Legal Boundaries to UN Sanctions

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May 2002


Abstract: The Security Council is empowered under Article 41 of the UN Charter to enforce the peace by imposing non-military measures, including comprehensive economic sanctions. As UN sanctions have shown to cause massive harm to civilian populations, the question has arisen whether the Security Council is bound by any legal norms in designing and imposing economic coercion on populations and if so, what are these norms[2]. Our conclusion is that when imposing Article 41 measures, the Security Council is bound by the UN Charter, by general principles of international law and by human rights norms.

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It is by now undisputed that economic sanctions can cause substantial harm to civilian populations. This has even been admitted, albeit implicitly, by the permanent members of the UN Security Council [3] and by US leaders [4], responsible for imposing and maintaining UN

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[3] On 13 April 1995, the five permanent members of the Security Council sent to the President of the Security Council a non-paper entitled "Humanitarian impact of sanctions" in which they
sanctions against Iraq. Is the Security Council legally entitled to deliberately cause hardships to a civilian population in order to discharge its peace-enforcement mandate? If yes, what are the boundaries beyond which the harm caused to human beings by UN-imposed economic sanctions would be unlawful?

The article will first examine and dispose of the claim that the Security Council is not bound by any legal norm and then proceed to identify the legal norms that circumscribe action by the Council and by States acting under its authority, with particular regard to the human rights of the people in sanctioned countries.

1. Are the powers of the Security Council at all limited?

Before examining the legal boundaries, if any, circumscribing the powers of the Security Council, it is necessary to establish whether the United Nations, as an international organisation, is a "subject of international law" and "capable of possessing both rights and duties". This question has been answered in the affirmative by the International Court of Justice in its Advisory Opinion on the UN expenses case [5]. That the United Nations possesses a distinct legal personality under international law is furthermore confirmed by the provisions of the Convention on the Privileges and Immunities of the United Nations of February 13, 1946 [6].

1.1 Is the Security Council bound by legal standards?

The view is sometimes held, at the fringe of legal debate and perhaps with tongue in cheek, that no rules of law constrain the Security Council with regard to its mandate to maintain international peace and security [7]. Such argument is grounded mainly on policy considerations, inferred from the intent of the drafters of the UN Charter.

In justifying this view, it is argued that in order to secure the continuous existence of humanity it is necessary to confer upon one, and only one, institution, unlimited powers to face any conceivable threat to international peace and security. To place legal constraints on such a body, according to such a view, would place it in a disadvantage in the case the international community were confronted by actors disregarding all legal rules and seriously threatening international peace and security or even the existence of humanity. The hypothetical case of malicious individuals willing and able to destroy humankind with weapons of mass destruction, is a popular illustration that presumably would justify endowing the Security Council with powers to disregard any legal rules. What remains unsaid by


[4] At the time she served as US Ambassador to the UN, Madeleine Albright (later US Secretary of State), was interviewed by Lesley Stahl on the popular CBS TV Programme "Sixty Minutes" of 12 May 1996. After commenting on the consequences of the sanctions against Iraq, he asked her "We heard that a half a million children have died [as a result of the sanctions on Iraq]. I mean, that's more children than died when - wh-in—in Hiroshima. And—and, you know, is the price worth it?" Her answer: "I think this is a very hard choice, but the price - we think the price is worth it." [From CBS's authorized transcript, p. 8]


proponents of unlimited powers of the Council is that even if constrained by existing legal norms, the Security Council would still wield formidable discretionary powers to act for the maintenance of international peace and security, assuming in the first place that it is genuinely committed to such values. It can also be shown that far from constraining the mandate of the Council, legal norms provide a useful restraint against hasty action that could exacerbate international peace and security. The invocation of security theories is common among non-democratic leaders. They can claim with some truth to maintain a sort of peace, albeit at the cost of torture, extra-judicial executions and the abolition of civil rights, all of which ultimately pave the ground for violent upheaval. Even at the level of policy, it appears far from certain that endowing the Security Council with powers to disregard the law, would enhance international peace and security.

We will presently return to the question whether the Security Council stands above or beyond the law or has the capacity to disregard the law.

Our first observation will address the legitimacy of an institution mandated to act for the benefit of humanity as a whole. As our discourse is situated within the realm of rationality, we dismiss outright the unstated assumption that some individuals, because of their political status, are endowed with divine powers that enable them to know what is good for humanity as a whole and disregard law created by common humans. It follows that if one does not attribute divine attributes to those who garner the ranks of officialdom, and if there is nevertheless a utilitarian need to establish an authority that could secure peace and security, such an authority must represent those for the benefit of whom it purports to act. It must, in other words, possess legitimacy. The concept of representation entails, necessarily, its complement, namely that of accountability. An organ representing others seeks its legitimacy from those it represents. The obligation of accountability entails a relationship of hierarchy between principal and the agent. By basing its actions on a mandate to act for the common good and on behalf of others, an authority undertakes an obligation to act with good faith to fulfil its mandate. The obligation to act in good faith and the obligation of accountability are not merely political, but constitute legal obligations, even where there exists no mechanism to enforce accountability and good faith.

As all human beings are fallible, it must be assumed that a reasonably informed person, acting freely and rationally, would hardly delegate to fallible human beings unlimited powers to act on her behalf[8].

Hart ponders about the attributes of a “legal system” After discussing the various pitfalls that students of this question may encounter, he concludes:

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

[8] Even when undergoing medical surgery, in which a person effectively places his or her own life in the hands of a specialist, the implied powers conferred by the patient to the surgeon are limited to the specific operation, and do not extend to other spheres of life. The relationship between the patient and his physician is based on consent, trust and the delegation of limited powers. Similar considerations apply to the relation of a civilian population to the police.
It follows that “officials”, whatever their status or designation, are not free to act as they please but are bound by “common public standards of official behaviour” and must “appraise critically their own and each other’s deviations as lapses”.

We submit further that it is possible to demonstrate empirically the existence of an international “legal system”. This system is composed, inter alia, of identifiable institutions, principles, norms and rules, conventional and customary. The United Nations is part of that system.

We submit further that Hart’s minimum conditions, as quoted above, apply to any legal system, including the “international legal system”. We further posit that there exists a number of institutions that can be viewed as acting as “officials” within the “international legal system”. Such “officials” (using Hart’s terminology) include, inter alia, the Security Council, the General Assembly of the United Nations and the International Court of Justice. We moreover posit that there exists a common understanding that because their “official” status, such institutions are expected to act for the common good[9]. If these propositions are accepted, it follows that the Security Council and its individual members are bound by “common public standards of official behaviour” and that all organs fulfilling “official” functions in the “international legal system” are under the standing obligation to “appraise critically” each other’s conduct, in order to prevent deviations[10].

The purpose of the above demonstration was to emphasise that the Security Council does not stand “beyond” or "above" the law but acts within the “international legal system”. It is thus subject to the variety of principles and rules that are applicable in that system.

In the Libya v. U.S. case, the International Court of Justice was asked by Libya to conclude that certain resolutions by the Security Council were “contrary to international law”. Judge Shahabuddeen, in his separate opinion, concurring with the majority, asked the following important, though rhetorical, questions:

The question now raised by Libya’s challenge to the validity of resolution 748 (1992) is whether a decision of the Security Council may override the legal rights of States, and, if so, whether there are any limitations on the power of the Council to characterise a situation as one justifying the making of a decision entailing such consequences. Are there any limits to the Council’s powers of appreciation ? In the equilibrium of forces underpinning the structure of the United Nations within the evolving international order, is there any conceivable point beyond which a legal issue may properly arise as to the competence of the Security Council to produce such overriding results ? If there are any limits, what are those limits and what body, if other than the Security Council, is competent to say what those limits are ?[11]

In the same vein, Judge Weeramantry, in his Dissenting Opinion, asked: “[D]oes...the Security Council discharge [...] its variegated functions free of all limitations, or is there a circumscribing boundary of norms or principles within which its responsibilities are to be [9] Under the UN Charter, the Security Council is conferred with the mandate to maintain international peace and security, a common good.

[10] This would obviously be the ideal situation and reality does not conform to this ideal. But law is not a mere tool of realpolitik; it is a normative sphere applicable equally to all members. Inasmuch as States recognise the norm, their conduct can and should be examined in the light of that norm, whether acting alone or collectively.

discharged?"[12] Similar questions were expressed by former UN Secretary-General Boutros Boutros-Ghali[13].

These authors imply the existence of such boundaries, although they did not indicate their exact nature. Assessing the case, M. Franck concluded that the

majority and dissenting opinions [of the Court] seem to be in agreement that there are such limits and that they cannot be left exclusively to the Security Council to interpret. The legality of actions by any UN organ must be judged by reference to the Charter as a ‘constitution’ of delegated powers.”[14] (emphasis in the original)

Bedjaoui, former Judge of the International Court of Justice, goes further, arguing that “all the principal organs of the United Nations must respect not only the Charter but international law itself, if only because the founding States did not invest them with any function as international legislators or creators of new rules.”[15]

One variant of the view that the Security Council is bound by legal norms is to consider the UN Charter as a "constitution" of the international community[16]. Fassbender, thus, holds that "all available evidence has made me conclude that the UN Charter was not conceived as one more multilateral treaty operating within the framework of international law but as the constitution of an international political society within which international law would operate[17].

For our present purposes it will not be necessary to determine to what extent the UN Charter can be considered as a constitutional instrument of the international community. Obviously, any comparison with national constitutions would be tenuous. However it must by now be settled that the Security Council is bound by legal standards, though their exact nature and scope have yet to be identified.

1.2 States cannot delegate or grant to an international organisation rights they do not possess

An international organisation of States owes its very existence to the sovereign will of its member States, who can at any time agree to dismantle it. Article 24(1) of the Charter stipulates that the Members confer primary responsibility for the maintenance of peace and security upon the Security Council. Gill explains:

The word confer means ‘to grant’ or ‘to bestow’ and implies a superior or hierarchical relationship in as much as the grantor generally has the power to determine that the


[14] Franck, supra note 2, pp. 522-23

[15] Bedjaoui, supra note 2, p. 32

[16] See, for example, Fassbender, supra note 2, citing Andreas Stein's dissertation on the legality of 'humanitarian interventions' by the Security Council in the light of the 'concept of rule of law', op. cit. p. 78 et seq.

[17] Fassbender, supra note 2, in note 20 loc.cit., borrowing the language from Sir Humphrey Waldeck, General Course on Public International Law, 106 Recueil des Cours, (1962-II), 1, at 19.
The grantee has exceeded his authority and ultimately withdraw the authority which has been granted [18].

Consequently, a legal subject that was granted certain rights does not possess the competence to extend and amend these rights without the express consent of the grantors. Should the Security Council, as a grantee of rights, exceed such rights, its members could at any time withdraw their consent [19] or decide to close down the Council by refusing to elect its ten non-permanent members [20]. If member States possess in law the above prerogatives, it follows that the competence of the Security Council is limited by that which UN members are willing to concede to it. And because States can not confer upon an international organisation rights they do not possess, such as the right to commit genocide, the Council is equally precluded from engaging in such conduct by virtue of the prohibition imposed on its members.

Former ICJ Judge Bedjaoui eloquently captured the absurdity of the proposition that States could confer powers they do not possess to an international organisation:

> It appears less acceptable than ever that sovereign States should have created an international organisation equipped with broad powers of control and sanction vis-à-vis themselves but itself exempted from the duty to respect both the Charter which gave birth to it and international law [21]

For the above reasons, it must be concluded that the rights (or powers) of international organisations and their respective organs, can never exceed those conferred on them by their members.

In the *UN Expenses* case, the International Court of Justice held that States, "by entrusting certain functions to [the United Nations], with the attendant duties and responsibilities, have clothed it with the competence to enable those functions to be effectively discharged." [22] (emphasis added). As States bear duties and responsibilities to the human person, it follows that the Security Council, when acting in a collective manner instead of individual states, continues to bear such duties and responsibilities, including those owed to the human person [23].

### 2. Limits inherent in procedural provisions of the UN Charter

Vera Gowlland-Debbas argues that “the extent of [procedural] restraints is in direct relationship to the prevailing political consensus and balance of forces within the broader

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[18] Gill, *supra* note 2, p. 68

[19] Their ability to intervene against what they consider as excesses by the Council is in fact restricted by their capacity to withstand pressures, coercion or attacks by powerful Council members.


international system."[24]. She appears to suggest that a voting majority within the Council could constitutionally - and thus lawfully - decide to disregard procedural provisions of the UN Charter. Under general principles of international law and under the provisions of the Vienna Convention on the Law of Treaties (hereafter "VCLT"), parties to a treaty are bound to fulfil their treaty obligations in good faith[25]. Such an obligation arguably extends to all provisions of treaties, including those of a procedural character. This obligation extends to States, when acting within international organisations, in the name of the international community. It is, therefore, difficult to reconcile oneself with the view that a UN organ, such as the Security Council, could simply disregard a procedure stipulated in the Charter, in order to pursue policies which it could pursue by respecting the procedure[26]. For if the Council were permitted to disregard one particular procedural provision, what would prevent it from disregarding other such provisions, such as the requirement of a majority vote?

It must be remembered that procedures are stipulated in legal instruments, *inter alia*, in order to prevent abuse and ensure accountability. They serve major purposes in law and cannot be discounted as legal niceties to be disposed at will. What would be the legal consequences of a procedural dereliction by the Council, is however a question that will not dealt with here.

3. **Boundaries to Council action set by general international law**

It is assumed here that the United Nations and its organs are acting within the international legal order and not above or outside that order. Consequently they are bound by general principles of law[27].

General principles of law constitute one of the sources of law used by the International Court of Justice in the course of its work and is listed under Article 38 (I) (c) of the Statute of the Court. Such principles are essentially supplementary, or subsidiary, sources of law used by international judicial bodies when faced with an issue not covered by a specific conventional rule or where a specific customary norm cannot be identified. Examples of such general principles of law are given by Brownlie as the principles of "consent, reciprocity, equality of states, finality of awards and settlements, the legal validity of agreements, good faith, domestic jurisdiction, and the freedom of the seas."[28]. Other rules of general international

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[24] Gill, supra note 2, equally, warns against placing too much emphasis on the formal, or procedural, requirements to be followed by the Council (p. 110).

[25] Article 26 [Pacta sunt servanda] of the VCLT: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

[26] A glaring example is provided by SCR 687 (1991) which secured the continued maintenance of economic sanctions against Iraq after the Gulf war. Had the Security Council followed the strict procedure, it should have ended the sanctions that were imposed in August 1990 with the sole aim to secure the end of Kuwait’s occupation by Iraq. It could then determine that a new "threat to the peace" emanated from Iraq, it could do so and re-impose economic sanctions. This procedure was not followed because the Council dominant members may have feared that the Council would not agree to designate a defeated Iraq as a “threat to the peace”. Instead, a shortcut was taken, by simply replacing the initial goal of the sanctions (the end of Kuwait’s occupation) with new goals.

[27] Fassbender, supra note 2, claims that because, in his view, the UN Charter is "the constitution" of the international order, "there is no room for a category of 'general international law' existing independently beside the Charter. Instead, the Charter is the supporting frame of all international law existing today and, at the same time, the highest layer in a hierarchy of norms of international law." Such a view is not widely shared.

law include the obligation to repair a breach, abuse of rights[29] and the principle of non-discrimination[30].

The invocation of general principles of law, as a supplementary source of law, is found in many constitutions and municipal codes in most, if not all, legal systems of the world. Cheng provides such evidence from sources as varied as the Bengal Regulation III of 1793, the French Civil Code of 1804, the Peruvian Civil Code of 1852, the Egyptian Mixed Civil Code of 1875, the Spanish Civil Code of 1888, the German Civil Code of 1896, the Brazilian Civil Code of 1916, the Thai (Siamese) Civil Code of 1925, the Chinese Civil Code of 1929, the Greek Civil Code of 1940, the Philippine Civil Code of 1949 and the Iraqi Civil Law No. 40 of 1951.

According to Akande, it is a "duty on the part of the [Security] Council not to violate general international law unless the Charter specifically allows it to do so."[31] In support of this view he quotes statements by a number of judges of the ICJ in separate and dissenting opinions and the drafting history of the Charter. Thus in Lockerbie Judge Weeramantry stated: "The history of the United Nations Charter [...] corroborates the view that a clear limitation on the plenitude of the Security Council's powers is that those powers must be exercised in accordance with the well established principles of international law."[32]

In the Reparations case, the International Court of Justice pointed out that it was [...] "faced with a new situation. The questions to which it gives rise can only be solved by realising that the situation is dominated by the provisions of the [UN].Charter considered in the light of the principles of international law." (emphasis added)[33]

In the Tadic case, the ICTY Trial Chamber implicitly recognised that the Security Council is bound by general principles of international law: "It is a matter of logic that if the Security Council acted arbitrarily or for an ulterior purpose it would be acting outside the purview of the powers delegated to it in the Charter [34] (emphasis added).

For our present purposes, a number of general principles that concern the rights of the human person, are relevant:

• The principle of humanity;
• The principle of necessity;
• The principle of proportionality.

[29] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Stevens & Sons Ltd., London (1953), Chapter 4 (Good faith in the exercise of rights, the theory of abuse of rights)

[30] Discussed, *inter alia*, by Hevener and Mosher, see infra note 33, at 608-9. Some authors categorize the norm of non-discrimination as a customary norm of international law or a norm *jus cogens*, rather than a general principle.


The content of these principles will be briefly reviewed below.

3.1 The principle of humanity

The principle of humanity, formulated in various ways, derives from the inherent dignity of every human person, a concept of natural law. The principle of humanity is enshrined in the Preamble of the UN Charter, in numerous national constitutions, in human rights and humanitarian instruments[35], UN Declarations and Resolutions and has been referred to by municipal and international courts. The principle of humanity is regarded as a general principle of international law[36].

In most cases the principle of humanity is formulated negatively, namely as the prohibition of conduct that would infringe a person's humanity (or dignity). An example is the imperative prohibition of torture.

While it is possible to affirm that subjecting human beings to sub-human, or animal, conditions of existence would be totally incompatible with the principle of humanity, the question remains at what point do conditions of existence become inhuman. We suggest that the threshold of humanity - in its positive form - can be deduced from the minimal standards applicable to prisoners. The underlying reasoning is that the lowest threshold of humanity can be assumed to be imposed on individuals condemned by society for the gravest offences.

The Economic and Social Council adopted by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 Standard Minimum Rules for the Treatment of Prisoners. General Assembly Resolution 45/111 (1990) sets out the Basic Principles for the Treatment of Prisoners, which refers to the duty of States to give due respect to prisoners' "inherent dignity and value as human beings".

The Basic Principles for the Treatment of Prisoners stipulate that

> [e]xcept for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the ICESCR and the ICCPR and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants (para. 5)[37].

The Standard Minimum Rules for the Treatment of Prisoners list minimal norms concerning prisoners' sleeping accommodation (cubic content of air, lighting, heating, ventilation), prisoners' living/working quarters, sanitary conditions, provision of clothing, bedding, adequately nutritional food and drinking water, opportunities for physical exercise, sport, further education and recreational activities and access to medical care. The Basic Principles for the Treatment of Prisoners emphasise the right of all prisoners to "take part in cultural activities and education aimed at the full development of the human personality."

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The rights of prisoners of war are enshrined in Section II of the III Geneva Convention of 12 August 1949. These rights extend to personal safety, hygiene, adequate living quarters, adequate and nutritional food, access to sufficient drinking water, clothing, underwear and footwear, access to medical care, right to exercise religious duties and opportunities to practice intellectual, educational and recreational pursuits, sports and games.

If one accepts that the principle of humanity applies, as a general principle of law, to non-military measures adopted under the authority of the Security Council, it follows that such measures may not be so severe as to subject human beings to sub-human conditions of existence, let alone to the risk of disease and death.

3.2 The principle of necessity

The principle of necessity applies to any public authority endowed with discretionary powers. Such an authority must demonstrate that measures it imposes are necessary in order to achieve overriding policy goals to which the authority was mandated. The principle of necessity finds application in various fields, such as in international relations, human rights law and the law of armed conflict. To the extent that the United Nations are bound by general principles of international law, the Security Council is bound by the principle of necessity.

The invocation of the principle of necessity in international relations can occur, for example, when a State is confronted with a "grave and imminent peril" and must act in violation of international obligations because it is the "only means of safeguarding an essential interest of the State". According to the ICJ which examined to some depth the concept of the "state of necessity", the "state of necessity is a ground recognised by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation." The Court observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. Elsewhere we argue that when discharging its mandate, such as when determining the necessity to respond to a threat to, or breach of, the peace, the Security Council of the United Nations must act in good faith, and consequently must act according to the principle of necessity.

The principle of necessity applies equally within States' internal order. The Meeting of Experts on Rights Not Subject to Derogation During States of Emergency and Exceptional Circumstances held at the United Nations in Geneva 17-19 May 1995, regarded the principle of necessity as "the most relevant standard for determining the legality, under international law, of emergency measures affecting rights not classified as non-derogable." The report refers, inter alia, to the decision of the European Commission of Human Rights in the Lawless case, adopted in 1960, which has stood the test of time and still furnishes the basic test of necessity for emergency measures in Europe and elsewhere. The decision established a three part test: are the measures adopted "apt to contribute to the solution of" a specific problem which forms part of the emergency which is affecting the country in question; is the problem such that normal measures - i.e. those which would be compatible with international obligations without derogation - would


not be adequate and, thirdly, would other emergency measures having a lesser impact on human rights be able to solve the problem in question.

In the law of armed conflict, the principle of necessity is applied restrictively and is generally formulated in the form of military necessity or imperative military reason.

In the authoritative Commentary to the Additional Protocol I issued by the ICRC, the term "military necessity" is discussed in detail and given the following meaning: "Military necessity means the necessity for measures which are essential to attain the goals of war, and which are lawful in accordance with the laws and customs of war. Consequently a rule of the law of armed conflict cannot be derogated from by invoking military necessity unless this possibility is explicitly provided for by the rule in question."[41]. Such rules include, inter alia, Article 54 (5) of the Additional Protocol I, which envisages that a Party to the conflict may derogate from certain prohibitions "where required by imperative military necessity"; Article 62 (1), which requires that Parties to a conflict respect the right of civil defence organisations and their personnel to "perform their civil defence tasks except in case of imperative military necessity."; and Article 71 (3) which permits a Party to the conflict to limit or temporarily restrict the movements of relief personnel "[o]nly in case of imperative military necessity."

It is important, though, "not to confuse military necessity with military convenience. It is the obligation of military personnel to assume some risk in the effort to protect innocents."[42].

If one accepts that the principle of necessity applies, as a general principle of law, to measures adopted under the authority of the Security Council, it follows that any impairment to derogable human rights that could be reasonably foreseen to ensue as a result from these measures, must be demonstrated as necessary to achieve the legitimate purpose of these measures. For example, if it is agreed to ban or curtail international travel of the targeted country’s residents as part of non-military enforcement measures, such curtailment of rights must be shown as necessary for achieving the legitimate purpose of these measures. But even when it can be shown that particular measures would contribute to the achievement of the legitimate purpose, they must nevertheless fulfil the principle of proportionality.

3.3 The principle of proportionality

The principle of proportionality is linked to that of necessity. It stipulates “that the extent of any limitation should be strictly proportionate to the need or the higher interest protected by the limitation.”[43]. A reasonable relationship must exist between means and the goals to be achieved.

In listing in its Resolution 1997/33 standards and norms pertaining to responsible crime prevention, the Economic and Social Council of the United Nations addresses the principle of proportionality with regard to infringement of principles:

Whenever preventive measures are adopted which do not infringe upon the principles set out in paragraphs 4 and 5 above but affect human rights, they have


Commenting Article 49 of the Charter of Fundamental Rights of the European Union, the drafters write:

The general principle of proportionality of criminal offences and penalties stems from the common constitutional traditions of the Member States. The extension of its scope beyond penalties is not a direct result of the wording used in the Charter. However, in accordance with the provisions of the Treaties, the European Court of Justice applies the principle of proportionality not only to the exercise of the institutions’ penal powers, but also to the legislative power and its control over the application of Community law by the national authorities.\[45\]

Article 52 (1) of the Charter of Fundamental Rights of the European Union directly addresses the principle of proportionality:

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.\[46\].

One of the Just War criteria for entering into war (\textit{jus in bellum}) is the principle of proportionality: "In deciding whether or not to enter war, the principle of proportionality requires the assessment that the costs of war in damage and human suffering must be proportionate to the good expected to be achieved by the war." Once a decision to enter war has been taken, the principle of proportionality is applicable to the conduct of the war (\textit{jus in bellum}).

It has also been suggested that "[o]ne very important element of the principle of constitutional state is the principle of proportionality."\[47\]

This principle of proportionality is one of the fundamental rules of the law of armed conflicts. It is found, for example, in Article 51 (5) (b) of the First Additional Protocol: An attack would be considered indiscriminate [and unlawful] "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." This does not mean that any attack fulfilling these requirement would be authorised. The law of armed conflicts tempers the principle of proportionality: "In order to comply with the conditions, the attack must be directed against a military objective with means which are not disproportionate in relation to the objective, but are suited to destroying


\[46\] Id. Article 52 (Scope of guaranteed rights) http://www.europarl.eu.int/comparl/libe/elsj/charter/art52/default_en.htm

\[47\] Thomas Börner, Introduction to German Law, http://www.hull.ac.uk/php/lastcb/rightst1.htm
only that objective, and the effects of the attack must be limited in the way required by the
Protocol; moreover, even after those conditions are fulfilled, the incidental civilian losses and
damages must not be excessive."[48]

The meaning of the terms "concrete and direct military advantage" above, is to be interpreted
narrowly, excluding acts with merely "potential or indeterminate advantages"[49].

The principle of proportionality can only be invoked with regard to lawful and necessary
measures. To impose "moderate" (a proportional amount) of torture (with regard to the
anticipated advantage) would not, for example be permissible, because torture is always
unlawful. And even moderate impairments of various human rights, such as the right to
education and to travel, will have to be justified as being a necessary, concrete and direct
contribution to a legitimate goal, in order to be justified.

3.4 The doctrine of jus cogens

While the category jus cogens has an honourable history, going back at least to the 19th
century[50], its status and content have remained unsettled: "The definition of jus cogens has
challenged the most expert of scholars. Some stress its substance, some its procedural effect,
and some its character of upholding world order."[51] A general consensus appears to have
crystallised around the recognition of a limited number of norms as having a jus cogens
status. There exists a wide consensus both at the level of States and academy that jus cogens
is a necessary concept in international law. It is often designated as the generic name for
peremptory norms of international law from which no derogation is permitted.

Norms jus cogens are generally couched in negative terms [52] and include, inter alia, the
prohibition of genocide, apartheid, slavery and piracy. Further norms have been suggested as
amounting to jus cogens. These include the prohibition of war crimes [53], crimes against
humanity[54], racial discrimination[55], aggressive war[56], murder or causing disappearance

[48] International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June
1977 to the Geneva Conventions of 12 August 1949 (Geneva: Martinus Nijhoff Publishers,
1987) [hereafter ICRC Commentary], ICRC Commentary to Article 51, §1979, p. 625

[49] ICRC Commentary to Article 52 of the API, ICRC, §2024, p. 636

[50] MacDougal et al, mention that Bluntschli had written in his book Modern Law of Nations of
Civilized States, first published in 1867, that "treaties the contents of which violate the
generally recognized human rights or the binding rules of international law are invalid."
Among such treaties, Bluntschli reportedly identified those which "introduce, extend, or
protect slavery" or which "declare that aliens have no rights" or which "provide for
persecutions on the ground of religion" (cited by Myres S. McDougal, Harold D. Lasswell,
and Lung-chu Chen, Human Rights and World Public Order, Yale University Press, New
Haven; London, (1980), p 341)

[51] Karen Parker, Jus Cogens: Compelling the Law of Human Rights, 12 Hastings Int'l and
Comparative Law Review (1989, p. 414

[52] No positive jus cogens obligation could be yet produced. This means that state practice cannot
be adduced as establishing the norm, only opinio juris. This led a number of authors to argue that
jus cogens belongs to general principles of law rather than to customary law. If such
reasoning is accepted, it arguably should also apply to human rights and humanitarian law, in
general. Parker,ibid, presents, however, jus cogens as "the highest category of customary
law." (emphasis added)

[53] Turkin, Jus Cogens in Contemporary International Law, 1971 U. Tol. L. Rev. 107, 117 (citer
in Parker, supra note 50, at 428)

[54] Ibid.; as well as Brownlie. supra note 29.
of individuals; torture or other cruel, inhuman or degrading treatment and punishment; prolonged arbitrary detention; the principle of non-refoulement; self-determination; and other prohibited conduct.

The view that the Security Council is at least bound by norms *jus cogens* is uncontroversial and needs hardly any further comments. It remains unsettled what norms or rules can be regarded as *jus cogens* and whether the Council is bound exclusively by *jus cogens* norms.

One author argues, for example, that the imperative obligation to respect the non-derogable rights of the ICCPR, can be described as a rule *jus cogens*. Among these rights the author lists

- the right to life and integrity of the person (subject to the permissible restrictions upon that right),
- the prohibition of torture or cruel and degrading treatment, the prohibition of genocide, the freedom of conscience and worship, the integrity of the family, the prohibition of slavery, the prohibition of discrimination on the grounds of race, creed, gender or ethnic origin, the right to a fair trial including the concomitant procedural guarantees which ensure fairness and impartiality and the right to food, shelter and basic medical care in so far as circumstances permitted.

Such an expansive view of *jus cogens* is not widely shared. A more restricted view, though general in character, was provided by the International Court of Justice. In the *Namibia* case the Court held that the obligation contained in the Resolution could not be applied to certain general conventions, such as those of a humanitarian character, because the non-performance of these treaties might adversely affect the people of Namibia. [...] The Court's decision is generally interpreted to mean that the Security Council's decision to forbid treaty relations with South Africa could not be applied to humanitarian treaties because such treaties embody *jus cogens*, which the Council cannot override.

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[55] Brownlie, *supra* note 29

[56] *Ibid.*. However, H.H.G. Post, *Some curiosities in the sources of the law of armed conflict conceived in a general international legal perspective*, XXV Netherlands Yearbook of International Law (1994), points out that while the ICJ has considered the *jus cogens* character of the general prohibition of armed force [aggressive war], it has done so with great reluctance (p. 114)

[57] Restatement (III) of Foreign Relations Act of the United States §702 (1987)


[60] Parker, *supra* note 51, at 435-6

[61] Parker, *supra* note 51, at 440-1

[62] Gill, *supra* note 2, p. 79: ("[I]n any event the Council will at a minimum be bound by the rules of human rights contained in the International Bill of Rights from which no derogation is permitted in time of emergency or armed conflict...Another way of describing such a rule is to classify it as *jus cogens.*") Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989), concedes that the "irreducible core" of non-derogable rights constitute "fundamental and perhaps even peremptory norms of international law", at 193-194.

[63] Faiza Patel King, *supra* note 35
A number of authors contend that Security Council’s prerogatives are only circumscribed by *jus cogens*. If one accepts this view, it becomes crucial to determine which norms of international law are considered as *jus cogens*.

An approach which would condition the powers of the Security Council to a determination of *jus cogens* (which by definition remains elusive), cannot yield a firm set of legal rules that could guide the Council when adopting enforcement measures.

In this writer’s view, the category of *jus cogens* can be of little help to determine the limits to the powers of the Security Council. The category of *jus cogens* can, however, supplement the various recognised limits to the powers of the Security Council that can be gleaned from the Charter, from general principles of international law and from custom. As most customary norms of human rights - regardless whether they are defined as *jus cogens* or not - can only be ascertained from *opinio juris*, rather than from negative state practice (desisting from committing breaches), the question whether the category *jus cogens* belongs to general principles of international law or to custom, appears having limited practical interest.

4. Legal boundaries set by the provisions of the UN Charter

The Security Council is an organ established under the provisions of the United Nations Charter, a multilateral treaty. In order to identify the scope of the powers of an executive organ established under the provisions of a treaty, the first source that must be consulted, are the provisions of that treaty.

At the outset it must be realised that the UN Charter does not include specific obligations, such as those relating to human rights[64]. The Charter was formulated in a generalised manner, leaving to further codification and state practice the specification of the obligations derived from it. Thus, for example, the Universal Declaration of Human Rights is widely regarded as a detailed specification of one of the purposes of the UN Charter, namely to promote human rights[65]. The various human rights treaties further codify into specific State obligations the provisions of the Charter relative to human rights.

4.1 The mandate of the Security Council

By Article 24(1) of the Charter, UN Members “confer on the Security Council the primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.” Article 24(2) stipulates that in “discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations...” (emphasis added).

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[64] “Higgins has remarked appropriately that ‘the Charter is not in the habit of defining its terms, and if a definition were a pre-requisite to obligation, virtually all the articles of the Charter would be rendered meaningless.’” (Higgins, The Development of International Law Through the Political Organs of the UN (London, OUP, 1963, p. 119)

[65] Such a view is widely held and formulated in varying nuances. Thus, for example, Judge Tanaka in his dissenting opinion in the *South-West Africa Cases (Second Phase)*, considered the Declaration “although not binding in itself, [as] evidence of the interpretation and application of the relevant Charter provisions.” (ICJ Reports, 1966, cited in Patrick Thornberry, *International Law and the Rights of Minorities*, Clarendon Press, Oxford, (1991), p. 232). Others, such as Humphrey, Waldeck and Sohn maintain that the Declaration has attained the status of customary international law.
ICJ Judge Weeramantry, in his dissenting opinion in *Lockerbie* inquired whether there are any norms that would limit, or circumscribe the prerogatives of the Security Council. He answered this inquiry with the following comment:

> Article 24 itself offers us an immediate signpost to such a circumscribing boundary when it provides in Article 24(2) that the Security Council in discharging its duties under Article 24(1), "shall act in accordance with the Purposes and Principles of the United Nations". The duty is imperative and the limits are categorically stated.

At the drafting stage of the Charter, the Rapporteur of Committee 1 of Commission 1 at San Francisco stated that the ‘purposes’ [of the United Nations] ‘constitute the raison d'être of the Organisation’. They are ‘the aggregation of the common ends on which our minds met; hence, the cause and object of the Charter to which Member States collectively and severally subscribed’. He regarded the Preamble as setting out ‘declared common intentions’.

As the Charter requires the Council to act "in accordance with the Purposes and Principles of the United Nations", it follows that should the Council act in a manner contrary to any of the Purposes and Principles of the United Nations, it would, in the very least, exceed its competence, that is acting *ultra vires*.

An example of an act glaringly contrary to such Purposes and Principles would be a Security Council decision to order or authorise member States to commit genocide as a means to “restore the peace”.

Among acts that have been considered by various authors as exceeding the competence of the Council, are its decisions to impose a border settlement between two countries and establish judicial bodies under its authority. As the Council is capable to adopt resolutions

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[69] In discussing an amendment by Norway, the U.S. delegate to the San Francisco Conference (Committee on the Structure and Procedure of the Security Council) said that "if the Security Council violated its principles and purposes it would be acting *ultra vires*" (cited by Akande *supra* note 2, p. 319

[70] To exterminate a whole nation might, effectively, further the peace of neighbouring nations.

[71] By the provisions of SCR 687 (1991), the Council imposed a border settlement between Iraq and Kuwait, against the protests of Iraq. This decision has been criticised as *ultra vires* the Charter. See statement by Ecuador's Ambassador, Sr. Ayala Lasso, in the Security Council prior to the adoption of this resolution (UN Doc. S/PV.2981). Also, *inter alia*, DaPo Akande, *supra* note 2, p.317 n. 26 and pp. 320-321.

[72] By SCR 687 (1991), the Council established an institutional mechanism permitting the use of Iraqi assets as reparations to individual and corporate victims of Iraq's invasion and occupation of Kuwait. The exact nature of this mechanism - political, administrative or quasi-judicial - is still in dispute. The Charter does not confer on the Council the competence to establish tribunals, judicial or arbitral bodies. Such functions have been devolved by the drafters to the International Court of Justice, the “principal judicial organ of the United Nations” (Article 92 of the Charter). The decisions by the Council to establish international criminal tribunals, the ICTY and the ICTR, are disputed. See, *inter alia*, the report by the Secretary-General to the Security Council of 3 May 1993, studying the “legal basis for the establishment of the International Tribunal [ICTY]” and subsequent discussion thereof in Bedjaoui, *supra* note 2, p. 47-50. See also Statement by the International Progress Organization, Report by Dr. Hans Koehler (http://www.emperors-
ultra vires and is dominated by powerful States acting for their own interest, “no act of the Council is exempt from scrutiny as to whether or not that act is in conformity with the Purposes and Principles of the United Nations.”[73]

Hans-Peter Gasser, Senior Legal Adviser at the ICRC, acknowledging the binding nature of Article 103[74] of the UN Charter, concedes nevertheless that the Security Council “does not have any discretionary right to disregard one of the very foundations of a peaceful international order: the rule of law.” And, alluding to the danger of a loss of legitimacy of the Security Council were it to disregard these foundations, he adds: “And the Council certainly has no interest in doing so.”[75]

Gasser argues that in spite of the language of Article 103 (which places the Charter above all other treaties), the Council would not be entitled to

[...] infringe upon treaty obligations which protect basic rights of the individual, in peacetime or during armed conflict. Whether called ‘elementary considerations of humanity’, ‘obligations erga omnes’, ‘fundamental general principles of humanitarian law’ or ‘minimum standards’ which cannot be derogated from, or whether considered as peremptory norms (jus cogens), as rights which cannot be waived by the beneficiary or by his/her power of origin, or as part of a treaty with a limited right of denunciation, the doctrinal qualification of such basic rules does not matter at this point. The important thing is to recognise that there are absolutely binding legal obligations which tie the hands not only of States individually but also of the Security Council[76]

Gowlland-Debbas concurs and places the obligations of the Council directly within the ambit of Article 24 (2), which requires it to act “only in accordance with the purposes and principles of the United Nations” (emphasis added). Those purposes and principles, listed in Articles 1 and 2 of the Charter, “not only include the primary goal of peace maintenance but also reflect the human rights, humanitarian, economic and social concerns of the UN.”[77]

4.2 Limits implied by Article 1 of the UN Charter

The first listed Purpose of the United Nations (Art. 1(1)) is “to maintain international peace and security”. To that end it shall “take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.” (emphasis added)

clothes.com/docs/prog2.htm); Koskenniemi, supra note 2, pp.325-348; and in general Jose E. Alvarez, Nuremberg Revisited: The Tadic Case, European Journal of International Law, Vol. 7 No. 2. http://www.ejil.org/journal/Vol7/No2/art7.html


[74] Art. 103 of the UN Charter reads: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”


[76] Id.

[77] Gowlland-Debbas, supra note 2, p. 91
Forceful measures adopted to maintain international peace and security must be “effective”. If they are not effective to secure that purpose they should not be taken or when commenced and seen as ineffective they should be disrupted. Due to the graded nature of this provision (the first limb refers to forceful measures under Chapter VII and the second to “peaceful means”, pointing to Chapter VI of the Charter) it is reasonable to deduce that forceful measures should only be taken when “peaceful means” have proved to be or are expected to be inadequate.

The second listed group of Purposes of the UN (Article 1(2)) are: (a) “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,” and (b) “to take other appropriate measures to strengthen universal peace.” Measures taken by the Council to ensure international peace and security should therefore “respect the principle of equal rights and the self-determination of peoples”. Gill notes that the obligation to respect peoples’ self-determination

[...] precludes the imposition of any form of government by the United Nations on the population of a State or other entity...The UN cannot in law act in an ‘imperial role’ as has on occasion been contended or surmised recently. There is no legal basis for the imposition of UN Trusteeships or other forms of UN administration upon the population of any State or territory without the clear acquiescence of that population...any more than any Member State can lawfully impose or maintain colonial or colonial-type rule upon an alien population under contemporary international law[78]

Gill would not preclude, however, temporary restrictions to the right to peoples’ self-determination, such as “transitional administration of the type utilised in the context of the UNTAC operation in Cambodia; or military occupations by UN or UN authorised forces in the course of carrying out (large-scale) military enforcement actions for the duration of the armed conflict and a reasonable period subsequent to operations necessary to organise civilian administration and carry out a cease-fire or other termination of hostilities and a safe withdrawal of UN personnel”, only “the imposition by the Council of any form of long term administrative authority...”[79]

If the Council were legally permitted, as Gill contends, to temporarily curtail peoples’ right to self-determination, as long as the Council deems it necessary, the conjunction of a number of factors (such as the composition of the Council, the rules of procedures, the effects of the “negative veto” and most importantly the interests of its most powerful members) could risk to permanently affect the political, economic, social or cultural, situation in the respective territory. Therefore, even the temporary curtailment of peoples' right to self-determination may constitute an impermissible violation of the Charter. In any case, a standing obligation of good faith is borne by the Security Council to seek, whenever feasible, the consent of a population affected by UN measures to such measures, in order to refrain from undermining that population's exercise of self-determination.

Another observation is in place here. The above paradigm refers only to situations where the controlling authority is located within the territory subject to UN enforcement measures. However, restrictions to the right to self-determination may be effective even without military occupation of a territory, for example by subjecting a population to rule exercised from outside that territory. This has been the case with the Sanctions Committees established by the Security Council. These Committees effectively curtail the right of peoples to self-determination, particularly their right to determine their foreign trade policies and to some extent their domestic economic priorities. Inasmuch as such intervention in domestic

[78] Gill, supra note 2, p. 75
[79] Ibid.
decision-making constitutes an infringement of the right to self-determination, it constitutes a violation of Article 1(2) of the Charter.

The third listed Purpose of the UN (Article 1(3)) is “[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” Such Purpose can only be achieved if the Council - and States acting under its authority - would not only promote and encourage the respect for human rights, but actually respect human rights themselves. Measures adopted by the Security Council that exacerbate international problems of an economic, social, cultural, or humanitarian character or undermine the “respect for human rights and for fundamental freedoms for all” would be rightly considered as contrary to the Purposes of the UN. As the formulation of Article 1(3) is very general, it is tempting to consider it as lacking any binding force. Read in conjunction with Article 24 of the Charter, such interpretation cannot be sustained, because the obligation stipulated in that provision is imperative. While Article 1(3) does not specify the exact limits that human rights place on acts by the Security Council, such limits can be ascertained by consulting customary international law pertaining to human rights.

The fourth listed Purpose of the UN (Article 1(4)) is to “be a centre for harmonising the actions of nations in the attainment of these common ends.” In the light of this provision the Security Council must desist from acting selectively or arbitrarily. “Sanctions imposed on one country but not on another for the same wrongs would violate this requirement of harmonisation. Sanctions imposed unequally on two countries for the same wrongs would also violate the harmony provision.”[80]

The multiplicity of purposes in Article 1 of the Charter inevitably gives rise to situations in which the achievement of one purpose clashes with another purpose. In such cases, interpretation becomes necessary. “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”[81] (emphasis added).

Kelsen argued that “the purpose of the enforcement action under Article 39 [of the Charter] is not to maintain or restore the law, but to maintain or restore peace, which is not necessarily identical with the law.”[82]. But the concept of peace, as defined in the Charter, views the international order as merely the juxtaposition of black boxes (States) and does not take into account transborder legal obligations to the human person. Peace, viewed in accordance with Kelsen's perspective, may be achieved by destroying one such black box that deems by the rulers of the other "black boxes" to threaten international peace and security. Such a view cannot be reconciled with contemporary views of human rights that transcend States' rights. Kelsen's view was firmly opposed by Lauterpacht who said that "any construction of the Charter according to which Members of the UN are, in law, entitled to disregard - and to violate - human rights and fundamental freedoms is destructive of both the legal and moral authority of the Charter...[and]...runs counter to a cardinal principle of construction according to which treaties must be interpreted in good faith."[83]

[80] Bossuyt, supra note 74, para. 27
[81] VCLT, Art. 31 (General rule of interpretation)
The Charter “was placed from the beginning under the aegis of ‘the peoples’ [of the United Nations] and it is to them that account must be rendered.”[84] The seven first words of the UN Charter (“We the Peoples of the United Nations”) do not refer to States. The preambular paragraphs that follow do not either mention States as the addressees of the Charter. The following entities are listed in the Preamble as the ultimate beneficiaries of the United Nations: “Succeeding generations”, “mankind”, “men and women”, “nations”, “peoples” and “human person”, whereby the last category, “human person” may be viewed as the basic constituent of all other, collective, categories[85]

A careful reading of Article 1 reveals that none of the Purposes of the United Nations (Article 1) is related, either, to the rights or prerogatives of States. The term ‘State’ or ‘Members’ of the UN does not yet appear at that location. Paragraphs (2) and (4) of Article 1 refer to ‘nations’ and ‘peoples’ while paragraph (3) refers to ‘human rights’. It can thus be inferred that the rights of States derive from the rights of nations and of human beings; they are not independent but derivative rights. Such reasoning can be extended to the rights and prerogatives of inter-statal organisations, such as the United Nations and its organs.

According to the Rapporteur of Committee 1 of Commission 1 at San Francisco, where the Charter of the United Nations was adopted, the "purposes" of the United Nations "constitute the raison d’être of the Organisation”. They are "the aggregation of the common ends on which our minds met; hence, the cause and object of the Charter to which Member States collectively and severally subscribed.”[86] He regarded the Preamble as setting out "declared common intentions.”[87]

The above analysis does not mean that States have no specific existence or that States do not deserve protection against unlawful encroachment. The analysis merely attempts to reveal the inadequacy of a perspective of States as black boxes possessing, as it were, a specific personality and will, over and above the fundamental rights of the human person. The primacy of the human person, as the ultimate destinatory of international values to be protected and promoted such as peace, security and justice, whether in the internal order of States or within the international order, is hardly disputed[88]. Any interpretation of the UN Charter must therefore have due regard to the ultimate object and purpose of the United Nations - and that of any other national or international organisation - namely the “dignity and worth of the human person”[89]. This ultimate object and purpose requires the maintenance of international peace and security, the respect for the principle of equal rights and self-determination, non-discriminatory and equitable policies by UN organs and the

[84] Bedjaoui, supra note 2, p. 35
[85] Philosophies and ideologies do, however, exist that place the existence of nations and peoples above the rights and aspirations of the human person. Such philosophies and ideologies are not, however, commensurable with the UN Charter nor with the UDHR.
[87] Id. (p.225)
[88] This was clearly reflected in the Namibia Opinion by the International Court of Justice, in which it was stated that “the non-recognition of South Africa’s administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation’, nor of depriving them of the protection and enjoyment of “certain conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia.” (International Court of Justice Rep. (1971), p. 56 (para. 125) and p. 55 (para.122) (Legal Consequences for States of the Continued Presence of South Africa in Namibia [South West Africa] Notwithstanding SCR 276 (1970)) (cited in Gill, supra note 2, p. 69-70)
[89] United Nations Charter, Preamble, para. 1
respect of human rights and fundamental freedoms, rather than the achievement of one purpose of the UN at the cost of another. Such an imperative obligation is "even more exacting in peace than in war."[90]

Economic sanctions can be assessed in the light of Article 1 of the Charter. Questions that may be asked in this regard are: Do the sanctions contribute to "develop friendly relations among nations"? Are they compatible with the "principle of equal rights" of peoples? Does their imposition derive from the principle of self-determination or constitute a limitation to such a right? Do they contribute to solve "international problems of an economic, social, cultural, or humanitarian character"? Do they, can they, promote and encourage "respect for human rights and for fundamental freedoms for all"?

4.3 General obligations with regard to Articles 39 and 41

Before embarking upon an examination of substantive legal limitations to the prerogatives of the Security Council, a short examination of the procedural requirement for the imposition of economic sanctions under the provisions of Chapter VII of the UN Charter, is in order.

Procedural requirement

Procedures are known at all levels of public affairs, for example in the conduct of meetings, legislative work, public administration or court proceedings. Their purpose is to preclude arbitrary conduct or abus de pouvoir. The UN Charter envisages a specific procedure before imposing collective measures as a response to a threat or breach to the peace.

According to Article 39,

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

According to Article 41 of the UN Charter

“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.”

Read in isolation, Article 41 would suggest that the Security Council could impose any of the listed measures at any time, regardless of the existence or absence of a threat to, or breach of, the peace. Such interpretation would be, however, contradicted by the terms of Article 39, which clearly envisages a sequential approach. Articles 39 and 41 must therefore be read in conjunction. The measures listed under Article 41 can only be imposed, if at all, after the Council had determined “the existence of any threat to the peace, breach of the peace, or act of aggression”, as required under Article 39. In fact, the Council, after having determined the existence of any of the situations listed in Article 39, retains the option to “call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable” (Art. 40), decide to impose “measures not involving the use of armed force...to give effect to its decisions” (Art. 41) or, if the measures listed under Art. 41 should prove

[90] ICJ, Corfu Channel case
inadequate, decide to take “action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.” (Art. 42).

It is thus incumbent upon the Council to first determine that a particular situation constitutes a threat to, a breach of, the peace, or an act of aggression, and only then decide what measures to adopt to maintain or restore the peace.

Substantive issues

According to the drafting history of the Charter reported by Goodrich et al,

[...] the major powers [at San Francisco] refused to accept an amendment (to the Dumbarton Oaks Proposals) requiring that collective measures be taken in accordance with international law and justice, on the grounds that this would tie the hands of the Security Council to an undesirable extent and that, in any case, the object of collective measures was to prevent or suppress the use of armed force, and not to achieve a settlement[91]

It is unclear from this description whether the Purposes of the Principles of the United Nations were deemed outside “international law and justice”. Are human rights, the promotion of which is one of the Purposes of the United Nations, not a part of international law? More generally, one may ask to what extent can statements made by the drafters of the UN Charter, before the development of human rights law, once and for all freeze the meaning given to the Charter by succeeding generations?

Article 39 merely refers to the “peace”, implying that the wherever peace is threatened, including within States, the Council would be empowered to intervene under Chapter VII of the Charter. The Council does not have to base its determinations “upon considerations of international law or even that such considerations must necessarily be taken in account in determining that enforcement measures are warranted in relation to a particular situation.”[92]

But the Charter does not empower the Security Council to intervene in States’ internal affairs. The threats to, or breaches of, the peace, must contain an international dimension. Article 24 specifically confers on the Council the “primary responsibility to the maintenance of international peace and security” (emphasis added).

Article 39 does not indicate who should be the target or targets of collective measures. From the language of Article 1(1) we glean that when the Council acts to ensure “international peace and security” the measures it takes shall deem “effective”. It follows that measures targeted at the wrong parties and therefore unlikely to restore the peace, should not be imposed, or when such measures have already been imposed, they should be dropped when it is realised that they are not effective. As an “unarmed civilian population is, in all likelihood, unable to pose [...] a threat [to the peace]”[93], targeting economic sanctions against a civilian population could hardly be regarded as an “effective” measure to restore the peace.


[93] Bossuyt, *supra* note 74, para. 19
It has been argued that "underdevelopment is a threat to international peace and security"[94].
According to this reasoning, economic sanctions imposed by the Security Council that cause
underdevelopment could themselves constitute a threat to international peace and security.
This reasoning is echoed in U.S. legislation which characterises boycotts and embargoes
against a country a "threat to the peace". Thus The Foreign Relations and Intercourse: Taiwan
Relation [Act] declares as United States’ policy “to consider any effort to determine the future
of Taiwan by other than peaceful means, including by boycotts or embargoes, a threat to the
peace and security of the Western Pacific area and of grave concern to the United States.”[95]

Although it is commonly held that the Council is free to determine any situation as a threat to
the peace, such view is not universal[96]. This view disregards the obligation of the Council
to act in good faith. A determination of a threat to the peace made in bad faith would
constitute an abuse of rights and could be considered as ultra vires the Charter[97]

5. Limits to Security Council powers set by human rights norms

One of the Purposes of the United Nations, stipulated in Article 1(3), is "[t]o achieve
international co-operation [...] in promoting and encouraging respect for human rights and for
fundamental freedoms for all without distinction as to race, sex, language, or religion."

When carrying out its "primary responsibility for the maintenance of international peace and
security", Article 24(2) stipulates that in "discharging these duties the Security Council shall
act in accordance with the Purposes and Principles of the United Nations...”.

If follows that the Security Council must act in such a way as to comply with and fulfil the
Purpose of Article 1(3), such as refraining from adopting decisions, the implementation of
which could be anticipated to undermine the promotion and respect of human rights and
fundamental freedoms.

But Article 1(3) is not the only provision that sets a limit to the prerogatives of the Council
with regard to human rights. Such limits can be inferred from other provisions of the Charter
as well as from norms of customary international law.

According to ICJ Judge Schwelb

When the [International] Court [of Justice] speaks of 'conformity with the
international obligations assumed ... under the Charter', of a 'violation of the
purposes and principles of the Charter', of the pledge to observe and respect
human rights and fundamental freedoms for all, when it finds that certain
actions 'constitute a denial of fundamental human rights' and classifies them as
'a flagrant violation of the purposes and principles of the Charter', it leaves no

Economic Sanctions and Development, Symposium, 28 November 1996, Vienna International
Centre (United Nations)

[95] Foreign Relations and Intercourse: Taiwan Relation. Congressional findings and declaration of
policy. Statute, US legislation Title 22, Chapter 48, Sec. 3301. It is interesting to note that the
US legislator defined boycotts and embargoes as "other than peaceful means".

[96] Akande, supra note 2, p. 337, cites two ICJ judges, Gros and Fitzmaurice, who consider that the
Council is not totally free to make its determinations, but concludes (p.338) that "Article 39
determinations of the Security Council are final and non-reviewable[...] as there are no clear
legal standards as to what constitutes a threat to the peace or a breach of the peace".

http://www.aldeilis.net/jus/unlaw/scgoodfaith.pdf.
doubt that, in its view, the Charter does impose on Members of the United Nations legal obligations in the human rights field[98].

Members' obligations in the human rights field are not limited to action within their own jurisdiction but extend to policies they pursue within international organisations, such as the United Nations. One such obligation of good faith, discussed below, is that enshrined in Article 56 of the Charter.

### 5.1 The applicability of human rights norms to non-military enforcement measures

UN-imposed economic sanctions may be regarded as a countermeasure by the collectivity of States, acting *in lieu* of a particular injured State. Even when a State (or the Security Council acting in place of the injured State) resorts to countermeasures, the scope of such measures would, according to the third and fourth reports by the Special Rapporteur on State responsibility, be limited, *inter alia*, to “respect for human rights and humanitarian values, as well as deriving from *jus cogens* and *erga omnes* obligations.”[99] Article 50 of the Draft on State Responsibility, approved on first reading in 1996, indeed lists among prohibited countermeasures “any conduct which derogates from basic human rights” as well as “any other conduct in contravention of a peremptory norm of general international law.”[100]. While the concept of “basic human rights” or “fundamental human rights”[101] is not defined in the Draft, there is hardly any dispute that it covers at the very least the non-derogable rights of the ICCPR[102].

The applicability of human rights, including economic, social and cultural rights (not deemed “basic” or “fundamental”) to UN-imposed economic sanctions has been affirmed by various authors as well as by the UN Committee on Economic, Social and Cultural Rights[103]. The Committee stresses that “the inhabitants of a given country do not forfeit their basic economic, social and cultural rights by virtue of any determination that their leaders have violated norms relating to international peace and security,”[104] a perspective shared by Amnesty International[105].

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[99] Gowlland-Debbas, *supra* note 2, p. 91 (the formulation is that of Gowlland-Debbas); see also the report by the Special Rapporteur, UN Doc. A/CN.4/440/Add.1 and A/CN.4/444/Add.1


[101] The formulation in Article 51 (formerly Article 50) of the revised Draft on State Responsibility provisionally adopted by the Drafting Committee on second reading (UN Doc. A/CN.4/L.600)

[102] Various States corroborate this view in comments to the Draft Articles. See, for example, States’ comments on Article 50, Sub-paragraph (d), UN Doc. A/CN.4/488. It must be noted, however, that with regard to countermeasures, the United States and the United Kingdom, take the most restrictive view of human rights obligations, if compared to other States.


[104] Id., para. 16

[105] Amnesty International position paper on economic sanctions, around 28 Jul 1999
The UN General Assembly adopted in [...] Resolution 2675 (XXV) of 1970 entitled "Basic Principles for the Protection of Civilian Populations in Armed Conflicts". Of interest to the present section is the proposition affirmed within that resolution that "[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict." The General Assembly clearly held that the obligation to respect human rights is a customary norm of international law, also applicable, by extension - and a fortiori - to non-military enforcement measures.

While the opinions expressed by the International Law Commission and by the UN Committee on Economic, Social and Cultural Rights do not bind the Security Council, they demonstrate an emerging consensus that the Security Council is not only bound by non-derogable human rights, but also by economic, social and cultural rights, inasmuch as its decisions can affect the rights of civilian populations in sanctioned countries[106]

Numerous relations exist, in fact, between economic and social rights and some of the rights deemed non-derogable, particularly the right to life and the right to freedom from torture and inhuman treatment. Thus, for example, to deny individuals (or groups of people) essentials for life, such as adequate food and drinking water, or to prevent the access of individuals to medical treatment, might constitute inhuman treatment or arbitrary killing.

Another approach, represented inter alia, by Gill, is to regard non-derogable human rights as jus cogens and assert that the Council is bound to respect jus cogens norms.

5.2 Specific human rights provisions of the UN Charter

The United Nations exist, as established in its Preamble, to

[... reassert faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligation arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples.

While the Preamble does not specify binding norms, it provides guidance as to the overall purpose of the United Nations, and assists in interpreting the Charter. From the Preamble one may deduce that the maintenance of international peace is a means for the achievement of higher purposes, listed above, rather than the ultimate purpose of the Organisation.

According to Kelsen, however,

the Charter does not impose upon the Members a strict obligation to grant to their subjects the rights and freedoms mentioned in the Preamble or in the text of the Charter. The language used...does not allow the interpretation that the Members are

under legal obligations regarding the rights and freedoms of their subjects... Besides, the Charter does in no way specify the rights and freedoms to which it refers[107].

This opinion is not widely held. Lauterpacht's view, for example, was that "any construction of the Charter according to which Members of the UN are, in law, entitled to disregard - and to violate - human rights and fundamental freedoms is destructive of both the legal and moral authority of the Charter...[and]...runs counter to a cardinal principle of construction according to which treaties must be interpreted in good faith."[108] This view appears consistent with both current scholarly opinion and the practice of the United Nations. Rosalyn Higgins pointed out that "the Charter is not in the habit of defining its terms, and if a definition were a pre-requisite to obligation, virtually all the articles of the Charter would be rendered meaningless."[109]

**Article 1**

Article 1(3) provides that one of the Purposes of the United Nations is "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." This provision does not specify any exact obligations (see above). These must therefore be ascertained elsewhere, including from other provisions of the Charter, from general principles of international law and from custom.

**Article 13**

Article 13(1) places the obligation ("shall") on the General Assembly to "make recommendations for the purpose of: [...] (b) promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

While this obligation is aimed at the General Assembly, it would be illogical if the Security Council were allowed to take action undermining the efforts of the General Assembly as enumerated above.

**Articles 55 and 56**

Article 55 of the Charter specifically requires the UN to promote human rights and well-being:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation;


and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

There are two points that warrant comments:

Various authors have noted the imperative nature of this provision, reflected by the verb "shall". The United Nations is thus held under the duty to promote the enumerated values. Such duty arguably entails the converse duty of refraining from undermining the enumerated values which are necessary for achieving "peace and friendly relations among nations." Such reasoning is supported in an opinion rendered by the Inter-American Court of Human Rights, given in 1994, where the Court asserted that

If a State has undertaken to adopt the measures mentioned above, there is even more reason for it to refrain from adopting measures that conflict with the object and purpose of the Convention[110]

Another approach to reach the same conclusion is to use the rules of treaty interpretation provided in the Vienna Convention on the Law of Treaties. To interpret the obligation to promote the respect for human rights - enshrined in Article 55 of the Charter - in such a way as to authorise acts intended to impair human rights would be an absurd interpretation of such a provision. Moreover, such interpretation would be contrary to the object and purpose of the Charter, particularly those mentioned in its Preamble regarding the dignity and equality of human beings. The obligation to promote the respect for human rights encompasses therefore the obligation not to knowingly impair such rights.

A specific recommendation linking the obligation of the Security Council to take account of human rights when acting for the maintenance of international peace and security, was made in the Vienna Declaration of the World Conference on Human Rights. Paragraph 8 of the Declaration stipulates inter alia: "[...]In the context of the above, the promotion and protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached." (emphasis added). To condition the enjoyment of human rights of peoples to compliance by their authorities with Security Council resolutions, would contradict the will of States expressed in that Declaration.

Addressing specifically economic sanctions, Hans-Peter Gasser, basing himself on Article 1 (3) and Article 55 of the Charter, writes:

Suffice it to say that promoting and encouraging respect for human rights and fundamental freedoms are among the UN’s purposes and primary tasks. Any decision on economic sanctions must therefore necessarily take human rights into account[111].

In its General Comment No. 3 of 1990, para. 14 (The nature of States parties obligations), the Human Rights Committee addresses states’ international human rights obligations derived from Articles 55 and 56 of the Charter:

[110] Inter-American Court of Human Rights, San José, State and individual responsibility regarding laws which manifestly violate the American Convention. Advisory Opinion OC-14/94, 9 Dec 1994 (Reported in HRJ 16:1-3 p. 9-14). A similar reasoning can be found at Thornberry, supra note 65, p. 227 and Waldeck, General Course in Public International Law, Rec. des Cours, 106 (1962 vol. ii), p.228

[111] Gasser, supra note 76, p. 880
The Committee wishes to emphasise that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international law, international co-operation for development and thus for the realisation of economic, social and cultural rights is an obligation of all States.

While the General Comment limits the obligation of States to “international co-operation” the Maastricht Guidelines widen the scope to “international legal obligations in the field of economic, social and cultural rights”, which presumably include the obligation to refrain from deliberately infringing such rights[112].

Article 55 stipulates the obligation of the UN to promote various values, including human rights, Article 56 places an obligation of good faith on UN Members "to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55."

This obligation of good faith (stated as "pledge" in Article 56) extends, of course, to the conduct of States within the United Nations, including their participation in the adoption of decisions at the Security Council. Unless one presumes that the drafters of the Charter merely resorted to empty words when formulating Article 56 as a "pledge", one must assume that such pledge gives rise to a legal obligation by States to act in good faith for the achievement of the purposes listed in Article 55.

5.3 Limits to the powers of the Security Council set by customary norms of human rights

The Universal Declaration of Human Rights (UDHR)

The legal status of the UDHR has been the object of numerous comments that will not reviewed here. A general consensus appears to have emerged that at least some of the provisions of the UDHR have achieved the status of customary norms. These include particularly the non-derogable human rights that must be respected at all times.

It is also widely held that the UDHR can be regarded as the specification or elaboration of the Charter's human rights provisions. Thus, when the UN Charter refers to human rights, the referent of such general provisions would be the set of rights enumerated under the UDHR.

Finally, a number of commentators hold that the UDHR as a whole represent customary international law. Surely, this can hardly mean that every single norm included therein has reached the status of a customary norm. More probably it is meant that the UDHR is to be regarded as an expression by the community of States that individuals possess inalienable human rights by virtue of their humanity and that these rights, enumerated in the UDHR, are to be regarded as such rights. Such a view could then be reconciled with the position that it remains for States to agree on the exact nature and scope of each particular right and on means of protecting the enjoyment of each such right.

For our purpose it is sufficient to note that even a minimalist understanding of the status of the UDHR would preclude the adoption by the United Nations of measures whose purpose is to undermine the enjoyment of rights listed in the UDHR. The question remains only whether

[112] Such reading into the Maastricht Guidelines is supported by personal communications received by the author from a number of personalities who participated in drafting the Guidelines.[The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 20 Human Rights Quarterly (1998), pp. 691-701]
action for the maintenance and restoration of international peace and security might permit - on an exceptional basis - the temporary derogation from certain rights. The question of derogations will be examined below.

**Customary norms derived from human rights conventions**

While not all UN member States have signed or ratified the various human rights conventions, a number of provisions of these conventions are deemed to have the force of a customary norm, in addition to their conventional nature. These include

a. Non-derogable provisions of the ICCPR
b. A number of provisions relative to collective rights, particularly self-determination

The non-derogable provisions of the ICCPR, specified in Article 4 thereof, include, *inter alia*, the right to life, the right to not be subjected to torture or to cruel, inhuman or degrading treatment or punishment and the right to be recognised everywhere as a person before the law. Such rights must be respected by States even when public order is endangered and even when the security of the nation is endangered, such as in war. It follows that the United Nations cannot violate nor mandate individual Members to violate such non-derogable human rights when acting in response to a threat or breach to the peace. The exact scope of the obligation to respect specific human rights is discussed in separate articles[113].

A number of collective rights are enshrined in human rights conventions. These include most prominently the right to self-determination and the right of peoples to freely dispose of their natural wealth and resources[114]. The right of peoples to self-determination is undoubtedly one of fundamental collective rights (containing an individual dimension). Such right is specifically included in the UN Charter, has been repeatedly affirmed by the UN collective membership and has been even considered by numerous authors to constitute a peremptory norm of international law (norm *jus cogens*). While it is not certain whether the collective right to self-determination constitutes a norm *jus cogens*, its inclusion in Articles 1 and 55 of the UN Charter as values to be protected, and its inclusion in both the ICCPR and the ICESCR suggests that it has achieved the status of a customary norm international law. The right to self-determination has no meaning without its correlative obligation, namely the obligation of other parties to respect the freely expressed collective will of every people to determine its own destiny (inasmuch as the realisation of one people's right of self-determination does not interfere with the realisation of that right by another people). The right to self-determination includes as a derivative the right of peoples to freely dispose, for their own ends, of their natural wealth and resources. Inasmuch as the right to self-determination (and its derivatives) are customary norms of international law, they represent boundaries which may not be transgressed by the Security Council.

**Core human rights and the state of emergency**

The ICCPR permits states to derogate from certain human rights obligations in a state of emergency. There remains, however, a core list of human rights that must be respected in all circumstances. Such human rights are designated as "non-derogable" or "fundamental" human rights.

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[113] The right to life and economic sanctions: [http://www.aldeilis.net/jus/econsanc/righttolife.htm](http://www.aldeilis.net/jus/econsanc/righttolife.htm)

Economic deprivation as inhuman treatment: [http://www.aldeilis.net/jus/econsanc/inhumantrat.htm](http://www.aldeilis.net/jus/econsanc/inhumantrat.htm)

[114] Common Article 1 to the ICCPR and the ICESCR
The [Inter-American] Court warned that 'certain inviolable attributes' of the individual could not be legitimately restricted.

"[R]estrictions - duly and expressly authorised by the Convention and with legitimate ends - could only take place if 'established by a law passed by the Legislature in accordance with the Constitution' ('principles of legality and requirement of law'). The word 'laws' in Article 30 of the Convention, the Court concluded, meant legal norms directed to the general welfare, passed by 'democratically elected' legislative organs established by the Constitution and promulgated by the executive branch, and "formulated according to the procedures set forth by the Constitutions of the States Parties for that purpose"[115].

The question may be asked whether the Security Council, in imposing economic sanctions, sets in motion what may regarded as an international "state of emergency", equivalent in the international sphere to such a regime imposed domestically by States when public order is threatened. If one accepts that the Security Council carries out a similar purpose on the international sphere (the removal of the threat to public order) as by national authorities on the domestic level, one could argue that the Security Council would be, when adopting non-military measures, bound in the very least by the set of "non-derogable" human rights that must be respected in all circumstances. When it comes to restrictions to other human rights, these would demand - if imposed within the internal order of States - the respect of "principles of legality and the requirement of law, which according to the view of the American Court cited above, would require the constitutional and democratic enactment of such restrictions. Although UN organs, such as the Security Council and the General Assembly, are not the equivalent to domestic executive and legislative bodies, the functions they fulfil display sufficient similarities to suggest the relevance, in law and policy, of subjecting restrictions to human rights during UN non-military enforcement measures to the "principles of legality and the requirement of law" as discussed above.

Akande argues that the Security Council must respect all human rights when carrying out its duties under Article 41, such as when imposing economic sanctions. He wonders therefore whether "the Council may have authorised a violation of the right to a fair hearing provided for in Article 14 of the ICCPR."[116]. He cites provisions of SCR 820(1993) and 992(1995) which, within the system of sanctions imposed on the Federal Republic of Yugoslavia denied vessels the right of passage on the base of their suspected prior violations, without, however, permitting the owners of these vessels to have their rights and obligations judicially determined. Mutatis mutandi, such failure pervades the entire system of economic sanctions, and particularly the victims of such measures, who have not been afforded any opportunity to have their rights and obligations determined by an international judicial authority.

Without prejudice to a detailed study of a possible analogy between Security Council collective enforcement measures and national "states of emergency", we make the following tentative conclusions:

a. If collective enforcement measures by the Security Council are to be regarded as international law-enforcement measures, such characterisation would require that the Security Council be subject to similar constraints and requirements as have been imposed on States when declaring a "state of emergency". Among such constraints would be the obligation by the Security Council to refrain from violating "non-derogable" human rights


[116] Akande, supra note 2, p. 324, n. 56
and the elaboration of international judicial mechanisms permitting victims of potential violations of such norms to ascertain their rights and obtain remedies.

b. Should Security Council enforcement measures remain a *sui generis* mode of international conduct - based on the contention that international peace and security is qualitatively different from domestic peace and security - a need would arise to define a set of limits to the powers of the Council with regard to human rights. The question arises then what would the scope of such limits. When national governments institute a "state of emergency", they are subject to obligations of accountability, including the requirement of notifying the international community of the institution of a "state of emergency" and of any amendments and the termination thereof. States are also required to provide an adequate justification for imposing a "state of emergency" and may not invoke such regimes for illegitimate purposes. Such accountability provides a certain protection to those subject to a "state of emergency" against the abusive curtailment of their individual rights. Such accountability does not exist, however, with regard to the Security Council. The Council is neither obligated to justify the imposition of Chapter VII measures; its decisions are not reviewable by the General Assembly of the United Nations or the International Court of Justice; the victims of such measures, individuals, groups, corporations, or States, cannot have their rights determined by an international judicial body; the international community has not established any norms regarding the scope and duration of such measures with regard to human rights. This means that individuals affected by Security Council measures enjoy far less protection of their human rights than those subjected to a national "state of emergency". In order to compensate for this lack of accountability, it is suggested that the Security Council and States acting under its authority, must in principle, and to the extent possible, respect all human rights and that any derogation from human rights obligations must be fully justified in the light of the principles of necessity, humanity and proportionality, where applicable; finally individuals claiming to have been unlawfully harmed by such measures, must be provided with means to have their rights determined by an international judicial authority and obtain remedies if their rights were unlawfully denied or violated.

6. **Limits to the powers of the Security Council set by international humanitarian law**

Until 1990, the Cold War effectively prevented the Security Council from carrying out its mandate when needed but at the same time precluded its abuse by dominant members. The demise of the Soviet bloc left the United States and its allies within the Council (France and the UK) as effectively dominating the Council, for good and ill. Questions that had were formerly only the object of academic interest, such as the applicability of international humanitarian law to UN operations, became highly actual and of practical significance.

As the Security Council increased its resort to peace-keeping and peace-enforcement missions, questions regarding the legal obligations of UN forces under IHL began to surface. The resolution of such questions became urgent as reports surfaced about misconduct by "blue helmets" in operations carried out under UN mandate in various parts of the world[117].

Casual observers would be justified in asking why any doubt should at all exist about the applicability of humanitarian norms to UN peace-keeping or peace-enforcement measures. After all, such norms have been established to protect non-combatants, the wounded,

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prisoners and civilians, from the adverse effects of military hostilities. Such doubt has nonetheless persisted for reasons that will be detailed below.

6.1 Can humanitarian norms apply to UN enforcement measures?

Although the UN Charter entrusts the Security Council to take necessary action for the maintenance and restoration of international peace, including the use of force, no humanitarian provisions are made in the Charter that would bind the Security Council or States acting under its authority in carrying out this task.

It was eventually a non-State organisation, the International Committee of the Red Cross, who brought Governments together in order to draft and adopt the four Geneva Conventions of 12 August 1949. The ICRC, rather than the United Nations, became the principal forum for the elaboration of the norms of international humanitarian law. Today, most States have become High Contracting Parties to the Geneva Conventions, many provisions of which are now regarded as customary law and binding also non-Contracting Parties.

The question whether the laws of war, such as the Hague Regulations of 1907, were applicable to "international police measures" preoccupied already the League of Nations. A special legal committee of the League stated:

“Certain members of the Committee drew its attention to the question whether, in the case of resistance to aggression or the execution of international police measures, the laws of war (jus in bello) would continue to be applicable. In such circumstances, it might, indeed, be doubtful whether the case was one of war properly so called. In the Committee's opinion, whatever name may be given to such operations, the rules of the laws of war would remain applicable”.

The Committee on Equality of Application of the Rules of the Law of War to Parties to an Armed Conflict of the Institute de droit international made the following resolution (V) in the same spirit:

“Les obligations, ayant pour but de restreindre les horreurs de la guerre et imposées aux belligérants pour des motifs humanitaires par les conventions en vigueur, par les principes généraux du droit ou par les règles du droit coutumier, sont toujours de rigueur pour les parties dans toutes les catégories de conflicts armés, y compris l’action coercitive de la part de l’O.N.U. Il en est de même pour les règles concernant la participation de non-combattants aux opérations de la guerre.” (emphasis added).

The question whether the United Nations or forces acting under its authority, must abide by provisions of international humanitarian law, has arisen with great force in recent years[118]. The situations in which IHL might be applicable are those in which the United Nations or forces acting under its authority would find themselves involved in the use of force. Such situations include mainly peace-keeping measures, peace-enforcement measures and the full-fledged war.

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[118] The question arose first in connection with the Korean conflict (1951). One of the main protagonists, the United States stated in a letter to the Security Council dated 5 July 1951 that "the forces participating in the unified command were under instruction to observe the four Geneva Conventions of 1949, as well as the applicable portions of the 1907 Hague Convention IV, as well as other pertinent principles of international law...The statement established an important precedent with respect to the applicability of IHL to international operations and has shaped and informed the debate on the issue for almost half a century.” (Ralph Zacklin, General Report, pp. 50-51, in UNIHL, supra note 116)
According to Zacklin "actions involving the use of force, whether consensual, as in peacekeeping, or not, as in enforcement, cannot take place in a legal vacuum and that as a matter of principle, international humanitarian law is applicable regardless of the characterization of the action itself."[119]. While the principle itself is not contested, a number of questions have remained unsettled. These include the precise extent of the obligations and responsibilities of the UN and States acting under its authority, with regard to international humanitarian law. Part of the problem lies in the fact that the "United Nations is not a State and does not possess the juridical and administrative powers necessary to independently discharge many of the obligations provided for under international humanitarian law"[120].

Another problem is that when acting, the United Nations is deemed to do so on behalf of the international community with the aim to restore the peace. It cannot, thus, according to this view, be regarded as a "party to the conflict", equal in rights and obligations under international humanitarian law, as the party that threatens or breaches the peace. There are at least three objections made to this view. First, it must be remembered that jus in bellum (the law of armed conflict) does not address the status of the belligerents nor the legitimacy of their use of force. This law takes the parties to an armed conflict as is: Organised entities wielding and using lethal weapons to military defeat or coerce the other party. This law expects all parties to an armed conflict, regardless of the legitimacy of their cause, to respect minimal humanitarian norms[121]. Secondly, the view that the Security Council must be granted a privileged status that would exonerate it from certain legal obligations rests on the assumption that the Security Council effectively represents the international community, and carries out its mandate on behalf of that community in good faith. As this assumption is highly contestable, the conclusions based on it must also be tenuous. A third objection, presented by Gill[122], who takes issue with the utilitarian argumentation of "reciprocity" (see above), is that humanitarian law, like human rights law, forms part of the "core values and principles" of the [UN] Organisation. These bind Member States as a matter of both customary and treaty law. Members could not, by conferring on the Security Council the right to use force, invest it with the right to violate humanitarian norms that they are not entitled to violate.

Whether action under Chapter VII of the Charter should be regarded as "international police action" or not, is a question that can be dealt separately from the applicability of IHL to UN mandated or authorised use of force. It must be remembered that police forces are also subject to principles and rules similar to those informing the laws of armed conflict. These principles will be considered below.

A further problem applies to cases where States co-operate in joint military efforts under the authority of the United Nations. As not all States are Parties to the Additional Protocol I, their obligations with regard to international humanitarian law may vary. This does not represent, however, a significant hurdle because a number of provisions of the Additional Protocols I represent customary law and bind also non-Parties.

[119] Zacklin (id. p. 50)
[120] Zacklin, (id. p. 51)
[121] Schachter [cited by Gill, supra note 2, p. 81, note 123], who "argues vigorously in favour of the applicability of the law of armed conflict to UN and UN authorised military enforcement operations", says that "[t]o abandon the principles of equality and reciprocity in this regard would weaken the basis for any observance of the humanitarian rules of armed conflicts".
[122] Gill, supra note 2, p. 82
Finally, it cannot be accepted that fundamental human rights of combatants and non-combatants be made dependent upon the characterisation of a conflict by a highly politicized body, such as the Security Council[123].

6.2 General principles of law applicable to international humanitarian law

While a number of general principles, such as the principles of humanity, of necessity and of proportionality (see discussion supra under General Principles of Law), apply also to situations of armed conflict, the principle of distinction between civilians and combatants, is specific to the law of armed conflicts. It is also regarded as a rule of customary law.

The principle of distinction between civilians and combatants

This principle is termed a "Basic rule" (Article 48 of API) and is "the foundation on which the codification of the laws and customs of war rests: the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military objectives. The entire system established in The Hague in 1899 and 1907 and in Geneva from 1864 to 1977 is founded on this rule of customary law."[124]

The underlying assumption of the laws of armed conflict is that the purpose of hostilities is to achieve the military defeat of another party, not the extermination of a population or the devastation of a country. One of the overriding purposes of regulating armed conflict by the conclusion of treaties has been to reduce harm ensuing from armed conflict to civilians, the wounded, the sick and prisoners of war, ("protected persons") and to civilian objects.

Some prominent examples of the principle of distinction are listed below:

(a) Common Article 3 to the four Geneva Conventions, applicable to armed conflict not of an international character, establish that "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in circumstances be treated humanely...". Such obligation applies equally to "protected persons" as defined in Article 13 of the First and Second Geneva Conventions (the wounded and sick) and to prisoners of war (Article 13 of the Third Geneva Convention). Civilian populations "in the hands of a Party to the conflict or Occupying Power of which they are not nationals" are subject to the protection of the Fourth Geneva Convention, which includes various humanitarian provisions.

(b) Article 10 of the Additional Protocol I (hereafter API), which mandates that all "wounded, sick and shipwrecked, to whichever Party [to the conflict] they belong, shall be respected and protected" and "treated humanely". Similar obligations apply


to "persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result" of armed conflicts.

(c) Medical units (API, Article 12 (1)), civilian medical personnel (API, Article 15(1)), civilian religious personnel (API, Article 15(5)), medical vehicles (API, Article 21 (1)), medical ships and craft (API, Article 23(1)) and medical aircraft (API, Article 24) shall be respected and protected at all times.

(d) [T]he Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives" (API, Article 48). Article 50 of API defines what constitutes a "civilian" and a "civilian population" and adds: "In case of doubt whether a person is a civilian, that person shall be considered to be a civilian."

(e) Article 51 API lays down a number of rules for the protection of the civilian population, that "shall be observed in all circumstances". Among the most important rules are (i) "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited (Article 51 (2)); (ii) Indiscriminate attacks are prohibited. Indiscriminate attacks are (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol."

The above provisions are considered as customary rules and therefore applicable to parties to a conflict, even without their ratification or accession to the Additional Protocol I. We will now consider whether these rules are applicable to economic sanctions.

6.3 International humanitarian law cannot adequately apply to economic sanctions

It has been argued in different quarters that UN economic sanctions are, or should be, regulated by rules derived from international humanitarian law[125]. Most authors recognise, however, the humanitarian exemptions affixed to a sanctions regime cannot adequately[126] meet the requirements of civilian population. This is particularly problematic in cases or protracted sanctions[127]. A number of authors maintain that economic sanctions can be legitimate (and lawful) if they adhere to the principles of necessity and proportionality[128]

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[125] Yves Sandoz, Rapport général (p.74), in UNIHL, supra note 116

[126] Sandoz, id. p. 95 ("Mais force est de constater que c'est d'abord la population civile qui souffre des effets de l'embargo et que le contrôle prévu par le droit humanitaire est très aléatoire")

[127] Gasser, supra note 75

[128] See, for example, W. Michael Reisman and Douglas L. Stevick, The Applicability of International Law Standards to United Nations Economic Sanctions Programmes, 9 European Journal of International Law (1998), pp. 86-141 ("Yet the concept of necessity must be elastic enough to allow for substantial collateral damage when the dangers to public order warrant it. Otherwise, the economic instrument, indeed all instruments, become, definitionally, techniques which must be ineffective in order to be lawful. The question, then, is how to incorporate the necessity factor into calculations of lawfulness of prospective economic sanctions programmes"); also David Cortright and George A. Lopez, The Sanctions Decade: Assessing UN Strategies in the 1990s, Lynne Rienner Publ., Boulder/London, 2000 ("Although there indeed can be tensions between humanitarian impacts [of sanctions] and
The principle of humanity is applicable both in peace and war. As was suggested above, States (and by extension the United Nations) must respect in all circumstances minimal standards of humanity. Such standards were shown to exist, for example, with regard to the basic rights of prisoners (see supra discussion of minimal standards humanity, Chapter 3.1). These standards extend to various socio-economic rights, such as the right to adequate and sanitary living conditions, the right to sufficient and nutritional food, to adequate quantities of drinking water, to adequate medical care, to opportunities of engaging in self-education, sports and recreational activities. The level of socio-economic protection provided to civilians under international humanitarian law is, however limited to secure survival rights in extreme situations[129] which is far from adequate to ensure minimal standards of humanity over any lengthy period of time.

Economic sanctions, unless merely symbolic in nature, are measures that bite with time. By definition, economic sanctions are macro-economic measures aimed at the entire economy of a target state and by extension to its civilian population, not at individual leaders[130]. To allow the population of a targeted country to enjoy the minimal rights conceded to prisoners, would effectively dilute the intended injurious impact of economic sanctions.

Economic sanctions, being an indiscriminate form of onslaught, is incompatible with the principle of distinction that underlies international humanitarian law. To invoke the principle of proportionality as a constraint on economic sanctions would mean to endow an authority, such as the Security Council, with the power to determine the level of hardship it is ready to impose on civilian populations without their consent, in order for that hardship to translate into compliance by their leaders with international demands. In other words, civilian pain thus inflicted would not be incidental but a tool to achieve the political purpose, akin to the Israeli concept of "moderate physical pressure" as a permissible form of torture[131]. Reisman and Stevick correctly compare such a "trickle up" theory of deprivation to a military strategy of carpet bombing of urban concentrations, a war crime, although they merely urge practitioners not to "justify" economic sanctions on that "trickle up" theory[132]. Under the provisions of international humanitarian law, it is not the justification of carpet bombing which is prohibited, but the act[133]. In practice, neither the Security Council nor States have

[129] See, for example, Commentary to Article 69 of the Additional Protocol I ("Duties of the Occupying Power"), ICRC, p. 812

[130] Reisman and Stevick, supra note 129, p. 132, assert that "[e]conomic sanctions may be used when they are capable of discrimination. Sanctions that deprive an adversary of war matériel are presumptively lawful, for they are directed against combatants." The reasoning is correct except that such measures would not constitute economic sanctions [measures aimed at crippling the economy] but an arms embargo.

[131] The euphemism invented by the Israeli Supreme Court in order to authorise torture.

[132] Reisman and Stevick, supra note 129, p. 131 ("'Trickle up' economic sanctions theories [...] contend that the increased pain of lower social strata will percolate upward, by some remarkable osmosis, to those who have the capacity to influence decision...An economic sanctions programme may not be justified on a 'trickle up' theory of deprivation any more than a military strategy, such as carpet bombing of urban concentrations of non-combatants, can be justified on the theory that the pain of death and injury will rise to the higher, politically responsible levels.").

[133] Article 85 (3) of the Additional Protocol I defines as a war crime "launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects [...] in relation to the concrete and direct military advantage anticipated."
been particularly anxious to justify economic sanctions on the "trickle up" theory or even to explain how the sanctions are to translate into compliance of targeted governments. This is quite understandable because such explanations could have exposed proponents of this theory to the charge of endorsing international terrorism[134]!

The principle of relief, which is enshrined in instruments of humanitarian law, is relevant when hostilities incidentally impair the access of populations to humanitarian goods, say because shipping becomes hazardous. Relief is not meaningful, however, where impairment of shipping and trade is intentional, as is the case with economic sanctions. Providing relief would in such circumstances reduce the shortages which economic sanctions seek to produce; it would an exercise in futility.

International humanitarian law regulates armed conflict. Economic sanctions do not constitute an armed conflict. Should principles and provisions of international humanitarian law nevertheless apply to economic sanctions, it would be necessary to regard such measures, by analogy, as an "attack"[135] or as "method or means of combat", so as to permit the evaluation of their use in the light of existing humanitarian principles, particularly the principle of distinction between combatants and civilians[136].

According to the customary principle of distinction between combatants and civilians that has been enshrined in Article 51 of the API, "the civilian population as such...shall not be the object of attack". Moreover, "indiscriminate attacks are prohibited". Economic sanctions constitute by their very nature an indiscriminate "attack" on the well-being of the general civilian population. Such measures are therefore inherently unlawful in the light of principles of international humanitarian law. Attempt to mitigate the humanitarian effects of economic sanctions would be equivalent to reduce the severity, though not the nature, of indiscriminate attacks on urban agglomerations, or provide humanitarian relief to those indiscriminately attacked. Such relief operations would not negate the unlawfulness of the attacks.

As an attack on a civilian population is prohibited in all circumstances, the principles of military necessity and of proportionality do not apply to such attacks. Such reasoning applies by analogy to economic sanctions as an "attack on a civilian population".

While the United Nations and States acting under UN authority are bound by humanitarian rules in the case of the use of force, such rules are both inadequate and inappropriate with regard to UN non-military enforcement measures, such as economic sanctions.

### 7. Conclusions

The Security Council is today under a double threat. On the one hand, the most powerful nations, particularly the United States and its closed allies, either use it to pursue their own

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[134] US legal code (Title 18 § 2331) defines "international terrorism" as activities that involve "acts dangerous to human life that are a violation of the criminal laws of the United States or of any State" and "appear to be intended to intimidate or coerce a civilian population [and/or] to influence the policy of a government by intimidation or coercion".

[135] The term "attack" is defined in Article 49 of the API.

[136] Humanitarian law has been drafted with regard to traditional forms of warfare. It does not adequately address indirect forms of hostile action, such as information warfare and economic warfare, which can be as devastating to a civilian population as military "attacks". In practice, the humanitarian effects of an "attack" on an urban agglomeration or on civilian infrastructure can be similar in nature to those resulting from economic sanctions in which no kinetic force is used. The term "attack" can thus be widened to include all forms of onslaught and the infliction of harm.
agenda, or simply disregard it by acting unilaterally. On the other, and as a reaction to this development, distrust of the Security Council as an extension of imperial power is growing, compounded by the realisation that a true reform of the Council is hardly feasible. This development may, ultimately, undermine the very idea of a universal collective security system.

The UN Security Council, dominated by the world's main arms exporters can hardly be expected to seek the end of armed conflicts, nor has it, and its permanent members, demonstrated that they act in good faith[137] for the common good. Even for this reason alone, it is necessary to subject the Council to a normative framework that would permit an objective evaluation of its action.

A general consensus exists today that while no judicial or political authority has yet been empowered to review the decisions of the Security Council, it is always bound by the provisions of the UN Charter, as the primary normative base for its action, complemented by general principles of international law and custom. Should the Council transgress the boundaries set by the Charter and other sources of law, it would exceed its competence. Its decisions would have to be regarded as null and void. In such cases, States would be entitled to disregard the decisions of the Council. Although refusal by States to comply with Security Council resolutions would appear to undermine the UN system, such danger is grossly exaggerated. Non-compliance with Security Council decisions by a handful of countries, including by some of its permanent members, has accompanied the United Nations since half a century without destroying the organisation. Such marginal non-compliance has arguably done less to undermine the authority and legitimacy of the Council than the double standards it pursues and attempts by dominant members to abuse the Council for their own purposes.

In order for the Security Council to retain its capacity to discharge its unique mandate as stipulated in the UN Charter, it must act in good faith, impartially, objectively and accept to be fully accountable to the UN membership and to the world's peoples. It must be faithful to the UN Charter and to international legal norms, particularly those concerning the rights of the human person. Securing international peace and security, even when using military force, does not require to commit torture, commit extra-judicial executions, subject civilians to starvation or degrade human beings. The United Nations must never commit human rights violations that no State and no individual is allowed to commit. Such rules need not be elaborated anew for they have been carefully crafted through international co-operation. The international community should affirm the applicability of these rules to the United Nations and its organs and establish effective mechanisms capable of assessing - from the outside - the compliance of the Security Council with such rules.

The affirmation and reaffirmation of the duties of the Security Council to the human person are particularly important with regard to the human rights of inhabitants of sanctioned countries.

When economic sanctions are imposed in order to "squeeze" the economy of a State, they almost inevitably cause violations to the human rights of the population of that State. Paraphrasing ICJ Judge Weeramantry in the Nuclear weapons case (Advisory Opinion) we say:

It is not the point that such results [the injurious effects of economic sanctions] are not directly intended, but are 'by-products' or 'collateral damage' caused by economic sanctions. Such results are known to be the necessary consequences of the use of the weapon. The author of the act causing these consequences cannot in any coherent legal system avoid legal responsibility for causing them,

[137] See, in general, Davidsson, supra note 98
any less than a man careering in a motor vehicle at a hundred and fifty kilometres per hour through a crowded market street can avoid responsibility for the resulting deaths on the ground that he did not intend to kill the particular persons who died\[138\].

Violations of human rights caused by economic sanctions may encompass anything from moderate to serious impairment of any of the following rights: the right of everyone to an adequate standard of living, including food, clothing and housing, and to the continuous improvement of living conditions; the right of everyone to the opportunity to gain his living conditions by work; the right of everyone to the enjoyment of safe and healthy working conditions; the right of everyone to social security; the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the right of everyone to education; the right to receive and impart information regardless of frontiers; and the right to development. The violations of the above rights may also affect individuals right to life and to be free from cruel, inhuman or degrading treatment, deemed non-derogable rights. Economic sanctions, unless specifically requested by the population\[139\], deprive a people from its right to self-determination, to freely dispose of its natural wealth and resources and to development. Individuals, in targeted and in third countries affected by UN economic sanctions, are not provided with a procedure by which they could have their infringed rights judicially determined. They are thus discriminated against in their right to equal protection of the law.

The Security Council is bound to respect all the above human rights as well as general principles of international law, including those of good faith, humanity, necessity and proportionality. The Council must demonstrate that in imposing economic sanctions it takes full account of these obligations and principles. To which extent, if at all, can economic sanctions be imposed within the limits imposed on the Council by the UN Charter, general principles of law and human rights, is a question that warrants a separate treatment.

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\[138\] _ICJ: Legality of the threat or use of nuclear weapons (Advisory Opinion) Separate Opinion Judge Weeramantry_, The Hague, 8 July 1996, Chapter III (7)

\[139\] In two and only two cases - those of the sanctions on South Africa and on Haiti - organisations ostensibly representing the majority of the population of these countries, specifically requested the imposition of economic sanctions against their own country, as an attempt to remove an illegitimate government.