rhodesia for investment, prohibited air links with that country, and called upon states to prevent the entry into their territories of people holding Southern Rhodesian passports (SC Res. 253, 29 May 1968, UN Doc. S/RES/253 reprinted in 7 I.L.M. 897). For a chronology and text of Security Council resolutions and other measures taken by the U.N. see the annexes in, R. Zacklin, *The United Nations and Rhodesia, a Study in International Law* (New York: Praeger Publishers, 1974) at 115-160.
[298] SC Res. 253, *ibid.*, SC Res. 277, 18 March 1970, UN Docs. S/RES/277 reprinted in 9 I.L.M. 636, and, SC Res. 328 (1973).

Even though the Security Council refrained from giving explanations regarding the criteria used in concluding that a threat to international peace and security existed, the Council's decision has been justified by commentators on different grounds.[299] According to McDougal and Reisman,

> [i]n terms of substantive merits, the decision realistically recognizes that in the contemporary world, international peace and security and the protection of human rights are inescapably interdependent and that the impact of the flagrant deprivation of the most basic human rights of the great mass of the people of a community cannot possibly stop short within the territorial boundaries in which the physical manifestations of such deprivations first occur.[300]

Resolution 253 made an exception to the ban on exports to Rhodesia. On humanitarian grounds, the following were allowed to enter the country: "supplies intended strictly for medical purposes, educational equipment and material for use in schools and other educational institutions, publications, news material, and in special humanitarian circumstances foodstuffs."[301] Furthermore, this resolution established a Committee to "examine the reports on the implementation" of sanctions and monitor compliance of member states with sanctions.[302] Under the terms of a later resolution, the mandate of the Committee was extended to "studying ways and means by which member states could carry out more effectively the decisions of the Security Council."[303] The Committee recommended expansion of the scope of the sanctions against Rhodesia.

At no point did the U.N. consider the impact of sanctions on the Rhodesian populace and economy.[304] According to Riesman and Stevick, the reasons for the U.N.'s indifference were the following: (i) the fact that the U.N. was "primarily concerned with the sanctions evasion by both Member States and non-members," (ii) the sanctions' "manifestly limited impact" on Rhodesia's economy, (iii) the "stereotypical view of a

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[299] See also chapter 2:II:A:i, "Threat to the Peace", at 39, above.

[300] M.S. McDougal & W.M. Reisman, "Rhodesia and the United Nations: the Lawfulness of International Concern" (1968) 62 A.J.I.L. 1 at 18; *contra* A. Chayes & A.H. Chayes, *The New Sovereignty, Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press 1995) at 47. According to Chayes & Chayes, in case of Southern Rhodesia, "[t]he legal basis for Chapter VII was shaky. A state's treatment of its own citizens was then beginning to emerge as an important international concern, based on the human rights provisions of the UN Charter and the 1948 Universal declaration of Human Rights. But it had bot yet matured into a universally acknowledged legal norm" (Chayes & Chayes, *ibid.* at 47).

[301] SC Res. 253, *supra* note 297, para. 3(d).

[302] *Ibid.* pare. 20.

[303] SC Res. 277, *supra* note 298, para. 21(c).

[304] See W.M. Reisman & D.L. Stevick, "The Applicability of International Law Standards to United Nations Economic Sanctions Programmes" (1998) 9 Euro. J. Int'l L. 86 at 98.

'Third World' dual economy [according to which] Africans were exclusively engaged in the traditional sector, ..., which was not susceptible to injury by the sanctions," and, (iv) the presumption that African Rhodesians had consented to hardships caused by sanctions as the "price for freedom."[305]

It is submitted that all sections of the population suffered hardship and the government was particularly concerned with protecting whites.[306] The U.N. went so far as authorizing relief measures for Zambia,[307] which suffered economic hardship as a result of sanctions, while it did not consider the effects of the sanctions on the economy and populace of Southern Rhodesia.

In 1979, the Security Council decided that, "having regard to the agreement reached at the Lancaster House conference,[308] [it would] call upon Member States to terminate the measures taken against Southern Rhodesia under Chapter VII of the Charter."[309]

After twelve years the sanctions did not prove to be successful in bringing about the desired changes in Southern Rhodesia. This was partly because of non-participation of states like Portugal and South Africa.[310] Rhodesia eventually gained legal independence and a government based on genuine majority rule; however, the sanctions "were at most a contributing factor and certainly not a determining one."[311]

B- South Africa

The South African case is very similar to that of Rhodesia. The legal entrenchment of apartheid resulted in international outrage in 1960's.[312]

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[305] *Ibid.* at 99-101.

[306] *International Enforcement, supra* note 19 at 73.

[307] Resolution 329 (1973) (SC Res. 329, 10 March 1973, UN Doc. S/RES/329 in (1973) Y.B.U.N. 118).

[308] With the British mediation, Lancaster House agreement was signed between opposition front and white minority leaders and the government acceded to black majority rule (Renwick, *supra* note 26 at 55).

[309] SC Res. 460, 21 December 1979, UN Doc. S/RES/460 reprinted in 19 I.L.M. 258.; in examining the question of "Termination of Sanctions: Solving the Problem of the Reverse Veto", at 128, below, this resolution will be discussed again.

[310] See *e.g.* Zacklin, *supra* note 297 at 106; *International Enforcement, supra* note 19 at 76; Reisman & Stevick, *supra* note 304at 98.

[311] Renwick, *supra* note 26 at 58; *contra Economic Sanctions Reconsidered: Supplement, supra* note 76 at 291-292: "[o]ver the long term, however, the economic and moral weight of sanctions increased the pressure on the Smith government and, hence, contributed to a negotiated settlement."

[312] As early as 1946, the issue of racial discrimination in South Africa was debated in the U.N. In that year, India wrote to the U.N. Secretary General to complain of the discriminatory treatment of Indians in South Africa. In 1952, upon the request of a group of 13 member states "the question of race conflict in South

[continues on the next page]

Invoking Article 2(7) of the *U.N. Charter*, South Africa constantly dismissed objections against its policy of apartheid, arguing that it was a matter essentially within its domestic jurisdiction.[313] However, in 1952, a commission established by the General Assembly "to study the racial situation in the Union of South Africa in the light of the Purposes and Principles of the Charter, with due regard to the provision of Article 2, paragraph 7, as well as the provisions of Article 1, paragraphs 2 and 3, Article 13 paragraph 1 b, Article 55 c, and Article 56 of the Charter"[314] produced "a highly competent and authoritative report that took full account of the views of the South African Government and scholars such as Luterpacht, Preuss, Kelsen, and René Cassin."[315] According to this commission, as a result of the adoption of the *U.N. Charter*, fundamental human rights no longer fell essentially within domestic jurisdiction, and principal U.N. organs were entitled to decide in every specific instance whether or not a matter fell within the domestic jurisdiction of a state.[316] It was also stated that the philosophy on which the policy of apartheid was based, was "extremely dangerous to international peace and international relations."[317]

Conversely, the Security Council's actions were limited to imposing arms embargoes. Economic sanctions were never imposed on South Africa.[318] As progress was made toward ending apartheid, the embargoes were gradually lifted. This process began

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Africa resulting from the policies of apartheid of the Government of the Union of South Africa" was included in the agenda of the General Assembly (see Kamminga, *supra* note 135 at 91).

[313] Text of Article 2(7) of the *U.N. Charter* can be found at 92, below.

[314] *The question of race conflict in South Africa resulting from the policies of apartheid of the Government of the Union of South Africa*, GA Res. 616 (VII)A, UN GAOR, 7th Sess., Supp. No. 20, UN Doc. A/2361 (1952).

[315] Kamminga, *supra* note 135 at 91.

[316] UN Doc. A/2505 (3 October 1953) at 44-65 cited in Kamminga, *ibid.* at 91.

[317] *Ibid.* at 116; There is no doubt that the fundamental norm of the U.N. Charter, requiring respect for and observance of human rights and freedom for all without distinction as to race, is now part of customary international law. Furthermore, the *International Convention on the Elimination of All Forms of Racial Discrimination* (with an exceptionally large number of 150 states party to it) in the Preamble and Article 3 mentions apartheid, particularly condemns it and prohibits all practices of that nature (*International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 U.N.T.S. 195, 5 I.L.M. 352). On illegality of apartheid see T. Meron, *Human Right Law-Making in the United Nations* (Oxford: Clarendon Press, 1986) at 7-52; and International Commission of Jurists, *A Study on Apartheid in South Africa and South West Africa* (Geneva: International Commission of Jurists, 1967).

[318] The reason was France the U.K. and the United States vetoing the resolutions on economic sanctions, because South Africa was the most important producer of strategic minerals. However, in 1962 the UN General Assembly passed a resolution calling for a ban on exports to or imports from South Africa (*Question of South West Africa*, GA Res. 1805(XVII), UN GAOR, 17th Sess., Agenda Item 57, UN Doc. A/RES/1805 (XVII) (1962)).

international peace and security according to Chapter VII of the *U.N. Charter*. Resolution 282 of the Security Council refers to the *Universal Declaration of Human Rights*[319] and recognizes "the legitimacy of the struggle of oppressed people of South Africa in pursuance of their human and political rights."[320] It also states that the "extensive arms build up of the military forces of South Africa poses a real threat to the security and sovereignty of independent African States opposed to the racial policies of the Government of South Africa, in particular the neighbouring countries." In this resolution, the Security Council clearly describes its reasons for defining the situation in South Africa as a threat to international peace and security. In contrast to the Rhodesia resolutions that made no reference to human rights law, in the case of South Africa, the Security Council more precisely justified its decision. This can be considered to be a positive development.

Later, the Security Council's Resolution 311 (1972) determined that apartheid in South Africa "disturbs" international peace and security.[321] Resolution 418 (1977),[322] in which the Security Council expressly affirmed the prerequisites for the application of Chapter VII measures for South Africa, condemned the system of apartheid, as well as "attacks" on neighbouring countries. It then determined that, on the basis of the "policies and acts" of the South African Government, the acquisition of weapons by the South African government would be a threat to international peace and security.[323] Later, according to the Security Council Resolution 421 (1977), a committee was established to supervise the implementation of the arms embargo against South Africa.[324] Since the sanctions were confined to an arms embargo, the issue of humanitarian effects of sanctions did not exist.

(*Question of South West Africa*, GA Res. 1805(XVII), UN GAOR, 17th Sess., Agenda Item 57, UN Doc. A/RES/1805 (XVII) (1962)).

[319] 10 December 1948, GA Res. 217(III), UN GAOR, 3rd Sess., Supp. No. 13, UN Doc. A/810 (1948) 71[hereinafter *Universal Declaration*].

[320] SC Res. 282, 23 July 1970, UN Docs. S/RES/282 in (1970) Y.B.U.N. 146.

[321] SC Res. 311, 4 February 1972, UN Doc. S/RES/311 in (1972) Y.B.U.N. 88.

[322] SC Res. 418, 4 November 1977, UN Doc. S/RES/418 reprinted in 16 I.L.M. 1547.

[323] Paragraph 1 of this resolution states that the Security Council, "having regard to the policies and acts of the South African Government, [determines] that the acquisition by South Africa of arms and related material constitutes a threat to the maintenance of international peace and security."

[324] SC Res. 421, 9 December 1977, UN Doc. S/RES/421 in (1977) 31 Y.B.U.N. 162.

Some authors argue that the sanctions imposed under the auspices of the U.N. contributed only modestly to the changes which occurred in South Africa,[325] and that even the U.N.'s Proclamation that 1982 be the "International Year of Mobilization of Sanctions against South Africa" had a minimal impact;[326] others maintain that such actions were crucial in bringing about the change in South Africa.[327] In my opinion more decisive action was required by the international community because of the gravity of the situation in South Africa and the fact that apartheid is recognized as an international crime.[328] A mere arms embargo did not suffice in such a situation. Had there been enough international political will to impose effective sanctions, the situation in South Africa may have been resolved earlier.

C- Iraq

Following the invasion of Kuwait by Iraqi troops on August 1st, 1990, the Security Council adopted Resolution 661,[329] which imposed comprehensive economic sanctions against Iraq and Kuwait under Chapter VII of the *U.N. Charter*. The sanctions programme forbade all imports and exports to and from Iraq, and suspended pre-existing commercial contracts with Iraq and froze the assets of the Iraqi government and nationals abroad.[330] However, "supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs" were exempted from the sanctions.[331] The means by which the sanctions were to be imposed was clearly indicated: a "Sanctions Committee" was established to monitor the implementation of sanctions.[332]

The long introduction to Resolution 661 explains the legal basis on which the measures were taken. It rightly considered the invasion of Kuwait by Iraq as a threat to

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[325] See *Economic Sanctions Reconsidered: History*, *supra* note 27 at 247-248.
[326] D.G. Anglin, "United Nations Economic Sanctions against South Africa and Rhodesia" in D. Leyton-Brown, ed., *The Utility of international Economic Sanctions* (London: Croom Helm, 1987) 23 at 45.
[327] See J. Davis, "Sanctions and Apartheid: The Economic Challenge to Discrimination" in Cortright & Lopez, *supra* note 22, 173 at 181. President Nelson Mandela addressing the Joint Houses of the U.S. Congress underscored the role of sanctions saying, "[w]e came to salute you for the place you have taken in the universal assault on apartheid ... which has enabled us to repeat in this chamber the poetry of the triumph of the oppressed: 'Free at last, free at last, thank God Almighty we are free at last!'" (cited in *ibid.* at 181).
[328] See Article 19(2) of the *ILC Draft Articles* (enumerating international crimes) at 29,above; Mohr, *supra* note 144 at 126; de Hoogh, *supra* note 143 at 64.
[329] SC Res. 661, 6 August 1990, UN Doc. S/RES/661 reprinted in 29 I.L.M. 1325.
[330] *Ibid.* para. 3 &5.
[331] *Ibid.* para 4.
[332] *Ibid.* para 6.

international peace and security. However, it did not refer to Article 39 of the *U.N. Charter* specifically, but merely stated that the Council was acting under Chapter VII.

Later, several other resolutions were issued which dealt with invasion of Kuwait and modified the original sanctions programme. Resolution 666 (1990) delegated the task of determining what constituted "humanitarian circumstances" under Resolution 661 to the aforementioned Sanctions Committee.[333] Since the sanctions programme failed to achieve its goal of peacefully compelling Iraq to withdraw from Kuwait, under Resolution 678 (1990), the Council authorized member states to "use all necessary means" to ensure Iraq's withdrawal.[334]

In accordance with Resolution 678, an allied arm force in the framework of the U.N. was mandated to liberate Kuwait from Iraqi occupation. After the Iraqi Army was expelled from Kuwait, the Security Council decided to maintain the sanctions programme against Iraq until Iraq complied with the provisions of Resolution 687 (1991) which required it to destroy its weapons of mass destruction and permit international monitoring to ensure that it did not resume its nuclear, chemical or biological weapons programmes.[335] This Resolution, in addition to restating the exception to the sanctions, authorized the Sanctions Committee to approve "material and supplies for essential civilian needs" under an accelerated no-objection procedure.[336]

In addition to the resolutions that addressed the invasion of Kuwait, another resolution regarding Iraq is important in our analysis of the definition of a threat to international peace and security according to the Council. Adoption of Resolution 688 in April 1991,[337] which authorized "humanitarian intervention" in Iraq, sought to protect the Kurdish minority. This marked a new role for the Security Council. The Council decided that the consequences of "repression of the Iraqi civilian population in many parts of Iraq, including ... Kurdish populated areas ... threatens international peace and security in the

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[333] Resolution 666 (1990), para. 6. 8. (SC Res. 666, 13 September 1990, UN Doc. S/RES/666 reprinted in 29 I.L.M. 1327); in addition to that, Resolutions 665 and 670, respectively authorized member states to halt Iraq's inward and outward maritime shipping in order to inspect the cargoes and banned air traffic to and from Iraq and asked member states to deny overflight rights to Iraq.
[334] SC Res. 678, 29 November 1990, UN Doc. S/RES/678 in (1990) 29 Y.B.U.N. 1565.
[335] SC Res. 687, 3 April 1991, UN Doc. S/RES/687 in (1991) 30 Y.B.U.N. 847.
[336] *Ibid.* paras 20 and 22.
[337] SC Res. 688, *supra* note 198.

region."[338] This resolution was not made under Article 39 of the *U.N. Charter* or even Chapter VII, nor did it impose any new sanction on Iraq. Nonetheless, in the future, the Security Council can designate a similar situation as a threat to international peace and security and impose economic sanctions.

It is believed that sanctions have harmed the Iraqi people, their standard of living has suffered immensely, and that the country faces crises in health, nutrition and education.[339] Iraq's economy has suffered severely due to the sanctions. "All measures of economic activity have significantly declined while inflation has soared. In 1993, the unofficial inflation rate was running about 4000 percent over prices in August 1990."[340]

The U.N. Security Council has been concerned with the humanitarian consequences of the sanctions and "made a conscious effort to weave humanitarian concerns into its design of the economic sanctions levied against Iraq."[341] Resolutions 712 and 706 of the Council provided Iraq with the possibility of exporting oil to earn funds to purchase food and other humanitarian goods.[342] Although Iraq, for some time, refused to participate in this oil-for-food programme, in 1996, the programme was implemented under Resolution 986 (1995).[343] After negotiations between Iraq and the U.N., the final plan allowed Iraq to sell $2 billion worth of oil over six months to buy food, medicines and other humanitarian goods under the administration of the U.N.

Sanctions against Iraq are still in force and will be lifted only after Iraq's compliance with the provisions of Resolution 687 regarding eradication of weapons of

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[338] *Ibid.* para. 1. The introduction of this resolution expressly states that the Council is

> [g]ravely concerned by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions, which threaten international peace and security in the region.

[339] Reisman & Stevick, *supra* note 304 at 102-104.

[340] D.E. Reuther, "UN Sanctions against Iraq" in Cortright & Lopez, *supra* note 22, 121 at 126. It should also be mentioned that many studies were published on the effects of the sanctions on Iraqi people. A study done by a Harvard Medical Team examined the effect of the sanctions on the Iraqi children and reported epidemics of cholera, typhoid and gastroenteritis. Other studies too reported the crisis in the health of the Iraqi people (see, The Harvard Medical Study Team, "Special Report: The Effect of the Gulf Crisis on the Children of Iraq" (1991) 325:13 New England Journal of Medicine 977; A. Ascherio, *et al.*, "Effect of the Gulf War on Infant and Child Mortality in Iraq" (1992) 327:13 New England Journal of Medicine 931; International Federation of the Red Cross and Red Crescent Societies, *World Disasters Report 1995* (1995) 26).

[341] Reuther, *ibid.* at 130.

[342] SC Res. 706, 15 August 1991, UN Doc. S/RES/706 (1991) reprinted in 30 I.L.M. 1719; SC Res. 712, 19 September 1991, UN Doc. S/RES/712 reprinted in 30 I.L.M. 1730.

[343] SC Res. 986, 14 Aril 1995, UN Doc. S/RES/986 reprinted in 35 I.L.M. 1144.

mass destruction. The continuation of sanctions has been very controversial. Over the course of the past few months, the Security Council has been sharply divided on the issue.[344]

Most recently, several proposals for the conditional suspension of sanctions were rejected by Iraq on the grounds that it would transform Iraq into a colony. According to these proposals, the embargo was to be suspended once Iraq answered questions about its banned weapons programmes and committed to adhere to strict financial controls to ensure that oil revenues were not spent on new weapons.[345]

D- Former Yugoslavia

Following the disintegration of the former Yugoslavia in the summer of 1991 and the internal conflict that broke out afterwards, economic sanctions were imposed in four phases to encourage an end to the violent conflict.[346]

First, in May 1991, the U.S., by withdrawing economic and financial aid, tried to bring the Yugoslav politicians to negotiating table. Later, the European Union adopted the same tactic and withdrew economic and financial assistance to Yugoslavia.

The second phase began after the outbreak of war. The Security Council adopted Resolution 713 (1991).[347] Recalling that its primary responsibility under the *U.N. Charter*, is the maintenance of international peace and security, and invoking Chapter VII of the *U.N. Charter*, the Council imposed "a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia." Then, the European Union, followed by the U.S., imposed trade sanctions. The embargo did not reduce the tensions.[348]

Consequently, after taking other measures (including deployment of a U.N. peacekeeping operation and establishing a U.N. protection force [UNPROFOR]) on May

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[344] Among the five permanent veto-wielding Security Council members, Russia, China and France have been sympathetic to an immediate lifting of the sanctions imposed. The U.S. stresses that in no case prior to full compliance should there be any change in the fact that the Iraqi present regime should not have access to resources. "Major U.N. Powers Divided on Lifting Iraq Sanctions," online: CNN <http://www.cnn.com/WORLD/meast/9909/20/un.iraq/index.html> (date accessed: 20 September 1999).

[345] "Iraq: No to Sanctions Plan" *The [Montreal] Gazette* (21 June 1999) E8.

[346] See S.L. Woodward, "The Use of Sanctions in Former Yugoslavia: Misunderstanding Political Realities" in Cortright & Lopez, supra note 22, 141 at 142.

[347] SC Res. 713, *supra* note 199.

[348] Chayes & Chayes, *supra* note 300 at 56.

30th, 1992 a trade embargo was imposed on the Federal Republic of Yugoslavia (Serbia and Montenegro);[349] thus, the third phase of sanctions began. In Resolution 760, after a long introduction, the Council, recalling its primary responsibility, invoked Chapter VII of the *U.N. Charter* to impose a complete trade embargo on the Federal Republic of Yugoslavia. These extensive sanctions included all imports and exports, financial transactions, air communications, scientific and technical cooperation, cultural exchanges, and sporting events. The only exceptions were "supplies intended strictly for medical purposes and foodstuff notified to the Committee" previously established, and also trans-shipment through this country.[350]

The fourth phase occurred when it became evident that the embargo was being violated. Then, the Council adopted another resolution.[351] In order to ensure that goods trans-shipped through Yugoslavia were not diverted in violation of Resolution 757, the Council, acting under Chapter VII of the *U.N. Charter*, decided to prohibit trans-shipment of certain products, and called on the states to monitor sea and land borders to ensure implementation of sanctions. Accordingly, the NATO alliance was empowered to deploy warships to the region to carry out this mandate.[352] Later, the sanctions were enlarged: Serbia's assets and oversees property were frozen and the embargo was extended to the areas of Bosnia and Herzegovina controlled by the Bosnian Serbs.[353]

Although, at the beginning it appeared that the Serbian economy might be able to withstand the sanctions, it soon became clear that it could not:[354] "Inflation skyrocketed ..., production fell sharply while unemployment jumped ... By 1993 close to 80 percent

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[349] SC Res. 757, 15 May 1992, UN Doc. S/RES/757 reprinted in 31 I.L.M. 1453.
[350] SC Res. 760, 18 June 1992, UN Doc. S/RES/760 reprinted in 31 I.L.M. 1461.
[351] SC Res. 787, 16 November 1992, UN Doc. S/RES/787 reprinted in 31 I.L.M. 1481.
[352] See Chayes & Chayes, *supra* note 300 at 56-57.
[353] SC Res. 820, 17 April 1993, UN Doc. S/RES/820 in (1993) 47 Y.B.U.N. 471.
[354] Reisman & Stevick, *supra* note 304 at 114. However, in the same article, it is stated that:

> [f]our factors must be taken into account in evaluating the legality of UN sanctions against the FRY. First, it is difficult to measure how much of Serbia and Montenegro's post-1991 economic crisis is attributable to the sanctions and how much to other factors, such as economic mismanagement. Second, it is not clear that the Yugoslav people suffered disproportionately from the sanctions: while some claim that the average family struggled just to meet its basic needs, others argue that the sanctions did not unduly burden the populace and that they brought about long-needed changes in the FRY's previously state-dominated and inefficient economy. Third, at least some evidence supports the conclusion that the Serbian and Montenegran people were not innocent victims of UN sanctions (*ibid.* at 116-7).

of the population had fallen below the poverty line."[355] In 1993, medicine, food, spare parts, fuels, and cultural products were scarce and difficult to find.[356] According to the Red Cross, malnutrition and infant mortality increased during the sanctions programmes.[357]

After the conclusion of the *Dayton Peace Treaty*[358] between the implicated parties and Yugoslavia's agreement to close its borders between Serbia and Serb-controlled Bosnia, the sanctions were gradually eased and then suspended by Resolution 1022 in 1995.[359] It is worth mentioning that during the period in which sanctions were eased, the Security Council began by allowing measures which "benefited primarily the people of the Federal Republic of Yugoslavia, not their rulers."[360]

E- Haiti

In 1991, a military *coup d'etat* brought a short period of democracy in Haiti to an abrupt end.[361] Initial measures were taken by the O.A.S.[362] Then, in 1993, the U.N.

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[355] Licht, S., "The Use of Sanctions in Former Yugoslavia: Can They Assist in Conflict Resolution?" in Cortright & Lopez, supra note 22, 153 at 156.

[356] *Ibid.* at 157.

[357] *World Disasters Report*, *supra* note 340 at 23-24.

[358] *Dayton Agreement of Implementing the Federation of Bosnia and Herzegovina of 10 November 1995*, Republic of Bosnia and Herzegovina and Federation of Bosnia and Herzegovina, 35 I.L.M. 172; *General Framework Agreement for Peace in Bosnia and Herzegovina*, Republic of Bosnia and Herzegovina, Republic of Croatia and the Federal Republic of Yugoslavia, 14 December 1995, 35 I.L.M. 89.

[359] SC Res. 1022, 22 November 1995, UN Doc. S/RES/1022 reprinted in 35 I.L.M. 259.

[360] Reisman & Stevick, *supra* note 304 at 113. For instance, according to Resolution 943 (1994), para. 12, international passenger air traffic with Serbia and Montenegro, passenger services to Bari, Italy, and Serbia's participation in international sporting and cultural exchanges were permitted (see SC Res. 943, 23 September 1994, UN Doc. S/RES/943 in (1994) 48 Y.B.U.N.557.).
Following the recent events in Kosovo, Russia opposed Security Council action against Yugoslavia for some time ("Russia Opposes U.N. Steps against Yugoslavia" *The New York Times* (20 March 1998) A3). Finally, under Resolution 1160, the Security Council imposed an arms embargo on Yugoslavia for its treatment of ethnic Albanians (SC Res. 1160, 31 March 1998, UN Doc. SC/RES/1160 (1998) online: United Nations www.un.org/Docs/scres/1998/sres1160.htm (date accessed:18 December 1998)). Another Security Council Resolution stated that the deterioration of situation in Kosovo, constituted a threat to peace and security in the region (SC Res. 1199, 23 September 1998, UN Doc. SC/RES/1199 reprinted in 38 I.L.M. 249). In justifying its subsequent actions in Kosovo, NATO, in part, invoked this designation of situation as a threat to peace and security. The arms embargo is still in force.

[361] After many years of dictatorship, in 1990, the Haitians for the first time could participate in a fair and democratic election, in which Jean-Bertrand Aristide was elected (see C.A. Werleigh, "The Use of Economic Sanctions in Haiti: Assessing the Economic Realities" in Cortright & Lopez, supra note 22, 161 at 163).

[362] After Aristide went into exile he asked for the help of the O.A.S. Members of the O.A.S., in October 1991, agreed to impose economic sanctions on Haiti; only humanitarian goods were exempted from sanctions. However, due to lack of the proper structure for implementation and control of the embargo in the framework of the O.A.S., the sanctions were constantly violated by member states (especially

[continues on the next page]

imposed sanctions on Haiti. In Resolution 841, the Security Council, acting under Chapter VII of the *U.N. Charter*, imposed oil and arms embargo on Haiti and froze the funds of the Haitian government and its officials.[363] The Security Council justified its decision by stressing, in the preamble of Resolution 841, that:

> the persistence of this situation [in Haiti] contribute[d] to a climate of fear of persecution and economic dislocation which could increase the number of Haitians seeking refuge in neighbouring Member States, [and that] in these unique and exceptional circumstances, the continuation of [the] situation threaten[d] international peace and security of the region.[364]

This resolution established a Sanctions Committee to monitor the implementation of sanctions and approve shipment of oil for humanitarian needs. Later, the sanctions were reinforced according to Resolution 917, and a comprehensive embargo was imposed on Haiti.[365]

According to Reisman and Stevick, "because of their devastating effects on the Haitian economy and their impact on the health and social well-being of the mass of impoverished Haitians the O.A.S. and U.N. sanctions programmes against Haiti were particularly controversial."[366] Unemployment rose, production dropped, and malnutrition, particularly among children, became widespread.[367] The U.N. Secretary General went so far as informing the General Assembly of the deplorable situation in Haitian.[368]

When the sanctions first began in Haiti, the Security Council did not take the possible disproportionate or discriminatory effects of sanctions into account. Later, however, the Council's President stated that it was "deeply concerned by the suffering of

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Dominican Republic) and failed to achieve their goal. For more details on effect of O.A.S. sanctions see Werleigh, *supra* note 361 at 164-166.

[363] SC Res. 841, *supra* note 202.

[364] *Ibid.*

[365] SC Res. 917, 6 May 1994, UN Doc. S/RES/917 in (1994) 48 Y.B.U.N. 419; according to this resolution member states were required to deny landing and overfly permission to all but regularly scheduled commercial passenger flights to or from Haiti; deny entry into their territories of members of the Haitian military, its agents, and Haitian government officials, ban imports to or exports from Haiti, and observe a trade embargo with Haiti. It also urged member states to freeze the funds of members of the Haitian military, its agents and government officials.

[366] *Supra* note 304 at 119.

[367] A study by Harvard Center for Population and Development Studies indicated that the sanctions may have caused up to 1000 extra children deaths per month (Harvard Center for Population and Development Studies, *Sanctions in Haiti: Crisis in Humanitarian Action* (1993)).

[368] See *The Situation of Democracy and Human Rights in Haiti: Report of the Secretary-General*, UN GAOR, 47th Sess., Agenda Item 22, UN Doc. A/47/599 (1992) and UN Doc. A/47/599/Corr. 1(1992), and *Report of the Secretary-General on the Question Concerning Haiti*, UN Doc. S/1994/1012 (1994).

the Haitian people."[369] The Security Council expressed its determination "to minimize the impact of the ... situation on the most vulnerable groups and call[ed] upon Member States to continue, and to intensify, their humanitarian assistance to the people of Haiti."[370] Despite the fact that some of Security Council decisions targeted the military authorities in Haiti, those measures were only complementary to already existing U.N. sanctions.[371] Other than the aforementioned instances, the Security Council did not formally consider the humanitarian consequences of sanctions on Haiti.[372]

After the direct engagement of the U.S., and once the U.S. military forces were prepared to invade Haiti, an agreement was reached and implemented.[373] President Aristide was restored to power, and sanctions were lifted on October 15th, 1994.[374]

F- Libya

The case of Libya is also very important for the purposes of this thesis, as the sanctions were challenged by Libya at the International Court of Justice. [375] After Libya refused to extradite two Libyans who were suspects in the bombing of the 1988 Pan Am Flight 103, the Security Council passed a non-binding resolution and urged the Libyan government to extradite the suspects.[376] At the same time Libya, "invoking its rights

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[369] *Report of the Secretary-General on Haiti*, UN Doc. S/26480 (1993).
[370] *Note by the President of the Security Council Concerning the Situation in Haiti*, 15 November 1993, UN Doc. S/26747.
[371] For example, some measures adopted under Resolution 917 (see *supra* footnote 365).
[372] See Reisman & Stevick, *supra* note 304 at 122-23. The authors have given two reasons for International Community's failure to recognize the disproportionately harmful impact of sanctions on the Haitian people; first, the fact that Aristide strongly supported economic sanctions against his country, and second, Haiti's strategic insignificance to the great powers on the Security Council (*ibid.*).
[373] That military intervention was on the basis of Resolution 940 of the Security Council which, under Chapter VII of the *U.N. Charter*, authorized member states "to form a multinational force ... to use all necessary means to facilitate the departure from Haiti of the military leadership." The resolution had decided that "situation in Haiti continue[d] to constitute a threat to peace and security in the region" (SC Res. 940, 31 July 1994, UN Doc. S/RES/940 in (1994) 48 Y.B.U.N.426). The U.S. government, acting under authority of this resolution, gave an ultimatum to the Haitian military to surrender power or face invasion by a multinational force. After this ultimatum negotiations were held and as a result the military agreed to permit President Aristide to return to power (Reisman & Stevick, *supra* note 304 at 119).
[374] SC Res. 948, 15 October 1994, UN Doc. S/RES/948 in (1994) 48 Y.B.U.N.429.
[375] *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiryia* v. *United Kingdom)*, Provisional Measures, Order of 14 April 1992 [1992] I.C.J. Rep 3; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiryia* v. *United States)*, Provisional Measures, Order of 14 April 1992 [1992] I.C.J. Rep 114 [hereinafter *Lockerbie Case*]. The *Lockerbie Case* will be examined in the next chapter.
[376] SC Res. 731, *supra* note 205.

under the Montreal Convention[377] not to extradite the accused Libyans,"[378] and brought a case against the U.K. and the U.S. in front of the I.C.J. During the provisional measures phase of the case, the Security Council passed another resolution, imposing sanctions on Libya under Chapter VII of the *U.N. Charter*.[379] These sanctions imposed an air ban and arms embargo on Libya. Later, due to the non-cooperation of Libya, the sanctions were tightened. All states were required to freeze the assets of the government of Libya and any Libyan undertaking.[380]

Another important issue regarding these sanctions is that, for the first time ever, the Security Council "insisted that it had considered the possible effects of the sanctions on Libyan people in designing and imposing the initial sanctions regime of Resolution 748 in March 1992."[381] Representatives of the U.S., U.K. and France each argued that the sanctions against Libya were precise and limited and were appropriately designed to penalize the Government of Libya and not the Libyan people.[382]

However, after the sanctions were tightened the Security Council did not investigate, nor did it formally consider the possible impacts of the sanctions on Libyan people. The "impact of sanctions on the Libyan people has been relatively mild at least until recently." There has been "widespread sanctions evasion [and] the prolonged internal debates in the Security Council [on imposition of sanctions has] permitted Libya to anticipate and minimize the impact of the sanctions."[383]

Conversely, in the past few years, according to Reisman and Stevick, sanctions have become more effective. Inflation and unemployment are high and Libya had attempted to portray the sanctions as having a devastating impact on its people.[384]

In April 1999, following international mediations, an agreement was reached between the Libyan Government and the U.N. according to which the two Libyan

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[377] *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (with Final Act of the International Conference on Air Law held under the auspices of the International Civil Aviation Organization at Montreal in September 1973)*, 23 September 1971, 974 U.N.T.S. 177 [hereinafter the *Montreal Convention*].
[378] Reisman & Stevick, *supra* note 304 at 108.
[379] SC Res. 748, *supra* note 203.
[380] SC Res. 883, 11 November 1993, UN Doc. S/RES/883 in (1993) 47 Y.B.U.N. 101.
[381] Reisman & Stevick, *supra* note 304 at 109.
[382] UN SCOR, 47th Year, 3063 Mtg., UN Doc. S/PV.3063 (1992) at 67, 69 and 74.
[383] Reisman & Stevick, *supra* note 304 at 110.
[384] *Ibid.* at 110 and 111.

suspects were handed over in the Netherlands and the sanctions against Libya were suspended.[385] But due to the U.S. opposition the sanctions are not permanently lifted yet.[386]

G- Other Cases

Cases in which sanctions have been imposed have become increasingly frequent in recent times. There have been cases, other than those discussed above, in which the Security Council has imposed arms embargoes. In these cases, the Council used language similar to the language it used in justifying the use of broader sanctions.

i- Sierra Leone

In the case of Sierra Leone,[387] following the military coup and the massive violation of human rights by the junta, the Security Council determined "that the situation in Sierra Leone constitute[d] a threat to international peace and security in the region."[388]

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[385] On August 24, 1998, a letter from representatives of the U.S. and the U.K. presented a proposal from thew two governments to solve the crisis (*Letter dated 24 August 1998 from the Acting Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United Stated of America to the United Nations addressed to the Secretary-General*, UN Doc. S/1998/795). On August 27, 1998 the Security Council adopted resolution 1192 (1998) in which it welcomed the initiative for the trial of the two persons charged with the bombing of the Pan American Flight 103 (SC Res. 1192, 27 August 1998, UN Doc. S/RES/1192 reprinted in 38 I.L.M. 937). In a letter dated April 5, 1999 the Secretary-General informed the Security Council that the two accused were handed over to the Dutch authorities and requested the suspension of the sanctions set forth in Security Council Resolution 748. The measures were immediately suspended on 5 April 1999 at 1400 hours eastern standard time (*Letter Dated 5 April 1999 from the Secretary-General Addressed to the President of the Security Council*, UN Doc. S/1999/378). On June 30, 1999, the Secretary-General submitted a follow up report concerning Libya's compliance with the provisions of Resolution 731 and 748 to the Security Council (*Report of the Secretary-General Submitted pursuant to Paragraph 16 of Security Council Resolution 883 (1993) and Paragraph 8 of Resolution 1192 (1998)*, UN Doc. S/1999/726 (1999)).

[386] Following a meeting of the Security Council at which several countries argued for sanctions to be ended, the United States declared that it is not ready to support the permanent lifting of international sanctions against Libya or to re-establish diplomatic relations with the country. The U.S. justifies its position on the grounds that Libya still had to demonstrate its willingness to cooperate fully over the Lockerbie bombing in 1988, for which two Libyan suspects are facing trial in Holland ("Libya: Security Council Praise" *The New York Times* (8 July 1999) A7). However, on July 9, 1999, a Statement by the President of the Security Council stated that:

> [t]he Security Council welcomes the positive developments identified in the report and the fact that the Libyan Arab Jamahiriya has made significant progress in compliance with the relevant resolutions ... The Council recalls that the measures set forth in resolutions 748 (1992) and 883 (1993) have been suspended, and reaffirms its intention to lift those measures as soon as possible, in conformity with the relevant resolutions (*Statement by the President of the Security Council, 9 July 1999*, UN Doc. S/PRST/1999/22).

[387] SC Res. 1132, 8 October 1997, UN Doc. S/RES/1132 (1997) online: United Nations www.un.org/Docs/scres/1997/9726713E.htm (date accessed:18 December 1998).

[388] *Ibid.*

Although the Council expressed grave concern about "the continued violence and loss of life in Sierra Leone following the military coup of 25 May 1997, the deteriorating humanitarian conditions in that country, and the consequences for neighbouring countries,"[389] it did not clarify why it considered the situation to be a threat to international peace. It can be assumed, however, from other provisions of Resolution 1132 that the refugee problem gave the situation an international dimension.[390] The Council, acting under Chapter VII of the *U.N. Charter*, imposed a petroleum and arms embargo on Sierra Leone, and asked all states to "prevent the entry into or transit through their territories of members of the military junta and adult members of their families."[391]

ii- Somalia

The case of Somalia was another case in which the Security Council imposed an arms embargo. Following the internal armed conflicts in Somalia and concerns that "the continuation of this situation constitute[d] ... a threat to international peace and security," the Council imposed an arms embargo in January 1992.[392]

iii- Liberia

In Liberia, in November 1992, an arms embargo was implemented due to the internal conflicts which "constitute[d] a threat to international peace and security, particularly in West Africa as a whole."[393]

iv- UNITA

When the National Union for the Total Independence of Angola (UNITA), in 1993, refused to recognize the legitimacy of the results of the U.N.-supervised elections and lay down its arms, the Security Council imposed an arms and petroleum embargo on UNITA.[394]

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[389] *Ibid.*

[390] Paragraph 15 of Resolution 1132 stated that the Council "[u]rges all States, international organizations and financial institutions to assist States in the region to address the economic and social consequences of the influx of refugees from Sierra Leone."

[391] *Ibid.* para 5.

[392] SC Res. 733, *supra* note 200.

[393] SC Res. 788, *supra* note 201.

[394] SC Res. 864, 15 September 1993, UN Doc. S/RES/864 in (1993) 47 Y.B.U.N. 256.

v- Sudan

Sanctions were also implemented against Sudan following the attempted assassination of President Mubarak of Egypt in Addis Ababa. At that time, the terrorists sought asylum in Sudan. The Security Council acting under Chapter VII, stated that the situation constituted a "threat to international peace and security in the region." But the Council first imposed diplomatic sanctions against Sudan.[395] Later, it merely required states to deny to Sudanese aircraft permission to fly to or from their territory.[396]

vi- Rwanda

In the case of Rwanda, the Security Council "deeply disturbed by the magnitude of the human suffering caused by the conflict ... determine[d] that the situation in Rwanda constitute[d] a threat to peace and security in the region" and decided to impose an arms embargo on that country.[397] In its most recent decision regarding Rwanda, on April 9th, 1998, the Council, expressed its concern that illegal flow of arms to Rwanda "pose[d] a threat to peace and stability in the great lakes region," and declared "its willingness to consider further other recommendations offered by Commission of Inquiry."[398]

III- Conclusion

The single case of a unilateral sanction studied in this thesis reveals the problem of extraterritoriality, which will be examined in the next chapter.[399] After more than three decades, most sanctions theorists agree that the sanctions have failed to achieve their intended goals.[400] According to sanction theories, clear, short-term, easily attainable goals are most likely to be achieved through a sanctions policy, and Cuba's case did not correspond to these criteria.[401] The impact of the embargo on the Cuban citizens and economy is deemed to be disproportionate to the impact of the confiscation of American

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[395] SC Res. 1054, 26 April 1996, UN Doc. S/RES/1054 in (1996) 50 Y.B.U.N. 130.
[396] SC Res. 1071, 30 August 1991, UN Doc. S/RES/1071 in (1996) 50 Y.B.U.N. 116.
[397] SC Res. 918, 17 May 1994, UN Doc. S/RES/918 in (1994) 48 Y.B.U.N.285.
[398] SC Res. 1161, 9 April 1998, UN Doc. S/RES/1161 (1998) online: United Nations www.un.org/Docs/scres/1998/sres1161.htm (date accessed:18 December 1998).
[399] See chapter 4:IV:B, "Extraterritoriality", at 111, below
[400] Kaplowitz, *supra* note 261 at 9; *contra* Baldwin, *Economic Statecraft* at 179-81, cited in Kalpowitz, *ibid.* at 9.
[401] Kaplowitz, *ibid.* at 201.

confiscated property. Furthermore, some important allies of the U.S. have refused to participate in the trade ban and sanctions are criticized in international forums. [402]

On collective sanctions, the analysis of cases in this chapter leads to the inference, that concern about the human impact of sanctions has become more prominent in more recent cases. The importance of this moral question in recent cases such as Haiti, Iraq and former Yugoslavia is due to the fact that "only a few sanctions programs of the Cold war period attracted much multilateral participation, and the Cold War dynamic made it quite likely that targets (such as Cuba) would be able to obtain assistance in resisting sanctions imposed by one superpower or bloc."[403] In the older cases of Rhodesia and South Africa, implementation of sanctions was less concerted and the economies of the targeted countries were stronger.

For the purposes of this thesis, the cases of collective economic sanctions should be analyzed against the tests set out in chapter 2. I have relied on the categorization of "hard cases"[404] by Thomas Franck: cases which did not involve actual or imminent international military hostilities, but were nonetheless treated by the U.N. as constituting a threat to the peace. While Franck uses this categorization to support his arguments about fairness in the Security Council actions, I am using the categorization to support the conclusion that, in certain cases, the alternative base for imposing collective sanctions—that of sanctions for breach of *erga omnes* obligations—can be a more compelling justification for imposing sanctions. According to Chayes and Chayes, "[t]he UN framers and their immediate successors held a common-speech conception of a threat to international peace and security as a situation which significant interstate hostilities are in train or at least imminent."[405] But fifty years later, "a threat to international peace" includes a wider range of situations.

Accordingly, the cases examined in this chapter can be categorized as follows:

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[402] See the General Assembly Resolutions calling for termination of American sanctions against Cuba (*supra* note 285); see also R. Bhala & K. Kennedy, *World Trade Law: The GATT-WTO System, Regional Arrangements and U.S. Law, 1999 Supplement* (Charlottesville: Lexis Law Publishing, 1999) at 276.

[403] L.F. Damrosch, "The Collective Enforcement of International Norms Through Economic Sanctions" (1994) 8 Ethics & Int'l Affairs 59 at 59 [hereinafter "The Collective Enforcement"].

[404] Used by Thomas Franck (See *Fairness in International Law and Institutions*, *supra* note 171 at at 222-24); Examples of "easy case," where, as opposed to hard cases, legitimacy of Security Council's decisions was beyond dispute are: the Security Council's intervention in 1948 in Palestine, armed attack by North Korea on South Korea on June 25th, 1950, and, 1990-91 crisis following Iraq's conquest of Kuwait.

[405] *Supra* note 300 at 50.

A- Cases Involving Civil Wars

Under normal circumstances civil wars fall under the exception of Article 2(7) of the *U.N. Charter* (matters within domestic jurisdiction). However, in certain cases, civil wars have been deemed to be threats to the international peace.

Congo is an example of a "hard case" that deals with the civil war issue.[406] It also addresses the question of what differentiates a threat to the peace from a country's domestic affairs. The Security Council, before invoking Article 39 of the *U.N. Charter*, had decided that civil wars were no longer exclusively domestic matters, but could constitute a threat to the peace. According to Franck, "[f]or political reasons, however, the Council still preferred to base its decision to intervene on the Congolese government invitation."[407] He adds, that even in the absence of an invitation, the Council could have intervened: "[t]hat civil wars can satisfy the Chapter VII conditions for U.N. intervention has since been confirmed by other Council actions"[408]

The case of the former Yugoslavia reinforces this view. Under Resolution 713, sanctions were imposed on Serbia, because the continuation of the situation constituted a threat to international peace and security:

> [s]anctions were imposed despite the fact that the conflict in Yugoslavia initially involved parties *within* what was still a member state of the UN. This made the decision to find a 'threat to international peace and security' and the invocation of Chapter VII an important indicator of the Council's view of its powers. The resolution sought to soften the edge of this precedent by noting in its opening preamblular paragraph 'that Yugoslavia has welcomed the convening of a Security Council meeting'.[409]

The case of Somalia is another example of the application of Chapter VII to a civil war. The Council authorized military intervention in the civil war there because "the magnitude of the human tragedy caused by the conflict ... constitute[d] a threat to international peace and security."[410]

However, it cannot be concluded that the Council can, or is willing to, intervene in all the cases of civil wars. It is clear that the circumstances surrounding each case—and

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[406] A short while after Congo gained independence from Belgium, in 1960, the President and Prime Minister of Congo asked the U.N. Secretary-General for military assistance to end the Belgian intervention which supported the province of Katanga's self-proclaimed secession.
[407] *Supra* note 171 at 228-29.
[408] *Ibid.* at 229.
[409] *Ibid.* at 237 [emphasis in original].
[410] SC Res. 794, 3 December 1992, UN Doc. S/RES/794 in (1992) 46 Y.B.U.N. 209.

especially, the "magnitude of the human tragedy"—were important factors in the Security Council's decisions.

B- Cases of Breach of Human Rights That May Lead to War

In the case of Rhodesia, as already discussed, the Council took action following a request by Rhodesia's *de jure* authorities; it decided that the situation constituted a threat to international peace and focused on "the inalienable rights of the people of Southern Rhodesia to freedom and independence."[411]

> The Rhodesian sanction may thus be seen as an important first example of the Security Council deciding that a secessionist regime which denies a portion of its own people freedom and self-rule may thereby constitute a threat to peace—even in the absence of actual civil war—and that this warrants collective measures under chapter VII.[412]

In the case of South Africa, the Council determined, "that acquisition by South Africa of arms and related material constitute[d] a threat to the maintenance of international peace and security."[413] In addition to "the military build-up by South Africa and its persistent acts of aggression against the neighboring States," the decision of the Security Council was taken on the basis of the violent suppression of the South African people by the government.[414] The latter basis, "marks a further decision by the Security Council to create a threshold of conduct by a government towards its own people which, when crossed, may be deemed a threat to the peace. That threshold in the South African case is established by international law's prohibition of the offence of apartheid."[415]

Accordingly, it can be concluded from the cases of South Africa and Rhodesia, that violations of human rights or the rules of international law by a government, which may eventually lead to war, can create a threat to the peace: "[n]ot every violation of international human rights law, however, would necessarily constitute that threat and it would be useful for the sponsors of such actions to engage the members in a fairness discourse to clarify the basis on which action was being proposed."[416]

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[411] SC Res. 232, 16 December 1966, UN Doc. S/RES/232 (1966), para. 4.
[412] *Fairness in International Law and Institutions*, *supra* note 171 at 230.
[413] SC Res. 418, *supra* note 322.
[414] Preamble of Resolution 418: "strongly condemn[ed] the racist regime of South Africa for its resort to massive violence against and wonton killings of the African people" and "Consider[ed] that the *policies* and acts of the South African Government [were] fraught with danger to international peace and security" [emphasis added].
[415] *Fairness in International Law and Institutions*, *supra* note 171 at 230.
[416] *Ibid.* at 231.

The alternative justification of collective sanctions for breach of *erga omnes* obligations can be useful for other grave cases of violations of international human right law which are not likely to lead to war, but at the same time require an international action.

C- Concerns about Future Conduct of a State

In the case of Iraq, the Security Council continued its Chapter VII action after the act of aggression was terminated. Thus, the Council is still, under Chapter VII of the *U.N. Charter*, intervening in matters that would once have been considered domestic. According to this interpretation of threats to the peace, the Council has considered concerns about future conduct of a state as justifying Chapter VII enforcement measures.

> If this is a correct interpretation of the Council's actions under Security Council Resolution 687, ending the military hostilities against Iraq and imposing a loser's regime, it suggests a new interpretation of the scope of Articles 2(7), 39, and 41, with significant implications in other situations where a 'threat to the peace' might be deduced from collateral evidence of a government's 'tendencies,' even in the absence of ongoing aggressive behavior.[417]

The Security Council's actions in this case have significantly broadened the notion of "threat to the peace." The Council also invoked Iraq's non-compliance with different treaties to which it is a party to justify its actions.[418] It can be concluded from the Council's actions that, "egregious violations of treaties imposing duties of major importance to the preservation of peace may be deemed to be threats to the peace, inviting recourse to remedies under Chapter VII."[419]

In addition, the Council has usurped a role traditionally performed by the judiciary, namely, deciding whether or not a treaty has been violated. It is also believed

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[417] *Ibid.* at 232.

[418] The following treaties were mentioned:
-*Agreed Minutes between the State of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters*, 4 October 1963, 485 U.N.T.S. 321.
-*Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*, 17 June 1925, XCIV L.N.T.S. (1929) 65 (Germany, United States of America, Austria, Belgium, Brazil, etc.).
-*Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction* 10 April 1972, 1015 U.N.T.S. 163, 26 U.S.T. 583.
-*Treaty on the Non proliferation of Nuclear Weapons*, 1 July 1968, 729 U.N.T.S. 161.
-*International Convention Against the Taking of Hostages*, 18 December 1979, GA Res. 34/146, UN GAOR 34 Sess., Supp. No. 46, UN Doc. A/34/46 (1979) 245.

[419] *Fairness in International Law and Institutions*, *supra* note 171 at 232.

that the Security Council decisions in the case of Iraq imply that the failure of a state to ratify major international conventions, combined with past behaviour, could justify Chapter VII actions against such state.[420] Further:

> [t]hat a member state's 'unco-operative behavior' can rise to the level of a threat to the peace and justify the use of collective measures to compel co-operation with international normative standards beyond the specific binding obligations of the Charter represents a significant elucidation, or perhaps extension, of the Council's jurisdiction and range of options.[421]

Such broad interpretation of the Security Council's discretion to impose sanctions raises questions of control and accountability of the Council that will be explored in the next chapter.

D- Non-compliance with International Obligations

Resolution 707 of the Security Council extended its power in another sense. In that resolution, the Security Council threatened Iraq that if it did not comply with its obligations flowing from an agreement with the International Atomic Energy Agency, further collective measures might be used. According to Franck, this resolution "raises speculation, for example, as to whether a gross violation of an environmental convention should be found by the Council to constitute a threat to the peace and security of humanity which would justify the Council in ordering compliance under threat of Chapter VII measures."[422]

Even if we agree that "a gross violation of an environmental convention" should not form the basis of Council's decisions regarding what constitutes a threat to the peace and security, it can be considered as a breach of *an erga omnes* obligation and economic sanctions can be justified on that ground.

E- Massive Flow of Refugees

The massive flow of refugees has been considered to be a threat to international peace in several cases.

In the case of Iraq's repression of its Kurd population, Chapter VII measures were not invoked. This is an interesting contrast with the aforementioned cases in which civil

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[420] In the case of Iraq, this country's failure to ratify the Convention on biological weapons was deemed to contribute to the threat that it posed to peace and security.
[421] *Fairness in International Law and Institutions*, *supra* note 171 at 233.
[422] *Ibid.* at 234.

war and repression of civil population resulted in Council's taking of enforcement measures. Resolution 688 regarding Iraq referred to the situation as a threat to international peace and security, and thus, recognized that the "repression of the civilian population by its own government were thought not to be primarily within the domestic jurisdiction of Iraq."[423] To legitimize this assumption, the Council stated that a massive flow of refugees caused by Iraqi government actions contributed to the threat to the peace and security in the region.

This justification was also used in the case of Haiti when the military regime refrained from relinquishing power to the government of legally elected President Aristide and the situation in that country caused a massive flow of refugees.[424]

The above categorization clarifies the practice of the Security Council regarding Chapter VII of the *U.N. Charter*, and more specifically, the situations which are designated as a threat to the international peace. As will be seen, the Security Council's exercise of its enforcement powers under Chapter VII is often criticized. But, it is submitted here, that even in the debatable cases, the Council can use the *erga omnes* justification as the basis of its actions. As it was argued in chapter 2 of this thesis, breach of an *erga omnes* obligation is a ground for imposition of unilateral sanctions by all the states, because an obligation towards all states have been breached. On the same ground, the Security Council can—without invoking its Chapter VII powers and in the absence of a threat to international peace—supervise collective economic sanctions in response to breaches of *erga omnes* obligations.

In the next chapter, certain constraints on the use of economic sanctions will be examined in the light of the cases and the categorization which were presented in this chapter.

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[423] *Ibid.* at 235-36.

[424] Details of this case can be found at 66, above.

CHAPTER 4- CONSTRAINTS ON USE OF ECONOMIC SANCTIONS[425]

In this chapter, I analyze the current practice regarding sanctions and revisit the legal basis of sanctions with a more critical approach. I will try to answer the following questions: Are the requirements for legality of sanctions met in the current practice of states and international organizations? What are the challenges to the legitimacy of sanctions? And, what is the relation between legitimate economic sanctions and other rules of international law?

While the section on "countermeasures amounting to use of force" relates mostly to unilateral economic sanctions and the next section on "limitations on implementation of collective sanctions by the Security Council" concerns only collective economic sanctions, the rest of this chapter relates to both types of sanctions.

I- Countermeasures Amounting to Use of Force and the Legality of Economic Coercion

The subject of this section is a source of debate among legal scholars and practitioners. The International Law Commission, in Article 50 of the *ILC Draft Articles*, deals with this subject. The article enumerated prohibited countermeasures as follows:[426]

> a. the threat or use of force as prohibited by the charter of the United Nations;
>
> b. extreme economic and political coercion designed to endanger the territorial integrity or political independence of the State which has committed the international wrongful act;
>
> c. any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;

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[425] In addition to the restraints on use of economic sanctions there are certain problems associated with enforcement and effectiveness of sanctions. These questions are more relevant in political analysis of sanctions. Nonetheless, I should briefly mention that the problem of enforcement of sanctions is caused by the problem of goal setting, selection of measures, scope of sanctions, the cost factor and policing and supervising sanctions (See *International Enforcement, supra* note 19 at 80-105 and *Sanctions in Contemporary Perspective, supra* note 55 at 82-93). The problem of secondary enforcement of sanctions is especially important to the extent that in the case of Rhodesia, "Soviet Union proposed that any member who failed to participate in economic and financial sanctions would be subjected to measures of customs and trade discrimination on the part of members states." But this proposal was not acted upon (*Sanctions in Contemporary Perspective, ibid.* at 91).

[426] Paragraphs a and b of this article are examined in this section. Paragraphs d, and e will be examined later in section III, "Sanctions for the Violation of Humanitarian Law", at 105, below. The prohibition on countermeasures infringing the inviolability of diplomatic agents, stated in subparagraph (c), is irrelevant in the case of *economic* countermeasures.

d. any conduct which derogates from basic human rights; or

e. any other conduct in contravention of a peremptory norm of general international law.[427]

The first subparagraph refers to the prohibition expressed in Article 2(4) of the *U.N. Charter*, according to which, "[a]ll members shall refrain ... from the threat or use of force against territorial integrity and political independence of any states ..." In so far as this article refers to the prohibition of armed reprisals or countermeasures, there is no doubt that this principle has "acquired the status of customary rule of international law of a peremptory character."[428]

However, there are divergent views regarding the scope of the notion of use of force. Some consider this article to refer only to "armed force," while others read "use of force" in a broader sense such that it includes "economic coercion."[429] The latter view can be dismissed on the following grounds: (i) paragraph 7 of the Preamble to the *U.N. Charter* and Article 44 of the *U.N. Charter* support the view that the term *force* is used "where it clearly means *armed force*;"[430] (ii) if this provision included other forms of force, states would have been left with no means of "exerting pressure on other states that violate international law;"[431] and (iii) according to the *travaux préparatoires* of the *U.N. Charter*, during the San Francisco Conference, the Latin American States presented a proposal to extend the prohibition of force to economic coercion, which was rejected.[432]

According to the International Law Commission, the most widely accepted interpretation is that "the prohibition of the use of force is limited to military force, and therefore objectionable forms of economic or political coercion could only be condemned

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[427] *Report of the International Law Commission on the work of its forty-eight session*, *supra* note 10 at 145.
[428] "Report of the Commission to the General Assembly on the work of its forty-seventh session" *supra* note 126 at 68.
[429] In support of the latter view see L.C. Buchheit, "The Use of Non-violent Coercion: A Study in Legality Under Article 2(4) of the Charter of the United Nations" in Lillich, ed., *supra* note 32, 41 at 69; *contra* Elagab, *supra* note 33 at 201.
[430] Simma *et al.*, eds., *supra* note 69 at 112 [emphasis added].
[431] *Ibid.*
[432] See *Documents of the United Nations Conference on International Organizations*, vol. 6 (London, New York: United Nations Information Organizations, 1945), at 334 cited in Simma *et al.*, eds., *supra* note 69 at 112. According to Cassese the reasons for rejection of this amendment were not reported (*supra* note 134 at 137).

under a distinct rule prohibiting intervention or particular forms thereof."[433] According to this interpretation, the prohibition contained in Article 2(4):

> should be logically understood to "embrace also measures of economic or political pressure applied either to such extent and with such intensity as to be an equivalent of an armed aggression *or*, in any case—failing such extreme—in order to force the will of the victim State and secure undue advantages" for the acting State.[434]

The Commission itself, has adopted this view. On the one hand, the fact that subparagraph (b) of this article considers "extreme economic or political coercion" as prohibited countermeasures indicates that in view of the Commission the ban on use of force in the *U.N. Charter* (and repeated in subparagraph (a) of Draft Article 50) does not include political or economic coercion. On the other hand, ultimately the result of the Commission's approach and the aforementioned most-widely accepted interpretation are the same and the extent to which an injured state may resort to countermeasures is restricted by this subparagraph.

This restriction is due to the fact that extreme economic or political measures may have consequences which are as serious as the consequences which result from use of

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[433] "Report of the Commission to the General Assembly on the work of its forty-seventh session" *supra* note 126 at 68 [footnote omitted]. See also G. Arangio-Ruiz, "Human Rights and Non-intervention in the Helsinki Final Act" (1977) 157 Rec. des Cours, 195 at 267; Cassese, *supra* note 134 at 137; C.H. Waldcock, "The Regulation of Use of Force by Individual States in International Law" (1952) 81 Rec. des Cours 451 at 493-494; L. Oppenheim, *International Law: A Treatise*, 7th ed. by H. Lauterpacht, vol. 2 (London: Longmans, 1952) at 153; "Economic Coercion and Reprisals by States" *supra* note 32; R. Lillich, "The Status of Economic Coercion under International Law: United Nations Norms" in R.M. Mersky, ed., *Conference on Transnational Economic Boycotts and Coercion, 19-20 February 1976, University of Texas Law School*, vol. 1 (Dobbs Ferry, New York: Oceanna Publications, 1978) at 116-117; A. Beirlaen, "Economic Coercion and Justifying Circumstances" (1984) 18 Belgian Rev. Int'l L. 57 at 67; M. Virally, "Commentaire du paragraphe 4 de l'Article 2 de la Charte" in J.P. Cot & A. Pellet, eds., *La Charte des Nations Unies*, 2nd ed, rev. & enl. (Paris: Economica, 1990) at 120-121; C. Leben, "Les contr-mesure inter-étatique et les réactions à l'illicite dans la société internationale" (1982) 28 Ann. fran. dr. int. 9 at 63-69; P. Malanczuk, "Countermeasures and Self-defence as Circumstances Precluding Wrongfulness in International Law Commission's Draft Articles on State Responsibility" in Spinedi & Simma, eds., *supra* note 144, 197 at 197; Elagab, *supra* note 33 at 201; I. Seidl-Hohvenldern, "International Economic Law" (1986) 198 Rec. des Cours 9 at 200-201; L.A. Sicilianos, *Les réactions décentralisées à l'illicite—Des contre-mesures à légitime défense* (Paris: Librairie générale de droit et jurisprudence, 1990) at 248-253.

[434] G. Arangio-Ruiz, *ibid.* at 267, cited in "Report of the Commission to the General Assembly on the work of its forty-seventh session" *supra* note 126 at 68, footnote 194 [emphasis in original].

armed force.[435] *The Declaration on Friendly Relations*,[436] other international or regional instruments[437] and state practice confirm the existence of this restriction.

Accordingly, it can be concluded that extreme economic or political coercion is prohibited under international law, but only when such coercion violates the principle of non-intervention; and, this prohibition falls within a different legal regime than the prohibition on the use of force.[438]

The restriction on implementation of economic sanctions amounting to use of force is not applicable to collective economic sanctions. This is because collective sanctions are governed by Chapter VII of the *U.N. Charter*. According to Article 2(7) of the *U.N. Charter*,[439] application of enforcement measures under Chapter VII of the *U.N. Charter* is one of the two exceptions to the ban on use of force.[440]

II- Limitations on the Implementation of Collective Sanctions by the Security Council

In examining the legal basis of collective sanctions it becomes clear that, "[t]he Security Council has potentially far-reaching enforcement powers."[441] Nevertheless, "to assert the legitimacy of its actions and to pull members towards compliance with its

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[435] *Ibid.*

[436] *Supra* note 40. This Declaration proclaims that, "[n]o State may use or encourage the use of economical, political or any other type of measure to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind ..."

[437] Another General Assembly Resolution (*Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, GA Res. 2131 (XX), UN GAOR, 20 th Sess. Supp. No. 14, UN Doc. A/6220 (1965) 11-12) contains a very similar provision which was later incorporated in the Resolution 2625. In addition to that, the *Charter of Organization of American States* contains a broad formulation of the principle of non-intervention. Article 15 of that Charter states that "[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements." According to Article 16, "the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind" is prohibited (*Charter of Organization of American States (Charter of Bogota)*, 30 April 1948, 119 U.N.T.S. 3 (Argentina, Bolivia, Brazil, Chile, Colombia, etc.)). *Final act of the Conference on Security and Cooperation in Europe*, too, has similar provisions, prohibiting economic coercion (*Conference on Security and Co-operation in Europe: Final Act*, 1 August 1975, 14 I.L.M. 1292). The I.C.J., in the *Nicaragua Case* recognized the unlawfulness of economic measures in the context of non-intervention (see *Nicaragua Case*, *supra* note 188 at 108 *et seq*).

[438] See "Report of the Commission to the General Assembly on the work of its forty-seventh session" *supra* note 126 at 68.

[439] Text of Article 2(7) of the *U.N. Charter* can be found at 92, below.

[440] The other exception is Article 51 of the Charter on right of individual or collective self-defence.

[441] Franck, *Fairness in International Law and Institutions*, *supra* note 171 at 218.

decisions, the Council must be seen to be acting in accordance with established procedures and limitations."[442] In the words of Judge Shahabuddeen the relevant questions are: "whether there are any limitations on the power of the Council to characterize a situation as one justifying the making of a decision entailing such consequences ... [and] [i]f 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?"[443]

On the other hand, the legitimacy of the Security Council itself has been called into question. So, when one examines the issue closely, it becomes evident that there exists, in fact, three inter-related problems regarding the decisions of the Security Council: first, a general problem is that of legitimacy of the collective authority of the Council;[444] second, if one assumes that Security Council's collective authority is legitimate, the problem of broad interpretation of Article 39 by the Council and its limitations arises; and third, if there are limitations to the power of the Council, there remains the question of how these limitations are to be enforced and the body which will oversee the enforcement of these limitations.

Each of these three issues will be addressed and an attempt will be made to determine the limitations on the implementation of collective sanctions by the Security Council.

A- Legitimacy of the Collective Authority of the Security Council: Permanent Membership and the Veto Problem

Collective authority of the Council has been challenged on two grounds. The fact that the Council is dominated by a few states is cited by those who challenge the legitimacy of the Council. It is also claimed that, "the veto held by the permanent members is unfair."[445] There is also the problem of termination of the Security Council actions, which is also known as the reverse veto problem.

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[442] *Ibid.* at 218.
[443] The *Lockerbie Case*, *supra* note 375 at 142 (separate opinion of Judge Shahabuddeen).
[444] For a detailed study of this problem see D.D. Caron, "The Legitimacy of the Collective Authority of the Security Council" (1993) 87 A.J.I.L. 552.
[445] *Ibid.* at 562.

i- Permanent Membership and the veto

The permanent members of the Security Council, according to Professor Reisman, are, "roughly congruent with the actual distribution of power in the larger political system."[446] Accordingly, "when the core Council membership does not agree, the organization cannot act."[447] Reisman's observation legitimizes the present composition of the Council and existence of the veto because, "the Organization cannot directly confront one of the major powers." The veto is necessary to avoid such confrontation, because, "in a confrontation, the Organization will be the casualty."[448] It is also argued that there exists a "potential for a functional veto by the nonpermanent membership" because the General Assembly can block the Security Council actions in case of necessity.[449]

According to Caron, "the veto quickly proved to be much more of a problem than even the more pessimistic of the delegations at the San Francisco Conference had probably foreseen."[450] In spite of justifications made by proponents of present composition of the Security Council and the right of the five permanent members to veto the Council's decisions, the debate over these issues has not gone away. It has been going on for years. Many attempts have been made to modify the situation and introduce a constitutional control over the Security Council's activity. These issues still exist at the U.N. and the debate continues.[451]

Even supporters of the veto admit that, "what is missing from this system is the opportunity for the Assembly to be apprised of prospective Council operations under Chapter VII."[452]

According to Caron, dominance of the Council by a few states, allows the legitimacy of the Council to be challenged on three grounds:[453] there is the perception that the Security Council is dominated by a few states due to these states' power in

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[446] W.M. Reisman, "The Constitutional Crisis in the United Nations" (1993) 87 A.J.I.L. 83 at 98.
[447] *Ibid.*
[448] *Ibid*; Goodrich, Hambro & Simons state that, "[d]rafters of the Charter recognized that it was unrealistic to attmpt to establish a system of United Nations enforcement action which would be effective in the event a major power violated the peace. Indeed, most felt that the United Nations should not attempt to take action if those powers were not in aggreement" (*supra* note 161 at 291).
[449] *Ibid*; that is nine concurrent vote of nonpermanent members can stand against the decision of five permanent members.
[450] *Supra* note 444 at 568.
[451] Reisman, *supra* note 446 at 83-84.
[452] *Ibid.* at 98.
[453] *Supra* note 444 at 566.

international affairs generally, the perception of dominance due to the capabilities of those states within the Council, and dominance due to the disproportionate representation of certain states in the Council. Each of these arguments calls the legitimacy of the Security Council into question.

The critics of the present system of representation on the Security Council point out that the present membership of the U.N. is much more diverse than it was in 1945, and that, power in its different aspects is distributed entirely differently than it was when the U.N. was created.[454]

There is also a perception that the veto power is unfair. As Caron states, this perception is caused by "the possibility of a double standard in governance" and, "the disabling effect of the veto on the sense of participatory governance."[455]

The reform of the structure of the Council in 1963,[456] which added 4 seats to the nonpermanent seats, was an attempt to address the aforementioned concerns. Whereas, in the past, the reciprocal operation of the American and Russian vetoes often resulted in practical paralysis of the Council, this is no longer the case. Hence, the issues regarding the structure of the Security Council have become increasingly important today.

Another issue is the use of the "abusive" practice by which the veto is used by a member in characterization of a question as procedural or otherwise.[457] This has been

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[454] B. Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (Hague: Kluwer Law International, 1998) at 197. He points out that as of July 1947 the UN had 55 member states fourteen (25%) of which were European (including Soviet Union) and twenty-two (40%) American states, and only four (7.2%) African members. By January 1, 1995 the UN had 185 member states: 53 African states (28.6%), 49 Asian states (26.4%; African and Asian 55% together), 33 Latin American and Caribbean states (17.8%); 22 Eastern European states (11.9%) and 26 Western European and other states (14%) (see *ibid.*). At the same time according to General Assembly's Resolution 1991 (XVIII) the African and Asian states hold one permanent and five non permanent seats (40% of the total number of seats), Latin American and Caribbean states are entitled to two nonpermanent seats (13%); Eastern European states hold one permanent and one nonpermanent seats (13%) and Western European and other states hold three permanent and two nonpermanent seats (33%) (*Resolutions 1991 Adopted by the General Assembly*, GA Res. 1991A (XVIII), UN GAOR, 18th Sess., Supp. No. 15, UN Doc. A/5515 (1963) 21). Fassbender also presents some interesting comparison of statistics on member states with the highest population, largest surface area, annual GNP and contribution to the UN regular budget in 1947 and 1996 (see *ibid.* at 197-207).

[455] *Supra* note 444 at 566.

[456] *Resolutions 1991 Adopted by the General Assembly*, *supra* note 454.

[457] According to Article 27(2) of the *U.N. Charter*, the veto does not exist for procedural matters. However, the veto can be used (or abused!) to decide the preliminary question on whether a question is procedural or not. Since the general criterion for the definition of procedural matters in the application of Article 27(2) remains unclear, "in cases of doubt ... the permanent members of the Security Council decided themselves upon the right to veto" (Simma *et al.*, eds., *supra* note 69 at 443). See generally S.D. Bailey, *Voting in the Security Council* (Bloomington: Indiana University Press, 1969) at 18-25.

labeled as a "double veto."[458]

Given the problems delineated above, it is, "virtually impossible to deny that the structure of the Council has become an extremely sensitive and problematic issue."[459] It is in response to these challenges that proposals for reform in the U.N. system and the Security Council have been submitted. Such proposals, including reform of the veto, increasing the membership of the Security Council and increasing the involvement of the General Assembly, will be evaluated in the final chapter of this thesis.[460] These challenges are, however, directed at the composition and practice of the Security Council in general and not merely the enforcement powers of the Council.

ii- Termination of the Security Council's Actions: the Problem of the "Reverse Veto"

Another problem with the decisions of the Security Council to impose sanctions is the question of termination of such sanctions. As the former Secretary-General of the U.N. has pointed out in the *Supplement to An Agenda for Peace*:

> [t]he objectives for which specific sanctions regimes were imposed have not always been clearly defined. Indeed they sometimes seem to change over time. This combination of imprecision and mutability makes it difficult for the Security Council to agree on when the objectives can be considered to have been achieved and sanctions can be lifted.[461]

The *U.N. Charter* has no provisions regarding the means by which actions taken by the Security Council should be terminated. In the absence of such provisions, it can be concluded that, "it is for the Council itself to end or modify its actions."[462]

In support of this interpretation the case of Rhodesia is often cited. The sanctions against Rhodesia were terminated by a Security Council Resolution. Presently, the United Kingdom and the United States support the view that it is the Council which has the power to terminate. Nonetheless, in the case of Rhodesia their position was the source of debate and controversy. As the United Kingdom and the United States are two permanent

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[458] See generally A.W. Rudzinski, "The So-Called Double Veto" (1951) 45 A.J.I.L. 443.
[459] M. Ewing, *Justifying Humanitarian Intervention* (LL.M. Thesis, McGill University, Institute of Comparative Law 1993) [unpublished] at 83.
[460] See chapter 5:I:A, "Reform of the Composition of the Security Council", at 124, below.
[461] *Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, UN Doc. A/50/60; S/1995/1, 25 (1995) para. 68 [hereinafter *Supplement to An Agenda for Peace*].
[462] Caron, *supra* note 444 at 578.

members of the Security Council, it is interesting and important to examine their position in this regard.

In the case of Rhodesia, after the Smith regime accepted the resumption of full legislative and executive authority over Southern Rhodesia by a British governor, the United Kingdom informed the Council that:

> [t]he state of rebellion in the Territory has been brought to an end.
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> ...
>
> in these circumstances, the obligations of Member States under Article 25 of the Charter in relation to [the sanctions] are, in the view of the Government of the United Kingdom, to be regarded as having been discharged. This being so, the United Kingdom is terminating the measures which were taken by it pursuant to the decisions adopted by the Council in regard to the then situation of illegality.[463]

Many African States and the Soviet Bloc opposed the United Kingdom's position and asserted that the Security Council's resolutions can only be revoked by a decision of the Security Council.[464] However, after considering the matter, the Security Council decided to terminate the sanctions without much debate.[465] The United Kingdom's statement after the vote is interesting: "[o]ur view remains that the obligation to impose those sanctions fell away automatically with the return to legality of the colony. But we have been very conscious that many countries have attached great importance to the adoption by the Council of a resolution on this subject."[466]

But, as Caron asserts, today there is no doubt that the Rhodesian case confirms the view that the Council has the authority to terminate its own action.[467] Any ambiguity

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[463] *Letter dated 12 December 1979 from the representative of the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council*, UN SCOR, 34th Sess., Supp. For Oct.-Dec. 1979, at 119, 120, cited in *ibid.* at 581.

[464] *Letter dated 14 December 1979 from the representative of Madagascar to the President of the Security Council* and *Letter dated 21 December 1979 from the representative of the Unison of Soviet Socialist Republics to the President of the Security Council*, UN SCOR, 34th Sess., Supp. For Oct.-Dec. 1979, at 119, 120 and 138, cited in Caron, *ibid.* at 581.

[465] SC Res. 460, *supra* note 309.

[466] SC Res. 460, UN SCOR, 34th Sess., Res. & Dec., 2181st Mtg., UN Doc. S/PV.2181 at 2 cited in Caron, *supra* note 444 at 582. The United States position, however, was not exactly the same. The U.S. expressed its pleasure that the Council was terminating its measures and stated that "it was in recognition of that fact that the United States made its recent announcement regarding [termination] of sanctions." Tanzania, on the other hand, emphasized that any individual interpretation concerning sanctions should not be accepted (*ibid.* at 582).

[467] See *ibid.*

caused by the statements of the United Kingdom and the United States regarding Rhodesia was resolved by their statements towards the end of the Gulf war.[468]

The fact that the Council has the exclusive power to terminate actions which it initiated paves the way for the permanent members of the Security Council to exercise what is called a *reverse* veto. A reverse veto is the veto of a permanent member of the Security Council on the question of the termination of a Council action. Such veto can be criticized on the grounds that it "increases the dominance of the permanent members in Council deliberations that revisit action already taken, [and] it curtails the already limited ability of actors within and without the Council to end a crisis by negotiation."[469]

This reverse veto problem became manifest in the case of Iraq. While, today, it may be difficult to find the consensus, which existed in 1990, to impose sanctions on Iraq, it has become impossible to lift or modify the sanctions due to the veto of the permanent members of the Council. Proposals to solve the problem of the reverse veto will be examined in the next chapter.[470]

B- Legitimacy of the Council's Actions under Chapter VII

Even if it is accepted that the Security Council's decisions are political—the view expressed in chapter 2 of this thesis[471]—there is till room to examine the legitimacy of Security Council's actions under Chapter VII of the *U.N. Charter*.

The underlying purpose of Chapter VII powers is to provide an incentive for peaceful settlement of the disputes.[472] However, the language used by the Security Council in its resolutions is not always clear:

> [a] problem with Security Council resolutions is that they speak in the covered language of diplomacy, sometimes out of political necessity, sometimes out of the drafters' professional habit. They often fail to address issues of fairness, which leaves Council actions vulnerable to attack as exercises in unprincipled

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[468] See Statements of Mr. Pickering, representative of the Unites States: "it is only here in the Security Council that we could agree to lift sanctions against Iraq" (UN SCOR, 34th Sess., 2977 Mtg., UN Doc. S/PV.2977 (1991) (part II) (closed-Resumption 3) at 301 [provisional]); and Statement of Sir David Hannay, representative of the United Kingdom: "only the Security Council itself can make that judgement" (*ibid.* at 313).

[469] Caron, *ibid* at 582-3.

[470] See chapter 5:I:C, "Termination of Sanctions: Solving the Problem of the Reverse Veto", at 128, below.

[471] See chapter 2:II:A:iv, "Article 39 Enforcement Measures: "Political" or "Legal" Decision?", at 44, above.

[472] See R.F. Kennedy, "*Libya v. United States*: the International Court of Justice and the Power of Judicial Review" (1993) 33 Va. J. Int'l L. 899 at 903.

> power. This adversely affects the resolution, its capacity to garner voluntary compliance, and perceptions of the process' legitimacy.[473]

The Council's discretion in taking decisions under Chapter VII and the two contrary positions regarding limits on the Security Council's discretion should be examined before the question of legitimacy of the Council's actions is addressed.

i- There is no Limit on the Security Council's Discretion

According to one view, supported by eminent scholars like Kelsen, there is virtually no limit to Council's discretion under Article 39.[474] Kelsen's argument is summarized below.[475]

To decide whether actions of the Security Council are legal or not, the scope of the power conferred on the Council by the *U.N. Charter* should be examined. The related provisions are found in Chapter V of the *U.N. Charter* which is dedicated to the Security Council and, more specifically, Article 24 which stipulates the Functions and Powers of the Council. This article provides that:

> 1. In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
>
> 2. In discharging these duties the Security Council shall act in accordance with the *Purposes and Principles of the United Nations*. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII.[476]

According to this Article, actions of the Council should be in accordance with the "Purposes and Principles of the United Nations." Article 1 of the *U.N. Charter* articulates the "purposes" of the U.N., one of which is:

> [t]o maintain international peace and security, and to that end: *to take effective collective measures* for the prevention and removal of threats to the peace, and

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[473] *Fairness in International Law and Institutions*, *supra* note 171 at 230.

[474] The extreme version of this position is best stated by former Secretary of State of the US, John Foster Dulles:

> [t]he Security Council is not a body that merely enforces agreed law, it is a law unto itself. If it considers any situation as a threat to the peace, it may decide what measures shall be taken. No principles of law are laid down to guide it; it can decide in accordance with what it thinks is expedient. It could be a tool enabling certain powers to advance their selfish interests at the expense of another power (J.F. Dulles, *War or Peace* (New York: MacMillan, 1950) at 194-195).

[475] *The Law of the United Nations*, *supra* note 239 at 287-295; *contra* M. Bedjaoui, "Du contrôle de légalité des actes du conseil de sécurité" in *Nouveaux itinéraires en droit: hommage à François Rigaux* (Bruxelles: Bruylant, 1993) 69 at 83-87 [hereinafter "Du contrôle de légalité"].

[476] Emphasis added.

> for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and *in conformity with the principles of justice* and international law, *adjustment or settlement of international disputes* or situations which might lead to a breach of the peace.[477]

This statement contains two elements. The first deals with the maintenance of peace and security by taking effective collective measures; and the second relates to the peaceful settlement of disputes. Because, "conformity with the principles of justice and international law" is only mentioned in the latter case, some writers assert that "the Security Council is not legally bound by the Charter to respect principles of international law when acting under Chapter VII."[478]

Similarly, the *U.N. Charter* does not provide that the decisions of the Council must be in conformity with the law which exists at the time they are adopted for them to be enforceable. Further, "[t]he purpose of the enforcement action under Article 39 is not: to maintain or restore the law, but to maintain or restore peace, which is not necessarily identical with the law."[479]

Other provisions of the *U.N. Charter* do not place any limitations on the Council's powers. According to Kelsen, "[t]he statement in the preamble, providing that the peoples of the United Nations are determined 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained' is hardly applicable to an enforcement action under article 39."[480]

Kelsen argues that, even if one assumes that the principles of the preamble (cited above) are applicable to Article 39 enforcement actions, and were the Council bound to act, "in conformity with the principles of justice and international law,"[481] the power of the Security Council will not be restricted. In his words, "[t]he Council would be empowered to establish justice if it considered the existing law as not satisfactory, and hence to enforce a decision which it considered to be just though not in conformity with existing law. The decision enforced by the Security Council may create new law for the concrete case."[482] But, this view is not shared by all authors and international jurists.

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[477] Article 1(1) of the *U.N. Charter* [emphasis added].
[478] See Kennedy, *supra* note 472 at 906.
[479] *The Law of the United Nations*, *supra* note 239 at 294.
[480] *Ibid.* at 295.
[481] As stated in Article 1(1) of the *U.N. Charter*.
[482] *Ibid.*

ii- The Security Council Should Exercise its Power Justly

Contrary to the view mentioned in (i) above, another view holds that, "[t]here is no real peace and security if these are achieved only at the sacrifice of justice."[483] In the *Namibia Case* some of the judges of the International Court of Justice criticized the Security Council for acting in cases in which the perceived threat did not constitute a threat to the peace.[484] Judge Fitzmaurice, in his dissenting opinion, explored the limitations on the power of the Security Council under Chapter VII, and then, stated that:

> limitations on the powers of the Security Council are necessary because of the all too great ease with which any acutely controversial international situation can be represented as involving a latent threat to international peace and security, even where it is really too remote genuinely to constitute one. Without these limitations, the function of the Security Council could be used for purposes never originally intended ...[485]

Accordingly, even if we presume that the collective authority of the Security Council is legitimate, and that enforcement powers of the Council are *political*, the Council must also persuade states that it is exercising its powers justly.[486] In practical terms, the actions taken by the Council should correspond to the "standards of legitimacy and fairness," in order to gain the support and compliance of the states.[487]

The treaty basis of the United Nations Organization (and, consequently, its political organs) is emphasized by those who see limits to the power of the Security Council. Put more eloquently, Professor Franck writes:

> [t]he United Nations is the creature of a treaty, and as such it exercises authority legitimately only insofar as it deploys powers which the treaty parties have assigned to it ... [t]hese may be modestly augmented by a 'penumbra' of other powers which are necessarily incidental to the effective implementation of the enumerated ones.[488]

Accordingly, the criterion for legitimacy of actions of the Security Council should be sought in the *U.N. Charter*: "if the organization decides to exceed powers [delegated to it] then its decisions cease to be legitimate."[489]

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[483] Goodrich, Hambro & Simons, *supra* note 161.
[484] *Namibia Case*, *supra* note 255 at 294 (dissenting opinion of Judge Sir Gerald Fitzmaurice) and 340 (dissenting opinion of Judge Gros).
[485] *Ibid.* at 294.
[486] "Du contrôle de légalité" *supra* note 475 at 87.
[487] *Fairness in International Law and Institutions*, *supra* note 171 at 219.
[488] *Ibid.* at 219.
[489] *Ibid.* at 220.

Article 2(7) of the *U.N. Charter* defines the limits of the power of the U.N. and, thus, the limits of the Security Council power. Article 2(7) provides:

> [n]othing contained in the ... 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 ... Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.[490]

Thus, the general rule is that the U.N. cannot intervene in matters within the domestic jurisdiction of a state. This rule is subject to two caveats.

Firstly, our notion of what is "essentially domestic" has changed over the past fifty years. Multinational corporations have emerged as major players on the world scene and civil wars are no longer considered to be exclusively within the realm of a country's domestic affairs.

Secondly, there is a crucial exception to the rule at Article 2(7): it does not apply when the Security Council has authorized enforcement measures under Chapter VII. It was submitted in the discussion of legal basis of collective sanctions,[491] that application of enforcement measures by the Security Council is subject to fulfillment of a "substantive" and a "procedural" condition. The determination of a threat to the peace, breach of the peace, or act of aggression are substantive conditions and not merely formal declarations.

Practically, however, as evidenced by the cases studied in chapter 3 of this thesis, the "open-textured"[492] quality of Chapter VII has enabled the Council to redefine international peace and security according to its needs. Even proponents of restricting the Security Council's powers admit this. Former President of the I.C.J., Mohammed Bedjaoui, after examining recent resolutions of the Security Council whose legality, in his view, ought to be subject to verification,[493] states that, "[i]ndeed, whether one is in favour

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[490] Article 2(7) the *U.N. Charter*.

[491] See chapter 2:II, "The Legal Basis of Collective Sanctions", at 32, above.

[492] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1960) at 120.

[493] These resolutions include:
-SC Res. 687 (*supra* note 335) concerning Iraq which established an observer mission for Iraq and Kuwait, a UN Special Commission for supervising neutralization of Iraq's chemical or biological weapons, a UN Compensation Commission, and a Sanctions Committee;
-SC Res. 731 (*supra* note 205) and 748 (*supra* note 203) concerning Libya;
-SC Res. 808 (22 February 1993, UN Doc. S/RES/808 in (1993) 47 Y.B.U.N. 438) and 827 (25 May 1993, UN Doc. S/RES/827 in (1993) 47 Y.B.U.N. 438) on the establishment of an international criminal tribunal;

[continues on the next page]

of it or not, the Council's freedom of appraisal finds clear textual warrant in the Charter. For that reason it could not, as such, very well be the object of legality-control."[494]

However, he then goes on saying:

> [o]n the other hand, ..., the same degree of immunity can surly not apply in the domain of the more concrete activities that the Council is led to deploy as a result, in particular, of its qualification of a given situation under Article 39 of the Charter. It is in this area of action undertaken, or of the ways and means decided for having them carried out, that the need may arise and a proper place be found for testing the legality of Security Council resolutions.[495]

Bedjaoui then rejects Kelsen's position that the Council can enforce decisions which are not in conformity with law, and create new law for the concrete cases. His rejection of Kelsen's analysis is based on several grounds.[496]

(i) Nowhere in the *U.N. Charter* are the organs of the United Nations empowered to create new customs through their concordant, consistent and undisputed practice; (ii) even a plenary and representative organ such as the General Assembly can, at most, make "recommendations" to encourage progressive development of international law;[497] (iii) on the subject of the rule making power of international organizations, Bedjaoui quotes Professor Dupuy who states that, "having been created by states, international organizations themselves create legal rules addressed to various entities, all of whose provisions, however, even if they have their due place within the particular legal order of the organization concerned, are subjected to international law;"[498] (iv) if a legal norm exists, as both a general rule of international law and a *U.N. Charter* rule (with slight variation in each system), it is normal that the Security Council, as an organ created by the *U.N. Charter*, should first apply the stipulations of the *U.N. Charter*; (v) if a legal norm exists in either the *U.N. Charter* or in general international law, the Council's

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-SC Res. 837 (6 June 1993, UN Doc. S/RES/837 in (1993) online: United Nations <www.un.org/Docs/scres/1993/837e.pdf> (date accessed:5 January 1999)) concerning Somalia; and,
-SC Res. 713 (*supra* note 199) concerning the arms embargo on Bosnia and Herzegovina.
Thomas Franck has also referred to these resolutions and stated that in certain cases the Security Council "has significantly extend[ed] its Chapter VII jurisdiction" (*Fairness in International Law and Institutions*, *supra* note 171 at 241).

[494] M. Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts* (Dordrecht: Martinus Nijhoff Publishers, 1994) at 52 [hereinafter *The New World Order and the Security Council*].

[495] *Ibid.* at 52-53.

[496] See *ibid.* at 32-35.

[497] Article 13 of the *U.N. Charter*.

[498] P-M. Dupuy, *Droit international public* (Paris, Dalloz-Sirey, 1992) at 127 cited in *The New World Order and the Security Council*, *supra* note 494 at 32-33.

application of that rule under either one of the systems is not objectionable; (vi) in the case that the Council applies a new mode of settlement which is provided for neither by the *U.N. Charter* nor by customary international law, the Council' obligation to act in accordance with international law is automatically fulfilled; (vii) the obligation to respect international law certainly implies the duty not to act against international law; (viii) the *U.N. Charter*, like any other international treaty, may contradict rules of international law; at the very least, it cannot contradict imperative and inviolable norms of international law; (ix) Kelsen holds that, in order to restore international peace and security, the Security Council may in some cases not be able to act in accordance with international law (use of force under Chapter VII being an example); Bedjaoui, on the other hand, deems it to be impossible for the Security Council to brush aside fundamental norms of law of war (humanitarian law, human rights and the right to self-determination of peoples) which have imposed the necessity to respect principles relating to the "universal conscience of mankind" when it resorts to use of force; (x) finally, Bedjaoui, believes that today it is no longer possible to draw a distinction between peace and law: "[t]he restoration of peace can only be illusory without the observance of international law."[499]

According to Bedjaoui's analysis, the Security Council is bound to respect the *U.N. Charter* and international law. This view is reinforced by the fact that, since the Persian Gulf war, the Council has resumed the practice of citing the chapter and verse which form the basis for its decisions, thereby grounding them in the law.[500]

In sum, even though the decisions of the Security Council are essentially political, the Council is limited in its exercise of power by the *U.N. Charter* and rules of general international law.[501]

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[499] *The New World Order and the Security Council*, *supra* note 494 at 35.

[500] *Ibid.* at 35. On the other hand, in 1988, Sonnenfeld wrote, "in its practice the Security Council has adopted only a few resolutions referring *expressis verbis* to Article 39... This proves that the content of resolutions negotiated in the Security Council rarely reflects the real situations" (R. Sonnenfeld, *Resolutions of the United Nations Security Council*, (Dordrecht: Martinus Nijhoff Publishers, 1988) 89-91).

[501] This is also reflected in the words of Sir Gerald Fitzmaurice, "[t]his is a principle of international law that is as well-established as any there can be,—and the Security Council is as much subject to it (for the United Nations is itself a subject of international law) as any of its individual members are" (*Namibia Case*, *supra* note 255 at 294 (dissenting opinion of Judge Sir Gerald Fitzmaurice)). M. Bothe also states that, "*[l]es Nations Unies sont basées sur le respect du droit, et il serait inconcevable d'exclure le droit comme facteur déterminant d'un élément clé de leurs activités. Le Conseil de sécurité n'est pas une sorte de pape du droit internaitonal : « Roma locuta, causa finita »*" ("Les limites des pouvoires du conseil de sécurité" in R.-J. Dupuy, ed., *supra* note 181, 67 at 69).

C- Constitutional Control over the Activities of the Council: *The Lockerbie Case*

The conclusion that there is a limit to the actions of the Security Council leads to another question: who will exercise control over the activities of the Council. If there are limits to the Council's powers, which body is competent to oversee its actions?

During the Cold War, the reciprocal operation of the veto created a system that was a "functional equivalent" of a "constitutional theory of checks and balances" that the *U.N. Charter* did not explicitly provide for.[502] However, with the end of the Cold War, the Council has become more effective and the functional system of checks and balances no longer functions as it once did.

In addition, the Council has become more "secretive."[503] There are many "mini-Councils" within the Council which meet behind closed doors and do not keep minutes of their meetings. Often, the final decisions of the Security Council are taken in accordance with the recommendations of these secretive meetings.[504] Such decision-making by the Security Council may have been acceptable in a case of indisputable act of aggression like Kuwait's invasion by Iraq, but in a case such as sanctions against Libya[505] for alleged export of state terrorism, it may be considered to be acting like "a world directorate for *anything* they determined to be a 'threat to the peace'."[506]

Would the International Court of Justice, as the principle judicial organ of the United Nations, be the appropriate body to review the actions of the Security Council and check on legality of its actions? According to the *U.N. Charter*, there is no doubt that the Court has no power to review the actions of other organs of the U.N. However, the *U.N. Charter* also provides that the Court can exercise its own jurisdiction, and reach its own conclusion in a case, even if the matter is simultaneously before another organ of the U.N.[507] There have been cases of concurrent jurisdiction of the Court and the Council

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[502] Reisman, *supra* note 451 at 84.
[503] *Ibid.* at 85.
[504] *Ibid.* at 85-86.
[505] That case is mentioned at 68, above.
[506] Reisman, *supra* note 451 at 86 [emphasis in original].
[507] See Kennedy, *supra* note 478 at 910.

over the same issue; The *Hostage Case*[508] and the *Nicaragua Case*[509] are two examples of such a situation.[510]

In dealing with Libya's request for interim measures[511] the Court has confronted serious constitutional debates regarding the framework of the U.N.[512] By bringing this matter to the International Court of Justice, Libya raised the question of jurisdictional boundary between the International Court and the Security Council, as well as the question of whether the Court has supervisory control over the Security Council's decisions.

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[508] *Supra* note 114.

[509] *Supra* note 188.

[510] I should also mention Article 36 of the *U.N. Charter* (that establishes a system of separation of powers within the U.N.) according to which the Security Council should, as a general rule, refer legal questions surrounding the pacific settlement of disputes between parties to the International Court of Justice. Article 36 states that

> (1) The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures of methods of adjustment.
>
> ...
>
> (3) In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

Accordingly, this provision seems to approve that at least in the cases involving legal questions—*i.e.* in the case of legal disputes as enumerated in Article 36(2) of the *Statute of the International Court of Justice* [hereinafter *Statute of the I.C.J.*]—the Court can play a role. According to Article 36(2) of the *Statute of the I.C.J.*, subject to voluntary recognition of the compulsory jurisdiction of the Court by the states party to disputes, the Court will have jurisdiction in

> ... all legal disputes concerning:
>
> (a) the interpretation of a treaty;
>
> (b) any question of international law;
>
> (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
>
> (d) the nature or extent of the reparation to be made for the breach of an international obligation (*Statute of the International Court of Justice*, 26 June 1945, Can. T.S. 1945 No. 7 at 48).

[511] The *Lockerbie Case*, *supra* note 375.

[512] The Court's decision was only in response to a request for interim measure and the question be considered again in a merits phase. After Libya filed its written pleadings, the United Kingdom and the United States raised objections to the Courts jurisdiction and to the admissibility of the Libyan claims. In two separate Judgments handed down on 27 February 1998 on these preliminary objections, the Court declared that it had jurisdiction to deal with the merits of the disputes between Libya and the United Kingdom, and Libya and the United States. It based its jurisdiction on Article 14, paragraph 1, of the *Montreal Conventions*, which concerns the settlement of disputes on the interpretation or application of the provisions of that Convention. The Court also found the Libyan claim admissible and stated that it was not appropriate, at this stage of the proceedings, to make a decision on the arguments of the United Kingdom and the United States that resolutions of the United Nations Security Council have rendered these claims without object (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiryia* v. *United States)*, Preliminary Objections, Judgment of 27 February 1998, reprinted in 37 I.L.M. 590; see also C. Gray "The Lockerbie Case Continues" Case and Comment (1998) 57 Cambridge L.J. 433.

An inference can be drawn from the I.C.J.'s decision in *Lockerbie Case*, namely, that the Court is unwilling to review the decision of the Council taken under the power conferred on the Council by Chapter VII.[513] Before addressing this issue, the case itself needs to be examined in some detail.

Libya brought the United States and the United Kingdom to the Court for alleged violations of its rights under the 1971 *Montreal Convention*.[514] In November 1991, the authorities in the United Kingdom and the U.S. charged two Libyan nationals with placing a bomb aboard Pan Am flight 103 on December 21, 1988; the plane exploded over Lockerbie in Scotland. The two Governments, in a joint declaration issued in November 1991, asked Libya to surrender the accused for trial. The subject of that declaration was later considered by the Security Council, which on January 21, 1992, adopted Resolution 731 (1992) to the same effect. Libya claimed that the *Montreal Convention* was the only appropriate convention in force between the parties dealing with such offences, that the United Kingdom and the U.S. were bound by their legal obligations under that convention, and that these two countries were acting in breach of their obligations under the convention.[515] Furthermore, Libya requested the Court to grant provisional measures:

> (a) to enjoin the United Kingdom [and the United States] from taking any action against Libya calculated to coerce or compel Libya to surrender the accused individuals to any jurisdiction outside of Libya; and
>
> (b) to ensure that no steps are taken that would prejudice in any way the rights of Libya with respect to the legal proceedings that are the subject of Libya's Application.[516]

On March 31, 1992 (three days after the close of the hearing and before the Court order was rendered), the Security Council adopted Resolution 748 (1992)[517] which stated that, "the Libyan Government must now comply without any further delay with paragraph

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[513] Ewing, *supra* note 459 at 76.
[514] *Supra* note 377.
[515] Articles 5(2), 5(3), 7, 8(2) and 11 of the *Montreal Convention* were invoked by Libya. The convention has adopted the customary international law rule of *Aut dedere aut judicare*, according to which the alleged offender found in the territory of a Contracting State should either be extradited to the country in whose territory the offence was committed, or submit the case to its competent authorities for the purpose of prosecution. Libya claimed that it has taken such measures as were necessary to establish its jurisdiction over the offences charged. Libya also claimed that the United Kingdom and the U.S. by their actions and threats were in breach of their obligations under the *Montreal Convention* (*supra* note 377).
[516] *Lockerbie Case*, *supra* note 375 at 8 and 119.
[517] SC Res. 748, *supra* note 203.

3 of Resolution 731." The resolution was taken under Chapter VII of the *U.N. Charter*. The Court took this resolution into consideration[518] and stated that, "whatever the situation previous the adoption of that resolution [748], the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures."[519]

In the words of Professor Reisman, "[w]hen the Security Council makes a decision under Chapter VII of the Charter that concerns a state and the decision is inconsistent with some other treaty-based right claimed by that state, the Council decision prevails."[520]

The basis of the Court's decision, thus, is the existence of a Security Council decision under Chapter VII,[521] and I tend to agree with Professor Reisman who claims that the Court's approach "precludes in blanket fashion, the exercise of judicial jurisdiction *whenever* and *simply because* the Council is in a Chapter VII decision mode."[522]

To draw general conclusions in this debate it is useful to consider the different choices available to the Court in this case. It:

> [c]ould have held that the sanctions ordered by Resolution 748 should be suspended until such time as the Court ascertained, at the merits state, that Libya's claim was groundless. Or it could have decided that, since no sufficient case of *mala fides* or *ultra vires* had been established by Libya at this preliminary stage there were no grounds upon which the Court could order such interim relief. Or, third, the Court could have held that no relief would be forthcoming at any stage of the proceedings if granting that relief would require the Court to make a finding that a Chapter VII decision of the Security Council exceeded its lawful authority.[523]

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[518] Reisman, *supra* note 451 at 88.

[519] *Lockerbie Case*, *supra* note 375 at 15, 126-127. The Court by eleven votes to five, "[found] that the circumstances of the case are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures" (*ibid.*).

[520] *Supra* note 451 at 87.

[521] Reisman has criticized this formalistic basis as an "unsound constitutional policy reasoning, which may prove to be troublesome in subsequent cases." In his view it is enough for the Council to be factually in a Chapter VII mode, and as such, even recommendations may have the effect of overriding treaty or custom-based rights (*I.e.* Resolution 731 was enough for the Court to reach this conclusion) (see Reisman, *supra* note 451 at 87-90).

[522] *Ibid.* at 90 [emphasis in original]. I should emphasize that according to Article 59 of the *Statute of the I.C.J.* "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case."

[523] T. M. Franck, "The "Powers of Appreciation": Who is the Ultimate Guardian of UN Legality?" Editorial Comment (1992) 86 A.J.I.L. 519 [hereinafter "Powers of Appreciation"] at 521.

An implicit right of judicial review would result from either of the first two options; judicial restraint or abdication would be the consequence of the third option.[524] It is important to note that the Court chose not to assume "judicial restraint or abdicate."[525] It, in fact, chose a variation of the second option, which can be construed as the Court's assertion of a power to review Security Council actions, even though it did not vote in favour of interim measures.[526] As Kennedy has pointed out, "[t]his sort of "review" does not appear to be foreclosed by the Charter, notwithstanding the potentially disastrous ramifications of the existence of two conflicting, binding decisions by coequal branches of the United Nations."[527]

Even if the Court decides to use its powers as the "guardian of legality for the international community" differently in a future case, and make a decision contrary to that of the Security Council, it would have no practical effect. It would simply lead to controversy. This is because, according to the *U.N. Charter*, it is the Security Council which has the power to enforce the court's decisions upon its discretion.[528] Furthermore, according to Article 59 of the *Statute of the I.C.J.*, the Court is barred from any *erga omnes* pronouncements.[529] Thus, it is not likely that the Court would contradict the Security Council's decision in the future, as so doing would be futile and the only consequence would be a weakening of the U.N. system.

Judge Lachs in his separate opinion in the *Lockerbie Case*, expresses this point of view:

> [i]t is important for the purposes and principles of the United Nations that the two main organs with specific powers of binding decision act in harmony—though not, of course, in concert—and that each should perform its functions with

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[524] *Ibid.*

[525] *Fairness in International Law and Institutions*, *supra* note 171 at 243.

[526] Franck's conclusion from the Court's decision is that

> [t]he majority and dissent opinions seem to be in agreement that there are such limits and that they can not be left exclusively to the Security Council to interpret. The legality of actions by any UN organ must be judged by reference to the Charter as the "constitution" of *delegated* powers. In extreme cases, the Court may have to be the last-resort to enjoy the adherence of its members. This seems to be tacitly acknowledged judicial common ground ("Powers of Appreciation" *supra* note 523 at 522-23 [emphasis in original]).

[527] Kennedy, *supra* note 472 at 913.

[528] Article 94(2) of the *U.N. Charter* states that, "[I]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

[529] For the text of Article 59 of the *Statute of the I.C.J.* see *supra* note 522.

> respect to a situation or dispute, different aspects of which appear on the agenda of each, without prejudicing the exercise of the other's power.[530]

It can be concluded from this debate that, while the I.C.J. may not have the power to review and overturn the Security Council's decisions *stricto senso*, in theory, it has the power to decide a case concurrently with the Security Council and reach a binding contradictory decision.

In my view, Judge Lachs' opinion, demonstrates the reluctance which rightly exists in the Court to contradict the Council. Regardless of the opposing views of scholars on the issue,[531] the Court will continue to deal with this *legal* issue in a very *political* manner.[532] On the other hand, given the political and jurisdictional constraints upon the I.C.J., the role of law will play itself out largely through the self-restraint of the Council and not through the imposition of control in a legal sense.

III- Sanctions Violating Humanitarian Law and Basic Human Rights

Having reached the conclusion that the Security Council is bound by principles of international law in rendering its decisions, it is important to determine which principles of international law are relevant for sanctions. That is, which principles must be respected by the U.N. in implementation of sanctions.

Reisman and Stevick argue that the relevant principles of international humanitarian law[533] should be observed by the Security Council when implementing

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[530] The *Lockerbie Case*, *supra* note 375 at 139 (separate opinion of Judge Lachs).

[531] See for instance the views expressed by two prominent scholars, Franck and Reisman: While Franck claims that in its decision on provisional measures in *Libya* v. *UK* and *Libya* v. *USA* the Court "marked its role as the ultimate arbiter of institutional legitimacy" ("Powers of Appreciation" *supra* note 523 at 523). Reisman states that, "[h]ard substantive and procedural standards for review of Chapter VII actions are difficult to pinpoint in the Charter. Their very absence, in a context where so much power is assigned to the Council, is telling. A judicial review function, viewed in the formal Charter regime, seems somewhat difficult" (*supra* note 451 at 94).

[532] Kennedy, in his article on this subject, has reached the same conclusion, in that, he hopes that, "Court and Council will continue to complement each other, as required by the spirit of the UN Charter, and will remain cognizant of their roles and capabilities, each acknowledging the distinctive competence of the other for addressing particular kinds of disagreements in the international arena" (*supra* note 472 at 925).

[533] Such rules were embodied in four Geneva conventions of 1949:

- *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31 (entered into force on 21 October 1950).
- *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S.85. (entered into force on 21 October 1950).
- *Geneva Convention relative to Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135 (entered into force on 21 October 1950).

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sanctions, and that enforcement actions of the Council may be illegal if they do not distinguish between combatants and non-combatants.[534]

In fact, as early as 1934, concern was expressed that economic sanctions, "operate against whole peoples and tend to drag millions of innocent parties into an affair not of their making."[535] The question, then, is whether economic sanctions designed to paralyze a nation's economic life, which cause suffering in a given community are more "humane" than military actions? According to Damrosch:

> some programs of collective economic sanction, begun with the best of intentions, may severely harm the very people they are intended to help. There is the perception, and possibly the reality, that *sanctions*, rather than the crises to which they respond, have created humanitarian emergencies.[536]

Likewise, Cassese writes, "[r]espect for human dignity has acquired such importance in the world community that it is no longer possible to sacrifice the interests and exigencies of human beings for the sake of responding to wrongs caused by States."[537]

Concern about the human impact of sanctions is raised by many observers without using the legal jargon. Imposition of sanctions in certain circumstances may result in economic crises in the target states that, in turn, result in a population's impoverishment. Often, the policymakers of the target states, who are responsible for the breaches of international law, are those who are least affected by the sanctions. Even when the formalities for the implementation of sanctions are respected, the U.N. may still ignore the socio-economic history of the target state.[538]

- *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287 (entered into force on 21 October 1950).

[534] *Supra* note 304 at 94.

[535] P.S. Wild Jr., *Sanctions and Treaty Enforcement* (Cambridge, Massachusetts: Harvard University Press, 1934) at 219. In spite of such concerns, for many years the impact of economic sanctions on the population of target states was ignored. The *First Report of the Collective Measures Committee* enumerates functions of the proposed "co-ordinating committee" for collective economic and financial measures which includes co-ordination, making specific recommendations to the Council or the Assembly regarding additions to, and amplification or modification of collective economic measures, but considering the human impact of sanctions was not mentioned (See *First Report of the Collective Measures Committee*, UN GAOR, 6th Sess., C1, 480th Mtg. (Jan. 4, 1952) at 15-16 cited in Goodrich & Simons, *supra* note 163 at 419).

[536] L.F. Damrosch, "The Civilian Impact of Economic Sanctions" [hereinafter "The Civilian Impact"] in *Enforcing Restraint*, *supra* note 156, 274 at 275.

[537] Cassese, *supra* note 134 at 242.

[538] In the case of Haiti for instance, "the United Nations observed the legal formalities for implementing sanctions pursuant to the framework set out in the Charter. Yet the organization virtually ignored Haiti's socio-economic history despite the obvious poverty of the country" (F. Swindells, "U.N. Sanctions in Haiti:

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The human catastrophe caused by sanctions is often emphasized (in certain cases in an exaggerated manner)[539] by the target states in order to incite the international public opinion against the sanctions.[540] Nonetheless, many independent studies have confirmed the claims of target states in this regard. In the case studies in chapter 3 the claims were substantiated by reference to the studies and statistics available on the human impact of economic sanctions. Notably, there has been controversy surrounding the impact of sanctions against Haiti and Iraq on the civil population of those countries. In the case of Haiti it is even claimed that "the economic situation in Haiti had reached the point where military intervention was 'the most humane solution'."[541]

The situation in Iraq provides a good example of the effect which ongoing sanctions can have. The United Nations Children's Fund (UNICEF) has revealed that infant mortality in heavily populated parts of Iraq has doubled since sanctions were imposed. From a rate of 56 per 1,000 in 1989, infant mortality went up to 131 per 1,000 in the period 1994-1999.[542] A survey with the World Health Organization calculated 500,000 more children had died than would have been the case if medical conditions had

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A Contradiction under Articles 41 and 55 of the U.N. Charter" Note (1997) 20 Fordham Int'l L.J. 1878 at 1960).

[539] Cuba has criticised economic sanctions imposed by the U.S. as a policy of deliberate genocide. The Cuban National Assembly said many people had died because of lack of medicine caused by the embargo ("Cuba Condemns US Embargo as Genocide," *supra* note 281).

[540] For example, in the case of the U.N. sanctions against Iraq, the U.S. claims that Saddam Hussein refuses to distribute food and medicines to his people. The State Department spokesman Mr. Rubin said: "[w]e often hear that sanctions are hurting the Iraqi people, but an analysis, an objective analysis of the facts reveals that Iraq has access to international markets and the money to buy food, but Saddam will not buy or distribute it to the needy." Another senior State Department official Martin Indyk said that while the mortality rate continued to rise amongst children, it was not due to a lack of food or medicine as a result of international sanctions: "[t]hose medicines and nutritional supplements are either sitting in warehouses under Saddam Hussein's control, or he has refused to order them" ("As Iraqis Starve, U.S. Asserts Their Leaders Live in Luxury" *The New York Times* (14 September 1999) A8). Another report concerning Iraq states that Iraq is re-exporting the supplies intended for children it says are suffering because of sanctions. In August 1999, Kuwait impounded the small boat, bound for the United Arab Emirates, when it was discovered to contain two-hundred-and-fifty tones of baby goods and other supplies. The spokesman for the U.S. State Department, James Rubin, said Iraq was showing cynical disregard for children's suffering by exporting baby supplies for hard currency in violation of international sanctions. The official Iraqi news agency said the supplies, including feeding bottles from India and baby powder from China, were of poor quality and were being returned ("Iraq: Mysterious Traffic" *The New York Times* (18 August 1999) A14).

[541] Letter from Rep. Robert Torricelli to President George Bush (10 January 1992) cited in Reisman & Stevick, *supra* note 304, footnote 207.

[542] B. Crossette, "Children's Death Rates Rising in Iraqi Lands, UNICEF Reports" *The New York Times* (12 August 1999) A6.

been allowed to improve at the pre-sanctions rate.[543] However, the head of the UNICEF, Carole Bellamy, has stated that the U.N. sanctions are not the only reason.[544] According to Ms. Bellamy, "[s]anctions are tools that are used, they are decided by others than UNICEF, but we would urge that in imposing them to take into account the implications for children."[545] It is also reported that malnutrition and severe health problems due to absence of medicines and water purification systems are commonplace.[546] According to Denis Halliday, the United Nations Humanitarian Coordinator for Iraq, one quarter of all Iraqi children under the age of six are malnourished. In 12 per cent of cases, chronic malnutrition is leading to stunted growth, high school drop-outs and reduced attention spans.[547]

Sanctions can also have a long-term impact on the population of a targeted country. The view that "sanctions are only temporary tools and in theory should only have short term effects"[548] is also reflected in Security Council discussions.[549] In many cases sanctions severely affect the economic infrastructure of the target countries, which will in turn create long-term consequences for generations to come.

Concerns over the humanitarian impact of sanctions have been raised in the Security Council several times. Most importantly, the humanitarian impact was acknowledged in a letter dated April 13, 1995 from the permanent representatives of the permanent members of the Security Council to the President of the Council.[550] The letter,

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[543] "Special Report: Sanction-breakers risk jail" online BBC <http://news2.thls.bbc.co.uk/hi/english/special_report/regions/wales/newsid_420000/420544.stm> (date accessed 14 August 1999).

[544] The UNICEF report sparked a controversy between Iraq and the United States over who is to blame. Baghdad claimed it proved that sanctions are killing thousands of children every month. The U.S. alleged that Iraqi inefficiency and obstructionism are also key factors. Ms. Bellamy said she would plead the cause of Iraq's children before the U.N. sanctions committee ("UNICEF Chief Pleads the Cause of Iraqi Children" *Agence France Presse* (17 October 1999), online: Lexis-Nexis (News. CURNWS)).

[545] *Ibid.*

[546] See the following reports: J. Dreze & H. Gazdar, "Hnger and Poverty in Iraq, 1991" (1992) 20:7 Word Development and *FAO Nutritional Assessment Mission to Iraq*, November 1993 cited in M. Grey, "UN Sanctions against Iraq: The Human Impact" (1994) 70:11 Current Affairs Bulletin 11 at 13.

[547] "Sanctions "Have Hurt People", not Leader", online: The Irish Times on the Web http://www.irish-times.com/irish-times/paper/1998/0225/wor5.html (date accessed: 28 February 1998).

[548] Swindells, *supra* note 538 at 1955.

[549] UN SCOR, 49th Year, 3376th Meeting, UN Doc. SC/5841 (1994) (Following the Adoption of Resolution 917).

[550] *Letter dated 13 April 1995 from the Permanent Representatives of China, France, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council*, UN Doc. S/1995/300 (1995).

outlined some considerations which should be taken into account in the cases of implementation of sanctions. [551]

In addition to the Security Council, reports from other U.N. bodies reflect the same concern. A 1998 report from the Committee on Economic, Social and Cultural Rights acknowledges that, "sanctions often cause significant disruption in the distribution of food, pharmaceuticals and sanitation supplies, jeopardize the quality of food and the availability of clean drinking water, severely interfere with the functioning of basic health and education systems, and undermine the right to work."[552]

Notwithstanding a growing awareness regarding the humanitarian impact of sanctions, the Security Council is still constantly criticized in the case of sanctions against Iraq due to the mentioned humanitarian concerns.[553]

Since non-military instruments—including economic sanctions—can be destructive, it can be concluded that they, "should be tested rigorously against the criteria of international law of armed conflict and other relevant norms of contemporary international law *before* a decision is made to initiate or to continue to apply them."[554] This proposition means that the economic weapons are subject to principles of *jus ad bellum* and *jus in bello*.[555]

The relevance of international humanitarian law and principles of human rights[556] is not limited to situations of collective economic sanctions. Subparagraph (d) of Article

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[551] These proposals will be mentioned in the next chapter. See chapter 5:V, "Continuing Assessment of Sanctions", at 141, below.

[552] *General Comment No. 8 (1997): The relationship between economic sanctions and respect for economic, social and cultural rights*, UN ESCOR, 17th Sess., Annex V, UN Doc. E/C.12/1997/10 (1998) at 119.

[553] See B. Pisik, "The U.N. Report" *The Washington Times* (30 August 1999) A14; "Emirate Calls for Diplomatic Solution to Iraq Crisis" *Agence France Presse* (26 January 1999), online: Lexis-Nexis (News. CURNWS); E. Bryant, "Arab Meeting Meet Ends in Disarray" *United Press International* (24 January 1999), online: Lexis-Nexis (News. CURNWS); B. Pisik, "U.S. Plan Would Ease Iraqi Pain; Unlimited Oil Sales Would Buy Food" *The Washington Times* (15 January 1999) A1; J.M. Goshko, "On Security Council, Mixed Views of Attack; Some Question Action but Also Blame Iraq" *The Washington Times* (17 December 1998) A30.

[554] Reisman & Stevick, *supra* note 304 at 95 [emphasis in original].

[555] In chapter 5:II, "Applying International Humanitarian Law Standards to Sanction", at 132, below, I will come back to this point.

[556] Regarding the relationship of international humanitarian law and human rights McCoubrey states that:

> [t]here is manifestly a significant degree of convergence between the concerns of international humanitarian law and those of the international law of human rights. However, the precise nature of the interface between these two sectors is a more controversial question. The idea of fundamental entitlements inherent in the human social condition is of ancient provenance, with long roots in the tradition of naturalist jurisprudence, and it has played a prominent role in the

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50 of the *ILC Draft Articles* echoes the same concern and imposes another restriction on the use of unilateral economic sanctions. Even though unilateral sanction are less likely to violate rules of humanitarian law, resort to countermeasures that lead to the violation of basic human rights is prohibited.

During the past century, essential rules of humanity and inviolable rights have been recognized by international law, leading to the prohibition of reprisals in times of international or internal armed conflict. This development has led to similar restrictions on reprisals in times of peace.[557] In the *Naulilaa Case*, the tribunal stated that a lawful reprisal must be "limited by the requirements of humanity and the rules of good faith applicable in relations between States."[558] A similar statement was made by the *Institut de droit international* in its 1934 Resolution.[559] Furthermore, in many cases of unilateral economic sanctions and even mere retorsions, states have taken humanitarian considerations into account.[560]

In addition, the last subparagraph of article 50 of the *ILC Draft Articles* prohibits countermeasures that are in contravention of a peremptory norm of general international

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constitutional development of some states since the late 18th century. As a distinct sector of public international law, however, the law of human rights has taken shape largely since 1945 (H. McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare*, 2nd ed. (Darthmouth: Ashgate, 1998) at 5-6).

For a comprehensive bibliography on the subject see International Committee of the Red Cross, *Bibliography Of International Humanitarian Law Applicable In Armed Conflicts* (Geneva: International Committee of the Red Cross & Henry Dunant Institute, 1987).

[557] See "Report of the Commission to the General Assembly on the work of its forty-seventh session" *supra* note 126 at 72.

[558] *Naulilaa Case*, *supra* note 107 at 1026.

[559] Paragraph 4 of Article 6 of that resolution states that:

> *Dans l'exercice des représailles, l'Etat doit se conformer aux règles suivantes :*
> *[...]*
> *4- S'abstenir de toute mesure de rigueur qui serait contraire aux lois de l'humanité et aux exigences de la conscience publique.*

"Résolutions votées par l'Institut au cours de sa XXXIXe Session" (1934) 38 Ann. inst. dr. int. 708 at 710.

[560] For example, in the case of the United Kingdom sanctions against Argentina during the Falkland Islands crisis, funds which would normally be necessary for living, medical and educational and similar expenses of residents of the Argentine Republic in the United Kingdom were not frozen. Or, in the case of United States total blockade of trade relations with Libya, an exception was made for the publications and donations of articles intended to relive human suffering, such as food, clothing, medicine, and medical supplies intended strictly for medical purposes (see "Report of the Commission to the General Assembly on the work of its forty-seventh session" *supra* note 126 at 73). More recently the U.S. changed its sanctions policy in line with the concerns over humanitarian impact of sanctions. Accordingly, humanitarian items will be exempted from future sanctions. Undersecretary of State Stuart Eizenstat told reporters on this issue, "sales of food, medicine and other humanitarian necessities do not generally enhance a nation's military capacity or support terrorism ... our purpose in applying sanctions is to influence the behavior of regimes,

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law.[561] This prohibition is "widely recognized in the contemporary doctrine since the Second World War."[562] There is no doubt that *jus cogens* rules may not be departed from in international law. However, the debate persists as to the scope of such norms. For this very reason the *ILC Draft Articles* contain only a non-exhaustive list of international crimes.[563]

There is no doubt that the issue of the human impact of collective and unilateral sanctions and the conformity of their application with principles of international humanitarian law and human rights is one of the most important problems of economic sanctions. In my view, this problem is the Achilles heel of economic sanctions as an enforcement measure; it is a serious and well-founded criticism of economic sanctions and should be addressed by the states and organizations implementing them.

Apparently, the Security Council has not gone any further than providing for exceptions on import of humanitarian goods in trade embargoes, and there is no constant practice of studying the humanitarian impact of sanctions by the Council. A number of recent United Nations and other studies have concluded that the aforementioned exemptions have not achieved the goal of ensuring basic respect for economic, social and cultural rights within the target states. A major study prepared for the General Assembly states that "humanitarian exemptions tend to be ambiguous and are interpreted arbitrarily and inconsistently. ... Delays, confusion and the denial of requests to import essential

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not to deny people their basic humanitarian needs" ("U.S. Eases Policy on Some Sanctions" *The New York Times* (21 April 1999) A1 & A12).

[561] This is also in line with the regime of the *Vienna Convention* which in Article 53 states that, "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law" (The *Vienna Convention, supra* note 104). Prohibition of countermeasures that are in contravention of a peremptory norm of general international law encompasses some of the prohibited countermeasures mentioned above. The reason is that there is a certain overlap between the spheres of human rights and *jus cogens* in general. Certain general rules protecting specific human rights (including racial discrimination, apartheid, slavery, genocide, self determination of peoples) haven been described as peremptory norms (see Cassese, *supra* note 134 at 149); Also Judge Tanaka's dissenting opinion in the *South West Africa Cases*, in which he states that "surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*" (*South West Africa Cases (Ethiopia* v. *South Africa; Liberia* v. *South Africa)* Second Phase, Judgement [1966] I.C.J. Rep. 5 at 298).

[562] "Report of the Commission to the General Assembly on the work of its forty-seventh session" *supra* note 126 at 74 [footnote omitted]. See also, D. Alland, "International Responsibility and sanctions: Self-Defence and Countermeasures in the ILC Codification of Rules Governing International Responsibility" in Spinedi & Simma, eds., *supra* note 144, 143 at 185; and, Elagab, *supra* note 33 at 99.

[563] Examples of *jus cogens* rules can be found at 28, above. The ambiguity exists especially as to which breaches of human rights obligations, other than slavery, genocide, and *apartheid*—often-cited examples—constitute international crimes.

humanitarian goods cause resource shortages."[564] Another report concludes that the review procedure established under the various sanctions committees set up by the Security Council "remain cumbersome and aid agencies still encounter difficulties in obtaining approval for exempted supplies."[565]

Accordingly, in addition to taking the long-term effects of sanctions into account, the sanctioning state(s) or the Security Council should vigorously apply principles of international humanitarian law, including necessity, proportionality, and discrimination between combatants and non-combatants. Currently, the sanctions committees of the Security Council, which operate secretively and cannot be monitored,[566] have failed to establish a constant and coherent practice with regard to humanitarian concerns. Creating certain bodies in charge of economic sanctions and further institutionalizing the practice of implementing sanctions can be helpful in avoiding humanitarian disasters caused by economic sanctions.[567]

IV- The Effects on Third Parties

A- The Effects on Third States

Unilateral economic sanction can affect third states, and in extreme cases the implementation of unilateral economic sanctions may even amount to a threat to international peace. Most significantly, extraterritorial application of sanctions affects third states.

Even if not applied extraterritorially, unilateral sanctions may still, in certain circumstances, affect the economies of third states.[568] In cases when damage is caused to a third party state by unilateral sanctions, the imposing state should not be deemed liable unless the collateral damage to the third state amounts to violation of its rights under

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[564] "Impact of armed conflict on children: note by the Secretary-General" (A/51/306), annex, para. 128, cited in *General Comment No. 8 (1997): The relationship between economic sanctions and respect for economic, social and cultural rights, supra* note 552 at 120.

[565] L. Minear, *et al.*, *Toward More Humane and Effective Sanctions Management: Enhancing the Capacity of the United Nations System* (Providence: Thomas J Watson Jr. Institute for International Studies, 1998) at vii.

[566] See Paul, J.A., "Sanctions: An Analysis" <http://www.globalpolicy.org/security/sanction/analysis.htm> (date accessed 28 November 1998).

[567] In the chapter 5:III, "Institutionalizing Sanctions: Breaches of the *Erga Omnes* Obligations", at 137, below, proposals to deal with this concern will be examined.

[568] For example state A imposes sanctions on B, and C, which is the transit state, suffers damages for loss of profits.

international law.[569] In other words, the third state can only claim reparations if the collateral damages which it incurs amount to economic intervention or are in breach of treaty rights.[570]

Due to increasing inter-dependence of economies, it is also conceivable that the economic conduct of a group of states may damage the world trade and financial stability to a degree that is can be considered to be a threat to international peace.[571] Although threat to international peace is not likely to be the result of one state imposing sanctions on another state, it may be present in the case of sanctions imposed by a group of states on other states, as was the case with the 1973 Arab oil embargo.

When it comes to collective sanctions, in most cases, "some states will suffer unduly for geographic reasons or because of their special economic and finaincial relationships with the victim state or the state against which measures are directed."[572]

In many cases, the economies of neighbouring countries are so interdependent that imposition of economic sanctions against one state inevitably has serious effects on the economies of other states.[573] The question, then, is to decide who should pay for those losses. This problem may lead to the non-participation or weak participation of the targeted country's trade partners. The case of Rhodesia is a good example of neighbouring countries suffering hardship due to sanctions. In that case, the economies of

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[569] "International Legal Aspects" *supra* note 13 at 154.

[570] *Ibid.*; a good example of breach of treaty rights of a third state as a result of an economic sanction is Article XXIII of GATT on "nullification and impairment":

> 1- If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
> (a) the failure of another contracting party to carry out its obligation under this agreement, or
> (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
> (c) the existence of any other situation,
> the contracting party may, with a view to the satisfactory adjustment of the matter, make written representation or proposals to the other contracting party or parties which it considers to be concerned ...

If the sanctioning state and the state that suffers from collateral damages are both members of the W.T.O., the latter can claim nullification and impairment under this article. However, the sanctioning state can be protected by the exceptions in Article XXI of the GATT (see *infra* note 623).

[571] "International Law and Economic Coercion" *supra* note 94 at 245.

[572] Goodrich, Hambro & Simons, *supra* note 161 at 343.

[573] "International Legal Aspects" *supra* note 13 at 154.

Zambia and Botswana were affected by the sanctions against Rhodesia, which, in turn, caused non-application of sanctions by these countries.[574]

Logically, the cost of collective sanctions should not be born exclusively by innocent members of the international community which have significant trade relations with the target states. However, in legal terms, it is very difficult to argue for the indemnification of states that bear the loss as a consequence of economic sanctions. Article 50 of the *U.N. Charter* may be invoked by injured states which are not the target of the sanctions.[575] That article provides 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 economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

The above does not impose any substantial obligation on the Security Council to provide specific remedies. A proposal made by Venezuela, in the process of drafting the *U.N. Charter*, to replace the mere right to consultations with a right to assistance was unsuccessful.[576]

In examining the practice of the Council, it becomes evident that until very recently, it never went beyond "an appeal to the member states to render assistance" to member states which suffered hardship as a result of participating in the implementation of U.N. sanctions.[577] This practice, however, appears to have changed, at least in the

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[574] Renwick, *supra* note 26 at 46.

[575] Before the *U.N. Charter*, in the frame work of the League of Nations too the problem of third states was addressed in a report of the Secretary-General, entitled "Legal Position Arising from the Enforcement in Time of Peace of the Measures of Economic Pressure indicated in Article XVI of the Covenant of the League, particularly by a Maritime Blockade." However, as is explained here the approach at that time was based on different notions of international law, and furthermore the League's economic sanctions were only recommendatory. The third part of the report was entitled *Position of Third States* and stated that their rights must be fully respected but they cannot object to measures taken by League members in their own territory. As for territory outside, *e.g.* pacific blockade: 1- By sympathy third states may let the blockade apply to their vessels. 2- The League may declare the situation one of war, making the blockade a belligerent one, throwing the moral responsibility for the war upon the third state or states. 3- Without war, the third states might treat the League and the aggressor as belligerents (see Wild, *supra* note 535 at 145).

[576] Simma *et al.*, eds., *supra* note 69 at 659. However, even the non-member states are entitled to consultation under Article 50. Federal Republic of Germany in case of sanctions against Rhodesia and Switzerland and the Republic of Korea in the case of sanctions against Iraq have used this right (*ibid.* at 660).

[577] See especially the following Security Council resolutions regarding sanctions against Southern Rhodesia: Resolution 253 (1968), Resolution 277 (1970), Resolution 329 (1973), in which it was mentioned that Zambia and Mozambique deserve such assistance. The Council followed up its call by sending an expert commission to Zambia to study its problems (see Simma *et al.*, eds., *supra* note 69 at 660).

recent case of the sanctions imposed on Iraq. In that case, numerous states requested assistance under Article 50. The Committee established under Resolution 661 was entrusted with the task of examining these requests.[578] A working group was established to consider the requests; it recommended that the world community should support the affected countries with financial help.[579] Furthermore, the Security Council's Resolution 687 anticipated that Iraq, "is liable 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."[580]

Resolution 687 established a Compensation Commission to administer the payment of indemnities caused by damages incurred as a result of the invasion. Although the wording of Resolution 687 suggests that the injuries resulting from economic sanctions should be considered as consequences of Iraq's unlawful occupation of Kuwait, that possibility was not considered in the reports of the Compensation Commission.[581]

In the cases of Haiti and Yugoslavia, the relevant resolutions made no mention of the economic impact of sanctions on third states.[582]

On the other hand, Former Secretary-General of the U.N., Boutros Boutros-Ghali, has acknowledged the existence of the problem, stating that "there is an urgent need for action to respond to the expectations raised by Article 50 of the Charter."[583]

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[578] SC Res. 661, *supra* note 329.
[579] Simma *et al.*, eds., *supra* note 69 at 661.
[580] SC Res. 687, *supra* note 335 para. 16.
[581] On May 2, 1991 pursuant to Paragraph 19 of Security Council Resolution 687, the Secretary-General submitted a detailed report to the Council on the details of the work of the Commission and the Fund established under the Resolution (*Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687* UN Doc. S/ 22559 (1991) reprinted in 30 I.L.M. 1706). The exemplary categorization of the claims given in paragraph 23 of this report does not contain claims related to economic sanctions. Neither does the *Letter dated 2 August 1991 from the President of the Governing Council of the United Nations Compensation Commission to the President of the Security Council* mention such claims (UN Doc. S/ 22885 (1991) reprinted in 30 I.L.M. 1711). Later, the Governing Council excluded compensation for losses suffered as a result of the trade embargo and related measures (*Decision taken by the Governing Council of the United Nations Compensation Commission during its third session, at the 18th meeting, held on 28 November 1991, as revised at the 24h meeting held on 16 March 1992*, UN Doc. S/23765, S/AC.26/1991/7/Rev.1, reprinted in 31 I.L.M. 1045 at 1046).
[582] See SC Res. 841, *supra* note 202 and SC Res. 757, *supra* note 349.
[583] *Supplement to An Agenda for Peace*, *supra* note 461, para. 73.

B- Extraterritoriality

The problem of adversely affecting third states by the imposition of unilateral sanctions is easier to conceive in terms of extraterritoriality. Due to the importance of this problem in the assessment of unilateral sanctions, it will be briefly discussed in this section, bearing in mind, however, that question of extraterritoriality is a thesis topic in its own right.[584]

The issue of extraterritoriality arises primarily in the case of American sanctions against other states. I will concentrate on two controversial and recent Acts which imposed sanctions on Cuba, Iran and Libya.

The *Iran and Libya Sanctions Act* [hereinafter ILSA] is a recent example of the extraterritoriality problem.[585] This Act was drafted in reaction to alleged state terrorism by the two target states. The Act requires the U.S. President to impose at least two out of a list of six sanctions on *any* person (nationals or non-nationals of the United States) who enters into certain types of transactions with Iran or Libya.[586]

In practice, however, the sanctions under the ILSA have not been applied, and violations of the Act have been ignored. According to Asaro, the reason for the lack of enforcement of this Act is that the imposition of sanctions will give rise to violations of the GATT and other agreements under the W.T.O.[587] Applying sanctions under the ILSA is inconsistent with the obligations of the U.S. under the GATT. In the case of the possible imposition of sanctions under ILSA, the U.S. would have to be prepared to defend its position in the W.T.O. panels under the security exception.[588] The W.T.O. panels would, most probably, not accept the argument that restrictions on trade are imposed under the security exception of the GATT, and, may authorize the aggrieved party to adopt retaliatory measures: a situation which may be damaging to the W.T.O.'s dispute settlement system.[589]

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[584] This brief examination is focussing on themes consonant with the remainder of this thesis

[585] Pub. L. No. 104-172, 110 Stat. 1541 Aug. 5, 1996 (codified at 50 U.S.C. § 1701 Note).

[586] See M.A. Asaro, "The Iran and Libya Sanctions Act of 1996: A Thorn in the Side of the World Trading System" Recent Development (1997) 13 Brooklyn J. Int'l L. 505.

[587] *Ibid.* at 553.

[588] That is the exception provided in Article XXI of the GATT discussed in Section V below (for the text of that article see *infra* note 623).

[589] *Ibid.* ; ILSA contains a sunset provision for the year 2001.

The controversial and well-known case of the *Helms-Burton Act*,[590] which seeks to establish democracy in Cuba by imposing sanctions, is another example of the extraterritorial effects of American sanctions. Title III of this Act, which is designed to protect U.S. property rights in Cuba, has raised the issue of extraterritorial jurisdiction. It goes further than merely imposing sanctions, rejects the Act of State Doctrine,[591] and allows U.S. courts to adjudicate claims arising from expropriations carried out years ago. It also gives the U.S. government the power to deny entry into the U.S. of aliens who traffic in property confiscated from the U.S. nationals by the Cuban government or who are shareholders of corporations which traffic in such property.[592]

Put simply, the Act conflicts with established principles of international law because of its extraterritorial reach. It seeks to punish non-US nationals in American Courts for actions which cannot be regarded as illegal according to the principles of international law.[593] The United States Government argues that expropriation is, under certain circumstances, illegal under international law, and, the Act itself defends the extraterritorial reach of the anti-trafficking provisions in the following terms:

> [t]he Congress makes the following findings:
>
> (8) The international judicial system, as currently structured, lacks fully effective remedies for wrongful confiscation of property and for unjust enrichment from the use of wrongfully confiscated property by governments and private entities at the expense of the rightful owners of the property.
>
> (9) International law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory.
>
> (10) The United States Government has an obligation to its citizens to provide protection against wrongful confiscations by foreign nations and their citizens, including the provision of private remedies.
>
> (11) To deter trafficking in wrongfully confiscated property, United States nationals who were the victims of these confiscations should be endowed with a judicial remedy in the courts of the United States that would deny traffickers any profits from economically exploiting Castro's wrongful seizures.[594]

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[590] *Supra* note 268.

[591] According to this doctrine, municipal courts will not pass on the validity of the acts of foreign governments performed in their capacities as sovereign within their own territory (see *Principles of Public International Law, supra* note 137 at 507).

[592] See L. Gierbolini, "The Helms-Burton Act: Inconsistency with International Law and Irrationality at their Maximum" (1997) 6 J. Transnat'l L. & Pol'y 289.

[593] J. van den Brink, "Helms-Burton: Extending the Limits of US Jurisdiction" (1997) XLIV Netherlands Int'l L. Rev. 131 at 147.

[594] 22 U.S.C. § 6081 (8)-(11).

This view is based on the doctrine of extraterritoriality, according to which a legitimate basis of jurisdiction is the effects principle, which holds that "a state has jurisdiction to prescribe law with respect to ... conduct outside its territory that has or is intended to have substantial effect within its territory."[595] But, "this principle is to some degree an *American* one,"[596] and is not universally accepted.[597]

It was precisely because of the extraterritorial effects of the *Helms-Burton Act* that White House initially opposed its adoption.[598] The Act has already caused problems in the relations of the U.S. and the European Union and other treaty partners under global and regional trade agreements.[599] The European Union, on May 3, 1996, filed a complaint with the W.T.O. Dispute Settlement Body and asked for consultations with the U.S. because the provisions of the Act were inconsistent with the U.S. obligations under the W.T.O. Agreement (Articles 1, 3, 5, 11 and 13 of the GATT and some similar provisions of the GATS). A panel was established, but later suspended its work at the request of the

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[595] I Restatement of the Foreign Relations Law of the United States, § 402 (1) (c) at 237-38 cited in Bhala & Kennedy, *supra* note 402 at 311.

[596] See Bhala & Kennedy, *ibid.* [emphasis in original].

[597] See *Principles of Public International Law*, *supra* note 137 at 308-309; Brett Busby after an analysis of the international jurisdictional basis of the *Helms-Burton Act* and ILSA comes to the conclusion that, "[b]ased on the absence of any persuasive jurisdictional basis for prescribing the Acts ... under the Restatement (Third) [of Foreign Relations Law of the United States], as well as the serious jurisdictional problems with their antecedents, it seems clear that the Acts cannot be justified under customary international legal principles of prescriptive jurisdiction" (*supra* note 269 at 658); see also Cain, *supra* note 285 at 384-389; and, J.W. Boscariol, "An Anatomy of a Cuban Pyjama Crisis: Reconsidering Blocking Legislation in Response to Extraterritorial Trade Measures of the United States" (1999) 30:3 L. Pol'y Int'l Bus. 439; *contra* J.W. Smagula, "Redirecting Focus: Justifying the U.S. Embargo Against Cuba and Resolving the Stalemate" (1995) 21 North Carolina Journal of International Law and Commercial Regulation 66; D.M. Shamberger, "The Helms-Burton Act: A Legal and Effective Vehicle for Redressing U.S. Property Claims in Cuba and Accelerating the Demise of the Castro Regime" Note (1998) 21 Boston College Int'l & Comp. L. Rev. 497.

[598] Kaplowitz, *supra* note 261 at 180.

[599] A Resolution of the General Assembly of the O.A.S. adopted in June, 1996, directed the Inter-American Juridical Committee (the juridical body of the O.A.S.) "to examine and decide upon the validity under international law" of the *Helms-Burton Act* (OAS, General Assembly, *Resolution on Free Trade and Investment in the Hemisphere*, OR OEA/Ser.P/AG/Doc.3375/96 (1996)). In its non-binding opinion, the Inter-American Juridical Committee analyzed the legislation and came to the conclusion that it does not conform with the norms established by international law. The opinion contains much that supports the doctrinal basis for fair treatment and protection of private foreign investment, but at the same time condemns the application of provisions which are questionable under international law (OAS, Inter-American Juridical Committee, *Opinion of the Inter-American Juridical Committee in Fulfillment of Resolution AG/Doc.3375/96 of the General Assembly of the Organization of American States, Entitled "Freedom of Trade and Investment in the Hemisphere"*, OR OEA/CJI/SO/II/Doc.67/96 rev.5 (1996) reprinted in 35 I.L.M. 1329). See also S.J. Rubin, "Introductory Note" (1996) 35 I.L.M. 1322.

European Union following a settlement between the parties.[600] According to this settlement, President Clinton reassured Europeans that he will continue, until his term expires in January 2001, to suspend the application of the provision on civil liability for trafficking in confiscated property and waive the provision on excluding aliens, their spouses, and their minor children from the United States who traffic in such property.[601]

The issue of extraterritorial applications of the American law is not yet fully resolved. For the moment, the United States has refrained from rigorously enforcing the provisions of these acts.[602]

C- The Effects on Individuals

According to international law, in the case of collective sanctions, the decisions of the Security Council under Article 41 of the *U.N. Charter* bind all states. Whether these decisions are enforceable before national courts depends on the national legal system in question.[603] American courts have decided that no individual rights result from the Security Council resolutions.[604]

In the case of unilateral sanctions, the third parties affected may be individuals.[605] The imposition of sanctions may affect the sanctioning state's nationals and may deprive

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[600] "Overview of the State-of-play of WTO Disputes" (as of 8 May 1998), http://www.wto.org/wto/dispute/bulletin.htm (date accessed: 9 May 1998). For the text of the agreement see *Memorandum of Understanding Concerning the U.S. Helms Burton Act and the U.S. Iran and Libya Sanctions Act, April 11, 1997*, European Union and United States, 36 I.L.M. 529; *Guide to the EU-U.S. Summit*, <http://europa.eu.int/s97.vts> (date accessed 1 March 1999).

[601] Bhala & Kennedy, *supra* note 402 at 277.

[602] It is interesting to note that three months after the Act took effect, on 21 November 1996, the U.N. General Assembly approved a non-binding resolution (GA Res. 51/17) calling for an end to all United States economic measures against Cuba (see *supra* note 285).

[603] Simma *et al*, eds., *supra* note 69 at 626.

[604] *Diggs* v. *Dent*, [1975] 14 I.L.M. 797 (U.S., Dist. Ct. D.C.). For the discussion in the U.S. see J. Bianchi, "Security Council Resolutions in United States Courts" (1974) 50 Indiana L. J. 83; R. Brand, "Security Council Resolutions; When Do They Give Rise to Enforceable Legal Rights?" (1976) 6 Cornell Int'l L. J. 298; T.A. Schweitzer, "The UN as a Source of Domestic Law: Can Security Council Resolutions be Enforced in American Courts?" (1978) 4 Yale Studies in World Public Order 162. This debate in the United States has another dimension: some local sanctions by States haven been imposed against South Africa in the 1980s and Burma (now Mianmar) in 1990s (see D.M. Price & J.P. Hannah, "The Constitutionality of United States State and Local Sanctions" (1998) 39:2 Harv. Int'l. L. J. 443).

[605] Private parties in general (*i.e.* individuals and enterprises) may be affected by sanctions. In the case of the U.S. sanctions against Iran we constantly hear that American companies seek exemption from the U.S. sanctions or call for an end to the sanctions because of the loss of their interest (see "US Wheat Growers Seek Iran Deal" *Wall Street Journal* (9 December 1998) A14; "Iran: Business People, not Tourists, Attacked" *The New York Times* (28 November 1998) A8; S. Natan, "Mobil Denied" *USA Today* (30 April 1999) A8).

them of their constitutionally or otherwise protected rights.[606] This problem is intertwined with the constitutional law of the sanctioning state. However, since the case of the U.S. sanctions against Cuba was already discussed, I will only briefly mention the consequences of those sanctions for individuals, including their property right or their right to travel. The American unilateral sanctions on Cuba were challenged in the U.S. courts for breach of property rights and right to travel.

The question of affecting individual rights may be examined from another perspective: sanctions inevitably affect the individuals of target states. Can a state, in taking countermeasures, legitimately deny the nationals of the target state certain rights (*e.g.* to invest or do business) on the ground that the target state has done so? In response to this question, distinction should be drawn between actions that relate to the basic rights of individuals and the privileges and benefits of foreign nationals on the basis of a treaty or comity.[607] As Schachter points out, "[i]t is clear that grave infringement of fundamental human rights against individuals cannot be justified on the ground that similar ... violations of human rights and dignity were perpetrated by the state of the nationality of those individuals."[608]

According to some jurists, blocking or confiscating the private property of nationals of the target state as countermeasure is one of the most controversial issues relating to actions against individuals.[609] In one case, a Cuban residing in Havana sued the Federal Reserve Bank of New York to collect the proceeds of a life insurance policy written by his son.[610] The Bank had refused the disbursal of the proceeds on the basis of the restriction imposed on the transfer of assets to Cuba. The court decided in favor of the Bank, claiming that it was a "reasonable response" to the actions of the Cuban Government. In another case, the regulation restricting travel to Cuba was challenged, but that challenge was also unsuccessful.[611]

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[606] For examples and more details in this regard, especially under the U.S. law, see L.B. Boudin, "Economic Sanctions and Individual Rights" (1987) 19 N.Y.U. J. Int'l L. & Pol'y 803.
[607] Schachter, *supra* note 34 at 194.
[608] *Ibid.* at 194.
[609] E. Borchard, "Reprisals on Private Property" 30 (1936) A.J.I.L. 108 cited in Schachter, *supra* note 34 at 201.
[610] *Sardino* v. *Federal Reserve Bank of New York, et al.*, 361 F.2d 106, *cert. Denied*, 385 U.S. 898 (1966).
[611] *Zemel* v. *Rusk, Secretary of State, et al.*, 381 U.S. 1 (1965). Another interesting example is the prohibition of travel to Iran during the hostage crisis. In that case when former Attorney General of the U.S.

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It can be concluded that, as long as countermeasures taken are proportionate and do not infringe fundamental human rights, their application cannot be challenged on the basis that they violated the rights of the nationals of the target state. But, a "reasonable response" to actions of another government does not include the seizure of private property simply as retaliation.[612]

V- Contradicting other Obligations of the State

As already mentioned, trade sanctions may violate international bilateral or multilateral treaties that the imposing states have entered into.

In the case of collective sanctions, however, according to Article 103 of the *U.N. Charter*, the solution is clear: the obligations under the *U.N. Charter* trump all other obligations. In some cases, the Security Council has expressly stated, in the resolution imposing sanctions, that, in the case of contradictory obligations, the Security Council's sanctions should prevail.[613]

On the other hand, the existence of multi-lateral arrangements makes unilateral recourse to reprisals more difficult. The most important treaty in this regard is the treaty which established the W.T.O.[614] This organization, which has 135 member-states and 36 observer-states,[615] has established a multilateral arrangement that imposes a vast range of obligations on the member-states, and binds them to maintain free trade. Accordingly, in

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Ramsey Clark traveled to Iran without the State Department's authorization the Department of Justice threatened criminal prosecution but never carried out this threat (see Boudin, *supra* note 606 at 818).

[612] Another example of a case resulting from breach of contractual rights of private parties caused by economic sanctions is a very interesting case still pending in the Superior Court of Quebec. A dispute which has arisen between Air France and Libyan Arab Airlines on a $43-million maintenance contract—frozen after the United Nations sanctions against Libya—should be arbitrated in Montreal. Air France, invoking the U.N. sanctions to justify the breach of the contract, has objected to the arbitration and refused to appoint an arbitrator and has taken action to the Superior Court of Quebec (see P. Mathias, "France to Ask Canada to Stop Helping Libya" *The [Canada] National Post* (16 December 1998) A1).

[613] For example Resolution 841 (imposing sanctions on Haiti) in Paragraph 9 stated that, "[the Security Council] calls upon all states, and all international organizations, to act strictly in accordance with the provisions of the present resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted prior to 23 June 1993."

[614] *Agreement Establishing the Multilateral Trade Organization*, *supra* note 47.

[615] See "Members", *supra* note 90.

most cases, a violation of a state's obligations under the agreement will result from the imposition of sanctions.[616]

The following articles of the GATT[617] are relevant.

(i) Articles I(1), III(4), XI(1), XIII(1): The following provisions impose obligations on member states of the W.T.O. which may stand in opposition to the imposition of economic sanctions: Article I(1) of the GATT,[618] which envisages the most-favored nation principle; Article III (4), [619] which provides for principle of national treatment; Article XI(1),[620] which stipulates that no restriction or prohibition, other than duties or other charges, are permitted against import or export of other members; and, Article XIII(1),[621] which requires that any restriction on imports and exports of one GATT member be extended to all other GATT members. It is evident from these provisions that any sanction imposed by one member-state of the W.T.O. on another member-state would be a violation of international obligations of the imposing state.

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[616] The third paragraph of Article XXI of the GATT has the same effect as aforementioned Article 103 of the *U.N. Charter*. This paragraph is related to collective measures and allows the contracting parties to take action in pursuance of their obligations under the *U.N. Charter*.

[617] *Supra* note 46.

[618] Article I(1) of the GATT reads as follows:

> [w]ith respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

[619] Article III(4) reads as follows:

> [t]he products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use ...

[620] Article XI(1) of the GATT provides that:

> [n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

[621] Article XIII(1) of the GATT stipulates that:

> [n]o prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

On the other hand, certain articles of the Agreement contain exceptions to aforementioned principles.

(ii) Article XI(2): The second paragraph of Article XI provides that certain exceptions to that article are allowed.[622] The many potential reasons for imposing sanctions are not among these exceptions; for instance, restricting trade because of human rights violations or environmental reasons are not included in the list of exceptions.

(iii) Articles XX, XXI: Articles XX and XXI of the GATT, which enumerate the exceptional trade restricting measures, are possible avenues for the justification of economic sanctions.[623]

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[622] The exceptions envisaged in that Article are as follows:

> [t]he provisions of paragraph I of this Article shall not extend to the following:
> (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;
> (b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;
> (c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:
> (i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or
> (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or
> (iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

[623] In the early draft proposals of the GATT these two articles were lumped together in one article (J.H. Jackson, *World Trade and the Law of GATT* (Indianapolis: The Bobbs-merill Co., 1969)).
According to Article XX:

> [s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
> (a) necessary to protect public morals;
> (b) necessary to protect human, animal or plant life or health;
> ...
> (e) relating to the products of prison labour;
> (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
> ...

Article XXI reads as follows:

> [n]othing in this Agreement shall be construed
> (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or,
> (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

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Article XXI of the GATT allows the contracting parties to take any action which they "consider necessary for the protection of their security interests" relating to the traffic of arms, and fissionable materials, as well as actions required in times of war or other emergency situations. This provision is a controversial one. Thus, "states would be reluctant to invoke this provision absent at least a plausible national security risk," and the W.T.O. would be very likely to oppose any effort to read that exception in a broad manner as a justification for unilateral economic sanctions.[624]

Article XX may provide a stronger justification for the application of unilateral sanctions, especially in cases involving human rights and environmental issues. Three exceptions in this article—the public morals, human life and health and prison labour—can be invoked by states to legitimize their non-observance of their treaty obligations. Even though states can use these exceptions to justify their unilateral economic sanctions, a broad interpretation of these provisions is unlikely. The reason is that the W.T.O. dispute settlement system follows the customary rules of interpretation of public international law, which are set out in Articles 31 and 32 of the *Vienna Convention*.[625] A textual interpretation of Articles XX and XXI of the GATT does not allow a broad

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(i) relating to fissionable materials or the materials from which they are derived;
(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

[624] F.J. Garcia, "The Global Market and Human Rights: Trading Away the Human Rights Principle" (1999) 25:1 Brooklyn J. Int'l L 51 at 79. In defending the Helms-Burton Act, Americans invoke the exception of Article XXI of the GATT, they even hold that the very invocation of the GATT's security exception bars the W.T.O. review. But this view is rejected by many (see *e.g.* H.L. Schloemann & S. Ohlhoff, "'Constitutionalization' and Dispute Settlement in the WTO: National Security as an Issue of Competence" (1999) 93:2 A.J.I.L. 424 at 451).

[625] The *Vienna Convention*, *supra* note 104. Article 31 of the *Vienna Convention* states that:

1- A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose.

...

4- A special meaning shall be given to a term if it is established that the parties so intended.

And according to Article 32:

[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation According to Article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

See also Garcia, *ibid.* at 79-80.

interpretation.[626] Furthermore, the history of the drafting of Articles XX and XXI, and *travaux préparatoire* of the GATT demonstrate that the issues that typically arise from the implementation of unilateral economic sanctions are difficult to fit into the aforementioned exceptions; in fact, many delegates at the GATT negotiations were concerned about the danger of abuse of these provisions.[627]

It can be concluded that, under the present multilateral trading system of the W.T.O., the practice of imposing unilateral economic sanctions will be curtailed in the future. The imposition of sanctions by one member state of the W.T.O. will most likely be deemed to be breach of other obligations of the sanctioning state under the W.T.O. system. Even if permitted under the exceptions of Articles XI(2), XX and XXI of the GATT, unilateral economic sanctions should be non-discriminatory.[628]

VI- Politicization, Selectivity and Double Standards

Sanctioning states are not expected to be consistent in their adoption and implementation of *unilateral* sanction programmes.[629] The fact that targets are chosen on an political rather than principled basis is hardly objectionable.[630] Conversely, principled application of sanctions is important in the case of *collective* sanctions. As Former Secretary General of the U.N., Boutros Boutros-Ghali, emphasized in his *Agenda for Peace*, "the principles of the Charter must be applied consistently, not selectively, for if the perception should be of the latter, trust will wane and with it the moral authority

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[626] An example of invoking this article is the United States trade embargo against Nicaragua, in 1985, which was justified under article XXI. A panel was established to investigate the matter, and finally agreed in November 1986 that the United States was within its rights in imposing the trade embargo ("U.S. Embargo on Nicaragua Did Not Violate Obligations Under GATT, Dispute Panel Rules" 3 Int'l Trade Rep. (BNA) No. 45 at 1368-69 (Nov. 12, 1986) cited in R. Sutherland Whitt, "The Politics of Procedure: An Examination of the GATT Dispute Settlement Panel and the Article XXI Defence in the Context of the U.S. Embargo of Nicaragua" (1987) 19 L. & Pol'y Int'l Bus. 603 at 604.

[627] See Jackson, *supra* note 623 at 741-752.

[628] According to Article XX, exceptions should, "not [be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail."

[629] That is why unilateral sanctions can be imposed for wider range of reasons. For example, recently, the United States was considering imposing sanctions on China because of the possible sale of M-11ballistic missiles to Pakistan. Sanctions would have banned the sale to Chinese agencies of high technology equipment that could be used for the development of missiles (See "US considering sanctions on China" online: BBC <http://news2.thls.bbc.co.uk/hi/english/world/asia-pacific/newsid_447000/447635.stm> (14 September 1999)).

[630] "The Collective Enforcement", *supra* note 403 at 62; Unless—as mentioned under last section—if sanctions are imposed under exception of Article XX of the GATT.

which is the greatest and most unique quality of that instrument."[631] In practice, too, Mr. Boutros-Ghali criticized the Security Council for paying more attention to the Yugoslavia case, when a human tragedy was occurring in Somalia.[632]

As this problem is, in part, related to the question of the legitimacy of the actions of the Security Council, which was addressed in section II in this chapter,[633] the previous argument will not be repeated.

The decision to implement collective sanctions is in the hand of a limited number of countries sitting on the Security Council, and the Security Council has a seemingly unconstrained ability to assess its own jurisdiction. Therefore, there is always a risk that the sanctions may be applied for reasons other than those provided in the *U.N. Charter*. Sanctions may be applied against governments for political reasons. For instance, the human rights abuses in China and the former USSR, as well as the invasion of Afghanistan by the USSR were never sanctioned because the countries in question were permanent members of the Security Council and thus had a veto right.[634]

The other problem, which was briefly mentioned in the discussion of Haiti in chapter 3,[635] is the problem of selectivity or applying double standards. This problem is closely related to the question of whether the application of sanctions is political. In some cases of human rights violation, sanctions are imposed; while, in other cases, human rights violations are ignored. The point raised by many writers is that, in most cases, the concern over the human rights situation of the target states or concerns about international peace is not the main motive for implementing sanctions. Sometimes other factors are considered. The question, then, is how to define the categories of cases which warrant a collective response.[636]

Even though the concern about double standards may have some basis, on the question of the politicization of the Council's decision, it should be noted that the

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[631] *An Agenda for Peace; Preventive Diplomacy, Peacemaking and Peace-keeping, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992*, UN Doc. A/47/277; S/24111(1992) at 23, reprinted in 31 I.L.M. 956 [hereinafter *An Agenda for Peace*].

[632] "The Collective Enforcement", *supra* note 403 at 62.

[633] See Chapter 4:II:B: "Legitimacy of the Council's Actions under Chapter VII", at 88, above.

[634] A. Rosen, "Canada's Use of Economic Sanctions for Political Purposes" (1993) 51 U.T. Fac. L. Rev. 1 at 42.

[635] The case of Haiti was examined at 66, above.

[636] "The Civilian Impact", *supra* note 536 at 277

Security Council is not a judicial body and it is not expected to perform as such. In the words of Kelsen, "[s]eparation of law from politics in the presentation of national or international problems is possible in so far as law in not an end in itself, but, ... a specific social technique for the achievement of ends determined by politics."[637] The realities of international relations inevitably results politicized practices. The fact that, five of the strongest states are accorded a dominant role in the Security Council and are enabled to bind all the other members "on the occurrence of rather vague contingencies that they themselves are authorized to determine," simply reflects reality.[638] Politicization of the Security Council's decisions is inevitable, and can only be redressed by the good faith of the Council in taking its decisions and the political interests of different powers sitting on the Council balancing each other.

VII- Conclusion

Even when the conditions of legality of sanctions are fulfilled, there are still constraints on the use of economic sanctions. The problems which were discussed in this chapter are the major points raised by critics of economic sanctions. Ideally, sanctions should be implemented in such a fashion to avoid the problems delineated below.

As for unilateral economic sanctions, the implementation of sanctions should not amount to use of force, nor should they constitute a threat to international peace. Furthermore, unilateral sanctions should not be applied extraterritorially, affecting third states. The expansion of multilateral trading systems has added another dimension to the use of unilateral sanctions. Embargoes should not be in breach of a state's obligations under the W.T.O. system.

A major problem associated with application of collective sanctions is their human impact, that is violation of international humanitarian law or basic human rights. Collective sanctions are also subject to criticism due to general concerns over the composition of the Security Council and the way in which it exercises its powers.

Some of the constraints on the use of economic sanctions are, indeed, additional conditions for legality of sanctions. However, some constraints can be overcome by modifying the practice regarding imposition of sanctions. The next chapter will address the proposals for the ideal application of economic sanctions.

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[637] *The Law of the United Nations, supra* note 239 at xiii.
[638] Reisman, *supra* note 451 at 83.

CHAPTER 5- PROPOSALS

Although, from classical legal perspective, the implementation of sanctions—subject to observance of the conditions examined in chapter 2—can very well be justified, as shown in chapter 4, the practice of the implementation of sanctions can be modified in such a way as to avoid the undesired consequences of sanctions and render them more efficient and legitimate.

Before drawing some general conclusions regarding sanctions, proposals for the modification and refinement of sanctions practices—primarily in the context of the U.N. collective sanctions—will be examined. In presenting these proposals, the following must be taken into account: the consequences and objective of the implementation of economic sanctions; developments of international law in the past decades; the past practice regarding the imposition of sanctions; and, the reaction of international public opinion to different cases.

I- Proposals for Ameliorating the Legitimacy of the Collective Authority of the Security Council and its Decisions

Criticism of the legitimacy of the Security Council can be overcome by reform of the Council, with the view of rendering decisions of the Council more legitimate and acceptable. While reform proposals will not have a *direct* effect on the practice of the Council regarding economic sanctions, they will have an impact on decisions-making and enforcement actions of the Security Council in general.

The question of reform of the Council is, at base, a question about the appropriate balance between "legitimacy" and "effectiveness:" "Just as it seems wrong to gain effectiveness at too great expense to legitimacy, so does it not make sense to increase legitimacy at the expense of a significant loss of effectiveness."[639] As Reisman points out, realistically, it is impossible to satisfy all of the members of the General Assembly, since, "[s]ecurity, in the final analysis is not a verbal exercise but the exercise of power in defense of public order. Without power, security is a word."[640] In dealing with proposals for reform in the Security Council, "the intellectual task will be to see to what extent

[639] Caron, *supra* note 444 at 567.
[640] *Supra* note 451 at 97.

responsible participation and constitutional control can be made compatible with effective security."[641]

A- Reform of the Composition of the Security Council

Many feasible proposals for the reform of the Council aim at changing the composition of the Security Council. Most of the proposals in this regard seek to increase the strength of the non-Western members of the Council. Since 1979, India, supported by a number of other, mainly developing states, have been calling for "equitable representation on and increase in the membership of the Security Council."[642] However, due to opposition of the permanent members of the Security Council, except China, the matter lay dormant until 1991. In 1991, and in 1992—in the first meeting of the Security Council at the level of heads of states—the issue was revived. Boutros-Ghali's *An Agenda for Peace*, and the summit meeting of the Movement Non-Aligned Countries also recognized the need to restructure the Security Council. Finally, the General Assembly, on December 11, 1992, adopted Resolution 4762, entitled *Question of equitable representation on and increase in the membership of the Security Council.*[643] In this resolution, the Member States were invited to submit written comments on possible ways in which to review membership of the Security Council.[644] As a result of these activities, the Assembly decided "to establish an Open-ended Working Group to consider all aspects of the question of an increase in the membership of the Security Council and other matters related to the Council."[645]

Several proposals have been submitted. Each presents a different method for reconstructing the Security Council.[646] Germany and Japan, and regional powers such as India, Poland, Mexico, Brazil, Canada, Indonesia and Egypt are named in the proposals of

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[641] *Ibid.* at 98.

[642] Fassbender, *supra* note 454 at 221; other proposals in form of draft resolutions were submitted at the same time (*ibid.*).

[643] *Question of equitable representation on and increase in the membership of the Security Council*, GA Res. 47/62, UN GAOR, 47th Sess., Agenda item 40, UN Doc. A/RES/47/62 (1993).

[644] These comments were presented by the Secretary-General in a report dated 20 July 1993 and four addenda to this report: *Question of equitable representation on and increase in the membership of the Security Council: Report of the Secretary-General*, UN GAOR, 48th Sess., Agenda Item 33, UN. Doc. A/48/264 (20 July 1993) and Add.1 (26 July 1993), Add.2 (27 July 1993) and Add.2/Corr.1, Add.3 and 4 (28 September 1993).

[645] Resolution 48/26 of 3 December 1994 adopted consensualy (Draft resolution A/48/L.28).

[646] There are numerous proposals that cannot be discussed here; for details of the current debate on reform of the Security Council and different proposals see Fassbender, *supra* note 454 at 221-263.

different countries and interest groups as countries which should have some power over decision making. Some proposals support an increase in both permanent and nonpermanent membership, while others support an increase in the nonpermanent membership only, and still others support the creation of new categories or types of council membership. Since most of the proposals to increase the membership include adding particular states or groups of states to the Council, it is difficult to see how this increased membership of the Council will result in increasing the perception of legitimacy.[647]

Furthermore, the experience of the Council of the League of Nations causes some uncertainty and concern as to whether an increase in membership of the Security Council is desirable. In the case of the League, even though the Council was more representative, it lacked effectiveness as a political instrument. In the words of Carr, "reality was sacrificed to an abstract principle."[648] Thus, apprehension exists today that an enlarged Security Council will have more difficulty making decisions. On this matter, Caron, after contemplating the possibility that concerns about effectiveness are overstated, notes that, "at some point an increase in the size of the Council would inevitably reduce its effectiveness." He concludes that, "thus, the question becomes the point at which this limit is reached."[649] He also emphasizes that the call for increased membership of the Council, in part, comes from countries that seek the status of membership as opposed to an effective Council. Taking these considerations into account, he then calls for "adding members as appropriate to solidify [the relationship of the Council to the Assembly] without also weakening either the effectiveness or the legitimacy of the Council."[650]

In order to avoid the complications of amending the *U.N. Charter* and adding new members to the Security Council, the demands of states seeking membership in the Security Council can be satisfied through establishing informal mechanisms for their involvement in the Security Council activities. In fact, there is precedent for this. In the past, the Security Council has created informal mechanisms which do not require Charter

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[647] Caron, *supra* note 444 at 573.
[648] Carr, *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations* (London: Macmillan, 1946) at 20.
[649] *Supra* note 444 at 574 [footnote omitted].
[650] *Ibid.*

amendments to satisfy demands for fundamental change.[651] Other ways of satisfying the need for change include: offering promise of increased consultations with regional powers, and placing some regional powers or representatives of certain groups of states on special Council committees on different issues.[652]

B- Reform of the Veto

In practical terms, one cannot expect the veto to be eliminated completely from the decision-making process of the Security Council. Possession of the veto by five permanent members of the Security Council is rooted in the "confrontation between utopia and reality, morality and power"[653] and was selected from a range of possibilities considered by the drafters of the *U.N. Charter*. These options included the inclusion of different majorities of permanent and nonpermanent members' votes for decision-making of the Security Council. In any event, the present procedure was the one chosen. This was the result of prevalence of the *realist* view of international relations over the *internationalist* one, and it is very unlikely and unrealistic to imagine that the permanent members will give up their privileged position in the U.N. Each permanent member has its interest to protect. The U.S. and Russia have concerns about shielding their allies such as Israel and Serbia. Likewise, China is not inclined to entertain any proposal for the reform of the veto because of its internal problems.

This present situation is summarized in the *Conference room paper by the Bureau of the Working Group* in May 1997 in the following terms:

> [t]he question of the veto is closely linked to an increase in the number of permanent members. The view held by an overwhelming majority is that the veto is anachronistic and undemocratic and should be eliminated in a modernized United Nations. The veto should not perpetuate differences and discrimination among members of the Security Council on the one hand or between present and proposed new permanent members on the other. This view has been strongly underlined by the membership. However, the permanent five have indicated that they will not accept or ratify any Charter amendments which aim at abolishing or limiting the veto.[654]

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[651] Caron states that the budgetary process of the United Nations is an example of such informal process. Even thought according to Article 17(1) of the *U.N. Charter* the budget shall be approved by the General Assembly by a two-thirds majority vote, due to the U.S. demands, the informal operational budgetary process is now one of consensus (*ibid.*).

[652] *Ibid.*

[653] *Ibid.* at 567 [footnote omitted].

[654] *Conference room paper by the Bureau of the Working Group*, UN Doc. A/AC.247/1997/CRP.8, at para 1.

It is still the place of the academy to prepare for the possibility—no matter how remote it may be—of future modification or elimination of the veto. If this occurs, the problem will then be which alternate system will replace the present system. No doubt, deciding this will be a very complicated task.[655]

One proposal calls for progressive and gradual limitations on the use of the veto, the goal being, its eventual elimination. The Movement of Non-Aligned Countries has proposed that the right to the veto should be confined to decisions made under Chapter VII of the *U.N. Charter*.

Other proposals call for the elimination of the veto for questions regarding the following issues: admission of new members; the sending of investigative missions by the Council according to Chapter VI; the nomination of the Secretary-General; humanitarian law; disputes to which a permanent member is party, provisional measures provided for by Article 40, as well as decisions taken according to Article 50 of the *U.N. Charter*; preventive diplomacy measures, including mediation efforts; referral of issues to the I.C.J.; measures confined to the gathering of information and ascertaining facts; the dispatch of the U.N. observers to observe and report to the Security Council; and, decisions entrusting the Secretary-General with certain functions in dispute settlement.

Expanding the scope of procedural matters to which the veto, according to Article 27(2), does not apply is another proposal. This solution avoids the problem of amending the *U.N. Charter* and could be achieved through revisions to the *Provisional Rules of Procedure of the Security Council*.[656]

Another proposal aims at forbidding a single permanent member from exercising its veto. Accordingly, for a veto to become effective it would have to be exercised by at least two permanent members.

It is also proposed that new permanent members of the Security Council should not be awarded the right of the veto so that an inherently undemocratic privilege will not

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[655] The following proposals are summarized from Fassbender, *supra* note 454 at 263-275. See also S.D. Bailey, *The Procedure of the UN Security Council* (Oxford: Clarendon Press, 1975) at 167-171.

[656] *Provisional Rules of Procedure of the Security Council*, UN Doc. S/96/Rev.7 (adopted by the Security Council at its 1st meeting and amended at its 31st, 1st, 42nd, 44th and 48th meetings, on 9 April, 16 and 17 May, 6 and 24 June 1946; 138th and 222nd meetings, on 4 June and 9 December 1947; 468th meeting on 28 February 1950, 1463 meeting on 24 January 1969, 1761st meeting on 17 January 1974, and 2410th meeting on 21 December 1982).

be strengthened. Conversely, some have argued in favor of giving new permanent members the veto.

Reaching an agreement over any new composition and voting procedure for the Council will be very difficult and positions on concrete proposals have still not been reconciled. As a consequence, the efforts for conferring the Security Council with more legitimacy may have to focus on other proposals.

C- Termination of Sanctions: Solving the Problem of the Reverse Veto

In so far as the problem of termination of sanctions relates to the ambiguity of the objectives of sanctions, this problem can be solved by "defin[ing] an objective criteria for determining that their purpose has been achieved."[657]

It is submitted that solving the problem of the reverse veto in the Security Council, contrary to reform of the veto in general, does not require Charter amendment.[658] The easiest solution, of course, is to address the problem at the time that resolutions under Chapter VII of the *U.N. Charter* are passed. This requires incorporating provisions regarding different voting procedures for termination of Chapter VII actions in the relevant resolutions. There is precedent supporting this approach. This is what happened in the case of the Compensation Commission established following the Gulf War according to which a Governing Council composed of members of the Security Council was in charge of making decisions regarding the Commission, and the Governing Council did not have the right to veto the Commission's decision.[659] Caron notes that, in drafting modified voting clauses to apply the above-mentioned proposal, a double veto situation should be avoided: "[t]here should be no need to discuss whether the second resolution modifies the first or whether it creates new obligations, a categorization issue to which the veto might apply."[660] He also proposes that, "the number of affirmative votes to terminate a resolution should be high so as to prevent political maneuvering by the state at which the resolution is directed."[661] Such a solution may be appealing to permanent members because it shields them from abusive use of the veto by other permanent

[657] *Supplement to An Agenda for Peace, supra* note 461, para. 68.
[658] Caron, *supra* note 444 at 584.
[659] SC Res. 692, 20 May 1991, UN Doc. S/RES/692 in (1991) 30 Y.B.U.N. 864.
[660] *Supra* note 444 at 585.
[661] *Ibid.* at 586.

members. Furthermore, modified voting clauses are generally desirable because they "increase the perceived legitimacy of decision making generally by encouraging the maintenance of consensus." They are also desirable in the case of economic sanctions, because, "[they] enable the state targeted by the sanctions to act with a view of ending them."[662]

Another proposed solution is incorporation of "sunset provisions" in Chapter VII resolutions, similar to those of peacekeeping resolutions. After the lapse of a certain time, the sanctions or the Security Council's actions would terminate automatically and renewing the actions would require another resolution. This solution, it is argued, is consistent with the spirit of the *U.N. Charter* and the principle of good faith.[663]

D- Establishing a Chapter VII Consultation Committee

Reisman's proposal addresses the problem caused by the "absence of an appropriate informational loop from Council to Assembly." He suggests that a "Chapter VII Consultation Committee [composed of] twenty-one members of the Assembly, representing a range of regions and interests, to be selected annually by the Assembly" be formed by the Security Council.[664] In cases that require a decision under Chapter VII of the *U.N. Charter*, the Security Council would notify the committee, and the President of the Council and the Secretary-General would meet the committee to exchange views and information. According to Reisman, in this fashion "the Council would always be apprised of representative Assembly views and the Assembly, for its part, would have the full benefit of the Council's perspective."[665] In the present system, the nonpermanent members are not "charged with maintaining an open line between the Council and the Assembly." Applying this proposal, he concludes, will fill this gap.[666]

Other proposals to the same effect—"open[ing] up Council proceedings to the General Assembly and thus increas[ing] the sense of participatory governance"[667]—

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[662] *Ibid.* at 587; the case of Iraq may be a good example. Because if the target states feel that no matter what they do the sanctions will remain in place due to the veto of a few members of the Security Council they will see no point in trying to comply with the Security Council resolutions.
[663] *Ibid.* at 584.
[664] *Supra* note 451 at 99.
[665] *Ibid.*; Reisman also points out the importance of consultation in international law as a practice that does not give a veto power to the party consulted, but at the same time, is more than mere notification.
[666] *Ibid.*
[667] Caron, *supra* note 444 at 575.

include, the Assembly's acquisition of power to evaluate and criticize the efforts of the Security Council to maintain international peace and security, and giving the Secretary-General the authorization to notify the Assembly of disputes and situations being dealt with by the Security Council.[668]

Regardless of which of the aforementioned proposals is adopted, the issue remains the same. In the words of Lori Damrosch, "the Security Council must be perceived as acting on a principled basis in order to continue elicit compliance with its decisions and support from states whose interests do not coincide with those of the permanent members."[669]

E- Limitations on the Power of the Council: Supervisory Control over Council's Actions

In the last chapter, it was determined that the I.C.J. has no supervisory control over the decisions of the Security Council. Nonetheless, the academy may explore possible ways in which such a supervisory role for the I.C.J. may *evolve*.[670] In fact, in the *Lockerbie Case* the Court did not overrule the possibility of pronouncing, in the future, its view on the decisions of the Security Council.

The former President of the I.C.J., Mohammed Bedjaoui, argues that even though no supervision of legality was introduced under the San Francisco system,

> [n]ow that the United Nations has come of age, it is unthinkable that the system should not be perfected by introducing that supervision of legality, the principle advisability of which was admitted by the San Francisco Conference, though the Conference left for future decision the methods and procedures by which it might be achieved.[671]

Bedjaoui also finds it

> increasingly inadmissible that international political organs should take liberties with the Charter or adopt a relaxed attitude towards international law when it is they, surely, even more than States, that have been given the duty of fortifying international law's credibility and reliability.[672]

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[668] *Ibid.*

[669] "The Collective Enforcement", *supra* note 403 at 62.

[670] Possible exercise of supervisory power by the I.C.J. in the *Lockerbie Case* will be an indirect control, based on the *Montreal Convention* and not on the *U.N. Charter*. It is suggested that if there are indirect ways for the Court to exercise a judicial control on the Security Council's actions, there can be a direct control to avoid the problem of haphazard judicial control of some actions and not others (see Bothe, *supra* note 501 at 80).

[671] *The New World Order and the Security Council*, *supra* note 494 at 129.

[672] *Ibid.* at 130.

One can suggest, by adopting a *de lege ferenda* approach, different ways in which judicial control by the I.C.J. or a political control by the General Assembly may develop. Similar attempts have been made by, *inter alia*, the American Society of International Law, the International Law Association, Grotius Society, and Institut de droit international.[673] In 1950, a committee set up by the American Society of International Law, proposed that the International Court of Justice, in the framework of its advisory function, consider the cases where one or more member state challenge the U.N. competence under the *U.N. Charter* in a given situation.[674] The International Law Association, on the other hand, in its 47th Conference in Dubrovnick, proposed an amendment to Article 96 of the *U.N. Charter*, according to which it would be the duty of the political organs of the U.N. to request an advisory opinion of the Court on any situation in which a member state alleged that an organ had committed an excess of its powers under the *U.N. Charter*.[675] Professor André Gros, was entrusted by the Grotius Society, in 1950, to report on "the Problem of Redress Against the Decisions of International Organization." He suggested that in response to the need for judicial redress for states against *ultra vires* decisions of international organizations, the Court should have jurisdiction to adjudicate. The remedy before the Court would be directed against the decision itself and not against the organizations, and the action thus conceived would be deemed to have arisen out of a dispute between the applicant member state and one of the member states having voted for the decision impugned. The Grotius Society did not endorse the suggestion of its rapporteur, because it may result in too many legal actions against political organs.[676] Finally, the *Institut de droit international*, in its Amsterdam

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[673] Bedjaoui has mentioned these efforts, and the related texts can be found in an annex to his book. See *ibid* at 55-61 and annexed documents.

[674] J.P. Chamberlain, L.B. Sohn, & L.H. Woolsey, "Report of Special Committee on Reference to the International Court of Justice of Questions of United Nations Competence" (44th Annual Meeting of the American Society of International Law, Washington, D.C., 27-29 April 1950) (1950) Am. Soc. Int'l L. Proc. 256 at 256-269.

[675] Schwarzenberger, G., "Second Report on the Review of the Charter of the United Nations" (Forty-Seventh Conference of the International Law Association, Dubrovnik, 28 August 1956) (1956) Rep. Int'l L. Assoc. 109 at 109-120.

[676] A. Gros, "The Problem of Redress against the Decisions of International Organizations" (Proceedings of the International Law Conference, Second Session, Middle Temple Hall, London, 28 October 1950) (1951) 36 Grot. Soc. 30 at 30-31.

Session, 1957, took up the question. The *Institut* acknowledged the merits of judicial supervision of international political organs.[677]

The question relates to the powers of the Security Council. It is subject to the same problems that surround the question of a reform of the veto. Realization of any such proposal cannot be expected in the near future. For reasons of brevity, I will not enter any further into that discussion on this subject.[678]

Due to the seemingly insurmountable differences of opinion regarding the reform of the Security Council and judicial control over the Council's actions, it is more realistic to focus on other proposals for improving the practice of imposition of economic sanctions.

II- Applying International Humanitarian Law Standards to Sanctions

As explained in chapter 4, several commentators have argued that the standards of international humanitarian law should be applied when implementing economic sanctions.[679] If principles of international humanitarian law are "an established and accepted means of evaluating the use of one instrument of statecraft that can cause great pain, suffering and physical harm, then they might well be appropriate in evaluating another instrument that can produce similar effects."[680] Therefore, sanctions should be necessary, proportionate and maximize discrimination[681] between combatants and non-combatants.[682]

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[677] M.W. Wengler, "Recours judiciare à instituer contre les décisions d'organes internationaux" (La quarante-huitième session de l'Institut de Droit International, 24 September 1957) (1957) 47:2 Ann. inst. dr. int. 274 at 275.

[678] See generally "Du contrôle de légalité" *supra* note 475 at 93-107.

[679] According to Pictet, "the fundamental principle of humanitarian law is the result of a compromise between opposing concepts: humanity and necessity" (J. Pictet, *Humanitarian Law and the Protection of War Victims* (Leyden: A. W. Sijthoff, 1975) at 28). This fundamental principle can very well be applied to economic sanctions.

[680] A.C. Pierce, "Just War Principle and Economic Sanctions" (1996) 10 Ethics & Int'l Affairs 99 at 100. And in words of Pictet, "[t]he belief is gaining ground that it is the functions of international law to ensure minimum safeguards and humane treatment for all, whether in time of peace or in time of war, whether the individual is in conflict with a foreign nation or with his own community" (Pictet, *ibid.* at 31).

[681] In terms of international humanitarian law, necessity and proportionality are principles of *jus ad belum*. "The aim of *jus ad belum* is to avert and restrain resort to armed force in the conduct of international relations." Discrimination between combatants and non-combatants is a principle of *jus in bello* which "is vested with the secondary, but vital, office of mitigating the impact and consequences of those armed conflicts which occur dispute the *jus ad bellum*" (McCoubrey, *supra* note 556 at 1-2).

[682] Reisman & Stevick, *supra* note 304 at 128-140.

Applying international humanitarian law standards to the enforcement actions of the Council also poses certain limits on the powers of the Security Council.

A- Necessity and Proportionality

The concept of necessity deals with the following question: "how much, if any, collateral damage is permissible in a particular case?"[683] Necessity has been defined as the minimum collateral damages necessary to achieve the objective of the action. "Yet" as Reisman and Stevick point out," the concept of necessity must be elastic enough to allow for substantial collateral damages when the dangers to public order warrant it."[684] Reisman and Stevick suggest that the Natural Law criteria of necessity and proportionality should be applied when implementing economic sanctions: "the tolerance for lawful violence, with the corresponding level of collateral damage that will ensue, varies in part, according to the degree of injury that is posed to public order and the degree of irreparability of injuries if they occur."[685]

Accordingly, whatever the instrument for enforcement measures (military, economic or propagandic), the resulting collateral damages should be assessed through "comparative projections" of the costs to non-combatants and non-responsible parties.[686]

The result of the principle of necessity is that, in dealing with a situation of potential implementation of economic sanctions, alternative strategies should be evaluated. The instrument which accomplishes the necessary objective with the least potential harm should be preferred.[687]

The principle of proportionality adds another condition, that of necessity. This principle requires that a "sanction programme cannot exceed the somewhat broadly construed bounds of proportionality."[688] In other words, the damage to be inflicted and the costs incurred must be proportionate to the good expected to result from the action.[689]

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[683] *Ibid.* at 128.
[684] *Ibid.*
[685] *Ibid.* at 129; as an example they compare the cases of sanctions against Saddam Hussein and Fidel Castro and conclude that a higher level of collateral damage should be legally tolerable for Sadamm than for Castro.
[686] See *ibid.* at 130; In addition to that, the implications for the environment should also be taken into account.
[687] *Ibid.* at 130.
[688] *Ibid.* at 131.
[689] Pierce, *supra* note 680 at 105.

Proportionality as a condition for unilateral sanctions is recognized in international law.[690] Extending this condition to collective sanctions is possible either through analogy with unilateral sanctions, or by applying principles of international humanitarian law.

It is, however, very difficult to measure the intangible goals of sanctions against, "tangibles like hunger, illness, and other physical deprivation."[691] It should be noted that this problem does not only arise in association with economic sanctions. The problem arises whenever the proportionality criterion is applied to a state's action, including the use of force.[692]

B- Discrimination between Combatants and Non-Combatants

Since economic sanctions can, in some cases, be more destructive than military instruments, it is only logical and in line with "the fundamental goals of international law that are expressed in the prescribed law of armed conflict" to implement sanctions in such a way that they will have the least effect on civil population.[693]

It is, thus, preferable to implement sanctions in such a manner as to deprive the target state of a war arsenal, to change the political programme, or to target those who can influence the policies of the target state. Furthermore, "more collateral damage may be permitted when the target is democratic, for more adults may be deemed to support and

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[690] The question of proportionality was examined at 25, above.

[691] Pierce, *supra* note 680 at 106. However, de Hoogh claims that

> [t]o the extent that that it concerns itself with the enforcement of prohibitions of the use of force, slavery, genocide and racial discrimination, denial of self-determination, breaches of basic human rights, the criteria for judging proportionality between wrongful acts and responses thereto seem to provide more than enough leeway to justify even the imposition on a State of a complete trade embargo (de Hoogh, *supra* note 143 at 268).

[692] According to Pierce:

> [t]he sanctions case poses no special conceptual problems in applying proportionality criterion, which already incorporates many kinds of human suffering to be inflicted and many kinds of human values to be protected and advanced. Thus severe hunger, illness, and other forms of deprivation found in cases of sanctions are included in the traditional concept, which need no basic modification here (Pierce, *ibid*).

[693] See Reisman & Stevick, *supra* note 304 at 131. In terms of international humanitarian law means of warfare should discriminate between combatants and non-combatants. That leads, then, to the problem of definition of "combatants" and "non-combatants." For the purposes of this thesis I do not need to enter into those detailed technical discussions (See generally R.R. Baxter, "The Privy Council on the Qualifications of Belligerents" (1969) 63 A.J.I.L. 290; B. Brungs, "The Distinction between Combatants and Non-Combatants" (1964) Military Law Review 76; A.M. De Zayas, "Combatants" in R. Bernhardt, ed., *Encyclopedia of Public International Law*, vol. 3 (Amsterdam: North-Holland Publishing Co., 1982) 152).

be implicated in the comportment that is the target of international condemnation and sanction."[694]

General embargoes can be highly destructive and therefore they should not be implemented. According to Reisman and Stevick, neither the Security Council nor the Council of the League of Nations has ever studied the collateral damages likely to be caused by economic sanctions before imposing such sanctions.[695] It is, thus, proposed that every implementation of economic sanctions should be preceded by a preliminary study of the impact the sanctions will have on different sections of the economy and the civil population of the target state.

Of course, due to the nature of economic activities and the relation of different sectors of the economy to each other, absolute precision in using the economic weapon is impossible. However, some techniques should be developed to reduce the harm:

> A policy-effective sanctions programme is one that accomplishes the objective of changing an external or internal policy while minimizing collateral damage. A policy-effective programme minimizes collateral damage by reducing the duration of economic suffering, concentrating harm on those who have material influence in policy-making, and targeting resources that are not essential for civilian survival or bodily integrity but whose neutralization is likely to lead to desirable adjustments in the target's policies.[696]

Policy-effectiveness or, in terms of international humanitarian law, "probability of success" cannot be easily estimated, but past experiences and techniques of contemporary social inquiry may provide important insights into prospective effectiveness.[697] In order to increase the probability of success of the sanctions programmes, different economic and political factors should be taken into account. Economic factors include: the nature of commercial relations between the sanctioner and the target state and the economic structure of the target state. Another important political factor must be taken into account: the target state must be given the room to change its policy without enduring a "critical value loss." In other words, the target state must be allowed to save face.[698] This goal can be achieved, in some circumstances, by proposing a package deal, in which there appears to be concessions on both sides.

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[694] Reisman & Stevick, *supra* note 304 at 132.
[695] *Ibid.*
[696] *Ibid.* at 133.
[697] See Pierce, *supra* note 680 at 108; and Reisman & Stevick, *ibid.*
[698] Reisman & Stevick, *ibid.* at 136.

With an effective application of aforementioned humanitarian norms and policy-effectiveness techniques, economic sanctions programmes will be less likely to cause controversy.

C- Taking the Long Term Effect of Sanctions into Account: Applying Article 55 of the *U.N. Charter*

Article 55 of the *U.N. Charter* should also be considered in application of economic sanctions. Because—even though the article is not *directly* relevant—so doing is in line with humanitarian concerns.[699]

Article 55, the opening article of the chapter on international economic and social co-operation, states that, the U.N. shall promote, *inter alia*, "higher standards of living, conditions of economic and social progress and development, [and] observance of human rights."[700] This article, "delineates elementary standards and the United Nations should take them into consideration before applying sanctions ... The organization would have to first assess the socio-economic status of the target and determine what type of sanctions would cause the least damage to the target's development."[701]

The Committee on Economic, Social and Cultural Rights of the Economic and Social Council of the U.N. has also taken note of this problem:

> whatever the circumstances, [economic sanctions] should always take full account of the provisions of the international Covenant on Economic, Social and Cultural Rights. The Committee does not in any way call into question the necessity for the imposition of sanctions in appropriate cases in accordance with Chapter VII of the Charter of the United Nations or other applicable international law. But those provisions of the Charter that relate to human rights (Articles 1, 55 and 56) must still be considered to be fully applicable in such case.[702]

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[699] Swindells, *supra* note 548 at 1955.

[700] Article 55 of the *U.N. Charter* reads as follows:

> [w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations 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 co-operation; and
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

[701] Swindells, *supra* note 548 at 1955.

[702] *General Comment No. 8 (1997): The relationship between economic sanctions and respect for economic, social and cultural rights*, *supra* note 552 at 119.

Some of the proposals submitted for effective assessment of sanctions by the U.N. bodies have addressed the issue of application of Article 55 to economic sanctions. They will be discussed in the following section.

Creating guidelines for imposition of economic sanctions and further institutionalizing the practice of implementation of sanctions will also ameliorate the situation.

III- Institutionalizing Sanctions for Breaches of the *Erga Omnes* Obligations of States

In chapter 2 of this thesis, I argued that in both cases of unilateral and collective sanctions, the breach of an *erga omnes* obligation by a state can be a legal justification for the implementation of sanctions by other state(s) against the violator. In this section, I will examine different proposals for the imposition of sanctions in the cases of breach of *erga omnes* obligations.

A- Proposal for a U.N. Sanctions Council

I have already argued for the collective use of economic sanctions in the case of violations of *erga onmes* obligations and breaches of *jus cogens* norms. It is contended that, in order for economic sanctions to be regarded as legitimate in these cases, "an international representative body must have pronounced authoritatively on the illegal acts which originally provoked them."[703] The same goes for unilateral economic sanctions in cases of breaches of *erga omnes* obligations. The U.N. may be a desirable forum for orchestrating international reactions against breaches of *erga omnes* obligations.

But, at the same time, the *U.N. Charter*, drafted more than half a century ago, does not reflect the realities of contemporary international law. The *U.N. Charter*'s mechanisms are inadequate for the imposition of sanctions in cases of *erga omnes* obligations. An eventual revision of the *U.N. Charter* should consider the question of enforcing *erga omnes* obligations, and institutionalize the use of sanctions in such cases.

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[703] Cassese, *supra* note 134 at 244. According to Cassese, this pronouncement can be in the form of a Security Council resolution designating a situation as a breach of the peace (*e.g.* Resolution 502 (1983) to the effect that Argentina committed a 'breach of the peace' in the case of the Falklands/Malvinas), a decision of the competent body of a regional organization (*e.g.* EEC Council of Ministers decision in the same case) or a resolution adopted by a very large majority in the General Assembly (*e.g.* Resolution ES-6/2 on 14 January 1980 deploring the arm intervention in Afghanistan as contrary to the fundamental principles of respect for sovereignty) (*ibid.*).

One proposal calls for creation of a new U.N. Council on Economic Sanctions.[704] This proposal addresses both the general issue of the legitimacy of economic sanctions, and the specific issue of sanctions imposed in response to breaches of *erga omnes* obligations. According to this proposal, a Council on Economic Sanctions should be created because: first, it would be more inclusive than the Security Council; second, there would be no veto power for five permanent members; and third, "the task of imposing, monitoring, and enforcing sanctions is large and complex enough to justify creating an entity wholly focused on doing these important functions well."[705]

In my view, for practical reasons, this proposal would not attract sufficient support in the event of a reform of the *U.N. Charter*.[706] Ideally, the creation of a separate Council, with a large membership and no veto power, would increase the legitimacy of the decisions of the Council and would encourage participation in sanctions programmes. However, realistically, the adoption of such a proposal would result in inefficiency.[707]

Strengthening the sanctions committee, effective monitoring and constant evaluation of sanctions programmes and their human consequences, and the inclusion of provisions regarding enforcement action in response to breaches of *erga omnes* obligations in the *U.N. Charter* are more feasible solutions. Compiling a list of sanctionable violations, addressing the problem of how sanctions should be terminated, and adopting a uniform policy for the imposition of sanctions are other steps which will lead to the institutionalized implementation of economic sanctions.

Another proposal for institutionalizing the implementation of economic sanctions concentrates on the application of Article 55 of the *U.N. Charter* to economic sanctions. According to this proposal, the Specialized Agencies of the U.N. could "form a mechanism to assess impact of sanctions prior to their implementation, to monitor application of the sanctions, minimize sanctions' collateral damage, and ensure delivery

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[704] See L. Dumas, "A Proposal for a New United Nations Council on Economic Sanctions" in Cortright & Lopez, supra note 22, 187.

[705] *Ibid.* at 191.

[706] Even though Dumas who has presented this proposal describes it as "far from utopian," there is no doubt that reaching an agreement on such a broad range of issues especially involving veto power of the permanent member of the Security Council is impossible and, in fact, it is very utopian!

[707] In the past there has been similar proposals for increasing the efficiency of enforcement of economic sanctions. In the case of sanctions against Rhodesia, the African delegations advanced proposals for the appointment of a Commissioner for United Nations Sanctions against Rhodesia responsible to the Security

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of humanitarian assistance."[708] The role of the Specialized Agencies in assessing the impact of sanctions is especially important because of the Agencies' presence in target states and their links with NGO's experts, and local authorities.[709] To avoid amending the *U.N. Charter*, it is proposed that, "ECOSOC could establish the mechanism to monitor the targeted state by creating a sub-commission pursuant to Article 68 of the *U.N. Charter*."[710] Of course, in that case, constant co-operation between ECOSOC and the Security Council to transmit the result of the assessments would be necessary.

B- Institutionalizing Unilateral Sanctions through the W.T.O.

For unilateral sanctions, a proper procedure for the enforcement of sanctions may reduce the instances of arbitrary application by states. Furthermore, since the application of unilateral economic sanctions increasingly conflicts with states' obligations under the W.T.O., it is submitted that the W.T.O. may be the appropriate framework for implementation of sanctions in response to breaches of *erga omnes* obligations.

In fact, the W.T.O. agreement is already equipped with an article which—if modified—could serve this purpose. Violation of human rights or breaches of environmental law norms may be added to the exceptions mentioned in Article XX of the GATT and similar provisions of other W.T.O. agreements.

Furthermore, there is always the possibility of bringing disputed unilateral sanctions to the Dispute Settlement Body. Thus, there would be a quasi-judicial control over application of sanctions.

A more ambitious proposal is to create a body charged with human rights issues, which would deal with sanctions.[711] It would not be easy to achieve this goal, as the member states and the organization itself are hesitant about mixing political issues and

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Council and with a broad mandate to coordinate all existing actions under the Security Council sanctions resolutions. This proposal failed (see Zacklin, *supra* note 297 at 99).

[708] Swindells, *supra* note 548 at 1955, 1956.

[709] In the case of Haiti agencies and organizations working in Haiti proved to be the most useful in helping to monitor the impact of sanctions on the target's population by the information, constructive comments, relevant input that they provided (*ibid.* at 1956).

[710] Article 68 of the *U.N. Charter* states that "[t]he Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned."

[711] See P. Stirling, "The Use of Trade Sanctions as an Enforcement Mechanism for the Basic Human Rights: a proposal for addition to the World Trade Organization" (1996) 11 Am. U. J. Int'l L. & Pol'y 1.

trade matters. But, at the same time, in the absence of an institutional application of unilateral sanctions, each unilateral application of sanction will result in a new dispute the Dispute Settlement Body.

IV- Protecting Third Parties

As mentioned in the last chapter, third states or individuals often suffer the consequences of economic sanctions. The effects of sanctions on third parties should be considered in the planning stage.

In imposing sanctions, the sanctioning states may violate the rights of their own nationals. Violations of these rights, and the remedies available to individuals in cases of violations are issues related to domestic constitutional law of the states. Suffice it to say that the basic human rights of nationals should be protected in any event.

Proposals to reduce the negative effects of collective sanctions on the economies of third states are relevant to the present discussion. In *An Agenda for Peace*, Butros Boutros-Ghali, in response to the problem of collateral damages of sanctions, proposes that the injured states "should be entitled not only to consult the Security Council but also to have a realistic possibility of having their difficulty addressed."[712] He elaborates on this proposal and recommends that, "the Security Council devise a set of measures involving the international financial institutions and other components of the United Nations system that could be put in place to address the problem."[713] Following up on this idea, in the *Supplement to an Agenda for Peace*, he reports that he sought the opinion of the heads of the international financial institutions.[714] They acknowledge the collateral effects of sanctions, but proposed that injured states should be helped in the framework of, "existing mandates for support of countries facing negative external shocks and consequent balance-of-payment difficulties" and that no special provisions should be made for that purpose.[715] In the *Supplement to An Agenda for Peace*, he proposes a mechanism to, *inter*

[712] *Agenda for Peace*, *supra* note 631 at 75.
[713] *Ibid.*
[714] *Sanctions in Contemporary Perspective*, *supra* note 55 at 80.
[715] *Supplement to An Agenda for Peace*, *supra* note 461, para. 74.

alia, "explore ways of assisting Member States that are suffering collateral damage and to evaluate claims submitted by such States under Article 50."[716]

The fact that the former Secretary-General of the U.N. acknowledges the problem of the effects of sanctions on third parties indicates that the mechanisms now in place are not sufficient. Implementing the proposals of Boutros-Ghali is the least that can be done to address the problem.

V- Continuing Assessment of Sanctions and Procedural reform of Sanctions Committees

Continuing assessment of sanctions is one way to address many of the problems related to economic sanctions: "[e]conomic sanctions programmes must continuously update their information as the programme proceeds to ensure that they are consistent, in their effects with international law."[717]

A letter dated April 13, 1995, from the representatives of the permanent members of the Security Council to the President of the Council (regarding human impact of sanctions) recommended objective assessment, "of the short- and long-term humanitarian consequences of sanctions in the context of the overall sanctions regime, [and in appropriate situations, reviewing] the application of sanctions and tak[ing] appropriate actions." The letter also recommended that due regard be given to the humanitarian situation of the target state, that simple authorization procedures be developed in the case of essential humanitarian supplies, and that, "the effectiveness of the sanctions committees [be improved], by drawing on the experience and the work of different sanctions committees."[718] Similarly, the aforementioned report of the Committee on Economic, Social and Cultural Rights of the Economic and Social Council of the U.N., gives proposals for assessment of sanctions. The Committee has noted proposals such as:

> those calling for the creation of a United Nations mechanism for anticipating and tracking sanctions impacts; the elaboration of a more transparent set of agreed principles and procedures based on respect for human rights; the identification of a wider range of exempt goods and services; the authorization of agreed technical

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[716] *Ibid.*, para. 75. This mechanism would have to be located in the U.N. Secretariat and should be empowered to utilize the expertise available through the U.N. system, in particular that of the Bretton Woods institutions (*ibid.* para. 76).

[717] Reisman & Stevick, *supra* note 304 at 140.

[718] *Letter dated 13 April 1995 from the Permanent Representatives of China, France, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council, supra* note 550 at 2-3.

> agencies to determine exemptions; the creation of a better resourced set of sanctions committees; more precise targeting of the vulnerabilities of those whose behaviour the international community wishes to change and the introduction of greater overall flexibility.[719]

It is also suggested that while the obligations created by the implementation of Chapter VII sanctions are very important and preempt any conflicting statutes or obligations,[720] the sanctions law or sanctions administration and procedural law are among the least developed areas of international law.[721] In line with proposals for institutionalizing sanctions, one proposal is to create a general sanctions committee as a subsidiary organ of the Security Council. This model could be varied by having several such subsidiary bodies, one for substantive political matters, one for purely administrative tasks, and one specialized to address humanitarian exemptions. There should also be more accountability in future sanctions committees. They should be required to submit periodic reports on their work to the Security Council.[722]

VI- Summary

To summarize, the proposals presented in this chapter concentrated on the following: rendering the Security Council's decisions more legitimacy by creating more encompassing consultative bodies and possibly reforming the veto; addressing the problem of reverse veto by incorporating different voting procedures for termination of sanctions, or providing for sunset provisions; applying international humanitarian law standards of necessity, proportionality and discrimination between combatants and non-combatants to economic sanctions; in accordance with Article 55 of the *U.N. Charter*, taking into account the long term effects of sanctions; institutionalizing sanctions for breaches of *erga omnes* obligations through enlarging the exceptions to Article XX of the GATT or creating a special body in the W.T.O.; creating effective mechanisms for protecting third party interests; and finally, creating a United Nations mechanism for anticipating and tracking sanctions impacts and developing the administration and procedural law of sanctions.

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[719] *General Comment No. 8 (1997): The relationship between economic sanctions and respect for economic, social and cultural rights*, *supra* note 552 at 122.
[720] See Article 103 of the *U.N. Charter*, *supra* note 166.
[721] See P. Conlon, "Lessons from Iraq: The Functions of the Iraq Sanctions Committee as a Source of Sanctions Implementation Authority and Practice" Recent Development (1995) 35 Va. J. Int'l L. 633 at 664-5.
[722] *Ibid.* at 666-7.

CONCLUSION

The growth in the use of collective and unilateral sanctions in the post-Cold-War epoch calls for a re-examination of the legal basis and restraints on the implementation of sanctions. This thesis is an attempt to explore, from a legal point of view, the problems and restrictions associated with sanctions, and suggest ways in which sanctions can be rendered more legitimate in terms of international legal requirements.

Unilateral and collective sanctions are based on different legal premises, and thus, their legal bases were studied separately. One of the main propositions of this thesis is that there is a potential new legal basis for both unilateral and collective sanctions.

Due to the developments in international law of the past century and the emergence of *erga omnes* obligations, traditional doctrines are no longer sufficient for justifying enforcement actions—including economic sanctions—taken by states. Even the open-textured quality of Article 39 of the *U.N. Charter* is not a sufficient legal basis. There is a lacuna in the field of enforcement of international law and especially *erga omnes* obligations, and the Security Council has tried to fill that lacuna by using its powers and discretion.

It was argued that, in cases of breaches of *erga omnes* obligations, the Council is expected to intervene. However, in certain cases, it is impossible to justify such sanctions within Chapter VII of the *U.N. Charter*. Yet interventions can be justified under international law. The proper framework and procedure for implementation in these cases has yet to be created.

There is a very important restriction on the use of unilateral sanctions. The advent of the W.T.O. (with its ever-growing membership) signals the establishment of a multilateral trade regime. This situation renders it difficult to implement unilateral sanctions without contravening multilateral obligations. Considering the limitations placed on use of unilateral economic sanctions by provisions of the W.T.O. agreements, the likelihood that unilateral sanctions will be used in the near future is slight.[723]

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[723] See Reisman & Stevick, *supra* note 304 at 95. Even the United States which, traditionally, has frequently been using sanctions as a policy tool seems to have reached the conclusion that priority should be given to collective sanctions in comparison with unilateral sanctions. In April 1999, in the context of a broader attempt at comprehensive sanctions reform, it was announced that the goal is to resort to unilateral

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Notwithstanding this legal limitation, there are other reasons to prefer collective sanctions over unilateral ones. As the world economy has become increasingly interconnected, unilateral economic sanctions are less likely to be successfully implemented.[724] Target states can always satisfy their needs from alternate markets. Furthermore, collective actions are generally cheaper, help neutralize domestic political opposition, offer opportunities to acquire useful political allies, reassure the international community that operations have limited and legitimate goals and reduce the risk of large-scale force being used by rival powers.[725]

As far as collective sanctions are concerned, they are one of the only means of international enforcement; and, in the absence of suitable alternatives, their application is inevitable. The emphasis, thus, should be on refining sanction programmes. The cases of implementation of sanctions in the past are subject to valid criticisms. Even when the classical conditions of legality of sanctions were observed, it was argued that sanctions are still subject to restrictions and their application raised problems related to broader constitutional issues within the U.N. as well as the structure and functioning of the Security Council. Limits should be set on the Security Council's absolute discretion and it should not be conceived to be an agency *legibus solutus*.[726]

Solution to problems related to the structure of the Security Council and the veto and constitutional control lies, in part, in reform proposals; These question are very complicated and subject to political concerns. They relate to a delicate balance between effective security and legitimacy.[727]

In the meantime, there are interim solutions. There is, undoubtedly, room for improving the legitimacy of the Security Council's decision-making procedure. In the absence of agreement on U.N. reforms, heavy emphasis should be put on process, "not because ... justice is merely procedural, but because ... our diverse global community is more likely to find its vision of substantive justice through a process involving debate."[728]

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sanctions only after all other options, including diplomacy and multilateral sanctions have been exhausted ("U.S. Eases Policy on Some Sanctions" *The New York Times* (21 April 1999) A1 & A12).

[724] Dumas, *supra* note 704 at 190.

[725] A. Roberts, "The United Nations and International Security" (1995) 35:2 Survival 3 at 6.

[726] See B. Conforti, "Non-Coercive Sanctions in the United Nations Charter: Some Lessons from the Gulf War" (1991) 2 European J. Int'l L. 110 at 112.

[727] See Reisman, *supra* note 451 at 98.

[728] Caron, *supra* note 444 at 588.

To reduce the effect of the veto, nonpermanent members of the Security Council can at least ask for the inclusion of modified voting clauses or sunset clauses.[729]

It is also suggested that while the obligations created by the implementation of Chapter VII sanctions trump other state's obligations,[730] the sanctions law or sanctions administration and procedural law are among the least developed areas of international law.[731] Establishing a proper mechanism for the implementation and institutionalization of sanctions—especially in cases of implementation in response to breaches of *erga omnes* obligations—will ameliorate the current situation and diminish the criticism of the Security Council actions.[732]

A major concern regarding the implementation of sanctions in the recent years relates to their human impact. Contrary to the traditional view that sanctions are "perceived as non-violent alternative to the use of force," recent cases have proved that, sometimes, "sanctions may have a more devastating impact on the general population than a limited but directed use of force."[733] It was argued that to address this concern sanctions should be subject to the principles of international humanitarian law. Sanctions must be applied more discriminately to hit the intended target.

A rigorous assessment of the collateral damages caused by sanctions is, thus, very important. The assessment of sanctions should be done on a case by case basis taking into account different circumstances. The decision regarding appropriateness of sanctions should be based on an understanding of the environment targeted by sanction, and price of achieving the desired objectives through sanctions. It is even suggested that "sometimes a precise use of the military strategy will more efficiently achieve the international objective and more closely approximate the tests of lawful international coercion than would an undefined economic sanctions programme."[734]

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[729] *Ibid.* at 587

[730] Article 103 of the *U.N. Charter.*

[731] See Conlon, *supra* note 721 at 664-5.

[732] In line with such proposals it is suggested that under Article 55 of the *U.N. Charter*, the U.N. is required to create a sustainable development policy and the sanctions applied under Article 41 of the *U.N. Charter* should not undermine that duty (see Swindells, *supra* note 548 at 1961).

[733] J. Boulden, *The Application of Sanctions under Chapter VII of the United Nations Charter: A Contemporary Assessment* (Canadian Centre for Global Security, 1994).

[734] Reisman & Stevick, *supra* note 304 at 141.

This conclusion has broader repercussions in terms of international law. A few decades ago, Hart claimed that in disputed matters in international law, "often no mention is made of moral right or wrong, good or bad."[735] Conversely, it is evident that there is no room nor tolerance for immoral behaviour today. International law and international public opinion will simply not allow it. The fact that in recent cases, the international community did endeavor to act with wisdom and prudence and to learn from past mistakes render the questions of human impact and moral repercussions of imposing sanctions even more difficult.[736]

Finally, as Damrosch states:

> [s]electivity in the adoption of sanctions may be inevitable for the foreseeable future, as key international actors set the agenda in accordance with their own perceptions of interests and resource constraints ... but over the longer term, as the international community matures, elaboration of normative criteria for the application of sanctions will be a critical step, leading to the eventual goal of treating like cases alike.[737]

The lawyers' ideal of promoting the rule of law in international relations necessitates that a social order in which law is enforced by organized and regularized procedures is put in place.[738] Economic sanctions are one of the only such social orders available in international relations. In installing this system of social order, in the words of Lon Fuller "ends and means cannot be divorced."[739] Proposals in this thesis intended to reinforce that ideal. Of course, the power and politics of present day international relations complicate matters immensely.

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[735] *Supra* note 492 at 228.
[736] "The Civilian Impact" *supra* note 536 at 275.
[737] *Ibid.* at 277.
[738] I.L. Claude, Jr., "Sanctions and Enforcement: An Introduction" in J.M. Paxman & T.G. Boggs, eds., *The United Nations: A Reassessment; Sanctions, Peacekeeping, And Humanitarian Assistance* (Charlottesville: University Press of Virginia, 1973) 21.
[739] L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969) cited in S.J. Toope, "Confronting Indeterminacy: Challenges to International Legal Theory" (XIX[th] Annual Conference of Canadian Council on International Law, Ottawa, 18-20 October 1990) (1990) 19 Can. Council Int'l L. Proc. 209.

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