

INTERNATIONAL LAW AND ECONOMIC
SANCTIONS IMPOSED BY THE UNITED
NATIONS' SECURITY COUNCIL.
LEGAL IMPLICATIONS IN THE GROUND OF
ECONOMIC, SOCIAL AND CULTURAL RIGHTS*

*EL DERECHO INTERNACIONAL Y LAS
SANCIONES ECONÓMICAS IMPUESTAS
POR EL CONSEJO DE SEGURIDAD
DE LAS NACIONES UNIDAS.
IMPLICACIONES EN EL CAMPO DE
LOS DERECHOS ECONÓMICOS,
SOCIALES Y CULTURALES*

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PARA CITAR ESTE ARTÍCULO / TO CITE THIS ARTICLE
Marco Alberto Velásquez Ruiz, International Law and Economic Sanctions
imposed by the United Nations' Security Council. Legal implications in
the ground of economic, social and cultural rights, 21 International Law,
Revista Colombiana de Derecho Internacional, 223-254 (2012).

1692-8156(201212)12:21<223:ILESUN>2.0.TX;2-M

* Artículo de investigación.

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ABSTRACT

Nowadays and concretely after the end of Cold War, it is quite visible that the activity of the Security Council is showing a variation to the traditional conception of the international system, as the increase of actions starting from the invocation of Chapter VII of the Charter of the United Nations was accompanied by new controversial outcomes. This paper intends to describe several legal issues related to the imposition of economic sanctions by the Security Council, in order to show that even if it appears that such organ of the United Nations has a wide margin of appreciation when maintaining international peace and security, there are some limits arisen from the Charter of the United Nations –assumed here as a constitutional device–, but also from other branches of International Law, conceived nowadays as relevant for the protection of individuals from the adverse effects of these measures.

Key words author: International law, Security Council, human rights, economic, social and cultural rights, economic sanctions, international community.

Key words plus: international law, human rights, economic and social rights, economic sanctions, sanctions.

RESUMEN

Hoy en día, y concretamente luego de la finalización de la guerra fría, es claro que la actividad del Consejo de Seguridad está presentando una variación con referencia a una visión clásica de la estructura de la comunidad internacional, concretamente, que el incremento de las acciones desarrolladas en virtud del Capítulo VII de la Carta de las Naciones Unidas están produciendo resultados altamente controversiales. Esta investigación busca describir varias cuestiones legales relacionadas con la imposición de sanciones económicas por parte del Consejo de Seguridad, con el fin de mostrar que si bien parece ser que aquel órgano tiene un amplio margen de discreción para actuar en virtud del mantenimiento de la paz y la seguridad internacional, hay algunos límites impuestos por la mencionada Carta—asumida aquí como un dispositivo legal constitucional—, pero también por otras ramas del Derecho Internacional, concebido hoy en día como un mecanismo de protección de derechos humanos.

Palabras clave autor: *Derecho Internacional, Consejo de Seguridad de las Naciones Unidas, Derechos Humanos, Derechos Económicos, Sociales y Culturales, sanciones económicas, comunidad Internacional*

Palabras clave descriptor: *derecho internacional, derechos humanos, derechos económicos y sociales, sanciones económicas, sanciones.*

INTRODUCTION

Nowadays and concretely after the end of Cold War, it is quite visible that the activity of the Security Council is showing a variation to the traditional conception of the international system, as the increase of actions starting from the invocation of Chapter VII of the Charter of the United Nations was accompanied by new controversial outcomes, among other things, the possibility of the Council to impose economic sanction in order to maintain or restore international peace and security.

However, the implementation of such measures has an impact on the enjoyment of human rights, but in particular on the civilian's economic, social and cultural rights (ESCR hereafter), provided the humanitarian emergency created by adverse collateral effects i.e. the shortage of certain goods and services essential for the guarantee of basic standards of living.

Such collision of interest raises a delicate question to the International System, which is progressively moving towards the recognition of the individual as the main concern of the Apparatus, and its protection the ultimate objective. As Geiss points out,

At a time when the efficiency of the Security Council is no longer reduced to a minimum and the significance of human rights norms and humanitarian law principles are widely recognized at the international level, it would be anachronistic to grant unlimited power to any international organ¹.

This paper intends to describe several legal issues related to the imposition of economic sanctions by the Security Council, in order to show that even if it appears that such organ of the United Nations has a wide margin of appreciation when maintaining international peace and security, there are some limits arisen from the Charter of the United Nations—assumed here as a constitutional device-, but also from other branches of Inter-

1 GEISS, Robin. "Humanitarian Safeguards in Economic Sanctions Regimes: A Call for Automatic Suspension Clauses, Periodic Monitoring, and Follow-Up Assessment of Long-Term Effects". *The Harvard Human Rights Journal* 18 (2005), p. 173.

national Law, conceived nowadays as relevant for the protection of individuals from the adverse effects of these measures.

Firstly, Section I describes the legal framework for the imposition of economic sanctions by the Security Council (contained in the Charter of the United Nations), and then focuses on the humanitarian problematic of such measures; that is to say, the adverse consequences generated to the civilians located on the areas where there is the greatest impact.

Section II, will try to assess possible limitations under International Law, in order to avoid adverse effects when the Council implements economic sanctions. Consequently, it deals with a preliminary inquiry related to the United Nation's international legal personality as to assume certain capacity as subject of rights and obligations, and thereafter, it boards the description of tangible restrictions and the problematic for their application, taking into account the emergence of new realities to the International Community and the need to adjust the Legal System to such novel circumstances.

Thereafter, Section III sets forth perspectives and proposals, assuming that the imposition of economic sanctions by the Security Council has to keep a balance between the maintenance of international peace and security and the protection of individuals under a situation of special vulnerability, an bearing in mind the progressive overlap between Human Rights Law and International Humanitarian Law as a way to extend such protection to new circumstances and establishing duties to new actors. Finally, conclusion s will be developed.

I. ECONOMIC SANCTIONS AND THEIR IMPACT ON THE CIVILIAN POPULATION

A. Economic sanctions as a means for the UN Security Council to maintain or restore International Peace and Security: legal framework.

Notwithstanding controversial, the Charter of the United Nations, whether the foundational instrument of such Organization², has progressively been assumed as the “Substantial Constitution on the International Community”³, and therefore a paramount legal device as well as an inspirational instrument for the rest of System⁴.

In spite of the persistent structure of horizontal relations between sovereign states⁵, the Charter incorporates a distinguishable separation of functions and distribution of powers in several Organs⁶, in charge of concrete matters linked to the abovementioned programmatic intentions of the Organization, and materialized on a set of Purposes and Principles⁷.

Whether the Principles (article 2) represent the pillars that support the International System, the Purposes of the United Nations (article 1) constitute a truly navigation chart⁸. Thus, relations between the States themselves as well as among the United Nations and its members have to be featured by three

2 As the preamble to the Charter illustrates; “our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization known as the United Nations”.

3 See Dupuy, Pierre-Marie. “The Constitutional Dimension of the Charter of the United Nations Revisited”. Max Planck Yearbook of United Nations Law 1 (1997), p. 2

4 See Tomuschat, Christian. The United Nations at Age Fifty: a legal Perspective. 1995.

5 Such structure can be illustrated, for instance, by the way international law is produced, or even clearer, the way international law is not produced by a legislative body, but rather by bilateral or multilateral conventional exercises (treaties), or conscious state practice (custom).

6 According to article 7 of the Charter, the principal organs of the United Nations are The General Assembly, the Secretariat, the International Court of Justice, The Trusteeship Council, the Economic and Social Council and the Security Council.

7 See articles 1 and 2 of the Charter.

8 For a detailed construction of the interplay between principles and purposes under the framework of the Charter, see DUPUY, Pierre-Marie, *op. cit.*, p. 5.

patterns; a) equal rights and self-determination⁹; b) international co-operation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights¹⁰, and c) maintenance of international peace and security¹¹.

Hence, the latter was turned into a concrete mandate conferred to the Security Council¹² by virtue of article 24, which establishes not only that such responsibility is primordial to it, but that in doing so it has on one hand to act according to the other Principles and Purposes, and on the other, limit itself to the specific powers granted by the Organization on chapters VI, VII, VIII and XII, thus following the Constitutional logic of the Charter.

Chapter VII sets forth the operative dispositions concerned to the maintenance of international peace and security. Article 39 establishes a two-step process; firstly, it “shall determine the existence of any threat to the peace, breach of the peace or act of aggressions”, and secondly, “shall make recommendations or decide what measures shall be taken”.

Such measures are the object of concern; following this argumentative line, article 41 suggests what kind of measures different to military intervention¹³ may be taken in case of the arisen of a situation relevant to the Council's mandate, in form of a non-comprehensive list but rather an illustrative catalog of coercive actions¹⁴, such as the complete or partial interruption of economic relations, intermission of means of communication, and the severance of diplomatic relations.

9 Article 1(2) of the Charter.

10 Article 1(3) of the Charter.

11 Article 1(1) of the Charter.

12 The Council's structure is set forth in Chapter V of the Charter, but its concrete functions in relation to international peace and security are

13 Ruled by article 42 of the UN Charter.

14 According to Geiss, the drafting process of article 41 showed a clash between Russia and the United Kingdom, who wanted to include an exclusive catalogue of sanctions, vis à vis the western powers, believing that such a thing would inappropriately limit the authority of the Security Council. GEISS, Robin. “Humanitarian Safeguards in Economic Sanctions Regimes: A Call for Automatic Suspension Clauses, Periodic Monitoring, and Follow-Up Assessment of Long-Term Effects”. *The Harvard Human Rights Journal* 18 (2005), p. 172.

These type of measures are regularly called “sanctions”, and reflect a common pattern; a reproach for an action considered by a collectivity –name it International Community- as prejudicial to one shared interest, and a consequent non-military, centralized response used to influence the perpetrator to conform to some desired behavior¹⁵. Likewise, the UN General Assembly has stated that, “the purpose of sanctions is to modify the behavior of a party that is threatening international peace and security and not to punish or otherwise extract retribution”¹⁶.

Regarding on the specific area of economic sanctions, it can be inferred from the practice¹⁷ that they are characterized as “(a) restrictions on the flow of goods, (b) restrictions on the flow of services, (c) restrictions on the flow of money and (d) control of markets themselves in order to reduce or nullify the target’s chances of gaining access to them”¹⁸.

Thus, by virtue of the Charter of the United Nations, the mandate of maintain or restore international peace and security has been conceded to the Security Council, supported by a flexible and centralized procedure through which it may impose military or non-military measures, i.e. collective economic sanctions.

B. How Economic Sanctions have an adverse impact on the civilian population

According to the theory on sanctions, they represent a middle ground in international politics, being more severe than mere verbal condemnation, but less severe than the use of force¹⁹.

15 See FAUSEY, Joy K. “Does the United Nations Use of Collective Sanctions to Protect Human Rights Violate own Human Rights Standards?” Connecticut Journal of International Law 10 (1994), p. 195.

16 A/Res/51/242, 26 September 1997.

17 Concrete reference to the cases when the Security Council has imposed economic sanctions will be given on the next sections.

18 FAUSEY, Joy K. “Does the United Nations Use of Collective Sanctions to Protect Human Rights Violate own Human Rights Standards?”. Connecticut Journal of International Law 10 (1994), p. 197.

19 SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS. The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights – Working Paper prepared by Mr. Marc Bossuyt, 21 June 2000. E/CN.4/Sub.2/2000/33, par.48.

Thus, the recent increase in use of collective sanctions stems in large part from the perception of this technique as a more moderate approach, falling between the extremes of diplomacy and military intervention²⁰ (Fausey 193).

Taking into account such conception, two approaches can be distinguished:

On one hand, the legality of the conduct lies on the ideological Purpose and the concrete authorization given by the Charter of the United Nations to the Security Council for the maintenance or restoration of international peace and security as its primary function.

On the other, as a practical argument, it has been stressed that economic sanctions are capable to modify the behavior of authoritarian regimes, since they are an effective way to achieve the desired result, that is to say, the above-mentioned ideological purpose of having a kind of world public order.

Nevertheless, even if initially praised as the new method to guarantee effective Security Council action while avoiding the costs and risks of military engagement, it soon became evident that sanctions had a number of unintended effects, predominantly a devastating impact on the civilian population²¹. Likewise, the Sub-Commission for the Protection and Promotion of Human Rights has stated that economic sanctions mostly seriously affect the innocent population, especially the most vulnerable; aggravate imbalances in income distribution; and generate illegal and unethical business practices²².

Although the theory maintains that economic pressure on civilians will translate into pressure on the Government for change the targeted leaders, they have managed to continue pursuing their policies and to stay in power²³. In the same direction, the

20 FAUSEY, Joy K. "Does the United Nations Use of Collective Sanctions to Protect Human Rights Violate own Human Rights Standards?". *Connecticut Journal of International Law* 10 (1994), p. 193.

21 GEISS, Robin. "Humanitarian Safeguards in Economic Sanctions Regimes: A Call for Automatic Suspension Clauses, Periodic Monitoring, and Follow-Up Assessment of Long-Term Effects". *The Harvard Human Rights Journal* 18 (2005), p. 167.

22 See Resolution 1997/35 of 28 August 1997.

23 REINISCH, August. "Developing Human Rights and Humanitarian Law Accountability

traditional calculation of balancing civilian suffering against the desired political effects is giving way to the realization that the efficacy of a sanctions regime is in inverse proportion to its impact on civilians”²⁴.

Conscious of the problems raised by economic sanctions, the Security Council has tried to mitigate the adverse effects to civilian population through the design of “smart sanctions”, intended to limit the measures to specific targets, or by including humanitarian exceptions on the text of the Resolutions, in order to allow the normal distribution of basic goods and services to the vulnerable population, thus trying to “compensate” the damage previously created.

Citing Reinisch:

*Some scholars have even spoken of an human rights paradox, i.e., that since the end of the cold war the cause for human rights has increasingly become the reason for the imposition of the UN sanctions, while the United Nations—in adopting such sanctions—more and more disregards these same human rights principles*²⁵.

Nevertheless, and trying to point it in the crudest way possible, it has to be concluded that “under sanctions, the middle class is eliminated, the poor get poorer, and the rich get richer as they take control of smuggling and the black market”²⁶.

II. LIMITATIONS TO ECONOMIC SANCTIONS IMPOSED BY THE SECURITY COUNCIL UNDER INTERNATIONAL LAW

As it was illustrated, the Security Council has a wide margin of discretion in framing economic sanctions under Chapter VII of

of the Security Council for the Imposition of Economic Sanctions”. American Journal of International Law 95 (2001), p. 851.

24 SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS. The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights – Working Paper prepared by Mr. Marc Bossuyt, 21 June 2000. E/CN.4/Sub.2/2000/33, par.48.

25 REINISCH, August. Op. cit., p. 852.

26 Ibid, par. 50.

the Charter, resulting on adverse side effects to the rights of the civilian population.

It is necessary then to address whether there is any kind of limits for the action of such organ when imposing enforcement measures, and even more relevant, to establish the content and scope of any possible restriction. Thus, the problem of striking an acceptable balance between the effectiveness of a sanctions regime and its adverse side effects lies at the heart of the debate.²⁷

A. United Nation's legal personality and Security Council's political character under International Law

The imposition of limits and/or obligations to an entity such as the Security Council depend on its legal position under the System where it is performing its functions; on one hand, it is a political organ created by an International Agreement with a constitutional character (The Charter of the United Nations), and on the other, it is part of an Organization that is subject of rights and obligations under International Law; thus, each one of these perspectives has different consequences.

Regarding on the first issue, the International Court of Justice has firmly pointed that "The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment"²⁸.

Thus, independently of its quality or the mandate it is compelled to display, the Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization; consequently, neither the text nor the spirit of the Charter conceives of the

27 GEISS, Robin. "Humanitarian Safeguards in Economic Sanctions Regimes: A Call for Automatic Suspension Clauses, Periodic Monitoring, and Follow-Up Assessment of Long-Term Effects". *The Harvard Human Rights Journal* 18 (2005), p. 173.

28 *Admission of a State to the United Nations (Charter, Art.4)*, Advisory Opinion: ICJ Reports 1948, par. 64

Security Council as *legibus solutes* (unbound by law)²⁹, and it is precisely this legal instrument who can provide them.

On the other hand, the possibility to go further and find concrete obligations under International Law resides on the legal personality of the United Nations as an international organization. This alternative might be more suitable for the protection of individuals than the first one, because the UN Charter, as it will be seen on Section III, has inspirational limits which are broad, and cannot be assumed as concrete measures but just abstract guidelines.

Regarding on the issue, the International Court of Justice has pronounced several times to support the United Nations' subjectivity; thus, in the Reparations Advisory Opinion, it was upheld that it "is subject to Public International Law because it partakes of personality under this legal system", and therefore "the rights and duties of an entity such as the United Nations must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice"³⁰.

Likewise, some years later the judicial organ of the World Organization specified the content of such legal personality, whether it sustained that "International Organizations are subjects of International Law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements they are parties"³¹.

The latter is fundamental, since it defines the sources from which the UN –and consequently the Security Council as one of its principal organs- is obliged under International Law: its constitution, international agreements of which it is a party and mostly relevant for the purposes of this study, the always up to be defined "General Rules of International Law".

29 ICTY Trial Chamber, Prosecutor v. Tadic Appeal on Jurisdiction. Case IT-94-I-ART72 1995, p. 28

30 *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion. ICJ Reports 1949, p. 179.

31 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, para. 37.

As it was expressed, the first one is fully applicable as a limit to the Security Council, but it lacks specificity and might be interpreted in a flexible way when establishing concrete duties for the imposition of economic sanctions. On this respect, Geiss points out that “these purposes and principles are formulated broadly and cannot be assumed to be synonymous with specific rules of international treaties and general international law”³².

Thus, it would be more suitable to use the provisions of the Charter as a Constitutional authorization in order to engage more specific provisions of international law which contain relevant dispositions for the protection of the rights of civilians in the case of a humanitarian emergency, such as the one which might be generated by economic sanctions. As Judge Álvarez expressed once, *it is necessary when interpreting the Charter to look ahead*³³.

B. The Charter of the United Nations as a source of control to the imposition of economic sanctions by the Security Council

The Charter's dispositions shouldn't be considered as separate mandates, but as complementary and equally relevant; in the same way that maintenance of international peace and security is a must for ordered and pacific relations among States, respect and enforcement of human rights and humanitarian issues constitute a safeguard for the individual as the International Community's center of concern. Hence, when producing resolutions, the Security Council is bound the UN Charter.

Provided that the main intention to establish limits to the action of the Council is the protection of civilians, three different provisions of the Charter contain relevant dispositions which could be seen as restrictions when imposing economic sanctions:

32 GEISS, Robin. “Humanitarian Safeguards in Economic Sanctions Regimes: A Call for Automatic Suspension Clauses, Periodic Monitoring, and Follow-Up Assessment of Long-Term Effects”. *The Harvard Human Rights Journal* 18 (2005), p. 178.

33 Cited in GOWLAND-DEBBAS, Vera “Security Council Enforcement and Issues of State Responsibility”. *The International and Comparative Law Quarterly* Vol. 43-1 (1994), p. 95.

- a. The Preamble mentions as common aspirations to the United Nations the “faith in fundamental human rights, in the dignity and worth to human person” as well as the intention to “establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”. Beyond its legal value, the Preamble is relevant whether it represents a political tendency –the way the organization in conceived-, in order to influence all the legal provisions of such legal Instrument.
- b. Article 1(3), which was previously characterized as one of the purposes of the United Nations. Consequently, there is a paramount aspiration of “solving international problems of an economic, social, cultural or humanitarian character, and promoting and encouraging respect for human rights”.
- c. Article 55 is intimately related to the former purpose, whether it highlights the promotion of “higher standards of living”, as well as the “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction”.

Thus, although the language used in these legal provisions does not explicitly require the Organization to observe human rights³⁴ or specifically impose obligations, it might not be consistent that one of its principal Organs act in such a way to discourage one of its objectives in order to favor another i.e. the performance of political functions as the maintenance of international peace and security; that is to say, it doesn't have unfettered discretion as a political organ³⁵.

34 REINISCH, August. “Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions”. *American Journal of International Law* 95 (2001), p. 857.

35 As Gowland points out, “the purposes and principles stated in articles 1 and 2 of the Charter not only include the primary goal of peace maintenance, but also reflect human rights, humanitarian, economic and social concerns of the UN”. GOWLAND-DEBBAS,

However, one should ask whether such legal provisions are sufficient to limit the action of the Council, and more relevant, to bring real protections for civilians; the formulation of the abovementioned rules is vague and could be interpreted widely, so transition to relevant rules of International Law- has to be done, in order to establish if more concrete standards or obligations can be linked.

A. Limitations to sanctions in International Law

Although there is no express provision requiring the Council to respect International Law³⁶, The United Nations is a subject to such legal order, so its organs such as the Security Council, owns rights and duties. Thus, ascertaining precise criteria to establish restrictions for the imposition of economic sanctions requires an exercise of association to the specific sources of International Law.

1. International agreements as applicable law to impose obligations

The possibility that International Agreements relevant to the protection of civilian populations could be used as a source of obligations to such a United Nations' organ like the Council has to be considered carefully, provided that although International organizations in general and the UN in particular has legal personality, it is not party to Human Rights or International Humanitarian Law instruments.

This would mean that an organ like the Security Council is not bound by obligations as a matter of treaty law³⁷ different

Vera. "Security Council Enforcement and Issues of State Responsibility". The International and Comparative Law Quarterly Vol. 43-1 (1994), p. 91.

³⁶ Ibid, p. 856.

³⁷ REINISCH, August. "Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions". American Journal of International Law 95 (2001), p. 854.

from the ones which might be extracted from the Charter of the United Nations, as it was explained above.

Nevertheless, the fact that international agreements are neither the only nor the most comprehensive source of International Law³⁸, implies the need to look with detail to Customary International Law in order to extract relevant dispositions to the United Nations as subject of International Law, no matter if it expressed its consent to be bound, but due to its belonging to the International Community.

1. Customary International Law as applicable law to impose obligations

Provided the analysis on the apparently unsuitability of the international agreements on human rights and international humanitarian law to oblige the Security Council as it is not a party to such treaties, the second alternative would be to consider General International Law (either General Principles or Customary Law) as the appropriate source for bringing concrete limits and/or obligations to the case of the imposition of economic sanctions.

Human Rights Law

Arguably, the greatest strength of Human Rights rests on its applicability either in times of peace and when an armed conflict occurs, notwithstanding the particularities on the latter related to the suspension on certain entitlements.

However, it is odd that apart from the right to life³⁹, the customary nature of the rights contained in such branch of International Law is not clear and specifically for the purposes of

38 In fact, as it will be analyzed on the next Section, most of the times treaty law is just codifying existent General International Law, or at the most crystallizing it.

39 "The SC is, at a minimum, bound to respect the right to life, which is not only non-derogable under the ICCPR, but which has also acquired *jus cogens* status". See GEISS, Robin. "Humanitarian Safeguards in Economic Sanctions Regimes: A Call for Automatic Suspension Clauses, Periodic Monitoring, and Follow-Up Assessment of Long-Term Effects". *The Harvard Human Rights Journal* 18 (2005), p. 178).

this study, those who are relevant in the case of adverse effects coming from the imposition of economic sanctions, such as the right to health and the respect for basic standards of living⁴⁰.

On the other hand, is paradoxically that the general rules of protection of the civilian population contained in International Humanitarian Law are more suitable for the case of a humanitarian emergency as an adverse consequence of the imposition of economic sanctions than Human Rights provisions, which although have a greater spectrum of application, doesn't provide

Hence, the problematic can be identified as a collision between the way on which the scenarios for the applicability of Human Rights and International Humanitarian Law were originally conceived, and the emergence of new situations demanding the protection of individuals, as a result of a humanitarian situation. Therefore, special attention will be given to International Humanitarian Law in order to reconcile the abovementioned problems on the applicability of Human Rights

International Humanitarian Law

Regarding International Humanitarian Law, the ICJ has pointed out that such branch has a clear set of rules distinguishable as customary legal provisions, including those which are suitable for humanitarian situations. In that sense, it has been upheld that "the Geneva Conventions are in some respects a development, and in other respects no more than an expression, of fundamental general principles of international law"⁴¹.

Likewise, in the Advisory opinion on the Legality of the Use of Nuclear Weapons the Court expanded the evidence of the customary nature of International Humanitarian Law, since it sustained that:

40 Notwithstanding the important assertions made by the Committee on Economic, Social and Cultural Rights on its Commentary No.8, on the

41 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, par.218.

*The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles*⁴².

The precedent citation helps to clarify that even if such rules are contained in treaties of which the UN is not a party, they are generally declaratory of existing customary law⁴³. Therefore, it doesn't constitute a limitation for their applicability since the Organization has legal personality to International Law, and their organs such as the Security Council are obliged to observe them.

Such appointment have been enforced and clarified by a Study sponsored by the International Committee of the Red Cross, where specific customary rules coming from this branch were defined, as well as their content and scope⁴⁴.

Thus, for a humanitarian situation such as the one produced by economic sanctions, applicable customary norms might be deduced from the general rules on protection of the civilian population⁴⁵. Following the ICRC study⁴⁶:

1. Rule 53: "The use of starvation of the civilian population as a method of warfare is prohibited"⁴⁷.
2. Rule 54: "Attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population are prohibited"⁴⁸.

42 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, Para.82.

43 REINISCH, August. "Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions". *American Journal of International Law* 95 (2001), p. 855.

44 HENCKAERTS, Jean-Marie and DOSWALD-BECK, Louise, *Customary International Humanitarian Law*, ICRC and Cambridge University Press, 2005; vol.I, *Rules*; vol.II, *Practice*.

45 REINISCH, August, *Op. cit.*, p. 860.

46 HENCKAERTS, Jean-Marie and DOSWALD-BECK, Louise, *Customary International Humanitarian Law*, ICRC and Cambridge University Press, 2005; vol.I, *Rules*, p. 186-201.

47 See article 54(1) of Additional Protocol I (international armed conflicts), and article 14 of Additional Protocol II (non-international armed conflicts).

48 See article 54(2) of Additional Protocol I (international armed conflicts) and article 14 of Additional Protocol II (non-international armed conflicts), with the exceptions of objects which can be attacked since they qualify as military objects, as well as the "scorched earth policy".

3. Rule 55: "The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to the right of control"⁴⁹.
4. Rule 56: "The parties to the conflict must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions. Only in case of imperative military necessity may their movements be temporarily restricted"⁵⁰.

Notwithstanding the precedent rules and their applicability to humanitarian situations resulting from the implementation of economic sanctions, a problematic situation has to be formulated: International Humanitarian Law is only applicable to situations of armed conflict, and in any case doesn't consider specifically the case of measures imposed by the Security Council on its scope of relevance. In other words, it "can only regulate economic sanctions when they are directed against a party otherwise engaged in an armed conflict"⁵¹.

Whether most of the cases where economic sanctions have been imposed are inside the spectrum of an armed conflict (be it international or non-international), it would be perfectly possible to face such situation in times of peace⁵², facing thus a great limitation on its application provided the characteristics of such branch of International Law.

As is has been shown so far, the issue of economic sanctions imposed by the Security Council can be analyzed twofold; on one hand, the need to implement a set of guidelines to direct the

49 Article 23 of the Fourth Geneva Convention require states to "allow the free passage of all consignments of medical and hospital stores" and "the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases". See as well article 70 of Additional Protocol I (international armed conflict); Additional Protocol II doesn't contain a specific provision on access of humanitarian relief, to the case of non-international armed conflicts.

50 See article 71 of additional Protocol I.

51 SASSOLI, Marco. "Sanctions and International Humanitarian Law – Commentary", in GOWLAND-DEBBAS, Vera Ed. *United Nations and International Law*. The Hague; London; Boston: Kluwer Law International, 2001, p. 241.

52 However, the applicability of human rights law will be treated on the fore coming Section.

action of the organ, and on the other the protection of civilian population who is exposed to adverse effects. Although there are several normative dispositions applicable to both sides of the problem, they fall short to deal with every possible variable. Is there therefore a normative loophole for the applicability of International Humanitarian Law?

III. PERSPECTIVES AND PROPOSALS

Such issue reflects the apparent limitations that the International System has to face when dealing with new circumstances appearing upon the global community, and implies the need raise alternatives to enlarge the applicability of International Law (including the relevant branches). This study suggests that three possible solutions can be envisaged:

A. Apply “Well-Established Principles of International Law”

The first possibility could be find humanitarian legal provisions that because of its nature as fundamental principles could be generally applied to any international subject, and every factual situation. As Judge Weeramantry upheld on his dissenting opinion in the Lockerbie Advisory Opinion, “The history of the United Nations Charter thus 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”⁵³.

On this regard, the jurisprudence of the ICJ is once more helpful to illustrate such alternative, as it recognized in The Corfu Cannel Case the existence of “Certain general and well recognized principles, namely: elementary considerations of

53 Dissenting opinion by Judge Weeramantry. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, p. 175.

humanity, even more exacting in peace than in war”⁵⁴, in order to extend the application of several humanitarian provisions to the parties involved in such dispute independently of the factual situation it was faced.

Such affirmation was complement at 1986 in the case on Military and Paramilitary Activities in and Against Nicaragua, where it was defined the content of such principle. Thus, the provisions contained in Article 3 Common to the Geneva Conventions “are rules which, in the Court’s opinion, reflect what the Court called in 1949 elementary considerations of humanity”⁵⁵.

Hence, Article 3 Common mentions the obligation to provide human treatment without any adverse distinction based on discriminatory criteria, in all circumstances to persons not taking active part in hostilities, establishing as well the prohibition of violence to life and person, and outrages upon personal dignity. Through this interpretation, the purpose is not to state that such codified provision has to be directly applicable in the case of economic sanctions since it is a conventional rule, but that the content of Article 3 Common has to be transplanted to precise what the General Principle signify, in order to be used in peace time.

Now, even if useful elements such as protection to life, dignity and non-discrimination can be extracted from Article 3 Common, the issue is again, like in the case of the Charter of the United Nations⁵⁶, the broad character of the General Principles. Therefore, contrary to customary law applicable in armed conflicts it doesn’t provide specific commands for the effective protection of civilians and/or prohibitions related to the effective implementation of humanitarian assistance in times of peace.

54 *Corfu Channel Case*, Judgment of April 9th 1949: ICJ Reports 1949, p. 22.

55 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, par. 218

56 See Section III (c).

B. Apply “Minimum Humanitarian Standards”

The second alternative would be to establish an autonomous set of rules for any humanitarian situation, avoiding the distinction between peace time and war time, and including concrete obligations relevant to any subject of international law involved.

In fact, such possibility is suggested by a process of acknowledgment on the growing convergence of Human rights and International Humanitarian Law, which for our concrete purposes started with the non-binding 1990 Declaration of Minimum Humanitarian Standards⁵⁷, and continued with relevant studies produced by the former UN Commission of Human Rights (replaced in 2006 by the UN Human Rights Council) as well as the former Sub-Commission on Prevention of Discrimination and Protection of Minorities⁵⁸.

As the UN Secretary-General has stated:

*The need to identify fundamental standards of humanity initially arose from the premise that most often situations of internal violence pose a particular threat to human dignity and freedom. The process of fundamental standards of humanity is not, however, limited to situations of internal strife and aims at strengthening the protection of individuals through the clarification of uncertainties in the application of existing international law standards aimed at the protection of persons in all circumstances. The process of fundamental standards of humanity should thus focus on the clarification of uncertainties in the application of existing standards in situations which present a challenge to their effective implementation*⁵⁹.

57 Adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, in Turku/Åbo, Finland, 30 November – 2 December 1990.

58 See E/CN.4/Sub.2/1991/55 - Review of further developments in fields with which the Sub-Commission has been concerned: Declaration of minimum humanitarian standards, working paper submitted by Mr Theo van Boven and Mr Asbjørn Eide; E/CN.4/1995/116 - Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its forty-sixth session. Letter dated 5 January 1998 from the Permanent Representative of Norway and the Chargé D’Affaires of the Permanent Mission of Finland addressed to the Commission on Human Rights; E/CN.4/2000/145 - Promotion and protection of human rights. Letter dated 30 March 2000 from the head of the delegation of Sweden to the fifty-sixth session of the Commission on Human Rights addressed to the Chairman of the Commission on Human Rights. Report of the Expert Meeting on Fundamental Standards of Humanity, Stockholm 22-24 February 2000.

59 Commission of Human Rights. “Fundamental Standards of Humanity”, E/CN.4/2006/87, 3 March 2006.

Likewise, the Preamble of the Declaration points out three ideas supporting this alternative; the impossibility of the relevant branches for the protection of individuals to cover every situation of humanitarian emergency; the fact that in any case every person and group is protected by at least “the principles of international law derived from established custom, from the principles of humanity and the dictates of public conscience”; and the belief that accountability to every subject involved must be developed⁶⁰.

Even it is a non-binding instrument, important UN dependencies such as the Sub-Commission on the Promotion and Protection of Human Rights, have recalled the Declaration as a useful instrument for the protection of civilians in any circumstances⁶¹.

As Reinisch points out, “The future will show whether a development that started with the legally nonbinding *Turku Declaration on Minimum Humanitarian Standards* will bridge the perceived gap between Human Rights and Humanitarian Law protection”⁶².

C. Develop a Specific Code of Conduct to the Security Council

This last alternative comes from a different perspective, which implicitly assumes the need to impose limits to the Council without referring to specific branches of International Law, but by establishing practical standards to moderate the adverse effects which can be generated from its action. Such alternative was raised inside different organs and dependencies of the United

60 The most relevant articles are the following: Article 1: Applicability in all situations. Article 2: These standards shall be respected by, and applied to all persons, groups and authorities, irrespective of their legal status and without any adverse discrimination. Article 3(2): The following acts are and shall remain prohibited: f) deliberate deprivation of access to necessary food, drinking water and medicine; Article 15: In situations of internal violence, disturbances, tensions or public emergency, humanitarian organizations shall be granted all the facilities necessary to enable them to carry out their humanitarian activities.

61 See Resolution 2000/1, 11 August 2000.

62 REINISCH, August. “Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions”. *American Journal of International Law* 95 (2001), p. 860.

Nations, and is the product of a debate which started in 1995 and is currently being discussed.

The first antecedent of the debate under the United Nations is a Secretary General's document denominated "An Agenda for Peace"⁶³, where there were preliminary recalled the adverse effects of economic sanctions, perhaps provided the relevant situations which were taking place at that time such as the sanctions imposed to Irak since 1990⁶⁴.

In connection with such document, the Security Council made two Statements⁶⁵; even if it pointed out the importance of periodic reviews to control the implementation of economic sanctions as well as the need to assure humanitarian assistance "to minimize unintended adverse side-effects of sanctions on the most vulnerable segments of targeted countries"⁶⁶, the Council stressed the importance to implement them in a effective way and did not refer to any international legal instrument as a relevant standard to direct its action.

The consequent answer was twofold; firstly, the Secretary-General through the "Supplement to an Agenda for Peace"⁶⁷, where it was raised an ethical question on "whether suffering inflicted on vulnerable groups in the target country can legitimate means of exerting pressure on political leaders whose behavior is unlikely to be affected by the plight of their subjects"⁶⁸; and secondly, annex II to the General Assembly's Resolution 51/242⁶⁹, considered as the first attempt to formally criticize the system and propose a set of guidelines to the imposition of economic sanctions by the Security Council⁷⁰, and commonly cited by subsequent reports, resolutions and official statements.

63 See S/1995/1.

64 Security Council, Resolution 661/1990.

65 See S/PRST/1995/9, 22 February 1995 (Statement by the President of the Security Council on behalf of this organ), and S/PRT/1995/9, 13 April 1995 (Non-Paper on the humanitarian impact of sanctions agreed by the Council's Permanent Members).

66 Ibid, par.1.

67 A/50/60-S/1995/1.

68 Ibid, par.70.

69 Annex II "Question of Sanctions Imposed by the United Nations". A/RES/51/242, 26 September 1997.

70 MOMTAZ, Djamchid, « La Compatibilité du Conseil de Sécurité avec le Droit International

Such Resolution maintains the utility of economic sanctions as a policy tool to maintain international peace and security, but stress that such measures should be established in strict conformity with the Charter, with clear objectives, provision for regular review and precise conditions for their lifting⁷¹. It also points out the importance of humanitarian assistance in order to allow an adequate supply of humanitarian material to reach the civilian population⁷², and the need to establish a Sanction Committee in order to deal with challenging situations around sanctions.

As a consequence of this approach, several documents containing relevant dispositions were produced, showing the crescent concern of the competent UN bodies on different areas, such as the adverse consequences of economic sanction on the enjoyment of human rights⁷³, and their concrete impact on Economic, Social and Cultural Rights of the civilian population⁷⁴.

Complementary to those documents, two concrete attempts to develop a code of conduct to the Security Council were produced under the framework of the General Assembly's "Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization", showing the increasing concern of the International Community to establish a base of conduct.

On one hand, a working paper presented by Russia⁷⁵ called "Basic conditions and Standard Criteria for the Introduction of Sanctions and other Coercive Measures and their Implementa-

Humanitaire » in GOWLAND-DEBBAS, Vera Ed. *United Nations and International Law*. The Hague; London; Boston: Kluwer Law International, 2001, p. 228.

71 See Resolution 51/242 Annex II, par.2.

72 See Resolution 51/242 Annex II, par.4.

73 SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS. "The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights" – Working Paper prepared by Mr. Marc Bossuyt, 21 June 2000. E/CN.4/Sub.2/2000/33; "Human Rights and Humanitarian Consequences of Sanctions, including Embargoes", 11 August 2000. E/CN.4/Sub.2/Res/2000/1.

74 COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS. The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights – General Comment 8, 12 December 1997. E/C.12/1997/8.

75 A/AC.182/L.100/Rev.1, published in A/55/33 (2000), p. 6.

tion”, which maintains the argumentative line but uses a specially strict language to limit the Council’s scope of action.

Due to the reluctance from the members of the Council to accept the decisive language used on the above-mentioned Paper, the Special Committee presented the document “Introduction and Implementation of Sanctions Imposed by the United Nations”⁷⁶.

Hence, It maintains the approach of Resolution 51/242⁷⁷, but enlarging the spectrum of concern to “Socio-economic and humanitarian consequences, for populations and third states”⁷⁸, and makes a remarkable recognition of International Law as a source of limitations/protection to affected individuals, since it states that “The Security Council should introduce sanctions in conformity with the provisions of the Charter, taking into account other applicable rules of international law, in particular all of those related to human rights and fundamental freedoms”⁷⁹, and that “decisions on sanctions should be in accordance with the purposes and principles set out in the Charter of the United Nations”⁸⁰.

Such process evidence that as a general pattern, the United Nations bodies have unilaterally agreed to respect these rules by referring to them (at least implicitly) in its force regulations and resolutions relevant to the imposition of economic sanctions, creating thus at least an expectation to maintain a behavioral scheme.

It is the opinion of the author that such references reflect the process which began in 1995 with the Secretary General’s perception on the impact of economic sanctions, and continued with several approaches of different bodies of the UN, showing that one of the consequences of the evolution of the International System is, among others, that the so-called “Rule of Law” or Principle of Legality is present and distinguishable, so every

76 A/64/33 (2009), p. 19.

77 Ibid, par.3.

78 Ibid, par.1.

79 Ibid, par.4.

80 Ibid, par.17.

action of any subject is regulated and can't be conceived as unbound, even if it is a political action.

The integration of a specific code of conduct with the provisions of International Law and its branches is a graceful outcome which has to be encouraged and promoted to new situations and new actors. Sensible evidence of compliance is highly expected.

IV. CONCLUSIONS

The intention of this study was to look for possible alternatives to understand the problematic situations coming from the impositions of economic sanctions by the Security Council, and therefore deal with possible solutions coming from International Law and other special manifestations of the International Community.

Thus, it was seen that even if authorized by the Charter of the United Nations as an important device to protect International Community from the abusive use of force, the Security Council's power to impose economic sanctions is controversial, since encompasses adverse effects to the vulnerable population inside the targeted country, although such measures were initially established to influence the behavior of the government who is acting contrary to international peace and security.

Nevertheless, as a Constitution that establishes an ideological pattern and concede attributions, the Charter of the United Nations is an evolving document so the apparently divergent views of sanctions and protection of human rights and humanitarian law inside it are not irreconcilable⁸¹.

Consequently, the System has to integrate in order to offer tangible solutions for such issues, taking into account that the evolution of International Law targets to the inclusion of new protective branches⁸², every subject and creative ways to adapt itself on novel factual situations. As Gowland has sustained, "it can be argued that the States which gathered at San Francisco in 1945 were conscious of the fact that their vision of a world institution should not remain frozen in time and was capable of evolution and adaptation"⁸³.

81 FAUSEY, Joy K. "Does the United Nations Use of Collective Sanctions to Protect Human Rights Violate own Human Rights Standards?" *Connecticut Journal of International Law* 10 (1994), p. 208.

82 In this case Human Rights Law and International Humanitarian Law.

83 GOWLAND-DEBBAS, Vera. "Security Council Enforcement and Issues of State Responsibility". *The International and Comparative Law Quarterly* Vol. 43-1 (1994), p. 91.

Therefore, having clear that the United Nations as a subject to International Law and consequently the Security Council is not unbound by law, the issue was analyzed from the point of view of the Sources of International Law, denoting various problems on the application of the relevant branches for the protection of individuals (Human Rights and International Humanitarian Law), but proposing alternatives in order to enlarge their apparent weak capacity to challenge adverse effects of economic sanctions.

Hence, as a result from such options, two patterns can be extracted; firstly, a tendency to limit the discretionary action of the organs that design and impose sanctions through the elaboration of internal codes of conduct and permanent inter-institutional dialogue in order to exercise pressure; and secondly, the interest to establish a concrete legal framework for the protection of the civilian population determined by a language of individual rights and correlative obligations.

Whichever be the most suitable approach, what is important is the relevance that a process of adaptation of International Law to novel emerging situations has started. Probably, is just through a combination of both tendencies that effective results can be achieved, bearing in mind that beyond the political jealousy to the almighty Security Council is not the break point, but the well-being of individuals.

Whether the most effective alternative would be apply customary rules, general principles of International Law, basic humanitarian standards or develop a specific code of conduct to the Security Council, it is clear that the tendency of the System is to move from an unfettered recognition of political supremacy and discretionarily power of States (be them considered individually or as an Organization) to a Global Community bound by Law, and concerned to locate the protection of human beings as the final objective, more than a simple means to conduct International Relations.

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