

**STRENGTHENING THE DESIGN AND IMPLEMENTATION OF ECONOMIC SANCTIONS  
WITHIN THE FRAMEWORK OF INTERNATIONAL HUMAN RIGHTS LAW: A CRITICAL  
APPRAISAL**

**Submitted in partial fulfilment of the requirements of the degree LLM (Human  
Rights and Democratisation in Africa)**

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## **Dedication**

To my husband, Moses- for being the wind beneath my wings

## Acknowledgments

Over and above, utmost thanks to the Lord Jesus Christ for His grace that kept me from giving up so many times. My faith in Him kept me through it all.

I remain forever grateful to my late parents – Zephaniah and Febbie; and though not here to see this work, your trust in my capabilities inspired me greatly each day.

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I accord due appreciation to the Institute for Human Rights, Abo Akademi University for the welcoming and wonderful working environment. I take with me the memories of the beautiful and quiet Turku...and a bigger dream for my own country.

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And of course I thank my dear husband for being there through it all; for his constant encouragement, love and guidance.

## Definition of terms

**Boycott:** measures seeking to refuse imports from a target country.

**Embargo:** trade sanctions aimed at preventing exports to a target country.

**Sanctions:** in the context of this thesis, the term sanction is used to mean ‘economic sanctions.’

**Comprehensive/general sanctions:** the application of the total range of sanction measures against a target country, including trade and financial sanctions as well as the withdrawal of customary trade or financial relations.

**Targeted/smart sanctions:** the selective application of sanction measures with the primary intention of minimizing unintended adverse humanitarian impact on the population by specifically targeting individuals (often those who play a major role in the violations of human rights).\*

**Restrictive measures:** often used interchangeably with economic sanctions. A preferred term of EU imposed sanctions

**Target country/entity:** the country/entity against which sanctions are imposed

**Sender country/imposing state/imposing entity:** the country/state/entity imposing the sanctions

\*Targeted sanctions are not only imposed against human rights violations. However, in the context of this thesis, only those targeted sanctions imposed against human rights violators are examined.

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## CHAPTER ONE

### 1.0 Introduction

Economic sanctions (sanctions) can be defined as ‘coercive economic measures taken against one or more countries to force a change in policies.’<sup>1</sup> They are ‘measures of an economic -as contrasted with diplomatic or military -character taken by states to express disapproval of the acts of the target state or to induce that state to change some policy or practice or even its governmental structure...and are measures taken not for economic gain, and often at commercial sacrifice on the part of the state engaged in a program of denial.’<sup>2</sup> Sanctions serve as ‘reactionary measures’ against a target state/ regime/ other entity that has violated international law or which poses a threat to peace and security.<sup>3</sup> They take a variety of forms, ranging from a mere refusal to renew foreign aid to a total trade embargo.<sup>4</sup> They can also be calibrated to impose unwelcomed costs on a single rogue leader flaunting international norms; or ratcheted up to impose those costs on the elites supporting that leader; or further ratcheted to impose population-wide costs on a recalcitrant society.<sup>5</sup> They are *generally* imposed in two ways; by the United Nations (UN) Security Council<sup>6</sup> and by individual states (mostly the United States of America (US) and countries within the European Union (EU)).<sup>7</sup>

### 1.1 The history of sanctions

#### 1.1.1 Economic sanctions prior to the League of Nations

The best-known historical example of economic sanctions being employed dates back to 432 BC when Pericles decreed that the entry of products from Megara into the markets of Athens be limited in response to Megara’s territorial expansion and its’ kidnapping of three women.<sup>8</sup> However during that period, there was no formalized avenue under which such sanctions were

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<sup>1</sup> D E. Rennack, R Shuey *Economic Sanctions to Achieve U.S. Foreign Policy Goals: Discussion and Guide to Current Law* (1997) available at <http://www.fas.org/man/crs/crs-sanction.htm> (accessed 31 July 2012).

<sup>2</sup> A. F. Lowenfeld *International Economic Law* (2002) 698 as cited in M Abler *Retooling economic sanctions: challenges of legitimacy & efficacy* (2008) available at [http://works.bepress.com/e\\_michael\\_abler/1](http://works.bepress.com/e_michael_abler/1) (accessed 17 August 2012).

<sup>3</sup> Practice Brief *Economic & Financial Sanctions Practice* available at [http://www.erenlaw.com/pdfs/pb\\_economic\\_sanctions-defined.pdf](http://www.erenlaw.com/pdfs/pb_economic_sanctions-defined.pdf) (accessed 31 July 2012).

<sup>4</sup> J D’hollander *Economic sanctions as a means to enforce human rights* (1995) 24.

<sup>5</sup> D Cortright & G Lopez *Introduction: Assessing Smart Sanctions: Lessons from the 1990s* 2, 3 as cited in M Abbler (n 3 above) 6.

<sup>6</sup> Articles 24, 39 and 41 of the United Nations Charter.

<sup>7</sup> B Baek *Economic sanctions against human rights violations* (2008) 21.

<sup>8</sup> B Carter *Economic Sanctions* (2011) available at [http://www.google.fi/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&ved=0CEIQFjAG&url=http%3A%2F%2Fwww.mpepil.com%2Fsample\\_article%3Fid%3D%2Fepil%2Fentries%2Fflaw-9780199231690-e1521%26recno%3D3%26&ei=Xp1IUKCxG6Si4gTUIYH4Aw&usg=AFQjCNGiRkHY\\_GmqUz8DVYFlcxNmQf8P6A&sig2=S8L8WH-YcVSlreMWhKdD1Q](http://www.google.fi/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&ved=0CEIQFjAG&url=http%3A%2F%2Fwww.mpepil.com%2Fsample_article%3Fid%3D%2Fepil%2Fentries%2Fflaw-9780199231690-e1521%26recno%3D3%26&ei=Xp1IUKCxG6Si4gTUIYH4Aw&usg=AFQjCNGiRkHY_GmqUz8DVYFlcxNmQf8P6A&sig2=S8L8WH-YcVSlreMWhKdD1Q) (accessed 4 September 2012).

imposed. Thus, attempts to institutionalize the concept of economic sanctions began in 1899 during the Hague Peace Conference (1899 conference) with another follow-up conference occurring in 1907.<sup>9</sup> The underlying thought behind the institutionalization of economic sanctions was to foster and enforce international peace and security.

The 1899 conference resulted in the adoption of the Convention for the pacific settlement of international disputes which is considered to be the most essential as it forms the basis for establishing alternatives to war in regard to resolving international disputes.<sup>10</sup> Such alternatives to war included the voluntary use of mediation, commissions of inquiry and arbitration.<sup>11</sup> However during the 1907 conference, attempts to require mandatory arbitration of disputes failed but the idea of ensuring enforcement through arbitration was raised and hence, the concept of economic sanctions soon became a welcome development.<sup>12</sup> The conferences thus served as an important precedent for the League of Nations.<sup>13</sup>

### **1.1.2 Economic sanctions during the League of Nations**

The idea of economic sanctions as an alternative to armed force was further institutionalized when the League of Nations was established (soon after World War I) with the primary purpose of preventing another world war. The drafters of the Covenant to the League of Nations considered military and economic measures to be linked and did not originally intend to separate them.<sup>14</sup> The idea of economic weapons replacing the use of military force only emerged gradually.<sup>15</sup> In any case, economic sanctions were codified in the League of Nations Covenant adopted in 1919 as part of the Treaty of Versailles ending World War I.<sup>16</sup>

Nineteen resolutions were adopted the following year as general procedural guidelines for implementing economic sanctions.<sup>17</sup> In addition, under the Covenant of the League of Nations,<sup>18</sup> articles 10 and 16 provided the mechanism by which sanctions were to be implemented. Under article 10, the territorial integrity and political independence of League members were to be respected and article 16 provided that any member of the League who breached its obligation under the Covenant and resorted to war, shall be

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<sup>9</sup> Abler (n 2 above) 14.

<sup>10</sup> M Bedjaoui *International Law: Achievements and Prospects* (1991) 521.

<sup>11</sup> Abler (n 2 above) 18.

<sup>12</sup> S Heselhaus *International law and the use of force* 4.

<sup>13</sup> Abler (n 2 above) 18.

<sup>14</sup> D'hollander (n 4 above) 4.

<sup>15</sup> As above.

<sup>16</sup> Abler (n 2 above) 22.

<sup>17</sup> As above 24.

<sup>18</sup> Available at <http://www.unhcr.org/refworld/publisher,LON,,,3dd8b9854,0.html> (accessed 6 September 2012).

'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.' Article 16 was self-executing such that any member of the League that violated one of its obligations under the Covenant could be subjected to economic sanctions. This 'automatic implementation' of article 16 was not pleasing to many members at the time so the Assembly later agreed that every member could decide for itself whether or not a breach of the Covenant had occurred.<sup>19</sup> This discretionary approach only served to undermine the purpose of article 16. Thus, although article 16 was supposed to be the 'teeth' of the Covenant, the few attempts to enforce this provision resulted in failure as there was little power to implement and enforce sanctions.<sup>20</sup> The League of Nations only successfully wielded the threat of economic sanctions twice in the 1920s to resolve international disputes. In November 1921, the League threatened economic sanctions against Yugoslavia, which eventually withdrew its military invasion in Albania.<sup>21</sup> Similarly, in October 1925, the League successfully settled a border conflict between Greece and Bulgaria through the threat of sanctions.<sup>22</sup>

Actual implementation of sanctions however proved unsuccessful. When Italy invaded Ethiopia in November 1935, a majority of member states imposed economic sanctions under article 16 of the Covenant in order to force Italy's withdrawal from Ethiopia.<sup>23</sup> The sanctions consisted of an arms embargo, restrictions on loans, restrictions on the importation of particular goods from Italy as well as the exportation of goods to Italy and a suspension of all bilateral clearing agreements with Italy.<sup>24</sup> Despite the apparent severity of these measures, and the fact that the aggressor did appear vulnerable, Italy was not deterred in its campaign against Ethiopia.<sup>25</sup> By June 1936, it became apparent that the sanctions would not force Italy to change its policy and as such the sanctions were lifted.<sup>26</sup> That marked the beginning and the end of collective sanctions under the League of Nations.

### 1.1.3 Economic sanctions under the United Nations

Following World War II and the failure of the League of Nations to maintain world peace, the UN was established in 1945. According to article 1 of the UN Charter, the purpose of the UN is to maintain international peace and security. To this end, the UN shall take steps to settle

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<sup>19</sup> D'hollander(n 4 above) .5

<sup>20</sup> As above.

<sup>21</sup> As above.

<sup>22</sup> J Garner *Settlement of the Graeco-Bulgarian Dispute* (1926) 20 *The American Journal of International Law* 337.

<sup>23</sup> C Ristuccia *1935 sanctions against Italy: would coal and crude oil have made a difference?* available at <http://www.nuffield.ox.ac.uk/economics/history/paper14/14paper.pdf> (accessed 6 September 2012).

<sup>24</sup> As above.

<sup>25</sup> J Olson, R Shadle *Historical Dictionary of European Imperialism* (1991) 205.

<sup>26</sup> H. J. Morgenthau *International Affairs: The Resurrection of Neutrality in Europe* (1939) 479.

disputes that might lead to a breach of the peace by (preferably) 'peaceful means.'<sup>27</sup> Taking into account the experience of the League of Nations, more power was bestowed upon an organ of the UN; the Security Council than had been the case with its predecessor (the League's Council). Article 24(1) of the Charter stipulates that the Members confer primary responsibility for the maintenance of peace and security upon the Security Council. The real power of the Security Council in regard to economic sanctions flows from Chapter VII of the UN Charter, which permits it to take legally binding decisions under article 25 directing member states to impose economic sanctions. However, in order for the Security Council to take action under Chapter VII of the UN Charter, the requirements stipulated under article 39 of the UN Charter must be met. Article 39 provides that the Security Council must 'determine the existence of any threat to the peace, breach to the peace, or act of aggression' and, then 'make recommendations, or decide what measures shall be taken in accordance with article 41 and 42, to maintain or restore international peace and security.' Article 41 of Chapter VII (which is crucial in regard to economic sanctions) provides:

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

In order to impose such sanctions, the Security Council must act by a majority vote with no veto from any of the five permanent members i.e. France, China, Russia, United Kingdom (UK) and US. From thereon, economic sanctions have played a dominant role in international relations usually in the form of trade sanctions like embargoes and/or boycotts, and the interruption of financial and investment flows between sender and target countries.<sup>28</sup>

## **1.2 Economic sanctions as a 'human rights enforcement tool'**

Economic sanctions as a coercive means of protecting human rights are frequently used in the modern era of international relations. Before the 20th century, sanctions were imposed to supplement the use of force in war.<sup>29</sup> Even under the Covenant of the League of Nations, there

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<sup>27</sup> J Dugard *International law: a South African perspective* (2011) 474. Also see article 1 (1) of the UN Charter.

<sup>28</sup> Human rights council: nineteenth session agenda items 2 and 3 *Thematic study of the Office of the United Nations High Commissioner for Human Rights on the impact of unilateral coercive measures on the enjoyment of human rights, including recommendations on actions aimed at ending such measures* (2012) available at [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-33\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-33_en.pdf) (accessed 2 September 2012).

<sup>29</sup> M Majlessi *Use of economic sanctions under international law: a contemporary assessment* (1999) 6.

were no indications of sanctions being imposed for the purpose of protecting human rights in target countries.<sup>30</sup> The League of Nations was created so as to foster peace and the term ‘peace’ was understood as avoiding war.<sup>31</sup> Furthermore, the violations of human rights could not have been considered a breach of international law, since basic legal instruments on this matter were only drafted after the Second World War.<sup>32</sup> Yet again, the UN was not originally conceived as a protector of human rights norms and those norms did not traditionally fall under the Security Council's domain.<sup>33</sup> However, the protective mandate of the UN Security Council has slightly evolved in accordance with emerging issues. In modern times, sanctions have been used as measures to uphold standards of behaviour expected by custom or required by law.<sup>34</sup>

### 1.3 Significance of the study

No issue has dominated the use of economic sanctions more than its role in the protection of human rights.<sup>35</sup> The controversy over economic sanctions, however, is not a dispute about the ends sought as it is generally agreed that protecting human rights are worthwhile pursuits. Rather, the disagreement is about whether economic sanctions serve as the appropriate means to achieve such ends.<sup>36</sup> The skepticism over the use of sanctions within the framework of international human rights law rests upon a number of factors. The first is that though economic sanctions are meant to weaken the target regime's coercive capacity in efforts to reduce human rights violations committed by that regime,<sup>37</sup> the prevailing view is that undermining the coercive capacity of the target elites often leads to more economic and political disorder resulting into further human rights violations.<sup>38</sup> Thus economic sanctions are perceived to be generally inappropriate in inducing target countries to comply with the demands of upholding human rights. Secondly, the ethical and moral underpinnings of economic sanctions have been undermined by the horrendous humanitarian consequences in Iraq, Haiti, and Yugoslavia during sanctions imposed in the 1990s.<sup>39</sup> Hence, if sanctions produce the desired behavior

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<sup>30</sup> J Humphrey *The International Law of Human Rights in the Middle Twentieth Century* (1973) 1-2.

<sup>31</sup> D'hollander (n 4 above) 8.

<sup>32</sup> As above.

<sup>33</sup> D'hollander (n 4 above) 13.

<sup>34</sup> As above.

<sup>35</sup> C Drury *Economic sanctions and political repression: assessing the impact of coercive diplomacy on political freedoms* (2009) 393-411.

<sup>36</sup> Thihan Myo Nyun *Feeling good or doing good: inefficacy of the US unilateral sanctions against the military government of Burma/Myanmar* (2008) 455.

<sup>37</sup> Peksen (n 42 above).

<sup>38</sup> As above.

<sup>39</sup> Abler (n 2 above) 8.

modification, they do so at a cost that is often unacceptably high.<sup>40</sup> Thirdly, others are critical of sanctions not so much for their inherent limitations, but because of the selective ways in which they are applied.<sup>41</sup> Often it is not just the degree of reprehensibility of the conduct of a state that makes it a target of either unilateral or multilateral sanctions, but the fact that it is small and weak.<sup>42</sup> Lastly, procedures for imposing sanctions have come under harsh criticism. In the case of unilateral sanctions (imposed by individual states), many states hold the view that based on principles of state equality, an individual state cannot impose sanctions upon another even for purposes of protecting human rights. They therefore insist that the UN Security Council is the only lawful authority to impose sanctions upon states. However, in regard to the UN Security Council, procedures for imposing sanctions have been harshly criticized for not according to principles of due process guaranteed by international human rights law.

Thus, on one hand, economic sanctions are an attractive middle ground between inaction and armed force to maintain international norms of peace and security but on the other hand, they are attacked as ineffective, immoral, unethical, and illegitimate.<sup>43</sup> It seems odd to accuse economic sanctions of both endangering and strengthening international human rights law. And yet this is precisely what scholarship on economic sanctions does. The interplay between economic sanctions vis-à-vis protection of human rights in target countries is often displayed as being fraught with tension. But does this necessarily mean that the two are irreconcilable? This thesis analyzes the existent tensions and proposes possible solutions in a bid to strengthen the role of sanctions imposed against human rights violations within the framework of international human rights law with specific focus on the design and implementation of sanctions. The design of sanctions, in this regard, refers to the procedures implored by the UN Security Council when imposing sanctions against individuals and how the same can be strengthened in accordance with principles of due process. Implementation of sanctions refers to the execution of sanctions and what factors must be taken into account so as to ensure that the sanctions imposed result in the deterrence of human rights violations without causing adverse humanitarian impact on the population.

#### **1.4 Research question and specific objectives**

This thesis aims at strengthening the role of economic sanctions as a coercive measure for protecting human rights in target countries within the framework of international human rights law. It therefore answers the following research question: in what way can the design and

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<sup>40</sup> Addis *Economic Sanctions and the Problem of Evil* (2003) 576.

<sup>41</sup> As above 577.

<sup>42</sup> As above

<sup>43</sup> Abler (n 2 above) 9.

implementation of economic sanctions imposed against human rights violations in target countries be strengthened within the realm of international human rights law?

To this end, the thesis will address the following:

- To examine and discuss the legal framework justifying the imposition of economic sanctions against human rights violations under international law;
- To identify and discuss challenges in the design and implementation of economic sanctions (imposed against human rights violations) within the framework of international human rights law;
- To recommend solutions to identified challenges in the design and implementation of economic sanctions within the framework of international human rights law.

### **1.5 Methodology**

The study is conducted upon desk research which will encompass a critical review of relevant documentation including treaties, resolutions, declarations, national legislation, policies, media reports and scholarly articles. Thus, research information shall be gathered from both primary and secondary sources. Case studies will also be implored where appropriate.

### **1.6 Limitations**

This study only centers upon sanctions that are imposed with an objective of addressing human rights violations in a particular country. In addition, considering its authoritative and prominent role in maintaining international peace and security, the study places much emphasis on sanctions imposed under the UN Security Council. However subtle references, where relevant, is also made to other sanctioning regimes i.e. the EU sanctions, unilateral sanctions etc. The study also deliberately focuses on the design and implementation of sanctions as these pose the most challenges when examined within the lens of international human rights law.

### **1.7 Literature review**

There is a significant amount of literature that tackles the debate on the use of economic sanctions in protecting human rights in target countries. Perksen suggests that economic sanctions only worsen government respect for human rights.<sup>44</sup> He argues that economic sanctions are a detrimental and counterproductive policy tool even when they are imposed

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<sup>44</sup> D Peksen *Better or Worse? The Effect of Economic Sanctions on Human Rights* (2009).59.

with the specific goal of promoting human rights conditions.<sup>45</sup> The underlying logic behind his argument is that foreign economic pressure unintendedly permits the targeted leadership to enhance their coercive capacity and create more opportunities to violate the basic rights of average citizens.<sup>46</sup>

Perksen is supported by Carneiro who argues that distressed leaders often engage in more repression.<sup>47</sup> He contends that among the reasons leaders have to suppress human rights, and to engage in repression, is their own political survival.<sup>48</sup> Thus, when economic sanctions aim at promoting human rights and democracy, they may inadvertently release pressures that increase the frequency of human rights violations.<sup>49</sup>

Adeno points out that 'the relationship between economic effectiveness and political effectiveness is not at all clear; indeed, it may be an inverse relation.'<sup>50</sup> He continues to state that an unaccountable regime will always externalize the cost from itself and its supporters to the ordinary citizens and the power of the ordinary citizen to punish the regime for the consequences of the sanction is rather negligible, if not non-existent. Thus, the current sanctioning system doubly victimizes citizens of the target state: they become not only victims of their own (repressive) governments, but that of the international community as well.<sup>51</sup>

Riley holds the contrary opinion. He argues that the assertion by many scholars that economic sanctions increase political repression should be revisited.<sup>52</sup> His analysis suggests that economic sanctions imposed on purely autocratic regimes significantly decrease levels of political repression when measured in terms of extra judicial killings, political imprisonment, disappearances, and torture. Thus the implication of such analysis suggests that international actors should continue to rely on 'coercive diplomacy' on the international stage when dealing with the most autocratic forms of government.<sup>53</sup>

Levy, with specific focus on the case of South Africa, illustrates that though economic sanctions imposed against the South African apartheid regime appear to have been successful on the face of it, the reality is to the contrary and he proceeds to suggest that they

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<sup>45</sup> As above. 60.

<sup>46</sup> As above. 61 & 62.

<sup>47</sup> C Carneiro & D Elden *Sanctions, Survival, and Human Rights* (2009) 971.

<sup>48</sup> As above. 973.

<sup>49</sup> As above. 976.

<sup>50</sup> Addis (n 40 above) 606-607.

<sup>51</sup> As above. 617

<sup>52</sup> E Riley *Better or Worse? The Impact of Economic Sanctions on Human Rights Revisited* (2011) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2018708](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2018708) (accessed 25 July 2012).

<sup>53</sup> As above.

may have even deferred its desired impact.<sup>54</sup> In fact they resulted in enhanced hardship for the already burdened black population. However, he is quick to point out that one cannot argue conclusively that sanctions had completely nothing to do with the political change.<sup>55</sup>

In a seemingly helpless gesture, Malloy laments that short of abandoning sanctions as foreign policy tools, there is probably no practical way to ensure that sanctions both narrowly affect only the targeted state actors and still remain effective in their desired impact.<sup>56</sup> Hove, partly agreeing with Malloy, states that one may find it fruitful and humane if great players in diplomacy search for flexible strategies of engagement rather than rely on rift widening tactics like sanctions which impact negatively on target countries.<sup>57</sup>

However, reliance upon diplomacy for the purposes of ensuring human rights compliance in target countries is heavily criticized by Michael Abler where he points out that even though critics contend that economic sanctions are inefficacious and illegitimate, the alternatives are less effectual and more unviable.<sup>58</sup> Consequently, he maintains that economic sanctions remain a useful tool to fix breaches in international norms of peace and security.<sup>59</sup> He argues that without such a tool, the new 'internationalism' would face three undesirable choices: except with the option of diplomacy, they would accept breaches to international norms of peace and security; negotiate from a constrained bargaining position because its only tangible leverage would be the threat of war (which may not be credible, depending upon the breach); or wage war against the aggressor to restore the status quo ante (again, depending on the breach, international consensus on the use of military force may be unavailable).<sup>60</sup>

Oudraat also argues that economic sanctions remain an attractive and non-expensive measure of taking action in place of military force.<sup>61</sup> Thus he proposes that there is need to develop a better understanding of how economic sanctions work in order to enhance their intended impact and to limit their harmful humanitarian effects.

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<sup>54</sup> P Levy *Sanctions on South Africa: What did they do?* (1999) Center Discussion Paper No. 796 at Yale University.

<sup>55</sup> As above. 12.

<sup>56</sup> M Malloy *Economic Sanctions and Human Rights: A Delicate Balance Human Rights* (1995) 12, 14.

<sup>57</sup> See M Hove *The Debates and Impact of Sanctions: The Zimbabwean Experience* (2012).

<sup>58</sup> Abler (n 2 above)1.

<sup>59</sup> As above. 6

<sup>60</sup> Abler (n 2 above)11.

<sup>61</sup> C Oudraat *Making economic sanctions work* (2000) 105-128.

Majlessi, aligning to Oudraat's approach, points out that there is no doubt about the importance of sanctions as means of enforcing international human rights law.<sup>62</sup> However the question that he suggests ought to be answered critically is whether they (sanctions) should be reorganized systematically.

As is evident, criticisms against sanctions as an appropriate tool for human rights protection are plenty. This study intends to support scholarship insisting that sanctions remain an appropriate tool for such a function. It is agreeable that the whole concept of sanctions needs to be reorganized systemically but this must be done within the framework of international human rights law. Systematic re-organization of sanctions would thus necessitate a critical review of sanctions from how it is imposed to how it is executed. Thus this thesis examines and makes recommendations on the design and implementation of sanctions within the framework of international human rights law.

### **1.8 Overview of chapters**

Chapter one presents the background to the study, significance of the study and methodology implored. The research question and objectives are also highlighted.

Chapter two discusses the legal justification under international law for using sanctions as a coercive measure to protect human rights. Thus, the different types of sanctions and their legal basis are analyzed herein.

Chapter three discusses some of the main criticisms signifying why economic sanctions remain at odds with international human rights law. Criticisms focus on the design and implementation of sanctions.

Chapter four provides recommendations to address the criticisms highlighted in chapter three. The conclusion is also provided.

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<sup>62</sup> Majlessi (n 29 above)1.

## CHAPTER TWO

### 2.0 Introduction

This chapter discusses the legal framework justifying the imposition of sanctions for human rights protection in target countries. This is done in light of the fact that there are debates regarding the lawfulness of sanctions under international law, and also whether they should be imposed to address human rights violations in another state. In addressing the latter, principles of non-intervention and national sovereignty will also be examined.

### 2.1 The legal framework for sanctions

As stated by Majlessi, the lawyer's quest is to determine whether sanctions are legal and whether they conform to the framework of international relations.<sup>63</sup> In answering this question, this section examines the different legal obligations that arise depending on the type of sanctions that have been imposed.

#### 2.1.1 Unilateral sanctions

According to the Human Rights Council report, unilateral sanctions are defined as 'economic measures taken by one State to compel a change in policy of another State.'<sup>64</sup> Many countries still maintain that as a matter of legal policy, economic sanctions should be imposed only under Chapter VII Security Council resolution or by states acting collectively in reaction to fundamental violations of international law and peace and security, in pursuance of a UN resolution.<sup>65</sup> They argue that states cannot impose economic sanctions unilaterally against human rights violations in a target country as it would constitute derogation from the general principle concerning friendly relations among states.<sup>66</sup> Chinese Foreign Ministry spokesperson Hong Lei recently said that 'China is against one country putting their domestic laws above international law and placing unilateral sanctions on another country.'<sup>67</sup> It seems inconceivable that in a non-hierarchical international legal order, a state(s) equal with all others could impose such measures at all.<sup>68</sup>

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<sup>63</sup> Majlessi (n 29 above).

<sup>64</sup> Human Rights Council *Thematic study of the Office of the United Nations High Commissioner for Human Rights on the impact of unilateral coercive measures on the enjoyment of human rights, including recommendations on actions aimed at ending such measures* (2012) A/HRC/19/33.

<sup>65</sup> E Proukaki *The problem of enforcement in international law* (2010) 98.

<sup>66</sup> As above.

<sup>67</sup> J Reilly *China's Unilateral Sanctions* (2012)1.

<sup>68</sup> Proukaki (n 65 above).

As a general rule, whether unilateral sanctions are legal or illegal under international law depends upon the form of coercive measure, applicable treaty law and on customary international law rules relevant to the assessment of coercive measures, as well as on potential grounds for precluding the wrongfulness of such measures. However from the onset and as confirmed by the International Court of Justice (ICJ); in the absence of explicit treaty obligations, states are still considered to be free as to whether to maintain trade relations or not.<sup>69</sup> Thus, their decisions to stop such relations cannot, strictly speaking, be considered unlawful. States are entitled, as a general principle of international law, to suspend the performance of any other international law norm in their relation with the 'violator.'<sup>70</sup> 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.<sup>71</sup> However, this sovereign right is not unlimited and is subject to specific conditions. For instance, states often enter international trade arrangements in order to facilitate their foreign trade. Thus, states are bound by bilateral or multilateral trade treaties which may also create legal obstacles to the use of economic sanctions.<sup>72</sup> Due to this limitation, a state violates international law if it breaks treaty norms which are binding upon the state imposing the sanction. For instance, the World Trade Organization (WTO) encompasses a multilateral agreement that limits the application of unilateral economic sanctions by its member states.<sup>73</sup> An illustrative example of this is the 'Burma law' which was enacted by the US State of Massachusetts to pressure Burma to improve its human rights conditions through trade restrictions with Burma. The law was at issue before the WTO because it violated the non-discrimination principle enshrined in the WTO Agreement on Government Procurement (GPA) which are prohibited according to Article I and XI of the General Agreement of Trade and Tariffs (GATT).<sup>74</sup>

However, even at the WTO level, unilateral economic sanctions imposed to address human rights violations can be justified under Article XX of the GATT. Article XX is the general exception clause that lists specific public policy reasons that justify the deviation of GATT principles. Those relevant for trade-related human rights measures include the protection of public morals (paragraph. a) and the protection of human, animal or plant life or health (paragraph. b). In addition to fulfilling the requirements of the specific policy goals, the

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<sup>69</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Merits (Judgment of 27 June 1986) ICJ Reports 14, para. 276.

<sup>70</sup> Majlessi (n 29 above) 19.

<sup>71</sup> As above.

<sup>72</sup> As above. 19-20.

<sup>73</sup> As above.

<sup>74</sup> G Zagel *WTO & Human Rights: Examining Linkages and Suggesting Convergence* (2005) 5.

protective measure has to fulfill the general requirements of Article XX ('chapeau'); this means that it must comply with the principle of non-discrimination and must not constitute a disguised restriction to international trade.<sup>75</sup> As states are fairly inventive in finding 'non-economic reasons' as excuses for protectionist measures, the difficult task of the WTO Dispute Settlement institutions is to examine whether the measure aims to genuinely protect the non-economic concern or rather to protect the national industry.<sup>76</sup> Thus, in order to keep up with GATT principles, the Panels and Appellate Body have always interpreted Article XX very strictly, which contributes to the WTO's reputation of failing to respect human rights.<sup>77</sup> Article XXI of the GATT does permit the enforcement of gross human rights violations through economic sanctions enacted by the UN Security Council; however it is doubtful whether the WTO should be more responsive to trade-related human rights measures imposed by individual states since this would mean that Member States could unilaterally determine what human right standards to apply.<sup>78</sup> The difficulties surrounding WTO state obligations vis-à-vis human rights protection through trade restrictions is, however, beyond the scope of this thesis.

It must also be borne in mind that articles 55 and 56 of the UN Charter require the UN member States to co-operate in order to promote 'universal respect for, and observance of human rights.' Hence the duty of governments to respect and protect called human rights is also an accepted international principle. Since the worst violations of human rights are often those perpetrated by repressive governments against their own subjects, there are times when outside intervention by a unilateral state seems warranted<sup>79</sup> as it is not always easy, in light of the veto powers under the Security Council, to get consensus by the 'permanent 5' to impose sanctions against such governments.

State practice, as is evidenced by sanctions imposed against Greece, Central African Republic and Liberia amongst others, signify that systematic and gross violations of human rights can give rise to such measures. In fact, through consistent and widespread practice, some can even argue that protection of collective interests through sanctions has evolved into customary law. The concept of such solidarity measures has developed through the apparent necessity to enforce fundamental interests of international law. Much as concerns about unilateral sanctions being prone to abuse are worthwhile, state practice proves that

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<sup>75</sup> As above.

<sup>76</sup> As above.

<sup>77</sup> As above.

<sup>78</sup> As above.

<sup>79</sup> J Slater & T Nardin *Non-intervention and human rights* (1986) 86.

states have responded to serious violations of violations with an *erga omnes*<sup>80</sup> effect. This element (*erga omnes*) is thus crucial to prevent abuse.

### 2.1.2 Multilateral sanctions

Multilateral sanctions (also known as collective sanctions/centralized sanctions) are those decided upon by a competent organ of an international organization. The clearest example of a multilateral sanction is that imposed by the Security Council of the UN pursuant to its authority under the UN Charter. Article 39 of the UN Charter mandates the Security Council to determine the existence of any threat to the peace, breach of the peace, or act of aggression and decide what measures to be taken to maintain or restore international peace and security. Article 41 provides for economic sanctions which constitute one of the measures open to the Security Council in ensuring international peace and security. When such sanctions are deemed mandatory, all Member States of the United Nations are required to comply with the order and to enforce the sanction against the outlaw state(s).<sup>81</sup>

Multilateral sanctions have to be adopted for the specific purpose for which the constituting document provides that they shall be used. In regard to Security Council imposed sanctions, it is clear from the wording of article 39 as read together with article 41 of the UN Charter that the Security Council can only impose economic sanctions if it is established that a threat to international peace exists. Thus, it is not in contention that the Security Council has the mandate to impose sanctions. It is also generally agreed that although the UN Security Council does not have an explicit mandate to involve itself in human rights matters, its mandate of maintaining international peace and security has been extended to include human rights related issues.<sup>82</sup> However, since the UN Charter is silent on what constitutes a 'threat to the peace,' states such as Russia and China remain vehemently opposed to the notion that human rights violations *within* a state could amount to a 'threat to *international* peace and thus warranting sanctions. Such opposition has resulted in the Security Council being unable to impose sanction in cases such as Zimbabwe and Syria.

Again we draw guidance from the Security Council practice which has read its Chapter VII mandate 'as including the objectives to enforce respect for international law and to achieve fundamental political changes in the target countries, either by changing a regime condemned as illegal [outlaw], or by restoring democracy in a country beset by internal

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<sup>80</sup> Refers to an obligation or rights towards all.

<sup>81</sup> A Addis (n 40 above) 545.

<sup>82</sup> F Viljoen *international human rights law in Africa* 2<sup>nd</sup> edition (2012) 50.

disorder.<sup>83</sup> When the Security Council imposed sanctions on Southern Rhodesia in 1968 and on South Africa in 1977, they served as an important precedent indicating the ‘de facto’ competence of the Security Council in the internal ‘human rights issues’ of states.<sup>84</sup> The Security Council has thus given the terms ‘international peace and security’ generous interpretations. In 1992, a Security Council meeting recognized that the absence of war and military conflicts does not in itself ensure international peace and security.<sup>85</sup> A seemingly purely internal dispute among warring factions of a state, more or less limited in scope and reach, has been declared a threat to international peace and security hence bringing it within the jurisdiction of the Security Council.<sup>86</sup> Similarly, a regime’s brutal repression of certain minorities has been deemed a threat to international peace and security entitling the Council to monitor the actions of the regime in relation to those minorities and even to limit the authority of the regime over the area where the majority of such minorities reside.<sup>87</sup> Thus, the interpretation that the Security Council has used to exercise its Chapter VII authority are sufficiently general that they have allowed it to fit almost all disputes that are sufficiently intense as threats to international peace and security.<sup>88</sup> The notions of ‘threat,’ ‘peace,’ and ‘security’ have been understood in the context of an international landscape, such that ‘human rights’ are considered to be central to the identity of the community, the denial of which will likely lead to resistance, hence posing a threat to international peace and security.<sup>89</sup>

The Security Council’s mandate to protect human rights also emanates from the Responsibility to Protect doctrine (R2P).<sup>90</sup> According to a General Assembly resolution<sup>91</sup> and Security Council resolution 1674 (2006) on the Protection of Civilians in Armed Conflict, states have a commitment to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. If a state fails to protect its populations or is, in fact, the perpetrator of such crimes, the international community (including the Security Council) must be prepared to take measures.

Thus, not all forms of human rights violations within a state’s territory can amount to a threat of international peace. The majority of scholars seem to hold the opinion that there

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<sup>83</sup> Addis (n 40 above) 601.

<sup>84</sup> Viljoen (n 82 above) 50.

<sup>85</sup> L Svedenstedt *Threat to the peace? Are gross violations of human rights a threat to the peace in the meaning of Article 39, Charter of the United Nations?* (2002) 22.

<sup>86</sup> Addis (n 40 above) 598.

<sup>87</sup> As above. 599.

<sup>88</sup> As above.

<sup>89</sup> As above 600-601.

<sup>90</sup> See General Assembly’s Outcome Document of the 2005 World Summit on the R2P Doctrine.

<sup>91</sup> UN General Assembly, *The responsibility to protect* resolution / adopted by the General Assembly, 7 October 2009, A/RES/63/308.

needs to be a *serious* violation of a *fundamental* human right.<sup>92</sup> There also seems to be support for a violation that is ‘gross,’ ‘massive,’ ‘large-scale’ or ‘persistent’ and of ‘elementary’ or ‘fundamental’ human rights, in such a way that ‘atrocities,’ ‘barbaric acts’ or ‘repulsive practices’ are committed which constitutes ‘crimes against (the laws of) humanity’ or ‘genocide,’ and are considered to ‘shock the conscience of mankind’ or ‘flagrantly violate standards of morality and civilization’ or at least a threat of substantial loss of human life.<sup>93</sup> Since it also largely unsettled in regard to what amounts to ‘elementary’ or ‘fundamental’ human rights’ and whether they only encompass civil and political rights or also include the much contested economic, social and cultural rights or the ‘third-generation rights;’ we draw assistance from the practice of the Security Council. The UN Security Council has made decisions under Chapter VII pertaining to peace and security that involved such ‘fundamental rights’ as the rights to adequate nutrition (for example, in Somalia), and freedom from repression (for example, in Iraq).<sup>94</sup> In South Africa<sup>95</sup> and Southern Rhodesia,<sup>96</sup> the domestic policy of the racist regimes constituted a threat to the peace. In Burundi<sup>97</sup> and Angola,<sup>98</sup> the humanitarian situation was so grave that it constituted a threat to the peace. Such examples purport to show that in order for the Security Council to intervene, that there must be ‘gross and persistent human rights violations that shock the world’s conscience’ and occur ‘from systematic attacks on civilians by a central government, or a system breakdown in law and order.’<sup>99</sup>

In rare cases, economic sanctions may also be implemented by international organizations or by a group of states through intergovernmental cooperation.<sup>100</sup> These are sometimes called ‘organized unilateral sanctions.’<sup>101</sup> The EU is the clearest example of such. Other criteria suggested for this category of sanctions which distinguish them from other types of sanctions imposed by a group of states-are:

- ‘(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;

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<sup>92</sup> Svedenstedt (n 85 above) 35.

<sup>93</sup> As above.

<sup>94</sup> As above 35-36.

<sup>95</sup> Security Council Resolution 282 (1970) of 23 July 1970.

<sup>96</sup> Resolution 406 (1977) adopted by the Security Council at its 2008th meeting, on 25 May 1977.

<sup>97</sup> Resolution 1577 (2004) adopted by the Security Council at its 5093rd meeting, on 1 December 2004

<sup>98</sup> Resolution 1439 (2002) adopted by the Security Council on the situation in Angola.

<sup>99</sup> Svedenstedt (n 85 above) 36.

<sup>100</sup> Majlessi (n 29 above) 8.

<sup>101</sup> As above.

- (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.<sup>102'</sup>

Currently organizations such as the EU continually use trade and economic benefits 'in exchange' for respect of fundamental human rights. The legal basis for this category of sanctions is sought within the legal framework of such organizations.<sup>103</sup> Under the law of treaties, a specific agreement can be suspended or terminated on the ground of human rights considerations only if the treaty so provides or if the human rights violations go against the very object and purpose of the treaty.<sup>104</sup> A simple understanding of this would entail that unless human rights specific provisions exist in the treaties establishing such organizations, organized unilateral sanctions imposed to address human rights violations would not be permitted. However, under article 103 of the UN Charter, obligations deriving from the UN Charter *should* prevail over all other international treaty obligations. This means that the human rights obligations deriving from the UN Charter remain applicable notwithstanding the absence of human rights specific provisions in a treaty. In addition, articles 52 to 54 of the UN Charter also recognize the role of regional agencies in maintaining peace and security as long as such role is pursued in line with the principles of the UN Charter. Lastly, states can also respond through sanctions to serious violations of fundamental human rights norms with an *erga omnes* effect even in contravention of specific obligations under their respective treaties.<sup>105</sup>

### 2.1.3 Secondary sanctions

Even more contentious is the practice of imposing states to compel others to join a sanctions' effort by threatening 'secondary sanctions' against third states that are unwilling to sanction the target entity/country. Not only does this position raise questions of legitimacy but invariably may adversely affect a third parties' efforts to pursue socio-economic development interests. The case of Kenya and Iran serves as a striking example. The Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010 (CISADA) enacted by the US restricts the selling of gasoline, services and equipment related to gasoline production to Iran not only by US companies but extends extraterritorially to foreign companies.<sup>106</sup> In line with this Act, Kenya recently cancelled an agreement to import four million tons of Iranian crude oil per year due to threats from the US that Kenya will suffer secondary sanctions should it continue to

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<sup>102</sup> Majlessi (n 29 above)10.

<sup>103</sup> Majlessi (n 29 above) 32. For the EU, see article 11 of the EU treaty.

<sup>104</sup> Proukaki (n 65 above) 10.1

<sup>105</sup> As above 133.

<sup>106</sup> K Larsson *United States extraterritorial application of economic sanctions and the new international sanctions against Iran* (2011) 25.

deal with Iran.<sup>107</sup> Similarly, in June 2012, US Representative Howard Berman sent a letter to Tanzania's president warning that Tanzania could face aid cuts if it continued to 're-flag' Iranian oil tankers.<sup>108</sup>

Many commentators assert that secondary sanctions are illegally 'extraterritorial,' exceeding the proper bounds of the imposing states' jurisdictional authority under customary international law.<sup>109</sup> If secondary sanctions were imposed by the Security Council against non-compliant third party member states, such action would be justified considering that all states are obliged to comply with Security Council resolutions/measures. But a unilateral sanction cannot be said to enjoy that power. When one country imposes unilateral sanctions, no other countries are legally bound to follow suit. Not only does this practice interfere with a state's sovereignty to legitimately undertake development activities crucial for its own national advancement but it also subjects nationals of that third party state to unwarranted sanctions. It is contended that States remain bound both by treaty and customary international law to respect the fundamental right of other nations to pursue economic and social development in accordance with their own sovereign volition. Unfortunately, most countries cannot afford to pay the price of being isolated from major powers such as the US for dealing with a target state such as Iran. Such abuse of power in the use of sanctions has enabled states to take the law into their own hands and 'implement international law,' a power that exposes small and weak states to the abuse of powerful states.<sup>110</sup> Hence 'weak' third states, though not in support of a particular foreign policy objectives, are threatened into implementing a unilateral sanction.

On the other hand, in the event of a violation of an *erga omnes* norm, it can be argued that all states are obliged to act in cooperation against that state that has violated such a norm even without Security Council authorization. However, an appeal is still made towards developed states that they must be sensitive towards the delicate position of many developing countries. For poor landlocked countries like Malawi who benefit from the passageway of neighboring states like Zimbabwe, it is unforeseeable for them to take a major stand against Zimbabwe in spite of the human rights situation existent therein. Historically, even when the Security Council proclaimed sanctions against Rhodesia, some countries such as

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<sup>107</sup> A Kisia *Kenya cancels oil deal with Iran due to sanctions* (2012) available at <http://www.standardmedia.co.ke/?articleID=2000061186> (accessed 4 October 201).

<sup>108</sup> K Katzman *Iran Sanctions* (2012) 44.

<sup>109</sup> J Meyer *Second thoughts on secondary sanctions* (2009) 30 *University of Pennsylvania Journal of International Law*.

<sup>110</sup> Proukaki (n 65 above) 69.

Zambia were too vulnerable to risk full involvement in economic sanctions. Zambia's dependence on copper from Rhodesia prevented it from taking part in the embargo, although it did not approve of the incumbent regime at the time.<sup>111</sup> Similarly, western nations have complained of the complicity of Southern African countries in addressing the Mugabe regime and inasmuch as political considerations has also resulted in this complicity, one must not also ignore the fact that in light of the poverty and the economic interdependence of Sub-Saharan Africa, the cost of sanctioning a neighboring country like Zimbabwe may be too costly for some countries to bear.

The United Nations Conference on Trade and Development condemned the application of economic coercion, especially when the latter is used against developing countries as it adversely affects the economies and development efforts of developing countries and creates a negative impact on international economic co-operation.<sup>112</sup> Though this thesis in no way advocates the abolition of sanctions against entities engaged in human rights violations, the use of secondary sanctions contravenes article 32 of the Charter of Economic Rights and Duties of States.<sup>113</sup> Developed countries therefore need to take steps (through an impact assessment/cost analysis) to ensure that the economic isolation that can be suffered by a poor developing country through sanctioning another is averted. Article 50 of the UN Charter<sup>114</sup> may also provide remedy to 'weak' third states if the sanctions emanate from the UN Security Council.

## **2.2 Exploring the principles of sovereignty and non-intervention in relation to sanctions**

The doctrine of non-intervention requires a state to refrain in their actions from 'dictatorial' interference in the affairs of another for the purpose of maintaining or altering the actual conditions of things.<sup>115</sup> Herein also lies the essence of state sovereignty. The principles of non-intervention and sovereignty have been enshrined in various international legal instruments such as the UN Charter and the Declaration of Principles of International Law Concerning Friendly

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<sup>111</sup> D'hollander (n 4 above) 28.

<sup>112</sup> 5th plenary meeting A/RES/44/215 (22 December 1989) see preamble.

<sup>113</sup> Provides that that no 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.

<sup>114</sup> Provides: '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.'

<sup>115</sup> S Wheatley *The non-intervention doctrine and the protection of the basic needs of the human person in contemporary international law* (1993) 15 Liverpool Law Review 189-199.

Relations and Co-operation among States in accordance with the Charter of United Nations.<sup>116</sup> Article 2(7) of the UN Charter is a widely cited article in regard to the principle of non-intervention. It prohibits intervention in matters which are within the domestic jurisdiction of states.<sup>117</sup> However, the principle of non-intervention is subject to the enforcement measures in chapter VII. It therefore comes as a surprise that some Security Council member states have opposed imposing economic sanctions against countries like Syria and Zimbabwe (in spite of gross human rights violations therein) on the basis that such sanctions would conflict fundamental principles of international law, namely the principle of non-intervention and state sovereignty. Having developed in a legal system with its roots deeply founded on the principles of sovereign equality of states and non-interference in domestic affairs, the imposition of coercive measures by one state against another is sometimes perceived as an attack on the foundations of the system itself.<sup>118</sup> Unfortunately, the greatest threats appear to come, not from inter-state conflict but events that occur within a state's borders.<sup>119</sup> Thus, there appears to exist both a moral and legal duty for trans-boundary uses of economic coercion against human rights violations that do not, in the strictest sense, pose a trans-boundary threat to peace and security. It is gratifying to note that the use of Chapter VII powers by the Security Council to address crises which threaten human rights violations, as threats to the peace, is resulting into a gradual change in the traditional definitions of sovereignty and non-intervention.<sup>120</sup> As the Permanent Court of International Justice in the *Nationality Decrees* case illustrated, 'the question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations.'<sup>121</sup> Hence it is an evolving concept. In fact the ICJ in the *Nicaragua* case upheld the economic coercive measures applied through the imposition of a trade embargo and only considered the aspect of unlawful intervention in the context of military support afforded to the insurgent group.<sup>122</sup>

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<sup>116</sup> UN General Assembly, *Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, 24 October 1970, available at: <http://www.unhcr.org/refworld/docid/3dda1f104.html> (accessed 6 September 2012) See specifically the preamble and principle c.

<sup>117</sup> Article 2(4) of the UN Charter also enshrines the principle of non-intervention: 'all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.' Some scholars have argued that this article prohibits not only armed force but economic force against another state. However, the prevailing view is that the notion of force in article 2 (4) does not extend to all kinds of kind of force such as economic coercion but refers to armed forces. The General Assembly Declaration on the Principles of International Law confirms this reading of 'force.' The same position has also been confirmed by the *Nicaragua* (n 66 above) case.

<sup>118</sup> Proukakai (n 65 above) 93.

<sup>119</sup> Wheatley (n 115 above) 1.

<sup>120</sup> L Fielding *Taking a closer look at threats to peace: the power of the Security Council to address humanitarian crises* (1996)555.

<sup>121</sup> *National Decrees in Tunisia and Morocco* (1923) PCIJ Series B. no 4. 24-27.

<sup>122</sup> (n 69 above) Para 239-245.

Therefore, economic sanctions imposed to address systematic human rights violations in a country where the government is unable or unwilling to protect its population against such violations would not amount to unlawful intervention.

### **2.3 Conclusion**

Countries can no longer argue that economic sanctions imposed to address human rights violations have no legal justification. Though many would prefer that the mandate to impose sanctions for such cases be limited to the Security Council, the political considerations that sometimes dictate the decision making powers of the Security Council may render sanctions largely inactive. However unilateral sanctions are also not devoid of political considerations and this is best reflected through the use of secondary sanctions. Hence, both sanctioning systems can complement each other should one fail to fulfil its role in regard to the international protection of human rights.

## CHAPTER THREE

### 3.0 Introduction

Criticisms against sanctions range from the actual design of sanctions- that they fail to observe human rights obligations in the procedures for the imposition of sanctions; to the implementation and impact of sanctions- that in spite of the good intentions behind their imposition, they adversely affect human rights in the long run. This chapter discusses these criticisms in more in-depth.

### 3.1 The emergence of targeted sanctions

Historically, the main criticism against economic sanctions as an inappropriate tool to address human rights was because of its humanitarian consequences on the populace of the target country. A case in point is the period of broad-scale sanctions against South Africa where continuous concern was expressed over the disproportionate impact of sanctions upon the oppressed black South African population.<sup>123</sup> Human rights activists debated as to whether it was appropriate to impose sanctions against South Africa that resulted in exacerbated near-term economic deprivation of blacks in the interests of the long-term objective of moving South Africa beyond its policy of apartheid.<sup>124</sup> Was this hardship part of the price that had to be paid in order to achieve the end to apartheid in South Africa? Similarly, a team of researchers sent to Iraq in 1996 to investigate the impact of UN sanctions on the populace were astonished at the humanitarian consequences of such sanctions and were drawn to conclude that 'Iraq illustrates why sanctions are not always a humane alternative to war.'<sup>125</sup> Instruments embodying the pertinent international humanitarian norms (i.e. the Geneva Conventions of 1949 and the Additional Protocols of 1977) apply only in the context of armed conflict and do not explicitly address economic sanctions. However, human rights activists maintain that as the population's protection underlies international humanitarian law, then humanitarian law norms could be considered applicable to limit the use of economic sanctions.<sup>126</sup>

Nevertheless, the adverse humanitarian impact of sanctions urged the international community to seriously reconsider the practicality of using sanctions to address human rights violations in target countries. The UN General Assembly adopted a resolution

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<sup>123</sup> Malloy (n 56 above) 2.

<sup>124</sup> As above.

<sup>125</sup> Browne *The effect of economic sanctions on political repression in targeted states* (2011) 3.

<sup>126</sup> V. P. Nanda *Accountability of international organizations: some observations* (2004) *Denver Journal of International Law and Policy*, University of Denver 385.

critical of coercive economic measures in 1989.<sup>127</sup> Similarly, the Sub-Commission on the Promotion and Protection of Human Rights in its resolution 1997/35 entitled ‘adverse consequences of economic sanctions on the enjoyment of human rights’ also pointed out that economic sanctions ‘most seriously affect the innocent population... and have a tendency to aggravate the imbalances in income distribution already present in the countries concerned.’<sup>128</sup> Consequently, General Assembly Resolution 242 provides that: ‘the purpose of sanctions is to modify the behavior of a party that is threatening international peace and security and not to punish or otherwise exact retribution.’<sup>129</sup> In addition, General Comment 8 of the Committee on Economic, Social and Cultural Rights (ESCR)<sup>130</sup> in paragraph 1 emphasizes that sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Paragraph 3 of general comment 8 acknowledges that whilst ‘the impact of sanctions varies from one case to another...they almost always have a dramatic impact on the rights recognized in the Covenant.’<sup>131</sup>

In spite of the heavy task of evaluating the extent to which misery is caused by sanctions, such documents highlighted the fact that states possess a duty to ensure that economic sanctions imposed on target countries do not result in adverse humanitarian consequences. The duty to consider the humanitarian impact of sanctions is deemed applicable even to Security Council sanctions imposed under the auspices of the UN. The UN, as an international organisation, is a ‘subject of international law’ and ‘capable of possessing both rights and duties’ as reaffirmed by the ICJ in its Advisory Opinion on the *UN expenses case*.<sup>132</sup> Thus, in a bid to address the humanitarian consequences of sanctions, ‘targeted (smart)’ sanctions were developed that target only the individuals responsible for the reprehensible behaviour within target countries. Targeted sanctions involve some form of limited financial sanctions such as travel bans or freezing assets of targeted individuals. They are designed to raise the target regime’s costs of non-compliance while avoiding the general suffering that comprehensive sanctions often create.<sup>133</sup> The five permanent members of the Security Council

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<sup>127</sup> UN General Assembly Resolution 44/215 22 December, 1989.

<sup>128</sup> Available at

<http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/32798bb8fb7af1c8c1256982005a37a5?Opendocument> (accessed 3 October 2012)

<sup>129</sup> UN General Assembly Resolution 51/242 of 15 September 1997.

<sup>130</sup> *The relationship between economic sanctions and respect for economic, social and cultural rights*: 1997/12/12. E/C.12/1997/8, CESCR General Comment 8 available at

<http://www.unhcr.ch/tbs/doc.nsf/0/974080d2db3ec66d802565c5003b2f57?Opendocument> (accessed 4 October 2012).

<sup>131</sup> As above.

<sup>132</sup> *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion of 11 April 1949) ICJ Rep. 174 p. 179.

<sup>133</sup> D W. Drezner *How Smart are Smart Sanctions?* (2003) 5 *International Studies Review* (2003) 107–110.

issued a short policy statement on the humanitarian impact of sanctions illustrating that 'further collective actions in the Security Council within the context of any future sanctions regime should be directed to minimize unintended adverse side-effects of sanctions on the most vulnerable segments of targeted countries'<sup>134</sup> Thus, following the severe humanitarian consequences of comprehensive sanctions against Iraq, the Security Council has only adopted targeted measures<sup>135</sup> and so have many other states and organizations. For example, Security Council Resolution 1333 of December 19, 2000, regarding Afghanistan, explicitly recognized the 'necessity for sanctions to contain adequate and effective exemptions to avoid adverse humanitarian consequences.'<sup>136</sup> Similarly, in the case of Sudan, a pre-assessment report warning of adverse humanitarian consequences increased the Security Council's reluctance to impose stronger sanctions.<sup>137</sup> Security Council sanctions now allow the provision of food and medicine (e.g. Sierra Leone,<sup>138</sup> Iraq<sup>139</sup>). In addition, the UN working paper on the criteria for imposing sanctions stipulated that future sanctions must not create a situation in which fundamental human rights are violated.<sup>140</sup> So while the UN Charter specifies no explicit limitations on the Security Council's powers acting under Chapter VII, one could argue that the activities undertaken by the Security Council must be in accordance with the purposes and principles of the UN Charter as contained in Article I and 55.

Targeted sanctions are, however, still lacking in their compatibility with international human rights law. Firstly, though targeted sanctions have minimized adverse humanitarian effects on the populace, they have adversely affected individual rights such as freedom of movement and right to property through measures such as travel bans and financial restrictions respectively. Secondly, there is evidence to suggest that targeted political leaders are sometimes able to shield themselves from the worst effects of sanctions such that directing measures against governments or particular actors does not necessarily protect the population from devastating humanitarian effects. Thus sanctions are deemed ineffective in curbing human rights violations. These two contentions are examined

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<sup>134</sup> Letter dated 13 April 1995 from the Permanent Representatives of China, France, Russia, the United Kingdom and President of the Security Council 'Humanitarian Impact of sanctions' (1995) UN Doc. S/I 99 5/300 .

<sup>135</sup> T Biersteker *Addressing Challenges to Targeted Sanctions: An Update of the "Watson Report"* (2009) available at [http://www.watsoninstitute.org/pub/2009\\_10\\_targeted\\_sanctions.pdf](http://www.watsoninstitute.org/pub/2009_10_targeted_sanctions.pdf) (accessed 5 October 2012).

<sup>136</sup> Available at <http://www.state.gov/documents/organization/5265.pdf> (accessed 7 October 2012).

<sup>137</sup> Giess 180

<sup>138</sup> Security Council resolution S/1997/1132

<sup>139</sup> See Security Council resolutions S/1990/661 and S/1995/986.

<sup>140</sup> , Special Commission on the Charter of the UN and on the Strengthening of the Role of the Organization *Declaration on the Basic Conditions and Standard Criteria for the Introduction and Implementation of Sanctions and Other Coercive Measures: Revised Working Paper* (2004) U.N. GAOR, P 1, U.N. Doc. A/AC.182/L.114/Rev.1.

below beginning with the former –the human rights implications of targeted sanctions on the individual; and then ending with the latter- the humanitarian impact of targeted sanctions.

### 3.1.1 Targeted sanctions and individual rights

The emergence of targeted sanctions within the Security Council mandate raises various human rights implications. Is the Security Council legally mandated to impose sanctions against individuals? Wasn't the whole system of the UN originally conceived to deal with the primary actors in international law which are states? Furthermore, article 25 of the UN Charter provides that the decisions of the Security Council bind states, *not individuals*. Even though the Security Council uses member states as intermediaries when it directs sanctions against individuals, the mere fact that such sanctions in the end target particular individuals raises some human rights implications. Arguably, international human rights law applicable to individuals should therefore also bind the Security Council's action in relation to such individuals. This raises evident problems that will be explored here.

The first obligation that should bind the Security Council when imposing sanctions against individuals are rights relating to due process. This is so because when imposing sanctions, the Security Council generally establishes a sanctions committee with the task of monitoring and reporting on the sanctions.<sup>141</sup> These committees list individuals and corporate entities that are to be subjected to the sanctions based on proposals or information of member states (listing process). The problem of due process arises herein because listed individuals are not heard before being listed. Individuals are also not informed of the evidence against them that justifies their listing and thus limiting their right to be informed of the case against them. Currently, the sanctions committee only produces narrative summaries justifying reasons for listing<sup>142</sup> which are often general. This undermines the right to a fair trial necessary for an individual's right to defense. The right to a fair trial is enshrined in article 10 of the Universal Declaration of Human Rights(UDHR), article 14(1) of the International Covenant on Civil and Political Rights(ICCPR), article 6(1) of the European Convention on Human Rights(ECHR) and article 7 of the African Charter on Human and Peoples' Right. In addition, these are fundamental human rights principles implicitly recognized by the UN Charter in its purposes and principles and thus applicable to the Security Council. At its minimum, the right to a fair trial would include the right to be heard before being subjected to targeted sanctions, the right to be informed of the evidence against oneself and the right to an effective review before an independent forum so as to challenge such decision.

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<sup>141</sup> Article 29 is the legal basis for establishing these committees: 'The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.'

<sup>142</sup> See Security Council committee *Narrative summaries for reasons for listing* <http://www.un.org/sc/committees/1988/narrative.shtml> (accessed 29 October 2012).

Regarding the right to be heard, the Security Council has justified that in consideration of the fact that sanctions are aimed at being preventive in nature, it would defeat the purpose of sanctions should individuals be informed of possible listing as some individuals will be able to hide their assets before the sanctions are eventually implemented.<sup>143</sup> Thus, the question that must be asked is whether the right to be heard is justifiably limited. Two contrasting interests come into play; the individual's right to be heard and the general interest of maintaining international peace and security through the Security Council. The principle of proportionality stipulates that the extent of any limitation should be strictly proportionate to the need or the higher interest protected by the limitation. The principle of necessity additionally requires an assessment of whether the measure in question is capable of achieving the goal. Drawing this linkage is not an easy task. However, considering that the sanctions are aimed at deterring an individual from engaging in human rights violations and that informing such individual of possible listing would alert them to divert their assets and thus render the sanctions ineffective to compel positive behavior change on such individual; this may arguably provide reasonable justification for the limitation of the right to be heard.

Thus, if individuals are 'justifiably' denied the right to be heard, the question to be asked is whether they are accorded the right to an effective review so as to challenge their listing in accordance with international human rights law such as articles 8 of the UDHR and 2(3) of the ICCPR. With the exception of the Al Qaida sanctions committee with which an Office of the Ombudsperson (OoO) was created<sup>144</sup> so as to receive requests from individuals who seek to be delisted(removed) from the sanction's list, most sanctions committees do not offer effective review. Effectiveness, in this regard, refers to the accessibility of the procedure, speed and efficiency of consideration by the reviewing body, power of the reviewing body to request interim measures of protection and / or grant appropriate relief, fairness of the proceedings, quality of the decision making, compliance with the decision and follow up.<sup>145</sup> The Security Council has only established a 'focal point mechanism' to consider requests from individuals seeking to be delisted from sanctions.<sup>146</sup> The government that designated that individual to be listed as well as the individual's government are consulted but the primary decision to delist an individual remains with the sanctions committee. The focal point holds no power whatsoever but merely facilitates the delisting processes. This does not therefore

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<sup>143</sup> European Centre for Constitutional and Human Rights 'Backlisted: Targeted sanctions, preemptive security and fundamental rights' (2010) available at <http://www.statewatch.org/news/2010/dec/eu-ecchr-blacklisted-report.pdf> (accessed 21 October 2012).

<sup>144</sup> Through resolution 1904 and extended in 2011 through resolution 1989. See <http://www.un.org/en/sc/ombudsperson/> (accessed 17 October 2012).

<sup>145</sup> European Centre for Constitutional and Human Rights (n 143 above).

<sup>146</sup> Available at [http://www.undemocracy.com/S-RES-1730\(2006\).pdf](http://www.undemocracy.com/S-RES-1730(2006).pdf)

amount to an 'effective review' as the sanctions committee acts as a judge in its own case, being involved in both the listing and delisting process. In addition, the 'focal point' process does not mandate disclosure to the individual (the petitioner) of any evidence relied on to justify the refusal for delisting and only a single member state represented on the relevant sanctions committee can object to delisting in order for the designation to remain in place.

Even in regard to the Al Qaida sanctions committee, the OoO can only propose delisting but the final decision rests with the sanctions committee or the Security Council should the sanctions committee fail to reach a decision. This undermines principles of impartiality and unfairness. As pointed out by the Canadian Federal Court judge in the *Abdelrazik* case regarding the OoO of the Al Qaida sanctions committee: 'there is nothing in the listing or delisting procedure that recognizes the principles of natural justice or that provides for basic procedural fairness.'

Perhaps some can be defensive of these apparent loopholes on the basis of security interests and the fact that the unique nature of targeted sanctions cannot merely allow an extrapolation of due process principles applicable in administrative, civil or criminal cases into sanction's design. In fact others contend that an 'effective remedy' means a remedy that is as effective as can be having regard to the circumstances.<sup>147</sup> But do the circumstances of the UN Security Council necessitate a complete negation of the right to an effective review? And if so, is this position compatible with international human rights law. In *Al-Nashif v Bulgaria*, the European Court of Human Rights (ECtHR) stipulated that even where an allegation of a threat to security interests is made, 'the guarantee of an effective remedy requires as a minimum that the competent independent appeals authority must be informed of the reasons grounding the...[decision], even if such reasons are not publicly available. The authority must be competent to reject the executive's assertion that there is a threat to national security where it finds it arbitrary or unreasonable.' European case law in general also implies that what is decisive is the gravity of the consequences of a decision, not their formal classification.<sup>148</sup> The gravity of listing an individual for sanctions thus demands effective review.

However, can individuals be said to have no access to review when they may have access to national or regional courts? Inevitably yes as national courts seldom serve as an alternative forum since states (and their national courts), under Article 25 of the UN Charter, are obliged to accept and carry out the decisions of the Security Council. A national decision condemning the listing as violating specific international law standards and ordering the state

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<sup>147</sup> As above.

<sup>148</sup> D Wet *Human Rights Standards for Targeted Sanctions* (2010).

to act contrary to the sanctions committee's lists, risks undermining the whole system of collective security.<sup>149</sup> The same holds true for decisions of regional courts.<sup>150</sup> If the accuracy of the listings were faultless, then perhaps we would have little recourse for worry. But this is not the case. In several reports of the Panel of Experts on Liberia, the Panel noted that it had received a number of complaints from individuals claiming to be improperly listed and thus unfairly subjected to the travel ban.<sup>151</sup> The problem of wrong listings and the apparent difficulties in being delisted also arose in the context of targeted sanctions against the Taliban and al Qaida.<sup>152</sup> The applicants had claimed that freezing their assets without allowing the possibility of challenging that decision violated their right to property, their right to be heard and their right to judicial review. The *Kadi* case eventually decided by the European Court of Justice (ECJ) in 2008 serves as a landmark decision on human rights protection vis-à-vis sanctions imposed on individuals by the Security Council. The court held, whilst acknowledging its limited competence to review Security Council decisions, that European Community acts should be subjected to judicial review even if taken in compliance with Security Council resolutions and that the EU's principles could not be disregarded on the ground of compliance with obligations arising from other international agreements.<sup>153</sup> This decision could be said to have propelled the creation of the OoO in 2009 to review requests seeking to be delisted from the Al Qaida sanctions list. As already noted, this organ still lacks effective review powers and handles requests from individuals in the Al Qaida sanctions committee only.

The aspect of wrongful listing also brings to the fore the standard under which targeted individuals are listed in the first place. Should it be a test of 'beyond reasonable doubt' that the individual is engaged in or supporting gross violations of human rights in the target country? Should such a standard be applied in all cases or differ according to the magnitude of the violation in occurrence? Should it be determined according to the type of sanction and how far such a sanction limits the individual's rights i.e. the greater the limitation, the stricter the test to justify listing? In the recent case of *Tay Za v Council* concerning targeted sanctions imposed by the EU against Mr Tay Za, the Grand Chamber held that the necessary 'test' to be satisfied so as to include an individual such as Mr Tay Za on a sanctions list was 'precise, concrete evidence' establishing that the specific individual benefited from the

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<sup>149</sup> L Herik *The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual* (2007) 20 *Leiden Journal of International Law* 798.

<sup>150</sup> As above.

<sup>151</sup> Herik (n 149 above) 799.

<sup>152</sup> *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, Case T 306/01; *Yassin Abdullah Kadi v. Council and Commission*, Case T 315/01, 21 September 2005.

<sup>153</sup> *Kadi and Al Barakaat v Council and Commission* (3 September 2008) 303.

economic policies of the leaders of Burma/Myanmar.<sup>154</sup> Thus, in the courts view, a mere family connection with someone who benefited was not enough. Since that ‘concrete evidence’ was not available, the regulation as it applied to Mr Tay Za was annulled for want of legal basis. Considering the difficulties of obtaining evidence in target countries (especially in authoritarian regimes), the ‘Tay Za’ test might actually prove to be too burdensome to prove and thus make it practically impossible for individuals to be listed at all. Perhaps we can draw assistance from the standard of proof required by International Criminal Tribunal for the former Yugoslavia (ICTY) Rules of Procedure and Evidence which provides that there must exist ‘a reliable and consistent body of material which tends to show that the suspect may have committed a crime’<sup>155</sup> Though reliability seems to be a justifiable notion within this test, consistency may however prove to be more problematic and thus prove also to be a stringent test. On the other hand, the current Ombudsperson asserts that this categorization is misplaced and she contends that the sanctions process is a unique mechanism of a *sui generis* character, which makes the criminal-civil terminology wholly inappropriate. Instead she says that what is decisive is ‘whether there is sufficient information to provide a reasonable and credible basis for the listing.’<sup>156</sup> Again, in this case, one might ask; what is a reasonable and credible basis in the context of listing? This test remains subjective. The challenge therefore is to establish a test that is broad enough to enable the Security Council discharge its duties of maintaining peace but this ambit must not be too wide as to allow for arbitrariness.

Lastly, regarding the right to an effective remedy- other than the fact that targeted sanctions infringe on rights to movement, property and personal integrity, they could also amount to defamation in cases of wrongful listing as they can severely damage one’s reputation. Ideally, a violation of such rights warrants an effective remedy regardless of whether the proceedings can be deemed to be civil or criminal. However, the court in the case of *Sison* found that economic sanctions were a temporary measure and thus not affecting the substance of the individual’s right to property.<sup>157</sup> Thus, for individuals who are wrongfully listed and, if possible, successfully challenge their listing, their only remedy rests in being delisted. Being awarded monetary compensation for loss of economic interests is challenging as the individual will have to prove wrongful conduct on the part of the sanctioning entity and

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<sup>154</sup> *Pye Phyo Tay Za v Council of the European Union United Kingdom of Great Britain and Northern Ireland, European Commission Case C-376/10 P* (13 March 2012) Judgment of the Court (Grand Chamber). para. 70.

<sup>155</sup> Rule 40 (B) (iii) of the ICTY Rules of Procedure and Evidence.

<sup>156</sup> Office of the Ombudsman of the Security Council 1267 Committee *Approach to and standard for analysis, observations, principal arguments and recommendation* (2011).

<http://www.un.org/en/sc/ombudsperson/approach.shtml>

<sup>157</sup> *Jose Maria Sison v Council T-341/07* (23 November 2011) Judgment of the General Court (Second Chamber, Extended Composition) para. 75-82.

damage suffered as a result of (casual link) the sanctioning entity's conduct.<sup>158</sup> Furthermore, the UN is immune from suit according to article 105 of the UN Charter and even if it was liable to provide compensation, it does not have the institutional structure or capacity to do so. Similarly, claiming compensation through their national government could cause problems of attribution. However, in the *Sayadi* case, the HRC was able to order that Belgium do everything in its power to secure de-listing, and pay compensation to the complainants<sup>159</sup> Implementation of court decisions however remains a challenge.

### 3.1.2 The humanitarian impact of targeted sanctions

Targeted sanctions were introduced with the purpose of deterring adverse humanitarian effects on the population of the target country and inducing positive behavioral change on targeted individuals. Regarding the former, critics maintain that even targeted sanctions such as travel bans and financial measures will inevitably have far-ranging adverse effects on the populace if imposed over a significant period of time.<sup>160</sup> For instance, Zimbabwean President Mugabe and some supporters of his regime have been under targeted sanctions imposed by the US, EU and other western countries since 2002.<sup>161</sup> Such sanctions consist of freezing of assets, arms embargoes and travel bans.<sup>162</sup> In spite of efforts to ensure that adverse humanitarian impact of the sanctions is limited, UN High Commissioner Navi Pillay in her mission to Zimbabwe in May 2012 called for countries implementing sanctions against targeted members of the Zimbabwe regime to suspend them as there seemed to be 'little doubt that the existence of the sanctions regimes has...acted as a serious disincentive to overseas banks and investors...Taken together, these and other unintended side-effects...inevitably...had a negative impact on the economy at large, with possibly quite serious ramifications for the country's poorest and most vulnerable populations.<sup>163</sup>' Commissioner Pillay's sentiments only confirm the fact that while targeted sanctions may help to limit their adverse effects from the outset, given the complexity of state economies and welfare systems, even a focused ban on air flights or the supply of petroleum

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<sup>158</sup> As above.

<sup>159</sup> *Sayadi and Vinck v. Belgium* CCPR/C/94/D/1472/2006 (Views adopted on 22 October 2008). para. 12

<sup>160</sup> R Geiss *Humanitarian safeguards in economic sanctions regimes: a call for automatic suspension clauses, periodic monitoring, and follow-up assessment of long-term effects* (2005) 18 *Harvard Human Rights Journal* 167-185.

<sup>161</sup> For history of sanctions against Zimbabwe, see J Grebe *And They Are Still Targeting: Assessing the Effectiveness of Targeted Sanctions against Zimbabwe* (2010).

<sup>162</sup> As above.

<sup>163</sup> *UN Human Rights Chief ends first ever mission to Zimbabwe* (2012) available at

<http://www.ohchr.org/EN/NewsEvents/Pages/HRChiefendsfirstevermissiontoZimbabwebyaUNHCforHR.aspx> (accessed 3 October 2012).

could adversely affect a state's population in troubling ways.<sup>164</sup> This effect is amplified if sanctions are imposed during a time of crisis, caused for example by famine as was the case with Zimbabwe in 2003.<sup>165</sup> Similarly, despite humanitarian relief clauses contained in the sanctions regime imposed against Haiti, the fuel embargo in and of itself raising no specific humanitarian concerns led to an increase in transportation costs that in turn caused a dramatic increase in food prices.<sup>166</sup> Thus several factors such as hyperinflation, the cumulative effects of military operations, the collapse of government institutions, a natural disaster, or the targeted state's own behavior can all transform a sanctions regime intended to be moderate into a devastating means of coercion by drastically augmenting its adverse impact.<sup>167</sup> It would appear that the humanitarian exemption clauses currently employed when imposing sanctions are simply not up to the task of preventing a dramatic, adverse impact on the population of the target state with any degree of certainty.<sup>168</sup> Others have proposed that if unavoidable, the effects of sanctions must, as far as possible be irreversible.<sup>169</sup> Unfortunately, it is practically impossible to do so since such humanitarian impacts are often widespread and intertwined.

Yet again, the principle of proportionality has been proposed as a test that states can use when imposing sanctions in a bid to limit humanitarian effects and ensure that means employed are not excessive. In the case of *Nabil Sayadi and Patricia Vinck v. Belgium*, the Human Rights Committee noted that 'restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function.'<sup>170</sup> The Security Council is bound by the principle of proportionality when enforcing any measure as inferred from the reference to 'necessary' measures in articles 40 and 42 of the UN Charter.<sup>171</sup> In addition, by stipulating that military action shall only be undertaken if measures under article 41 of the UN Charter prove inadequate, article 42 indicates a systemic intention of the UN Charter to minimize the impact of enforcement measures as much as possible.<sup>172</sup>

When imposing targeted sanctions, the imposing entity must therefore ask; are the means employed suitable for the fulfillment of the legitimate goal? If the answer is to the affirmative and it is evident that such sanctions will have adverse humanitarian consequences,

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<sup>164</sup> Geiss (n 160 above) 185.

<sup>165</sup> *Famine in Zimbabwe* (2003) available at <http://library.fes.de/pdf-files/iez/02815.pdf> (accessed 4 October 2012).

<sup>166</sup> Geiss (n 160 above) 185.

<sup>167</sup> Geiss (n 160 above) 191.

<sup>168</sup> As above.

<sup>169</sup> Proukaki (n 65 above) 263.

<sup>170</sup> *Sayadi and Vinck v. Belgium* (n 159 above). Para 10.5.

<sup>171</sup> Geiss (n 160 above).

<sup>172</sup> As above.

the imposing entity must then ask; are the adverse consequences of the measure on a legally protected interest justified in light of the importance of the pursued goal? An assessment must therefore be made concerning the importance of the goal pursued in light of the harm to be suffered. For instance, the issue of proportionality was raised in regard to UN sanctions against Yugoslavia concerning the impounding of the Turkish Bosphorus Airline.<sup>173</sup> The ECJ concluded that the essential international community interest to cease the war in Bosnia-Herzegovina supervened over the rights of Bosphorus. As such, the impounding of the aircraft was proportionate to the objective sought. This reasoning was also confirmed by the EtCHR.<sup>174</sup> In contrast, the US responded through sanctions to a suspected alignment between Cuba and the Soviet Union during the height of the Cold War.<sup>175</sup> The US restricted and eventually blocked Cuba's exportation of sugar to the US.<sup>176</sup> In addition, the US waged a covert campaign to block Cuba's ability to obtain loans or credit from Western European and Canadian financial institutions resulting in the elimination of Cuba's trade relationships.<sup>177</sup> The UN General Assembly objected against US's sanctions against Cuba as it was felt that the 'sugar embargo' on its own was sufficient and that its effect would still have been felt by Cuba since the US accounted for the majority of Cuba's market for sugar.<sup>178</sup> Thus the 'harm' inflicted by the US sanctions was disproportionate to the objectives sought.

Thus regarding the humanitarian effects of targeted sanctions, the proportionality test would imply that particularly 'burdensome' sanctions will be assessed in the context of fundamental human rights to be protected. The nagging question, however, is: 'how much, if any, collateral damage is permissible in a particular case?'<sup>179</sup> In addition, in the absence of review, the question of proportionality seems to be a subjective test decided by the imposing entity. Furthermore, given the character of economic sanctions as complex measures commonly employed over a significant period of time, the chief problem in assessing their adequacy lies in the fact that circumstances change over time.<sup>180</sup> An initially modest enforcement measure

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<sup>173</sup> *Bosphorus v Minister for Transport, Energy and Communications, Ireland and the Attorney General* Case C-84/95, European Court Reports I (1996) Part 1.

<sup>174</sup> *Bosphorus Hava Yollari Turizm ve Ticaret Sirketi v Ireland* application No. 45036/98 Grand Chamber judgment (30 June 2005) 149-157.

<sup>175</sup> Proukaki (n 65 above).

<sup>176</sup> As above.

<sup>177</sup> As above.

<sup>178</sup> As above.

<sup>179</sup> W. Michael Reisman, Douglas L. Stevick *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes* (1998).

<sup>180</sup> As above 178.

may turn into a devastating form of coercion if circumstances in the target state change in particular ways, severely distorting the adequacy of the measure.<sup>181</sup>

Also of interest is that when sanctions are imposed, they are imposed to address human rights violations in the context of civil and political rights. The end result, however, is that they adversely affect economic, social and cultural rights (ESCR). Thus, the same sanctions that are imposed to end human rights violations of a civil and political nature are causing human rights violations of an economic, social, and cultural nature, in a target country.<sup>182</sup> Scholars argue that this effect is incongruous with international human rights law, which is predicated on the idea that human rights are universal; and yet sanctions deprive international human rights law of this universality.<sup>183</sup> They contribute to civil and political human rights norms favoured by most western/developed states at the expense of ESCR favoured by many other nations, and recognized on equal footing with civil and political rights in international human rights law.<sup>184</sup> For instance, the following objectives of sanctions imposed have a civil and political rights objective. US sanctions against South Africa starting in 1985 sought to compel the apartheid government to release all political prisoners and those detained without trial from prison, to lift the ban on democratic political parties and the right to express political opinions, to repeal discriminatory measures, and make efforts to make the political process more representative.<sup>185</sup> Similarly, US imposed sanctions against Haiti in 1991, aimed at forcing a military coup to step aside and restore the democratically elected leader to power.<sup>186</sup> Not only did such sanctions inflict harm to ESCR but they also sought to address civil and political rights and neglect ESCR that were equally violated. Howlett notes that the sanctions levelled against South Africa by the US did not expressly take note (in their objectives) of the discrimination caused by apartheid which violated many aspects of ESCR such as work, culture, education, and access to health care.<sup>187</sup> In fact, most sanctions are rarely imposed with an objective to directly address ESCRs violation. Howlett attributes this to the fact that because ESCR involve a positive duty on the state, it is more difficult to assess whether an ESCR has been violated.<sup>188</sup> Civil and political rights on the other hand mostly require a negative act in order to prove a violation and they are also immediately enforceable. In addition, the jurisprudence behind ESCR is still developing. However, in many instances, governments fail to

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<sup>181</sup> As above.

<sup>182</sup> A Howlett *Getting "smart": crafting economic sanctions that respect all human rights* (2004) 1199.

<sup>183</sup> As above

<sup>184</sup> As above.

<sup>185</sup> See section 311 of the Comprehensive Anti-Apartheid Act of 1986.

<sup>186</sup> Howlett (n 182 above) 1215.

<sup>187</sup> As above.

<sup>188</sup> As above 1205.

take concrete steps within their resources towards the progressive realisation of ESCR and thus resulting into gross violations of human rights which, arguably, should also warrant intervention in the form of economic sanctions. Unfortunately this is not the case and most sanctions continue to be levelled against violations of a civil and political nature and thus giving the impression that it is acceptable to violate ESCR so long as civil and political rights are realised.

Lastly, considering that even targeted sanctions can inflict harm on the innocent populace, the question of providing compensation to the injured again unavoidably arises. It is not only unclear in regard to what remedies and mechanisms are available to the victims of such sanctions<sup>189</sup> but also who can be held accountable or responsible for the violations. Can it be attributed to the 'troublesome' regime or the imposing entity or both? With specific focus on the Security Council, invoking the possible responsibility of the UN would raise difficult problems of attribution since UN sanctions are regularly imposed by the Security Council but implemented by national policies/legislation.<sup>190</sup> Furthermore, the UN enjoys complete immunity from any form of legal proceedings before any national court under Article 105 of the UN Charter. However, the ECJ has held that damage suffered as a result of the economic embargo against Iraq was not attributable to the European Community but the Court hinted at the responsibility of the UN for Security Council sanctions.<sup>191</sup> On the hand, it has also been contended that the suffering arising out of the sanctions was a rise of the regime that had initially caused a threat to international peace and security and not the Security Council.<sup>192</sup> Perhaps there is need for enhanced discussions on the liability of the Security Council within the context of Article 50 of the UN Charter, under which any state 'confronted with special economic problems arising from the carrying out of [preventive or enforcement measures taken by the Security Council] shall have the right to consult the Security Council with regard to a solution of those problems. Similarly the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights provides that an international organization or state can be held responsible for violations of economic, social and cultural rights and as such all concerned victims are entitled to adequate reparation, which may take the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition.<sup>193</sup>' Some have also suggested that claims for

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<sup>189</sup> Nanda (n 126 above).

<sup>190</sup> A Reinisch *Developing human rights and humanitarian law accountability of the Security Council for the imposition of economic sanctions* (2002) 95 *American Journal of International Law*.

<sup>191</sup> As above.

<sup>192</sup> Jeremy Matam Farrall *United Nations Sanctions and the Rule of Law* (2007).

<sup>193</sup> *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, January 22-26, 1997. Para 19 and 23 <http://www1.umn.edu/humanrts/instree/Maastrichtguidelines.html> (accessed 5 October 2012).

damages be brought before national courts, or regional human rights organizations, or the ICJ.<sup>194</sup> Nevertheless, the quest for legal remedies faces various procedural and substantive obstacles as all institutions remain hesitant to the risk of opening a floodgate of claims.

### 3.2 Conclusion

All the highlighted problems provoke us to seriously reconsider the aspect of targeted sanctions in addressing human rights violations. Targeted sanctions, in spite of their noble pursuit of protecting human rights, do not themselves succumb to principles of due process as demanded by international human rights law. Their subsequent implementation does not also necessarily protect the innocent populace from adverse humanitarian impacts and studies confirm that most sanctions simply do not succeed in achieving stipulated goals. Most targeted sanctions have not brought about an increase in effectiveness that is dramatically better than that of comprehensive sanctions.<sup>195</sup> Examples of Iraq, Zimbabwe, Haiti, Cuba, Burma, amongst others, seem to confirm this point. Inasmuch as sanctions also serve as an important symbolic gesture of strong disapproval by the international community towards the targeted regime/entity other than merely inducing behavioral change, its end goal of ensuring human rights protection must be realized. Thus, the need to systemically review sanctions from their design and implementation from a human rights perspective cannot be more emphasized.

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<sup>194</sup> See UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights*, (2000) U.N. Doc. ECN.4/Sub.2/2000/33 para. 6.

<sup>195</sup> J Gordon *Smart Sanctions Revisited* (2011).

## CHAPTER FOUR

### 4.0 Recommendations

#### 4.1 Introduction

Economic sanctions can be imposed with the good intention of protecting human rights in target countries but the current framework within which they operate has also negatively affected human rights. Though criticism leveled against sanctions are well-founded, abandoning sanctions altogether limits coercive options for human rights protection in target countries to diplomatic measures and/or military intervention which both have significant limitations. Economic sanctions, if systematically improved, could serve as an attractive and effective middle-ground between the two options. In this chapter, recommendations are provided in a bid to improve the design and implementation of sanctions within international human rights law. In proposing these recommendations, this thesis hopes to add to the jurisprudence of ensuring that sanctions are ‘human rights friendly tools’ in their design, but are also effective in deterring human violations with minimal adverse humanitarian impact when implemented. Reference to case studies where relevant is also made in an attempt to signify the importance of context when imposing sanctions. Recommendations herein have thus been proposed from two angles. The first angle provides recommendations addressing the problem of due process under the procedural aspects of imposing sanctions. The second angle provides recommendations on the implementation of sanctions so as to address concerns on the humanitarian impact of sanctions, and to ensure that they achieve their intended goal of protecting human rights.

#### 4.2 Addressing the problem of due process under sanction’s design

##### 4.2.1 The right to be informed

It has been noted that when the sanctions committees are considering listing proposals, such discussions are often held under strict confidentiality. Targeted individuals are therefore not accorded the opportunity to object their inclusion in the listing process because they are mostly unaware of such proceedings. In fact, if reviewed in terms of a criminal proceeding, their right to be presumed innocent is curtailed.<sup>196</sup> On the other hand, it is understandable that the listing process requires sensitivity. Thus, the primary goal of the Security Council in maintaining international peace and security is paramount but this does not entail a complete negation of

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<sup>196</sup> This position has however been rejected in *the El Morabit* case on the basis that such a step did not pre-determine the guilt or innocence of the individual. *El Morabit v. Council of the European Union* Case T-323/07 (judgment of 2 · September 2009) Para 40-52.

individuals' fair trial rights. In *A. and Others v. United Kingdom*, the EtCHR has held that limitations on the right to disclosure of all material may be possible for important public interest matters, provided the person still has the possibility to effectively challenge the allegations against him.<sup>197</sup> Thus, in this context, though the right to be heard before listing occurs cannot be guaranteed, it is recommended that the Security Council provides even the most minimal access to evidentiary information against concerned individuals soon after listing so that individuals can be accorded an opportunity to understand and challenge their listing. According to *Fulmen v Council*, the court held that reasons given, although brief, are sufficient if the individual is able to understand the allegations and is able to dispute the truth or relevance of it..<sup>198</sup> Proportionality test<sup>199</sup> in this regard would thus demand that if the individual is not accorded a chance to be heard due to security interests, he/she must be accorded the opportunity to be provided with information justifying his/her listing which the individual can use to challenge the listing decision. Such information must not merely be a general statement of facts but it must be adequate to enable the individual to understand and challenge the decision. This does not mean that full disclosure of all evidence is required (as the Security Council may also be unwilling to divulge all evidence due to security interests) but sufficient evidence must be provided.

Secondly, the issue of evidentiary information leads us to the important issue regarding the burden of proof required to be discharged when imposing sanctions. Inasmuch the listing process cannot be strictly defined as either a civil or criminal proceeding, it is imperative that there must be a standard of proof to be satisfied under which individuals are listed so that perceptions of impartiality and arbitrariness are minimized. In addition, the severe consequence of being listed justifies the need for a consistent standard that validates listing individuals. It is therefore recommended that the standard to be satisfied must be that there exists a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in an act that justifies listing. This test has been adopted from the international commission of inquiry which was created to investigate reports of violations of international humanitarian law and human rights

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<sup>197</sup> *A and Others v. United Kingdom* Application no. 3455/05 EtCHR (19 February 2009).

<sup>198</sup> Judgment of the General Court (Fourth Chamber) of 21 March 2012.

<sup>199</sup> See also *Tinnelly and Sons Ltd and others and McElduff and others v. UK*, Application No. 20390/92 EtCHR (1998) 76 where it was held that for limitations on court access or fair trial rights based on national security concerns, there must be 'a reasonable relationship of proportionality between the concerns for the protection of national security invoked by the authorities and the impact which the means they employed to this end had on the applicants' right of access to a court or tribunal.'

law in Darfur in 2004.<sup>200</sup> This standard is chosen in light of the fact that it strikes a right balance between having too stringent or too flexible a standard. There must exist evidence, not entirely sufficient but adequate to provide a rational basis that the targeted individual is or could be involved in such unwarranted activities. The link need not be direct but it must raise reasonable and reliable suspicion.

Thirdly, it is recommended that the objective for listing an individual must be clear. It must not be broad or vague but must clearly stipulate the behavioural modification that the sanction seeks. For instance, the objectives behind the sanctions implemented against targeted persons in Zimbabwe (by the EU) are meant to ensure that targeted individuals reject policies that lead to the suppression of human rights, of the freedom of expression and of good governance.<sup>201</sup> This objective is applicable to Mugabe and some supporters of his regime. For Mugabe and some heavy weight politicians who support him, this objective is somewhat clear as they initiate policies but this may be expecting too much from low level targeted supporters. What does it mean to 'reject' a policy within this context? Does this mean that the individual must have successfully opposed the implementation of a 'destructive' policy? Or does this mean that such individuals should refrain from signifying any form of support when the policies are implemented? When objectives for targeting individuals are formulated, they must be sufficiently clear to indicate what the particular individual must do to 'qualify' for delisting. This is proposed in light of the fact that sanctions cannot be merely punitive; instead they seek behavioural modification. The case of *Organisation des Modjahedines du peuple d'Iran (OMPI)*<sup>202</sup> emphasizes the importance of clear objectives behind sanctions.<sup>203</sup> The challenge of course is for the sanctioning entity to strike a balance that allows sufficient flexibility in the formulation of the objective so as to accommodate unforeseeable circumstances that may arise during the sanction period but at the same time avoid a scenario where the objective is too broad and thus leading to unjustified prolonged listing. This could be solved through periodic review that can take into account any circumstance and modify the objective accordingly. However to avoid a scenario where the legitimacy of sanctions is questioned through constant reformulation of objectives, the guiding principle should be that the formulation of sanctions is not strictly constrained but it must still be sufficiently detailed

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<sup>200</sup> See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (2005) available at [http://www.un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf) (accessed 29 October 2012).

<sup>201</sup> Foreign and Commonwealth Office Zimbabwe <http://www.fco.gov.uk/en/about-us/what-we-do/services-we-deliver/export-controls-sanctions/country-listing/zimbabwe> (accessed 17 October 2012)

<sup>202</sup> *Organisation des Modjahedines du peuple d'Iran (OMPI) v. Council of the European Union* Case T-228/02 European Court of First Instance (Second Chamber) (12 December 2006) paras. 154, 155 and 159.

<sup>203</sup> As above. para. 154.

and concise in a manner that accords the individual sufficient information to modify its behaviour for possible delisting.

#### **4.2.2 Review proceedings**

Considering that most sanction committees review requests for delisting through the facilitation of the focal point, it is recommended that the focal point mechanism is abolished as it merely facilitates requests for reviews and does not ensure that due process principles are accorded to. Thus, it is also recommended that the current mandate of the Office of the Ombudsman (OoO) who only reviews requests for delisting from individuals under the Al Qaida regime should be expanded to review individual requests from all Security Council sanctions regimes, and not just Al Qaida.

Secondly, in order to ensure effective review, ideally the Ombudsperson should be accorded decision making powers other than issuing mere proposals for delisting which risk not being implemented by the sanctions committee or the Security Council. However such a recommendation would be over-ambitious considering that this could amount to a 'de facto' review of Security Council decisions and it is unforeseeable that the Security Council would agree to a creation of such a body. And yet there is still need to have an impartial mechanism that issues final decisions for delisting. To balance the competing interests, the following recommendation is made. When the OoO makes a proposal for delisting to the sanctions committee, any refusal to delist should be accompanied by substantiated information from the sanctions committee warranting the refusal, and such refusal must address all the issues initially raised by the OoO in the delisting proposal. The substantiated information warranting refusal for being delisted must be made available to the individual via the OoO unless security interests dictate that such information cannot be made public. In cases where security interests would limit the individual from having access to that information, the information must still be provided to the OoO whereas the OoO will issue a general statement to the individual that his/her request for delisting has been denied providing minimal information as security interests would dictate. The final decision in this case still remains with the sanctions committee but at least under this recommendation, the sanctions committee is bound to provide authenticated reasons for any refusal for delisting.

Thirdly, it is recommended that a defined criteria for delisting under every sanction regime needs to be created. Some efforts have been made under UN Security Council

imposed sanctions<sup>204</sup> though they are not necessarily categorized as criteria to be met. By criteria, this does not mean procedures for delisting but rather factors that must be taken into account when the OoO and the sanctions committee are reviewing requests for delisting. Such guidelines need not be exhaustive but would assist in ensuring consistency and credibility.

#### **4.2.3 Addressing the challenge of political will**

Throughout these recommendations it is borne in mind that political considerations play an important role when sanctions are being designed. As such it may be unlikely that such recommendations are implemented in the near future. Thus, as a short term strategy, there is need for national and regional courts to take an active role in ensuring human rights compliance under targeted sanctions, especially for those implemented under Security Council authorization as they pose the most hierarchical challenges. Inasmuch as states are obliged to implement Security Council sanctions, states must do this within the principles of the UN Charter i.e. respect for human rights. In *Al-Jedda*, for example, the EtCHR held that there ‘must be a presumption that the Security Council does not intend to impose any obligation on member states to breach fundamental principles of human rights.’<sup>205</sup> Taking into account the *Kadi* decision, domestic judicial review can thus be taken by national judiciaries to entertain reviews of listing procedures. This is not to be perceived as a review of the authority of the Security Council but rather an attempt to ensure that sanctions are not blindly implemented by member states without recourse to human rights implications. Even if the guarantees of due process are not necessarily part of *jus cogens*, they arguably belong to international customary law and, as general principles of law, bind also the Security Council.<sup>206</sup> The recent 12 September 2012 EtCHR judgment of *Nada*<sup>207</sup> provides practical guidance on how states can respect individual human rights without derogating from their obligation to implement Security Council decisions. The Court in this case observed that Switzerland could not simply rely on the binding nature of the Security Council resolutions, but should have taken all possible measures, within the latitude available to it, to adapt the sanctions regime to the applicant’s individual situation.<sup>208</sup> Since Switzerland had failed to harmonize the international obligations that appeared contradictory, the Court found that there had been a violation of Article 8 of the ECHR. In reflecting upon Article 103 of the UN Charter, the Court’s view was that the respondent Government had failed to show that they attempted, as far as possible, to harmonise the

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<sup>204</sup> See Security Council Resolution 1735 *Threats to International Peace and Security Caused by Terrorist Acts* Adopted by the Security Council at its 5609th meeting, on 22 December 2006. para 14.

<sup>205</sup> *Al-Jedda v The United Kingdom* Application no. 27021/08 EtCHR (7 July 2011) para 102

<sup>206</sup> Agnieszka Grossman *A Critical Assessment of the 1267 Sanctions Committee* (2012) available at <http://www.e-ir.info/2012/03/03/a-critical-assessment-of-the-1267-sanctions-committee/> (accessed 15 October 2012).

<sup>207</sup> *Nada v Switzerland* Application no. 10593/08 EtCHR (Judgment of 12 September 2012).

<sup>208</sup> As above. para 196-180.

obligations that they regarded as divergent. It is therefore recommended that national and regional courts assume vigilant roles in ensuring that implementation of targeted sanctions is human rights compliant and thus indirectly pressuring the Security Council to adhere to principles of due process.

#### **4.3 Addressing the problem of the unsuccessful implementation of targeted sanctions**

The logic behind the introduction of *targeted* sanctions is twofold: to ensure that any adverse humanitarian impact on the public as a result of the sanctions is prevented, and to ensure that sanctions only target those individuals involved in gross violations of human rights and thus compel them to alter their behavior accordingly. However, in the previous chapter, it has been shown that due to the complexity of sanctions, targeting sanctions on perpetrators, without affecting other parts of the population is not easy to achieve. In addition, their unintended consequences can include reinforcement of the power of oppressive élites and thus render sanctions ineffective in compelling behavioral change. Recommendations are thus made to address these two problems.

##### **4.3.1 Proportionality**

Proportionality, though an accepted principle under international enforcement measures, is rarely adhered to. It is reiterated that the objectives of the sanctions imposed must be strictly proportionate to the means sought. Guidance must be drawn from the recent judgment of *Nada* by the EtCHR concerning a businessman placed on the UN anti-terrorism sanctions list for several years.<sup>209</sup> What makes the case peculiar is that the applicant lived in the Italian enclave of Campione d'Italia, a small 1.6 sq. km enclave on Lake Lugano, surrounded by a Swiss canton. Since the sanctions imposed a prohibition on transit, Nada was not able to leave the small enclave to visit family or friends. The Court's view was that the implementation measures taken against Nada were not proportionate and that the state should have taken the very special situation of him living in the enclave into account.<sup>210</sup> Similarly, the Human Rights Committee in the case of *Sayadi v Vinck*<sup>211</sup> held that the travel restrictions imposed on the applications violated their right to movement and the Committee held the opinion that it did not perceive the travel restriction as necessary for the protection of national security and public order. Thus it is recommended that imposing entities must ensure that a reasonable relationship

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<sup>209</sup> *Nada v Switzerland* (n 207 above).

<sup>210</sup> A concurring opinion by three judges who adopted a different approach in signifying Switzerland's violation of Nada's rights stipulated that the State did not 'take all reasonable steps open to them to seek to mitigate the effect of the sanctions regime by the grant of requests for exemption for medical reasons or in connection with judicial proceedings, or to bring about a change in the sanctions regime against the applicant so as to secure so far as possible his Convention rights.'

<sup>211</sup> *Sayadi v Vinck* (n 159 above).

exists between the means implored and the goal sought. Though still a subjective assessment, an imposing entity must consider whether that particular restriction on the individual's right will most likely result into, or contribute towards a deterrence of the 'opposed' behavior.

#### **4.3.2 Identifying the operating framework of the target**

When considering whether to impose sanctions upon individuals accused for gross human rights violations, regard must be had to the framework under which those particular individuals are operating within. This factor is important in limiting adverse humanitarian effects to the populace and in ensuring that the conduct resulting in human rights violations is eventually curbed. In most cases, such individuals operate within framework of a governing regime. In some cases, it can be an independent revolutionary movement like the Taliban (this point will be addressed in the next section). In the case of a governing regime, an imposing entity needs to take into consideration the specific characteristics of the regime. This is important because the type of the regime can invariably affect the human rights conditions in the country once sanctions are imposed. An imposing entity must therefore consider whether the regime is a purely dictatorial one. If the answer is to the affirmative, it must be borne in mind that the possibility of inducing behavioural change on the part of that regime will be difficult. The failure of sanctions to induce change in dictatorial regimes such as Iran, Cuba and Haiti serve as good examples. Thus imposing entities must be able to rethink, at this juncture, whether sanctions remain a proper and necessary coercive measure for protecting human rights in such a regime. This is not to be perceived as a weakness since best practice dictates that sanctions must be preceded or taken together with other coercive tools especially in cases where their likelihood to induce change is minimal. Sanctions must be perceived to be one 'tool in the toolbox' and must be seen in the context of larger foreign policy options<sup>212</sup> especially if the regime is largely authoritarian. Sanctions imposed against authoritarian regimes have often resulted in those regimes engaging in further political repression as a means to retain power.<sup>213</sup> The regime can also simply avoid economic pressure by shifting the hardship to the population.<sup>214</sup> Thus it is recommended that in the case of authoritarian regimes, other avenues of coercion such as diplomatic negotiation with offers of incentives should be explored.<sup>215</sup>

Secondly, it is also recommended that other than imposing targeted sanctions on individuals in the form of travel bans or asset freeze in a purely authoritarian regime, it is

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<sup>212</sup> The Carter Center *Meeting on the Viability of International Economic Sanctions* (1996) 2.

<sup>213</sup> Perksen (n 47 above).

<sup>214</sup> Grebe (n 161 above) 21.

<sup>215</sup> Others may criticize diplomatic channels as being lengthy, but similarly, sanctions imposed against authoritarian regimes have proved to be considerably lengthy without yielding desired results. Consider the sanctions against the authoritarian regimes in Iraq, Iran, Afghanistan, Cuba and Haiti.

more strategic to impose an arms embargo so that such regimes do not use such weaponry to further repression. However, this proposal is made cautiously considering the fact that the effectiveness of an arms embargo largely has to do with the level of state cooperation. Underground supply of weaponry by other states has often undermined any positive behavior change as evidenced by the cases of Zimbabwe (secretly supplied weaponry by China) and Syria (secretly supplied by Russia).

Thirdly, if the regime is a hybrid regime, targeted sanctions are more likely to succeed. A hybrid regime is one that possesses democratic structures but largely reflects authoritarian tendencies. Such democratic structures, as imperfect as they may be, demand some sense of accountability on the part of the regime. The presence of opposition parties/factions is also a positive factor to consider. In nations where repression has eliminated domestic democratic opposition, coercion against such regimes is much more difficult.<sup>216</sup> On the other hand, sanctions imposed coupled with the presence of such structures can represent pressure to the regime and thus warrant behavioural change. Human rights violations by that regime are thus more likely to decrease.

#### **4.3.3 What is the relationship between the regime and the targeted entity?**

The imposing entity often makes the mistake of confusing a regime and any hostile entity operating within the regime as one. In cases like the Taliban in Pakistan and Afghanistan, the distinction is clear and as such, sanctions can be rightfully targeted against that hostile entity without necessarily targeting the governing regime. In other cases, it is not so clear. For instance, ZANU-PF and the Mugabe regime are often perceived to be the same because the distinction is not clear. And yet this distinction is important because sanctions must strategically target individuals who, when targeted, will induce the desired behavioural change. Without the Mugabe regime, ZANU-PF may not necessarily pose as a hostile entity. Similarly, in the case of Iraq, groups such as the Sunni minority and the Baath Party gained prominence through Saddam Hussein. In such cases, the general recommendation would be that sanctions need to target regimes because it is these regimes which encompass the procedures defining and regulating access to power. Targeting sanctions against groups that support oppressive regimes in the hope that the 'pain' inflicted on the group members will deter their support for the regime sometimes only produces the opposite effect (by inducing further rebellious support for the regime). Such was the case during the Saddam Hussein regime who consolidated his repressive authoritarian rule by enhancing the relationship between the regime and the key groups whilst allowing him to maintain a strong repressive rule against civilians in spite of the

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<sup>216</sup> David Cortright *Humanitarian Sanctions? The Moral and Political Issues* (1995) 1-3.

sanctions.<sup>217</sup> Such non-strategic imposition of sanctions can therefore increase human rights violations. Thus it is recommended that economic sanctions should, where applicable, target key players. They should target those in whom, once a change of behaviour is achieved, will also alter the behaviour of its followers.

#### **4.3.4 Is the target regime hurting?**

Vulnerability rather than the degree of culpability often determines whether or not a regime is an appropriate target of economic sanctions. So the question that the imposing entity ought to ask is whether the target regime is 'hurting' in a manner that will cause it to desist from carrying out further human rights violations. In order to ensure that the regime is 'hurting,' economic or political costs to the leaders of those regimes must be carefully crafted. However, care ought to be taken that the regime's vulnerability is not deftly transformed into the vulnerability of the nation itself. In addition, 'hurting' in this context is not used as a form of punishment but rather to ensure that the outlaw regime is able to feel the pain enough to change its policies. An illustrative example is the US imposition of sanctions against Idi Amin that strategically targeted Uganda's coffee exports (which was crucial for obtaining foreign exchange) in a bid to undermine Amin's regime. This foreign exchange was crucial to curb Idi Amin's strategy of providing private goods to his core group of supporters such as the army and civil servants. The initial commercial boycott and subsequent trade ban eventually contributed to weaken Amin's regime.<sup>218</sup> Similarly, in the Dominican Republic, sugar exports were the main source of the Trujillo family's resources used to buy the support of core supporters, including the armed forces. Hence the strategy implored by the Organization of American States (OAS) and the US restricting Dominican sugar imports contributed to efforts towards a peaceful regime change.<sup>219</sup> In ensuring that the cost is not unduly borne by the populace, the target of such sanctions must be something that is directly under the control of the regime and is used for the regime's sustenance.

#### **4.3.5 What is the extent of internal support for the regime?**

Sanctioning entities must bear in mind that even the most brutal of regimes can attract some level of support from the populace. Most dictators do not rule in isolation, but build supporting coalitions whose loyalty is largely dependent on obtaining patronage resources or policy concessions from the dictator.<sup>220</sup> The Haitian military regime had, for example, the support of

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<sup>217</sup> Perksen (n 47 above) 62.

<sup>218</sup> R Nurnberger *Why sanctions almost never work?* (2003) 1-2.

<sup>219</sup> Abel Escriba`-Folch *Dealing with Tyranny: International Sanctions and the Survival of Authoritarian Rulers* (2010) 340.

<sup>220</sup> As above.

the small wealthy elite.<sup>221</sup> The Taliban had the support of religious militants and the Iraqi regime had the support of the military i.e. the Republican Guard.<sup>222</sup> As Kimenyi emphasized, 'to keep the coalition intact, it is necessary for the dictator to distribute benefits to the coalition.'<sup>223</sup> This is even more evident in countries where resources are scarce, for instance Zimbabwe. The magnitude of internal support for the regime will affect how the targeted regime responds to sanctions. In some cases, the support emanates from an innocent populace and not necessarily a hostile faction. Lack of proper communication channels is one of the reasons why such populace rallies behind targeted regimes. Regimes, especially those that are authoritarian in nature and thus in control of information flow, are able to effectively convey to the populace misconceptions about the sanctioning entities. This is most apparent in regimes operating in countries with historical disadvantages. Such regimes manage to relate the sanction imposed as an attempt to entrench such historical disadvantages. The Taliban has used this tactic to display western imposed sanctions as attempts of demeaning Islam. A study conducted during the Taliban-led regime found that the sanctions against Afghanistan was mostly seen by the citizens of that country as another attempt by the West (the Judeo-Christian tradition) to isolate Islam by defining it as the troublesome other.<sup>224</sup> Thus, there was absolutely no support within Afghanistan for further economic sanctions and that there was 'strong and widespread perception that the Security Council had set out to harm rather than help Afghans.'<sup>225</sup> Mugabe has also attacked sanctions imposed on his country as an attempt by the West to interrupt his government's attempt in correcting colonial imbalances evidenced through current land inequalities. In fact, observers suspect that the Mugabe regime does not want the sanctions lifted as they have effectively been used as a campaign tool to rally support against the west and enhance Mugabe's control.<sup>226</sup> Similarly in Cuba, Castro depicted US sanctions as an imperialistic attempt to infringe on the independence and integrity of the Cuban people. Sanctions therefore allowed Castro to divert public attention from internal problems of the communist regime to the external threat posed by sanctions.<sup>227</sup> In such instances, a significant number of supporters have rallied behind such regimes and thus made it easier for the regime to justify repression. Considering the challenges of obtaining information in some regimes, it may not always be easy to effectively communicate the intended objectives of sanctions to the people of the regime being targeted. However, it is recommended that attempts must still be

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<sup>221</sup> Addis (n 40 above) 585.

<sup>222</sup> As above.

<sup>223</sup> Folch (n 219 above) 337.

<sup>224</sup> Addis (n 40 above) 610.

<sup>225</sup> As above.

<sup>226</sup> A Harding *EU to suspend Zimbabwe sanctions after referendum* available at

<http://www.bbc.co.uk/news/world-africa-18951> (accessed 30 July 2012).

<sup>227</sup> Perksen (n 47 above) 63.

made to effectively communicate the reasons for sanction policy to the population of the state whose regime is being targeted either through other non-state controlled means such as civil society, opposition parties, public discussions and seminars as well as website publications.

#### **4.3.6 What does the populace want?**

Even though economic sanctions discussed herein are imposed with the good intention of protecting human rights in a target country, it must be borne in mind that other equally important aspirations are prioritised by the populace such as peace. Most, if not all sanctions, are imposed without any consultation of the group whose rights are to be protected.<sup>228</sup> Examples include attempts by the US to force a democratic transition in Myanmar without a thorough assessment of Myanmar's historical, political, economic, social, and cultural climate.<sup>229</sup> The same can be said of Zimbabwe whose current political problems can be traced back to historical problems upon attaining independence. This is not to mean that human rights should be forgone but it is recommended that a holistic assessment of the situation in a target country is done before sanctions are implored otherwise sanctions will only serve as a short term solution within a broader range of problems that are likely to resurface later and cause wider human rights violations

#### **4.3.7 Enhanced regional support- a unique call for the African Union (AU)**

Perhaps the sanctions agenda has been driven by the western world and there is need for regional bodies to create ownership of the agenda. A special call is hereby made for the AU in consideration of the fact that many sanctions regime under the Security Council concern African countries. The AU's sanctioning powers has largely centred upon unconstitutional changes of government. Much as unconstitutional changes of government invariably affect human rights, there is still need for the AU to pay closer attention to other forms of gross violations of human rights in African countries and impose sanctions accordingly. The AU has repeatedly rejected sanctions against countries like Zimbabwe and South Sudan citing negotiations as more effective mediums even when evidence suggests otherwise. In some instances, it is this lack of cooperation that has entrenched repressive governments where such governments have avoided the cost of sanctions by securing the supplies of scarce resources through neighbouring countries. The support that Mugabe currently enjoys with neighbouring countries in the SADC region is a good example. Even though Hufbauer's theory suggests that the greater the number of participating countries, the more likely the regime is compelled to alter its behaviour;<sup>230</sup> it is contended that it is not really the number of sanctioners that matters

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<sup>228</sup> D'Hollander (n 4 above).

<sup>229</sup> As above.

<sup>230</sup> G Hufbauer, B Oegg *A Short Survey of Economic Sanctions* (2001).

but the strategic positions of the participating country and their relationship with the targeted regime. Thus if AU mandates member states implement sanctions against African regimes who engage in gross human rights violations, the pressure may be harder felt and compel behavioural change. Thus it is recommended that the sanctions committee under the AU must be systematically strengthened so as to address human rights violations. Procedurally, the AU sanctions committee must adhere to due process principles as discussed earlier.

#### **4.4 Conclusion**

This thesis has sought to convey that economic sanctions require strategic design and implementation within the framework of international human rights so as to improve their impact. It has thus provided recommendations to address the same. However, an issue that remains unresolved concerns remedies for wrongfully listed individuals and for victims of humanitarian impact of sanctions. Resources permitting, perhaps the solution could lie in the establishment of a separate organ/commission under the UN to consider and award rightful claims. All in all, the challenge is that political will remains wanting. Nevertheless it is hoped that an active role played by national/regional courts will provide substantial pressure for reform.

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